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P.O Box 10443 - 00100, Nairobi Kenya.

+254 [0]20 271 2767, 2719231 info@kenyalaw.org www.kenyalaw.org mykenyalaw mykenyalaw

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2023 VOLUME 2







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Editor
Prof Jack Mwimali

Nairobi

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Fundamental rights and freedoms – *remedies – writ of habeas corpus – nature and scope - what was the nature, scope, and rationale of the writ of habeas corpus - whether a habeas corpus application barred proceedings for the enforcement of fundamental rights and freedoms - Constitution of Kenya, 2010 articles 25(d) and 51(d); Preservation of Public Security Act (repealed) section 4(2)(a); Criminal Procedure Code section 389(1); Criminal Procedure (Directions in the Nature of habeas corpus) Rules, 1948.*
Muriithi (Representative of the Estate of Mwangi Stephen Muriithi) v Janmohamed SC (Executrix of Estate of Daniel Arap Moi) & another [2023] KESC 61 (KLR) 397

Fundamental rights and freedoms – *right to a fair hearing – where it was alleged that a court declared one a contemnor without considering their pleadings – whether the action of a court declaring one a contemnor without considering the contemnor's pleadings was a breach of the right to a fair hearing – Constitution of Kenya, 2010, article 50.*
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Fundamental rights and freedoms – *right to fair trial – allegations of fraud that were determined via affidavit evidence only - whether a court finding that a party had conducted land fraud based on affidavit evidence was a violation of the person's their right to a fair trial - Constitution of Kenya, article 50; Evidence Act (cap 80) section 97(1).*
Fanikiwa Limited & 3 others v Sirikwa Squatters Group & 17 others [2023] KESC 105 (KLR) 191

Fundamental rights and freedoms – *right to life – right to human dignity – right to equality and freedom from discrimination – freedom and security of the person - - where a dusk to dawn curfew was put in place in response to a terrorist attack on a town - whether the imposition of a*

dusk to dawn curfew in response to a terrorist attack violated the rights to life, human dignity, equality, freedom from discrimination and freedom and security of the person - Constitution of Kenya, 2010, articles 26, 27, 29, and 39.
Haki Na Sheria Initiative v Inspector of Police & 2 others; Kenya National Human Rights & Equality Commission (Interested Party) [2023] KESC 51 (KLR) 481

Fundamental rights and freedoms – *right to privacy– audio and video recordings of a conversation that were recorded covertly by a party to the conversation – where the audio recordings implicated a judicial officer for being unethical – where the judicial officer defended themselves against the recordings in public media - whether a judicial officer who publicly addressed covertly recorded audio and video recordings relinquished their right to privacy - whether the intrusion into an individual's privacy was proportionate to the public interest to be served by the intrusion – Constitution of Kenya, 2010, article 31.*
Chitembwe v Tribunal Appointed to Investigate Into the Conduct of the Hon. Justice Said Juma Chitembwe, Judge of the High Court [2023] KESC 114 (KLR) 40

Fundamental rights and freedoms – *rights of the child – rights of a child on trial – applicable principles to be applied by courts, counsel, prosecutors, and the media in a criminal trial or a civil suit centering around a child – what principles were applicable by courts, court staff, counsel, prosecutors, and the media in protecting the best interests of the a child facing a criminal trial or a child in a civil suit – Constitution of Kenya, 2010, article 53; Children Act, 2022, sections 90, 93(5), 95, and first schedule, part XV; Children in Conflict with the Law (Practice and Procedure) Rules 2020 (Act No 8 of 2001 Sub Leg); Children Act, 2001 (repealed) sections 4(2)(3), 18, 19, 25, 74, 75, and 76(5); Child Offenders Rules, 2001 (Act No 8 of 2001 Sub Leg) (repealed); Media Council Act, 2013 (Act No 46 of 2013); Media Act, 2007 (repealed) section 18.*
CMM (Suing as the Next of Friend of and on Behalf of CWM) & 6 others v Standard Group & 4 others [2023] KESC 68 (KLR) 351

Fundamental rights and freedoms – *rights of the child – rights of the child on trial – provisions restricting the publication of the details of a child facing trial – where a media house published the pictures and names of children facing trial on grounds of public interest - how did courts reconcile the best interests of the child and the competing right of the people to open justice through a public hearing, the freedom of expression of journalists, freedom of media and the right to access to information of the Kenyan public- whether the High Court and the Court of Appeal erred by placing public interest in the publication of the images and identities of children in a criminal trial over and above the children's best interest - Constitution of Kenya, 2010, articles 33, 34, and 50(1); Children Act, 2022 sections 90, 93(5), 95, and first schedule, part XV; Children in Conflict with the Law (Practice and Procedure) Rules 2020, (Act No 8 of 2001 Sub Leg); Children Act, 2001 (repealed) sections 4(2)(3), 18, 19, 25, 74, 75, and 76(5); Child Offenders Rules, 2001 (Act No 8 of 2001 Sub Leg) (repealed); Media Council Act, 2013 (Act No 46 of 2013); Media Act, 2007 (repealed) section 18.*
CMM (Suing as the Next of Friend of and on Behalf of CWM) & 6 others v Standard Group & 4 others [2023] KESC 68 (KLR) 351

National values and principles – *public participation - whether public participation was required in the recruitment of administrative officers to coordinate Government functions - Constitution of Kenya, 2010, article 10; National Government Coordination Act, cap 127, section 15.*
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CONTEMPT OF COURT

Guiding principles that courts were to apply in determining contempt of court applications – *where it was alleged that a court ignored pleadings of a contemnor and condemned the contemnor unheard - whether a court hearing a contempt application could revive the original un-amended contempt of court application in chambers, prosecute and convict on the same upon striking out the amended contempt application - whether a court in presiding over proceedings which had been heard fully on an amended pleading can upon striking out the amended pleading proceed suo motu to determine the original pleading without invitation and participation of either party in the proceedings - whether a court hearing a contempt of court application could convict the alleged contemnors without affording them a hearing - Judicature Act, cap 8 section 5.*
Githiga & 5 others v Kiru Tea Factory Company Ltd [2023] KESC 41 (KLR) 508

Nature and purpose – *standard of proof - enabling legislation - what principles were courts to apply when dealing with contempt of court proceedings - what legislation guided contempt of court proceedings considering that the Contempt of Court Act had been declared unconstitutional by the High Court - Judicature Act, cap 8 section 5.*
Githiga & 5 others v Kiru Tea Factory Company Ltd [2023] KESC 41 (KLR) 508

CRIMINAL LAW – *entrapment – conditions where entrapment could occur – where one claimed to be entrapped by persons not in law enforcement - under what conditions could entrapment occur - whether individuals without law enforcement authority, such as private citizens, were capable of committing entrapment.*
Chitembwe v Tribunal Appointed to Investigate Into the Conduct of the Hon. Justice Said Juma Chitembwe, Judge of the High Court [2023] KESC 114 (KLR) 40

ELECTORAL LAW

Electoral Code of Conduct – *parties bound by the Electoral Code of Conduct - whether a member of a political party participating in an election but was not a candidate was bound by the Electoral Code of Conduct.*
Independent Electoral and Boundaries Commission v Chege [2023] KESC 74 (KLR) 320

Electoral units – *constituencies - delimitation of constituency boundaries - whether creation of administrative units influenced or affected constituency boundaries - whether movement of*

locations from one constituency to another amounted to delimitation of constituency boundaries - Constitution of Kenya, 2010,article 89(7).
Member of Parliament Balambala Constituency v Abdi & 7 others [2023] KESC 35 (KLR) 539

EVIDENCE LAW – *admissibility of evidence – admissibility of evidence of parties who were not involved in court proceedings - whether pay slips of people not involved in court proceedings as witnesses or by way of express authority in the form of affidavits or other depositions were admissible as evidence.*
Muthuuri & 4 others v Attorney General & 2 others [2023] KESC 52 (KLR) 451

FAMILY LAW – *children – best interests of the child - meaning of the term "best interest of the child" - what was the rationale and scope of the principle of the best interests of the child - Constitution of Kenya, 2010, article 53.*
CMM (Suing as the Next of Friend of and on Behalf of CWM) & 6 others v Standard Group & 4 others [2023] KESC 68 (KLR) 351

HEATH LAW – *mental capacity – definition of mental incapacity – procedures to be followed by a court when making an assessment of mental incapacity – applicable tests when determining an employee's ability to perform functions based on their mental capacity - what was the legal definition of mental incapacity - what guidelines should courts follow in matters which involved an assessment of mental incapacity - what tests should courts apply when they were faced with the issue of establishing whether mental incapacity affected the performance of a person in their work duties - whether a diagnosis of Schizophrenia and the resulting mental incapacity would render a Judge incapable of performing the functions of a Judge – Mental Health Act (Cap 248) section 2; Mental Health Act 1983, (United Kingdom) Mental Capacity Act, 2005, (United Kingdom) section 2(1) and (2); United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, 1991, principle 1(7).*
MMG v Tribunal Appointed to Investigate the Conduct of Hon. Lady Justice MMG, Judge of the Environment and Land Court of Kenya [2023] KESC 73 (KLR) 286

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Judicial immunity – *scope - whether judicial immunity covered actions conducted in bad faith outside judicial duties - Judicial Service Act, (Act No 1 of 2011), sections 15, 19(4), 31(5), 32, 42, 45; and, part VIII; Schedule 2; Judicial Service (Code of Conduct and Ethics) Regulations, 2020 (Act No 1 of 2011 sub leg), regulations 9, 11(3)(b), 13(1)(a), 14(1)(3),15, 16, 17, 18, 19, 20, 21(1)(c)(d)(e)(h), and 30; Penal Code (cap 63), section 15.*
Chitembwe v Tribunal Appointed to Investigate Into the Conduct of the Hon. Justice Said Juma Chitembwe, Judge of the High Court [2023] KESC 114 (KLR) 40

Petition for the removal of a judge – *applicable principles - standard of proof - what standard of proof applied in a petition for the removal of a judge - what principles did the Supreme Court apply when dealing with the question of removal of a judge – Constitution of Kenya, 2010, articles*

10, 31(d), 50(4), 73, 74, 75(1), 160(5), 165, 168(2), 172, and 252(1)(3); Judicial Service Act, (cap 8), sections 15, 19(4), 31(5), 32, 42, 45; and, part VIII; Schedule 2; Judicial Service (Code of Conduct and Ethics) Regulations, 2020 (Act No 1 of 2011 sub leg), regulations 9, 11(3)(b), 13(1)(a), 14(1)(3),15, 16, 17, 18, 19, 20, 21(1)(c)(d)(e)(h), and 30; Penal Code (cap 63), section 15.
Chitembwe v Tribunal Appointed to Investigate Into the Conduct of the Hon. Justice Said Juma Chitembwe, Judge of the High Court [2023] KESC 114 (KLR) 40

Petition for the removal of a judge – *mandate of the Judicial Service Commission – mandate of the Tribunal – mandate of the Supreme Court - whether the Judicial Service Commission was obligated to conclusively determine the validity of allegations against a judge before recommending the initiation of removal proceedings - whether a Tribunal formed to consider a petition for the removal of a judge had the jurisdiction to enquire in to the activities/proceedings of the Judicial Service Commission - whether the Supreme Court in an appeal against the decision of a Tribunal formed to consider a petition for the removal of a judge had the jurisdiction to determine whether the JSC in its proceedings violated the rights of the appellant - Judicial Service Act, (cap 8), sections 15, 19(4), 31(5), 32, 42, 45; and, part VIII; Schedule 2; Judicial Service (Code of Conduct and Ethics) Regulations, 2020 (Act No 1 of 2011 sub leg),regulations 9, 11(3)(b), 13(1)(a), 14(1)(3),15, 16, 17, 18, 19, 20, 21(1)(c)(d)(e)(h), and 30; Penal Code (cap 63), section 15.*
Chitembwe v Tribunal Appointed to Investigate Into the Conduct of the Hon. Justice Said Juma Chitembwe, Judge of the High Court [2023] KESC 114 (KLR) 40

Professional ethics – *conflict of interest – duty to declare conflict of interest – duty to recuse oneself in a matter involving a property that they had interest in - whether a judicial officer who presided over a case involving property in which they had an interest, had the duty to recuse themselves from the matter - whether the failure of a judicial officer to recuse himself/herself from a case in which he/she had a vested interest in the property in dispute in the case was a breach of the Judicial Code of Conduct and Ethics and of the Constitution - Judicial Service Act, (cap 8), sections 15, 19(4), 31(5), 32, 42, 45; and, part VIII; Schedule 2; Judicial Service (Code of Conduct and Ethics) Regulations, 2020 (Act No 1 of 2011 sub leg), regulations 9, 11(3)(b), 13(1)(a), 14(1)(3),15, 16, 17, 18, 19, 20, 21(1)(c)(d)(e)(h), and 30; Penal Code (cap 63), section 15.*
Chitembwe v Tribunal Appointed to Investigate Into the Conduct of the Hon. Justice Said Juma Chitembwe, Judge of the High Court [2023] KESC 114 (KLR) 40

Role – *duties – mediation - whether a judge of the High Court of Kenya had the authority to conduct mediation over a case in which they had presided.*
Chitembwe v Tribunal Appointed to Investigate Into the Conduct of the Hon. Justice Said Juma Chitembwe, Judge of the High Court [2023] KESC 114 (KLR) 40

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MMG v Tribunal Appointed to Investigate the Conduct of Hon. Lady Justice MMG, Judge of the Environment and Land Court of Kenya [2023] KESC 73 (KLR) 286

Jurisdiction of courts – *jurisdiction to make a determination on an un-pleaded issue - under what circumstance would a court make a determination on an un-pleaded issue?.*
Muthuuri & 4 others v Attorney General & 2 others [2023] KESC 52 (KLR) 451

Jurisdiction of courts – *jurisdiction when reviewing prosecutorial powers - what were the guidelines to be considered by courts when reviewing prosecutorial powers.*
Dande & 3 others v Inspector General, National Police Service & 5 others [2023] KESC 40 (KLR) 593

Jurisdiction of the Environment and Land Court (ELC) – *jurisdiction to determine disputes involving the management of the environment or issues of petroleum and energy – claim that the Environmental and Management Coordination Act and the Energy Act ousted the jurisdiction of the ELC – whether the ELC had original jurisdiction over disputes involving the management of the environment or issues of petroleum and energy – Constitution of Kenya, 2010, article 162(2)(b); Environment and Land Court Act, (Cap 8D), section 13; Environmental Management Coordination Act, (Cap 387), section 125; Energy Act, (Cap 314), section 36; Fair Administrative Action Act, (Cap 7L), section 9(4).*
Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) [2023] KESC 113 (KLR) 97

Jurisdiction of the High Court – *jurisdiction of the High Court in judicial review matters - jurisdiction to conduct merit review - when could the High Court excising its judicial review jurisdiction carry out a merit review of a case - whether the High Court could conduct a merit review where in a judicial review matter there were claims of violations of constitutional provisions - Civil Procedure Rules, 2010, order 53.*
Dande & 3 others v Inspector General, National Police Service & 5 others [2023] KESC 40 (KLR) 593

Jurisdiction of the High Court – *jurisdiction of the High Court vis-à-vis the jurisdiction of the Environment and Land Court (ELC) – jurisdiction of the High Court to determine matters relating to the environment and the use and occupation of, and title to land that was filed before the Environment and Land Court (ELC) was operational - whether the High Court had the jurisdiction to determine a suit relating to the environment and the use and occupation of, and title*

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Jurisdiction of the Independent Electoral and Boundaries Commission (IEBC) – *jurisdiction to entertain disputes arising from nominations and conclusively determining them - whether the Independent Electoral and Boundaries Commission had the jurisdiction to entertain disputes arising from nominations and to conclusively determine them - what were attendant powers which the Independent Electoral and Boundaries Commission could exercise in settling electoral disputes – Constitution of Kenya, 2010, article 84, 88 and 252(1); Elections Act, (cap 7), Second Schedule, section 15(4).*
Independent Electoral and Boundaries Commission v Chege [2023] KESC 74 (KLR) 320

Jurisdiction of the National Environment Tribunal (NET), the Energy and Petroleum Regulatory Authority (EPRA) and the Energy and Petroleum Tribunal (EPT) – *jurisdiction to determine constitutional violations - whether the NET, EPPRA and EPT had the jurisdiction to determine constitutional violations - Constitution of Kenya, 2010, article 162(2) (b); Environment and Land Court Act, (Cap 8D), section 13; Environmental Management Coordination Act, (Cap 387), section 125; Energy Act, (Cap 314), section 36.*
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Jurisdiction of the Supreme Court – *appellate jurisdiction - what were the factors to consider in invoking the Supreme Court's appellate jurisdiction as of right in any case involving the interpretation or application of the Constitution – Constitution of Kenya, 2010, article 163(4).*
Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) [2023] KESC 113 (KLR) 97

Jurisdiction of the Supreme Court – *appellate jurisdiction – jurisdiction to determine appeals that raised matters of general public importance – extent of jurisdiction – where an appellant sought redress for legal issues other than the issue certified as one of general public importance - whether the Supreme Court had the jurisdiction to determine at its own discretion, other points of law raised in appeal other than the point of law that was certified as a matter of general public importance – Constitution of Kenya, 2010, article 163(4)(b).*
Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others [2023] KESC 106 (KLR) 1

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Githiga & 5 others v Kiru Tea Factory Company Ltd [2023] KESC 41 (KLR) 508

Jurisdiction of the Supreme Court – *jurisdiction of the Supreme Court to determine appeals as of right in matters involving constitutional interpretation – where an appeal arose from an interlocutory application from the Court of Appeal - whether Supreme Court's jurisdiction to determine appeals as of right in matters involving constitutional interpretation extended to appeals that challenged the exercise of discretion of the Court of Appeal in interlocutory applications - what were the circumstances in which the Supreme Court could exercise its jurisdiction to determine appeals as of right in matters involving constitutional interpretation to determine appeals arising from the Court of Appeal's interlocutory applications – Constitution of Kenya, 2010, article 163(4)(a); Matrimonial Property Act, (cap 152), section 7; Marriage Act, (cap 150), section 66(2); Court of Appeal Rules, 2010, (cap 9 Sub Leg), rule 5(2)(b).*
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CMM (Suing as the Next of Friend of and on Behalf of CWM) & 6 others v Standard Group & 4 others [2023] KESC 68 (KLR) 351

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Torino Enterprises Limited v Attorney General [2023] KESC 79 (KLR) 261

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Fanikiwa Limited & 3 others v Sirikwa Squatters Group & 17 others [2023] KESC 105 (KLR) 191

Public land – *allotment of public land – allotment letter – legal effect of an allotment letter on conferring property rights - whether a letter of allotment that had not been perfected could confer property rights – whether a letter of allotment, in and by itself, conferred a transferable title to the allottee - whether an allottee that had fulfilled all the conditions of a letter of allotment but had not registered the land in their name could pass a valid title to a third party - whether the Commissioner of Lands had the authority to allocate un-alienated government land that had been converted to private free hold land - whether un-alienated government land that had been converted to private free hold land fell under the regulatory regime of the Government Lands Act (repealed) or subsequent laws regulating use of public land - Registration of Titles Act (cap 281 Repealed) section 23; Physical Planning Act (cap 286 Repealed), section 3; Land Registration Act, 2012 (Act No 3 of 2012), section 26; Land Acquisition Act (cap 295) (Repealed) part II; Government Lands Act (cap 280) (Repealed) section 2.*
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Squatter – *definition – capacity to be a squatter - what was the legal definition of a squatter – whether one could be deemed to be a squatter when the person had never occupied the land they deemed to be squatters in.*
Fanikiwa Limited & 3 others v Sirikwa Squatters Group & 17 others [2023] KESC 105 (KLR) 191

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Unalienated land – *unalienated land that had been transmuted to private land – legitimate expectation - where one had a legitimate expectation that the President would allocate them land - whether unalienated government land that had been acquired and transmuted from public to private land was still governed by the provisions of the Government Lands Act (repealed) - whether the power of the President to make grants/dispositions under the Government Lands Act (repealed) extended to unalienated land that had been transmuted from public to private land - whether the principle of legitimate expectation was applicable when the actions or conduct of a public authority led individuals to form specific expectations about being allocated land - Government Land Act (repealed), cap 280, sections 2, and 3; Registered Land Act (repealed), (cap 300), sections 27, and 28; Registration of Titles Act (repealed), (cap 281), section 2, and 44.*
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Muriithi (Representative of the Estate of Mwangi Stephen Muriithi) v Janmohamed SC (Executrix of Estate of Daniel Arap Moi) & another [2023] KESC 61 (KLR) 397

Electronic evidence – *audio and video recordings – audio and video recordings of a conversation that were recorded covertly by a party to the conversation - whether covertly recorded audio and video recordings that were recorded by a party engaged in the conversation was admissible -*

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Chitembwe v Tribunal Appointed to Investigate Into the Conduct of the Hon. Justice Said Juma Chitembwe, Judge of the High Court [2023] KESC 114 (KLR) 40

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Fanikiwa Limited & 3 others v Sirikwa Squatters Group & 17 others [2023] KESC 105 (KLR) 191

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Haki Na Sheria Initiative v Inspector of Police & 2 others; Kenya National Human Rights & Equality Commission (Interested Party) [2023] KESC 51 (KLR) 481

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Retrospective application of statutes – *retrospective application of the National Government Coordination Act - whether the National Government Coordination Act applied retrospectively to matters that happened in 2010 before the enactment of the Act.*
Member of Parliament Balambala Constituency v Abdi & 7 others [2023] KESC 35 (KLR) 539

WORDS AND PHRASES

Constructive trust – *definition - an equitable remedy that a court imposes against one who has obtained property by wrong doing - The Black's Law Dictionary, 9th Edition.*
Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others [2023] KESC 106 (KLR) 1

Cross- appeal – *definition of cross- appeal - to seek review (from a lower court's decision) by a higher court - Black's Law Dictionary, 9th ed, at page 133.*
Kenya Ports Authority v Munyao & 4 others [2023] KESC 112 (KLR) 147

Cross-appeal – *definition of a cross-appeal - a proceeding undertaken to have a decision reconsidered by a higher authority, especially the submission of a lower court's or agency's decision to a higher court for review and possible reversal - Bryan A Garners, Black's Law Dictionary, (11th ed).*
Independent Electoral and Boundaries Commission v Chege [2023] KESC 74 (KLR) 320

Cross-petition – *a claim asserted by a defendant against a person not a party to the action for a matter relating to the subject of the action. Also known as a cross- complaint - Bryan A Garners, Black's Law Dictionary, (11th ed).*
Independent Electoral and Boundaries Commission v Chege [2023] KESC 74 (KLR) 320

Cross-petition – *definition of cross-petition - a claim asserted by a defendant against another party to the action; claim asserted by a defendant against a person not a party to the action for a matter relating to the subject of the action - Black's Law Dictionary, 9th ed, at page 433.*
Kenya Ports Authority v Munyao & 4 others [2023] KESC 112 (KLR) 147

Curfew – *definition - a regulation that forbids people from being outdoors or in vehicles during certain hours -Black's Law Dictionary.*
Haki Na Sheria Initiative v Inspector of Police & 2 others; Kenya National Human Rights & Equality Commission (Interested Party) [2023] KESC 51 (KLR) 481

Entrapment – *definition - a law enforcement officer's or government agent's inducement of a person to commit a crime, by means of fraud or undue persuasion, in an attempt to cause a criminal prosecution against that person - Black's Law Dictionary; 10th Edition.*
Chitembwe v Tribunal Appointed to Investigate Into the Conduct of the Hon. Justice Said Juma Chitembwe, Judge of the High Court [2023] KESC 114 (KLR) 40

Habeas corpus – *definition - a writ employed to bring a person before a court, most frequently to ensure that the person's imprisonment or detention is not illegal (habeas corpus ad subjiciendum) in addition to being used to test the legality of an arrest or commitment, the writ may be used to obtain judicial review of, the regularity of the extradition process, the right to or amount of bail, or the jurisdiction of a court that had imposed a criminal sentence. - Black's Law Dictionary.*
Muriithi (Representative of the Estate of Mwangi Stephen Muriithi) v Janmohamed SC (Executrix of Estate of Daniel Arap Moi) & another [2023] KESC 61 (KLR) 397

Judgment in personam – *an action was said to be in personam when its object was to determine the rights and interests of the parties themselves in the subject matter of the action, however the action could arise, and the effect of a judgment in such an action was merely to bind the parties to it. A normal action brought by one person against another for breach of contract was a common example of an action in personam - Black's Law Dictionary, Ninth Edition.*
Member of Parliament Balambala Constituency v Abdi & 7 others [2023] KESC 35 (KLR) 539

Judgment in rem – *an action in rem was one in which the judgment of the court determined the title to the property and the rights of the parties, not merely as between themselves, but also as against all persons at any time dealing with them or with the property upon which the court had adjudicated - Black's Law Dictionary, Ninth Edition.*
Member of Parliament Balambala Constituency v Abdi & 7 others [2023] KESC 35 (KLR) 539

Judicial discretion – *definition of judicial discretion - the exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not to act when a litigant is not entitled to demand the act as a matter of right - Black's Law Dictionary, 9th ed, at page 534.*
Kenya Ports Authority v Munyao & 4 others [2023] KESC 112 (KLR) 147

Judicial review – *definition of judicial review - a court's power to review the actions of other branches or levels of government; especially the court's power to invalidate legislative and executive actions as being unconstitutional; the constitutional doctrine providing for this power; a court's review of a lower courts or an administrative body's factual or legal findings; Black's Law Dictionary, 9th Edition.*
Dande & 3 others v Inspector General, National Police Service & 5 others [2023] KESC 40 (KLR) 593

Merger – *definition - converse of surrender. A surrender occurs where the landlord acquires the lease; merger occurs where the tenant acquires the reversion. The underlying principle is the same in both; the lease is absorbed by the reversion and destroyed - Harpum, RMC., & Megarry, R., (ed) (2012), The Law of Real Property (London: Sweet & Maxwell; 8th edition, pp 856).*
Fanikiwa Limited & 3 others v Sirikwa Squatters Group & 17 others [2023] KESC 105 (KLR) 191

Miscarriage of justice – *definition - a grossly unfair outcome in a judicial proceeding as when a defendant is convicted despite lack of evidence on an essential element of the crime; also termed a failure of justice - Black's Law Dictionary, 11th Edition.*
Githiga & 5 others v Kiru Tea Factory Company Ltd [2023] KESC 41 (KLR) 508

Shareholder – *definition - an individual who owns or holds a share or shares in a company - Black's Law Dictionary, 11th edition at page 1654.*
Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others [2023] KESC 106 (KLR) 1

Squatter – *definition - a person who settles on property without any legal claim or title- Black's Law Dictionary, 8th Edition.*
Fanikiwa Limited & 3 others v Sirikwa Squatters Group & 17 others [2023] KESC 105 (KLR) 191

Surrender – *definition - the yielding up of the term of lease to the person who has the immediate estate in reversion in order that, by mutual agreement, the term may merge in the reversion - Halsburys Laws of England volume 27 at paragraph 444.*
Fanikiwa Limited & 3 others v Sirikwa Squatters Group & 17 others [2023] KESC 105 (KLR) 191

Trust – *definition - the right, enforceable solely in equity, to the beneficial enjoyment of property to which another held legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary) - The Black's Law Dictionary, 9th Edition.*
Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others [2023] KESC 106 (KLR) 1

Unfair labour practice – *definition of unfair labour practice -any conduct prohibited by state or federal law governing the relations among employers, employees, and labour organisations - Black's Law Dictionary, 9th ed.*
Kenya Ports Authority v Munyao & 4 others [2023] KESC 112 (KLR) 147

Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others (Petition 18 (E020) of 2022) [2023] KESC 106 (KLR) (28 December 2023) (Judgment)

Supreme Court of Kenya

PM Mwilu, DCJ & VP, SC Wanjala, N Ndungu, I Lenaola & W Ouko, SCJJ

Neutral citation: [2023] KESC 106 (KLR)

Law of Trusts *– trusts – constructive trusts – scope and purpose of constructive trusts - circumstances in which a constructive trust was created – what were the circumstances in which a constructive trust would be created - what was the definition, purpose and scope of constructive trusts - Trustee Act, (Cap 167), section 2; Judicature Act (Cap 8), section 3(1).*

Land Law *– trusts – constructive trusts – applicability of constructive trusts to land sale transactions - whether the doctrine of constructive trust was applicable to land sale transactions - whether a constructive trust could be imported into a land sale agreement to defeat a registered title - whether a constructive trusts could be considered as an overriding interests that had the capacity to limit the rights of a property holder - Constitution of Kenya, 2010, article 40; Trustee Act, (Cap 167), section 2; Judicature Act (Cap 8), section 3(1); of the Land Registration Act (Act No 3 of 2012), sections 25, 26 and 28; Registered Land Act (repealed), section 163.*

Company Law *– trusts – constructive trusts – applicability of constructive trusts in the shareholding of a company - whether a constructive trust could be imported into the shareholding of a company to disentitle a registered holder of shares in a company obtained for valuable consideration - whether a constructive trust could be imported into the shareholding of a company to disentitle a registered holder of shares in a company obtained for valuable consideration - Constitution of Kenya, 2010, article 40; Companies Act, (Act No 17 of 2015) section 30, 93, and 104; Companies Act (cap 486) (repealed), section 119.*

Civil Practice and Procedure *– appeals – appeals to the Supreme Court – record of appeal – content and endorsements on a notice of appeal – where a notice of appeal to the Supreme Court was not stamped – where the appellant had not attached documents on the record that would be useful for a finding of facts - whether the failure to have a notice of appeal to the Supreme Court stamped/endorsed by the Court of Appeal was fatal to the appeal - whether appellants before the Supreme Court, where the appeal was on questions of general public importance, were under an obligation to file on the record documents that they filed in the superior courts below including documents that would be useful for a determination of facts - whether the failure of an appellant before the Supreme Court to mark every tenth line of the documents was not fatal to the appeal - Constitution of Kenya, 2010, article 159(2)(d); Supreme Court Act (cap 299) section 15; Supreme Court Rules, 2020 (Act No 7 of 2011 sub leg) rule 40(1)(d).*

Jurisdiction *– jurisdiction of the Supreme Court – appellate jurisdiction – jurisdiction to determine appeals that raised matters of general public importance – extent of jurisdiction – where an appellant sought redress for legal issues other than the issue certified as one of general public importance - whether the Supreme Court had the jurisdiction to determine at its own discretion, other points of law raised*

in appeal other than the point of law that was certified as a matter of general public importance – Constitution of Kenya, 2010, article 163(4)(b).

***Words and Phrases** – trust – definition - the right, enforceable solely in equity, to the beneficial enjoyment of property to which another held legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary) - The Black's Law Dictionary, 9th Edition.*

***Words and Phrases** – constructive trust – definition - an equitable remedy that a court imposes against one who has obtained property by wrong doing - The Black's Law Dictionary, 9th Edition.*

***Words and Phrases** – shareholder – definition - an individual who owns or holds a share or shares in a company - Black's Law Dictionary, 11th edition at page 1654.*

Brief facts

Sometime in May, 2005, the respondents experienced financial challenges as a result of debts incurred by the 1st respondent, and secured by the suit land that was registered in the name of the 1st respondent. The suit property was however threatened with sale by the financier, Standard Chartered Bank Ltd, to recover the monies secured by it.

In an effort to save the suit property, the 2nd and 3rd respondents, at the time tasked with the running of the 1st respondent, sought the assistance of the 1st appellant. The 1st appellant recommended the restructuring of the 1st respondent. The respondents acted upon the 1st appellant's recommendations. To forestall the looming auction, the 1st appellant approached Standard Chartered Bank Kenya Ltd with the resolution, the sale agreement and a proposed settlement of the outstanding debt upon registration of title to the suit property in favour of the 8th appellant or its nominee.

Standard Chartered Bank accepted the proposal on condition that 10% of the purchase price, being Kshs 2,700,000/-, be paid upfront as a non-refundable deposit and a guarantee for payment of the balance thereof be given by a reputable bank. As a consequence, the 10% deposit and a bank guarantee by Giro Commercial Bank were released to Standard Chartered Bank who in turn released the title of the suit property to the advocates acting for both the 8th appellant and Giro Commercial Bank. A discharge of the charge in favour of Standard Chartered Bank was subsequently registered. The incorporation of the 4th to the 7th appellants was concluded with the shareholding comprising the 1st appellant, 4th respondent and the 3rd appellant each holding 20, 490 and 490 shares, respectively. The directors of the 4th to the 7th appellants were the 3rd respondent and 1st appellant. Subsequently, the 8th appellant nominated the 4th appellant to be registered as proprietor of the suit property. The brick making plant and maize milling factory on the suit property were assigned to the 5th, 6th and 7th appellants.

Thereafter, the 4th appellant applied for a loan and an overdraft facility of Kshs 50,000,000/- from Giro Commercial Bank to finance the purchase of the suit property and its working capital. The financing was approved on August 11, 2005. A fresh charge over the suit property was registered in

favour of Giro Commercial Bank and the balance of the outstanding loan released to offset the loan at Standard Chartered Bank.

At the High Court several suits were filed that sought to stay a declaration by the High Court that 4th, 5th, 6th and 7th appellants held the suit property in trust for the respondents; and to stay an order of injunction that compelled the transfer of the suit property to the 1st respondent. The High Court found that the respondents voluntarily made a resolution to sell the suit property and received an agreement for sale, had it executed properly in accordance with the law; there was no coercion or undue influence in the signing of the sale agreement; and that the Memoranda and Articles of Associations of the companies incorporated for the purpose of salvaging the suit property were freely negotiated, agreed and executed. The court further held that, the sale agreement dated August 31, 2005 was valid, lawful and binding and it did convey and confer to the purchaser a valid and good title to the land purchased.

The Court of Appeal found that the 1st and 3rd appellants held the shareholding in the 4th to the 7th appellant companies in trust for the 1st respondent or its nominees, and the 4th appellant held the suit land in trust for the 1st respondent. Whereas the 4th appellant's title was registered under section 23 of the Registration of Titles Act (repealed), the Court of Appeal found it impeachable. Thus, it nullified the sale agreement and the transfer of the suit property to the 4th appellant.

Aggrieved the appellants filed the instant case where they contended that the Court of Appeal erred in holding that the agreement for sale between the 8th appellant and the 1st respondent did not represent the will of the parties and that the same had been procured through undue influence and unconscionable bargains. It was their case that the finding was contrary to the facts pleaded by the respondents that the agreement was a product of negotiations.

The 3rd and 4th respondents' filed a preliminary objection premised on the grounds that; the notice of appeal was not in compliance with rule 10 of the Court of Appeal Rules as the same was not signed and endorsed with the stamp of the Deputy Registrar; that the paragraphs of the notice of appeal was not properly numbered; and that the record of appeal was not complete as various documents that had been filed in the Superior Court below had not been filed before the Supreme Court. They sought for the notice of appeal to be struck out.

The respondents also urged the court that a constructive trust overrode the registered title where a party had exerted undue influence when obtaining and retaining the property transferred to him, as were the circumstances in the instant case.

Issues

i. Whether the failure to have a notice of appeal to the Supreme Court stamped/endorsed by the Court of Appeal was fatal to the appeal.

ii. Whether the failure of an appellant before the Supreme Court to mark every tenth line of the document was fatal to the appeal.

iii. Whether the Supreme Court had the jurisdiction to determine at its own discretion, other points of law raised in appeal other than the point of law that was certified as a matter of general public importance.
iv. Whether the doctrine of constructive trust was applicable to land sale transactions and if so, whether it could be imported into a land sale agreement to defeat a registered title.
v. What was the legal framework governing constructive trusts in Kenya?
vi. Whether a constructive trust could be imported into the shareholding of a company to disentitle a registered holder of shares in a company obtained for valuable consideration.

Held

1. The notice of appeal was properly filed before the Court of Appeal. Whereas the heading of the notice of appeal indicated that it was filed in regard to an application for grant of certification and leave to appeal to the Supreme Court, its contents specified the intent to appeal against the decision of the Court of Appeal rendered on April 4, 2019. The parties having engaged in the certification and leave to appeal proceedings both at the Court of Appeal and before the Supreme Court, there was little doubt left as to the appellants' intention to appeal against the judgment of the Court of Appeal.
2. It was not for the Supreme Court to entangle itself in the filing and administrative processes of the Court of Appeal. The failure to have an appeal stamped or endorsed by the Court of Appeal was not fatal, as the notice of appeal was duly lodged in the Court of Appeal.
3. The instant case was a matter for determination of specific framed questions of general public importance. The documents stated as missing from the record would be useful for the interrogation of findings of facts which fell outside the purview of the Supreme Court.
4. The failure by the appellants to mark every tenth line of the document, without condoning the same, was not fatal. Article 159 (2) (d) of the Constitution obliged the Supreme Court to administer justice without undue regard to procedural technicalities. The 3rd and 4th respondents' preliminary objection had no merit.
5. An appeal was granted in specific terms by the Constitution or statute. An appeal thus typically lay to a higher court and entailed a reconsideration of a decision by the higher court with a view to reversing it either in part or *in toto*. The appellate jurisdiction of the Supreme Court derived from article 163(4) of the Constitution. That involved an appeal as of right or an appeal on certification. The court could not exercise both jurisdictions concurrently.
6. The litigant chose the best path upon which the matter would be considered within the established threshold. Unlike an appeal as of right where the court exercised its appellate jurisdiction on the application and interpretation of the Constitution by the superior courts below, the jurisdiction on certification was narrower as the court was only called upon to express its position on matters that transcend the litigants before court among other parameters set out in *Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone [2013]eKLR* without necessarily sitting on appeal between the parties before it. The Supreme Court was

not just another appellate layer of courts to offer remedies to parties dissatisfied with the decisions of the Court of Appeal.

7. It would always be a matter for the exercise of discretion whether to allow a point in no way connected with the certified point of law to be argued on the appeal, and it was not to be assumed that an appellant could as a matter of right raise any such point. None of the issues raised to challenge the jurisdiction of the court sufficed.

8. The Trustee Act defined a trust and trustee as extending to implied and constructive trusts. A constructive trust was an equitable instrument which served the purpose of preventing unjust enrichment. Trusts were created either expressly, where the trust property, its purpose and the beneficiaries were clearly stated, or established by the operation of the law. Like in the instant case, where it was not expressly stated, the trust may be established by operation of the law.

9. A constructive trust was a right traceable from the doctrines of equity. It arose in connection with the legal title to property when a party conducted himself in a manner to deny the other party beneficial interest in the property acquired. A constructive trust would thus automatically arise where a person who was already a trustee took advantage of his position for his own benefit.

10. The doctrines of equity were applicable in Kenya vide section 3(1) of the Judicature Act and formed part of Kenyan laws. Common law, doctrines of equity and statutes of general application applied in so far as the circumstances of Kenya and its inhabitants permitted and subject to such qualifications as those circumstances rendered necessary.

11. Every person either individually or in association with others, had the right to acquire and own property of any description, and in any part of Kenya. That right to property was however not absolute.

12. While article 40 had an internal limitation on the right to property, the general limitation of rights provision at article 24 of the Constitution provided that any limitation on a right shall be by law, and only to the extent that the limitation was reasonable and justifiable.

13. While Sections 25, 26, and 28 of the Land Registration Act established that the rights of a registered proprietor of land were absolute and indefeasible, those rights were subject to the encumbrances recorded in the register and overriding interests, including trusts. Furthermore, in the absence of limitations on trusts, constructive trusts were also included. Consequently, under Article 24 of the Constitution, the limitation of property rights was legally defined and encompassed constructive trusts.

14. Constructive trusts could arise in various circumstances, including in land sale agreements. A trust was an equitable remedy which was an intervention against unconscionable conduct. Where the circumstances of the case were such that it would demand that equity treated the legal owner as a trustee, the law would impose a trust. It was imposed by law whenever justice and good conscience required it. A constructive trust could be imported into a land sale agreement to defeat a registered title.

15. The Companies Act made provision to govern all types of companies. Section 20 provided for the articles of association as the constitution of the company. Pursuant to section 26, for existing companies before the commencement of the Act, such as the companies in the instant suit, the memorandum of association was treated as provisions of the articles. Companies therefore had a free hand in managing their own affairs through those constitutive documents. Under section 30(1), the company's constitution bound the company and its members to the same extent as if the company and its members had covenanted, agreed with each other to observe the constitution. A court could not interfere with the internal affairs of a company except for limited circumstances.
16. Section 93 of the Companies Act required the company to keep a register of its members including information relating to beneficial owners of the company, if any. Section 104(1) however provided that a company shall not accept, and shall not enter in its register of members, notice of any trust, expressed, implied or constructive. Section 104(1) was similarly contained in section 119 of the Companies Act (cap 486)(repealed) which provided that no notice of any trust, expressed, implied or constructive, was to be entered on the register, or be receivable by the registrar.
17. Section 105 of the Companies Act stated that until the contrary was proved, the register of the members of a company was evidence of the matters required or authorised to be included in it. The Companies Act expressly provided that there could be no entry of a trust on the company register.
18. Whereas section 104 of the Companies Act proscribed the entry of trusts on the register of members, the intention of the provision was not to bar any trust arrangements, including constructive trusts. There was no bar to the holding of share(s) upon a trust.
19. Where there was unconscionable or inequitable behaviour, a trust was imposed as the most appropriate remedy. A constructive trust could be imported into a shareholding of a company. Section 104 of the Companies Act did not outlaw or bar importation of trust into the shareholding of a company. A shareholding signified proprietorship in a company to the extent of the share(s) held. Company shares constituted property under article 260 of the Constitution and therefore, where it was found that there was some wrongdoing, then a constructive trust may be inferred. In the instant case, a constructive trust had therefore been created.
20. The focus of the Supreme Court was on the recourse, rather than the applicability of the doctrine of trust. The court was not persuaded to re-open the merits of the Court of Appeal decision in concluding the applicability of the trust. Litigation had to come to an end. The Court of Appeal, having satisfied itself of the facts, came to one conclusion and made its orders. A decision arising out of adversarial litigation was not bound to be satisfactory to both parties and undoubtedly, different courts would come to different conclusions on the same facts. Re-opening the facts was not appropriate under circumstances, and would be going beyond the Supreme Court's constitutional remit.

21. Courts were an integral part of the Kenyan judicial system, they were entrusted with the responsibility of adjudicating disputes and administering justice, in accordance with the Constitution's ethos, values and principles. In carrying out their judicial duties, they were obligated to adhere to the principles outlined under article 159 of the Constitution. That guaranteed that the objectives and tenets of the Constitution were upheld.
22. **[Obiter]** *"A trend towards promotion of legal certainty, safeguarding of property rights, and equitable access to justice undoubtedly emphasizes the necessity for a revision of the legislation governing the registration of trusts (including constructive) in relation to shares held in a company. These changes would be indicative of a growing recognition of the importance of constructive trust as a means of addressing unjust enrichment and ensuring equitable outcomes in disputes. Legislation that is in line with international developments and prevailing standards can enhance the strength and adaptability of the legal system, enabling it to more effectively tackle present day issues pertaining to shareholding, property rights and fair redress. It provides an opportunity for courts to shape the legal landscape concerning providing clarity particularly on enforcing remedies when breaches or unfairness occur."*
23. **[Obiter]** *"We however, note that there may be legal uncertainty over the recourse that parties have upon declaration of trust by the Courts and how to actualise the same especially concerning shareholding. While it is open to each court to have regard to the specific circumstances, we think this is an issue that the Kenya Law Reform Commission, the Attorney General, Parliament and all the stakeholders should give consideration whether there is need for legislative intervention."*

Appeal dismissed.

Orders

Each party was to bear its own costs.

Citations

Cases

Kenya

1. *Dhanjal Investments Limited v Kenindia Assurance Company Limited* Petition 7 of 2016; [2018] KESC 16 (KLR) - (Explained)
2. *Dina Management Limited v County Government of Mombasa & 5 others* Petition 8 (E010) of 2021; [2023] KESC 30 (KLR) - (Explained)
3. *Euromec International Limited v Shandong Taikai Power Engineering Company Limited* Civil Case E527 of 2020; [2021] KEHC 93 (KLR) - (Explained)
4. *Hatayan, Twalib & another v Said Saggar Ahmed Al-Heidy & 5 others* Civil Appeal 51 of 2014; [2015] KECA 713 (KLR) - (Explained)
5. *Kitilit v Kibet* Civil Appeal 51 of 2015; [2018] KECA 573 (KLR) - (Explained)
6. *Macharia & another v Kenya Commercial Bank Limited & 2 others* SC Appl. No 2 of 2011 [2012] eKLR; [2012] 3 KLR 199 - (Explained)

7. *Maina & 87 others v Kagiri* Civil Appeal 6, 26 & 27 of 2011; [2014] eKLR - (Explained)
8. *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) - (Explained)
9. *Moi University v Zaippeline & another* Petition 43 of 2018; [2022] KESC 29 (KLR) - (Explained)
10. *Mokoosio, Martin Lemaiyan & another v Reshma Praful Chandra Vadera & 3 others* Petition 13 of 2020; [2021] KEHC 7677 (KLR) - (Explained)
11. *Njihia v Kimani & another* Application No 3 of 2014 [2015] eKLR - (Explained)
12. *Ravate, Farouk & another v Eric Agbeko & 2 others ; Ravasam Development Company Limited (Interested Parties)* Civil Case 450 of 2011; [2020] KEHC 8063 (KLR) - (Explained)
13. *Salesio M'itonga v M'arithi M'athara & 3 others* Civil Appeal 6 of 2013; [2015] KECA 772 (KLR) - (Explained)
14. *Steyn v Giovanni Gnecchi-Ruscone* Application 4 of 2012; [2013] KESC 11 (KLR) - (Explained)
15. *Tanui & 4 others v Birech & 11 others* ? 107 of 1991; [1991] KECA 6 (KLR) - (Explained)
16. *Twaha v Abdalla & 2 others* Civil Application 35 of 2014; [2015] eKLR - (Explained)

United Kingdom

1. *Attorney-General for Northern Ireland v Gallagher* [1963]AC 349 - (Explained)
2. *Chappell & Co Ltd v Nestley Co Ltd* [1959] All ER 701 - (Explained)
3. *Kane v Radley* [1999] CH 274 - (Explained)
4. *Neville v Wilson* [1996] 3 All E.R 171 (CA) - (Explained)
5. *Royal Bank of Scotland vs Etridge* (No 2) (2002) AC 773 - (Explained)
6. *Thomas v Thomas* [1842] 2QB 851 - (Explained)
7. *Westdeustsche Landerbank Girozentrale v Islington LBC* [1968] 2 AC 669 - (Explained)

United States

1. *Harris Tr & Sav Bank v Salomon Smith Barney Inc* 530 US 238 (2000) - (Explained)
2. *Moore v Crawford* 130 US 122 (1889) - (Explained)

Canada

1. *MacDonald v Creelman* (1988), 83 NSR (2d) 415 - (Explained)
2. *Murdoch v Murdoch* [1975] 1 SCR 423 - (Explained)
3. *Soulos v Korkontzilas* [1997] 2 SCR 217 - (Explained)

Texts

1. Garner, BA., (Ed) (2009), *Black's Law Dictionary* St Paul Minnesota: West Group 9th Edn
2. Hogg, QM., (Lord Hailsham) *et al* (Eds) (1995), *Halsbury's Laws England* London: Butterworth 4th Edn vol 48 (1) para 690
3. Scott, AW., (Ed) (1967), *Law of Trusts* Saul Touster: University at Buffalo School of Law 3rd Edn p 3215

4. Smerdon, R., (2000), *Palmer's Company Law Manual* London: Sweet & Maxwell

Statutes

Kenya

1. Companies Act (cap 486 Repealed) section 119 - (Interpreted)
2. Companies Act, 2015 (Act No 17 of 2015) sections 30, 93, 104, 105, 165 - (Interpreted)
3. Constitution of Kenya articles 40, 159, 163(4)(b), 164(4), 260 - (Interpreted)
4. Court of Appeal Rules, 2010 (cap 9 sub leg) rule 10 - (Interpreted)
5. Evidence Act (cap 80) section 97(1) - (Interpreted)
6. Judicature Act (cap 8) section 3(1) - (Interpreted)
7. Land Registration Act, 2012 (cap 300) sections 25, 28, 36, 41, 43, 44 - (Interpreted)
8. Law of Contract Act (cap 23) section 3 - (Interpreted)
9. Registered Land Act (cap 300 Repealed) section 163 - (Interpreted)
10. Registration of Titles Act (cap 281 Repealed) section 23 - (Interpreted)
11. Supreme Court (General) Practice Directions, 2020 (Act No 7 of 2011 Sub Leg) rule 11 - (Interpreted)
12. Supreme Court Act (cap 9B) sections 3A, 20, 21, 27 - (Interpreted)
13. Supreme Court Rules, 2020 (cap 9B Sub Leg) rules 11, 26(3), 39(1)(b), 40 - (Interpreted)
14. Trustee Act (cap 167) In general - (Cited)

United Kingdom

Companies Act, 2006 section 126 - (Interpreted)

Advocates

Francis Wasuna & Hannington Amol for the appellants
Mohammed Nyaoga Senior Counsel for the 1st & 2nd respondents
Wamuti Ndegwa for the 3rd & 4th respondents
Ambrose Weda for the 5th & 6th respondents

December 28, 2023, the Court delivered the following Judgment:

A. Introduction

1. This petition of appeal dated July 28, 2022 challenges the decision of the Court of Appeal in Civil Appeal No 117 of 2018 delivered on April 4, 2019. It is filed pursuant to the court's Ruling dated July 8, 2022. In the said ruling, we granted the appellants leave to appeal to the Supreme Court, limited to the following issues certified as being of general public importance:

    i. Whether a constructive trust can be imported into a land sale agreement to defeat a registered title therefrom; and

ii. Whether a constructive trust can be imported into a shareholding of a company as to disentitle a registered holder of shares in a company obtained for valuable consideration.

B. Background

2. Sometime in May, 2005, the respondents experienced financial challenges as a result of debts incurred by the 1st respondent, and secured by Plot No 500/VI/Mainland North (Title No CR 4xxx) (suit property) registered in the name of the 1st respondent. The suit property housed a brick factory, a maize mill factory, a coconut extracting factory, a go-down, office blocks, a workshop, a residential house, ancillary buildings and included various machines and equipment. The brick making machinery and equipment, other movable and immovable assets were not part of the security but were attached to the suit property. The suit property was however threatened with sale by the financier, Standard Chartered Bank Ltd, to recover the monies secured by it.

3. In an effort to save the suit property, Dinesh and Ateet Jetha, the 2nd and 3rd respondents, at the time tasked with the running of the 1st respondent, sought the assistance of the 1st appellant, Arvind Shah, a close and trusted friend perceived to be an experienced and successful businessman running numerous profitable companies. The 1st appellant recommended the restructuring of the 1st respondent. This involved the incorporation of two holding companies, Zaverchand Sojpal Jetha Holdings Ltd, the 6th respondent, to be owned 100% by the respondents and Goshrani Holdings Ltd, the 3rd appellant, to be owned by the 1st appellant or his agents. These two companies would then incorporate four other companies to hold various assets of the 1st respondent. The four incorporated companies are: Coast Properties Ltd; Coast Maize Millers Ltd; Coast Clay Works Ltd; and Spa Millers Nairobi Ltd, which are the 4th, 5th, 6th and 7th appellants, respectively. At incorporation, the companies did not own any assets. The companies were to hold the 1st respondents' assets for the sole benefit of the respondents during the process of repayment of the facility and redeeming the assets from the charge held by Standard Chartered Bank Kenya Ltd.

4. The respondents acted upon the 1st appellant's recommendations. Before the incorporation of the companies was complete, the 1st respondent passed a resolution dated June 2, 2005 to sell the suit property. Subsequently, a sale agreement between the 1st respondent and the 8th appellant was entered into for the sale of the suit property for the sum of Kshs 27,000,000/- equivalent to the outstanding loan amount owed to Standard Chartered Bank Kenya Ltd.

5. To forestall the looming auction, the 1st appellant approached Standard Chartered Bank Kenya Ltd with the resolution, the sale agreement and a proposed settlement of the outstanding debt upon registration of title to the suit property in favour of the 8th appellant

or its nominee. Standard Chartered Bank accepted the proposal on condition that 10% of the purchase price, being Kshs 2,700,000/-, be paid upfront as a non-refundable deposit and a guarantee for payment of the balance thereof be given by a reputable bank. Concurrently, the 1st appellant sought financing from Giro Commercial Bank Limited who had agreed to offer a loan facility secured by the suit property.

6. As a consequence, the 10% deposit and a bank guarantee by Giro Commercial Bank were released to Standard Chartered Bank who in turn released the title of the suit property to the Advocates acting for both the 8th appellant and Giro Commercial Bank. A discharge of the charge in favour of Standard Chartered Bank was subsequently registered.

7. In the meantime, the incorporations of the 4th to the 7th appellants were concluded with the shareholding comprising the 1st appellant, 4th respondent and the 3rd appellant each holding 20, 490 and 490 shares, respectively. The directors of the 4th to the 7th appellants were the 3rd respondent and 1st appellant. Subsequently, the 8th appellant nominated the 4th appellant to be registered as proprietor of the suit property. The brick making plant and maize milling factory on the suit property were assigned to the 5th, 6th and 7th appellants.

8. Thereafter, the 4th appellant applied for a loan and an overdraft facility of Kshs 50,000,000/- from Giro Commercial Bank to finance the purchase of the suit property and its working capital. The financing was approved on August 11, 2005. A fresh charge over the suit property was registered in favour of Giro Commercial Bank and the balance of the outstanding loan released to offset the loan at Standard Chartered Bank.

9. Seemingly, underlying issues concerning the shareholding and controlling interest of the companies therein surfaced in the year 2009 resulting in the institution of numerous suits by the parties.

C. Litigation History

i. High Court

10. Several suits were filed at the High Court being, HCCCNo 2, 21, 22, 23, 24 all of 2009, Misc No 4 of 2009 and HCCCNo 9 of 2011. Pursuant to the trial court's directions on July 26, 2012, all the cases were stayed pending determination of HCCCNo 9 of 2011 whose outcome would guide the related cases.

11. In Mombasa High Court Civil Case No 9 of 2011 against the appellants, the respondents sought the following orders:

a. A declaration that the 4th, 5th, 6th and 7th appellants held and continue to hold the piece of land known as 500/VI/MN and all the attachments thereto in trust for the respondents.

b. A mandatory injunction compelling the defendants herein to unconditionally transfer the title and interest on plot No 500/VI/MN back to the 1st respondent or the respondents and or their nominee.

c. In the alternative, a setting aside or nullifying the purported agreement of the sale dated August 31, 2005 in respect of the transfer of the land from the 1st respondent to the 4th appellant.

In the alternative and without prejudice to the above,

a. A declaration that the shares held by the 1st and 3rd appellants in the 4th, 5th, 6th and 7th appellant companies are held by the said 1st and 3rd appellants in trust for the respondents.

In a further alternative,

i. As against the 1st, 3rd and 4th, 5th, 6th and 7th appellants, the said appellants be ordered to pay the respondents through the 1st respondent 50% of the market value of the suit plot No 500/VI/MN, brick manufacturing machinery and every asset of the respondent as at the date of valuation actual payment.

In a further alternative,

a. As against the 4th, 5th, 6th and 7th appellants, the honourable court be pleased to order that the respective contributions into the past and present assets of the 4th, 5th, 6th and 7th appellants as between the respondents and the 1st, 2nd, and 3rd appellants be assessed by an auditor appointed jointly by the parties hereto or by the court.

b. The value of the assets and in particular plot No 500/VI/MN and the brick manufacturing machinery over and above the nominal value of the shares be declared to be share premium and be transferred to the share premium account.

c. The 4th, 5th, 6th and 7th appellant companies be directed to increase their authorised capital and issue such bonus shares as the court will direct from the said share premium and the said share premium capital be deemed as allotted and issued to the shareholders according to their actual proportionate contribution to the assets of the company and the memorandum and Articles of Association and or share register be deemed as amended accordingly and share certificates issued.

d. Any other relief as the honourable court may deem fit.

12. The appellants filed a defence and counterclaim seeking *inter alia* the following orders:

    a. Mombasa High Court Civil Suit Nos 2, 21, 22, 23 and 24 of 2009 be dismissed with costs to the 1st, 2nd and 3rd appellants.

    b. The 1st, 2nd and 3rd respondents jointly and severally be ordered to pay mesne profit to the 3rd appellant in the sum of Kshs 1,200,000/- per month from May 1, 2013 until the 2nd and 3rd respondents vacate the suit premises.

    c. The 1st respondent be restrained from running the affairs of the 3rd and 4th appellants without the involvement of the 1st and 2nd appellants.

    d. A perpetual injunction be issued against the 2nd, 3rd and 4th respondents from engaging in any business, trade or manufacture of any item in the suit premises.

    e. An order of eviction to evict the 2nd and 3rd respondents from the suit premises.

    f. A declaration that the 1st and 2nd appellants are entitled to the shares they hold in the 4th-7th appellants.

    g. Punitive and aggravated damages against 3rd respondent for trespass/conversion.

13. The respondents alleged that the 1st appellant, Arvind Shah, had misrepresented his true intention in offering his advice to the 1st respondent, took advantage of the 1st respondent's vulnerable situation and Ateet Jetha's inexperience to induce the 1st respondent to enter into the arrangement it did. Furthermore, the respondents contended that the sale of the suit property to the 8th appellant was unconscionable since the amount of Kshs 27,000,000/- allegedly paid as consideration was nowhere near the value of the land which at the time was estimated at Kshs 150,000,000/-.

14. On the other hand, the appellants denied the allegations and averred that the 1st respondent's resolution, sale agreement and transfer of the suit property spoke for themselves. According to Arvind, when he set out to offer his assistance and or advice he did not do so on a philanthropic or charitable basis. He did so as a business venture expecting returns and benefits for his effort. It is on that basis that he mobilized not only his resources but those of his family members and companies associated with them to salvage the assets in question. That he went to great lengths to halt the auction and obtain the requisite financing from Giro Bank to pay off the outstanding debt to Standard Chartered Bank. That it was agreed that in exchange for his assistance he and the 3rd appellant would hold a controlling interest in the 4th to 7th appellant. Thus, the 1st appellant denied exerting any undue influence or making any misrepresentation with respect to his intention of getting involved with the respondents.

15. The parties consented to the determination of the following issues at the High Court : whether the document dated 2.06.05 described as a resolution by the 1st respondent Company to sell land known as subdivision number No 500 section VI Mainland North, is a lawful document or a document obtained by unlawful means; whether the document dated 31.08.05 is a lawful Agreement of Sale of subdivision number No 500 section VI Mainland North by the 1st respondent to the 8th appellant/nominee or whether it was obtained by unlawful means; whether the document described as a transfer of subdivision Number No 500 section VI Mainland North from the 1st appellant to the 4th appellant is a lawful transfer, whether the consideration was paid and whether it was obtained by unlawful means; and whether the shareholding structure in the Memorandum and Articles of Association of the 4th, 5th, 6th and 7th appellant embody a lawful shareholders agreement between the respondents and the 1st, 2nd and 3rd appellants or whether that structure was procured by unlawful means. All other issues in the suit and counterclaim would abide the determination of these 4 (four) issues.

16. In its judgment dated December 22, 2017, the High Court determined that; the resolution dated June 2, 2005 by the 1st respondent was valid and not amenable to disturbance by the court; the respondents voluntarily made a resolution to sell the suit property and received an agreement for sale, had it executed properly in accordance with the law; there was no coercion or undue influence in the signing of the sale agreement; and that the Memoranda and Articles of Associations of the companies incorporated for the purpose of salvaging the suit property were freely negotiated, agreed and executed. The court further held that, the sale agreement dated August 31, 2005 was valid, lawful and binding and it did convey and confer to the purchaser a valid and good title to the land purchased.

17. The trial court also found that the parties executed the agreement for sale as well as the transfer for a consideration of Kshs 27,000,000/-, a sum which was paid to Standard Chartered Bank as a chargee who had moved to exercise its statutory power of sale. It found that the shareholding structure exhibited in the Memorandum and Articles of Association had not undergone any alterations but remained as they were at incorporation, and the respondents did not prove the accusations of undue influence or coercion. It observed that once a Memorandum and Articles of Association is registered, it binds the members, and the members cannot unilaterally denounce any provision thereto or just renege therefrom. As to the counterclaim, the court stated that by virtue of the ownership of the suit property, the 4th appellant is entitled to the benefits flowing from such proprietorship. The court also upheld the 4th appellant's rights as fundamental under article 40 of the *Constitution*.

ii. Court of Appeal

18. Aggrieved by the decision of the High Court, the respondents filed Civil Appeal No 117 of 2018 premised on 30 grounds of appeal while the appellants filed a cross appeal. The Court of Appeal framed the issues for determination as: whether the parties were proper parties to the suit; whether the shares held by the 1st and 3rd appellants are held in trust for the 1st respondent or its nominees; whether the 4th appellant holds the suit land in trust for the 1st respondent or its nominees; whether the sale agreement and transfer of the suit land should be nullified; whether the circumstances surrounding the dispute called for lifting of the corporate veil of the concerned companies; whether the imposition of payment of mesne profits on the 5th and 6th respondents was proper; whether there was legal basis for directing the audit of the accounts held by the 5th and 6th respondents; whether an inspector should have been appointed under section 165 of the *Companies Act* to inspect the 5th respondent's affairs; and whether the learned judge erred in not granting costs to the appellants or imposing interest on the mesne profits and misappropriated funds.

19. In its judgment delivered on April 4, 2019, the Court of Appeal allowed the appeal and dismissed the cross appeal. It held that; the parties before the court were well suited for purposes of the determination of the dispute as each party played a role in the dispute; there was a relationship of trust between the respondents and the 1st appellant, who offered to reorganize and restructure the respondents' business in order to salvage the suit property; instead of using his position as a trustee, the 1st appellant set out a scheme to purchase the property at Kshs 27,000,000/- unjustly enriching himself and he was conflicted between his duties as a trustee and his scheme to purchase the property. It further held that, there was a presumption of undue influence on the part of the 1st appellant as the net effect of the documents giving rise to the arrangement the parties found themselves in did not reflect the true and independent consent of the 1st to 4th respondents. The transactions thus met the criteria of being regarded as unconscionable bargains. The court lifted the corporate veil of the 3rd and 8th appellants holding that the companies were used to cover the 1st appellant's improper conduct. The court in that regard deemed the said appellants to be one and the same with respect to the transaction in issue.

20. The Court of Appeal further found that the 1st and 3rd appellants hold the shareholding in the 4th to the 7th appellant companies in trust for the 1st respondent or its nominees, and the 4th appellant holds the suit land in trust for the 1st respondent. Whereas the 4th appellant's title is registered under section 23 of the repealed *Registration of Titles Act*, the Court of Appeal found it impeachable. Thus, it nullified the sale agreement dated August 31, 2005 and the transfer of the suit property to the 4th appellant.

C. Proceedings Before The Supreme Court

a. Appellants' case

21. Dissatisfied with the decision of the Court of Appeal, the appellants have preferred the instant appeal. They seek the following orders:

    a. The petition of appeal be allowed.

    b. The judgment of the Court of Appeal in Mombasa Civil Appeal No 117 of 2018 dated April 4, 2019 be quashed and set aside.

    c. The honourable Court reinstates and upholds in entirety the judgment of the High Court in Mombasa Civil Case No 9 of 2011 and delivered on February 26, 2015 be upheld. (*sic*)

    d. Alternative to (c) above, having set aside the Court of Appeal decision, the honourable court does substitute it with the honourable court's own decision.

    e. Any other remedy the honourable court may deem just in the circumstances.

    f. Costs of the appeal and the suits in the courts below be met by the respondents jointly and severally.

22. The appeal is premised on 28 grounds, reframed for precision as follows: that the learned judges erred in law and in fact in;

    i. Finding that the agreement dated August 31, 2005 between the 8th appellant and the 1st respondent did not represent the will of the parties and that the same was entered through undue influence, and unconscionable bargain.

    ii. Finding that the 1st appellant was at all material times in a fiduciary relationship of a trustee to the respondents when no such relationship or expectation existed and misconstruing that the suit property in the agreement of sale dated August 31, 2005 was being held in trust for the 1st respondent.

    iii. Failing to interpret and apply the provisions of the *Law of Contract Act* and laws relating to the disposal of rights in land hence varied material provisions of a written contract for sale of land duly executed by parties thereto and duly registered.

    iv. Reaching a judgment that erroneously overrode established principles of contract and the provisions of section 3 *Law of Contract Act*, sections 36, 41, 43 and 44 of the *Land Registration Act*.

v. Relying on contested and unproven facts to conclude that the actual value of the suit land was Kshs 150 million and attempting to write a new contract when on the face of the said consideration, the consideration was sufficient.

vi. Finding that the shares held by the 1st, 2nd, and 3rd appellants in the 4th, 5th, 6th and 7th appellants were wholly held in trust for the 1st and 3rd respondents and declaring that a trust existed between the parties in the entire arrangement when no elements of trust were present thereby depriving the 1st and 3rd appellants of their property as well as shares in 4th - 7th appellants.

vii. Introducing a non-existent unwritten shareholders agreement to vary the terms of the Memorandum and Articles of Association of a company hence overriding the provisions of sections 30, 93, 104 and 105 of the *Companies Act*.

viii. Finding that the 1st, 2nd and 3rd appellants had not demonstrated that they paid consideration to acquire the shares in the 4th, 5th,6th and 7th appellants.

ix. By ordering the appellants to continue servicing obligations towards the credit facilities obtained by the 4th - 7th appellants when the court found that they had no claim or equitable interest in the said companies.

x. Lifting the corporate veil to find that the 1st appellant was the figure behind the 8th and 3rd appellants.

23. In support of their petition, the appellants filed Submissions dated May 8, 2023 and rejoinder submissions dated May 23, 2023. In addition, they filed a rejoinder dated November 24, 2023 in response to the 1st and 2nd respondents' replying affidavit and grounds of objection separately filed by the 3rd and 4th respondents, and the 5th and 6th respondents.

24. On the jurisdiction of the court, the appellants submit that sections 3A, 21 and 27 of the *Supreme Court Act, 2011* grant the court wide powers to make such orders as may be necessary for the administration of justice, and its decisions are not mere interpretations to render the appeal an academic exercise. Further, the appellants aver that section 20 of the *Supreme Court Act* and rule 26(3) of the *Supreme Court Rules 2020* give the court powers to consider facts, re-appraise evidence and draw inferences of facts, and the court is not bound by the findings of fact and so the court can go beyond any framed issue in administering justice. In support of this averment, the appellants rely on this court's decision in *Moi University v Zaippeline & another* Petition 43 of 2018 [2022] KESC 29 (KLR)(Civ), (17 June 2022) (Judgment) *Dhanjal Investments Limited v Kenindia Assurance Company Limited* SC Petition No 7 of 2016 [2018] eKLR and *Attorney-General for Northern Ireland v Gallagher* [1963]AC 349.

25. On whether a constructive trust can be imported into a land sale agreement to defeat a registered title resulting therefrom, they submit that the Court of Appeal erred in holding that the agreement for sale dated August 31, 2005 between the 8th appellant and the 1st respondent did not represent the will of the parties and that the same had been procured through undue influence and unconscionable bargains. It is their case that this finding is contrary to the facts pleaded by the respondents that the agreement was a product of negotiations.

26. The appellants urge that the impugned judgment overrode established principles of contract and the provisions of sections 3 of the *Law of Contract Act*, 97 (1) of the *Evidence Act*, 36, 41, /43 and 44 of the *Land Registration Act* that a written contract for disposing interest in land or a written contract cannot be unilaterally amended by parole evidence as was affirmed by this Court in *Moi University v Zaippeline & another* (Petition 43 of 2018) [2022] KESC 29 (KLR) (Civ) (17 June 2022) (Judgment).

27. The appellants contend that the Court of Appeal erred in attempting to rewrite the agreement as regards the consideration. They submit that the 3rd respondent testified that the forced sale value of the suit property was Kshs 60 million which was consistent with the valuation by Tysons and Houthi Valuers. In addition, they submit that the government valuation for purposes of stamp duty placed the value at Kshs 40 million. They contend that the values pleaded did not place the value at more than Kshs 70 million, therefore, the Court of Appeal fished the amount of Kshs 150 million from a letter the 1st appellant had written to Giro Commercial Bank estimating the value of the suit property at Kshs 150 million which was a statement to entice the bank to agree to provide a loan but not based on any formal valuation. They submit that the Court of Appeal disregarded an elementary principle of contract law that a contract consideration needs only to be sufficient but not adequate. They rely on *Thomas v Thomas* [1842] 2 QB 851 and *Chappell & Co Ltd v Nestley Co Ltd* [1959] All ER 701 to buttress this argument.

28. On whether a constructive trust can be imported into a shareholding of a company as to disentitle a registered holder of shares in a company obtained for a valuable consideration, they fault the Court of Appeal for declaring that the shares held by the 1st to 3rd appellants in the 4th -7th appellants were being held wholly in trust for the 1st and 3rd respondents. They contend that shareholding as spelt out in the Memorandum and Articles of Association was a product of negotiations and a trust did not therefore arise.

29. They posit that the 2nd and 3rd respondents conceded, by their testimonies, that they had negotiated extensively with the 1st appellant regarding shareholding and agreed at 50:50 beneficial ownership. In this context, they aver that the respondents had, in Mombasa High Court in Civil Case No 22 of 2019, sought to compel the 1st appellant and his associates to

meet their part of the bargain by paying Kshs 35 million for the 51% shares they had been allotted in the companies at incorporation. It is their case that the Court of Appeal ought to have compelled the respondents to be bound by their own pleadings that confirmed that there was an agreement to acquire the shares by the 1st appellant. Further, they submit that the 1st appellant provided Kshs 35 million to the 4th to the 7th appellants towards achieving optimum working capital to enable the companies access credit facilities to bankroll the businesses, which contribution is admitted by the respondents. They therefore faulted the Court of Appeal's findings that the 1st, 2nd and 3rd appellants had not demonstrated that they paid for consideration to acquire shares in the 4th - 7th appellants.

30. On the existence of a fiduciary relationship that could lead to constructive trust, they rely on the Court of Appeal decision in *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri* [2014] eKLR where the court described constructive trust as an equitable concept that acts on the conscience of a fiduciary to prevent a person from acting unconscionably to defeat the common intention. In this context, they submit that the court defied its own precedents and failed to properly assess the two critical ingredients of constructive trust, guilty conscience and common intention. They contend that the dispute that the Court of Appeal ought to have determined was whether the appellants had met their commitment to contribute to 51% shares of the business and if not, what remedy would be available. Further, that at the outset of the negotiation the 1st appellant made his proposal to the respondents to acquire 51% stake and that he would pay off the Standard Chartered Bank loan using his money as his contribution to the partnership, a fact that was admitted by the 2nd respondent. They, therefore, submit that the relationship was an investment relationship and not that of trusteeship.

31. As for lack of an unconscionable bargain, they disagree with the Court of Appeal's conclusion in that regard, adding that the court failed to pay attention to the ingredients of such a bargain. They argue that what constitutes an unconscionable bargain was discussed in *Euromec International Limited v Shandong Taikai Power Engineering Company Ltd* [2021] KEHC 93 KLR. They submit in that regard that the Court of Appeal ought to have considered whether as at 2005, when the respondents were deep in debt and facing imminent and destructive action, the 1st appellant's action led to the respondents salvaging 49% of what they would have lost, entirely reviving a business that had been dead for nearly 10 years.

32. The appellants urge that equity aids the vigilant and not the indolent because the respondents alleged that by 2006, they were already aware that the 1st appellant had behaved inequitably yet they only filed a suit in 2009, and thereby are guilty of laches. In addition, they urge that there was no threat, undue influence or coercion on the respondents to make any payments.

33. They argue that the respondents had ample opportunity to seek independent legal advice on each of the agreements and that the 3rd respondent admitted that despite this opportunity, they nevertheless did not see the need to seek such legal advice. They added that the respondents were represented in the sale transaction by their own advocates, James Gitau Singh Advocates, and that the Advocate who drafted the Memorandum and Articles of Association was working with the said Gitau Singh Advocates.

34. Moreover, the appellants submit that a constructive trust is not a tool for rebalancing a relationship to aid a supposedly weaker party in obtaining a bargain or improved terms, as the Court of Appeal purported to do. They rely on *Westdeustsche Landerbank Girozentrale v Islington LBC* [1968] 2 AC 669 where the court held that constructive trust only exists where the defendant has knowledge of some factors that affect his conscience and that the 1st appellant did not in this case have a guilty conscience.

They thus seek that the court do allow the appeal, set aside the impugned decision of the Court of Appeal and reinstate the High Court decision.

b. Respondents' Case

i. The 1st and 2nd respondents

35. In response to the petition, the 1st and 2nd respondents filed a replying affidavit sworn on November 17, 2022 by Ateet Dinesh Jetha, the 3rd respondent. They also filed Submissions and supplementary submissions all dated May 26, 2023.

36. The 1st and 2nd respondents, as a preliminary point, submit that the court's jurisdiction can only be exercised with regard to the two issues that were determined to have met the set standards under article 163(4)(b) of the *Constitution*. They aver that this being a second appeal, it should be confined to points of law and that the court should not interfere with the factual findings by the Court of Appeal. They further argue that the instant appeal raises 7 grounds of appeal for determination by this court, 5 of which raise matters of fact contrary to the jurisdiction of the court. They posit that the court ought not to be compelled to evaluate the factual evidence but only cardinal issues of law or jurisprudence.

37. On the first issue of importing a constructive into a land sale agreement to defeat a registered title resulting therefrom, they submit that the question before this court is not whether the 1st appellant held the suit property in constructive trust for the respondents as this question had been answered in the affirmative by the Court of Appeal and to open this question would lead the court to delve into matters of fact which the court does not have jurisdiction to address.

38. To them, three key facts were established by the Court of Appeal, that; there existed a relationship of trust between the respondents and the 1st appellant; instead of using the fiduciary duty strictly as a trustee, the 1st appellant unjustly enriched himself through the agreement entered into between the appellants and the respondents; and that the 1st respondent remains the true and beneficial owner and as such, the suit property and shares in the 4th -7th respondents were held in trust for the 1st respondent.

39. They argue that a constructive trust overrides the registered title where a party has exerted undue influence when obtaining and retaining the property transferred to him, as is the circumstances in the instant case. Furthermore, section 25 (2) of the *Land Registration Act* provides that overriding interests such as a trust, can be imposed to defeat the title of a registered proprietor.

40. On whether shares acquired on the basis of a fiduciary duty can be enforced by the letter of the law defeating the interests of the equitable owner, they submit that the Court of Appeal established as a matter of fact that the shareholding held by the 1st and 3rd appellants in the 4th - 7th appellants was in trust for the respondents. They rely on the Court of Appeal's decision in *Salesio M'tonga v M'ithara & 3 others* [2015] eKLR to support this assertion. In conclusion, they urge the court to give effect to the principles of equity and in particular the doctrine of constructive trusts and dismiss the appeal for want of merit.

b. The 3rd and 4th respondents

41. The 3rd and 4th respondents filed grounds of objection dated November 17, 2022 contending that the petition raises questions of facts outside the scope of the two questions restricted by the certification given on July 8, 2022. They also filed a notice of preliminary objection dated November 24, 2022 challenging the court's jurisdiction to entertain the Petition of appeal as it is fatally defective and invalid for, it does not set out the summary of the grounds for the petition and that the record of appeal does not comply with rule 40 (1) (d) of the *Supreme Court Rules*.

42. In support of their case, the 3rd and 4th respondents filed submissions dated May 16, 2023 2022. On jurisdiction, they submit that this court does not have jurisdiction to revisit the factual findings of the superior court. To buttress this assertion, they rely on this court's decision in *Dina Management Limited v County Government of Mombasa & 5 others* (SC Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment) and *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* (SC Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021) (Judgment).

43. On the identity of parties, they argue that the 3rd to 8th appellant companies are mere corporate veils of the 1st and 2nd appellants. Therefore, the 3rd to 8th appellants are crucial to this dispute since they stood in a fiduciary relationship with the 1st, 2nd, and the 3rd respondents as financial advisors.

44. On whether a constructive trust can be imported into a land sale agreement to defeat a registered title resulting therefrom, they urge that equity will impose a constructive trust in an agreement for the sale of land and the resultant registration, whenever it is shown that the claimant obtained the agreement and title while standing as a fiduciary irrespective of whether he breached the fiduciary duties or not. In addition, they contend that equity absolutely prohibits fiduciaries from becoming purchasers and that the principle dictates that a trustee may not place himself in a position where his duty and his interest may conflict. They further argue that equity goes beyond the agreement of sale/conveyance to investigate whether the fiduciary used unlawful means such as undue influence to create the intention/consent on the part of the advisee to enter into the agreement. They cite the decision in *Royal Bank of Scotland vs Etridge (No 2)* (2002) AC 773 and *MacDonald v Creelman* (1988), 83 NSR (2d) 415 to support this contention.

45. On the importation of a constructive trust into a shareholding of a company so as to disentitle a registered holder of shares in a company obtained for valuable consideration, they submit that shares in a company are property like any other. Therefore, a constructive trust applies against persons who acquire title by breach of fiduciary duties, undue influence and other wrong doings. This would apply equally to shareholding agreements and the registration as holder of shares in a company. They cite *Kane v Radley* [1999] Ch 274 and *Neville v Wilson* [1996] 3 All ER 171 (CA) to support this assertion.

b. The 5th & 6th respondents' case

46. Similarly, the 5th and 6th respondents filed grounds of objection dated November 17, 2022 reiterating the 1st to the 4th respondents' contention, adding that the petition neither discloses nor establishes any special circumstances or basis to justify a departure from the established principles of constructive trust.

47. The 5th and 6th respondents reiterate the 1st to the 4th respondents' submission on the issue of undue influence and the jurisdiction of the court and submit that the petition as framed renders it difficult for the court to grant the prayers sought and urge the court to dismiss it.

C. Issues for Determination

48. In our ruling of July 8, 2022, we certified the appeal as one involving matters of general public importance under article 164(4)(b) of the *Constitution*. In the said ruling, we agreed with

the appellants that the issue whether it is open to the court to imply and import the doctrine of trust into land sale transactions and into shareholding of a company as to disentitle a registered holder of land or shares obtained for valuable consideration, without offending the constitutional right to property under article 40 of the *Constitution* and other statutory provisions, is an issue that required the input of this court. We thus certified the appeal as one deserving our attention but limited to the two issues only.

49. The jurisdiction of the court has, however, been put to question. The 3rd and 4th respondents filed a preliminary objection dated November 24, 2022 on the grounds that this court lacks jurisdiction to entertain the petition of appeal as it is fatally defective, for the reason that it does not comply with rule 10 of the *Court of Appeal Rules*, rule 39(1)(b) and (e), 40(1)(d) and Form G of the *Supreme Court Rules* and rule 11 of the *Supreme Court (General) Practice Directions, 2020*. They also object to the court's jurisdiction, just like the 1st and 2nd respondents, for the appeal raising questions of fact beyond that which was certified as involving general public importance.

50. We have held in several of our decisions that jurisdiction is a preliminary issue and ought to be dealt with in limine. Where a court finds that it does not have jurisdiction, it ought to down its tools. Therefore, with the jurisdictional challenge raised by the respondents as against the appeal, it is imperative that the same be determined upfront. Taking this into consideration, our Ruling of July 8, 2022, the parties' respective cases, submissions, and the remedies sought, the issues that arise for determination before this court are:

    i. Whether the petition satisfies the jurisdictional threshold under article 163(4)(b) as read with section 15 of the *Supreme Court Act*;

    ii. Whether a constructive trust can be imported into a land sale agreement to defeat a registered title therefrom; and

    iii. Whether a constructive trust can be imported into a shareholding of a company as to disentitle a registered holder of shares in a company obtained for valuable consideration.

C. Analysis and Determination

i. Whether the petition satisfies the jurisdictional threshold under article 163(4)(b) as read with section 15 of the *Supreme Court Act*

51. There is a two-fold challenge on the court's jurisdiction. The first angle of the challenge is on non-conformity of the petition with the rules and the second angle is on the contents of the petition.

52. The 3rd and 4th respondents' preliminary objection is premised on the grounds that the notice of appeal; is not in compliance with Rule 10 of the *Court of Appeal Rules* as the same is not signed and endorsed with the stamp of the Deputy Registrar; it does not relate to the judgment delivered on April 4, 2019 but is filed in the application for certification and leave to appeal to the Supreme Court; is contrary to rule 39(1)(b), (c) and Form G of the *Supreme Court Rules* and does not set out the concise presentation of arguments supporting each of the grounds of the petition of appeal, thus it occasions prejudice to the respondents' rights to a fair trial. The 3rd and 4th respondents further posit that the Record of Appeal does not comply with rule 40(1)(d) of the *Supreme Court Rules* as it has not included the relevant pleadings and documents required to determine the appeal, in omitting some documents from the Record; and it does not comply with rule 11 of the *Supreme Court (General) Practice Directions, 2020* of November 16, 2020 as the 10th line of each document is not numbered.

53. We note that in the 3rd and 4th respondents' notice of motion Application dated December 2, 2022 is raised similar grounds in urging this court to strike out the record of appeal. In our ruling of April 21, 2023 we addressed these grounds conclusively and we were satisfied, as we still are, that the notice of appeal was properly filed before the Court of Appeal. Our perusal of the said notice of appeal reveals that whereas the heading of the notice of appeal indicates that it is filed in regard to an application for grant of certification and leave to appeal to the Supreme Court, its contents specify the intent to appeal against the decision of the Court of Appeal rendered on April 4, 2019. The parties having engaged in the certification and leave to appeal proceedings both at the Court of Appeal and before us, there was little doubt left as to the appellants' intention to appeal against the judgment of the Court of Appeal.

54. In addressing the 3rd and 4th respondents' argument on non-compliance with rule 10 of the *Court of Appeal Rules*, we reiterate, as we stated in our ruling, that it is not for this Court to entangle itself in the filing and administrative processes of the Court of Appeal. We affirmed that the failure to have it stamped or endorsed by the Court of Appeal was not fatal, as the Notice of Appeal was duly lodged in the Court of Appeal.

55. On the lack of compliance with rule 40(1)(d) of the *Supreme Court Rules*, this being a matter of determination of specific framed questions of general public importance, the documents stated as missing from the record would be useful for the interrogation of findings of facts which falls outside the purview of this court.

56. Concerning the failure by the appellants to mark every tenth line of the document, we find, without condoning the same, that this is also not fatal. Article 159 (2) (d) of the *Constitution* obliges this court to administer justice without undue regard to procedural technicalities.

We therefore find that the 3rd and 4th respondents' preliminary objection dated November 24, 2022 has no merit and is dismissed.

57. The second limb of the respondents' objection is that the petition of appeal as framed goes beyond the scope of the questions certified as matters of general public importance. The 1st and 2nd respondents urge that the court's jurisdiction can only be exercised with regard to the two framed issues. They submit that, while the appellants raise seven grounds of appeal, five of them raise matters of fact contrary to the jurisdiction of the court. Similarly, the 3rd and 4th respondents urge the court to decline the invitation to consider and find alleged errors of fact by the Court of Appeal, as that falls outside the scope of the two framed questions. The 5th and 6th respondents also urge that by virtue of this court having a limited scope and jurisdiction as set out in the ruling of July 8, 2022, it cannot grant reliefs (b), (c), (d), and (e) of the petition of appeal as they are *ultra vires*.

58. In response, the appellants underscore that the court can choose which set of facts to address, where the facts as summarized by the High Court differ from those of the Court of Appeal. Moreover, that section 20 of the *Supreme Court Act* and rule 26(3) of the *Supreme Court Rules, 2020* empower the court to consider facts including taking new evidence not previously available, re-appraise evidence and draw inferences of facts. They also cite section 3A of the *Supreme Court Act* to urge that the Court has wide powers to make such orders as may be necessary for the administration of justice.

59. In *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* SC Appl. No 2 of 2011 [2012] eKLR we held that an appeal is granted in specific terms by the *Constitution* or statute. An appeal thus typically lies to a higher court and entails a reconsideration of a decision by the higher court with a view to reversing it either in part or in toto.

60. The appellate jurisdiction of this court derives from article 163(4) of the *Constitution*. This involves an appeal as of right or an appeal on certification. As held in *Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others* SC Civil Appl No 35 of 2014 [2015] eKLR, the court cannot exercise both jurisdictions concurrently. The litigant chooses the best path upon which the matter is considered within the established threshold. Unlike an appeal as of right where the court exercises its appellate jurisdiction on the application and interpretation of the *Constitution* by the superior courts below, the jurisdiction on certification is narrower as the court is only called upon to express its position on matters that transcend the litigants before court among other parameters set out in *Phillipus Hermanus Steyn v Giovanni Gnecchi-Ruscone* SC Application No 4 of 2012 [2103] eKLR without necessarily sitting on appeal between the parties before it. This stems from the holding in *Daniel Kimani Njihia v Francis Mwangi Kimani & another* SC Appl No 3 of 2014 [2015] eKLR that the Supreme

Court is not just another appellate layer of courts to offer remedy to parties dissatisfied with the decisions of the Court of Appeal.

61. Further, in *Dhanjal Investments Limited v Kenindia Assurance Company Limited* Sup Ct. Petition No.7 of 2016 [2018] eKLR, we appreciated that the court may allow parties to submit on an issue not previously framed as one for determination but which, even if unconnected to any of the framed issue, is nonetheless important in resolving a dispute before it. The 'public importance' criteria should in any event never be lost. We stated as follows in that regard:

> "(67) Having so stated, we must at this point remind parties that it is only the issues that are certified as being of great public importance that must form the basis for submissions and ultimately the decision of this court. To frame certain issues as being of great public importance at the point of certification under article 163(4)(b) of the *Constitution* and then submit on issues that are specific to the parties at hand with no public element exhibited is an abuse of court process and may lead to the dismissal of an appeal."

62. As noted in the above cited case, it will always be a matter for the exercise of discretion whether to allow a point in no way connected with the certified point of law to be argued on the appeal, and it is not to be assumed that an appellant can as a matter of right raise any such point. In framing the two questions that we certified as being of great public importance, we observed as follows:

> "13. ... We think that the dispute did not end with the vitiation of contracts or the law on the circumstances of resulting or constructive trusts and the lifting of the corporate veil which we agree are settled issues. The crux of the applicants' case in their fifteen grounds, as we understand it, <u>is the ultimate recourse granted by the courts under such instances in view of the existing constitutional and statutory provisions</u> " (Emphasis ours)

We are therefore mindful of our exercise of discretion and find no merit in the objection to our jurisdiction as sought in the objection and the application to strike out the appeal. None of the issues raised to challenge our jurisdiction suffices. We disallow the preliminary objection and the application by the respondents and now turn to determine the issues as framed.

ii. Whether a constructive trust can be imported into a land sale agreement to defeat a registered title therefrom

63. The appellant faults the Court of Appeal for holding that the agreement for sale dated August 31, 2005 between the 8th appellant and the 1st respondent did not represent the will of the parties. They state that this overrode the established principles of section 3 of the *Law of Contract Act*; section 97(1) of the *Evidence Act*; and sections 36, 41, 43 and 44 of the *Land Registration Act* as a written contract for disposing interest in land or a written contract cannot be unilaterally amended by parole evidence. They dispute the importation of constructive trust and maintain that parties had a common intention, which was not to establish the 1st appellant or any of the appellants as a fiduciary. We however note that the appellants failed to address us on the specific issue framed for determination, save to regurgitate the factual background and litigation history before the superior courts.

64. On the other hand, the respondents submit that a constructive trust overrides the registered title where a party has exerted undue influence when obtaining and retaining the property transferred to him, as was in the instant case. Furthermore, section 25 (2) of the *Land Registration Act* provides for overriding interests, which include trusts, which can be imposed to defeat the title of a registered proprietor. The respondents further urge that, equity will impose a constructive trust in an agreement for the sale of land and the resultant registration whenever it is shown that the claimant obtained the agreement and title while standing as a fiduciary, irrespective of whether he breached the fiduciary duties. They add that the petition neither discloses nor establishes any special circumstances or basis to justify a departure from the established principles of constructive trust.

65. The Court of Appeal having considered the pleadings, and appraised itself of the evidence within the confines of its jurisdiction, established that the respondents had placed their trust in the 1st appellant to salvage the suit properties. In examining the transactions, it found that the circumstances gave rise to a presumption of undue influence on the part of the 1st respondent and met the criteria of being regarded as unconscionable bargains. It therefore found that the 1st and 3rd appellants hold the shareholding of the 4th -7th appellant companies in trust for the 1st respondent, and the 4th appellant holds the suit land in trust for the 1st respondent.

66. The *Trustee Act*, cap 167 Laws of Kenya defines a "trust" and "trustee" as extending to implied and constructive trusts. The *Black's Law Dictionary*, 9th edition defines a trust as:

> " The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary)."

67. It further defines a constructive trust at pg 1649 as:

> " An equitable remedy that a court imposes against one who has obtained property by wrong doing.

68. *Halsbury's Laws of England*, 4th edition, volume 48 at paragraph 690 states as follows on constructive trusts:

> "A constructive trust will arise in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired. This will be so where: (1) there was a common intention that both parties should have a beneficial interest; and (2) the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest. The relevant intention of each party is the intention reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention or even acted with some different intention which he did not communicate.
>
> The first question is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the property, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. Such an agreement will be conclusive.
>
> Where the evidence is that the matter was not discussed at all, the court may infer a common intention that the property was to be shared beneficially from the conduct of the parties. In this situation direct contributions to the purchase price by the party who is not the legal owner, whether initially, or by way of mortgage instalment, will readily justify the inference necessary to the creation of a constructive trust.
>
> Exceptionally the agreement, arrangement or understanding may be arrived at after the date of the original acquisition. Once common intention has been

established, whether by direct evidence of common agreement or by inference from conduct, the claimant must show that he acted to his detriment in reliance on the agreement.

The final question to determine is the extent of the respective beneficial interests. If the parties have reached agreement, this is conclusive. Where there is no agreement as to the extent of the interest, each is entitled to the share the court considers fair having regard to the whole course of dealing between the parties in relation to the property."

69. A constructive trust is thus an equitable instrument which serves the purpose of preventing unjust enrichment. The Canadian Supreme Court in *Soulos v Korkontzilas*, [1997] 2 SCR 217, a case which involved a land dispute stated as follows, as to the purpose of constructive trust:

> " The constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in "good conscience" they should not be permitted to retain. While Canadian courts in recent decades have developed the constructive trust as a remedy for unjust enrichment, this should not be taken as expunging from Canadian law the constructive trust in other circumstances where its availability has long been recognized. Under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, and to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground."

70. Similarly, although in a matrimonial property dispute, the Canadian Supreme Court in *Murdoch v Murdoch* [1975] 1 SCR 423 stated as follows:

> "As is pointed out by Scott, *Law of Trusts*, 3rd ed., 1967, vol. 5, at p. 3215, "a constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it ... The basis of the constructive trust is the unjust enrichment which would result if the person having the property were permitted to retain it. Ordinarily, a constructive trust arises without regard to the intention of the person who transferred the property"; and, again, at p. 3413, quoting Judge Cardozo "a constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in

> such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee."

71. The United States Supreme Court in *Harris Tr & Sav Bank v Salomon Smith Barney Inc*, 530 US 238, 250–51 (2000) citing *Moore v Crawford*, 130 US 122, 128 (1889) stated thus:

> "Whenever the legal title to property is obtained through means or under circumstances 'which render it unconscientious for the holder of legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same.."

72. As has been established therefore, trusts are created either expressly, where the trust property, its purpose and the beneficiaries are clearly stated, or established by the operation of the law. Like in the instant case, where it is not expressly stated, the trust may be established by operation of the law.

73. From the definitions above, we establish that a constructive trust is a right traceable from the doctrines of equity. It arises in connection with the legal title to property when a party conducts himself in a manner to deny the other party beneficial interest in the property acquired. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit.

74. *Vide* section 3(1) of the *Judicature Act*, cap 8 Laws of Kenya, the doctrines of equity are applicable in Kenya and form part of our laws. It states that common law, doctrines of equity and statutes of general application shall apply in so far as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.

75. In addition, we also note that the concept of trust is not new in our jurisdiction. In *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* Petition 10 of 2015 [2018] eKLR, we observed that the courts, *vide* section 163 of the *Registered Land Act* (repealed by the *Land Registration Act* No 3 of 2012) have been more willing to import the doctrines of implied, resulting and constructive trust as known in English law, into section 28 of the Act.

76. The concept of constructive trust has also been inferred in a number of decisions of the superior courts. The Court of Appeal in *Twalib Hatayan & another v Said Saggar Ahmed Al-Heidy & 5 others*, Civil Appeal No 51 of 2014 [2015] eKLR held that:

> "A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see. *Halsbury's Laws of England supra* at para1453). As earlier stated, with constructive trusts, proof of

> parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment."

77. In *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri* Civil Appeal No 6 of 2011, consolidated with No 26 & 27 of 2011 [2014] eKLR and in *Willy Kimutai Kitilit v Michael Kibet*, Civil Appeal No 51 of 2015 [2018] eKLR, the Court of Appeal, in matters involving the sale of land, held that the equitable doctrines of constructive trust and proprietary estoppel are applicable and enforceable to land, subject to the circumstances of the case.

78. The applicability of the doctrine of constructive trust is therefore now settled within our jurisdiction and is applied to land sale transactions. In our ruling

reviewing the Court of Appeal decision on certification, we underscored the fact that the constructive trust is already settled. We stated thus:

> "13. We think that the dispute did not end with the vitiation of contracts or the law on the circumstances of resulting or constructive trusts and the lifting of the corporate veil which we agree are settled issues. The crux of the applicants' case in their fifteen grounds, as we understand it, is the ultimate recourse granted by the courts under such instances in view of the existing constitutional and statutory provisions. ..." (Emphasis ours)

The first question before us therefore is not whether the Court of Appeal was correct in imputing a constructive trust but rather, whether such trust can be imported into a land sale agreement to defeat a registered title therefrom obtained for valuable consideration without offending the constitutional right to property under article 40 of the *Constitution* and other statutory provisions.

79. By virtue of article 40 of the *Constitution*, every person either individually or in association with others, has the right to acquire and own property of any description, and in any part of Kenya. This right to property is however not absolute. Under article 40(3) the State may deprive a person of property through a process of acquisition of land for a public purpose or in public interest in accordance with the *Constitution*. Further, under article 40(6) the rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

80. While article 40 has an internal limitation on the right to property, the general limitation of rights provision at article 24 of the *Constitution* provides that any limitation on a right shall be by law, and only to the extent that the limitation is reasonable and justifiable, in an open and democratic society based on human dignity, equality and freedom. Other relevant

factors to be taken into account include the nature of the right, the importance and purpose of the limitation, and relation between the limitation and the purpose of such limitation. It further, provides that the person seeking to justify a particular limitation has the obligation to justify the limitation.

81. As prescribed, a limitation of a fundamental right or freedom, must be provided under law. It is therefore imperative for us to examine legislation making provision for the registration of titles and the limitations on the right to property set out.

82. The *Land Registration Act*, No 3 of 2012, is the law that governs registration of titles. Section 25 of the *Land Registration Act* provides that the rights of a proprietor shall not be liable to be defeated except as provided under the Act, subject to encumbrances and conditions in the register; and to such liabilities, rights and interests declared by section 28 not to require noting on the register, unless the contrary is expressed in the register. Additionally, as is stipulated under section 25(2) nothing in this provision shall be taken to relieve a proprietor from any duty or obligation to which the person is subject as a trustee.

83. Under section 26 of the *Land Registration Act*, No 3 of 2012, a Certificate of Title issued by the Registrar upon registration or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner. However, this is subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate. Further, the title of the proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation and where the certificate of title was acquired illegally, un- procedurally or through a corrupt scheme.

84. Section 28 provides that unless the contrary is expressed in the register, all registered land shall be subject to overriding interests as may for the time being subsist and affect the same, without being noted in the register. These overriding interests include, trusts.

85. While sections 25, 26 and 28 of the *Land Registration Act* recognize that the rights of a registered proprietor of land are absolute and indefeasible, these are only subject to rights and encumbrances noted in the register and overriding interests. The overriding interests include trusts. In our view, and in the absence of any limitation as to the trusts, this includes constructive trusts. Applying the provisions of article 24 of the *Constitution* therefore, the limitation of the right to property is provided under law, and includes a constructive trust.

86. We have found that the doctrines of equity are part of our laws by virtue of section 3 of the *Judicature Act*. And while the *Constitution* entitles every person to the right to property at article 40, this right is not absolute. Article 24 provides that a right cannot be limited except by law. We have also established that, while sections 25 and 26 of the *Land Registration Act* provide for the rights of a proprietor and that the certificate of title is conclusive evidence

of proprietorship, section 28 provides that the registration is subject to overriding interests. One of these overriding interests is trust, which includes constructive trust.

87. We have also established that constructive trusts can arise in various circumstances, including in land sale agreements. Trust is an equitable remedy which is an intervention against unconscionable conduct. Where the circumstances of the case are such that it would demand that equity treats the legal owner as a trustee, the law will impose a trust. It is imposed by law whenever justice and good conscience require it. On this issue and for the reasons given above, we therefore find that a constructive trust can be imported into a land sale agreement to defeat a registered title.

iii. Whether a constructive trust can be imported into a shareholding of a company as to disentitle a registered holder of shares in a company obtained for valuable consideration.

88. The appellants urge that a constructive trust cannot be declared against a shareholder for valuable consideration, and that in any event, the remedy against a shareholder who has not fully paid a valuable consideration for his shares is a call- up for payment by the innocent shareholders. They posit that the appropriate remedies for non-payment of share value by a shareholder was set out in the *Companies Act* and within the Articles of Association of the various companies. They further contend that shareholding itself, being a contractual matter between shareholders, a declaration of trust in the circumstances amounted to deprivation of the 1st, 2nd and 3rd appellants' right to property under article 40 of the *Constitution*. They maintain that a trust did not arise as the shareholding was a product of negotiations and was spelt out in the Memorandum and Articles.

89. The respondents on the other hand submit that shares in a company are property like any other. Constructive trust therefore applies to shareholding agreements and the registration as holders of shares in a company, against persons who acquire title by breach of fiduciary duties, undue influence and other wrong doings. They submit that it is not in dispute that the 4th to 7th appellants were special purpose vehicles created to salvage the 1st respondent from financial distress. The constructive trust therefore stepped in as an equitable concept to prevent the appellants from acting in an unconscionable manner defeating the common intention.

90. The respondents further urge that the appellants never paid any consideration for the shares they seek to enforce. They cannot therefore rely on the letter of the law to enforce the ownership of shares when at all material times, the intention of the parties was to create a trust to aid in the restructuring of the 1st respondent. They thus submit that the issue at hand must be answered affirmatively, as the global stance is that a constructive trust can be imported into a shareholding agreement to disentitle a registered shareholder.

91. The *Companies Act*, No 17 of 2015, makes provision to govern all types of companies. Section 20 of the Act provides for the articles of association as the *Constitution* of the company. Pursuant to section 26 of the Act, for existing companies before the commencement of the Act, such as the companies in the instant suit, the memorandum of association is treated as provisions of the articles. Companies therefore have a free hand in managing their own affairs through these constitutive documents. As provided under section 30(1) of the Act, the company's constitution binds the company and its members to the same extent as if the company and its members had covenanted, agreed with each other to observe the *constitution*. Further, within our jurisdiction and outside, it has been held that a court cannot interfere with the internal affairs of a company except for limited circumstances. In *Martin Lemaiyan Mokoosio & another v Reshma Praful Chandra Vadera & 3 others* [2021] eKLR, Odunga J (as he then was) held as follows:

> "13. Whereas disputes regarding internal affairs of a company ought to be resolved in accordance with the *constitution* of the company, where it was alleged that the company was not acting in accordance with its own constitution, the court had the power to intervene. In the instant case the allegations were that the respondents had violated the *constitution* of the company and therefore the court was entitled to intervene."

In *Tanui & 4 others v Birech & 11 others* [1991] KLR, the Court of Appeal expressed itself in the following terms:

> " ...We would agree that while it is not the business of the High Court or this court to involve itself in the day to day running of institutions such as the church, colleges, clubs and so on, yet where it is shown that such an organization is conducting its affairs in a manner contrary to its constitution and to the detriment of its members, then the High Court and this court would not only be entitled to but under a duty to compel it, either, by injunction or otherwise, to obey its constitution."

92. It is important to note that section 93 of the Act requires the company to keep a register of its members including information relating to beneficial owners of the company, if any. Section 104 however provides that:

> 104. Trusts not to be entered on register
>
> 1. A company shall not accept, and shall not enter in its register of members, notice of any trust, expressed, implied or constructive.

> 2. If a company contravenes subsection (1), the company, and each officer of the company who is in default, commit an offence and on conviction are each liable to a fine not exceeding five hundred thousand shillings.

Section 104(1) was similarly contained in section 119 of the repealed *Companies Act* cap 486 which provided that: "No notice of any trust, expressed, implied or constructive, shall be entered on the register, or be receivable by the registrar".

93. Further, section 105 of the Act states that until the contrary is proved, the register of the members of a company is evidence of the matters required or authorised to be included in it. It is therefore evident from the statutory provision that the Act expressly provides that there can be no entry of a trust on the company register.

94. We have found that a constructive trust can arise and be imported into a land sale agreement to defeat a registered title, and established that the constructive trust is imposed on property in the hands of a wrongdoer to prevent him or her from benefitting unjustly from the wrongful conduct. Constructive trust is therefore an appropriate remedy for a wronged party and has a right to the proceeds.

95. We however note that section 104(1) of the *Companies Act*, and section 119 of the repealed *Companies Act* cap 486, which is similar to section 126 of the *Companies Act 2006* of the United Kingdom provides that:

> 126. Trusts not to be entered on register
>
> No notice of any trust, expressed, implied or constructive, shall be entered on the register of members of a company registered in England and Wales or Northern Ireland, or be receivable by the registrar.

96. In commenting on this provision, *Palmer's Company Law Manual* observes as follows:

> "There is nothing to prevent trustees from becoming members of a company but the CA 1985, S.360 provides that no notice of any trust – express, implied or constructive – may be entered on the register of any company registered in England and Wales. The rationale behind the rule (which does not apply in Scotland) is that the relationship between trustee and beneficiary is of no concern to the company which should be entitled to assume that it can deal solely with the registered holders."

97. In *Farouk Ravate & another v Eric Agbeko & 2 others; Ravasam Development Company Limited (interested parties)* HCCC No 450 of 2011 (Consolidated with No. 476 of 2015 and No. 637 of 2015) [2020] eKLR, Tuiyott J (as he then was) stated as follows while

noting the observations made in commentaries on the effect of section 119 of the repealed *Companies Act*:

> "40 ...Nothing in the three passages I have set out suggests that the effect of this provision is to outlaw or bar trust arrangements in regard to shares in a company. Quite to the contrary, it recognizes that they may exist but that rights of the beneficiaries as against the Company (and perhaps against third parties as I shall be proposing) are circumscribed because no notice of such Trust is to be entered in the register of members.
>
> In all these cases (in English law, but not in Scots Law) the trustee as registered holder will be personally responsible for all matters and liabilities arising in respect of the shares although he will in turn be entitled to an indemnity from the beneficiaries. An English company's rights as against the trustee are not therefore limited to the trust property".

98. We do agree that whereas section 104 of the *Companies Act* proscribes the entry of trusts on the register of members, the intention of this provision was not to bar any trust arrangements, and we add, including constructive trusts. There is therefore no bar to the holding of share(s) upon a trust. As the court stated in the case above, which we agree with:

> "The fact that a company does not recognize a person holding a share upon a trust and treats a registered shareholder as the absolute owner of his shares does not mean that it does not allow its members to enter trust relationships. As a corollary it does not mean that a trust arrangement is not enforceable as between the contracting parties."

99. In the present case, the Court of Appeal having established that there was unconscionable or inequitable behaviour, trust was imposed as the most appropriate remedy, and we are in total agreement thereto. In answering the question before us and taking into account the cited provisions of the *Companies Act*, whether a constructive trust can be imported into a shareholding of a company, our answer is in the affirmative. We have established that, section 104 does not outlaw or bar importation of trust into the shareholding of a company. Further, the *Black's Law Dictionary*, 11th edition at page 1654 defines a shareholder as an individual who owns or holds a share or shares in a company. A shareholding therefore signifies proprietorship in a company to the extent of the share(s) held. Consequently, in this regard, company shares constitute property under article 260 of the *Constitution* and therefore, where it is found that there was a wrong doing, then a constructive trust may be inferred, and we find that the Court of Appeal, after considering the totality of the circumstances in the case, was right in finding that a constructive trust had clearly been created.

iv. What reliefs should this Court grant?

100. The appellants have urged that we allow the petition of appeal, set aside the order of the Court of Appeal and reinstate the decision of the High Court in Mombasa Civil Case No. 9 of 2011, and in the alternative substitute it with the court's own decision. The respondents submitted that by virtue of this court having a limited scope and jurisdiction as set out in the ruling of July 8, 2022, it cannot grant reliefs (b), (c), (d), and (e) of the petition as they are *ultra vires* the court's powers.

101. The Court of Appeal determined that the shares held by the 1st and the 3rd respondents in the 4th to the 7th appellants are held in trust for the 1st respondent or its nominees having determined that the 1st appellant had set out in a scheme to purchase the property at a paltry Kshs 27,000,000/- thus unjustly enriching himself; he was conflicted between his duties as a trustee and his scheme to purchase the property; and notwithstanding the trust relationship, the 1st appellant did not utilize any of his personal funds to purchase the property. It found that the actions of the 1st appellant were irregular, deceitful, in breach of his trust obligations and resulted in his unjust enrichment. We uphold these findings.

102. A party was wronged, another has benefitted as a result of the wrongdoing. It clings on section 104 of the *Companies Act* to state that there can be no entry of a trust on the company register. To rectify the unjust enrichment, breach of fiduciary duty and right the wrong doing committed against the respondents, the Court of Appeal found that there was a constructive trust to remedy the wrong. We have noted that the *Companies Act*, however, bars the registration of any trust, expressed, implied or constructive in its register of members. It further provides for a hefty fine for any person who contravenes this provision. In our view, this statutory provision needs to be relooked at noting that there are circumstances that may give rise to a constructive trust, or other kind of trust in companies, and which require that trusts related to companies be disclosed for reasons of rule of law, accountability and good sense of justice.

103. Having set out our parameters in this appeal, and noting that our focus is on the recourse, rather than the applicability of the doctrine of trust, we are not persuaded to re-open the merits of the Court of Appeal decision in concluding the applicability of the trust. Litigation has to come to an end and the Court of Appeal, having satisfied itself of the facts, came to one conclusion and made its orders. As expected, a decision arising out of adversarial litigation is not bound to be satisfactory to both parties and undoubtedly, different courts would come to different conclusions on the same facts. Re-opening the facts in our view is not appropriate under circumstances, and would be going beyond our constitutional remit if we so did. At any rate nothing has been shown to take that unconventional route.

104. A trend towards promotion of legal certainty, safeguarding of property rights, and equitable access to justice undoubtedly emphasizes the necessity for a revision of the legislation governing the registration of trusts (including constructive) in relation to shares held in a company. These changes would be indicative of a growing recognition of the importance of constructive trust as a means of addressing unjust enrichment and ensuring equitable outcomes in disputes. Legislation that is in line with international developments and prevailing standards can enhance the strength and adaptability of the legal system, enabling it to more effectively tackle present day issues pertaining to shareholding, property rights and fair redress. It provides an opportunity for courts to shape the legal landscape concerning providing clarity particularly on enforcing remedies when breaches or unfairness occur.

105. We reiterate that a constructive trust is imposed to address situations where it would be unjust for one party to retain legal ownership of property under the unequitable circumstances. The court recognizes that a claimant has a better right to certain property than the person who holds legal title to it, it therefore declares a constructive trust in favour of the victim of the wrong, who is then given a right to the property.

106. Courts are an integral part of the Kenyan judicial system, viewed as vehicles for redressing wrongs. As a result, they are entrusted with the responsibility of adjudicating disputes and administering justice, in accordance with the *Constitution*'s ethos, values and principles. In carrying out their judicial duties, they are obligated to adhere to the principles outlined under article 159 of the *Constitution*. This guarantees that the objectives and tenets of the *Constitution* are upheld.

iv. Costs

107. On costs, taking all the above into consideration and the nature of this matter as one involving general public importance, our finding transcends beyond the parties before the court, and therefore we order that each party bear their own costs.

108. In the end and in answering the two questions posed for our determination, we do find that:

i. A constructive trust can be imported into a land sale agreement to defeat a registered title therefrom; and

ii. A constructive trust can be imported into a shareholding of a company as to disentitle a registered holder of shares in a company obtained for valuable consideration.

We are also not mindful of exercising our discretion towards disturbing the findings of fact made by the Court of Appeal. We however, note that there may be legal uncertainty over the recourse that parties have upon declaration of trust by the Courts and how to actualise the

same especially concerning shareholding. While it is open to each court to have regard to the specific circumstances, we think this is an issue that the Kenya Law Reform Commission, the Attorney General, Parliament and all the stakeholders should give consideration whether there is need for legislative intervention.

Orders

109. Consequently, we make the following orders:

i. A constructive trust can be imported into a land sale agreement to defeat a registered title therefrom; and

ii. A constructive trust can be imported into a shareholding of a company as to disentitle a registered holder of shares in a company obtained for valuable consideration

iii. The appeal dated July 28, 2022 is hereby dismissed;

iv. Each party shall bear its own costs; and

v. We hereby direct that the sum of Kshs 6,000/-, deposited as security for costs upon lodging of this appeal, be refunded to the appellant.

It is so ordered.

Chitembwe v Tribunal Appointed to Investigate Into the Conduct of the Hon. Justice Said Juma Chitembwe, Judge of the High Court (Petition E001 of 2023) [2023] KESC 114 (KLR) (28 December 2023) (Judgment)

Supreme Court of Kenya

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

Neutral citation: [2023] KESC 114 (KLR)

Judicial Officers *– petition for the removal of a judge – mandate of the Judicial Service Commission – mandate of the Tribunal – mandate of the Supreme Court - whether the Judicial Service Commission was obligated to conclusively determine the validity of allegations against a judge before recommending the initiation of removal proceedings - whether a Tribunal formed to consider a petition for the removal of a judge had the jurisdiction to enquire in to the activities/proceedings of the Judicial Service Commission - whether the Supreme Court in an appeal against the decision of a Tribunal formed to consider a petition for the removal of a judge had the jurisdiction to determine whether the JSC in its proceedings violated the rights of the appellant - Judicial Service Act, (cap 8), sections 15, 19(4), 31(5), 32, 42, 45; and, part VIII; Schedule 2; Judicial Service (Code of Conduct and Ethics) Regulations, 2020 (Act No 1 of 2011 sub leg),regulations 9, 11(3)(b), 13(1)(a), 14(1)(3),15, 16, 17, 18, 19, 20, 21(1)(c)(d)(e)(h), and 30; Penal Code (cap 63), section 15.*

Judicial Officers *– petition for the removal of a judge – applicable principles - standard of proof - what standard of proof applied in a petition for the removal of a judge - what principles did the Supreme Court apply when dealing with the question of removal of a judge – Constitution of Kenya, 2010, articles 10, 31(d), 50(4), 73, 74, 75(1), 160(5), 165, 168(2), 172, and 252(1)(3); Judicial Service Act, (cap 8), sections 15, 19(4), 31(5), 32, 42, 45; and, part VIII; Schedule 2; Judicial Service (Code of Conduct and Ethics) Regulations, 2020 (Act No 1 of 2011 sub leg), regulations 9, 11(3)(b), 13(1)(a), 14(1)(3),15, 16, 17, 18, 19, 20, 21(1)(c)(d)(e)(h), and 30; Penal Code (cap 63), section 15.*

Judicial Officers *– professional ethics – conflict of interest – duty to declare conflict of interest – duty to recuse oneself in a matter involving a property that they had interest in - whether a judicial officer who presided over a case involving property in which they had an interest, had the duty to recuse themselves from the matter - whether the failure of a judicial officer to recuse himself/herself from a case in which he/she had a vested interest in the property in dispute in the case was a breach of the Judicial Code of Conduct and Ethics and of the Constitution - Judicial Service Act, (cap 8), sections 15, 19(4), 31(5), 32, 42, 45; and, part VIII; Schedule 2; Judicial Service (Code of Conduct and Ethics) Regulations, 2020 (Act No 1 of 2011 sub leg), regulations 9, 11(3)(b), 13(1)(a), 14(1)(3),15, 16, 17, 18, 19, 20, 21(1)(c)(d)(e)(h), and 30; Penal Code (cap 63), section 15.*

Judicial Officers *– judicial immunity – scope - whether judicial immunity covered actions conducted in bad faith outside judicial duties - Judicial Service Act, (Act No 1 of 2011), sections 15, 19(4), 31(5), 32, 42, 45; and, part VIII; Schedule 2; Judicial Service (Code of Conduct and Ethics) Regulations, 2020 (Act No 1 of 2011 sub leg), regulations 9, 11(3)(b), 13(1)(a), 14(1)(3),15, 16, 17, 18, 19, 20, 21(1)(c)(d)(e)(h), and 30; Penal Code (cap 63), section 15.*

Judicial Officers *– role – duties – mediation - whether a judge of the High Court of Kenya had the authority to conduct mediation over a case in which they had presided.*

Criminal Law *– entrapment – conditions where entrapment could occur – where one claimed to be entrapped by persons not in law enforcement - under what conditions could entrapment occur - whether individuals without law enforcement authority, such as private citizens, were capable of committing entrapment.*

Law of Evidence *– electronic evidence – audio and video recordings – audio and video recordings of a conversation that were recorded covertly by a party to the conversation - whether covertly recorded audio and video recordings that were recorded by a party engaged in the conversation was admissible - whether a judicial officer who publicly addressed covertly recorded audio and video recordings relinquished their right to privacy - whether evidence on the authenticity of audio and video recordings could be doubted in the absence of counter-evidence challenging their genuineness - Evidence Act (cap 80), section 5, 106B; Constitution of Kenya, 2010, article 50(4).*

Constitutional Law *– fundamental rights and freedoms – right to privacy– audio and video recordings of a conversation that were recorded covertly by a party to the conversation – where the audio recordings implicated a judicial officer for being unethical – where the judicial officer defended themselves against the recordings in public media - whether a judicial officer who publicly addressed covertly recorded audio and video recordings relinquished their right to privacy - whether the intrusion into an individual's privacy was proportionate to the public interest to be served by the intrusion – Constitution of Kenya, 2010, article 31.*

Words and Phrases *– entrapment – definition - a law enforcement officer's or government agent's inducement of a person to commit a crime, by means of fraud or undue persuasion, in an attempt to cause a criminal prosecution against that person - Black's Law Dictionary; 10th Edition.*

Brief facts

The petitioner was the single presiding judge in the succession cause, where the suit property was the main subject matter of the recordings. In November 2021, Judicial Service Commission's (JSC) attention was drawn to several video clips, social media posts, and cell phone recordings that were in the public domain. The recordings were attributed to Hon. Mike Sonko (former Governor of Nairobi) (Hon. Sonko) and appeared to question the integrity of the petitioner, a judge. The recordings revealed that the petitioner had a vested interest in the suit properties. Hon Sonko was the main petitioner in the consolidated petitions, in which the petitioner was the presiding judge in a bench of three judges. Four complaints were filed against the petitioner with the JSC and later withdrawn. Due to the persistence of the allegations and because of the intense public interest elicited by recordings and social media postings, JSC resolved to initiate, on its own motion, proceedings for the removal of the petitioner from office.

Satisfied that the material and evidence placed before it disclosed *prima facie* grounds for the removal of the petitioner, JSC unanimously resolved to petition the President to appoint a Tribunal pursuant to article 168(4) and (5) of the Constitution. The Tribunal once formed and after considering the

matter recommended the removal of the petitioner from judicial service. It was that process that the petitioner challenged, first before the Tribunal and before the Supreme Court.

The petitioner contended that the evidence in support of the six (6) allegations seeking his removal from office were obtained in contravention of his rights to privacy and therefore inadmissible. The petitioner contended that the recordings were interfered with and manipulated to meet a certain narrative. The petitioner further contended that the video and audio recordings were inadmissible for having been obtained in a deliberate scheme of entrapping him. The petition sought for the Supreme Court to overturn the decision of the Tribunal that recommended his removal from judicial service.

Issues

i. What were the principles to be applied by the Supreme Court when dealing with the question of removal of a judge?

ii. Whether the Judicial Service Commission was obligated to conclusively determine the validity of allegations against a judge before recommending the initiation of removal proceedings.

iii. Whether a Tribunal formed to consider a petition for the removal of a judge had the jurisdiction to enquire in to the activities/proceedings of the Judicial Service Commission.

iv. Whether the Supreme Court in an appeal against the decision of a Tribunal formed to consider a petition for the removal of a judge had the jurisdiction to determine whether the JSC in its proceedings violated the rights of the appellant.

v. What was the standard of proof to be applied in a petition for the removal of a judge?

vi. Whether judicial immunity covered actions conducted in bad faith outside judicial duties.

vii. Whether a judicial officer who presided over a case involving property in which they had an interest had the duty to recuse themselves from the matter.

viii. Whether the failure of a judicial officer to recuse himself/herself from a case in which he/she had a vested interest in the property in dispute in the case was a breach of the Judicial Code of Conduct and Ethics and of the Constitution.

ix. Whether a judge of the High Court of Kenya had the authority to conduct mediation over a case in which they had presided.

x. Whether the decisions of a judge made in the course of the discharge of judicial function could be questioned by the Judicial Service Commission or by the Tribunal in a petition for the removal of a judge.

xi. Whether covertly recorded audio and video recordings that were recorded by a party engaged in the conversation was admissible.

xii. Whether a judicial officer who publicly addressed covertly recorded audio and video recordings relinquished their right to privacy.

xiii. Whether the intrusion into an individual's privacy was proportionate to the public interest to be served by the intrusion.

xiv. Whether evidence on the authenticity of audio and video recordings could be doubted in the absence of counter-evidence challenging their genuineness.

xv. Under what conditions could entrapment occur?

xvi. Whether individuals without law enforcement authority, such as private citizens, were capable of committing entrapment.

Held

1. When dealing with the question of removal of a judge, the Supreme Court considered the following principles:
    1. as the first and only appellate court in matters of the removal of a judge, the Supreme Court had a more expansive jurisdiction since, it was required to re-evaluate and re-assess the evidence on record in order to establish whether the Tribunal misdirected itself leading to a wrong conclusion.
    2. Judges were presumed to be independent and to act without the control of anyone in deciding cases before them.
    3. Judges should always ensure that their conduct was beyond reproach in the eyes of a reasonable observer. They must always uphold the principle that justice must not only be done but be seen to be done
    4. Once the President had received a petition from the Commission, he was constitutionally bound to appoint a Tribunal.
    5. The standard of proof, whether in direct or circumstantial evidence, was one which was neither beyond reasonable doubt nor on a balance of probabilities.
2. An appeal to the Supreme Court under article 168(8) of the Constitution, could be likened to a primary appeal, affording the court broader authority to scrutinize and reassess the evidence presented. The process aimed to validate the accuracy of the Tribunal's findings regarding the application of factual matters to the law, even as the court acknowledged the Tribunal's firsthand assessments of witnesses' credibility. The court would exercise that authority to overturn factual conclusions with caution and would only do so if it was demonstrated that the Tribunal's conclusions were not supported by evidence or if it was evident that the Tribunal failed to appreciate the weight or bearing of circumstances admitted or proved, or if the Tribunal was plainly wrong in its conclusion.
3. There were only two routes to initiate the removal of a judge. Firstly, by the Judicial Service Commission acting on its own motion, or secondly, on the petition of any person to the Judicial Service Commission. Article 168(4) of the Constitution provided that a petition to the Judicial Service Commission (JSC) must be in writing, setting out the alleged facts constituting the grounds for the judge's removal.
4. The standard to be attained before the petition was sent to the President was entirely subjective, depending on the material placed before the JSC. Whether the petition was filed by a person or where the JSC was in possession of some information, regardless of the source, pointing to a questionable conduct of a judge, it had to consider the petition or the

information and satisfy itself that the complaint disclosed facts constituting grounds for the judge's removal. The JSC was expected to evaluate the facts and only if it was satisfied that a ground or grounds for removal had been disclosed will it recommend to the President to constitute a Tribunal. The JSC was not simply a conduit pipe by which complaints were channeled to the President. It must be convinced that the complaint disclosed *prima facie* evidence against the judge and that the complaint was serious enough to warrant a representation to the President.

5. In considering whether a ground for removal had been disclosed, and being concerned only with *prima facie* evidence, the JSC was not required or expected to make definitive conclusions whether the allegations against the judge had been proved. It was expected to act in good faith, to accord the judge an opportunity to understand the accusations and to be guided by the provision of article 47 of the Constitution on the fair administrative action. It could not be the JSC's mandate to conduct a full-fledged inquiry, with witnesses being cross-examined. That was a preserve of the Tribunal where the actual hearing took place. The course in which the JSC initiated the petition was perfectly permitted by the force of article 168(2) of the Constitution.
6. The Tribunal's jurisdiction was founded on article 168(7)(b) of the Constitution, as read with section 31 of the Judicial Service Act (JS Act) and the Second Schedule. The Tribunal was mandated to a clear, specific constitutional jurisdiction restricted to inquiring into the matter and reporting on the facts in connection with the allegations made by the JSC. That jurisdiction was pointed and specific. It did not include an inquiry into the activities of or proceedings before the JSC. It was informed solely by the request made by the JSC.
7. Just like jurisdiction was everything for a court of law, it was equally critical for a tribunal or any administrative body exercising quasi-judicial authority. Similarly, like a court of law, a tribunal could only exercise jurisdiction donated by statute or the Constitution. Since the Tribunal in the instant proceedings was a direct creation of a petition presented to the President, it would be an act of overreach for it to interrogate events that took place before its appointment. It had no such powers.

8. The proceedings before the JSC took the following form:
    1. JSC initiated removal proceedings on its own motion based on the allegations regarding the conduct of the petitioner.
    2. Thereafter, JSC set up a committee of its members to consider its own motion alleged transgressions of the petitioner.
    3. The petitioner was informed of the allegations against him and furnished with the petition, witness statements, and evidence supporting the proceedings.
    4. The petitioner was represented by an advocate of his own choice.
    5. The Committee conducted its investigations and recorded witness statements.
    6. The petitioner was given ample time to prepare his defence and to respond to the allegations in the petition.
    7. The petitioner's response to the petition being a preliminary objection was considered and determined.
    8. The Committee reported its findings to JSC who in turn submitted a petition to the President.
9. In conducting the proceedings, JSC was performing a quasi- judicial function. If the petitioner felt aggrieved by the conduct of the proceedings before JSC, which in his view amounted to a violation of his rights and fundamental freedoms, his recourse was not to the Tribunal that would be formed many months later but to the High Court, which had jurisdiction to determine questions of whether a right or fundamental right has been denied, violated, infringed, or threatened under article 165(3)(b) of the Constitution.
10. The principles laid down by the Court in *Shollei v Judicial Service Commission & another* (Petition 34 of 2014) [2022] KESC 5 (KLR) (17 February 2022) (Judgment) (*Shollei* case) involving disciplinary proceedings against the former Chief Registrar of the Judiciary, could not be applied in the proceedings involving a judge. While the principles enunciated in the *Shollei* case were based on the provisions of section 32 of the JS Act, as read with regulation 25 of the third schedule to the Act (Provisions relating to the Appointment, Discipline and Removal of Judicial Officers and Staff), the instant proceedings were initiated under article 168(2) of the Constitution as read with section 31 of the JS Act. The two processes had very distinct considerations, one unique to a Judge and the other to a judicial officer.
11. The JSC ensured that the proceedings before it were conducted in consonance with the Constitution and the law, upholding the rules of natural justice and respecting the petitioner's constitutional rights. There was no basis upon which to conclude that the JSC violated the petitioner's right to fair administrative action, nor could we fault the Tribunal for rejecting the invitation to interrogate the proceedings before the JSC.
12. The import of article 160(5) of the Constitution (judicial immunity) was that a member of the judiciary was accorded judicial immunity for anything done or omitted to be done in good faith and in the lawful performance of a judicial function. The Constitution used two key phrases: anything done or omitted to be done in good faith and in the lawful

performance of a judicial function. The use of the two phrases was not idle but deliberate. Only things done by a judge in good faith and in the lawful discharge of the function of judicial office would merit protection. The antithesis to acting in good faith would be to act in bad faith, where a person acts dishonestly in the discharge of the functions of a judicial office. Bad faith would be implied when the office-bearer had acted with a clear intent to deceive. That privilege would also be extended only when the action was done lawfully and in the performance of judicial duties. It was not available for acts done by a judge, or a judicial officer who were out on frolics of their own, going beyond the confines of what would normally be regarded as their judicial function. From a plain and textual reading of article 160(5) of the Constitution, and section 6 of the Judicature Act, judicial immunity was not absolute nor did it cover improper conduct aimed at furthering personal interests.

13. The basic principles of judicial independence under the Constitution required, among other safeguards, that judges ought to enjoy absolute freedom from liability in respect of decisions taken in their judicial function, just as their security, remuneration, conditions of service, pensions, and the age of retirement are secured by the Constitution and the law. To that extent, judges were guaranteed tenure of office until attainment of retirement age; and, barring that, they could be removed only for specified reasons; incapacity or behaviour and other grounds that rendered them unfit to discharge their duties.

14. Section 45 of the JS Act protected judicial officers from any personal culpability. They were not liable for any civil action or suit arising from anything done or omitted to be done in good faith. In the Penal Code too, in section 15, a judicial officer was not criminally responsible for anything done or omitted to be done by him in the exercise of his judicial functions. Section 6 of the Judicature Act made a similar provision to insulate a judge and judicial officer, so long as they acted in good faith and within the confines of the law.

15. The Tribunal was well aware of its limits of jurisdiction. An excerpt of the Hansard indicated that the Tribunal had to guide the lead counsel not to venture into asking the petitioner questions that would suggest the Tribunal was interrogating the merits of the petitioner's decision or questioning the manner of his exercise of judicial discretion which impacted the decisional independence of the court.

16. The petitioner had a long-standing relationship with Hon Sonko. He met him at his private residence and held discussions which were intended to assist Hon Sonko in the appeal challenging the decision to uphold his impeachment by the High Court. There was direct evidence by those who were in the meeting, including Hon Sonko himself, that the petitioner advised him on the possible grounds of appeal. Secondly, he met and once again advised Hon Sonko, Mr Jirani, and Mr Askar on the prospects of withdrawing Malindi Civil Appeal No 32 of 2018 to pave way for the finalization of the transaction for the sale of the suit properties. Those actions accorded the petitioner protection under the principles of judicial immunity, when they were clearly outside and in excess of the judge's mandate as a trial Judge.

17. Judges did not entertain parties whose cases were pending or had been determined by them; they did not invite litigants into the privacy of their homes; and they did not discuss those cases or what steps to take to advance to the next level. A judge was an impartial arbiter with no personal interest in the outcome of a case he/she tried. A judge could not decide a case impartially if his/her mind was mired in benefiting from the subject matter of the case. Regulation 19 (1) of the The Judicial Code of Conduct and Ethics prohibited a judge from anticipating a future benefit from the performance of the duties of the judicial office or from proceedings before the judge. To be involved in a transaction of the subject matter of a case pending before or determined by a judge, was outside the ambit of lawful performance of judicial function. It was an act of bad faith.
18. Regulations 11 (1) of the Judicial Code of Conduct and Ethics required judges to discharge the official duties, act honourably and in a manner befitting the judicial office. A judge must ensure that his or her personal and extrajudicial activities were not in conflict with the obligations of a judicial office.
19. The Supreme Court could not find fault with the Tribunal's conclusion considering the admitted relationship between the petitioner and Hon Sonko and the former's failure to disclose the same to the Hon Chief Justice, his colleague Judges on the bench, and the parties. The petitioner's conduct divested him of any claim to protection under the principles of judicial immunity.
20. Article 50(4) of the Constitution established a dual threshold for evidence to be excluded. The evidence must have been obtained in a manner that violated any right or fundamental freedom. Second, the admission of the evidence would render the trial unfair or detrimental to the administration of justice. Therefore, for the video and audio recordings to be found to be inadmissible for violating article 31 as read with article 50(4), the petitioner was required to demonstrate that his rights were unjustifiably violated in the manner that evidence was obtained and that their admission rendered the proceedings unfair or detrimental to the administration of justice.
21. The contents of the video and audio recordings produced before the Tribunal were intended to demonstrate three things: the petitioner discussing with Hon Sonko among others, the proposed sale of the suit property which had been the subject of succession proceedings before him in Malindi Succession Cause No 97 of 2015; the petitioner discussing the possible withdrawal of an appeal against his decision in the said succession matter, Malindi Civil Appeal No 32 of 2018; and the petitioner discussing with hon Sonko who was the main petitioner in the consolidated petitions, in which his impeachment as a governor was the subject, and possible grounds of appeal against the decision rendered by a three-judge Bench of the High Court over which the petitioner presided. Furthermore, in the KTN News interview that took place on November 18, 2021 in which the petitioner made various concessions and admissions, *inter alia* that both Mr Jirani, a person alleged in the video

recordings to hold the suit property on his behalf, as well as Hon Sonko, were his relatives or were persons personally known to him.

22. The right to privacy was not absolute. A person's privacy extended to those aspects in which a legitimate expectation of privacy could be harboured. The right to privacy could never be absolute and a balancing test had to be applied to determine whether the intrusion into an individual's privacy was proportionate to the public interest to be served by the intrusion, in the instant case, the recordings.

23. It was the petitioner who invited the team to his private residence where the recordings took place. He was recorded discussing cases that involved third parties and land transactions involving parties not necessarily his relatives. Those recordings were made public by Hon Sonko on his social media platforms bringing the conduct of the petitioner as a Judge into question. Four petitions were filed but later withdrawn. There was public interest generated by the posts; a judge recorded discussing matters that were either before him or which he had handled, with parties in some of those cases and third parties. The judge himself appeared on a live show on a national television to admit some of the allegations. Under article 172 of the Constitution, some of the functions of the JSC included the promotion and facilitation of the independence and accountability of the judiciary and the efficient, effective, and transparent administration of justice. The original petitions having been withdrawn, was the JSC could not be rendered impotent, in the discharge of its functions and in light of the circumstances of recordings and televised show. As it ought to in the circumstances, the JSC in terms of article 168(2) initiated on its own motion the removal process culminating in the instant proceedings.

24. By willingly discussing the matters in question with parties and third parties and on a public forum, being a live television interview, the petitioner voluntarily removed the issue from the private realm to a public platform. He could not now claim that the evidence was obtained in a manner that violated any of his rights or fundamental freedoms.

25. Though the video and audio recordings were covertly recorded, they were recorded by participants in the conversations. The persons depicted in the recordings were at the petitioner's residence with his permission, and the discussions therein, that flowed effortlessly were of interest both to the petitioner and his visitors. The recordings were made by parties who were privy to the transactions over the suit properties. There was no claim that a third party was involved in the recordings that would render the recordings inadmissible.

26. The audio and video recordings produced did not contravene the petitioner's right to privacy under article 31 of the Constitution. Their admission into evidence did not render the inquiry before the Tribunal detrimental to the administration of justice in contravention of article 50(4) .

27. For entrapment to be committed, there must be authorities, law enforcement officers or government agents involved, and they must have provided an opportunity for the

commission of a crime. That was not the case in the instant proceedings of the subject of the petition. The recordings were procured by the petitioner's relatives and acquaintances. Even in the absence of the recordings, there was independent and direct evidence of persons who were present and participated fully in the recorded conversation. Those present testified as to who they were and what their engagements were in different sectors of the economy. None of them was a government agent or an enforcement officer. Hon Sonko testified that he was the immediate former Governor of Nairobi City County, Mr Askar testified that he was the consul of Nepal in Kenya for the past ten years. Mr Kivuva described himself as a businessman and Mr. Jirani described himself as a farmer and land broker. Entrapment in the strict sense of the word did not occur. Judicial response to entrapment was based on the need to uphold the rule of law. A person entrapped will be excused, not because he was less guilty of the offence he may have committed as a result, but because of the inappropriate behavior of the law enforcers. State-created crime was not only unacceptable but also improper. The allegation that the recordings were obtained in a deliberate scheme to entrap the petitioner could not stand.

28. The petitioner did not call expert evidence to controvert the evidence the expert witness, a certified digital forensics examiner, who examined the recording devices and prepared a Memorandum and two separate Certificates of Authenticity. The evidence of the two witnesses on authentication of the recordings was intended to demonstrate to the Tribunal that there was a reasonable probability that the recordings were what they purported to be, a meeting of people in the recordings and the subjects of discussion. It was for the Tribunal to determine that it was reasonably probable that there was no material alteration of the evidence. the Tribunal was justified in rejecting the allegation of manipulation. The ground therefore lacked basis and was rejected.

29. Removal proceedings, though quasi- judicial were not in the nature of criminal proceedings. Such proceedings did not require or depend on criminal culpability to succeed. All that was required was that the allegations be substantiated. The standard of proof in removal proceedings was an intermediate one; neither beyond reasonable doubt nor on a balance of probabilities, with the burden of proof being on the assisting counsel to bring proof to the required standard in proof of the alleged misconduct. Once the assisting counsel has discharged the legal burden by providing sufficient evidence, the evidential burden would normally shift to the Judge on matters which are peculiarly within the Judge's knowledge.

30. The petitioner had an interest in the suit property and for which Mr Jirani fronted him. The petitioner personally and keenly followed and directed the intended sale of the suit property to Mr Askar in a transaction involving Hon Sonko. Judicial impartiality was a significant element of justice. In order to maintain impartiality where there was a likelihood of conflict of interest, the proper thing to do was to recuse oneself and let the dispute be resolved by another impartial judge, because no person shall be a judge on a case in which they had interest. Justice must not only be done but seen to be done. Regulation 20 (1) of the Code of

Conduct enjoined judges to use the best efforts to avoid being in situations where personal interests conflict or appeared to conflict with the judge's official duties. The petitioner had a *sua sponte* duty to recuse himself from the case, or to disclose the nature of the interest in the matter. For failing to opt for any of the two routes, and instead proceeding to sit to the end of the case, the petitioner was in breach of articles 10, 50(1), 75, 232 of Constitution, and regulations 9, 19, 20 and 21 of the Judicial Code of Conduct and Ethics. There was no fault in the conclusion reached by the Tribunal.

31. The petitioner conducted himself in a manner that demonstrated a singular lack of integrity by engaging parties who were litigants before him contrary to articles 10, 73(2)(b), 75(c) of the Constitution as well as regulations 11(3)(a) and (b), 17(3), 20, 21 and 30 of the Judicial Code of Conduct and Ethics. The Tribunal properly directed itself on the evidence and arrived at the correct conclusion that the allegation under that ground was established to the required standard.

32. A judge who made a decision in a contested case could not purport to mediate without all the parties before him, in his private house and with strangers. His singular interest was in the suit property and how to end the pending appeal in order to complete the transaction and receive and share the proceeds of sale. The petitioner was prohibited by regulations 30 of the Judicial Code of Conduct and Ethics from using a third party or proxy to do what he knew if done by him would constitute a contravention of the Judicial Code of Conduct and Ethics. The petitioner's conduct amounted to a lack of accountability, involvement in corrupt practices, and impropriety contrary to Articles 10, 73, and 75 of the Constitution, and regulations 13(1)(a), 14(1)(a), 14(1)(b), 14(3), and 30 of the Judicial Code of Conduct and Ethics.

33. The petitioner was engaged in the subversion of justice by commenting on pending cases and suggesting to a litigant, possible points for the challenge of the judgment arising from the consolidated petitions contrary to article 75(c) of the Constitution, and regulation 18 of the Judicial Code of Conduct and Ethics. His conduct, apart from being unprofessional was also unbecoming of a judge and contravened articles 73 of the Constitution as well as regulations 15, 16(a), (b), (c) and 17(3) of the Judicial Code of Conduct and Ethics.

34. Though there was no obligation in removal proceedings to prove each and every allegation, in the instant case the Tribunal, found proof in all the six allegations against the petitioner. No material had been placed before the court to warrant the Supreme Court's interference with the conclusions reached by the Tribunal.

35. The robe magnified the conduct. Judges must be held to higher ethical standards if they were to keep the trust and confidence of the people they serve. The Judicial Code of Conduct and Ethics was formulated from the provisions of article 168(1)(b) of the Constitution enjoined judges to preserve the integrity of the judiciary and to avoid even the appearance of impropriety.

36. Generally, the decisions of a judge made in the course of the discharge of judicial function could not be questioned except through judicial review or appeal, and a judge was 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.
37. So important was judicial independence that removal of a judge could only be justified where the shortcomings complained of were of such a serious nature as to destroy the confidence in the judge's ability properly to perform the judicial function. Gross misconduct or misbehaviour as grounds for removal of a judge was an expression of something very serious.
38. The proceedings before the Tribunal were not criminal in nature and therefore not subject to a standard of proof beyond reasonable doubt.

Appeal dismissed.

Orders

i. *The Tribunal's finding that the petitioner's conduct was in breach of the Judicial Service (The Judicial Code of Conduct and Ethics) Regulations 2020 and amounted to gross misconduct contrary to article 168(1) (b) and (e) of the Constitution was affirmed.*
ii. *The Tribunal's recommendation to the President for the petitioner's removal from office under article 168(1)(e) of the Constitution was affirmed.*
iii. *No orders as to costs.*
iv. *The security for costs was to be refunded to the petitioner.*

Citations

Cases

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1. *Bellevue Development Company Ltd v Francis Gikonyo & 7 others* Civil Appeal 239 of 2018; [2018] KECA 330 (KLR) - (Explained)
2. *Bellevue Development Company Ltd v Gikonyo & 3 others* Petition 42 of 2018; [2020] KESC 43 (KLR) - (Explained)
3. *In the matter of the Estate of Peter Werner (Deceased)* Succession Cause Malindi No 97 of 2015; [2015] eKLR - (Mentioned)
4. *Judicial Service Comission v Mutava & another* Civil Appeal 52 of 2014; [2015] KECA 741 (KLR) - (Explained)
5. *Kioko, Mike Sonko Mbuvi Gidion & another v Clerk, Nairobi City County Assembly & 9 others* Petition E425 of 2020; [2021] KEHC 8000 (KLR) - (Explained)
6. *Lubanga v Inspector General of Police & 4 others* Petition 12 of 2013; [2016] KEHC 6293 (KLR) - (Explained)
7. *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd* [1969] EA 696 - (Explained)

8. *Mutava v Tribunal appointed to Investigate the conduct of Justice Joseph Mbalu Mutava, Judge of the High Court of Kenya* Petition 15 "B" of 2016; [2019] KESC 49 (KLR) - (Explained)
9. *Muya v Tribunal Appointed to Investigate the Conduct of Justice Martin Mati Muya, Judge of the High Court of Kenya* Petition 4 of 2020; [2022] KESC 16 (KLR) - (Explained)
10. *Nur v Attorney General* Petition 181 of 2010; [2011] eKLR; [2011] 2 KLR 258 - (Explained)
11. *Nyakundi, Cyprian & another v Director of Criminal Investigations & 2 others; Victoria Commercial Bank (interested party)* Constitutional Petition E284 of 2020; [2021] eKLR - (Explained)
12. *Oduol v IEBC & 2 others* Election Petition 2 of 2012; [2013] KEHC 2710 (KLR) - (Explained)
13. *Okoiti & 9 others v Mwenda & 6 others; Gidion & 9 others (Interested Parties)* Constitutional Petition E005, E007, E009, E011, E012, E013, E015, E019 & E021 of 2021 & E433 of 2020 (Consolidated); [2021] KEHC 463 (KLR) - (Explained)
14. *Okoiti, Okiya Omtatah v Attorney General* Petition 311 of 2019; [2020] KEHC 4711 (KLR) - (Explained)
15. *Pacific Frontier Seas Limited v Kyengo & another* Civil Appeal 32 of 2018; [2021] KECA 53 (KLR) - (Mentioned)
16. *Rai & 3 others v Rai & 4 others* SC Petition 4 of 2012; [2013] eKLR; [2013] 2 KLR 142 - (Explained)
17. *Rawal v Judicial Service Commission & 2 others* Civil Appeal (Application) 1 of 2016; [2016] KECA 717 (KLR) - (Explained)
18. *Republic v Ethics and Anti-Corruption Commission ex- parte Nairobi City County Assembly & 13 others* Misc Civ Appl No 383 of 2018; [2019] eKLR - (Explained)
19. *Shollei v Judicial Service Commission & another* Petition 34 of 2014; [2022] KESC 5 (KLR) - (Explained)

South Africa

Bernstein v Bester NO (CCT23/95) [1996] ZACC 2; 1996 (4) BCLR 449; 1996 (2) SA 751 - (Explained)

United Kingdom

1. *Mustard v Flower* [2019] EWHC 2623 (QB) - (Explained)
2. *R v Latif* [1996] 1 WLR 104, 112 - (Explained)

Canada

R v Mack [1988] 2 SCR 903 - (Explained)

Texts

Garner, BA., Black, HC., (Ed) (2014), *Black's Law Dictionary* St Paul, Minnesota: Thomson Reuters 10th Edn

Statutes

Kenya

1. Constitution of Kenya articles 10, 31(d), 50(4); 73; 74; 75(1); 160(5); 165; 168(2); 172; 252(1)(3); Chapter 6 - (Interpreted)
2. Evidence Act (cap 80) sections 5, 106B - (Interpreted)
3. Fair Administrative Action Act (cap 7L) section 4(3) - (Interpreted)
4. Judicature Act (cap 8) section 6 - (Interpreted)
5. Judicial Service (Code of Conduct and Ethics) Regulations, 2020 (cap 8A Sub Leg) regulations 9, 11(3)(b), 13(1)(a), 14(1)(3),15, 16, 17, 18, 19, 20, 21(1)(c)(d)(e)(h), 30 - (Interpreted)
6. Judicial Service Act, 2011 (cap 8A) sections 15, 19(4), 31(5), 32, 42, 45; part VIII; Schedule 2 - (Interpreted)
7. Leadership and Integrity Act (cap 185) section 13 - (Interpreted)
8. Penal Code (cap 63) section 15 - (Interpreted)

South Africa

Constitution of South Africa, 1996 section 14 - (Interpreted)

Instruments

1. African Charter on Peoples' and Human Rights (ACPHR), 1981 In general
2. Bangalore Principles of Judicial Conduct, 2002 Principle 4.9
3. Basic Principles on the Independence of the Judiciary, 1985 In general
4. Commonwealth Principles (Latimer House), 1988 In general
5. International Covenant on Civil and Political Rights (ICCPR), 1966 In general

Advocates

Mr Oscar Eredi for the respondent
Patrick Ochwa & Peter Wena for the appellant

December 28, 2023, the Court delivered the following Judgment:

A. Introduction

1. Judges are entrusted with a significant responsibility to uphold the principles of justice and maintain the integrity of the judicial and legal system. In their everyday lives, public or private, judges are expected to exhibit the highest standards of impartiality, fairness, and ethical behavior. They must remain unbiased and refrain from any actions or expressions that may compromise their objectivity. They must display a demeanor that commands respect and instills public confidence in the office of a judge. Maintaining independence from external influences is crucial to ensuring the credibility of the judiciary, and judges are obligated to resist any attempts at undue influence or interference. Transparency, diligence,

and a commitment to upholding the rule of law are paramount in guiding judges in the proper conduct of their duties and fostering public trust in the legal system they represent.

2. Although judges have guaranteed tenure until mandatory or early retirement age, they can be removed only for reasons and through the process outlined in the *Constitution* and the law. These principles are espoused not only in the oath of office of a judge but also in some of the international and regional human rights instruments which in turn are replicated in the *Constitution* and relevant statutes. Those international and regional instruments include the *International Covenant on Civil and Political Rights (1966)*, the *United Nations Basic Principles on the Independence of the Judiciary, 1985 Commonwealth Principles (Latimer House), 1988*, *African Charter on People and Human Rights, 1981*.

3. A judge can be removed from office only on specific grounds, namely the inability to perform the functions of office arising from mental or physical incapacity; a breach of a code of conduct prescribed for judges of the superior courts by an Act of Parliament; bankruptcy; incompetence; or gross misconduct or misbehaviour. Where any or some of these grounds are alleged, the concerned Judge is entitled to due process before an independent tribunal is appointed to inquire into the alleged grounds. Similarly, should the tribunal recommend removal, the Judge has the right to challenge the decision of the tribunal through an appeal process to this court.

4. The petition before us has been lodged pursuant to article 168(8) of the *Constitution* by the hon Mr Justice Said Juma Chitembwe, (the petitioner), a Judge of the High Court, who is challenging the decision of the tribunal that has recommended to the President his removal from office for gross misconduct.

B. Background

5. The petitioner was appointed to the High Court as a Judge on April 2, 2009 and has an aggregate experience of 32 years in the legal profession, having been admitted to the Bar in 1991. He has served the nation in different court stations around the country.

6. When the events giving rise to these proceedings came up, the petitioner was serving at the High Court Civil Division in Nairobi. In the month of November 2021, the attention of the Judicial Service Commission (the JSC) was drawn to several video recordings, social media posts, and audio cell phone recordings attributed to Hon Mike Mbuvi Sonko (Hon Sonko), the former Governor of Nairobi City County, in which the conduct of the petitioner was brought into question, because in the recordings he was exposed discussing with persons, including, Hon Sonko, the sale of property number Kwale/Galu/Kinondo/779 (parcel no 779) which had been the subject of a succession cause HC Succ Cause Malindi No 97 of 2015, *In the matter of the Estate of Peter Werner (Deceased)* over which the petitioner had presided as a Judge. Among the things discussed was the possible withdrawal of an appeal,

Malindi Civil Appeal No 32 of 2018, *Pacific Frontiers Seas Limited v Jane Mutulu Kyengo & another*, that had been lodged against his decision in the said succession cause.

7. In other video and audio recordings, the petitioner is presented discussing yet another matter with Hon Sonko, *Mike Sonko Mbuvi Gideon Kioko & another v Clerk, Nairobi City County Assembly & 9 others* Constitutional Petition No E425 of 2020 (consolidated with Petition No E014 of 2021) [2021] eKLR and *Okiya Omtatah Okoiti & 9 others v Anne Kananu Mwenda (1st respondent/Cross-petitioner) & 6 others; Mike Mbuvi Sonko Kioko Gideon & 9 others (interested parties)* Nairobi High Court Constitutional Petition No E005 of 2021 (consolidated with Petition No E433 of 2020, E007 of 2020, E009 of 2020, E011 of 2021, E012 of 2021, E013 of 2021, E015 of 2021, E019 of 2021 and E021 of 2021) (the consolidated petitions) in which Hon Sonko was the petitioner. The consolidated petitions were determined against hon Sonko by a three-judge bench presided over by the petitioner in a judgment rendered on June 24, 2021. The discussion in the recordings revolved around possible grounds of appeal against this judgment.

8. Thereafter, on November 18, 2021, the petitioner appeared on a live television interview with Kenya Television Network (KTN) News, hosted by Ms Sophia Wanuna, in which the petitioner made various concessions and admissions. For example, he disclosed that both Mr Amana Saidi Jirani (Mr Jirani) and Hon Sonko, were his relatives or were personally known to him. Mr Jirani had been alleged in the video clips to be holding parcel no 779 as the petitioner's proxy.

9. Based on these episodes, JSC received the following complaints against the petitioner:

   a. Petition No 69 of 2021 by Imgard Biege and David Leboo Olekilusu

   b. Petition No 80 of 2021 by Stephen Owoko and John Wangai

   c. Petition No 91 of 2021 by Peter Agoro and Jacob Omondi

   d. Petition No 92 of 2021 by Francis Wambua.

   All these petitions were subsequently withdrawn or terminated by those who had brought them under unclear circumstances.

10. Following the withdrawal or termination of these petitions, and given the public interest generated by the social media posts, JSC resolved on November 22, 2021 to initiate, on its own motion, proceedings for the removal of the petitioner under the provisions of article 168(2) of the *Constitution*.

C. Litigation History

i. Proceedings before the Judicial Service Commission

11. Pursuant to its resolution of November 22, 2021, and in terms of section 19(4) of the *Judicial Service Act* (the Js Act), JSC appointed a panel of five of its commissioners to constitute a committee to consider the allegations against the petitioner and report its findings to the full JSC as soon as possible.

12. The committee identified, interviewed, and recorded statements from 18 persons of interest according to the provisions of article 252(1)(a) and 3(b) of the *Constitution* and section 42 Part VIII of the *JS Act* to ascertain the veracity of the allegations made against the petitioner. Hon Sonko and 13 others recorded statements.

13. By a letter dated November 23, 2021, JSC communicated to the petitioner its decision to commence removal proceedings against him on its own motion under article 168(1) and (2) of the *Constitution*. The letter outlined the grounds upon which it was seeking the removal of the petitioner together with relevant supporting material. The grounds cited included impropriety, gross misconduct, and misbehaviour. The provisions of articles 10, 73, 74, 75(1), 168(1), and 232 of the *Constitution* and the *Judicial Service (Code of Conduct and Ethics) Regulations 2020* (Code of Conduct) were similarly relied upon.

14. After the dispatch of the letter of November 23, 2021, JSC by another letter dated December 8, 2021, forwarded to the petitioner a flash disk containing all the video recordings, social media posts, and cell phone recordings. The petitioner was required to respond to the allegations within fourteen (14) days from the date of service. However, at the request of the petitioner's counsel, PW Wena & Co Advocates, JSC granted the petitioner an extension of a further thirty (30) days from November 25, 2021 within which to respond. As a result, the hearing already scheduled had to be adjourned to a later date.

15. Upon further evaluation of the statements together with the evidence so far collected, the Committee identified further grounds against the petitioner, which were served upon him on March 16, 2022 by a letter dated March 14, 2022. The petitioner was requested to respond to these further allegations within seven (7) days from the date of service.

16. No response to the two letters dated November 23, 2021 and March 14, 2022 was received. Instead, the petitioner through his counsel, filed a Notice of preliminary objection dated December 20, 2021 contesting the hearing of the motion on the grounds that the video clips and audio recordings that formed part of the evidence were inadmissible and amounted to illegally obtained evidence contrary to article 31(d) of the *Constitution*. In the Committee's view, however, the Preliminary Objection did not raise pure points of law as held in the

case of *Mukisa Biscuits Manufacturing Company Ltd* (1969 EA at p 696), and in any event, the issue as to whether the video clips and audio recordings were illegally obtained could only be canvassed during the hearing of the own motion proceedings. In any event, the petitioner had not filed any response to the motion proceedings, and therefore the preliminary objection lacked merit and was dismissed, and the motion was declared as undefended in the absence of any response.

17. Based purely on the material on record, the Committee in unanimity found merit in the motion and declared that it disclosed gross misconduct and breach of the *Code of Conduct* for Judges to warrant a recommendation to the President to establish a tribunal to investigate the petitioner's conduct. The Committee submitted its report to the full JSC, which similarly unanimously adopted it. A petition was submitted to the former President, hon Uhuru Kenyatta, to appoint a Tribunal pursuant to article 168(4) and (5) of the *Constitution*. Following this petition, the former President suspended the petitioner from office by a Gazette Notice No 5540 dated May 17, 2022 and at the same time appointed a Tribunal to inquire into the matter.

ii. Proceedings before the Tribunal

18. The terms of reference of the seven-member Tribunal were:

> " To consider the petition for the removal of the hon Justice Said Juma Chitembwe from office that was submitted by the Judicial Service Commission and to inquire into the allegations therein."

19. In the discharge of its functions, the Tribunal was to:

> " (a) Prepare and submit a report and its recommendations thereon expeditiously; and
>
> (b) Exercise all the powers conferred upon it by law for the proper execution of its mandate".

20. Vide a Gazette Notice No 6608 dated June 8, 2022, the tribunal published its Rules of Procedure under section 31(5) of the *JS Act* and by rule 8(2) of those rules, a list of allegations and summary of evidence in support was prepared and served on the petitioner on June 28, 2022. This was followed on July 25, 2022, by a case conference which was attended by the petitioner and his Counsel, Mr Patrick Ochwa and Mr Peter Wena. The list of allegations and summary of evidence in support of the allegations were read out to the petitioner, who was informed of his rights. He elected to have a hearing in camera under rule 9(1) aforesaid. Thereafter, the hearing commenced on September 19, 2022 and was concluded on January

25, 2023. Counsel assisting the Tribunal called a total of 25 witnesses. On his part, the petitioner gave oral testimony but did not call any witnesses.

21. Based on the evidence and submissions by the petitioner and the Assisting Counsel, the Tribunal condensed for determination the following issues:

    a. Whether in light of article 165 of the *Constitution*, the Tribunal had jurisdiction to hear and determine the allegations against the petitioner.

    b. If the answer to the foregoing issue is in the affirmative, whether the Tribunal has the jurisdiction to hear and determine the *locus* and jurisdiction of the JSC under article 168(2) and (4), or allegations of breach of the constitutional rights of the Judge by the JSC.

    c. Whether the petitioner was protected by the principles of judicial independence and absolute immunity.

    d. On the admissibility of the evidence adduced before the Tribunal, four sub- issues were identified thus;

        i. Whether the evidence adduced in support of the allegations was precluded from admissibility by the rules of natural justice and relevance.

        ii. Whether the video and audio recordings produced were in contravention of the provisions of article 31 as read with article 50(4) of the *Constitution* and therefore inadmissible.

        iii. Whether the video and audio recordings are inadmissible for having been obtained in furtherance of a scheme to entrap the Judge.

        iv. Whether the video and audio recordings were edited or modified to suit hon Sonko's alleged revenge narrative and were therefore inadmissible

    e. Whether the allegations against the petitioner had been proved to the required standard.

22. On whether in light of article 165 of the *Constitution*, the Tribunal had jurisdiction to hear and determine the allegations against the Judge, the Tribunal held that nothing, either in the *Constitution* or in law, prohibits the Tribunal from interpreting the provisions of the *Constitution* which came within the purview of its task of inquiring into whether the grounds for the removal of a Judge have been established. Ultimately, the Tribunal held that it had jurisdiction to hear and determine the allegations against the petitioner regarding purported contraventions of the *Constitution*.

23. On whether the Tribunal had the jurisdiction to hear and determine the *locus* and jurisdiction of the JSC under article 168(2) and (4), or allegations of breach of constitutional rights of the Judge by the JSC, the Tribunal was of the view that it cannot arrogate to itself the jurisdiction either to entertain or to determine any alleged acts or omissions of and or proceedings before the JSC prior to its constitution; that the alleged acts or omissions of JSC as claimed by the petitioner as constituting breaches of the *Constitution* are matters which should have been placed before and dealt with by the High Court under article 165 of the *Constitution*.

24. In the Tribunal's view, JSC's consideration of its own motion against the petitioner was a separate constitutional process that was concluded upon submission of its recommendation to the President; that the consideration of the petition by the President leading to the appointment of the Tribunal was also a separate constitutional process which was also concluded, and the Tribunal's conduct of the matter is a third separate constitutional process under article 168 of the *Constitution*. Therefore, assuming jurisdiction to consider infractions of JSC, if any would amount to sitting on appeal or reviewing a decision of JSC on a concluded constitutional process.

25. On the claim of judicial independence and absolute immunity, the Tribunal noted that, while article 160(5) of the *Constitution* and section 6 of the *Judicature Act* protect judges and judicial officers from liability 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, judicial immunity is not absolute. Accordingly, the Tribunal found that the conduct of the petitioner which it was inquiring into did not relate to the discharge of his judicial functions. Its mandate was to investigate the petitioner's conduct which was alleged to be in breach of the *Code of Conduct and Ethics* and whether the conduct amounted to gross misconduct or misbehaviour. That task required the Tribunal to consider whether the discussions surrounding the sale of the property subject of the petitioner's decision in the succession cause, the advice on points to take on appeal in a matter the petitioner had presided over and his intervention on the consent to compromise the appeal before the Court of Appeal at Malindi challenging his decision in the succession cause as well as the admissions that he was related to Hon Sonko, amounted to gross misconduct or misbehaviour. The Tribunal found in the circumstances and on the facts of this matter that the concept of judicial immunity did not apply.

26. On whether the evidence adduced in support of the allegations was precluded from admissibility by the rules of natural justice and relevance, the Tribunal explained that it took all necessary steps to furnish the petitioner with all documents and exhibits within a reasonable time. In addition, the petitioner was accorded ample opportunity to challenge the evidence against him, not to mention that the Tribunal entertained all the objections raised by the petitioner and gave its determination on each of them. For these reasons, the Tribunal

was of the view that the evidence produced complied with the rules of natural justice, the Tribunal being guided by the provisions of rules 11 and 17(4) and (5) of its rules as well as the principles set out in section 5 of the *Evidence Act*. The Tribunal was therefore duly satisfied that the evidence presented before it was relevant.

27. On whether the video and audio recordings produced were in contravention of the provisions of article 31 as read with article 50(4) of the *Constitution* and therefore inadmissible, the Tribunal expressed the view that article 50(4) establishes a dual threshold for such evidence to be excluded. First, the evidence must have been obtained in a manner that violates a right or fundamental freedom.

Second, the admission of the evidence would render the trial unfair or detrimental to the administration of justice. Concerning article 31, the Tribunal noted that the petitioner discussed cases pending determination and land transactions of a property, the subject matter of litigation with third parties. Further, he willingly discussed these matters on a live television interview, a public forum. As such, the Tribunal was of the view that in the circumstances the matters became public in nature, the petitioner having, by his own conduct removed them from the private realm. He could not also be heard to complain that there was a violation of his right to privacy in the recording of the meetings at his residence.

28. Even though the Tribunal found that the audio and video recordings were covertly taped, it however underscored the fact that the recordings were not done illegally. Guided by the cases cited with regard to electronic recording, the Tribunal outlined the following four fundamental principles to be considered for the covert recordings to qualify for admission in evidence:

a. The recording must have been done by a participant in the conversation and not by a third party;

b. The recording was of a conversation between parties who were privy to the truth of the matter they were discussing and were freely talking about it;

c. The court or tribunal has direct evidence of the participant who made the recording and;

d. The recording is of great probative value.

29. Applying these principles to the evidence, the Tribunal was satisfied that the above conditions were met as the video and audio recordings were by participants in the conversations or their agents; that the video and audio recordings were of immense probative value in the determination of the matter before it; and that the recordings were not obtained in a manner that contravenes the provisions of articles 31 and 50(4) of the *Constitution* and was therefore admissible.

30. On whether the video and audio recordings were inadmissible for having been obtained in furtherance of a scheme to entrap the Judge, the Tribunal noted that other than making the bare assertion that the visits to his residence and the recordings were a scheme to entrap him, the petitioner did not demonstrate how the alleged actions of Hon Sonko, Mr Francis Wambua Kivuva (Mr Kivuva), Mr Jirani, Mr Jimmy Ibrahim Askar (Mr Askar) and others amounted to entrapment. The Tribunal further noted that the persons who obtained the recordings were private citizens who were participants in the meeting and not law enforcement officers. There was therefore nothing before the Tribunal that fell within the legal definition of entrapment. Further, there was no evidence before the Tribunal that he objected to or questioned the presence of those who accompanied his guests. Accordingly, the Tribunal concluded that the petitioner's claim of entrapment had no basis.

31. On whether the video and audio recordings were edited or modified to suit Hon Sonko's alleged revenge narrative and therefore inadmissible, the Tribunal first noted that the recording devices were examined by PC Mutinda, a certified digital forensics examiner who prepared a Memorandum dated October 4, 2022 and two separate Certificates of Authenticity dated September 29, 2022 and October 8, 2022, respectively. Mr Kivuva produced a Certificate of Authentication of Video dated November 24, 2022 and a Certificate of Authenticity of Video dated October 3, 2022. The memorandum and certificates, in the Tribunal's assessment met the dictates of the law regarding certification of the reliability of electronic evidence.

32. The Tribunal further noted that apart from the petitioner failing to particularize the allegation, he admitted that the recordings depicted him, Hon Sonko, Mr Askar, Mr George Omollo Ngasi and Mr Peter Ngati Mutisya and thereby gave first-hand account of the events depicted in the recordings. The Tribunal watched and listened to the video and audio recordings and noted that they were clear and continuous and the participants' contribution to the matters that were being discussed could be heard. Because of the foregoing, the Tribunal rejected the petitioner's assertion that the video and audio recordings were edited or modified to suit hon Sonko's alleged 'revenge' narrative.

33. On whether the allegations against the Judge were proved to the required standard, the Tribunal considered each allegation and drew its conclusions on each as follows, beginning with allegations one and six, which were premised on similar statements of misconduct.

Allegation one: Lack of impartiality contrary to articles 10 and 168(1) of the *Constitution*, and regulations 11(3)(b), 16, 20, 21 and 30 of the *Code of Conduct and Ethics*; and

Allegation six: Non-disclosure of conflict-of-interest contrary to articles 75 and 168(1) of the *Constitution*, and regulations 19, 20 and 21(1)(c), 21(1)(d), 21(1)(e) and 21(1)(h) of the *Code of Conduct and Ethics*

34. The alleged misconduct under these two combined heads was that the petitioner while serving as a Judge of the High Court of Kenya, failed to disclose to the hon Chief Justice, his colleague Judges, and parties or failed to disqualify himself from proceedings in the consolidated petitions, circumstances having arisen in which his impartiality might have been reasonably questioned. In particular, the petitioner failed to disclose that he knew Hon Sonko, as he had ongoing dealings with him over parcel no 779 aforesaid.

35. The Tribunal upon analysis of the evidence found that the petitioner had a relationship with Hon Sonko through marriage, his late step cousin having married Hon Sonko's aunt. Further, by his own admission and based on the evidence of Hon Sonko and corroborated by the evidence of Mr Weldon Siongok, the petitioner held two meetings with Hon Sonko on March 16, 2021 and May 22, 2021 during the pendency of the consolidated petitions. In addition, on those dates, it was demonstrated that there was communication between the petitioner, Mr Jirani, and Mr Askar who in turn communicated with Hon Sonko. All these parties were demonstrated in the video, audio recordings, and oral testimony to have had interactions over the transaction involving land parcel no 779. The Tribunal was also convinced that the petitioner had an interest in parcel no 779 in which Mr Jirani was acting as his proxy, and that he keenly followed and directed the intended sale of the parcel to Mr Askar in a transaction involving Hon Sonko.

36. In view of the foregoing, the Tribunal concluded that the facts presented circumstances to compel a reasonable person in the petitioner's shoes to disclose the same to the hon Chief Justice, the petitioner's colleague Judges on the Bench, and parties in the consolidated petitions, and to proceed to recuse himself from sitting on the petitions. The Tribunal therefore found that the petitioner was in breach of articles 10, 50(1), 75, 232 of the *Constitution*, and regulations 9, 19, 20 and 21 of the *Code of Conduct and Ethics*. The Tribunal, having considered the totality of the evidence in respect of allegations one and six, found that the two related allegations had been established to the required standard.

Allegation two: Lack of integrity contrary to articles 10, 73(2)(b), 75(c), and 168(1) of the *Constitution*, section 13 of the *Leadership and Integrity Act*, and regulations 11(3)(a), 11(3)(b), 17(3), 20, 21 and 30 of the *Code of Conduct and Ethics*.

37. The allegation against the petitioner under this head was that while serving as a judge of the High Court of Kenya, the petitioner failed to exercise his judicial functions as a judge independently by engaging with persons who were litigants in matters that were before him. The particulars of the allegations were to the effect that the petitioner offered legal advice to hon Sonko on the viability of an appeal and the proposed grounds upon which the appeal against his own judgment in a three-judge bench consolidated petitions could be challenged.

38. The Tribunal found that there was no dispute that two meetings took place on 9th and July 10, 2021 in the petitioner's residence in Mountain View Estate involving the petitioner, third parties, and Hon Sonko, who was a principal party in the petition concerning his impeachment. The Tribunal further found on the admission of the petitioner and based on the evidence of hon Sonko and Mr Jirani, that there was a discussion about the possible grounds of appeal against the aforesaid High Court judgment. The two meetings also discussed with litigants a transaction involving land Parcel nos 779 and 1222 that had been the subject of litigation before the petitioner in Malindi Succession Cause No 97 of 2015.

39. The Tribunal found that contrary to the assertion by the petitioner that he did not advise hon Sonko on the grounds of appeal, it was *contra bonos mores* for a judge to engage in a conversation with a litigant about possible grounds of appeal. And it mattered not that the advice on possible grounds of appeal was given after the High Court had delivered its judgment on June 24, 2021, given seven (7) days stay order, and that by the time the matter was mentioned after the seven (7) days, hon Sonko had already obtained permanent orders of stay from the Court of Appeal.

40. In the circumstances, the totality of the evidence before the Tribunal indicated that the petitioner conducted himself in a manner that demonstrated a singular lack of integrity by engaging with parties who were litigants before him. The Tribunal held that this was contrary to articles 10, 73(2)(b), 75(c) of the *Constitution* as well as regulations 11(3)(a) and (b), 17(3), 20, 21 and 30 of the *Code of Conduct and Ethics*, based on which the Tribunal was persuaded that Allegation Two was established to the required standard.

Allegation Three – Lack of accountability, involvement in corrupt practices, and impropriety contrary to articles 10, 75 and 168(1) of the *Constitution*, and

regulations 13(1)(a), 14(1)(a), 14(1)(b), 14(3), and 30 of the *Code of Conduct and Ethics*

41. According to this allegation the petitioner, while presiding over Malindi Succession Cause No 97 of 2015, conducted himself in a manner inconsistent with the dignity of his judicial office by acquiring a beneficial or proprietary interest in a property that formed the subject matter of the cause, an action that did not exhibit, uphold and promote the high standards of judicial conduct required to maintain public confidence in the Judiciary. It was alleged that the petitioner having heard and determined the cause actively involved himself in the transfer of parcel no 779, which was the main subject matter in the succession cause to Mr Jirani to hold on his behalf.

42. In view of the arguments placed by both sides before it, the Tribunal considered in this allegation the question for determination as being whether the petitioner had a proprietary interest in parcel no 779 which was allegedly held on his behalf by Mr Jirani and whether, in acquiring or holding the interest, if at all, the same amounted to lack of accountability, involvement in corrupt practices, and impropriety. On the first part of this allegation, the Tribunal made reference to its finding under allegations one and six; that as a matter-of-fact Mr Jirani was indeed a proxy for the petitioner and that he was holding land parcel no 779 on his behalf.

43. The Tribunal found that the petitioner having heard and determined Malindi Succession Cause No 97 of 2015, in which the subject matter was parcel no 779, it was improper for him to acquire an interest in it through Jirani. It was equally inappropriate for him to host several meetings at his residence on March 16, 2021, May 22, 2021, 9th and July 10, 2021 to discuss the withdrawal of the appeal against his own decision in the succession cause, the completion of the sale transaction and transfer of parcel no 779 to Mr Askar and the distribution of the proceeds of the sale. While the petitioner stated that he gave advice as a mediator, the Tribunal found that the same was still inconsistent with the petitioner's role as a judge who had heard the cause.

44. On the second limb, the Tribunal declined the invitation to determine whether it was legal for the petitioner to direct the Kwale County Police Commandant in his judgment on May 16, 2018 to ensure that possession of parcel no 779 was reconveyed to Jane Mutual Kyengo. The Tribunal was of the view that such a course was not available to it as it would amount to a review of or sitting on appeal over the decision of the petitioner, which would be in excess of its jurisdiction under article 168 of the *Constitution*.

45. Save for this one solitary aspect in so far as allegation Three was concerned, the Tribunal found the rest of the aspects proved, namely: that the petitioner had a proprietary interest in parcel No 779 which was held on his behalf by Mr Jirani; that he subsequently held meetings

with parties at his residence to discuss the sale of parcel no 779; that he advised the parties in the Malindi Civil Appeal No 32 of 2018; and that he undertook to compromise the Court of Appeal Judges to facilitate quick resolution of the appeal. The Tribunal concluded that all these amounted to lack of accountability, involvement in corrupt practices, and impropriety contrary to articles 10, 73, and 75 of the *Constitution*, and regulations 13(1)(a), 14(1)(a), 14(1)(b), 14(3), and 30 of the *Code of Conduct and Ethics*.

Allegation four- subversion of justice through commenting and advising a litigant on matters pending in court contrary to article 75(c) of the *Constitution*, section 13 of the *Leadership and Integrity Act* and regulation 18 of the *Code of Conduct of Judges*; and

Allegation five- Lack of professionalism and conduct unbecoming of a judge in contravention of articles 73 and 168(1)(e) of the *Constitution of Kenya, 2010* and regulations 15, 16(a), (b) and (c) and 17(3) of the *Code of Conduct for Judges*.

46. Because allegations four and five raised related questions, the Tribunal decided to determine them together. In allegation four it was alleged that the petitioner while serving as a Judge of the High Court, conducted himself in a way and manner inconsistent with the dignity of the judicial office and went against the judicial principle of *sub judice* by discussing the withdrawal of Malindi Civil Appeal No 32 of 2018 pending before the Court of Appeal and emanating from his own decision. He also discussed at meetings at his residence in Mountain View Estate and through telephone calls on March 16, 2021 with Ms Kyengo, hon Sonko, Mr Askar, and Mr Jirani among others, how to facilitate the completion of the sale of parcel no 779 for his personal benefit.

47. Allegation five on the other hand stated that the petitioner held a meeting with hon Sonko during which he offered legal advice on the viability of an appeal and the proposed grounds of appeal against the judgment in the consolidated petitions over which he presided in a three-judge bench. It turned out that hon Sonko and the petitioner were known to each other as distant relatives. It was alleged that, because of this fact, the petitioner ought but failed to disclose the same to the hon Chief Justice and the other two Judges on the Bench as well as the parties, an omission that derogates from the Judge's duty to safeguard the right of equality before the law and the right of equal protection, and benefit of the law without bias or prejudice.

48. Based on the evidence before it, the Tribunal found that it was inappropriate for the petitioner to be engaged in discussions with parties of matters he had dealt with, was dealing with or was pending before any court, and therefore the petitioner was engaged in the subversion of justice through commenting and advising a litigant on matters pending in court contrary to article 75(c) of the *Constitution*, and regulation 18 of the *Code of Conduct*

and Ethics. His conduct showed a lack of professionalism and conduct unbecoming of a judge which is in contravention of articles 73 of the *Constitution* as well as regulations 15, 16(a), (b) and (c) and 17(3) of the *Code of Conduct and Ethics*.

49. With regard to the third aspect of the particulars of allegation five that the petitioner ought to have disclosed to the hon Chief Justice and his colleague judges and the parties that he had offered advice on the withdrawal of Malindi Civil Appeal No 32 of 2018 and the viability of the appeal from the judgment in the consolidated petitions, the Tribunal reiterated its determination that the conduct in question amounted to subversion of justice and unbecoming of a judge.

50. The Tribunal having reached the determination that allegations one, two, three, four, five, and six had been proved, it unanimously concluded in its final decision that the petitioner's conduct was in breach of the *Code of Conduct and Ethics* and amounted to gross misconduct in terms of article 168(1)(b) and (e) of the *Constitution*. Accordingly, pursuant to article 168(7)(b) of the *Constitution*, the Tribunal recommended to the President that the petitioner be removed from office of Judge of the High Court.

iii. Proceedings before the Supreme Court

51. Aggrieved by the outcome of the Tribunal, the petitioner lodged the instant petition under article 168(8) of the *Constitution* on 12 grounds seeking:

    a. A declaration that the Judicial Service Commission lacked the *locus standi* to initiate removal proceedings against the petitioner on its own motion when the petition by the Judicial Service Commission was effectively relying on other petitions by third parties.

    b. A declaration that the Judicial Service Commission acted in violation of the requirements of articles 47 and 50 of the *Constitution* and the petitioner's right to fair administrative action was violated thereby rendering the petition by the Judicial Service Commission null and void.

    c. A declaration that the allegations made against the petitioner were not proved to the required standard and the same are dismissed.

    d. A declaration that the petitioner's action did not amount to gross misconduct and/or misbehaviour and were not in breach of the *Constitution* and the *Code of Conduct and Ethics* warranting his removal from office.

    e. A declaration that the findings and recommendation of the Judicial Service Commission to his Excellency the President of the Republic of Kenya that the

petitioner be removed from office be quashed with an order directing that the petitioner resumes his duties as a Judge of High Court of Kenya.

f. The costs of the petition be borne by the respondent.

D. Parties' Submissions

The Petitioner

52. To advance the broad grounds, the petitioner clustered and argued his petition under the following heads:

53. As to the Tribunal's finding that it lacked jurisdiction to hear and determine allegations of breach of the petitioner's constitutional rights by the JSC, the petitioner relied on the guiding principles set out by this court in *Gladys Boss Shollei v Judicial Service Commission*; [2022] eKLR and submitted that once he alleged breach by the JSC of his constitutional rights, the Tribunal, being a quasi-judicial body, was duty bound to make an inquiry and a determination of the issue.

54. About the doctrine of judicial independence, the petitioner submitted that the totality of the examination of the witnesses in relation to the Malindi Succession cause by both the Tribunal members and the lead counsel amounted to the interrogation of the merits of the decision of a judge, the petitioner, which amounted to an overreach by the Tribunal playing the role of an appellate court. It was this misdirection that influenced the erroneous final decision of the Tribunal, ignoring the fact that the petitioner had immunity from liability for anything allegedly done or omitted to be done by him in good faith in the lawful performance of his judicial function. On judicial immunity the Petitioner cited the Court of Appeal decision in *Bellevue Development Company Ltd v Francis Gikonyo & 7 others*; Civil Appeal No 239 of 2017; [2018] eKLR and the Supreme Court decision in *Bellevue Development Company Ltd v Francis Gikonyo & 3 others*; SC Petition No 42 of 2018; [2020] eKLR.

55. Regarding his relationship with Hon Sonko and whether he was biased against him so as to require the petitioner to disclose his relationship to the hon Chief Justice, the other two judges, and parties in the consolidated petitions, the petitioner posited that the evidence of his relationship with Hon Sonko revealed that they were not so close as to warrant him to recuse himself or to disclose the same to the hon Chief Justice, other members of the bench and parties. He insisted that the relationship was remote as it was his step-cousin who had married hon Sonko's aunt. That marriage ended in a divorce. Secondly, hon Sonko did not raise the issue of bias during the hearing of the consolidated petitions; and in any event, he was vindicated by the fact that their judgment in the High Court was upheld by both the Court of Appeal and the Supreme Court. This was an indication that the petitioner was not biased against Hon Sonko.

56. On whether the petitioner had any dealings with Hon Sonko with regard to the sale of parcel no 779 during the pendency of the consolidated petitions, the petitioner contended that the allegations that he met Hon Mike Sonko on March 16, 2021 at his residence in Mountain View and on May 22, 2021 in Kwale were not supported by evidence since the records obtained from Safaricom did not place the mobile phones of the petitioner and Hon Sonko at the Kangemi tower near the petitioner's residence on that day; and that the linking of mobile phones of Hon Sonko and Mr Jirani by a Safaricom Tower in Kwale on May 22, 2021 could not conclusively constitute proof that a meeting took place with the petitioner on the same date.

57. Turning to the finding that the petitioner had acquired an interest in parcel no 779 through his alleged proxy, Mr Jirani during the pendency of Malindi Succession Cause No 97 of 2015, the petitioner denied that he paid Ms Kyengo the sum of Kenya Shillings Eight Million (Kshs 8,000,000) as no such evidence was tendered in proof. Two investigations officers attached to JSC, Inspector Lucy Wanjiku Wambugu and Inspector Boniface Musembi Kivelenge indeed confirmed that they did not find any proof of such payment into Ms Kyengo's bank account or that of Mr Jirani. Instead, the petitioner sought to persuade the Tribunal that given the relationship between Hon Sonko and Mr Jirani, it was safe to conclude that Mr Jirani was in fact a proxy to hon Sonko, who had in his possession the original title deed, together with a duly executed transfer instrument in respect of parcel no 779 and copies of Mr Jirani's national identity card and KRA pin certificate.

58. In respect of the Tribunal's finding that the petitioner discussed the withdrawal of Malindi Civil Appeal No 32 of 2018 to facilitate the completion of the sale of parcel no 779, the petitioner argued that his role in the meeting was purely as a mediator advising those present on how the matter could be resolved amicably. However, he maintained that he did not speak to any of the parties to the appeal. In his view, the request to meet and hold discussions on the sale of the land and the withdrawal of the appeal was just another pre-conceived scheme to set him up and use the meeting as a ground for his removal from office. The truth of the matter, though was that the question of withdrawal of the appeal was hon Sonko's suggestion, who even went ahead to communicate with the parties and their advocates.

59. On whether the petitioner advised Hon Sonko on the possible grounds to challenge the decision in the consolidated petitions over Hon Sonko's impeachment, the petitioner submitted that the evidence was insufficient to conclude that he indeed engaged in such discussion; that such a suggestion would not have arisen given the fact that the grounds of appeal had already been settled; furthermore that Hon Sonko had advocates acting for him in the appeal and the discussion was a general discussion that did not amount to a piece of advice.

60. The Tribunal's finding that the recording of the video and audio did not violate the petitioner's right to privacy as enshrined in article 31 as read with article 50(4) of the *Constitution* and therefore admissible, has also been challenged with the petitioner maintaining that the recordings could not be relied upon since there was a variance between the creation and modification date. He urged that the report showed that the videos were running backward for over one month. He also pointed out that the dates in the report are generated scientifically from the forensic lab and are not generated by human beings. He further questioned the integrity of the video and audio evidence considering it was not clear where they were stored from the time they were created in July, November, and December 2021; that the videos recorded using the watch are in short second clips, yet the ones produced before the Tribunal run for more than the given second in the report. The videos recorded using the spectacles run backward for periods over one month. The petitioner maintained that based on the evidence brought before the Tribunal and Mr peter Mbatha's testimony, there was a possibility that the videos were edited.

61. To buttress his argument, the petitioner cited the decision in *William Odhiambo Oduol v IEBC & 2 others*; Kisumu Election Petition No 2 of 2012; [2013] eKLR, that to be admitted as evidence it must be demonstrated that the tapes are in their original form. He further noted that an examination of Galaxy Phone 9 by Mr Mbatha revealed that the audio recording between Mr Jirani and Mr Wambua *alias* Peter did not exist. This, in the petitioner's view, rendered the audio inadmissible as the gadget that allegedly made the recording did not yield any results. To him therefore the videos and audio were manipulated by Hon Sonko and his two personal assistants, Mr Wambua and Mr George Omollo Ngasi.

62. For all the foregoing reasons the petitioner has urged the court to make a finding that the video recordings did not comply with the requirement of section 106B of the *Evidence Act* and at the same time, infringed on his fundamental rights under articles 31 and 50(4) of the *Constitution*.

63. Submitting on the issue of entrapment, the petitioner urged the court to weigh the evidence adduced before the Tribunal against that of Mercy Nkatha who stated in her affidavit that she was offered money to swear an affidavit alleging that the petitioner was bribed with between Kshs 30 to 40 million; that she was subsequently abducted and threatened at gunpoint by Hon Sonko to record incriminating evidence against the petitioner; that the videos were edited to fit in Hon Sonko's scheme and narrative; and that she was also asked to file a separate petition for the removal of the petitioner on Hon Sonko's behalf. The totality of all the evidence presented before the Tribunal pointed to a revenge mission by Hon Sonko, for which reasons he urged the court to allow his appeal.

ii. The Respondent

64. The respondent relied on its grounds of objection to the petition dated March 20, 2023 together with its written submissions dated May 15, 2023.

65. On whether the JSC accorded the petitioner the right to fair administrative action, the respondent relied on the proceedings before the JSC to argue that the petitioner's right to fair administrative action was upheld; he was informed of the allegations against him and furnished with the petition, witness statements and evidence supporting the allegations; he was represented by an advocate of his choice; ample opportunity was extended to him to respond to the allegations; a preliminary objection he raised was considered and determined; a Committee of JSC was set up to investigate the petitioner's conduct; and the Committee made a report to JSC, the basis upon which JSC recommended to the President to set up a Tribunal.

66. That apart, the respondent submitted that it is now settled in a long line of cases including *Judicial Service Commission v Mbalu Mutava & anor*; Civil Appeal No 52 of 2014; [2015] eKLR, that proceedings before the JSC are not a trial; that all that is required of the JSC is to follow and apply the rules of natural justice. Ultimately, when judged by the correct standards, the respondent argued, the proceedings before the JSC were lawful and the petitioner's right to fair administrative action was respected and upheld. In any case, the petitioner had the right to challenge the JSC proceedings in the High Court under article 47 of the *Constitution* and the *Fair Administrative Action Act* but did not. Accordingly, having fully participated in the process before the JSC and the Tribunal, the respondent submitted that it was too late in the day for the petitioner to raise these questions.

67. As to the role of the Tribunal to evaluate and review the JSC proceedings as proposed by the petitioner, the respondent affirmed that, like in *Judicial Service Commission v Mbalu Mutava & another* (*supra*), the role of JSC under article 168 of the *Constitution* is confined to making a preliminary inquiry to satisfy itself that the petition for the removal of a judge has merit. No residual powers are granted to JSC to decide the fate of a judge. Once it determines that the threshold for removal from office has been met, it merely forwards its recommendation to the President who must then appoint a Tribunal to investigate fully the allegations of misconduct of a judge. The Tribunal could not, in those circumstances arrogate itself jurisdiction to either entertain or determine any errors in the proceedings before the JSC committed prior to the Tribunal's formation.

68. Responding to the issue of admissibility of the recordings, the respondent reiterated that for the same to be excluded it had to be shown that either there was a violation of a right or fundamental freedom in the manner the evidence was obtained or that the admission of the evidence would otherwise be detrimental to the administration of justice in terms

of article 50(4) of the *Constitution*. On the facts of this case, the respondent submitted that there was no proof that any of the petitioner's rights were violated in the recording of the conversations. In any event, they argued that there is nothing like a right not to have one's communications recorded without consent especially where the communications are recorded by a person who is a participant in the discussion.

69. The respondent dismissed the allegations of entrapment, arguing that they were without legal basis, and distinguished the case of *Cyprian Nyakundi & another v Director of Criminal Investigations & 2 others; Victoria Commercial Bank (interested party)*; High Court Constitutional Petition No E284 of 2020; [2021] eKLR on which the petitioner relied, noting that police officers were not involved.

70. Likewise the allegation that the recordings were doctored or edited had no merit as no evidence was presented to the Tribunal to prove this. Without particulars of how the recordings were edited, and in the absence of expert evidence to prove this, the assertion was for rejecting. Furthermore, the petitioner having admitted that the recordings depicted him, and the witnesses who testified as to the events contained in the recordings cannot now claim that they were interfered with. The Tribunal was the best judge in factual matters. It watched and listened to the video and audio recordings and noted that they were clear and continuous and the participants' contribution to the matters that were being discussed could be heard clearly.

71. Guided by the rules of natural justice and the evidence, the Tribunal gave the petitioner ample opportunity to challenge the recordings. The recordings were relevant as they pointed to the facts in issue and were therefore admissible.

72. On lack of integrity on the part of the petitioner, it has been submitted that the allegation was proved by the fact that the petitioner discussed the viability and merits of the appeal against the judgment in which the petitioner was the presiding judge in a bench of three judges of the High Court. Secondly, there was sufficient evidence to demonstrate that the petitioner held a meeting with hon Sonko and others on separate occasions. While the petitioner testified that at the time he met hon Sonko and discussed the appeal in the Court of Appeal, the notice of appeal had already been filed and he was *functus officio*, the respondent argued that it was nonetheless inappropriate for a judge to entertain any conversation with a litigant concerning an appeal challenging the decision of the judge.

73. The respondent relying on the Court of Appeal decision in *Kalpana H Rawal v Judicial Service Commission & 2 others*; Civil Appeal No 1 of 2016; [2016] eKLR submitted that the petitioner lacked impartiality and was guilty of non-disclosure of conflict of interest; that the test for impartiality is whether an informed person viewing the matter realistically and practically would conclude that there is a likelihood of bias. In the respondent's view,

a reasonable person appraised of the fact that hon Sonko was a distant relative and a close acquaintance of the petitioner who was presiding in matters concerning his impeachment would likely conclude that the petitioner may lack impartiality. Likewise, a reasonable man with the knowledge of these facts would also have concluded there was a conflict of interest which the petitioner ought to have disclosed.

74. Whereas the respondent appreciated that it is acceptable for a judge to be wrong in making a decision, for which the appellate system exists to correct, it was however of the view that, in the circumstances of the complaints against the petitioner, and the evidence, the petitioner had an interest, through a proxy in parcel no 779, the subject matter of a cause he had determined. His involvement was purely to further his personal interests as opposed to serving the ends of justice. Therefore, the Tribunal correctly concluded that the allegations of lack of accountability, participating in corrupt practices, and impropriety, were proved.

75. The respondent also pointed out that, by discussing the particulars of Malindi Civil Appeal No 32 of 2018 with Mr Omwenga, Advocate, who was acting for prospective buyers in the matter; and by commenting on how the appeal would be withdrawn to pave way for the completion of the sale transaction of parcel no 779, the petitioner was engaged in acts of subversion of justice through commenting and advising a litigant on matters pending in court. In the respondent's view, the petitioner's conduct violated the provisions of regulation 18 of the *Code of Conduct and Ethics* which prohibits comments on proceedings before the court and the Tribunal cannot be faulted for so finding.

76. Citing *Republic v Ethics and Anti-Corruption Commission ex- parte Nairobi City County Assembly & 13 others*; Misc Civ Appl No 383 of 2018; [2019] eKLR to support the proposition that state officers are the nerve center of the Republic and carry the highest level of responsibility in the management of state affairs, which in turn requires their conduct to be beyond reproach; and that the provisions of chapter six of the *Constitution* applied to all public officers, including judges. There was evidence, according to the Tribunal that the petitioner discussed the viability of the appeal against the decision of a bench on which he presided with the appellant, Hon Sonko who also happened to be his relative and failed to disclose this relationship to the hon Chief Justice and his fellow judges or litigants. In view of this, the Tribunal committed no error in finding that the petitioner lacked integrity and professionalism and was involved in a conduct unbecoming of a judge.

77. Did the Tribunal delve into the merits of the succession cause and how the Judge discharged his judicial functions? The respondent has reiterated that the Tribunal's findings that the conduct of the Judge that the Tribunal was asked to inquire into did not relate to the discharge of his judicial functions but conduct that was alleged to be outside the functions of his duties and which was in breach of the *Code of Conduct and Ethics* and amounted to gross misconduct or misbehaviour. As such, the concept of judicial immunity did not apply.

78. But was there proof of gross misconduct or misbehaviour to warrant the removal of the petitioner? The respondent submitted that from the videos and television interviews, it is clear that the petitioner was not circumspect at all in his associations and dealings; that he was audacious, brazen and intentional in his conduct; that he had no qualms about subverting justice or using his office for unlawful gains. In conclusion, the respondent urged the court to dismiss the petition and uphold the Tribunal's findings that the Judge's conduct was in breach of the *Code of Conduct and Ethics* and amounted to gross misconduct contrary to article 168(1)(b) and (e) of the *Constitution*, and the recommendation to his Excellency the President that the petitioner be removed from the office of Judge of the High Court was justified.

E. Issues for Determination

79. From our own consideration of the pleadings, the findings of the Tribunal, and the arguments by counsel representing the parties, we consider the following five issues as falling for our determination:

i. Whether the Tribunal had jurisdiction to review the proceedings before the JSC;

ii. Whether the Tribunal failed to uphold the doctrine of judicial independence and immunity;

iii. Whether the electronic evidence admitted by the Tribunal was unlawfully or illegally procured in violation of the petitioner's constitutional rights under articles 31 and 50(4) of the *Constitution*;

iv. Whether the allegations against the petitioner were proved to the required standard; and

v. Who should bear the costs.

F. Analysis and Determination

80. We start by restating the broad principles to be borne in mind when dealing with the question of removal of a judge. Those principles were outlined by this court in its maiden determination under article 168(8) in the case of *Joseph Mbalu Mutava v Tribunal appointed to Investigate the conduct of Justice Joseph Mbalu Mutava, Judge of the High Court of Kenya*, SC Petition 15 B of 2016; [2019] eKLR (Mutava case), and further summarized in the case of *Muya v Tribunal Appointed to Investigate the Conduct of Justice Martin Mati Muya, Judge*

of the High Court of Kenya, SC Petition 4 of 2020; [2022] KESC 16 (KLR) (Muya Case) as follows:

> "i. Unlike its jurisdiction under article 163(4), the Supreme Court, as the first and only appellate court in such matters, has a more expansive jurisdiction since, it is required to re-evaluate and re-assess the evidence on record in order to establish whether the Tribunal misdirected itself leading to a wrong conclusion.
>
> ii. Judges are presumed to be independent and to act without the control of anyone in deciding cases before them.
>
> iii. Judges should always ensure that their conduct is beyond reproach in the eyes of a reasonable observer. They must always uphold the principle that justice must not only be done but be seen to be done.
>
> iv. Once the President has received a petition from the Commission, he is constitutionally bound to appoint a Tribunal.
>
> v. The standard of proof, whether in direct or circumstantial evidence, is one which is neither beyond reasonable doubt nor on a balance of probabilities."

81. Consequently, an appeal to the Supreme Court under article 168(8), can be likened to a primary appeal, affording the court broader authority to scrutinize and reassess the evidence presented. This process aims to validate the accuracy of the Tribunal's findings regarding the application of factual matters to the law, even as the court acknowledges the Tribunal's firsthand assessments of witnesses' credibility. The court will exercise this authority to overturn factual conclusions with caution and will only do so if it is demonstrated that the Tribunal's conclusions were not supported by evidence or if it is evident that the Tribunal failed to appreciate the weight or bearing of circumstances admitted or proved, or if the Tribunal was plainly wrong in its conclusion.

82. We observe at the outset that the petitioner sought to persuade us to overturn the decision of the Tribunal on twelve (12) grounds, which were condensed into eight (8) in the written submissions but argued before us in two broad clusters. For our part, we think that, given the importance of the arguments in this petition, it is necessary and only appropriate to consider all the grounds as framed.

i. Whether the Tribunal had jurisdiction to review the proceedings before the JSC

83. The petitioner has challenged the proceedings before the JSC on the basis that his constitutional right to fair administrative action under article 47 of the *Constitution* was not observed and to that extent, the Tribunal was duty-bound to make an inquiry and a determination as to the integrity of the proceedings before the JSC. The respondent opposes these arguments and instead affirms that the proceedings before the JSC were lawfully conducted in strict compliance with the tenets of fair administrative action under article 47 of the *Constitution*.

84. According to article 168(2) of the *Constitution*, there are only two routes to initiate the removal of a judge.

> " The removal of a judge may be initiated only by the Judicial Service Commission acting on its own motion, or on the petition of any person to the Judicial Service Commission". [our Emphasis].

85. As a constitutional requirement, a petition to the JSC must be in writing, setting out the alleged facts constituting the grounds for the judge's removal. Upon receipt of the petition or upon considering the question of removal of a judge on its own motion, the JSC,

> "(4) shall consider the petition and, if it is satisfied that the petition discloses a ground for removal under clause (1), send the petition to the President". [our Emphasis]

86. The standard to be attained before the petition is sent to the President is entirely subjective, depending on the material placed before the JSC. Whether the petition is filed by a person or where the JSC is in possession of some information, regardless of the source, pointing to a questionable conduct of a judge, it must consider the petition or the information and satisfy itself that the complaint discloses facts constituting grounds for the judge's removal. The JSC is expected to evaluate the facts and only "if it is satisfied" that a ground or grounds for removal has/have been disclosed will it recommend to the President to constitute a Tribunal. The JSC is not simply a conduit pipe by which complaints are channeled to the President. It must be convinced that the complaint discloses *prima facie* evidence against the judge and that the complaint is serious enough to warrant a representation to the President. This is the threshold described by the Court of Appeal in *Judicial Service Commission Mbalu Mutava & another* (*supra*) as:

> " a preliminary inquiry to satisfy itself that the complaint is not frivolous, lacking in substance, unfounded or hypothetical. The inquiry is not intended to lead to

> a final decision but is only designed for receiving information for purposes of a recommendation on which a subsequent and final decision may be founded. As such, JSC does not conduct a formal hearing where witnesses are called and examined". (per Ouko, JA as he then was, concurring)

87. In considering whether a ground for removal has been disclosed, and being concerned only with *prima facie* evidence, the JSC is not required or expected to make definitive conclusions whether the allegations against the judge have been proved. It is expected to act in good faith, to accord the judge an opportunity to understand the accusations and to be guided by the provision of article 47 of the *Constitution* on the fair administrative action. It cannot be the JSC's mandate to conduct a full-fledged inquiry, with witnesses being cross-examined. That is a preserve of the Tribunal where the actual hearing takes place.

88. In November 2021, JSC's attention was drawn to several video clips, social media posts, and cell phone recordings that were in the public domain. The recordings were attributed to hon Sonko and appeared to question the integrity of the petitioner. From the record, it is apparent that four complaints were filed against the petitioner with the JSC and later withdrawn. Due to the persistence of the allegations and because of the intense public interest elicited by recordings and social media postings, JSC resolved to initiate, on its own motion, proceedings for the removal of the petitioner from office. That course was perfectly permitted by the force of article 168(2) of the *Constitution*, which we have set out in the previous paragraph. Satisfied that the material and evidence placed before it disclosed *prima facie* grounds for the removal of the petitioner, JSC unanimously resolved to petition the President to appoint a Tribunal pursuant to article 168(4) and (5) of the *Constitution*. It is this process that the petitioner challenged, first before the Tribunal and now before this court.

89. Following the petition by JSC and in exercise of the powers conferred by article 168(5)(b) of the *Constitution* as read with section 31 of the *JS Act*, HE Uhuru Kenyatta, the former President, suspended the petitioner from office and appointed a Tribunal to inquire into the allegations by Gazette Notice No 5540 of May 17, 2022, which read in the pertinent parts as hereunder:

> "Whereas the Judicial Service Commission has submitted to the President a Petition for the removal from office of the hon Justice Said Juma Chitembwe, Judge of the High Court of Kenya, under the provisions of article 168 of the *Constitution*.
>
> .....
>
> Now Therefore, having received and considered the Petition of the Judicial Service Commission and in exercise of the powers conferred by article 168(5)

(b) of the *Constitution* of Kenya, as read together with section 31 of the *Judicial Service Act, 2011*, I, Uhuru Kenyatta, President and Commander in Chief of the Kenya Defence Forces, do hereby direct as follows:

1. The hon Justice Said Juma Chitembwe, Judge of the High Court of Kenya, be and is hereby suspended from office with immediate effect; and

2. A Tribunal to inquire into the matter be and is hereby appointed, constituted as follows ...

3. The mandate of the Tribunal shall be to consider the Petition for the removal of the hon Justice Said Juma Chitembwe from office that was submitted by the Judicial Service Commission and to inquire into the allegations therein". [our Emphasis].

90. The Tribunal's jurisdiction is founded on article 168(7)(b) of the *Constitution*, as read with section 31 of the *JS Act* and the Second Schedule thereto. In appreciation of its mandate the Tribunal made the following observations:

> "818. Article 168(7)(b) of the *Constitution*, as read with section 31 of the *Judicial Service Act* and the Second Schedule thereto, and in light of the said Gazette Notice, it is the Tribunal's view that it was thereby mandated to a clear, specific constitutional jurisdiction restricted to inquiring into the matter and reporting on the facts in connection with the allegations made by the JSC. As the Gazette Notice reads, the Tribunal came into being after the appointing authority having received and considered the Petition of the Judicial Service Commission. Consequently, the President appointed the Tribunal 'to inquire into the matter'. He mandated the Tribunal 'to consider the Petition' for the removal of the Judge the subject of the inquiry 'that was submitted by the Judicial Service Commission and to inquire into the allegations therein'.
>
> 819. That jurisdiction was pointed and specific. It did not and does not include an inquiry into the activities of or proceedings before the JSC. It was informed solely by the request made by the JSC."

91. We are in agreement with the above pronouncement and conclusion, save to only add that, just like jurisdiction is everything for a court of law, it is equally critical for a tribunal or any administrative body exercising quasi-judicial authority. Similarly, like a court of law, a tribunal can only exercise jurisdiction donated by statute or the *Constitution*. Since the

Tribunal in these proceedings was a direct creation of a petition presented to the President, it would be an act of overreach for it to interrogate events that took place before its appointment. It had no such powers and therefore we agree with the conclusion reached by the Tribunal in that regard.

92. But since heavy weather was made of article 47 of the *Constitution*, that the JSC did not accord the petitioner the right to an administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair, it is important to understand the evolution of administrative justice in Kenya. In *Judicial Service Commission v Mbalu Mutava & another* (*supra*), the Court of Appeal traced this development thus:

> "Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of *ultra vires* from which administrative law under the common law was developed."

93. The *Fair Administrative Action Act* was eventually enacted to illuminate and expand the values espoused in article 47 aforesaid. It provides in section 4(3) the broad parameters to which bodies undertaking administrative action must conform to as follows:

> " (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-
>
> a. prior and adequate notice of the nature and reasons for the proposed administrative action;
>
> b. an opportunity to be heard and to make representations in that regard;
>
> c. notice of a right to a review or internal appeal against an administrative decision, where applicable;
>
> d. a statement of reasons pursuant to section 6;
>
> e. notice of the right to legal representation, where applicable;

f. notice of the right to cross-examine where applicable; or

g. information, materials and evidence to be relied upon in making the decision or taking the administrative action."

94. The proceedings before the JSC took the following form, from what is obvious to us on the face of the record:

a. JSC initiated removal proceedings on its own motion based on the allegations regarding the conduct of the petitioner.

b. Thereafter, JSC set up a committee of its members to consider its own motion alleged transgressions of the petitioner.

c. The petitioner was informed of the allegations against him and furnished with the petition, witness statements, and evidence supporting the proceedings.

d. The petitioner was represented by an advocate of his own choice.

e. The Committee conducted its investigations and recorded witness statements.

f. The petitioner was given ample time to prepare his defence and to respond to the allegations in the petition.

g. The petitioner's response to the petition being a preliminary objection was considered and determined.

h. The Committee reported its findings to JSC who in turn submitted a petition to the President.

95. To our mind, in conducting these proceedings, JSC was performing a quasi- judicial function. If the petitioner felt aggrieved by the conduct of the proceedings before JSC, which in his view amounted to a violation of his rights and fundamental freedoms, his recourse was not to the Tribunal that would be formed many months later but to the High Court, which has jurisdiction to determine questions of whether a right or fundamental right has been denied, violated, infringed, or threatened under article 165(3)(b) of the *Constitution*.

96. The principles laid down by the court in *Gladys Boss Shollei v Judicial Service Commission* (*supra*) involving disciplinary proceedings against the former Chief Registrar of the Judiciary, cannot be applied in the proceedings involving a judge. While the principles

enunciated in *Gladys Boss Shollei v Judicial Service Commission* (*supra*) were based on the provisions of section 32 of the *JS Act*, as read with regulation 25 of the third schedule to the Act (Provisions relating to the Appointment, Discipline and Removal of Judicial Officers and Staff), the instant proceedings were initiated under article 168(2) of the *Constitution* as read with section 31 of the *JS Act*. The two processes have very distinct considerations, one unique to a Judge and the other to a judicial officer.

97. True to its constitutional mandate, the JSC ensured that the proceedings before it were conducted in consonance with the *Constitution* and the law, upholding the rules of natural justice and respecting the petitioner's constitutional rights. In view of the foregoing, we find no basis upon which to conclude that the JSC violated the petitioner's right to fair administrative action, nor can we fault the Tribunal for rejecting the invitation to interrogate the proceedings before the JSC.

Whether the Tribunal failed to uphold the doctrine of Judicial independence and immunity

98. The petitioner contends that the totality of the examination of witnesses concerning the Malindi Succession Cause by both the Tribunal members and the lead counsel was tantamount to interrogating the merits of the decisions made by the petitioner as a result of which the Tribunal overstepped its mandate and assumed the role of an appellate court. What was more, according to the petitioner was the Tribunal's erroneous finding that there was a reasonable apprehension that the petitioner would be biased against hon Sonko who was facing impeachment proceedings in the consolidated petitions; and that in those circumstances the petitioner ought to have disclosed this relationship to the hon Chief Justice, the other judges on the bench and the parties.

99. The petitioner also took issue with the Tribunal's finding, without proof, that he had acquired an interest in parcel no 779 through a proxy when Malindi Succession Cause, over which he was presiding was awaiting determination. Lastly, the petitioner faulted the Tribunal for finding, again without any proof, that he had engaged in subversion of justice by advising litigants on matters before the courts. The truth, according to the petitioner was that he handled the matters in question in good faith and in the lawful performance of his judicial function. Citing the proposition in the Supreme Court case of *Bellevue Development Company v Francis Gikonyo & 3 others*, SC Pt No 42 of 2018; [2020] eKLR that judicial immunity is a public policy that enables judges to freely express themselves in matters brought before them, without fear of reprisal or of being disciplined, prosecuted or harassed. In other words, a judge or a judicial officer, in exercising the authority vested in him or her, should be free to act upon his own convictions, without apprehension of personal consequences to himself.

100. The import of article 160(5) of the *Constitution* is that a member of the judiciary is accorded judicial immunity for anything done or omitted to be done in good faith and in the lawful performance of a judicial function. The *Constitution* uses two key phrases: anything done or omitted to be done in good faith and in the lawful performance of a judicial function. The use of the two phrases was not idle but deliberate. Only things done by a judge in good faith and in the lawful discharge of the function of judicial office will merit protection. The antithesis to acting in good faith would be to act in bad faith, where a person acts dishonestly in the discharge of the functions of a judicial office. In other words, bad faith will be implied when the office-bearer has acted with a clear intent to deceive. This privilege will also be extended only when the action was done lawfully and in the performance of judicial duties. It is not available for acts done by a judge, or a judicial officer who are out on frolics of their own, going beyond the confines of what would normally be regarded as their judicial function. From a plain and textual reading of article 160(5) of the *Constitution*, and section 6 of the *Judicature Act*, judicial immunity is not absolute nor does it cover improper conduct aimed at furthering personal interests.

101. The basic principles of judicial independence under the *Constitution* require, among other safeguards, that judges ought to enjoy absolute freedom from liability in respect of decisions taken in their judicial function, just as their security, remuneration, conditions of service, pensions, and the age of retirement are secured by the *Constitution* and the law. To that extent, judges are guaranteed tenure of office until attainment of retirement age; and, barring this, they can be removed only for specified reasons; incapacity or behaviour and other grounds that render them unfit to discharge their duties.

102. Section 45 of the *JS Act* protects judicial officers from any personal culpability. They are not liable for any civil action or suit arising from anything done or omitted to be done in good faith. In the *Penal Code* too, in section 15, a judicial officer is not criminally responsible for anything done or omitted to be done by him in the exercise of his judicial functions. Section 6 of the *Judicature Act* makes a similar provision to insulate a judge and judicial officer, so long as they act in good faith and within the confines of the law.

103. In *Bellevue Development Company v. Francis Gikonyo & 3 others* (*supra*) we explained the rationale for judicial immunity and stated that:

> "(53) 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.
>
> .....

> (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."

104. In determining this issue, the sole consideration is whether the petitioner should be accorded protection under article 160(5) aforesaid to extend to him the principles of judicial immunity.

105. Re-evaluating the evidence on record, it is a statement of fact that the petitioner conceded that he knew Mr Jirani and met him and others at his residence on two or more separate occasions. It is equally true that the purpose of the meeting was for the prospective buyer of parcel no 799, Mr Askar, to confirm that he knew Mr Jirani and hon Sonko parcel no 779 was at the time registered in the name of Mr Jirani and parcel no 1222 was registered in the name of a company associated with hon Sonko. Further, apart from the recording of the meeting of July 10, 2021 in which the petitioner confirmed that Mr Jirani was acting as his proxy, there was evidence of eyewitnesses who attended the meeting. This evidence was further corroborated by Mr Jirani who in several instances in the recordings gave assurance that he was in the transaction as the petitioner's representative.

106. Further, the petitioner testified that he had no blood relationship with Hon Sonko, and that their relationship was only through marriage, his late step-cousin having married Hon Sonko's aunt. Asked why he never disclosed his relationship with Hon Sonko to the Chief Justice and his colleague Judges, the petitioner stated that the disclosure was not necessary since the relationship was too remote and could not have impeded his impartiality in hearing and determining the consolidated petitions. In any event, the petitioner denied that he ruled against Hon Sonko in the consolidated petitions because of the alleged disagreement over Parcel nos 779 and 1222. According to him, he only became aware of the land transaction on July 9, 2021 almost one month after the judgment in the consolidated petitions had been delivered on June 24, 2021. After all, he added that the decision in the consolidated petition was unanimous, and further that it has since been upheld by the Court of Appeal and the Supreme Court. Lastly, the petitioner explained his role in the sale transaction as that of a mediator and merely expressed an opinion on how Malindi Civil Appeal No 332 of 2018 could be withdrawn to facilitate the completion of the transactions for the sale of Parcel nos 779 and 1222.

107. It is clear to us that the Tribunal was well aware of its limits of jurisdiction. An excerpt of the Hansard of November 4, 2022 indicates that the Tribunal had to guide the lead counsel

not to venture into asking the petitioner questions that would suggest the Tribunal was interrogating the merits of the petitioner's decision or questioning the manner of his exercise of judicial discretion which impacts the decisional independence of the court.

108. Upon our own assessment of the evidence, we are convinced that the petitioner had a long-standing relationship with Hon Sonko. He met him at his private residence and held discussions which we are persuaded were intended to assist Hon Sonko in the appeal challenging the decision to uphold his impeachment by the High Court. There was direct evidence by those who were in the meeting, including hon Sonko himself, that the petitioner advised him on the possible grounds of appeal. Secondly, he met and once again advised hon Sonko, Mr Jirani, and Mr Askar on the prospects of withdrawing Malindi Civil Appeal No 32 of 2018 to pave way for the finalization of the transaction for the sale of Parcel nos 779 and 1222. How could these actions accord the petitioner protection under the principles of judicial immunity, when they were clearly outside and in excess of his mandate as a trial Judge? Judges do not entertain parties whose cases are pending or have been determined by them; they do not invite litigants into the privacy of their homes; and they do not discuss those cases or what steps to take to advance to the next level. A judge is an impartial arbiter with no personal interest in the outcome of a case he or she tries. A judge cannot decide a case impartially if his or her mind is mired in benefiting from the subject matter of the case. regulation 19. (1) prohibits a judge from anticipating a future benefit from the performance of the duties of the judicial office or from proceedings before the judge. To be involved in a transaction of the subject matter of a case pending before or determined by a judge, is outside the ambit of lawful performance of judicial function. It is an act of bad faith.

109. Regulations 11 (1) of the *Code of Conduct and Ethics* requires judges to discharge the official duties, act honourably and in a manner befitting the judicial office. In this context, a judge must ensure that his or her personal and extrajudicial activities are not in conflict with the obligations of a judicial office.

110. In view of the admitted relationship, albeit distant, between the petitioner and hon Sonko and the former's failure to disclose the same to the hon Chief Justice, his colleague judgeson the bench, and the parties, we do not find fault with the Tribunal's conclusion on this ground that the petitioner's conduct divested him of any claim to protection under the principles of judicial immunity.

Whether electronic evidence admitted by the Tribunal was unlawfully or illegally procured in violation of the petitioner's constitutional rights under articles 31 and 50(4) of the *Constitution* and therefore inadmissible

111. The petitioner contends that the evidence in support of the six (6) allegations seeking his removal from office was obtained in contravention of his rights to privacy under article 31

and to a fair hearing under article 50(4) of the *Constitution* and therefore inadmissible; and that the recordings were interfered with and manipulated to meet a certain narrative. The petitioner further contends that the video and audio recordings were inadmissible for having been obtained in a deliberate scheme of entrapping him.

112. Article 31 of the *Constitution* provides that:

> " 31. Every person has the right to privacy, which includes the right not to have-
>
> a. Their person, home or property searched;
>
> b. Their possession seized.
>
> c. Information relating to their family or private affairs unnecessarily required or revealed; or
>
> d. the privacy of their communications infringed." [our Emphasis]

113. Article 50(4) on the other hand provides that:

> "(4) Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice."

114. In the Tribunal's view, article 50(4) establishes a dual threshold for evidence to be excluded. First, the evidence must have been obtained in a manner that violates any right or fundamental freedom. Second, the admission of the evidence would render the trial unfair or detrimental to the administration of justice. Therefore, for the video and audio recordings to be found to be inadmissible for violating article 31 as read with article 50(4) of the *Constitution*, the petitioner was required to demonstrate that his rights were unjustifiably violated in the manner that evidence was obtained and that their admission rendered the proceedings unfair or detrimental to the administration of justice.

115. In our fresh assessment of the evidence on record, it is our understanding that the contents of the video and audio recordings produced before the Tribunal were intended to demonstrate three things: the petitioner discussing with Hon Sonko among others, the proposed sale of parcel no 779 which had been the subject of succession proceedings before him in Malindi Succession Cause No 97 of 2015; the petitioner discussing the possible withdrawal of an appeal against his decision in the said succession matter, Malindi Civil Appeal No 32 of 2018; and the petitioner discussing with hon Sonko who was the main petitioner in the

consolidated petitions, in which his impeachment as a governor was the subject, and possible grounds of appeal against the decision rendered by a three-judge Bench of the High Court over which the petitioner presided. Furthermore, in the KTN News interview that took place on November 18, 2021 in which the petitioner was hosted by Ms. Sophia Wanuna, he made various concessions and admissions, *inter alia* that both Mr Jirani, a person alleged in the video recordings to hold parcel no 779 on his behalf, as well as hon Sonko, were his relatives or were persons personally known to him.

116. Article 31 of our *Constitution* is the equivalent of section 14 of the *Constitution of South Africa* which was the basis of the decision of *Bernstein v Bester NO*; 1996 (2) SA 75 where the Constitutional Court of South Africa dealt with the meaning of the right to privacy. Ackermann J writing for the majority observed that:

> "The truism that no right is to be considered absolute, implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly." [our Emphasis]

117. The Constitutional Court also gave instances of violation of the right to privacy and stated:

> "(69) Examples of wrongful intrusion and disclosure which have been acknowledged at common law are entry into a private residence, the reading of private documents, listening in to private conversations, the shadowing of a person, the disclosure of private facts which have been acquired by a wrongful act of intrusion, and the disclosure of private facts contrary to the existence of a confidential relationship. These examples are all clearly related to either the private sphere, or relations of legal privilege and confidentiality. There is no indication that it may be extended to include the carrying on of business activities."

118. It should be apparent from the two passages that the right to privacy is not absolute. We agree with the formulation that a person's privacy extends to those aspects in which a legitimate

expectation of privacy can be harboured. It is our considered view therefore that the right to privacy can never be absolute and a balancing test has to be applied to determine whether the intrusion into an individual's privacy is proportionate to the public interest to be served by the intrusion, in this case, the recordings.

119. To begin with, we are convinced that it was the petitioner who invited the team to his private residence where the recordings took place. He was recorded discussing cases that involved third parties and land transactions involving parties not necessarily his relatives. These recordings were made public by Hon Sonko on his social media platforms bringing the conduct of the petitioner as a Judge into question. As indicated earlier, four petitions were filed but later withdrawn. Already there was public interest generated by these posts; a judge recorded discussing matters that were either before him or which he had handled, with parties in some of those cases and third parties. And as if that was not enough, the judge himself appears on a live show on a national television to admit some of the allegations. Under article 172 of the *Constitution*, some of the functions of the JSC include the promotion and facilitation of the independence and accountability of the judiciary and the efficient, effective, and transparent administration of justice. The original petitions having been withdrawn, was the JSC rendered impotent, in the discharge of these functions and in light of the circumstances of recordings and televised show? As it ought to in the circumstances, the JSC in terms of article 168(2) initiated on its own motion the removal process culminating in these proceedings.

120. By willingly discussing the matters in question with parties and third parties and on a public forum, being a live television interview, the petitioner voluntarily removed the issue from the private realm to a public platform. He cannot now claim that the evidence was obtained in a manner that violated any of his rights or fundamental freedoms.

121. On the second limb, that the admission of audio and video recordings would render the hearing of the allegations against him unfair and detrimental to the administration of justice, the Tribunal relied on the cases of *Mustard v Flower*; [2019] EWHC 2623 (QB) for the proposition that even though the court found that the manner in which the covert recordings were made was reprehensible, it underscored that they were not done illegally as they were not prohibited by any written law. The court weighed the way the evidence was obtained against its relevance and probative value and what the effect of admitting the evidence or otherwise would have on the fairness of the trial, which tipped the balance in favour of admitting the evidence. The Tribunal also distinguished the above case with those of the Supreme Court in Electoral and Boundaries Commission & 2 others (*supra*) and *Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others* [2020] eKLR where documents were obtained unprocedurally in circumstances where there was a clear mechanism for obtaining information under article 35 of the *Constitution*. The petitioners

in those cases had obtained the documents in violation of procedure and the evidence obtained was held to have been illegally obtained and therefore inadmissible.

122. To that end, the Tribunal while relying on the cases cited above concluded that for covert recordings to be admissible in evidence, the following principles should be considered:

> "i. The recording must have been done by a participant in the conversation and not by a third party;
>
> ii. The recording was of a conversation between parties who were privy to the truth of the matter they were discussing and were freely talking about it;
>
> iii. The court or tribunal has direct evidence of the participant who made the recording; and
>
> iv. The recording is of great probative value."

123. Applying these principles to the instant case, we find just like the Tribunal did, that though the video and audio recordings were covertly recorded, they were recorded by participants in the conversations. Concerning the recordings of 9th and July 10, 2021, the persons depicted in the recordings were at the petitioner's residence with his permission, and the discussions therein, that flowed effortlessly were of interest both to the petitioner and his visitors. The recordings were made by parties who were privy to the transactions over Parcel nos 779 and 1222. Indeed, there is no claim that a third party was involved in the recordings that would render the recordings inadmissible.

124. Accordingly, we find that the audio and video recordings produced did not contravene the petitioner's right to privacy under article 31. Additionally, we find that their admission into evidence did not render the inquiry before the Tribunal detrimental to the administration of justice in contravention of article 50(4) of the *Constitution*.

125. On the allegation of entrapment, the petitioner has argued that the audio and videos were edited to fit a pre-determined narrative. Entrapment as defined by the *Black's Law Dictionary*; 10th edition is:

> "A law enforcement officer's or government agent's inducement of a person to commit a crime, by means of fraud or undue persuasion, in an attempt to cause a criminal prosecution against that person."

126. The Canadian Supreme Court in *R v Mack* [1988] 2 SCR 903 stated that entrapment occurs when:

> " (a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a *bona fide* inquiry; and
>
> (b) although having such a reasonable suspicion or acting in the course of a *bona fide* inquiry, they go beyond providing an opportunity and include the commission of an offence."

127. The High Court in *Mohamed Koriow Nur v Attorney General* [2011] eKLR relying on *R v Mack* [1988] 2 SCR 903 and in *Lydia Lubanga v Inspector General of Police & 4 others* [2016] eKLR, dealt with the question of entrapment and accepted the proposition that entrapment occurs when, one the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity and two, although having such a reasonable suspicion or acting in the course of a *bona fide* inquiry, they go beyond providing an opportunity and include the commission of an offence.

128. It is apparent from what we have stated in the preceding paragraphs that, for entrapment to be committed, there must be authorities, law enforcement officers or government agents involved, and they must have provided an opportunity for the commission of a crime. This, however, was not the case in the proceedings of the subject of this petition. The recordings were procured by the petitioner's relatives and acquaintances. We must go ahead and add that, even in the absence of the recordings, there was independent and direct evidence of persons who were present and participated fully in the recorded conversation. Those present testified as to who they were and what their engagements were in different sectors of the economy. None of them was a government agent or an enforcement officer. Hon Sonko testified that he was the immediate former Governor of Nairobi City County, Mr Askar testified that he was the consul of Nepal in Kenya for the past ten years. Mr Kivuva described himself as a businessman and Mr. Jirani described himself as a farmer and land broker. Entrapment in the strict sense of the word did not, for these reasons, occur.

129. We emphasize finally on this question that judicial response to entrapment is based on the need to uphold the rule of law. A person entrapped will be excused, not because he is less guilty of the offence he may have committed as a result, but because of the inappropriate behavior of the law enforcers. The situation is what Lord Steyn described in *R v Latif* [1996] 1 WLR 104, 112 as "state-created crime" which is not only unacceptable but also improper.

We conclude that the allegation that the recordings were obtained in a deliberate scheme to entrap the petitioner cannot stand in light of the foregoing analysis.

130. In addition, and contrary to claims that the recordings were doctored or edited, the petitioner did not call expert evidence to controvert the evidence of PC Mutinda, a certified digital forensics examiner who examined the recording devices and prepared a Memorandum and two separate Certificates of Authenticity and those produced by Mr Kivuva. The evidence of the two witnesses on authentication of the recordings was intended to demonstrate to the Tribunal that there was a reasonable probability that the recordings were what they purported to be, a meeting of people in the recordings and the subjects of discussion. It was for the Tribunal to determine that it is reasonably probable that there was no material alteration of the evidence. the Tribunal was justified in rejecting the allegation of manipulation. The ground therefore lacks basis and is rejected.

Whether the allegations against the petitioner were proved to the required standard

131. Earlier in this judgment we noted that JSC, in the exercise of its mandate, was performing quasi-judicial functions. Removal proceedings, though quasi- judicial are not in the nature of criminal proceedings. Such proceedings do not require or depend on criminal culpability to succeed. All that is required is that the allegations be substantiated. In both the *Mutava and Muya cases*, we set the standard of proof in removal proceedings as an intermediate one; neither beyond reasonable doubt nor on a balance of probabilities, with the burden of proof being on the assisting counsel to bring proof to the required standard in proof of the alleged misconduct. Once the assisting counsel has discharged the legal burden by providing sufficient evidence, the evidential burden will normally shift to the Judge on matters which are peculiarly within the Judge's knowledge.

132. Article 168(1) of the *Constitution* provides that a judge of a superior court may be removed from office only on the grounds of:

> " a. Inability to perform the functions of office arising from mental or physical incapacity;
>
> b. a breach of a code of conduct prescribed for judges of the superior courts by an Act of Parliament;
>
> c. bankruptcy;
>
> d. incompetence; or
>
> e. gross misconduct or misbehaviour." [our Emphasis]

133. Perhaps in passing, we note that though this court has determined questions of removal of a judge under the grounds of inability to perform the functions of office arising from mental incapacity and for gross misconduct or misbehaviour, this is the first time a removal on the ground of breach of a code of conduct for judges of the superior courts has been recommended. Of course, this is in addition to the ground of gross misconduct or misbehaviour.

134. In addressing the latter ground, the Tribunal noted that gross misconduct or misbehaviour infers more serious infraction; that the framing of gross misconduct or misbehaviour under the *Constitution* and the *Code of Conduct*, requires the possibility of sanctioning a variety of contravening behaviour; that not every allegation of misconduct merits the removal of a judge from office; and that where a Tribunal is of the view that the allegation does not meet the constitutional standard, the Tribunal cannot recommend the removal of the judge that is the subject of the inquiry.

135. A similar rendition was articulated by this court in the *Muya case* in these words:

> "Whether the conduct of a judge can be typified as "gross misconduct or misbehaviour" cannot be assessed in abstract. It is a question of fact which will depend on the nature of the complaint. As the Tribunal correctly noted, it is not every misconduct that will expose a judge to a removal process.
>
> ... that not every allegation of misconduct merits the removal of a judge from office....and where a Tribunal is of the view that the allegation does not meet the constitutional standard the Tribunal cannot recommend the removal of the judge".

136. Considering everything else we have said in the preceding paragraphs regarding the conduct of the petitioner, we now turn to answer the question, whether any material has been placed before us or other any basis laid in this petition to warrant our interference with the Tribunal's recommendation to the President. To answer the question, we have to consider each of the allegations, guided by the standard of proof described above.

137. Allegation one: Lack of impartiality contrary to articles 10 and 168(1) of the *Constitution*, and regulations 11(3)(b), 16, 20, 21 and 30 of the *Code of Conduct and Ethics* and allegation six: non-disclosure of conflict of interest contrary to articles 75 and 168(1) of the *Constitution*, and regulations 19, 20 and 21(1)(c), 21(1)(d), 21(1)(e) and 21(1)(h) of the *Code of Conduct and Ethics*, it is common factor the petitioner had a relationship with hon Sonko through marriage. There is no controversy too that the petitioner met hon Sonko on two different occasions, on March 16, 2021 and May 22, 2021 which are relevant to the issues under inquiry. By necessary deduction, the two meetings took place during the pendency of

the consolidated petitions, regarding the removal from office of governor of hon Sonko. In those meetings, there was communication between the petitioner, Mr Jirani, Mr Askar and hon Sonko. The discussions, we are satisfied by the direct evidence of eyewitnesses and the audio and video evidence, centered around two subjects: the sale of parcel no 779, and the appeal of the judgment in the consolidated petitions. Again, from overwhelming evidence on record, it was established that the petitioner had an interest in parcel no 779 and for which Mr Jirani fronted him. The petitioner personally and keenly followed and directed the intended sale of the parcel to Mr Askar in a transaction involving hon Sonko.

138. Three things stand out and must be remembered from the facts: the petitioner was the single presiding judge in the succession cause, where parcel no 779 was the main subject matter; hon Sonko, on the other hand, was the main petitioner in the consolidated petitions, in which the petitioner was the presiding judge in a bench of three judges. Finally, Mr Jirani was a person well known to the petitioner while hon Sonko was both well-known to and a distant relative of the petitioner.

139. Accordingly, these facts presented reasonable circumstances for the petitioner to either disclose the same to the hon Chief Justice, colleague judges of the Bench and parties in the consolidated petitions, or to recuse himself altogether from sitting. We stress that judicial impartiality is a significant element of justice. In order to maintain impartiality where there is a likelihood of conflict of interest, the proper thing to do is to recuse oneself and let the dispute be resolved by another impartial judge, because no person shall be a judge on a case in which they have interest. The old age principle that justice must not only be done but seen to be done holds true today. Regulation 20 (1) of the *Code of Conduct* enjoins judges to;

> " use the best efforts to avoid being in situations where personal interests conflict or appear to conflict with the judge's official duties".

The petitioner had a sua sponte duty to recuse himself from the case, or to disclose the nature of the interest in the matter.

140. For failing to opt for any of the two routes, and instead proceeding to sit to the end of the case, we agree entirely with the Tribunal that the petitioner was in breach of articles 10, 50(1), 75, 232 of *Constitution*, and regulations 9, 19, 20 and 21 of the *Code of Conduct and Ethics*. Accordingly, concerning allegations one and six, we find no fault in the conclusion reached by the Tribunal.

141. Allegation two: Lack of integrity contrary to articles 10, 73(2)(b), 75(c), and 168(1) of the *Constitution*, section 13 of the *Leadership and Integrity Act*, and regulations 11(3)(a), 11(3)(b), 17(3), 20, 21 and 30 of the *Code of Conduct and Ethics*, we have already determined that there were two meetings in the petitioner's private residence in Mountain View estate

involving the petitioner, hon Sonko and others on 9th and July 10, 2021. Similarly, on the petitioner's own concession and on the strength of direct evidence of hon Sonko and Mr. Jirani, we are persuaded that the petitioner and Hon Sonko discussed the possible grounds of appeal against the High Court judgment in the consolidated petitions regarding the impeachment of hon Sonko. There was also discussion about the sale of land Parcel nos 779 and 1222.

142. In the petitioner's view, there was nothing untoward with him discussing the appeal to challenge his judgment since the grounds of appeal had been settled. That view is mistaken and, we dare say, borders on impunity. A judge makes a decision against a party and goes ahead to discuss the case with that litigant, is *contra bonos mores* and it is immaterial that the window for lodging a notice of appeal had lapsed.

143. Regulations 18 of the *Code of Conduct and Ethics* directs that;

> " a judge shall not, comment on proceedings pending in any court".

144. Ultimately, the totality of the evidence on record shows that the petitioner conducted himself in a manner that demonstrated a singular lack of integrity by engaging parties who were litigants before him contrary to articles 10, 73(2)(b), 75(c) of the *Constitution* as well as regulations 11(3)(a) and (b), 17(3), 20, 21 and 30 of the *Code of Conduct and Ethics*. It must follow that the Tribunal properly directed itself on the evidence and arrived at the correct conclusion that the allegation under this ground was established to the required standard. We dismiss this ground too.

145. Allegation three: Lack of accountability, involvement in corrupt practices, and impropriety contrary to articles 10, 75 and 168(1) of the the *Constitution*, and regulations 13(1)(a), 14(1)(a), 14(1)(b), 14(3), and 30 of the *Code of Conduct and Ethics*. Based on our conclusions in allegations one and six, the petitioner had a proprietary interest in parcel no 779 and that Mr. Jirani was his proxy and was registered as such to hold parcel no 779 on his behalf. Accordingly, we find that by the very fact that the petitioner acquired an interest in parcel no 779 through Mr Jirani, after hearing Malindi Succession Cause No 97 of 2015 in which parcel no 779 was the subject matter of succession, in itself amounted to lack of accountability, conflict of interest, involvement in corrupt practices and impropriety on the part of the petitioner.

146. Under value 4, principle 4.9 of the *Bangalore Principles*, a judge shall not use or lend the prestige of the judicial office to advance the private interests of the judge, a member of the judge's family or of anyone else, nor shall a judge convey or permit others to convey the impression that anyone is in a special position improperly to influence the judge in the performance of judicial duties.

147. The several meetings hosted by the petitioner at his residence on March 16, 2021, May 22, 2021, 9th and July 10, 2021 to discuss the withdrawal of the appeal against his decision in the succession cause, completion of the sale transaction over parcel no 779 to Mr Askar and the distribution of the proceeds of the sale went against the provisions of articles 10, and 75 of the *Constitution*, and regulations 13(1)(a), 14(1)(a), 14(1)(b), 14(3), and 30 of the *Code of Conduct and Ethics*.

148. It is as ridiculous as it is absurd for the petitioner to argue that he did not offer advice on Malindi Succession Cause No 97 of 2015 but acted purely as a mediator. As a judge of many years, the petitioner obviously knows that what he was engaged in was not mediation but an act of subversion of justice. A judge who makes a decision in a contested case cannot purport to mediate without all the parties before him, in his private house and with strangers. What was there to mediate, anyway, after the petitioner had handed down a judgment which was the subject of appeal in the Court of Appeal? His singular interest was in parcel no 779 and how to end the pending appeal in order to complete the transaction and receive and share the proceeds of sale.

149. The petitioner was prohibited by regulations 30 of the *Code of Conduct and Ethics* from using a third party or proxy to do what he knew if done by him would constitute a contravention of the *Code of Conduct and Ethics*.

150. Consequently, like the Tribunal we find that the petitioner's conduct amounted to a lack of accountability, involvement in corrupt practices, and impropriety contrary to Articles 10, 73, and 75 of the *Constitution*, and regulations 13(1)(a), 14(1)(a), 14(1)(b), 14(3), and 30 of the Code of Conduct and Ethics.

151. On Allegation four, it was charged that the petitioner was involved in acts that subverted justice through commenting and advising a litigant on matters pending in court contrary to article 75(c) of the *Constitution*, section 13 of the *Leadership and Integrity Act* and regulation 18 of the *Code of Conduct of Judges*. In Allegation five, the petitioner was alleged to lack professionalism and to be engaged in conduct unbecoming of a judge in contravention of articles 73 and 168(1)(e) of the *Constitution of Kenya, 2010* and regulations 15, 16(a), (b) and (c) and 17(3) of the *Code of Conduct for Judges*. Besides the evidence of hon Sonko and Mr Jirani that the petitioner and hon Sonko had a private conversation in which he suggested to hon Sonko the points to raise in his appeal, the petitioner himself admitted that his advice amounted to nothing as the appeal had already been lodged.

152. Regulation 17(3) of the *Judicial Service (Code of Conduct and Ethics) Regulations 2020* provides that:

> "(3) A judge shall not engage in consultancy or practice law by offering legal advice or drafting pleadings for litigants or members of the public, while holding judicial office."

153. Regulation 18(1) on the other hand provides that:

> "A judge shall not, comment on proceedings pending in any court, and shall require similar abstention on the part of the court personnel subject to the judge's direction and control."

154. The evidence before us and as captured in the Hansard of November 4, 2021, is that the petitioner admitted that he discussed with hon Sonko possible grounds of appeal against the judgment in the consolidated petitions, being the grounds in the petition. In our view, such advice, from a judge to a person who was a litigant before him in the matter, the subject of discussion and in respect of which an appeal to the Court of Appeal was contemplated, is what is prohibited by regulations 17(3) and 18(1) of the *Code of Conduct and Ethics*.

155. Ultimately on this ground, we find that the petitioner was engaged in the subversion of justice by commenting on pending cases and suggesting to a litigant, possible points for the challenge of the judgment arising from the consolidated petitions contrary to Article 75(c) of the *Constitution*, and regulation 18 of the *Code of Conduct and Ethics*. His conduct, apart from being unprofessional was also unbecoming of a judge and contravened articles 73 of the *Constitution* as well as regulations 15, 16(a), (b), (c) and 17(3) of the *Code of Conduct and Ethics*. We therefore find that allegations four and five were proved to the required standard.

156. As we conclude we make the following four points arising from the petition:

i. Though there is no obligation in removal proceedings to prove each and every allegation, in this instance the Tribunal, found proof in all the six allegations against the petitioner. No material has been placed before us to warrant our interference with the conclusions reached by the Tribunal.

ii. As the old saying goes, the robe magnifies the conduct, meaning judges must be held to higher ethical standards if they are to keep the trust and confidence of the people they serve. The *Code of Conduct* which was formulated from the provisions of article 168(1)(b) of the *Constitution* enjoins judges to preserve the integrity of the judiciary and to avoid even the appearance of impropriety.

iii. Generally, the decisions of a judge made in the course of the discharge of judicial function cannot be questioned except through judicial review or appeal, and a judge 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.

iv. So important is judicial independence that removal of a judge can only be justified where the shortcomings complained of were of such a serious nature as to destroy the confidence in the judge's ability properly to perform the judicial function. Gross misconduct or misbehaviour as grounds for removal of a judge is an expression of something very serious.

v. The proceedings before the Tribunal are not criminal in nature and therefore not subject to a standard of proof beyond reasonable doubt.

157. In the end and for all the reasons we have given, this Petition of Appeal fails as we are satisfied with the Tribunal's conclusion that the evidence presented established that the petitioner's conduct was in breach of the *Code of Conduct and Ethics* and also amounted to gross misconduct or misbehaviour contrary to article 168(1) (b) and (e) of the *Constitution*.

G. Costs

158. Costs follow the event but are at the discretion of the Court. We are guided by the principles on the award of costs enunciated in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others*; SC Petition 4 of 2012; [2013] eKLR. Noting the nature of the appeal, we shall make no orders with regard as to costs.

H. Final Orders

159. Accordingly, we make the following orders:

a. The petition of appeal dated February 15, 2023 is hereby dismissed;

b. The Tribunal's finding that the Petitioner's conduct was in breach of the *Judicial Service (Code of Conduct and Ethics) Regulations 2020* and amounted to gross misconduct contrary to article 168(1) (b) and (e) of the *Constitution* is affirmed;

c. The Tribunal's recommendation to the President for the petitioner's removal from office under article 168(1)(e) of the *Constitution* is hereby affirmed;

d. No orders as to costs.

e. We hereby direct that the sum of Kshs 6,000/-, deposited as security for costs upon lodging of this appeal, be refunded to the petitioner.

It is so ordered.

Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023) [2023] KESC 113 (KLR) (28 December 2023) (Judgment)

Supreme Court of Kenya

PM Mwilu, DCJ & VP, SC Wanjala, N Ndungu, I Lenaola & W Ouko, SCJJ

Neutral citation: [2023] KESC 113 (KLR)

Jurisdiction *– jurisdiction of the Environment and Land Court (ELC) – jurisdiction to determine disputes involving the management of the environment or issues of petroleum and energy – claim that the Environmental and Management Coordination Act and the Energy Act ousted the jurisdiction of the ELC – whether the ELC had original jurisdiction over disputes involving the management of the environment or issues of petroleum and energy – Constitution of Kenya, 2010, article 162(2)(b); Environment and Land Court Act, (Cap 8D), section 13; Environmental Management Coordination Act, (Cap 387), section 125; Energy Act, (Cap 314), section 36; Fair Administrative Action Act, (Cap 7L), section 9(4).*

Jurisdiction *– jurisdiction of the National Environment Tribunal (NET), the Energy and Petroleum Regulatory Authority (EPRA) and the Energy and Petroleum Tribunal (EPT) - jurisdiction to determine constitutional violations - whether the NET, EPPRA and EPT had the jurisdiction to determine constitutional violations - Constitution of Kenya, 2010, article 162(2)(b); Environment and Land Court Act, (Cap 8D), section 13; Environmental Management Coordination Act, (Cap 387), section 125; Energy Act, (Cap 314), section 36.*

Constitutional Law *– constitutional reliefs – constitutional reliefs in matters where there existed alternative dispute resolution mechanisms - whether the availability of an alternative remedy automatically barred an individual from seeking constitutional relief.*

Jurisdiction *– jurisdiction of the Supreme Court – appellate jurisdiction - what were the factors to consider in invoking the Supreme Court's appellate jurisdiction as of right in any case involving the interpretation or application of the Constitution – Constitution of Kenya, 2010, article 163(4).*

Civil Practice and Procedure *– pleadings – amendment of pleadings - whether a party could amend pleadings after a preliminary objection had been raised relating to pleadings filed.*

Brief facts

The appellant was aggrieved by the mining activities of the 2nd and 3rd respondents in Ramba and complained to the 6th respondent, National Environment Management Authority (NEMA) to take action. The appellant alleged that the 2nd and 3rd respondents dumped waste and/or effluent from their mining shaft posing health risks. NEMA noted that the 2nd and 3rd respondents were conducting mining activities and had submitted an environmental impact assessment (EIA) report which activity was illegal for want of authorization from NEMA and the 4th respondent, the Ministry of Mining and Petroleum. NEMA proceeded to issue a stop order halting the operations of the 2nd and 3rd respondents.

According to the appellant, the 2nd and 3rd respondents continued with their mining operations. The appellant claimed that the 2nd and 3rd respondents invaded his property and had since proceeded to excavate and mold concretes therein. Additionally, the 2nd and 3rd respondents together with the 8th respondent had trespassed onto his land, dug holes and erected electricity poles thereon without his consent. Aggrieved, the appellant filed a petition at the Environment and Land Court (ELC) claiming violation of various constitutional rights and statutory provisions. The 2nd and 8th respondents filed preliminary objections challenging the jurisdiction of the ELC to determine the petition. The ELC found that the 2nd and 8th respondents' objections were merited.

The ELC held that as the appellant's complaint against the 8th respondent, Kenya Power & Lightning Co. Ltd (KPLC) involved the placement of electrical posts on his land, the Energy and Petroleum Regulatory Authority (EPRA) had the power to entertain the dispute and the court would not assume jurisdiction at the first instance and if dissatisfied by any decision made by EPRA, the appellant could then move to the Energy and Petroleum Tribunal (EPT) for redress on appeal. As regards the preliminary objection raised by the 2nd respondent, the ELC found that the dispute primarily focused on the mining activities and alleged resultant environmental pollution which fell within the jurisdiction of NEMA as it revolved around issuance of licenses and the result of such issuance.

The ELC stated that its jurisdiction in relation to disputes reserved for NEMA and the National Environment Tribunal (NET) was restricted to appeals emanating from the former. Aggrieved by the decision, the appellant filed an appeal with the Court of Appeal, which ruled that nothing, aside from the statute of limitations, prevented the appellant from initiating another suit, excluding issues governed by the Environmental Management Coordination Act and the Energy Act. The Court also affirmed that the ELC's final order was valid, as the ELC had determined it lacked original jurisdiction over certain claims in the multifaceted petition.

Issues

i. Whether the Environment and Land Court had original jurisdiction over disputes involving the management of the environment and issues of petroleum and energy.
ii. Whether the National Environment Tribunal, the Energy and Petroleum Regulatory Authority and the Energy and Petroleum Tribunal had the jurisdiction to determine constitutional violations.
iii. Whether the availability of an alternative remedy automatically barred an individual from seeking constitutional relief.
iv. What were the factors to consider in invoking the Supreme Court's appellate jurisdiction as of right in any case involving the interpretation or application of the Constitution?
v. Whether a party could amend pleadings once a preliminary objection had been raised in regard to pleadings filed.

Relevant provisions of the Law

Environment and Land Act, Cap 8D

Section 13 - Jurisdiction of the Court

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(5) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(f) restitution;

(g)declaration; or

(h)costs.

Held

1. The appellate jurisdiction of the court was as set out in article 163(4) of the Constitution. As to what constituted a matter involving interpretation and application of the Constitution, a specific provision(s) of the Constitution must have been an issue for interpretation and/or application by both the High Court and courts of equal status as well as the Court of Appeal.

2. A determination about whether an appeal satisfied the criteria for invoking the court's appellate jurisdiction was not governed by rigid principles. Instead, it was a power exercised by the court on a case-by-case basis but within the confines of the Constitution and statute.
3. The issues in the instant case fell squarely within the court's appellate jurisdiction in article 163(4)(a) of the Constitution and called for the court to determine them as a matter of constitutional interpretation and application. The appeal correctly invoked the court's jurisdiction to the extent of determining those questions.
4. The resolution of environmental issues before NEMA had been the subject of prior decisions by the superior courts and two schools of thought had emerged in that regard. On one hand, there was a series of decisions that had taken the position that, even though the ELC had original and appellate jurisdiction on environment and land matters, parties should exhaust the mechanisms provided for under the Environmental Management Coordination Act, by first referring a matter to NET before an appeal could lie to the ELC. There was however another school of thought that had posited that, if the complaints and prayers by a petitioner related to infringement of the constitutional right to a clean and healthy environment or any other constitutional violation, then NET lacked the jurisdiction to determine the constitutional issue hence the provisions of section 129 of the Environmental Management Coordination Act were inapplicable to such claims.
5. Where there was an alternative remedy, especially where Parliament had provided a statutory appeal procedure, then it was only in exceptional circumstances that the court could resort to any other process known to law.
6. Under article 165(1)(c) of the Constitution, the High Court had the jurisdiction to determine whether a right or fundamental freedom outlined in the Bill of Rights had been denied, violated, infringed upon, or was under threat. In that context, article 165(5)(b) imposed limitations on the High Court's jurisdiction concerning matters falling within the purview of the courts specified in article 162(2) of the Constitution. Consequently, article 165(2)(b) mandated the establishment of courts possessing the status of the High Court to *inter alia* and of relevance to the appeal before the court, address issues related to the environment, as well as the utilization and ownership of land with Parliament assuming the responsibility to delineate the functions and jurisdiction of that court as stipulated in article 165(3).
7. The Environment and Land Court's jurisdiction was as provided for in section 13 of the Environment and Land Court Act with section 13(1) specifically outlining that the court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with article 162(2)(b) of the Constitution. The provisions of section 13(2) must be read in contrast to those in the Environmental Management Coordination Act which provided for instances where disputes pertaining to compliance with breach and/or violations of the provisions of EMCA and which disputes ought to be lodged with and/or addressed by NET, which was established pursuant to the provisions of section 125 of the Environmental

Management Coordination Act. Redress for constitutional violations was not part of that mandate.

8. The Energy Act provided for a dispute resolution mechanism for complaints to be determined by EPRA which was vested with such authority under section 10 of the Act. Should a party be dissatisfied with the decision of EPRA, then he or she had the right to file an appeal before the EPT as provided for under section 36 of the Energy Act. It was only when one was dissatisfied with the decision of the EPT that such a party could appeal the Tribunal's decision to the ELC.

9. The provisions of the Environmental Management Coordination Act and the Energy Act did not expressly oust the jurisdiction of the ELC in respect of the procedure for the determination of disputes that involved the management of the environment or issues of petroleum and energy. In the ordinary course of events, the ELC still had original jurisdiction over the matters that were handled by NEMA, unless such jurisdiction was specifically and expressly ousted in a constitutionally compliant manner. The same held true for proceedings under the Energy Act.

10. Section 9(2) of the Fair Administrative Action Act, provided that where there existed internal mechanisms for the resolution of a dispute, the court would not review the administrative action until the internal dispute mechanism had been exhausted. That fact notwithstanding, there was nothing that precluded the adoption of a nuanced approach, that safeguarded a litigant's right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms could offer. That was also why section 9(4) of the Fair Administrative Action Act created the exception that exhaustion of administrative remedies may be exempted by a court in the interest of justice upon application by an aggrieved party.

11. Neither the NET, EPRA nor EPT had the jurisdiction to determine alleged violations of the Constitution. That right to access the court for redress of alleged constitutional violations, should not be impeded or stifled in a manner that frustrated the enforcement of fundamental rights and freedoms.

12. The availability of an alternative remedy did not necessarily bar an individual from seeking constitutional relief. That was because the act of seeking constitutional relief was contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy was deemed inadequate in addressing the issue at hand, then the court was not restrained from providing constitutional relief.

13. There was a need for the court to scrutinize the purpose for which a party was seeking relief, in determining whether the granting of constitutional reliefs was appropriate in the given circumstances. That meant that a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of

seeking such constitutional reliefs, was a necessary prerequisite on the part of any superior court.

14. Where the reliefs under the alternative mechanism were not adequate or effective, then there was nothing that precluded the adoption of a nuanced approach. What must matter at the end was that a path was chosen that safeguarded a litigant's right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms could offer. That was because, to achieve a harmonious and effective legal framework, it was imperative to strike a judicious balance between the emphasis on providing the initial opportunity for resolution to entities established by law and the assertion of a litigant's right to access the court. However, such convergence required a case-by-case assessment by considering issues such as the nature of the dispute and the adequacy of the alternative dispute mechanism.

15. It was sufficient that the appellant alleged that a right in the Constitution had been infringed or threatened with violation, making it clear that in light of the provisions of the Constitution and the Environment and Land Court Act, the issues raised were within the original jurisdiction of the ELC. That was also why section 3 of the Environmental Management Coordination Act provided that, one of the general principles under the Act was the entitlement to a clean and healthy environment. Section 3(3) of the Environmental Management Coordination Act was even more instructive as it granted any person, who claimed that their right to a clean and healthy environment had been violated, the right to apply to the ELC for redress.

16. There was nothing that barred the appellant from filing a claim before the ELC as he had two options available to him once NEMA was unable to enforce the stop order against the 2nd and 3rd respondents. The first option was to appeal to the NET. The other option was to file a claim before the ELC, which the appellant did, as against both NEMA and KPLC for the claim under the Energy Act. The ELC was thereafter obligated to interrogate his claims on merit and render a determination one way or the other. By not doing so, it fell into error which the Court of Appeal failed to rectify.

17. A party could not move to amend pleadings once a preliminary objection had been raised in regard to pleadings filed to confer jurisdiction. Preliminary objections were raised because, upon determination, the outcome would have a major bearing on the status of a claim, as the preliminary objection raised a pure point of law which if successful, would dispose of the petition as it did in the instant case.

18. Article 70(1) of the Constitution provided for the *locus standi* in the enforcement of environmental rights by way of a constitutional petition. Article 70(1) generously allocated the appellant the right to file his constitutional petition before the ELC and from the orders that the appellant had set out in his constitutional petition, the remedies of appealing to NEMA and EPRA, respectively, were not efficacious and adequate. Section 129 of the Environmental Management Coordination Act provided for matters that may require

determination by NET. They were all related to licenses and not constitutional violations as was the case in the instant dispute. The fact that licenses may well be a part of the appellant's petition did not in any way outlaw the hearing and determination of it by ELC.

19. Section 106 of the Energy Act provided that appeals to the EPT from decisions by EPRA shall be in relation to issues relating to licensing while section 25 of the Act generally granted jurisdiction to the EPT to hear and determine disputes and appeals in accordance with the Act or any other written law. Determination of allegations of constitutional violations could not be such issues as to attract the Tribunal's attention.

20. Since the appellant's claim was multifaceted, by his own choice, the most appropriate forum for the determination of his petition was the ELC which would then interrogate and determine them based on such facts and law as shall be placed before it. The superior courts therefore erred by finding that the appellant had not demonstrated that he would not have received efficacious relief if he had followed the dispute resolution process outlined in the Energy Act. That was because though the claims against the 2nd and 3rd respondents were intertwined and arose from the same series of events, it would have been impractical to expect the appellant to appeal the decisions of both NEMA and KPLC before two different tribunals.

21. It was the 2nd and 3rd respondents alleged unabated mining activities on the suit property that led them to dump waste or effluent onto the appellant's property. While conducting those mining activities, the 2nd and 3rd respondents allegedly requested electricity connection from KPLC, who then proceeded to dig holes and erect electricity poles on his property. Those matters were contested in the context of the claims of constitutional violations and only the ELC could properly hear and determine them.

22. It was upon a party to frame its pleadings as it deemed fit but in doing so should not create such a disjointed case that a court had to struggle in the identification of each facet thereof. Elegant pleadings also ensured that the responding party had a clear case to answer to. A court on its part, must not descend to the arena of litigation but instead determine all contested matters judicially and in a multifaceted claim, address each issue within its jurisdiction including remitting parts of the claim to the relevant statutory body while retaining what was properly before it. In the instant case, the issues raised were well within the ELC's jurisdiction to determine and there was no reason to either reserve or remit any of them.

23. The petition filed before the ELC should be determined on its merits with respect to the alleged violations of the appellant's rights *inter alia* to a healthy and clean environment as well as his right to property for the acts committed by KPLC and whether the acts of NEMA of failing to enforce the stop order, which created a legitimate expectation that his concerns would be addressed.

Appeal allowed.

Orders

i. *The petition of appeal dated March 16, 2023 and lodged on March 20, 2023 was allowed and the judgment of the Court of Appeal dated February 7, 2023 was set aside in entirety as was the ruling of the ELC dated February 2, 2021.*

ii. *The matter was remitted to the ELC at Kisumu for hearing and determination by any judge other than Ombwayo, J on the alleged constitutional violations highlighted and in conformity with the instant judgment.*

iii. *In view of the time taken in determining the issues raised by the appellant, the court directed that the hearing before the ELC shall be conducted expeditiously and on a priority basis.*

iv. *Each party shall bear its costs at the ELC, Court of Appeal and the instant court.*

v. *The court directed that the sum of Kshs 6,000 deposited as security for costs in the appeal therein be refunded to the appellant.*

Citations

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1. *Kiragu, Ananias N v Eric Mugambi, Franklin Mwirigi & Martin Njeru* Civil Appeal 59 of 2016; [2019] KECA 911 (KLR) - (Mentioned)
2. *Borbor & 2 others v National Environment Management Authority* Environment and Land Judicial Review Case 2 of 2022; [2022] KEELC 3947 (KLR) - (Mentioned)
3. *Busia Sugar Industries Limited v West Kenya Sugar Limited,Tejveer Singh Rai & Jaswant Singh Rai* Judicial Review 4 of 2016; [2018] KEHC 2622 (KLR) - (Mentioned)
4. *Cortec Mining Kenya Limited v Cabinet Secretary, Ministry Of Mining & Attorney General* Miscellaneous Application 298 of 2013; [2013] KEHC 6504 (KLR) - (Mentioned)
5. *Eaton Towers Kenya Limited v Kasing'a & 5 others* Civil Appeal 49 of 2016; [2022] KECA 861 (KLR) - (Mentioned)
6. *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* Application 5 of 2014; [2014] KESC 30 (KLR) - (Mentioned)
7. *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* Petition 64 of 2013; [2024] KEHC 6648 (KLR) - (Mentioned)
8. *Ken Kasinga v Daniel Kiplagat Kirui,National Environment Management Authority,Eaton Towers Kenya Ltd,Communications Commission of Kenya,Nakuru County Government & Peman Consultants Limited* Petition 50 of 2013; [2014] KEHC 4427 (KLR) - (Mentioned)
9. *Kenya Breweries Limited v Lawrence Ndutu & 6000 Others* Civil Application 283 of 2013; [2014] KECA 212 (KLR) - (Mentioned)
10. *Kenya Revenue Authority, Commissioner of Customs Services & Julius Musyoki v Darasa Investments Limited* Civil Appeal 24 of 2018; [2018] KECA 358 (KLR) - (Mentioned)

11. *Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others* Civil Appeal 153 of 2019; [2020] KECA 875 (KLR) - (Mentioned)
12. *Kimani & 2 others v Kenya Airports Authority & 3 others* Petition 11 of 2019; [2021] KESC 43 (KLR) - (Mentioned)
13. *Macharia, Samuel Kamau & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] eKLR - (Mentioned)
14. *Muslims for Human Rights v Attorney General & 2 others* Petition E168 of 2018; [2022] KEHC 12775 (KLR) - (Mentioned)
15. *National Cereals & Produce Board v Erad Suppliers & General Contracts Limited* Civil Appeal 9 of 2012; [2014] KECA 473 (KLR) - (Mentioned)
16. *National Environmental Tribunal v Overlook Management Limited, Silver Sand Camping Site Limited, National Environmental Management Authority, Malindi Green Town Movement, Malindi South Residents Association & Sycamore Investment Limited* Civil Appeal 9 of 2011; [2019] KECA 1005 (KLR) - (Mentioned)
17. *Ngugi v Commissioner of Lands; Owindo & 63 others (Interested Parties)* Petition 9 of 2019; [2023] KESC 20 (KLR) - (Mentioned)
18. *Okoiti & 2 others v Attorney General & 14 others* Petition 2 (E002) of 2021; [2023] KESC 13 (KLR) - (Mentioned)
19. *Orata International Limited v National Environment Management Authority* Miscellaneous Civil Application 21 of 2019; [2019] KEELC 2599 (KLR) - (Mentioned)
20. *Peter Oduor Ngoge vs Francis Ole Kaparo & 5 Others* Petition 2 of 2012; [2012] KESC 7 (KLR)
21. *R v National Environment Management Authority Kilifi County & National Environment Management Authority* Environment & Land Case 196 of 2018; [2020] KEELC 3010 (KLR) - (Mentioned)
22. *Rai, Jasbir Singh & 3 others v Tarlochan Singh Rai & 4 others* Petition 4 of 2012: [2014] eKLR - (Mentioned)
23. *Ramogi, William Odhiambo & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR Constitutional Petition 159 of 2018 & 201 of 2019 (Consolidated) - (Explained)
24. *Republic v Kenya Revenue Authority Ex Parte Style Industries Limited* Miscellaneous Application 45 of 2019; [2019] KEHC 11965 (KLR) - (Mentioned)
25. *Suleiman Said Shahbal v Independent Electoral & Boundaries Commission (IEBC), Mwadime Mwashigadi & Hassan Ali Joho* Election Petition 8 of 2013; [2013] KEHC 3488 (KLR) - (Mentioned)

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1. *England v Louisiana State Board of Medical Examiners* 375 US 411 (1964) - (Mentioned)

2. *Railroad Commission of Texas v Pullman Co* 312 US 496; 61 S Ct 643, 85 L Ed 971 (1941) - (Mentioned)

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Statutes

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1. Constitution of Kenya articles 10, 27 (1); 28; 35(1); 42; 43; 47; 69(1); 73; 75; 163(4) - (Interpreted)
2. Energy (Complaints and Dispute Resolution) Regulations, 2012 (cap 314 Sub Leg) regulations 4, 7- (Interpreted)
3. Energy Act (cap 314) sections 3(1); 10; 11(e) (f)(i)(k)(l); 23; 24; 36; 40; 42; 224(2)(e) - (Interpreted)
4. Environment and Land Court Act (cap 8D) section 13(1)(2) - (Interpreted)
5. Environmental Management and Co-Ordination Act (cap 387) sections 3, 118, 129 (1)(2)(3)(4); 130 - (Cited)
6. Fair Administrative Action Act (cap 7L) sections 2, 9(2)(3)- (Interpreted)
7. Mining Act (cap 306) In general - (Cited)
8. Physical and Land Use Planning Act (cap 303) sections 15, 19, 38- (Interpreted)

Advocates

Attorney General for for the 1st, 4th, 5th and 7th respondents
Bruce Odeny & Company Advocates for for the 2nd respondent
Odongo Okal and Company Advocates for for the 3rd respondent
Ms Sakami for for the 6th respondent (National Environment and Management Authority)
Mr Ngara (S Ngara & Associates Law) for for the 8th respondent
Ms Emily Kinama (c/o Katiba Institute) for for the 3rd interested party

December 28, 2023, the Court delivered the following Judgment:

A. Introduction

1. The Petition of Appeal dated 16th March 2023 and lodged on 20th March 2023 is brought pursuant to the provisions of article 163(4)(a) of the *Constitution*. The appellant seeks orders to set aside the Judgment of the Court of Appeal at Kisumu ((Kiage, Mumbi Ngugi & Tuiyott, JJ A) in Civil Appeal No E042 of 2021 delivered on 7th February 2023, which affirmed the decision - a Ruling-by the Environment and Land Court (ELC) at Kisumu (Ombwayo, J) - in ELC Petition No 7 of 2020 delivered on 2nd February 2021.

B. Background

2. Abidha Nicholus, the appellant, is the registered proprietor of L.R No. Siaya/Ramba/788 and also has interest in the lower parts of LR No Siaya/Ramba/719 and 720, both bordering River Odundu, Ramba in Rarieda Sub-County within Siaya County. The appellant claims that in 2018, the 2nd and 3rd respondents proceeded to survey LR No Siaya/Ramba/716, which contained a shaft left by entities that had previously engaged in mining activities between 1988 and 2008 in the Ramba area. After the survey, in 2019, the 2nd and 3rd respondents commenced mining operations in the area including on L.R No. Siaya/Ramba/716.

3. The appellant further claims that, he and other concerned parties questioned Joseph Andeere Nyaanga and Owang Isaak Ogweyo, the 2nd and 3rd respondents', respectively, on the licenses/permits or authorizations issued for the mining activities. Their concerns were allegedly ignored by the 2nd and 3rd respondents.

4. Appalled by the non-response to their concerns, on 9th April 2019, the appellant on his behalf and also on behalf of members of Ramba Community, while invoking the provisions of Article 35(1) of the *Constitution*, and with the intention to conserve the environment, wrote to officers of the Ministry of Petroleum and Mining, Ministry of Environment and Forestry and National Environmental Management Authority(NEMA), the 4th, 5th and 6th respondents, requesting information about the mining activities that were being carried out in the Ramba area. The 4th and 5th respondents did not respond to the letter and also failed to give any explanation as to why they so declined.

5. Undeterred, on 23rd July 2019, the appellant wrote to the Ombudsman/Commission on Administrative Justice (CAJ), the 2nd Interested Party, seeking its intervention in highlighting the appellant's grievance by reporting the 4th, 5th and 6th respondents' failure to respond to his letter, or even giving explanation for such failure. The appellant's letter prompted CAJ to write to the 4th, 5th, and 6th respondents demanding an explanation on the issues raised in the letter dated 23rd July 2019.

6. The action by CAJ provoked NEMA to respond through a letter dated 26th August 2019 whereby it confirmed that the 2nd and 3rd respondents were indeed conducting mining activities in Ramba and had submitted an Environmental Impact Assessment (EIA) Report for an existing small-scale artisanal gold mine at San-Martin, Ramba, specifically on LR No Siaya/Ramba/711, which activity was illegal for want of authorization from NEMA and that of the 4th respondent, the Ministry of Mining and Petroleum. NEMA further confirmed that Environmental Impact Assessment (EIA) Report No NEMA/PR/5/2/22027 had not

been approved and proceeded to issue a stop order halting the operations of the 2nd and 3rd respondents effective 31st July 2019.

7. The stop orders notwithstanding, according to the appellant, the 2nd and 3rd respondents continued with their mining operations. In or around June 2020, the appellant claims that he received information that the 4th respondent had renewed prospecting license No PL/2019/0226 covering Ramba Area for an entity known as AfriOre International (Barbados) Ltd, which license was later transferred to Acacia Exploration Kenya Limited. NEMA then issued Environmental Impact License No NEMA/EIA/PSL/9290 over the same area, to another entity not related to the 2nd and 3rd respondents. The appellant proceeded to inquire from Acacia Exploration Kenya Limited on whether the activities it was carrying out were connected to the 2nd and 3rd respondents. Acacia Exploration Kenya Ltd denied any connection with the 2nd and 3rd respondents.

8. Consequently, on 2nd July 2020, the appellant again wrote to the 1st, 5th, 6th, and 7th respondents informing them about the irregular mining activities by the 2nd and 3rd respondents and also raised other issues, namely; the need to identify the investors in the mining activities; public participation prior thereto, if any; lack of licenses/permits or approvals from the 4th and 5th respondents; insecurity and health issues; child labour and non-compliance with labour laws; demarcation of public utilities; environmental impact assessment; environmental degradation/pollution to land, air, water, and associated flora and fauna-as well as the human environment; individual health and safety, local community lifestyles, cultural survival, social order and economic wellbeing; disposal of wastes and effluent in the nearby river; the benefits from the royalty which the local community is entitled to under the *Mining Act*; and post mining rehabilitation planning. Even after raising all these issues, the appellant's letter was not responded to.

9. The appellant furthermore claims that the 1st, 4th, 5th and 6th respondents have continued to issue licenses since 1988 for mineral rights in Ramba area thereby causing harm and loss to residents of the area.

10. The appellant also claims that the 2nd and 3rd respondents invaded his property, LR No Siaya/Ramba/788 and have since proceeded to excavate and mold concretes therein. Additionally, the 2nd and 3rd respondents together with the 8th respondent have trespassed onto the land, dug holes and erected electricity poles thereon, without the appellant's consent.

11. The appellant adds that the 2nd and 3rd respondents have continued to damp waste and/or effluent from their mining shaft on LR No Siaya/Ramba/788 as well as LR Nos Siaya/Ramba/719 and 720 posing health risks. Further, that the 2nd and 3rd respondents positioned their agents and workers to process ore/ and or gold into the nearby parcels of land which overflow into the subject land and also drain into the river without taking any

safety precautions or measures. And that the excavation, molding of concretes, installation of structures by the 2nd and 3rd respondents and erection of electricity poles by the 8th respondent are acts of trespass.

12. The appellant lastly avers that the 1st, 4th, 5th, 6th, 7th respondents and 8th respondents, by their acts, deprived him and other members of Ramba area of equal enjoyment and protection of the law by allowing unlicensed/unpermitted mining activities and wanton destruction of the environment.

C. Litigation History

i. Proceedings at the Environment and Land Court (ELC)

13. The appellant, aggrieved by the mining activities aforesaid, filed before the Environment and Land Court Kisumu Petition No 7 of 2020 where he claimed violation of various constitutional rights and statutory provisions under articles 10, 27 (1), 28, 35 (1), 42, 43, 47, 69 (1), 73 and 75 of the *Constitution* and sought various declaratory orders as well as judicial review orders against the respondents to that effect.

14. The various reliefs sought are reproduced verbatim hereunder as they are central to this appeal. They are:

    (i) A declaration that the 1st to 7th respondents have jointly and severally violated and continue to violate the rights and fundamental freedoms of the appellant and the Ramba Community contrary to articles 10, 27 (1), 28, 35 (1), 42, 43, 47, 69 (1), 73 and 75 of the *Constitution*.

    (ii) A declaration that the appellant's right to property has been violated by the 2nd, 3rd and 8th respondents.

    (iii) A declaration that the mining activities including leaching and gold processing carried out in Ramba Area by the 2nd & 3rd respondents have been irregular, illegal and unconstitutional.

    (iv) A declaration that the 1st, 4th, 5th, 6th and 7th respondents are guilty of failing to enforce and abide by relevant provisions of the *Constitution*, *Environmental Management Coordination Act* (EMCA), *Mining Act*, *Fair Administrative Actions Ac*t, *Access to Information Act* and all international treaties and conventions as far as mining activities in Ramba Area is concerned.

    (v) An order of mandamus compelling the 1st, 4th, 5th and 6th respondents to supply the petitioner or any member of Ramba Area with all mining records touching on Ramba Area since 1988.

(vi) An order of certiorari do issue to bring to this court for purposes of quashing any decision by the 4th, 5th and 6th respondents to issue any permit and/or licenses for mineral rights in Ramba Area issued in blatant breach of the *Mining Act*, *EMCA* and other relevant Treaties and Conventions.

(vii) An order of prohibition prohibiting the 4th, 5th and 6th respondents from supporting, supervising and/or issuing any license or permit for mineral rights in Ramba Area without public participation and in blatant violation of the *Constitution*, *Mining Act* and *EMCA*.

(viii) A conservatory order restraining/prohibiting the 1st and 2nd respondents either by themselves, agents, hirelings, hoodlums, servants and workers or persons working on their behalf from continuing with threats to the life of the appellant, disposal of wastes/effluents on Plots Ramba 788, 719 and River Odundu; trespass on Plot 788 or any actions/activities likely to interfere with the appellant's rights to life, property and clean and healthy environment as protected under Articles 40 and 42 of the *Constitution*.

(ix) An order under article70 (2) (a) & (b) of the *Constitution* compelling the 1st, 2nd, 3rd, 4th, 5th and 6th respondents to restore to the original state or at least to an environmental apt status the areas within Ramba which have been polluted, degraded and violated because of reconnaissance, prospecting, mining, leaching or gold processing activities. And to stop, prevent and discontinue further pollution and degradation occasioned by the 2nd and 3rd respondent or any other person/ or entity mining, prospecting, leaching, processing gold or conducting connected activities without compliance with the *Constitution*, the *Mining Act* and EMCA.

(x) An order that the 2nd, 3rd and 8th respondent do pay damages for trespass and/or infringement of the appellant's right to property known as LR Ramba/No 788 in Rarieda Sub County.

(xi) An order for compensation and/or damages:

(a) Against the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th respondents under article 70 (2) (c) of the *Constitution* for violation of the rights of the appellant and Residents of Ramba Area under article 42, 43(1), 69(1) and 70 (1) of the *Constitution*;

(b) Against the 1st, 4th, ,5th, 6th and 7th respondents for violating his rights under article 47 of the *Constitution* envisaged under section 11(1) (j) & (2) (d) of the Fair Administrative Actions Act; and

(c) Compensation for members of Ramba Area for the historical sufferings, damages, loss of lives and environmental degradation/pollution to land, air and water.

(xii) An order that costs of this petition be borne by the respondents.

(xiii) Any other relief that this Honorable Court may deem fit to issue for the interest of justice.

15. Two separate preliminary objections were filed by the 2nd and 8th respondents challenging the jurisdiction of the ELC to hear and determine the petition. The first preliminary objection was raised by the 2nd respondent, where he claimed that the portions of the appellant's claim dealing with the environment were within the mandate of the National Environment Tribunal (NET) as provided for under section 129 (1), (2), (3) & (4) of the *EMCA* and should therefore be determined by NET.

16. The second preliminary objection, by 8th respondent, challenged the jurisdiction of the ELC on the grounds that the petition offended the provisions of sections 3 (1), 10, 11 (e) (f) (i) (k) and (l), 23, 24, 36, 40, 42 and 224 (2) (e) of the *Energy Act* ,2019 together with regulations 2, 4, 7 and 9 of the Energy (Complaints and Dispute Resolution) Regulations, 2012 as read with articles 159 (2) (c) and 169 (1) (d) of the *Constitution*; and sections 9(2) and (3) of the *Fair Administrative Act*, 2015.

17. The appellant opposed the objections. As regards the 2nd respondent's objection, he contended that because article 162 (b) of the *Constitution* gives the ELC jurisdiction to hear and determine disputes relating to the environment and the use and occupation of and title to land, it is therefore mandated, under Articles 23 (1) and 70 of the *Constitution*, to give a legal remedy in case of breaches of the right to a clean and healthy environment recognized and protected under Article 42 of the *Constitution*.

18. As for the 8th respondent's objection, the appellant argued that the primary violation attributed to the 8th respondent was the infringement of his right to property contrary to article 40 of the *Constitution* as well as Sections 46, 47 and 48 of the *Energy Act*. He thus claimed that, article 162 (2) (b) of the *Constitution* gives the court jurisdiction because his claim touched on enforcement of rights and freedoms under the *Constitution*.

19. Upon considering the two preliminary objections, the trial court (Ombwayo, J) in a Ruling dated 2nd February 2021, found that the 2nd and 8th respondents' objections were merited. By first addressing the 8th respondent's objection, the ELC held that the appellant's complaint against the 8th respondent was in respect of way leaves, easements or rights of way in relation to the distribution and supply of electrical energy. The learned trial court judge reasoned

that, since the appellant's grievance involved the placement of electrical posts on his land by the 8th respondent, the Energy and Petroleum Regulatory Authority (EPRA) has the power to entertain the dispute and the court would not assume jurisdiction at the first instance. And if dissatisfied by any decision made by the Authority, the appellant could then move to the Energy and Petroleum Tribunal (EPT) for redress on appeal. Additionally, the trial court found that Section 9(2) and (3) of the *Fair Administration Act*, 2015, transfers jurisdiction for such disputes from the ELC and places jurisdiction on the EPT initially. Consequently, the trial court struck out the petition against the 8th respondent for the reason that there existed an alternative mechanism for resolving the dispute.

20. As regards the preliminary objection raised by the 2nd respondent, the trial court found that the dispute before the court primarily focused on the mining activities of the 2nd and 3rd respondents in the Ramba area, which involved gold processing and alleged resultant environmental pollution. The trial court found that this issue falls within the jurisdiction of NEMA as it revolves around issuance of licenses and the result of such issuance. While acknowledging the trial court's jurisdiction, under Articles 22, 162(2) (b) of the *Constitution* and section 13(1) (2) of the *ELC Act*, to hear and determine environmental disputes including those related to land use, occupation of, and title to land, the trial court clarified that its jurisdiction in relation to disputes reserved for NEMA and the NET is restricted to appeals emanating from the former. Consequently, the trial court concluded that the appellant had not exhausted the available remedies set out in *EMCA* before filing his petition. The 2nd respondent's preliminary objection was thus upheld, leading to the striking out of the appellant's petition for want of jurisdiction.

ii. Proceedings at the Court of Appeal

21. Aggrieved by the decision of the ELC, the appellant filed an appeal, Kisumu Civil Appeal No. 42 of 2021, challenging the ELC's decision on thirteen (13) grounds. By consensus of the parties, the grounds were condensed to the following: whether the court's determination was sua sponte and without reasons; whether the court ignored the issues raised in the petition; whether the court erred in finding that it lacked jurisdiction regarding the 2nd respondent's preliminary objection; and whether the court erred in abstaining from considering issues raised against the 8th respondent.

22. In a judgment delivered on 3rd February, 2023 penned by Tuiyott JA (Kiage and Mumbi Ngugi JJA concurring) the Court of Appeal identified four issues for determination:

    (i) Did the appellant exhaust the dispute resolution mechanism provided by EMCA in respect to his complaints regarding the right to a clean and healthy environment?

(ii) Were the complaints against KPLC resolvable, in the first instance, under the dispute resolution mechanism provided under the *Energy Act* and if so, did the appellant exhaust that mechanism?

(iii) Did the appellant's petition disclose a cause of action or actions that fell outside EMCA and the *Energy Act*? and

(iv) If the appellant had failed to exhaust the alternative dispute resolution mechanisms available under EMCA or the *Energy Act* or both, but the petition nevertheless raised other issues outside the two statutes, what orders should the ELC have made?

23. On the issue as to whether the appellant exhausted the dispute resolution mechanism provided by *EMCA* in respect of his complaints regarding the right to a clean and healthy environment, the Court of Appeal was of the same view as the ELC's finding that, at the heart of the appellant's complaint against NEMA was that NEMA failed to enforce the stop order it had issued against the 1st and 2nd respondents. The appellate court also observed that, by dint of Section 9(1) of EMCA, NEMA plays an important role of exercising general supervision and co-ordination over all matters relating to the environment and is the principal implementor of government policies relating to the environment.

24. It was the appellate court's other finding that, by dint of Section 118 of *EMCA*, NEMA grants powers to an environmental inspector to prosecute an offender by instituting and undertaking criminal proceedings where it is alleged that offences listed under the Act have been committed. Consequently, NEMA, through an environmental inspector, should have instituted and undertaken criminal proceedings against the 2nd and 3rd respondents should they have failed to comply with the stop order. In addition, the appellate court observed that, having failed to make the decision to do so, NEMA would be failing in its duty and its inaction and dereliction of duty could be a proper subject of proceedings by the appellant against NEMA. The appellate court further found that in so far as the appellant faulted the decision by NEMA in regard to the issuance of licenses and permits to the miners, those issues fell squarely within the jurisdiction of NET, and upheld the ELC's finding on the same. The appellate court furthermore clarified that it is only when there is a decision not to enforce a stop order that such a decision would fall within the contemplation of Section 129(2) of *EMCA* afore stated.

25. With regard to whether the complaints against KPLC were resolvable in the first instance, under the dispute resolution mechanism provided under the *Energy Act* and whether the appellant ought to have exhausted that mechanism, the Court of Appeal affirmed the trial court's analysis of Section 3 of the *Energy Act* and its finding that the said Act prevails over any other Act of Parliament or law with regard to disputes over energy and petroleum but not over the *Constitution*. The appellate court, while acknowledging the appellant's

grievance against KPLC for allegedly trespassing on his property and unlawfully digging holes and erecting power lines on it, stated that there exists a three- tiered mechanism as a dispute resolution mechanism under the *Energy Act*. The first tier involves the raising of a complaint with EPRA under Regulations 4 and 7 of the *Energy (Complaints and Dispute Resolution) Regulations, 2012* and in that regard, since the complaint by the appellant against KPLC relates to a way leave for transmission of electricity, then the first forum for the resolution of that dispute should have been EPRA.

26. The Court of Appeal further observed that, should a party be dissatisfied with EPRA's decision, then such a party can follow the second process which is a right of appeal to the EPT whose jurisdiction is provided under Section 36 of the *Energy Act*. And that it is only upon exhaustion of the appellate process before the Tribunal that an aggrieved party can further escalate the matter to the High Court, which is the third tier and as provided for under Section 37(3) of the *Energy Act*. Thus, in affirming the trial court's finding, the Court of Appeal reasoned that, the appellant did not demonstrate that he would not have obtained efficacious relief had he taken the route envisaged in the *Energy Act* and the ELC was correct in declining jurisdiction in respect of the grievances against KPLC.

27. Additionally, the Court of Appeal acknowledged that, even after determining that the disputes against NEMA and KPLC needed to be heard elsewhere, there were other disputes raised by the appellant that would fall outside those frameworks. These disputes, as pointed out, included the complaints that the 2nd and 3rd respondents breached his rights by violating the *Mining Act* and specifically breached the appellant's rights to life, right to property, right to access to information, and fair administrative action. The appellate court noted that even if some of these issues were properly before the trial court, questions would still arise concerning the nature of the orders that the trial court should have made after declining to entertain the environment and energy disputes, which were the core issues being raised in the appeal before it.

28. Furthermore, adopting the findings of this Court in Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others SC Petition No 3 of 2020 [2020] eKLR (*The Benson Ambuti Case) and Eaton Towers Limited v Kasing'a & 5 others* (Civil Appeal 49 of 2016) [2022] KECA 645 (KLR) (28th April 2022) (Judgment)), the appellate court held that the responsibility to bring a petition that was not multifaceted was always on the appellant. That, when the appellant was confronted with the objection to the petition, he had the option to seek leave to amend his petition, trimming off matters that belonged elsewhere in the first instance and having reached the correct decision that it lacked original jurisdiction with respect to certain claims in the petition, then the trial court had no business splitting the petition on behalf of the appellant to retain matters it would properly have been seized of.

29. In conclusion, the Court of Appeal held that nothing forecloses the appellant, subject to the law of limitation, from filing another suit, excluding the matters under *EMCA* and the *Energy Act* and that the trial court's final order was not made sua sponte but was a valid decision following the trial court's determination that it lacked original jurisdiction with respect to some of the claims in the multifarious petition.

iii. Proceedings at the Supreme Court

30. Aggrieved by the Judgment and Orders of the Court of Appeal, the appellant has now filed this Petition of Appeal dated 10th March 2023 arguing that the points of law to be determined before this Court are on the:

(a) Breach of Articles 22, 23, 27 (1), 70, and 162 (2) (b) of the *Constitution* read together with sections 13 of the ELC Act and section 3 of EMCA on jurisdiction of the ELC regarding environmental disputes/claims.

(b) Breach of Articles 27 (1), 35, and 47 of the *Constitution* regarding access to information and fair administrative action in light of the 6th respondent's administrative silence and or inaction.

(c) Breach of right to fair hearing contrary to Article 50 (1) of the *Constitution*.

(d) Breach of right to access to justice enshrined under article 48 of the *Constitution* premised on the application of the doctrine of sua sponte.

(e) Breach of article 163 (7) of the *Constitution*.

31. As a result, the appellant seeks the following reliefs:

(i) An order setting aside the Court of Appeal's decision made on 3rd February 2023.

(ii) An order pursuant to Section 22 of the *Supreme Court Act* remitting the Petition dated 1st September 2019 for hearing before the Environment and Land Court by any Judge other than Justice Anthony Ombwayo.

(iii) Any other order deemed appropriate by the Honourable Court.

(iv) Costs be awarded to the appellant.

32. In opposition, the 1st, 4th, 5th & 7th respondents filed grounds of objection dated June 19, 2023. The 2nd respondent filed a replying affidavit sworn on April 24, 2023 while the 3rd respondent filed grounds of opposition dated April 24, 2023. The 8th respondent on its part filed a notice of preliminary objection dated April 12, 2023, grounds of objection dated April 12, 2023, and replying affidavit sworn by Jude Ochieng on April 17, 2023

primarily challenging this Court's jurisdiction to hear the instant appeal as of right. The 3rd Interested party filed a replying affidavit sworn on April 10, 2023 in support of the petition. In rejoinder, the appellant filed a further affidavit sworn on 22nd May 2023. The grounds for and against the appeal as urged by the parties are set out in detail as part of the parties' respective submissions below.

D. Parties' Submissions

i. appellant's case

33. The appellant relies on the averments in his further affidavit sworn on May 22, 2023, his written submissions dated June 8, 2023 and filed on June 12, 2023 as well as further submissions dated July 3, 2023 and filed on July 7, 2023. Therein, he addresses five issues for determination by the Court. They are;

    (i) Whether this Court has jurisdiction to hear and determine the petition.

    (ii) Whether the Court of Appeal breached Articles 22, 23, 27(1), 70, and 162(2)(b) of the *Constitution* as read together with Section 13 of the *Environment and Land Court Act* and Section 3 of EMCA on jurisdiction of the ELC regarding claims of administrative silence against the 6th respondent.

    (iii) Whether there was breach of articles 27(1), 35, and 47 of the *Constitution* regarding to access to information and fair administrative action in light of the NEMA administrative silence and/or inaction.

    (iv) Whether there was breach of the right to access to justice and fair hearing contrary to article 19, 22(1) & (2), 27(1), 48 and 50(1) of the *Constitution*.

    (v) Whether there was breach of article 163(7) of the *Constitution*.

    (vi) Whether the Court erred in awarding costs against the appellant.

34. Regarding the issue of the jurisdiction of this Court to consider his petition, the appellant contends that his case involves constitutional issues falling within the purview of this Court's jurisdiction under article 163(4)(a) of the *Constitution*. The constitutional matters for this Court to address are said to include the Court of Appeal's omission to address the jurisdictional question outlined in article 70(1) of the *Constitution* when determining the forum for claims of article 42 violations which provides the right to a clean and healthy environment. Furthermore, the appellant asserts that other constitutional issues requiring this Court's attention include the NET'S ability to enforce articles 35 and 47 of the *Constitution* concerning access to information and fair administrative action in light of

NEMA's administrative silence and failure to enforce its stop order favoring the appellant and Ramba area residents and directed at the 2nd and 3rd respondents.

35. The appellant also raises concerns about the enforcement of article 40 of the *Constitution* against the 8th respondent, KPLC. He argues that both the Court of Appeal and ELC overlooked the fact that the claim against KPLC in the trial court was beyond the *Energy Act*'s scope, if read with article 40(2) of the *Constitution*.

36. The appellant has furthermore raised the question whether the Court of Appeal addressed the trial court's action, sua sponte, and whether the latter failed to provide reasons for its final decision. The appellant asserts that the Court of Appeal erroneously upheld the ELC's decision, which involved striking out his entire petition without allowing parties to be heard on the unaffected sections of the appeal.

37. On the issue of whether the Court of Appeal breached articles 22, 23, 27(1), 70, and 162(2)(b) of the *Constitution* as read together with section 13 of the *Environment and Land Court Act* and Section 3 of EMCA on jurisdiction of the ELC regarding claims of administrative silence against NEMA, the appellant submits that ELC and the Court of Appeal ignored the scope of the preliminary objection raised by the 2nd respondent thereby intentionally ignoring the jurisdiction conferred under article 70 of the *Constitution* which grants original jurisdiction to the ELC to address and resolve violations of rights protected under article 42 of the *Constitution* and that this jurisdiction is also explicitly outlined in Section 13 of the ELC Act as well as Section 3 of EMCA. Consequently, the appellant argues that the Court of Appeal erred in not applying articles 22, 23, 27(1), and 42, in conjunction with articles 69, 70, and 162(2)(b) of the *Constitution*.

38. The Court of Appeal, according to the appellant, also incorrectly concluded that the enforcement of the 6th respondent's stop order fell under NEMA's purview and was not enforceable under articles 42, 47, and 70 of *the Constitution* and emphasizes that the jurisdiction provided by article 70 is applicable even though there exist other dispute resolution mechanisms on the same issues. On this submission, he relies on this Court's decision in the Benson Ambuti Case (*supra*) where the Court held that the jurisdiction by the ELC to hear and determine claims *inter alia* relating to breaches of the right to a clean and healthy environment.

39. The appellant furthermore contends that, the Court of Appeal made an error in applying the reliefs test to displace article 70 of the *Constitution* and this was done without considering that the petition had sought to enforce Articles 35 and 47 within the context of rights under Article 42 of the *Constitution*. In addition, that the Court of Appeal ignored the 6th respondent's admission that the 2nd and 3rd respondents had not been issued with any license or permit to undertake the impugned activities and so the issue was beyond contestation.

40. On the issue of breach of articles 27 (1), 35, and 47 of *the Constitution* pertaining to access to information and fair administrative silence and/or inaction, the appellant submits that the administrative silence by NEMA did not amount to a decision within the meaning of Section 9 of the Fair Administrative Actions Act. To the contrary, he argues that the failure to enforce the said stop order issued by NEMA was an administrative silence enforceable under the right to fair administrative action pursuant to article 47 of the *the Constitution*.

41. The appellant thus submits in the above context that, the decisions by the superior courts limited the enforcement of his rights to access information and fair administrative action, as relates to the stop order issued by NEMA which stop order affected his constitutional right under article 42 of the *Constitution*. That NEMA also communicated the stop order but failed to provide the order itself, creating a legitimate expectation nonetheless that it would enforce it in his favour. He thus argues that a legitimate expectation having arisen, then it was enforceable under article 47 of the *Constitution* and not under section 129(2) of *EMCA*. In that regard, the appellant argues that the Court of Appeal erred in finding that the silence by NEMA amounted to a decision appealable under section 129(2) of *EMCA*.

42. The appellant furthermore underscores the point that, the trial court allowed the preliminary objection raised by the 2nd respondent on grounds that environmental issues under EMCA should always be referred to the 6th respondent at the first instance. It is his contention on the contrary that the said objection was ripe for dismissal since the jurisdiction of ELC, as enshrined in article 70 (1) of the *Constitution* and provided under sections 3 (2) and 13 of *EMCA*, is extensive enough to address questions of fair administrative actions relating to the right to clean and healthy environment raised in the petition.

43. On the issue of breach of the right to a fair hearing and access to justice contrary to articles 50 (1) and 48 of the *Constitution*, the appellant submits that the ELC and the Court of Appeal acted sua sponte in striking out his entire petition without affording the parties the right to be heard. He emphasizes that the preliminary objection only targeted specific issues relating to the ELC's jurisdiction concerning environmental matters and despite this limited scope, the Court of Appeal erred in upholding ELC's decision without considering the error committed by that court and properly pointed out by the appellant.

44. In challenging the Court of Appeal's findings, the appellant also contends that the said court, in finding that the appellant could pursue the issues in the petition afresh before the court subject to the law of limitation, infringes upon his right to a fair hearing. He argues that this approach imposes new processes and obstacles, including limitations under the law, despite the appellant initially and properly approaching the court within the provisions of articles 70 and 162(2)(b) of the *Constitution*.

45. Additionally, the appellant argues that the Court of Appeal constrained his right to a fair hearing by asserting that matters related to arbitrary entry onto the property by KPLC should be addressed by EPRA, despite the admission by KPLC that EPRA lacked jurisdiction to grant the orders sought, thus limiting the appellant's rights to equal protection of the law under article 27(1), access to justice under article 48 and a fair hearing under article 50(1) of the *Constitution*.

46. On the issue of whether there was a breach of article 163 (7) of the *Constitution*, the appellant states that other courts are bound by the decisions of the Supreme Court. In that regard, he argues that the Court of Appeal departed from this Court's decision in the Benson Ambuti Case (supra) on how a court should deal with multifaceted claims, contrary to article 163(7) of the *Constitution*, thus undermining the appellant's rights under articles 22, 23, 50(1) and 163(7) of the *Constitution*.

47. On the issue of costs, the appellant claims that the appellate court erred in condemning him to pay the costs of the appeal in light of the position taken by the ELC that the petition raised public interest issues. He further submits that the order on costs by the Court of Appeal was punitive in light of the reference by Tuiyott J that 'a party who has deliberately and in bad faith crafted pleadings so as to cheat jurisdiction' ought to bear the costs of his petition. He submits that the harsh words used in the judgment had the effect of punishing, embarrassing and deterring him from pursuing public interest litigation relating to the claims in the petition, contrary to articles 23 and 48 of the *Constitution*. In conclusion, he urges the Court to allow his appeal and grant the reliefs as sought in his petition.

ii. 3rd Interested party's case (In support of the Petition)

48. Katiba Institute, the 3rd interested party's submissions are dated June 20, 2023 and filed on June 21, 2023 wherein they submit on five issues: whether this Court has jurisdiction to hear and determine the matter; whether the Court of Appeal erred in law in finding that the ELC had no jurisdiction to hear and determine the appellant's claims; whether the Court of Appeal erred in law in interpreting the allegations of violation of the appellant's rights under articles 48 and 50(1) of the *Constitution*; whether the Court of Appeal erred in law by failing to uphold article 167(3) of the *Constitution*; and whether the Court of Appeal erred in law in issuing an order of costs against the appellant.

49. On the question of jurisdiction, they submit that this Court has jurisdiction to determine the appeal because the orders sought before the ELC and the Court of Appeal are in line with article 163(4)(a) of the *Constitution* and primarily centered on the interpretation of articles 40, 42, 48, 70 and 162(2) of the *Constitution*. In so saying, the 3rd interested party relies on this Court's decisions in *Samuel Kamau Macharia & another v Kenya Commercial Bank*

Limited & 2 others SC Application No 2 of 2011 [2012] eKLR and Ngugi v Commissioner of Lands; *Owindo & 63 Others (Interested Party)* (Petition 9 of 2019) [2023] KESC 20 (KLR) (31 March 2023) (Judgment).

50. On the issue of whether the Court of Appeal erred in finding that the ELC had no jurisdiction to hear and determine the appellant's claims, the 3rd interested party argues that the Court of Appeal misinterpreted Section 129(2) of EMCA, contending that it wrongly concluded that NET should handle disputes related to NEMA's failure to enforce its stop orders as that section only specifies NET's jurisdiction when NEMA has made a decision, not when the 6th respondent, as happened in the present case, has issued a stop order which the 2nd and 3rd respondents disobeyed. They argue that the appellant was therefore right to challenge NEMA's failure to enforce the stop orders under Article 42 of the *Constitution* and invoking articles 22 and 23 to seek judicial review orders for violation of his right to fair administrative action.

51. Moreover, the 3rd interested party maintains that the Court of Appeal overlooked the ELC's dual jurisdiction—both original and appellate—under article 162(2)(b) of the *Constitution* and Section 13(1) of the *ELC Act*. They argue in that context that, the ELC has the authority, as outlined in section 3(3) of *EMCA*, to interpret matters involving violations of articles 42 and 70 as argued by the appellant.

52. Additionally, the 3rd interested party criticizes the Court of Appeal for wrongly attributing jurisdiction to EPRA over allegations made against KPLC for unlawfully entering the appellant's property. They argue in that regard that, EPRA lacks the authority to grant orders, especially declarations of a violation of the appellant's property rights, as these matters fall under the ELC's jurisdiction according to article 162(2) of the *Constitution*. The 3rd interested party thus asserts that, neither EPRA nor the EPT have the jurisdiction to interpret constitutional provisions or grant remedies under the *Constitution*.

53. Building on the above submission, the 3rd interested party contends that the appellant's rights under articles 48 and 50(1) were violated as he now lacks a forum where he can raise the constitutional violation of his right under article 42 of the *Constitution*, violated by the 2nd and 3rd respondent by proceeding with their mining activities without an EIA licence and with a stop order by NEMA issued against them.

54. The 3rd interested party also submits that the Court of Appeal erred in failing to uphold the provisions of article 163(7) of the *Constitution*, which enshrines the principle of precedence. It is their submission that by failing to uphold the decision by this court in the Benson Ambuti Case (supra) which provides guidance on handling petitions with multifaceted issues.

55. Finally, on the issue of whether the Court of Appeal erred in issuing costs against the appellant, the 3rd interested party argues that this is a public interest matter and there ought not to be any order as to costs.

iii. 1st, 4th, 5th & 7th Respondents' Case

56. The 1st, 4th, 5th, & 7th respondents' submissions are dated 19th June 2023 and were filed on 22nd June 2023. The said respondents' submissions are focused on two issues, which are: whether the instant appeal raised a question of constitutional interpretation or application to warrant determination at this Court; and whether this court ought to remit proceedings for hearing before the ELC by any judge other than Ombwayo, J.

57. They contend that the appeal, which does not identify or specify how the appeal relates to the interpretation and application of the *Constitution*, does not meet the jurisdictional threshold as stipulated under article 163 (4) (a) of the *Constitution*. It is their submission in that context that, the ELC did not have jurisdiction to adjudicate the dispute in the first place, as it was only endowed with supervisory and appellate jurisdiction under Article 165 (6) and (7) of the *Constitution*. Therefore, in the absence of ELC pronouncements on the merits of constitutional breaches, the appellant cannot invoke this Court's jurisdiction under article 163 (4) (a) when superior courts themselves were not vested with the authority to examine the constitutional merits of the dispute.

iv. 2nd respondent's case

58. The 2nd respondent's submissions are dated 3rd July 2023 and filed on 4th July 2023. The 2nd respondent, who also challenges the jurisdiction of this Court on comparable grounds as the 1st, 4th, 5th, and 7th respondents adds that, had the appellant heeded the signal indicated by the preliminary objections before the trial court, he would have had ample time to amend his multifaceted petition.

59. Nevertheless, the 2nd respondent maintains that the appellant's constitutional right to be heard remains unimpeded, and he is at liberty to ventilate any complaint before the appropriate forum, ensuring all statutory remedies are exhausted before moving to any court. He further asserts that the petition is misplaced and geared towards frustrating the respondents from moving on with their project and have been kept in perpetual litigation to their detriment. He therefore prays that the petition be struck out for want of jurisdiction with costs.

v. 3rd respondent's case

60. The 3rd respondent's in written submissions dated 3rd July 2023 and filed on 5th July 2023 challenges this Court's jurisdiction on the same basis as the preceding respondents. In that regard, the 3rd respondent argues that, since the appellant's appeal at the Court of Appeal was dismissed solely due to a lack of jurisdiction—an issue purely based on law—it cannot be considered as having been substantively heard on constitutional matters, thus not justifying this Court's intervention. The 3rd respondent further contends that no question arises regarding which constitutional provision was misinterpreted by the superior courts below, given that the decision of the ELC was founded on the *Energy Act*, 2019 and EMCA only. Consequently, any appeal to this Court should have been limited to certification under article 163 (4) (b) of the *Constitution* which is not the case.

vi. 8th respondent's case

61. The 8th respondents written submissions are dated 21st June 2023 and were filed on 26th June 2023. Similarly, it objects to this Court's jurisdiction since the appeal does not fall within the ambit of article 163 (4) (a) of the *Constitution*. The 8th respondent argues in that context that this appeal is founded on an interlocutory decision of the superior courts that did not delve into any substantive constitutional issues. In support of this proposition, they rely on this Court's decisions in *Paul Mungai Kimani & 2 other v Kenya Airports Authority & 3 others SC Petition No 11 of 2019* [2021] eKLR and *Ananias N Kiragu v Eric Mugambi & 2 others* Civil Application No 10 of 2019 [2020] eKLR.

62. The 8th respondent further contends that the mere invocation of alleged contraventions of constitutional provisions in the appellant's pleadings before this Court does not confer jurisdiction under article 163 (4) (a) of the *Constitution*. It argues that the constitutional issues raised in the petition arise from the appellant's perception and or own interpretation as opposed to the Court of Appeal's declarations.

63. Accordingly, the 8th respondent reiterates the findings of the appellate court, emphasizing that if infringement can be redressed within the legislative framework, it should be the preferred course to follow unless the framework fails to effectively address a litigant's complaint. Additionally, the 8th respondent asserts that, since the appellant, an advocate, did not amend his pleadings to exclude matters falling outside the court's jurisdiction after preliminary objections were raised, it is only just that costs against him should be awarded automatically.

E. Issues for Determination

64. Having considered the 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 appellant has properly invoked this Court's jurisdiction under Article 163(4)(a) of the *Constitution*.

(b) Whether the appellant was required to exhaust the alternative dispute resolution mechanisms under *EMCA* and the *Energy Act* before filing his constitutional petition at the Environment and Land Court.

(c) Whether the Court of Appeal erred in finding that the appellant could amend his petition once a preliminary objection has been raised.

(d) Remedies available to a party in a multifaceted claim.

(e) What orders are to be issued by this court?

(f) Who should bear the costs of this appeal?

We now proceed to address these issues below.

F. Analysis

i. Whether the appellant has properly invoked this Court's jurisdiction under Article 163(4)(a) of *the Constitution*.

65. The respondents have questioned the jurisdiction of this Court to hear and determine this matter. They urge that there is nothing of constitutional interpretation and/or application in the appeal invoking this Court's jurisdiction under article 163(4)(a) of the *Constitution*. Specifically, the 1st, 4th, 5th & 7th respondents assert that the appellant cannot invoke this Court's jurisdiction under article 163 (4) (a) when both the ELC and the Court of Appeal lacked the mandate to examine the merits of the dispute. The 3rd respondent further adds that there is no constitutional provision that was misinterpreted by the superior courts, while the 8th respondent contends that this appeal relies on an interlocutory decision of the superior courts that did not address substantive constitutional issues.

66. On our part, we are alive to the fact that the appellate jurisdiction of this court is as set out in article 163 (4) of the *Constitution*, which provides that:

> " Appeals shall lie from the Court of Appeal to the Supreme Court;

> (a) as of right in any case involving the interpretation or application of this Constitution; and
>
> (b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)."

67. As to what constitutes a matter involving interpretation and application of the *Constitution*, our approach has always been that a specific provision(s) of the *Constitution* must have been an issue for interpretation and/or application by both the High Court and courts of equal status as well as the Court of Appeal. In the *Lawrence Nduttu & 6000 Others v Kenya Breweries Ltd & Anor* SC Petition No 3 of 2012 [2012] eKLR, we thus delineated our jurisdiction under article 163 (4) (a) of the *Constitution* as follows:

> " ... 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 ...
>
> (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 ..."

68. Similarly, our decisions in *Erad Suppliers & General Contractors Ltd v National Cereals & Produce Board* SC Petition No. 5 of 2012 [2012] eKLR, *Hassan Ali Joho & Another v. Suleiman Said & Others* SC Petition No 10 of 2013 [2014] eKLR and *Gatirau Peter Munya v Dickson M Kithinji & Others* SC Application No 5 of 2014, [2014] eKLR (The Munya 1 case) settled the issue as we held that appeals are admissible before this Court if it can be demonstrated that the matter involved the interpretation or application of the *Constitution* and had been the subject of litigation before the High Court and the Court of Appeal and then risen through the judicial hierarchy on appeal.

69. In *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others*; SC Petition No. 17 of 2015; [2019] eKLR (John Florence Maritime Services), we specifically held as follows:

> "... As to what constitutes a matter involving interpretation and application of the *Constitution*, the conventional approach is that a particular provision of the *Constitution* must have been in issue for an interpretation and/or application from the High Court and the Court of Appeal ..."

70. However, there is a broader approach as to what would constitutes a matter involving constitutional interpretation or application, where, even if a specific constitutional provision is not directly in question, the appellant must demonstrate that the court's reasoning and conclusions led to a determination that can be considered a trajectory of constitutional interpretation or application. In the Munya 1 case, supra this Court thus expounded on this broader approach while relying on its earlier decision in *Peter Oduor Ngoge vs Francis Ole Kaparo & 5 Others*, SC Petition No. 2 of 2012 [2012] eKLR case, where the Court stated at [paragraph] 69:

> "The import of the Court's statement in the Ngoge case is that <u>where specific constitutional provisions cannot be identified</u> as having formed the gist of the cause at the Court of Appeal, the very least an appellant <u>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</u>." [Emphasis own]

71. From our finding in the *Munya 1* case the focus should not therefore solely be on the explicit mention of a constitutional provision but also the overall context and impact of the Court's reasoning in relation to constitutional matters. In John Florence Maritime Service, supra, we added that the Court should not have a narrow mind when evaluating whether a matter raises a constitutional issue, and that the search for constitutional issues should extend beyond specific constitutional provisions. It was our determination in that regard that:

> "[34] It therefore emerges that in evaluating whether a matter raises a constitutional issue of interpretation and/or application, this Court should not be narrow-minded in its inquiry. The quest for discovery should not start and stop with a determination of whether or not there is a specific provision of the *Constitution* that was at issue before the Superior courts. Instead, there is need for a

> holistic inquiry of all the various facets of the law as pleaded by the parties if they do indeed raise a constitutional question. This is the constitutional trajectory that requires a look at a Court(s)' reasoning and even the processes and procedures adopted by a court in its proceedings."

72. Consequently, it is our view that a determination of whether an appeal before us satisfies the criteria for invoking the Court's appellate jurisdiction is not governed by rigid principles. Instead, it is a power exercised by the Court on a case-by-case basis but within the confines of the *Constitution* and statute. In that regard, this was our finding in John Florence Maritime Services, supra:

> " [39] It again follows that a determination of whether a matter has met the appellate jurisdictional threshold embodied in article 163(4)(a) of the *Constitution* is not based on principles cast in stone. This is a discretionary mandate and power that the Supreme Court exercises judiciously on a case to case basis. Therefore, where a litigant before this Court alleges that in exercise of their constitutional mandates, the Superior Courts contravened the *Constitution* in the conduct of their proceedings, in protecting the *Constitution* that is the embodiment of the aspirations of the People of Kenya, this Court may assume jurisdiction to correct such an anomaly.
>
> [40] It should be noted that it does not follow as a matter of cause that where a litigant, like the Appellants before us, files a Petition of appeal, which appeal prima facie triggers the discretion of this Court and the Court assumes jurisdiction, that that appeal must succeed. Assumption of jurisdiction is a legal question at the discretion of this Court. On the contrary, succession or otherwise of an appeal is a factual issue determined on merit on the basis of the peculiarity of each case and how those facts are applied to the law."

73. To put the above findings in context, in John Florence Maritime Services, *supra*, the respondents had urged the court to strike out the appellant's case for want of jurisdiction, since its case before the High Court had also been struck out for being *res judicata*. The appellant however urged this Court to find that, as a consequence of the *res judicata* finding, his right to a fair hearing under article 50(1) of the *Constitution* was denied. It was our finding that, should the appellant prove that the determination of its claim by the High Court took

a constitutional trajectory then we would seize jurisdiction and interrogate the merits of his appeal and specifically stated thus:

> " [35] Consequently, to para-phrase what we laid out in the Joho case, a question regarding the interpretation and application of the *Constitution* may arise from a multiplicity of factors and not necessarily an interpretation and application of a specific provision of the *Constitution*. Upon consideration, we are inclined to find that the Appellants' case fits this bill. While the High Court and Court of Appeal were only charged with a common law doctrine of res judicata, it is alleged that the manner in which the High Court applied the doctrine in its proceedings infringed upon article 50(1) of the *Constitution*, by denying the Petitioners a right to be heard.
>
> [36] Such a contention by a litigant before this Court draws the Court's attention particularly given the fact that the right to Fair hearing provided for by article 50(1) of the *Constitution* is a non- derogable right under article 25 of *Constitution*. If the petitioners' contentions were to be found to have merit, then it cannot be otiose to conclude that, the determination of the High Court took a constitutional trajectory by infringing on a fundamental right. The Appellants' allegations, if affirmed, would suffice to conclude that while the Court was considering the application of a common law doctrine of *res judicata*; its determination took a trajectory that infringed on article 50(1) of the *Constitution*."

74. Returning to the matter at hand, a perusal of the appellant's case reveals that the appellant has questioned the manner in which the ELC and the Court of Appeal interpreted the constitutional provision conferring jurisdiction on the ELC to determine the petition, and implores this Court to find that the issues raised before the ELC were proper and ought to have been determined in light of article 70 and 162(2) of the *Constitution*. This is also in addition to the appellant's argument where he raises concerns on NET'S and EPT's capacity to enforce articles 35 and 47 of the *Constitution*, given NEMA's administrative silence and failure to enforce its stop order, impacting the appellant and Ramba area residents as well as the jurisdictional limitations imposed by law on EPRA and EPT. Further, he has questioned the superior Courts' determination that, claims involving article 42 violations fall under the NET'S jurisdiction and not ELC's and that complaints directed at KPLC should be determined by EPRA and later EPT.

75. Having considered the matter, it is our firm finding that the above issues fall squarely within this court's appellate jurisdiction in article 163(4)(a) of the *Constitution* and call for us to determine them as a matter of constitutional interpretation and application. This is also because the question of ELC's jurisdiction requires interpretation of articles 162(2) as read with articles 40, 42 and 70 of the *Constitution* and whether the superior courts properly applied their mind to the petition that had invoked those Articles. It is also necessary for us to consider the context in which the appellant claims that various rights enshrined in the *Constitution* were violated, and whether the trial court ought to have heard his plea and interrogated those violations.

76. The upshot is that the appeal correctly invokes this Court's jurisdiction to the extent of determining these questions and the objections raised by the respondents are consequently overruled. In addressing subsequent issues below, this finding will further be fortified.

ii. Whether the appellant was required to exhaust the alternative dispute resolution mechanisms under EMCA and the *Energy Act* before filing his constitutional petition at the Environment and Land Court

77. The appellant faults the determination by the Court of Appeal that his complaint against KPLC relating to a way leave for its transmission lines was to be first resolved by EPRA, and an appeal on such a decision would be handled by the EPT before escalation to the ELC, hence limiting the enjoyment of his right to property under article 40 of the *Constitution*. The appellant also contends that the administrative silence/and or inaction by NEMA in failing to act on the non-compliance of the stop order issued against the 2nd and 3rd respondents violated his right to equal protection before the law under article 27(1) and the right to fair administrative action under article 47 of the *Constitution*.

78. Both superior courts found that the disputes against KPLC and NEMA were to be determined elsewhere, and not before the ELC and the trial court, while upholding KPLC's objection on jurisdiction, and held that the appellant's complaint against the 8th respondent was to be determined, initially by EPRA. In that regard, it stated thus (per Tuiyott JA):

> "I do find that the Petitioner's complaint against the 8th respondent is in respect of way leaves, easements, or rights of way in relation to the distribution and supply of electrical energy. The petitioner alleges that the 8th Respondent has allowed electrical posts to be placed in his parcel of land and that the Authority has the power to entertain the dispute. If dissatisfied, the petitioner can move to the Tribunal. This court further finds that Section 9 (2) and 3 of the Fair

Administration Act 2015 removes this kind of disputes from this court and places jurisdiction to the Energy Authority."

79. The learned judge in finding as above, then proceeded to state:

> " 36. At the very heart of the appellant's grievance is that KPLC trespassed on his property and unlawfully dug holes and erected electricity power lines on it. As submitted correctly by counsel for KPLC, KPLC is listed as one of the energy sector entities within the country under the third schedule of the *Energy Act*.
>
> 37. The dispute resolution mechanism envisaged by the *Energy Act* is three tiered. The first is to raise a complaint with the Energy and Petroleum Regulatory Authority (EPRA), the successor of the Energy Regulatory Commission (ERC) ...
>
> 38. One of the subsidiary legislations saved by these provisions is the Energy (Complaints and Dispute Resolution) Regulations 2012 which are the regulations still used by EPRA as the successor of ERC ...
>
> 40. Given that the complaint by the appellant as against KPLC relates to a way leave for transmission, then the first forum for resolution of that dispute would be before the EPRA. A party dissatisfied with the decision of the authority can invoke the second tier which is a right of appeal to the Energy and Petroleum Tribunal whose jurisdiction is provided by section 36 of the *Energy Act*."

80. Again, addressing the dispute resolution system under EMCA, the trial court, in finding that the appellant's dispute against the 2nd and 3rd respondent was to be determined by NEMA held:

> " The dispute before me revolves on the mining activities of the 2nd and 3rd respondents at the Ramba area including the processing of gold, and the pollution that is resultant from the processing of the gold. This issue falls within the powers of the NEMA as it revolves on issuance of a licence and pollution. Section 7 of *Environment and Co-ordination Act (EMCA)* (cap 387) Laws of Kenya establishes NEMA and section 9 sets out its objects that include co-ordination of the various environmental management activities being undertaken by the lead agencies and promotion of the integration of environmental considerations into development policies, plans, programmes and projects with a view to ensuring

the proper management and rational utilization of environmental resources on a sustainable yield basis for the improvement of the quality of human life in Kenya.

Section 58 provides for an Environmental Impact Assessment Licence which the authority has the power to issue.

This is followed by section 63 that provides that The Authority may, after being satisfied as to the adequacy of an environmental impact assessment study, evaluation or review report, issue an environmental impact assessment licence on such terms and conditions as may be appropriate and necessary to facilitate sustainable development and sound environmental management. The authority has the power to cancel or revoke a licence or suspend such licence for such time not more than 24 months where the licensee contravenes the provisions of the licence.

The *Environment and Co-ordination Act (EMCA)* (cap 387) Laws of Kenya provides for the National Environmental Tribunal with the powers to hear appeals from the decisions of NEMA. Any person dissatisfied by the decision of the tribunal can appeal to the ELC. Under section 130 of the *Environment and Co-ordination Act (EMCA)* (cap 387) Laws of Kenya."

81. The Court of Appeal (Tuiyott, JA) on its part found as follows:

> " As I understand it, the complaint of the appellant against NEMA is that NEMA failed to enforce the stop order it had issued. I think it would have been available to NEMA, through an environmental inspector, to institute and undertake criminal proceedings against the 2nd and 3rd respondents if the two failed to comply with the stop order. Having failed to make the decision to do so, NEMA would be failing in its duty and its inaction and dereliction of duty could, in my view, be a proper subject of proceedings by the appellant against NEMA. The definition of a decision in section 2 of The *Fair Administrative Action Act* includes an administrative or quasi-judicial decision that is required to be made. A decision not to enforce the stop order is a decision that would fall within the contemplation of section 129 (2) of the Act."

82. In making the above findings, the superior courts both applied the doctrine of exhaustion and the question as to whether a party is required to exhaust any dispute resolution mechanism provided by a statute and/or any other law before resorting to the courts. More specifically, whether exhausting the appeal process set out under sections 129 and 130 of *EMCA* as well as the dispute resolution system as set out under Sections 10 and 36 of the *Energy Act*, for the claim against KPLC, is an issue that must be resolved by this judgment.

83. This is because the resolution of environmental issues before NEMA has been the subject of prior decisions by our superior courts and two schools of thought have emerged in that regard. On one hand, there is a series of decisions that have taken the position that, even though the ELC has original and appellate jurisdiction on environment and land matters, parties should exhaust the mechanisms provided for under EMCA, by first referring a matter to NET before an appeal can lie to the ELC.

84. This was the position taken in *Orata International Limited v National Environment Management Authority* [2019] eKLR, where the ELC (Christine Ochieng, J), while upholding a preliminary objection raised as to its jurisdiction to grant judicial review orders held:

> "In relying on the facts above and the three authorities, I find that in so far as the Environment & Land Court Act gives original and appellate jurisdiction on environment and land matters to the Environment & Land Court, the prayers sought in the instant application cannot hold at this juncture as the Applicant has a remedy to refer the complaint to the National Environment Tribunal first before an appeal can lie to the Environment and Land Court (ELC). Since there is already an established avenue under *Environmental Management and Coordination Act* (EMCA) to deal with the Applicant's complaint. I am unable to grant him leave but direct him to lodge an Appeal with NET. Since I have already made my findings above, I will not deal with the second issue."

85. Similarly, Angote J, in *Borbor & 2 others v National Environment Management Authority* (Environment and Land Judicial Review Case 2 of 2022) [2022] KEELC 3947 (KLR) (28 July 2022) (Ruling) applied the doctrine of exhaustion in finding that an applicant who is aggrieved or seeks to challenge the acts of NEMA ought to first move NET pursuant to Section 129(2) of the *EMCA* and not the Court.

86. The learned judge in so saying was guided by the pronouncements by the Court of Appeal in *National Environmental Tribunal v Overlook Management Limited & 5 Other*s [2019] eKLR. The Court of Appeal in that case and with a view to reconciling the conflicting decisions on the question of NEMA's jurisdiction held:

> "... where a party considers itself aggrieved by the events stipulated in section 129 (1) (a)-(e) of the *Act*, such a party may as of right appeal.... Where an aggrieved party does not qualify under the provision but is aggrieved by a decision made by the 3rd respondent, its Director-General or its committees, then such a party lodge an appeal pursuant to sub-section 2 of that provision."

87. Furthermore, the Court of Appeal in *Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others* [2020] eKLR, (Asike- Makhandia JA with Kiage JA as Odek JA had passed on before delivery of judgment), while faulting the ELC for assuming jurisdiction before the parties had exhausted other mechanisms in resolving their dispute held (per Asike-Makhandia JA) held:

> "... I observe that the jurisdiction of the ELC is appellate under Section 130 of *EMCA*. The ELC also has appellate jurisdiction under Sections 15, 19 and 38 of the *Physical Planning Act*. An original jurisdiction is not an appellate jurisdiction. A court with original jurisdiction in some matters and appellate jurisdiction in others cannot by virtue of its appellate jurisdiction usurp original jurisdiction of other competent organs. I note that original jurisdiction is not the same thing as unlimited jurisdiction.
>
> A court cannot arrogate itself an original jurisdiction simply because claims and prayers in a petition are multifaceted. The concept of multifaceted claim is not a legally recognized mode for conferment of jurisdiction to any court or statutory body.
>
> In addition, section 129 (3) of *EMCA* confers power upon the NET to *inter alia* exercise any power which could have been exercised by NEMA or make such other order as it may deem fit. The provisions of Section 129 (3) of EMCA is an all- encompassing provision that confers at first instance jurisdiction upon the Tribunal... It was never the intention of the *Constitution* makers or legislature that simply because a party has alleged violation of a constitutional right, the jurisdiction of any and all Tribunals must be ousted thereby conferring jurisdiction at first instance to the ELC or High Court."

88. There is however another school of thought that has posited that, if the complaints and prayers by a petitioner relate to infringement of the constitutional right to a clean and healthy environment or any other constitutional violation, then NET lacks the jurisdiction to determine the constitutional issue hence the provisions of Section 129 of *EMCA* are inapplicable to such claims.

89. In the above context, in *Ken Kasinga v Daniel Kiplagat Kirui & 5 others* [2015] eKLR, Emukule, J (as he then was) of the High Court, in finding that the ELC has unlimited jurisdiction to determine the question of whether a right to fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened, stated:

> "... In my view, so long as a dispute can be categorized as being a dispute over environment, or over land, the ELC has unlimited jurisdiction. This jurisdiction

is both original and appellate. One cannot therefore be faulted if he originates his suit in the ELC and not in NET, for the ELC has original jurisdiction. I am unable to accept the argument of the respondents, that the ELC has no jurisdiction in a matter concerning the issuance or rejection of an EIA licence. True, a person aggrieved by the decision has the avenue to appeal to NET within 60 days, but that does not mean that he is prevented from contesting that decision in an appropriate pleading flied in the ELC as a court of first instance ... " [Emphasis ours]

90. Further, in *West Kenya Sugar Co. Limited v Busia Sugar Industries Limited & 2 others* [2017] eKLR, Mukunya J, while addressing the ELC's jurisdiction to determine a constitutional petition where the petitioner had alleged violations of his rights under the *Constitution*, held that the mandate given to the NET under Section 129 of EMCA is limited in the scope of matters it can handle on appeal, and rendered itself thus:

> " This argument that the court has no jurisdiction is based on a misunderstanding of the matter before this court. What is before the court is a constitutional petition in which the petitioner has alleged several violations of his rights enshrined in the *Constitution*. The National Environment Tribunal does not have mandate to deal with constitutional violations relating to the environment. That is the preserve of this Court. A look at the mandate given to the National Environment Tribunal under section 129 of EMCA aforesaid shows a limited scope of the matters it can handle on appeal. They particularly deal with license and licensing...
>
> This court was established by article 162(2)(b) of the *Constitution of Kenya 2010*. One of its mandate therein is to determine the environment and the use and occupation of and title to land. The issues herein deal with the environment use and occupation of land ..." [Emphasis ours]

91. On our part, in *NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae)* (Petition 16 of 2019) [2023] KESC 17 (KLR) (Constitutional and Human Rights) (24 February 2023) (Judgment) (NGOs Co-ordination Board) we outlined the doctrine of exhaustion of administrative remedies and adopted our finding in *Albert Chaurembo Mumbo & 7 others v Maurice Munyao & 148 others*; SC Petition No 3 of 2016, [2019] eKLR where we held that:

> " ... even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi- judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute."

92. In the above decision, we furthermore emphasized that, where there exists an alternative method of dispute resolution established by legislation, courts must exercise restraint in exercising their jurisdiction as conferred by the *Constitution* and must give deference to the dispute resolution bodies established by statute with the mandate to deal with such specific disputes in the first instance.

93. This position was also adopted by the Court of Appeal in *R v National Environmental Management Authority*, CA No 84 of 2010; [2011] eKLR that we persuasively relied on in NGOs Co-ordination Board (*supra*). The Court of Appeal in doing so, observed that;

> " The principle running through these cases is where there was an alternative remedy and especially where parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it ..." [Emphasis ours]

94. The principle, expressed in the above decision, which we agree with, is therefore that, where there is an alternative remedy, especially where Parliament has provided a statutory appeal procedure, then it is only in exceptional circumstances that the court can resort to any other process known to law.

95. But the above decisions do not unravel the conflict alluded to above because, under article 165(1)(c) of the *Constitution*, the High Court has the jurisdiction to determine whether a right or fundamental freedom outlined in the Bill of Rights has been denied, violated, infringed upon, or is under threat. In that context, article 165(5)(b) imposes limitations on the High Court's jurisdiction concerning matters falling within the purview of the courts specified in article 162(2) which provides that;

> " Parliament shall establish courts with the status of the High Court to determine disputes relating to
>
> (a) employment and labour relations; and
>
> (b) the environment and the use and occupation of, and title to, land."

96. Consequently, article 165(2)(b) mandates the establishment of courts possessing the status of the High Court to inter alia and of relevance to the appeal before us, address issues

related to the environment, as well as the utilization and ownership of land with Parliament assuming the responsibility to delineate the functions and jurisdiction of that court as stipulated in sub- article (3).

97. In this context, and in the exercise of these powers, Parliament enacted the Environment and *Land Act* 2011, (No. 19 of 2011) and by section 4 thereof established the ELC. Its jurisdiction is as provided for in Section 13 with Section 13 (1) specifically outlining that the court 'shall have original and appellate jurisdiction to hear and determine all disputes in accordance with article 163(2)(b) of the *Constitution*'. Section 13(2) then grants express and original jurisdiction in matters;

(a) relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

And further provides;

> "Nothing in this *Act* shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to the environment and land under articles 42, 69 and 70 of the *Constitution*."

98. These provisions must be read in contrast to those in EMCA which provide for instances where disputes pertaining to compliance with breach and/or violations of the provisions of EMCA and which disputes ought to be lodged with and/or addressed by NET, which is established pursuant to the provisions of section 125 of the said *Act*. Redress for constitutional violations is not part of that mandate.

99. In addition to, and turning to the provisions of the *Energy Act*, it is uncontested that the said Act provides for a dispute resolution mechanism for complaints to be determined by EPRA that is vested with such authority under section 10 of the said Act. Should a party be dissatisfied with the decision of EPRA, then he or she has the right to file an appeal before the EPT as provided for under section 36 of the *Energy Act*. It is only when one is dissatisfied with the decision of the EPT that such a party can appeal the Tribunal's decision to the ELC.

100. In addressing the conundrum placed before us, we must remind ourselves that, what is in dispute before this Court is the applicability of these provisions to the appellant's claim and not the true meaning of the provisions of either EMCA or the *Energy Act*. This is because the provisions of EMCA or the *Energy Act* do not expressly oust the jurisdiction of the ELC in respect of the procedure for the determination of disputes that involve the management of the environment or issues of petroleum and energy. In the ordinary course of events, the ELC still has original jurisdiction over the matters that are handled by NEMA, unless such jurisdiction is specifically and expressly ousted in a constitutionally compliant manner. The same holds true for proceedings under the *Energy Act*. In so saying, we are persuaded by the finding of the Court of Appeal in *Kenya Revenue Authority & 2 others vs Darasa Investments Ltd* [2018] eKLR which held as follows:

> "What then, is the consequence, if any, of the respondent's failure to invoke the alternative remedies? As appreciated by the parties, availability of an alternative remedy is not a bar to judicial review proceedings. It is only in exceptional cases that the High Court can entertain judicial review proceedings where such alternative remedies are not exhausted. This position is fortified by the decisions of this court in *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 Others* [2017] eKLR and *Kenya Revenue Authority & 5 others v Keroche Industries Limited* CA No 2 of 2008. Perhaps that is why the legislature at section 9(4) of the *Fair Administrative Action Act* stipulates that:
>
> > "Notwithstanding subsection (3), the High Court or a subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.
> >
> > Our reading of the above provision reveals that contrary to the appellant's contention, the High Court or a subordinate court may on its own motion or pursuant to an application by the concerned party, exempt such a party from exhausting the alternative remedy."

101. Reference to the High Court above must be read *mutatis mutandis* with jurisdiction conferred on courts of equal status to it including the ELC. Section 9(2) of the *Fair Administrative Action Act*, we must add, provides that where there exist internal mechanisms for the resolution of a dispute, the court will not review the administrative action until the internal dispute mechanism has been exhausted. As we had earlier stated, in our view, that fact notwithstanding, there is nothing that precludes the adoption of a nuanced approach, that safeguards a litigant's right to access justice while also recognizing the efficiency and

specificity that established alternative dispute resolution mechanisms can offer. That is also why Section 9(4) of the *Fair Administrative Action Act* creates the exception that exhaustion of administrative remedies may be exempted by a court in the interest of justice upon application by an aggrieved party.

102. In the above context, what was in issue in the appellant's petition? The appellant claims as regards the environmental question that, NEMA issued a stop order that was favourable to him but that NEMA failed to enforce the stop order. Despite the existence of the stop order, the 2nd and 3rd respondents continued their mining activities. The issue therefore that arose in the petition was whether the acts of the 2nd and 3rd respondents, by failing to adhere to the stop order, violated the appellant's rights under articles 40 and 42 of the *Constitution*.

103. The other claim by the appellant is that KPLC trespassed on his property, dug holes, and erected electricity poles thereon without notice to him or his authority to do so.

104. Having considered the above complaints, we reiterate our earlier finding in this judgment that the mandate and jurisdiction to determine these questions lie with the ELC under articles 22, 23(3) and 162(2)(b) of the *Constitution* as read with Section 4(1) of the Environment and *Land Act*. We say so because neither the NET, EPRA nor EPT have the jurisdiction to determine alleged violations of *the Constitution*. That right to access the court for redress of alleged constitutional violations, should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms. We say this persuaded by the elegant reasoning in *William Odhiambo Ramogi & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR where the High Court (Achode (as she then was), Nyamweya (as she then was), & Ogola, JJ) stated:

> "In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court." [Emphasis ours].

105. We agree with the above reasoning and find that the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief. But there is also a need to emphasize the need for the court to scrutinize the purpose for which a party is seeking relief, in determining whether the granting of such constitutional reliefs is appropriate in

the given circumstances. This means that a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs, is a necessary prerequisite on the part of any superior court.

106. The restraint and effective remedy rule, which we find favor in, is what led the Supreme Court of India in *United Bank of India vs Satyawati Tondon & Others*; (2010) 8 SCC to state as follows:

> "44. ... we are conscious that the powers conferred upon the High Court under article 226 of the *Constitution* to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under article 226 of the *Constitution*.
>
> 45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under article 226 of the *Constitution* and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance." [Emphasis ours]

107. Flowing from the above findings and in that context, it is our view that, where the reliefs under the alternative mechanism are not adequate or effective, then there is nothing that precludes the adoption of a nuanced approach, as we have stated. What must matter at the end is that a path is chosen that safeguards a litigant's right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. This is because, to achieve a harmonious and effective legal framework, it is imperative to strike a judicious balance between the emphasis on providing the initial opportunity for resolution to entities established by law and the assertion of a litigant's right to access the court. However, such convergence requires a case-by-case assessment by considering issues such as the nature of the dispute and the adequacy of the

alternative dispute mechanism. See also our decision in *Bia Tosha Distributors Ltd v Kenya Breweries Ltd & 6 Others* (Pet No 15 of 2020) [2023] KESC 14(KLR) (Const. and JR) (17 February 2023) (Judgment).

108. It was therefore sufficient that the appellant alleged that a right in the *Constitution* had been infringed or threatened with violation, making it clear that in light of the provisions of the *Constitution* and the ELC Act, the issues raised were within the original jurisdiction of the ELC. That is also why section 3 of *EMCA* provides that, one of the general principles under the Act is the entitlement to a clean and healthy environment. That section provides:

> " Entitlement to a clean and healthy environment
>
> (1) Every person in Kenya is entitled to a clean and healthy environment in accordance with the *Constitution* and relevant laws and has the duty to safeguard and enhance the environment."

109. Section 3 (3) of *EMCA* is even more instructive as it grants any person, who claims that their right to a clean and healthy environment has been violated, the right to apply to the ELC for redress by specifically stating:

> " If a person alleges that the right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may on his behalf or on behalf of a group or class of persons, members of an association or in the public interest may apply to the Environment and Land Court for redress and the Environment and Land Court may make such orders, issue such writs or give such directions as it may deem appropriate to—
>
> (a) prevent, stop or discontinue any act or omission deleterious to the environment;
>
> (b) compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment;
>
> (c) require that any on-going activity be subjected to an environment audit in accordance with the provisions of this Act;
>
> (d) compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and

(e) provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing."

110. As we stated earlier, there is nothing that therefore bars the appellant, reading the plain provisions of the law above, from filing a claim before the ELC as he had two options available to him once NEMA was unable to enforce the stop order against the 2nd and 3rd respondents. The first option was to appeal to the NET, as was rightfully held by the Court of Appeal. The other option was to file a claim before the ELC, which the appellant did, as against both NEMA and KPLC for the claim under the *Energy Act*. The ELC was thereafter obligated to interrogate his claims on merit and render a determination one way or the other. By not doing so, it fell into error which the Court of Appeal failed to rectify.

iii. Whether the Court of Appeal erred in finding that the appellant could amend his petition once a preliminary objection has been raised

111. The Court of Appeal while determining this issue, held that it was incumbent upon the appellant to seek leave to amend his petition to trim off matters that belonged elsewhere, once the preliminary objections on jurisdiction were raised. The Court of Appeal specifically stated in that regard:

> " The responsibility to bring a petition that was not multifaceted was always on the petitioner. Confronted by the objection, he had the option to seek leave to amend his petition so as to trim off matters that belonged elsewhere in the first instance."

112. With utmost respect, the Court of Appeal was misguided in arriving at this finding. Misguided was the court because, a party cannot move to amend pleadings once a preliminary objection has been raised as relates to pleadings filed to confer jurisdiction. Preliminary objections are raised because, upon determination, the outcome would have a major bearing on the status of a claim, as the preliminary objection raises a pure point of law which if successful, would dispose of the petition as it did in the instant case. To restate the relevant principle in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696:

> " 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. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....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 has to be ascertained or if what is sought is the exercise of judicial discretion."

113. The appellant presented his grievances as constitutional questions believing that his fundamental rights under the *Constitution* had been violated. The trial court proceeded to strike out his petition preliminarily for lack of jurisdiction. He chose to appeal the decision, as opposed to amending his pleadings or filing another suit. There was nothing wrong in that act and the pursuit of an appeal is the choice of a litigant as is the choice to withdraw a pleading and filing a fresh one. Indeed, courts generally take a dim view of a party acting upon a preliminary objection by taking the path of avoiding such an objection instead of facing it and letting the court determine it on the merits. This finding is also pertinent to the issue below.

iv. Remedies available to a party in a multifaceted claim

114. The appellant faults the Court of Appeal for finding that he could pursue the issues in the petition by filing a fresh suit before the ELC and that such a finding infringes upon his right to a fair hearing. He also argues that this edict imposes new processes and obstacles, including the law of limitation, despite the appellant initially approaching the court within the provisions of articles 70 and 162(2)(b) of the *Constitution*. The Court of Appeal, in making its finding aforesaid pronounced itself thus:

> " Nothing forecloses the appellant, subject to the law of limitation, from mounting another suit but leaving out the matters under the *EMCA* and the *Energy Act*. The final order made by the ELC was therefore not made suo sponte as it was one available to the court after reaching the decision that it lacked original jurisdiction in respect to some of the claims in the multifarious petition."

115. Having already found that the ELC had the original jurisdiction to determine the appellant's petition notwithstanding the availability of other dispute resolution mechanisms, the Court is now obliged to consider whether, due to the multifaceted nature of the appellant's petition, the ELC is the best forum to grant constitutional redress where the only other alternatives available to the appellant are not efficacious nor adequate.

116. One of the reasons the appellant approached the ELC was because he had separate claims against both KPLC and NEMA but chose to file them in the same petition earning the

displeasure of the superior courts. In his petition, the appellant sought, *inter alia*, the following declarations, which we reproduce verbatim;

> "(i) A declaration that the 1st to 7th respondents have jointly and severally violated and continue to violate the rights and fundamental freedoms of the petition and the Ramba Community contrary to articles 10, 27 (1), 28, 35 (1), 42, 43, 47, 69 (1), 73 and 75 of the *Constitution*.
>
> (ii) A declaration that the petitioner's right to property has been violated by the 2nd, 3rd and 8th respondents.
>
> (iii) A declaration that the mining activities including leaching and gold processing carried out in Ramba Area by the 2nd & 3rd respondents have been irregular, illegal and unconstitutional".

117. Looking at all the above issues in perspective, we must start by giving due consideration to the provisions of article 70(1) of the *Constitution* which provides for the locus standi in the enforcement of environmental rights by way of a constitutional petition. It provides that:

> "If a person alleges that a right to a clean and healthy environment recognized and protected under article42 has been, is being, or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter."

118. It is this provision that generously allocates the appellant herein the right to file his constitutional petition before the ELC and looking at the orders that the appellant had set out in his constitutional petition, it is evident to us without much effort that, the remedies of appealing to NEMA and EPRA, respectively, are not efficacious and adequate. Under EMCA, Section 129 provides for matters that may require determination by NET. They are all related to licenses and not constitutional violations as is the case in the present dispute. The fact that licenses may well be a part of the appellant's petition does not in any way outlaw the hearing and determination of it by ELC.

119. Similarly, in respect of the *Energy Act*, section 106 of the Act provides that appeals to the EPT from decisions by EPRA shall be in relation to issues relating to licensing while Section 25 generally grants jurisdiction to the EPT to hear and determine disputes and appeals in accordance with the Act or any other written law. Determination of allegations of constitutional violations cannot be such issues as to attract the Tribunal's attention.

120. In addition to the above findings, since the appellant's claim is multifaceted, by his own choice, the most appropriate forum for the determination of his petition was the ELC which

would then interrogate and determine them based on such facts and law as shall be placed before it. The superior courts therefore clearly fell into in error by finding that the appellant had not demonstrated that he would not have received efficacious relief if he had followed the dispute resolution process outlined in the *Energy Act*. We say so because though the claims against the 2nd and 3rd respondents are intertwined and arise from the same series of events, it would have been impractical to expect the appellant to appeal the decisions of both NEMA and KPLC before two different tribunals.

121. We must hasten to add that, it is the 2nd and 3rd respondents alleged unabated mining activities on LR No Siaya/Ramba/716 that led them to dump waste or effluent onto the appellant's property namely LR No Siaya/Ramba/719 and 720. While conducting these mining activities, the 2nd and 3rd respondents allegedly requested electricity connection from KPLC, who then proceeded to dig holes and erect electricity poles on his property. These matters are contested in the context of the claims of constitutional violations and only the ELC could properly hear and determine them.

122. Having so found, we note that, in Benson Ambuti Case (supra), we addressed the question of appropriate reliefs in a multifaceted claim. The appeal before the Court in that case was also on the question of the jurisdiction of the ELC *vis-à-vis* the NEMA and or the National Environmental Complaints Committee (NECC). Our jurisdiction to determine the appeal was challenged primarily on the premise that the appeal was not one involving issues of interpretation or application of the *Constitution* under article 163(4)(a) of the *Constitution* as there were no constitutional issues determined by the Superior Courts. Though our determination to that effect was that the decisions by the superior courts did not involve the interpretation or application of the *Constitution*, we nevertheless addressed the question of appropriate reliefs in a multifaceted suit. We held thus:

> "[51] Judicial abstention, as with judicial restraint, is a doctrine not founded in constitutional or statutory provisions, but one that has been established through common law practice. It provides that a Court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination, if there would be other appropriate legislatively mandated institutions and mechanism.
>
> [52] The abstention doctrine, also known as the Pullman doctrine, was deliberately first reviewed by the US Supreme Court in *Railroad Commission of Texas v Pullman Co*., 312 U.S 496 61 S Ct 643, 85 L Ed 971 (1941). The doctrine, and as applied within the context

> of the US legal system, allows federal courts to decline to hear cases concerning federal issues where the case can also be resolved with reference to a state-based legal principle. The Supreme Court, in an opinion by Justice Brennan in *England v Louisiana State Board of Medical Examiners*, 375 US 411 (1964) also noted that a State Court determination would indeed bind the federal court. The proper procedure, the Court determined, is to give notice that the federal issue is contended, but to expressly reserve the claim on the federal issue for the federal court. If such a reservation is made, the parties can return to the federal court, even if the State Court makes a ruling on the issue.
>
> [53] Applying these principles to the instant Petition, the more favorable relief that the Superior Court should have issued was to reserve the constitutional issues on the rights to a clean and healthy environment, pending the determination of the issue with regards to the issuance of EIA licenses by the 4th respondentto the 1st, 2nd and 3rd respondents. The Court should have reserved the issues pending the outcome of the decision of the Tribunal, thereby affording any aggrieved party the opportunity to appeal to the Court. It would then have determined the reserved issues, alongside any of the appealed matter, if at all, thus ensuring the parties right to a fair hearing under article 50 of the *Constitution* was protected."

123. Our finding in this matter is instructive and relevant to this appeal because, the Court of Appeal held that once the ELC found that it lacked original jurisdiction with respect to certain claims in the petition, then the ELC was not to split matters and retain those it felt it had jurisdiction to determine. The Court of Appeal (Tuiyott JA) held:

> " Having reached the correct decision that it lacked original jurisdiction in respect to certain claims in the petition, the ELC had no business splitting the petition on behalf of the appellant so as to retain matters it would properly be seized of. At any rate, I do not think that the order eventually made by the ELC can be said to be inimical to the petitioner's right to fair hearing."

124. The Court of Appeal in our view, in making the findings it did above fell into error because, as we held earlier in this judgment, there was nothing that barred the appellant from filing an appeal against the decision of the trial court once his petition was struck out. The appellant had two options available to him; appeal the decision or file a new claim. The appellant chose the latter and we have found that his chosen path was the correct one. Such a finding is also

well within the confines of our decision in Benson Ambuti case (*supra*) and ensures that a party's right to a fair hearing under article 50 of the *Constitution* is protected.

125. In concluding on this issue, it is our finding that it is upon a party to frame its pleadings as it deems fit but in doing so should not create such a disjointed case that a court has to struggle in the identification of each facet thereof. Elegant pleadings also ensure that the responding party has a clear case to answer to. A court on its part, must not descend to the arena of litigation but instead determine all contested matters judicially and in a multifaceted claim, address each issue within its jurisdiction including remitting parts of the claim to the relevant statutory body while retaining what is properly before it. In the present case and for reasons given above, the issues raised were well within the ELC's jurisdiction to determine and there was no reason to either reserve or remit any of them and we so hold.

v. What is the most appropriate relief available to the appellant?

126. Earlier in this judgment, we held that there are substantive constitutional violations that have been raised in the petition that have not been answered in the proper forum. Having found that the jurisdiction of the ELC was properly invoked and that the matters in the appellant's constitutional petition fell within the purview of article 162(2)(b) and section 13 of the *ELC Act*, and to ensure the appellant gets his day in court, we hereby declare that the petition filed before the ELC should be determined on its merits for a determination on the alleged violations of the appellant's rights inter alia to a healthy and clean environment as well as his right to property for the acts committed by KPLC and whether the acts of NEMA of failing to enforce the stop order created a legitimate expectation that his concerns will be addressed.

vi. Costs

127. The appellant faults the Court of Appeal for condemning him to pay the costs of the appeal by finding that

> "a party who has deliberately and in bad faith crafted pleadings so as to cheat jurisdiction."

128. In *Okoiti & 2 others v Attorney General & 14 others* (Petition (Application) 2 (E002) of 2021) [2023] KESC 31 (KLR) (21 April 2023) (Ruling) while addressing the issue of awarding costs in public interest litigation, we specifically held that:

> "Public interest litigation aims to address genuine public wrongs where legal action is initiated for the enforcement and advancement of constitutional justice and public interest."

129. An interpretation of this finding in the present case shows that this is not a public interest matter, but private interest litigation where the appellant is pursuing his own claim against both private and public entities. Further guided by our finding in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 other*s, Sup Ct Petition No 4 of 2012; [2014] eKLR where we set out the legal principles that guide the grant of costs by finding that costs follow the event and that costs should not be used to punish the losing party but to compensate the successful party for the trouble taken in prosecuting or defending a suit, we see no reason to burden any of the parties with costs. Moreover, in view of our decision to allow the appeal, the order of costs cannot stand.

130. Consequently, we apply our discretion and order that each party shall bear their own costs at the ELC, Court of Appeal and this Court.

G. Orders

131. Having found that the appeal is merited, we now issue orders as follows:

(a) The Petition of Appeal dated March 16, 2023 and lodged on March 20, 2023 is hereby allowed and the Judgment of the Court of Appeal dated February 7, 2023is hereby set aside in entirety as is the Ruling of the Environment and Land Court dated February 2, 2021.

(b) The matter is hereby remitted to the Environment and Land Court at Kisumu for hearing and determination by any judge other than Ombwayo, J on the alleged constitutional violations highlighted and in conformity with this judgment.

(c) In view of the time taken in determining the issues raised by the appellant, we direct that the hearing before the ELC shall be conducted expeditiously and on a priority basis.

(d) Each party shall bear its costs at the ELC, Court of Appeal and this Court.

(e) We hereby direct that the sum of Kshs 6,000/- deposited as security for costs in the appeal herein be refunded to the appellant.

132. Orders accordingly.

Kenya Ports Authority v Munyao & 4 others (Petition E008 of 2023)
[2023] KESC 112 (KLR) (28 December 2023) (Judgment)

Supreme Court of Kenya

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

Neutral citation: [2023] KESC 112 (KLR)

Statues *– interpretation of statutory provisions – interpretation of section 49 of the Employment Act – where section 49 provided for the remedies for wrongful dismissal and unfair termination - when was section 49 applicable - what was the role of the court in exercising judicial discretion in instances where section 49 was not applicable - Employment Act, cap 226, sections 49 and 50.*

Labour Law *– employment - unfair termination of employment vis a vis wrongful dismissal - what was the distinction between unfair termination of employment and wrongful dismissal – Employment Act, cap 226, sections 45, 46, 49 and 50.*

Constitutional Law *– fundamental rights and freedoms – enforcement of fundamental rights and freedoms – right to fair labour practices – claim of breach of the right to fair labour practices – remedies available - damages - whether damages under the head of article 41 of the Constitution on labour relations ought to be specifically pleaded and proved – whether intentional conduct was a necessary prerequisite for reduction of compensation in a claim of unfair labour practices - Constitution of Kenya, 2010, article 41.*

Constitutional Law *– fundamental rights and freedoms – enforcement of fundamental rights and freedoms – right to go on strike – claim that employees went on a go-slow - what was the recourse to be followed where employees resolved to participate in a go-slow.*

Civil Practice and Procedure *– cross-appeals – cross-appeals at the Supreme Court - what was the nature of a cross appeal and what were the requirements for one to file a cross appeal at the Supreme Court.*

Words and Phrases *- cross- appeal – definition of cross- appeal - to seek review (from a lower court's decision) by a higher court - Black's Law Dictionary, 9th ed, at page 133.*

Words and Phrases *- cross-petition – definition of cross-petition - a claim asserted by a defendant against another party to the action; claim asserted by a defendant against a person not a party to the action for a matter relating to the subject of the action - Black's Law Dictionary, 9th ed, at page 433.*

Words and Phrases *– judicial discretion – definition of judicial discretion - the exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not to act when a litigant is not entitled to demand the act as a matter of right - Black's Law Dictionary, 9th ed, at page 534.*

Words and Phrases *- unfair labour practice – definition of unfair labour practice -any conduct prohibited by state or federal law governing the relations among employers, employees, and labour organisations - Black's Law Dictionary, 9th ed.*

Brief facts

The respondents were gantry operators employed by the appellant. The gantry operators had demanded an increase in remuneration and were offered an increment of Ksh. 21,000 which they considered insufficient. According to the appellant, the respondents were part of a team of approximately 94 gantry operators who commenced a go-slow following their unsuccessful demands.

The gantry operators were issued with warning letters and immediately thereafter interdicted. Following hearings, the interdictions of 48 employees including the respondents were lifted. They were however issued with a warning for participating in the go-slow; surcharged an amount equivalent to between two and half to three months basic salary; and further placed on a 24-month (2 year) probation.

Aggrieved, the respondents filed a suit at the trial court. The trial court restored the 1st and 2nd claimants to their positions/ responsibilities and ordered that each claimant to be paid Kshs 800,000 as general damages for unfair labour practice(s). Dissatisfied, the appellant filed an appeal while the respondents filed a cross appeal, both at the Court of Appeal. The Court of Appeal set aside the order directing the reinstatement of the 1st and 5th respondents to their previous positions as gantry operators and the award of damages for unfair labour practice of Kshs 800,000 to each respondent and substituted the same with an award equivalent to 4 months gross salary in favour of the 1st and 5th respondents and one-month gross salary for the 2nd, 3rd and 4th respondents. Further aggrieved, the appellant filed the instant appeal.

Issues

i. What were the circumstances in which section 49 of the Employment Act on remedies for wrongful dismissal and unfair termination were applicable?
ii. What was the role of the court in exercising judicial discretion in instances where section 49 of the Employment Act on the remedies for wrongful dismissal and unfair termination was not applicable?
iii. What was the distinction between unfair termination of employment and wrongful dismissal?
iv. Whether damages under article 41 of the Constitution on labour relations ought to be specifically pleaded and proved.
v. What was the recourse on the employers where employees resolved to participate in a go-slow.
vi. Whether intentional conduct was a necessary prerequisite for reduction of compensation in a claim of unfair labour practices. .
vii. What was the nature of a cross appeal and what were the requirements for one to file a cross appeal at the Supreme Court?

Relevant provisions of the Law

Employment Act, cap 226

Section 45 - Unfair termination

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

(a)that the reason for the termination is valid;(b)that the reason for the termination is a fair reason—

(i)related to the employees conduct, capacity or compatibility; or

(ii)based on the operational requirements of the employer; and

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

Section 49 - Remedies for wrongful dismissal and unfair termination

1. *Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—*
    1. *the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;*
    2. *where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or*
    3. *the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.*

Section 50 - Courts to be guided

I*n determining a complaint or suit under this Act involving wrongful dismissal or unfair termination of the employment of an employee, the Employment and Labour Relations Court shall be guided by the provisions of section 49*

Held

1. Wrongful dismissal occurred when the employee was dismissed without notice or with inadequate notice. The rationale of giving notice was to offer the affected parties' time, either to search for alternative employment or for the replacement of an employee, respectively. The parties, when entering into the contract of employment, may have agreed on the requirement of notice of termination of the contract.
2. The Constitution provided for labour relations under article 41. Unfair labour practice encompassed all conduct prior to, in the course of employment, during and after termination of employment. The provisions of article 41 were borne from the realization that employment and/or right to work was a human right. The right was also linked to other rights in the bill of rights more so the protection of life and the dignity of a person. The right was therefore a principle with legal obligations.
3. Whereas the Employment Act was expressive of the rights under article 41 of the Constitution, damages under article 41, as a constitutional provision, ought to be specifically

pleaded and proved. Any other constitutional provisions that would have been infringed could equally be canvassed, alongside, and, under that head. That was different and distinguishable from the provisions under section 49 as read with section 50 of the Employment Act which were limited to the provisions under the Employment Act. The wording of the Employment Act under section 49 only related to an instance where an employee had been terminated.

4. As to the nature and categories of wrongful dismissal and unfair termination that section 49 of the Employment Act applied to, the provisions of Part V of the Employment Act referred to almost all instances of employment and circumstances that led to termination of employment. Some provisions of the Employment Act referred to instances that necessarily did not lead to termination of employment providing penalties and sanctions therein.
5. The wording of section 12 of the Employment and Labour Relations Court Act granted the Employment and Labour Relations Court power to issue such orders as contemplated under the Act and any other written law, it also granted the court jurisdiction to issue any appropriate relief as it may deem fit.
6. Section 49 of the Employment Act applied to only instances as had been set out under the Act. It only applied where an employee was terminated. In any other instance the court was expected to exercise its discretion as granted by the Constitution, the Employment and Labour Relations Act and any other statutory provisions. In exercising such judicial discretion, a judge or magistrate bore the burden of accounting for their decision and in order to discharge that burden, the judge or magistrate ought to explain the basis of their decision.
7. Despite the internal dispute mechanisms between the parties, the Human Resource Manual at clause 1.6.(v) allowed an employee to invoke the provisions of the Labour Relations Act, 2007. Section 2 of the Labour Relations Act defined a trade dispute to mean a dispute or difference, or an apprehended dispute or difference, between employers and employees, between employers and trade unions, or between an employers' organisation and employees or trade unions, concerning any employment matter, and included disputes regarding the dismissal, suspension or redundancy of employees, allocation of work or the recognition of a trade union.
8. Section 62 of the Labour Relations Act mandated the reporting of a trade dispute to the minister who thereafter appointed a conciliator. If the parties failed to reach a consensus section 73 of the Act allowed an aggrieved party to file a claim at the Employment and Labour Relations Court. Section 76 also allowed an aggrieved party to take part in a protected strike after issuing a seven-day notice.
9. The parties only referred to a private conciliation whereby they undertook a case study of other jurisdictions and an increment of wages was made. That did not auger well with the respondent and they resolved to participate in a go-slow. From the reading of the Labour Relations Act, the immediate recourse was to report the go-slow to the minister who would

then have appointed a conciliator. Had the conciliation fallen through, then the matter would have been referred to the Employment and Labour Relations Court.

10. Redeployment was not one of the punishments envisaged in the Disciplinary Handbook; the appellant did not equate the loss incurred, and the surcharge was arbitrary and not in conformity with the disciplinary handbook which provided for a maximum of three-months surcharge.

11. The petition and amended plaint were anchored on article 41 of the Constitution; the predominant claim was a claim for unfair labour practice. The respondent urged the court to rely on the claim for breach of contract; however, in the amended plaint the particulars of breach were not set out. The immediate recourse under article 41 was to rely on section 12 of the Employment and Labour Relations Court Act which granted the court power to issue an award of compensation in any circumstance contemplated under the Act or any other written law.

12. If the court determined that the issues raised by the complainant were partially caused or contributed to by their own actions, it would reduce the compensatory award by a proportion deemed just and equitable based on that finding. Intentional conduct was considered essential for reducing compensation. Thus, any adjustment to the compensation amount largely hinged on the degree of contributory factors, though it did not prevent recovery altogether. In cases of industrial action, an employee's behavior that led to the occurrence of such action could be seen as contributory fault.

13. Despite the Court of Appeal's reliance on section 49 of the Employment Act in assessing damages, its determination was based on the respondents' contribution to the industrial action. The same reasoning applied to the Court of Appeal's award on costs. The court reversed its decision, finding that both parties had partially succeeded in their claims and that there was no fault in the original award, which it therefore chose not to disturb. The appeal succeeded only to the extent that the Court of Appeal erred in applying section 49 of the Employment Act.

14. A cross appeal was an action by a respondent, who intended to counter an appellant's cause in an appeal, with the view of obtaining certain relief(s) from the court. Pursuant to rule 47(2)(b) a respondent who intended to cross appeal was expected to lodge eight copies of the memorandum and record of appeal and not rely on other parties' pleadings as they had prayed. Failure to comply with rule 47 rendered a cross appeal incurably defective.

15. Probing the cross-appeal, the respondent lodged the appeal together with eight copies of memorandum of appeal and record of appeal. Certification was not sought for grounds raised in the cross-appeal. The grounds raised in the cross-appeal did not relate to the issue for consideration before the court, being the parameters of the application of section 49 of the Employment Act. The grounds of the cross-appeal did not raise any constitutional questions for determination or interpretation of the Constitution.

16. An order on cost was a judiciously-exercised discretion of the court, accommodating the special circumstances of the case, while being guided by ends of justice considering the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.

Appeal partly allowed; cross appeal dismissed.

Orders

i. *The petition of appeal dated March 27, 2023 and lodged on March 31, 2023 succeeded only to the extent that the Court of Appeal erred in its reliance of section 49 of the Employment Act.*

ii. *Each party to bear the costs of the appeal.*

Citations

Cases

Kenya

1. *Communications Commission of Kenya & 3 others v Royal Media Services Limited & 7 others* Petition 14, 14A, 14B & 14C of 2014; [2015] KESC 13 (KLR) - (Explained)
2. *County Government of Nyeri & another v Cecilia Wangechi Ndungu* Petition 1 of 2014; [2015] KEELRC 1142 (KLR) - (Explained)
3. *Erad Suppliers and General Contractors Limited v National Cereals & Produce Board* Civil Suit 639 of 2009; [2012] KEHC 4372 (KLR) - (Mentioned)
4. *Independent Electoral and Boundaries Commission v Sabina Chege* Petition No 23 (E026) of 2022; [2022] eKLR - (Mentioned)
5. *Kariuki, Peter Wambugu & 16 others v Kenya Agricultural Research Institute* Petition 2 of 2013; [2013] KEELRC 373 (KLR) - (Explained)
6. *Ken freight (E.A) Limited v Benson K Nguti* Petition No 37 of 2018 [2019] eKLR - (Explained)
7. *Mumba, Albert Chaurembo & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* Petition No 3 of 2019; [2019] eKLR - (Mentioned)
8. *Munya v Kithinji & 2 others* Petition 2B of 2014; [2014] eKLR; [2014] 2 KLR 366 - (Explained)
9. *Munyao, Joseph Makau & 4 others v Kenya Ports Authority & another* Petition No 11 of 2015; [2016] eKLR - (Explained)
10. *Munyi v Munyi* Petition 31 of 2014; [2015] KESC 9 (KLR) - (Mentioned)
11. *Rai & 3 others v Rai & 4 others* Petition No 4 of 2012; [2014] eKLR; [2014] 2 KLR 253 - (Explained)
12. *Republic v Kenya School of Law & another ex parte Kithinji Maseka Semo & another* Miscellaneous Application 120 of 2018; [2019] eKLR - (Explained)

13. *Sagoo & another v Dourado & another* Civil Appeal 24 of 1982; [1983] KECA 49 (KLR); [1983] KLR 365 - (Mentioned)
14. *Senate & 3 others v Speaker of the National Assembly & 10 others* Petition (Application) 19 (E027) of 2021; [2023] KESC 95 (KLR) - (Explained)
15. *Warrakah, Suleiman Mwamlole & 2 others v Mwamlole Tchappy Mbwana & 4 others* Petition 12 of 2018; [2018] eKLR - (Explained)

Texts

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2. Mackay, JPH., (Lord of Clashfern) (Eds) *et al* (1964), *Halsbury's Laws of England* London: Butterworths 3rd Edn para 990-

Statutes

Kenya

1. Constitution of Kenya articles 41, 48, 163(4) - (Interpreted)
2. Employment Act (cap 226) sections 43, 45, 47(5); 49; 50; part vi - (Interpreted)
3. Employment and Labour Relations Court Act (cap 8E) section 12 - (Interpreted)
4. Kenya Ports Authority Act (cap 391) In general - (Cited)
5. Labour Relations Act (cap 223) sections 2, 62, 73, 76; part x - (Interpreted)
6. Supreme Court Act (cap 9B) sections 3A, 15A, 15B, 21(1) - (Interpreted)
7. Supreme Court Rules, 2020 (cap 9B Sub Leg) rule 47 - (Interpreted)
8. Work Injury Benefits Act (cap 236) In general - (Cited)

Advocates

Mr Paul Gichuhi and *Mr Vincent Wesonga* for the appellant
Mr Yusuf Aboubakar for the respondents

December 28, 2023, the Court delivered the following Judgment:

a. Introduction

1. The petition of appeal dated March 27, 2023 and lodged on March 31, 2023 was filed pursuant to certification by the Court of Appeal (Nyamweya, Lesitt & Odunga JJA) in its ruling dated March 3, 2023 as one involving a matter of general public importance under article 163(4)(b) of the *Constitution*. The appellant is challenging the entire judgement and orders of the Court of Appeal (Visram, Karanja & Koome (as she then was) JJA) in Civil Appeal No 134 of 2018 delivered on July 11, 2019.

2. The petition raises the following substantive issue; the parameters of section 49 of the *Employment Act* and in particular the question of the nature and categories of wrongful dismissal and unfair termination the section applies to.

b. Background

3. The appellant is a state corporation established under statute, *Kenya Ports Authority Act*, cap 391 and mandated to *inter alia* manage and operate the port of Mombasa and all scheduled seaports along Kenya's coastline. The respondents were at the material time gantry operators employed by the appellant and were part of a larger group of approximately 94 gantry operators who had worked for the appellant for a period of between 14 and 30 years. For context, gantry is a large crane used to load and offload containerized cargo from ships.

4. Prior to March, 2011, the gantry operators had demanded an increase in remuneration and a committee was formed comprising gantry operators' representatives and management to embark on a fact-finding mission by touring the various ports around the world to consider and make recommendations on the terms and conditions of the gantry operators. After its fact-finding mission, the committee proposed an increment of the gantry operators' dues by Ksh 21,000/- which the gantry operators considered insufficient.

5. According to the appellant, the respondents were part of a team of approximately 94 gantry operators who, on 29th and March 30, 2011, commenced a go-slow following their unsuccessful demands. The appellant alleged that in its daily report of moves each gantry crane made for the two days reflected a huge variation from other days; that as a result of the go slow, it failed to meet its delivery targets resulting in a crisis at the port which involved backlog and delays. The gantry operators were issued with warning letters and immediately thereafter interdicted. The interdiction letters relayed the appellant's decision to suspend the operators pending investigations and also called on the gantry operators to show cause why they should not be dismissed on account of their conduct.

6. Thereafter, the appellant carried out investigations to determine the gantry operators who were involved in the go slow and their level of involvement. Those found to have participated in the go slow either by actual participation or incitement were invited to attend a personal hearing on July 8, 2011. Following the hearings, the interdictions of 48 employees including the respondents were lifted. They were however issued with a warning for participating in the go slow; surcharged an amount equivalent to between two and half to three months basic salary; and further placed on a 24-month (2 year) probation.

c. Litigation History

i. Before the High Court & Employment and Labour Relations Court.

7. On June 22, 2012, the respondents filed a constitutional petition in the High Court at Mombasa, thereafter referred to as Petition No. 11 of 2015 *Joseph Makau Munyao & 4 others v Kenya Ports Authority the Managing Director Kenya Airports Authority*

alleging contravention of various constitutional rights. The petition was subsequently referred to the Employment and Labour Relations Court on March 11, 2014. The petition was converted into a claim which was re-amended on April 22, 2014. The respondents sought an array of orders which included special damages in terms of refund of the amounts surcharged, allowances and salary increments they deemed were due to them; general damages; declaration that the warning and interdictions of the respondents were illegal and unwarranted; declaration that their constitutional rights had been violated; and reinstatement of their designation as gantry operators with all the allowances attendant to that position.

8. The trial court in its determination found that in as much as there was evidence that a go slow took place on the material days the 1st and 5th respondents who were on standby and dormant shift could not have taken part in the said strike. The learned Judge (Radido J) went on to declare the warnings issued to the respondents as unfair for the reason that they were not issued in conformity with the appellant's disciplinary procedure. Finally, he held that the conditions attached to the lifting of the respondents' interdictions amounted to unfair labour practice. Accordingly, the learned Judge issued orders in the following terms:

> " 150. Arising from the above the court orders that
>
> a. 1st and 2nd claimants be restored to their positions/ responsibilities as gantry operators with immediate effect.
>
> b. Each claimant to be paid Kshs 800,000/- as general damages for unfair labour practice(s).
>
> c. Claimants surcharged should be refunded the amounts surcharged (Kshs 245,580/- each) forthwith.
>
> 151. The claimants to have costs of the cause."

ii. At the Court of Appeal

9. Aggrieved, the appellant preferred an appeal dated September 25, 2018; the respondents filed a cross appeal. The Court of Appeal noted that the appeal was centered around four grounds to the effect that the learned judge erred by:

i. Directing the reinstatement of the 1st and 5th respondents to their positions as gantry operators despite the lapse of the statutory 3 years limitation period for issuing an order of reinstatement.

ii. Assessing and awarding Kes 800,000 to each respondent as general damages.

iii. Directing the refund of Kes 245,580 to each of the respondents being the amount surcharged without any basis.

iv. Failing to exercise his discretion properly with respect to costs of the suit.

10. On the other hand, the cross appeal was premised on the grounds that the learned Judge erred to the extent of:

i. Declining to award special damages to the respondents.

ii. Failing to expressly declare that the warnings issued to the respondents were unlawful.

iii. Failing to find that the interdiction of the respondents was unwarranted and/or illegal.

11. The superior court noted that at the heart of the appeal was the determination of who between the parties, if any, met their respective burden of proof as espoused under section 47(5) of the *Employment Act*; did the respondents demonstrate that the disciplinary process and sanctions issued thereunder were unfair or did the appellant justify the reason(s) for the disciplinary sanctions in issue?

12. The court held that that the redeployment of the 1st and 5th respondents in the face of evidence of the appellant having undergone restructuring was not practical. On the reinstatement of the 2nd to 4th respondents, the court noted that it was not a ground of appeal in both the appellant's appeal and the respondent's cross appeal. The court further found that the award of Ksh 800,000/- as damages for unfair labour practices was not in conformity with the principles for awarding damages as the trial Judge did not explain how he arrived at the said figure and therefore elected to interfere with it. The Court of Appeal reversed the decision but issued an award of four (4) months gross salary in favour of the 1st and 5th respondents, and one (1) month's gross salary for the 2nd to the 4th respondents. On the validity of the surcharged amount, the court found that there was no basis for it because though the appellant's claim was based on alleged financial loss as a result of the go slow, there was no evidence concerning the said loss. Further, the act of surcharging the respondents was against the appellant's internal disciplinary procedures and they could not fault the trial judge for awarding a refund of the surcharged amount.

13. As for the other special damages sought by the respondents' including bonuses and salaries, the court found the trial judge was right in declining to grant it. The allowances were only payable to gantry operators when on duty; the respondent s since interdiction had not worked as gantry operators therefore there was no basis for awarding the same.

14. The Court of Appeal ultimately set aside the order directing the reinstatement of the 1st and 5th respondents to their previous positions as gantry operators; the award of damages for unfair labour practice of Kes 800,000 to each respondent and substituted the same with an award equivalent to 4 months gross salary in favour of the 1st and 5th respondents and I month gross salary for the 2nd, 3rd and 4th respondents; and the order of costs, substituting the same with an order that each party should bear its own costs at the ELRC.

i. At the Supreme Court

15. The appellant has now moved this court citing six (6) grounds of appeal claiming that the learned Judges of Appeal;

    a. Erred in law in failing to appreciate and find that section 49 of the *Employment Act* applies to remedies for wrongful dismissal and unfair termination of employment whereas, the respondents employment contracts were not terminated by the appellant.

    b. Erred in law in finding that the 2nd, 3rd and 4th respondents had engaged in a go slow and then failing to consider the illegality thereof and/or breach by the respondents of the terms and conditions of employment and the law in that regard.

    c. Erred in law in failing to take into account the mutuality of both parties' obligations to each other and their conduct in the circumstances in making an award of damages in favour of the respondents.

    d. Erred in law for failing to consider or take account of the crisis and potential damage to an employer's business arising from an employee's wilful engagement in an unlawful industrial action warranted a reasonable reaction by the employer to protect its assets and its business.

    e. The honourable Judges of the Court of Appeal failed to apply a reasonable and/or fair standard in considering the applicant's reaction to the go slow in the circumstances by holding it in breach of its Disciplinary Handbook in circumstances not contemplated therein.

    f. The honourable Judges of the Court of Appeal erred in law in finding that anything that may alter or affect an employee's rights under the employment contract should be set out in the contract by failing to take into account that the go slow amounted to an extenuating illegality not reasonably foreseeable to have been included in the Applicant's Disciplinary Handbook.

16. Consequently, the appellant seeks the following reliefs;

a. A finding that section 49 of the *Employment Act* does not provide for damages or any relief where the employee has not been dismissed or the contract of employment has not been terminated.

b. Part of the Judgment of the Court of Appeal substituting the award of damages for unlawful labour practices of Kes 800,000/- to each respondent with an award equivalent to 4 months gross salary in favour of the 1st to 5th respondents and 1 month gross salary for the 2nd, 3rd and 4th respondents be set aside.

c. The costs of this Appeal be paid by the respondents.

17. The respondents filed a response in opposition to the petition of appeal dated May 15, 2023. The respondents have also filed a notice of cross of appeal pursuant to rule 47 of the *Supreme Court Rules, 2020* dated April 11, 2023 contending that the decision of the Court of Appeal ought to be varied or reversed to the extent or in the manner and on the following grounds:

1. The Court of Appeal erred in finding that 'it was not unreasonable for the 1st appellant to believe that the 2nd, 3rd and 4th respondents took part in the go slow when the same court had found the following:

    a. The 1st appellant's disciplinary process it had invoked lacked procedural and substantive fairness

    b. There was no evidence with regard to the extent of the alleged loss as neither Reginald nor Irene could quantify or tender evidence of the loss alleged to have occurred.

2. Consequent to the aforestated, the Court of Appeal erred in awarding the 2nd, 3rd and 4th respondents only one-month gross salary as damages instead of four (4) months gross salaries as was the case to the 1st and 5th respondents

3. The Court of Appeal erred in failing to find that, if it was not for the unfair interdiction, the respondents would have continued working as gantry operators and would have earned the allowances and therefore bearing in mind the award of damages is intended at compensating the respondents for the economic injuries suffered by them, they were entitled to be awarded the special damages they claimed from the 1st appellant.

3. The Court of Appeal erred in finding that the respondents did not prove the special damages when there was clear and uncontradicted evidence of the same.

4. The Court of Appeal erred in failing to appreciate that the respondents proved their claim for unfair interdiction and were thus entitled to the costs of the trial court.

18. Consequently, the respondents pray for the following orders:

    a. The court to set aside the Court of Appeal order awarding the 2nd, 3rd and 4th respondents one-month gross-salary as damages and substituted the same with an order awarding their four (4) months gross salary as damages as was the case with the 1st and 5th respondents

    b. The honourable court do set aside the Court of Appeal order that each party should bear its own costs at the ELRC and substitute the order awarding costs to the respondents as awarding costs to the respondents as awarded by the trial court.

    c. The respondents be awarded costs of the appeal and the cross appeal.

19. In opposing the cross appeal, the appellant filed a preliminary objection dated May 16, 2023 contending that the cross appeal does not fall under article 163(4)(a) of the the *Constitution*; the cross appeal had not been certified by either the Court of Appeal or the Supreme Court pursuant to article 163(4)(b) of the *Constitution* and section 15B of the *Supreme Court*; and rule 47 of the *Supreme Court Rules* does not confer jurisdiction on the Supreme Court as a second appellate court as this would be inconsistent with articles 163(4)(a) and (b) of the *Constitution* and sections 15A and 15B of the *Supreme Court Act*.

a. Parties' Submissions

a. The appellant's case

20. The appellant relied on its preliminary objection as aforestated together with three sets of written submissions; in support of its preliminary objection dated June 2, 2023; in support of their appeal dated May 8, 2023; and in response to the cross-appeal dated June 20, 2023.

21. In support of its preliminary objection, the appellant urged that the cross appeal does not satisfy either limb of article 163(4) of the *Constitution*. Relying on the decisions in *Gladys Wanjiru Munyi v Diana Wanjiru Munyi* SC Petition 31 of 2014 (2015) eKLR, *Erad Suppliers and General Contractors Limited v National Cereals & Produce Board* SC Pet No 5 of 2012 (2012) eKLR, it submitted that a cursory glance at the grounds of the cross-appeal yields the conclusion that the same does not raise any constitutional questions for determination or interpretation of the *Constitution* therefore the cross appeal does not lie as of right. Relying further on *Suleiman Mwamlole Warrakah & 2 others v Mwamlole Tchappy Mbwana & 4 others* SC Pet 12 of 2018 (2018) eKLR, the appellant pointed out that the only alternative available to the respondents was for the cross appeal to fall within the ambit of article 163(4)(b) of the *Constitution* but the respondents have failed to seek certification from either the Court of Appeal or the Supreme Court.

22. To further assail the cross appeal, the appellant submitted that rule 47 of the *Supreme Court Rules* does not aid the respondents' cross appeal. It was argued that the rule only sets out the contents of a notice of appeal but does not in any way supplant the provisions of article 163(4)(a) and (b) of the *Constitution*; that any other interpretation of rule 47 to infer that it confers jurisdiction to the court to entertain an appeal, would be inconsistent and in conflict with articles 163(4)(a) and (b) of the *Constitution* and sections 15A and 15B of the *Supreme Court Act*. In this regard the appellant cited the case of *Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* SC Petition No 3 of 2019 [2019] eKLR.

23. To support its appeal, the appellant submitted that section 49 of the *Employment Act* sets out the remedies for wrongful dismissal and termination, yet it is common ground that the respondents' contracts were not terminated; that the Court of Appeal erred in construing section 49 of the Employment Act as applicable in the computation and award of damages to the respondents whose contracts were not terminated. Citing *Republic v Kenya School of Law & another ex parte Kithinji Maseka Semo & another* (2019) e KLR and *Sagoo v Dourado* [1983] KLR 365 the appellant urged that the statute must be read as it stands and the courts may not write words into it or deduct words from it. It is contended that the language of section 49 is that it applies only to cases of dismissal or termination of employment and therefore did not apply to the undisputed facts before the trial court.

24. The appellant further contended that the Court of Appeal proceeded in error to award damages to the respondents despite determining that they were on a go slow and hence confirming that the respondents breached their terms and conditions of employment; that, both parties were in breach of their contractual obligations, in which case the respondents should not have been awarded damages under section 49 of the *Employment Act*.

25. In response to the cross -appeal, the appellant contended that the respondents have not in any way demonstrated any basis for the court to disturb the findings of the Court of Appeal as it is trite law that special damages must be specifically pleaded and proved. Further, that it is not enough for the respondents to allege that they were entitled to the payment of special damages for a period they did not serve as gantry operators.

26. On costs, the appellant submitted that the Court of Appeal explained the basis for its order on costs, in particular that each party having been partially successful, the appropriate order was for each party to bear its costs. Therefore, the respondents' claim for costs before the Court of Appeal is unsustainable.

b. The 1st to 5th respondent s' case

27. The respondents rely on its response to the appellant's petition of appeal together with three sets of submissions; in response to the preliminary objection dated August 14, 2023; in response to the appellant's appeal dated July 27, 2023; and in support of its cross appeal dated July 3, 2023.

28. In response to the preliminary objection they contended that once an appeal is properly before the Supreme Court, under section 21(1) of the *Supreme Court Act*, the court has the power to make any order and grant any reliefs that could have been granted by the court or tribunal from which the appeal emanates. They urged that the reliefs sought in the cross appeal could have been granted by the Court of Appeal hence the court has the jurisdiction to hear and determine the cross appeal pursuant to section 3A of the *Supreme Court Act*, 2011.

29. They pointed out that the legal effect of rule 47 of the *Supreme Court Rule 2020* is that the right to cross appeal is not limited to any category of appeal but rather is available to a respondent in an appeal initiated under articles 163(3)(a), (4)(a) and (b) of the *Constitution* and section 15, 15A, 15B and 15C of the *Supreme Court Act*, 2011. Further that a respondent is at liberty to challenge any part of the judgment provided they specify the grounds of contention and such respondent is also free to seek for any relief different in nature from that of the appellant.

30. They urged that their arguments fall under article 48 of the *Constitution* whose primary objective is the dispensation of justice. They add that the Supreme Court being the final call for judicial intervention in dispensing justice is given latitude to consider every aspect of a grievance that might have caused injustice. Due to the foregoing submissions, they implored the court to find that the preliminary objection lacks merit and should be dismissed with costs.

31. In opposition to the petition of appeal, the respondent s submitted that the issue as certified by the Court of Appeal is whether the respondent s are entitled to an award of damages under section 49 of the *Employment Act*. They submitted that their relationship with the appellant is contractual therefore the provisions of section 12(1)(a) of the *Employment Act* are applicable to the terms of the contract; that the ELRC having found that the disciplinary process was unfair and this finding having been upheld by the Court of Appeal, then there was a clear case of a breach of contract of employment. They urged that the Court of Appeal reached the said finding after a lengthy analysis of the evidence on record and after taking note of fundamental facts established by the said evidence. They also argued that the Court of Appeal noted that the disciplinary proceedings were not produced as evidence as they would have shed more light on whether the respondent s participated in the go slow or

not. Further, the letters lifting the respondent s' interdictions also failed to indicate the disciplinary committee's findings on that aspect. Relying on *Halsbury's Law of England*, 3rd Edition, Volume 25 par 990, they submit that law requires that a party who has suffered a breach of contract is entitled to damages. They argue that they are therefore by law entitled to damages.

32. They further conceded that there is no express provision in the *Employment Act* that provides for award of damages to an employee for breach of contract that does not lead to termination of the contract. They pointed out that the Court of Appeal relied on the provisions of sections 43, 47 and 45 of the *Employment Act* in its analysis of the burden of proof. Section 49 of the *Employment Act* provides for cases of wrongful dismissal and unfair termination and the case before the court was neither of the two. It is their contention that recourse is therefore taken from the law of contract which supplements the Employment Act.

33. It was therefore their case that they are entitled to general and special damages that the ELRC and the Court of Appeal declined to grant. Further, it was submitted that how these are calculated is left to the discretion of the Judge who may elect to award damages that could be measured against the circumstances of the case; that this is what Radido J contemplated in awarding the respondent s Ksh 800,000/= each, without reference to section 49 of the *Employment Act*.

34. They submitted further that Radido J considered the interdiction without adherence to the disciplinary procedure, the redeployment of the respondent s were trained as gantry operators to areas that were not related to gantry operations; their reduction in salaries due to denial of the fixed allowances only payable to gantry operators; the fact that despite notice being given, the appellant refused to produce the findings of the disciplinary process rendering the allegation of a go slow unproved.

35. They urged that the Court of Appeal was wrong in interfering with the ELRC award as they did not give justifiable reasons to interfere with the judge's exercise of discretion. They however urge that the Court of Appeal was right in awarding them damages.

36. In support of their cross appeal, the respondents submitted that the Court of Appeal erred in differentiating the claim of the 2nd to 4th respondent with that of the 1st and 5th respondents despite the court establishing that the disciplinary process by the appellant lacked procedural and substantive fairness, and that the proceedings related to the disciplinary hearing were not produced.

37. On their claim for bonuses, allowances and salaries that they should have earned had they not been interdicted and redeployed to other duties other than gantry operators, they contended that if employment remedies must be proportionate to the economic injuries

suffered by the employee, then the Court of Appeal was wrong when it rejected their claim for bonuses, allowances and salaries that they should have earned. They submitted that the general principles as to the measure of damages or the standard or method by which the amount of damages is to be assessed is laid out in *Halsbury's Law of England*, and supports the award of all the special damages as pleaded by the respondents. Using the example of restitution in integrum, whereby the wronged person must be put in the same position had he not sustained the wrong, they urge that they would have continued to earn the bonuses, allowances and salaries they had been earning before being wrongly interdicted. They urged that they are entitled to special damages and the ELRC, and the court of appeal were both wrong for denying them the same.

38. They contended that they pleaded and proved the special damages by adducing their pay slips as evidence to demonstrate that they used to earn these allowances and that they were subsequently removed by the appellant.

39. On costs, they submitted that they were entitled to costs as correctly awarded by the ELRC, which award was in line with this Court's decision in *Jasbir Singh Rai &3 others v Tarlochan Singh Rai & 4 others* SC Petition No 4 of 2012; [2014] eKLR. They pointed out that despite their success, the Court of Appeal erroneously set aside the order of costs and substituted it with an order that each party bear its own costs at the ELRC. They note that the basis for this substitution was due to the Court of Appeal alluding to both parties having been partially successful in their respective cases. The respondents urged that the issue at the Court of Appeal was the amount of damages which it only reduced and this did not justify setting aside the award of costs; the Court of Appeal failed to demonstrate that the ELRC decision on costs was based on a whim, was capricious or was plainly wrong.

40. Finally, it was urged that the respondents are also entitled to costs at the Court of Appeal having successfully defended the decision that their interdiction was unfair and having justified that they were entitled to costs despite the fact that the damages were reduced by the Court of Appeal.

d. Issues for Determination

41. In the Court of Appeal 's ruling delivered on March 3, 2023 the Court certified the matter as concerning issues of general public importance. In doing so the Court of Appeal did not delineate questions for the determination of the court but rather noted as follows regarding the issues for determination by the Supreme Court:

> "12. Section 49 of the *Employment Act* provides for remedies for wrongful dismissal and unfair termination which includes compensation pegged on the wages or salary of an employee, reinstatement of an employee, reengagement of an employee in comparable or suitable work and wages. In light of the observation made by this

court on the parameters of operation of section 49 of the *Employment Act*, we are of the view that this is a point of law of general importance which needs to be settled by the Supreme Court in light of reliance on the said section in employment disputes. In particular, the question of the nature and categories of wrongful dismissal and unfair termination that the section applies to needs to be settled. We accordingly find that the threshold set in *Hermanus Philipus Steyn v Giovanni Gnecchi Ruscone*(*supra*) has been met, as the question of law raised by the appellant is one of general public importance that transcends the dispute between the parties in this particular case."

42. A preliminary objection has also been raised as to the competence of the respondents cross-appeal. We therefore find that the following issues emerge for the court to determine;

i. The nature and categories of wrongful dismissal and unfair termination that section 49 of the *Employment Act* applies to and in particular; whether section 49 applies where an employee has not been dismissed or the contract of employment terminated.

ii. Whether the respondents' cross appeal is valid; and

iii. Who should bear the costs of the suit?

d. Analysis and Determination

i. The nature and categories of wrongful dismissal and unfair termination that section 49 of the Employment Act applies to, and in particular; whether section 49 applies where an employee has not been dismissed or the contract of employment terminated.

43. While analyzing how to determine the intention of a statute, the Court of Appeal in *County Government of Nyeri & anor v Cecilia Wangechi Ndungu* [2015] eKLR held that:

> "Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors."

44. In *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, SC Pet No 26 of 2014; [2014] eKLR, this court opined that a purposive interpretation should be given to statutes so as to reveal the intention of the statute. The court observed as follows:

> "In *Pepper v Hart* [1992] 3 WLR, Lord Griffiths observed that the "purposive approach to legislative interpretation" has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the court is not to be held captive to such phraseology. Where the court is not sure of what the legislature meant, it is free to look beyond the words themselves, and consider the historical context underpinning the legislation. The learned Judge thus pronounced himself:
>
> "The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted."

45. Section 49 of the *Employment Act* provides for remedies for wrongful dismissal and unfair termination when it provides as follows;

> 1. Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following —
>
> a. the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;
>
> b. where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or

c. the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

2. Any payments made by the employer under this section shall be subject to statutory deductions.

3. Where in the opinion of a labour officer an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to —

a. reinstate the employee and treat the employee in all respects as if the employees employment had not been terminated; or

b. re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage

46. With regard to awards under section 49, the legislature found it necessary to catalogue the factors to be considered in making an award as follows;

4. A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following—

a. the wishes of the employee;

b. the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and

c. the practicability of recommending reinstatement or re- engagement;

d. the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;

e. the employee's length of service with the employer;

f. the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;

g. the opportunities available to the employee for securing comparable or suitable employment with another employer;

h. the value of any severance payable by law;

i. the right to press claims or any unpaid wages, expenses or other claims owing to the employee;

j. any expenses reasonably incurred by the employee as a consequence of the termination;

k. any conduct of the employee which to any extent caused or contributed to the termination;

l. any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee.

m. any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee.

47. Section 50 of the *Employment Act* also provides that in determining a complaint or suit under the Act involving wrongful dismissal or unfair termination of the employment of an employee, the industrial court shall be guided by the provisions of section 49.

48. Part VI of the *Employment Act* makes a distinction between wrongful dismissal and unfair termination. A termination of employment by an employer is unfair in terms of section 45, if the employer fails to prove;

a. that the reason for the termination is valid;

b. that the reason for the termination is a fair reason—

i. related to the employee's conduct, capacity or compatibility; or

ii. based on the operational requirements of the employer; and

a. that the employment was terminated in accordance with fair procedure.

49. Section 46 of the *Employment Act* provides occurrences that do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty. Specifically, it will be unfair if it relates to; (i) a female employee's pregnancy, (ii) the going on leave of an employee, (iii) an employee's membership of a trade union, (iii) the participation of an employee in the activities of a trade union, (iv) the employee's seeking office in a trade union, or his refusal to join or withdraw from a trade union, (v) an employee's race, colour, tribe, sex, religion, political opinion or affiliation, national extraction, nationality, social origin, marital status, HIV status or disability, (vi) an employee's initiation of a complaint or legal proceedings

against the employer unless done irresponsibly, or (vii) an employee's participation in a lawful strike.

50. Wrongful dismissal therefore occurs when the employee is dismissed without notice or with inadequate notice. The rationale of giving notice is to offer the affected parties' time, either to search for alternative employment or for the replacement of an employee, respectively. The parties, when entering into the contract of employment, may have agreed on the requirement of notice of termination of the contract.

51. In *Ken freight (EA) Limited v Benson K Nguti* SC Pet No 37 of 2018 [2019] eKLR this court explained the applicability of the provisions of section 49 as hereunder;

> "…..What then should be the correct award on damages be based on? Having keenly perused the provisions of section 49 of the *Employment Act*, we have no doubt that once a trial court finds that a termination of employment as wrongful or unfair, it is only left with one question to determine, namely, what is the appropriate remedy? The Act does provide for a number of remedies for unlawful or wrongful termination under Section 49 and it is up to the judge to exercise his discretion to determine whether to allow any or all of the remedies provided thereunder. To us, it does not matter how the termination was done, provided the same was challenged in a court of law, and where a court found the same to be unfair or wrongful, section 49 applies…."

52. The *Constitution of Kenya* equally provides for labour relations under article 41;

> 41. Labour relations
>
> 1. Every person has the right to fair labour practices.
>
> 2. Every worker has the right—
>
> a. to fair remuneration;
>
> b. to reasonable working conditions;
>
> c. to form, join or participate in the activities and programmes of a trade union; and
>
> d. to go on strike.
>
> 3. Every employer has the right—
>
> a. to form and join an employers organisation; and

b. to participate in the activities and programmes of an employers organisation.

4. Every trade union and every employers' organisation has the right—

a. to determine its own administration, programmes and activities;

b. to organise; and

c. to form and join a federation.

5. Every trade union, employers' organisation and employer has the right to engage in collective bargaining.

53. *Black's Law Dictionary* 9th edition defines unfair labour practice as follows;

> "Any conduct prohibited by state or federal law governing the relations among employers, employees, and labour organisations. Examples of unfair labour practices by an employer include (1) interfering with protected employee rights, such as the right to self-organization, (2) discriminating against employees for union related activities, (3) retaliating against employees who have invoked their rights, and (4) refusing to engage in collective bargaining. Examples of unfair labour practices by a labour organization include causing an employer to discriminate against an employee, engaging in an illegal strike or boycott, causing an employer to pay for work not to be performed (ie featherbedding), and refusing to engage in collective bargaining...."

54. In *Peter Wambugu Kariuki & 16 others v Kenya Agricultural Research Institute* [2013] eKLR the court explained the concept of unfair labour practice and its application under article 41 thus;

> " What is this right to fair labour practices? First, it is the opinion of the court that the bundle of elements of "fair labour practices" is elaborated in article 41(2), (3), (4) and (5) of the *Constitution*.....These constitutional provisions constitute the foundational contents of the right to fair labour practices.....
>
> Secondly, it is the opinion of the court that the right to "fair labour practices" encompasses the constitutional and statutory provisions and the established work place conventions or usages that give effect to the elaborations set out in article 41 or promote and protect fairness at work. These include provisions for basic fair treatment of employees, procedures for collective representation at work, and of

late, policies that enhance family life while making it easier for men, women and persons with disabilities to go to work."

55. From the above definition unfair labour practice encompasses all conduct prior to, in the course of employment, during and after termination of employment. The provisions of article 41 therefore encompass the full spectrum of labour practices. The provisions of article 41 are borne from the realization that employment and/or right to work is a human right. The right is also linked to other rights in the bill of rights more so the protection of life and the dignity of a person. The right is therefore a principle with legal obligations.

56. Whereas the *Employment Act* is expressive of the rights under Article 41, we find that damages under the head of article 41, as a constitutional provision, ought to be specifically pleaded and proved. Any other constitutional provisions that would have been infringed can equally be canvassed, alongside, and, under this head. This is different and distinguishable from the provisions under section 49 as read with section 50 of the *Employment Act* which are limited to the provisions under the *Employment Act*. The wording of the *Employment Act* under section 49 only relate to an instance where an employee has been terminated. This court determined in *Ken freight (E.A) Limited v Benson K. Nguti* (*supra*) that section 49 of the *Employment Act* is applicable upon the finding that a person has been unlawfully terminated.

57. As to the nature and categories of wrongful dismissal and unfair termination that section 49 of the *Employment Act* applies to, the provisions of part V of the *Employment Act* refer to almost all instances of employment and circumstances that lead to termination of employment. What about instances that necessarily don't lead to termination of employment? Some provisions of the *Employment Act* refer to such circumstance providing penalties and sanctions therein. One such instance is set out in part VII of the *Employment Act*; this is a distinct section of the Act that focuses on protection of children. The *Labour Relations Act*, 2007 at Part X deals with lock- out and strikes. The Labour Relations Act also provides for conciliation as a method of dispute resolution. The *Work Injury Benefits Act* 2007 provides for compensation to employees for work related injuries and diseases contracted in the course of their employment and for connected purposes with the ELRC in the instance of the *Labour Relation Act* and the *Work Injury Benefits Act* acting as an appellate court and an enforcer.

58. Does it therefore limit a judicial officer from relying on the principles outlined in section 49 in deciding a matter not set out in the *Employment Act* and which necessarily don't lead to termination of employment. It all reverts back to the powers granted to the court under section 12 of the *Employment and Labour Relations Act*. Section 12 (3) of the Act grants the ELRC powers to make any of the following orders—

i. interim preservation orders including injunctions in cases of urgency;

ii. a prohibitory order;

iii. an order for specific performance;

iv. a declaratory order;

v. an award of compensation in any circumstances contemplated under this Act or any written law;

vi. an award of damages in any circumstances contemplated under this Act or any written law;

vii. an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the court thinks fit to impose under circumstances contemplated under any written law; or

viii. any other appropriate relief as the court may deem fit to grant.

59. The wording of section 12 grants the employment and labour relations court power to issue such orders as contemplated under the Act and any other written law, it also grants the court jurisdiction to issue any appropriate relief as it may deem fit. The *Black's Law Dictionary* 9th edition at page 534 defines judicial discretion as follows:

> " the exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not to act when a litigant is not entitled to demand the act as a matter of right"

60. From the above analysis and the wording of section 49, it is clear to us that section 49 applies to only instances as have been set out under the Act; section 49 only applies where an employee is terminated; in any other instance the court is expected to exercise its discretion as granted by the *Constitution*, the *Employment and Labour Relations Act* and any other statutory provisions. In exercising such judicial discretion, a judge or magistrate bears the burden of accounting for their decision and in order to discharge this burden, the judge or magistrate ought to explain the basis of their decision.

61. How then do we relate the above analysis to the appeal before us, the appellant contends that the Court of Appeal was wrong in their reliance on the provisions of section 49 of the *Employment* while clearly in this case the respondents were not dismissed from their employment. The genesis of the dispute between the parties was that the respondents were alledged to have been in a go-slow between March 29, 2011 to March 31, 2011. A go-slow is a form of industrial action in which work or progress is deliberately delayed or slowed

down. Both superior courts found that there was no indication that the 1st and 5th respondent participated in the go-slow. The courts equally found that due procedure was not adhered to and that the disciplinary measures taken by the appellant were not anchored in law nor in the disciplinary handbook. The Employment court issued a sum of Kes 800,000/= on account of general damages for unfair labour practices. The Court of appeal on the other hand relied on the provision of section 49 of the *Employment Act* and reversed the award of general damages to 4 months gross salary in favour of the 1st and 5th respondent and 1 month's gross salary in favour of the 2nd, 3rd & 4th respondent.

62. Despite the internal dispute mechanisms between the parties, the Human Resource manual at clause 1.6. (v) allowed an employee to invoke the provisions of the *Labour Relations Act*, 2007. Section 2 of the *Labour Relations Act* defines a trade dispute to mean a dispute or difference, or an apprehended dispute or difference, between employers and employees, between employers and trade unions, or between an employers' organisation and employees or trade unions, concerning any employment matter, and includes disputes regarding the dismissal, suspension or redundancy of employees, allocation of work or the recognition of a trade union. Section 62 of the *Labour Relations Act* mandates the reporting of a trade dispute to the minister who thereafter appoints a conciliator. If the parties fail to reach a consensus section 73 allows an aggrieved party to file a claim at the Employment and Labour Relations Court. Section 76 also allows an aggrieved party to take part in a protected strike after issuing a seven-day notice.

63. The parties herein only refer to a private conciliation whereby they undertook a case study of other jurisdictions and an increment of wages was made. This, as alleged by the appellant, did not auger well with the respondent and they resolved to participate in a go-slow. From the reading of the *Labour Relations Act*, the immediate recourse was to report the aforesaid go-slow to the minister who would then have appointed a conciliator. Had the conciliation fell through then the matter would have been referred to the Employment and Labour Relations Court.

64. Looking at the Disciplinary Handbook the same provides for various forms of punishment listed as follows; (a) verbal caution or warning, (b) suspension from duty for a period not exceeding three (3) days, (c) stoppage of annual increments (d) surcharge (e) termination of contract (f) forfeiture of appointment (g) retirement/termination on public interest (h) dismissal. We therefore, agree with the superior courts that redeployment was not one of the punishments envisaged in the disciplinary handbook; we also agree that the appellant did not equate the loss incurred, and the surcharge was arbitrary and not in conformity with the disciplinary handbook which provided for a maximum of three-months surcharge.

65. Were the superior courts then justified to issue general damages in favour of the respondents and if so, what criteria should the courts have adhered to. While the action in the trial

court started its life as a constitutional petition the same changed character to an ordinary cause. The trial court did not particularise the various rights allegedly violated but dealt with the same under the respective reliefs sought ultimately awarding general damages of Kes 800,000/= in favour of the appellant. The Court of Appeal on the other hand found that the trial judge did not ascertain how he came to the award issued on account of general damages. In reversing the decision, the court relied on the provisions of Section 49 to justify its award.

66. The petition and amended plaint were clearly anchored on article 41 of the *Constitution*; the predominant claim was a claim for unfair labour practice. The respondent urges the court to rely on the claim for breach of contract; however, in the amended plaint the particulars of breach were not set out. The immediate recourse under article 41 is to rely on section 12 of the *Employment and Labour Relations Act* which grants the court power to issue an award of compensation in any circumstance contemplated under the Act or any other written law.

67. As we have found above the activities are linked to an alleged go-slow. We have already set out the procedure that the parties ought to have undertaken before commencing the claim. We have arrived to the same finding that due procedure was not adhered to by the appellant; this justified a claim for unfair labour practice. We note that the appellant suffered loss as a result of the go- slow, the same was however not quantified. Contributing of the loss was only apportioned to the 2nd, 3rd and 4th respondent.

68. It is our view that, where the court finds that the matters complained of was to any extent caused or contributed to by an action of the complainant it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding. Intentional conduct is regarded as a necessary prerequisite for reduction of compensation. Variation of an amount of compensation, therefore largely depends on the extent of contributory circumstances but does not bar recovery. In any industrial action the conduct of an employee in causing such industrial action to take place can be regarded as contributory fault.

69. We have considered the parameters the Court of Appeal applied in the exercise of its discretion. Despite the Court of Appeal's reliance on the provisions of section 49, in assessing the damages; their determination was pegged on the contribution of the respondents to the industrial action, the same applied in the Court of Appeal's award on costs, the court reversed the decision upon a finding that both parties partly succeeded in their claims, we therefore find no fault in the award issued and we shall therefore not disturb the same. We arrive at the finding that the appeal therefore succeeds only to the extent that the Court of Appeal erred in its application of section 49 of the *Employment Act*.

ii. Whether the respondents' cross appeal is valid.

70. The grounds raised by the appellant contesting the validity of the cross- appeal are three- fold; the cross appeal does not fall under article 163(4)(a) of the *Constitution*; the cross appeal had not been certified by either the Court of Appeal of Supreme Court pursuant to article 163(4)(b) of the *Constitution* and section 15B of the *Supreme Court*; and, rule 47 of the *Supreme Court Rules* does not confer jurisdiction on the Supreme Court as a second appellate court as this would be inconsistent with articles 163(4)(a) and (b) of the *Constitution* and sections 15A and 15B of the *Supreme Court Act*.

71. The respondents align to the submission that the provisions of rule 47 of the *Supreme Court Rules* are not limited to appeals filed as of right; the rule equally applies to appeals filed upon certification that a matter is of general public importance.

72. Rule 47 of the *Supreme Court Rules* provide as follows;

> 47. Notice of cross-appeal
>
> 1. A respondent who intends to cross-appeal shall specify the grounds of contention, and the nature of the relief that the respondent seeks from the court.
>
> 2. The respondent shall—
>
> a. provide contact details including the names, postal address, telephone number and email address of any persons intended to be served with the notice; and
>
> b. lodge eight copies of the memorandum of appeal and record of appeal in the registry within thirty days of service upon the respondent, or not less than thirty days before the hearing of the appeal, whichever is the later.
>
> 3. An application or notice to cross-appeal shall be as set out in Form I of the First Schedule.
>
> 4. In a criminal appeal, the Registrar of the court or tribunal from which an appeal originates shall prepare the record of appeal, and cause copies to be served upon the parties and to the Registrar.

73. This court in the case of *Communications Commission of Kenya & 3 others v Royal Media Services Limited & 7 others*, SC Petition No 14 of 2014; [2014] eKLR and more recently in *IEBC v Sabina Chege* SC Pet No 23 (E026) of 2022 (delivered on September 12, 2023)

(unreported) determined that a cross appeal is an action by a respondent, who intends to counter an appellant's cause in an appeal, with the view of obtaining certain relief(s) from the court and the same is filed pursuant to rule 47 of the *Supreme Court Rules, 2020*. Further this court in the case of *Senate & 3 others v Speaker of the National Assembly & 10 others*, (Petition 19 (E027) of 2021); [2023] KESC 7 (KLR) and again in the case of *IEBC v Sabina Chege* (*supra*) the court held that pursuant to rule 47(2)(b) a respondent who intends to cross appeal is expected to lodge eight copies of the memorandum and record of appeal and not rely on other parties' pleadings as they have prayed. Failure to comply with rule 47 renders a cross appeal incurably defective.

74. The *Black's Law Dictionary*, 9th ed (at page 133) defines "cross- appeal" as follows:

> " to seek review (from a lower court's decision) by a higher court" And "cross-petition" (p 433) as follows:
>
> "i. a claim asserted by a defendant against another party to the action;
>
> iii. claim asserted by a defendant against a person not a party to the action for a matter relating to the subject of the action."

75. In *Communications Commission of Kenya & 3 others v Royal Media Services Limited & 7 others*, SC Petition No 14 of 2014; [2014] eKLR we had this to say regarding filing cross-appeals and cross-petitions;

> " ...From the above definitions, there is a difference between a cross-appeal and a cross-petition. A cross-appeal is an action by a respondent, who intends to counter an appellant's cause in an appeal, with the view of obtaining certain relief(s) from the court. A cross-petition on the other hand, is an action by a defendant in first-instance claims, intending to counter the claim of a petitioner with the view of obtaining certain remedies. The applicant, therefore, does not bear the right to file a cross-petition or even a cross-appeal, as this is a preserve of a respondent who has a claim against another party already in the appeal (cross-appeal), or another party to the suit (cross-petition)....."

76. In *Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others* (*supra*) held that a cross appeal must at the onset fall within the jurisdictional sphere of the court as set out in the constitutionand must be limited to issues not already addressed by the appeal or those that cannot be argued during the appeal as a response. The court went on further to distinguish an appeal filed under article 163(4)(b) when it held as follows;

> (181) Where the appeal requires certification as being a matter of great public importance under the provisions of article 163(4)(b) of the *Constitution*, it is our position that

during such certification, the respondent is at liberty to raise the cross appeal and the grounds applicable for such. In that instance, should the Court of Appeal or Supreme Court dealing with the certification find that the ground raised either in the application for certification and/or cross appeal qualifies as raising great public importance, then the issues and grounds will be framed as such to form the basis of certification of the appeal to the Supreme Court. With such certification, as may be reviewed by the Supreme Court where necessary, the respondent will be at liberty to file the cross appeal in accordance with the Supreme Court directions....."

77. Probing the cross-appeal before us, the respondent lodged the appeal together with eight copies of memorandum of appeal and record of appeal; certification was not sought for grounds raised in the cross-appeal. Nevertheless, the grounds raised in the cross-appeal urged the court to re-assess the factual dispositions and make a finding that the respondents are entitled to special damages; the grounds clearly do not relate to the issue for consideration before us, being the parameters of the application of section 49 of the *Employment Act*. The grounds of the cross-appeal do not raise any constitutional questions for determination or interpretation of the *Constitution*.

Further, even if we were to make a finding that the same fits within the parameters of the question certified, we have already decided on the appeal and made findings with regard to the issues raised in the cross-appeal.

78. On costs, we are guided by the decision in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* SC Pet No 4 of 2012 [2014] eKLR which held that an order on cost is a judiciously-exercised discretion of the court, accommodating the special circumstances of the case, while being guided by ends of justice considering the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation. Accordingly, we order that each party bears their own costs.

e. Orders

79. Consequent upon our conclusion above, we finally order that;

a. The petition of appeal dated March 27, 2023 and lodged on March 31, 2023 succeeds only to the extent that the Court of Appeal erred in its reliance of section 49 of the *Employment Act*.

b. The cross appeal is hereby dismissed.

c. Each party to bear the costs of the appeal.

Orders accordingly.

Khan v International Commercial Company (K) Ltd (Petition E010 & E009 of 2023 (Consolidated)) [2023] KESC 107 (KLR) (21 December 2023) (Judgment)

Supreme Court of Kenya

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

Neutral citation: [2023] KESC 107 (KLR)

Jurisdiction *– jurisdiction of the Supreme Court – jurisdiction to determine appeals on matters of constitutional interpretation/application – whether the appeal progressed through the appropriate mechanisms - whether the appeal raised questions of constitutional interpretation or application of the Constitution to warrant an appeal to the Supreme Court - whether the appeal before the Supreme Court had progressed through the appropriate appellate mechanisms so as to reach the Supreme Court by way of an appeal - Constitution of Kenya article 163(4)(a).*

Brief facts

The appellant invoked the Supreme Court's jurisdiction under article 163(4)(a) of the Constitution alleging that the directions, actions, or omissions of the Employment and Labour Relations Court took a constitutional trajectory involving interpretation and application of the Constitution, particularly the Bill of Rights that the Court of Appeal failed to address.

The respondent contended that the appeal did not involve any issue of interpretation or application of the Constitution and as such the court did not have jurisdiction to entertain the same.

Issues

i. Whether the appeal raised questions of constitutional interpretation or application of the Constitution to warrant an appeal to the Supreme Court.

ii. Whether the appeal before the Supreme Court had progressed through the appropriate appellate mechanisms so as to reach the Supreme Court by way of an appeal.

Held

1. To evaluate the jurisdictional standing of the Supreme Court in handling the appeal, it was necessary for the court to consider 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 Supreme Court by way of an appeal, as contemplated under article 163(4)(a) of the Constitution.
2. The directions that emanated from the Employment and Labour Relations Court (ELRC) were interlocutory matters. No substantive questions of interpretation and application of the Constitution arose at the ELRC during the proceedings leading to the directions issued by the court. What was before the ELRC concerned normal court processes during the conduct of the matter which were aimed at aiding the disposal of the matter and not cogent issues of constitutional controversy. The Court of Appeal only tangentially touched on the issue of the violation of the appellant's rights.

3. The Supreme Court lacked jurisdiction to adjudicate the appeal pursuant to article 163(4)(a) of the Constitution. The Supreme Court was unable to assess whether the trial court appropriately exercised its discretion and whether the rights of the appellant were violated.

Appeals dismissed.

Orders

Costs awarded to the respondent.

Citations

Cases

Kenya

1. *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya; Communications Commission of Kenya* Miscellaneous Application 1640 of 2003; [2005] KEHC 1767 (KLR) - (Explained)
2. *Gakure, John & 148 others v Dawa Pharmaceutical Co Ltd & 7 others* Civil Application 299 of 2007; [2010] KECA 89 (KLR) - (Explained)
3. *Hangzhou Agrochemical Industries Ltd v Panda Flowers Limited* Civil Suit 97 of 2009; [2012] KEHC 1937 (KLR) - (Explained)
4. *Joho & another v Shahbal & 2 others* SC Petition No 10 of 2013; [2014] eKLR; [2014] 1 KLR 111 - (Explained)
5. *Judicial Service Commission v Shollei & another* Civil Appeal 50 of 2014; [2014] KECA 334 (KLR) - (Explained)
6. *Kimani & 2 others v Kenya Airports Authority & 3 others* Petition 11 of 2019; [2021] KESC 43 (KLR) - (Explained)
7. *Kiragu v Mugambi & 2 others* Civil Application No 10 of 2019; [2020] eKLR - (Explained)
8. *Krishen s/o Duragadass v Priska Wambui w/o David Karangi* Civ case 2047 of 1976; [1998] KEHC 233 (KLR) - (Explained)
9. *Munya v Kithinji & 2 others* Application No 5 of 2014; [2014] 1 KLR 58 - (Explained)
10. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition No 3 of 2012; [2013] 1 KLR 741 - (Explained)
11. *Ngoge v Ole Kaparo & 5 others* Petition No 2 of 2012; [2012] 3 KLR 436 - (Explained)
12. *Rai & 3 others v Rai Estate of & 4 others* SC Petition 4 of 2012; [2013] eKLR; [2013] 2 KLR 142 - (Explained)
13. *Rutongot Farm Ltd v Kenya Forest Service & 3 others* Petition 2 of 2016; [2018] KESC 27 (KLR) - (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 2(2); 27; 48; 50; 73(1)(a)(i)(iv)(2)(b); 159(2)(a); 160; 163(4)(a); 165(2); 258; 259(1)(a)(c) - (Interpreted)
2. Employment and Labour Relations Court Act (cap 8E) section 5(4) - (Interpreted)

3. Industrial Court (Procedure) Rules, 2010 (cap 234 Sub Leg) rule 23 - (Interpreted)
4. Judicial Service Act, 2011 (Act No 1 of 2011) sections 2, 6 - (Interpreted)
5. Supreme Court Act (cap 9B) sections 3(a)(e); 3A; 15(2); 15A - (Interpreted)
6. Supreme Court Rules, 2020 (cap 9B Sub Leg) rule 38(1) - (Interpreted)

Advocates

Ms. Katile for the respondent

December 21, 2023, the Court delivered the following Judgment:

A. Introduction

1. Before the court are two appeals by the appellant both dated March 31, 2023 and filed on April 3, 2023, pursuant to articles 163(4)(a), and 258(1) of the *Constitution*, sections 3(a)(e), 3A, 15(2) and 15A of the *Supreme Court Act, 2011* and rule 38(1) (a) of the *Supreme Court Rules, 2020*. The appeals challenge the decisions of the Court of Appeal in Civil Appeals Nos 63 and 124 of 2018, both delivered on February 17, 2023 which dismissed the appellant's appeals challenging the Employment and Labour Relations Court's (ELRC) hearing directions issued on December 1, 2017 by Onyango J and February 14, 2018 by Makau J the appellate court reasoned that the learned Judges of the trial court had correctly exercised their discretion in issuing the impugned directions.

2. By a consent dated May 17, 2023 and adopted on May 26, 2023, the two appeals were consolidated with Petition No E010 of 2023 designated as the lead file.

B. Background

i. Proceedings at the Employment and Labour Relations Court

3. The appeal originates from an employment dispute. The appellant was employed by the respondent until the termination of his employment on May 2, 2012. Aggrieved, the appellant filed ELRC Case No 66 of 2013 where he *inter alia* alleged unfair constructive dismissal on grounds that he was required to manage a newly completed commercial development that had core construction defects, without any comparative salary increment. During the pendency of the suit, the parties filed several applications but of importance to this appeal are two applications highlighted below.

4. The appellant's first application sought the recusal of Mbaru J citing bias for *inter alia* permitting surprise oral evidence without a witness statement thus denying the appellant the right to further cross-examine the respondent's witness after re-examination and also for denial of leave to amend his pleadings. Vide a Ruling delivered on January 24, 2014, Mbaru

J dismissed the application for recusal and denied the appellant leave to amend his pleadings. Aggrieved, the appellant appealed against the ruling. The Court of Appeal allowed the amendment but made no orders as to the learned judge's recusal. That appeal is not subject of the present proceedings.

5. Upon resumption of hearing before the ELRC, the appellant wrote a complaint letter dated September 15, 2017 against Mbaru J, detailing his dissatisfaction with the manner in which the suit was handled. On September 29, 2017, the learned Judge recused herself to bolster the appellant's confidence that justice would be dispensed impartially. The learned Judge also referred the matter back to the Principal judge of the ELRC for re-allocation to another trial Judge.

6. Subsequently, the matter was listed for directions on December 1, 2017 before the Principal Judge, Onyango J, and after hearing the parties, she directed that; the matter be heard by court No 3; all the applications pending determination be consolidated and heard with the main claim; parties were precluded from filing any other applications pending the hearing of the substantive suit; and the matter was fixed for hearing on February 5, 2018. These directions of December 1, 2017 were to become the subject of appeal in Civil Appeal No 63 of 2018.

7. Pursuant to the directions issued on December 1, 2017, the appellant filed a second application for stay pending appeal, and the same was listed for hearing before Radido J on January 18, 2018 wherein the judge directed that the file be placed before the principal judge for further directions. On January 22, 2018, parties appeared before Onyango J who declined to hear the application and noted that the matter had been scheduled for hearing on February 5, 2018 before court No 3. On the date fixed for the hearing, the matter was mentioned before the Deputy Registrar who fixed it for hearing on February 14, 2018.

8. On February 14, 2018, the parties appeared before court No 3 presided over by Makau J and after hearing the parties' contesting arguments on which of the pending applications was to be heard first, the learned Judge directed that; the court do focus on finalizing the substantive suit; the applications that challenged the competency of pleadings be heard on priority basis to pave way for the hearing of the part-heard suit; notices of motion dated June 6, 2017 seeking to strike out the defence and the one dated June 27, 2016 seeking to strike out the amended claim be heard on a priority basis; parties to file submissions; and the matter be mentioned for highlighting of submissions on March 20, 2018. These directions further aggrieved the appellant and are the root of Civil Appeal No 124 of 2018.

ii. Proceedings at the Court of Appeal

9. The appellant filed two appeals at the Court of Appeal emanating from the decisions of Onyango J of December 1, 2017 and Makau J of February 14, 2018, as follows:

a. Civil Appeal No 63 of 2018

10. Aggrieved by the directions of December 1, 2017 by Onyango J, the appellant instituted Civil Appeal No 63 of 2018. The appeal was premised on 21 grounds as set out in the memorandum of appeal but was later condensed by the appellant into seven thematic grounds, *inter alia*; that the principal judge erred in law and fact by;

i. Violating the provisions of the *Constitution*, to wit, articles 2(2), 73(1)(a)(i) to (iv) & 2(b), 159(2)(a), 259(1)(a) to (c), and 160;

ii. Violating the appellant's rights under the Bill of Rights, that is articles 25(c), 27(1) (2) & (4), 48 and 50(1) of the *Constitution*;

iii. Assuming jurisdiction and purporting to assist the respondent's case, thereby weakening the appellant's case;

iv. Displaying actual bias, partiality, and misuse of the court's authority in granting the impugned directions;

v. Unlawfully interfering and intermeddling with the appellant's case; and

vi. Failing to recuse herself or disclose that she had had contact with the respondent or its representatives.

11. The Court of Appeal delineated a single issue for determination; whether the presiding judge exercised her discretion properly. In a judgment delivered on February 17, 2023, the appellate court (M'Inoti, Laibuta & Gachoka, JJA) dismissed the appeal. In doing so, it determined that the directions by Onyango J were in accordance with the law and her supervisory capacity as directed by article 165(2) of the *Constitution*, sections 2 of the *Judicial Service Act*, and 5(4) of the *Employment and Labour Relations Act*. It was further noted that the impugned directions were intended to facilitate the quick determination of the appellant's case and therefore could not have been issued in misuse of the court's discretion. As regards the alleged violation of the Constitution and the Bill of Rights, bias, and partiality on the part of the Judge, the appellate court found that the same was unsubstantiated and had failed. The Court of Appeal also observed that the trial Judge cannot be faulted because she did not deal with any issues raised in the interlocutory applications or the main suit but only issued directions to aid in the disposal of the suit in a timely manner.

b. Civil Appeal No 124 of 2018

12. Similarly, aggrieved by the Directions of February 14, 2018, by Makau J, the appellant lodged Civil Appeal No 124 of 2018. The appeal was premised on eighteen (18) grounds later

condensed into five (5) grounds. It was argued in that regard that the learned Judge erred in law and fact by;

i. Failing to consider or record that any proceedings further to the orders of the Presiding Judge, were merely academic and a waste of judicial time;

ii. Declining to hear the appellant's application for stay of proceedings thereby denying him equality and equal benefits of law;

iii. Failing to guard the appellant's rights, causing an injustice;

iv. Failing to give priority to the application predicated on violations of the appellant's fundamental rights and freedoms; and

v. Conducting the proceedings in a biased manner.

13. The Court of Appeal delineated one issue for determination; whether the trial Judge exercised discretion properly in [issuing] his directions of February 14, 2018. By a judgment delivered on February 17, 2023, the Court of Appeal (M'Inoti, Laibuta & Gachoka, JJA) dismissed the appeal on the ground that the learned Judge exercised his discretion correctly. The court further cautioned that, a Judge is the master of proceedings and cannot act at the whim of the parties. It also emphasized that to allow parties to determine how proceedings are to be conducted would amount to promoting anarchy in the court process and would contravene articles 159 and 160 of the Constitution which vests judicial authority in the judiciary and protects judicial independence.

ii. Proceedings at the Supreme Court

14. Aggrieved by the said judgments of the Court of Appeal, two appeals were filed before the court namely: Petition No E009 of 2023 and Petition No E010 of 2023 both dated March 31, 2023 and filed on April 3, 2023.

15. By a consent adopted by this court on May 26, 2023, the two appeals were consolidated, with Petition No E010 of 2023 designated as the lead file. The appellant seeks the following reliefs in the consolidated appeal:

i. The appeals be allowed;

ii. Orders setting aside the Court of Appeal's judgements and orders delivered February 17, 2023 in Civil Appeal No 63 of 2018 and Civil Appeal No 124 of 2018;

iii. A declaration that all proceedings imposed and impressed upon the appellant by the trial court from February 14, 2018 to June 8, 2018 were null and void;

iv. Orders setting aside the decision of December 1, 2017 of the Employment and Labour Relations Court;

v. A declaration that the Directions of December 1, 2017 by the Employment and Labour Relations Court are null and void;

vi. A declaration that all proceedings imposed and impressed upon the appellant after the decision of December 1, 2017 are null and void;

vii. An order remitting the application dated August 29, 2017 to the High Court (Human Rights and Constitutional Division) for hearing and determination, prior to the determination of the employment claim;

viii. Order for costs to the appellant; and

ix. Any other reliefs the court deems fit to grant.

16. In response, the respondent has filed two grounds of objection both dated May 16, 2023, challenging this court's jurisdiction to hear the instant appeal as of right under article 163(4)(a) of the *Constitution*. The appellant equally filed a rejoinder dated May 24, 2023 urging that the court's jurisdiction had been properly invoked. The rival arguments by the parties are set out in detail below.

C. Parties' Submissions

i. Appellant's submissions

17. The appellant's submissions are dated June 9, 2023 and filed on June 29, 2023. On the issue of the jurisdiction of the court, the appellant submitted that contrary to the respondent's assertions, the requirements under article 163(4)(a) of the *Constitution* had been satisfied. He urged that the directions, actions, or omissions of the trial court took a constitutional trajectory involving the interpretation and application of the Constitution, especially the Bill of Rights. Moreover, it was the appellant's case that the Court of Appeal was called upon to analyze the enumerated breaches but instead wrongly upheld the violations, occasioning a gross miscarriage of justice thus necessitating this court's intervention under article 163(4)(a) of the *Constitution*. Therefore, he urged that it is the duty of this court to interrogate and right the wrongs committed by the superior courts in this matter.

18. On the issue of breach of fundamental rights, the appellant contended that the impugned directions contravened his constitutional rights of access to justice and to a fair and free trial for reasons that the directions were issued *suo motu*, without hearing the parties, and prevented him from moving the trial court for leave to adduce additional evidence in support of his amended claim or reliefs necessary to prosecute his employment claim.

19. The appellant also argued that the trial court breached the following provisions of the *Constitution*: article 2(2) & (4) by issuing orders violating the Constitution and granting the respondent an unfair advantage; article 73(1)(a) (i) to (iv) and 2(b), by exercising authority inconsistent with the purpose and objective of the Constitution and failing to exercise objectivity and impartiality in the exercise of judicial authority; articles 27, 48 and 50 by displaying bias and partiality in the decision-making process; articles 159(1)(2)(a) and (e), 259(1)(a) to (c), by omitting to implement the Constitution in a manner that promotes its purpose, values, principles and advance the Bill of Rights; and article 160(1) of the *Constitution*, by interfering with the independence of the court. Lastly, he faulted the appellate court for upholding the trial court's interpretation or application of the cited constitutional provisions.

20. On the issue of bias, it was the appellant's case that the Court of Appeal Judges failed to interrogate the evidence presented or apply the *dictum* of a reasonable mind to ascertain whether indeed the trial Judges were biased. He further argued that the trial court was biased in the conduct of its proceedings for reasons that: the respondent forum shopped for favorable orders from the Principal Judge; the Principal Judge omitted to record proceedings pertaining to the appellant's oral submissions; the learned Judges denied the appellant a right of audience; issued *suo motu* orders to the detriment of the appellant; omitted to weigh the prejudice occasioned to the appellant; issued orders devoid of reasons; and the proceedings were fundamentally defective and failed to comply with constitutional standards.

21. On the issue of whether the trial court correctly exercised its discretion, the appellant contended that, as regards the directions of December 1, 2017, the Principal Judge acted in excess of her supervisory powers and usurped the trial court's jurisdiction by proceeding to issue pre-hearing conditions after assigning the matter to Makau J. He further urged that the impugned directions were biased and prohibitive and improperly went into the merits of the substantive matter. Consequently, he urged this court to find that the superior courts incorrectly interpreted and applied article 165 (2) of the Constitution}}, sections 2 and 6 of the *Judicial Service Act*, and 5(4) of the *Employment and Labour Relations Act*.

22. As regards the directions of February 14, 2018, the appellant postulates that the trial court failed to give reasons for its directions. In the same breath, he posits that the advanced reasons-that the impugned directions were issued to prioritize the expeditious determination of the substantive dispute- were misconceived and invalid in law. Furthermore, the appellant faults the Court of Appeal for failing to analyze and give directions on the order of priority in determining the applications pending before the trial court as well as the finalization of the substantive suit. He thus urged this court to declare the impugned directions void and a nullity in law.

ii. Respondent's submissions

23. The respondent's submissions are dated July 6, 2023 and filed on July 10, 2023. On the issue of jurisdiction, the respondent challenged this court's jurisdiction to entertain the appeal on the grounds that; the substratum of the appeal relates to the ELRC's exercise of discretion; the appeal does not arise from a judgment or ruling of the trial court but from pre-hearing directions; the exercise of discretion did not raise any questions of the interpretation and application of the Constitution; the appeal is premature as the substantive case is still pending before the ELRC; and the appeal is misconceived, vexatious and an abuse of the court process.

24. On violation of the appellant's fundamental rights, the respondent argued that the directions did not in any way contravene the appellant's right to a fair trial or deter access to justice. It emphasized that the appellant was given enough opportunities to prosecute his employment claim and the delay was occasioned by his multiple applications and appeals. Citing *Krishen s/o Duragadass v Mrs Priska Wambui w/o David Karangi* [1998] eKLR, the respondent contended that the impugned orders were necessary to ensure that the main suit was heard and determined and that litigation came to an end.

25. Without prejudice to the foregoing, the respondent submitted that a right can be limited under article 24 of the Constitution, and therefore the directions were issued in furtherance of the overriding objective to ensure the just and expeditious determination of the substantive suit. In that regard, it relied on the High Court decisions in *Hangzhouh Agrochemical Industries Limited v Panda Flowers Limited* [2012] eKLR and *John Gakure & 148 others v Dawa Pharmaceuticals Co Limited & others* Civil Application No 299 of 2007 to make the point that, the trial court had the jurisdiction to drive the court process and firmly steer the wheel of the process in order to attain the overriding objective including obviating hardship, reducing delay or expenses and ensuring expeditious and fair determination of all disputes before it.

26. On the issue of whether the court exercised its discretion properly, it was submitted that the trial court did so as the orders of December 1, 2017 were issued by the principal judgein the exercise of administrative and supervisory powers granted by article 162(2)(a) of the Constitution, section 5 (4) of the *Employment and Labour Relations Act* and rule 23 of the *Industrial Court (Procedure) Rules, 2010*. It was the respondent's further submission that the trial court observed the rules of natural justice and it is not sufficient to merely allege denial of an opportunity to be heard.

27. As pertains the directions of February 14, 2018 by Makau J, the respondent submitted that the court rightfully exercised its judicial authority and inherent jurisdiction to ensure just, expeditious, and timely determination of the claim and ensure that real and substantial

justice is served on the disputants. It relied on the case of *Econet Wireless Kenya Limited v Minister for Information & Communication of Kenya* [2005] 1KLR 828 to further buttress this argument.

28. As regards the issue of bias, the respondent submitted that the appellant had failed to substantiate these allegations or show any unprofessional contact between the trial judges and the respondent or its representatives, and consequently, the claim of bias must fail. In conclusion, it urged that such accusations are serious, concerning, uncalled for, and must be discouraged by this court. In support of these assertions, it relied on the High Court decision in *Judicial Service Commission v Gladys Boss Shollei & another* [2014] eKLR.

D. Analysis and Determination

29. Having considered the respective parties' pleadings and submissions in the appeal before us, we are of the considered view that the following issues emerge for determination:

    i. Whether the jurisdiction of this court has been properly invoked under article 163(4)(a) of the Constitution; and

    ii. If the answer to (i) is in the affirmative,

        a. whether the trial court properly exercised it discretion;

        b. whether the appellant's fundamental rights had been infringed; and

        c. What reliefs are available to the appellant?

i. Whether the jurisdiction of this court has been properly invoked under article 163 (4) (a) of the Constitution

30. The appellant invoked this court's jurisdiction under article 163(4)(a) of the *Constitution* alleging that the directions, actions, or omissions of the learned judges of the ELRC took a constitutional trajectory involving interpretation and application of the Constitution, particularly the Bill of Rights and therefore he is properly before us. Moreover, that the Court of Appeal was called upon to pronounce itself on the breaches of the Constitution but it ignored the breaches occasioning gross miscarriage of justice.

31. At the core of the respondent's response to the above contentions is that the appeal does not involve any issue of interpretation or application of the Constitution and as such the court does not have jurisdiction to entertain the same. Furthermore, that the appeal arose from interlocutory applications and the exercise of discretionary powers by the ELRC, and the superior courts did not therefore interpret or apply any constitutional provisions with finality.

32. From the foregoing, this court is called upon to evaluate its jurisdictional standing to entertain this appeal, that is, whether the appeal raises questions of constitutional interpretation or application of the Constitution and whether the same has progressed through the appropriate appellate mechanisms so as to reach this court by way of an appeal as contemplated under article 163(4)(a) of the *Constitution*.

33. This court has in many instances addressed the question of its jurisdiction under article 163(4)(a) of the Constitution. The court in that regard specifically laid down the guiding principles in *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another* SC Petition No 3 of 2012; [2012] eKLR, *Peter Oduor Ngoge v Francis Ole Kaparo & 5 others* SC Petition No 2 of 2012 [2012] eKLR and *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 other* SC Application No 5 of 2014 [2014] eKLR. The court was also categorical on this issue when it stated thus in *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others*, SC Petition No 10 of 2013; [2014] eKLR: "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*."

34. This position was furthermore reaffirmed by the court in *Rutongot Farm Ltd v Kenya Forest Service & 3 others* [2018] eKLR where we emphasized that;

> "…in order to evaluate the jurisdictional standing, the test is whether the appeal raises a question of constitutional interpretation or application and whether such a constitutional issue has been canvassed in the superior courts leading to the present appeal. In order to establish that fact, the court needs to ask itself the following questions:
>
> i. What was the question in issue at the High Court and the Court of Appeal?
>
> ii. Did the superior Courts dispose of the matter after interpreting or applying the Constitution}}?
>
> iii. Does the instant appeal raise a question of constitutional interpretation or application, which was the subject of judicial determination at the High Court and the Court of Appeal?"

35. In applying the above holdings to the present issue, we note that the first set of directions, subject of the appeal herein, were issued by Onyango J on December 1, 2017 where she directed as follows:

> "The matter will be heard by court 3; All the applications will be consolidated with the claim and heard together; parties will not be allowed to file further applications pending the hearing of the case; the case is fixed for hearing on February 5, 2018."

36. The second set of directions which are the subject of the appeal before us were given by Makau J as follows:

> "The court will focus on finalizing the suit i.e. the dispute between the employer and employee. I will fix the hearing date from the applications,which challenge the pleadings so that after the issue of the pleadings is settled, we can focus on the trial which is already part-heard. The notice of motion dated June 5, 2017 by the claimant seeking to strike out defence and the notice of motion dated June 27, 2017 seeking to strike out the amended claim will be heard on a priority basis. The submissions have been filed for the claimant's motion. Respondent is given 14 days to file and serve the motion dated 27.6.2017 and thereafter to file submission and serve within 14 days after service. Mention for highlighting on March 20, 2018."

37. A plain reading of the above directions reveals that the directions emanated from interlocutory matters before the trial court. No substantive questions of interpretation and application of the Constitution therefore arose at the ELRC during the proceedings leading to the directions issued by the two learned judges. What was before the ELRC concerned normal court processes during the conduct of the matter which was aimed at aiding the disposal of the matter and not cogent issues of constitutional controversy.

38. Similarly, the determination of the Court of Appeal in both appeals before it revolved around the single issue of the exercise of discretion by the learned judges of the ELRC. Even though the Court of Appeal tangentially touched on the issue of violation of the appellant's fundamental rights, it found that there was no evidence to support the assertions and that was the end of that matter.

39. In *Ananias N Kiragu v Eric Mugambi & 2 others* SC Civil Application No 10 of 2019; [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..."

40. This position was reiterated and reaffirmed by this court in *Paul Mungai Kimani & 2 others v Kenya Airports Authority & 3 others* SC Petition No 11 of 2019; [2021] eKLR where we observed:

> "(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."

41. Having found that the trial court did not determine any constitutional issue in its directions issued on December 1, 2017 and February 14, 2018 and that the Court of Appeal only tangentially touched on the issue of the violation of the appellant's rights, we are of the considered view that the same has not progressed though the appropriate appellate mechanisms to properly reach this Court under article 163(4)(a) of the *Constitution*. Moreover, bearing in mind that the appeal herein originated as a result of interlocutory directions or orders from the ELRC and that the substantive matter is still pending determination before the ELRC, we find that this court does not have jurisdiction to entertain it.

42. Having concluded that this court lacks jurisdiction to adjudicate the appeal pursuant to article 163(4)(a) of the *Constitution*, it consequently follows that the court is unable to assess whether the trial court appropriately exercised its discretion and whether the rights of the appellant were violated.

43. It is well established that costs follow the event but the court may in appropriate cases exercise discretion and order otherwise as was our holding in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others*; SC Petition 4 of 2012; [2013] eKLR. The appellant, acting

in person, impressed us with his clear submissions, misguided as they were for the reasons above, and he ought to have anticipated the consequences of his pursuit of a lost cause. Consequently, we shall exercise discretion and award costs to the respondent.

E. Orders

44. Consequently, we issue orders as follows:

    1. Petition No E010 of 2023 dated March 31, 2023 is hereby dismissed.

    2. Petition No E009 of 2023 dated March 31, 2023 is hereby dismissed.

    3. Costs of the two appeals are hereby awarded to the respondent.

    4. We hereby direct that the sum of Kshs 6,000/- deposited as security for costs in each of the appeals herein be refunded to the appellant.

45. It is so ordered.

Fanikiwa Limited & 3 others v Sirikwa Squatters Group & 17 others (Petition 32 (E036), 35 (E038) & 36 (E039) of 2022 (Consolidated)) [2023] KESC 105 (KLR) (15 December 2023) (Judgment)

Supreme Court of Kenya

MK Koome, CJ & P, PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala, N Ndungu, I Lenaola & W Ouko, SCJJ

Neutral citation: [2023] KESC 105 (KLR)

Constitutional Law *– fundamental rights and freedoms – right to fair trial – allegations of fraud that were determined via affidavit evidence only - whether a court finding that a party had conducted land fraud based on affidavit evidence was a violation of the person's their right to a fair trial - Constitution of Kenya, article 50; Evidence Act (cap 80) section 97(1)*

Land Law *– unalienated land – unalienated land that had been transmuted to private land – legitimate expectation - where one had a legitimate expectation that the President would allocate them land - whether unalienated government land that had been acquired and transmuted from public to private land was still governed by the provisions of the Government Lands Act (repealed) - whether the power of the President to make grants/dispositions under the Government Lands Act (repealed) extended to unalienated land that had been transmuted from public to private land - whether the principle of legitimate expectation was applicable when the actions or conduct of a public authority led individuals to form specific expectations about being allocated land - Government Land Act (repealed), cap 280, sections 2, and 3; Registered Land Act (repealed), (cap 300), sections 27, and 28; Registration of Titles Act (repealed), (cap 281), section 2, and 44.*

Land Law *– leases – surrender of leases – doctrine of merger - conversion of lease hold interest to free hold interest - what was the legal process under the Registration of Titles Act (repealed) and the Registered Land Act (repealed) of surrendering leasehold interests for conversion into freehold interests - what was the doctrine of merger and how was it applicable in the Kenyan land laws - whether a company could surrender a lease based of the directions of a director without there having been a board resolution supporting the said surrender of lease - whether the act of a private entity surrendering a lease for the purpose of converting the land to freehold interests implied that the land was surrendered to the Government of Kenya, thereby classifying it as public land eligible for allocation or grant by the President - whether the execution of surrender of lease instruments by both the owner of land and the Government of Kenya with intention to convert the land to free hold interests legally extinguished the leasehold interest and appropriately merged it into a freehold interest - Registered Land Act (repealed), (cap 300) sections 27, and 28; Registration of Titles Act (repealed), (cap 281) section 2, and 44.*

Land Law *– squatter – definition – capacity to be a squatter - what was the legal definition of a squatter – whether one could be deemed to be a squatter when the person had never occupied the land they deemed to be squatters in.*

Law of Evidence *– evidence in a case for determination of land ownership – evidence in a case alleging fraud in ownership of land - nature of evidence required – affidavit evidence – viva voce evidence - what*

was the standard of proof in land fraud allegations - whether the determination of ownership disputes, particularly those involving land, should be conducted solely through affidavit evidence - whether one could be adjudged to be guilty of fraud based on affidavit evidence only - Evidence Act (cap 80) section 97(1)

***Words and Phrases** – squatter – definition - a person who settles on property without any legal claim or title- Black's Law Dictionary, 8th Edition*

***Words and Phrases** – surrender – definition - the yielding up of the term of lease to the person who has the immediate estate in reversion in order that, by mutual agreement, the term may merge in the reversion - Halsburys Laws of England volume 27 at paragraph 444*

***Words and Phrases** – merger – definition - converse of surrender. A surrender occurs where the landlord acquires the lease; merger occurs where the tenant acquires the reversion. The underlying principle is the same in both; the lease is absorbed by the reversion and destroyed - Harpum, RMC., & Megarry, R., (ed) (2012), The Law of Real Property (London: Sweet & Maxwell; 8th edition, pp 856)*

Brief facts

Three appeals were brought before the Supreme Court, challenging the judgment of the Court of Appeal in a consolidated appeal involving the ownership of several parcels of land. The appeals were filed by Fanikiwa Limited (the 1st appellant), the administrators of the estate of Mark Kiptarbei Too (the 2nd appellant), and Lonrho Agribusiness (EA) Ltd (the 3rd appellant), and David Korir (the 4th appellant). The appeals were subsequently consolidated under Petition No 32 (E036) of 2022, with the issue at stake being the ownership and/or entitlement to parcels registered in the former Uasin Gishu District. The genesis of the dispute could be traced back to the surrender of titles to the suit land by Lonrho Agribusiness to the government in 2000, a move contested by the parties involved.

A petition filed by the 1st respondent at the High Court claimed ownership of the land on the basis of their ancestors' occupation and a direct approval for allocation by the then President, Daniel Toroitich Arap Moi, in 1998. The High Court transferred the matter to the Environment and Land Court which found in favor of the 1st respondent, establishing their legitimate expectation to the land based on government correspondence. This decision was contested and led to the appeal at the Court of Appeal, which upheld the rights of the 1st respondent to the land but also recognized the titles of third-party purchasers and financial institutions holding charges on subdivisions of the parcels.

The instant appeal at the Supreme Court was filed on grounds that that the superior courts below the Supreme Court misapplied the law in that the lease hold title had been surrendered for conversion to a freehold title and that the President had no power to allocate private land as the suit land had already been converted from public land to private land at the time of the allocation. The appeal at the Supreme Court also challenged the position of the 1st respondent as squatters.

Issues

i. Whether the determination of ownership disputes, particularly those involving land, should be conducted solely through affidavit evidence.
ii. What was the standard of proof in land fraud allegations?
iii. Whether one could be adjudged to be guilty of fraud based on affidavit evidence only.
iv. Whether a court finding that a party had conducted land fraud based on affidavit evidence was a violation of the person's right to a fair trial.
v. What was the legal process under the Registration of Titles Act (repealed) and the Registered Land Act (repealed) of surrendering leasehold interests for conversion into freehold interests?
vi. Whether a company could surrender a lease based of the directions of a director without having a board resolution supporting the said surrender of lease.
vii. What was the doctrine of merger and how was it applicable in the Kenyan land laws?
viii. Whether the act of a private entity surrendering a lease for the purpose of converting the land to freehold interests implied that the land was surrendered to the Government of Kenya, thereby classifying it as public land eligible for allocation or grant by the President.
ix. Whether the execution of surrender of lease instruments by both the owner of land and the Government of Kenya with intention to convert the land to free hold interests legally extinguished the leasehold interest and appropriately merged it into a freehold interest.
x. Whether unalienated government land that had been acquired and transmuted from public to private land was governed by the provisions of the Government Lands Act (repealed).
xi. Whether the power of the President to make grants/dispositions under the Government Lands Act (repealed) extended to unalienated land that had been transmuted from public to private land.
xii. Whether the principle of legitimate expectation was applicable when the actions or conduct of a public authority led individuals to form specific expectations about being allocated land.
xiii. What was the legal definition of a squatter? Could someone be considered a squatter if they had never occupied the land they claimed to have squatted on?

Relevant provisions of the Law

Evidence Act cap 80

97. Written contracts and grants.

(1)When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.

Held

1. The Supreme Court should not down its tools as a result of the 1st appellant's introduction at the Court of Appeal when he was not a party to the proceedings at the superior courts below. The Court of Appeal had to consider the evidence before it. Such issues expressly referring to 1st appellant would not have been framed by the appellate court had they not emanated from the Environment and Land Court (ELC), the said issues were determined by the Court of Appeal and were before the Supreme Court.
2. The instant appeal emanated from a consolidated appeal before the Court of Appeal that resulted in one judgment involving other parties in the present matter whose standing is not in issue. The matter having been consolidated before the Supreme Court, the issues raised were cross cutting and were not affected by the standing of 1st appellant alone. The Supreme Court had jurisdiction to hear and determine the consolidated appeal.
3. There were competing claims as to the ownership of the suit parcels. Therefore, it behoved a court to make a just determination on the same, procedurally. In the instant case a trial process involving examination, cross-examination and re- examination of the witnesses was the only way of resolving the competing allegations and counter allegations.
4. The superior courts below relied on rule 20(1)(a) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules (Mutunga Rules) to hear the matter by way of affidavit evidence. A court was required to make a special endeavour to unravel all the competing claims and in particular, by calling for *viva voce* evidence from witnesses, especially those who had sworn depositions, and cross-examination done. That was particularly important because its decision would have a far-reaching impact especially upon the party(ies) whose ownership could end up being nullified. The Supreme Court was fortified by rules 20 (3), (4), and (5) of the Mutunga Rules which allowed a court to admit oral evidence, examine and cross-examine parties.
5. The administrators of the estate of Mark Too were right in asserting that the appellate court adjudged him guilty of fraud without affording him a hearing. However, fraud which, depending on the circumstances was recognized as a criminal offence, must be pleaded and strictly proved. In addition, although the standard of proof of fraud in civil matters was not proof beyond reasonable doubt, it was higher than proof on a balance of probabilities as required in other civil claims.
6. The vague particulars of fraud were not proved to the required standard going by the absence of any serious attempt to table concrete evidence to prove the subject allegations to the required degree. Fraud and conspiracy to defraud were very serious allegations. There was simply no credible evidence to prove such a serious allegation which could also attract criminal sanction. The Court of Appeal fell into error when it varied the ELC's judgment to the extent that it found the late Mark Too guilty of fraud.
7. The principle of legitimate expectation imposed a duty to act fairly and to honour reasonable expectation raised by the conduct of a public authority. If a public body had raised

expectations that it would in future undertake a certain course of action, then it should ordinarily fulfill those expectations. That was important for the promotion of certainty and consistency in public administration.

8. For an individual to invoke the principle of legitimate expectation, an expectation must have been induced by some conduct of the public authority. The principle extended to any individual who was in a situation in which it appeared that the administration's conduct had led him to entertain certain expectations.

9. The principle of legitimate expectation protected only those expectations which had arisen through the conduct of the administrative body concerned, and not those which had arisen as a result of an individual's subjective hopes. It was concerned with upholding trust in the administration rather than protecting expectations which the individual had decided to entertain at his or her own risk. Only reasonable expectations would be afforded protection by the law. An individual must hold an expectation which was reasonable to have in light of the prevailing circumstances. Not just any promise would do; the promise must be one giving rise to a legitimate expectation. Certain requirements must also be met for a promise to generate a legitimate expectation.

10. As at the date of 1st respondent's application and on October 28, 1998 when former President Moi endorsed the subject application with the words 'Approved', the suit parcels were registered as private property in the name of Lonrho Agribusiness. The evidence on record further showed that up to the year 2000, when the titles for the suit parcels were surrendered, they had at all times been held as private property. The position that the suit parcels were private property up to the year 2000 was acknowledged by the Government when it compulsorily acquired certain portions thereof for the development and construction of public utilities including the Eldoret International Airport and Moi University School of Law Annex in the year 2000. The suit parcels, being private properties at the material time, could only be alienated or transferred by the registered owner, Lonrho Agribusiness, rather than by the President under the Government Lands Act (repealed).

11. Under section 3 of the Government Lands Act (repealed)the President's power to make grants or disposition in land was restricted to unalienated government land. Section 2 defined unalienated government land to mean Government land which was not for the time being leased to any other person, or in respect of which the Commissioner had not issued any letter of allotment.

12. Once an individual or entity acquired any unalienated government land, or other land for that matter, consequent upon registration of title, in accordance with the provisions of the applicable law, such land transmuted from public to private land. Such land was as a consequence, removed from the ambit and confines of the Government Lands Act (repealed) to the new legal regime conferring title to an entity other than the government and on such terms as shall be inscribed on the new title. The subject suit parcels, being land that was at the time private property vested in Lonrho Agribusiness did not fall within

the category of unalienated government land envisaged under the Government Lands Act (repealed)and the former President had no legal capacity and authority to allocate or confer any legitimate interest in the subject suit parcels to members of 1st respondent or any other entity.

13. The application by 1st respondent for allocation of the suit parcels was made to the 4th respondent, the Director of Land Adjudication, who did not have the capacity or mandate to allocate government land, if any. Only the 2nd respondent, the Commissioner of Lands, had the mandate to allocate government land.

14. There was no legitimate expectation for 1st respondent's members to be allocated the suit parcels. In determining whether legitimate expectation had been established, primacy must always be given to the requirement of legality which flowed from the constitutional principle and value of the rule of law, as articulated in article 10(2)(a) of the Constitution. Legality dictated that an action could only be undertaken if it was authorized by the law. A representation, promise, practice, conduct or an action outside the prescription of the law or undertaken by a person or entity without competent authority was illegal and could not give rise to legitimate expectation.

15. A squatter was a person who settled on property without any legal claim or title. The 1st respondent defined itself as an amalgamation of over 500 squatter families that had a legitimate claim and interest over the suit parcels. The 1st respondent's members were not in occupation of any of the suit parcels or the sub-divisions. No member of 1st respondent ever took actual physical possession of the suit parcels. They had never occupied it. The failure to take possession and occupy the land means that 1st respondent were not squatters on the suit parcels.

16. The 1st respondent's claim was based on heritage from their forefathers who became dispossessed of their land by the colonialists and subsequently became workers. That evidence could not support the claim by 1st respondent that they were squatters in the absence of occupation of the suit land.

17. The 1st respondent contended that upon the forceful eviction of its members' forefathers from the suit parcels in the 1920s, the said forefathers and their lineage worked on the suit parcels as farm hands. By then the parcels had since been adjudicated and titles issued. However, the 1st respondent did not answer whose workers were they, whether the farm owner own the land in question, whether workers could turn around and invoke the right to their place of work as squatters and if so, whether they could do so over 70 years later. The 1st respondent did not state who should shoulder the responsibility of compensating the claim, and neither did they note if it was a form of reparations to be paid on behalf of the colonialists. Members of 1st respondent were not squatters on the suit parcels and had no legal basis to bring a claim asserting a right to the suit parcels.

18. The consensual nature of a surrender was the cardinal ingredient of a surrender of lease. That was the essence of the proviso in section 44 of Registration of Titles Act (repealed) that proved that the endorsement shall be signed by the lessee and the lessor as evidence of the acceptance thereof.
19. The import of section 97(1) of the Evidence Act was that the extrinsic evidence generally excluded: where the intention of parties had been reduced to writing it was in general not permissible to adduce extrinsic evidence whether oral or contained in writing such as instructions, drafts, articles, conditions of sale or preliminary agreements either to show that intention or to contradict, vary or add to the terms of the document. Extrinsic evidence could not be received in order to prove the object with which a document was executed or that the intention of the parties was other than that appearing on the face of the document.
20. The intent or the consensual agreement between Lonrho Agribusiness and the Government of Kenya was for the conversion of the suit titles from leasehold under Registration of Titles Act (repealed) to freehold under the Registration of Land Act (repealed). The ELC and the Court of Appeal should have considered the deposition of R J Simiyu as corroborated by presentation 174 in determining the intent for the surrender. The letter from J P Hulme should not have overridden the credible testimony by R J Simiyu in the face of presentation 174 given the provisions of section 97(1) of the Evidence Act.
21. There was insufficient evidence to support the claim that Lonrho Agribusiness intended to surrender the suit properties for the allocation to 1st respondent. That was a serious question that the two superior courts below did not address their minds to. A company as a distinct legal entity from its promoters, directors or employees could only act through its organs and make decisions by resolutions. No resolution of the company's board supporting the purported purpose for the surrender was presented in evidence.
22. The intent of surrender of the leasehold interest in the suit parcels was that the leasehold term to which the suit parcels were then held was to be surrendered and the same converted into a freehold interest with titles re-issued in the name of Lonrho Agribusiness as private property. There was nothing illegal or fraudulent in a process for surrender of a lease to enable the conversion of a title from a leasehold interest under the Registration of Titles Act (repealed) to a freehold interest under the Registered Land Act (repealed).
23. Upon the execution of the surrender instruments by both Lonrho Agribusiness and the Government of Kenya, the leasehold interest was extinguished and emerged in the freehold interest in terms of section 44 of the Registered Land Act (repealed). A surrender was the yielding up of the term of lease to the person who had the immediate estate in reversion in order that, by mutual agreement, the term may merge in the reversion. Merger was the converse of surrender. A surrender occurred where the landlord acquired the lease; merger occurs where the tenant acquired the reversion. The underlying principle was the same in both; the lease was absorbed by the reversion and destroyed.

24. The doctrine of merger as codified in section 44 of the Registered Land Act (repealed) envisaged that as all inferior estates and interests in land were derived out of the fee simple, therefore, whenever a particular estate or limited interest in land vested in him who had the fee-simple of the same land, such particular estate or limited interest was immediately drowned in the fee. That was the essence of the principle *omne majus continent in se minus*, meaning the greater contains or embraces the less. Therefore, there was nothing untoward in Lonrho Agribusiness getting a freehold title in reversion under the RLA.
25. Upon the surrender and merger, a new registration section was created which were registered in the name of Lonrho Agribusiness. Those were subsequently sub-divided and sold to third parties. It followed that the subsequent sub-divisions and sale thereof to third parties, including 1st appellant, by Lonrho Agribusiness were done legally and procedurally.
26. The impugned judgment of the Court of Appeal violated their right to property. The Supreme Court disagreed with the findings of the ELC and the Court of Appeal and made a finding that the purpose of surrender of the titles of the suit properties was to enable their conversion from leasehold titles under the Registration of Titles Act (repealed) to freehold titles under the Registered Land Act (repealed).
27. The financial institutions which were a party to the instant cause were not purchasers but lenders. They could not possibly be described as innocent purchasers. They were financial institutions who advanced substantial sums of money to some of those parties who purchased the properties excised from the suit parcels from the registered owners on the security of their titles.

Appeal allowed.

Orders

i. *The consolidated appeal met the constitutional threshold under article 163(4)(a) of the Constitution.*
ii. *The superior courts below violated the appellants' right to fair hearing under article 50(1) of the Constitution.*
iii. *The proceedings at the trial court ought to have been conducted through taking of viva voce evidence.*
iv. *The 1st respondent did not have a legitimate expectation to acquire and be allocated the suit parcels.*
v. *The 1st respondent had no right to the suit parcels as its members were not squatters on the suit parcels.*
vi. *The intent for the surrender of the titles for the suit parcels was for conversion of their titles from leasehold interests under the Registration of Titles Act (repealed) to freehold interests under the Registered Land Act (repealed).*

Citations

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3. *Central Kenya Limited v Trust Bank Limited & 4 others* Civil Application 167 of 1996; [1996] KECA 130 (KLR) - (Explained)
4. *Chai, Nelson Kazungu & 9 others v Pwani University College* Civil Appeal 78 of 2016; [2017] KECA 135 (KLR) - (Explained)
5. *Chief Land Registrar & 4 others v Koech & 4 others* Civil Appeal 51 & 58 of 2016; [2018] KECA 27 (KLR) - (Explained)
6. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition No 14, 14A, 14B and 14C of 2014 (Consolidated); [2014] eKLR - (Explained)
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16. *Koinange & 13 others v Charles Karuga Koinange* Civil Suit 66 of 1984; [1986] KEHC 3 (KLR) - (Explained)
17. *Koinange & 13 others v Charles Karuga Koinange* Civil Suit 66 of 1984; [1986] KEHC 3 (KLR) - (Explained)
18. *Lawrence Nduttu and Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others*
19. *Macharia v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2011] eKLR; [2012] 3 KLR 199 - (Explained)
20. *Mbugua, Margaret Nyokabi & 5 others v Ngenda New Farmers Co Ltd & 4 others* Environment & Land Case 84 of 2017; [2019] KEELC 1268 (KLR) - (Explained)

21. *Munya v Kithinji & 2 others* Petition 2B of 2014; [2014] eKLR; [2014] 1 KLR 58 - (Explained)
22. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] eKLR; 2012] 2 KLR 804 - (Explained)
23. *Onditi v Kenya Commercial Finance Company Limited* Civil Appeal 329 of 2009; [2010] KECA 58 (KLR) - (Explained)
24. *Rai & 3 others v Rai Estate of & 4 others* SC Petition 4 of 2012; [2013] eKLR; [2013] 2 KLR 142 - (Explained)
25. *Republic v District Land Registrar, Nakuru Ex-Parte Lawi Kigen Kiplagat; Lee Maiyani Kinyanjui (Interested Party)* Environment & Land Case 1 of 2020; [2021] KEELC 3872 (KLR) - (Explained)
26. *Republic v Land Registrar & 3 others ex parte Aryan Limited* HC Misc Applic No 95 of 2012; [2016] eKLR - (Explained)
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30. *Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others* Civil Appeal 21 of 2014; [2015] eKLR - (Explained)
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2. Constitution of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules, 2013 (Constitution of Kenya Sub Leg) rule 20(1) - (Interpreted)
3. Constitution of Kenya articles 10(2); 19; 20; 21; 22; 23; 25(c); 27; 40(6); 47; 48; 50(2); 62; 163(4); 165 - (Interpreted)
4. Evidence Act (cap 80) section 97(1) - (Interpreted)
5. Government Land Act (Repealed) (cap 280) sections 2, 3 - (Interpreted)
6. Registered Land Act (Repealed) (cap 300) sections 27, 28 - (Cited)
7. Registration of Titles Act (Repealed) (cap 281) sections 2, 44 - (Interpreted)

Advocates

Mr Fred Ngatia, Senior Counsel for the 1st appellant (Ngatia & Associates)

Prof Tom Ojienda, Senior Counsel and *Ms Awuor* for the 2nd appellant (Prof Tom Ojienda & Associates)

Ms Karen Chesoo and *Ms Kesei* for the 3rd and 4th appellants (Kalya & Co Advocates)

Mr William Arusei and *Ms Julia Kiget* for the 1st respondent (Arusei & Co Advocates)

Mr Oscar Eredi and *Mr Odongo Mohammed* for the 2nd to 6th respondents (Attorney General's Chambers)

Ms Anne Odwa for the 9th respondent (Nyairo & Company Advocates)

Mr Zephaniah Yego for the 10th respondent (ZK Yego Law Offices)

Mr Moses Kipkogei, *Ms Achitsa* and *Ms Saina* for the 11th, 12th & 15th respondents(G & A Advocates LLP)

Mr Langat Kiprono for the 16th and 17th respondents (Mburu Maina & Co Advocates)

Ms Barbara Gichuhi for the 18th respondent (Waweru Gatonye & Co Advocates

December 15, 2023, the Court delivered the following Judgment:

A. Introduction

1. Three appeals were filed before this court, that is, petition No 32 (E036) of 2022 by Fanikiwa Limited (Fanikiwa), petition No 35 (E038) of 2022, by Mary Jepkemboi Too & Sophie

Jelimo Too (suing as joint administrators *ad litem* of the estate of Mark Kiptarbei Too) (administrators of the estate of Mark Too), and petition No 36 (E039) of 2022 by Lonrho Agribusiness (EA) Ltd & David Korir The appeals which are dated November 21, 2022, December 14, 2022 and December 23, 2022, respectively, are anchored on article 163(4)(a) of the *Constitution*. Subsequently, by a consent order dated January 31, 2023, the three appeals were consolidated with Petition No 32 (E036) of 2022 designated as the lead file.

2. The consolidated appeal challenges the judgment of the Court of Appeal ((Kiage, M'Inoti & Mumbi Ngugi, JJA) in Civil Appeal No 45 of 2017 (consolidated with Civil Appeal No 44 & 68 of 2017) delivered on November 18, 2022. In a nutshell, the dispute that culminated in the consolidated appeal revolves around the ownership and/or entitlement to parcels which were registered as LR Nos 9606, 9607, 9608, 745, 742/2, 7739/7R, 12398, 10793 and 10794 in the former Uasin Gishu District (the suit parcels).

B. Background

i. Factual history

3. The suit parcels were registered under the repealed Registration of Titles Ordinance (subsequently referred to as the repealed *Registration of Titles Act* (RTA). The grants/titles to the suit parcels were first issued in favour of Plateau Wattle Company Ltd between 1958 and 1962 as leaseholds for periods ranging from 946 to 951 years. However, before the expiry of the leaseholds, Plateau Wattle Company transferred the suit parcels on March 26, 1965 to East Africa Tanning Extract Company for a consideration of Kshs 6,583,925. It is instructive to note that the East Africa Tanning Extract Company changed its name multiple times. Eventually, in 2000 it became Lonrho Agribusiness (East Africa) Limited (Lonrho Agribusiness), the 3rd appellant. On November 2, 2000, Lonrho Agribusiness surrendered the titles to the suit parcels to the government. The purpose of the surrender is a matter contested between the parties and marks the genesis of the dispute before the court. Nonetheless, upon the surrender, the suit parcels were subsequently registered under the repealed *Registered Land Act* (RLA) and freeholds titles issued thereto in favour of Lonrho Agribusiness. Thereafter, the suit parcels were sub-divided into various units that were eventually transferred to third parties.

ii. Litigation History

a. At the High Court and the Environment and Land Court

4. It is the sub-division of the suit parcels and the subsequent transfer of the sub- divided units to other parties that caused Sirikwa Squatters Group (Sirikwa) to file a petition in the High Court, HC Petition No 7 of 2012, on July 30, 2012. The petition was later amended on

December 18, 2012 with leave of the court. However, on March 10, 2016, the matter was transferred to the Environment and Land Court (ELC) and assigned a new file number, ELC Petition No 4 of 2016.

5. Sirikwa described its membership as comprising of over 500 squatter families whose forefathers originally occupied the suit parcels. According to Sirikwa, the squatters' forefathers were evicted from the suit parcels in the early 1920s by white settlers. Sirikwa further maintained that, their said forefathers were hired as farm hands on the suit parcels by the same settlers. Thereafter, they claimed their lineage continued working as farm hands and labourers on the suit parcels for subsequent registered proprietors including Lonrho Agribusiness. It was Sirikwa's position that, throughout this entire timeline, its members pushed their employers and other agencies and offices to be settled on the suit parcels. Sirikwa in that regard claimed that, by an application dated October 22, 1998, it requested for allocation and settlement of the squatters on the suit parcels, and that on October 28, 1998 the request was directly approved by the then President, Daniel Toroitich Arap Moi.

6. Sirikwa asserted that the said approval and allocation of the suit parcels was evidenced by several correspondence from government offices and officers and specifically made reference to letters dated July 17, 2007, September 10, 2008 and September 10, 2010 from the Commissioner of Lands (the 2nd respondent) to the Attorney General (AG) confirming allocation of the suit parcels to Sirikwa and stating that the ministry of lands was in the process of formalizing the occupation of the squatters; letters dated October 11, 2001 and June 22, 2007 from the Director of Land Adjudication and Settlement (the 4th respondent) to the AG confirming allocation of the suit parcels to Sirikwa and letters dated May 14, 2008 and July 23, 2008 from the District Land Officer, Uasin Gishu District (the 6th respondent) to the 2nd respondent stating that the squatters could be settled on the suit parcels. As far as Sirikwa was concerned, Lonrho Agribusiness surrendered the titles to the suit parcels to the government for the sole purpose of settlement of its members. Therefore, Sirikwa contended that its members had a legitimate expectation to be registered as proprietors of the suit parcels.

7. Sirikwa further averred that, contrary to their expectation and by a letter dated May 31, 2012, the 6th respondent contended that the surrender of the titles to the suit parcels was for purposes of conversion of their registration regime from RTA to RLA and subsequent transfer of the sub-divisions thereof to respective beneficiaries other than themselves. Further, that Kennedy Kubasu (the 8th respondent), a private surveyor trading as Highland Surveyors (the 7th respondent), without authority entered into the suit parcels and carried out survey works thereon which resulted in the sub-divisions of the suit parcels. What was more, Sirikwa contended that Mark Too (deceased) and David Korir being the Chairman and Property Sales Manager of Lonrho Agribusiness, respectively, abused their positions by

sub-dividing the suit parcels and allocating the sub-divisions thereof to themselves and their beneficiaries. Sirikwa also alleged that the 2nd, 3rd (Chief Registrar of Titles), 4th, 5th (Director of Survey) and 6th respondents also abused their powers by sanctioning the sub-divisions and transfers thereof. In addition, it claimed that the said respondents had jointly with Mark Too, Lonrho Agribusiness and David Korir sought to arbitrarily deprive the squatters of the suit parcels.

8. Overall, Sirikwa urged that the sub-division of the suit parcels and transfer thereof to third parties violated its members' right to property and was not only illegal but void. Towards that end, Sirikwa sought a number of reliefs ranging from declarations to the effect that its members' right to property had been violated or was in danger of being violated; cancellation of all titles emanating from the suit parcels in favour of Lonrho Agribusiness and Mark Too as well as other third parties; an order directing the 2nd to the 6th respondents to issue titles over the suit parcels in favour of Sirikwa for purposes of allocating and resettling its members; and damages for violation of the squatters' right to property.

9. In response, the 4th respondent on behalf of the 2nd to 6th respondents, claimed that the suit parcels were surrendered by Lonrho Agribusiness for purposes of conversion of their tenure and registration regime from leasehold under RTA to freehold under RLA and subsequent subdivision and transfer. The 4th respondent further deposed that, following the conversion of the registration regime, the suit parcels and the resultant sub-divisions were registered under a new registration section known as Pioneer Ngeria Block 1 (EATEC) on or about January 23, 2001. The 4th respondent, in addition, pointed out that part of the suit parcels had earlier on been compulsorily acquired by the government in the year 2000 for setting up of the Moi Eldoret International Airport situate on LR No 20631.

10. The 4th respondent asserted that, at the time the titles were surrendered by Lonrho Agribusiness, the suit parcels were privately owned. Consequently, the suit parcels did not revert to the government to be administered as unalienated government land under the repealed *Government Land Act* (GLA). As such, the 4th respondent argued that the approval by the former President of Sirikwa's application for allocation could not constitute an allocation of the suit parcels to Sirikwa's members as the land did not belong to the government. Equally, the 4th respondent urged that the letters relied on by Sirikwa were written in ignorance of the status of the suit parcels at the time the said letters were issued. In any event, in the 4th respondent's view, the letters did not amount to legal instruments capable of conferring interest/title over the suit parcels. Further, the 4th respondent denied that the 2nd to the 6th respondents had abused their powers or violated the rights of Sirikwa's members and to the contrary, was of the view that the orders as sought by Sirikwa could not issue.

11. On his part, Mark Too described himself as a Director of Fanikiwa (at this point, Fanikiwa was not a party before ELC). He stated that he was the registered proprietor of Pioneer Ngeria Block 1(EATEC)/7079,7080,703,7075,7074,7076,7077,7078 being sub-divisions of the suit parcels. He urged that he had lawfully purchased the parcels from Lonrho Agribusiness and paid full consideration and that, at the time of purchase, the parcels were vacant and he took possession immediately he had paid the consideration aforesaid. He added that, in accord with the sale agreement, he had several nominees who were to benefit from the said purchase and they had since received titles to their portions. He also claimed that he was aware that all genuine squatters had been settled in a land which had been allocated for that purpose. To that extent, he questioned the credibility of Sirikwa and its members. Moreover, Mark Too maintained that Sirikwa had not established any lawful ground to warrant cancellation of his titles to the sub-divisions.

12. In opposing the petition, David Korir described himself as Lonrho Agribusiness' Property Manager. He averred that the suit parcels claimed by Sirikwa did not exist since they had not only been converted and registered under RLA but had also been sub-divided and new titles thereto created. He urged that the sub-divisions had been sold to third parties with the approval of the government, and it followed that Lonrho Agribusiness no longer owned any of the parcels claimed by Sirikwa. It was his contention that since ownership had passed to third parties, the orders sought were incapable of enforcement and in any event, during the process of sub-division and sale, the government had set aside land to allocate to eligible squatters who were never members of Sirikwa.

13. The petition was prosecuted by way of affidavits and written submissions as per the directions that were issued by the High Court (Ngenye, J, as she then was) on August 13, 2014 prior to the transfer of the matter to ELC. Upon considering the pleadings and parties' respective submissions, the ELC (Ombwayo, J) by a judgment dated February 9, 2017 distilled the following three issues as arising for determination: whether the petitioner's (Sirikwa) members had legitimate expectation to acquire and be allocated property; whether the disputed parcels of land were private or public land upon surrender; and which remedies should the court grant.

14. On the issue of legitimate expectation, the court found that Lonrho Agribusiness had surrendered titles to the suit parcels for purposes of allocation to the members of Sirikwa. In that regard, the court was persuaded by the letters relied on by Sirikwa, exchanged between various government departments, which spoke to the presidential approval for allocation of the suit parcels to its members. Consequently, the court held that the members of Sirikwa had a legitimate expectation to be registered as owners of the suit parcels.

15. On whether the suit parcels were public or private land after the surrender, the court considered the registration and proprietorship history of the suit parcels prior to the surrender. It found that the import of the said history was that the suit parcels had always been alienated government land allocated to a private company. However, according to the court, the import of section 44 of the *RTA* was that upon surrender of a lease in respect of government land, the same reverts to the government to be allocated pursuant to the provisions of the GLA. Likewise, the court held that titles to the suit parcels reverted to the government upon surrender and were to be managed under the GLA as opposed to being converted to the regime under RLA. Therefore, the court found that the said conversion was unlawful and that all the transactions that followed thereafter were a nullity.

16. On remedies, the court having found that Sirikwa had established its claim under legitimate expectation allowed the amended petition and issued the following reliefs:

    a. An order directing the 2nd to 6th respondents to issue title deeds for the suit parcels in the name of Sirikwa to resettle and allocate its members.

    b. A declaration that Sirikwa's members' right to property and/or interest over the suit parcels had been violated and that the suit parcels were in real danger of being arbitrarily acquired by Lonrho Agribusiness, Mark Too, David Korir, the 7th and 8th respondents and their beneficiaries to their detriment.

    c. A declaration that the acts of the 7th and 8th respondents of carrying out survey works on suit parcels without the authority of the Director of Survey was illegal and of no effect.

    d. A declaration that the acts of Lonrho Agribusiness, Mark Too and David Korir of unlawfully attempting to deprive Sirikwa's members their allotted suit parcels were without any legal basis and unconstitutional.

    e. The court hereby forthwith cancels all the resultant titles or any title issued and/or emanating from the suit parcels to Lonrho Agribusiness, Mark Too and all other beneficiaries and the register be rectified accordingly.

17. Notwithstanding the above findings, the court went on to find that it had not been established that Mark Too had been involved in any fraud or wrong doing. As a result, the court directed that he be allocated not less than 27 hectares of the suit parcels and in the meantime, status quo be maintained in respect of approximately the 27 hectares occupied and utilized by Mark Too.

18. Upon delivery of the said judgment, the AG by an application dated April 5, 2017 sought review of the judgment on the basis that there was an error apparent on the face of the record.

The error being that the court should have excluded all public utilities such as the Eldoret International Airport, Moi University, public roads, public schools and all administrative centres on the suit parcels from the parcels granted to members of Sirikwa. By a ruling dated 10th November 2017, the ELC (Ombwayo, J) allowed the application and reviewed its judgment, to the extent sought.

b. At the Court of Appeal

19. Aggrieved by the ELC's judgment, various parties moved the Court of Appeal by way of three appeals and a cross appeal. Lonrho Agribusiness and David Korir, filed Eldoret Civil Appeal No 44 of 2017; Fanikiwa filed Eldoret Civil Appeal No 45 of 2017; and the administrators of the Estate of Mark Too filed Civil Appeal No 68 of 2017.

20. Lonrho Agribusiness and David Korir faulted the learned trial judge for finding that Sirikwa had legitimate expectation to the suit parcels; for holding that conversion of the titles to the suit parcels was unlawful; for failing to hold that the suit parcels were private property; and for failing to hear many affected parties. Fanikiwa complained that the learned judge erred by cancelling its titles carved out of the suit parcels and registered in its name, without affording it an opportunity to be heard. The administrators of the Estate of Mark Too faulted the learned judge for holding that the suit parcels were surrendered for purposes of settling the members of Sirikwa, and for cancelling indefeasible titles. On its part, Sirikwa filed a cross appeal challenging the learned judge's finding that Mr Mark Too had legitimately acquired 27 hectares of the suit parcels. The three appeals were consolidated pursuant to a consent order adopted by the Court of Appeal on February 7, 2019, with Civil Appeal No 45 of 2017 being designated as the lead file.

21. It is imperative to note that due to the far-reaching effect and implication of ELC's judgment, the Court of Appeal by an order dated October 1, 2018 directed Fanikiwa to publish within 14 days, a notice in one of the daily newspapers with wide circulation, notifying the general public of the judgment of the trial court and the existence of the three appeals. The notice was carried in the Daily Nation Newspaper on October 15, 2018. Pursuant to this notice, 78 individuals and 7 financial institutions applied and were joined to the consolidated appeal by a ruling dated October 17, 2019. The 78 individuals are Ahmed Ferej & 60 others (the 9th respondent), Richard Kirui & 15 others (the 10th respondent) and Milly Chebet (the 14th respondent). The 78 individuals claimed that they had purchased the sub-divided suit parcels and were registered as proprietors thereof. The 7 financial institutions were Stanbic Limited (the 11th respondent) Kenya Commercial Bank Limited (the 12th respondent), Eco Bank Limited (the 13th respondent), National Bank of Kenya Limited (the 15th respondent), Kenya Women Micro-Finance Bank (the 16th respondent), Commercial Bank of Africa (the 17th respondent), and Co-operative Bank of Kenya (the

18th respondent). These financial institutions held charges over titles to the sub-divided suit parcels which had been sold and registered in favour of third parties.

22. In its appeal, Fanikiwa argued that it was not a party to the proceedings before the ELC and as a result, its right to property had been extinguished without being heard contrary to article 50 of the Constitution. It was contended that the ELC misapprehended the doctrine of legitimate expectation since at the time of the alleged approval by the late President, the suit parcels were unavailable for allocation under the *GLA* as they were private land. Fanikiwa submitted that the presidential approval was granted in 1998 before the surrender of the titles to the suit parcels in 2000. Therefore, in its opinion, the consequent approvals by government officers were void and of no legal effect. Moreover, Fanikiwa asserted that the suit parcels were surrendered for purposes of conversion to the *RLA* regime; to facilitate subdivision and subsequent transfers. Following the conversion, transfers and registration, the titles to the suit parcels were indefeasible by virtue of sections 27 and 28 of the *RLA*. Also, as a corollary to the above, there were no allegations of fraud which could have led to drastic cancellation of title. Finally, Fanikiwa posited that the members of Sirikwa were not squatters as they were not in occupation of any of its registered parcels and there was no evidence adduced to prove that they are members of the families that were displaced by the colonialists from the suit parcels.

23. The parties who were joined to the proceedings supported the consolidated appeal. The 78 individuals joined issues with Fanikiwa and urged that they were innocent purchasers for value of various titles excised from the suit parcels. Moreover, it was their case that their titles were legally acquired, valid and indefeasible. Similarly, the financial institutions urged that they held valid charges totalling to millions of Kenya shillings over some of the nullified titles. They thus urged that, upon nullification of the charged titles by the ELC, they were left holding worthless securities for no fault of their own; and they stood to suffer massive irreparable loses.

24. In response, Sirikwa reiterated its case before the ELC. With regard to the right to be heard, it urged that Fanikiwa and the joined parties were well aware of the proceedings before the trial court but chose not to participate and therefore, could not allege violation of the right to be heard. On indefeasibility of title, Sirikwa submitted that under article 40(6) of the Constitution, protection of the right to property did not extend to unlawfully acquired property. On the cross appeal, it contended that, having found the conversion of the titles to the suit parcels and the subsequent sale were vitiated by fraud, the trial court erred by upholding the validity of Mark Too's titles.

25. Upon considering the pleadings and parties respective submissions, the Court of Appeal (Kiage, M'Inoti & Mumbi Ngugi, JJA) by a judgment delivered on November 18, 2022 identified five issues for its determination: whether Fanikiwa's right to be heard as well

as that of the joined parties were violated; whether Sirikwa's legitimate expectation could override express provisions of the law; whether, upon conversion from *RTA* to *RLA*, the titles acquired by Fanikiwa and the joined parties were indefeasible; whether the allocation of the suit parcels to Sirikwa was legitimate; and whether the titles held by Fanikiwa and the joined respondents arising from the suit parcels were legitimate.

26. On violation of the right to be heard, the appellate court found that the 9th to 18th respondents were only notified of the proceedings before the ELC and the judgment therein by the public notice. Consequently, they were not afforded the right to be heard before cancellation of their titles. Turning to Fanikiwa, the court found that there was a close nexus between Mark Too and Fanikiwa as Mr Mark Too had described himself as a majority shareholder as well as a Director of the latter. Therefore, the court held that since Fanikiwa had elected to stand-by and watch the proceedings play out, it could not purport that its right to be heard had been contravened. On the assertion that the petition should have proceeded by way of *viva voce* evidence, the court, guided by rule 20(1) of the *Constitution of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules, 2013* (the Mutunga Rules), found that hearing by way of affidavit evidence is permitted and there was no impropriety committed by the trial court in doing so. It further observed that in any event, directions dated August 13, 2014 directing the matter to be heard by way of written submissions were never challenged through an appeal by any party.

27. On the issue of legitimate expectation, the appellate court, like the ELC, found that Sirikwa had proved that it had a legitimate and enforceable expectation that it would be allocated the suit parcels. The court went on to hold that the promise and commitment to Sirikwa did not violate any law. Furthermore, it cautioned that it would be unconscionable and untenable for the government, in the face of such express, unambiguous and consistently repeated promises and representation, to be allowed to retract the same, on account of procedural steps its relevant officers ought to have undertaken to meet the legitimate expectation.

28. On indefeasibility of the titles, upon extensive evaluation of the evidence before it, the appellate court found that Fanikiwa and Mark Too were well aware of the purpose of the surrender due to their close proximity with Lonrho Agribusiness. Therefore, the court was not convinced by their assertions to the effect that they were bona fide purchasers for value and without notice. The court also found that there was no evidence on record that any consideration was paid following the alleged purchase from Lonrho Agribusiness. Turning to the 78 individuals and the financial institutions joined to the appeal, the court was satisfied that they were true innocent purchasers for value without notice. The court found that there was nothing to suggest that they were party to any fraud, misrepresentation or mistake in the acquisition of their titles to the sub-divisions of the suit parcels. Accordingly, the court upheld the validity of their titles. Finally, as regards the cross appeal, the court, having found that Mark Too was part and parcel of the misrepresentation and fraudulent allocation and

transfer of the sub-divisions to himself and Fanikiwa, found instead that the titles registered in his favour were unworthy of protection by the court.

29. In the end, the Court of Appeal issued the following reliefs:

i. The consolidated appeal is hereby dismissed.

ii. The judgment of the Environment and Land Court dated February 9, 2017 is varied to the extent that the nullification of the titles of the individual and financial institution respondents who were joined to this appeal is hereby set aside.

iii. The cross appeal by Sirikwa is hereby allowed.

iv. Costs of the consolidated appeal and cross appeal shall be borne by the appellants.

c. At the Supreme Court

30. The appellants filed their respective appeals as set out in the opening paragraph of this judgment, which were eventually, consolidated.

31. Cumulatively, the appellants raised several grounds of appeal which can be summarized as follows - that the Court of Appeal erred by;

i. Upholding the cancellation of Fanikiwa's titles to its properties and cancelling Mark Too's titles without affording them an opportunity to be heard contrary to articles 25(c), 27, 47, 48 and 50(2) of the *Constitution*; and without a *viva voce* hearing to test the veracity of the letters relied on by Sirikwa;

ii. Usurping the jurisdiction of the trial court and, suo motu, finding that Fanikiwa fraudulently acquired its titles without giving it a chance to defend its acquisition in violation of article 25(c), 40, 47, 48 and 50(2) of the *Constitution*;

iii. Ignoring the tenets of the doctrine of legitimate expectation by finding that legitimate expectation can override the express provisions of the law;

iv. Failing to find that the promise made by the retired President to allocate or resettle Sirikwa's members on the suit parcels was illegal, null and void on account of the suit parcels being private properties; and

v. Holding without any legal basis that the surrender by Lonrho Agribusiness of the titles to the suit parcels was for allocation to Sirikwa's members;

32. The appellants further sought the following common reliefs:

a. The consolidated appeal be allowed;

b. The Judgment and orders of the trial and appellate court be set aside in entirety;

c. The costs of the appeals;

d. Any other or further relief that this court may deem fit to grant;

e. In addition, Fanikiwa sought a permanent injunction restraining Sirikwa, its agents, members, servants, employees and/or representatives from entering, taking possession of and in any other manner interfering with its quiet possession of the suit properties described as LR No Pioneer/Ngeria Block 1 (EATEC) 7070, 7068, 3395, 5903, 2454, 476, 1860, 475, 5497, 5494, 5492, 5489, 5486, 1384, 1383, 5484, 474, 472, 5485, 5487, 5490, 5488, 5491, 5493, 1861, 5496, 1862, 5491, 473, 477, 471, 1353, 1375, 1374, 1379, 1378, 1380, 1381, 1382, 1852, 1386, 1385, 85, 5495 and 5902; and

f. Lonrho Agribusiness and David Korir sought a declaration that the finding by the superior courts below to the effect that the retired President's approval of allocation of the suit parcels and the subsequent surrender of the titles was for purposes of settling Sirikwa's members grossly violated and arbitrarily deprived Lonrho Agribusiness interest or right over the suit parcels as guaranteed under article 40 of the Constitution.

33. In response, the 2nd to the 6th respondents, the 9th and 10th respondents supported the appeals as consolidated.

34. On its part, Sirikwa opposed the consolidated appeal and also raised a preliminary objection. The preliminary objection was to the effect that this court lacked jurisdiction to entertain the consolidated appeal since it does not meet the threshold of a case involving interpretation and application of the Constitution as espoused in *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another*, SC Petition No 3 of 2012; [2012] eKLR (Lawrence Nduttu).

35. The 11th, 12th, 15th, 16th, 17th and 18th respondents also opposed the consolidated appeal, but only to the extent, that it sought to set aside the Court of Appeal's finding with respect to the titles to the sub-divisions which had been charged by the financial institutions. It is important to note that the 7th, 8th 13th and 14th respondents did not appear when the consolidated appeal was heard by this court.

C. Parties' Submissions

i. Fanikiwa

36. According to Fanikiwa, the preliminary objection raised by Sirikwa is at best frivolous and ill-conceived since several constitutional issues were raised and adjudicated by the superior

courts below. Fanikiwa argued that, from a clear reading of the petition before the ELC and the appeals in the Court of Appeal, the superior courts below were called upon to determine various constitutional rights that were claimed by Sirikwa.

37. Fanikiwa submitted that the Court of Appeal erred in finding that Lonrho Agribusiness had conferred five of the suit parcels for the resettlement of Sirikwa's members by virtue of a letter dated November 9, 2000 under the hand of Mr Hulme, who allegedly was Lonrho Agribusiness' General Manager. It posited that no evidence was adduced to establish that Mr Hulme was the General Manager on the said date or that he had authority to confer and/or surrender the suit parcels or that he issued the letter in question. In addition, it is Fanikiwa's position that the Court of Appeal erred by holding that Mark Too used his position as the Chairman of Lonrho Agribusiness to fraudulently acquire the suit parcels. It urged that the correct position is that Mr Mark Too had resigned from Lonrho Agribusiness in September, 2000 and that its titles were impeached on account of perceived close proximity with Mark Too yet at the time of purchasing the sub-divisions in 2003, Mr Mark Too had no affiliation to Lonrho Agribusiness.

38. Fanikiwa further asserted that, sometime in 2003, it purchased from Lonrho Agribusiness sub-divisions of the suit parcels namely Pioneer Ngeria Block 1 (EATEC) 7070, 5903,7068,3395,2454,476,1860,474,5497, 5494, 5492,5489, 5486, 1384, 1383, 5484, 474, 472, 5485, 5487, 5490, 5488, 5491, 5493, 1861, 5496, 1862, 5491, 473, 477, 471, 1353, 1375, 1374, 1379, 1378, 1380, 1381, 1382, 1852, 1386, 1385, 5495 and 5902 measuring approximately 2756 acres for valuable consideration, that is, Sterling Pound 1 Million plus Kshs 31 million. The conveyance in respect of the sub-divisions was completed in 2005. It followed therefore that the ownership of the sub-divisions had been vested upon Fanikiwa as a bona fide purchaser for value by the time the suit was filed at the High Court. Consequently, the impugned decision had violated its right to property.

39. Fanikiwa furthermore argued that the Court of Appeal erred in misconstruing the tenets of the doctrine of legitimate expectation because the alleged 'approval' by the late President Moi could not override the rights of a registered proprietor. Besides, at the time of the said approval, the land was not unalienated government land capable of being allocated to Sirikwa or any other entity by the President. In that regard, it cited section 3 of the *GLA*.

40. Fanikiwa, in addition, submitted that the promise by the 4th respondent to allocate land was illegal and unenforceable as such mandate was vested in the Commissioner of Lands and not the 4th respondent. It thus urged that Sirikwa did not produce and tender in evidence any Letter of Allotment as required. To bolster this point, it cited the case of *Dina Management Limited v County Government of Mombasa & 5 others*, SC Petition No 8 (E010) of 2021; [2023] KESC 30 (KLR) (Dina Management Limited). Fanikiwa argued in that context that, it was contradictory for the appellate court to cancel its titles and spare those held as security

by financial institutions on the basis that there was no evidence of fraud, misrepresentation or mistake in registration of the said titles.

41. Fanikiwa contended that its right to a fair hearing was violated by the appellate court in holding that the perceived wrongs by the late Mark Too were *ipso facto* wrongs committed by Fanikiwa, yet, they are distinct legal entities. It posited that it ought to have been given an opportunity to defend itself in the trial court and that the Court of Appeal failed to appreciate that what was tendered as evidence by Sirikwa at the trial court were copies of alleged letters and handwritten inscriptions on the letters whose authors were not called upon to adduce evidence. It cited the case of *Sanghani Investment Limited v Officer in charge Nairobi Remand & Allocation Prison*, HC Misc Applic No 99 of 2006; [2007] eKLR where the court held that copies of documents would not be sufficient to establish authenticity of a title and that original documents need to be produced at a full hearing where oral evidence would be adduced. It also cited the case of *Republic v Land Registrar & 3 others ex parte Aryan Limited*, HC Misc Applic No 95 of 2012; [2016] eKLR and *Republic v District Land Registrar, Nakuru ex parte Lawi Kigen Kiplagat; Lee Maiyani Kinyanjui (interested party)*, ELC JR No 1 of 2020; [2021] eKLR on the import of *viva voce* hearing in such circumstances.

ii. Administrators of the Estate of Mark Too

42. The above administrators' submissions on the preliminary objection and the consolidated appeal were more or less similar to those of Fanikiwa. On the right to fair hearing, they submitted that the judgment of the ELC violated their right to fair hearing under article 50 of the *Constitution* by cancelling Mark Too's titles in the absence of *viva voce* evidence, thereby adjudging Mark Too guilty of fraud on mere presumptions without any evidence. They also argued that mere affidavit evidence was not a sufficient basis to nullify Mark Too's titles and that a title can only be cancelled and/or revoked upon proof of illegal conduct on the part of the proprietor. They thus insisted that the finding that Mark Too was guilty of fraud based on affidavit evidence amounted to presuming criminal conduct on an individual without the allegations being tested. They relied on the case of *Sanghani Investment Limited v Officer in charge Nairobi Remand and Allocation Prison* (*supra*) in support of this assertion.

43. They submitted in addition that the Court of Appeal misapplied the doctrine of legitimate expectation by finding that the members of Sirikwa had established their claim as falling within the ambit of the said doctrine. It was their case that former President Moi did not have the power to allocate private property as doing so would violate the provisions of article 40 of the *Constitution*. They cited *Kenya Airports Authority v Mitu Bell Society & 2 others*, Civil Appeal No 218 of 2024; [2016] eKLR and *Nelson Kazungu Chai & 9 others v Pwani University College*, Civil Appeal No 78 of 2016; [2017] eKLR to support this proposition. In any event, they claimed that at the time of the purported allotment by the

former President, Lonrho Agribusiness was still the registered owner of the suit parcels and its right of ownership was only subject to the provisions of sections 27 and 28 of the *RLA* and not any other law including the *GLA*. As such, the suit parcels were not available for allotment. In conclusion, they submitted that Mark Too had purchased the sub- divided suit parcels between 2003 and 2008 long after he had resigned from Lonrho Agribusiness in the year 2000 and was an innocent purchaser for value and possessed indefeasible titles under the *RLA*.

iii. Lonrho Agribusiness and David Korir

44. Likewise, the 3rd and 4th appellants maintained that the consolidated appeal fell within the purview of article 163(4)(a) of the *Constitution* and reiterated their position in the ELC and Court of Appeal, that Lonrho Agribusiness was the registered proprietor of the suit parcels and that it had exercised its proprietorship right to surrender the titles thereto. They submitted that the purpose of the surrender by Lonrho Agribusiness is evident in the entry of the title to LR No 9608 (IR No 14209) registered on November 2, 2000 which entry confirms that the surrender to the government was for conversion of the leasehold titles to freehold titles and not allocation to squatters. As such, the suit parcels were private property incapable of being allocated as public land. They further submitted that, Lonrho Agribusiness, as the proprietor of the suit parcels lawfully subdivided the same, sold and transferred the sub-divisions thereof to third parties. Besides, they contended that Sirikwa had not established fraud on the part of Lonrho Agribusiness and David Korir to the required standard and cited *RG Patel v Lalji Makanji* [1957] EA 314 and *Koinange & 13 others v Koinange* [1968] KLR 23 to reinforce this submission. They also contended that Sirikwa's claim to the suit parcels on the basis of legitimate expectation did not hold any weight as the President's power was only limited to allocating unalienated government land and not private land.

In support of the consolidated appeal

iv. The 2nd to 6th respondents

45. The 2nd to 6th respondents supported the consolidated appeal in the same vein they had articulated before the superior courts below. They posited that the following pertinent questions arise regarding the alleged direct approval by the late President Moi; whether the President had legal and legitimate authority to deal with the suit parcels; whether the allocation was a futuristic desire or whether it conferred any legitimate right and what was the intention of the proprietor of the suit parcels during surrender. It is their submission in that context that the suit parcels were private properties registered in the name of Lonrho Agribusiness and had not been surrendered back to the government as alleged by Sirikwa. The President therefore had no mandate to allocate private land or confer any legitimate

interest to Sirikwa and that the intention of the surrender to the government was solely for the purpose of conversion from leasehold tenure under *RTA* to freehold under *RLA* and subsequent subdivision, sale and transfer to third parties.

46. Lastly, they contended that Sirikwa's members did not meet the threshold of being described as squatters as they were not in occupation of any portion of the suit parcels. In that regard, they made reference to the definition of squatters in the *Black's Law Dictionary* and the case of *Kenya Petroleum Refineries v Hassan Ngoa & 53 others*, HC Civil Suit No 544 of 2000; [2013] eKLR.

v. The 9th respondent

47. The 9th respondent, who were joined at the Court of Appeal, as set out earlier, are individuals registered as proprietors of some of the sub-divisions of the suit parcels. They supported the Court of Appeal's finding that upheld their titles to the sub- divisions of the suit parcels on the basis that they had not been afforded an opportunity to be heard by the ELC and that they were innocent purchasers. However, they faulted the Court of Appeal's judgment on the finding that Fanikiwa was given an opportunity to be heard at the trial court yet it was not a party in the said proceedings. They therefore urged this court to set aside the impugned judgment and exempt titles belonging not only to Fanikiwa but also to individuals/institutions who were not parties to the proceedings before the ELC and the Court of Appeal.

vi. The 10th respondent

48. The 10th respondent are individuals registered as proprietors to some of the sub- divisions of the suit parcels. Like the 9th respondent, they urged that the Court of Appeal rightly upheld the sanctity of their titles as they were innocent purchasers for value without notice. In their opinion, Sirikwa's members did not have a lawful claim to the suit parcels since they were privately owned. Further, that Lonrho Agribusiness had established that it was the legitimate proprietor of the suit parcels which meant that titles held by subsequent purchasers of the sub-divisions thereof, including the 10th respondent, were indefeasible. Therefore, they asked the court to protect the sanctity of not only their titles but also of other innocent purchasers.

In opposition to the consolidated appeal

vii. Sirikwa

49. With regard to the preliminary objection, Sirikwa maintained that this court lacked jurisdiction to entertain the consolidated appeal as it did not fall within the purview of article

163(4)(a) as invoked by the appellants. Towards that end, Sirikwa reiterated the grounds of its preliminary objection as set out above.

50. Sirikwa further reiterated its case before the trial court and the appellate court. As far as it was concerned, the superior courts below properly analysed the evidence and correctly found that its members were entitled to the suit parcels by virtue of the doctrine of legitimate expectation. It submitted that the issue of whether the petition before the ELC should have been disposed by *viva voce* evidence was never raised or challenged in the Court of Appeal and could not therefore be raised at this stage.

51. Pertaining to conversion of the titles of the suit parcels, it was Sirikwa's submission that the Court of Appeal correctly found that the proper procedure for the conversion alluded to had not been followed. Consequently, everything else that followed the purported conversion was a nullity. Moreover, it asserted that the Court of Appeal properly disabused Fanikiwa's claim of being an innocent purchaser for value. Further, that Mark Too described himself before the ELC as Fanikiwa's Director and a majority shareholder, which admission Fanikiwa cannot run away from. Sirikwa further submitted that the appellate court exhaustively analysed the case before it and correctly concluded on the central issue of fraudulent dealings by the appellants, which a court of law would not lend its hand to aid.

52. On the right to a fair hearing, Sirikwa contended that it is legally and factually incorrect for the appellants to claim that they were denied a hearing before the ELC and the Court of Appeal because they were heard and a decision fairly made against them.

viii. The 11th, 12th and 15th respondents

53. The 11th, 12th and 15th respondents are financial institutions which were joined at the Court of Appeal on the basis of charges they hold over some of the sub-divisions of the suit parcels. The totality of their submissions was that the charged titles in respect of the sub-divisions of the suit parcels which are held as security by themselves are indefeasible because there was no proof that the said titles were obtained through fraudulent or illegal means. Towards this end, they asked this Court to uphold the Court of Appeal's judgment wherein it set aside the trial court's judgment nullifying the titles charged by the financial institutions aforesaid.

ix. The 16th and 17th respondents

54. The 16th and 17th respondents are also financial institutional which were joined by the Court of Appeal due to the securities they hold over the titles to sub-divisions of the suit parcels. Their position echoed that held by the 11th, 12th and 15th respondents and they equally urged the court to uphold the Court of Appeal's judgment wherein it set aside the trial court's judgment nullifying the titles charged by financial institutions.

x. The 18th respondent

55. The 18th respondent is also a financial institution and held the same position as the 11th, 12th, 15th, 16th and 17th respondents which position has been summarized above.

D. Analysis

56. Upon deliberation on the consolidated appeal, it is our view, that its determination will turn on the following issues:

    i. Whether the consolidated appeal meets the constitutional threshold under article 163(4)(a) of the *Constitution*.

    ii. Whether the appellants' right to fair hearing under article 50(1) of the *Constitution* was violated by the appellate court's cancellation of their titles.

    iii. Whether the proceedings ought to have been through *viva voce* evidence at the trial court.

    iv. Whether Sirikwa had a legitimate expectation to acquire and be allocated the suit parcels.

    v. Whether Sirikwa has a right to the suit parcels on account of its members being squatters on the suit parcels.

    vi. What was the intent for the surrender of the titles to the suit parcels?

    vii. Costs and available relief(s).

    We now turn to the determination of these issues.

i. Whether the consolidated appeal meets the constitutional threshold under article 163(4)(a) of the Constitution.

57. Sirikwa filed a preliminary objection dated January 18, 2023 contesting this court's jurisdiction to entertain the consolidated appeal on the basis that it does not fall within the purview of article 163(4)(a) of the *Constitution* as invoked by the appellants. It argued in sum, that the consolidated appeal does not come within the purview of the principles set out in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, SC Petition No 2B of 2014; [2014] eKLR, *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others*, SC Petition No 18 of 2014 as consolidated with SC Petition No 20 of 2014; [2014] eKLR and *Lawrence Nduttu*. Sirikwa further submitted that the Court of Appeal's judgment did not turn on article 40 of the *Constitution* and that the consolidated appeal has nothing to do with the interpretation and application of the Constitution and that both superior courts

below did not make any determination that warrants the intervention of this court under article 163(4)(a) of the *Constitution* and so it ought to be struck out in limine.

58. As noted earlier in this judgment, the appellants on the other hand, opposed the preliminary objection and maintained that the questions in issue at both the ELC and Court of Appeal were constitutional matters and both superior courts disposed of the matter after interpreting and applying the *Constitution*.

59. They added that the *Constitution*, in article 163(4)(a), provides that appeals shall lie from the Court of Appeal to the Supreme Court as of right in any case involving the interpretation or application of this *Constitution* and they have correctly invoked that jurisdiction. Moreover, the matter was initially filed in the High Court as a constitutional petition.

60. In determining the preliminary objection, we are alive to the fact that this court has held, time without number, that a court's jurisdiction is a vital ever-germane issue that must be dispensed with at the onset given that without it, a court must down its tools. In *Samuel Kamau Macharia v Kenya Commercial Bank Limited & 2 others*, SC Application No 2 of 2011; [2012] eKLR, we rendered ourselves as follows at paragraph 68:

> "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."

61. In *Lawrence Nduttu andBenson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others*, SC Petition No 3 of 2020; [2020] eKLR, we held that, to bring forth an appeal pursuant to article 163(4)(a) of the *Constitution*, it must be demonstrated that the issues of contestation involve the interpretation or application of the Constitution, which constitutional issues have been considered and determined by the superior courts below. It is that interpretation or application of the *Constitution* by the appellate court that forms the basis of a challenge before this court.

62. More recently in P*aul Mungai Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney-General & 2 others*, SC Petition No 45 of 2018; [2020] eKLR at paragraph 62, we set out some attributes which ought to be used to assess whether a cause lies under article 1634)(a) of the *Constitution*. Observing that this is an appellate court with a very qualified jurisdiction, we stated that not every issue that was before the superior courts below is nonetheless open for this court's determination in exercise of its appellate jurisdiction under article 163(4)(a).

63. In *Rutongot Farm Limited v Kenya Forest Service & 3 others* SC Petition No 2 of 2016; [2018] eKLR, we held that the mere clothing of an appeal or intended appeal as a question of

constitutional interpretation or application does not grant jurisdiction to this court. Matters of fact that touch 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. We also emphasise that each case will turn on its own peculiar facts.

64. With this in mind, we now turn to establish whether we can entertain this matter. The appellants want us to determine whether they were deprived of their right to property contrary to article 40 of the *Constitution*, whether their right to fair hearing was breached because there was no *viva voce* evidence adduced before their titles were cancelled, and whether the appellate court ignored the tenets of the doctrine of legitimate expectation in violation of article 47 of the *Constitution*.

65. We pause here to point out that this case is unique in that Fanikiwa was not a party in the ELC and only became a party in the Court of Appeal where it alleged breach of its property rights. Having observed thus, it is important to note that, in fact it is Sirikwa, which had initially filed a constitutional petition in the High Court (later transferred to ELC) in which it sought constitutional remedies for violation and/or infringement of their constitutional rights under articles 19, 20, 21, 22, 23, 35, 40, 47 and 165 of the *Constitution of Kenya*. It further claimed that its members' rights to own the suit parcels were violated, which rights arose out of the doctrine of legitimate expectation. They sought in that regard a declaration that their constitutional right to property and/or interest in the suit parcels ought to be protected by the ELC; a declaration that their rights and fundamental freedom and in particular, the protection of right to property and/or interest over the suit parcels had been violated and/or infringed or was about to be violated and damages for breach and/or violation of their constitutional rights.

66. We further note from the record that the learned trial judge interpreted and applied the constitutional provisions invoked by Sirikwa. The trial judge specifically framed three issues as already noted above in this judgment. That is, whether the petitioner's (Sirikwa) members had legitimate expectation to acquire and be allocated property; whether the disputed parcels of land were private or public land upon surrender; and which remedies should the court grant. The trial judge then came to the conclusion that Sirikwa's members had a legitimate expectation to be registered as owners of the suit parcels and therefore, cancelled all the appellants' titles which had emanated from the suit parcels which prompted the appeal in the Court of Appeal. With specific reference to article 40 of the *Constitution*, which is central to the right to property, the learned trial judge stated:

> "The import of this article of the constitution of Kenya is twofold. The 1st instance is that it provides for the right to own property and the 2nd instance is that the property acquired should be protected by the state on condition that it was lawfully acquired. This court finds that the titles issued to the 7th respondent

(Mark Too) were issued against the legitimate expectation of the petitioners (Sirikwa) who had been promised by the 6th respondent (Lonrho Agribusiness) and the Government of Kenya that they would be allocated the land."

67. At the appellate court, Fanikiwa argued that it was not a party to the proceedings before the ELC and as a result, its right to property was extinguished without being heard contrary to article 50 of the Constitution. It also argued that the ELC misapprehended the doctrine of legitimate expectation. The appellate court on its part, considered and made findings on articles 47, 50 relating to fair hearing, and 40(6) of the *Constitution* relating to legitimate expectation, and legitimacy of the suit titles of the appellants. On article 40, the court rendered itself thus at paragraphs 165 and 166:

> "165. Article 40 of the *Constitution of Kenya 2010* protects the right to property in the following terms:
>
> ...
>
> 166. The effect of all the above provisions is that registration as proprietor of land confers on the registered owner absolute and indefeasible title, unless it is proved that the registration was procured through fraud, mistake or misrepresentation to which the registered owner was a party. It does not mean, as the appellants submitted, that the title of a registered proprietor cannot be impeached in all and sundry circumstances. The truth is that the title of a registered owner can be challenged and nullified if it is proved that he or she was party to any fraud, mistake, or misrepresentation pursuant to which registration was acquired."

68. The appellate court in framing the five issues for determination, as we have already highlighted, three of them related to Fanikiwa: whether Fanikiwa's right to be heard as well as that of the joined parties were violated; whether, upon conversion from *RTA* to *RLA*, the titles acquired by Fanikiwa and the joined parties were indefeasible; and whether the titles held by Fanikiwa and the joined respondents arising from the suit parcels were legitimate. What is apparent from the findings by the superior courts below is that Fanikiwa was not only mentioned but also the validity of its titles remained central to the determination of the matter. It is not in dispute that Fanikiwa was not a party before the High Court and the ELC. It is also not in dispute that Fanikiwa claims property that was excised from the suit parcels.

69. The appellants now want us to determine whether articles 25(c), 40, 47, and 50 of the Constitution were violated. Articles 40 and 47 of the *Constitution* have been at the centre of the key questions for determination in the superior courts below. This brings this cause

within the remit of article 163(4)(a) of the *Constitution*. Though the issue of fair hearing under both articles 25(c) and 50, was raised for the first time at the Court of Appeal and mainly so by Fanikiwa, the issue is also integrally linked to this cause and falls to us for determination.

70. The question that we ask ourselves then is, should this court down its tools and find that it has no jurisdiction as a result of Fanikiwa's introduction at the Court of Appeal? We do not think so. In determining the appeal, the Court of Appeal had to consider the evidence before it. Such issues expressly referring to Fanikiwa would not have been framed by the appellate court had they not emanated from the ELC, the said issues were determined by the Court of Appeal and are now before this court.

71. We also note that the present appeal emanates from a consolidated appeal before the Court of Appeal that resulted in one judgment involving other parties in the present matter whose standing is not in issue. The matter having been consolidated before the Supreme Court, the issues raised are cross cutting and are similarly not affected by the standing of Fanikiwa alone. We therefore find that we have jurisdiction to hear and determine the consolidated appeal and thus Sirikwa's preliminary objection fails.

ii Whether the appellants' right to fair hearing under article 50(1) of the *Constitution* was violated by the appellate court; and

iii Whether the proceedings ought to have been through *viva voce* evidence at the trial court.

72. We deem it proper to consider issues ii and iii as framed together given that they are integrally linked. Fanikiwa contended that its right to a fair hearing was violated by the appellate court by considering that the perceived wrongs by the late Mark Too were *ipso facto* wrongs committed by Fanikiwa yet the two are distinct legal entities. As such, Fanikiwa submitted that it ought to have been given an opportunity to defend itself. In addition, it submitted that the Court of Appeal failed to appreciate that what was tendered as evidence by Sirikwa at the ELC were copies of alleged letters and handwritten inscriptions on the letters whose authors were not called to adduce evidence.

73. The administrators of the estate of Mark Too urged that the deceased's right to a fair hearing was violated in a two-fold manner. Firstly, the Court of Appeal failed to appreciate that what was tendered as evidence by Sirikwa at the trial court were copies of alleged letters and handwritten inscriptions on the letters whose authors were not called to corroborate their contents and authenticity. Secondly, that the appellate court adjudged Mark Too guilty of fraud based on mere assumptions without any cogent evidence to support those assumptions. Sirikwa on the other hand, contended that it is legally and factually incorrect

for the appellants to claim that they were denied a hearing before the ELC and the Court of Appeal and instead urged that Mark Too described himself as a Director of Fanikiwa. Sirikwa submitted that he was a majority shareholder of Fanikiwa and therefore the Court of Appeal was correct to find that he was literally the mind and the brain of Fanikiwa. Sirikwa also maintained that Mark Too was part and parcel of the misrepresentation, fraudulent acquisition and transfer of the sub-divisions of the suit parcels to himself and Fanikiwa, and urged that the issues of illegality and fraud were completely dealt with by the superior courts below and that there is no controversy on the law relating to fraud to warrant our intervention.

74. Two limbs of the right to fair hearing stand out for determination. Firstly, whether the superior courts below erred in failing to call the authors of the documents relied on to make their findings on the suit parcels and secondly, whether the appellate court erred in finding Mark Too guilty of fraud without hearing him. These will be interrogated in turn.

75. The Court of Appeal found as follows on the need for *viva voce* evidence in paragraphs 110, 111 and 112 of its judgment:

> " 110. The second limb of the alleged violation of Fanikiwa's right to be heard is the assertion that the petition should not have proceeded otherwise than by *viva voce* evidence.
>
> ...
>
> 111. The record before us shows that after considering the matter, the court directed, on May 13, 2014, that the petition be heard by way of affidavits and written submissions. That is the default position under the rules and it is a direction that the court was validly and lawfully entitled to make. Almost two years after the directions, Lonrho Agribusiness, Mr Too and Mr Korir applied for cross examination of deponents of the various affidavits. By a considered ruling, the trial court declined to vary the directions on the mode of conducting the hearing. The record shows that none of the parties appealed against that ruling.
>
> 112. The fact that if we ourselves were hearing the petition would have preferred to conduct the proceedings differently is not sufficient reason to fault the directions that the trial court gave, particularly when the parties had an opportunity to appeal against those directions but elected not to do so and thereby allowed the petition to proceed until conclusion. We are satisfied that from the affidavits by the parties and the annexures thereto, it was possible to appreciate

the issues raised by each of the parties and render a fair and just decision thereon."

76. Based on the record, it is not lost on us that Lonrho Agribusiness and David Korir by an application dated March 18, 2016 in the ELC sought to cross-examine all the deponents who had sworn affidavits before the court. The learned trial judge heard and dismissed the application on November 3, 2016. These appellants never appealed this ruling. This notwithstanding, the court had a duty to satisfy itself that no party would be prejudiced by proceeding in the manner in which it did especially in a matter where the facts deposed to in the various affidavits were seriously contested. Consequently, we are constrained to say a few things about the necessity of viva voce evidence in the circumstances such as those obtaining in this case.

77. This matter entails disputed ownership of land. In other words, there are competing claims as to the ownership of the suit parcels. Therefore, it behoves a court to make a just determination on the same, procedurally. In doing so, it has to, on the basis of the law and evidence before it, decide who the owner is and thoroughly interrogate how such ownership was conferred. In the present scenario, a trial process involving examination, cross-examination and re- examination of the witnesses is the only way of resolving the competing allegations and counter allegations. We recognize that the superior courts below relied on rule 20(1)(a) of the *Mutunga Rules* to hear the matter by way of affidavit evidence. However, we are of the view that a court is required to make a special endeavour to unravel all the competing claims and in particular, by calling for *viva voce* evidence from witnesses, especially those who have sworn depositions, and cross-examination done. This is particularly important because its decision will have a far-reaching impact especially upon the party(ies) whose ownership may end up being nullified. In taking this view, we are fortified by rules 20(3), (4), and (5) of the *Mutunga Rules* which allow a court to admit oral evidence, examine and cross-examine parties.

78. In the circumstances of this case therefore, we are not convinced that it was prudent and judicious, considering the highly contentious nature of the claims and circumstances of each of the numerous parties involved to determine this matter by affidavit evidence only. The authors of the said affidavits ought to have been called and cross-examined to test the veracity of the affidavits and documentary evidence. To our minds, this would have presented the best available evidence for the learned trial judge to make his decision fairly.

79. On the second issue as to whether Mark Too was adjudged guilty of fraud unfairly, we note that the learned trial judge found that he was not involved in any fraud or wrongdoing. However, the appellate court in paragraph 186 of its judgment found as follows:

> "186. ..... Having found that Mr Too was part and parcel of the misrepresentation and fraudulent allocation and transfer to himself and Fanikiwa of the parcels of land that were expressly surrendered for settlement of the Sirikwa squatters, we find no basis or justification for the award of the 27 hectares to Mr Too. Mr Too was simply the prime mover in the scheme to swindle Sirikwa of the surrendered land and cannot be described by any stretch of imagination as an innocent purchaser. The transaction relating to the 27 hectares was tainted by fraud and misrepresentation and was completely unworthy of protection by the court. Accordingly, we allow the cross-appeal and set aside the part of the order that awarded 27 hectares to Mr Too."

80. The administrators of the estate of Mark Too are therefore right in asserting that the appellate court adjudged him guilty of fraud without affording him a hearing. However, it is trite law that fraud which, depending on the circumstances is recognized as a criminal offence, must be pleaded and strictly proved. In addition, although the standard of proof of fraud in civil matters is not proof beyond reasonable doubt, it is higher than proof on a balance of probabilities as required in other civil claims.

81. In the instant case, Sirikwa pleaded that the allocation and transfer of the suit parcels was tainted by fraud and lack of due process and was therefore illegal, null and void. The particulars of fraud were tabulated as refusal to transfer the suit parcels to Sirikwa notwithstanding official commitment by the government, trying to defeat and deprive Sirikwa of its right to the suit parcels, and endeavouring to illegally confer title to the suit parcels to other purported beneficiaries.

82. We are unconvinced that such vague particulars of fraud were proved to the required standard going by the absence of any serious attempt to table concrete evidence to prove the subject allegations to the required degree. Our appellate court has over the years developed settled jurisprudence on the requisite standard of proof for allegations of fraud which we endorse. In *Central Kenya Ltd v Trust Bank Limited & 4 others*, Civil Appeal No 215 of 1996; [1996] eKLR the appellate court determined:

> "The appellant has made vague and very general allegations of fraud against the respondents. Fraud and conspiracy to defraud are very serious allegations. The

onus of *prima face* proof was much heavier on the appellant in this case than in an ordinary civil case." [Emphasis added]

83. Further, in *Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others*, Civil Appeal No 21 of 2014; [2015] eKLR, the appellate court delivered itself thus:

> " Where fraud is alleged, it must be specially pleaded and particulars thereof given. That is what is required by order 2 rule 10 of the *Civil Procedure Rules, 2010*. Way back in the 19th Century, Lord Penzance stated the principle thus, in *Marriner v Bishop Of Bath And Wells* [1893) P. 146:
>
> > 'The court will require of him who makes the charge that he shall state that charge with as much definiteness and particularity as may be done, both as regards time and place.'
>
> Even where a plaintiff has properly pleaded fraud, he or she is required in addition to prove it beyond a mere balance of probabilities. In *RG Patel v Lalji Makanji* [1957] EA 314, at page 317 the former Court of Appeal for Eastern Africa stated that:
>
> > 'Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.'
>
> And in *Richard Akwesera Onditi v Kenya Commercial Finance Co Ltd*, CA No 329 of 2009 this court expressed itself on the issue as follows:
>
> > 'Needless to say, fraud and collusion are serious accusations and require a very high standard of proof, certainly above mere balance of probability, and the bare allegations put forward by the appellant do not therefore avail him.'
> >
> > (See also *Gudka v Dodhia*, CA No 21 of 1980 and *Koinange & 13 others v Koinange* (1996) KLR 23).
>
> Regarding *prima facie* proof of fraud, this court stated thus in *Central Kenya Ltd v Trust Bank Ltd & 4 others*, CA No 215 of 1996:
>
> > 'The appellant has made vague and very general allegations of fraud against the respondents. Fraud and conspiracy to defraud are very

> serious allegations. The onus of *prima face* proof was much heavier on the appellant in this case than in an ordinary civil case.'
>
> We would also wish to point out, as this court stated in *Westmontpower Kenya Ltd v Frederick & another t/a Continental Traders & Marketing* [2003] KLR 357, albeit in the context of an application for summary judgment, that issues of alleged fraud can only be determined with finality during a proper trial and not on conflicting affidavit evidence."

84. Back to the instant case, we note in addition that the ELC found as follows regarding Mark Too who was the 7th respondent before that court: "... the said 7th defendant (sic) has not been found to have been involved in any fraud or wrongdoing and therefore the court orders that he be allocated not less than 27 hectares of the suit land and that in the meantime status quo to be maintained in respect of the approximately 27 ha occupied and utilized by the 7th respondent. Orders accordingly." We agree with the ELC's finding on the allegations of fraud as reproduced and emphasised above. The Court of Appeal, on the other hand, did not give any cogent reasons for disagreeing with the ELC on this question of fraud.

85. There was simply no credible evidence to prove such a serious allegation which may also attract criminal sanction. As such, the Court of Appeal fell into error when it varied the ELC's judgment to the extent that it found the late Mark Too guilty of fraud and we so hold and find.

iv. Whether Sirikwa had a legitimate expectation to acquire and be allocated the suit parcels.

86. Sirikwa asserted all the way from the ELC to this court, that its members had a legitimate expectation that they would be allocated the suit parcels because of the 'approval' of allocation of the suit parcels to them by retired President Moi on October 28, 1998. Sirikwa further relied on subsequent official correspondence from government offices, which it argued showed steps or actions to give effect to former President Moi's 'allocation' of the suit parcels to settle its members. In essence, Sirikwa seeks the enforcement of what it argued is a legitimate expectation that prevents the relevant state bodies from resiling from a promise made by the then President.

87. The principle of legitimate expectation imposes a duty to act fairly and to honour reasonable expectation raised by the conduct of a public authority. If a public body has raised expectations that it will in future undertake a certain course of action, then it should ordinarily fulfil those expectations. This is important for the promotion of certainty and consistency in public administration.

88. For an individual to invoke the principle of legitimate expectation, an expectation must have been induced by some conduct of the public authority. The principle extends to any

individual who is in a situation in which it appears that the administration's conduct has led him to entertain certain expectations.

89. It is important to point out that the principle protects only those expectations which have arisen through the conduct of the administrative body concerned, and not those which have arisen as a result of an individual's subjective hopes. Put differently, it is concerned with upholding trust in the administration rather than protecting expectations which the individual has decided to entertain at his or her own risk.

90. This means that only reasonable expectations will be afforded protection by the law. An individual must hold an expectation which is reasonable to have in light of the prevailing circumstances. It is in appreciation of this, that this court pronounced itself in *Kenya Revenue Authority v Export Trading Company Limited*, SC Petition 20 of 2020; [2022] KESC 31 as follows at paragraphs 52-53:

> "... legitimate expectation may take many forms. It may take the form of an expectation to succeed in a request placed before the decision maker or it may take the objective form that a party may legitimately expect that, before a decision that may be prejudicial is taken, one shall be afforded a hearing.
>
> Respectfully, we take the view that the question of whether a legitimate expectation arose is more than a factual question. It is not merely confined to whether an expectation exists in the mind of an aggrieved party, but whether viewed objectively, such expectation is in a legal sense, legitimate."

91. As this court has emphasized above, not just any promise will do; the promise must be one giving rise to a legitimate expectation. Certain requirements must also be met for a promise to generate a legitimate expectation. This court pronounced itself on these requirements in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*, SC Petition No 14, 14A, 14B and 14C of 2014; [2014] eKLR as consolidated (Communications Commission of Kenya) and we provided the following guidelines at paragraph 269:

> " The emerging principles may be succinctly set out as follows:
>
> a. there must be an express, clear and unambiguous promise given by a public authority;
>
> b. the expectation itself must be reasonable;
>
> c. the representation must be one which it was competent and lawful for the decision-maker to make; and

d. there cannot be a legitimate expectation against clear provisions of the law or the *Constitution*." [Emphasis added]

92. Important for the case at hand, is the assertion by the appellants that the finding of breach of legitimate expectation by the ELC, as affirmed by the Court of Appeal, was erroneous given that the circumstances of the case show that the twin requirements that the representation ought to have been made by a public authority that is competent and the representation is lawful were not satisfied. They argued that the alleged 'approval' by the late President Moi could not override the rights of a registered proprietor to a private land. Besides, at the time of the said approval the land was not unalienated government land capable of being allocated by the President as was provided in the *GLA*.

93. It is notable from the record that in October 1998, Sirikwa wrote to the 4th respondent seeking allocation of the suit parcels belonging to Lonrho Agribusiness. Subsequently, on October 28, 1998, the former President, Daniel Arap Moi endorsed the application with the words 'Approved'. This is the genesis for subsequent actions by other government offices that sought to give effect to the former President's endorsement of the allocation of the suit parcels to Sirikwa's members. Did this 'approval' by the former President give rise to legitimate expectation that Sirikwa could and can now lawfully enforce?

94. The documentary evidence before the court, show irrefutably that as at the date of Sirikwa's application and on October 28, 1998 when former President Moi endorsed the subject application with the words 'Approved', the suit parcels were registered as private property in the name of Lonrho Agribusiness. The evidence on record further shows that up to the year 2000, when the titles for the suit parcels were surrendered, they had at all times been held as private property. The position that the suit parcels were private property up to the year 2000 was indeed acknowledged by the government when it compulsorily acquired certain portions thereof for the development and construction of public utilities including the Eldoret International Airport and Moi University School of Law Annex in the year 2000. It follows that the suit parcels, being private properties at the material time, could only be alienated or transferred by the registered owner, Lonrho Agribusiness, rather than by the President under the *GLA*.

95. Section 3 of the *GLA* provided that -

> "The President in addition to, but not limited to any other right, power or authority vested in him under this Act, may
>
> (a) subject to any other written law, make grants or disposition of any estates, interests, or rights in or over unalienated Government land." [Emphasis added] The import of this provision is that

> the President's power to make grants or disposition in land was restricted to "unalienated government land".

96. In addition, section 2 of the *GLA* defined "unalienated government land" to mean "Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment". This court in *Kiluwa Limited & another v Business Liaison Company Limited & 3 others,* SC Petition No 14 of 2017; [2021] KESC 37 (KLR) had this to say about unalienated government land at paragraph 55:

> "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. Unalienated government land remains public until it is privatized through allocation to individuals or other private entities."

97. Further this court in *Torino Enterprises Limited v hon Attorney General*, SC Petition No 5(E006) of 2022; [2023] KESC 79 (KLR) pronounced itself on what constitutes public and private land. We held at paragraph 55 of that judgment that, once an individual or entity acquires any unalienated government land, or other land for that matter, consequent upon registration of title, in accordance with the provisions of the applicable law, such land transmutes from public to private land. We also noted that such land is as a consequence, removed from the ambit and confines of the *GLA* to the new legal regime conferring title to an entity other than the government and on such terms as shall be inscribed on the new title. It follows therefore that the subject suit parcels, being land that was at the time private property vested in Lonrho Agribusiness did not fall within the category of 'unalienated government land' envisaged under the *GLA* and former President Moi had no legal capacity and authority to allocate or confer any legitimate interest in the subject suit parcels to members of Sirikwa or any other entity.

98. In addition, it is noteworthy that the application by Sirikwa for allocation of the suit parcels was made to the 4th respondent, the Director of Land Adjudication, who did not have the capacity or mandate to allocate government land, if any. Only the 2nd respondent, the Commissioner of Lands, had the mandate to allocate government land and this is the import of our decision in *Dina Management Limited* at paragraph 104.

99. In the end, we uphold this limb of the consolidated appeal and find that there was no legitimate expectation for Sirikwa's members to be allocated the suit parcels. We reiterate our stance in *Communications Commission of Kenya* that in determining whether legitimate expectation has been established, primacy must always be given to the requirement of legality which flows from the constitutional principle and value of the rule of law, as articulated in article 10(2)(a) of the *Constitution*. Legality dictates that an action can only be undertaken if it is authorized by the law. Therefore, a representation, promise, practice, conduct or an action outside the prescription of the law or undertaken by a person or entity without competent authority is illegal and cannot give rise to legitimate expectation.

v. Whether Sirikwa has a right to the suit parcels on account of being squatters on the suit parcels.

100. The appellants as well as the 2nd to the 6th respondents in support of the consolidated appeal submitted that Sirikwa's members did not meet the threshold of being described as squatters as they were not in occupation of any portion of the suit parcels. Sirikwa refuted this contention by averring that the definition of a squatter notwithstanding, it comprises of over 500 families and its members are entitled to ownership of the suit parcels as their heritage and on account of legitimate expectation and representations made to them by the government and Lonrho Agribusiness.

101. We pause to point out here that both superior courts did not delve into the issue of whether members of Sirikwa were indeed squatters. At the Court of Appeal, Fanikiwa maintained that members of Sirikwa were not squatters because they were not in occupation of any of the properties registered in its name. Still at the Court of Appeal, David Korir attached a list of squatters totalling to 73 people. He dismissed Sirikwa as 'an amorphous group consisting of impostors'. The Court of Appeal did not interrogate whether the members of Sirikwa were squatters. It concentrated on Fanikiwa's contention to the effect that it was impossible for Sirikwa to be allocated the parcel of land in issue because Sirikwa was not registered until the year 2006. It delivered itself thus at paragraph 160 of its judgment:

> " The evidence on record indicates that Sirikwa was registered as a self-help group with the Ministry of Gender, Sports, Culture and Social Services in 2006. We think that the objection raised in this issue is manifestly misconceived. First and foremost, Sirikwa as a group of squatters existed long before 2006 and was not created as a legal personality by registration as a self-help group by the Ministry."

102. A Squatter, in *Black's Law Dictionary*, 8th edition (at page 1439) is defined as:

> " a person who settles on property without any legal claim or title."

103. We note that Sirikwa defines itself as an amalgamation of over 500 squatter families that have a legitimate claim and interest over the suit parcels. They contend that the forefathers of its members were in occupation of the suit parcels but were forcefully evicted by the white settlers' community in the early 1920's. Subsequently, that the members' heritage and lineage were employed as workers and labourers by the colonialists. However, it is evident from the record that Sirikwa's members are not in occupation of any of the suit parcels or the sub-divisions thereof.

104. The evidence on record further shows that no member of Sirikwa ever took actual physical possession of the suit parcels. They have never occupied it. The failure to take possession and occupy the land means that Sirikwa were not squatters on the suit parcels. What is deducible from the evidence is that their claim is based on heritage from their forefathers who became dispossessed of their land by the colonialists and subsequently became workers. This evidence as compelling as it might seem, cannot support the claim by Sirikwa that they were squatters in the absence of occupation of the suit land. Also, the allegations of lineage (where no evidence was adduced) in our view is a complex web. We say so because in the absence of evidence to show who was the child of whom? Who exactly should be compensated by whom? Which proprietor? The record shows there were many proprietors as the suit parcels changed ownership severally. As claimed by Sirikwa, upon the forceful eviction of its members' forefathers from the suit parcels in the 1920s, the said forefathers and their lineage worked on the suit parcels as farm hands. By then the parcels had since been adjudicated and titles issued. This begs the question, whose workers were they? Didn't the farm owner own the land in question? Can workers then turn around and invoke the right to their place of work as squatters and if so, can they do so over 70 years later? So, who should shoulder the responsibility of compensating the claim? Was it a form of reparations to be paid on behalf of the colonialists? All these pertinent questions were not asked and we are therefore of the view that members of Sirikwa were not squatters on the suit parcels and have no legal basis to bring a claim asserting a right to the suit parcels.

v. What was the intent for the surrender of the titles to the suit parcels?

105. All the parties before this court are in agreement that in 2000, Lonrho Agribusiness, the then registered proprietor of the suit parcels as leasehold interests, surrendered the titles to the government. In effect, the leasehold interest in the properties came to a premature end without running their term due to the surrender and acceptance of that surrender by the government in the year 2000. Where the parties part ways and what is in contention before this court is the intent for the surrender of the subject titles.

106. Section 44 of the *RTA* which provided the legal regime for 'surrender of leases' stipulated as follows:

> "(1) Whenever any lease which is required to be registered by the provisions of this Act is intended to be surrendered, and the surrender thereof is effected otherwise than by operation of law, there shall be endorsed upon the lease the word "surrendered", with the date of surrender, and the endorsement shall be signed by the lessee and the lessor as evidence of the acceptance thereof, and shall be attested by a witness; and the registrar thereupon shall enter in the register a memorial recording the date of surrender and shall likewise endorse upon the lease a memorandum recording the fact of the entry having been so made in the register, and thereupon the interest of the lessee in the land shall vest in the lessor or in the person in whom having regard to intervening circumstances, if any, the land would have been then vested if no such lease had ever been executed; and production of the lease or counterpart bearing the endorsed memorandum shall be sufficient evidence that the lease has been so surrendered:
>
> Provided that no lease subject to a charge shall be surrendered without the consent of the chargee." [Emphasis added]

107. The above provision has received wide judicial interpretation over the years. We will interrogate a sample of such judicial pronouncements. In *Mwinyi Hamisi Ali v Attorney General & another*, Civil Appeal No 125 of 1997; [1997] eKLR the Court of Appeal (Tunoi, Shah & Bosire, JJA) noted as follows:

> "The land in question was held under the *Registration of Titles Act*, cap 281, laws of Kenya. Section 44 of the Act requires that surrender of land leased by the Government to persons to be registered in order to terminate the interest of the lessees. Registration of such surrender is evidence of surrender."

108. More recently, in *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others*, Civil Appeal 51 & 58 of 2016 (Consolidated); [2018] eKLR the Court of Appeal (Githinji, Mohammed & Otieno-Odek, JJA) held at paragraph 96 that:

> "A surrender of Grant or instrument of title is not compulsory acquisition. The legal framework and procedure for surrender of title to land is different from the legal regime for compulsory acquisition. Section 44 of the *RTA* is the legal framework for surrender and the Land Acquisition Act is the regime

for compulsory acquisition. Surrender cannot be construed and equated to compulsory acquisition."

109. It is notable that section 2 of the *RTA* did not define the term "surrender". However, the concept of surrender is one of long lineage and wide usage in land law. The *Black's Law Dictionary* (7th edition) at page 1458 defines "surrender" as follows:

> "...3. The return of an estate to the person who has a reversion or remainder, so as to merge the estate into a larger estate... 5. A tenant's relinquishment of possession before the lease has expired, allowing the landlord to take possession and treat the lease as terminated."

110. Lord Millett at the House of Lords in *Barrett v Morgan*, [2000] 2 AC 264, aptly noted thus on the nature of 'surrender of leases':

> "A surrender is simply an assurance by which a lesser estate is yielded up to the greater, and the term is usually applied to the giving up of a lease or tenancy before its expiration. If a tenant surrenders his tenancy to an immediate landlord, who accepts the surrender, the tenancy is absorbed by the landlord's conversion and is extinguished by operation of law. A surrender is ineffective unless the landlord consents to accept it, and is therefore consensual in the fullest sense of the term." [Emphasis added]

111. The "consensual" nature of a surrender is emphasized in Robert Megarry & William Wade, *The Law of Real Property* (Sweet & Maxwell; 2012, 8th ed.) page 851 as follows: "surrender is a consensual transaction between the landlord and the tenant, and therefore dependent for its effectiveness on the consent of both parties" [Emphasis added]. Similarly, Martin Dixon, *Principles of Land Law*, (Cavendish Publishing; 2002, 4th ed.) at page 237 notes that: "a surrender, being a consensual act between landlord and tenant." [Emphasis added]

112. We are persuaded by the foregoing propositions that the "consensual" nature of a surrender is the cardinal ingredient of a surrender of lease. Indeed, this is the essence of the *proviso* in section 44 of *RTA* that: "and the endorsement shall be signed by the lessee and the lessor as evidence of the acceptance thereof". This raises the question as to what was the "consensual arrangement" or "agreement" between Lonrho Agribusiness and the government of Kenya, being the lessee and lessor respectively, that underpinned the contested surrender.

113. Put differently, to resolve the present dispute, the court needs to determine what was agreed between the Government of Kenya and Lonrho Agribusiness at the time of alleged surrender of the subject leases in 2000. It is here that we meet the evidential contestation between the two parties which is at the heart of the question as framed. On the one hand, the appellants

contend that the surrender was for purposes of converting the suit parcels from leasehold properties under the *RTA* to freehold properties under the *RLA*. On the other hand, is the assertion by Sirikwa, that the surrender was to facilitate the settlement of members of Sirikwa on the suit parcels.

114. We note that the ELC and the Court of Appeal found that the surrender was to facilitate the settlement of members of Sirikwa on the suit parcels. The Court of Appeal was specifically of the view that, by virtue of a letter by JP Hulmes dated November 9, 2000, there was a clear manifest that Lonrho Agribusiness had surrendered five of the suit parcels (LR Nos 9608, 745/2, 12398, 7739/7 and 9607) for the resettlement of members of Sirikwa.

115. In our considered view, resolving this question is hinged on what the instruments of surrender show. In taking this position, we take note of section 97(1) of the *Evidence Act*, cap 80 Laws of Kenya, which stipulates that-

> "When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act."

116. The import of section 97(1) of the *Evidence Act* is similar to that explained in *Halsbury's Laws of England*, 4th edition volume 12, on Interpretation of Deeds and Non-Testamentary Instruments paragraph 1478 as follows:

> " Extrinsic evidence generally excluded: Where the intention of parties has been reduced to writing it is in general not permissible to adduce extrinsic evidence whether oral or contained in writing such as instructions, drafts, articles, conditions of sale or preliminary agreements either to show that intention or to contradict, vary or add to the terms of the document.
>
> Extrinsic evidence cannot be received in order to prove the object with which a document was executed or that the intention of the parties was other than that appearing on the face of the document."

117. We note in that context and from the record that RJ Simiyu in his capacity as the then District Land Officer, Uasin Gishu County, swore a replying affidavit which at paragraph 20 stated as follows:

> "That I am also aware that on November 21, 2000, the company Lonrho Agri-Business (East Africa) Limited surrendered to the Government of the Republic of Kenya all the grants for purposes of conversion of the tenure from the regime under the *Registration of Titles Act* cap 281 to the freehold tenure under the regime of the *Registered Land Act* which surrenders were noted in presentations Nos 163, 164, 169, 171, 174,175, on 2/11/2000."

118. Again from the record, presentation 174 registered on November 2, 2000 by the Registrar of Titles, Jane Kanja, indicates: "Surrender to the Government of the Republic of Kenya in issuance of freehold title under *RLA* (Chapter 300)". This presentation corroborates the deposition of RJ Simiyu that the intent or the consensual agreement between Lonrho Agribusiness and the Government of Kenya was for the conversion of the suit titles from leasehold under *RTA* to freehold under the *RLA*. We therefore find his testimony credible, convincing and persuasive that the surrender for all the suit parcels was for the same intent.

119. It is furthermore our considered view that the ELC and the Court of Appeal should have considered the deposition of RJ Simiyu as corroborated by presentation 174 in determining the intent for the surrender. The letter from JP Hulme should not have overridden the credible testimony by RJ Simiyu in the face of presentation 174 given the provisions of section 97(1) of the *Evidence Act* as reproduced above.

120. An additional reason as to why the two superior courts below ought to have accorded little weight to the letter from JP Hulme is that it is not clear whether the said JP Hulme had the sanction, competence or authority of Lonrho Agribusiness, a registered limited liability company to bind the company. In our view, there was insufficient evidence to support the claim that Lonrho Agribusiness intended to surrender the suit properties for the allocation to Sirikwa. This is a serious question that the two superior courts below did not address their minds to. It is elementary principle of company law that a company as a distinct legal entity from its promoters, directors or employees can only act through its organs and make decisions by resolutions. No resolution of the company's board supporting the purported purpose for the surrender was presented in evidence.

121. Having considered the evidence on record, we have come to the conclusion that the intent of surrender of the leasehold interest in the suit parcels was that the leasehold term to which the suit parcels were then held was to be surrendered and the same converted into a freehold interest with titles re-issued in the name of Lonrho Agribusiness as private property.

However, some peripheral and connected questions arise which we believe it is important for the court to settle.

122. We point out that there is nothing illegal or fraudulent in a process for surrender of a lease to enable the conversion of a title from a leasehold interest under the *RTA* to a freehold interest under the *RLA*. This was the holding in *Margaret Nyokabi Mbugua & 5 others v Ngenda New Farmers Co Ltd & 4 others*, Murang'a, ELC Case No 84 of 2017; [2019] eKLR wherein the ELC (Kemei, J) expressed as follows, and we agree:

> "When confronted by similar facts of conversion of titles from *Registration of Titles Act* to *Registered Land Act* the court in the case of *Rosemary Wanjiru Njiraini v Officer in Charge of Station, Molo Police Station & another* [2017] eKLR observed that the conversion of title therefore leads to closure of the title issued under *Registration of Titles Act* and a new registration under the *Registered Land Act* is created which is read together with its Registry Index Map(RIM). The RIM is an equivalent of the survey plan in Registration of Titles Act titles.
>
> It is the view of the court that there is no direct conversion of title across the two statutes, the title and interests in the leasehold must be surrendered to the grantee in exchange of something new under a separate regime." [Emphasis added]

123. Legally, upon the execution of the surrender instruments by both Lonrho Agribusiness and the Government of Kenya, the leasehold interest was extinguished and emerged in the freehold interest in terms of section 44 of the *RLA*. The said section 44 of the *RLA* in providing for 'merger of registered interests' stipulated thus:

> " Where, upon the registration of a dealing, the interests of - (a) lessor and lessee... vest in the same proprietor, those interests shall not merge unless a surrender or discharge is registered or the parcels are combined or there is a declaration of merger, which may be contained in the instrument evidencing the dealing."

124. *Halsburys Laws of England* volume 27 at paragraph 444 also notes as follows on 'surrender':

> " A surrender is the yielding up of the term of lease to the person who has the immediate estate in reversion in order that, by mutual agreement, the term may merge in the reversion."

125. Robert Megarry & William Wade, *The Law of Real Property* (*supra*.) page 856 notes that-

> "Merger is the converse of surrender. A surrender occurs where the landlord acquires the lease; merger occurs where the tenant acquires the reversion. The

underlying principle is the same in both; the lease is absorbed by the reversion and destroyed."

126. The doctrine of merger as codified in section 44 of the *RLA* envisaged that as all inferior estates and interests in land are derived out of the fee simple, therefore, whenever a particular estate or limited interest in land vests in him who has the fee- simple of the same land, such particular estate or limited interest is immediately drowned in the fee. Indeed, this is the essence of the principle *omne majus* continent in se minus, meaning the greater contains or embraces the less. Therefore, there was nothing untoward in Lonrho Agribusiness getting a freehold title in reversion under the RLA.

127. Upon the said surrender and merger, a new registration section was created known as Pioneer & Ngeria Block 1 (EATEC) which was registered on or about January 23, 2001 with resultant sub-divisions known as Pioneer & Ngeria Block 1(EATEC) 707, 5903, 7068, 7739, 3395 which were registered in the name of Lonrho Agribusiness. These were subsequently sub-divided and sold to third parties. It follows that the subsequent sub-divisions and sale thereof to third parties, including Fanikiwa, by Lonrho Agribusiness were done legally and procedurally.

128. Consequently, we uphold the contention by the appellants that the impugned judgment of the Court of Appeal violated their right to property. We disagree with the findings of the ELC and the Court of Appeal on this question and instead make a finding that the purpose of surrender of the titles of the suit properties was to enable their conversion from leasehold titles under the *RTA* to freehold titles under the *RLA*.

129. Before we make our final orders, we have one other issue that we need to clarify. Having made a finding that the transactions leading to the sale or dealings with the suit parcels to third parties were not tainted with illegalities or fraud, the question of whether such third parties were innocent purchasers for value without notice should not arise.

130. However, given the precedential value of the Court of Appeal's reasoning on this point, we are constrained to clarify the Court of Appeal's pronouncements on determination of true innocent purchasers for value. At paragraph 178 of its judgement, the court rendered itself thus:

> " 178. Turning to the respondents and the financial institutions who were joined to this appeal, were (*sic*) are satisfied that they were true innocent purchasers for value without notice. There is absolutely no evidence that they were party to the scheme to take over for themselves the five parcels of land that were surrendered for settlement of Sirikwa members. They conducted due diligence and

there was nothing to alert them that there was anything amiss with the titles to the properties they were purchasing or charging. The purchasers paid good money and the financial institutions advanced substantial sums of money to the innocent purchasers of the properties excised from the suit properties on the security of their titles. There being no evidence that these respondents were party to any fraud, misrepresentation or mistake in the registration of the impugned titles, we would uphold the validity of their titles." [Emphasis added]

131. In *Dina Management Limited*, we observed as follows:

> " [90] The Black's Law Dictionary 9th Edition defines a bona fide purchaser as:
>
> > 'One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.'
>
> [91] The Court of Appeal in Uganda in *Katende v Haridar & Company Ltd* [2008] 2 EA 173, defined a *bona fide* purchaser for value as follows:
>
> > 'For the purposes of this appeal, it suffices to describe a *bona fide* purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the *bona fide* doctrine he must prove that:
> >
> > 1. he holds a certificate of title;
> > 2. he purchased the property in good faith;
> > 3. he had no knowledge of the fraud;
> > 4. he purchased for valuable consideration;
> > 5. the vendors had apparent valid title;

6. he purchased without notice of any fraud; and

7. he was not party to the fraud.'

[92] On the same issue, the Court of Appeal in *Samuel Kamere v Lands Registrar, Kajiado* Civil Appeal No 28 of 2005; [2015] eKLR stated as follows:

> '...in order to be considered a *bona fide* purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property...'"

132. The point we are making is that the financial institutions which are a party to this cause are not purchasers but lenders. They cannot possibly be described as "innocent purchasers". They are financial institutions who advanced substantial sums of money to some of those parties who purchased the properties excised from the suit parcels from the registered owners on the security of their titles. We shall say no more on this issue.

133. Having considered the issues framed by this court, our findings are as follows:

i. The consolidated appeal meets the constitutional threshold under article 163(4)(a) of the *Constitution*.

ii. The superior courts below violated the appellants' right to fair hearing under article 50(1) of the *Constitution*.

iii. The proceedings at the trial court ought to have been conducted through taking of *viva voce* evidence.

iv. Sirikwa did not have a legitimate expectation to acquire and be allocated the suit parcels.

v. Sirikwa has no right to the suit parcels as its members were not squatters on the suit parcels.

vi. The intent for the surrender of the titles for the suit parcels was for conversion of their titles from leasehold interests under the *RTA* to freehold interests under the *RLA*.

E. Costs

134. As regards costs, in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others*; SC Petition 4 of 2012; [2013] eKLR, this court held that it has the discretion to award costs to ensure that the ends of justice are met and that costs ordinarily follow the event. In the special circumstances of this case, its convoluted nature and the numerous parties, we find it judicious for each party to bear its own costs.

F. Orders

135. Accordingly, and for the reasons afore-stated, we make the following orders:

i. The consolidated appeal is hereby allowed;

ii. The judgment and orders of the trial and appellate courts are hereby set aside in their entirety.

iii. The 1st respondent herein, to wit, Sirikwa Squatters Group, its agents, members, servants, employees and/or representatives are hereby permanently restrained from entering, taking possession of and in any other manner interfering with Fanikiwa's (the 1st appellant) quiet possession of the suit properties described as LR No Pioneer/ngeria Block 1 (EATEC) 7070, 7068, 3395, 5903, 2454, 476, 1860, 475, 5497, 5494, 5492, 5489, 5486, 1384, 1383, 5484, 474, 472, 5485, 5487, 5490, 5488, 5491, 5493, 1861, 5496, 1862, 5491, 473, 477, 471, 1353, 1375, 1374, 1379, 1378, 1380, 1381, 1382, 1852, 1386, 1385, 85, 5495 and 5902;

iv. We declare that the finding by the superior courts below to the effect that the retired President's approval of allocation of the suit parcels and the subsequent surrender of the titles was for purposes of settling Sirikwa's members, violated and arbitrarily deprived the 3rd appellant herein, Lonrho Agribusiness, of its rights over and interests in the suit parcels as guaranteed under article 40 of the *Constitution*.

v. All parties shall bear their own costs

It is so ordered.

Adam v Jiir & 3 others (Petition E017 of 2023)
[2023] KESC 101 (KLR) (8 December 2023) (Reasons)

Supreme Court of Kenya

MK Koome, CJ & P, PM Mwilu, DCJ & VP, N Ndungu, I Lenaola & W Ouko, SCJJ

Neutral citation: [2023] KESC 101 (KLR)

Jurisdiction *- jurisdiction of the Supreme Court - jurisdiction to entertain appeals from the Court of Appeal – claim that the Supreme Court had no jurisdiction to hear and determine matters concerning proper filing and competency of a notice of appeal – whether matters involving the competency of a notice of appeal were under the jurisdiction of the Supreme Court as of right -– Constitution of Kenya 2010, article 163(4) (a).*

Brief facts

The appellant, dissatisfied with the declaration of the August 9, 2022 gubernatorial election results for Wajir County, lodged an election petition against the 1st to 4th respondents. He alleged that the election was tainted by numerous illegalities and irregularities that contravened the law and the principles laid down therein, leading to skewed results in favor of the 1st and 2nd respondents. Upon hearing the case, the High Court dismissed the petition with costs, and upheld the election of the 1st and 2nd respondents as governor and deputy governor of Wajir County respectively.

Dissatisfied, the appellant lodged a notice of appeal dated March 9, 2023 before the High Court. The appellant admitted that a second notice of appeal was electronically filed on March 10, 2023 before the Court of Appeal but did not form part of what was termed as the "physical" record of appeal. The respondents raised a preliminary objection challenging the court's jurisdiction on the basis that the notice of appeal filed on March 9, 2023, was fatally flawed and totally incompetent. They specifically contended that the notice of appeal was filed at the High Court registry as opposed to the Court of Appeal. Further that the notice did not comply with Election Petition Rules, 2017. The Court of appeal stated that the notice of appeal did not conform to the format specified in the Court of Appeal (Election Petition) Rules, 2017; and sought to challenge the whole judgment which was based on fact and law and contrary to section 85A of the Elections Act. Regarding the second notice of appeal, which did not form part of the record of appeal before the court, the court found it identical to the first and thus, wanting in form and content.

Aggrieved by the decision of the Court of Appeal, the appellant sought to challenge the decision of the Court of Appeal before the instant court.

Issues

Whether matters involving the competency of a notice of appeal were under the jurisdiction of the Supreme Court as of right.

Relevant provisions of the Law

Court of Appeal (Election Petition) Rules, 2017

Rule 5 Compliance with rules

The effect of any failure to comply with these Rules shall be a matter for determination at the Court's discretion subject to the provisions of Article 159(2)(d) of the Constitution and the need to observe timelines set by the Constitution or any other electoral law.

Held

1. The appellant never sought to have the appeal certified as involving a matter of general public importance as to invoke the provisions of article 163(4)(b) of the Constitution. The appellant grounded its appeal on alleged violation of articles 27, 50(1) and 159 of the Constitution in the context of interpreting and applying the Court of Appeal (Election Petition) Rules, 2017. The Supreme Court had jurisdiction to determine the appeal under article 163(4)(a) as invoked by the appellant, as issues surrounding a notice of appeal were jurisdictional in their very nature.
2. While the appellant focused on the erroneous reference to the contents of the notice of appeal, the Court of Appeal dealt with two issues, the primary of which was the place of filing. Counsel having conceded that the record did not contain the second notice of appeal dated March 10, 2023 and went a step further to seek leave to introduce a supplementary record containing the same, it was not persuasive that he would adopt a different position in asking the court to imply the electronically filed notice of appeal into the record. No attempt was made to denounce what was already on record. Moreover, the Court of Appeal's powers under rule 5 of the Election Petition Rules were discretionary.
3. There was no reasonable basis to fault the factual finding by the Court of Appeal, that there was no valid notice of appeal on record and thereby striking out the record of appeal before it. The matter was effectively concluded within the timelines. At the time of the hearing before the instant court on September 7, 2023, the timeline for the matter to be heard before the Court of Appeal had already lapsed. Time started running on March 3, 2023, being the date of the High Court judgment.

Appeal struck out; costs awarded to the respondents.

Orders

i. *The notice of motion dated August 15, 2023 and filed on even date be and was allowed with costs to the 1st and 2nd respondents.*
ii. *The petition of appeal dated July 31, 2023 and filed on even date was struck out with costs to the respondents.*

Citations

Cases

Kenya

1. *Aramat & another v Lempaka & 3 others* Petition 5 of 2014; [2014] KESC 21 (KLR) - (Explained)
2. *Asanyo, Geoffrey M. & 3 others v Attorney-General* Petition 21 of 2015; [2018] KESC 10 (KLR) - (Explained)

3. *Kibira, Apungu Arthur v Independent Electoral & Boundaries Commission & 3 others* Petition 29 of 2018; [2019] KESC 62 (KLR) - (Explained)
4. *Kimani, Paul Mungai & 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) - (Explained)
5. *Law Society of Kenya v Centre for Human Rights and Democracy & 12 others* Petition 14 of 2013; [2014] KESC 29 (KLR) - (Explained)
6. *Loitiptip v Independent Electoral and Boundaries Commission & 2 others* Petition 18 & 20 of 2018 (Consolidated); [2019] KESC 67 (KLR) - (Mentioned)
7. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR) - (Applied)
8. *Mureithi, Francis Wambugu v Owino Paul Ongili Babu & 2 others* Petition 15 of 2018; [2019] KESC 63 (KLR) - (Explained)
9. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] KESC 9 (KLR) - (Explained)
10. *Njihia, Daniel Kimani v Francis Mwangi Kimani & another* Civil Application 3 of 2014; [2015] eKLR - (Explained)
11. *Opore, Zebedeo John v Independent Electoral and Boundaries Commission & 2 others* Petition 32 of 2018; [2018] KESC 5 (KLR) - (Explained)
12. *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* Civil Appeal 50 of 1989; [1989] eKRL; [1989] KLR 1 - (Explained)
13. *Sawe, Patricia Cherotich v Independent Electoral & Boundaries Commision (IEBC), United Republican Party(URP), Rose Kisama, Naum Chelagat & Cheruiyot Maritim* Petition 8 of 2014; [2015] KESC 7 (KLR) - (Mentioned)
14. *Sirma, Musa Cherutich v Independent Electoral and Boundaries Commission & 3 others* Election Petition 13 of 2018; [2019] KESC 64 (KLR) - (Mentioned)
15. *Teachers Service Commission v Kenya National Union of Teachers & 3 others* Application 16 of 2015; [2015] eKLR - (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 25; 27 (1); 48; 50 (1); 86; 87 (1); 159 (2) (d); 163- (Interpreted)
2. Court of Appeal (Election Petition) Rules, 2017 (cap 9 Sub Leg) rules 4(2); 5; 6(1)(2)(3); 8; 19; 23 - (Interpreted)
3. Court of Appeal Rules, 2022 (cap 9 Sub Leg) section 5(2)(b) - (Interpreted)
4. Elections (General) Regulations, 2012 (cap 7 Sub Leg) In general - (Cited)
5. Elections Act (cap 7) section 85A - (Interpreted)
6. Supreme Court (General) Practice Directions, 2020 (cap 9B Sub Leg) In general - (Cited)
7. Supreme Court Act (cap 9B) sections 3, 3A, 15A, 21 - (Interpreted)
8. Supreme Court Rules, 2020 (cap 9B Sub Leg) rule 28(2) - (Interpreted)

Advocates

Mr Kioko Kilukumi Senior Counsel, Mr Paul Nyamodi and Mr Issa Mansur for the appellant
Prof Tom Ojienda, Mr Omwanza Ombati and Ms Misiati for the 1st & 2nd respondents
Mr Mahat Somane and Mr Hassan Nura for the 3rd & 4th respondents

December 8, 2023, the Court delivered the following Reasons:

Reasons for the Judgment of the Court

(Pursuant to rule 28(2) of the *Supreme Court Rules, 2020*)

A. Introduction

1. The *Constitution of Kenya, 2010*, underscores the sovereignty of the people. Thus, the people may exercise their sovereign power either directly or through their democratically elected representatives. Sovereign power is exercised through elected representatives and occurs through a general election, being the second Tuesday of August every fifth year. With the promulgation of the *Constitution of Kenya, 2010*, Kenya held its third general election on August 9, 2022. In the said election, the appellant and the 1st respondent were among the candidates for the Gubernatorial Elections in Wajir County. The 3rd respondent, through the 4th respondent, declared the 1st and 2nd respondents as governor and deputy governor of Wajir County, respectively, having garnered 35, 533 votes. The appellant came in second with 27, 224 votes. Just like in the first and second electoral cycle, the election of the Governor for Wajir County was challenged before the courts.

2. Taking into account the importance of expeditious settlement of electoral disputes as prescribed under Article 87(1) of the *Constitution*, the Court heard this petition of appeal and rendered an ex tempore judgment on September 8, 2023 pursuant to Rule 28(2) of the *Supreme Court Rules 2020* by which the petition of appeal dated July 31, 2023 was struck out with costs to the respondents and the reasons thereby reserved; now rendered in this judgment of the Court.

B. Litigation Background

Proceedings in the High Court

3. The appellant, dissatisfied with the declaration of the August 9th, 2022 general election results, lodged High Court election Petition No E008 of 2022 against the 1st to 4th respondents. He alleged that the election was tainted by numerous illegalities and irregularities that contravened the *Constitution*, *Elections Act*, *Election (General) Regulations*

and the principles laid down therein or any law relating to the conduct of elections including decisions of superior courts, leading to skewed results in favour of the 1st and 2nd respondents.

4. He alleged intimidation and misinformation of voters; gross discrepancies in the statutory forms; improper counting, tallying and tabulation of results; failure to deploy KIEMS Kits; and inflation of vote numbers through the use of supervisor method of voter identification. He therefore sought an order for scrutiny and recount at various polling stations; that the results declared by the returning officer be set aside and fresh elections be conducted.

5. The 1st and 2nd respondents, in their joint response, denied all the allegations made against them. In particular, they responded to the averment relating to the postponement of elections in Eldas constituency, clan dynamics, intimidation, misinformation, undue influence of voters, voter turnout and failure to deploy KIEMS kits.

6. Likewise, the 3rd and 4th respondents jointly denied every allegation set out in the petition. They averred that the Wajir Gubernatorial election process was backed by an elaborate electoral management system in compliance with electoral laws, which system included several layers of safeguards to ensure an open, transparent, participatory and accountable process, to guarantee free and fair elections pursuant to Article 81 as read with Article 86 of the *Constitution*.

7. Following the conclusion of oral witness testimonies, the court allowed the appellant's application for scrutiny in part, limiting it to twelve (12) polling stations; that it be presided over by the Deputy Registrar of that court; and the resultant reports be filed and supplied to the parties who made submissions on the same.

8. Upon hearing the parties' arguments, the court identified three issues for determination:

(a)Whether illegalities and irregularities were committed in the Wajir Gubernatorial elections as alleged and if yes, what the effect was; (b) Whether the Wajir Gubernatorial elections were conducted substantially in accordance with the *Constitution* and election laws; and (c)What orders the court should issue. The first issue was further delineated into the following sub- issues: the supervisor mode of identification; failure to deploy KIEMS Kits; alterations in Forms 37A; rejected ballots; voter intimidation and mis- information; violence in some parts of Wajir East Constituency and disproportionately high turnout in Wajir West Constituency.

9. In a Judgment delivered on March 3, 2023, the court (Dulu, J) dismissed the petition with costs, and upheld the election of the 1st and 2nd respondents as governor and deputy governor of Wajir County respectively. In respect of the first issue, the court held that: though the 3rd respondent failed to fill in Form 32A for supervisor validated voters there was no evidence of vote inflation or padding as a result of this failure; failure to deploy KIEMS

Kit was not proved; the impugned alterations on Forms 37A are excusable to human error and the mere absence of countersigning did not affect the election results; the appellant did not call any evidence to demonstrate non – declaration of rejected ballots in Form 37C, in any event, rejected ballots are void and accord no advantage to any candidate; voter intimidation, misinformation and bribery spurred by the postponement of the Eldas election and clan dynamics was not proved; the complaint of violence in some parts of Wajir East Constituency did not interfere with distribution of election materials which were airlifted; and the allegation of disproportionately high turnout in Wajir West Constituency were unsubstantiated.

10. As to whether the Wajir Gubernatorial elections were conducted substantially in accordance with the *Constitution* and election laws, the court held that though there was non-compliance with the legal provisions on filling Form 32A and there were counter signing alterations made on Form 37A, there was no evidence that voters in any polling station exceeded the number of registered voters. Furthermore, neither of the two irregularities appeared to confer an advantage or disadvantage on any of the candidates. Consequently, the court found that there was no non-compliance with the *Constitution*.

Proceedings before the Court of Appeal

11. Aggrieved by the High Court decision, the appellant moved to the Court of Appeal in Election Petition Appeal No E008 of 2023, to challenge the judgment on twenty (20) grounds. At the pre-hearing conference, it was directed that the interlocutory applications and the main appeal be heard together. When the appeal came up for hearing, the 1st and 2nd respondents notified the court that their application dated 28th April 2023 intended to dispose of the appeal at the conception stage.

12. That application raised a preliminary objection challenging the court's jurisdiction on the basis that the notice of appeal filed on March 9, 2023, was fatally flawed and totally incompetent. They specifically contended that the notice of appeal was filed at the High Court registry in Garissa as opposed to the Court of Appeal at Nairobi; that the notice did not comply with the provisions of rule 6(1) of the *Court of Appeal (Election Petition)Rules, 2017* (hereinafter the *Election Petition Rules*") which requires all appeals to be initiated by way of a notice of appeal, rule 6 (2) that directs an appeal to be lodged within 7 days of the contested decision, and rule 6(3) requiring the pointing out of the part of the judgment being contested, the basis for which the appeal is made and the grounds of appeal and reliefs sought.

13. The 3rd and 4th respondents aligned themselves with the 1st and 2nd respondents' arguments. Additionally, they argued that a notice of appeal is a jurisdictional prerequisite that must

contain sufficient information. Besides, that there can be no redemption in trying to excuse the character of the impugned notice of appeal.

14. The appellant countered the preliminary objection. He asserted that the untimely submission of the objection beyond 7 days from the date of service of the notice or record of appeal did not abide by rule 19 of the *Election Petition Rules, 2017*, and in any event, there was a valid notice of appeal on record.

15. It was further argued that while it is acknowledged that the only notice of appeal is the one filed in the High Court, there exists another notice of appeal filed electronically in the Court of Appeal dated March 10, 2022, within the stipulated seven (7) days after judgment of the High Court, albeit not part of the physical record of appeal. In light of this, the appellant invoked rule 4 (2) of the *Election Petition Rules* urging the Court of Appeal to exercise its jurisdiction in a reasonable manner, as well as Article 159 (2) (d) of the *Constitution*, to grant him a life line by allowing for the filing of a supplementary record of appeal to formally include this notice of appeal.

16. In a ruling delivered on July 24, 2023, the Court of Appeal (Musinga (P), Omondi & Ngenye, JJA) upheld the preliminary objection and struck out the notice of appeal with costs for offending rules 6 and 8 of the *Election Petition Rules*. The court determined that jurisdiction is purely a point of law that goes to the very root of the matter, and must be dispensed with first. Accordingly, the court recognized that since the notice of appeal the very foundation of its jurisdiction was challenged, it proceeded to hear the preliminary objection and determined it.

17. The court held that a valid notice of appeal must fulfil the stipulations outlined in rule 6(3) of the *Election Petition Rules* to kick off the court's jurisdiction; and that it was evident that the prescribed form of the notice of appeal subsumes what would ordinarily be a memorandum of appeal. The court observed that though the first notice of appeal was filed within the stipulated timeline, it was filed at the High Court in Garissa. Sadly, it did not conform to the format specified under rule 6(5); and sought to challenge the whole judgment which is based on fact and law, contrary to section 85A of the *Elections Act*. Regarding the second notice of appeal, which did not form part of the record of appeal before the court, the court found it identical to the first and thus, wanting in form and content.

18. The court considered its discretion under rule 5 of the *Election Petition Rules* on the effect of non-compliance with Rule 6, and concluded that to allow the appellant to file a supplementary record introducing an amended notice of appeal would not portray a balance of interests of the parties as it would be allowing undue advantage to one party to fill in the gaps pointed out by the adversary.

C. Proceedings Before The Supreme Court

19. Dissatisfied, the appellant seeks to challenge the decision of the Court of Appeal before this Court pursuant to Article 163 (4) (a) of the *Constitution*, sections 3A, 15A, 21 of the *Supreme Court Act* and all other enabling provisions of the law. The appeal is premised on ten (10) grounds, faulting the Court of Appeal Justices for:

    i. Relying on non-existent 'Draft Court of Appeal (Election Petition) Rules, 201' (hereinafter, 'the Draft Rules') thereby violating the appellant's right to a fair hearing guaranteed under Article 50(1) of the *Constitution*;

    ii. Disregarding the gazetted and valid *Court of Appeal Election Petition Rules, 2017* referred to by the appellant as published under Legal Notice No 114 of 2017;

    iii. Erroneously relying on Rule 6(3) of the Draft Rules to determine the form and content of the Notice of Appeal filed by the appellant;

    iv. Misdirecting itself that Rule 19(2) of the *Court of Appeal (Election Petition) Rules*, Legal Notice No 114 of 2017 was not applicable despite the rule expressly being a statutory bar to the respondents' objection to the record of appeal where no formal application was filed within 7 days of service, hence violating the appellant's right to equal protection and benefit of the law under Article 27(1) of the *Constitution*;

    v. Declining jurisdiction by relying on the Draft Rules drafted by the Judiciary Elections Committee in April 2017 for public participation, and which are different from the *Court of Appeal (Election Petition) Rules*, Legal Notice No 114 of 2017, in so doing violating the appellant's right to access to justice under Article 48 of the *Constitution*;

    vi. Disregarding the binding directions of the Supreme Court on timely management and determination of electoral disputes in Martha Wangari Karua v Independent Electoral Boundaries Commission & 3 Others, SC Petition No 3 of 2019; [2019] eKLR, thereby violating Article 163(7) of the *Constitution*;

    vii. Narrowly interpreting the provisions of Article 159 of the *Constitution* in holding that the Notice of Appeal did not set out the grounds of appeal and was therefore fatal, despite decisions to the contrary that want of form did not go to jurisdiction;

    viii. Holding that the Notice of Appeal was not in the format provided for in Rule 6(3) of the Draft Rules which decision was erroneous and per incuriam;

    ix. Determining the preliminary objection without reference to the *Court of Appeal (Election Petition) Rules*, Legal Notice No 114 of 2017 which were the valid

applicable law and by that violating the appellant's rights to a fair hearing under Article 50 (1) of the *Constitution*; and

x. Adopting a narrow, pedantic and wrong interpretation of the requirement for the Notice of Appeal to substantially be in conformity with the form in the Schedule to the Rules, and by disregarding the fact that there was a Memorandum of Appeal setting out the grounds of appeal.

20. In the result, the appellant seeks the following reliefs:

1. This appeal be admitted for hearing and be given directions for expedited hearing by the Supreme Court. If unsuccessful, the appeal be remitted back to the Court of Appeal for hearing and determination in accordance with Section 85A of the *Elections Act*, in any event, before October 1, 2023.

2. The Ruling of the Court of Appeal dated and delivered on July 24, 2023 be set aside and this Honourable Court do make an order:

    a. Allowing this Petition of Appeal and reinstating the Notice and Record of Appeal in Election Appeal No E008 of 2023.

    b. Directing that Election Appeal No E008 of 2o23 be remitted back to the Court of Appeal for expeditious hearing and determination, in any event, before 1st October 2023 by a bench excluding Mr. Justice D. K. Musinga (President of the Court of Appeal), Lady Justice H. A Omondi and Lady Justice G. W. Ngenye-Macharia;

3. Alternative to prayer (2) above, the Supreme Court to determine the Election Petition No E008 of 2023 on merits and the appeal be allowed with costs to the appellant and issue:

    a. A declaration that the 1st and 2nd respondents were not validly elected as the County Governor and Deputy Governor and the result declared by the 4th respondent on 12th August is null and void.

    b. An Order be issued setting aside the result declared by the 4th respondent on August 12, 2022 and fresh elections for Wajir County Governor to be conducted.

4. That the costs of this Appeal and costs of the proceedings in the Court of Appeal be awarded to the Appellant/Petitioner.

5. This Honourable Court make such order(s) that it may deem fit to meet the demands of justice.

21. In opposition, the 1st and 2nd respondents filed a joint response to the petition and an application to strike out the appeal pursuant to Article 163 (4) of the *Constitution*, sections 15 (1), 15B and 21(2) of the *Supreme Court Act*, *Supreme Court Rules* and the *Supreme Court (General) Practice Directions, 2020*, both dated August 11, 2023. The 3rd and 4th respondents filed a response to the petition dated August 20, 2023 and a replying affidavit by Adan Ali Mohamed sworn on August 20, 2023.

22. The respondents challenge this Court's jurisdiction to hear the instant appeal under Article 163 (4) (a) of the *Constitution*. Alternatively, they state that the appeal is incompetent as leave to appeal/ certification has not been sought in accordance with Section 15(1) and 15B of the *Supreme Court Act*.

23. The appellant filed a rejoinder to the response to petition and grounds of opposition to the application filed by the 1st and 2nd respondents, both dated August 18, 2023 urging that the Court's jurisdiction has been properly invoked. The grounds for and against this assertion as urged by the parties are set out in detail under the parties' respective submissions captured herein.

D. Parties Respective Cases

Appellant's Case

24. The appellant relies on his submissions dated August 18, 2023 in support of his petition. He delineates two issues for determination, that is:

> whether the Court has jurisdiction to hear and determine the appeal and whether the learned Judges violated his non-derogable right to a fair trial and access to justice.

25. On jurisdiction, the appellant submits that as a general rule, for an appeal to lie to the Supreme Court as of right, the issue of constitutional interpretation or application must have arisen before the superior courts below. He contends that the exception to this rule is in instances where the superior courts in exercising their constitutional mandate commit jurisdictional wrongs, which by virtue of Article 163(4)(a) of the *Constitution* necessitate this Court to intervene and remedy them. He buttresses his argument by citing *Geoffrey M. Asanyo & 3 others v Attorney General*, SC Petition No 21 of 2015; [2018] eKLR. He urges this Court to assume its inherent jurisdiction to interrogate and right the jurisdictional wrong committed by the Court of Appeal by relying on what he terms as 'non-existent rules of procedure' or Draft Rules to strike out his election petition appeal.

26. Further, the appellant submits that though this Court has shown hesitation and reluctance to interfere with the exercise of the Court of Appeal's discretion, it can intervene when there is apparent injustice in the decision sought to be appealed from, or an infringement of fundamental rights and freedoms. Relying on the decision in *Musa Cherutich Sirma v Independent Electoral and Boundaries Commission & 2 others*, SCPetition No 13 of 2018; [2019] eKLR the appellant contends that there was gross violation of his right to a fair trial and access to justice by the Court of Appeal's erroneous exercise of discretion. He elucidates that the Court of Appeal's reliance on non-existent rules of procedure satisfies all the four tests delineated in the aforementioned case, which are: the appellate court acted whimsically; its decision was unreasonable; violated the *Constitution*; and all the factors listed above collectively occasioned undue prejudice upon the appellant. Accordingly, the appellant implores the Court to exercise its special jurisdiction under Section 3 of the *Supreme Court Act* to cure the Court of Appeal's infractions; and remit the file to the Court of Appeal for determination, noting that the jurisdiction to determine election petition appeals will lapse on October 1, 2023.

27. On whether there was violation of the appellant's non-derogable right to a fair trial and access to justice, the appellant submits that the contents of a valid notice of appeal are stipulated under the *Election Petition Rules* gazetted as Legal Notice. No 114 of 2017. He faults the Court of Appeal for relying on Draft Rules in concluding that the notices of appeal, though conceding that the appellant had indeed filed the second notice of appeal at the Court of Appeal's registry and paid for it, were deficient in form and content prescribed under rule 6 of the Draft Rules. The appellant argues that the decision, not being anchored on the appropriate laws rids it of any legitimacy to be binding on any person and renders it obsolete ab initio; and the learned judges are at fault for inevitably contravening their duty as dictated under Article 159 (2) (e) of the *Constitution* leading to blatant violation of the appellant's right to a fair trial as stipulated under Article 50 (1) of the *Constitution* as the decision was made per incuriam.

28. Moreover, the appellant submits that the appellate court acted beyond the powers conferred to it by law, since it was barred by the seven (7) day statutorily prescribed timeline under Rule 19 of the gazetted *Election Petition Rules*; and that by proceeding to strike out the notice and record of appeal it hindered the appellant's right to access justice. Furthermore, by the court subsuming both applications as an issue to be heard at the main hearing, the appellant had legitimate expectation that it would hear and determine the case on its merits, even whilst dispensing with all the interlocutory applications.

1st and 2nd Respondents' Case

29. The 1st and 2nd respondents' submissions are dated August 21, 2023 and were filed on August 22, 2023. They address the Court on two issues: Jurisdiction and whether the appeal is merited.

30. With regard to jurisdiction, the 1st and 2nd respondents submit that the appellant improperly opted to invoke the Court's jurisdiction as of right under Article 163(4)(a) of the *Constitution*, since, the impugned ruling did not involve a question of constitutional interpretation but rather, an interpretation of rule 6 of the *Election Petition Rules*. To that end, they urge that it was incumbent upon the appellant to apply for, and obtain, certification prior to the filing of this present petition. For this contention, the 1st and 2nd respondents contend that the appeal before this Court is bereft of jurisdictional backing and should be struck out. To buttress this submission, they rely on several decisions including *Zebedeo John Opore v Independent Electoral and Boundaries Commission & 2 others*, SC Petition No 32 of 2018; [2018] eKLR which underscored principles to aid in determining whether this Court's jurisdiction under Article 163(4)(a) of the *Constitution* has been properly invoked in an election appeal.

31. On whether the appeal is merited, the 1st and 2nd respondents, citing this Court's decision in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others*, SC Application No 2 of 2011;[2012] eKLR, affirm that notwithstanding the timeline set out under Rule 19 of the Election Rules, the same cannot be interpreted to limit when jurisdictional challenges can be raised. The respondents urge the Court to rely on its decision in *Apungu Arthur Kibira v Independent Electoral & Boundaries Commission & 3 others*, SC Petition No 29 of 2018; [2019] eKLR in so far as a litigant may not seek to invoke the provisions of Article 159 of the *Constitution* to whitewash his fundamental flaws, considering that the notice of appeal is a vital document and a jurisdictional prerequisite.

3rd and 4th respondents' case

32. The 3rd and 4th respondents' submissions are dated August 21, 2023 and were filed on August 22, 2023. They address the Court on three issues: whether the Petition of Appeal falls within the scope of Article 163(4) (a) of the *Constitution*; whether the appellant ought to have sought leave to lodge an appeal to the Supreme Court; and whether the Court of Appeal erred in law in its decision of July 24, 2023.

33. Echoing the 1st and 2nd respondents' arguments, on whether the appeal falls within the scope of Article 163 (4) (a) of the *Constitution* the 3rd and 4th respondents further contend that the notice of appeal which triggered the court's jurisdiction was to be lodged in the

correct court, format and served upon the parties to signal the parties of the appellant's intention to appeal. They rely on the decisions of *Anuar Loitiptip v Independent Electoral & Boundaries Commission & 2 others*, SC Petition No 18 of 2018; [2019] eKLR; and *Patricia Cherotich Sawe v Independent Electoral & Boundaries Commission & 4 others*; SC Petition No 8 of 2014 [2015] eKLR to augment this submission. They argue that in this instance, the appellant neither lodged nor served the parties with a notice of appeal. Therefore, the Court of Appeal was justified to hear the preliminary objection first on the issue of interpretation of rule 6 of the *Election Petition Rules, 2017* rendering the appeal to be beyond the ambit of Article 163(4)(a) of the Constitution. Thus, since the appeal does not meet the criteria of Article 163 (4)(a) of the *Constitution*, the alternative avenue would be to appeal under certification under Article 163 (4) (b) as read with section 15B of the *Supreme Court Act*.

34. Consequently, on whether the Court of Appeal erred in law in its decision of July 24, 2023, the 3rd and 4th respondents maintain that the court had no option but to allow the preliminary objection as it was bound by the decision of *Apungu Arthur Kibiria* case (*supra*) where this Court gave very specific directions regarding filing of a Notice of Appeal as per rule 6 of the *Court of Appeal Rules*. Therefore, they humbly submit that the Court of Appeal did not err in its ruling of July 28, 2023. Subsequently, they submit that the appellant cannot claim infringement of his right to fair hearing or access to justice because the court proceeded to determine a jurisdictional question.

E. The Judgment of the Court without Reasons of July 15, 2022

35. The appellant's Petition of Appeal dated July 31, 2023 against the ruling of the Court of Appeal dated July 24, 2023 in Election Petition Appeal No E008 of 2023; and the 1st and 2nd respondents' Notice of Motion dated 11th August, 2023 challenging this Court's jurisdiction to entertain the appeal lodged under article 163(4)(a) of the *Constitution* came up for hearing before this Court on September 7, 2023.

36. Having considered the appeal, the notice of motion and the parties' respective submissions thereto, as advanced by their respective advocates on record, we found no justifiable reasons to interfere with the ruling of the Court of Appeal. Accordingly, the appellant's appeal was struck out with costs to the respondents.

37. Consequently, we issued the following Orders:

    i. The Petition of Appeal dated July 31, 2023 and filed on even date is struck out.

    ii. The detailed reasons of this ex tempore Judgment will be issued on notice.

    iii. Costs are awarded to the respondents.

38. Pursuant to Rule 28(2) of the *Supreme Court Rules 2020*, we now give hereunder the reasons for these conclusions.

F. Analysis and Determination

39. This matter turns on two broad issues:

    i. Whether this Court has jurisdiction to entertain the appeal and if so,

    ii. Whether the Court of Appeal properly exercised its discretion in striking out the appellant's Notice of Appeal and Record of Appeal in the Court of Appeal.

Whether the Court has jurisdiction to entertain the appeal

40. In the age-old words of Nyarangi JA in the case of *Owners of the Motor Vessel "Lillian s" v. Caltex Oil Kenya Limite*d [1989] KLR 1, without jurisdiction, a court has no power and must down tools in respect of the matter under consideration. In *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others*, SC Application No 2 of 2011; [2012] eKLR, jurisdiction flows from the *Constitution* or Statute and cannot accrue from judicial craft.

41. The appellant anchors the appeal on this Court's jurisdiction as of right, under article 163(4)(a) of the *Constitution*. That being said, this is a well- trodden path and there are several parameters that must be met to satisfy whether the jurisdiction has been correctly invoked. In *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another*, SC Petition No 3 of 2012; [2012] eKLR, we stated that the appellant must demonstrate to our satisfaction how the appeal involved application or interpretation of the *Constitution* and the manner in which the Court of Appeal erred in determining those very questions.

42. In *Paul Mungai Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v. Attorney- General & 2 others*, SC Petition No 45 of 2018; [2020] eKLR, we restated the jurisprudence around Article 163(4)(a) of the *Constitution* by emphasizing the specialized nature of Article 163(4)(a)'s Appellate jurisdiction of this Court. That the jurisdiction vested in the Court is not just another level of appeal. 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*. In essence, the appellant has to show that not only were there constitutional issues that were subject to contestation at the High Court but also that the said issues transcended through the court hierarchy.

43. In this instance, the appellant while conceding that the constitutional issues subject of appeal did not arise from the High Court but rather at the Court of Appeal, nevertheless maintains

that we have jurisdiction based on our position in the *Geoffrey Asanyo* case. In that case, we held:

> " [62] ...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 "

We further reiterated 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.

44. It is common ground that the issue before the Court of Appeal was a Preliminary Objection on whether there was a proper Notice of Appeal before that court. Specifically, the issue was whether the appellant's notice of appeal was compliant with the *Court of Appeal (Election Petition)Rules, 2017* under Legal Notice No 114 of 2017. In its determination, the Court of Appeal appreciated the following:

> " 21. The issue that we must first determine relates to our jurisdiction to determine the preliminary objection in light of the argument by the appellant's counsel that it has not been brought through a formal application, and is being raised too late in the day thereby offending rule 17."

45. Satisfied that it was imperative to determine the preliminary objection, the court went on to address the issue whether the notice of appeal as filed was competent and whether the court had jurisdiction to extend time for filing a notice of appeal in the matter. The Court of Appeal concluded that the record of appeal filed therein be struck out for offending Rules 6 and 8 of the *Court of Appeal (Elections Petition) Rules, 2017*.

46. This determination is now the subject of appeal before the Court in which, there is yet another challenge on whether we have jurisdiction, as of right, under article 163(4)(a) of the *Constitution*. Undoubtedly, the appellant never sought to have the appeal certified as involving a matter of general public importance as to invoke the provisions of article 163(4)(b) of the *Constitution*. The appellant grounds its appeal on alleged violation of articles 27, 50(1) and 159 of the *Constitution* in the context of interpreting and applying the *Court of Appeal (Election Petition) Rules, 2017*. The respondents are adamant that the appeal merely involves the factual position of compliance with the said Rules in relation to the validity and

filing of the Notice of Appeal and the Record of Appeal, with no issues of constitutional contestation and determination arising.

47. This Court has considered its previous decisions where similar arguments were raised. In *Musa Cherutich Sirma v Independent Electoral and Boundaries Commission & 2 others* SC Petition No 13 of 2018 [2019] eKLR the Court was persuaded that it had jurisdiction to hear and determine the appeal under article 163(4)(a) of the *Constitution* to the extent of the application of article 159(2)(d) of the *Constitution* in determining the effect of non-compliance with the *Court of Appeal (Election Petition) Rules, 2017*. In the same case, the Court disagreed with the contention that the appellant's right of access to justice under article 48 and the right to fair hearing under articles 25 and 50 of the *Constitution* were violated by the striking out of the Notice of Appeal and Record of Appeal.

48. Similarly, in *Francis Wambugu Mureithi v Owino Paul Ongili Babu & 2 others* SC Petition No15 of 2018 [2019] eKLR, we assumed jurisdiction in an appeal where it had been argued that the issue of Notice of Appeal to the Court of Appeal as contemplated under the said *Election Petition Rules* was an issue in controversy. We further interrogated to what extent, if at all, we would interfere with the exercise of discretion under rule 5 of the *Election Petition Rules*, as had been done by the Court of Appeal.

49. Taking into account our previous decisions, we are satisfied that we have jurisdiction to determine the appeal under article 163(4)(a) as invoked by the appellant, as issues surrounding a Notice of Appeal are jurisdictional in their very nature.

Whether the Court of Appeal properly exercised its discretion in striking out the appellant's Notice of Appeal and Record of Appeal in the Court of Appeal

50. The genesis of this issue is that the appellant being aggrieved with the decision of the High Court (Dulu, J) dated March 3, 2023 in Election Petition No E008 of 2022 lodged a Notice of Appeal dated March 9, 2023 before the High Court in Garissa. The appellant admitted as much before the Court of Appeal and also before this Court, only adding that a second Notice of Appeal was electronically filed on March 10, 2023 before the Court of Appeal but did not form part of what counsel termed as the "physical" record of appeal.

51. The appellant put up a spirited argument that the Court of Appeal, in striking out the appeal, relied on the wrong and non-existent 'Draft Court of Appeal (Election Petition) Rules, 2017' instead of the proper gazetted *Election Petition Rules*. What is inescapable is that the Notice of Appeal before the Court of Appeal faced several challenges. The first was on the non-compliance with rule 6(1) of the *Court of Appeal (Election Petition)Rules, 2017* by filing the Notice at the High Court instead of the Court of Appeal Registry. The next challenge was on the contents of the notice of appeal and whether the record of appeal was complete. A further challenge was made on contravention of section 85A in

purporting to appeal against the whole judgment on both facts and law. In addressing the challenges, recourse was made by the Court of Appeal to the reliefs under rules 5 and 17 of the *Election Petition Rules*. In addressing these issues, the Court of Appeal took into account the corollary issue of the second notice of appeal filed before the Court of Appeal registry on March 10, 2023.

52. Under rule 6(1) of the *Court of Appeal (Election Petition)Rules, 2017* published in Legal Notice No 114 of 2017 it is stipulated that a Notice of Appeal should be filed at the Court of Appeal Registry. It is on this basis that the argument before the court as aptly captured in the ruling was that:

> " 29. The respondent's counsel submitted that the notice of appeal before the Court is not compliant with rule 6 of the *Election Petition Rules, 2017*, as the same is filed in the High Court at Garissa and, as such, this Court has no jurisdiction to entertain the appeal as there is no appeal existing. To support this proposition, the respondents rely on the case of *Anuar Loitiptip v IEBC & 2 others* (*supra*) . . ."

53. The record as contained in the ruling reveals the following:

> "35. The appellant's counsel admitted that the notice of appeal found at pages 1532-1533 of the record of appeal was filed in the High Court at Garissa. He further contended that the second notice of appeal filed on March 10, 2023 in the Court of Appeal does not form part of the record of appeal before court..."

54. The record further shows that counsel for the appellant stated that the notice of appeal before the court was a proper one, and that filing the same in the wrong court was an error. Counsel proceeded to rely on rule 5 of the *Election Petition Rules* and article 159(2)(d) of the *Constitution* to cure the defect, urging the court to allow him file a supplementary record so as to include the second notice of appeal dated March 10, 2023. The Court of Appeal, having considered this request, found that the notice of appeal was not salvageable. The court stated:

> " 42. ...Would it be unreasonable of us to then insist that there is no notice of appeal filed in the Court of Appeal, yet it is before our very own eyes? After all, isn't it human to err, and make some error of omission? Is rule 5 available to salvage the situation? Unfortunately, matters are not as simple as waving a wand of human error, as this second notice is similar to the first notice found in the record of appeal, completely wanting in form and content. As such there

> would still be no valid notice of appeal, and filing of a supplementary record of appeal would not offer any healing balm."

The court observed that in granting a move to file a supplementary record introducing an amended notice of appeal, the same would not portray a balance of the interests of the parties by allowing one party undue advantage to fill in the gaps pointed out by the adversary.

55. We have carefully followed these arguments. While the appellant focuses on the erroneous reference to the contents of the notice of appeal, the court of appeal dealt with the two issues, the primary of which was the place of filing. Counsel having conceded that the record did not contain the second notice of appeal dated 10th March 2023 and, gone a step further to seek leave to introduce a supplementary record containing the same, it is not persuasive that he would now adopt a different position in asking us to imply the electronically filed notice of appeal into the record. No attempt was made to denounce what is already on record.

56. Moreover, we note that the Court of Appeal's powers under rule 5 of the *Election Petition Rules* are discretionary. The rule provides:

> " 5. Non-compliance with the Rules
>
> > The effect of any failure to comply with these Rules shall be a matter for determination at the Court's discretion subject to the provisions of Article 159(2)(d) of the *Constitution* and the need to observe timelines set by the *Constitution* or any other electoral law."

Our hesitation to interfere with discretionary jurisdiction of the superior courts below is now settled. In *Teachers Service Commission v Kenya National Union of Teachers & 3 others* SC Application No 16 of 2015 [2105] eKLR we held that the Court lacks jurisdiction to entertain an application challenging the exercise of discretion by the Court of Appeal under rule 5(2)(b) of that Court's Rules.

57. This position was also enunciated in *Daniel Kimani Njihia v. Francis Mwangi Kimani & Another* SC Civil Application No 13 of 2014 where this Court held in paragraph 21 as follows:

> " ... Not all decisions of the Court of Appeal are subject to appeal before this Court. One category of decisions we perceive as falling outside the set of questions appealable to this Court, is the discretionary pronouncements appurtenant to the Appellate Court's mandate. Such discretionary decisions which originate directly from the Appellate Court, are by no means the occasion to turn this Court into

a first appellate Court, as that would stand in conflict with the terms of the *Constitution*"

58. Besides, in *Law Society of Kenya v. Centre for Human Rights and Democracy & Others*, Supreme Court Petition No 14 of 2013, the Court cautioned against a blanket invocation of Article 159 thus:

> " Indeed, this Court has had occasion to remind litigants that article 159(2) (d) of the *Constitution* is not a panacea for all procedural shortfalls. All that the Courts are obliged to do is to be guided by the principle that 'justice shall be administered without undue regard to technicalities.' It is plain to us that article 159 (2) (d) is applicable on a case-by-case basis, *Raila Odinga and 5 others v IEBC and 3 others*; Petition No 5 of 2013, [2013] eKLR".

This is more so in the wake of strict constitutional timelines appurtenant to the litigation around electoral process. In *Lemanken Aramat v Harun Meitamei Lempaka & 2 others*, Supreme Court Petition No 5 of 2014, the Court underscored the inflexibility of timelines prescribed under the election laws.

59. In light of the above, we find no reasonable basis to fault the factual finding by the Court of Appeal, that there was no valid Notice of Appeal on record and thereby striking out the Record of Appeal before it.

60. The appellant asked us to consider remitting the matter to the Court of Appeal for determination within the 6-month period contemplated under the law. This was based on the position adopted by the appellant that the Court of Appeal had until October 1, 2023, the appeal having been filed on April 1, 2023.

61. Rule 23 of the *Court of Appeal (Election Petition)Rules, 2017* provides for the duration for hearing and determination of election petition appeals. It provides:

> " An appeal filed under these Rules shall be heard and determined within six months of the date of judgment of the High Court."

The judgment of the High Court having been delivered on March 3, 2023, the appeal should have been heard and determined by the Court of Appeal by September 2, 2023. The Court of Appeal having made its determination, and correctly so as we have found, the matter was effectively concluded within the timelines. At the time of the hearing before us on September 7, 2023, the timeline for the matter to be heard before the Court of Appeal had already lapsed. Respectfully, Counsel were absolutely wrong in their computation of time, as time started running on March 3, 2023, being the date of the High Court judgment.

62. Based on the foregoing, we find the 1st and 2nd respondents' motion has merit and we hereby allow it as prayed. As such, the appeal herein is struck out. On costs, it is trite that they follow the event. That being the position, the respondents are awarded the costs.

G. Final Orders

63. Consequently, we issue the following Orders:

i. The Notice of Motion dated August 15, 2023 and filed on even date be and is hereby allowed with costs to the 1st and 2nd respondents.

ii. The Petition of Appeal dated July 31, 2023 and filed on even date is struck out with costs to the respondents.

It is so ordered.

Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment)

Supreme Court of Kenya

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

Neutral citation: [2023] KESC 79 (KLR)

Jurisdiction *– jurisdiction of the High Court – jurisdiction of the High Court vis-à-vis the jurisdiction of the Environment and Land Court (ELC) – jurisdiction of the High Court to determine matters relating to the environment and the use and occupation of, and title to land that was filed before the Environment and Land Court (ELC) was operational - whether the High Court had the jurisdiction to determine a suit relating to the environment and the use and occupation of, and title to land that was filed before the Environment and Land Court (ELC) was operational, but was concluded after the ELC was operational - Constitution of Kenya, 2010 article 162 (1) and (2)(b); Practice Directions on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land, 2011 (Act No 19 of 2011 Sub Leg)*

Land Law *– public land – allotment of public land – allotment letter – legal effect of an allotment letter on conferring property rights - whether a letter of allotment that had not been perfected could confer property rights – whether a letter of allotment, in and by itself, conferred a transferable title to the allottee - whether an allottee that had fulfilled all the conditions of a letter of allotment but had not registered the land in their name could pass a valid title to a third party - whether the Commissioner of Lands had the authority to allocate un-alienated government land that had been converted to private free hold land - whether un-alienated government land that had been converted to private free hold land fell under the regulatory regime of the Government Lands Act (repealed) or subsequent laws regulating use of public land - Registration of Titles Act (cap 281 Repealed) section 23; Physical Planning Act (cap 286 Repealed), section 3; Land Registration Act, 2012 (Act No 3 of 2012), section 26; Land Acquisition Act (cap 295) (Repealed) part II; Government Lands Act (cap 280) (Repealed) section 2*

Land Law *– innocent purchaser for value – expectations - whether to be considered as an innocent purchaser for value, one was expected to inspect the property they were purchasing.*

Brief facts

At the High Court, the appellant contended that it had acquired the suit property upon payment of a consideration of Kshs 12 million . It contended to have acquired the property from Renton Company Ltd (Renton), which company had acquired the property from an allotment letter from the defunct Nairobi City Council. The appellant urged that it had been issued with a title deed under the Registration of Titles Act, repealed, on April 26, 2021. The appellant contended that around 2005, the DoD encroached on its property and unlawfully fenced off 90 acres. DoD constructed a demining college and auxiliary buildings. The petitioner contended that the acts were illegal. The petition was allowed by the High Court and the occupation by DoD was deemed to be compulsory

acquisition without compensation. The respondent was ordered to pay the appellant the sum of Kshs 1.5 billion being the market value of the suit land.

Aggrieved the respondent appealed to the Court of Appeal which held that the land in question was not un-alienated government land within the meaning of section 2 of the Government Lands Act (repealed). On the contrary, the court held that the suit property was private land, even long before defunct Nairobi City Council bought it in 1971. The Commissioner of Lands lacked the power to alienate or allocate it to a third party. Neither Renton nor the appellant had acquired a valid interest in or over the suit property. The Court of Appeal ultimately held that the Certificate of Title issued to the appellant was an illegal document and by virtue of article 40 (6) of the Constitution, the concept of indefeasibility of title under section 26 of the Land Registration Act was inapplicable.

Aggrieved the appellant filed the instant appeal before the Supreme Court.

Issues

i. Whether the High Court had the jurisdiction to determine a suit relating to the environment, the use and occupation of and title to land that was filed before the Environment and Land Court (ELC) was operational, but was concluded after the ELC was operational.

ii. Whether un-alienated government land that had been converted to private free hold land fell under the regulatory regime of the Government Lands Act (repealed) or subsequent laws regulating use of public land.

iii. Whether a letter of allotment that had not been perfected could confer property rights.

iv. Whether the Commissioner of Lands had the authority to allocate un-alienated government land that had been converted to private free hold land.

v. Whether the Commissioner of Lands had the authority to alienate land via allotment to a third party where the conditional thirty-day acceptance period to accept the allotment had lapsed.

vi. Whether a letter of allotment, in and by itself, conferred a transferable title on the allottee.

vii. Whether an allottee that had fulfilled all the conditions of a letter of allotment but had not registered the land in their name could pass a valid title to a third party.

viii. Whether to be considered as an innocent purchaser for value, one was expected to inspect the property they were purchasing.

Held

1. The Environment and Land Court was established under article 162 (1) and (2)(b) of the Constitution of 2010 . It was operationalized by the Environment and Land Court Act. After its commencement, vide Gazette Notice No 16268 dated November 9, 2012, the then Chief Justice issued the 'Practice Directions on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land (the Practice Directions). It was directed that all matters pending judgment and ruling before the High Court, arising from proceedings relating to the environment and the use and occupation of, and title to

land, would be concluded by the High Court. Similarly, all part-heard cases pending before the High Court, relating to the same proceedings would be heard and determined by the same court.

2. The plaint was filed and determined at the High Court at a time before the Environment and Land Court was operational. The Practice Directions unequivocally directed the High Court to hear and determine pending proceedings on environment and land matters.
3. By a Consent dated March 25, 2021, the proceedings in ELC No 282 of 2012 were withdrawn, and the consent adopted as an order of the court. Consequently, when the appellate court delivered its Judgment, the said proceedings had long been concluded. There was no reason to fault the appellate court's exercise of jurisdiction to determine the appeal. There was nothing pending at the Environment and Land Court which could have necessitated the Court of Appeal to down its tools.
4. Once an individual or entity acquired any un- alienated government land, or other land for that matter, consequent upon registration of title, in accordance with the provisions of the applicable law, such land transmuted from "public" to "private" land. Article 64(a) of the Constitution defined private land as consisting of registered land held by any person under any freehold tenure.
5. Upon alienation to Kayole Estates Limited in 1964, the suit property was converted from un-alienated government land to private freehold land. The same was effectively divested from the purview of the regulatory regime of the Government Lands Act (repealed). The Commissioner of Lands could therefore not have had any authority, to allocate the suit property to any other person as he purported to have done.
6. The defunct Nairobi City Council acquired valid title to the suit property from Kayole Estates Ltd through purchase. Renton Company Ltd could only have acquired valid title from the Nairobi City Council, and not the Commissioner of Lands who had long been divested of authority to allocate the same.
7. An allotment letter was incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of conditions stipulated. An allottee, in whose name the allotment letter was issued, had to perfect the same by fulfilling the conditions therein. Those conditions included but were not limited to, the payment of a stand premium and ground rent within prescribed timelines. But even after the perfection of an allotment letter through the fulfillment of the conditions stipulated therein, an allottee could not pass valid title to a third party unless and until he acquired title to the land through registration under the applicable law. It was the act of registration that conferred a transferable title to the registered proprietor, and not the possession of an allotment letter.
8. An allotment letter in and by itself, was incapable of conferring a transferable title to an allottee. The holder of an allotment letter was incapable of transferring or passing valid title to a third party on the basis of the allotment letter unless and until he became the registered

proprietor of the land consequent upon the perfection of the allotment letter. It mattered not therefore that the allotment letter had not lapsed.

9. Renton Ltd had not complied with the terms and conditions of the allotment letter. Therefore, the letter ought to have been deemed as lapsed at the time it purported to transfer the same to the appellant. An allotment letter, even if perfected, could not by and in itself confer transferable title to the allottee, unless the latter completed the process by registration. All transactions between Renton Company Limited and the appellant were a nullity in law.

10. The argument that the appellant was an innocent purchaser for value without notice could not hold. However, there was evidence on record in the form of correspondences and minutes, confirming that Department of Defence (DoD) had been granted access by the defunct municipal council and had taken possession of, and erected public infrastructure upon the suit property before the purported purchase. If the appellant was a diligent purchaser, it ought to have at least known of that fact. An innocent purchaser for value would also denote one was aware of what they were purchasing by inspecting the suit premises. The fact that the suit land was occupied must have sounded a warning of "buyer be aware" to the appellant. It was not an innocent purchaser for value entitled to orders for restoration or compensation.

11. Although the DoD had been able to prove that it had been in exclusive occupation and use of the Suit Property from 1986, with the full knowledge and authority of defunct Nairobi City Council and the Commissioner of Lands, there was nothing on record to prove that DoD ever acquired valid title to the suit property. Just as the Commissioner of Lands could not allocate the said land to Renton for reasons already canvassed, so also was he equally hamstrung in relation to DoD. The title to the suit property, remained vested in Nairobi County which was the legal successor to the defunct Nairobi City Council.

12. The impugned documents were public documents within the meaning of section 79 of the Evidence Act requiring certification in accordance with sections 68 (1)(e)(f), (2)(c) and 80 of the Evidence Act. Information held by the State or state organs, unless for very exceptional circumstances, ought to be freely shared with the public. However, such information should flow from the custodian of such information to the recipients in a manner recognized under the law without undue restriction to access of any such information. A duty has also been imposed upon the citizen(s) to follow the prescribed procedure whenever they require access to any such information. That duty cannot be abrogated or derogated from, as any such derogation would lead to a breach and/or violation of the fundamental principles of freedom of access to information provided under the Constitution and the constituting provisions of the law. It was a two-way channel where the right had to be balanced with the obligation to follow due process.

Appeal dismissed.

Orders

Each party was to bear its own costs, security for costs to be refunded to the appellant.

Citations

Cases

Kenya

1. *Arthi Highway Developers Limited v West End Butchery Limited, Solomon Mwinzi Mwau, John Mucheni Musa , Attorney General, Kenya Medical Association Cooperative Society Ltd, Yamin Construction Co Ltd & Gachoni Enterprises* Civil Appeal 246 of 2013; [2015] KECA 816 (KLR) - (Explained)
2. *Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others* Civil Appeal 79 of 2007; [2015] KECA 457 (KLR) - (Explained)
3. *Chemey Investment Limited v Attorney General & 2 others* Civil Appeal 349 of 2012; [2018] KECA 863 (KLR) - (Explained)
4. *Electrical Options Limited v Attorney General & another* Petition 23 of 2011; [2012] KEHC 5976 (KLR) - (Explained)
5. *Githinji, Elizabeth Wambui & 29 others v Kenya Urban Roads Authority & 4 others* Civil Appeal No 156 of 2013; [2019] eKLR - (Explained)
6. *Kanyiri, Peter Wariire v Chrispus Washumbe & 2 others* Environment & Land Case 603 of 2017; [2022] KEELC 1531 (KLR) - (Explained)
7. *Kiluwa Limited & another v Business Liaison Company Limited & 3 others* Petition 14 of 2017; [2021] KESC 37 (KLR) - (Explained)
8. *Kirimi, John Elias v Martin Maina Nderitu & 4 others* Environment and Land Case 320 of 2011; [2017] KEELC 3261 (KLR) - (Explained)
9. *Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others* Election Petition 4 of 2017; [2017] KESC 28 (KLR) - (Explained)
10. *Muriithi & 4 others v Law Society of Kenya & another* Civil Application 12 of 2015; [2016] eKLR; [2016] 1 KLR - (Explained)
11. *Mwero, Kadzoyo Chombo v Ahmed Muhammed Osman & 11 others* Environment & Land Case 42 of 2021; [2021] KEELC 30 (KLR) - (Explained)
12. *National Land Commission v Afrison Export Import Limited & 10 others* Environment and Land Reference 1 of 2018; [2019] eKLR - (Explained)
13. *Ng'ok , Joseph NK Arap v Moijo Ole Keiwua & 4 others* Civil Application 60 of 1997; [1997] KECA 1 (KLR) - (Explained)
14. *Ngacha v Chepsaat & 4 others* Civil Case 182 of 1992; [2008] KEHC 622 (KLR) - (Explained)
15. *Njatha, Lilian Wanjeri v Sabina Wanjiru Kuguru & another* Environment & Land Case 471 of 2010; [2022] KEELC 222 (KLR) - (Explained)
16. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2014] KESC 31 (KLR) - (Explained)
17. *Vekariya Investments Limited v Kenya Airports Authority & 2 others* Petition 263 of 2011; [2014] KEHC 5533 (KLR) - (Explained)

18. *Wanjohi , Isaac Gathungu & another v Attorney General & 6 others* Petition 154 of 2011; [2012] KEHC 5200 (KLR) - (Followed)

Statutes

Kenya

1. Constitution of Kenya articles 6(2); 10(1)(2),19; 22; 24; 27(1)(2); 40; 50(1); 62(1)(b); 162(1)(2)(b); 163(3)(b)(4)(a); 189(3) - (Interpreted)
2. Environment and Land Court Act, 2011 (cap 8D) In general - (Cited)
3. Evidence Act (cap 80) sections 68, 79, 80 - (Interpreted)
4. Government Lands Act (Repealed) (cap 280) section 2 - (Interpreted)
5. Inter- governmental Relations Act, 2012 (cap 265F) In general - (Cited)
6. Land Acquisition Act (Repealed) (cap 295) part II - (Interpreted)
7. Land Registration Act, 2012 (cap 300) section 26 - (Interpreted)
8. Physical Planning Act (Repealed) (cap 286) section 3 - (Interpreted)
9. Practice Directions on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land, 2011 (Act No 19 of 2011 Sub Leg) In general - (Cited)
10. Registration of Titles Act (Repealed) (cap 281) section 23 - (Interpreted)
11. Supreme Court Act (cap 9B) section 15(2) - (Interpreted)

Advocates

Dr Kenneth Kiplagat and *Mr Ezekiel Wafula* for the appellant (E Wafula & Associates Advocates)

Mr Oscar Eredi for the respondent (State Counsel Office of the Attorney General)

September 22, 2023, the Court delivered the following Judgment:

A. Introduction

1. Before this court is the petition dated March 14, 2022 and filed on March 16, 2022. It is brought under articles 10(1) and (2), 19, 22, 27 (1) and (2), 50(1) and 163(3)(b) and (4)(a), of the *Constitution* and section 15(2) of the *Supreme Court Act, 2011*, challenging the judgment and orders of the Court of Appeal (Musinga (P), Murgor & Mohamed JJA) delivered in Civil Appeal No 84 of 2012 on February 4, 2022. The impugned decision overturned the High Court (Gacheche, J as she then was) in Constitutional Petition No 38 of 2011.

B. Background

i.At the High Court

2. On February 21, 1964, a freehold title known as Embakasi LR No 11xxx (Original No 41/x) measuring 5639 acres was alienated and granted to Kayole Estates Limited. Thereafter, this parcel of land was transferred to the then Nairobi City Council (hereinafter NCC) for

valuable consideration and a transfer duly registered on November 22, 1971. In 1973, the parcel of land was subdivided into eight parcels. One such parcel is LR No 22xxx, Grant No IR 85966 situate within the City of Nairobi and measuring 83.910 hectares (hereinafter the Suit Property).

3. In a plaint dated March 10, 2011 and filed on even date, the appellant instituted High Court, Constitutional Petition No 38 of 2011 against the Attorney General, the respondent herein. It was the appellant's case that upon payment of a consideration of Kshs 12,000,000.00 it had acquired the suit property for a term of 99 years commencing from the year 2000, from Renton company limited, which company had acquired the said property for value from NCC, through an allotment letter dated December 19, 1999. The appellant urged that it was issued with a title deed under the *Registration of Titles Act* cap 281 on April 26, 2001.

4. The appellant further contended that on or about the year 2005, the Department of Defence (hereinafter DoD) encroached on its property and unlawfully fenced off ninety (90) acres thereof. It urged that despite demands and requests to desist from trespassing on its property, DoD proceeded to construct a demining college and auxiliary buildings. It was its case that these actions were illegal and contravened its constitutional rights to property guaranteed under article 40 of the *Constitution*. It further urged, that DoD had failed to communicate its intention to acquire part of the suit property or to comply with the compulsory acquisition procedures provided for under the *Land Acquisition Act* (cap 295). It consequently sought the following reliefs;

   i. A declaration that the Government's acquisition of 90 acres of the suit property was in contravention of article 40(3) of the *Constitution*;

   ii. A declaration that the said occupation, retention and detention of the said 90 acres amounted to compulsory acquisition;

   iii. A declaration that any continued occupation of the said portion of the suit property without compensation amounted to acquisition contrary to article 40(3) of the *Constitution*;

   iv. That it be restored possession of its land in the same condition it was when it was unlawfully acquired by the Government, or alternatively an order for the payment of Kshs 1, 530,000,000 being the [then] current value of the said 90 acres, with interest thereon at the [then] prevailing central bank rates from the date of the petition till payment in full;

   v. An order for mesne profits from the date of the respondent's occupation until its restoration; and

   vi. Costs of the petition.

5. In opposition, DoD argued that in 1984, it had requested the permanent secretary, Ministry of Defence to initiate consultative engagements with the NCC, the then registered proprietor and other stakeholders, with the intention to acquire a portion of the suit property for the expansion of its Embakasi Garrison. It was the respondent's argument that after expansive consultation in 1986, the Ministry of Defence surveyed, beaconed and fenced the identified portion. It was also contended that the Commissioner of Lands had given assurance to DoD that the said parcel would be registered in its name.

6. DoD also challenged the legality of the appellant's title, arguing that the same had not been acquired in accordance with the applicable laws. It contended that the suit property was public land, and as such, was not available for allocation to a private entity. It further submitted that it had put up important military facilities thereon. In conclusion, DoD argued that the title issued to the appellant could not be protected under article 40(6) of the *Constitution* and that the said alleged proprietorship was against public interest.

7. In a judgment delivered on July 4, 2011, the trial court, (Gacheche, J) allowed the petition with costs to the appellant. The court determined that the suit property was a freehold private property and not public land, contrary to the contention by DoD. The court held that the appellant was the lawfully registered proprietor, pursuant to article 40 of the *Constitution* and section 23(1) of the *Registration of Titles Act*.

8. The trial court held that DoD was in contravention of article 40(3) of the *Constitution* and the requirements laid down in Part II of the *Land Acquisition Act* cap 295. It held that the occupation, retention, and continued occupation of the said portion of the suit property amounted to an illegal compulsory acquisition.

9. The trial court issued the following orders, as particularized in its decree issued on July 12, 2011;

    a. A declaration that the acquisition of the suit property by the respondent was in contravention of article 40(3) of the *Constitution of Kenya* & the *Land Acquisition Act* and thus the occupation, retention, detention and any continued occupation of the said portion of the suit land amounted to compulsory acquisition without compensation contrary to article 40(3) of the *Constitution of Kenya* .

    b. The respondent shall, within 30 days from the date of the Judgment, restore the possession of the said land to the respondent in the same condition as it was when it was unlawfully acquired;

    c. In the alternative, the respondent shall pay the appellant the sum of Kshs 1,530,000,000.00, being the market value of the said land as per the valuation report produced in court and undisputed by the respondent;

d. Interest on the award at court rates till payment in full;

e. The prayer for mesne profits is declined as it was not specifically pleaded; and

f. Costs to the petitioner.

ii.At the Court of Appeal

10. Aggrieved by the entire Judgment, the respondent filed Civil Appeal No 84 of 2012 citing twenty-five (25) grounds summarized as follows, that the trial judge erred in law and fact, in:

i. Failing to consider that the respondent had been in actual occupation of the suit property for decades before the purported registration in the appellant's name;

ii. Failing to consider that DoD being a state organ within the meaning of article 62(1)(b) had an indefeasible constitutional right to use and occupy the suit property regardless of whether the appellant had subsequently been issued with title to the said property or not;

iii. Failing to consider that the uninterrupted occupation of the land by DoD and the erection of military installations thereon had created a public interest that overrides all private interests;

iv. Failing to find that the suit property was an original allocation from the Commissioner of Lands and thus was Government land within the meaning of the *Government Lands Act*;

v. Failing to find that the title documents were processed in favour of Torino Enterprises without the consent of the Attorney General's Accounting Officer;

vi. Finding that there was compulsory acquisition;

vii. Failing to consider that some of the documents relied on by Torino Enterprises before the trial court were obtained fraudulently;

viii. Granting Torino Enterprises an award of Kshs 1, 530,000,000.00 on the basis of an unproved valuation report;

ix. Failing to find that the title to the suit property purportedly acquired by Torino Enterprises contravened the provisions of article 40(6) of the *Constitution*; and

x. Failing to find that there was fraud in the process of registration of the suit land in the name of Torino Enterprises.

11. Before the matter was set down for hearing, the respondent by way of a motion dated October 5, 2017, sought leave to adduce additional evidence. The appellate court (Waki, Gatembu & Odek, JJA) on February 22, 2019, allowed the application and further granted leave to the appellant to adduce any additional evidence in reply. Both parties duly complied with the leave orders. However, during the hearing of the appeal, counsel for the respondent raised an objection urging the appellate court, to expunge part of the evidence adduced by the appellant. It was argued that the particularised evidence was inadmissible as it comprised uncertified public documents or confidential correspondence marked either 'restricted or secret', which ran contrary to the provisions of sections 68(2) and 80 of the *Evidence Act*.

12. After hearing the parties, the Court of Appeal delineated the following issues for determination; whether some of the documents that were relied upon by the respondent offended the provisions of sections 68(2)(c) and 80 of the *Evidence Act*; whether the suit land was available for alienation and/or allocation; whether the registration of the suit land in the respondent's name was legally done; and whether the respondent was illegally dispossessed of the suit land and therefore entitled to compensation.

13. In a judgment delivered on February 4, 2022, the Court of Appeal (Musinga (P), Murgor & Mohamed, JJA), allowed the appeal and overturned the High Court. On the issue of whether any evidence relied on was inadmissible, the appellate court faulted the trial court for failing to make a finding on a similar objection raised by the respondent before it. It then determined that the evidence appearing on pages 32 and 52 of the record of appeal and on pages 21, 22, 23-27, 28-29,30, 32 and 33 of the respondent's supplementary record of appeal was inadmissible. The court held that the same were public documents under section 79 of the *Evidence Act*. For the documents to be admissible as evidence, they had to be certified as required by section 80 of the *Evidence Act*. Since they had not been so certified, the same were expunged from the court's record.

14. On whether the suit land was available for alienation, the appellate court determined that the land in question was not "unalienated government land" within the meaning of section 2 of the *Government Lands Act* (repealed). on the contrary, the court held that the suit property was private land, even long before NCC bought it in 1971. As a result, it opined that the Commissioner of Lands lacked the power to alienate or allocate it to a third party.

15. The court further found that at the time of allocation, purchase, and consequent transfer of the suit property, DoD was in occupation of a portion thereof. The latter had fenced it and put up various facilities thereon. As a result, it was the court's reasoning that even if the Commissioner of Lands had the power to alienate the suit property, all persons likely to be affected by such action ought to have been informed and heard before the alienation. Additionally, it determined that the appellant was not an innocent purchaser for value

without notice, as any diligent purchaser ought to have been aware of DoD's occupation and military installations.

16. The appellate court also took issue with the fact that the suit property, was hastily registered just a day after Renton Company Limited's application to transfer the same to the appellant. It also noted that there was overwhelming evidence that sometime in 1997, NCC had entered into an arrangement with the Government of Kenya agreeing to allocate part of its land measuring 400 hectares to DoD at a consideration of Kshs.40,000,000.00. However, the appellate court did not definitively establish whether the purchase sum had been paid by DoD.

17. Consequently, the court concluded that neither Renton Company Limited, nor the appellant herein, had acquired a valid interest in or over the suit property. It held that the Certificate of Title issued to the appellant was an illegal document and by virtue of article 40(6) of the *Constitution*, the concept of indefeasibility of title under section 26 of the *Land Registration Act* was inapplicable.

iii.At the Supreme Court

18. Aggrieved by the entire judgment, the appellants filed the instant appeal, citing several grounds of appeal summarized as follows:

> The judges of appeal erred in law by:
>
> i. Failing to dismiss the appeal before it having entered a finding that the suit property was private land, but instead proceeded to invalidate the appellant's title in disregard of articles 10, 19, 22, 24, 27,40 and 50 of the *Constitution*, and particularly in disregard of laid down procedures for establishing the legality or otherwise of a title;
>
> ii. Failing to consider that under article 40(6) of the *Constitution*, a finding that any land was unlawfully acquired, must be through a legally established process;
>
> iii. Failing to determine that there had never been such a process leading to a finding of any unlawfulness;
>
> iv. Converting themselves into a court of first instance even when the respondent had brought to their attention the existence of a pending ELC Civil Case No 282 of 2012 *City Council of Nairobi v Attorney General, Minister for State for Defence & Kenya Defence Forces* (hereinafter ELC Civil Case No 282 of 2012) wherein the

ownership and legality of the title to the Suit Property was squarely in issue;

v. Failing to recognize that in a case where there were pending and substantive proceedings before a correct forum charged with the determination of the *bona fides* of a certificate of title, to wit the Environment and Land Court, it lacked the jurisdiction to prejudge the pending suit;

vi. Defying and ignoring the respondent's clear submission to the effect that the High Court Constitutional Division was not the proper or appropriate forum to determine the parties' respective rights as there was no opportunity to call and test evidence on the nullification of a certificate of title;

vii. Failing to find that the respondent had not presented any cross petition to establish fraud, illegality or corruption by the appellant and therefore its finding prejudiced any other future or pending legal process under article 40(6) of the *Constitution*;

viii. Failing to follow the principle that the appellant's title could only be challenged on the ground of fraud or misrepresentation, which had not been proven; and

ix. Failing to appreciate that the *bona fide* owner of the suit property (NCC) was not claiming any rights against the appellant herein.

19. The appellant seeks the following reliefs:

a. The appeal herein be allowed and the portion of the Court of Appeal judgment dated February 4, 2022 that purported to nullify or otherwise invalidate the appellant's title to land parcel No 22xx, Grant No IR 85xxx be set aside and the Judgment of the High Court dated July 4, 2011 be reinstated in full.

b. The court be pleased to grant any other or further relief it may deem fit.

C. The Parties Respective Submissions

i.The appellant's case

20. The appellant's submissions are dated September 12, 2022, and filed on November 7, 2022. The appellant challenges the Court of Appeal's jurisdiction, and urges that the latter assumed jurisdiction and prematurely determined the legality of its title in disregard of

proceedings pending before the Environment and Land Court, in ELC Civil Case No 282 of 2012.

21. To support this assertion, the appellant cites this court's finding in *Deynes Muriithi & 4 others v Law Society of Kenya & another*, SC Civil Application No 12 of 2015, [2016] eKLR, wherein it was determined that the Court of Appeal's determination of an issue pending before the High Court had a pre- emptive effect and had consequently predetermined the petitions before the High Court without the applicants having been heard on the merits, contrary to article 50 of the *Constitution*.

22. Furthermore, the appellant urges that the respondent did not file any cross petition before the High Court seeking nullification or cancellation of its title. It submits that the issue before the Court of Appeal was whether a tort of trespass had been established at the trial court. Moreover, it is submitted that the legality of its title was only interrogated for the first time at the submission stage before the Court of Appeal, denying it the right to present its evidence or call witnesses.

23. On the second issue, whether the Court of Appeal determined the rights of a party not before it, the appellant submits that despite its several objections, the appellate court determined the legality and validity of property rights of Renton Company Limited which party was not before it. It is urged that the Court of Appeal denied Renton Company LiMited the right to rebut allegations made against it, to the appellant's detriment.

24. On the requirement of interrogation of the legality of a title through a legally established process under article 40(6) of the*Constitution*, the appellant submits that where allegations of illegality or irregularity are made, the said article requires a formal process of proof to be undertaken by the party alleging fraud. Similarly, it urges that this requirement is mirrored by section 26 of the *Land Registration Act* No 3 of 2012, which provides that a title can only be challenged on the ground of fraud or misrepresentation. It must also be proved that the proprietor was a party to such fraud or had acquired the property illegally, or through a corrupt scheme.

25. To this end, it is submitted that the appellate court was wrong to investigate and make a finding on the legality of its title, in disregard of an established formal process before the Environment and Land Court. It faults the Court of Appeal for failing to abide by the constitutional requirement under article 40(6) of the *Constitution*. In support of its arguments, the appellant relies on the High Court Decisions in *Vekariya Investments Limited v Kenya Airports Authority & 2 others*; Constitutional Petition No 263 of 2011, [2014] eKLR; Chemei Investments Limited v the Attorney General & others Constitutional Petition No 94 of 2005 (unreported); *Electrical Options Limited v the Attorney General & another*; Constitutional Petition No 23 of 2011, [2012] eKLR; and *Isaac Gathungu Wanjohi*

& another v the Attorney General and others; Constitutional Petition No 154 of 2011, [2012] eKLR.

26. Likewise, the appellant submits that in the absence of a finding of illegality by way of a hearing and determination by the Environment and Land Court, the respondent cannot rely on phantom fraud to forcefully deprive the former of its property. It cites the Court of Appeal Decision in *Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others*; Civil Appeal No 156 of 2013; [2019] eKLR to buttress this assertion.

27. On the issue as to whether a trespasser can assert a better title against a registered proprietor, it was urged in the negative. It is the appellant's submission that having determined that DoD did not have any rights over the suit property, the Court of Appeal only had one remedy to grant, to dismiss the appeal with *ex gratia* advice to the respondent to pursue the established legal process and challenge the legitimacy of the appellant's title.

28. On the issue of expunged evidence, it was the appellant's submission that when the respondent was granted leave to adduce additional evidence, the Attorney General adduced new evidence marked 'secret and confidential'. It further urges that to sanitize the misleading evidence, it retrieved and produced the same thread of communication and documentation omitted by the respondent.The appellant contests that the Attorney General ought not to have been allowed to present and rely on evidence marked 'secret and confidential' while denying an opposing party from controverting the same. In conclusion, it was urged that the Court of Appeal unfairly tilted the scales of justice in favour of the State and seriously prejudiced the appellant.

ii.The respondent's case

29. In opposing the appeal, the respondent has filed its response dated July 8, 2022 on July 13, 2022 and submissions dated November 4, 2022 and on November 7, 2022. It is the respondent's case that the Court of Appeal correctly considered the evidence adduced before it and conclusively applied the law.

30. The respondent challenges the appellant's title on ground that the latter did not acquire a good title from Renton Company Limited. To this end, it is urged that the appellant acquired a letter of allotment which had initially been issued to Renton Company Limited on December 19, 1999, to get itself registered as the proprietor of the suit property. Moreover, it is submitted that the suit property was not un-alienated government land, and consequently the Commissioner of Lands lacked the authority to allocate it. Similarly, it is the respondent's case that at the time of allotment to Renton Company Limited, the Commissioner of Lands was aware that the suit property was occupied by DoD and was therefore, not available for allocation.

31. It is the respondent's further case that there were irregularities in the process leading to the acquisition of the appellant's title to the suit property. It urges that it was impractical to have the grant issued and registered on the same day. The respondent contends that the speedy registration was shrouded in fraud. To support this assertion, the respondent cites the Court of Appeal Decision in *Chemey Investment Limited v Attorney General & 2 others*; Civil Appeal No 349 of 2012, [2018] eKLR wherein the appellate court held that a speedy registration was not a reflection of efficient delivery of public services but rather a deliberate and fast-tracking of a flawed process to facilitate the theft of public property.

32. The respondent further submits that the said Letter of Allotment, had a condition that Renton company limited was to accept the allotment and pay the standard premium within 30 days or the offer would lapse. Since the condition had not been fulfilled at the time of the transfer of the letter of allotment to the appellant, the same was of no legal effect.

33. In conclusion, it is submitted that had the appellant exercised due diligence before purchasing the suit property, it could have discovered that DoD had been in actual occupation of the same since 1984. It is therefore the respondent's argument that the appellant cannot be treated as an innocent purchaser of the suit property for value without notice. It relies on the Court of Appeal Decision in *Arthi Highway Developers Limited v West End Butchery Limited & 6 others*; Civil Appeal No 246 of 2013, [2015] eKLR and *National Land Commission v Afrison Export Import Limited & 10 others*; ELC Reference 1 of 2008, [2019] eKLR to urge that the appellant had an obligation to carry out due diligence by looking at the history of the suit property before purchasing the same.

34. On the requirement of interrogation of the legality of a title through a legally established process under article 40(6) of the *Constitution*, it is contended that the appellant's pleadings before this court depart from its pleadings before the High Court. At the High Court, the appellant had claimed violations of its right to property under article 40 of the *Constitution*. Accordingly, it is urged that this right is subject to article 40(6) of the *Constitution*, and as such, the Court of Appeal was justified in ascertaining the validity of the title to the suit property, before determining whether the said right had been violated or not.

35. On the issue of expunged evidence, it is the respondent's case that in principle, the production of a public document by private individuals was not unlawful, but must be within the confines of section 80 of the *Evidence Act*. It submits that the Court of Appeal was well within the law in expunging the documents illegally obtained and adduced.

36. On the issue, of whether the respondent was in rightful occupation of the suit property, the respondent submits that DoD was in a long and uninterrupted physical possession, occupation, use and development of the suit property, before the purported allocation and subsequent transfer and registration to the appellant. It also emphasizes that NCC entered

into an arrangement with the Government of Kenya to allocate part of its land measuring 400 hectares to DoD, and that the Commissioner of Lands had authorized the respondent to occupy and utilize the suit property.

37. In the alternative, it is urged that the respondent's occupation of the suit property was lawful and that the same had been converted to public land by virtue of article 62(1)(b) of the *Constitution*. More so, the Attorney General urges that the respondent is a state organ that has used and occupied the suit property, and therefore had an indefeasible constitutional right over it.

D. Issues for Determination

38. Based on the parties' pleadings and respective submissions, we consider that the following five issues, once determined will dispose of the appeal at hand

    i. Whether the superior courts below had jurisdiction to determine the legality of title to the suit property;

    ii. Whether the appellant has a valid title to the suit property;

    iii. Whether DoD acquired a good title to the suit property;

    iv. Whether the impugned documents were procedurally adduced; and

    v. Reliefs, if any, available to the parties.

E. Analysis

i.On jurisdiction

39. The appellant argued that the two superior courts acted in excess of jurisdiction by failing to confine themselves to the limited question of trespass and restitution as presented, and instead inquiring into the validity of the appellant's title to the suit property.

40. As regards the High Court, the appellant urged that the trial court was not the appropriate forum to determine the parties' respective rights to the suit property as there was no opportunity to call or test evidence. As for the Court of Appeal, it was contended that the appellate court converted itself into a court of first instance, in disregard of the proceedings then pending before the Environment and Land Court in ELC Civil Case No 282 of 2012, wherein the ownership and legality of the title to the suit property was in issue.

41. Similarly, it was urged that article 40(6) of the *Constitution* and section 26 of the *Land Registration Act* No 3 of 2012, create a positive legal prerequisite, entailing an inquiry to determine the validity of a title to land. The appellant submitted that the Environment and

Land Court, is the constitutionally established forum for such inquiry, and faulted the two superior courts for usurping the constitutionally donated jurisdiction of the former.

42. On the other hand, the respondent argued that the two superior courts had properly invoked their jurisdiction. Towards this end, it was contended that to effectively determine the parties' respective claims, the courts had first to settle the question regarding the validity of title over the suit property. Moreover, the Attorney General urged that the appellant had departed from its pleadings before the superior courts and was seeking for the first time, the interpretation of what amounts to a legally established process under article 40(6) of the *Constitution*.

43. For us to dispose of the first issue in the face of the two contrasting views, it is important to briefly revisit the procedural environment, that preceded the operationalization of the Environment and Land Court. The court is established under article 162(1) and (2) (b) of the *Constitution of 2010* . It was operationalized by the *Environment and Land Court Act* No 9 of 2011. After its commencement, vide Gazette Notice No 16268 dated November 9, 2012, the then Chief Justice issued the '*Practice Directions on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land*'. It was directed that all matters pending judgment and ruling before the High Court, arising from proceedings relating to the environment and the use and occupation of, and title to land, would be concluded by the High Court. Similarly, all part-heard cases pending before the High Court, relating to the same proceedings would be heard and determined by the same court.

44. Upon perusal of the record before us, we note that the appellant's suit before the High Court was instituted by way of a plaint dated March 10, 2011 and filed on even date. Consequently, the trial court heard and determined the dispute through its Judgment delivered on July 4, 2011. From the chronology of events, we entertain no doubt that, at the time the trial court heard and determined the suit, the Environment and Land Court was not operational.

45. In any event, the Practice Directions unequivocally directed the High Court to hear and determine pending proceedings on environment and land matters as specified in the foregoing paragraph 43 of this judgment. In the circumstances, we see no reason to fault the trial court on grounds of jurisdictional over-reach.

46. We now turn focus to the contention by the appellant to the effect that by determining the appeal before it, the Court of Appeal had in reality transformed itself into a court of first instance. It was the appellant's submission that at the time the appellate court handed down its judgement, the ELC Civil Case No 282 of 2012 was pending before the Environment and Land Court.

47. Upon perusal of the record before the Environment and Land Court, we note that by a consent dated March 25, 2021, the proceedings in ELC No 282 of 2012 were withdrawn,

and the consent adopted as an order of the said court on June 30, 2021. Consequently, as of February 4, 2022 when the appellate court delivered its Judgment, the said proceedings had long been concluded. In similar vein therefore, we see no reason to fault the appellate court's exercise of jurisdiction to determine the appeal. There was nothing pending at the Environment and Land Court which could have necessitated the Court of Appeal to down its tools.

ii.Whether the appellant has a valid title to the suit property;

48. Two central sub-issues fall for our determination, namely, the legal status of the suit property, and whether the appellant acquired a valid title to the same. It was the appellant's case that upon payment of Kshs 12,000,000, it acquired the suit property from Renton Company Limited for a term of 99 years from 2000. It further argued that it was the duly registered proprietor, having been issued with a certificate of title on April 26, 2001.

49. The respondent disputed this assertion and contended that the appellant did not acquire a good title from Renton Company limited. The Attorney General maintained that the letter of allotment, upon which the appellant's title is premised, was silent on whose behalf the Commissioner of Lands was making the allotment; at the time of its transfer to the appellant, the conditional thirty days acceptance period had lapsed; the suit property was not un-alienated government land and therefore the Commissioner of Lands lacked the authority to alienate it. The Attorney General further submitted on "without prejudice" basis that, at the time of allotment, the suit property was occupied by DoD and was unavailable for allocation. In the alternative, the respondent urged that there were irregularities in the process leading to the registration of the property in the appellant's name;and had the appellant conducted due diligence, it would have ascertained DoD's possession and occupation at the time of purchase.

50. For us to determine the legal status and validity of the title, we must inquire into the root title of the suit property.

iii.Alienated or un-alienated government land

51. Article 62 of the *Constitution* defines 'public land' to include:

62 (1)

(a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date; [Emphasis Added].

52. The *Government Lands Act* (repealed), which was the Act in force at the effective date defined 'unalienated government land' in section 2 as follows;

> " unalienated Government land" means Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment. [Emphasis Added].

section 3 of the *Physical Planning Act*, cap 286 defines unalienated land in similar terms.

53. This court in *Kiluwa Limited & another v Business Liaison Company Limited & 3 others*, (Petition 14 of 2017); [2021] KESC 37 (KLR) had this to say about un-alienated government land:

> "(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".

54. On the basis of the parties' submissions and the evidence on record, it is clear to us that on February 21, 1964, a parcel of land known as Embakasi LR No 113xx (Original No 41/3) measuring 5639 acres was alienated and a freehold title granted to Kayole Estates Limited. This parcel of land was later transferred to the defunct Nairobi City Council for valuable consideration by a transfer registered on November 22, 1971. In 1973, the parcel of land was subdivided yielding to, amongst others, the suit property.

55. In view of these dealings, could the suit property retain the status of "unalienated government land"? The answer to this question must be in the negative considering the fact that once an individual or entity acquires any un- alienated government land, or other land for that matter, consequent upon registration of title, in accordance with the provisions of the applicable law, such land transmutes from "public" to "private" land. Article 64(a) of the *Constitution* defines private land as consisting of 'registered land held by any person under

any freehold tenure'. In *Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others*, Civil Appeal No 79 of 2007; [2015] eKLR, the Court of Appeal held:

> " ... the legal effect of registrations made in 1907 and 1911 was to convert the suit property at that time from un-alienated government land to alienated land with the consequence that the suit property became private property and moved out of the ambit and confines of the Government *Land Act*. ..." [Emphasis Added].

We consider the foregoing statement to be an accurate illumination of the meaning of "private land".

56. Consequently, we find that upon alienation to Kayole Estates Limited in 1964, the suit property was converted from un-alienated government land to private freehold land. There being no question as to the regularity and legality of the process by which the said land was alienated in favour of Kayole Estates Ltd, we find and hold that the same was effectively divested from the purview of the regulatory regime of the *Government Lands Act* (now repealed). The Commissioner of Lands could therefore not have had any authority, to allocate the suit property to any other person as he purported to have done. By the same token, there being no evidence on record to the contrary, we find that the defunct Nairobi City Council acquired valid title to the suit property from Kayole Estates ltd through purchase. Where does our finding leave Renton company ltd? It is worthy restating that the said company could only have acquired valid title from the Nairobi City Council, and not the commissioner of lands who had long been divested of authority to allocate the same.

57. The respondent also challenged the letter of allotment on grounds that at the time of its transfer, the conditional thirty (30) days acceptance period had lapsed. As it turned out, the letter was also silent on whose behalf the commissioner of lands had made the allotment. Noting that the Commissioner of Lands by an allotment letter dated December 19, 1999 purported to allocate the suit property to Renton Company Limited. Thereafter, by a letter dated April 25, 2001, Renton Company Limited sought approval from the Commissioner of Lands to transfer the same to the appellant. The appellant's ownership is traced back to this allotment Letter even if subsequently registered under the *Registration of Titles Act* cap 281 (Repealed) on April 26, 2001.

58. So, can an allotment letter pass good title? It is settled law that an allotment letter is incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of conditions stipulated therein. In *Dr Joseph NK Arap Ng'ok v Justice Moijo Ole Keiyua & 4 others* CA 60/1997 [unreported]; and in *Gladys Wanjiru Ngacha v Teresa Chepsaat &*

4 others HC Civil Case No 182 of 1992; [2008] eKLR, the superior courts restated this principle as follows:

> "It has been held severally that a letter of allotment per se is nothing but an invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer an interest in land at all " [Emphasis added].

59. The pronouncement in Gladys Wanjiru and Dr Joseph NK Arap Ng'ok (*supra*) has been echoed in various Environment and Land Court decisions post the 2010 *Constitution*, including; *Lilian Wanjeri Njatha v Sabina Wanjiru Kuguru & another*, Environment and Land Case No 471 of 2010; [2022] eKLR; *John Elias Kirimi v Martin Maina Nderitu & 4 others*, Environment and Land Suit No 320 of 2011; [2021] eKLR; and *Kadzoyo Chombo Mwero v Ahmed Muhammed Osman & 11 others*, Environment and Land Case No 42 of 2021; [2021] eKLR, to mention but a few.

60. Suffice it to say that an Allottee, in whose name the allotment letter is issued, must perfect the same by fulfilling the conditions therein. These conditions include but are not limited to, the payment of a stand premium and ground rent within prescribed timelines. But even after the perfection of an allotment letter through the fulfillment of the conditions stipulated therein, an allottee cannot pass valid title to a third party unless and until he acquires title to the land through registration under the applicable law. It is the act of registration that confers a transferable title to the registered proprietor, and not the possession of an allotment letter. In *Peter Wariire Kanyiri v Chrispus Washumbe & 2 others*, Environment and Land Court Case No 603 of 2017; [2022] eKLR, Kemei, J held as follows:

> "[15]. In the case at hand, in the absence of any title registered in the name of the plaintiff, the court is unable to hold that the plaintiff is the registered proprietor of the land. This is because the letter of allotment lapsed within 30 days and the same is of no legal consequences" [Emphasis added].

61. While we agree with the general tenor of the learned Judge's foregoing pronouncement, we remain uncomfortable with his inference that the allotment letter was of no legal consequence solely because it had lapsed after 30 days. We must reiterate the fact that an allotment letter in and by itself, is incapable of conferring a transferable title to an allottee. Put differently, the holder of an allotment letter is incapable of transferring or passing valid title to a third party on the basis of the allotment letter unless and until he becomes the registered proprietor of the land consequent upon the perfection of the Allotment Letter. It matters not therefore that the allotment letter has not lapsed.

62. Back to the facts of this case, the allotment letter issued to Renton Company Limited was subject to payment of stand premium of Kshs 2,400,000.00, annual rent of Kshs 480,000.00 amongst others. Moreover, the letter was granted on condition that Renton Company Limited would accept it within thirty (30) days from the date of the offer, failure to which it would be considered to have lapsed.

63. While the allotment letter is dated December 19, 1999, Renton Company limited made the specified payments on April 24, 2001, one hundred and twenty- seven (127) days from the date of the offer. It is not in question that Renton had not complied with the terms and conditions of the allotment letter. Therefore, the letter ought to have been deemed as lapsed at the time it purported to transfer the same to the appellant. The respondent submitted that a letter of allotment does not confer any property rights unless it is perfected, failure to which it is rendered inoperative and of no legal import. We have already declared that an allotment letter, even if perfected, cannot by and in itself confer transferable title to the Allottee, unless the latter completes the process by registration. Therefore, the grim reality is that all transactions between Renton Company limited and the appellant were a nullity in law.

64. What about the argument to the effect that the appellant was an innocent purchaser for value without notice? It is obvious by now that such argument cannot hold in view of our pronouncements regarding the transactions between Renton and the appellant. However, be that as it may, there is evidence on record in the form of correspondences and minutes, confirming that DoD had been granted access by the defunct municipal council and had taken possession of, and erected public infrastructure upon the suit property before the purported purchase. Of importance is the letter from the Commissioner of Lands to DoD, confirming that the latter was in occupation of the Property. Further, it is on record that the Ministry of Lands and Settlement was monitoring excision activities by NCC to ensure that the portion occupied by DoD was not affected. This letter is dated August 11, 1999, approximately one (1) year and eight (8) months before the impugned transfer. Therefore, if the appellant was a diligent purchaser, it ought to have at least known of this fact. An innocent purchaser for value would also denote one was aware of what they are purchasing by inspecting the suit premises. This takes us to the question of whether the appellant had visited the suit premises and if so, what was its impression of the military installations on the suit premises? The fact that the suit land was occupied must have sounded a warning of "buyer be aware" to the appellant. We therefore find that it was not an innocent purchaser for value entitled to orders for restoration or compensation.

iv.Whether DOD acquired a valid title to the property

65. In as much as the appellant does not have a valid title to the suit property, DoD is similarly tainted. Although it has been able to prove that it has been in exclusive occupation and use of the Suit Property from 1986 to date, with the full knowledge and authority of NCC and the Commissioner of Lands, (see the various communication and correspondence between it, NCC and other stakeholders including an Internal Memo dated April 24, 1984, minutes of a meeting held on May 24, 1984, letter dated February 22, 1996 and letter dated August 11, 1999), there is nothing on record to prove that DoD ever acquired valid title to the suit property. Just as the Commissioner of Lands could not allocate the said land to Renton for reasons already canvassed, so also was he equally hamstrung in relation to DoD.

66. The court takes cognizance of ELC Civil Case No 282 of 2012, filed by the defunct Nairobi City County seeking; rescission of the letter of allocation dated October 7, 1997; delivery of vacant possession of LR. No 41/33 Embakasi; in the alternative to compensation in the sum of Kshs 61,500,000,000; interest; any other reliefs the court deemed fit to grant. Moreover, we note that during the main hearing of this case, the learned state counsel, representing the Attorney General, submitted that Parliament had taken over the dispute between NCC and DoD with a view to settling the matter outside the court process.

67. Although, ELC Civil Case No 282 of 2012 was duly withdrawn in line with the provisions of articles 6(2) and 189(3) of the *Constitution* as well as the *Inter- governmental Relations Act* No 2 of 2015, the withdrawal neither determined ownership nor passed good title to the Suit Property or a portion thereof to DoD. As matters currently stand therefore, title to the suit property, remains vested in Nairobi County which is the legal successor to the defunct Nairobi City Council.

v.Admissibility of evidence

68. The appellant faults the Court of Appeal for expunging documents on pages 32, 52 and 21, 22 23-27, 28-29, 30, and 33 of its record and supplementary record respectively. It urged that the appellate court crafted and imposed an asymmetrical application of section 80 of the *Evidence Act*. It also contended that once the Attorney General had been granted leave to introduce confidential documents, it too had an automatic corresponding right to adduce similar evidence obtained from the same chains of communication. The appellant urged that the asymmetrical application contravened article 50(1) of the *Constitution* and amounted to suppression of evidence. In response, the Attorney General submitted that public documents within the meaning of section 79 of the *Evidence Act* must be produced in accordance with sections 68(1)(e)(f), (2)(c) and 80 of the *Evidence Act*, and the non-compliance rendered the evidence inadmissible.

69. We agree with the Court of Appeal's reasoning that the impugned documents were public documents within the meaning of section 79 of the *Evidence Act* requiring certification in accordance with sections 68(1)(e)(f), (2)(c) and 80 of the *Evidence Act*. Moreover, we are guided by this court's decision regarding evidence unlawfully procured, in *Njonjo Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others*; Presidential Election Petition No 4 of 2017, [2017] eKLR, wherein we held as follows:

> "(22) ..... We also recognize that information held by the State or state organs, unless for very exceptional circumstances, ought to be freely shared with the public. However, such information should flow from the custodian of such information to the recipients in a manner recognized under the law without undue restriction to access of any such information.
>
> (23) Further, a duty has also been imposed upon the citizen(s) to follow the prescribed procedure whenever they require access to any such information. This duty cannot be abrogated or derogated from, as any such derogation would lead to a breach and/or violation of the fundamental principles of freedom of access to information provided under the *Constitution* and the constituting provisions of the law. It is a two-way channel where the right has to be balanced with the obligation to follow due process." [Emphasis Added].

vi.Reliefs

70. Having disposed of the issues framed, and having reached the conclusions we have, we are left with no option but to dismiss the Appeal. As regards costs, in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, SC Pet No 4 of 2014; [2014] eKLR, this court held that it has the discretion to award costs to ensure that the ends of justice are met and that costs ordinarily follow the event.

71. Having considered the history and nature of the case before us, it is our view that each party shall bear its own costs in the High Court, Court of Appeal, and this court.

F. Orders

72.

i. The appeal dated March 14, 2022 and filed on March 16, 2022 is hereby dismissed;

ii. Each party shall bear its own costs; and

iii. The sum of Kshs 6,000/-, deposited as security for costs upon lodging of this appeal, shall be refunded to the appellant.

It is so ordered.

MMG v Tribunal Appointed to Investigate the Conduct of Hon. Lady Justice MMG, Judge of the Environment and Land Court of Kenya (Petition 10 (E013) of 2022) [2023] KESC 73 (KLR) (12 September 2023) (Judgment)

Supreme Court of Kenya

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

Neutral citation: [2023] KESC 73 (KLR)

Heath Law *– mental capacity – definition of mental incapacity – procedures to be followed by a court when making an assessment of mental incapacity – applicable tests when determining an employee's ability to perform functions based on their mental capacity - what was the legal definition of mental incapacity - what guidelines should courts follow in matters which involved an assessment of mental incapacity - what tests should courts apply when they were faced with the issue of establishing whether mental incapacity affected the performance of a person in their work duties - whether a diagnosis of Schizophrenia and the resulting mental incapacity would render a Judge incapable of performing the functions of a Judge – Mental Health Act (Cap 248) section 2; Mental Health Act 1983, (United Kingdom) Mental Capacity Act, 2005, (United Kingdom) section 2(1) and (2); United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, 1991, principle 1(7).*

Jurisdiction *– jurisdiction of a Tribunal formed for the purpose of determining a petition for the removal of a Judge – where the matter before the Tribunal was the mental capacity of the Judge - whether a Tribunal formed for the purpose of determining a petition of removal of a Judge had the jurisdiction to consider the mental capacity of the said Judge – Constitution of Kenya, 2010 article 168(2) to (7).*

Brief facts

Pursuant to a petition by Judicial Service Commission (JSC), the President vide Gazette Notice No 8625 of 2021 suspended the petitioner (a Judge of the Environment and Land Court) from office and appointed a Tribunal to inquire on the question whether the petitioner was fit to hold office.

On account of the medical evidence adduced at the hearing, the Tribunal established that the petitioner had severe schizophrenia and within a span of five (5) years, her mental illness had deteriorated. Thus, the Tribunal concluded that the question of whether the Judge had schizophrenia was proved to the required standard of beyond reasonable doubt.

Aggrieved, the petitioner filed the instant appeal under article 168(8) of the *Constitution*. The petitioner contended that the tribunal went outside its mandate when it made conclusions and findings on mental illness and mental incapacity, treatment, psychosocial support, and the petitioner's mental illness and its impact on the right to access justice. The respondent opposed those contentions and reiterated that it acted within its mandate.

The petitioner also contended that it was not established that she suffered mental incapacity. It was her case that the required standard of proof was not met and the Tribunal erroneously concluded that mental illness amounted to proof of mental incapacity. The respondent on the other hand urged that the standard of proof that the mental illness had affected the petitioner's ability to perform her

duties as Judge was satisfied on account of the evidence adduced. The petitioner also contended that the process followed by the JSC and the Tribunal to remove her from office was procedurally unfair.

Issues

i. Whether a Tribunal formed for the purpose of determining a petition for the removal of a Judge had the jurisdiction to consider the mental capacity of said Judge.

ii. Whether the Tribunal erred in arriving at a finding that the Judge was incapable of holding office due to her mental incapacity.

iii. What was the legal definition of mental incapacity?

iv. What guidelines should courts follow in matters which involve an assessment of mental incapacity?

v. What tests should courts apply when they were faced with the issue of establishing whether mental incapacity affected the performance of a person in their work duties?

vi. Whether a diagnosis of chizophrenia and the resulting mental incapacity would render a Judge incapable of performing the functions of a Judge.

Held

1. The process of removal of a Judge from office was provided for under article 168(2) to (7) of the Constitution. It was initiated by the Judicial Service Commission (JSC) on its own motion or upon a petition being filed by any person for consideration by the Commission. If satisfied that the petition disclosed a ground for the removal of a Judge, the JSC would then send the petition to the President. The President thereafter suspended the Judge within fourteen days and also appointed a Tribunal to hear the petition and make recommendations to the President for the removal or reinstatement of the Judge.

2. The tribunal was responsible for the regulation of its proceedings, and for inquiring into the matter expeditiously and to report on the facts and make binding recommendations to the President. The Supreme Court, pursuant to article 168(8) of the Constitution had the jurisdiction to hear a Judge who was aggrieved by the decision of the tribunal and appealed within ten days after the tribunal made its recommendation. The Supreme Court's jurisdiction under article 168(8) of the Constitution was expansive in that the court was required to re-evaluate and re-assess the evidence on record with a view of establishing whether the tribunal misdirected itself and whether the tribunal's conclusion should stand.

3. The Tribunal conducted an in-depth inquiry as to whether the petitioner was unable to perform her judicial functions due to mental incapacity. The Tribunal exercised its mandate pursuant to article 168(1)(a) of the Constitution. The Tribunal found that the petitioner suffered from a mental illness that led to mental incapacity and inability to undertake the functions of her office. The Tribunal confined itself to the matters contained in the petition submitted to the President by the JSC. The Tribunal did not consider issues extraneous to its jurisdiction.

4. The Mental Health Act, did not define mental incapacity. It however defined a person with mental illness in section 2 as a person diagnosed by a qualified mental health practitioner to

be suffering from mental illness. The Mental Health Act was however silent on the resultant effect of mental capacity of persons with mental illness.

5. United Kingdom law (Mental Health Act 1983, Mental Capacity Act, 2005) was clear that under the common law, every person was presumed to have mental capacity until the contrary was proved. Adults were presumed to have decision-making capacity, but that presumption could be rebutted for particular decisions if the person had some impairment or disturbance of mental functioning that rendered him or her either: unable to comprehend and retain the information that is material to the decision, or; unable to use and weigh the information as part of the process of making the decision. The ultimate decision on mental capacity was one for the Court to make.

6. The Tribunal established that the petitioner admitted to being diagnosed with Schizophrenia in the year 2008, which diagnosis was also confirmed by doctors who submitted evidence. On account of the medical evidence adduced at the hearing, the Tribunal established that the petitioner had severe schizophrenia and within a span of five (5) years, her mental illness had deteriorated. The Tribunal established beyond reasonable doubt, that the Petitioner had a mental illness, schizophrenia.

7. In no instance did the Tribunal equate mental illness to mental incapacity. One of the effects of the illness although not manifested every day was that the patient experienced difficulty in thinking and reasoning. Based on the nature of the disease, symptoms, result of relapses, and mental impairment caused by the disease and upon our evaluation of the evidence before the Tribunal, the Tribunal's finding that the petitioner's mental illness caused mental incapacity was arrived at correctly.

8. There was a necessity to strike a balance, on the one hand, of the rights of an individual in a free society and, on the other hand, the need to protect the individual, employment environment, and society at large, from the adverse effects of mental illnesses and disorders. Therefore, when determining cases of mental incapacity, and bearing in mind that conclusions could not be transposed from one case to another, the following guidelines were established for courts to follow in matters which involved an assessment of mental incapacity:

    1. Mental incapacity included but was not limited to a person's inability to make a decision, understand information about a decision, remember information, use the information to make a decision, or communicate a decision.
    2. Mental incapacity could result from mental illness but it did not necessarily follow that mental illness equaled mental incapacity.
    3. Mental incapacity must be diagnosed by a qualified professional.
    4. A court was bound to consider whether an employer caused the establishment of an independent medical board of duly qualified members to determine whether the employee was, by reason of an infirmity of mind, incapable of discharging the functions of the relevant office.

5. If an employee's mental illness was adversely affecting their ability to perform their duties, in some instances, the employer, following due process, could terminate the employee's contract of employment or recommend the employee's removal from office.
6. A court must consider the diagnosis by a qualified professional, and medical expert evidence and assess whether, on a balance of probabilities, the employee's mental illness affected their work duties.
7. Where a person was deemed to lack mental capacity, any interference with his or her fundamental rights and freedoms must be the least restrictive possible.

9. The Environment and Land Court (ELC) heard and determined complex legal issues in relation to a finite resource often with numerous parties and lengthy hearings due to the voluminous documents to be scrutinised and parties to be heard. The petitioner had considerably handled several matters but had numerous judgments and rulings that were pending delivery.

10. The petitioner's performance as a Judge in the period under review was affected by absenteeism caused by her mental illness. Her absence was not only when she was hospitalised but also when she fell ill and not admitted to hospital. Her absence from duty became acute in the Financial Years 2015/2016 and 2016/2017. Her absence from duty resulted in cases in her docket being re-allocated to other Judges when applications were filed under certificate of urgency. The cases due for hearing were adjourned to other dates when the Judge resumed duty after recovering from illness. That negatively impacted the performance of the ELC due to the burden of caseload assumed by other Judges in the absence of the petitioner.

11. The requisite standard of proof that applied to and that was applied by the Tribunal was that of below beyond reasonable doubt but higher than a balance of probabilities. There was no reason to interfere with the Tribunal's finding that the petitioner was unable to perform the functions of a judge of the ELC. While considering this illness and its attendant consequences on mental capacity, the Tribunal was well within its rights to consider its treatment and psychosocial support both integrally linked to the ability of the petitioner to perform her functions of office.

12. A two-stage test would guide courts when they are faced with the issue of establishing whether mental incapacity affected the performance of a person in their work duties. Firstly, there must be proof that a person had an illness or injury that affected the manner in which the brain or mind works. Secondly, that the illness or injury affected the person to the extent that they were unable to perform their duties to the requisite standard.

13. The jurisdiction of the Supreme Court extended only to enquiry of the proceedings of the Tribunal and not the JSC. Section 13 of the second schedule of the Judicial Service Act (JSA), provided that the Tribunal shall not be bound by strict rules of evidence but shall be guided by the rules of natural justice and relevancy. The Tribunal was compliant with the provisions

of the second schedule on how a hearing by the Tribunal was conducted. The petitioner did not also specifically fault how the Tribunal failed to comply with the rules of natural justice during the hearing. There was no basis to fault the Tribunal for failing to adhere to procedural fairness.

14. The Supreme Court was guided by principle 1(7) of the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, 1991. It provided that where a court or other competent tribunal found that a person with mental illness was unable to manage his or her own affairs, measures shall be taken, so far as was necessary and appropriate to that person's condition, to ensure the protection of his or her interest. Although the Supreme Court had established that the petitioner was unable to perform the functions of the office of a Judge which required immense alertness, endless concentration, presence, a good frame of mind to observe the demeanour of witnesses, back-breaking research, writing/typing skills, this was not to mean that she could not undertake other duties pertaining to the legal profession.

15. [***Obiter]*** *"... mental health issues are becoming quite prevalent in the Country. In this regard, it would be prudent for the Legislature to amend the Mental Health Act (Cap 248) guided by best practices and provide for inter alia a clear definition of mental capacity, the test for mental capacity, insight, pension for Judges and other state officers who may be removed from office due to mental incapacity, and so forth. In this regard, the Legislature would also need to align the provisions of the Pension Act (Cap 289) with any new amendments. Parliament should also consider aligning the Employment Act with mental health considerations and accommodations such as the provision of clauses that place an onus on employers to ensure that they create a safe working environment and that mental health issues are not caused or exacerbated by work-related stress; clauses that provide that employers have a legal duty to reasonably accommodate employees with mental illness providing the same can be done without undue hardship to the employer; what is 'reasonable' will depend on the facts of each case; to give but a few examples."*

Petition dismissed.

Orders

i. *The Tribunal's finding that the petitioner was unable to perform the functions of her office due to mental incapacity was affirmed.*

ii. *The Tribunal's recommendation to the President for the Petitioner's removal from office under article 168(1)(a) of* the Constitution *was affirmed.*

iii. *No orders as to costs.*

iv. *The sum of Kshs. 6000/- deposited as security for costs in the appeal was to be refunded to the petitioner.*

Citations

Cases

Kenya

1. *Baraza v Judicial Service Commission & 9 others* Petition 23 of 2012; [2012] KEHC 5440 (KLR) - (Applied)
2. *Gitau, Simon Gichuru v Package Insurance Brokers Ltd* Cause 1375 of 2014; [2017] KEELRC 566 (KLR) - (Explained)
3. *Jane Samba Mukala v Ol Tukai Lodge Limited* Cause 823 of 2010; [2013] KEELRC 794 (KLR) - (Mentioned)
4. *Machira, Jane Wairimu v Mugo Waweru and Associates* Cause 621 of 2012; [2012] KEHC 39 (KLR) - (Explained)
5. *Maina, Mwangi v Thika Coffee Mills Limited* Cause 2177 of 2012; [2014] KEELRC 599 (KLR) - (Mentioned)
6. *Msagha v Chief Justice of the Republic of Kenya & 7 others* Miscellaneous Civil Application 1062 of 2004; [2006] KEHC 3497 (KLR) - (Applied)
7. *Mutava v Tribunal appointed to Investigate the conduct of Justice Joseph Mbalu Mutava, Judge of the High Court of Kenya* Petition 15 "B" of 2016; [2019] KESC 49 (KLR) - (Explained)
8. *National Bank of Kenya v Samuel Nguru Mutonya* Civil Appeal 118 of 2017; [2019] KECA 404 (KLR) - (Explained)
9. *Republic v Chief Justice of Kenya & 6 others Ex-parte Moijo Mataiya Ole Keiwua* Judicial Review 1298 of 2004; [2010] KEHC 4115 (KLR) - (Explained)

South Africa

Gold Fields Mining South Africa (PTY) Ltd v CCMA [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC) - (Mentioned)

United Kingdom

1. *A Local Authority v A & another* [2010] EWCOP 1549 - (Applied)
2. *Associated Pictures Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680 - (Explained)
3. *CC v STCC* [2012] EWCOP 2136, [62]
4. *Heart of England NHS Foundation Trust v JB* [2014] EWCOP 342; [2014] EWHC 342 - (Applied)
5. *London Borough of Islington v QR* [2014] EWCOP 26 - (Explained)
6. *Re C (Refusal of Medical Treatment)* [1994] 1 FLR 31 - (Explained)
7. *Re MB (Medical Treatment)* [1997] EWCA Civ 3093; [1997] Fam Law 542; [1997] 2 FCR 541; [1997] 2 FLR 426; [1997] 8 Med LR 217; (1997) 38 BMLR 175 - (Explained)

Texts

1. Case, P., (Ed) (2016), *Dangerous Liaisons? Psychiatry and Law in the Court of Protection – Expert Discourses of 'Insight' (and 'Compliance* Oxford: Med Law Review
2. The Judiciary (2017), *Human Resource Policies and Procedures Manual* The Judiciary

3. Great Britain Law Commission., Great Britain Lord Chancellor's Department., (Eds) (1995), *Mental incapacity : Item 9 of the Fourth Programme of Law Reform: Mentally Incapacitated Adults* London: HMSO., Law Comm Series 231
4. Law Society of New South Wales (Ed) (2016), *When a Client's Mental Capacity is in Doubt: A Practical Guide for Solicitors* Perth: Law Society of Western Australia

Statutes

Kenya

1. Constitution of Kenya articles 47, 50, 162 (2) (b), 163(3), 168(1)(a) - (Interpreted)
2. Employment Act (cap 226) In general- (Cited)
3. Environment and Land Court Act (cap 8E) section 13- (Interpreted)
4. Fair Administrative Actions Act (cap 7L) In general - (Cited)
5. Mental Health Act (cap 248) In general- (Cited)
6. Pensions Act (cap 189) In general - (Cited)

United Kingdom

1. Mental Capacity Act (2005) - (Cited)
2. Mental Health Act (Repealed), 1983 - (Cited)

Australia

Guardianship and Administration Act, 1993

International Instruments

Convention on the Rights of Persons with Disabilities (CRPD), 2006

Advocates

Mr Colbert Ojiambo, Dr. Omondi Owino & Mr. Nyboma for petitioner
Mr Emmanuel Bitta & Ms. Mbilo Schola for respondent

September 12, 2023, the Court delivered the following Judgment:

A. Introduction

1. By the petition of appeal dated May 19, 2022, this court is being asked to exercise its jurisdiction under article 163(3) and (8) of the *Constitution*. The appeal challenges the report and recommendation issued by the tribunal appointed to inquire into the petitioner's inability to perform the functions of her office due to mental incapacity.

2. Part A of the petition of appeal specifies that the petition is premised on the following grounds:

i. That the inability of the petitioner to perform the functions of her office due to mental incapacity was not established as contemplated under article 168(1)(a) of the *Constitution*;

ii. That the honourable Tribunal erred in law and fact in holding that Judicial Service Commission had discharged its mandate as contemplated under article 168(4) of the *Constitution*;

iii. That in all circumstances of the case, the findings of the honourable Tribunal and the recommendation thereto is not supported in law by the evidence adduced.

B. Background

3. The petitioner was nominated to serve as a Judge of the Environment and Land Court (ELC) in the year 2012. Before her appointment, the Judicial Service Commission (JSC) through one of its Commissioners, reported that it had received information from unnamed lawyers that the Judge had a medical history of mental illness. The JSC resolved to have the petitioner, who was then a nominee for appointment as a judge, undergo a medical examination conducted by a medical board constituted by the Director of Medical Services to determine her suitability for the position.

4. The Medical Board assessed the petitioner on November 1, 2012. Its findings were communicated to the JSC on November 2, 2012. The findings of the report indicated that:-

> "the judgewas sane, coherent in speech, had a good memory of current affairs, and was fairly eloquent in addressing issues raised by the board members." The Board then concluded that, "even though records indicate that the judgehad a history of mental illness, she had been declared by her psychiatrist as having fully recovered and was therefore fit to take up the position of a judge."

5. The petitioner was subsequently appointed as a judgeof the ELC and posted to Kakamega Law Courts. She was later transferred to Milimani Law Courts in January 2013 and then to the Judiciary Training Institute (JTI) in January 2018.

6. Following complaints received by the JSC *inter alia* regarding delay of delivery of rulings and judgment, the Commission in a meeting held on May 2, 2019 resolved to inquire further into the matter. In this regard, the JSC sought reports of the performance of the Judge from the acting Registrar of the ELC, the Director of the JTI, and lastly, a report by the acting Director of Planning and Organizational Performance (DPOP). The JSC also called for her medical record which medical file was availed by the Human Resource Directorate.

7. Subsequently, upon deliberations, the JSC resolved that the petitioner appears before a Medical Board (second Medical Board) which was to be constituted by the Director of Medical Services for examination of her fitness to continue serving as a Judge. The second Medical Board was constituted and it examined the Judge on November 28, 2019 at the National Spinal Injury Hospital.

8. It submitted its report dated July 24, 2020 and concluded that:-

> "Based on the fact that the Hon Lady Justice MG was on treatment for Schizophrenia with evidence of several relapses, evidence of lack of insight during the period of relapses leading to absence from duty. She also had evidence of below-average performance. She is not fit for further service as a judge."

9. The JSC held a meeting on September 16, 2020 and deliberated on the report and findings of the second Medical Board. It resolved to institute proceedings against the petitioner for her removal pursuant to article 168 (1)(a) of the *Constitution*. The petitioner was invited on September 28, 2020 to make her representation on the findings of the second Medical Board and the contemplated action of her removal from office.

10. Following the hearing of the petitioner and the deliberations on the matter, the JSC Committee that had been established to consider her removal from office concluded that the ground for removal of the petitioner on the basis of her inability to perform the functions of the office arising from mental incapacity under article 168(1) of the *Constitution* had been established. Consequently, on March 23, 2021, the JSC considered and deliberated on the Committee's findings and recommendations and adopted the same through a majority decision. Thus, a petition dated April 12, 2021 was submitted to the President recommending the suspension of the Judge and the appointment of a Tribunal in terms of article 168 (5)(b) of the *Constitution* to consider the removal of the petitioner from office.

11. His Excellency, President Uhuru Kenyatta, (as he then was) by a Gazette Notice No 8625 dated July 20, 2021 and published on August 23, 2021, suspended the petitioner from office with immediate effect and appointed a Tribunal to inquire into the matter of her removal. The composition of the Tribunal included three Judges, and two psychiatrists amongst others.

12. The tribunal concluded its hearing and deliberations and, in a report dated April 13, 2022 stated that the allegations, that the Judge has mental incapacity and therefore unable to perform the functions of the office of Judge of the ELC, were established to the required standard of proof. The Tribunal unanimously recommended that the petitioner be removed from office of judge of ELC.

13. Aggrieved by the decision of the tribunal, the petitioner filed a petition of appeal dated May 19, 2022 before this court pursuant to article 168(8) of the *Constitution*.

C. Proceedings Before The Supreme Court

The Petitioner's case and submissions

14. The petition of appeal raises a total of 33 grounds of appeal which are summarized as follows, that the honourable Tribunal erred in law and fact:-

    a. When it failed to consider or give weight to the totality of the evidence adduced and the submissions filed on behalf of the petitioner and thereby recommended the petitioner's removal.

    b. When it equated mental illness to mental incapacity and thereby failed to consider the requisite standard of proof set for establishing mental incapacity as required in article 168(8)(1)(a) of the *Constitution*. Further, the Tribunal relied on biased opinions, unsubstantiated hearsay evidence, and extraneous factors not pleaded in the petition or proved in arriving at its findings.

    c. When it erroneously shifted the burden of proof to the petitioner to demonstrate that the allegations against her were false, instead of requiring the allegations to be proved to the required standard.

    d. In finding that the petitioner failed to challenge the findings by the Medical Board, despite the petitioner putting questions to the witnesses and adducing evidence and submissions challenging the said Medical Report.

    e. In approaching the case with a predetermined and biased mind to remove the petitioner thereby wholly disregarding exculpatory evidence showing that the Judge was sound and fit to serve. Further, the Tribunal failed to single out even one function of the office of Judge that the petitioner was incapable of performing. Additionally, the Tribunal failed to consider the court diary and proceeded to solely blame the petitioner for the court backlog.

    f. In finding that the JSC had observed the procedural threshold for proportionality, rationality, reasonableness, and the rules of natural justice in spite of the illegalities and procedural lapses committed, disregarding article 47, 50 and 168 of the *Constitution*, and provisions of the *Fair Administrative Actions Act* when transferring the petitioner from court to the JTI.

g. In making an erroneous conclusion that she was unable to continue working despite having satisfied itself that the petitioner undertook considerable work while at the JTI.

h. When it disregarded the consensus reached by all the doctors who examined the petitioner and concluded that her mental state was "normal".

i. Despite finding that the petitioner was a person with a disability, the Tribunal erred in finding that the petitioner was adequately accommodated, when there was no such accommodation.

j. When it accepted claims of absenteeism, wholly disregarded exculpatory evidence that the petitioner sat in court more days in the relevant period than any other Judge in the station. Further, the Tribunal ignored exculpatory evidence that the petitioner handled the highest number of cases and was the second best-performing judge in the station.

k. In finding the petitioner lacked mental capacity to serve yet did not consider the contents of her rulings and judgments or even the record of her proceedings, and did not consider the fact that there were no complaints against the contents of her rulings and judgments for the entire period of her tenure.

l. In reaching the conclusion that the "existing laws do not adequately provide for a proportionate mechanism of handling a situation in which a Judge is not at fault" and further that the JSC has yet to formulate the appropriate rules of procedure governing complaints, initiation of investigations *suo moto*, consideration of medical evidence, conducting of investigations or preliminary removal proceedings, thus ought to have resolved this matter in the petitioner's favour.

15. The petitioner prays for the following orders:

a. The appeal herein be allowed.

b. The report and recommendation of the honourable tribunal herein be set aside in its entirety, and the petition for removal thereto be dismissed.

c. Any other or further orders or reliefs that this honourable may deem fit to grant.

d. The costs of the appeal.

16. The petitioner relies on her written submission dated August 4, 2022. She challenges the jurisdiction of the tribunal and urges that the jurisdiction of the tribunal is confined to the matters contained in the petition submitted to the President by the JSC and no more. She buttresses this assertion with the decisions in *Justice Amraphael Mbogoli Msagha v Chief*

Justice of the Republic of Kenya & 7 others [2006] eKLR, *Republic vs Chief Justice of Kenya & 6 others exparte Moijo Mataiya Ole Keiwua* [2010] eKLR and *Nancy Makokha Baraza v Judicial Service Commission & 9 others* [2012] eKLR. She contends that the Tribunal went outside its mandate when it made conclusions and findings on mental illness and treatment, psychosocial support, and the petitioner's mental illness and its impact on the right to access to justice. She urges that none of these issues are contemplated under article 168(1)(a) of the *Constitution* as grounds for removal.

17. It is the petitioner's case that the applicable standard of proof is that of 'beyond reasonable doubt' for the allegation of mental incapacity the intermittent standard being 'below beyond reasonable doubt but above a balance of probability' for allegations of inability to perform the functions of the office of a judge. The petitioner submits that the burden of proof in this matter was not discharged.

18. On mental incapacity, she submits that the required standard of proof was not met. She contends that it was not established that she suffered mental incapacity. She submits that the Tribunal erroneously concluded that mental illness amounted to proof of mental incapacity. She contends that the test of 'severity of illness' was a wrong test for determining mental capacity. The petitioner submits that the Tribunal erred in law and fact by finding that the assisting counsel had proved the element of mental incapacity beyond reasonable doubt.

19. The petitioner further submits that the allegation that she was unable to perform the functions of an office of a Judge was not established. She contends that the Tribunal did not attempt to set out the functions of the office of a judge, and that the Tribunal did not single out any function that she did not or could not perform. She submits that the finding that she was unable to perform the functions of her office is inconsistent with the evidence adduced.

20. The petitioner submits that the tribunal declined to apply the principles of fair labour practices enumerated in statutes and numerous case law. She contends that the respondent erred in failing to apply the *Judiciary Human Resources Policies* and Procedure Manual on Procedures and Processes of Evaluating and Assessment of Performance of Judges because of a mistaken view that this manual did not apply to Judges. In addition, she contends that the Tribunal refused to apply the correct principles of law in holding that she did not require performance evaluation and appraisal before termination of employment. She buttresses this assertion with the decision of Lady Justice Ndolo in *Simon Gitau Gichuru v Package Insurance Brokers Ltd*. [2017] eKLR and the decision in *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR. She also contends that if an assessment had been undertaken indicating poor performance, removal from office would not be the first option without giving the Petitioner a chance to improve. She reinforces this contention with the decisions in *Gold Fields Mining South Africa (PTY) Ltd. vs CCMA*, *Jane Wairimu Machira v Mugo Waweru and Associates* [2012] eKLR, *Jane Samba Mukala v Ol Tukai Lodge Limited* [2013]

eKLR and *Maina Mwangi v Thika Coffee Mills Limited* [2014] eKLR. The petitioner also submits that the decision to remove her from office was made before any investigations to her performance was made.

21. It is the petitioner's case that she was subjected to unfair administrative actions or process before the JSC. She urges that the Tribunal erred in holding that the JSC afforded her the procedural threshold as to proportionality, rationality, reasonableness and the right to be heard before making a decision that was adverse to her.

The Respondents' case and submissions

22. The respondent relies on its grounds of objection dated June 17, 2022 and written submissions dated September 14, 2022.

23. On the mandate of the respondent under article 168 of the *Constitution*, the respondent commences its case by outlining the mandate of the JSC. It submits that the JSC is the body tasked with initiating proceedings for the removal of a Judge either acting on its own motion or on the petition of any person to the JSC pursuant to article 168(2) of the *Constitution*. It urges that article 168(4) of the *Constitution* requires the JSC to consider the petition, and if satisfied that the petition discloses a ground for removal of a Judge, sends the petition to the President. It is urged that this brings the mandate of the JSC to a close. To reinforce this assertion, the respondent cites the case of *Joseph Mbalu Mutava vs the Tribunal appointed to Investigate the conduct of Justice Joseph Mbalu Mutava, Judge of the High Court of Kenya* (2019) eKLR (Mutava case), where this court held that the JSC became *functus officio* upon presenting the petition to the President.

24. It is the respondent's further case that upon receipt of the petition, the President is required to suspend the judgeand appoint a Tribunal in line with the provisions of article 168(5) of the *Constitution*. The Tribunal in conducting its proceedings, inquires into the matter expeditiously and reports on the facts, and makes binding recommendations to the President. It is therefore submitted that the mandate of the respondent as appointed under article 168(5) of the *Constitution* is to inquire into the matter presented through the petition that was submitted to the President by the JSC, report on the facts, and to make binding recommendations to the President.

25. It is also urged that the JSC conducted its own investigations and hearings following complaints on the conduct and performance of the petitioner. In addition, on evaluation of the evidence on record, the petitioner was accorded the procedural safeguards of proportionality, rationality, reasonableness and the right to be heard in line with the threshold set out in *Associated Pictures Houses Ltd vs. Wednesbury Corporation* [1947] 2 All ER 680. On being satisfied that there was sufficient ground, the JSC petitioned the President

seeking the Petitioner's removal from office. As such, the respondent contends that JSC's actions were within the law.

26. The respondent submits that it does not sit to inquire into the proceedings, if any, conducted by the JSC, but conducts its own independent proceedings. In addition, that it does not sit on appeal or review the proceedings before the JSC.

27. On whether the respondent acted within its mandate, it is the respondent's case that to discharge its mandate, it had to determine whether the petitioner had schizophrenia, and if so, whether it had led to mental incapacity, and if the mental incapacity led to her inability to discharge her duties as a Judge. The respondent further submits that it was guided by the gazetted rules of procedure in conducting its proceedings.

28. The respondent further urges that its proceedings were independent of the JSC proceedings. It submits that the parties were allowed to present their respective cases, call and cross-examine witnesses, evaluate the tabled evidence, and make submissions. The Tribunal further asserts that it considered relevant facts, evidence, and the law in arriving at its findings and recommendations - and not extraneous factors - but within the context of the matter before it and based on the applicable law. The Tribunal contends that the petitioner failed to demonstrate that the respondent was biased or had a predetermined mind to remove her.

29. On whether the petitioner was accorded a fair hearing, the respondent submits that on October 18, 2021, it held a case conference to determine the manner in which the proceedings would be conducted. The petitioner and her counsel were in attendance. It is urged that the preliminaries such as reading out the allegations were conducted in the presence and full participation of the petitioner and her counsel. It is also pointed out that the petitioner did not oppose Kenya National Commission on Human Rights (KNCHR) participation in the proceedings as *amicus curiae* neither did she at any point complain that she was given insufficient opportunity to be heard, to cross-examine witnesses or call witnesses to support her case. It is argued that from the record, it is clear that the petitioner was accorded a fair hearing and the findings of the Tribunal were based on the facts, evidence, and applicable law as well as article 50 of the *Constitution*.

30. On whether the respondent applied the required standard and burden of proof in proceedings of a tribunal established under article 168(5) of the *Constitution*, the respondent contends that from the proceedings, there was no dispute that the petitioner suffers from schizophrenia, which fact she admitted in her testimony. The Tribunal contends that it established that the applicable standard of proof in establishing mental illness is beyond reasonable doubt, while that of inability to perform functions of Judge is below reasonable doubt but above a balance of probability. It argues that the standard of proof that the mental

illness had affected the petitioner's ability to perform her duties as Judge was satisfied on account of the evidence adduced.

31. The respondent submits that in its findings it was cognizant of the applicable international and domestic laws that recognize the rights of people with disabilities. The respondent concludes by praying for this court to dismiss the petition with costs and uphold the respondent's Report to the President.

D. Issues for Determination

32. From the pleadings, submissions by the parties, and records of appeal, the following issues have crystallized for determination by this court:

    i. Whether the Tribunal acted within its jurisdiction to make the findings contained in its report;

    ii. Whether the petitioner's mental incapacity was established; and

    iii. Whether mental incapacity rendered the petitioner unable to perform the functions of the office of a judge of the ELC.

E. Analysis

Whether the Tribunal acted within its jurisdiction to make the findings contained in its report

33. The petitioner contends that the Tribunal went outside its mandate when it made conclusions and findings on mental illness and mental incapacity, treatment, psychosocial support, and the petitioner's mental illness and its impact on the right to access justice. The respondent opposes these contentions and reiterates that it acted within its mandate.

34. The process of removal of a Judge from office is provided for under article 168 (2) to (7) of the *Constitution* and we summarize it as follows; It is initiated by the JSC on its own motion or upon a petition being filed by any person for consideration by the Commission. If satisfied that the petition discloses a ground for the removal of a Judge, the JSC shall send the petition to the President. The President thereafter suspends the Judge within fourteen days and also appoints a Tribunal to hear the Petition and make recommendations to the President for the removal or reinstatement of the Judge.

35. The *Constitution* also provides under article 168(7)(a) & (b) that the Tribunal shall be: '(a) responsible for the regulation of its proceedings, subject to any legislation contemplated in clause (10); and (b) inquire into the matter expeditiously and report on the facts and make binding recommendations to the President.'

36. This court, pursuant to article 168(8) of the *Constitution* has the jurisdiction to hear a judge who is aggrieved by the decision of the Tribunal and appeals within ten days after the Tribunal makes its recommendation. We pause here to point out as we did in the Mutava case that our jurisdiction under article 168(8) of the *Constitution* is "expansive in that we are required to re-evaluate and re-assess the evidence on record with a view of establishing whether the Tribunal misdirected itself and whether the Tribunal's conclusion should stand."

37. The grounds for removal from office are outlined in article 168 (1) and they are reproduced hereunder for clarity:

> " 168. Removal from office
>
> A judge of a superior court may be removed from office only on the grounds of—
>
> a. inability to perform the functions of office arising from mental or physical incapacity;
>
> b. a breach of a code of conduct prescribed for judges of the superior courts by an Act of Parliament;
>
> c. bankruptcy;
>
> d. incompetence; or
>
> e. gross misconduct or misbehaviour."

38. From the record, it is evident that pursuant to the petition by JSC and in exercise of the powers conferred by article 168(5) of the *Constitution* as read with section 31 of the *Judicial Service Act, 2011*, His Excellency, former President Uhuru Kenyatta, vide Gazette Notice No 8625 dated July 20, 2021 and published on August 23, 2021, suspended the Petitioner from office with immediate effect and appointed a Tribunal to inquire into the matter. The pertinent parts of this gazette notice in this issue are reproduced hereunder:

> " Whereas the petition is premised on the Constitutional provisions on removal from office of a judge of a superior court, under article 168 (1) (a) of the *Constitution* and is pursuant to the findings of the Judicial Service Commission;

> .....Now therefore and having considered the petition of the Judicial Service Commission together with its annexures, I note that:
>
> .....The Judicial Service Commission having considered various medical reports was satisfied that a ground for removal of the Honourable Justice MMG, on the reason of her inability to perform the functions of office arising from mental incapacity under article 168(1)(a) of the *Constitution* has been disclosed,
>
> .....(iii) The mandate of the tribunal shall be:
>
> To consider the Petition on removal of the Hon Lady Justice MMG from office on the reason of her inability to perform the functions of office arising from mental incapacity under article 168(1)(a)..."

39. On September 10, 2021, the Tribunal gazetted its Rules of Procedure in accordance with the *Constitution* and pursuant to section 31(5) of the *Judicial Service Act*. It held a case conference on October 18, 2021. During the case conference, the list of allegations, summary of facts, and summary of the findings by the JSC and its resolution and recommendation for her removal were read out to the petitioner and her counsel. The petitioner elected to have the proceedings in camera pursuant to rule 9(1) of the Tribunal Rules.

40. The Tribunal heard a total of 12 witnesses including the petitioner. The Tribunal in its report dedicated Chapter Four to identifying and crystallizing key medical issues that emerged in the proceedings and were relevant in the determination of the subject matter.

41. The Tribunal on page 87 of its report at paragraph 554 acknowledging the novelty of the proceedings before it stated:

> " 554. The issue of inability to perform the functions of the office of a Judge arising out of mental incapacity has not been considered by any other Tribunal. article 168(1)(a) of the *Constitution* provides that a Judge may be removed from office for "inability to perform the function of office arising from mental or physical incapacity."
>
> 555. What is required to be established before this Tribunal is not the issue of breach of code of conduct applicable to Judges, bankruptcy, incompetence, gross misconduct or misbehaviour by the Judge but alleged incapacity arising out of a mental condition. The instant Tribunal must first establish the existence of a mental illness and, secondly answer the question whether that illness has resulted in mental incapacity, leading to inability on the part of the Judge to perform the expected functions of that office.

> 556. With specific reference to Justice MMG, whereas there is an admission that she has a mental illness known as Schizophrenia, this Tribunal, however being inquisitorial, must inquire into the nature of the illness, its extent and severity as well as its impact on the performance of the Judge and whether it has resulted in her inability to perform the expected function of that office."

42. Again on page 91 paragraph 579, after interrogating the definition of mental incapacity under the *Constitution*, the *Mental Health Act (1989) of Kenya* the *Mental Capacity Act, 2005* (UK), the *Convention on the Rights of Persons with Disabilities (CRPD)*, *Black's Law Dictionary* 9th Edition, the *Online Merriam-Webster Dictionary* and persuasive case law, the Tribunal reported:

> " 579. The Tribunal in the current instance is required to establish whether Justice MMG lacks mental capacity which renders her unable to perform the functions of the Office of a Judge of the ELC as provided under article 168 1(a) of the *Constitution*."

43. The Tribunal, on page 233 paragraph 1344 stated:-

> "In the context of these proceedings, the Tribunal holds that to determine the question of whether the mental illness resulted in mental incapacity, it must determine whether the mental illness is so severe as to affect the judge's capacity to undertake the functions of office of judge."

44. Indeed, a thorough reading of the Tribunal's Report reveals an in-depth inquiry as to whether the petitioner was unable to perform her judicial functions due to mental incapacity. It is therefore evident, in doing so, that the Tribunal was exercising its mandate pursuant to article 168(1)(a) of the *Constitution*. All the conclusions and findings of the Tribunal were geared towards establishing whether she was unable to perform the functions of office due to mental incapacity. The Tribunal found that she suffered from a mental illness that led to mental incapacity and inability to undertake the functions of her office. As such, we are of the view that the Tribunal confined itself to the matters contained in the petition submitted to the President by the JSC and we are not persuaded by the petitioner that the Tribunal considered issues extraneous to its jurisdiction.

Whether mental incapacity was established

45. We now turn to determine this novel issue before us; whether the Tribunal erred in arriving at a finding of mental incapacity. The petitioner contends that it was not established that she

suffered mental incapacity. It was her case that the required standard of proof was not met and the Tribunal erroneously concluded that mental illness amounted to proof of mental incapacity. The respondent on the other hand urged that the standard of proof that the mental illness had affected the petitioner's ability to perform her duties as judge was satisfied on account of the evidence adduced.

46. It is prudent for us to venture into the legislative scheme governing mental incapacity. The *Mental Health Act*, cap 248 Laws of Kenya does not define mental incapacity. It however defines a person with mental illness in section 2 as 'a person diagnosed by a qualified mental health practitioner to be suffering from mental illness.' This Act is however silent on the resultant effect of mental capacity of persons with mental illness. We shall therefore seek a comparative perspective on the issue.

47. The United Kingdom enacted the *Mental Capacity Act* in 2005 (UK Act). This Act, in section 1 provides that the following principles are applicable when applying the statute:

> a. "A person must be assumed to have capacity unless it is established that he lacks capacity;
>
> b. A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success;
>
> c. A person is not to be treated as unable to make a decision merely because he makes an unwise decision;
>
> d. An act done, or decision made under this Act for or on behalf of a person who lacks capacity must be done or made in his best interests;
>
> e. Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action."

48. The *UK Act* further provides in sections 2(1) and (2) as follows:

> "(1) A person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

(2) It does not matter whether the impairment or disturbance is permanent or temporary."

49. The case of Heart of *England NHS Foundation Trust vs JB* [2014] EWCOP 342 expounded on the UK Act. The case concerned a 62-year-old woman (JB) diagnosed with paranoid schizophrenia during her 20's In 2013 JB developed ulcers on her feet and eventually her right foot became gangrenous. The medical advice was for an amputation which JB opposed but doctors attending her were in conflict as to whether she lacked capacity to make medical decisions. The NHS Trust applied to the court of protection for a declaration that JB lacked capacity to consent to medical treatment and that it would be in her best interest to have a through-knee amputation and for her to be sedated if she resisted. Peter Jackson, J held:

"3. There are some who, as a result of an impairment or disturbance in the functioning of the mind or brain, lack the mental capacity to decide these things for themselves. For their sake, there is a system of legal protection, now codified in the *Mental Capacity Act 2005*. This empowers the court of protection to authorise actions that would be in the best interests of the incapacitated person.

4. The Act contains a number of important general principles regarding capacity:.....

These principles reflect the self-evident seriousness of interfering with another person's freedom of action. Accordingly, interim measures aside, the power to intervene only arises after it is has been proved that the person concerned lacks capacity. We have no business to be interfering in any other circumstances. This is of particular importance to people with disadvantages or disabilities. The removal of such ability as they have to control their own lives may feel an even greater affront to them than to others who are more fortunate.

5. Furthermore, the Act provides (s 1(6)) that even where a person lacks capacity, any interference with their rights and freedom of action must be the least restrictive possible: this acknowledges that people who lack capacity still have rights and that their freedom of action is as important to them as it is to anyone else."

50. The judge concluded by finding that JB undoubtedly had a disturbance in the functioning of her mind in the form of paranoid schizophrenia (as to which she lacked insight), but that it had not been established that she thereby lacked the capacity to make a decision about

surgery for herself. On the contrary, the evidence established that she had capacity to decide whether to undergo an amputation of whatever kind.

51. Long before the enactment of the *Mental Capacity Act* in 2005, the UK Law Commission's tabled a report on *Mental Incapacity: Item 9 of the Fourth Programme of Law Reform: Mentally Incapacitated Adults* (Law Comm 231) (https://www.lawcom.gov.uk/app/uploads/2015/04/lc231.pdf).

52. The Commission was investigating the then UK law (*Mental Health Act* 1983) relating to mental incapacity after a number of outside bodies drew attention to problems and deficiencies in the existing law to the Commission's attention. On page 32 the Commission noted as follows on 'capacity':

> " (1) Capacity and Lack of Capacity
>
> Presumption of capacity and standard of proof
>
> It is presumed at common law that an adult has full legal capacity unless it is shown that he or she does not. If a question of capacity comes before a court the burden of proof will be on the person seeking to establish incapacity, and the matter will be decided according to the usual civil standard, the balance of probabilities. We proposed in Consultation Paper No 128l that the usual civil standard should continue to apply and the vast majority of our respondents agreed with this proposal. A number, however, argued that it would be helpful if the new statutory provisions were expressly to include and restate both the presumption of capacity and the relevant standard of proof.
>
> We recommend that there should be a presumption against lack of capacity and that any question whether a person lacks capacity should be decided on the balance of probabilities. (Draft Bill, clause 2(6).)"

53. At page 34:

> " A diagnostic threshold
>
> In the consultation papers we suggested that a person (other than someone unable to communicate) should not be found to lack capacity

unless he or she is first found to be suffering from "mental disorder" as defined in the *Mental Health Act*, 1983.

On page 36:

> 3. 12 We take the view that (except in cases where the person is unable to communicate) a new test of capacity should require that a person's inability to arrive at a decision should be linked to the existence of a "mental disability". The adoption of the phrase "mental disability" will distinguish this requirement from the language-of the *Mental Health Act*, 1983 and will stress the importance of a mental condition which has a disabling effect on the person's capacity. We recommend that the expression "mental disability" in the new legislation should mean any disability or disorder of the mind or brain, whether permanent or temporary, which results in an impairment or disturbance of mental functioning. (Draft Bill, clause 2(2).) ...
>
> The definition of incapacity
>
> The functional approach means that the new definition of incapacity should emphasise its decision-specific nature. A diagnostic threshold of "mental disability" should be included, except in cases of inability to communicate.
>
> We recommend that legislation should provide that a person is without capacity if at the material time he or she is:
>
> "1. unable by reason of mental disability to make a decision on the matter in question, or
>
> 2. unable to communicate a decision on that matter because he or she is unconscious or for any other reason. (Draft Bill, clause 2(1).)"

54. In the English case *Re MB (Medical Treatment)* [1997] EWCA Civ 3093, the Supreme Court of Judicature in the Court of Appeal (Civil Division) made some observations on

the capacity to decide. Though dealing with the issue of capacity to consent to or refuse treatment, its findings are persuasive. It was observed at paragraph 18:

> " Capacity to decide.
>
> .....Lord Donaldson MR reviewed the relevant authorities and said at page 112:- "Capacity to decide
>
> "The right to decide one's own fate presupposes a capacity to do so. Every adult is presumed to have that capacity, but it is a presumption which can be rebutted. This is not a question of the degree of intelligence or education of the adult concerned.
>
> However, a small minority of the population lack the necessary mental capacity due to mental illness or retarded development (see for example, Re F (Mental Patient) (Sterilisation) [1990] AC 1). This is a permanent or at least a long -term state. Others who would normally have that capacity may be deprived of it or have it reduced by reason of temporary factors, such as unconsciousness or confusion or other effects of shock, severe fatigue, pain or drugs being used in their treatment.
>
> Doctors faced with a refusal of consent have to give very careful and detailed consideration to the patient's capacity to decide at the time when the decision was made. It may not be the simple case of the patient having no capacity because, for example, at that time he had hallucinations. It may be the more difficult case of a temporarily reduced capacity at the time when his decision was made. What matters is that the doctors should consider whether at that time he had a capacity which was commensurate with the gravity of the decision which he purported to make. The more serious the decision, the greater the capacity required. If the patient had the requisite capacity, they are bound by his decision. If not, they are free to treat him in what they believe to be his best interests."

Thorpe J, in *Re C (Refusal of Medical Treatment)* [1994] 1 FLR 31, formulated the test to be applied where the issue arose as to capacity to refuse treatment. In that case a man of

68 suffering from chronic paranoid schizophrenia refused to have an amputation of his leg. Thorpe J said at page 36:-

> "I consider helpful Dr E's analysis of the decision making process into three stages: first, comprehending and retaining treatment information, secondly, believing it and, thirdly, weighing it in the balance to arrive at choice. The Law Commission has proposed a similar approach in para 2.20 of its consultation paper 129 'Mentally Handicapped Adults and Decision-Making'."

In 1995 the Law Commission recommended in *Law Com No 231 on Mental Incapacity* in paragraphs 3.2-3.23 that a person is without capacity at the material time if he is unable by reason of mental disability to make a decision for himself on the matter in question either because -

a. he is unable to understand or retain the information relevant to the decision, including information about the reasonably foreseeable consequences of deciding one way or another or failing to make the decision; or

b. he is unable to make a decision based on that information.

'Mental disability' was defined as a disability or disorder of the mind or brain, whether permanent or temporary, which results in an impairment or disturbance of mental functioning."

55. According to *Halsbury's Laws of England* at page 75 and in reference to the *Mental Capacity Act* of the United Kingdom, 'a wide range of conditions can result in loss of capacity to make decisions e.g. psychiatric illness, learning disability, dementia, brain damage, toxic confusional state.' On reliance on expert evidence, *Halsbury's Laws of England* provides that 'expert evidence does not relieve the court from the obligation of forming its own judgment.

56. In a commentary on mental capacity, Paula Case (Case P *Dangerous Liaisons? Psychiatry and Law in the Court of Protection – Expert Discourses of 'Insight' (and 'Compliance*'). Med Law Rev (2016) 24(3):360–78. 10.1093/medlaw/fww027) observes:

> "The domain of mental capacity assessment defies categorisation—it is '... not straightforwardly medical, legal, biological or psychological'. In cases where P's mental capacity is disputed, the Mental Capacity Act 2005 (MCA) applies a test that fuses clinical and legal competences. The statutory test for incapacity requires those alleging incapacity to demonstrate that P is 'unable to make a decision' because of an 'impairment or disturbance in the functioning of the mind or brain'. In cases that come before the Court of Protection (CoP), the evidence of

> an expert witness (usually a psychiatrist) that P is suffering from an 'impairment' is generally accepted, but the courts claim to be the ultimate arbiter of whether P is in fact 'unable to make a decision'."

57. UK law is therefore very clear that under the common law, every person is presumed to have mental capacity until the contrary is proved. Adults are presumed to have decision-making capacity, but this presumption can be rebutted for particular decisions if the person has some impairment or disturbance of mental functioning that renders him or her either: unable to comprehend and retain the information that is material to the decision, or; unable to use and weigh the information as part of the process of making the decision. In addition, the courts in *A Local Authority v A* [2010] EWCOP 1549, [66]; *CC v STCC* [2012] EWCOP 2136, [62] and *London Borough of Islington v QR* [2014] EWCOP 26, [84] have held that the ultimate decision on mental capacity is one for the judge to make.

58. In Australia, the State of South Australia enacted the *Guardianship and Administration Act 1993*. This Act provides for the guardianship of persons unable to look after their own health, safety or welfare or to manage their own affairs and for the management of the estates of such persons; and for other purposes. In section 3, it defines mental incapacity as:

> " The inability of a person to look after his or her own health, safety or welfare or to manage his or her own affairs, as a result of—
>
> a. any damage to, or any illness, disorder, imperfect or delayed development, impairment or deterioration of, the brain or mind; or
>
> b. any physical illness or condition that renders the person unable to communicate his or her intentions or wishes in any manner whatsoever;"

59. Still in Australia, in the State of New South Wales, the Law Society of New South Wales in a 2016 publication, "*When a Client's Mental Capacity is in Doubt: A Practical Guide for Solicitors*" observes on page 5:

> " 3. What Is "Mental Capacity"?
>
> "There is no single legal definition of mental capacity in New South Wales. Rather, the legal definition of mental capacity depends in each case on the type of decision which is being made or the type of transaction involved. This means there are a variety of legal tests

> of mental capacity. Some are contained in legislation such as the Guardianship Act 1987 (NSW) and others have been developed in common law, such as the test for testamentary capacity. The different legal tests for mental capacity mean that a client may have the mental capacity to make some decisions, such as deciding whether to make small purchases like groceries, but may lack the mental capacity to make other decisions such as deciding whether to enter into more complicated financial arrangements."

60. Back to the instant case, the record reveals that the Tribunal established that the petitioner admitted to being diagnosed with Schizophrenia in the year 2008, which diagnosis was also confirmed by both Dr Mutisya and Dr Owiti in their evidence before the Tribunal.

61. On the medical issue of schizophrenia, the Tribunal entirely relied on the evidence as presented by Consultant Psychiatrists; Dr Catherine Mutisya, Dr Edith Kamaru Kwobah, and Dr Frederick Owiti. Dr Mutisya gave evidence as a Tribunal witness having participated in the 1st and 2nd Medical Board proceedings. Dr Owiti gave evidence in the proceedings as the petitioner's witness. Upon request by the Tribunal, Dr Kwobah was nominated as an expert witness by the Kenya Psychiatric Association.

62. The Tribunal in chapter 7 of its report noted that it was not contested that the petitionerhad schizophrenia. It undertook an analysis of medical evidence to establish the question whether the Petitioner's illness led to mental incapacity. The evidence by the psychiatrists was as hereunder.

63. Dr Owiti assessed the Judge for a total of three and a half hours on 19th and November 2021 by which dates the proceedings in the Tribunal had commenced. His assessment was that the petitioner was not mentally impaired and she is smart, sharp, and bright. He testified that in his view, this illness had not derailed any part of the petitioner's cognition. Dr Owiti also testified that schizophrenia only affects performance in its chronic state because a patient experiences difficulty in thinking and reasoning. It was Dr. Owiti's testimony that during periods of relapse, the judge experienced lack of sleep and confusion and that confusion can present itself in the form of 'not talking to people or being too aggressive.' He explained that relapses may be attributed to many factors including low medication, too much medication, non-compliance in taking medication and environmental factors. He also explained that if the work environment is too stressful, it can trigger illness. He testified that the petitioner was on Clozapine, a drug that causes lethargy, tiredness, dizziness and weight gain. He also stated that Olanzapine, another antipsychotic drug that that the petitioner was taking causes sedative effects.

64. It was Dr Mutisya's further testimony that with every relapse, the function of the brain may not go back to normal and this manifests through impairment in social and occupational life. He stated that in cases of relapse, the petitioner cannot perceive what is happening around her. He also testified that the Board in reaching a conclusion that the petitioner had severe schizophrenia, also considered an indication in the report by her doctor (Dr. Owiti) that when she misses her medication, she inevitably relapses and has to be admitted into hospital. This conclusion was affirmed by Dr. Owiti. Futher, Dr. Mutisya testified that the petitioner was on four different antipsychotic drugs which included Clozapine a third line drug reserved for schizophrenia.

65. The Tribunal also took note of Dr Kwobah's testimony. Dr Kwobah testified that an assessment of fitness to work cannot be done in a one day sitting but has to be carried out over a period of time because the symptoms of schizophrenia are not necessarily manifested every day of the person's life. Dr Kwobah further testified that schizophrenia is a complex mental illness that is chronic and recurring and that it is characterized by abnormal beliefs and hallucinations. With specific reference to the side effects of clozapine, Dr Kwobah testified at page 193 of the report, that "there are some that are standard, things like sedation, you feel a bit drowsy. There are people who develop tremors. There are people who have a very heavy tongue with saliva that continues drooling. There are people that can have weight gain."

66. Dr. Pius Kigamwa, on his part, observed that the petitioner's relapses occurred when she did not take her medication leading to involuntary hospital admissions. Dr Owiti testified that involuntary admission is an indicator for review and that when this happens, ordinarily a patient has no insight and a patient is labelled dangerous to him/herself and to other people.

67. The Tribunal then considered the burden and standard of proof. It adopted the holding in the *Mutava* case, that the Assisting Counsel bears the legal burden of proof, and where the Assisting Counsel has provided sufficient evidence, the judge may be required in law to discharge the evidential burden on matters which are peculiarly within the Judge's knowledge. The Tribunal also pointed out that the subject matter before it was distinct from that considered by other Tribunals before it because the matter related to inability to perform the functions of a judge arising from mental incapacity and not misconduct. Thus, having considered the applicable law and precedent, it concluded that the standard of proof is 'beyond reasonable doubt' in establishing the alleged mental illness and with regard to the inability to perform the expected functions of the office of Judge of a superior court, the applicable standard is 'below reasonable doubt but above a balance of probability.'

68. On account of the medical evidence adduced at the hearing, the Tribunal established that the petitioner had severe schizophrenia and within a span of five (5) years, her mental illness

had deteriorated. Thus, the Tribunal concluded that the question of whether the judge had schizophrenia was proved to the required standard of beyond reasonable doubt.

69. The Tribunal also took note of the evidence adduced before it and paid particular attention to the medical evidence on the diagnosis of schizophrenia, the progression of the illness, the course of treatment, the history of the petitioner's compliance with medication, coupled with the report from her treating doctor that she invariably relapses when she does not adhere to her medical regime. The Tribunal also considered the fact that over time, in order to control the symptoms of the illness, the antipsychotic medications prescribed had increased from one drug to four, out of which, one was Clozapine, a third line drug normally reserved for treatment of schizophrenia resistant to other antipsychotic medications.

70. The Tribunal considered the medical evidence on the use of Benzhexol to manage negative side effects including drowsiness, dizziness, lethargy, tiredness, and weight gain which have an impact on one's concentration and alertness. The Tribunal further noted the increased incidences of relapse and increased instances and duration of hospitalization from the time of her appointment as judge of the ELC. The Tribunal found that the petitioner'sepisodes and hospitalizations were occasioned by her failure to adhere to medication prescribed by her personal doctor and the increased episodes led to deterioration of the illness and made it severe. The Tribunal therefore concluded that the Petitioner had severe schizophrenia which affected her mental capacity to undertake the functions of office of judge of ELC. The question that then arises before us is whether the Tribunal erred in coming to this conclusion.

71. On the basis of the medical evidence on record, we find that it is not in contest that the petitioner suffers from a mental illness, having testified herself that she was diagnosed with schizophrenia in the year 2008. On the basis of the medical evidence adduced, it is evident that the severity of the illness is that it is chronic and deteriorates with every relapse. The Tribunal established beyond reasonable doubt, that the petitioner had a mental illness, schizophrenia.

72. The petitioner also acknowledged that on most occasions she was involuntarily admitted to the hospital. In no instance did the Tribunal equate mental illness to mental incapacity. We also note that one of the effects of the illness although not manifested every day is that the patient experiences difficulty in thinking and reasoning. It is our considered analysis that based on the nature of the disease, symptoms, result of relapses, and mental impairment caused by the disease and upon our evaluation of the evidence before the Tribunal, the Tribunal's finding that the petitioner's mental illness caused mental incapacity was arrived at correctly.

73. This court, guided by prevailing social needs as well as relevant case law as developed in comparative jurisdictions, is well aware of the necessity to strike a balance, on the one hand, of the rights of an individual in a free society and, on the other hand, the need to protect the individual, employment environment, and society at large, from the adverse effects of mental illnesses and disorders. Therefore, in determining cases of mental incapacity, and bearing in mind that conclusions cannot be transposed from one case to another, we establish the following guidelines for courts to follow in matters which involve an assessment of mental incapacity:

    1. Mental incapacity includes but is not limited to a person's inability to make a decision, understand information about a decision, remember information, use the information to make a decision, or communicate a decision.

    2. Mental incapacity can result from mental illness but it does not necessarily follow that mental illness equals mental incapacity.

    3. Mental incapacity must be diagnosed by a qualified professional.

    4. A court is bound to consider whether an employer caused the establishment of an independent medical board of duly qualified members to determine whether the employee is, by reason of an infirmity of mind, incapable of discharging the functions of the relevant office.

    5. If an employee's mental illness is adversely affecting their ability to perform their duties, in some instances, the employer, following due process, may terminate the employee's contract of employment or recommend the employee's removal from office.

    6. A court must consider the diagnosis by a qualified professional, and medical expert evidence and assess whether, on a balance of probabilities, the employee's mental illness affects their work duties.

    7. Where a person is deemed to lack mental capacity, any interference with his or her fundamental rights and freedoms must be the least restrictive possible.

Whether mental incapacity rendered the Petitioner unable to perform the functions of the office of a judge of the ELC.

74. It was the petitioner's case that her inability to perform the functions of an office of a judge was not established.

75. This necessitates us to consider the functions of a judge of the ELC. Section 7 of the *Environment and Land Court Act* (ELC Act) stipulates that a person shall be qualified for appointment as Judge of the court, if the person possesses the qualifications specified under article 166(2) of the *Constitution*; and has at least ten years' experience as a distinguished academic or legal practitioner with knowledge and experience in matters relating to environment or land. Section 8 of the ELC Act provides that a judge shall hold office until he resigns, retires, or is removed from office in accordance with the *Constitution* or is transferred from the court to the High Court or other court with the status of the High Court.

76. Section 13 of the ELC Act stipulates that the court has original and appellate jurisdiction to hear and determine all disputes in accordance with article 162(2)(b) of the *Constitution* and with the provisions of the ELC Act or any other law applicable in Kenya relating to environment and land.

77. Section 13(2) of the ELC Act provides that the ELC court in exercise of its jurisdiction under article 162(2)(b) of the *Constitution*, shall have power to hear and determine disputes relating to; environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals, and other natural resources; compulsory acquisition of land; land administration and management; public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and any other dispute relating to environment and land.

78. The Tribunal considered several aspects in determining whether the mental incapacity of the judge led to the inability to discharge her duties as judge of ELC. Firstly, they contemplated whether the petitioner's performance required appraisal before a decision was made by the JSC to petition for the appointment of the Tribunal. On this aspect, the Tribunal considered the evidence of Dr. Kimalu, Director of DPOP, who disclosed that the petitioner was not meeting her set monthly targets or prescribed minimum thereof.

79. The Tribunal also considered the evidence retired Chief Justice David Maraga, Justice Okong'o, the then Presiding Judge, ELC, Justice M'Inoti (the then Director JTI), the Chief Registrar of the Judiciary (CRJ), Dr Fredrick Owiti (petitioner's witness) and Dr Catherine Mutisya, the Acting Director General for Health that revealed that the Judge would be away from work occasionally affecting her performance.

80. The Tribunal also noted that the petitioner conceded that she was aware of the required minimum set for her performance and did not require an external appraiser to inform her that she was not performing. Due to this fact, the Tribunal found that the petitioner was aware of her performance shortcomings and at the time she was stationed at the ELC Milimani, she had the opportunity to improve but was unable to do so due to her mental illness. The Tribunal also found that by the time of her transfer to JTI, it was evident that her performance was below the expected standard and there was need for intervention.

81. Our consideration is that the ELC hears and determines complex legal issues in relation to a finite resource often with numerous parties and lengthy hearings due to the voluminous documents to be scrutinised and parties to be heard. The performance reports submitted by DIPOP demonstrated that the petitioner had considerably handled several matters but had numerous judgments and rulings that were pending delivery.

82. The record also shows that the petitioner's performance as a judge in the period under review was affected by absenteeism caused by her mental illness. Her absence was not only when she was hospitalised but also when she fell ill and not admitted to hospital. Her absence from duty became acute in the Financial Years 2015/2016 and 2016/2017. According to the Presiding Judge of ELC, her absence from duty resulted in cases in her docket being re-allocated to other Judges when applications were filed under Certificates of Urgency. The cases due for hearing were adjourned to other dates when the Judge resumed duty after recovering from illness. This negatively impacted the performance of the ELC due to the burden of caseload assumed by other judges in the absence of the petitioner.

83. We also note that the Presiding Judge testified that he received numerous complaints from advocates and litigants against the petitioner in relation to her conduct in court and on delays in rendering judgments and rulings. The retired Chief Justice also testified that he had received similar numerous complaints from advocates and the public about the petitioner. In addition, the Chief Justice testified that some advocates complained of instances when the petitioner was not concentrating on the case before her and at times would ask questions totally unrelated to the case at hand. Due to no fault of her own, it is clear to us that the petitioner was not performing at her optimum mental level.

84. We are, in addition, conscious of the side effects of the use of the drugs; Clozapine, Haloperidol and Risperidone some of which include drowsiness, lethargy and tiredness. These can impact on the concentration and alertness of the petitioner. We also note from the record that the petitioner's doctor had prescribed Benzhexol to counter some of the side effects and thus by parity of reason, the petitioner was experiencing some side effects.

85. We affirm the requisite standard of proof as that applied by the Tribunal, 'below beyond reasonable doubt but higher than a balance of probabilities', in addressing the issue at hand.

The Tribunal, on the basis of the evidence by the Petitioner's immediate supervisors and scope of work in the office of a judge of the ELC as well as having identified the mental illness schizophrenia as the cause of her mental incapacity, concluded that the petitioner unable to perform the functions of the office of a judge of the ELC. We find no reason to interfere with this finding, save to add that while considering this illness and its attendant consequences on mental capacity, the Tribunal was well within its rights to consider its treatment and psychosocial support both integrally linked to the ability of the petitioner to perform her functions of office.

86. We find it necessary at this stage, based on persuasive comparative jurisdiction outlined in earlier part of this Judgment, to establish a two-stage test that will guide courts when they are faced with the issue of establishing whether mental incapacity affects the performance of a person in their work duties. Firstly, there must be proof that a person has an illness or injury that affects the manner in which the brain or mind works. Secondly, that the illness or injury affects the person to the extent that they are unable to perform their duties to the requisite standard.

87. We find it necessary to make some observations regarding procedural fairness of the Tribunal proceedings. This is because the petitioner in her grounds of appeal contends that the Tribunal failed to consider the protections afforded to the petitioner by articles 47 and 50 of the *Constitution* and the Fair *Administrative Action Act, 2015*. On the other hand, the respondent submitted that the proceedings complied with the rules of natural justice. This calls upon us to review the report of the Tribunal and its Hansard report in determining whether there was procedural fairness by the Tribunal. Before doing so, we also note that it is the petitioner's case that she was subjected to unfair administrative actions or process before the JSC. However, as we observed in the Mutava case, our jurisdiction extends only to enquiry of the proceedings of the Tribunal and not the JSC. We shall therefore turn to consider the process by the Tribunal prior to arriving at its recommendation.

88. Section 13 of the second schedule of the *Judicial Service Act* (JSA), provides that the Tribunal shall not be bound by strict rules of evidence but shall be guided by the rules of natural justice and relevancy. Part IV of the said schedule provides for the hearings and evidence before the Tribunal. It provides in section 8 that the notice and list of allegations shall be served upon a judge who is the subject of the Tribunal proceedings at least fourteen (14) days before the date of hearing. Section 9(1) provides that the hearing shall be held in private save that the judge may choose to have the hearing in public. Section 10 provides that the judge shall have the right to be present at the hearing and is also entitled to legal representation by counsel. Section 12 provided that the Tribunal may summon witnesses and the judge has the right to cross-examine the witnesses. Likewise, the judge has the right to call evidence and the Tribunal's Assisting Counsel has the right to cross-examine any witnesses called by the judge.

89. In light of these provisions and upon consideration of the Report of the Tribunal, we find that the Tribunal was compliant with the provisions of the second schedule on how a hearing by the Tribunal is conducted. We also point out that the petitioner did not also specifically fault how the Tribunal failed to comply with the rules of natural justice during the hearing. We find no basis to fault the Tribunal for failing to adhere to procedural fairness.

90. Consequently, the petition of appeal fails. Before we give our orders, we take judicial notice that mental health issues are becoming quite prevalent in the Country. In this regard, it would be prudent for the Legislature to amend the *Mental Health Act* (cap 248) guided by best practices and provide for inter alia a clear definition of mental capacity, the test for mental capacity, insight, pension for judges and other state officers who may be removed from office due to mental incapacity, and so forth. In this regard, the Legislature would also need to align the provisions of the *Pension Act* (cap 289) with any new amendments. Parliament should also consider aligning the *Employment Act* with mental health considerations and accommodations such as the provision of clauses that place an onus on employers to ensure that they create a safe working environment and that mental health issues are not caused or exacerbated by work-related stress; clauses that provide that employers have a legal duty to reasonably accommodate employees with mental illness providing the same can be done without undue hardship to the employer; what is 'reasonable' will depend on the facts of each case; to give but a few examples.

91. We also note that despite the petitioner's ailment, she exuded great determination in the functions of her office as a Judge whenever she was able to do so. We point out that the Petitioner's mental illness that led to mental incapacity in the performance of her functions is not her fault or her own doing.

92. We are also guided by the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care Adopted by General Assembly resolution 46/119 of 17 Dec 1991. It provides in principle 1 (7) as follows:

> 7. Where a court or other competent tribunal finds that a person with mental illness is unable to manage his or her own affairs, measures shall be taken, so far as is necessary and appropriate to that person's condition, to ensure the protection of his or her interest.

93. In light of the foregoing, although we have established that the petitioner is unable to perform the functions of the office of a judge which require immense alertness, endless concentration, presence, a good frame of mind to observe the demeanour of witnesses, back-breaking research, writing/typing skills, this is not to mean that she cannot undertake other duties pertaining to the legal profession. She can.

94. This petition of appeal fails because the tribunal duly established the ground for the removal of the petitioner due to inability to perform functions of the office arising from mental incapacity.

F. Orders

95. Accordingly, we make the following orders;

a. The petition of appeal dated May 19, 2022 is hereby dismissed.

b. The Tribunal's finding that the petitioner was unable to perform the functions of her office due to mental incapacity is affirmed.

c. The Tribunal's recommendation to the President for the petitioner's removal from office under article 168(1)(a) of the *Constitution* is affirmed.

d. No orders as to costs.

e. We hereby direct that the sum of Kshs. 6000/- deposited as security for costs in the appeal be refunded to the petitioner.

Independent Electoral and Boundaries Commission v Chege (Petition 23 (E026) of 2022) [2023] KESC 74 (KLR) (12 September 2023) (Judgment)

Supreme Court of Kenya

PM Mwilu, DCJ & VP, SC Wanjala, N Ndungu, I Lenaola & W Ouko, SCJJ

Neutral citation: [2023] KESC 74 (KLR)

Jurisdiction *– jurisdiction of the Independent Electoral and Boundaries Commission (IEBC) - jurisdiction to entertain disputes arising from nominations and conclusively determining them - whether the Independent Electoral and Boundaries Commission had the jurisdiction to entertain disputes arising from nominations and to conclusively determine them - what were attendant powers which the Independent Electoral and Boundaries Commission could exercise in settling electoral disputes – Constitution of Kenya, 2010, article 84, 88 and 252(1); Elections Act, (cap 7), Second Schedule, section 15(4).*

Electoral Law *- Electoral Code of Conduct – parties bound by the Electoral Code of Conduct - whether a member of a political party participating in an election but was not a candidate was bound by the Electoral Code of Conduct.*

Civil Practice and Procedure *– cross-appeals vis a vis cross-petitions - what was the distinction between a cross-appeal and a cross-petition.*

Civil Practice and Procedure *– cross-appeals – filing of cross-appeals at the Supreme Court - what was the effect of failure to file a cross-appeal without eight copies of the memorandum and record of appeal as required by rule 47 of the Supreme Court Rules - Supreme Court Rules, 2020, rule 47.*

Words and Phrases *– cross-appeal – definition of a cross-appeal - a proceeding undertaken to have a decision reconsidered by a higher authority, especially the submission of a lower court's or agency's decision to a higher court for review and possible reversal - Bryan A Garners, Black's Law Dictionary, (11th ed).*

Words and Phrases *– cross-petition – a claim asserted by a defendant against a person not a party to the action for a matter relating to the subject of the action. Also known as a cross- complaint - Bryan A Garners, Black's Law Dictionary, (11th ed).*

Brief facts

The appellant, the Independent Electoral and Boundaries Commission (IEBC), through its Electoral Code of Conduct Enforcement Committee (the Committee) instituted proceedings against the respondent following comments that she had allegedly made at a public rally in contravention of clause 6(a) and (i) of the Electoral Code of Conduct (the Code). According to the IEBC, the respondent's comments cast aspersions on the integrity of the 2017 general elections 2017, and raised credibility questions on the IEBC's capacity to deliver a free and fair elections administered in an impartial, accurate and accountable manner. Subsequently, the respondent was summoned to appear before the Committee for hearing of the complaint against her.

The respondent appeared before the Committee but raised a preliminary objection challenging *inter alia*, the jurisdiction of the Committee to hear the matter. The Committee dismissed that preliminary objection. Dissatisfied, the respondent moved the High Court challenging the proceedings, together with an application for conservatory orders staying further proceedings. IEBC argued that it was empowered to: conduct its own investigations, issue summons to persons suspected to have breached the Code, examine them and arrest those suspected of having committed election offences. The High Court allowed the respondent's petition, effectively quashing the summons and statement of breach levelled against her, as well as the proceedings conducted before the Committee. Aggrieved, the IEBC filed an appeal at the Court of Appeal which dismissed the appeal. Further aggrieved, the IEBC filed the instant appeal.

Issues

i. Whether the Independent Electoral and Boundaries Commission had the jurisdiction to entertain disputes arising from nominations and to conclusively determine them.
ii. What were attendant powers which the Independent Electoral and Boundaries Commission could exercise when settling electoral disputes?
iii. Whether a member of a political party participating in an election but was not a candidate was bound by the Electoral Code of Conduct?
iv. What was the distinction between a cross-appeal and a cross-petition?
v. What was the effect of failure to file a cross-appeal without eight copies of the memorandum and record of appeal as required by rule 47 of the Supreme Court Rules?

Held

1. The IEBC was a constitutional commission established under article 88(1) of and further provided for under article 248(2)(c) of the Constitution. Article 252 of the Constitution provided for the general functions and powers of commissions. The IEBC was clothed with the powers to conduct investigations, either on its own initiative, or pursuant to a complaint made by a member of the public.
2. The Committee was established under section 15 of the Code. Pursuant to section 15(4) to (7), the Committee was empowered to issue summons requiring attendance before it. Additionally, sections 7, 8, and 10 of the Code and rules 15(4) and 17(1) and (2) of the Rules of Procedure on Settlement Disputes conferred similar powers to the IEBC, including the imposition of sanctions. Article 252(3) of the Constitution listed the commissions and independent offices empowered to summon witnesses to include the: Kenya National Human Rights and Equality Commission; Judicial Service Commission; National Land Commission; and the Auditor-General. The object of the Code envisaged under article 88(4)(j) of the Constitution was set out in section 3 of the Second Schedule to the Elections Act.
3. Article 88(4)(e) of the Constitution was clear and without ambiguity that the IEBC was tasked exclusively with the responsibility to entertain disputes arising from nominations

and conclusively determine them. The Elections Act in its Second Schedule in section 15(4) empowered the Committee to issue summons requiring attendance before it. Further, the Rules of Procedure on Settlement Disputes conferred similar powers to the IEBC, including the imposition of sanctions. The Elections Act and the Regulations thereunder were normative derivatives of the principles embodied in articles 81 and 86 of the Constitution, and in interpreting them, a court of law could not disengage from the Constitution.

4. The Elections Act and the Code therein were deliberately designed to enable the IEBC to perform its constitutional roles notably in articles 84, 88(4)(e), 88(5), and 252(1) of the Constitution. The IEBC could conclusively determine pre-electoral disputes. Settling electoral disputes furnished the IEBC with all requisite attendant powers to wit; conducting investigations, summoning witnesses, hearing complaints and making determinations thereof. That overlapping mandate was exceptional because it was authorized by statute and therefore was not unconstitutional. As such, the overlap did not foul the principle of natural justice, *nemo judex in causa sua* (no man should be a judge in his own cause).

5. The Code was designed to enable the IEBC to perform its constitutional and statutory mandate. The IEBC was empowered to enforce the Code through the issuance of summons and conducting trial proceedings. To find otherwise would be to hamper IEBC's constitutional mandate. The Code was constitutional.

6. The IEBC had jurisdiction to summon witnesses and to conduct hearings in relation to a complaint of breach of the Code pursuant to article 88(4) e of the Constitution in complement with article 252(3) of the Constitution. Thus, a constitution must be interpreted purposively and holistically and as an integrated whole, each clause supporting the other and not destroying it. Article 84 of the Constitution mandated all candidates and political parties to comply with the Code prescribed by IEBC. It was clear from the Constitution and the provisions of the Elections Act, that it was mandatory for political parties, candidates, and members of the referendum committees who participated in an election or referendum under the Constitution to comply and subscribe to the Code.

7. The respondent was not a candidate during the electoral period. However, at the respective time, the IEBC averred in its pleadings that she was a member of the Jubilee Party and that Jubilee Party was participating in the 2022 general elections. If that was indeed the case, it would mean that she was bound by the Code. However, the IEBC did not adduce any evidence to confirm that indeed the Jubilee Party subscribed to the Code for the election period which time was running from the January 20, 2022 to the declaration of the results of the general election that were held on August 9, 2022. Jubilee Party was also not a party in the cause. Neither could it be gleaned from the record that the IEBC adduced proof that the respondent was either a member or official of the Jubilee Party. Due to the inconclusive nature of the evidence, the respondent could not be found liable in the instant case.

8. A cross-appeal was distinct from a cross-petition. While a cross-appeal was filed to institute a counter appeal in an appellate process, a cross-petition was filed to institute a counter claim before a court exercising its original jurisdiction. Besides, Part V of the Supreme Court Rules, 2020, which regulated the mode of filing appeals before the court expressly referred to a cross-appeal, as opposed to a cross-petition. The respondent ought to have filed a cross-appeal. Rule 47(1) of the of the Supreme Court Rules, 2020, provided the procedure for filing a cross -appeal.
9. From a scrutiny of the record, the cross-petition was filed without eight copies of the memorandum and record of appeal. There was no reason to depart from the Supreme Court Rules, 2020, and set procedure, as well as settled legal standards on the purpose, tenets and substance of cross-appeals. The pleadings by the respondent, ought to have been filed in adherence to rule 47 of the Supreme Court Rules. The failure to so comply rendered the cross-petition, incurably defective.

Appeal party allowed.

Orders

i. *The appeal partially succeeded to the extent that the IEBC had jurisdiction to summon, hear complaints and make findings thereon, where there was breach of the Electoral Code pursuant to article 88(4)(e) of the Constitution.*
ii. *The appeal partially succeeded to the extent that the Code was constitutionally sound.*
iii. *The appeal, to the extent that the respondent was to be found liable, was dismissed.*
iv. *The cross-petition was struck out.*
v. *Each party to bear its costs before the instant court, the Court of Appeal and the High Court.*
vi. *The court directed that, the sum of Kshs 6,000 deposited as security for costs upon lodging the appeal, be refunded to the IEBC.*

Citations

Cases

Kenya

1. *Abwao, Daniel Ongong'a v Mohamed Ali Mohamed & 2 others* Election Appeal 5 of 2018; [2018] KECA 408 (KLR) - (Explained)
2. *Anami, Silverse Lisamula v Independent Electoral & Boundaries Commission & 2 others* Petition 30 of 2018; [2019] KESC 55 (KLR) - (Explained)
3. *Chege v Independent Electoral & Boundaries Commission* Constitutional Petition E073 of 2022; [2022] KEHC 239 (KLR) - (Explained)
4. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14 ,14A,14B & 14C of 2014; [2015] KESC 15 (KLR) - (Followed)
5. *Munya, Gatirau Peter v Dickson Mwenda Kithinji, Independent Electoral And Boundaries Commission & Fredrick Njeru Kamundi County Returning Officer, Meru County* Petition 2 of 2014; [2014] KESC 49 (KLR) - (Applied)

6. *Mahamud v Mohamad & 3 others; Muktar (Interested Party)* Petition 7 of 2018; [2019] KESC 70 (KLR) - (Explained)
7. *Mumba & 7 others (Sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Munyao & 148 others (Suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* Petition 3 of 2016; [2019] KESC 83 (KLR) - (Applied)
8. *Munya v Independent Electoral and Boundaries Commission & 2 others* Petition 2B of 2014; [2014] KESC 38 (KLR) - (Applied)
9. *Popat, Alnashir & 7 others v Capital Markets Authority* Petition 29 of 2019; [2020] KESC 3 (KLR) - (Explained)
10. *Republic v Independent Electoral & Boundaries Commission & another Ex-Parte George Mbogo Ochilo Ayacko* Judicial Review 439 of 2017; [2017] KEHC 3884 (KLR) - (Explained)
11. *Samson Owimba Ojiayo v Independent Electoral and Boundaries Commission (IEBC) & Attorney General* Petition 104 of 2013; [2013] KEHC 7004 (KLR) - (Explained)
12. *Senate & 3 others v Speaker of the National Assembly & 10 others* Petition 19 (E027) of 2021; [2023] KESC 7 (KLR) - (Followed)
13. *Waity, Sammy Ndung'u v Independent Electoral & Boundaries Commission & 3 others* Election Petition 33 of 2018; [2019] KESC 54 (KLR) - (Explained)

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Statutes

Kenya

1. Capital Markets Act (cap 485A) Preamble ; section 11(3) - (Interpreted)
2. Constitution of Kenya articles 1(1); 2 (1), (4); 3 (1); 20 (1); 22; 23, 24 (1); 27; 33; 35 (1), (3); 47 (1), (2); 50; 81(e); 82; 84; 86; 88 (4), (5); 105; 163 (4) (a); 249; 252; Chapter 15 - (Interpreted)
3. Elections Act (cap 7) sections 18; 74; 107; 109 (cc), (ff); 110 (1), (6); Schedule 2, clause 7(a); 8; 15(6)- (Interpreted)
4. National Police Service Act (cap 84) section 11- (Interpreted)
5. Public Service Commission Act (cap 185) section 5 (a) - (Interpreted)
6. Rules of Procedure on Settlement of Disputes (cap 7 Sub Leg) rules 15(4); 17(1)(2) - (Interpreted)
7. Salaries and Remuneration Commission Act (cap 412D) section 13(1)(c) - (Interpreted)
8. Supreme Court Act (cap 9B) section 15(2)- (Interpreted)
9. Supreme Court Rules, 2020 (cap 9B Sub Leg) rules 38; 39; 47 (1), (2) (b); part V- (Interpreted)

10. Teachers Service Commission Act (cap 212) section 12(2)(c) - (Interpreted)

Advocates

Mr. Moses Kipkogei & Mr. Ochola for the appellant

Mr. Martin Oloo for the respondent

September 12, 2023, the Court delivered the following Judgment:

A. Introduction

1. Before this Court is the Appeal dated August 8, 2022 and filed on even date. It is brought pursuant to article163(4) (a) of the *Constitution*, section 15 (2) of the *Supreme Court Act, 2011* and rules 38 and 39 of the *Supreme Court Rules, 2020*. It challenges the decision of the Court of Appeal (Karanja, J Mohammed & Laibuta, JJA) in Civil Appeal No E255 of 2022. The impugned decision upheld the decision of the High Court (Mrima, J) in Constitutional Petition No E073 of 2022.

B. Background

i. At the High Court

2. The appellantbefore this Court, through its Electoral Code of Conduct Enforcement Committee (hereinafter the 'Committee') instituted proceedings against the Respondent by its summons issued on February 11, 2022 following comments that she had allegedly made at a public rally at Isibuye area within Vihiga County on February 10, 2022 in contravention of Clause 6(a) and (i) of the Electoral Code of Conduct (hereinafter 'the Code'). She was also served with a statement of breach detailing the alleged offensive utterances. According to the Appellant, the Respondent's comments cast aspersions on the integrity of the General Elections 2017, and raised credibility questions on the Appellant's capacity to deliver a free and fair election administered in an impartial, accurate and accountable manner as envisaged under Article 81(e) of the *Constitution*. Those remarks reproduced verbatim were as follows:

> "*Mnajua kule Central nimeskia wengine wakisema hapa tuliwaibia... Kuna ka ukweli kidogo ... Lakini ... kama tulijua kuiba ... si hata hii tutafanya nini ... Wanafikiria wao ndo wajanja...*"

3. Subsequently, the respondent was summoned to appear before the Committee on February 15, 2022, for hearing of the complaint against her. She appeared before the Committee in obedience to the summons but raised a preliminary objection challenging inter alia, the

jurisdiction of the Committee to hear the matter. By its ruling delivered on the same date, the Committee dismissed the Respondent's preliminary objection.

4. Dissatisfied with the Committee's ruling, the Respondent filed High Court Constitutional Petition No E073 of 2022, *Sabina Wanjiru Chege v Independent Electoral and Boundaries Commission* (the High Court Petition) challenging the proceedings, together with an application for conservatory orders staying further proceedings. She urged that the Committee violated her fundamental rights protected under articles 1(1), 2(1) & (4), 3(1), 20(1), 22, 23, 24(1)(a) - (e), 27, 33, 35 (1) & (3), 47(1) & (2) and 50 of the *Constitution* and sought orders summarized as follows:

    a. *Certiorari* quashing the statement of breach, summons and proceedings by the Committee against the respondent;

    b. *Certiorari* quashing the Ruling by the Committee made on February 15, 2022 dismissing the respondent's objection;

    c. A declaration that the summons and statement of breach both dated February 11, 2022, and served by the Committee, were unlawful and unconstitutional;

    d. A declaration that the failure by the Commission to publish the regulations contemplated under section109 (cc) and (ff) to prescribe regulations of the enforcement of the Second Schedule to the *Elections Act* is unlawful and unconstitutional;

    e. A declaration that clause 15(6) of the Second Schedule to the *Elections Act, 2011*, is unlawful as it was based on section 110(6) of the *Elections Act*, which section had been deleted vide section 25 (c) of Act No 36 of 2016;

    f. A declaration that the decision by the Commission to invoke article 252 of the *Constitution* to commence a hearing into alleged breaches by the respondent on violations of Clause 6(a) and 6(i) was unlawful and unconstitutional;

    g. A declaration that, by claiming that it was seized of a report and materials in respect of the complaint against the respondent, the decision by the Commission to commence investigations suo motu as stated in its ruling of February 15th, 2022 was unlawful and illegal;

    h. an order of prohibition restraining the Committee from enforcing the Second Schedule of the *Elections Act* without first prescribing the regulations contemplated under section 109(cc) and (ff) of the Act, in accordance with the *Constitution*;

    i. A conservatory order restraining the appellantfrom acting unlawfully and unconstitutionally, before drafting the regulations, conducting public

participation, and submitting the regulations to Parliament as per the law and the *Constitution*;

J A conservatory order restraining the Appellant from violating the respondent's aforementioned fundamental rights and freedoms.

5. The respondent specifically faulted the appellant's dismissal of her preliminary objection, wherein she had raised concerns, regarding its refusal to furnish her with a copy of its investigation report, and other relevant documents.

6. In opposing the Petition, the appellant asserted that it had acted lawfully. It contended that the respondent was bound by its Code of Conduct specifically by virtue of the provisions of paragraphs (1) and (2) thereof, being an elected Woman Representative of Murang'a County and a member of the Jubilee Party Parliamentary Group. Furthermore, the appellant urged that pursuant to article 252(1)(a) and (d) of the *Constitution*, as read with section 107 of the *Elections Act*, it was empowered to: conduct its own investigations, issue summons to persons suspected to have breached the Code, examine them and arrest those suspected of having committed election offences. It was also the appellant's argument that its chairperson, had rightfully designated himself as the chairperson of the Committee, as he was the only member who by law, possessed qualifications required to chair it; that the Committee considered the preliminary issues raised by the respondent before dismissing them; and that the *Rules of Procedure on Settlement of Disputes* had already been enacted vide Legal Notice No 139 of 2012 pursuant to provisions of the Elections Act.

7. In its consideration of the petition, and application for conservatory orders which were determined together, the trial court framed six questions for determination, i.e,: whether the Committee had jurisdiction to entertain violations of the Code; whether the Code was in force and if so, whether it was binding upon the respondent; whether the appellant's chairpersonerred in chairing the sittings of the Committee; whether the appellanthad formulated regulations to guide the proceedings before the Committee; whether the proceedings against the respondentbefore the Committee were in violation of her afore-stated fundamental rights; and whether the respondent was entitled to any reliefs.

8. In a Judgment delivered on April 4, 2022, the trial court (Mrima, J) allowed the respondent's Petition, effectively quashing the summons and statement of breach levelled against her, as well as the proceedings conducted before the Committee. The trial court determined that the Committee was unconstitutional, null and void *ab initio* for being in contravention of articles 2(4), 3(1), 249 and 252 of the *Constitution*. It also issued orders quashing parts of sections 7, 8, 10 and 15 of the Code under the Second Schedule of the *Elections Act*; and portions of rules 15(4) and 17(1) and (2) of the *Rules of Procedure on Settlement of Disputes*

establishing and granting powers to the Committee to summon witnesses, and conduct hearings of complaints based on allegations of breach of the Code.

9. On the issue as to whether the Committee had jurisdiction to entertain violations of the Code, it was the court's determination that article252 of the *Constitution*, prescribes that the commissions and independent offices are vested with the powers to conduct investigations and issue summons to witnesses to assist in such investigations, namely: the Kenya National Human Rights and Equality Commission, the Judicial Service Commission, the National Land Commission and the Auditor General. The trial court found that the Appellant could conduct investigations but had no jurisdiction by itself or through the Committee to summon witnesses or conduct any hearings in relation to a complaint of the breach of the Code or at all. Moreover, the court held that the Committee was an unconstitutional outfit, lacking any legality.

10. Regarding the issue as to whether the Code was in force and if so, whether it was binding upon the respondent, the trial court underscored the fact that paragraph 18 of the Code had operational timelines for its application, which in this case was from the date of publication of a notice of Election, until the swearing in of newly elected candidates. In addition, the court determined that the appellant did not adduce evidence to confirm that the respondent or the Jubilee Party to which she belonged, had subscribed to the Code for the election period that ran from January 20, 2022 to the declaration of results on August 9, 2022, hence there was no basis to hold that the Code was binding upon her.

11. Regarding the issue as to whether the appellant's chairperson erred in chairing the sittings of the Committee, the trial court held that since the Committee was a nullity *ab initio*, it did not matter whether the appellant's chairperson rightly chaired the Committee or otherwise, as he was riding on a 'constitutionally dead horse.' For this reason, the court declined to make a pronouncement on the issue stating that it had been overtaken by events, hence a determination on it would serve no purpose.

12. On whether the appellant had formulated regulations to guide the proceedings before the Committee, the trial courtdetermined that the respondent's claim that the appellant had failed to publish regulations envisaged under the Code for its enforcement was misconceived; for the reason that it was clearly demonstrated that the *Rules of Procedure* had been promulgated as subsidiary legislation as Legal Notice No 139 of 2012.

13. As regards the issues whether the proceedings against the respondent before the Committee were in violation of her fundamental rights and if she was entitled to any of the reliefs sought, the trial Court determined that article 2(4) of the *Constitution* was violated to the extent that the Committee was contrary to article 252 of the *Constitution*; article 3(1) was contravened by the appellant's failure to uphold the *Constitution*; article 27(1) was infringed for not

according the respondent equal protection and benefit of the law; article 35 was contravened as the respondent was not provided with all the necessary evidence against her to be able to properly prepare for her defence having been served with the alleged footage from the Communications Commission of Kenya by a letter dated February 15, 2022, the date that the proceedings began. In the circumstances, articles 47 and 50 of the *Constitution* were also contravened. Consequently, the Petition succeeded, and the trial court issued orders summed up as follows:

a. A declaration that the appellant's Code and Committee contravened articles2(4), 3(1), 249 and 252 of the *Constitution* and were null and void *ab initio*;

b. A declaration and orders of *certiorari* quashing the Committee's summons, statement of breach, and proceedings against the respondent;

c. Orders of *certiorari* quashing parts of sections 7, 8, 10 and 15 of the Code under the Second Schedule of the *Elections Act* as well as parts of rules 15(4) and 17(1) and (2) of the *Rules of Procedure on Settlement Disputes* establishing and granting powers to the Committee to summon witnesses and conduct hearings of complaints based on allegations of breach of the Code.

ii. At the Court of Appeal

14. Aggrieved by this judgment, the appellantmoved the Court of Appeal vide Civil Appeal No E255 of 2022. The appellate court framed the following five issues for determination:

i. Whether the respondentwas bound by the Code;

ii. Whether the Committee had jurisdiction to summon the respondent, hear the alleged complaint against her, make findings thereon and possibly impose sanctions against her;

iii. Whether the impugned parts of the Code were unconstitutional;

iv. Whether the appellantwas entitled to the reliefs sought in the appeal; and

v. What remedies were appropriate under the circumstances, including orders as to costs.

15. In a Judgment delivered on July 15, 2022, the Court of Appeal (Karanja, J Mohammed & Laibuta, JJA) dismissed the appeal for being unmeritorious, in effect affirming the High Court's decision. On the question, whether the respondent was bound by the Code, the Court of Appeal observed that the legal force of the Code is dependent on actual subscription by political parties thereto, and professed candidates for elective positions at the national and county levels as provided in section 110(1) of the *Elections Act* and paragraphs

(1) and (2) of the Code. The appellate court noted that section 18 of the Elections Act states that the Code applies in the case of a general election, from the date of publication of a notice 0f election until the swearing in of newly elected candidates. Consequently, it reasoned that the Code was not binding on the respondent on account of: hernot being a candidate in the August 9, 2022 General Elections at the time of the Committee's proceedings and at all material times thereafter, the non-joinder of her political party in the proceedings before the Committee through which evidence of subscription would have been led and the non-disclosure of her being an official of that party, if that was the case. The court posited that the fact that the respondent was not bound by the Code divested the Committee of the jurisdiction and power to enforce the same against her.

16. As regards the issue whether the Committee had jurisdiction to summon the respondent, hear the alleged complaint, make findings and impose sanctions against her, the court upheld the High Court's finding that the appellantwas not one of the specific commissions and entities under article 252(3) of the *Constitution* vested with the power to issue summons and examine witnesses.

17. On the issue whether the impugned parts of the Electoral Code were unconstitutional, the appellate court agreed with and affirmed the High Court in entirety in its decision that the Committee was unconstitutional. The appellate court stated that to the extent that the Elections Act purported to confer on the Committee substantive prosecutorial and judicial or quasi-judicial powers not availed to the appellant under the *Constitution*, the impugned provisions were inconsistent with the *Constitution* by virtue of article 2(4). Further, it was an infringement on both substantive and electoral due process and at variance with the Latin maxim *nemo judex in causa sua*, 'no one should be a judge in their own cause'. In the same vein, the court surmised that the wielding by the Commission of policing, prosecutorial and quasi-judicial powers offended the immutable principles of due process and violated the rule against bias.

18. Arising from the foregoing, the appellate court held that the appellant was not entitled to the reliefs sought and dismissed the appeal with costs to the respondent.

iii. Proceedings at the Supreme Court

19. Aggrieved by the Judgment in its entirety, the appellant has filed the instant appeal premised on five grounds reproduced below. That the Court of Appeal misapplied and misapprehended the *Constitution* by:

    i. Finding that paragraph 15 of the Second Schedule to the Elections Act is unconstitutional because it empowered the appellant to summon witnesses; and that the appellant "cannot summon any witness neither can it conduct any hearing of such a complaint" ostensibly because it is not one of the Commissions and

Independent Offices empowered by article 252(3) of the *Constitution* to issue summons to witnesses yet the provisions of article 88(4)(e) of the *Constitution* empowers the appellant to "settle all electoral disputes" and that the disputes relating to breaches of the Electoral Code of Conduct are envisaged by the said article;

ii. Finding that 'the Electoral Code of Conduct Enforcement Committee is an unconstitutional outfit and lacks any legality' whereas article 88(4)(e) of the *Constitution* empowers the appellant to settle electoral disputes;

iii. Interpreting the provisions of Article 252(3) of the *Constitution* to mean that only the Commissions and the Independent Office listed therein have the power to summon witnesses yet the *Constitution*, in the case of the Appellant, under articles 82, 84 and 88(5) empowers Parliament to enact legislation for better performance of the predicate constitutional responsibilities. In effect, the Court of Appeal has also by parity of reasoning, paved the way for annulment of the power to issue summons upon witnesses conferred on other Chapter 15 institutions which are not listed in article 252(3). This includes the National Police Service Commission, the Salaries and Remuneration Commission, the Teachers Service Commission, the Ethics and Anti- Corruption Commission amongst others;

iv. Failing to consider that article88(4)(j) and (5) of the *Constitution* mandates the appellant to prescribe a code of conduct for all parties and candidates participating in an election and further that the Second Schedule to the *Elections Act* is a derivative of articles 82(2), 84, 86(d) and 88(5) of the *Constitution*. By establishing the Electoral Code of Conduct Enforcement Committee and conferring powers upon it to issue summons to persons who are alleged to have breached the Code, Parliament was merely fulfilling the aspirations of Chapter Seven of the *Constitution*; and

v. Applying the wrong principles when construing or interpreting the *Constitution* by not construing the *Constitution* as one integrated document, each clause supporting each other and not destroying it and consequently rendering the Electoral Code of Conduct ineffectual and otiose. In effect, the Court of Appeal has allowed elections to be held in a manner which is not in consonance with the principles of the electoral system envisaged in article 81(e)(ii) which requires that an election be conducted in a free and fair manner which is

> "free from violence, intimidation, improper influence or corruption"

as well as the responsibility placed on the appellantby article86(d) which requires it to put in place

> "appropriate structures and mechanisms to eliminate electoral malpractice".

20. The appellantseeks the following reliefs, that:

    a. The instant Petition (Appeal) be allowed.

    b. That the Judgment of the Court of Appeal dated July 15, 2022 in Civil Appeal No E255 of 2022 and the Judgment of the High Court dated April 4, 2022 in Constitutional Petition No E073 of 2022 be set aside.

    c. Such consequential and appropriate reliefs, further or other order(s) as this Court may deem just and expedient in the interest of justice.

    d. That the costs of this Petition be provided for.

21. The respondenthas filed a Cross-Petition and response dated September 9, 2022 and filed on November 18, 2022 in opposition to the Appeal and associating herself with the decisions of the superior courts below. She seeks the following declarations:

    a. That an attempt to turn IEBC into a quasi-judicial body is unconstitutional. As an independent elections management body, IEBC must remain impartial, neutral, efficient and accountable for its actions and processes as envisaged in Article 81(e) of the *Constitution*;

    b. That clause 15(1-10) which turns IEBC into a quasi-judicial body is unconstitutional;

    c. That in the matter of electoral disputes as envisaged in the *Constitution*, IEBC should only be called into acting out of a trigger or complaint by a citizen or political party citing violations of the Electoral Code;

    d. That where the IEBC acts *suo motu* and investigates a breach, the only mechanism available for it is to invoke the provisions of clause 9, 10, 11 and 12 of the Electoral Code of Conduct;

    e. That clauses 7(a)(i) and (ii) and 8 of the Second Schedule to the *Elections Act* is unconstitutional in so far as it purports to confer to the Appellant powers to issue a formal warning, a fine as it determines, and the requirement for registration of the fine with the High Court. Such powers are not envisaged in the *Constitution*;

f. That the envisaged committee on enforcement of the Electoral Code is illegal and in excess of the powers conferred to the IEBC in the *Constitution*;

g. That the provisions of the Second Schedule purporting to establish a committee to enforce the Electoral Code, its composition and duties thereof are invalid and unconstitutional.

22. The Cross-Petition and Response raises the following grounds:

i. In the application of section 74 of the *Elections Act* disputes relating to nominations ought to be lodged with the appellant and determined within ten days.

ii. The appellant acted as the complainant, purportedly investigated, arrived at the decision to charge, lodged the complaint with itself and purported to sit in trial of the respondent with a view to penalizing her contrary to the *Constitution*, the law and the principles of separation of powers and natural justice;

iii. The respondent never subscribed to the Electoral Code as espoused in section 110 of the *Elections Act* for purposes of the general election in August 2022;

iv. Clause 7(a)(i) and (ii) and 8 of the Second Schedule to the *Elections Act* is unconstitutional in so far as it purports to confer to the appellant powers to issue a formal warning, a fine as it determines, and the requirement for registration of the fine with the High Court. the *Constitution* mandates the appellant to develop the Electoral Code and not to enforce it;

v. The provisions of Clause 15(1) – (10) of the Electoral Code in purporting to set up the Enforcement Committee and its purported composition and duties are unconstitutional, illegal and a violation of the principles of separation of powers;

vi. The IEBC is not clothed with constitutional powers to summon any witness neither can it conduct any hearing of such a complaint on account of article 253(3) of the *Constitution*;

vii. The provisions of article 88(4)(e) of the *Constitution* only empowers the appellant in a limited way, to settle electoral disputes arising from or relating to party primary or party nominations. It excludes election Petitions and disputes after declaration of election results;

viii. Article 88(4)(j) confines the role of the appellantto the development of a code of conduct for candidates and parties contesting in an election. It makes no reference nor does it vest in the IEBC, the power to enforce and punish any breaches or violation of the Code of Conduct;

ix. Article 88(4)(k) confines the appellant to 'monitoring of compliance with the legislation required under article 82(1)(b) relating to nomination of candidates by political parties';

x. On the general functions of the Commission and holders of independent offices, article 252(1) restricts these commissions to conduct investigations on their own motion or on a complaint made by a member of the public and nothing more;

xi. The second schedule to the Elections Act is not a derivative of articles 88(2), 84, 86(d) and 88(5) of the *Constitution*;

xii. The Court of Appeal acted appropriately in declaring certain provisions of the Elections Act unconstitutional to the extent that they seek to make IEBC a complainant, an adjudicator over its own cause, an investigator and prosecutor in its own cause, besides sitting in trial over the very allegations it makes and investigates.

23. The appellant, in its Rejoinder to Response to Appeal and Reply to Cross- Petition dated and filed on September 28, 2022, posits that the Cross-Petition is fatally defective as neither the *Supreme Court Act* nor the *Supreme Court Rules* contemplate the filing of a Cross-Petition to a Petition of Appeal and that having been lodged without a record of appeal as contemplated under rule 47(2) (b) of the *Supreme Court Rules*, the Cross-Petition is incompetent. It implores the Court to strike out the Cross-Petition and its supporting affidavit with costs. Nonetheless, the appellant reiterates its averments in the Petition of Appeal in its substantive response thereto.

The Parties' Respective Submissions

i. The appellant's case

24. The appellant's written submissions are dated October 11, 2022 and filed on November 4, 2022. The appellant raises a Preliminary Objection challenging the competency of the Cross-Petition. The appellant faults the respondent for filing the Cross-Petition without a record of appeal, in contravention of rule 47(2)(b) of the *Supreme Court Rules* therefore warranting its striking out.

25. With respect to its substantive arguments, the appellant submits that the Petition of Appeal meets the requisite jurisdictional threshold contemplated under article 163 (4) (a) of the *Constitution*, as it involves the interpretation or application of the *Constitution*. It submits that the appeal invites this court to issue the correct interpretation of articles 82(2), 84, 86(d), 88(4)(e) and 88(5) as read together with article 252(1) as to whether the appellant has authority to summon witnesses; that there is a nexus between the content of the appeal and

issues adjudicated in the superior courts below, and that the appeal alleges misapplication of article 259(1) of the *Constitution* in arriving at the impugned decision.

26. As regards jurisdiction to summon witnesses or conduct any hearing in relation to a complaint on breach of the Code, the appellant submits that pursuant to article 252(1) (a) of the *Constitution*, each independent commission is empowered to conduct investigations on its own initiative or on a complaint made by a member of the public. The appellant posits that article 88(4) (e) empowers it to settle electoral disputes relating to nominations while paragraph 15(4) of the Code empowers it to issue summons. It relies on the decisions of Musyoka, J in *Republic v Independent Electoral and Boundaries Commission & another ex parte George Mbogo Ochilo Ayako* [2017] eKLR; and the Court of Appeal in *Ong'ong'a Abwao v Mohamed Ali Mohamed & 2 others* [2018] eKLR and *Samson Owimba Ojiayo v Independent Electoral and Boundaries Commission and another* [2013] eKLR which appreciated the imperative effect of the Second Schedule to the *Elections Act* in facilitating the appellant with the discretion to assess situations and intervene when necessary.

27. In response to the respondent's argument that the power to settle electoral disputes is limited to nomination disputes and disputes relating to registration of candidates, the appellantsubmits that electoral disputes transcend the entire electoral process from voter education to registration of observers. Any dispute emanating therefrom is an electoral issue that the appellantcan consider pursuant to article 88(4)(e), which is the basis upon which the appellant was empowered to enforce the Code.

28. The appellant furthermore asserts that by parity of reasoning, the position adopted by the trial and the appellate court would render other constitutional commissions established under article 248 ineffectual, stripping them of power to summon witnesses anchored in enabling statutory provisions such as: section 11 of the *National Police Service Act, 2011*; section 48 of the *Parliamentary Service Act*, section 5(a) of the *Public Service Commission Act*; section 13(1)(c) of the *Salaries and Remuneration Commission Act* and section 12(2)(c) of the *Teachers Service Commission Act*. It deemed the High Court and Court of Appeal's holding an affront to its independence from external interference while discharging its mandate, citing the case of *Communication Commission of Kenya & 5 others v Royal Media Services & 5 others*, SC Petition No 14 of 2014 [2014] eKLR to buttress its point, that independence is a necessary shield against influence of interference from external forces.

29. It is the appellant's case that the Code was binding upon the respondent in accordance with section 110 of the *Elections Act* as read with paragraph 1(2) of the Code, because at all material times, she was a member of Jubilee Party and a Member of Parliament by virtue of having participated in an election. According to the appellant, the Code applied to the respondent during the material time. It did not matter, that she had not registered as a candidate to participate in the 2022 elections, submits the appellant. The appellant further

stresses that the Code was in force when the Respondent made the offensive remarks, from the date of publication of the Notice of Elections on February 12, 2022 hence it was binding upon her.

30. Moreover, the appellant submits that the superior courts' faulty interpretation of the *Constitution* rendered the Code ineffectual and otiose. While citing jurisprudence on the purposive, liberal interpretation of the *Constitution*, the appellant asserts that there is a good reason for its application of the Code under article 84 of the *Constitution*. It posits that government officials and members of political parties in similar standing as the respondent, wield immense influence in the manner in which elections are conducted. If left uncontrolled, argues the appellant, such officials can completely derail the electoral process by inciting members of the public to violence.

31. In conclusion, the appellantsubmits that the kind of remedies it imposes on parties who transgress the Code, cannot be issued through a judicial process. For instance, denial of an opportunity to advertise using the national broadcaster, or barring a candidate from using specified venues for campaigns, are measures which can only be issued and enforced by the appellantas the manager of electoral processes. Further, it urges, the proceedings before the Commission are sui generis in nature, hence not amenable to conventional adversarial processes.

ii. The respondent's case

32. The respondent's submissions in opposition to the appeal and in support of its Cross-Petition are dated November 9, 2022 and filed on November 18, 2022.

On the issue as to whether the appellantlacks jurisdiction to either summon witnesses or conduct hearings in relation to a breach of the Code, the respondentsubmits that the Appellant has powers to initiate investigations on its own motion, as long as it does not proceed to frame charges, and purport to usurp judicial powers to conduct a trial. It is further submitted that the appellant, contrary to its assertion, is not clothed with the authority it purports to have under article252(1) of the *Constitution*. Moreover, it is the respondent's submission that article 88(4) (e) of the *Constitution*, only vests upon the appellant the power to settle electoral disputes arising from party nominations. The said provision does not confer upon the appellant any power to conduct trials in relation to breaches of the Code. The respondent urges that the appellant's functions and powers under article 88(4) of the *Constitution* are in respect of conducting or supervising referenda and elections which powers at any rate, ought to be exercised in accordance with the *Constitution* as per article 88 (5) thereof. To this end, she associates herself with the pronouncements of the superior courts to the effect that, the provisions of paragraph 15(4) of the Code offend the letter and spirit of the *Constitution* and are therefore null and void.

33. On the issue as to whether the Electoral Code of conduct is binding upon the respondent, it is urged that the Appellant did not lead any evidence demonstrating that she had subscribed to the Code by the time she was charged. Furthermore, it is contended that the gazettement of the electoral period referred to by the appellantconcerned the 2022 elections. The respondentemphasizes the fact that she did not offer herself for elective office and could not have subscribed to the Code in 2022 as she was not a candidate.

34. The respondentthen urges her Cross-Petition which raises issues on the constitutionality and legality of the appellant's assertions before the Court, as well as provisions of the *Elections Act* that donate powers to the appellant which are not envisioned or directly provided for by the *Constitution*. She reiterates that sections 74 and 110 of the *Elections Act* were inapplicable to her as she had not subscribed to the Code and that section 7(a) (i) and (ii) of the Second Schedule to the *Elections Act* offends article 50 of the *Constitution* in so far as it confers upon the appellant powers to issue a formal warning, or a fine without due process.

D. Issues for Determination

35. Having carefully considered the substance of the appeal, and the respective cases of the parties, as illuminated by their written and oral submissions, it is our opinion that there are four issues, the determination of which, shall dispose of the appeal. These are:

    i. Whether the Appellant had jurisdiction to summon the Respondent, hear the alleged complaint against her and make findings thereon;

    ii. Whether the impugned parts of the Code are unconstitutional;

    iii. Whether the Electoral Code of Conduct was binding upon the Respondent;

    iv. Whether the Respondent's Cross-Petition herein is incompetent.

E. Analysis

i. Whether the Appellant had jurisdiction to summon the Respondent, hear the alleged complaint against her and make findings thereon.

36. It was the appellant's argument that it is empowered under article252(1)(a) of the *Constitution*, to conduct investigations on its own initiative or upon a complaint made by a member of the public. Moreover, the appellant argued that according to article 88(4)(e) of the *Constitution*, it is empowered to settle electoral disputes relating to or deriving from nominations but excluding electoral Petitions.

In the same mould, the appellantsubmitted that paragraph 15(4) of the Code, being a normative derivative of the *Constitution*, empowers it to summon a suspected or implicated offender of the Code. The appellant took issue with the superior courts' declaration to the effect that it lacked jurisdiction. It contended that such a decision "stripping it of jurisdiction" would severely hamper the enforcement mandate of constitutional commissions, not listed in article 252 (3) of the *Constitution*.

37. On the other hand, the respondenturged that the appellantlacks the powers or jurisdiction to issue summons as it is not one of the Commissions listed under article252 (3) of the *Constitution*. Consequently, the respondent submitted that the provisions of paragraph 15(4) of the Code are an aberration as they offend the letter and spirit of the *Constitution*, specifically, articles 252 (3) and 88 (5) which circumscribe the powers to issue summons.

38. It is not in doubt that the appellantis a constitutional Commission established under article88 (1) and further provided for under article248 (2) (c) of the *Constitution*. Under article 252, the general functions and powers of Commissions are set out as follows:

> 252. General functions and powers
>
> 1. Each commission, and each holder of an independent office—
>
> a. may conduct investigations on its own initiative or on a complaint made by a member of the public;
>
> b. has the powers necessary for conciliation, mediation and negotiation;
>
> c. shall recruit its own staff; and
>
> d. may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by this Constitution.

39. Guided by the above provisions, it is clear that the appellantis clothed with the powers to conduct investigations, either on its own initiative, or pursuant to a complaint made by a member of the public. The question that then arises is whether such powers entail the issuance of summons requiring appearance before the appellantor committees established under it as well as conducting hearings in the enforcement of the Code.

40. It is instructive to take note of section15 of the Electoral Code under which the appellant's Enforcement Committee is established. Pursuant to section15 (4) to (7) thereof, the Committee is empowered to issue summons requiring attendance before it in the following terms;

15 ...

4. The Committee shall issue summons to the person, political party or referendum committee against whom a complaint has been received as having infringed the provisions of this Code and any other person who the Commission has reason to believe to have infringed the provisions of this Code to attend its meetings. The meetings will be convened at any place which the Committee may deem fit.

5. In its proceedings, the Committee may examine the person summoned and may allow a person to have legal representation.

6. The committee shall not be bound by the provisions of the Criminal Procedure Code or the *Evidence Act* in its proceedings.

7. Every person who is summoned by the Committee and who attends the meetings of the Committee shall be accorded the right to be heard.

41. Additionally, sections 7, 8, and 10 of the Code and rules 15(4) and 17 (1) and (2) of the *Rules of Procedure on Settlement Disputes* confer similar powers to the appellant, including the imposition of sanctions.

42. Article 252 (3) of the *Constitution* lists the Commissions and independent offices empowered to summon witnesses to include the; Kenya National Human Rights and Equality Commission; Judicial Service Commission; National Land Commission; and the Auditor-General.

43. Both the Court of Appeal and High Court were of the view that article 252(3) of the *Constitution*, limits the power of constitutional Commissions and independent offices to issue summons to the above listed four. The two superior Courts concluded that since the appellant is not one of the four listed therein, any law or statutory instrument that bestows upon it the power to summon witnesses, runs contrary to the *Constitution*, and is therefore null and void to the extent of its inconsistency.

44. It was the appellant's further contention that pursuant to article 88(4)(e) of the *Constitution*, it is empowered to settle electoral disputes relating to or deriving from nominations, but excluding electoral Petitions. It further urged that this provision clothes it with jurisdiction to enforce the Code.

45. The respondent submitted that the appellant had powers, to initiate investigations on its own motion, as long as it would not proceed to frame charges and transform itself into a trial tribunal. Moreover, she urged that article 88(4) (e) of the *Constitution*, only vests upon the

appellant, the power to settle electoral disputes arising from party nominations, but not the power to conduct trials arising from breaches of the Code.

46. The respondent further urged that the appellant's functions and powers, must be exercised in accordance with the *Constitution* as per the edict in article 88 (5) thereof. It was her case that article 86 (d) of the *Constitution*, requires the appellant to only ensure that appropriate structures and mechanisms to eliminate electoral malpractice are put in place.

47. In view of the foregoing submissions, we now turn to the task of determining whether, the appellantacted in excess of its constitutional mandate, by summoning, hearing the complaint against the respondent, and making a finding thereon. The following constitutional provisions of articles 84 and 88 are instructive in this regard:

> " 84. Candidates for election and political parties to comply with code of conduct.
>
> In every election, all candidates and all political parties shall comply with the code of conduct prescribed by the Independent Electoral and Boundaries Commission.
>
> ...
>
> 88 ...
>
> (4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament, and in particular, for –
>
> ...
>
> e. the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election Petitions and disputes subsequent to the declaration of election results; ...
>
> (j) the development of a code of conduct for candidates and parties contesting elections"

48. The object of the Code envisaged under article 88(4) (j) above, is set out in section 3 of the Second Schedule to the *Elections Act* as follows:

> The object of this Code is to promote conditions conducive to the conduct of free and fair elections and a climate of tolerance in which political activity may take place without fear, coercion, intimidation or reprisals.

49. This Court has on numerous occasions interpreted article 88 (4) (e) of the *Constitution* to mean that IEBC is empowered by the *Constitution* to resolve pre- election disputes including nominations. Our pronouncements have largely been in the context of whether, an election court has jurisdiction to determine pre-election disputes, notwithstanding the provisions of article 88(4)(e) of the *Constitution*. However, they are quite instructive in the instant case as they shed light on the powers of the IEBC in summoning witnesses as well as conducting hearings in relation to complaints on breach of the Electoral Code.

50. In *Silverse Lisamula Anami v. Independent Electoral and Boundaries Commission & 2 others*, SC Petition No 30 of 2018 [2019] eKLR where one of the issues for determination was "whether the election Court has jurisdiction to adjudicate over issues relating to the pre-election period, such as nomination and qualification of candidates, in view of article 88(4) (e) of the *Constitution*," this court at paragraph 54 rendered itself thus:

> " 54. How do we resolve the apparent conflicting positions taken by the Court of Appeal and election courts? Our view is that articles88(4) (e) and 105(1) and (3) must be read holistically and that whereas the IEBC and PPDT are entitled, nay, empowered by the *Constitution* and Statute to resolve pre-election disputes including nominations, there are instances where the election Court in determining whether an election is valid, may look to issues arising during the pre-election period only to the extent that they have previously not been conclusively determined, on merits, by the IEBC, PPDT or the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165(3) and (6) of the *Constitution*. Where a matter or an issue has been so determined, then the election Court cannot assume jurisdiction as if it were an appellate entity since that jurisdiction is not conferred on it by the *Constitution*."

51. In *Sammy Ndung'u Waity v. Independent Electoral & Boundaries Commission & 3 Others*, SC Petition No 33 of 2018, [2019] eKLR, one of the issues for determination was, "whether an Election Court has jurisdiction to determine pre-election disputes, including those

relating to the nomination of candidates." We emphasized the fact that the *Constitution* has to be interpreted holistically and purposively with regards to article 88 (4) (e) of the *Constitution*. We noted that article 88 (4)(e) of the *Constitution* constitutes part of the normative architecture for the resolution of pre-election disputes. We stated that this framework for dispute resolution came into existence after the promulgation of the *2010 Constitution*. Prior to this, the jurisdiction to determine pre-election disputes, lay with the High Court sitting as an Election Court. At paragraphs 59 and 60 the Court held:

> "(59) It is clear to us that the *Constitution of 2010* and the resultant electoral law, deliberately set out, to delimit the institutional competencies for the settlement of all electoral disputes. In this regard, it donated jurisdictional authority to different judicial and quasi- judicial organs.....
>
> 60. Coming to pre-election disputes, including disputes relating to, or arising from nominations, the *Constitution* is clear. These are to be resolved by the IEBC (through its Committee on Dispute Resolution as provided for by Section 12 of the enabling Act) or where applicable, by the Political Parties Disputes Tribunal. Where the *Constitution* or any other law establishes an organ, with a clear mandate for the resolution of a given genre of disputes, no other body can lawfully usurp such power, nor can it append such organ from the pedestal of execution of its mandate. To hold otherwise, would be to render the constitutional provision inoperable, a territory into which no judicial tribunal, however daring, would dare to fly."

52. To ensure that article 88 (4) (e) of the *Constitution* was not rendered inoperable, while at the same time preserving the efficacy and functionality of an election Court under article 105 of the *Constitution*, the Court developed the following principles at paragraph 68:

> "(i) all pre-election disputes, including those relating to or arising from nominations, should be brought for resolution to the IEBC or PPDT, as the case may be, in the first instance;
>
> ii. where a pre-election dispute has been conclusively resolved by the IEBC, PPDT, or the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under article165 (3) and (6) of the *Constitution*, such dispute shall not be a ground in a Petition to the election court;

iii. where the IEBC or PPDT has resolved a pre-election dispute, any aggrieved party may appeal the decision to the High Court sitting as a judicial review court, or in exercise of its supervisory jurisdiction under article 165 (3) and (6) of the *Constitution*; the High Court shall hear and determine the dispute before the elections, and in accordance with the Constitutional timelines;

iv. where a person knew or ought to have known of the facts forming the basis of a pre-election dispute, and chooses through any action or omission, not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a Petition to the election Court;

v. the action or inaction in (iv) above shall not prevent a person from presenting the dispute for resolution to the High Court, sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under article 165 (3) and (6) of the *Constitution*, even after the determination of an election Petition;

vi. in determining the validity of an election under article 105 of the *Constitution*, or section 75 (1) of the *Elections Act,* an election court may look into a pre-election dispute if it determines that such dispute goes to the root of the election, and that the petitioner was not aware, or could not have been aware of the facts forming the basis of that dispute before the election."

53. In *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others; Ahmed Ali Muktar (Interested Party)* Petition No 7 of 2018 [2019] eKLR, the court restated the relevance of article 88 (4)(e) of the *Constitution* in the clearly established constitutional mechanisms for resolving pre-election disputes. The court observed at paragraph 72:

> "72 What are we to make of a situation where a contestant ignores the *Constitution*, drags an entire County through a gruelling election, only to turn around and intone that his rival was not qualified to vie in the first place? Is an election court to assume jurisdiction over such a dispute in such circumstances? We think not. If we were to allow contestants, or any other person, to consciously incubate a dispute, bypassing the *Constitution*, and originating it at an election court, that would surely render article 88 (4) (e) of the *Constitution* inoperable. For if one can originate any dispute at an election court, why bother with the IEBC? The IEBC, in relation to election disputes, would surely become otiose!

> It is in this regard that we developed principle number (iv) hereinabove, which states that:
>
> "Where a person knew or ought to have known of the facts forming the basis of a pre-election dispute, and chooses through any action or omission, not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a Petition to the election court."

54. It is therefore evident that article 88(4)(e) of the *Constitution* is clear and without ambiguity that the IEBC is tasked exclusively with the responsibility to entertain disputes arising from nominations and conclusively determine them.

55. We are also alive to our decision in *Alnashir Popat & 7 others v Capital Markets Authority*, Pet. No 29 of 2019 [2020] eKLR, where we were grappling with the propriety of the dual statutory mandate granted to the Respondent therein as the investigator and enforcer of capital markets infractions in Kenya. We appreciated the social and historical background leading to the enactment of the *Capital Markets Act* (*CMA Act*). We noted that to meet its objectives, the *CMA Act* 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. We observed in paragraphs 50 &51 that:

> " [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." (emphasis ours)

We agreed with the respondentin that matter, at paragraphs 54 & 55 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 section11(3) (cc) & (h) of the *CMA Act* is not unconstitutional. The overlapping mandate does not per se render the Section unconstitutional."

56. We note that the *Elections Act* in its Second Schedule in section 15 (4) as reproduced in earlier parts of this Judgment empowers the appellant's Enforcement Committee to issue summons requiring attendance before it. Further, the Rules of Procedure on Settlement Disputes confer similar powers to the appellant, including the imposition of sanctions. This Court has been categorical that the *Elections Act* and the *Regulations* thereunder are normative derivatives of the principles embodied in articles 81 and 86 of the *Constitution*, and that in interpreting them, a Court of law cannot disengage from the *Constitution*. (*Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, Application No 5 of 2014 [2014] eKLR at para 77; *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, Petition No 2B of 2014 [2014] eKLR at paras 234, 243 and 244).

57. Thus, we are of the view that the *Elections Act* and the Electoral Code of Conduct therein are deliberately designed to enable the IEBC to perform its constitutional roles notably in articles 84, 88 (4) (e), 88 (5), and 252 (1) of the *Constitution*.

58. It, therefore, goes without saying that this courtconsistently emphasizes the importance of adhering to the mechanisms and procedures of dispute resolutions provided by the law. As earlier illustrated, we have been quite consistent that the IEBC can conclusively determine pre-electoral disputes. Settling electoral disputes furnishes the IEBC with all requisite attendant powers to wit; conducting investigations, summoning witnesses, hearing complaints and making determinations thereof. This overlapping mandate is exceptional

because it is authorized by statute and therefore is not unconstitutional. As such, the overlap does not foul the principle of natural justice, *nemo judex in causa sua* (no man should be a judge in his own cause).

59. Noting that the Electoral Code of Conduct is designed to enable the IEBC to perform its constitutional and statutory mandate, the appellantis empowered to enforce the Code of Conduct through the issuance of summons and conducting trial proceedings. To find otherwise would be to hamper IEBC's constitutional mandate. This finding also answers the second issue for determination, that indeed, the Electoral Code of Conduct is constitutional.

60. We, therefore, cannot agree with the superior courts below that IEBC acted in excess of jurisdiction, by issuing summons to and conducting hearings, pursuant to which it meted sanctions against the respondent. How else could IEBC conclusively resolve this matter? We are persuaded by the appellantthat it has jurisdiction to summon witnesses and to conduct hearings in relation to a complaint of breach of the Electoral Code pursuant to article 88 (4) e of the *Constitution* in complement with article 252 (3) of the *Constitution*. Thus, we remain faithful to the edict that a Constitution must be interpreted purposively and holistically and as an integrated whole, each clause supporting the other and not destroying it.

iii. Whether the Electoral Code of Conduct was binding upon the Respondent.

61. The appellant contends that the Code was binding upon the respondent in accordance with section 110 of the *Elections Act* as read with paragraph 1(2) of the Code. This is denied by the respondent who urges that she did not offer herself for elective office and could not have subscribed to the Code in 2022 as she was not a candidate.

62. The Elections Act in instructive on this issue. Section 110 provides:

> " 110. Electoral code of conduct
>
> 1. Every political party and every person who participates in an election or referendum under the *Constitution* and this Act shall subscribe to and observe the Electoral Code of Conduct set out in the Second Schedule in such manner as the Commission may, subject to paragraph 6 of that Schedule, determine.
>
> 2. A political party that is eligible to nominate candidates under the *Constitution*, this Act or any other written law shall not be eligible to contest in any election unless the political party and the candidate have subscribed

to the Electoral Code of Conduct referred to in subsection (1).

63. The second Schedule of the *Elections Act* in sections 1 & 2 provide:

1. This Code shall be subscribed to by—

   a. every political party participating in the election of a president, a member of Parliament, a county governor, a member of a county assembly;

   b. every candidate; and

   c. every leader, chief agent, agent or official of a referendum committee.

2. This Code shall, in so far as it is applicable, bind the Government and every political party, leader, office bearer, agent and member of a political party or a person who supports a political party, and every candidate nominated under the electoral laws for any election.

64. Article 84 of the *Constitution* mandates all candidates and political parties to comply with the Code of Conduct prescribed by IEBC. It is clear from the *Constitution* and the above provisions of the Elections Act, that it is mandatory for political parties, candidates, and members of the referendum committees who participate in an election or referendum under the *Constitution* to comply and subscribe to the Electoral Code.

65. Now was this Code binding on the respondent? She made the alleged utterances on February 10, 2022. We note that she was not a candidate during that electoral period. However, at the respective time, the appellantavers in its pleadings that she was a member of the Jubilee Party and that Jubilee Party was participating in the 2022 general elections. If this was indeed the case, it would mean that she was bound by the Electoral Code. However, we note that the Appellant other than stating this ground in its pleadings, they did not adduce any evidence to confirm that indeed the Jubilee Party subscribed to the Electoral Code for the election period which time was running from the January 20, 2022 to the declaration of the results of the general election that were held on August 9, 2022. We note that Jubilee party was also not a party in this cause. Neither can we glean from the record that the appellantadduced proof that respondentwas either a member or official of the Jubilee Party. Due to the inconclusive nature of the evidence on this, we find that the respondentcannot be found liable in the instant case.

iii. Whether the Respondent's Cross-Petition is Incompetent

66. The respondent filed a 'Cross-Petition' dated September 9, 2022, premised on eleven (11) grounds and seeking seven (7) reliefs. In objection, the appellant challenged the competency

of the Cross-Petition on the grounds that the same was fatally defective to the extent that neither the Supreme Court Act nor the *Supreme Court Rules* contemplate the filing of a Cross-Petition to an appeal. It was further contended that the Cross-Petition lodged without a record of appeal as required under rule 47(2)(b) of the *Supreme Court Rules 2020*, was incompetent. Notably, the respondent did not controvert the appellant's position.

67. The *Black's Law Dictionary*, (11th Ed) Bryan A Garners defines a Cross- Appeal as:

> 'A proceeding undertaken to have a decision reconsidered by a higher authority, especially the submission of a lower court's or agency's decision to a higher court for review and possible reversal.'

68. We adopted this definition in *Albert Chaurembo Mumba & 7 others (suing on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v. Maurice Munyao & 148 others (suing on their own behalf and on behalf of the plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)*, SC Petition No 3 of 2016; [2019] eKLR (Albert Chaurembo) as follows:

> "(163) By its definition, a cross appeal is an appeal by an appellee, usually heard at the same time as the Appellant's appeal (see *Black's Law Dictionary* 9th edition p 113). A cross-appeal is also defined as a request filed by an appellee (respondent) requesting that a higher court review a decision made by a lower court...." [emphasis added].

69. In contrast, the *Black's Law Dictionary* [*supra*] defines a Cross-Petition as,

> 'a claim asserted by a defendant against a person not a party to the action for a matter relating to the subject of the action. Also known as a cross- complaint.'

Moreover, this court has expressly distinguished between a Cross-Petition and a Cross-Appeal. In *Communications Commission of Kenya & 3 others v Royal Media Services Limited & 7 others*, SC Petition No 14 of 2014; [2014] eKLR, we stated:

> "[31] From the above definitions, there is a difference between a cross-appeal and a cross-Petition. A cross- appeal is an action by a respondent, who intends to counter an appellant's cause in an appeal, with the view of obtaining certain relief(s) from the Court. A cross-Petition on the other hand, is an action by a defendant in first-instance claims, intending to counter the claim of a Petitioner with the view of obtaining certain remedies."

70. Guided by the foregoing, we restate our finding that a Cross- Appeal is distinct from a Cross-Petition. While a Cross-Appeal is filed to institute a counter appeal in an appellate process, a Cross-Petition is filed to institute a counter claim before a court exercising its original jurisdiction. Besides, Part V of the *Supreme Court Rules 2020*, which regulates the mode of filing appeals before this Court expressly refers to a Cross-Appeal, as opposed to a Cross-Petition. In the appeal before us, the respondent ought to have filed a Cross-Appeal. Rule 47 (1) thereof provides the procedure for filing a Cross -Appeal as follows:

> " A respondent who intends to cross-appeal shall specify the grounds of contention and the nature of the relief which the respondent seeks from the court" [emphasis supplied].

71. The second limb of the appellant's objection was that the Cross-Petition was not accompanied by a record of appeal. We note that rule 47 (2) (a) and (b) provides:

> " 47 (1) ....
>
> 2. The respondent shall-
>
> a. provide contact details including the names, postal address, telephone number and email address of any persons intended to be served with the notice; and
>
> b. lodge eight copies of the memorandum of appeal and record of appeal in the registry within thirty days of service upon the Respondent, or not less than thirty days before the hearing of the appeal, whichever is the later. [emphasis added]

72. Similarly, while extending time to file a Cross-Appeal, this court restated with approval this mandatory requirement in *Senate & 3 others v Speaker of the National Assembly & 10 others*, (Petition 19 (E027) of 2021); [2023] KESC 7 (KLR) and cautioned the applicant thus:

> "In the circumstances, we are minded to consider granting the application, while reminding the 1st and 2nd respondent that, by rule 47(2)(b) aforesaid, they are required to lodge eight copies of the memorandum of appeal and record of appeal and not to rely on other parties' pleadings as they have prayed" [Emphasised].

73. As submitted by the appellant, a scrutiny of the record reveals that the Cross- Petition was filed without eight copies of the memorandum and record of appeal as stipulated above. Flowing from the above, we see no reason to depart from this Court's Rules and set

procedure, as well as settled legal standards on the purpose, tenets and substance of cross-appeals. We therefore find that the pleadings by the respondent, ought to have been filed in adherence to rule 47 of the *Supreme Court Rules*. The failure to so comply renders the Cross-Petition, incurably defective.

F. Orders

i. The Appeal partially succeeds to the extent that the IEBC had jurisdiction to summon, hear complaints and make findings thereon, where there is breach of the Electoral Code pursuant to article 88 (4) (e) of the *Constitution*.

ii. The Appeal also partially succeeds to the extent that the Electoral Code of Conduct is constitutionally sound.

iii. The Appeal, to the extent that the respondent is to be found liable, is hereby dismissed.

iv. The Cross-Petition is hereby struck out.

v. Each party to bear its costs before this Court, the Court of Appeal and the High Court.

vi. We hereby direct that, the sum of Kshs 6,000/- deposited as security for costs upon lodging this appeal, be refunded to the Appellant.

It is so ordered.

CMM (Suing as the Next of Friend of and on Behalf of CWM) & 6 others v Standard Group & 4 others (Petition 13 (E015) of 2022) [2023] KESC 68 (KLR) (8 September 2023) (Judgment)

Supreme Court of Kenya

PM Mwilu, DCJ & VP, SC Wanjala, N Ndungu, I Lenaola & W Ouko, SCJJ

Neutral citation: [2023] KESC 68 (KLR)

Family Law *– children – best interests of the child - meaning of the term "best interest of the child" - what was the rationale and scope of the principle of the best interests of the child - Constitution of Kenya, 2010, article 53*

Constitutional Law *– fundamental rights and freedoms – rights of the child – rights of a child on trial – applicable principles to be applied by courts, counsel, prosecutors, and the media in a criminal trial or a civil suit centering around a child – what principles were applicable by courts, court staff, counsel, prosecutors, and the media in protecting the best interests of the a child facing a criminal trial or a child in a civil suit – Constitution of Kenya, 2010, article 53; Children Act, 2022, sections 90, 93(5), 95, and first schedule, part XV; Children in Conflict with the Law (Practice and Procedure) Rules 2020 (Act No 8 of 2001 Sub Leg); Children Act, 2001 (repealed) sections 4(2)(3), 18, 19, 25, 74, 75, and 76(5); Child Offenders Rules, 2001 (Act No 8 of 2001 Sub Leg) (repealed); Media Council Act, 2013 (Act No 46 of 2013); Media Act, 2007 (repealed) section 18.*

Constitutional Law *– fundamental rights and freedoms – rights of the child – rights of the child on trial – provisions restricting the publication of the details of a child facing trial – where a media house published the pictures and names of children facing trial on grounds of public interest - how did courts reconcile the best interests of the child and the competing right of the people to open justice through a public hearing, the freedom of expression of journalists, freedom of media and the right to access to information of the Kenyan public- whether the High Court and the Court of Appeal erred by placing public interest in the publication of the images and identities of children in a criminal trial over and above the children's best interest - Constitution of Kenya, 2010, articles 33, 34, and 50(1); Children Act, 2022 sections 90, 93(5), 95, and first schedule, part XV; Children in Conflict with the Law (Practice and Procedure) Rules 2020, (Act No 8 of 2001 Sub Leg); Children Act, 2001 (repealed) sections 4(2)(3), 18, 19, 25, 74, 75, and 76(5); Child Offenders Rules, 2001 (Act No 8 of 2001 Sub Leg) (repealed); Media Council Act, 2013 (Act No 46 of 2013); Media Act, 2007 (repealed) section 18.*

Civil Practice and Procedure *– constitutional petitions – claim for damages – proof of the rights that had been violated – whether a petitioner that had proved to the High Court that their rights had been violated was required to also prove damage and injury suffered so as to be awarded damages.*

Civil Practice and Procedure *– costs – award of costs – award of costs in public interest litigation - award of costs in a suit filed on behalf of children – whether a court could award costs against children in suits filed on behalf of children.*

Jurisdiction *– jurisdiction of the Supreme Court – jurisdiction to determine appeals as of right in any matter involving the interpretation/application of the Constitution – where in such an appeal*

the appellant raised issues of fact that did not have a constitutional underpinning - whether the Supreme Court in an appeal filed as of right in a matter involving the interpretation/application of the Constitution, had the jurisdiction to determine matters of fact and evidence that did not have any constitutional underpinning – Constitution of Kenya, 2010, article 163(4)(a).

Brief facts

The appellants were seven children suspects facing arson related charges in a matter that was of public interest. When they were presented before court to answer to their charges, the 1st to 4th respondents aired and published the case through their respective media houses on various platforms. In their publications they revealed the faces and identities of the children.

Aggrieved the petitioners filed a constitutional petition in which they contended that their rights had been violated. In the petition filed at the High Court, the appellants sought various declaratory orders; an order compelling the respondents to pay general, exemplary, punitive and aggravated damages to each minor for infringement of their rights; and an order compelling the respondents to remove the images, pictures, stories or caricatures posted on the internet regarding the minors.

The respondents' justification for doing so was, first, that they did not know that the suspects were minors in view of the fact that the proceedings were conducted in the normal manner in open court suggesting that they concerned adults; that generally, criminal proceedings were, by their nature public, open to other members of the public and the press; that the publication was a fair and accurate report of the proceedings and only exposed the minors to the extent that they were suspects of criminal involvement and misconduct; that the publications were authored and videos uploaded in public interest as a matter of informing the general public of the steps being taken, including charging in court those involved, to curb the arson menace; that it was the court's responsibility, knowing that the case involved children, to conduct the proceedings in camera; and finally, that the minors' right to privacy was not guaranteed in criminal proceedings but limited.

The petition before the High Court was dismissed and so was the appeal filed by the appellants at the Court of Appeal. Further aggrieved the appellants filed the instant petition before the Supreme Court in which they contended that the child's best interests ought to have been prioritized over public interest; that article 21 of the Constitution placed a duty on the 5th respondent and the courts as State organs, to observe, protect and promote the rights and fundamental freedoms in the Bill of Rights, especially in relation to vulnerable groups such as children.

The appellants' further contended that the 1st to 4th respondents were guilty of irresponsible journalism; that the story was published with malicious intent, commercial consideration and profit, given prominence to gain popularity and with utter disregard for the dignity, privacy and best interest of the minors.The appellants contended that by posting a story on YouTube channels that included pictures of the children accompanied by a voice-over discussion of their alleged participation in the arson attack; that by reporting, televising, and publishing the story along with the images of the children, the respondents were in violation of the right to privacy and to protect and preserve the best interest of the children.

Issues

i. What was the nature and scope of the concept of best interest of the child?

ii. How did courts reconcile the best interests of the child principle and the competing right of the people to open justice through a public hearing, freedom of expression of journalists, freedom of the media and the right of access to information of the Kenyan public?

iii. Whether a petitioner who had proved at the High Court that their rights had been violated was required to also prove damage and injury suffered so as to be awarded damages.

iv. What principles were applicable by courts, court staff, counsel, prosecutors, and the media in protecting the best interests of a child facing a criminal trial or a civil suit?

v. Whether the Supreme Court in an appeal filed as of right in a matter involving the interpretation/application of the Constitution, had the jurisdiction to determine matters of fact and evidence that did not have any constitutional underpinning.

Held

1. The instant appeal had properly been brought as of right pursuant to article 163(4)(a) of the Constitution. The petition filed in the High Court, the arguments before both superior courts below as well as the judgments of those courts, all involved the interpretation and application of articles 31(c), 33(1), 34 and 53(2) of the Constitution.

2. Courts were to interpret the Constitution in a manner that promoted its purposes, values and principles and contributed to good governance. That was in addition to the consideration of national values and principles of governance under article 10 of the Constitution. They were also discoverable through purposive, holistic, organic and liberal interpretations of the Constitution.

3. Article 53(2) of the Constitution was a right in and of itself, of the child, and not merely a guiding principle. It also strengthened the broader framework of human rights under chapter four of the Constitution. The reach of article 53(2) (a child's best interests) was not to be limited to the child's right to a name and nationality; to free basic education; to basic nutrition, shelter and health care; to be protected from abuse and neglect; to parental care and protection; not to be detained, except as a measure of a last resort, and when detained, for the shortest appropriate period of time and in a separate cell from adults and in conditions that took into account the child's age and sex, among other related rights. Article 53(2) must be interpreted to apply to all aspects of the law, civil or criminal which affected the child bearing in mind the principle of the best interest of a child. Beyond article 53, all the other rights in the Constitution applied to children, as human beings unless they were excluded because such rights only applied to adults, for example, the right to vote or to marry.

4. Since the best interest of a child varied from case to case depending on the situation, its determination and what constituted it depended on the unique circumstances of each case. A child's best interest was pliable, the term had not been defined by the Constitution or in United Nations Convention on the Rights of the Child (CRC) or the African Children's

Charter (ACC). However, the first schedule to the Children Act, 2022, listed 18 situations (not exhaustively) of what could constitute the best interests of the child headed "Best Interest Considerations".

5. In the context of criminal justice, the Children Act, 2022 affirmed the moral malleability or reformability of the child offender by emphasizing the concept of "diversion" as defined in section 2 and stipulated in Part XV of the Children Act to mean measures taken to address the root causes of the children's behavior, provide support, and help them reintegrate into society as law-abiding citizens. The primary goal was, among others, to reduce stigmatization; provide appropriate support services to reduce the likelihood of the children engaging in antisocial behaviour; reduce recidivism by children in conflict with the law; promote the rehabilitation, reconciliation, education and re-integration of the child, rather than punishment.
6. The protective procedures contained in the Children Act, including the prohibition of the imposition of a sentence of imprisonment and death penalty upon a child or committing a child under the age of twelve years to a rehabilitation school, or the prohibition of the use of words like "conviction" or "sentence" in relation to children, were all aimed at enhancing the best interest of the child and safeguarding their rights.
7. Based on the recognition, that children in conflict with the law facing criminal charges were vulnerable due to their age and level of maturity, the trial process should not itself expose them further to avoidable intimidation, humiliation or distress. That explained why special courts had been established and special procedures adopted for the trial of children. Those procedures placed restrictions on who could attend court proceedings involving a child and permit the trial court to hold sittings in camera at which only the presiding judicial officer, officers of the court and a children's officer were allowed to attend.
8. Article 50(1) of the Constitution provided that every person had the right to have any dispute that could be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. Article 50(1) should be read along with article 50(8) which provided that the article did not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion was necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security.
9. Article 50(1) and (8) of the Constitution provided for the protection of vulnerable persons. Children, by article 21 were recognized as vulnerable members of society. Unlike other vulnerable groups, children were more susceptible to experiencing harm or disadvantage due to the fact of their age and other social or physical circumstances. While article 50(1) granted the right to a fair and public hearing, sub-article (8) qualified that right by extending discretion to the court to exclude the press or other members of the public from any proceedings under specific circumstances, including to protect vulnerable persons. Further,

article 50(2)(a) enjoined trial courts to ensure that every accused person had the right to a fair trial, which included the right to be presumed innocent until the contrary was proved.

10. The presumption of innocence was a fundamental principle behind the right to a fair trial. It was guaranteed by article 50(2)(a) of the Constitution, international and regional instruments like the International Covenant on Civil and Political Rights (ICCPR), the Universal Declaration of Human Rights (UDHR), and the African Charter on Human and Peoples' Rights (ACHPR). The mere arrest and arraignment before the court of the appellants for the purpose of taking a plea alone did not amount to a conviction.

11. Apart from the limitations imposed by article 24 of the Constitution, there were certain rights in the Bill of Rights that were expressly self-limiting in the sense that those rights or freedoms were subject to certain declared limitations or restrictions. Self-limiting rights recognized that the exercise of one's rights should not infringe upon the rights of others or undermine public order, or safety. All the competing rights identified in the instant appeal were not non-derogable rights in terms of article 25 of the Constitution. They were subject to the limitation clause in article 24. To limit a right, it had to be demonstrated that the principles of article 24 of the Constitution had been met.

12. The two-step threshold for limitation of any constitutional right and fundamental freedoms were, first whether the right limited was by statute. There could be no limitation of a constitutional right except by the Constitution itself or by a law. Secondly, it had to be established whether the limitation imposed on a right was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account certain relevant factors listed in article 24(1)(a) to (e) of the Constitution, which list was not exhaustive. The focus on limitation was not based only on the formal existence of the law creating the limitation, but also on the nature of that law itself. Article 19(3)(c) of the Constitution was an emphasis that the rights granted in the Bill of Rights were subject only to the limitations contemplated in the Constitution, recognizing the fact that there could be no other way of limiting a fundamental right except in the manner and to the extent provided for by the Constitution.

13. Section 4(2) of the Children Act, 2001 *(*repealed*)*, which was the law in force at the time this dispute arose, recapitulated that in all actions, including actions taken in courts of law concerning children, their best interests was a primary consideration. The Children's Courts established under section 73 (section 90 of the Children Act, 2022) were enjoined when hearing criminal charges against children in conflict with the law to do so separately from proceedings involving adult offenders.

14. Courts were guided in proceedings involving children by sections 74, 75 and 76 of the repealed Children Act, 2001. Section 74 provided that the children's court shall be situated in a different building or room from the other courts. Sections 74 and 75 provided for the persons that could be present in a civil and criminal (respectively) suit in sittings of the children's court and proceedings of the criminal court (respectively). Under section 74

persons were the advocates, witnesses or persons concerned with the case, parents/guardians, bona fide registered representatives of news agencies and such other persons as the court may authorise to be present. For criminal proceedings under section 75, the court could direct any persons not being members or officers of the court, or parties to the case or their advocates, may be excluded from the court.

15. The Media Act, 2007 (repealed) imposed further limitations on the right to freedom of expression, freedom of the media and the right of access to information. Section 13 of the Media Council Act, 2013 was categorical that the public's right to know had to be weighed against the privacy rights of people in the news. However, Media Act, 2007 (repealed) was the law governing the conduct of proceedings involving children at the time of the dispute.

16. Section 20 of the Media Act, 2007 (repealed) enjoined the media as a general rule to apply caution in the use of pictures and names and should avoid publication when there was a possibility of harming the persons concerned. The repealed Act further prescribed in the Second Schedule, the Code of Conduct for the practice of journalists, which reiterated the duty to protect children.

17. A limitation of one's rights would only be justified if the court was satisfied that it met the threshold under article 24 of the constitution. Apart from the limitation imposed by article 24 of the Constitution on freedom of expression and of the media, similar restrictions were contained in articles 33 (freedom of expression) and 34 (freedom and independence of the media).

18. Whereas the general rule was that criminal trials were public, there were exemptions such as matters pertaining to children and witness protection under the Witness Protection Act. Section 76 of the Children Act, 2001 (repealed), (which was replicated in section 95(5) of the Children Act, 2022), together with sections 74 and 75, (section 93 of the Children Act, 2022) did not exclude the media from covering cases involving children. They included explicitly the journalists and media professionals in the class of very few persons permitted to be present in proceedings concerning children. What was restricted was what they could disclose in their reports and publications. They could not disclose the particulars of the child, the name, image or any information that could easily lead to the identification of the child. A child who was in conflict with the law was a vulnerable victim of a failure of a system in the society and therefore all efforts had to be made to protect the child from further harm even if he or she had to be processed through the criminal justice system.

19. The 1st to 4th respondents fell into a more serious error than that committed by the trial court by failing to conform to the constitutional, statutory and ethical standards of reporting. They proceeded to take pictures of the children with abandon and recklessly posted the story and videos on online channels complete with details of their images and names, alleging their participation in the arson attack in the school. For that infringement, the 1st to 4th respondents were jointly liable to the appellants and the trial and the appellate courts ought to have so found.

20. It was no defence that the trial court did not stop them from taking pictures. Similarly, they could not rely on the argument that they did not know that the suspects were children. That would amount to an admission of professional negligence because, with a little due diligence, they would have ascertained that fact. The instant appeal having been brought as of right under article 163(4)(a) of the Constitution, and therefore, matters of fact that touched on evidence without any constitutional underpinning were not open for the Supreme Court's review on appeal.

21. The respondents must have known they were reporting a case involving children because their own publications repeatedly referred to them as minors; and that it was evident that the suspects were not only school-going but were also being charged with the offence of arson within their school. The fact that they were arraigned in court as students, in school uniform, points to them ordinarily being minors. Moreover, the fact that the court ordered for age assessment of the children and for them to be remanded at a juvenile home was sufficient notice that it was not a case of adults. There was an infraction of the law committed by the respondents. Contrary to their assertions, the appellants bore no responsibility to ensure the court was cleared as indeed they had no power or capacity to do so.

22. The failure by the respondents to comply with the legal safeguards was not for the paucity of a guide or template of what ought to happen when dealing with children in conflict with the law. Apart from the Constitution, international instruments and statutes, there were numerous documents to guide the courts, the defence and prosecution counsel as well as all those in the child justice system.

23. At the time the minors were charged, there were numerous and widespread cases of arson attacks in schools, and whereas there was a general concern and therefore the public deserved to be informed, what was contested was the manner in which the respondents exercised that right in gathering and disseminating the information. Due to children's vulnerability on account of their age, their cases could not be used as pawns to deter others from committing crimes, they ought to be guided, counseled and taught good behavior and how to steer clear from acts that could bring them into conflict with the law.

24. The limitations imposed by the Children Act on the public hearing of cases involving children and the publication of their images, names and school were reasonable. They were justifiable in an open and democratic society, considering the human dignity of the children concerned. The limitation was derived from a statute, the Children Act and also article 50(8) of the Constitution itself; the limitation was intended to protect a vulnerable group, the children; it was not a blanket limitation but one that only restricted the disclosure of the child's name, the school or the images. In exceptional circumstances, the proceedings could be held in-camera. The limitation did not stop the media from carrying the story; the constitutional and statutory prescription on a child's best interests did not preclude the trial and punishment of children in conflict with the law; children in conflict with the law did not enjoy immunity from criminal prosecution; the limiting provisions in the Children

Act were precise as to the right or freedom to be limited and the nature and extent of the limitation. The provisions did not derogate the right in question from its core or essential content.

25. The courts below erred in raising the status of public interest over the protection and the best interest of the children and their rights to privacy without properly subjecting the limitation to the provisions of article 24. The intrusion upon privacy of the children by publishing their particulars was demeaning not only to their dignity as individuals, but also to the integrity of their parents and the wider society of which they were part. The names, images and videos of the appellants were not essential for purposes of public information.

26. The plea was taken in open court, even though the respondents knew of the requirement under sections 74 and 75 of the Children Act (repealed). They published, contrary to section 76(5) of the Children Act (repealed) and section 18 of the Media Act, 2007 (repealed) the names and images of the appellants who were minors. The combined respondents' actions were in violation of articles 50(8), 31 and 53(2) of the Constitution. The limitation of the cited rights of the 1st to 4th respondents was in conformity with article 24 of the Constitution.

27. Both the High Court and the Court of Appeal erred in applying the wrong test thereby arriving at an erroneous conclusion, absolving the respondents from liability. Moreover, the Court of Appeal's finding that whether the minors were tried in public or in private, the gravity of the charges alone, was sufficient to cause them distress, trauma, anguish, fear and lowered self- confidence was not only erroneous but irrelevant in the circumstances. The consideration ought to have been whether there was a benefit in limiting the respondents' rights in the manner the law provided. Had the appellate court properly addressed itself on this question, the clear answer would have been that the benefit of upholding the best interest of the appellants outweighed the loss the 1st to 4th respondents stood to suffer. The lifetime trauma and stigma the appellants were exposed to were more detrimental than the limitation of the respondents reporting the story without the appellants' names and images.

28. Under common law principles, an injured party was entitled to damages for the loss and injury suffered under private law causes of action, like in tortious claims. Compensation for personal loss depended on proof of such loss or damage. However, arising out of the violation of constitutional rights and fundamental freedoms of an individual under public law, the nature of the damages awardable were broadly compensatory or vindicatory, as should be apparent from the list of examples of reliefs in article 23 of the Constitution. While it was not necessary to prove loss or damage in cases of constitutional rights violations, the court could consider the extent, nature, gravity and immensity of harm suffered by the aggrieved party when determining the appropriate remedy. In deserving cases, the redress may be in the form of an award of damages to compensate the victim. In some cases, a suitable declaration, an injunctive or conservatory order, or an order of judicial review would suffice to vindicate the right.

29. In assessing the appropriate sum to be awarded as compensation, the court must feel satisfied that the sum would afford the victim adequate redress to vindicate the victim's constitutional right. Assessment of the right quantum for compensation would take into account all the relevant facts and circumstances of the violation and the victim in the particular case, bearing in mind any aggravating features. The purpose of constitutional relief of an award of compensation was not necessarily intended to punish the violator, but only to vindicate the right of the victim.

30. Once a petitioner had presented proof on a balance of probabilities that his or her rights were violated, the court had to vindicate and affirm the significance of the violated rights, even though the petitioner could not present evidence of any loss or damage suffered as a result of the violation. The approach in awarding damages or compensation in constitutional rights violation cases was different from that in tortious claims. The two courts below misdirected themselves in treating the case as if it was based on a claim of libel or one of personal injury by insisting that, even after proving an infringement, the victim must, in addition, demonstrate the extent of loss, injury or damage suffered as a result. It was erroneous for the two courts below to ignore the principles for the award of compensation in constitutional rights violation claims; namely, that once the burden of proving a violation was discharged, it was not necessary for the appellants to prove any damage or loss so as to be entitled to any of the reliefs contemplated in article 23(3) of the Constitution.

31. Parties were bound and must abide by their pleadings, just as courts could not change the pleadings presented by the parties. It would be out of character for the Supreme Court to pronounce itself on any relief that had not flown directly from the parties. The Supreme Court could not, no matter how well-intentioned, go beyond the grounds or prayers raised by the appellants. The instant court was unable to consider the question of quantum of damages that would have been awardable.

32. The legal action was initiated for the enforcement and advancement of constitutional justice and in the public interest. Perhaps informed by these considerations, the Court of Appeal did not award costs against the appellants even after losing the appeal.

33. Journalists must approach their work with the highest standards of ethics bearing in mind the prevailing provisions of the law and the constitutional imperatives involved in every case. For the instant case, the question to ask was whether publishing the pictures of children suspected in a criminal case, would advance the best interest of the child. Journalists must seek the objective truth to obviate harm associated with misreporting.

34. Apart from the provisions of the Constitution, international instruments and statutes there were several helpful policy documents that augment the law on children generally. Apart from simplifying the rules of procedure, those documents provided practical guidance on different aspects of children's matters which were aimed at assisting all agencies in the child justice system to navigate the delicate contours of promoting, safeguarding, and fulfilling children's rights. Because of the elaborate nature of those documents, which was

expected of every court, prosecutor and counsel to be well conversant with. The principles were:

1. At all times and in every circumstance, the child's dignity, rights and well- being must be respected. A child in conflict with the law had the right to privacy during arrest, detention and appearance in court.
2. In reporting cases concerning children in conflict with the law, the child's image and identity, including the name, the parents, school, and residence shall not be revealed either directly or indirectly.
3. It was the duty of the presiding officer to ensure that only those permitted by section 93(4) of the Children Act, 2022 were allowed in the courtroom where proceedings involving a child were held. Depending on the circumstances, the presiding officer could resort to section 93(5) of the Children Act and adjourn to an in-camera hearing. The prosecution and defence counsel as officers of the court were equally duty-bound to assist the court to comply with this requirement.
4. The court, where proceedings concerning a child were being conducted, shall not be used at the same time for adults. Children's Courts should be exclusively for children.
5. Presiding officers could secure the privacy and confidentiality of a child in conflict with the law, a victim of physical or sexual abuse, or a child witness in court by designing an obscured or blurred screen between the child and the rest of those who are permitted to be in open court by section 93(4) of the Children Act.
6. Code names, pseudo names, or initials of their names must be used to describe children in all children's cases.
7. The provisions of article 50 of the Constitution and section 235(c) of the Children Act must be adhered to in order to conclude cases involving children expeditiously.

Petition allowed.

Orders

i. *The Judgment of the Court of Appeal dated May 13, 2022, in Civil Appeal No 296 of 2017 was set aside, save for the determination on the costs of the appeal.*

ii. *The Judgment of the High Court dated February 2, 2017 in Constitutional Petition No. 56 of 2013 was set aside in its entirety.*

iii. *Declaration issued that the respondents violated the appellants' right to privacy as guaranteed under article 31 (c) of the Constitution.*

iv. *Declaration issued that the respondents violated the appellants' right to have their best interests considered of paramount importance as guaranteed under article 53(2) of the Constitution.*

v. *Parties were to bear their own costs of the instant appeal, in the High Court and the Court of Appeal.*

vi. *The Supreme Court directed that the sum of Kshs. 6,000/-, deposited as security for costs upon lodging of the instant appeal, be refunded to the appellants.*

Citations

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Kenya

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2. *Attorney General v Zinj Limited* Petition 1 of 2020; [2020] KESC 42 (KLR) - (Explained)
3. *Kagwe v Hussein Dairy Limited* Civil Appeal 215 of 2010; [2013] KECA 488 (KLR) - (Explained)
4. *Kandie v Alassane Ba & another* Petition 2 of 2015; [2017] KESC 13 (KLR) - (Explained)
5. *Kenya Railways Corporation & 2 others v Okoiti & 3 others* Petition 13 & 18 of 2020 (Consolidated); [2022] KESC 2 (KLR) - (Explained)
6. *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) - (Explained)
7. *MAK v RMAA & 4 others* Petition 2 (E003) of 2022; [2023] KESC 21 (KLR) - (Explained)
8. *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)
9. *Musembi & 13 others (Suing on their own behalf and on behalf of 15 residents of Upendo City Cotton village at South C Ward, Nairobi) v Moi Educational Centre Co Ltd & 3 others* Application EO19 of 2021; [2022] KESC 19 (KLR) - (Explained)
10. *Mwakwere, Chirau Ali v Nation Media Group Ltd & another* Civil Suit 1329 of 2003; [2009] KEHC 1338 (KLR) - (Explained)
11. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition No 3 of 2012; [2012] eKLR; [2012] 2 KLR 804 - (Explained)
12. *Njeru v Republic* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR); [1976-80] 1 KLR 1272 - (Explained)
13. *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* Petition 5, 3 & 4 of 2013 (Consolidated); [2013] KESC 5 (KLR)
14. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2013] KESC 20 (KLR) - (Explained)
15. *Republic v County Government of Mombasa Ex-parte Outdoor Advertising Association of Kenya* Judicial Review 63 of 2013; [2014] KEHC 5564 (KLR) - (Explained)
16. *Republic v JWK* Criminal Case 57 of 2009; [2013] eKLR - (Explained)
17. *Shollei v Judicial Service Commission & another* Petition 34 of 2014; [2022] KESC 5 (KLR) - (Explained)
18. *Sonko v Clerk, Nairobi City County Assembly & 11 others* Petition 11(E008) of 2022; [2022] KESC 27 (KLR) - (Explained)
19. *Union of Civil Servants & 2 others v Independent Electoral and Boundaries Commission (IEBC) & another* Petition 281 of 2014 & 70 of 2015; [2015] eKLR (Consolidated) - (Explained)

20. *Wamwere & 5 others v Attorney General* Petition (Application) 26 of 2019 & Petition 34 & 35 of 2019 (Consolidated); [2023] KESC 26 (KLR) - (Explained)

South Africa

1. *Centre for Child Law v Minister of Justice* (CCT98/08) [2009] ZACC 18; 2009 (2) SACR 477 (CC) ; 2009 (6) SA 632 (CC) ; 2009 (11) BCLR 1105 (CC) (15 July 2009) - (Explained)
2. *Child Law & others v Media 24 Limited & others* (CCT261/18) [2019] ZACC 46; 2020 (3) BCLR 245 (CC); 2020 (1) SACR 469 (CC); 2020 (4) SA 319 (CC) (4 December 2019) - (Explained)
3. *J v National Director of Public Prosecution* 59[CCT 114/13) [2014] ZACC 13 - (Explained)
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2. Judiciary (2018), *Criminal Procedure Bench Book* Nairobi: Judiciary of Kenya
3. Ministry of Labour and Social Protection (2018), *Guidelines for Child Protection Case Management and Referral in Kenya* Nairobi: Ministry of Labour and Social Protection
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5. National Council for Children's Services (2010), *National Children Policy* Nairobi: National Council for Children's Services
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8. The Judiciary of Kenya (2004), *Bench Book for Magistrates in Criminal Proceedings* Nairobi: Judiciary of Kenya
9. The Judiciary of Kenya (2016), *Sentencing Policy Guidelines* Nairobi; The Judiciary of Kenya

Statutes

Kenya

1. Child Offenders Rules, 2001 (Repealed) (Act No 8 of 2001 Sub Leg) In general - (Cited)
2. Children Act (cap141) Schedule First; part XV; sections 90, 93(5); 95 - (Interpreted)
3. Children Act, 2001 (Repealed) (Act No 8 of 2001) sections 4(2)(3); 18; 19; 25; 74; 75; 76(5)- (Interpreted)
4. Children in Conflict with the Law (Practice and Procedure) Rules, 2020 (cap 141 Sub Leg) In general- (Cited)

5. Constitution of Kenya articles 2(6); 10; 21; 23; 24; 25; 29(d)(f); 31; 33; 34; 35; 50(1)(8); 53(2); 163(4)(a); 258; 259; 260 - (Interpreted)
6. Evidence Act (cap 80) sections 107, 108, 109- (Interpreted)
7. Media Act, 2007 (Repealed) (Act No 3 of 2007) section 18 - (Interpreted)
8. Media Council Act (cap 411B) In general - (Cited)
9. Witness Protection Act (cap 79) In general - (Cited)

Instruments

1. African Charter on Peoples' and Human Rights (ACPHR), 1981 In general
2. African Charter on the Rights and Welfare of the Child (ACRWC), 1990 article 4
3. Convention on the Rights of the Child (CRC), 1989 In general
4. International Covenant on Civil and Political Rights (ICCPR), 1966 article 19
5. Universal Declaration of Human Rights (UDHR), 1948 articles 12, 19

Advocates

Mr. Lempaa and Mr. Ochiel Dudley for the appellants (Katiba Institute)
Mr. William Muthee for the 1st respondent (Triple OK Law Advocates LLP)
Mr. Karanja Munyori for the 2nd respondent (Kamau, Kuria & Kiraitu Advocates)
Ms. Lynne Muchira for the 3rd respondent (LM Muchira & Company Advocates)
Mr. Dennis Nkarichia and *Ms. Nimo Adan* for the 4th respondent (Mohammed Muigai Advocates)

September 8, 2023, the Court delivered the following Judgment:

A. Introduction

1. The *Constitution of Kenya* recognizes a wide variety of constitutional rights and fundamental freedoms: civil, political and socio-economic, religious and cultural rights: children and family rights: rights of persons with disabilities, older members of society, minorities and marginalized groups. Given this diversity of rights, competing constitutional rights claims are bound to arise and indeed are a common occurrence. The exercise of an individual's rights may result in the deprivation or violation of another person's rights because constitutional rights are mutually interrelated, interdependent, indivisible and form a single constitutional value system. This means that the realization of one right often relies on the respect and fulfillment of other rights. This appeal presents one such competition or clash, whose resolution is an equally complex and nuanced process. The resolution often requires careful balancing of rights. Courts and legal systems in different jurisdictions employ different methods and legal doctrines to determine the appropriate balance between competing rights. To perform this task, the courts in Kenya will construe the concerned provisions of the *Constitution* in a generous and purposive manner, guided by the principles set out in article 259, through a holistic manner; in a manner that promotes the purposes of the *Constitution*,

its values and principles; and in a way that advances the human rights and fundamental freedoms in the Bill of Rights. The *Constitution* itself recognizes that rights have limits in some situations where they substantially interfere with the rights of others and can be limited by law.

2. This appeal presents two broad competing rights between, on one hand, the freedom and rights under articles 33, 34 and 35 of the *Constitution* dealing, respectively with the freedom of expression, freedom of the media and the right to access to information, and on the other hand, articles 31 and 53(2) of the *Constitution* which relate to the right to privacy and a constitutional imperative that a child's best interests are of paramount importance in every matter concerning the child.

3. The competing exercise of the right to freedom of expression while maintaining another's right to privacy and the rights of a child is a common phenomenon around the globe. As a result, some of the international human rights instruments have made specific provisions to guide State parties in enacting laws to regulate this relationship. Article 12 of the *United Nations Declaration of Human Rights (UDHR)*, for example, guarantees that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Further, it recognizes that children are entitled to special care, assistance and social protection. On the other hand, article 19 grants everyone the right to freedom of opinion and expression, which includes the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.

4. Likewise, the *United Nations International Convention on Civil and Political Rights (ICCPR)* at article 19 provides for the right to hold opinions without interference; the right to freedom of expression, including the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media, subject to certain restrictions, as are provided by law and are necessary, for respect of the rights or reputations of others. Article 53 guarantees every child the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. These two instruments have a binding effect having been ratified by Kenya in terms of article 2(6) of the *Constitution*.

5. The events, the subject of this appeal, relate to a period in the history of Kenya in 2012 when reports of destructive fires in Kenyan secondary schools, mostly suspected to be arson cases, with the suspects being students were commonplace. The phenomenon spanned all regions in Kenya and occurred in boys', girls', and mixed schools, private and public schools, and across school calendars.

6. It is common factor that on November 5, 2012, the minors named above were students at [Particulars Withheld] School in Murang'a County. They were presented before the magistrates' court at Murang'a to answer arson-related charges. It is similarly not denied that on the same day, or subsequent to that day, the 1st to 4th respondents, all media houses, published and/or televised images of the students appearing before the court in print, online and visual media. The stories carried full identities and descriptions of the seven minors. Their names, images and school were disclosed. There were also detailed accounts of their alleged participation in the attempted burning of the school.

B. Litigation Background

i.Before the High Court

7. Aggrieved by the publication, the appellants, suing as the next friend of and on behalf of the seven (7) students filed a petition before the High Court in which they complained that in publishing the details of the minors in the manner they did, the respondents ignored the minors' right to privacy and their best interest. It was their case that the story was published with malicious intent, commercial consideration and profit; given prominence to gain popularity with utter disregard for the dignity, privacy and best interest of the minors as required by the *Constitution* and the law. They contended that in publishing the story, the respondents did not bother to confirm the ages of the minors or seek their comments on the issues published; and that as a result of the respondents' reckless behaviour, the minors have been stigmatized, traumatized and even shunned by society for being exposed as maturing arsonists; and that the injury to the minors was indelible as the stories had been transmitted worldwide, some in permanent form.

8. For the reasons aforesaid, the appellants asked the court to declare that the fundamental rights and freedoms of the minors had been violated and sought, *inter alia*: a declaration that the respondents had breached articles 29(d), (f), 31(c) and 53(2) of the *Constitution*, sections 4(2), 18 and 19 the *Children Act, 2001* and various provisions of the *African Charter on the Rights and Welfare of the Child*, *International Covenant on Civil and Political Rights (ICCPR)*, *Universal Declaration on Human Rights (UDHR)* and the *African Charter on Human and Peoples' Rights* (ACHPR); an order compelling the respondents to pay general, exemplary, punitive and aggravated damages to each of the minors for the infringement of their rights; and an order compelling the respondents to remove the images, pictures, stories or caricatures posted on the internet and other mediums regarding the minors.

9. In response, the 1st to 4th respondents in their defence maintained that the news story as published was correct and accurate of the events in court; that it was published in good faith and in public interest given the prevalence of violence and arson incidents in secondary

boarding schools; that the learned trial magistrate did not object to the presence of journalists and the public in the courtroom; and that they were simply exercising their fundamental right to freedom of speech and expression as enshrined in the *Constitution*.

10. The 5th respondent (The Attorney-General), sued as Principal Legal Adviser to the government on behalf of the State, on his part averred that the trial court attempted to get members of the public out of the courtroom but was not fully successful as the matter had generated immense public interest and not everyone complied with the directions. Further, it was contended that if any live proceedings were recorded, it was done without the court's consent or control. Lastly, it was the Attorney General's position that the appellants had not demonstrated how the 5th respondent had violated the minors' rights.

11. The High Court (Mativo, J (as he then was)) found in the first place, that although the law provides for the imposition of extra-judicial sanctions to protect minor offenders from unwarranted publicity, this right is not absolute and can be limited under article 24 of the *Constitution*; secondly, that the publication of the story and corresponding photographs were a matter of public interest; thirdly, that the stories as published were factual and published without malice; and finally, that the appellants had failed to discharge the burden of proof of any loss or damage suffered as a result of the alleged breaches. Consequently, the learned Judge finding no merit in the petition, dismissed it with costs to the respondents.

ii.Before the Court of Appeal

12. Dissatisfied with this outcome, the appellants moved to the Court of Appeal citing 23 grounds of appeal to challenge the aforesaid decision. For its part, the Court of Appeal condensed those grounds and framed three issues for determination; whether the minors' rights were violated; whether the court reliedon the wrong principles of law in determining the issues before it; and whether the learned Judge failed to give due regard to the evidence before him.

13. On the alleged violation of the minors' rights, the appellate court was categorical that the public nature of hearing of criminal cases is the general rule rather than the exception; that the principle of open justice requires that proceedings be held in open court where the press and members of the public have free access; and that, in addition, the principle of open justice permits the publication of accurate reports of any proceedings. As a result, in the court's view, the respondents had a right to be in court and to impart information in the exercise of their rights under articles 33(1) and 34 of the *Constitution*. The court, however, acknowledged that the enjoyment of these rights is subject to limitations stipulated under article 24(3) of the *Constitution*; and that the burden rested with the appellants to prove that the limitation on the respondents' rights was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The court found that it

was incumbent on the appellants, through the minors' advocates, to ensure that the court was cleared. Consequently, the court came to the conclusion, on this ground, that neither the court nor the prosecution violated the minors' rights for those reasons.

14. Secondly, the court expressed the view that, though it was arguable that the minors had a reasonable expectation that their privacy would be maintained during the criminal proceedings by virtue of their age, that alone did not guarantee them their privacy during criminal proceedings; that the right to privacy in proceedings involving children is not absolute and can be limited to the extent that the limitation is reasonable in an open and democratic society in consideration of the factors prescribed under article 24 of the *Constitution*.

15. In determining the purpose of the limitation, the court found no real substantial risk to warrant the limitation of the rights of the public and the media since the issues before the criminal trial court were of public importance and interest. In the court's opinion, although the child's best interest is the primary factor, it is not the sole consideration for all other actions affecting children. The appellate court took the position that the learned Judge of the High Court was justified in his determination that the story in question and the publication of the photographs was a matter of public interest.

16. Thirdly, the court held that the appellants did not prove the alleged violations of the minors' constitutional rights and consequential damage; that the evidence relied on by the appellants fell short of the required standard of proof; and that whether the minors were tried in public or in private, the gravity of the charges alone, was sufficient to cause them distress, trauma, anguish and fear.

17. Based on this fact, the court concluded on this ground that the damage suffered by the minors (if any) could not be attributed to the publication alone; that there was no evidence before it to link the publication of the identities of the appellants to any adverse effect claimed; and that the publications were immediately removed from circulation in view of the case that had been instituted in the High Court.

18. Accepting the conclusion reached by the High Court, the Court of Appeal was satisfied that the learned judge applied the correct principles of law and that no proof was presented to suggest that he did not consider any material he ought to have taken into account; and that as a matter of fact, he considered the provisions of article 24 of the *Constitution* and struck the right balance between the relevant competing rights. In consideration of all the foregoing, the Court of Appeal ultimately ruled that the first appeal lacked merit and dismissed it in its entirety. It made no order on costs.

iii.Before the Supreme Court

19. Undeterred, the appellants have now challenged the decision of the Court of Appeal before this court as of right pursuant to article 163(4)(a) of the *Constitution* on 4 broad grounds broken down into several detailed sub-grounds. These grounds were however argued in the submissions in a cluster of 6 issues;

    i. whether the 1st to 4th respondents violated articles 31 and 53 of the *Constitution*.

    ii. whether the limitation of the rights to privacy of minors is justified to protect open justice principles requiring public trials.

    iii. whether the provision of the right to privacy of minors is justified to limit the rights to freedom of expression.

    iv. whether the High Court and the Court of Appeal erred in law and fact in giving judgment without considering and analyzing the evidence and submissions of the appellants.

    v. whether the High Court and the Court of Appeal erred in concluding that the appellants had the burden of adducing evidence of damage suffered in a claim of violation of rights and freedoms; and

    vi. whether the High Court erred in awarding costs to the respondents.

20. The appellants then sought 14 reliefs which we have summarized as follows:

    i. The appeal be allowed.

    ii. A declaration be made that the 1st to the 5th respondents violated the appellants' rights to privacy, not to be subjected to torture, not to be treated or punished in a cruel, inhuman or degrading manner, to be protected from abuse, neglect, harmful cultural practices, all forms of violence and inhuman treatment, to have their best interests considered of paramount importance in every matter concerning them, as guaranteed under the *Constitution*, the law and international law.

    iii. A declaration that the 1st to 4th respondents violated rule 19 of the *Code of Conduct for the Practice of Journalism* by disseminating the names and images of the minor children.

    iv. A permanent order of injunction be issued prohibiting the 1st to 4th respondents from publishing the appellants' images or names on any media platform.

    v. The respondents to bear the costs in this court and the courts below.

What is readily apparent from the prayers is that none relates to an award of damages or compensation. We shall return to this question later.

C. Parties' Submissions

i. The appellants' submissions

21. To advance the broad grounds, the appellants have in their submissions framed and argued 6 issues as set out in paragraph 19 above. The appellants' premise is that both superior courts below were wrong to elevate public interest over and above the express provisions of the law and the best interest of children in conflict with the law. They submitted that the two courts ignored the provisions of section 76(5) of the *Children Act* which is intended to extend protection to a child by concealing a child's identity and other particulars; that the Court of Appeal misdirected itself in its conclusion that the 1st to 4th respondents were justified in the public interest to publish pictures and names of minors in an online news story, contrary to article 31(c) of the *Constitution* and section 76(5) of the *Children Act*; and that the court further erred in absolving the 5th respondent for not ensuring that the minors' pleas were taken in private, instead of blaming the defence counsel and the appellants for not applying to the trial court to move to her chambers. They maintained that under article 21 of the *Constitution*, the 5th respondent was bound to observe, protect and promote the rights and fundamental freedoms in the Bill of Rights, especially in relation to vulnerable people such as minors. Further, section 4(3) of the *Children Act* places a duty on courts where they are uncertain as to the age of a suspect to order for age assessment. They have relied on the persuasive decision of the High Court in the case of *Republic v JWK*, Criminal Case 57 of 2009 [2013] eKLR, to buttress this argument.

22. They have also relied on the case of *Republic v County Government of Mombasa ex parte Outdoor Advertising Association of Kenya* [2014] eKLR to the effect that there can never be public interest in breach of the law; and that on the facts of this case, the public had no right to know information founded on irresponsible journalism and conversely, that irresponsible journalists have no corresponding public duty to give such information to the public. They too have relied on *Chirau Ali Mwakwere v Nation Media Group Ltd & another* [2009] eKLR for the proposition that the defence of public interest is not available in unethical, untruthful and irresponsible press.

23. The appellants further urged that they did not need to make an application under article 50(8) of the *Constitution* to have the plea taken in private, since section 76(5) and (6) of the *Children Act* explicitly prohibits the publication of photographs and details of a child in criminal proceedings; that the Act is *lex specialist*, the specific and only law, on matters concerning the rights of the child. They faulted the learned appellate Judges for failing

to appreciate that the names and pictures of the children were not essential details when reporting on criminal proceedings; and that the public could have been adequately informed about the case in general without the inclusion of the names and images of the children.

24. Like in the South African case of *Centre for Child Law & others v Media 24 Limited & others* [2018] ZASCA 140, the appellants have emphasized that they do not seek, in this case, a blanket ban on reporting on victims of crime, but rather the protection of the minors' identities. That, it is this balance between freedom of expression and the right to dignity, privacy and the best interest of the child that needed to be struck. They have pointed out that, in their viva voce testimony, the 1st to 4th respondents admitted that the news stories could have been published without the pictures and other details of the minors; the respondents admitted that they did not ascertain the ages of the minors; and that as soon as they learnt that they were, in fact, children, they immediately pulled down the videos and images. They expressed their remorse but did not publish an apology.

25. From these admissions by the respondents, the appellants have faulted the Court of Appeal for failing to find in their favour since it was apparent that there was sufficient material from which the respondents would have known that the appellants were minors. Similarly, upon admission by the respondents and upon the court finding that the publications related to minors, the appellate court erred in insisting on proof of loss and damage.

26. Finally, the appellants have submitted that the High Court erred in ordering them to pay costs, yet in accordance with this court's decisions in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, SC Petition No 4 of 2012; [2013] eKLR and *Raila Odinga & 5 others v IEBC & 3 others*, PEP No 5, 4 & 3 of 2013 (Consolidated); [2013] eKLR no costs are awardable in a constitutional petition filed in public interest; and which are neither vexatious nor amount to an abuse of the court process. This case, according to the appellants meets this threshold.

ii.The 1st respondent's submissions

27. The 1st respondent has relied both on its written submissions and a replying affidavit sworn on July 12, 2022 by Millicent Ng'etich, the Head of its Legal Department. It is admitted that the 1st respondent published a report on the arraignment in Murang'a Magistrate's court of the minors. It is, however, contended that the information was published in public interest and in the exercise of the freedom of expression and information as well as in pursuit of the right to life due to the escalating cases of arson that were a threat to the lives of students; that there were also financial implications arising from the numerous arson incidents in the country, dating back to the early 1990s. Due to the gravity of the phenomenon, the Government of Kenya had set up a number of committees of inquiry and task forces to look into the issues of student unrest in the years 1999, 2000, 2001 and 2008 before the alleged

incident happened on November 5, 2012. Relying on a book, *Carter Ruck on Libel and Privacy* (2019) 6th Edition p 613, the 1st respondent urged that, the public interest in the matter outweighed the minors' right to privacy; that it published the information because it was key to appraise the public of the consequences of arson, to promote deterrence among students, and to protect the right to life and property and the right to education.

28. There being no dispute that the minors had been arraigned in court as arson suspects, it was the 1st respondent's argument that the publication was a fair and accurate report of the proceedings; that it merely exposed the minors as suspects of criminal involvement and misconduct; and that, in any case, the criminal proceedings were public in nature, open to members of the public and the press, and considering also that the appellants did not apply to have the proceedings conducted in camera.

29. It was the 1st respondent's further argument that, while the minors were entitled to the right to privacy, that right was not absolute and could be limited on the basis that the said right did not prejudice the rights of other students or people. In its opinion, criminal behaviour is not private in nature, does not attract any confidentiality and/or privilege and it is against public policy for the appellants to urge the court to trump the important social and collective considerations to protect their right to privacy. In addition, the appellants failed to demonstrate that the impugned publication was in breach of the minors' right to privacy or any other constitutional rights.

30. On whether the Court of Appeal erred in finding that the appellants were required to prove any damages suffered, and relying on Supreme Court decisions in *Attorney General v Zinj Limited*, SC Petition 1 of 2020 [2021] KESC 23 and *William Musembi & 13 others v Moi Educational Centre Co. Ltd & 3 others* SC Petition 2 of 2018; [2021] eKLR, the 1st respondent submitted that damages can only be awarded upon a party proving the nature of rights that have been violated and the extent and gravity of injury caused. But, without prejudice to this argument, the 1st respondent has urged that should the court be persuaded that they were in breach of the minors' constitutional rights, then a declaration to that effect would be sufficient relief under article 23(3)(a) of the *Constitution*. In the result, they pray that this appeal be dismissed and in terms of the decision in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, SC Petition 4 of 2012; [2013] eKLR, costs of the appeal and of the superior courts below be awarded to them.

iii.The 2nd respondent's submissions

31. In its grounds of opposition dated July 26, 2022, and the submissions, the 2nd respondent opposed the appeal on four grounds: that the Court of Appeal properly exercised its discretion in dismissing the first appeal; the appellants failed to meet the constitutional threshold required to prove their claim; the appellants failed to specify which constitutional

right had been breached and if so, how it was violated by the 2nd respondent in terms of the *ratio decidendi* in *Anarita Karimi Njeru v Republic*, [1979] eKLR; and finally, the matter was of public importance and interest. For those reasons, the 2nd respondent has applied for the dismissal of the appeal.

iv.The 3rd respondent's submissions

32. In the replying affidavit sworn on November 14, 2022 by John Mwaura Mwangi, a senior editor, and in its Written Submissions, the 3rd respondent admitted broadcasting a news clip concerning the minors' arraignment in court but maintained they did so at a time when the country was facing a wave of riots in secondary schools resulting in loss of lives and immense destruction of property, which was widely reported in the media.

33. The 3rd respondent pointed out that during the appearance in court of the minors, the presence of its photojournalist was evident in the courtroom, but the court took no steps to stop him. What was more, the Presiding Magistrate did not clear the courtroom, and neither did the suspects' advocates move the court to take plea in camera. It is also maintained that the reporting of the case was done in the normal course of business and there was no malice against the minors.

34. The 3rd respondent, however, conceded like the 4th respondent, that upon learning that the appellants were minors, it pulled down the news clips from its website and stopped airing the story; that the entire coverage of the news was fair comment on matters of public interest and was done pursuant to the 3rd respondent's right to freedom of expression under article 33(1) of the *Constitution* and freedom of the media guaranteed in article 34 of the *Constitution*. Further, that the minors' right to privacy was the subject of a criminal trial and was limited under article 24 of the *Constitution* since the public had the right to be informed of such matters and the steps the Government was taking to obviate and deter further acts of arson in schools.

35. Finally, in terms of sections 107, 108 and 109 of the *Evidence Act* the 3rd respondent submitted that the appellants failed to discharge the burden of proving how the minors' constitutional rights were violated by the 3rd respondent and the nature of the resultant injury or damage suffered. The entire appeal, we have been urged to find, is frivolous, vexatious and abuse of the court process and should be dismissed with costs.

v.The 4th Respondent's submissions

36. The 4th respondent relied on the replying affidavit sworn on July 26, 2022 by Sekou Owino, its Head of Legal and Training, and its submissions dated March 30, 2023, in which they have asked us to bear in mind that, as the second appellate court, our jurisdiction is restricted

to issues of law since factual aspects of the case were subjected to analysis and evaluation by the trial court and affirmed by the first appellate court.

37. The 4th respondent's arguments follow the same lines as those of the other respondents, highlighting the prevailing situation in schools at the time; the exercise of their constitutional mandate to disseminate for public good relevant information; they could not have assumed that the suspects were children; and that as soon as they got information that the suspects were minors, they removed the offending photographs from their website.

38. In urging the court to dismiss the appeal, the 4th respondent submitted that the appellants failed to link the minors' alleged mental and emotional distress to the publications and were therefore not entitled to damages.

vi. 5th respondent's submissions

39. The 5th respondent relying on his grounds of objection dated July 19, 2022 contends that the Court of Appeal in reviewing the evidence and affirming the decision by the High Court correctly found: that the story in question and the publication of the photographs was a matter of public interest which overrode the minors' individual rights; and that the 5th respondent did not violate those rights.

D. Issues for Determination

40. From our own consideration of the pleadings, the judgments of the two superior courts below, the 6 issues framed by the appellants and the arguments by counsel representing the parties, we consider the following three issues as falling for our determination:

    i. whether the Court of Appeal erred in placing public interest in the publication of the images and identities of children in a criminal trial over and above the children's best interest.

    ii. whether upon proof of violation of the minors' fundamental rights and freedoms, the appellants were required to go further and prove damage or injury suffered as would be the case in normal civil litigation; and

    iii. whether the High Court was right to award costs against children in public interest litigation.

E. Analysis And Determination

Jurisdiction of the Court

41. As a preliminary statement, we declare our satisfaction that this appeal has properly been brought as of right pursuant to article 163(4)(a) of the *Constitution*. The petition filed in the High Court, the arguments before both superior courts below as well as the judgments of those courts, all involve the interpretation and application of articles 31(c), 33(1), 34 and 53(2) of the *Constitution*, and as such satisfy the principles enunciated in *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another*, SC Petition No 3 of 2012: [2012] eKLR.

The first of the three main issues this appeal raises is,

i. Whether both superior courts below erred by placing public interest in publishing the pictures or images of children in a criminal trial over and above the best interest of the child;

42. We reiterate the common position that when the seven suspects were presented before court on November 5, 2012, they were children as defined in article 260 of the *Constitution*. They faced arson-related charges. It is further conceded that the 1st to 4th respondents aired and published the case through their respective media houses on various platforms. However, the respondents' justification for doing so was, first, that they did not know that the suspects were minors in view of the fact that the proceedings were conducted in the normal manner in open court suggesting that they concerned adults; that generally, criminal proceedings are, by their nature public, open to other members of the public and the press; that the publication was a fair and accurate report of the proceedings and only exposed the minors to the extent that they were suspects of criminal involvement and misconduct; that the publications were authored and videos uploaded in public interest as a matter of informing the general public of the steps being taken, including charging in court those involved, to curb the arson menace; that it was the court's responsibility, knowing that the case involved children, to conduct the proceedings in camera; and finally, that the minors' right to privacy was not guaranteed in criminal proceedings but limited.

43. On their part, the appellants argued that the child's best interests ought to have been prioritized over public interest; that article 21 of the *Constitution* places a duty on the 5th respondent and the courts as State organs, to observe, protect and promote the rights and fundamental freedoms in the Bill of Rights, especially in relation to vulnerable groups such as children.

44. It is the appellants' further contention that the 1st to 4th respondents were guilty of irresponsible journalism; that the story was published with malicious intent, commercial

consideration and profit, given prominence to gain popularity and with utter disregard for the dignity, privacy and best interest of the minors as required by the law; that the respondents neither bothered to confirm the age of the minors nor seek their comments on the issues before publishing them and that as a result of their reckless actions, the minors have been stigmatized, were traumatized and even shunned by society for being exposed as arsonists; that given the wide circulation and the permanent nature of the information, the children will have to live with that stigma and trauma throughout their lives and the injury will remain indelible.

45. The last three paragraphs above constitute the rival arguments of the two sides in this appeal. The resolution of the issue in contention on this ground must depend on the proper construction of all the relevant provisions of the *Constitution* and the law. The canons of constitutional interpretation that have been infused in our judicial system over the years and which are today expressed in article 259 of the *Constitution*, adjure the courts to interpret the *Constitution* in a manner that promotes its purposes, values and principles and contributes to good governance. Those constitutional values and principles are expressed in the *Preamble* to include a commitment to nurturing and protecting the well-being of the individual, the family, communities and the nation: the recognition of the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. This is in addition to the consideration of national values and principles of governance under article 10 of the *Constitution*. They are also discoverable through purposive, holistic, organic and liberal interpretations of the *Constitution*.

46. Applying these principles, we start with article 53(2) of the *Constitution* which is the clause in the Bill of Rights dedicated to enhanced protection of children's rights, in keeping with Kenya's obligation under the *1989 UN Convention on the Rights of the Child* (CRC) and the *1990 African Charter on the Rights and Welfare of the Child* (African Children's Charter). The article requires that:

> " 53(2). A child's best interests are of paramount importance in every matter concerning the child."

47. This article is a right in and of itself of the child, and not merely a guiding principle. In addition to being a self-standing right, it also strengthens the broader framework of human rights under chapter four of the *Constitution*. The reach of article 53(2) (a child's best interests) is not to be limited to the rights enumerated in article 53(2)(a) to (f), that is, the child's right to a name and nationality; to free basic education; to basic nutrition, shelter and health care; to be protected from abuse, neglect; to parental care and protection; not to be detained, except as a measure of last resort, and when detained, for the shortest appropriate

period of time and in a separate cell from adults and in conditions that take into account the child's age and sex, among other related rights. These provisions must be interpreted to apply to all aspects of the law, civil or criminal which affect the child bearing in mind the principle of the best interest of a child. In other words, beyond article 53, all the other rights in the *Constitution* apply to children, as human beings unless they are excluded because such rights only apply to adults, for example, the right to vote or to marry.

48. The best interest of a child principle is also reflected in international law. It is, for instance, one of the four core principles of the *United Nations Convention on the Rights of the Child* (CRC), which provides that;

> " In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

In identical language, article 4 of the *African Children's Charter* restates the principle that "the best interests of the child shall be the primary consideration." Both instruments, we confirm, have been ratified by Kenya.

49. Again, in fulfillment of its commitment to undertake all appropriate legislative and other measures to implement the rights under the Conventions, Kenya enacted the *Children Act, 2001* (Repealed). Section 4(2) and (3)(b) thereof which was the applicable law when this dispute arose, again in the very language of the two Conventions restated the principle in the following words:

> " (2). In all actions concerning children whether undertaken by public or private welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration.
>
> (3). All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—
>
> a. Safeguard and promote the rights and welfare of the child;
>
> b. and promote the welfare of the child;
>
> c. ..."

50. So, what does "the best interest" of the child mean, and what is its rationale and scope? Since the best interest of a child will vary from case to case depending on the situation, its determination and what constitutes it will depend on the unique circumstances of each case as we recently explained in *MAK v RMAA & 4 others*, SC Petition No 2 (E003) of 2022; [2023] KESC 21 (KLR). We said that;

> " The concept of the child's best interest is flexible and adaptable. It should be adapted and defined on an individual basis, according to the specific situation of the child concerned considering their personal context, situation and needs."

51. For the same reason, that a child's best interest is pliable, the term has not been defined by the *Constitution* or the two Conventions. However, the First Schedule to the *Children Act, 2022* lists 18 situations (not exhaustively) of what may constitute the best interests of the child headed "Best Interest Considerations". It is important to appreciate the rationale behind this principle and why children require special treatment. We can do no better than reproduce the following explanation in the judgment of the majority in the Constitutional Court of South Africa in the case of *Centre for Child Law v Minister of Justice* 50[(CCT98/08) [2009] ZACC 18, where Cameron J, said:

> " We distinguish them because we recognise that children's crimes may stem from immature judgment, from as yet unformed character, from youthful vulnerability to error, to impulse, and to influence. We recognise that exacting full moral accountability for a misdeed might be too harsh because they are not yet adults. Hence, we afford children some leeway of hope and possibility."

[52] Those sentiments were echoed in another case before the same court in the case of *J v National Director of Public Prosecution*, 59[CCT 114/13) [2014] ZACC 13, as follows:

> " The contemporary foundations of children's rights and the best-interests principle encapsulate the idea that the child is a developing being, capable of change and in need of appropriate nurturing to enable her to determine herself to the fullest extent and to develop her moral compass. This court has emphasised the developmental impetus of the best-interests principle in securing children's right to learn as they grow how they should conduct themselves and make choices in the wide and moral world of adulthood'. (Per Skweyiya, J)

[53] In the context of criminal justice, the *Children Act, 2022* affirms the moral malleability or reformability of the child offender by emphasizing the concept of "diversion" as defined in Section 2 and stipulated in Part XV of the *Children Act* to mean measures taken to address the root causes of the children's behavior, provide support, and help them reintegrate into

society as law-abiding citizens. The primary goal is, among others, to reduce stigmatization; provide appropriate support services to reduce the likelihood of the children engaging in antisocial behaviour; reduce recidivism by children in conflict with the law; promote the rehabilitation, reconciliation, education and re-integration of the child, rather than punishment.

[54] Further, the protective procedures contained in the *Children Act*, including the prohibition of the imposition of a sentence of imprisonment and death penalty upon a child or committing a child under the age of twelve years to a rehabilitation school, or the prohibition of the use of words like "conviction" or "sentence" in relation to children, are all aimed at enhancing the best interest of the child and safeguarding their rights.

[55] Based on this recognition, that children in conflict with the law facing criminal charges are vulnerable due to their age and level of maturity, the trial process should not itself expose them further to avoidable intimidation, humiliation or distress. That explains why special courts have been established and special procedures adopted for the trial of children. Those procedures place restrictions on who can attend court proceedings involving a child and permit the trial court to hold sittings in camera at which only the presiding judicial officer, officers of the court and a children's officer are allowed to attend.

[56] How does the court reconcile this right and the competing right of the people to open justice through a public hearing under article 50(1), freedom of expression under article 33, freedom of the media in article 34 and the right to access to information found in article 35 of the *Constitution*?

Article 50(1) states that:

> "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." [our emphasis]

57. This provision should be read with sub-article (8) of the same article 50, which recognizes the need to protect vulnerable persons and other persons in the course of a public hearing:

> "(8) This Article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security." [our emphasis]

58. We identify two things for highlighting from article 50(1) and (8); the protection of vulnerable persons. Children, by article 21 are recognized as vulnerable members of society. Unlike other vulnerable groups, children are more susceptible to experiencing harm or disadvantage due to the fact of their age and other social or physical circumstances. The second thing to be observed is that, while sub-article (1) grants the right to a fair and public hearing, sub-article (8) qualifies that right by extending discretion to the court to exclude the press or other members of the public from any proceedings under specific circumstances, including to protect vulnerable persons.

59. We further invoke sub-article 2(a) of article 50 that enjoins trial courts to ensure that;

> " Every accused person has the right to a fair trial, which includes the right—
>
> (a) to be presumed innocent until the contrary is proved".

The presumption of innocence is a fundamental principle behind the right to a fair trial. Apart from article 50(2)(a) of *the Constitution*, international and regional instruments like the *International Covenant on Civil and Political Rights* (ICCPR), the *Universal Declaration of Human Rights* (UDHR) and the *African Charter on Human and Peoples' Rights* (ACHPR) also guarantee this right. The mere arrest and arraignment before the court of the appellants for the purpose of taking a plea alone does not amount to a conviction.

60. Enough of the applicable principles. In order to answer the question whether the courts below erred by placing public interest over and above the minors' rights to privacy and their best interest as children, we must subject the competing rights to the provisions of article 24. We need to observe here, that apart from the limitations imposed by article 24, there are certain rights in the Bill of Rights that are expressly self-limiting in the sense that those rights or freedoms are subject to certain declared limitations or restrictions. Self-limiting rights recognize that the exercise of one's rights should not infringe upon the rights of others or undermine public order, or safety. For example, as we shall see shortly, articles 33 and 34 upon which the respondents rely as the rights they exercised to publish the impugned material are themselves explicitly limited by those very articles. All the competing rights identified in this appeal are not non-derogable rights in terms of article 25 of the *Constitution*. They are subject to the limitation clause in article 24. That article provides that:

> " 24(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."

61. To limit a right under any of the articles under review in this appeal, it has to be demonstrated that the principles in article 24 have been met. In terms of sub- article (3) of article 24 the person seeking to limit a right has the burden of satisfying those principles. It provides as follows:

> "(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".

62. The respondents have asserted that it was the burden of the appellants to show that article 24 limitations applied to the respondents' rights. Conversely, the appellants similarly insisted that the rights under articles 33, 34 and 35 are also not absolute but subject to article 24. We find the balancing of rights skillfully enunciated by Nugent, JA of South Africa's Supreme Court of Appeal in *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)*, [2007] SCA 56 (RSA), appealing. The learned Judge said:

> "In determining the extent to which the full exercise of one right or the other or both of them might need to be curtailed in order to reconcile them what needs to be compared with one another are the 'extent of the limitation' that is placed upon the particular right, on the one hand, and the 'purpose, importance and effect of the intrusion, on the other hand. To the extent that anything needs to be weighed in making that evaluation it is not the relative values of the rights themselves that are weighed (I have said that all protected rights have equal value) but it is rather the benefit that flows from allowing the intrusion that is to be weighed against the loss that the intrusion will entail." [our emphasis].

63. Article 24 has been the subject of interpretation in many cases at all levels of the three superior court systems in Kenya. For example, in the High Court case of *Union of Civil Servants & 2 others v Independent Electoral and Boundaries Commission (IEBC) & another*, HC Petition No 281 of 2014 & 70 of 2015; [2015] eKLR, *Attorney-General & another v Randu Nzai Ruwa & 2 others*, Civil Appeal No 275 of 2012; [2016] eKLR, a decision of the Court of Appeal and our own in *Karen Njeri Kandie v Alassane Ba & another*, SC Petition No 2 of 2015; [2017] eKLR, where similar principles were restated in the following words:

> "(77) After carefully considering article 24 of the *Constitution* and the above cases, we find that the test to be applied in order to determine whether a right can be limited under article 24 of the *Constitution*, is the 'reasonable and justifiable test', that must not be conducted mechanically. Instead, the court must, on a case-by-case basis, examine the facts before it, and conduct a balancing exercise, to determine whether the limitation of the right is reasonable and justifiable in an open and democratic society. The insertion of the word 'including' in article 24 also indicates that the factors to consider while conducting the balancing act are not exhaustive but a guide as to the main factors to be taken into account in that consideration".

See also the court's other decision in *Gladys Boss Shollei v Judicial Service Commission & another*, SC Petition No 34 of 2014; [2022] KESC 5 (KLR).

64. The two-step threshold for limitation of any constitutional right and fundamental freedoms are, first whether the right limited is by statute. There can be no limitation of a constitutional right except by the *Constitution* itself or by a law; and secondly, it has to be established whether the limitation imposed on a right is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account certain relevant factors listed in article 24(1)(a) to (e), which list is not exhaustive as explained in *Karen Njeri Kandie v Alassane Ba* (*supra*). In other words, the focus on limitation is not based only on the formal existence of the law creating the limitation, but also on the nature of that law itself. Article 19(3)(c) of the *Constitution* is an emphasis that the rights granted in the Bill of Rights "are subject only to the limitations contemplated in the *Constitution*", recognizing the fact that there can be no other way of limiting a fundamental right except in the manner and to the extent provided for by the *Constitution*.

65. The initial plea to limit a right was made by the appellants in their petition in the High Court. It is this very position that has been argued and determined by both the High Court and the Court of Appeal and now before us. They sought several declaratory orders, whose effect

was to limit the respondents' rights guaranteed by articles 33, 34 and 35 to disseminate the court proceedings to the public under the open justice principle. The basis of the limitation was expressed to be the provisions of the *Children Act, 2001 (Repealed)*, the *Media Act (Repealed)* and the *Media Council Act*. The appellants contended, in that regard, that by posting a story on YouTube channels that included pictures of the children accompanied by a voice-over discussion of their alleged participation in the arson attack; that by reporting, televising, and publishing the story along with the images of the children, the respondents were in violation of the right to privacy and to protect and preserve the best interest of the children.

66. For the specific purpose of article 24(1), and to test the principles laid thereunder, we turn to the three statutes cited in the preceding paragraph as the basis of limitation. Section 4(2) of the repealed *Children Act, 2001*, which was the law in force at the time this dispute arose, recapitulates that in all actions, including actions taken in courts of law concerning children, their best interests is a primary consideration. The Children's Courts established under section 73 (now section 90 of the *Children Act, 2022*) are enjoined when hearing criminal charges against children in conflict with the law to do so separately from proceedings involving adult offenders.

67. Generally speaking, courts were guided in proceedings involving children by sections 74, 75 and 76 of the repealed *Children Act, 2001*. The former had the following provision:

> "74. Sitting of Children's Court
>
> A Children's Court shall sit in a different building or room, or at different times, from those in which sittings of courts other than Children's Courts are held, and no person shall be present at any sitting of a Children's Court except—
>
> a. members and officers of the court;
>
> b. parties to the case before the court, their advocates and witnesses and other persons directly concerned in the case;
>
> c. parents or guardians of any child brought before the court;
>
> d. bona fide registered representatives of newspapers or news agencies;

e. such other persons as the court may specially authorise to be present. [our emphasis]

68. Section 75, on the other hand vested in court the following further powers, depending on the circumstances of the case:

"

"75. Where in any proceedings in relation to an offence against or by a child, or any conduct contrary to decency or morality, a person who, in the opinion of the court, is under eighteen years of age is called as a witness, the court may direct that all or any persons, not being members or officers of the court, or parties to the case or their advocates, shall be excluded from the court. [our emphasis].

Today, section 93(5) of the 2022 Act introduces the concept of in-camera proceedings which requires that everyone else, including even the parents or guardians of the child, the complainants, witnesses, and duly accredited journalists are excluded from the courtroom.

69. Finally, on limitation under the repealed *Children Act*, the general principles regarding proceedings in the Children's Court were set out in the repealed section 76(5) as follows:

"(5) In any proceedings concerning a child, whether instituted under this Act or under any written law, a child's name, identity, home or last place of residence or school shall not, nor shall the particulars of the child's parents or relatives, any photograph or any depiction or caricature of the child, be published or revealed, whether in any publication or report (including any law report) or otherwise." [our emphasis].

70. The *Media Act, 2007* which was repealed on January 10, 2014 by the *Media Council Act, 2013* had provisions, until its repeal, that imposed further limitations on the right to freedom of expression, freedom of the media and the right of access to information. The new Act is categorical that the public's right to know has to "be weighed against the privacy rights of people in the news". See section 13. However, for purposes of this appeal, we shall rely on the *2007 Act*, which was the law governing the conduct of proceedings involving children at the time of the dispute.

71. Section 20 of that Act enjoined the media;

"

> " 20. .....as a general rule, ...to apply caution in the use of pictures and names and should avoid publication when there is a possibility of harming the persons concerned. Manipulation of pictures in a manner that distorts reality should be avoided. Pictures of grief, disaster and those that embarrass and promote sexism should be discouraged".
>
> The Act further prescribes in the second schedule, the Code of Conduct for the practice of journalists, which reiterates the duty to protect children.

72. Can these limitations be regarded as reasonable and justifiable? Do they meet the criteria of article 24? The answer to these questions lies in the factors enumerated in article 24 being satisfied; the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the caveat that the need for enjoyment of the right by one individual does not prejudice the rights of others, the consideration of the relationship between the limitation and its purpose, and whether there was a less restrictive means to achieve the purpose of the limited right. A limitation will only be justified if the court is satisfied that it meets this threshold.

73. We have alluded in paragraph 60 to the fact that, apart from the limitation imposed by article 24 on freedom of expression and of the media, similar restrictions are contained in articles 33 and 34 themselves. The former guarantees every person the right to freedom of expression, but in the same breath declares that the exercise of that right "is subject to the rights and reputation of others"; that the right to freedom of expression does not extend to, among others, propaganda for war, incitement to violence, hate speech or advocacy of hatred. See article 33(2) of the *Constitution*. Similarly, article 34 is self-limiting on the freedom and independence of the media, which though guaranteed, is declared not to extend to any of the expression specified in article 33(2). The freedom and independence of the press are to be actualized through an Act of Parliament pursuant to article 34(5). The Act establishes a media regulatory body, to among other functions, set media standards and regulate and monitor compliance with those standards. In addition, a Code of Conduct for journalists has been formulated as the ethical threshold of the practice of journalism. It demands accurate and fair reporting, confidentiality and transparency as well as responsibility.

74. While the general rule is that criminal trials are public; we have set out in the preceding paragraphs, certain established exceptions that require them to be held away from the public glare or for certain sensitive particulars to be redacted. For instance, and just like in proceedings involving children, where it is necessary to protect the identity of witnesses under the *Witness Protection Act*, the courts have the power and discretion to exclude the public from the courtroom or in the alternative, to adjourn the hearing from open court to chambers. These exceptions are recognized under article 50(8) if the exclusion is necessary,

in a free and democratic society, to protect witnesses or vulnerable persons, or to preserve morality, public order or national security.

75. It is in furtherance of this constitutional edict that section 76 (5) of the *Children Act (Repealed)* , reproduced in paragraph 69 (above), demands of all agencies in the child (criminal) justice system to ensure that, a child's name, identity, home or last place of residence or school, or the particulars of the child's parents, or photograph of the child are not disclosed, published or revealed. To illustrate the seriousness of the protection section 76(6) imposes a penalty upon;

> "(6) Any person who contravenes the provisions of sub section (5) commits an offence and shall on conviction be liable to a fine not less than one hundred thousand shillings or to imprisonment for a term not less than one year or to both, and in the case of a body corporate, a fine of not less than one million shillings."

76. We state plainly that section 76, (which is replicated in section 95(5) of the present Act), together with sections 74 and 75, (now section 93 of the 2022 Act) do not exclude the media from covering cases involving children. They include explicitly the journalists and media professionals in the class of very few persons permitted to be present in proceedings concerning children. What is restricted is what they can disclose in their reports and publications. They cannot disclose the particulars of the child, the name, image or any information that can easily lead to the identification of the child. It is clear from the reading of the law that a child who is in conflict with the law is a vulnerable victim of a failure of a system in the society and therefore all efforts must be made to protect the child from further harm even if he or she has to be processed through the criminal justice system.

77. According to the record of proceedings of this case taken before the High Court, Hon Elizabeth Juma Osoro, Senior Principal Magistrate, who presided over the matter in the criminal trial court, gave evidence to the effect that ordinarily when children are in court, the practice would be to close the court to other people; that in the instant case, when the file was placed before her to take the plea, she was informed that there were parents in court. She testified that the court was crowded and behind the minors were adult remandees who were waiting for their cases to be heard as well as court orderlies who are part of the court personnel; that she could also not adjourn to her chambers because it was small; that she did not see any of the media electronic equipment in the courtroom; and that she did not consent to the taking of the pictures of the students. Lastly, and of significance, she conceded that she was aware that the case concerned children, and that in such cases no member of the public would ordinarily be allowed to be in court during the proceedings.

78. The 1st to 4th respondents similarly fell into a more serious error than that committed by the trial magistrate by failing to conform to the constitutional, statutory and ethical standards of reporting. They proceeded to take pictures of the children with abandon and recklessly posted the story and videos on online channels complete with details of their images and names, alleging their participation in the arson attack in the school. For this infringement, the 1st to 4th respondents were jointly liable to the appellants and the trial and the appellate courts ought to have so found.

79. It is no defence that the trial court did not stop them from taking pictures. Similarly, they cannot rely on the argument that they did not know that the suspects were children. That would amount to an admission of professional negligence because, with a little due diligence, they would have ascertained that fact. To begin with, this appeal having been brought as of right under article 163(4)(a) of the *Constitution*, and therefore matters of fact that touch on evidence without any constitutional underpinning are not open for this Court's review on appeal. See *Paul Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney General & 2 others*, SC Petition 45 of 2018; [2020] eKLR, *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)*, SC Petition No 3 of 2018; [2021] KESC 34 (KLR) and *Sonko v County Assembly of Nairobi City & 11 others*, SC Petition 11 (E008) of 2022; [2022] KESC 76 (KLR). Be that as it may, we agree with the concurrent conclusions of the courts below that the respondents must have known they were reporting a case involving children because their own publications repeatedly referred to them as minors; and that it was evident that the suspects were not only school-going but were also being charged with the offence of arson within their school. The fact that they were arraigned in court as students, in school uniform, points to them ordinarily being minors. Moreover, the fact that the court ordered for age assessment of the children and for them to be remanded at Murang'a Juvenile Home, was sufficient notice that this was not a case of adults.

80. From the totality of the material on record, there was an infraction of the law committed by the respondents. Contrary to their assertions, the appellants bore no responsibility to ensure the court was cleared as indeed they had no power or capacity to do so.

> "It is a fundamental duty of the State and every state organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights ... All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including .....children".

See article 21 of the *Constitution*.

81. The failure by the respondents to comply with the legal safeguards is not for the paucity of a guide or template of what ought to happen when dealing with children in conflict with the law. Apart from the *Constitution*, international instruments and statutes, there are numerous documents to guide the courts, the defence and prosecution counsel as well as all those in the child justice system. Examples of some of these tools developed at the time of this incident include, the Child Offenders Rules, 2001, (now repealed by the *Children in Conflict with the Law (Practice and Procedure) Rules 2020*), the *Bench Book for Magistrates in Criminal Proceedings, 2004*, the *National Children Policy, 2010* and the *Framework for The National Child Protection System for Kenya, 2011*. Others subsequently developed include the *Sentencing Policy Guidelines, 2016*, the *Criminal Procedure Bench Book, 2018*, the *Guidelines for Child Protection Case Management and Referral in Kenya, 2018*, the *Plea-Bargaining Guidelines 2019*, and the *Prosecutor's Guide to Children in the Criminal Justice System,2020*.

82. While there is no denying that at the time the minors were charged there were numerous and widespread cases of arson attacks in schools, and whereas there was a general concern and therefore the public deserved to be informed, what is contested is the manner in which the respondents exercised that right in gathering and disseminating the information. Again, due to children's vulnerability on account of their age, their cases cannot be used as pawns to deter others from committing crimes, they ought to be guided, counseled and taught good behavior and how to steer clear from acts that may bring them into conflict with the law.

83. Our analysis in the foregoing paragraphs based on the holistic and purposive reading of articles 50(2), (8), 53 on one hand and articles 33, 34 and 35, on the other hand, and testing the limitations in question against article 24, leads us to conclude that the limitations imposed by the *Children Act* on the public hearing of cases involving children and the publication of their images, names and school are reasonable. They are justifiable in an open and democratic society, considering the human dignity of the children concerned. The limitation is derived from a statute, the *Children Act* and also article 50(8) of the *Constitution* itself; the limitation is intended to protect a vulnerable group, the children; it is not a blanket limitation but one that only restricts the disclosure of the child's name, the school or the images. In exceptional circumstances, the proceedings may be held in-camera. The limitation does not stop the media from carrying the story; the constitutional and statutory prescription on a child's best interests does not preclude the trial and punishment of children in conflict with the law; children in conflict with the law do not enjoy immunity from criminal prosecution; the limiting provisions in the *Children Act* are precise as to the right or freedom to be limited and the nature and extent of the limitation. Finally, the provisions do not derogate the right in question from its core or essential content.

84. For these reasons, and with respect, we agree with the appellants that the courts below erred in raising the status of public interest over the protection and the best interest of the children and their rights to privacy without properly subjecting the limitation to the provisions of article 24. The intrusion upon privacy of the children by publishing their particulars was demeaning not only to their dignity as individuals, but also to the integrity of their parents and the wider society of which they are part. The names, images and videos of the appellants were not essential for purposes of public information.

85. In disposing of this ground, we repeat that the plea was taken in open court, even though the respondents knew of the requirement under sections 74 and 75 of the repealed *Children Act*. They published, contrary to section 76(5) of the *Children Act (Repealed)* and section 18 of the *Media Act, 2007(Repealed)* the names and images of the appellants who were minors. The combined respondents' actions were in violation of articles 50(8), 31 and 53(2) of the *Constitution*. The limitation of the cited rights of the 1st to 4th respondents was in conformity with article 24 of the *Constitution*.

86. Both the High Court and the Court of Appeal erred in applying the wrong test thereby arriving at an erroneous conclusion, absolving the respondents from liability. Moreover, in our view, the Court of Appeal's finding that whether the minors were tried in public or in private, the gravity of the charges alone, was sufficient to cause them distress, trauma, anguish, fear and lowered self- confidence was not only erroneous but irrelevant in the circumstances. The consideration ought to have been whether there was a benefit in limiting the respondents' rights in the manner the law provides. Had the appellate court properly addressed itself on this question, the clear answer would have been that the benefit of upholding the best interest of the appellants outweighed the loss the 1st to 4th respondents stood to suffer. The lifetime trauma and stigma the appellants were exposed to were more detrimental than the limitation of the respondents reporting the story without the appellants' names and images. This ground, for all the reasons proffered, must succeed.

We now turn to consider the second issue, being fully persuaded that the appellants proved the contravention of the minors' constitutional rights to privacy and the best interests of the child.

ii. Whether upon proof of violation of the minors' fundamental rights and freedoms, the appellants were required to go further and prove damage, loss or injury suffered as would be the case in a normal civil litigation.

87. Like the trial court, the appellate court concluded that, one, the publication of the minors' story together with their images, names and school was factual and justified; and did not, therefore, amount to a breach of the minors' rights. Two, the two courts did not find any proof that the minors had suffered any loss or damage as a result of the alleged violations of

their constitutional rights and fundamental freedoms. For these reasons, both courts rejected the appellants' claim.

88. Having ourselves come to the conclusion that this determination was wrong and found that indeed the appellants had successfully shown that the rights and fundamental freedoms of the minors were breached, the question the second issue seeks to answer is whether the appellants were required, upon succeeding in demonstrating that indeed there were violations, to also prove that the minors suffered loss and damage as a result of the violations.

89. According to the Court of Appeal, the duty to prove any alleged violations of constitutional rights and consequential damage rested on the shoulders of the appellants in terms of sections 107, 108 and 109 of the *Evidence Act*; that while the criminal proceedings against the minors may have had a traumatic effect on them, there was nothing to show that there would have been any difference had the proceedings have been conducted in camera, and in any case, the appellants also failed to link any damage, loss or injury the minors may have suffered to the impugned publication or to the open court proceedings.

90. To answer this issue, it must be borne in mind that in their petition filed in the High Court, the appellants sought various declaratory orders; an order compelling the respondents to pay general, exemplary, punitive and aggravated damages to each minor for infringement of their rights; and an order compelling the respondents to remove the images, pictures stories or caricatures posted on the internet regarding the minors. All these prayers were rejected by both the High Court and the Court of Appeal in their respective judgments.

91. By the provisions of articles 22 and 23 of the *Constitution*, the High Court has the power and authority to enforce and uphold the Bill of Rights in claims of infringements. In proceedings brought by any person claiming that a right or fundamental freedom has been denied, violated or infringed, or is threatened, the court may, under article 23 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."

92. This court in the case of *Gitobu Imanyara & 2 others v Attorney General*, SC Petition No 15 of 2017, described article 23 as "the launching pad of any analysis on remedies for Constitutional violations". This statement has repeatedly been made in other decisions like *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (amicus curiae)*, SC Petition No 3 of 2018; [2021] KESC 34 (KLR) and others. As a launching pad, it is acknowledged that the list of six remedies in article 23(3) is not closed; that the court can grant any other appropriate relief not included in the list; that whether or not to grant a constitutional relief is an act of judicial discretion which must be exercised upon known legal principles and not arbitrarily, whimsically or capriciously.

93. Article 23 has, for the first time in our constitutional history, specifically provided for the nature of reliefs available to victims of human rights abuses, unlike the former Constitution. Under section 84 of the latter, a person who alleged infringement could only, "apply to the High Court for redress", and;

> "... the High Court [could] make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 70 to 83 (inclusive)".

94. To answer directly the question posed by this issue, under common law principles, it is settled that an injured party is entitled to damages for the loss and injury suffered under private law causes of action, like in tortious claims. In situations like those, compensation for personal loss depends on proof of such loss or damage. However, arising out of the violation of constitutional rights and fundamental freedoms of an individual under public law, the nature of the damages awardable are broadly compensatory or vindicatory, as should be apparent from the list of examples of reliefs in article 23. While it is not necessary to prove loss or damage in cases of constitutional rights violations, the court may consider the extent, nature, gravity and immensity of harm suffered by the aggrieved party when determining the appropriate remedy. In deserving cases, the redress may be in the form of an award of damages to compensate the victim. In some cases, a suitable declaration, an injunctive or conservatory order, or an order of judicial review will suffice to vindicate the right.

95. In assessing the appropriate sum to be awarded as compensation, the court must feel satisfied that the sum will afford the victim adequate redress to vindicate the victim's constitutional right. Assessment of the right quantum for compensation will take into account all the relevant facts and circumstances of the violation and the victim in the particular case, bearing in mind any aggravating features. We stress that the purpose of constitutional relief of an award of compensation is not necessarily intended to punish the violator, but only to vindicate the right of the victim.

96. In *Wamwere & 5 others v Attorney General*, SC Petition 26, 34 & 35 of 2019 (Consolidated); [2023] KESC 3 (KLR) we noted that:

> " 91. Crafting of remedies in human rights adjudication goes beyond the realm of compensating for loss as it is principally about vindicating rights. Though the appellants did not lead any evidence of the loss they may have suffered due to the violation of their right and freedom from inhuman treatment, it is important for the court to vindicate and affirm the importance of the violated rights.
>
> 92. The foregoing rational is buttressed by the reasoning of the Supreme Court of Canada in *City of Vancouver v Ward* [2010] 2 SCR 28. In that matter, the court held that damages may be awarded if at least one of three objects is served: individual compensation; vindication, in the sense of addressing harm to 'society as a whole'; and deterrence, in the sense of 'influencing government behaviour in order to secure state compliance with the charter in the future', which would promote 'good governance'. At para 30 the court recognized that:
>
> > " ... the fact that the claimant has not suffered personal loss does not preclude damages where the objectives of vindication or deterrence clearly call for an award."
>
> 93. In awarding damages, courts exercise a very broad, open- ended remedial discretion taking into account what is just, fair and reasonable in the circumstances of the case." [our emphasis]

97. Therefore, once a petitioner has presented proof on a balance of probabilities that his or her rights were violated, the court must vindicate and affirm the significance of the violated rights, even though the petitioner may not present evidence of any loss or damage suffered as a result of the violation. For these reasons, it can be said that the approach in awarding damages or compensation in constitutional rights violation cases is different from that in tortious claims. The two courts below misdirected themselves in treating the case as if it was based on a claim of libel or one of personal injury by insisting that, even after proving an infringement, the victim must, in addition, demonstrate the extent of loss, injury or damage suffered as a result.

98. This court explains this distinction clearly in *William Musembi 13 others v Moi Educational Centre Co Ltd & 3 others*, SC Petition No 2 of 2018; [2021] eKLR as follows:

> "....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."

99. The appellants petitioned to be awarded general, exemplary, punitive and aggravated damages for the infringement of the minors' rights. All the trial court was expected to do in considering this prayer was to assess what, in the circumstances of the case would be the appropriate compensation, or what other relief would vindicate the appellants' contravened rights. Examples of factors the court would have taken account of include the fact that the violations related to children; that some of the children had to transfer from the school; some were ridiculed, and being minors they were bound to suffer distress, trauma, anguish, fear and lowered self-confidence. On the other hand, exculpatory factors to consider would be the fact that some of the respondents, upon learning of the complaints about their publications immediately pulled down the offending story.

100. In the result, it was erroneous for the two courts below to ignore settled principles for the award of compensation in constitutional rights violation claims; namely, that once the burden of proving a violation was discharged, it was not necessary for the appellants to prove any damage or loss so as to be entitled to any of the reliefs contemplated in article 23(3).

101. Before the High Court, as earlier stated, the appellants had asked for an award of general, exemplary, punitive and aggravated damages. In their Written Submissions they quantified these damages at Kshs. 5,000,000, but without supporting the proposal. The 1st appellant too casually alluded to the figure in his oral testimony, but similarly conceded that he did not have any basis for it. From what we can glean from the record, this figure was not supported by any comparable decided cases. On the other hand, contrary to time-honoured practice, the learned Judge of the High Court, in dismissing the claim did not assess the damages he

would have been inclined to award the appellants had they succeeded. See *John Wainaina Kagwe v Hussein Dairy Limited*, Civil Appeal No 215 of 2010; [2013] eKLR.

102. Although before the Court of Appeal the appellants also applied for an award of general damages to each of the minors for the infringement of their rights, no such prayer was made in the petition filed before the Supreme Court, as already alluded to in paragraph 20 (above). We reiterate that of the 14 reliefs sought before this court, none seeks an award of damages or compensation. They relate mainly to declaratory orders. By failing to pray to be awarded damages, the presumption is that the appellants will be content with the reliefs they have specifically applied for in their petition, the declaratory and injunctive reliefs, which are equally remedies under article 23(3) of the *Constitution*.

103. As a rule of thumb, parties are bound and must abide by their pleadings, just as courts cannot change the pleadings presented by the parties. It would be out of character for this court to pronounce itself on any relief that has not flown directly from the parties. We cannot, no matter how well-intentioned, go beyond the grounds or prayers raised by the appellants. For this reason, we are unable to consider the question of quantum of damages that would have been awardable, and think the issue does not warrant further deliberation beyond here.

The final issue is,

iii.whether the High Court was right to award costs against children in public interest litigation.

104. The appellant's grievance regarding costs was that the High Court erred in imposing costs on the appellants in a constitutional petition filed in public interest that was neither vexatious nor an abuse of the court process. In view of the decision we have reached, we ask ourselves whether this last issue is superfluous. We shall consider it only to buttress the court's expressed opinion on public interest litigation. The passage below from our recent decision in the case of *Kenya Railways Corporation & 2 others v Okiya Omtatah Okoiti & 3 others*, SC Petition No 13 consolidated with No 18 of 2020 should suffice. In it, we clarified that;

> "(97) We find it necessary to caution that, whereas article 22 of the *Constitution* entitles every person to institute court proceedings claiming that a right or a fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened, and article 258 entitles every person to institute court proceedings claiming that the *Constitution* has been contravened or is threatened with contravention, these provisions ought not to be abused in the name of 'public interest.' This is, more so, where the litigants seek to advance private or political interests or other considerations through

> proxies. Attractive as it may sound, public interest litigation must abide by laid down rules of procedure and the law and must be aimed at addressing genuine public interests and not used for personal gain or vendetta".

105. Although the appellants sought to vindicate their own constitutional rights through an award of damages, they too asked the court to make certain declarations regarding the right to privacy and the best interest of a child. We believe these prayers were aimed at addressing real and genuine public interest issues in the criminal justice system. The questions raised and our resolution thereof in this judgment transcends the circumstances of this case and go beyond the private interests of the minors involved. We, therefore, find that the legal action was initiated for the enforcement and advancement of constitutional justice and in the public interest. Perhaps informed by these considerations, the Court of Appeal did not award costs against the appellants even after losing the appeal.

F. Conclusion

106. In view of everything we have said, we come to the ultimate conclusion that the appellants successfully proved their case that the minors' rights and freedoms had been violated by the respondents, who are jointly and severally liable to them. The prayer for a permanent order of injunction to prohibit the 1st to 4th respondents from publishing the appellants' images or names on any media platform has no merit in view of the express declaration by those respondents that the offending publication was pulled down. At any rate, we do not think the relief can be availed more than 10 years after the act complained of without any evidence of a threat or likelihood of repetition.

    We accordingly allow the appeal.

107. Before we conclude, we wish to acknowledge the importance of responsible journalism that balances the public's right to information and respect for an individual's right to privacy. As such, journalists must approach their work with the highest standards of ethics bearing in mind the prevailing provisions of the law and the constitutional imperatives involved in every case. For the instant case, the question to ask was whether publishing the pictures of children suspected in a criminal case, would advance the best interest of the child. Journalists must seek the objective truth to obviate harm associated with misreporting.

108. In paragraph 84 we have drawn attention to the fact that, apart from the provisions of the *Constitution*, international instruments and statutes there are several helpful policy documents that augment the law on children generally. Apart from simplifying the rules of procedure, these documents provide practical guidance on different aspects of children's matters which are aimed at assisting all agencies in the child justice system to navigate the

delicate contours of promoting, safeguarding, and fulfilling children's rights. Because of the elaborate nature of these documents, which we expect every judge, magistrate, prosecutor and counsel to be well conversant with, we do not intend to restate the guidelines they espouse, save to briefly summarize the following guidelines by way of emphasis of our determination;

i. At all times and in every circumstance, the child's dignity, rights and well- being must be respected. A child in conflict with the law has the right to privacy during arrest, detention and appearance in court.

ii. In reporting cases concerning children in conflict with the law, the child's image and identity, including the name, the parents, school, and residence shall not be revealed either directly or indirectly.

iii. It is the duty of the presiding officer to ensure that only those permitted by section 93(4) of the *Children Act, 2022* are allowed in the courtroom where proceedings involving a child are held. Depending on the circumstances, the presiding officer may resort to section 93(5) of the *Children Act* and adjourn to an in-camera hearing. The prosecution and defence counsel as officers of the court are equally duty-bound to assist the court to comply with this requirement.

iv. The court, where proceedings concerning a child are being conducted, shall not be used at the same time for adults. Children's Courts should be exclusively for children.

v. Presiding officers can secure the privacy and confidentiality of a child in conflict with the law, a victim of physical or sexual abuse, or a child witness in court by designing an obscured or blurred screen between the child and the rest of those who are permitted to be in open court by section 93(4) of the *Children Act*.

vi. Code names, pseudo names, or initials of their names must be used to describe children in all children's cases.

vii. The provisions of article 50 of the *Constitution* and section 235(c) of the *Children Act* must be adhered to in order to conclude cases involving children expeditiously.

G. Costs

109. Costs follow the event but are at the discretion of the court. We are guided by the principles on the award of costs enunciated in Jasbir *Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others*, SC Petition 4 of 2012; [2013] eKLR. Without doubt, the appeal raises substantive issues of law and of public interest. We think, for these reasons, it is appropriate to order parties to meet their own costs.

H. Final Orders

110. In light of the above, we order that:

i. The petition dated June 24, 2022 is hereby allowed.

ii. The Judgment of the Court of Appeal dated May 13, 2022, in Civil Appeal No 296 of 2017 is hereby set aside, save for the determination on the costs of the appeal.

iii. The judgment of the High Court dated February 2, 2017 in Constitutional Petition No 56 of 2013 is hereby set aside in its entirety.

iv. A declaration hereby do issue that the respondents violated the appellants' right to privacy as guaranteed under article 31(c) of the *Constitution*.

v. A declaration hereby do issue that the respondents violated the appellants' right to have their best interests considered of paramount importance as guaranteed under article 53(2) of the *Constitution*.

vi. Parties to bear their own costs of this appeal, in the High Court and the Court of Appeal.

vii. We hereby direct that the sum of Kshs. 6,000/-, deposited as security for costs upon lodging of this appeal, be refunded to the appellants.

It is so ordered.

Muriithi (Representative of the Estate of Mwangi Stephen Muriithi) v Janmohamed SC (Executrix of Estate of Daniel Arap Moi) & another (Petition 41 of 2018) [2023] KESC 61 (KLR) (30 June 2023) (Judgment) (with dissent - MK Ibrahim & N Ndungu, SCJJ)

Supreme Court of Kenya

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

Neutral citation: [2023] KESC 61 (KLR)

Constitutional Law *– fundamental rights and freedoms – remedies – writ of habeas corpus – nature and scope - what was the nature, scope, and rationale of the writ of habeas corpus - whether a habeas corpus application barred proceedings for the enforcement of fundamental rights and freedoms - Constitution of Kenya, 2010 articles 25(d) and 51(d); Preservation of Public Security Act (repealed) section 4(2)(a); Criminal Procedure Code section 389(1); Criminal Procedure (Directions in the Nature of habeas corpus) Rules, 1948.*

Statutes *– interpretation of Statutes – interpretation of the Preservation of Public Security Act (repealed) – effect of the Preservation of Public Security Act (repealed) on the writ of habeas corpus - what was the effect of the Preservation of Public Security Act (repealed) (that legalized detention without trial) on the writ of habeas corpus - whether a court order in a habeas corpus application could determine the legality of a detention under the provisions of the Preservation of Public Security Act (repealed).*

Civil Practice and Procedure *– appeals – appeals to the Supreme Court – appeal on certification of a matter as one raising matters of general public importance vis-à-vis appeal on grounds of constitutional interpretation - whether an appellant before the Supreme Court could extend their appeal beyond the parameters which the appeal was certified as one involving a matter of general public importance by the Court of Appeal - whether the Supreme Court could shut appellants out from getting effective reliefs because of electing to pursue an appeal as a matter of general public importance and not one of application or interpretation of the Constitution – Constitution of Kenya, 2010 article 163(4); Preservation of Public Security Act (repealed) section 4(2)(a); Criminal Procedure Code section 389(1); Criminal Procedure (Directions in the nature of habeas corpus) Rules, 1948 rule 3*

Civil Practice and Procedure *– pleadings – constitutional petitions – parties to a suit -principle that courts were limited to the reliefs in the pleadings – where one filed a constitutional petition against the former president in his personal capacity but did not join the State or the Attorney General – where the petitioner sought reliefs against the estate of the former president and against the State - whether in a constitutional petition filed against a former President in his private capacity where the State or the Attorney General was not a party, the court could apportion liability to the State - whether courts could apportion liability and/or compensatory relief against a person that had never been a party to the proceedings.*

Law of Evidence *– burden of proof – burden of proof in constitutional petition for the violation of human rights – principle that the one that alleges bore the burden of proving the allegations –where a*

petitioner was hampered in collecting evidence because of interference by State actors - whether courts could forgo the burden of proof on a petitioner in cases of human rights violations where the state actors deliberately ensured that their victims' access to information and evidence was severely curtailed - whether in constitutional petitions courts could forgo the burden of proof on a petition to prove a claim and instead take judicial notice of incidents that had drawn widespread press coverage - Evidence Act section 3(2), 107, 108, and 109; of the Civil Procedure Rules (repealed) order VI rule 9

Words and Phrases *– habeas corpus – definition - a writ employed to bring a person before a court, most frequently to ensure that the person's imprisonment or detention is not illegal (habeas corpus ad subjiciendum) in addition to being used to test the legality of an arrest or commitment, the writ may be used to obtain judicial review of, the regularity of the extradition process, the right to or amount of bail, or the jurisdiction of a court that had imposed a criminal sentence. - Black's Law Dictionary*

Brief facts

The appellant was a former business partner with H.E the late Daniel Toroitich Arap Moi. The appellant contended that when their business interests conflicted, the appellant was unlawfully detained and his interests in the companies that he was a business partner with the former President were sold off without according him with proper compensation. The petitioner (deceased; estate was suing on his behalf) was arrested by the police in May 1982 while at his residence. Unable to trace him for three days, his wife took out a writ of *habeas corpus* against the Director of Criminal Investigations Department (CID). The court issued summons to the Director of Criminal Investigations, requiring him to appear before the court and show cause why the deceased could not be released. The summons was copied to the Attorney General. In response the State produced in court a copy of a detention order issued pursuant to the Preservation of Public Security Act (repealed) placing the deceased under preventive detention. He informed the court that the original order had been served upon the deceased. The court held that the police had discharged their burden and had shown cause why the deceased could not be set at liberty.

On October 23, 2009, twenty-seven years later, the deceased filed before the High Court, Constitutional and Judicial Review Petition No. 625 of 2009 against H.E the late Daniel Toroitich Arap Moi, who at the time of the deceased's detention was the President of the Republic of Kenya. The deceased alleged violation of his right to personal liberty and to property enshrined under sections 72, 75 and 84(1) of the repealed Constitution. It was his contention that his detention was illegally orchestrated by President Moi, who was his business partner, for the sole purpose of dispossessing him of his proprietary rights. The High Court held that the deceased's rights were violated and awarded the deceased a sum of Kshs. 50,000,000/- as punitive damages against President Moi's unlawful acts, at an interest rate of 12% per annum from the date of the Judgment till payment in full, and Kshs. 80,161,720/- at an interest rate of 12% per annum on a compounded basis for what would have been the deceased's share of the proceeds of sale from the suit properties.

On the appeal of the respondent, the Court of Appeal held that the consideration of a *habeas corpus* application barred proceedings for the enforcement of fundamental human rights and

freedoms. It also held that detention order was issued by the Minister in Charge of Internal Affairs in the Office of the President, and not the President himself, hence was an act of state. It therefore overturned the High Court's findings and instead found that President Moi was not responsible for the deceased's detention.

Aggrieved the estate of the deceased filed the instant petition in which it contended that Court of Appeal erred by finding that a *habeas corpus* application barred proceedings for the enforcement of fundamental human rights and freedoms against persons demonstrated to be responsible for the breach of such fundamental rights and freedoms. The appellant contended that liability accrued to the former President as the detention was occasioned by their private business dealings with the former President. The respondents opposed the appeal on grounds that the Supreme Court lacked jurisdiction as the appeal exceeded the parameters pursuant to which it was admitted.

Issues

i. What was the nature, scope, and rationale of the writ of *habeas corpus*?
ii. Whether a *habeas corpus* application barred proceedings for the enforcement of fundamental rights and freedoms.
iii. What was the effect of the Preservation of Public Security Act (repealed) (that legalized detention without trial) on the writ of *habeas corpus*?
iv. Whether a court order in a *habeas corpus* application could determine the legality of a detention under the provisions of the Preservation of Public Security Act (repealed).
v. Whether an appellant before the Supreme Court could extend their appeal beyond the parameters which the appeal was certified as one involving a matter of general public importance by the Court of Appeal.
vi. Whether the Supreme Court could shut appellants out from getting effective reliefs because of electing to pursue an appeal as a matter of general public importance and not one of application or interpretation of the Constitution.
vii. Whether courts could apportion liability and/or compensatory relief against a person that had never been a party to the proceedings.
viii. Whether in a constitutional petition filed against a former President in his private capacity where the State or the Attorney General was not a party, the court could apportion liability to the State.
ix. Whether courts could forgo the burden of proof on a petitioner in cases of human rights violations where state actors deliberately ensured that their victims' access to information and evidence was severely curtailed.
x. Whether in constitutional petitions courts could forgo the burden of proof on a petition to prove a claim and instead take judicial notice of incidents that had drawn widespread press coverage.

Held

Per PM Mwilu, DCJ and VP; SC Wanjala, and I Lenaola, SCJJ (Majority Decision)

1. The appeal was before the Supreme Court having been certified as one involving a matter of general public importance under article 163(4)(b) of the Constitution of Kenya, 2010. The delineated issues for determination derived from what the court considered as matters of general public importance. The jurisdiction of the court to entertain the appeal was conclusively determined at the stage of certification. The respondents could not argue that the appeal did not raise any weighty constitutional questions to warrant the Supreme Court's further intervention. Whether the appeal exceeded the parameters of leave granted by the Court of Appeal was a matter for the Supreme Court to decide as it disposed of the same.
2. *Habeas corpus* originated from a Latin maxim which simply translated to, you have the body, and by extension, produce the body. The essence of a writ or order of *habeas corpus* was to secure the production of a person in a court of law by the State so as to facilitate a judicial inquiry into the reasons for his/her incarceration. The application for such an order was usually directed at an agency of the State where the applicant had reason to believe that the missing person, was in the custody of the former. The writ of *habeas corpus* was a fountain of liberty, a bulwark against illegal confinement of those, who would otherwise be free. It liberated the oppressed from the dungeons of those who wield authority over the citizenry.
3. Before the promulgation of the the Constitution of Kenya, 2010, (the Constitution) the writ of *habeas corpus* applied in Kenya as a common law doctrine by virtue of section 3 (1) (c) of the Judicature Act. The jurisdiction to issue the writ vested as it still did, in the High Court. It was a special and supervisory jurisdiction which empowered the High Court to oversee, safeguard and uphold the liberty of a citizen in the event of an illegal incarceration. The writ of *habeas corpus* was enshrined in articles 25(d) and 51(d) of the Constitution as a fundamental right from which there could be no derogation.
4. Section 389 (1) of the Criminal Procedure Code provided the orders that the High Court could issue under *habeas corpus* jurisdiction. The Criminal Procedure (Directions in the Nature of *habeas corpus*) Rules, 1948 provided that an application shall be made by way of chamber summons supported by an affidavit. If not summarily dismissed, the court directed that summons be issued to the person alleged to be holding the detainee to show cause why the detainee should not be released. The summons and its supporting affidavit must be served upon the Attorney General.
5. The writ of *habeas corpus*, once granted or denied, could not operate as a bar to any further proceedings. *Habeas corpus* was meant to secure the release into liberty of a person from unlawful custody. The writ of *habeas corpus* was never fashioned to grant relief beyond release of a person from unlawful custody. The grant or denial of the writ did not deprive an applicant from pursuing recompense from the court for violation of his right to liberty occasioned by the unlawful detention. Such a claim for compensation could not be filed contemporaneously with a petition for a writ of *habeas corpus*. The pursuit of

compensation for a violation occasioned by the unlawful incarceration of a person, could not be extinguished by his release through a writ of *habeas corpus*.

6. The Preservation of Public Security Act (repealed) empowered the minister responsible for internal security, to issue an order for the detention without trial, of a person who in the opinion of the minister, was a danger to public security. The objective of the writ of *habeas corpus* was to secure the liberty of a person, while that of the Preservation of Public Security Act (repealed) was to limit the liberty of a person. The procedure under the former, was judicial while the one under the latter, was administrative. The effect of the Preservation of Public Security Act (repealed) was to render the writ of *habeas corpus* inoperable. At the time of the deceased's detention, what was produced before the court following an application for *habeas corpus*, was not a body, but of a copy of an order, ousting the High Court's authority to inquire into the legality of the deceased's detention.

7. In the proceedings, the High Court acknowledged the fact that the writ of *habeas corpus* was no longer available to the applicant in the face of the Preservation of Public Security Act (repealed). That was a classic case of rule by law as opposed to rule of law. It was during that dark period in the history of Kenya that many citizens who dared find fault with the government of the day, got detained without trial for indeterminate terms, at the pleasure of their tormentor.

8. It was not possible for a court to determine the lawfulness of a detention when the entire process of inquiry had been frozen by a detention order. The body could neither be produced, nor could an inquiry into the legality of the detention be conducted given the ouster of the High Court's authority to do that.

9. The instant appeal was admitted on the basis of two issues; whether a *habeas corpus* application barred proceedings for enforcement of fundamental rights and freedoms; and whether a court order in a *habeas corpus* application could determine the legality of a detention under the provisions of the Preservation of Public Security Act (repealed); as formulated by the Court of Appeal. The appellant was allowed to canvass the two issues because the court considered them to be of general public importance. The appellant was not at liberty to reopen his appeal beyond the parameters pursuant to which it was admitted.

10. Detention without trial, orchestrated by the State, against its critics amounted to a violation of the personal liberties of the detainees. The Bill of Rights was a non-negotiable covenant. It could not be legislated away or ousted by Parliament.

11. The deceased's right to personal liberty was violated consequent upon his detention without trial through the detention order. The violation was an act of State, for which compensation should ideally be awarded to the estate of the deceased against the State. However, the appellant had never sued or even sought to join the Attorney General or any other State Organ to the instant proceedings. The Supreme Court was faced with considerable difficulty on how to apportion liability, hence compensatory relief, against a person or agency that had

never been a party to the proceedings. A party was always bound by their pleadings. The Supreme Court restricted itself within pleadings.

12. The Supreme Court was not able to sanction any other form of compensation against the estate of President Moi based on the claims of fraudulent sale of company shares; claims that had been discounted by the Court of Appeal for insufficiency of evidence. Apart from the fact that the issue was not before the court, such a claim would be well founded not in public law, but company law, where the principle in Salomon v A Salomon and Co Ltd [1897] AC 22 (principle of separate legal personality of a company) still held sway.

Dissenting opinion

Per MK Ibrahim, SCJ (dissenting)

1. The sole purpose of the writ of *habeas corpus* was to free persons from impermissible detention. A person may still seek compensation from the court for a violation of their right to liberty brought on by the illegal imprisonment whether the writ was granted or not. A petition for a writ of *habeas corpus* could not be filed concurrently with such a claim for compensation.
2. On one hand, the purpose of *habeas corpus* had always been to ensure that a person in custody was brought before a court of law so that it could be decided whether or not his detention was legal. The rights to personal liberty had always been guaranteed under the Constitution. With Independence, a Bill of Rights was entrenched in the Independence Constitution (the repealed constitution before it was amended) to facilitate the protection of individual rights. Section 16 thereof guaranteed the right to personal liberty. Section 29 however provided for declaration of emergency during which derogation from section 16 was permitted if passed under the authority of an Act of Parliament.
3. In 1966, section 83 and 85 of the repealed Constitution (previously sections 16 and 29 respectively of the independence Constitution) were amended through Act No. 18 of 1966. The Preservation of Public Security Act (repealed) was also amended *to wit*; the term emergency was replaced by the term public security; the period for parliamentary review of the emergency order was increased from two months to eight months; and greater and wider derogations from the rights guaranteed in the Bill of rights were permitted.
4. The Constitution (Public Security) Order, L.N. 211 of 1966 brought Part III of the Preservation of Public Security Act (repealed) into operation, and the executive invoked the powers granted to it by section 4 (2) (a) and (b) of the Act. Significantly the sub-sections provided for the detention of persons, the registration of persons and restriction of movement and the compulsory movement of persons, including the imposition of curfews. Detailed rules governing the detention of persons were made, being the Preservation of Public Security (Detained and Restricted Persons) Regulations, 1978. The President delegated his power of detention to the Minister of Home Affairs under rule 6 of the Preservation of Public Security (Detained and Restricted Persons) Regulations. Act No. 10 of 1997 deleted the provisions of section 4(2)(a).

5. The Preservation of Public Security Act (repealed) and the Preservation of Public Security (Detained and Restricted Persons) Regulations, 1978 were applicable at the time of the appellant's detainment.
6. The Preservation of Public Security Act (repealed) gave the Minister in charge of internal security the authority to order the detention of anyone who, in his or her judgment, posed a threat to public safety. Juxtaposing that to the purpose of the writ of *habeas corpus* fashioned to protect an individual's right to liberty, the net result was that the Preservation of Public Security Act (repealed) was intended to do the exact opposite by arbitrarily restricting an individual's freedom. The former involved a judicial process, whereas the latter involved an administrative one. The Preservation of Public Security Act (repealed) had the effect of invalidating the *habeas corpus* writ. When the deceased was being held in custody, the only thing that was presented to the court in response to a request for *habeas corpus* was a copy of a detention order that barred the court from considering whether the deceased's detention was lawful.
7. The writ of *habeas corpus* application by the appellant did not operate as a bar to further proceedings. The Court of Appeal erred in setting aside the declaration by the High Court that the appellant's detention violated his rights under section 72 of the repealed Constitution.
8. The dissenting court departed with the position of the majority that beyond the issues framed and considered to be of general public importance, the appellant was not at liberty to reopen his appeal beyond the parameters pursuant to those admitted. The appellant was held without a trial during the administration of former President Moi. Kenyan courts had upheld the Bill of Rights enshrined in the repealed constitution and the Constitution of Kenya, 2010 as a non-negotiable covenant that could not be legislated away. Kenyan courts had determined that detention without trial, orchestrated by the State against its critics amounted to the egregious violation of the personal liberties of the detainees. The victims of the detentions had over the years, successfully sought recompense from the courts long after the reign of the aforesaid regime came to an end. The instant case should not be any different.
9. Ordinarily, once a party elected to file their appeal under article 163(4)(b) of the Constitution as concerning general public importance then the they would not have the option of arguing matters under article 163(4)(a) as raising the application or interpretation of the Constitution. However, what instigated the appeal before the Supreme Court was the appellant's High Court Constitutional and Judicial Review Petition No. 625 of 2009. It was for the court to relook at the viability of the High Court petition that stood dismissed by the Court of Appeal.
10. What the court looks out for before certification was whether an issue transcended the circumstances of a case and had a bearing on the general public or public interest. Though the court owed the general public resolution of the issue of general public importance, the court, as the apex and the court of last resort, bore a duty to the parties

before it to help them resolve their issues and grant effective remedies. The Supreme Court had previously resolved and issued reliefs in cases certified as involving matters of general public importance. In order to arrive at justiciable and appropriate remedies, the Supreme Court could re-examine factual findings by the superior courts to determine their suitability. The duty was more pertinent where there were historical human rights violations.

11. The appellant elected to sue only the late President Moi in his capacity as not only the former president but also his former business partner. He failed to enjoin the Attorney General or the State in whatever capacity.

12. Parties were bound by their pleadings and the Supreme Court was bound to resolve the case as presented by the parties. Nevertheless, the failure to enjoin the State or the Attorney General was not fatal to the appellant's claim. According to the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006, it was not a requirement that in constitutional cases the Attorney General had to be a respondent. Rule 15 under Part III on enforcement jurisdiction provided that the petition was to, in a criminal case, be served on the Attorney General and in a civil case, on the respondent, within seven days of filing. Remedies for violation of fundamental rights and freedoms under the repealed constitution were available against private individuals. There was nothing in law that barred the appellant from suing the later former President as a private citizen.

13. The issue before the superior courts was whether the appellant's fundamental human right to liberty was deprived as a consequence of the actions of the 1st respondent and whether as a result of such deprivation of liberty the appellant suffered loss in his business. The two were so intricately interconnected that to apply the principle of Salomon v A Salomon and Co Ltd [1897] AC 22 (principle of separate legal personality of a company) would be to defeat the purpose and intent of the Bill of rights guaranteed in the Constitution.

14. Where there were human rights violations by the state, or by persons utilizing state machinery, victims of such violations had their access to vital information hampered. That was often done in order to curtail the victim's ability to effectively pursue challenges in court. It was why several international human rights bodies had recognized, in a general sense, the merits of allocating the burden to the state where the state had greater access to information. That inequality in access to information was what informed the need for the Supreme Court to take judicial notice of incidents that had drawn widespread press coverage nationally and internationally as well as condemnation across the globe as a matter of general notoriety.

15. It could be time to have the discussion regarding strictly holding petitioners to the burden and standard of proof in cases of human rights violations where the state actor or persons using state machinery deliberately ensured that their victims' access to information and evidence was severely curtailed. It would be illogical to strictly hold the appellant to the

burden and standard of proof, given that the alleged realization of various properties was carried out during the time he was held in detention. The 1st respondent elected not to contest the appellant's factual claims. Further, even after being released, admittedly he was not able to gain access to all the necessary documents to prove his claim. However, the appellant was able to gather and submit to the High Court *vide* affidavit.

16. The appellant's detention order was issued by the Minister in Charge of Internal Affairs. During the time the 1st respondent was the President of Kenya, the office of the Minister of Internal Security was domiciled in the Office of the President. The dissenting court took judicial notice that during the time of the appellant's detention, it was well recorded that President Moi was all powerful and had control over that branch of government. His was a dictatorial state. Further, it was well documented that former President Moi used arrests and detention without charge to repress his opponents and deemed adversaries in the years following the attempted coup in 1982 as well as throughout the struggle for multiparty politics. Many people had shared accounts of being subjected to cruel treatment, humiliation, and appalling conditions. History was further checkered with the powers that the President had under the Preservation of Public Security Act (repealed). From the recorded history it would be reasonable to believe the appellant's account that the former President was not only involved but was the author of his detention for a period over three (3) years.

17. The appellant had sought to dissolve his business entities with the former President but the former President was opposed to the idea. Any disputes regarding the business relations between the appellant and the 1st respondent could have been resolved in civil court as civil matters. However, before the matter could be resolved, the appellant was detained under the Preservation of Public Security Act (repealed), without trial and for an indefinite period of time. During which time, the properties of the various companies were sold off without the appellant's involvement and without accounting for the same.

18. The appellant's detention order was signed by the Minister of Internal Security. However, there was no reason to believe that the detention was carried out for the purposes laid down in the Preservation of Public Security Act (repealed).

19. Civil proceedings could not be instituted in any court against the President or the person performing the functions of the office of the President during their tenure of office in respect of anything done or not done under the Constitution of Kenya 2010. Once a person ceased to be a President, they lost immunity and became liable for their actions and omissions. That position was no different from section 14 (2) of the repealed constitution.

20. The court was able to find that it was difficult to explicate the President's hand in commencing the constitutional amendment process and the use of the powers of the office to do so. So too in the instant case, it was difficult to explicate the role of former President Moi in the appellant's detention in 1982 and subsequent realization of various properties in companies both he and the appellant were shareholders during the time of the appellant's

detention. The Minister of Internal Security could not have detained the appellant, the former President's business partner, for three years without the former President being aware. Given that several properties were realized in that time. The authority the President had at the time, the nexus created by the detention order, the resultant interference of the appellants person liberty and the deprivation of his right to property were too glaring for the dissenting court to turn a blind eye.

21. Due to his detention, the appellant was not able to gain access to all the necessary documents to prove his case. However, he was able submit an affidavit that proved the sale of three properties for approximately 108 million Kenya Shillings.

22. It was difficult to award damages in cases of constitutional violations; it was not as straightforward as in tortious or civil liability claims. The parameters for consideration when assessing damages for constitutional violations were:

    1. the duration of the claimant's detention;
    2. the level of physical and mental suffering endured by the claimant;
    3. the degree of responsibility of the individual(s) responsible for the suffering caused to the claimant;
    4. the extent of the action or inaction complained of, and any other incidental rights that may have been violated as a consequence of the first breach(es);
    5. award was discretionary and would depend on the facts and the circumstance of each case; and,
    6. award was not compensatory or punitive but a vindication of the violated rights.

Dissenting court would have allowed the petition.

Orders Per MK Ibrahim, SCJ (Dissenting)

i. *Declaration issued to the effect that a habeas corpus application did not bar a litigant from pursuing the available legal remedies and the same did not determine the legality or otherwise of an individual's arrest and detention under the Preservation of Public Security Act*

ii. *Declaration issued to the effect that a President enjoyed immunity from personal omissions and illegalities attributed to him during his tenure of office, once he/she ceased to be a President and he/she was liable.*

iii. *Declaration issued that the petitioner was entitled to damages and interest owing to the loss of business incurred as a result of his detention*

iv. *The judgment rendered by the Court of Appeal was set aside.*

v. *Order issued partially reinstating the judgment and order of the High Court to the effect of awarding compensation for the deprivation of the appellant's liberty a sum of Ksh. 5 million and for the deprivation of his property a sum of Ksh. 27,541,720/- as against the 1st respondent's estate.*

vi. *Interest on the awards of Ksh. 5 million and Ksh. 27,541,720/- at court rates of 12% p.a. from the date of the Judgment of the High Court issued on April 6, 2011.*

Per N Ndungu, SCJ (dissenting)

1. A writ of *habeas corpus* could bar any further proceedings once it had been granted or denied. The finding by High Court that the appellant's detention violated his rights under section 72 of the repealed Constitution was proper. The Court of Appeal erred by finding otherwise.
2. The second dissenting court concurred with the majority in that it was impossible for a court to determine the lawfulness of the said detention and that it was undeniable that the deceased was detained without trial under the regime of former President Moi. However, the majority, even when coming to the above conclusion, could not grant the appellant the reliefs sought. The reasons given were that the appeal was admitted only on the basis of the two issues certified and formulated by the Court, under article 163 (4)(b) of the Constitution. Secondly, because it was determined that the appellant elected to sue only the late President Moi in his capacity, as not only the former President but also as his former business partner, and that he failed to sue or seek joinder of the Attorney General or the State in the suit. The majority, found it difficult to apportion liability and compensatory relief, against a person or agency that had never been a party to the proceedings. It was at that juncture, that the second dissenting court disagreed with the majority.
3. The Supreme Court ought not to deny the appellant effective reliefs because he elected to pursue the appeal as a matter of general public importance (GPI) as opposed to one of application or interpretation of the Constitution. Having agreed with the High Court, that the deceased's right to personal liberty was violated consequent upon his detention without trial, the Supreme Court ought to find a viable relief.
4. The Supreme Court certified the instant matter as one of GPI. Rightly so because it touched on the conduct, culpability, and liability of a former Head of State for matters (detention) arising in the course of his term and was therefore of immense public interest. In addition, it had ramifications on the rights of persons to pursue redress on the legality or otherwise of detentions, especially under applications for *habeas corpus*.
5. The Supreme Court, as the apex and the Court of last resort, bore a duty to the parties before it to help them resolve their issues and grant effective remedies. That was especially so in circumstances where a litigant was disadvantaged by factors outside his or her control. It was not in the interests of justice to deny effective remedies to an appellant who had exercised all due diligence in pursuit of his cause and led the court to the finding that his/her rights to personal liberty had been violated.
6. The repressive nature of an autocratic and powerful presidency and authoritarian regime in the late 1980's led to many arbitrary arrests, detentions, and other related constitutional violations. However, now under the new transformative Constitution of Kenya, 2010. The Supreme Court could not shut its eyes to the fact that the detention as evidenced, violated the deceased's right to personal liberty. Such detention caused a huge financial, social, and emotional cost to family members of such incarcerated people. Illegal detention had a negative impact on society. The court must recognize and ensure that the general welfare

of the public was protected. Seeing as there was a clear nexus between the act of detention and the resultant loss of property, the second dissenting court would have extrapolated the parameters for consideration when assessing damages for the deceased's constitutional violations.

7. Once established that the deceased's right to personal liberty was violated consequent upon his detention without trial, the Supreme Court ought to have come to his aid whether or not Attorney General or the State in the suit were parties to the suit, and provided effective remedies. That view was also buttressed by the legal regime pre-2010: remedies for violation of fundamental rights and freedoms under the repealed constitution were available against private individuals.
8. The issue before the superior courts was whether the appellant's fundamental human right to liberty was deprived as a consequence of the actions of the 1st respondent and whether as a result of such deprivation of liberty the appellant suffered loss in his business. Those two were so intricately interwoven that to apply the principle of *Salomon v A Salomon and Co Ltd* [1897] AC 22 (principle of separate legal personality of a company) would be to defeat the purpose and intent of the Bill of rights guaranteed in the Constitution.
9. The appellant was able to prove, at the High Court, to some extent, the sale of various properties and compensation he received and what was owed. That allowed the High Court to compute and award him what would have been his share of the proceeds.
10. It was important for the State to be consistently aware that past conduct of its officials and agents would no longer remain unpunished. Kenya must not return to those dark days. The Supreme Court should always be a temple of justice for victims of historical injustices and justice must be seen to be done in the eyes of the victim.

Second dissenting court would have allowed the petition.

Orders Per N Ndungu, SCJ (dissenting)

i. *Declaration issued that a habeas corpus application did not bar a litigant from pursuing the available legal remedies and the same did not determine the legality or otherwise of an individual's arrest and detention under the Preservation of Public Security Act (repealed).*
ii. *Declaration issued that the petitioner was entitled to damages and interest owing to the loss of business incurred as a result of his detention.*
iii. *The entire judgment of the Court of Appeal would have been set aside.*
iv. *The judgment and order of the High Court of Kenya at Nairobi would have been partially reinstated awarding compensation for the deprivation of the appellant's liberty at a sum of Ksh. 5 million and for the deprivation of his property a sum of Ksh. 27,541,720.*
v. *Interest on the awards of Ksh. 5 million and Ksh. 27,541,720/- at court rates of 12% p.a. from the date of the Judgment of the High Court issued on April 6, 2011 would have been granted.*
vi. *The 1st respondent would bear the appellant's costs.*

Appeal dismissed.

Orders

Security for costs to be refunded to the appellant, each party to bear its own costs.

Citations

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Kenya

1. *Attorney General & 2 others v Ndii & 79 others; Dixon & 7 others (amicus curiae)* Petitions 12, 11 & 13 of 2021; [2022] KESC 8 (KLR) (Consolidated) - (Explained)
2. *Board of Governors, Moi High School, Kabarak v Malcom Bell & another* Petitions 6 &7 of 2013; [2013] eKLR (Consolidated) - (Explained)
3. *Captain (Rtd) Frank Mbugua Munuku v Kenya Defence Forces & another* Constitutional Petition No 497 of 2012; [2013] eKLR - (Explained)
4. *Equity Building Society v Nathaniel Ngure Kihiu* Civil Case 1647 of 2000; [2001] eKLR - (Explained)
5. *Imanyara, Gitobu & 2 others v Attorney General* Petition No 15 of 2017; [2018] eKLR - (Explained)
6. *Independent Electoral Boundaries Commission & another v Stephen Ndambuki Muli & 3 others* Civil Appeal 219 of 2013; [2014] eKLR - (Explained)
7. *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (amicus curiae)* Petition 11 of 2020; [2023] KESC 4 (KLR) - (Explained)
8. *Kariuki, Peter M v Attorney General* Civil Appeal 79 of 2012; [2014] KECA 713 (KLR) - (Explained)
9. *Kidero, Evans Odhiambo & 4 others v Ferdinand Ndungu Waititu & 4 others* Petitions 18 & 20 of 2014; [2014] eKLR (Consolidated) - (Explained)
10. *Koigi Wamwere v Attorney General* Civil Appeal 86 of 2013; [2015] KECA 917 (KLR) - (Explained)
11. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] 3 KLR 199 - (Explained)
12. *Mariam, Mohamed & another v Commissioner of Police & another* Miscellaneous Criminal Application 732 of 2007; [2007] KEHC 1640 (KLR) - (Explained)
13. *Masoud, Salim Hemed & another v Director of Public Prosecution & 3 others* Petitions 7 & 8 of 2014; [2014] eKLR (Consolidated) - (Explained)
14. *Matiba, Kenneth Stanley Njindo v Attorney General* Petition 94 of 2014; [2017] eKLR - (Explained)
15. *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) - (Explained)
16. *MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (amicus curiae)* Petition 9 of 2021; [2023] KESC 2 (KLR) - (Explained)

17. *Mwangi Stephen Muriithi v Daniel Toroitich arap Moi & Raymark Limited* Application 45 of 2014; [2018] KESC 19 (KLR) - (Explained)
18. *Nduttu & 6000 others v Kenya Breweries Ltd & another* [2012] 2 KLR 804 - (Explained)
19. *Ngoge v Kaparo & 5 others* Petition 2 of 2012; [2012] 2 KLR 419 - (Explained)
20. *Njau, David Gitau & 9 others v Attorney General* Constitutional Petition No 340 of 2012; [2013] eKLR - (Explained)
21. *Nyutu Agrovet Limited v Airtel Networks Kenya Limited & another* Petition 12 of 2016; [2019] KESC 11 (KLR) - (Explained)
22. *Okoiti, Okiya Omtata & 4 others v Attorney General & others* Petition 7 of 2019; [2019] KEHC 9110 (KLR) - (Explained)
23. *Ooko v Republic* Civil Case 1159 of 1966; [1966] eKLR - (Explained)
24. *Osire, Denish Gumbe v Cabinet Secretary, Ministry of Defence & another* Petition 572 of 2013; [2017] eKLR - (Explained)
25. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2013] KESC 20 (KLR) - (Explained)
26. *Steyn, Hermanus Phillipus v Giovanni Gnecchi-Ruscone* Application 4 of 2012; [2013] KESC 11 (KLR) - (Explained)
27. *Town Council of Awendo v Nelson Oduor Onyango & 13 others* Miscellaneous Application No 49 of 2014; [2015] eKLR - (Explained)
28. *Waititu, Ferdinand Ndungu v Independent Electoral Boundaries Commission & 8 others* Civil Appeal 324 of 2013; [2013] eKLR - (Explained)
29. *Wambua, Peter Tonny & 17 others v Attorney General* Constitutional Petition No 427 of 2008; [2017] eKLR - (Explained)
30. *Wamwere & 5 others v Attorney General* Petition (Application) 26 of 2019 & Petitions 34 & 35 of 2019; [2023] KESC 26 (KLR) (Consolidated) - (Explained)

United Kingdom

1. *Ex P O'Brien* [1923] 2 KB 361, 391 - (Explained)
2. *Hadkinson v Hadkinson* [1952] AC 285 - (Explained)
3. *Secretary of State for Home Affairs v O'Brien* [1923] AC 603, 609 - (Explained)

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MA Estrelita D Martinez v Director General and others GR No 153795 - (Explained)

Regional Court

1. *Betayev and Betayeva v Russia* Case No 11,129, IACtHR, Merits (Nov 25, 2000) - (Explained)
2. *Grace Stuart Ibingira & others v Uganda* [1966] EA 445 - (Explained)
3. *Manji v Arusha General Store* [1970] EA 137 - (Explained)

Guatemala

Bamaca-Velasquez v Guatemala Case No 11,129, IACtHR, Merits (Nov 25, 2000), para 152 - (Explained)

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1. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 5 rule 9; order 6 rule 9- (Interpreted)
2. Constitution of Kenya articles 10, 27(1); 25(d); 29; 50(1); 51(d); 163(4)(a)(b) - (Interpreted)
3. Constitution of Kenya (Repealed) sections 14(2); 60(1); 72; 75; 84(1) - (Interpreted)
4. Criminal Procedure (Directions in the Nature of Habeas Corpus) Rules, 1948 (cap 75 Sub Leg) rules 3, 4 - (Interpreted)
5. Criminal Procedure Code (cap 75) section 389(1)(2) - (Interpreted)
6. Evidence Act (cap 80) sections 3(2); 107; 108; 109 - (Interpreted)
7. Judicature Act (cap 8) section 3(1)(c) - (Interpreted)
8. Limitations of Actions Act (cap 22) In general - (Cited)
9. Preservation of Public Security Act (cap 57) section 4(2)(a) - (Interpreted)
10. Public Authorities Limitations Act (cap 39) In general - (Cited)
11. Public Security (Detained and Restricted Persons) Regulations 1978 (cap 57 Sub Leg) In general - (Cited)
12. Public Security (Detained and Restricted Persons) Regulations, 1978 (Repealed) (cap 57 Sub Leg) regulation 6(1)(2) - (Interpreted)
13. Supreme Court Act (cap 9B) section 15(1) - (Interpreted)

United Kingdom

Habeas Corpus Act, 1679 In general - (Cited)

United States

Constitution, 1789 articles 1, 9 cl. 2 - (Interpreted)

Advocates

Paul Muite, SC, Dr John Khaminwa, SC Mr Kithinji Marete

Ms Winnie Wakaba (Paul Mwangi and Company Advocates) for the appellant

Mr James O Oduol for the 1st respondent (Triple OK Law Advocates LLP)

Mr Evans Ondiek for the 2nd respondent (Wanjiru, Chepkwony and Associates LLP)

June 30, 2023, the Court delivered the following Judgment:

A. Introduction

1. Before this court is the petition dated November 2, 2018 and lodged on even date. It is brought pursuant to the provisions of article 163(4)(b) of the *Constitution*, section 15(1) of the *Supreme Court Act, 2011* and rules 9 and 33 of the *Supreme Court Rules, 2012* (Repealed). The appeal challenges the decision of the Court of Appeal (Musinga P, Mwera, & Ouko (as he then was) JJA) delivered in Civil Appeal No 240 of 2011. On May 9, 2014, the impugned decision overturned the finding of the High Court (Gacheche, J) in Constitutional and Judicial Review Petition No 625 of 2009.

2. While certifying this appeal as one involving a matter of general public importance pursuant to article 163(4)(b) of the *Constitution*, this court delineated two issues for determination, namely:

    i. whether or not a habeas corpus application bars proceedings for the enforcement of fundamental rights and freedoms; and

    ii. whether a court order in a *habeas corpus* application could determine the legality of a detention under the provisions of the *Preservation of Public Security Act* (now repealed).

B. Background

(i)At the High Court

3. On May 22, 1982, Mwangi Stephen Muriithi (deceased), was arrested by the police while at his residence. Unable to trace him for three days, his wife took out a writ of *habeas corpus* in Miscellaneous Criminal Application No 88 of 1982, against the Director of Criminal Investigations Department (CID) pursuant to section 389 of the *Criminal Procedure Code* and rule 3 of the *Criminal Procedure (Directions in the Nature of habeas corpus) Rules* (herein referred to as *Habeas Corpus* Rules). The application sought the production of the body of the deceased before the High Court or cause to show why the deceased could not be released forthwith.

4. The *ex parte* application was heard and granted by Chesoni, J (as he then was). The learned judge issued summons to the Director of Criminal Investigations, requiring him to appear before the court and show cause why the deceased could not be released. The summons was copied to the Attorney General in compliance with rule 4 of the Habeas Corpus Rules.

5. Subsequently, on May 28, 1982, the date set for the hearing of the application, the Principal State Counsel, Mr Chunga, produced in court a copy of a Detention Order issued pursuant to the *Preservation of Public Security Act* (cap 57, Laws of Kenya), placing the deceased under preventive detention. He informed the court that the original order had been served upon the deceased. Upon the direction of the court, the original orders, duly signed by the then Minister of State in the President's Office, were presented in court and service acknowledged by the deceased.

6. However, in response, the deceased invited the court to examine and satisfy itself with the validity of the Detention Order. He urged that the *Public Security (Detained and Restricted Persons) Regulations 1978* (LN 234 of 1978) under which the orders had been issued were inapplicable and of no effect. In support of this assertion, it was contended that the National Assembly had not preserved or extended the application of the said regulations, upon the lapse of the first twenty- eight (28) days from the date of their issuance, as was mandatory under section 85(2) of the retired Constitution.

7. In a ruling delivered on May 29, 1982, Chesoni, J (as he then was) determined that the police had discharged their burden and had shown cause why the deceased could not be set at liberty. The learned Judge reasoned that the Director of CID had answered the court summons and had satisfactorily shown that he was unable to produce the deceased or release him because the latter had been detained in lawful custody under the *Preservation of Public Security Act* and regulations. Consequently, the High Court dismissed the *habeas corpus* application.

8. On October 23, 2009, twenty-seven years later, the deceased filed before the High Court, Constitutional and Judicial Review Petition No 625 of 2009 against HE the late Daniel Toroitich Arap Moi, who at the time of the deceased's detention was the President of the Republic of Kenya. The deceased alleged violation of his right to personal liberty and to property enshrined under sections 72, 75 and 84(1) of the *Repealed Constitution*. It was his contention that his detention was illegally orchestrated by President Moi, who was his business partner, for the sole purpose of dispossessing him of his proprietary rights.

9. He particularly pleaded the violation of his proprietary rights in Fourways Investments Limited wherein he had a 40%, President Moi 19% and James Kanyotu and Sadru Alibhai a combined total of 41% shareholding. The company was the registered proprietor of properties situated in Nairobi Central Business Centre known as LR No 209/4383, No 209/2464 and LR No 209/2385; Sheraton Holdings Limited wherein he had a 40%, President Moi 19%, and James Kanyotu and Sadru Alibhai a total of 41% shareholding. The company was also the registered proprietor of properties situated in Nairobi Central Business Centre, known as LR No 209/1846; and Mokamu Limited, wherein the deceased,

President Moi and James Kanyotu had a 33% shareholding each. In addition, the company was the registered proprietor of a farm situated in Solai Nakuru known as LR No 11793, measuring approximately 1020 acres. These properties are hereinafter referred as the Suit Properties.

10. He further submitted that during the time of his detention and thereafter, President Moi caused to be sold the suit properties without an account of the proceeds. President Moi, it was submitted, had also prevented the deceased from accessing any information concerning the suit properties and as a result, had violated his fundamental rights. The deceased therefore sought the following orders,*inter alia*:

    a. a declaration that his detention was caused by the 1st respondent for the achievement of ulterior commercial advantages and was illegal, unconstitutional and contravened his rights under section 72 of the *Constitution*;

    b. a declaration that the sale of the subject properties, which belonged to the said companies was illegal and an infringement of his Constitutional right to property under section 75 of the *Constitution*;

    c. an order for compensation for the properties the 1st respondent had allegedly deprived him of.

11. Subsequently, the 2nd respondent was joined to the petition as an interested party on grounds that it was and had always been the registered proprietor of one of the subject properties, to wit, LR No 11793. It was the 2nd respondent's argument that the said suit property had never been the property of Mokamu Limited as was alleged by the deceased.

12. In response to the constitutional petition, President Moi raised a preliminary objection seeking to strike out the petition in limine on grounds that it was bad in law and was an abuse of the court process. He relied on the following grounds; the petition sought constitutional redress against an individual; failed to join the Attorney General as the representative of the State which is the custodian of individual rights and freedoms; had not raised any constitutional issues; failed to set out particulars of contravention or the sections of the retired Constitution that were infringed; failed to disclose material facts with an intent to mislead the court; raised issues of company law which ought to be adjudicated upon by the Commercial Division of the High Court; and which in any event, were time- barred under the *Limitations of Actions Act* and the *Public Authorities Limitations Act*.

13. It was also his argument that the deceased's detention was legal as it was underpinned in law and in particular, section 4(2)(a) of the *Preservation of Public Security Act* as read with regulation 6(1) and (2) of the *Public Security (Detained and Restricted Persons) Regulations* (now repealed).

14. The trial court identified the following eight issues for determination: whether it had jurisdiction to determine the matter before it; whether the appellant was guilty of material non-disclosure; whether fundamental rights apply vertically or horizontally; whether there was a limitation period in constitutional litigation; whether the appellant's claim was a constitutional or commercial matter; what was the nexus between the appellant's detention and sale of the subject properties; whether the proceedings were defective for want of particulars of the alleged infringement; and who should bear costs.

15. In a Judgment delivered on April 6, 2011, the court, Gacheche, J, allowed the petition with costs to the deceased against President Moi and 2nd respondents. On the issues of jurisdiction, it was the trial court's finding that by dint of sections 60(1) and 84(1) of the *Repealed Constitution*, the High Court had jurisdiction to adjudicate on issues of constitutional contravention more so in matters where an aggrieved person had alleged infringement of his or her fundamental rights and freedoms.

16. As pertains to the issue of material non-disclosure, particularly whether the deceased had failed to disclose full facts or pertinent issues in the *habeas corpus* application, the trial court found that the issue of the legality of the deceased's detention was not before it, and as a result, he could not be said to have withheld any material facts. On whether fundamental rights apply vertically or horizontally, the court found that fundamental rights apply both vertically and horizontally, save that the horizontal application would not be invoked as a rule, but rather as an exception that would demand the court's examination of the circumstances of each case before it.

17. On whether the suit was time-barred, it was the court's finding that in constitutional matters under section 84 of the retired Constitution, there was no limitation period. Nevertheless, it acknowledged that to circumvent abuses of the court process, any inordinate delays must be explained to the satisfaction of the court. In this case, the trial court was satisfied that at all material times, President Moi was protected under section 14 of the retired Constitution and the deceased would only move the court against him upon his retirement as the President.

18. As regards substantive issues, the court addressed the question whether the deceased's claim was constitutional or commercial. It determined that his case was hinged on claims of unlawful detention and disposal of the suit properties while he was in detention, abrogating his constitutional rights to liberty and property. Accordingly, it held that the claims for the infringement of the deceased's right to liberty under section 72 and to property under section 75 of the retired Constitution were certainly constitutional issues.

19. On the issue of who had detained the deceased, it was the court's finding that the deceased had proved to the required standards that President Moi had detained him. The trial court opined that the detention was not only oppressive, arbitrary, and unconstitutional, but was

also orchestrated by President Moi, with the sole purpose of interfering with the deceased's personal liberties and his proprietary rights in the aforesaid companies and the suit properties thereof. Moreover, it noted that President Moi, did not rebut the deceased's assertions and evidence, and therefore as a rule of evidence under section 3(2) of the *Evidence Act* and order VI rule 9 of the *Civil Procedure Rules*, President Moi had admitted the evidence raised in the deceased's affidavits.

20. As pertains to the 2nd respondent's claim, the trial court found that apart from the contestation that one of the suit properties, that is, LR No 11793 in Solai Nakuru belonged to the 2nd respondent, it failed to adduce any evidence in support of this argument or at least rebut the deceased's evidence that the said property formed part of the suit properties. In view of the foregoing, the court made a finding that this property formed part of the suit properties.

21. Arising from the foregoing, it was the trial court's finding that President Moi was liable to compensate the deceased for unlawful detention and loss of property. Ultimately, it awarded the deceased a sum of Kshs 50,000,000/- as punitive damages against President Moi's unlawful acts, at an interest rate of 12% per annum from the date of the Judgment till payment in full, and Kshs. 80,161,720/- at an interest rate of 12% per annum on a compounded basis for what would have been the deceased's share of the proceeds of sale from the suit properties.

(ii) At the Court of Appeal

22. Aggrieved by this Judgment, President Moi filed Civil Appeal No. 240 of 2011. Both the 2nd respondent and the deceased filed cross-appeals against part of the Judgment. The appeal cited seventy-five (75) grounds which the Court of Appeal condensed into six broad grounds namely: jurisdiction; non-disclosure of material facts; legality of detention; failure to plead particulars of the breach; limitation of actions and res judicata; and assumption of facts.

23. In a Judgment delivered on May 9, 2014, the Court of Appeal, (Musinga P, Mwera, & Ouko (as he then was) JJA), allowed the appeal, consequently overturning the High Court's decision. Beginning with the issue of jurisdiction, the appellate court upheld the High Court by holding that it had unlimited original jurisdiction to hear and determine claims of violations of fundamental rights, pursuant to section 84 of the repealed Constitution. The learned Judges also upheld the High Court's finding on the limitation of time to seek redress for constitutional violations.

24. On whether the deceased was illegally detained, the appellate court determined that the legality of the detention was settled in the habeas corpus application as was heard and determined by Chesoni, J. It further opined that, without a subsequent appeal from that

decision, the deceased's detention was lawful under the then-existing law and remained lawful. Moreover, it was the court's finding that the issue of the unconstitutionality of the *Preservation of Public Security Act* and the regulations therein was not properly before Chesoni, J.

25. In any event, the appellate court noted that the detention order was issued by the Minister in Charge of Internal Affairs in the Office of the President, and not President Moi himself, hence was an act of State. It therefore overturned Gacheche, J's findings and instead found that President Moi was not responsible for the deceased's detention. In totality, the appellate court found that the legality of the detention was res judicata and could not be reopened before another Judge of the High Court. Consequently, the learned judgesof appeal set aside the declaration that President Moi had violated the deceased's rights under section 72 of the *Repealed Constitution*.

26. On the issue of deprivation of property, the appellate court determined that the deceased, as a shareholder, had the right to vote at meetings but lacked ownership or rights over properties owned by a company, that was a legal entity, separate and distinct from its shareholders. Besides, it was the Court of Appeal's finding that the burden of proof was not satisfied by the deceased as is required under sections 107 to 109 of the *Evidence Act*. This, it noted, was the law notwithstanding President Moi's failure to refute the deceased's assertions by way of a replying affidavit.

27. Particularly, the appellate court found that evidence ought to have been adduced on what properties were sold, to whom they were sold, at what consideration, and when the sales took place. Additionally, it was the appellate court's finding that the deceased ought to have produced the certificates of incorporation of the three companies together with their respective articles and memoranda of association, the names and addresses of the shareholders and shareholding of each shareholder and documents of title to show that each of the companies owned the suit property as pleaded.

28. As regards the 2nd respondent's case, it was determined that the deceased did not adduce any evidence to support the claim that LR No 11793 was owned by Mokamu Limited. It concluded that the burden of proof does not change even in the absence of a rebuttal from the opposing party.

29. On the question of damages, costs and interest rate, the court held that having found the deceased had failed to discharge the burden of proof, the general damages were simply lifted from its submissions and awarded in error. Consequently, the learned Judges set aside the award of Kshs 80,161,720/ awarded as share proceeds from the sale of the Suit Properties and the punitive damages of Kshs 50,000,000/.

(iii) At the Supreme Court

30. Aggrieved by the entire Judgment, the appellant, on behalf of the estate of the deceased, filed the instant appeal, citing several grounds of appeal summarized as follows, that the Judges of Appeal erred and misapprehended the *Constitution* by:

    i. holding that the consideration of a *habeas corpus* application bars proceedings for the enforcement of fundamental human rights and freedoms against persons demonstrated to be responsible for the breach of such fundamental rights and freedoms;

    ii. holding that the outcome of *habeas corpus* application determined the legality of a detention under the provisions of the *Preservation of Public Security Act* (now repealed);

    iii. misapplying and misconstruing the law on *habeas corpus vis-a-vis* the enforcement of fundamental rights and freedoms;

    iv. misapplying the *Constitution* as pertains to the exercise of the powers conferred on the Office of the President in holding that the petition at the High Court was against the wrong person;

    v. in interpreting and applying the *Constitution* on the question of liability by holding that the appellant's detention was occasioned by the State as opposed to the 1st respondent and that the 1st respondent enjoyed immunity for his actions as the then President and could not incur liability for his actions or directions as the President;

    vi. in interpreting and applying the principle in regard to the burden of proof in petitions pertaining to violation of fundamental rights and freedoms;

    vii. taking into account matters which they ought not have, and failing to take into account matters which they should have; and

    viii. setting aside the finding of the High Court on quantum of damages and interest awarded to the appellant.

31. The appellant seeks the following reliefs:

    a. That this appeal be allowed.

    b. That a declaration be issued to the effect that a *habeas corpus* application does not bar a litigant from pursuing the available legal remedies and the same does not determine the legality or otherwise of an individual's arrest and detention.

c. That a declaration be issued to the effect that failure by a respondent to file an affidavit in rebuttal of the issues raised by a petitioner in a suit for enforcement of fundamental rights and freedoms is uncontroverted proof that the petitioner has proven his/her case on a balance of probabilities.

d. That a declaration be issued to the effect that a President does not enjoy immunity from personal omissions and illegalities attributed to him during his tenure of office, once he/she ceases to be a president and he/she is liable.

e. That a declaration is issued to the effect that the petitioner was and is entitled to damages and interest at commercial rates owing to the loss of business incurred as a result of his detention.

f. That an order does issue setting aside the whole of the judgment rendered by the Court of Appeal on the 9th day of May, 2014.

g. That the judgment and order of the High Court of Kenya at Nairobi (Gacheche, J) be reinstated.

h. That the costs of the High Court and the Court of Appeal proceedings be awarded to the appellant herein and be borne by the respondents.

i. That the costs of the instant proceedings be awarded to the appellant herein and be borne by the respondents.

C. Parties Respective Submissions

(i) Appellant's case

32. The appellant's submissions are dated October 11, 2019 and were filed on even date. He addresses two issues as delineated by the court. On the first issue, whether or not a habeas corpus application bars proceedings for the enforcement of fundamental rights and freedoms, the appellant submits in the negative. He contends that the habeas corpus application was narrowly limited to compelling the state to produce the deceased in court and that the narrow purpose neither addressed the resulting violations nor foreclosed the deceased's right to file a subsequent lawsuit to enforce his fundamental rights.

33. To support this argument, he submits that under the repealed Constitution and provisions of the *Preservation of Public Security Act* (repealed), detention without a trial was not a judicial but rather an administrative action by the Executive, which involved neither a judicial inquiry nor provided procedural safeguards necessary for the protection of fundamental rights and freedoms. He states that the purpose of a habeas corpus application

is to produce a detainee before a court and not to initiate a trial or inquiry into the lawfulness of the state's reason for holding such a detainee.

34. He maintains that the habeas corpus application was filed by the deceased's wife and as a result, the application did not and could not have dealt with the violation of his fundamental rights resulting from his detention. He argues that fundamental rights such as the presumption of innocence; the right to a fair trial within a reasonable time; the right to be tried by a competent, independent and impartial tribunal established by law; and the right to be compensated in the event of unlawful deprivation of liberty, were violated and could not be exhausted by the *habeas corpus* application to which the only question for determination was whether the deceased had been detained pursuant to a valid detention order.

35. Besides, the appellant has also urged that the *habeas corpus* application was not an inquiry into whether the State's reasons were legally meritorious or whether the detention itself had violated the deceased's constitutional rights. In this context, he submits, the Court of Appeal misapprehended the effect and extent of a *habeas corpus* writ. He relies on the case of *Ooko v Republic* HCCC No 1159 of 1966 [unreported] (the *Ooko* case), and contends that at the habeas corpus stage, the court has the duty to merely inquire into the formal validity of a detention order and not the lawfulness of the detention or possible violation of the fundamental rights. Similarly, it is the appellant's argument that the constitutionality of the *Preservation of Public Security Act* was not at issue in the *habeas corpus* application, and could also not be raised in a subsequent appeal as held by the appellate court.

36. On the second issue, whether a court order in a *habeas corpus* application could determine the legality of detention under the provisions of the *Preservation of Public Security Act* (now repealed), the appellant submits that the purpose of a [writ of *habeas corpus*, is narrowly limited to production of a detainee in court and consequently legally incapable of determining the legality or otherwise of detention under the *Preservation of Public Security Act*.

37. The appellant faults the Court of Appeal's finding that the detention was lawful as no appeal was preferred against Chesoni, J.'s decision. It is his case that such a finding was self-defeating, as any such appeal could not have addressed the lawfulness of the deceased's detention. Furthermore, it is urged that in so far as the legal merits of the detention did not, and could not have been raised in the habeas corpus application, the question of the lawfulness of the detention or violation of rights, could not be settled in the said application or subsequent appeal.

38. Likewise, he submits that the Court of Appeal's finding that the detention was lawful for reasons that the deceased did not challenge the constitutionality of the *Preservation of Public Security Act*, was made in error, as the validity of the aforesaid Act was not at issue before

Chesoni, J. He submits that the constitutionality of the *Preservation of Public Security Act* was a cause of action independent from the *habeas corpus* application.

39. In any event, the appellant urges that even with a successful appeal, very limited remedies would be available to the deceased. He contends that this is so, as the only remedy available was an order compelling the state to issue the deceased with a rectified detention order and not a determination on the lawfulness of such detention or the breach of his fundamental rights. He cites the *Ooko* case to buttress this assertion.

In conclusion, it is the appellant's submission that the appellate court erred in its interpretation of the facts before it, its understanding of the nature of a *habeas corpus* application, and the legal effect of a court's decision on a *habeas corpus* application. He reiterates that President Moi misused his powers and had been allowed to keep the benefit of his abuse.

(ii)The 1st respondent's case

40. In opposing the appeal, the 1st respondent, on behalf of President Moi's estate, filed her submissions dated January 25, 2019 and October 30, 2019. In addition to the two questions delineated by the court, the 1st respondent raises a jurisdictional question. She challenges the court's jurisdiction to hear the appeal on grounds that the appeal is frivolous, vexatious and an abuse of the court process.

41. To support this assertion, it is the 1st respondent's case that the appeal has exceeded the parameters of leave granted by this court. As a result, she disputes the appellant's grounds of appeal pertaining to the exercise of the powers conferred on the Office of the President in relation to detention; the question of liability of the State as opposed to the President; the question of Presidential immunity for his actions as President; the question of burden of proof in constitutional matters; and the question of quantum of damages and interest. In that regard, the 1st respondent anchors her submissions on this court's finding in *Lawrence Nduttu & 6000 Others v Kenya Breweries Ltd & another* [2012] eKLR, a*nd Okiya Omtatah Okoiti v Central Bank of Kenya & 7 others* [2019] eKLR. She urges the court to strike out the appeal *in limine*.

42. On the substantive issues, specifically, the first issue as delineated by this court, whether or not a *habeas corpus* application bars proceedings for the enforcement of fundamental rights and freedoms, the 1st respondent submits in the affirmative. She urges that the High Court is seized of jurisdiction under section 60 of the *Repealed Constitution* to hear and determine all constitutional questions ensuing or raised within a *habeas corpus* application including breaches of fundamental rights. The 1st respondent relies on the High Court Decision in

Masoud Salim Hemed & another v Director of Public Prosecution & 3 others [2014] eKLR to persuade the court that a writ of *habeas corpus* is

> intended for the protection of fundamental rights particularly the right to liberty and due process of law as was protected under section 72 of the retired *Constitution*.

43. Furthermore, she urges that the *habeas corpus* application before Chesoni, J, determined all the issues presented before him, including the legality, validity and the cause or reasons for the deceased's detention. Therefore, it is submitted that as the resulting decision stands to date, the deceased was barred, from seeking before the same court, a declaration that his detention was illegal or that his right to liberty under the repealed Constitution was violated.

44. On the second issue, whether a court order in a *habeas corpus* application could determine the legality of detention under the provisions of the *Preservation of Public Security Act* (now repealed), the 1st respondent adopts her submissions on the first issue. She emphasizes that the High Court is clothed with original unlimited constitutional jurisdiction under section 60 of the repealed *Constitution* and statutory jurisdiction pursuant to section 389 of the Criminal Procedure Code, to pronounce itself on the rights of a subject as well as substantive issues of legality, lawfulness or impropriety of detention. To persuade the court, she cites the High Court decision of *Mariam Mohamed & Another v. Commissioner of Police & another* [2007] eKLR wherein the court directed that pursuant to Section 60 of the retired Constitution, the High Court could properly determine all constitutional questions on the issue of the deceased's detention without trial.

45. Moreover, the 1st respondent urges that the legality or lawfulness of the deceased's detention was raised and formed the substance of the *habeas corpus* application. She agrees with the Court of Appeal's finding to the extent that pursuant to the order of Chesoni, J in the *habeas corpus* application, the deceased's detention was and remains lawful. She categorically contends that this determination was not challenged and, in this regard, the issue of legality of the deceased's detention could not be re-opened before another judge of the High Court as it was *res judicata*.

46. On the remedies available, the 1st respondent argues that as the appeal is premised on the issues of legality of the deceased's detention under section 72 of the *Repealed Constitution*, section 72(6) provided for compensation as a remedy. She submits that should this court find in favour of the deceased, the only remedy available would be an order for compensation against the Attorney General. It is however noted that as the Attorney General is not a party to these proceedings, no such order can issue in the circumstances.

47. In conclusion, the 1st respondent opposes the appellant's invitation to the court to grant the remedies and standards set out in the 2010 Constitution. It is urged that reference to the 2010 Constitution would amount to a retrospective application of *the Constitution* contrary

to this court's finding in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others*, SC Application No 2 of 2011; [2012] eKLR (*Samuel Kamau Macharia* case). Consequently, she urges the court to uphold the decision of the Court of Appeal and dismiss the instant appeal with costs.

(iii) The 2nd respondent's case

48. In response to the appeal, the 2nd respondent filed its submissions dated February 27, 2019 and October 24, 2019 respectively. It adopts the 1st respondent's submissions on jurisdiction. In addition, it submits that the appeal is *re judicata* having been adjudicated by a court of competent jurisdiction. It is its argument that the decision by Chesoni, J was conclusive and binding on the parties.

49. Furthermore, the 2nd respondent maintains that it owns LR No 11793 and that the matter was conclusively determined by the Court of Appeal hence no weighty constitutional issue arises to warrant this court's intervention. It adds that to open up the case before this court would be contrary to articles 10, 27(1), 25 and 50(1) of the *Constitution*. The 2nd respondent cites several cases to support the foregoing submissions namely: *Peter Oduor Ngoge v Francis Ole Kaparo & 5 Others*, SC Petition No 2 of 2012; [2012] eKLR, the *Samuel Kamau Macharia* case; and *Board of Governors, Moi High School, Kabarak v Malcom Bell & Another*, SC Petition No 6 &7 of 2013; [2013] eKLR.

50. Similarly, the 2nd respondent supports the 1st respondent's argument that the issues being raised by the appellant in the instant appeal were never pleaded at the trial stage and that the appellant is bound by his pleadings. It cites the cases of *Ferdinand Ndungu Waititu v Independent Electoral Boundaries Commission & 8 Others* [2013] eKLR, and *Independent Electoral Boundaries Commission & another v Stephen Ndambuki Muli & 3 others*, Elections Petition No 2 of 2013 to support its argument.

51. In conclusion, it is the 2nd respondent's case that the deceased neither appealed against the decision of Chesoni, J nor filed a constitutional petition challenging the constitutionality of the *Public Security (Detained and Restricted Persons) Regulations, 1978*. In that respect, it urges this court to uphold the Judgment of Chesoni, J. It relies on the case of *Hadkinson v Hadkinson* [1952] AC 285, *Manji v Arusha General Store* [1970] EA 137, *Equity Building Society v Nathaniel Ngure Kihiu* Nairobi Milimani HCCC No 1647 of 2000 (unreported) to urge that where a judgment or an order has been issued by a court of competent jurisdiction, a party is stopped from litigating on a similar issue in subsequent proceedings in the absence of an appeal.

D. Issues for Determination

52. The issues for determination in this appeal, became self-evident at the stage when this court certified the same, as involving a matter of general public importance, pursuant to article 163(4)(b) of the *Constitution*. Towards this end, the questions deemed by the court as being of general public importance were;

    i. whether or not a *habeas corpus* application bars proceedings for the enforcement of fundamental rights and freedoms; and

    ii. whether a court order in a *habeas corpus* application could determine the legality of a detention under the provisions of the *Preservation of Public Security Act* (now repealed).

E. Analysis

53. Before considering the issues as set out above, we are constrained to pronounce ourselves on the question as to whether this court has jurisdiction to entertain this appeal in the first place. This would not have been necessary, had the issue not been raised by the respondents in the course of the main hearing. It is the 1st respondent's argument that the appeal is frivolous, vexatious and an abuse of the process of court. The appeal, argues the 1st respondent, exceeds the parameters of leave granted by this court. In support, the 2nd respondent submits that the issues raised in the appeal were never part of the pleadings at the trial stage. Furthermore, he argues, the appeal does not raise any weighty constitutional questions to warrant this court's further intervention.

54. In considering the foregoing arguments, we must emphasize the fact that this appeal, is before the court having been certified as one involving a matter of general public importance under article 163(4)(b) of the *Constitution*. The delineated issues for determination derive from what the court considered as matters of general public importance. Needless to say, the jurisdiction of this court to entertain the appeal was conclusively determined at the stage of certification. The respondents cannot therefore be heard to argue that the appeal does not raise any weighty constitutional questions to warrant this court's further intervention. Whether the appeal exceeds the parameters of leave granted by the court, is a matter for us to decide as we dispose of the same. We therefore reserve the question regarding the scope of the appeal to a later stage in this judgment.

(iii) *Habeas Corpus* as a bar to further Proceedings

55. A pertinent question in this appeal is whether the appellant herein, having taken out proceedings seeking a writ of *habeas corpus*, is by that fact barred from initiating any

other proceedings alleging violation of his fundamental rights and freedoms. On the one hand, the respondents submit that indeed, once a person makes an application for *habeas corpus* and the same is determined, he/she cannot commence other proceedings in the same court seeking recompense for violation of his/her fundamental rights and freedoms. The respondents contend that the decision of the High Court following the *habeas corpus* application was conclusive as it determined all the issues regarding the legality, validity, and reasons for the deceased's detention. The Judgment of the trial court, argue the respondents, renders any other proceedings relating the deceased's detention *res judicata*.

56. On the other hand, the appellant submits that the writ of *habeas corpus* is narrow in its reach and application. The writ is mainly sought to ensure the production in court of a person who is missing and suspected to be in the custody of the State. In the instant case, submits the appellant, the application was made by the deceased's wife, whose main objective was to oblige the Government to produce her husband, who had gone missing. In the circumstances, contends Senior Counsel Muite for the appellant, there is no way the trial court could have determined whether the fundamental rights and freedoms of the deceased had been violated.

57. In order for us to dispose of the first question in the face of the two contrasting viewpoints, it is important that we review albeit briefly, the nature, scope, and rationale of the writ of *habeas corpus*. This is a Latin maxim which simply translates to "you have the body" and by extension, "produce the body". The *Black's Law Dictionary* describes it as:

> "A writ employed to bring a person before a court, most frequently to ensure that the person's imprisonment or detention is not illegal (*habeas corpus ad subjici endum*) in addition to being used to test the legality of an arrest or commitment, the writ may be used to obtain judicial review of (1) the regularity of the extradition process, (2) the right to or amount of bail, or (3) the jurisdiction of a court that has imposed a criminal sentence."

58. In *Secretary of State for Home Affairs v O'Brien*, (1923) AC 603, 609), the court had this to say about the writ:

> "The writ of *habeas corpus*, by which the legal authority under which a person may be detained can be challenged, is of immemorial antiquity. After a checkered career in which it was involved in the struggles between the common law courts and the Courts of Chancery and the Star Chamber, as well as in the conflicts between Parliament and the crown, the protection of the writ was firmly written into English law by the *Habeas Corpus Act* of 1679. Today, it is said to be 'perhaps the most important writ known to the constitutional law of England..."

59. The *Habeas Corpus Act* to which the court made reference above, is described in *Black's Law Dictionary* as one of the four great charters of English Liberty, securing to English subjects, speedy relief from all unlawful imprisonments." The *US Constitution* (art 1, 9, cl.2) provides for the suspension of the writ of *habeas corpus* only when necessary to protect the public in times of rebellion or invasion. Our Constitution of 2010 does not countenance any limitation of the writ of *Habeas corpus*. Article 25 thereof provides that:

> "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; and
>
> d. the right to an order of *habeas corpus*."

60. The essence of a writ or order of *habeas corpus* is to secure the production of a person in a court of law by the State so as to facilitate a judicial inquiry into the reasons for his/her incarceration. The application for such an order, is usually directed at an agency of the State, where the applicant has reason to believe that the missing person, is in the custody of the former. The reason the writ of *habeas corpus* is celebrated by human rights defenders in common law jurisdictions, is that for many centuries of yore, it has provided succour to those unjustly incarcerated. To this day, it is continually regarded as a fountain of liberty. A bulwark against illegal confinement of those, who would otherwise be free. It liberates the oppressed from the dungeons of those who wield authority over the citizenry.

61. Before the promulgation of the 2010 Constitution, the writ of *habeas corpus* applied in Kenya as a common law doctrine by virtue of section 3 (1)(c) of the *Judicature Act*, cap 8 of the Laws of Kenya. The jurisdiction to issue the writ vested as it still does, in the High Court. It is a special and supervisory jurisdiction which empowers the court to oversee, safeguard and uphold the liberty of a citizen in the event of an illegal incarceration. The writ of *habeas corpus* is now enshrined in the *Constitution* as a fundamental right from which there can be no derogation (article 25 (d)). Article 51 (d) of the *Constitution* provides that "a person who is detained or held in custody is entitled to petition for an order of *habeas corpus*."

62. Section 389(1) of the *Criminal Procedure Code* provides that the High Court may issue the following directions under *Habeas Corpus* jurisdiction:

a. that any person within the limits of Kenya be brought up before the court to be dealt with according to law;

b. that any person illegally or improperly detained in public or private custody within those limits be set at liberty;

c. that any prisoner detained in a prison situated within those limits be brought before the court to be there examined as a witness in any matter pending or to be inquired into in that court;

d. that any prisoner so detained be brought before a court martial or commissioners acting under the authority of a commission from the President for trial to be examined touching any matter pending before the court martial or commissioners respectively;

e. that any prisoner within those limits be removed from one custody to another for the purpose of trial; and

f. that the body of a defendant within those limits be brought in on a return of *cepi corpus* to a writ of attachment.

63. Pursuant to section 389(2), the Chief Justice promulgated the Criminal Procedure (Directions in the Nature of habeas corpus) Rules, 1948; which provide that an application shall be made by way of chamber summons supported by an affidavit. If not summarily dismissed, the Judge directs that summons be issued to the person alleged to be holding the detainee to show cause why the detainee should not be released. The summons and its supporting affidavit must be served upon the Attorney General.

64. Against the foregoing background, we now turn to the first question before us, i.e, whether or not a *habeas corpus* application, bars proceedings for the enforcement of fundamental rights and freedoms. It is important to restate at the outset, the limited nature of the writ of *habeas corpus*. It was, and has always been meant, to secure the release of a person from unlawful custody. A long line of judicial authority from across the Commonwealth and beyond, has cemented the rationale and scope of *Habeas Corpus*. It is all about the liberty of the citizen or any other person found within the borders of the respondent state.

In *Grace Stuart Ibingira and others v Uganda* (1966) EA 445, the court held;

> " The writ of *habeas corpus* is a writ of right granted *ex debito justitiae*, but it is not a writ of course and it may be refused if the circumstances are such that the writ should not issue. The purpose of the writ is to require the production before the court of a person who claims that he is unlawfully detained so as to test the validity

> of the detention and so as to ensure his release from unlawful restraint should the court hold that he is unlawfully restrained."

65. The pronouncement in *Grace Ibingira* (*supra*), which accurately echoes the origins and nature of the writ of *habeas corpus*, has long been embraced by Kenyan superior courts, including those in other jurisdictions within the East African region. In *MA Estrelita D Martinez v Director General and ors* GR No 153795 of August 17, 2006, the Supreme Court of the Philippines set out the object of habeas corpus as follows:

> " Habeas corpus generally applies to 'all cases of illegal confinement or detention by which any person is deprived of his liberty or by which the rightful custody of any person is withheld from the person entitled thereto."

Similarly, the same court in *Ngaya-an v Balweg*, 200 SCRA 1489, 154-5, August 5, 1991 per Jaris, J stated;

> " The ultimate purpose of the writ of *habeas corpus* is to relieve a person from unlawful restraint. It is devised as a speedy relief from unlawful restraint. It is a remedy intended to determine whether the person under detention is held under lawful authority."

66. Given its limited scope, can the writ of *habeas corpus* be said to operate as a bar to any further proceedings, once it has been granted or denied? The answer to this question must be in the negative, given the fact that, what it is meant to secure without more, is the release into liberty, of a person from unlawful custody. As observed by Scrutton L J in *Ex P O'Brien* [1923] 2 KB 361, 391; "The object of the writ is not to punish previous illegality and it will only issue to deal with release from current unlawful detention."

67. We are therefore in agreement with the appellant's submission, that the writ of *habeas corpus* was never fashioned to grant relief beyond release of a person from unlawful custody. The grant or denial of the writ does not deprive an applicant from pursuing recompense from the court for violation of his right to liberty occasioned by the unlawful detention. Such a claim for compensation cannot be filed contemporaneously with a petition for a writ of *habeas corpus*. Recognizing the limited nature of *Habeas Corpus* application Ojwang, J (as he then was) in *Mariam Mohamed & anor v Commissioner of Police & anor* Misc Crim Appli No 732 of 2007 [2007] eKLR; opined as thus:

> " That the Subject should always have access to the safeguards of the *Constitution of Kenya* , is a right, and so the person who made it impossible for the subject to

> enjoy those rights, committed a constitutional and legal wrong against him. Legal wrongs are always actionable, in any common law system such as that

68. We are indeed in agreement with the learned Judge's pronouncement above, in so far as it signifies the fact that, the pursuit of compensation for a violation occasioned by the unlawful incarceration of a person, cannot be extinguished by his release through a writ of habeas corpus.

(iii) Legality/Validity of detention under the *Preservation of Public Security Act*

69. This brings us to the second question, that is, whether a court order in a Habeas Corpus application could determine the legality of a detention under the provisions of the *Preservation of Public Security Act* (now repealed). The 1st respondent contends that the determination by the High Court affirming the legality of the deceased's detention was never challenged and therefore could not be re-opened before another judge. He submits that the habeas corpus application before Chesoni, J (as he then was), determined all the issues presented before him, including the legality, validity and reasons for the appellant's detention.

70. The appellant on his part, submits that the constitutional validity of the *Preservation of Public Security Act* was not in issue before the court. It is his argument that given the contents of the aforesaid Act, it could not have been possible to question the legality/validity of the deceased's detention. Towards this end, he faults the Court of Appeal's interpretation of the facts before it, its understanding of the nature of *habeas corpus* application, and the legal effect of a court's decision consequent upon such an application. The appellant reiterates the argument that the purpose of the writ of *habeas corpus* is limited. The Court of Appeal held that the detention of the appellant, was lawful both at the time of the deceased's incarceration, and at the institution of these proceedings. This in the view of the appellate court, was due to the fact that the detention was grounded upon the *Preservation of Public Security Act*, a statute whose validity had never been challenged.

71. What then was the effect of the *Preservation of Public Security Act vis a vis* the writ of *habeas corpus*? On the one hand, *habeas corpus* has always been intended to secure the production of a person, who is held in custody before a court of law, so as to determine whether his incarceration is lawful or not. On the other hand, the *Preservation of Public Security Act* empowered the Minister responsible for internal security, to issue an order for the detention without trial, of a person who in the opinion of the Minister, was a danger to public security. Hence, the objective of the writ of *habeas corpus* is to secure the liberty of a person, while that of the *Preservation of Public Security Act* was to achieve the opposite; that is, to limit the liberty of a person. The procedure under the former, is judicial while the one under the latter, was administrative. The effect of the aforesaid Act therefore, was to render the writ of

habeas corpus inoperable. At the time of the deceased's detention, what was produced before the court following an application for *habeas corpus*, was not a body, but of a copy of an order, ousting the court's authority to inquire into the legality of the deceased's detention.

72. The harsh reality of the inoperability, hence the ineffectiveness of the writ of *habeas corpus*, in the face of the applicability of the *Preservation of Public Security Act*, is to be seen in the proceedings. Upon being invited to examine and satisfy himself regarding the validity of the Detention Order, Chesoni J, stated that 'the Director of CID was unable to produce the applicant or release him because the latter had been detained in lawful custody under the *Preservation of Public Security Act* and Regulations'. The court was acknowledging the fact that the writ of *habeas corpus* was no longer available to the applicant in the face of this Act. This was a classic case of "rule by law" as opposed to "rule of law". Indeed, it was during this dark period in the history of our Country, that many citizens who dared find fault with the Government of the day, got detained without trial for indeterminate terms, at the pleasure of their tormentor.

73. In view of the foregoing, we find it difficult to answer the question before us in the affirmative. How would it be possible for a court to determine the lawfulness of a detention, when the entire process of inquiry had been frozen by a Detention Order? The learned Judge stopped short of stating that his hands were tied by the production of the detention order. In other words, the body could neither be produced, nor could an inquiry into the legality of the detention be conducted given the ouster of the court's authority to do just that. Where then does this conclusion leave us, in terms of determining whether any relief is due to the estate of the deceased?

74. The appellant has all along claimed that the deceased's fundamental rights and freedoms as guaranteed under section 72(1) of the retired Constitution were violated due to his unlawful detention. The said section provided that "no person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases". Sub section (6) thereof provided that "a person who is unlawfully arrested or detained by another person shall be entitled to compensation therefor from that other person". The retired Constitution also guaranteed the right to a fair trial, and the right to property. The appellant claims that the deceased's right to personal liberty and property were violated. The appellant submits that the motive for the detention by former President Moi was to pave way for the latter to sell all the shares the two held in Fourways Investments Ltd, Sheraton Holdings Ltd, and Mokamu Ltd.

75. It is at this stage, that we must consider the scope of the appeal before us, within the context of this court's jurisdiction. Towards this end, the respondents have submitted that the appeal before us, exceeds the parametres pursuant to which it was admitted. It is her argument that the reliefs being sought by the appellant cannot be available to the deceased's estate as

the same have never been in issue before the superior courts. She submits that this court is limited to determining the matters of general public importance which informed its decision to admit the appeal and not more. This appeal was admitted pursuant to Application Number 45 of 2014 between *Stephen Murithi v Daniel Toroitich Arap Moi & Raymark Ltd*. The applicant sought a review of the Court of Appeal's decision (Nambuye, Gatembu, & M'Inoti JJA) which had declined to certify the intended appeal as one involving a matter of general public importance.

After considering the submissions of the parties to the application, this court stated:

> " As this court stated in the case of *Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone*.... an applicant seeking such certification 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..." if it is a point of law, he "must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest". The question is whether or not this threshold has been satisfied in this case."

In answer to the foregoing question, the court held that the issues of Whether or not a *Habeas Corpus* application bars proceedings for enforcement of fundamental rights and freedoms; and Whether a court order in a *habeas corpus* application could determine the legality of a detention under the provisions of the *Preservation of Public Security Act* (now repealed) to be matters of general public importance, which transcend the circumstances of this particular case.

76. It is clear that the appeal before us was admitted on the basis of these two issues as formulated by the court under article 163(4)(b) of the *Constitution*. The appellant was allowed to canvass these two issues because the court considered them to be of general public importance. We are therefore in agreement with the respondents that the appellant is not at liberty to reopen his appeal beyond the parameters pursuant to which it was admitted.

77. That the deceased was detained without trial under the regime of former President Moi is undeniable. We have already declared that an application for *habeas corpus* cannot operate as a bar to further proceedings by the deceased seeking compensation for violation of his fundamental rights. By the same token, we have also determined that it would not have been possible to inquire into the legality of one's detention under the *Preservation of Public Security Act*.

78. This court, not to mention other superior courts, has had occasion to pronounce itself on how detention without trial, orchestrated by the State, against its critics amounted to the egregious violation of the personal liberties of the detainees. The victims of the said detentions have over the years, successfully sought recompense from the courts long after

the reign of the aforesaid regime came to an end. See for example, *Gitobu Imanyara & 2 others v. Attorney General,* SC Petition No 15 of 2017; *Koigi Wamwere v Attorney General*, Civil Appeal No 86 of 2013; [2015] eKLR, and *Peter M Kariuki v Attorney General*, Civil Appeal No 79 of 2012; [2014] eKLR; High Court decisions in the cases of *Kenneth Stanley Njindo Matiba v Attorney General*, Constitutional Petition No 94 of 2014 [2017] eKLR, *Denish Gumbe Osire v. Cabinet Secretary, Ministry of Defence & another*, Constitutional Petition No 572 of 2013; [2017] eKLR, *Captain (Rtd) Frank Mbugua Munuku v Kenya Defence Forces & Another*, Constitutional Petition No 497 of 2012; [2013] eKLR, *David Gitau Njau & 9 Others v. Attorney General*, Constitutional Petition No 340 of 2012, [2013] eKLR and *Peter Tonny Wambua & 17 others v Attorney General*, Constitutional Petition No 427 of 2008; [2017] eKLR. The intervention by the courts, serves as a reminder to current and future regimes that the Bill of Rights enshrined in our Constitution is a covenant non-negotiable. It cannot be legislated away or ousted by Parliament.

79. Specifically, we must distinguish the *Matiba* decision from this one. In Matiba, the petition was filed against the Attorney General representing the State whose action of detaining the petitioner led to the collapse of his massive business empire. The High Court was also satisfied that there was a clear nexus between the act of detention and the resultant loss of property. And whereas President Moi was alleged to have been the author of the detention, no claim against him was made directly as was the case here. We have explained why such an approach does not meet the favour of the law.

80. In view of the foregoing observations, we are in agreement with the High Court, that the deceased's right to personal liberty was violated consequent upon his detention without trial through the now infamous detention order signed by the Minister responsible for internal affairs. This violation was an act of State, for which compensation should ideally be awarded to the estate of the deceased against the State. This explains why a copy of the detention order was served on the Attorney General by the Minister. However, for reasons unknown to us, the appellant has never sued or even sought to join the Attorney General or any other state organ to these proceedings. We are therefore faced with considerable difficulty on how to apportion liability, hence compensatory relief, against a person or agency that has never been a party to these proceedings. It is a trite principle of legal procedure that a party is always bound by his pleadings. We must therefore restrict ourselves within the four corners of the parties' pleadings.

81. The foregoing dilemma leads us to consider the liability of the estate of President Moi. The Court of Appeal, in re-evaluating the evidence tendered in support of the claim of fraudulent sale of shares by President Moi, held that such claim was not proven to the adequate standard. In addition, the appellate court was of the view that such claim ought to have been founded in company as opposed to public law. Be that as it may, this being an appeal under article 163(4)(b) of the *Constitution*, we must focus on the two issues that the

court delineated for determination. We have already discharged this obligation. In *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (amicus curiae)* [2021] KESC 34 (KL) we held,

> " 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*... We may however not delve into the factual findings of the trial court and Court of Appeal....Challenges of findings or conclusions on matters of fact by the trial court of competent jurisdiction after receiving, testing and evaluation of the evidence cannot not bring up an appeal within the ambit of article 163(4)(b)."

82. This pronouncement remains the authoritative statement regarding the scope of an appeal under article 163(4)(b) of the *Constitution*. Consequently, we are not able to sanction any other form of compensation against the estate of President Moi based on the claims of fraudulent sale of company shares; claims that have been discounted by the Court of Appeal for insufficiency of evidence. Apart from the fact that this issue was not before us, such a claim, as rightly held by the appellate court, would be well founded not in public law, but company law, where the principle in *Salomon v. Salomon* still holds sway. In *Gitobu Imanyara & 2 others v. Attorney General*, SC Petition No 15 of 2017, [Unreported] wherein the 2nd appellant had sought a declaration that he was entitled to an award of damages and compensation as result of the impounding of copies of his company's publication, this court held that such a claim, was a claim in public law for infractions to his rights under the *Constitution*, and therefore, the principles in *Salomon v Salomon* were inapplicable. This decision is however distinguishable from the current appeal, on grounds that in that case, the petitioner had all along sued the Attorney General. He had also been able to establish a clear nexus between the state action of his detention and the actions of state agents in impounding copies of his company's publication, resulting in financial loss. The court also cautioned that the petitioner had to be careful so as not to fall into the trap of regarding the loss to the company as automatically and necessarily equivalent to his personal loss. The petitioner was also able to establish that he was personally and inextricably linked to the day to day management of the company. The only issue before the court and which was referred to the High Court was the issue of quantum.

83. Having disposed of the twin issues that were the basis for the assumption of jurisdiction, and having reached the conclusions we have, regarding apportionment of liability and compensatory relief, we are left with no option but to dismiss the Appeal.

Dissenting Opinion of Justice Mohammed K Ibrahim, SCJ

84. I have had the advantage of reading the majority decision in this appeal. I agree with the factual background, the summary of the submissions advanced by the parties and the issues for consideration and determination as framed. I do not therefore intend to reiterate them here in detail save in limited aspects for purposes of clarity of any point I will be making.

85. While certifying this appeal as one involving a matter of general public importance pursuant to article 163(4)(b) of the *Constitution*, this court delineated two issues for determination, namely:

    i. whether or not a habeas corpus application bars proceedings for the enforcement of fundamental rights and freedoms; and

    ii. whether a court order in a *habeas corpus* application could determine the legality of a detention under the provisions of the *Preservation of Public Security Act* (now repealed).

86. I fully agree with the majority on the first issue that the sole purpose of the writ of *habeas corpus* is to free persons from impermissible detention. A person may still seek compensation from the court for a violation of their right to liberty brought on by the illegal imprisonment whether the writ is granted or not. A petition for a writ of *habeas corpus* cannot therefore be filed concurrently with such a claim for compensation.

87. On the second issue, I, in part, agree with the majority. I join the majority in taking note that on the one hand, the purpose of *habeas corpus* has always been to ensure that a person in custody is brought before a court of law so that it can be decided whether or not his detention is legal. The rights to personal liberty has always been guaranteed under the *Constitution*. With Independence, a Bill of Rights was entrenched in the 1963 Independence Constitution to facilitate the protection of Individual rights. Section 16 guaranteed the right to personal liberty. Section 29 of the same constitution however provided for declaration of emergency during which derogation from section 16 was permitted if passed under the authority of an Act of Parliament.

88. In 1966, section 83 and 85 of the *Repealed Constitution* (previously section 16 and 29 respectively of the independence Constitution) were amended through Act No 18 of 1966. The Preservation of Security Act was also amended to wit; the term emergency was replaced by the term public security; the period for parliamentary review of the emergency order was increased from two months to eight months; and greater and wider derogations from the rights guaranteed in the Bill of rights were permitted.

89. The *Constitution* (Public Security) Order, LN 211 of 1966 brought Part III of the *Preservation of Public Security Act* into operation, and the executive invoked the powers granted to it by section 4(2)(a) and (b) of the Act. Significantly these sub-sections provide for the detention of persons, the registration of persons and restriction of movement and the compulsory movement of persons, including the imposition of curfews. Detailed Rules governing the detention of persons were made, being the *Preservation of Public Security (Detained and Restricted Persons) Regulations, 1978*. The President delegated his power of detention to the Minister of Home Affairs under rule 6 of the *Preservation of Public Security (Detained and Restricted Persons) Regulations*. Act No. 10 of 1997 deleted the provisions of section 4(2)(a). See Mumma, A O "*Preservation of Public Security Through Executive Restraint of Personal Liberty: A Case Study of the Kenyan Position"* (1988) Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America, 21(4), 445–463.

90. The *Preservation of Public Security Act* No 18 of 1996 and the *Public Security (Detained and Restricted Persons) Regulations 1978* were applicable at the time of the appellant's detainment. Before Chesoni J the Deputy Prosecutor produced a detention Order signed by the Minister of State in the President's office in Charge of Internal Security. A reading of section 3 of the Public Security Act and the provisions of the *Public Security (Detained and Restricted Persons) Regulations 1978* gives an overview of the Powers of the President and that of the Minister under the Act and the Regulations.

91. The *Preservation of Public Security Act* gave the Minister in charge of Internal Security the authority to order the detention of anyone who, in his or her judgment, posed a threat to public safety. Juxtaposing this to the purpose of the writ of *habeas corpus* fashioned to protect an individual's right to liberty, the net result was that the *Preservation of Public Security Act* was intended to do the exact opposite by arbitrarily restricting an individual's freedom. The former involves a judicial process, whereas the latter involves an administrative one. The aforementioned Act therefore had the effect of invalidating the *habeas corpus* writ. When the deceased was being held in custody, the only thing that was presented to the court in response to a request for *habeas corpus* was a copy of a detention order that barred the court from considering whether the deceased's detention was lawful.

92. Ultimately, this finding resolves the second issue framed by the court that the *habeas corpus* could not determine the legality of a detention under the provisions of the *Preservation of Public Security Act*. I firmly agree with the majority that the writ of *habeas corpus* application by the appellant did not operate as a bar to further proceedings. This would in turn mean that the Court of Appeal erred in setting aside the declaration by the High Court (Gacheche, J) that the appellant's detention violated his rights under section 72 of the repealed Constitution.

93. After this conclusion, I find myself at my first point of departure with the majority. The majority have found that beyond the two issues framed and considered to be of general public importance, the appellant was not at liberty to reopen his appeal beyond the parameters pursuant to those admitted.

94. Turning back to the present appeal, i agree with the majority that it is beyond dispute that the appellant was held without a trial during the administration of former President Moi. Further, the majority have rightly pointed out that other superior courts have upheld the Bill of Rights enshrined in our Constitution (former and current) as a non-negotiable covenant that cannot be legislated away. The superior courts have had occasion to pronounce themselves on how detention without trial, orchestrated by the state against its critics amounted to the egregious violation of the personal liberties of the detainees. The victims of the said detentions have over the years, successfully sought recompense from the courts long after the reign of the aforesaid regime came to an end. This raises the question, why should the appellant's case be any different? Should the court shut the appellant out from getting effective reliefs because he elected to pursue the appeal as a matter of general public importance and not one of application or interpretation of the *Constitution*? I think not.

95. Ordinarily, once a party elects to file their appeal under article 163(4)(b) as concerning general public importance then the they would not have the option of arguing matters under article 163(4)(a) as raising the application or interpretation of the *Constitution*.

96. However, I take note that what instigated the appeal before this court, was the appellant's High Court Constitutional and Judicial Review Petition No 625 of 2009. Having resolved the second issue in the negative and in favour of the appellant, then it is for the court to relook at the viability of the High Court petition that stood dismissed by the Court of Appeal. I must revisit the *locus classicus* on certification of matters, *Hermanus Phillipus Steyn v Giovanni Gnnecchi-Ruscone*; SC Appl No 4 of 2012 [2013] eKLR wherein, the court 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." [Emphasis mine]

97. What the court looks out for before certification is whether an issue transcends the circumstances of a case and has a bearing on the general public or public interest. Though the court owes the general public resolution of the issue of general public importance, the court, as the apex and the court of last resort, still bears a duty to the parties before it

to help them resolve their issues and grant effective remedies. I find myself of a contrary opinion from that expressed by the majority, more so in light of the fact that this court has previously resolved and issued reliefs in the following cases certified as involving matters of general public importance; *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators – Kenya Branch (Interested Party)*, SC Petition No 12 of 2016; [2019] eKLR, *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae)* (Petition 11 of 2020) [2023] KESC 4 (KLR) and *MNK v POM; Initiative for Strategic Litigation In Africa (ISLA) (Amicus Curiae)*, Petition No 9 of 2021; [2023] KESC 2 (KLR). In order to arrive at justiciable and appropriate remedies, the court may reexamine factual findings by the superior courts to determine their suitability. It is my humble opinion that this duty is ever more pertinent where there are historical human rights violations. To reiterate the words of this court in the case of *Wamwere & 5 others v Attorney General* (Petition 26, 34 & 35 of 2019 (Consolidated)) [2023] KESC 3 (KLR):

> "In our view, there is also a public interest element in allowing victims of alleged past gross human rights violations to access courts; that is, serving justice is the most effective insurance against future repression. To us, a judicial trial serves to send strong expression of formal disapproval of gross abuse of human rights. It also functions to re-commit state institutions and persuade the general citizenry of the importance of human rights in a polity. On the other hand, failure to ensure access to justice could send the wrong signal that judicial imprimatur has been given to these historical wrongs. Such a stance will encourage not deter potential violators of rights. It would also send the signal to the public that they can be complicit in violation of rights without consequences attaching to the perpetration of such atrocities. This is informed by the reality that failure of enforcement of freedoms and rights vitiates their authority, sapping their power to deter proscribed conduct."

98. However, unlike the myriad of cases quoted in the majority decision as examples of the court compensating victims of illegal detentions under the Moi Regime, the appellant in the present appeal elected to sue only the late President Moi in his capacity as not only the former president but also his former business partner. He failed to enjoin the Attorney General or the State in whatever capacity. I join the majority in faulting the appellant for failing to do so. The appellant's detention order was signed by the Minister of Internal Security in the Office of the President and served on the Attorney General. Why, the appellant and his counsel elected not to enjoin the Attorney General or the State, is best known to them. However, it is by now well settled by precedent that parties are bound by their pleadings and the court is bound to resolve the case as presented by the parties.

99. Nevertheless, in contrast with the majority, I am of the considered opinion that this failure to enjoin the state or the Attorney General was not fatal to the appellant's claim. I say so for two reasons. First, according to the *Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006*it was not a requirement that in constitutional cases the Attorney General had to be a respondent. Rule 15 under Part III on enforcement jurisdiction provides as follows:

> " The petition shall, in a criminal case, be served on the Attorney General and in a civil case, on the respondent, within seven days of filing."

100. Secondly, as evident in rule 15 above, remedies for violation of fundamental rights and freedoms under the repealed Constitution were available against private individuals. There was nothing in law that barred the appellant from suing the later former President as a private citizen.

101. My third point of departure from the majority decision concerns whether the appellant's case was founded in public law or company law where the principle of *Salomon v Salomon* was applicable. To answer this, I am of the opinion that the cases of *Gitobu Imanyara & 2 others v Attorney General*, SC Petition No 15 of 2017, and *Kenneth Stanley Njindo Matiba v Attorney General* [2017] eKLR are instructive on the matter.

102. In *Gitobu Imanyara* this court held that such a claim, was a claim in public law for infractions to his rights under the *Constitution*, and therefore, the principles in Salomon v Salomon were inapplicable. While in the *Matiba* case the court (Lenaola J (as he then was)) held that that it was irrelevant whether the claim and evidence by the appellant possesses the characteristic of a commercial nature as long as the claim before the court seeks to protect or enforce the Bill of Rights. It was held as follows:

> " 45. I agree with the learned judge and it is not in doubt that this petition stems from perceived breaches and infringements of sections 70(a) & (b), 72(1), 74(1), 78(1), 79(1), 80(1) and 81(1) of the repealed *Constitution* directly as against his person and as against his business enterprises by fact of the said violations against him. Section 84(2) of the repealed Constitution also recognized that the court may give appropriate redress including an order for compensation where a party successfully proves that their rights have been infringed. From the materials that have been placed before me I am certain that I will be able to determine the appropriate redress to issue should the Petitioner's claim succeed. It is therefore irrelevant at this stage whether the materials possess the characteristic of a commercial

> nature as long as the claim before the court seeks to protect or enforce the Bill of Rights."

103. I resonate with the above decisions, as such, it is my considered opinion that the issue before the superior courts was whether the appellant's fundamental human right to liberty was deprived as a consequence of the actions of the 1st respondent and whether as a result of such deprivation of liberty the appellant suffered loss in his business. The two are so intricately interconnected that it is my considered view, to apply the principle of *Salomon v Salomon* would be to defeat the purpose and intent of the Bill of rights guaranteed in the *Constitution*.

104. My final point of departure from the majority concerns the sufficiency or otherwise of evidence concerning the fraudulent sale of company properties. In response to the constitutional petition filed before the High Court, the 1st respondent raised a preliminary objection seeking to strike out the petition in limine on grounds that it was bad in law and was an abuse of the court process. The 1st respondent did not file pleadings challenging the factual basis of the appellant's case. The High Court proceeded on the strength of order VI rule 9 of the Civil Procedure Rules which provide that any allegation of fact not traversed by the opposing party is deemed to be admitted. The Court of Appeal noted that the petition proceeded by way of affidavit, as is the nature of constitutional petitions. The learned Judges of appeal faulted the High Court for failing to apply sections 107, 108 and 109 of the *Evidence Act*.

105. Be that as it may, I take cognizance that commonly where there are human rights violations by the state, or by persons utilizing state machinery, what frequently happens is that victims of such violations have their access to vital information hampered. This is often done in order to curtail the victim's ability to effectively pursue challenges in court. It is why several international human rights bodies have recognized, in a general sense, the merits of allocating the burden to the state where the state has greater access to information. For instance, the Inter- American Court held that the state's defense cannot rest on the impossibility of the complainant to procure evidence, when it is the State that controls the means of clarifying facts (*Bamaca-Velasquez v Guatemala*, Case No 11,129, IACtHR, Merits (Nov 25, 2000), para 152). The European Court in the case of *Betayev and Betayeva v Russia*, App No 37315/03, ECtHR (May 29, 2008) held that where the applicant makes out a prima facie case and the court is prevented from reaching factual conclusions owing to the lack of documents, the burden shifts to the government to provide a satisfactory and convincing explanation of how the events occurred.

106. This inequality in access to information is what informed the need for this court in the case of *Wamwere & 5 others v Attorney General* (*supra*) to elect to take judicial notice of the events of 3rd March, 1992 of police officers storming freedom corner where the mothers of political prisoners who had been detained by the then regime, had congregated since February 28,

1992 and went on a hunger strike protesting the incarceration and seeking the release of the political prisoners. The court took the view that since the incident had drawn widespread press coverage nationally and internationally as well as condemnation across the globe, it was a matter that it could comfortably take judicial notice of as a matter of general notoriety. Consequently, it may be time to have the discussion regarding strictly holding petitioners to the burden and standard of proof in cases of human rights violations where the state actor or persons using state machinery deliberately ensure that their victims' access to information and evidence is severely curtailed. Nevertheless, in the present case it is my considered view that it would be illogical to strictly hold the appellant to the burden and standard of proof, given that the alleged realization of various properties was carried out during the time he was held in detention. All the more, in view of the fact that the 1st respondent elected not to contest the appellant's factual claims. Further, even after being released, admittedly he was not able to gain access to all the necessary documents to prove his claim. However, the appellant was able to gather and submit to the High Court vide affidavit sworn on May 14, 2010 proof of sale of various properties during his detention. The relevance of this evidence shall be apparent shortly.

107. The appellant's detention order was issued by the Minister in Charge of Internal Affairs. During the time the 1st respondent was the President of Kenya, the office of the Minister of Internal Security was domiciled in the office of the President. The appellant's detention did not attract as much press coverage as that of the freedom corner incident. That notwithstanding, I take judicial notice that during this time, it is well recorded that President Moi was all powerful and had control over branch of government. His was a dictatorial state. Further, it is well documented that Former President Moi used arrests and detention without charge to repress his opponents and deemed adversaries in the years following the attempted coup in 1982 as well as throughout the struggle for multiparty politics. Many people have shared accounts of being subjected to cruel treatment, humiliation, and appalling conditions. One of these accounts is an official report of the Government of the Republic of Kenya, Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission (Government printer, 2003). At page 20 the Commission records as follows:

> "In June 1982, after popular calls for an open political system, President Moi pushed through the single party parliament a constitutional amendment making Kenya a de jure one-party state. Several months later, an aborted coup by a section of the Kenya Air Force produced in President Moi a determination to crush all dissent and concentrate all power in his hands. From then on, President Moi worked to perfect the repressive state crafted by President Kenyatta. Thereafter, the Party and the state became one. Through the government and KANU, he exercised extensive and deep control over civic groups, trade unions, the press,

> the parliament, and most critically the judiciary. Political murder, politically-instigated ethnic clashes, detention without trial, arbitrary arrests and detentions, false and politically motivated charges of opponents, both real and imagined, became the business of the state."

108. This history is further checkered with the powers that the President had under the Act. In section 3 of the act the President had authority to bring into force the provisions of the Act through issuance of a gazette notice. Further to this the provisions of section 4 of the Act provided as follows:

> "(1) Where an order under section 29 of the*Constitution* (which relates to the bringing into operation of this Part of this Act) has been made by the President, and so long as the order is in force, it shall be lawful for the President, to the extent to which the provisions of this Part is brought into operation and subject to the provisions of Constitution, to make regulations for the preservation of public security." [Emphasis mine]

109. From this recorded history it would be reasonable to believe the appellant's account that the former President was not only involved but was the author of his detention for a period over three (3) years.

110. The appellant had sought to dissolve his business entities with the former President but the former President was opposed to the idea. Any disputes regarding the business relations between the appellant and the 1st respondent could have been resolved in civil court as civil matters. However, before the matter could be resolved, the appellant was detained under the *Preservation of Public Security Act*, without trial and for an indefinite period of time. During which time, the properties of the various companies were sold off without the appellant's involvement and without accounting for the same.

111. The appellant's detention order was signed by the Minister of Internal Security. However, there is no reason to believe that the said detention was carried out for the purposes laid down in the *Preservation of Public Security Act*. This was an office domiciled in the Office of the President. I refer to the court's decision on the role of a sitting president in ongoing processes in *Attorney-General & 2 others v Ndii & 79 others; Prof Rosalind Dixon & 7 others (Amicus Curiae)* (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR). Civil proceedings cannot be instituted in any court against the President or the person performing the functions of the office of the President during their tenure of office in respect of anything done or not done under the *Constitution of Kenya 2010* . This means that once a person ceases to be a president, they lose immunity and become liable for their actions and omissions. This position was no different from section 14 (2) of the *Repealed Constitution*.

Further the court was able to find that it was difficult to explicate the President's hand in commencing the constitutional amendment process and the use of the powers of the office to do so. So too in the present case, it is difficult to explicate the role of former President Moi in the appellant's detention in 1982 and subsequent realization of various properties in companies both he and the appellant were shareholders during the time of the appellant's detention. I find great difficulty in seeing how the Minister of Internal Security could have detained the appellant, the former President's business partner, for three years and the former President to have not been aware. More so, given that several properties were realized in that time. The authority the President had at the time, the nexus created by the detention order, the resultant interference of the appellants person liberty and the deprivation of his right to property are too glaring for me sitting on this Bench to turn a blind eye.

112. The appellant had particularized the violation of his proprietary rights in Fourways Investments Limited wherein he had a 40%, the 1st respondent 19% and James Kanyotu and Sadru Alibhai a combined total of 41% shareholding. The company was the registered proprietor of properties situated in Nairobi Central Business Centre known as LR No 209/4383, No 209/2464 and LR No 209/2385; Sheraton Holdings Limited wherein he had a 40%, the 1st respondent 19%, and James Kanyotu and Sadru Alibhai a total of 41% shareholding. The company was also the registered proprietor of properties situated in Nairobi Central Business Centre, known as LR No 209/1846; and Mokamu Limited, wherein the appellant, the 1st respondent and James Kanyotu had a 33% shareholding each. In addition, the company was the registered proprietor of a farm situated in Solai Nakuru known as LR No 11793, measuring approximately 1020 acres.

113. The appellant stated that due to his detention, he was not able to gain access to all the necessary documents to prove his case. However, what he was able to acquire, he put together in an affidavit sworn on 14th May, 2010 filed before the High Court annexing documents demonstrating sale of various properties and compensation he received. Of the particularized sales, he was able to prove the sale of LR 209/4383 for Ksh 25 million and IR 10580/30 for Ksh 36 million by Fourways Investments Limited in October of 1982; sale of LR 209/1846 for Ksh 20,354,300/- by Sheraton Holdings Limited sometime in the year of 1982. He also admitted to receiving Ksh 5 million from Sheraton Holdings Limited as his part- payment. Meaning his claim for compensation amounted to a net of Ksh 27,541,720/-.

114. In the case of Gitobu Imanyara, this court acknowledged how difficult it is to award damages in cases of constitutional violations, noting that it is not as straight forward as in tortious or civil liability claims. The court thus set out parameters for consideration when assessing damages for constitutional violations which include:

    i. The duration of the claimant's detention;

ii. The level of physical and mental suffering endured by the claimant;

iii. The degree of responsibility of the individual(s) responsible for the suffering caused to the claimant;

iv. The extent of the action or inaction complained of, and any other incidental rights that may have been violated as a consequence of the first breach(es);

v. Award is discretionary and will depend on the facts and the circumstance of each case; and

vi. Award is not compensatory or punitive but a vindication of the violated rights.

115. With these parameters in mind and further taking into consideration the evidence tendered by the appellant together with past decisions by this and other superior courts, including *Gitobu Imanyara & 2 others v Attorney General*, SC Petition No 15 of 2017, [Unreported], the Court of Appeal decision in *Koigi Wamwere v Attorney General*, Civil Appeal No 86 of 2013; [2015] eKLR,; High Court decision in the case of *Kenneth Stanley Njindo Matiba v Attorney General*, Constitutional Petition No 94 of 2014 [2017] eKLR, *Denish Gumbe Osire v Cabinet Secretary, Ministry of Defence & another*, Constitutional Petition No. 572 of 2013; [2017] eKLR, *Captain (Rtd) Frank Mbugua Munuku v Kenya Defence Forces & another*, Constitutional Petition No 497 of 2012; [2013] eKLR, *David Gitau Njau & 9 others v Attorney General*, Constitutional Petition No 340 of 2012, [2013] eKLR and *Peter Tonny Wambua & 17 others v Attorney General*, Constitutional Petition No 427 of 2008; [2017] eKLR, I would have for the aforestated reasons partially allowed the appeal and issued the following orders:

a. a declaration be issued to the effect that a habeas corpus application does not bar a litigant from pursuing the available legal remedies and the same does not determine the legality or otherwise of an individual's arrest and detention under the *Preservation of Public Security Act*

b. a declaration be issued to the effect that a President enjoys immunity from personal omissions and illegalities attributed to him during his tenure of office, once he/she ceases to be a president and he/she is liable.

c. a declaration is issued to the effect that the petitioner was and is entitled to damages and interest owing to the loss of business incurred as a result of his detention

d. an order does issue setting aside the whole of the judgment rendered by the Court of Appeal on the 9th day of May, 2014.

e. an order partially reinstating the judgment and order of the High Court of Kenya at Nairobi (Gacheche, J) to the effect of awarding compensation for the deprivation of the appellant's liberty a sum of Ksh. 5 million and for the deprivation of his property a sum of Ksh 27,541,720/- as against the 1st respondent's estate.

f. Interest on the awards of Ksh. 5 million and Ksh 27,541,720/- at court rates of 12% pa from the date of the Judgment of the High Court issued on April 6, 2011.

116. In accordance with this court's decision in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate & 4 Others* SC Petition No 4 of 2012 [2013] 2013 eKLR costs ordinarily follow the event. I would therefore have issued an order for the 1st respondent to bear the appellant's costs in the High Court, Court of Appeal and this court.

117. However, as these views are in the minority, the decision of the court is that of the majority.

Dissenting Opinion of Lady Justice Njoki Ndungu, SCJ

118. I have read in detail the majority decision in this appeal. The factual background, the summary of the submissions advanced by the parties as well as the two issues for consideration and determination as framed need no repetition having been properly captured by the majority. I find no need to restate them here save to the extent that I will refer to them to expound my opinion.

119. This court had certified this cause as one of general public importance and outlined two issues for determination:

i. whether or not a habeas corpus application bars proceedings for the enforcement of fundamental rights and freedoms; and

ii. whether a court order in a habeas corpus application could determine the legality of a detention under the provisions of the *Preservation of Public Security Act* (now repealed).

120. I do agree with the majority's determination on the first issue. The writ of *habeas corpus* has always been meant to secure the release of a person from unlawful custody. In other words, it aims to ensure that the person under detention is being held only under lawful authority. In addition, given its limited scope, it cannot be said to bar any further proceedings once it has been granted or denied.

121. Further, I concur with the majority finding that indeed the *Preservation of Public Security Act* did give the Minister responsible for internal security, the power to issue an order for detention without trial, where in the opinion of the Minister, the person to be so confined,

was a danger to public security. Indeed, the objective of the writ of *habeas corpus* is to secure the liberty of a person, while that of the *Preservation of Public Security Act* was to achieve the opposite; that is to limit the liberty of a person. It is worth pointing out here that a person detained pursuant to regulations 6(2) of the Public Security (Detained and Restricted Persons) Regulations 1978 was deemed to be in lawful custody no matter the (questionable) circumstances. This, therefore, means that even when a person was in custody, where a detention order pursuant to the *Preservation of Public Security Act* was produced before the court, the court could not, under the then existing legal regime, enquire as to the lawfulness of the detention.

122. Nonetheless, a writ of *habeas corpus* cannot bar any further proceedings once it has been granted or denied, and I am of the same mind with the Majority, that the finding by High Court (Gacheche J.), that the appellant's detention violated his rights under section 72 of the repealed Constitution, was proper. The Court of Appeal therefore erred by finding otherwise.

123. I concur further, with the finding of the majority, that it was impossible for a court to determine the lawfulness of the said detention and that it is undeniable that the deceased was detained without trial under the regime of former President Moi.

124. However, the majority, even when coming to the above conclusion, could not grant the appellant the reliefs sought. The reasons given for this are firstly that the appeal before us was admitted only on the basis of the two issues outlined above, formulated by the court, under article 163(4)(b) of the *Constitution*. Secondly, because it was determined that the appellant elected to sue only the late President Moi in his capacity, as not only the former president but also as his former business partner, and that he failed to sue or seek joinder of the Attorney General or the state in the suit. As such, says the Majority, it is difficult to apportion liability and compensatory relief, against a person or agency that has never been a party to these proceedings. It is at this juncture, and on this finding that I disagree with the majority.

125. I do not think that this court ought to deny the appellant effective reliefs because he elected to pursue the appeal as a matter of General Public Importance (GPI) as opposed to one of application or interpretation of the *Constitution*. Having agreed with the High Court, that the deceased's right to personal liberty was violated consequent upon his detention without trial, this court ought to find a viable relief. In this regard, I am entirely in agreement with similar views expressed by my brother, Mohammed Ibrahim, SCJ in his separate dissenting opinion.

126. This court certified this matter as one of GPI. Rightly so because it touches on the conduct, culpability, and liability of a former head of State for matters (detention) arising in the course

of his term and is therefore of immense public interest. In addition, it has ramifications on the rights of persons to pursue redress on the legality or otherwise of detentions, especially under applications for habeas corpus.

127. Further, noting that in *Town Council of Awendo v Nelson Oduor Onyango & 13 others*, Sup Ct Misc Application No 49 of 2015; [2015] eKLR this court added another criterion to matters of GPI as follows:

> "(35) From the content of paragraphs 32 and 34, it emerges that while this court did, in the *Hermanus Phillipus Steyn* and *Malcolm Bell* cases, set out an elaborate set of criteria for ascertaining "matters of general public importance" for the purpose of engaging the court's jurisdiction, a further criterion has arisen. It may be thus stated. Issues of controversy that emerge from transitional political-economic-social-cum-legal factors, with impacts on current rights and entitlements of suitors, or on public access to common utilities and services, will merit a place in the category of "matters of general public importance" [emphasis mine

128. It is my considered opinion, therefore, that in this matter, this court, as the apex and the court of last resort, bears a duty to the parties before it to help them resolve their issues and grant effective remedies. This is especially so in circumstances where a litigant is disadvantaged by factors outside his or her control. I am of the view that it is not in the interests of justice to deny effective remedies to an appellant who has exercised all due diligence in pursuit of his cause and led the court to the finding that his/her rights to personal liberty have been violated.

129. In my concurring opinion *In the matter of Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others* [2014] eKLR, albeit a matter concerning electoral disputes, I made the following observation at paragraphs 217 & 218:

> "(217) Is this court powerless, as suggested by counsel for the appellant, in the exceptional circumstances where a litigant is disadvantaged by factors outside his or her control? The history of electoral dispute settlement in Kenya negates any argument that the court is powerless in such circumstances. For many years, the courts were part of the problems impeding electoral justice, where potential petitioners were unable to serve their powerful opponents, or where they did, files would mysteriously disappear or reappear after the required filing deadlines had already passed. These issues are well documented in several reports by the International Commission

of Jurists (Kenya) and other election monitoring groups, where they list the judicial system in this country, in the past, as having committed several electoral injustices including "courts insisting that petitions must be personally signed by the petitioner; where the court held that a petition must be served personally upon the Respondent, such as the controversial case of *Mwai Kibaki v Daniel Toroitich Arap Moi*, Civil Appeal No 172 of 1999 as consolidated with Civil Appeal No 173 of 1999; or courts requiring high security for costs to the detriment of those who are unable to raise this amount; or courts taking inordinate amount of time to dispose Petitions; or unreasonable delays, resulting in ineffectual decisions and dismissal of petitions on grounds of technicality".

(218) And therefore a case such as the one before us, begs the question, are these misadventures and misapplications in our past - eradicated by our transformative Constitution, or are they still lurking menacingly, within the corridors of justice? If the latter is the case, then should a judicial officer down his or her tools mechanically, citing procedural technicality in the face of administrative unfairness? I respectfully think not. The entire judicial machinery including its administrative arm ought to respond to the impetus of judicial authority, which, aside from emanating from the people of Kenya, imposes certain guiding principles, under article 159(2): that justice shall be done to all, irrespective of status; justice shall not be delayed, justice shall be administered without undue regard to procedural technicalities and the purpose and principles of the*Constitution* shall be protected and promoted. These principles manage the exercise of judicial authority and indeed call upon all Judges to exercise managerial judging to suit the demands of Kenya's transforming charter. This duty is exercised in the discretionary powers of the court to extend statutory timelines where a convincing case, geared towards the protection of fundamental rights and freedoms is made out".

130. Similarly in the instant case before us, Kenya's darkest days in our political history shows itself again. The repressive nature of an autocratic and powerful presidency and authoritarian regime in the late 1980's, led to many arbitrary arrests, detentions, and other related constitutional violations. However, now under the new transformative *Constitution of Kenya 2010*, can we as courts of justice, say we are powerless to rectify past transgressions of the State and restore dignity and justice to those who suffered in the past?

131. In my opinion, this court cannot shut its eyes to the fact that the detention as evidenced, violated the deceased's right to personal liberty. In addition, such detention causes a huge financial, social, and emotional cost to family members of such incarcerated people. It is without doubt that illegal detention has a negative impact on society. This court must recognize and ensure that the general welfare of the public is protected. In my considered view therefore, seeing as there was a clear nexus between the act of detention and the resultant loss of property, I would have adopted the plethora of precedent set by the superior courts, to name but a few, *Gitobu Imanyara & 2 others v Attorney General*, SC Petition No 15 of 2017; *Koigi Wamwere v Attorney General*, Civil Appeal No 86 of 2013; [2015] eKLR, and *Peter M Kariuki v Attorney General*, Civil Appeal No 79 of 2012; [2014] eKLR; High Court decisions in the cases of *Kenneth Stanley Njindo Matiba v Attorney General*, Constitutional Petition No 94 of 2014 [2017] eKLR, *Denish Gumbe Osire v Cabinet Secretary, Ministry of Defence & another*, Constitutional Petition No 572 of 2013; [2017] eKLR, *Captain (Rtd) Frank Mbugua Mununku v. Kenya Defence Forces & another*, Constitutional Petition No 497 of 2012; [2013] eKLR, *David Gitau Njau & 9 others v Attorney General* Constitutional Petition No 340 of 2012, [2013] eKLR and *Peter Tonny Wambua & 17 others v Attorney General*, Constitutional Petition No 427 of 2008; [2017] eKLR, to extrapolate the parameters for consideration when assessing damages for the deceased's constitutional violations.

132. In my view, once established that the deceased's right to personal liberty was violated consequent upon his detention without trial, this court ought to have come to his aid whether or not Attorney General or the State in the suit were parties to the suit, and provided effective remedies. This view is also buttressed by the legal regime pre-2010: Remedies for violation of fundamental rights and freedoms under the repealed Constitution were available against private individuals.

133. I must point out at this juncture that I am not in consonance with the majority decision findings on whether the appellant's case was founded in public law or company law, where the principle of *Salomon v Salomon* was applicable. I fully adopt my brother Mohammed Ibrahim's reasoning on this issue and reiterate that the issue before the superior courts was whether the appellant's fundamental human right to liberty was deprived as a consequence of the actions of the 1st respondent and whether as a result of such deprivation of liberty the appellant suffered loss in his business. These two are so intricately interwoven that to apply the principle of *Salomon v Salomon* would be to defeat the purpose and intent of the Bill of rights guaranteed in the *Constitution*.

134. I also note that the appellant aptly particularized the violation of his proprietary rights in Fourways Investments Limited, Sheraton Holdings Limited, and Mokamu Limited. From the record, his shareholding of these properties was 40%, 40%, and 33% respectively.

He deponed to several properties that were sold during his detention. The record also reveals that he deposed that the properties Ruprani House, Kenwood House belonged to Fourways Investments Limited. It was his testimony that Corner House belonged to Sheraton Holdings Limited and that all these were disposed of for specified sums. He also deposed that the land in Solai, which belonged to Mokamu Limited at the material time, and whose acreage was 1020 acres, was then valued at approximately Ksh 100,000 an acre and that on it were 800 heads of cattle each valued at about Ksh 65,000, as well as various miscellaneous assets then valued at about Ksh 20,000,000.

135. He was able to prove, at the High Court, to some extent, the sale of various properties and compensation he received and what was owed. In my view, therefore, this allows the court to compute and award him what would have been his share of the proceeds.

136. Finally I wish to affirm that it is important for the State to be consistently aware that past conduct of its officials and agents will no longer remain unpunished. Kenya must not return to those dark days. This court should always be a temple of justice for victims of historical injustices and justice must be seen to be done in the eyes of the victim, Having so concluded, I would therefore have given similar orders as has my brother Ibrahim, SCJ in his separate dissenting opinion, to the following extent:

a. A declaration is hereby issued that a habeas corpus application does not bar a litigant from pursuing the available legal remedies and the same does not determine the legality or otherwise of an individual's arrest and detention under the *Preservation of Public Security Act* (repealed).

b. A declaration is hereby issued that the petitioner was and is entitled to damages and interest owing to the loss of business incurred as a result of his detention.

c. The entire judgment of the Court of Appeal dated 9th day of May 2014 is hereby set aside.

d. The judgment and order of the High Court of Kenya at Nairobi (Gacheche, J.) dated April 6, 2011, is partially reinstated awarding compensation for the deprivation of the appellant's liberty at a sum of Ksh 5 million and for the deprivation of his property a sum of Ksh 27,541,720/.

e. Interest on the awards of Ksh 5 million and Ksh 27,541,720/- at court rates of 12% pa from the date of the Judgment of the High Court issued on April 6, 2011 is hereby granted.

137. As regards costs, in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, SC Pet No 4 of 2014; [2014] eKLR, this court held that it has the discretion to award costs to ensure that the ends of justice are met and that costs shall follow the event. I would therefore have

issued an order for the 1st respondent to bear the appellant's costs in the High Court, Court of Appeal, and this court.

138. However, as my views are in the minority, the decision of the court shall be that of the majority.

F. Final orders of the court

i. The appeal dated November 2, 2018 is hereby dismissed;

ii. Each party shall bear its own costs; and

iii. We hereby direct that the sum of Kshs 6,000/-, deposited as security for costs upon lodging of this appeal, be refunded to the appellant.

It is so ordered.

Muthuuri & 4 others v Attorney General & 2 others (Petition 15 (E022) of 2021) [2023] KESC 52 (KLR) (23 June 2023) (Judgment)

Supreme Court of Kenya

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

Neutral citation: [2023] KESC 52 (KLR)

Constitutional Law *– constitutional commissions – Salaries and Remuneration Commission (SRC) – role of the SRC – reviewing and making recommendations on the conditions of service of State public officers - whether consultation with the SRC was mandatory in reviewing and making recommendations on the conditions of service by the Public Service Commission and the Judicial Service Commission - whether the National Police Service Commission could determine the appropriate remuneration and benefits for the National Police Service without the advice of the Salaries and Remuneration Commission - whether the SRC's advice was mandatory in reviewing any salary or benefit for a particular job group by the National Police Service Commission - Constitution of Kenya, 2010, article 172(1)(b), 234(2)(g) and 259(11); National Police Service Commission Act, (cap 85), section 10; Salaries and Remuneration Commission Act, (cap 412D), section 11.*

Jurisdiction *– jurisdiction of courts – jurisdiction to make a determination on an un-pleaded issue - under what circumstance would a court make a determination on an un-pleaded issue?*

Constitutional Law *– doctrine of legitimate expectation – principles in establishing legitimate expectation - what were the principles to consider in establishing of legitimate expectation.*

Evidence Law *– admissibility of evidence – admissibility of evidence of parties who were not involved in court proceedings - whether pay slips of people not involved in court proceedings as witnesses or by way of express authority in the form of affidavits or other depositions were admissible as evidence.*

Brief facts

Through a circular issued on January 1, 1969 (the 1969 circular), the then Police Commissioner granted graduate police officers in the rank of constable a salary higher than their counterparts who were not graduates. Over time, that practice developed into a policy within the police force (as it was then known) as evinced by a subsequent letter from the Permanent Secretary in charge of personnel management dated July 26, 1995 (the 1995 letter). In that letter, the Permanent Secretary directed that graduate police constables be differentiated and designated as university graduate constables and placed in job group J.

At the time of filing the petition before the Employment and Labour Relations Court (ELRC), the 1st to 4th appellants were police constables having been recruited on varying dates between 2007 and 2016. While in service, they enrolled and completed university studies attaining bachelor's degrees in different fields. The appellants' case was that the 2nd and 3rd respondents had been receiving degree certificates from graduate police constables in the National Police Service (the police service) but had selectively and capriciously upgraded some to job group J and ignored others with similar qualifications. Consequently, they sought among other orders, a declaration that the respondents'

conduct and action amounted to denial, violation, infringement and/or threat to their fundamental rights and freedoms under the Constitution.

The ELRC allowed the petition on the basis of the evidence of some pay slips exhibited by the appellants allegedly belonging to officers designated as graduate police constables, which showed a difference in their earnings from those of the appellants, yet both categories were in the rank of police constables. The ELRC further held, on a balance of probabilities, that the press statement released on March 19, 2018 by the 2nd respondent's chairperson, set out the 2nd respondent's prevailing policy on the graduate constables; and that the appellants were accordingly entitled to benefit from the policy. The ELRC issued an order of *mandamus* directing the 2nd and 3rd respondents to pay all graduate constables salaries equivalent to that of an inspector of police (job group J).

Aggrieved, the respondents appealed to the Court of Appeal which allowed the appeal, setting aside the judgment of the ELRC in its entirety. The court found that the Constitution of Kenya, 2010 (the Constitution) had established the Salaries and Remuneration Commission (SRC) one of whose functions was to set and review the remuneration and benefits of all State officers and other public officers and that its role was recognized in the National Police Service Commission Act (NPSC Act). The court opined that the appellants and other degree holders in the police service should submit their papers to the 2nd and 3rd respondents for consideration as to their qualifications for promotion to the corresponding job groups and that such emplacements and salary grading would also have to be done in consultation with SRC. Aggrieved, the appellants filed the instant appeal.

Issues

i. Whether the National Police Service Commission could determine the appropriate remuneration and benefits for the National Police Service without the advice of the Salaries and Remuneration Commission.

ii. Whether consultation with the Salaries and Remuneration Commission was mandatory when reviewing and making recommendations on the conditions of service by the Public Service Commission and the Judicial Service Commission.

iii. Under what circumstances would a court make a determination on an un-pleaded issue?

iv. What were the principles to consider when establishing a claim of legitimate expectation?

v. Whether pay slips of people not involved in court proceedings as witnesses or by way of express authority in the form of affidavits or other depositions were admissible as evidence.

vi. Whether the Salaries and Remuneration Commission's advice was mandatory when reviewing any salary or benefit for a particular job group by the National Police Service Commission.

Held

1. Apart from the fact that the respondents had not cross-appealed the issue of jurisdiction of the ELRC to entertain the dispute, that question was being introduced for the first time before the instant court. It was neither raised in the ELRC nor determined by the Court of Appeal. The general rule was that parties were bound by their pleadings. However, a

court could make a determination on an unpleaded issue where in the course of the hearing, parties had canvassed the issue and left it to the court to determine. That was not the case in the instant matter. The court could not, in those circumstances, consider or determine the question in *vacuo* without the benefit of the opinions of the two superior courts below.

2. Jurisdiction was everything. If the court found, for instance, that it did not have jurisdiction, it had to down its tools at that point, save in exceptional circumstances. Appeals from the Court of Appeal lay to the Supreme court under article 163(4) of the Constitution, either on matters of constitutional interpretation and application, or upon certification, by either the Court of Appeal or the instant court, on matters of general public importance. From the record of appeal, all through from the chain of courts starting with ELRC, to the Court of Appeal through to the instant court, the issue had remained the interpretation and application of articles 27, 41 and 47 of the Constitution. The court was clothed with the requisite jurisdiction to determine the instant appeal.

3. The principles on legitimate expectation were as follows:
   a. There must be an express, clear and unambiguous promise given by a public authority;
   b. the expectation itself must be reasonable;
   c. the representation must be one which it was competent and lawful for the decision-maker to make; and
   d. there could not be a legitimate expectation against clear provisions of the law or the Constitution.

4. The appellants were employed on diverse dates between 2007 and 2016. Their respective degree certificates were conferred upon them between 2015 and 2017. The origin of recruitment of graduate police constables at the level of job group J was a circular issued on January 1, 1969, followed on July 26, 1995 by a letter. At the time the 1995 letter and the circular of 1969 were issued, none of the appellants had been employed in the former police force. The 2nd respondent was also nonexistent.

5. Save for the 4th appellant who was employed in 2007, the rest of the appellants were employed after the promulgation of the Constitution and the establishment of the 2nd respondent in 2011. The Recruitment and Appointment Regulations and Promotion Regulations were subsequently developed in 2015. Therefore, the provisions of the Constitution, the National Police Service Act and the NPSC Act, the Recruitment and Appointment Regulations, 2015, the Promotion Regulations, 2015 and the Career Progression Guidelines, 2016 applied to the appellant at the time they received their degrees between 2015 and 2017.

6. Recruitment and promotions in the police service could only be done strictly in accordance with the Constitution and the law. At the time the appellants approached the respondents to consider their promotions or salaries enhancement, the ground had shifted. The circular

of 1969 and the letter of 1995 could not form the basis of the claim of legitimate expectation. In the hierarchy of laws, no policy paper or letter could override written law.

7. From the contents of the press release of March 19, 2018 by the Chairperson of the 2nd respondent, the release was a reaction to some misrepresentation in the media regarding an alleged decision by the 2nd respondent about the payment of salaries of graduate constables and officers with disabilities. The release merely confirmed that payment of special salaries (job group J) to graduate police officers in the police service was legally protected and was provided for in the new service policy guidelines.

8. While the press release was in fact an express promise issued by a public authority, the chairperson of the 2nd respondent, it was addressing a specific category of officers and a specific problem; it merely restated the procedure of promotion of graduate police constables in accordance with the terms of the Promotion Regulations, Recruitment and Appointment Regulations and made no reference to old policy documents. In any case the press release could not replace the law or these guidelines and regulations.

9. There was no rank in the police service categorized as graduate police constables. Under section 22 and the First Schedule to the National Police Service Act, there were thirteen (13) ranks in the police service, with the Inspector General at the apex and constables held the nadir position in the hierarchy. The Career Progression Guidelines developed by the 2nd respondent indeed made provision for two distinct entry points into the police service at the lowest level, the constable, PG 1. One could either be a holder of a Kenya Certificate of Secondary Education (KCSE) with a mean grade of D+ and above or have a Bachelor's Degree in fields like criminology, law, police science, education, public administration, strategic management, human resource management, physical education, music, media and public relations. That was in addition to a raft of other requirements, such as basic police training course lasting not less than nine (9) months; be a Kenyan citizen; physically and medically fit; have no criminal record; met the requirements of Chapter Six of the Constitution, and must be between the age 18 and 28 years and 30 years for graduates.

10. The procedure applied before 2010 under the 1969 circular and the letter of 1995 became obsolete and inoperative once the new ones were introduced. It was no longer mere presentation of a degree certificate by a constable to qualify for promotion to the rank of inspector. A little more was required. It was an absurdity to read into the press release a promise by the Chairperson of the 2nd respondent that the mere presentation of a degree certificate, irrespective of where it was obtained, or its authenticity or relevance, the officer would automatically be upgraded and be entitled to the salary of an inspector.

11. To corroborate their claim of legitimate expectation and discrimination and, further to rebut the respondents' assertion that the position of graduate constables was not recognized, or did not exist, the appellants relied on and produced copies of pay slips allegedly belonging to their colleagues. Without full terms of employment, particulars of the owners of the pay slips, and in the absence of their involvement in the proceedings as witnesses or by way of

express authority in the form of affidavits or other depositions, the pay slips were of no evidential significance. Further, the pay slips were not certified as true copies of the original by the 2nd respondent who was the employer of all police officers and custodian of the pay slips. In terms of section 35 of the Evidence Act, the pay slips were inadmissible.

12. Although generated and kept by the 2nd respondent, a pay slip was the personal property of the employee to whom it belonged. It contained sensitive confidential personal information. If evidence of a pay slip was not properly obtained, there may be a violation of the owner's right to privacy and a violation of data protection laws. Documents belonging to third parties must flow freely from them to whoever wished to use them in court. It was unacceptable to use 'self-help' or clandestine means to obtain documents as doing so would be detrimental to the administration of justice.

13. If the evidence of the pay slip was excluded, the appellants could not prove that there was a differential treatment of officers holding the same qualifications and performing the same duties and their claim to legitimate expectation fell flat. The respondents' contention that the position of graduate constables did not exist had not been controverted.

14. The concept of horizontal career development was recognized and formulated in regulation 12 of the Promotion Regulations, which provided for alternative avenues for career development. Regulation 12 made the scheme non-promotional. The reward was in the form of either higher financial incentives or other opportunities and rewards. The regulation vested in the 2nd respondent full discretion in the formulation and implementation of the scheme. In its implementation, the 2nd respondent took into consideration several factors.

15. The case presented by the appellants before the ELRC was specific that, as graduate police officers of the rank of constable they were entitled, as a matter of right to a grant of salaries at the scale of job group J, equivalent to an inspector. They indeed instituted the action in the ELRC to enforce those rights.

16. In discharging its mandate, the SRC was guided by the principles set out in article 230(5) of the Constitution, which required, among others, that SRC ensured: fiscal sustainability of the total public compensation bill, transparency and fairness in the public service. Whereas article 230(4)(b) of the Constitution integrated SRC in the determination of matters relating to remuneration and benefits of public officers, that provision must be read alongside other provisions of the Constitution which conferred power to some of the chapter fifteen commissions to review and make recommendations on the conditions of service of public officers under them.

17. Article 234(2)(g) of the Constitution empowered the Public Service Commission (PSC) to, review and make recommendations to the National Government in respect of conditions of service, code of conduct and qualifications of officers in the public service with the exception of State offices, an office of high commissioner, ambassador or other diplomatic or consular representative of Kenya. The article also did not apply to an office or position that was subject

to the Parliamentary Service Commission, Judicial Service Commission (JSC), Teachers Service Commission (TSC) and the 2nd respondent.

18. Article 172(1)(b) of the Constitution empowered JSC to review and make recommendations on the conditions of service of the staff of the Judiciary. The JSC was equally granted the power to review and make recommendations on the conditions of service of judges, except those terms and conditions that related to their remuneration. In other words, the JSC was at liberty and exercised freedom to determine and review the conditions of service of the staff of the Judiciary.

19. From a reading of the Public Service Commission Act and the Judicial Service Act (JS Act), in reviewing and making recommendations on the conditions of service, consultation with SRC was not mandatory.

20. Section 10 of the NPSC Act provided specifically for the role of SRC in the 2nd respondent's functions. The NPSC Act had specifically been amended in 2014 to include the role of SRC in the functions of the 2nd respondent. From a reading of section 10(1)(b), the 2nd respondent could determine the appropriate remuneration and benefits for the National Police Service only with the advice of the SRC. The 2nd respondent could not by any means proceed to determine the benefits of graduate police constables without the advice of the SRC. Its role was mandatory and must be obtained prior to taking any action that required that advice. The advice was binding in terms of article 259(11) of the Constitution.

21. The role of SRC did not come into play only when the 2nd respondent was determining new salaries. Its advice was also required at the point of reviewing any salary or benefit for a particular job group. The role of SRC was provided for under section 11 of the Salaries and Remuneration Commission Act.

22. Police officers were public officers within the meaning of article 260 of the Constitution as their remuneration and benefits were payable directly out of the funds provided by Parliament. The SRC (Remuneration and Benefits of State and Public Officers) Regulations (SRC Regulations) stipulated that besides carrying out a periodical four-year review of the remuneration and benefits of State and public officers, SRC was mandated to undertake special reviews to ensure attraction and retention of critical or scarce professional skills required to effectively execute the functions of the public service. Therefore, according to the SRC Regulations, if a public organization like the 2nd respondent, which required the advice of SRC, was desirous of reviewing allowances or any remunerative benefits of any cadre of police officers, the Regulations stipulated the procedure to be followed and the factors to be considered.

23. Where the SRC had already given its advice and salaries were set and subsequently implemented in accordance with that advice, should any public organization wish to review the existing allowances or any other remunerative benefits including extending any other form of incentives, it must submit the proposals to the SRC for consideration. If the 2nd respondent wished to ensure it attracted and retained professional skills of police constables

who were holders of degrees by reviewing their remuneration packages upwards to that of job group J, to actualize their horizontal career development, SRC had to be consulted. If the 2nd respondent were to proceed to independently review the salaries of police constables with degrees, it would be tantamount to usurping the mandate of SRC.

24. There was no proof that SRC had determined the benefits of graduate constables or that the salaries had been reviewed and that the SRC granted the 2nd respondent approval to treat the salaries of graduate constables differently from those who were not graduates. The respondents could not be ordered or directed to interfere with the appellants' salaries without involving the SRC. The appellants had failed to prove that after the establishment of the 2nd respondent, the 2nd and 3rd respondents had been selectively and capriciously receiving degree certificates from some graduate police constables and ignoring others with similar qualifications.

25. Police officers who were holders of degrees from recognized universities and other such institutions had to follow the law and the guidelines, by submitting their applications to the authorized bodies for consideration of whether to grant either a promotion or a reward under the horizontal career development scheme.

Appeal dismissed.

Orders

i. *Parties to bear their own costs.*

ii. *The court directed that the sum of Kshs 6,000 deposited as security for costs upon lodging of the instant appeal, be refunded to the appellants.*

Citations

Cases

Kenya

1. *Chikamai, Ben & another v Peter Macithi Muigai & another* Civil Appeal 313 of 2018; [2020] KECA 625 (KLR) - (Explained)
2. *Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* Petition 14, 14A, 14B & 14C of 2014; [2015] KESC 13 (KLR) - (Explained)
3. *Gikonyo, Ayub Mathenge & 4 others v AG & others* Judicial Review Application E032 of 2021; [2022] eKLR - (Explained)
4. *Kenya Revenue Authority v Export Trading Company Ltd* Petition 20 of 2020; [2022] KESC 31 (KLR) - (Explained)
5. *Mathenge & 4 others v Inspector General of Police & 3 others; Kenya Human Rights Commission (Interested Party)* Judicial Review Application 032 & 41 of 2021 (Consolidated); [2022] KEELRC 4872 (KLR) - (Explained)
6. *Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others* Election Petition 4 of 2017; [2017] KESC 30 (KLR) - (Explained)

7. *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* Civil Appeal 50 of 1989; [1989] KLR 1 - (Explained)
8. *Rai & 3 others v Rai & 4 others* [2013] 2 KLR 142 - (Followed)
9. *Rawal, Kalpana H v Judicial Service Commission & 4 others* Petition 386 of 2015; [2015] KEHC 784 (KLR) - (Mentioned)
10. *Teachers Service Commission v Kenya National Union of Teachers (KNUT) & 3 others* Petition 3 of 2015; [2015] KEELRC 863 (KLR) - (Explained)
11. *Zaippeline, Oindi & 39 others v Karatina University & another* Civil Appeal 52 of 2014; [2015] KECA 799 (KLR) - (Mentioned)

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Texts

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Statutes

Kenya

1. Constitution of Kenya articles 10, 27, 28, 40, 41(1); 43; 47; 163(3)(b)(i); 230(4)(5); 232; 244; 245; 246(3)(a); 249(1)(2); 258; 259; 260; Chapter 6 - (Interpreted)
2. Evidence Act (cap 80) section 35 - (Interpreted)
3. Fair Administrative Action Act, 2015 (cap 7L) sections 4, 7 - (Interpreted)
4. Judicial Service Act, 2011 (cap 8A) In general - (Cited)
5. National Police Service Act, 2011 (cap 84) section 28 - (Interpreted)
6. National Police Service Commission (Promotion) Regulations, 2015 (cap 85 Sub Leg) regulation 12- (Interpreted)
7. National Police Service Commission (Recruitment and Appointment) Regulations, 2015 (cap 85 Sub Leg) In general - (Cited)
8. National Police Service Commission Act, 2011 (cap 85) section 10- (Interpreted)
9. Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations, 2013 (cap 412D Sub Leg) In general- (Cited)
10. Salaries and Remuneration Commission Act, 2011 (cap 412D) sections 11, 12(1)- (Interpreted)
11. Supreme Court Rules, 2020 (cap 9B Sub Leg) rule 36 - (Interpreted)

Advocates

Mr. Albert Simiyu and *Ms. Cynthia Omuya* for the appellants (Musyoka Murambi & Associates)
Ms. Brenda Opiyo h/b for *Mr. Odukenya* for the respondents (Attorney General's Chambers)

June 23, 2023, the Court delivered the following Judgment:

A. Introduction

1. The genesis of this dispute can be traced back to a circular issued on January 1, 1969 where the then Police Commissioner granted graduate police officers in the rank of constable a salary higher than their counterparts who were not graduates. Over time, this practice developed into a policy within the police force (as it was then known) as evinced by a subsequent letter from the Permanent Secretary in charge of personnel management dated July 26, 1995. In that letter, the Permanent Secretary directed that graduate police constables be "differentiated" and designated as University Graduate Constables and placed in job group J.

2. It is apparent from the pleadings before us, that the program was intended to encourage graduates with degrees in the relevant fields to apply for recruitment in the lower echelons of the police force which guaranteed them a higher salary than those in the same cadre but without a degree. It appears to us that the programme was designed to entrench professionalism in the police force.

3. It should be apparent that the two documents, the 1969 circular and the letter of 1995, predate the current Constitution which was promulgated in 2010. Article 244 of which defines the functions and objects of the National Police Service (the force has come to be known). The article enjoins the service "to strive for the highest standards of professionalism and, to train staff to the highest possible standards of competence and integrity" so as to respect human rights and fundamental freedoms and dignity.

4. The *Constitution* also establishes the National Police Service Commission (named in the proceedings as the 2nd respondent) and the office of the Inspector- General (the 3rd respondent). The National Police Service Commission (NPSC) under article 246(3)(a) is the body mandated to "recruit and appoint persons to hold or act in offices in the service, confirm appointments, and determine promotions and transfers within the National Police Service".

5. Pursuant to, the *National Police Service Act* was enacted in 2011 to make further provisions in respect of the National Police Service. By section 28 thereof, the 2nd respondent is empowered to make regulations generally for the better carrying into effect of any provisions of the Act, and in particular to provide for: "(a) appointments, confirmation of appointments, promotions and termination of appointments."

6. Based on this, the 2nd respondent has made the *National Police Service Commission (Recruitment and Appointment) Regulations, 2015*. In November 2016, it also promulgated the *Career Progression Guidelines for the National Police Service Uniformed Personnel*. These two instruments, in addition t and the *National Police Service Act*, are critical in the determination of this petition, bearing in mind also that the *Constitution* has also created the Salaries and Remuneration Commission "to set and regularly review the remuneration and benefits" of all State officers: and to advise the national and county governments on the remuneration and benefits of all other public officers.

B. Litigation Background

i. Before the Employment and Labour Relations Court

7. At the time of filing the petition before the Employment and Labour Relations Court (ELRC), the 1st to 4th appellants were police constables serving in either the Administration Police Service (APS) or the Kenya Police Service (KPS), respectively having been recruited on varying dates between 2007 and 2016. While in service, they enrolled and completed university studies attaining bachelor's degrees in different fields. For example, the 1st appellant graduated with a Bachelor of Arts Degree in Economics and History, the 2nd and 4th appellants with Bachelor of Arts Degree in Criminology and Security Studies and the 3rd appellant got a bachelor's degree in arts with education.

8. We need to point out at this stage that the 5th appellant was not a member of the police service. He was described in the petition before the ELRC as a law-and- order enthusiast and police rights activist. He has participated in all the proceedings beginning in the ELRC, the Court of Appeal and this court.

9. As indicated earlier, the appellants' petition was anchored on the contents of the aforementioned circular of January 1, 1969 and the letter of July 26, 1995. They also sought to rely on a press release of March 19, 2018 by the then Chairperson of the 2nd respondent, Mr Johnston M Kavuludi, confirming that payment of special salaries (Job Group J) to graduate police officers in the National Police Service was legally protected and was provided for in the service policy guidelines.

10. The gravamen of the appellants' case was that the 2nd and 3rd respondents had been receiving degree certificates from graduate police constables in the service but had selectively and capriciously upgraded some to Job Group J and ignored others with similar qualifications. This, according to them, amounted to preferential treatment in contravention of articles 10, 27, 41(1), 43, 47, and 232 of the *Constitution* .

11. Consequently, they asked the trial court to declare that the respondents' conduct, and action amounted to denial, violation, infringement and/or threat to their fundamental rights and freedoms under the aforesaid articles of the *Constitution*. They also sought a declaration that Graduate Police Officers who are on a salary scale below Job Group J but similarly qualified as their colleague Graduate Police Officers in job group J have been discriminated against; an order of *mandamus* directing the 1st and 2nd respondents to pay all graduate constables Job Group J salaries with effect from the respective dates of their graduation or enlistment to the service; and an order for costs to be borne by the respondents.

12. In opposing the petition, the respondents contended that the appellants' claims were misconceived and misdirected for relying on both the circular of January 1, 1969 and the letter dated July 26, 1995. The letter, for instance, was to apply and benefit only those police constables who were, at the time of recruitment, university graduates, and who were then placed under intensive training. It did not apply to officers who were recruited as police constables and then, while already in service acquired degree certificates. In addition, they argued that the letter was annulled by operation of the law when the *National Police Service Act* (NPS Act) and the *National Police Service Commission Act* (NPSC Act) were enacted and following the promulgation of the *National Police Service Commission (Recruitment and Appointment) Regulations, 2015* (Recruitment and Appointment Regulations), the *National Police Service Commission (Promotion) Regulations, 2015* (Promotion Regulations) and the *National Police Service Career Progression Guidelines, 2016* (Career Progression Guidelines). These, according to the respondents, are the only documents that provide clear career progression with defined entry levels and promotion from one rank to the next. None of them provide for the rank of graduate constable as all officers are recruited to the rank of police constable in terms of the public advertisements for recruitment.

13. In conclusion, the respondents urged the trial court to find that the petition lacked merit as it was not anchored upon the prevailing law and regulations governing recruitment, appointment and promotions in the police service; that the letter dated July 26, 1995 had been overtaken by events; and that the first schedule to the *NPS Act*, does not recognize a rank known as graduate police constable.

14. In a judgment delivered on May 17, 2019, the ELRC (Ongaya, J) allowed the petition on the basis of the evidence of some pay slips exhibited by the appellants allegedly belonging to officers designated as graduate police constables, which showed a difference in their earnings from those of the appellants, yet both categories were in the rank of police constables. Because of this variance, the learned Judge held that the 2nd and 3rd respondents had acted unreasonably and in contravention of article 47; and that they also subjected the appellants

to unfair labour practices and unfair conditions of service in contravention of article 41 of the *Constitution*.

15. The court further held, on a balance of probabilities, that the press statement released on March 19, 2018 by the 2nd respondent's chairperson, set out the 2nd respondent's prevailing policy on the graduate constables; and that the appellants were accordingly entitled to benefit from the policy. What was more, the court went on, the statement confirmed that the *Career Progression Guidelines*, the *Recruitment and Appointment Regulations* and the *Promotion Regulations*, did not render invalid the emplacement of constables being holders of degree certificates to pay level as that of inspectors of police. In this regard, the court concluded that the 2nd respondent's policies in that regard were substantially similar to the policy conveyed in the letter dated July 26, 1995 with apparent variation that it applied to all constables, whether the degree is acquired before or after joining the service.

16. Third, the court found that, going by the established past practice, the appellants had a legitimate expectation that police constables holding degree certificates are to be emplaced upon the pay level for an Inspector of Police (job group J) and to be facilitated to undergo training by the respondents towards effective preparation and subsequent promotion to the substantive position of Inspector of Police. The expectation was reasonable as it was consistent with motivation of officers and in the best interest of the service. As a corollary, the 2nd respondent was the competent constitutional and statutory authority to make and implement the promise; and that the promise for such emplacement had not been shown to contravene any statutory or constitutional provision.

17. Save for the foregoing findings in favour of the appellants, the court rejected the rest of their claims alleging violation of the other cited constitutional provisions.

18. In the result, the court ultimately allowed the petition, declaring that the respondents' conduct and action amounts to a denial, violation, infringement and/or a threat to a violation of the fundamental rights and freedoms of the appellants, for which it issued an order of mandamus directing the 2nd and 3rd respondents to pay all graduate constables salaries equivalent to that of an Inspector of Police (Job Group J) in accordance with the prevailing policy and as clarified in the press release by the chairperson on March 19, 2018. Costs were awarded to the 1st to 4th appellants.

ii. Before the Court of Appeal

19. This determination aggrieved the respondents who moved to the Court of Appeal by a memorandum of appeal raising 8 grounds. Upon considering these grounds, the Court of Appeal, for its part, condensed them into three issues and framed the following question for its determination; whether the declaration that Graduate Police Constables were entitled to

be emplaced to pay scale of graduate constables' equivalent to pay of an Inspector of Police Job Group J was valid; whether the respondents' "legitimate expectation" was valid; and whether the order of mandamus was properly issued.

20. Beginning with the second issue, the Court of Appeal found that there was an express, clear and unambiguous promise given by a public authority in a circular issued on January 1, 1969 and a letter dated July 26, 1995. The maker of the representation contained in the two documents was legally competent to make them at the time they were made.

21. However, in the court's view, the ground shifted upon the promulgation o in 2010 and the enactment of the NPSC Act No 30 of 2011. That shift birthed the 2nd and 3rd respondents under articles 245 and 246 with further provisions in the NPSC Act and NPS Act.

22. Specifically, the court found tha has established the Salaries and Remuneration Commission (SRC) one of whose functions is to set and review the remuneration and benefits of all State officers and other public officers; that this role is recognized in the NPSC Act that requires that only with the advice of the SRC, can the NPSC determine the appropriate remuneration and benefits for the police service and staff of the NPSC; and that it ought to follow from these developments that, neither the press release of March 19, 2018 nor the letter and circular in question could supersede the provisions o and the law. The court, for this reason, held that the contents of the press release of March 19, 2018 did not give the appellants any legitimate expectation. Instead, it opined that the appellants and other degree holders in the police service should submit their papers to the 2nd and 3rd respondents for consideration as to their qualifications for promotion to the corresponding job groups; and that such emplacements and salary grading would also have to be done in consultation with SRC.

23. In setting aside the order of *mandamus* directing the 2nd and 3rd respondents to pay all graduate constables salaries equivalent to that of an Inspector of Police Job Group J, the appellate court stated that, since the role of SRC in determining benefits and remuneration was obligatory, it was in error for the learned judge to circumvent and indeed usurp this role; and further that, on the authority its decision in *Ben Chikamai and another v Machithi and another*, civil appeal No 313 of 2018; [2020] eKLR, the press statement, a policy paper or letter cannot override clear provisions of the law.

24. On the question of discrimination, the court held that there was no evidence that those graduate constables who had been promoted were promoted purely on the basis of the presentation of the degree certificates without any other considerations.

25. Consequently, in a judgment delivered on September 23, 2021, the court found merit in the appeal and allowed it, setting aside the judgment of the ELRC in its entirety, directing parties to bear their own costs both in the Court of Appeal and before the ELRC.

i. Before the Supreme Court

26. It is that decision of the Court of Appeal that the appellants have challenged in this appeal as of right pursuant to article 163(4)(a) of the *Constitution* on 9 grounds. They seek that we order:

    i. The appeal to be allowed.

    ii. The judgment and orders of the Court of Appeal to be set aside.

    iii. A declaration that the respondents' conduct, and action amounted to denial, violation, infringement and or threat to the fundamental rights and freedoms of Graduate Constable Officers' rights under articles 27, 28, 40, 41, 43 and 47 of the *Constitution*.

    iv. A declaration that police officers who are University graduates on a salary scale below Job Group J and yet similarly qualified as Graduate Police Officers in Job Group J have been unfairly discriminated against.

    v. An order of *mandamus* directing the 1st and 2nd respondents to pay all graduate constables Job Group J salaries with effect from the date of respective graduation or enlistment to the service; and

    vi. For costs.

C. Parties' Submissions

i. The appellant's submissions

27. In their submissions, the appellants proposed three issues for determination:

    i. whether the Court of Appeal erred in law in finding that the appellants' legitimate expectation to receive salary increment after obtaining their respective undergraduate degrees was not enforceable.

    ii. whether the Salaries and Remuneration Commission must be engaged before salaries and benefits already being paid to other public servants with the same qualifications and job description, can be paid to the other public servants who subsequently qualify for such pay; and

    iii. which party should settle the costs of the appeal?

28. Confirming that the court's jurisdiction has been properly invoked, the appellants relied on articles 22(1), 22(2)(c), 163(3)(b)(i), 27(1) and (4), 41(1) and (2), 48, 230(4), (5)(c) and

(d), 249(1) and (2) and 258 of the *Constitution*,, which they have been cited as the basis of bringing this appeal.

29. On the first ground, the appellants have argued that contrary to the respondents' case that the circular of 1969 and letter of 1995 were no longer applicable after the promulgation of the *Constitution* and the enactment of new statutes and regulations, the policy contained in both the circular and the letter has since been promulgated into law through regulation 12 of the promotion regulations. The regulation, according to the appellants provides for horizontal career development, which they explain to mean a non-promotional reward scheme such as higher financial incentives to members of the National Police Service, irrespective of whether the member is promoted or not.

30. In their view, it would be unfair, contrary to the rules of natural justice and grossly unconstitutional to apply the *Career Progression Guidelines* made in 2016 retrospectively to the appellants and other police constables who became entitled to increased pay and promotion before the operationalization of the guidelines.

31. They have maintained that, due to the foregoing, the 1st to 4th appellants being members of the National Police Service had a legitimate expectation that after completion of their university studies and obtaining degrees, they would receive higher financial incentives which was the trend from 1969 to 1995 in conformity with the intention to reward qualification, boost morale and intellectual growth in the service.

32. The press release of March 19, 2018 was, in their opinion a clear demonstration that, even after the promulgation o and the passage of relevant laws, the policy continued to be applied. The appellants having relied on past practice and promise had legitimate expectations that they would receive the same treatment as their graduate colleagues and the respondents were accordingly estopped and could not resile from the obligation, in accordance with the following decisions: *Communications Commission of Kenya & 5 others v Royal Media Services & 5 others* SC Petition No 14, 14a, 14B & 14C of 2014, *Kalpana Rawal v Judicial Service Commission & 4 others* [2015] eKLR, *Re Westminster City Council*, (1986) A.C 668 AT 692 and *Oindi Zaippeline & 39 others v Karatina University & another* [2015] eKLR.

33. They pointed out that the circular, the letter and the press release in question were express, clear, lawful and an unambiguous promise and the makers were competent and had lawful authority to issue them, giving the appellants a legitimate expectation that they would benefit from the arrangement.

34. In the appellants' view, the Court of Appeal failed to evaluate the disparity of salaries paid to other police constables who had similar qualifications and were performing the same functions as the appellants; that the court failed to consider the appellants' evidence which clearly pointed to some officers who graduated in the year 2016 and were designated graduate

police constables and whose salaries were upscaled to the level of Job Group J in line with the spirit of horizontal career progression highlighted in the promotion regulations; that this differential treatment amounted to unfair discrimination and was in contravention of article 27(4) of the *Constitution*, section 12(1) of the *Salaries and Remuneration Commission Act* and the practice of the National Police Service; and that the respondents have failed, neglected and/or refused to remunerate the appellants at the same level as other graduate police constables who have the same educational qualifications, are on the same rank and perform the same duties.

35. They claim that despite the respondents insisting that the appellants cannot seek to benefit from an illegality and further that there is no designation known as graduate constable in the NPS ranking structure, the respondents have not taken any practical action to correct the alleged illegality.

36. On the role of SRC, the appellants have submitted that all they are seeking are benefits that their fellow graduate police constables were and are already receiving and not new salaries; that it is only when new salaries or benefits are to be introduced that SRC would be consulted for concurrence under article 230(4) of the *Constitution*; that the learned judge of the ELRC was correct in his appreciation of the *ratio decidendi* in the case of *Teachers Service Commission v Kenya Union of Teachers (KNUT) & 3 others* [2015] eKLR and in distinguishing the facts and circumstances in that decision from those in the present case, noting that, unlike the present case, the SRC opinion was mandatory in the *Teachers Service Commission v Kenya Union of Teachers (KNUT) & 3 others* (*supra*) as the TSC (the appellant in that case) was setting new salaries.

ii. Respondent's submissions

37. The respondents rely on the replying affidavit sworn on December 16, 2022 by Silas Oloo Mc'Opiyo, the 2nd respondent's Chief Executive Officer and their joint written submissions, where they have reiterated their arguments in the ELRC and Court of Appeal, that the circular of 1969 and letter of 1995 were no longer applicable after the promulgation of the *Constitution*, the establishment of the 2nd and 3rd respondents and the enactment of new statutes and regulations to guide in the process of recruitment and promotion of police officers. They have also prayed for striking out of the 5th appellant's name from the proceedings for the reason that he is not a police officer and therefore lacks the *locus standi* to bring the present petition.

38. The respondents fault the appellants for blowing hot and cold; seeking a declaration that they have been discriminated against and at the same time seeking to be paid higher salaries and allowances than other officers of the same rank, with whom they were recruited at the same time and performing similar functions, without any proof of special training beyond

the degree certificates they hold. In any case, both courts below were unanimous in their conclusion that there was no evidence of the appellants being discriminated against, which decision the appellants have not appealed against. They, therefore, urge the court not to interfere with the findings of both the ELRC and the Court of Appeal.

39. In addition, the respondents have accused both the appellants and the learned trial judge of relying on inadmissible and illegally obtained pay slips to demonstrate the existence of a cadre of graduate police constables and the basis for a claim of legitimate expectation; and that this was done despite the fact that the officers whose pay-slips were presented were not parties to the proceedings, neither did they swear affidavits confirming the ownership or authenticity of the pay slips nor authorized their use in the proceedings. In any case, the respondents contend, a pay slip alone, without more, cannot define the terms of employment or be the basis for a claim of legitimate expectation.

40. Agreeing with the Court of Appeal, the respondents have reiterated that the appellants had failed to prove that they had a legitimate expectation to be placed in Job Group J automatically upon acquiring degree certificates; that the Court of Appeal applied its mind to the contents of the circular of 1969, letter of 1995, the provisions of the *Constitution*, the NPSC Act and the *Regulations on recruitment*, *Career Progression Guidelines*, *Promotion Regulations* and other laws governing the NPSC.

41. The respondents argue also that the concept of horizontal career development was introduced by the appellants for the first time in the proceedings before this court, without the ELRC or the Court of Appeal expressing their opinions on the concept. This court, for that reason, according to the respondents, cannot determine the question.

42. Was the advice of SRC mandatory? According to the respondents, the press release of March 19, 2018 did not make it automatic that the mere presentation of a university degree would entitle an officer to earn a salary attached to an Inspector. They argued that there is instead a whole process, starting with the declaration of vacancies, selection of candidates who must possess specified relevant requirements, and upon selection the successful candidates must undergo specialized training as inspectors, before being considered for promotion or enjoying the salary and other remuneration attached to Job Group J.

43. A blanket upgrading of all police officers with degree certificates to the rank of Inspector of Police (Job Group J) would have far-reaching legal, financial and operational implications within the National Police Service. The resultant wage bill will be fiscally unsustainable. In any case, the rank of an Inspector of Police is a position of operational command and control, with greater supervisory responsibilities.

44. Responding to the appellants' claim that nothing has been done to cure the inconsistencies brought about by the previous policy documents, the respondents have submitted that

all the police constables who were earning the salaries of Inspectors outside the present guidelines have reverted to their rightful pay Group of Job Group F. This decision was, however, challenged in the ELRC in JR Application No E032 of 2021; *Ayub Mathenge Gikonyo & 4 others v AG & others* where Nduma Nderi, J delivered judgment in April 2022 and declared that the respondents' unilateral decision to reduce graduate officers' pay from job group 'J' to job group 'F' offended articles 10, 27, 41, and 47 o as read together with section 4 and 7 of the *Fair Administrative Actions Act*.

45. The respondents have taken out a Notice of Motion in the Court of Appeal, being civil application No E211 of 2022 under rule 5(2)(b) to stay those orders. The application, we were informed, is pending hearing, and we say no more about it.

D. Issues forDetermination

46. From our own re-evaluation of the foregoing arguments, the pleadings and the decisions of the two superior courts below, we consider the following to be the issues falling for our determination.

    i. Whether the appeal before this court meets the constitutional threshold under article 163(4)(a) of the *Constitution*.

    ii. Whether the Court of Appeal erred in finding that the appellants did not have any "legitimate expectation"; and

    iii. Whether the Court of Appeal erred in finding that the opinion of SRC was obligatory in the circumstances of this dispute.

    iv. Who bears the costs?

E. Analysis and Determination

47. Before we turn to consider each of these issues, we must dispose of the two preliminary points raised by the respondents in their submissions. First, they have argued that the ELRC lacked jurisdiction in the first place to entertain the petition before it because it did not raise any constitutional issues and secondly, that the 5th appellant's name be struck out from these proceedings for being a busybody. On the latter question, it is apparent from the record that the 5th appellant has all along, from the ELRC through to this court been a party, though it is common factor that he is not a police officer. In terms of rule 36 of the *Supreme Court Rules*, we conclude that the 5th appellant has the *locus standi* to be in this appeal.

48. The short answer to the first question regarding the jurisdiction of the ELRC to entertain the dispute is that, apart from the fact that the respondents have not cross-appealed this issue, we note that this question is being introduced for the first time before us. It was neither

raised in the ELRC nor determined by the Court of Appeal. The general rule is that parties are bound by their pleadings. However, a court may make a determination on an unpleaded issue where in the course of the hearing, parties have canvassed the issue and left it to the court to determine. See *Odd Jobs v Mubia* [1970] EA 476. This was not the case here. We cannot, in those circumstances, consider or determine the question in *vacuo* without the benefit of the opinions of the learned judges of the two superior courts below.

Both objections must therefore fail.

i. Jurisdiction under article 163(4)(a)

49. Given this court's special and circumscribed jurisdiction, before considering the merits of arguments in any appeal before it, as a matter of practice, it first ascertains if it has properly been moved. As Nyarangi, JA said in his long- established and classic statement in the *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, jurisdiction is everything. If we find, for instance, that we do not have jurisdiction, we must down our tools at that point, save in exceptional circumstances. In this appeal, the respondents have contended that this court lacks jurisdiction to entertain the petition since the appellants' contracts of employment do not have statutory underpinnings as to render a breach thereof actionable by way of constitutional petition; and that the appellant's grievance before the ELRC did not raise any constitutional issues.

50. It is settled that appeals from the Court of Appeal will lie to this court under article 163(4) of the *Constitution*, either on matters of constitutional interpretation and application, or upon certification, by either the Court of Appeal or this court, on matters of general public importance.

51. It is apparent to us from the record of appeal, that all through from the chain of courts starting with ELRC, to the Court of Appeal through to this court, the issue has remained the interpretation and application of articles 27, 41 and 47 of the *Constitution*. Our simple answer to this question, is that the court is clothed with the requisite jurisdiction to determine the instant appeal.

ii. Whether the Court of Appeal erred in finding that the appellants did not have any legitimate expectation

52. Cumulatively, the appellant's case on legitimate expectation was that the 2nd respondent had established a consistent past practice of extending higher financial and promotional incentives to graduate police constables spanning over a period of 51 years; that this was a clear promise by the government evinced in the circular of 1969, the letter of 1995 and the 2nd respondent's press statement of March 19, 2018; that relying upon this promise the appellants enrolled into accredited institutions of higher learning and obtained university

degrees in order to grow in their careers and progress in life through salary increment and promotions; and that upon presentation of their degree certificates, they expected the respondents to emplace them in Job Group J automatically.

53. To these claims, the respondents asserted that the appellants were misconceived and misdirected to rely on the letter dated July 26, 1995 as it did not apply to them. The letter was to apply and benefit only university graduates recruited as police constables having obtained a degree and then placed under intensive training. While they concede that, this may have been the case in the past, the circular of 1969 and letter of 1995 ceased to be applied after the promulgation of the *Constitution*, the creation of the 2nd and 3rd respondents and the enactment of new statutes and regulations. The process of recruitment and promotion of police officers are now regulated by these instruments, none of which makes provision for the rank of Graduate Constables because all officers to be recruited at that rank are only recruited in accordance with advertisements. There cannot be any claim to legitimate expectation.

54. The Court of Appeal in determining this question relied on the decision by this court in *Communications Commission of Kenya & 5 other v Royal Media Services Limited & 5 others* (*supra*) and succinctly summarized the principles on legitimate expectation as follows:

> " a. there must be an express, clear and unambiguous promise given by a public authority;
>
> b. the expectation itself must be reasonable.
>
> c. the representation must be one which it was competent and lawful for the decision-maker to make; and
>
> d. there cannot be a legitimate expectation against clear provisions of the law or the *Constitution*."

55. We did recently restate this very principle in *Kenya Revenue Authority v Export Trading Company Limited*, SC Petition 20 of 2020; [2022] KESC 31 where we explained further that:

> " 52. As can be discerned from these two definitions, legitimate expectation may take many forms. It may take the form of an expectation to succeed in a request placed before the decision maker or it may take the objective form that a party may legitimately expect that, before a decision that may be prejudicial is taken, one shall be afforded a hearing.

> 53. Respectfully, we take the view that the question of whether a legitimate expectation arose is more than a factual question. It is not merely confined to whether an expectation exists in the mind of an aggrieved party, but whether viewed objectively, such expectation is in a legal sense, legitimate." [our emphasis]

56. Was the expectation by the appellants to be emplaced on the same pay level as an officer of the rank of Inspector under Job Group J upon presentation of their degree certificates legitimate? It is not in doubt that the appellants were employed on diverse dates between 2007 and 2016. For example, the 1st appellant was employed in 2016, the 2nd appellant in 2013, the 3rd appellant in 2016 and the 4th appellant in 2007. It is also common ground that their respective degree certificates were conferred upon them between 2015 and 2017. What then was the applicable law during the period in question?

57. It is well documented that the origin of recruitment of graduate police constables at the level of Job Group J was a circular issued on January 1, 1969, followed on July 26, 1995 by a letter. We underscore the fact that at the time the letter of 1995 and the circular of 1969 were issued, none of the appellants had been employed in the former police force. The 2nd respondent was also nonexistent. Save for the 4th appellant who was employed in 2007, the rest of the appellants were employed after the promulgation of the *Constitution* and the establishment of the 2nd respondent in 2011. The *Recruitment and Appointment Regulations* and *Promotion Regulations* were subsequently developed in 2015. Therefore, the provisions of the *Constitution*, the *NPS Act* and the *NPSC Act*, the *Recruitment and Appointment Regulations, 2015*, the *Promotion Regulations, 2015* and the *Career Progression Guidelines, 2016* to which we have made reference applied to the appellant at the time they received their degrees between 2015 and 2017.

58. In view of the foregoing fact, it must, of necessity follow that recruitment and promotions in the Kenya Police Service can only be done strictly in accordance wit and the law. Like the Court of Appeal, we find that at the time the appellants approached the respondents to consider their promotions or salaries enhancement, the ground had shifted. It follows, by necessary implication that the circular of 1969 and the letter of 1995 could not form the basis of the claim of legitimate expectation. We shall return to these documents in so far as some of them provide for graduate constables. But we stress that in the hierarchy of laws, no policy paper or letter can override written law.

59. What then do we make of the press release of March 19, 2018 by Johnston M. Kavuludi? The context of the press release is important in answering this question. From the contents, it is apparent that the release was a reaction to some misrepresentation in the media regarding an

alleged decision by the 2nd respondent about the payment of salaries of graduate constables and officers with disabilities.

60. In addition to this, the release confirmed that payment of special salaries to graduate constables was legally protected and were in fact provided for in law. It then gave additional conditions that had to be met for graduate constables to be considered. First, the graduate constables had to present their degree certificates to the Inspector General (IG), Deputy Inspector General (DIG) and the Directorate of Criminal Investigations (DCI) for processing and subsequent submission to the 2nd respondent for consideration and authentication. Second, if the officer's certificates met the approval of the 2nd respondent in accordance with the guidelines, the officer would only be granted a special salary equivalent to that of an Inspector, if the IG, in consultation with the 2nd respondent were satisfied that the officer selected in that category met all the other standards required for entry into the rank of Inspector. And that was not all. The officer concerned had to proceed for intensive training for a period of 3 years before emplacement to the rank of Inspector; again, only when vacancies were available and announced.

61. It was necessary to clarify this procedure in the press because the 2nd respondent was concerned about graduate constables who had unprocedurally been introduced into the payroll as graduate constables without authorization of the IG and approval by the 2nd respondent. In order to correct the widespread illegitimate infiltration of the payroll, the 2nd respondent indicated in that press release that he would embark on an audit of the payroll to remove those officers who did not qualify for such payments. It is this audit that resulted in some officers being demoted from Job Group J to Job Group F, culminating in the institution of *Mathenge & 4 others v Inspector General of Police & 3 others; Kenya Human Rights Commission (Interested Party)* (judicial review application 032 & 41 of 2021 (Consolidated)) [2022] KEELRC 4872 (KLR) before the ELRC. Nduma Nderi, J. declared on September 29, 2022 that the unilateral decision to reduce graduate officers' pay from Job Group 'J' to Job Group 'F' without giving them an opportunity to be heard was arbitrary, unreasonable and unlawful. This matter, from what we were told during the hearing, is now before the Court of Appeal.

62. But all said, the rationale for intensive training of candidates who already are in possession of a degree at the point of recruitment before emplacement to the position of an Inspector cannot be missed, bearing in mind the onerous supervisory role that comes with the rank of Inspector.

63. The release merely confirmed that payment of special salaries (Job Group J) to graduate police officers in the National Police Service was legally protected and was provided for in the new service policy guidelines.

64. While the press release was in fact an express promise issued by a public authority, the chairperson of the 2nd respondent, it was addressing a specific category of officers and a specific problem; it merely restated the procedure of promotion of graduate police constables in accordance with the terms of the *Promotion Regulations*, *Recruitment and Appointment Regulations* and made no reference to old policy documents. In any case the press release could not replace the law or these guidelines and regulations.

65. We confirm, first, that there is no rank in the police service categorized as "Graduate Police Constables". Under section 22 and the first schedule of the *National Police Service Act*, there are thirteen (13) ranks in the Kenya Police Service, with the Inspector General at the apex and Constables hold the nadir position in the hierarchy. Secondly, we confirm that the *Career Progression Guidelines* developed by the 2nd respondent indeed make provision for two distinct entry points into the police service at the lowest level, the constable, PG 1. One can either be a holder of a Kenya Certificate of Secondary Education (KCSE) with a mean grade of D+ and above or have a Bachelor's Degree in fields like Criminology, Law, Police Science, Education, Public Administration, Strategic Management, Human Resource Management, Physical Education, Music, Media and Public Relations.

66. This is in addition to a raft of other requirements, such as Basic Police Training Course lasting not less than nine (9) months; be a Kenyan citizen; physically and medically fit; have no criminal record; met the requirements of chapter six of the *Constitution*, and must "be between the age 18 and 28 years and 30 years for graduates".

67. Indeed, therefore, the procedure applied before 2010 under the 1969 circular and the letter of 1995 became obsolete and inoperative once the new ones were introduced. It is no longer mere presentation of a degree certificate by a constable to qualify for promotion to the rank of inspector. A little more is required, as demonstrated in the preceding paragraphs.

68. It is an absurdity to read into the press release a promise by the chairperson that the mere presentation of a degree certificate, irrespective of where it was obtained, or its authenticity or relevance, the officer would automatically be upgraded and be entitled to the salary of an inspector.

69. Was there proof of the appellants being unfairly treated? To corroborate their claim of legitimate expectation and discrimination and, further to rebut the respondents' assertion that the position of graduate constables was not recognized, or did not exist, the appellants relied on and produced copies of pay slips allegedly belonging to their colleagues.

70. The pay slips on record belong to three different officers: Joash Rotich stationed at Nakuru Provincial Police Office; Esther Chepkemoi Chebus of Kirinyaga OCPD; and Patrick Oyongo of Nairobi Embakasi OCPD. The pay slips show a steep rise in the salaries of these

individuals upon designation as Graduate Police Constables. At some point, the earnings appear to have been reduced. What is interesting about Patrick Oyongo's pay slips is that in all of them, his designation is not indicated. Without full terms of employment, particulars of the owners of the pay slips, and in the absence of their involvement in the proceedings as witnesses or by way of express authority in the form of affidavits or other depositions, the pay slips were of no evidential significance. Further, the pay slips were not certified as true copies of the original by the 2nd respondent who is the employer of all police officers and custodian of the pay slips. In terms of section 35 of the *Evidence Act*, the pay slips were inadmissible.

71. Although generated and kept by the 2nd respondent, a pay slip is the personal property of the employee to whom it belongs. It contains sensitive confidential personal information. If evidence of a pay slip is not properly obtained, there may be a violation of the owner's right to privacy and a violation of data protection laws.

72. We stress what we said in *Njonjo Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others*, Petition No 4 of 2017 [2017] eKLR, that a party intending to present a document in evidence must satisfy the requirements of the *Evidence Act*. We also stated that if the document belongs to a third party, then it is imperative that the source of the document and how it was obtained be explained. We summed up the law as follows:

> " The petitioners, using the above test, do not show how they were able to obtain the internal memos ... No serious answer has been given to that contention. The use of such information before the court, accessed without following the requisite procedures, not only renders it inadmissible but also impacts on the probative value of such information."

73. Although the above case relates to an election petition, the issue before the court, just like here was, whether the evidence obtained in an unlawful or questionable manner may be admitted as evidence. The principles are the same. Documents belonging to third parties must flow freely from them to whoever wishes to use them in court. It is unacceptable to use 'self-help' or clandestine means to obtain documents as doing so would be detrimental to the administration of justice.

74. This determination taken together with the unexplained discrepancies in the pay slips, leads us to an inevitable conclusion on this issue, that if the evidence of the pay slip is excluded, the appellants cannot prove that there was a differential treatment of officers holding the same qualifications and performing the same duties and their claim to legitimate expectation falls flat. The respondents' contention that the position of graduate constables does not exist has not been controverted.

75. Contrary to the submissions by the respondents that the appellants only raised the concept of horizontal career development before this court for the first time, the truth is that it was in fact raised for the first time in the appellants' submissions of September 21, 2020 before the Court of Appeal at paragraph 42. The Court of Appeal in its judgment, however, did not address itself to the question. We cannot blame the court because the question was not pleaded and argued before the trial court. It is common factor that this concept is now recognized and formulated in regulation 12 of the *Promotion Regulations*, which provides for alternative avenues for career development as follows:

> " 12.
>
> (1) The commission may establish other human resources development mechanisms and processes to be known as horizontal career development.
>
> (2) Horizontal career development may include a non-promotion reward scheme, where a member of the service is offered higher financial incentives and other career development opportunities and rewards irrespective of whether the member is promoted or not." [our emphasis]

76. In the first place, this regulation makes the scheme non-promotional. The reward is in the form of either higher financial incentives or other opportunities and rewards. The regulation vests in the 2nd respondent full discretion in the formulation and implementation of the scheme. In its implementation, the 2nd respondent takes into consideration several factors.

77. In any event, the case presented by the appellants before the ELRC was specific that, as Graduate Police Officers of the rank of constable they were entitled, as a matter of right to a grant of salaries at the scale of Job Group J, equivalent to an inspector. They indeed instituted the action in the ELRC to enforce those rights.

78. For all the reasons we have given, we reiterate in conclusion of this ground that the appellants could not rely on the circular of 1969 and the letter of 1995 as the basis of their legitimate expectation well after the promulgation o, the establishment of the 2nd respondent and the enactment of the *National Police Service Act* and the *National Police Service Commission Act*, the *Recruitment and Appointment Regulations*, the *Promotion Regulations* and the *Career Progression Guidelines*.

79. Concomitantly, we find that the press release of 2018 could not form the basis of legitimate expectation as it was simply a clarification of a specific situation. It restated the requirements

for consideration for the promotion of a graduate constable. This ground of appeal therefore fails.

iii. Whether the Court of Appeal erred in finding that the SRC opinion was obligatory in nature in the proceedings

80. Whereas the respondents contended that upgrading the pay group of all police officers below the rank of inspector with degree certificates to that of inspectors of police in Job Group J would have both legal, financial and operational implications within the National Police Service and the public wage bill; and that the same can only be issued within the confines of the law and in consultation with the SRC, the appellants, for their part, maintained that they were seeking benefits which their fellow graduate police constables were already in receipt of, and therefore the input of the SRC would not be necessary; and that the salaries have already been set for a specific job group, in which they belong by virtue of having acquired a degree but to which the respondents have failed to grant them.

81. Article 230(4) o vests the responsibility upon the SRC to:

> "a. set and regularly review the remuneration and benefits of all State officers; and
>
> b. advise the national and county governments on the remuneration and benefits of all other public officers." [our emphasis]

In discharging its mandate, the SRC is guided by the principles set out in article 230(5) of the *Constitution*, which require, among others, that SRC ensures: fiscal sustainability of the total public compensation bill, transparency and fairness in the public service.

82. Whereas article 230(4)(b) integrated SRC in the determination of matters relating to remuneration and benefits of public officers, this provision must be read alongside other provisions of the *Constitution* which confer power to some of the chapter fifteen commissions to review and make recommendations on the conditions of service of public officers under them. For instance, article 234(2)(g) empowers the Public Service Commission (PSC) to, "review and make recommendations to the national government in respect of conditions of service, code of conduct and qualifications of officers in the public service" with the exception of state offices, an office of high commissioner, ambassador or other diplomatic or consular representative of the Republic. The article also does not apply to an office or position that is subject to the Parliamentary Service Commission, Judicial Service Commission (JSC), Teachers Service Commission (TSC) and NPSC. See article 234(3).

83. Likewise, article 172(1)(b) empowers JSC to "review and make recommendations on the conditions of service" of the staff of the Judiciary. The JSC is equally granted the power to review and make recommendations on the conditions of service of judges, except those terms and conditions that relate to their remuneration. In other words, the JSC is at liberty and exercises freedom to determine and review the conditions of service of the staff of the Judiciary.

84. A reading of the PSC Act and the *Judicial Service Act* (JS Act) also shows that, in reviewing and making recommendations on those conditions of service, consultation with SRC is not mandatory.

85. Compared to the role SRC plays in the foregoing two commissions, section 10 of the *NPSC Act* provides specifically for the role of SRC in the NPSC's functions as follows:

> "(1) In addition to the functions of the Commission under article 246(3) of the Constitution, the Commission shall—
>
> (a) on the recommendation of the Inspector-General develop and keep under review all matters relating to human resources policies of members of the Service;
>
> (b) with the advice of the Salaries and Remuneration Commission, determine the appropriate remuneration and benefits for the Service and staff of the Commission;" [our emphasis]

86. In this regard, the Court of Appeal correctly observed that the NPSC Act had specifically been amended in 2014 to include the role of SRC in the functions of the NPSC. From a reading of section 10(1)(b) aforesaid, the 2nd respondent can determine the appropriate remuneration and benefits for the National Police Service only with the advice of the SRC. The 2nd respondent cannot by any means, as the appellants suggest, proceed to determine the benefits of graduate police constables without the advice of the SRC. Its role is mandatory and must be obtained prior to taking any action that requires that advice. The advice is binding in terms of article 259(11) of the *Constitution* which directs that:

> "(11) If a function or power conferred on a person under this *Constitution* is exercisable by the person only on the advice or recommendation, with the approval or consent of, or on consultation with, another person, the function may be performed or the power exercised only on that advice, recommendation, with that approval or consent, or

after that consultation, except to the extent that this *Constitution* provides otherwise." [our emphasis]

87. The role of SRC, therefore, does not come into play only when the 2nd respondent is determining new salaries as submitted by the appellants. Its advice is also required at the point of reviewing any salary or benefit for a particular job group. We have closely examined the role of SRC under section 11 of the *Salaries and Remuneration Commission Act* (SRC Act) which states:

> " Functions of the Commission:
>
> In addition to the powers and functions of the Commission under article 230(4), the Commission shall—
>
> a inquire into and advise on the salaries and remuneration to be paid out of public funds.
>
> b keep under review all matters relating to the salaries and remuneration of public officers.
>
> c advise the national and county governments on the harmonization, equity and fairness of remuneration for the attraction and retention of requisite skills in the public sector.
>
> d conduct comparative surveys on the labour markets and trends in remuneration to determine the monetary worth of the jobs of public offices;
>
> e determine the cycle of salaries and remuneration review upon which Parliament may allocate adequate funds for implementation;
>
> f make recommendations on matters relating to the salary and remuneration of a particular State or public officer;
>
> g make recommendations on the review of pensions payable to holders of public offices; and
>
> h perform such other functions as may be provided for b or any other written law." [our emphasis]

88. Police officers are public officers within the meaning of article 260 of the Constitution as their remuneration and benefits are payable directly out of the funds provided by Parliament. As mentioned earlier, the NPSC Act requires the advice of SRC in determining the salaries and benefits for its officers.

89. Moreover, the SRC (Remuneration and Benefits of State and Public Officers) Regulations (SRC Regulations) stipulate that besides carrying out a periodical four-year review of the remuneration and benefits of state and public officers, SRC is mandated to undertake special reviews to "ensure attraction and retention of critical or scarce professional skills required to effectively execute the functions of the public service". See regulations 4 and 6(1) respectively.

90. Therefore, according to the*SRC Regulations*, if a public organization like the NPSC, which requires the advice of SRC, was desirous of reviewing allowances or any remunerative benefits of any cadre of police officers, the Regulations stipulate the procedure to be followed and the factors to be considered.

91. From the foregoing, it is discernible that where the SRC has already given its advice and salaries were set and subsequently implemented in accordance with that advice, should any public organization wish to review the existing allowances or any other remunerative benefits including extending any other form of incentives, it must submit the proposals to the SRC for consideration.

92. If the NPSC wished to ensure it attracted and retained professional skills of police constables who are holders of degrees by reviewing their remuneration packages upwards to that of Job Group J, to actualize their horizontal career development, SRC has to be consulted. If the NPSC were to proceed to independently review the salaries of police constables with degrees in the manner suggested by the appellants, it would be tantamount to usurping the mandate of SRC.

93. In the instant case, we have no proof, first, that SRC had determined the benefits of graduate constables or that the salaries had been reviewed and that the SRC granted the 2nd respondent approval to treat the salaries of graduate constables differently from those who were not graduates.

94. We wish to emphasize that in the decision of *Teachers Service Commission* (*supra*) which the appellants rely on, the Court of Appeal (Githinji, Koome (as she then was), Mwilu (as she then was), Azangalala & Odek, JJA) was unanimous that no valid salary and/or benefit of a state or public officer, shall ensue from a process that ignores the role of SRC. The court held that the advice by SRC under article 230(4)(b) of the *Constitution* is binding and that SRC has a role to play in collective bargaining agreements on matters relating to remuneration and benefits of public officers, including teachers.

95. In conclusion, we agree with the finding of the Court of Appeal in the instant appeal that the respondents cannot be ordered or directed to interfere with the appellants' salaries without involving the SRC. This ground also fails.

96. In view of the foregoing, we come to the inevitable conclusion that the appellants have failed to prove that after the establishment of the 2nd respondent, the 2nd and 3rd respondents have been selectively and capriciously receiving degree certificates from some graduate police constables and ignoring others with similar qualifications.

97. We accordingly dismiss this appeal for want of merit, but wish to emphasize that police officers who are holders of degrees from recognized universities and other such institutions must follow the law and the guidelines, by submitting their applications to the authorized bodies for consideration of whether to grant either a promotion or a reward under the horizontal career development scheme.

F. Costs

98. Costs follow the event but are at the discretion of the court. This has been said by the courts time without number. See our decision in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others*; SC petition 4 of 2012; [2013] eKLR. Although this is not a public interest litigation matter, the circumstances of this dispute militate against condemning the unsuccessful parties, the appellants to pay costs. Instead, we order parties to bear their own costs.

H. Orders

99. In light of the above, we order that:

i. The petition dated October 28, 2021 is hereby dismissed.

ii. Parties to bear their own costs.

We hereby direct that the sum of Kshs 6,000/-, deposited as security for costs upon lodging of this appeal, be refunded to the appellants.

It is so ordered.

Haki Na Sheria Initiative v Inspector of Police & 2 others; Kenya National Human Rights & Equality Commission (Interested Party) (Petition 5 (E007) of 2021) [2023] KESC 51 (KLR) (23 June 2023) (Judgment)

Supreme Court of Kenya

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

Neutral citation: [2023] KESC 51 (KLR)

Statutes *– constitutionality of statutes – constitutionality of sections 8 and 9 of the Public Order Act - Whether sections 8 and 9 of the Public Order Act were unconstitutional for granting sweeping powers to the Cabinet Secretary and the Police without checks and balances or parliamentary and judicial oversight contrary to the provisions of article 58 and 95 of Constitution - Constitution of Kenya, 2010, articles 58 and 95.*

Public Order *– curfews – curfews vis-à-vis a state of emergency – procedure – oversight by parliament - whether curfew orders that affected a particular region were to be subjected to oversight by parliament the same way a declaration of a state of emergency that affected the entire State would be subject to parliamentary oversight - Constitution of Kenya, 2010, article 58; Public Order Act, (cap 56), sections 8 and 9.*

Constitutional Law *– fundamental rights and freedoms – right to life – right to human dignity – right to equality and freedom from discrimination – freedom and security of the person - - where a dusk to dawn curfew was put in place in response to a terrorist attack on a town - whether the imposition of a dusk to dawn curfew in response to a terrorist attack violated the rights to life, human dignity, equality, freedom from discrimination and freedom and security of the person - Constitution of Kenya, 2010, articles 26, 27, 29, and 39.*

Constitutional Law *– fundamental rights and freedoms – limitation of fundamental rights and freedoms - reasonable and justifiable test – where a dusk to dawn curfew was put in place in response to a terrorist attack on a town - what principles should courts consider when determining whether limitation of fundamental rights and freedoms was reasonable and justifiable - whether in imposing a dusk to dawn curfew occasioned by a terrorist attack, the need to preserve the right to life outweighed the limitation on the restriction of business trading hours – Constitution of Kenya, 2010, articles 24 and 26; Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights; International Covenant on Civil and Political Rights, article 4.*

Words and Phrases *– curfew – definition - a regulation that forbids people from being outdoors or in vehicles during certain hours -Black's Law Dictionary.*

Brief facts

The appeal challenged the institution of a curfew on Wajir, Garissa, Mandera and Tana River Counties following a terrorist attack on Garissa University that left over 100 persons dead. The appellant faulted the findings of the Court of Appeal that stated that the provisions of sections 8 and 9 of the Public Order Act were constitutional. The appellant contended that the provisions of section 8 and 9 of the Public Order Act were unconstitutional as they gave sweeping powers

to the Cabinet Secretary and the Police without checks and balances or parliamentary and judicial oversight contrary to the provisions of article 58 and 95 of Constitution. The provisions allegedly did not provide timelines on duration of curfews and further that the provisions infringe on an array of human rights. The appellant also contended that the provisions were archaic and contrasted the provisions to the colonial statutes on issuance of passes which were written permits granted by an authority under inter alia the Native Passes Regulations 1900.

The respondent highlighted that the curfew was as a result of a terrorist attack in Garissa University. It was the respondents' case that the impugned provisions were not unconstitutional as they met the objective of the Public Order Act which was to attain the legitimate purpose of ensuring safety, peace, and order at the attainment of national security in a given area of the country. Further, that sections 8 and 9 of the Public Order Act presupposed a state of security, peace, and stability that was free from criminal activities and violence.

Issues

i. Whether sections 8 and 9 of the Public Order Act were unconstitutional for granting sweeping powers to the Cabinet Secretary and the Police without checks and balances or parliamentary and judicial oversight contrary to the provisions of article 58 and 95 of Constitution.

ii. Whether curfew orders that affected a particular region were to be subjected to oversight by parliament the same way a declaration of a state of emergency that affected the entire State would be subject to parliamentary oversight.

iii. Whether the imposition of a dusk to dawn curfew in response to a terrorist attack violated the rights to life, human dignity, equality, freedom from discrimination and freedom and security of the person.

iv. Whether in imposing a dusk to dawn curfew occasioned by a terrorist attack, the need to preserve the right to life outweighed the limitation on the restriction of business trading hours.

v. What principles should be considered when determining whether limitation of fundamental rights and freedoms was reasonable and justifiable?

Held

1. The appeal met the jurisdictional requirements and was properly before the Supreme Court. The party that alleged inconsistency had the burden of proving such a contention. In construing whether statutory provisions offended Constitution, courts must subject the same to an objective inquiry as to whether they conform with Constitution. The true essence of a statutory provision as well as its effect and purpose must be considered.

2. The long title of the Public Order Act provided that the objective of the Statute was to make provision for the maintenance of public order and for purposes connected therewith. With reference to curfew orders, the Cabinet Secretary responsible for Internal Security was

mandated to issue the order which was premised on advice of the Inspector General of Police. The order was issued in the interests of maintaining public order.

3. The curfew orders in dispute were issued following a heinous terrorist attack in Garissa and it was necessary in the circumstances to forestall any other attacks as well as maintain public order while investigations relating to the attack were conducted whilst maintaining law and order in the affected county as well as the neighboring counties. The 2nd respondent legitimately issued the curfew order which was also a precautionary measure to avert any further potential risk upon the lives of the residents in the 4 counties.

4. There was need to maintain national security considering that the nature of terrorism translated across the victim country's borders. Article 238 of Constitution provided that the principles of national security were that it was subject to the authority of Constitution and Parliament, it shall be pursued in compliance with the law and utmost respect for the rule of law, democracy and human rights and fundamental freedoms and that national security organs shall respect the diverse culture of the communities within Kenya.

5. Sections 8 and 9 of the Public Order Act provided for the duration of hours to remain indoors and which applied to every member of any class except with a written permit. Additionally, curfew restriction orders were issued by the police in charge of a county or division restricting persons from entering, being or remaining in any premises.

6. Although the statutory provisions did not state the hours for the curfew operation, the proviso in section 8(3) catered to the limitation of hours to a curfew as it prohibited the operation of a curfew order for more than ten (10) hours consecutive hours of daylight for three (3) consecutive days or for less consecutive hours for more than seven (7) days. Further, a curfew restriction order should not exceed twenty-eight (28) days. The law provided for the operation hours of a curfew which was not excessive but rational to meet the objective of the issuance of the orders.

7. On publication of the orders, sections 8 and 9 of the Public Order Act provided that the authority making the order shall in a manner it may think sufficient notify all persons of the day the curfew shall come into force and its duration. Although the proviso did not state how the publication should be issued, the 2nd respondent had the onus to ensure that the publication was widespread and that all affected persons were informed on the issuance of the curfew.

8. Article 58 of Constitution provided that a state of emergency could be declared in the limited circumstances where the State was threatened by war, invasion, general insurrection, disorder, natural disaster, or other public emergency. The declaration was for an initial period of 14 days and any subsequent extension was subject to the approval by National Assembly and its validity or legislation enacted pursuant to the declaration can be challenged in the Supreme Court. The Constitution anticipated that a declaration of a state of emergency was likely to limit the enjoyment of rights and freedoms and provided that

the limitation should strictly be required by the emergency and be consistent with the Republic's obligation under international law applicable to a state of emergency.

9. In contrast to the legislative provisions on curfew orders and curfew restriction orders, it was apparent that a declaration of a state of emergency affected the entire State. Consequently, the declaration must be subjected to oversight by Parliament and any legal challenge arising thereof be resolved by the courts and in the instant case the jurisdiction was limited to the Supreme Court. On the other hand, curfew orders and curfew restriction orders were limited to a particular area and therefore would not require Parliamentary approval. However, any legal challenge arising from the declaration of a curfew can be adjudicated upon in the courts. The duration of a curfew restriction order shall not exceed a period of twenty-eight (28) days which was a reasonable period upon recommendation by the authority making it. The provisions of sections 8 and 9 of the Public Order Act attained constitutional threshold as well as meet the intent and purpose of the Act .

10. Some human rights treaties include special provisions allowing for derogations from particular rights in times of war or other emergencies threatening the life of the nation. The provisions generally require states to officially notify the respective treaty regime and indicate the reasons for their derogation as well as the duration. The derogation clauses were included because, during exceptional times, it could be crucial to curtail rights in order to preserve their long-term existence. Human rights came under threat in situations where there was no public order. The measures must be of an exceptional and temporary nature and only in a situation that amounts to a public emergency threatening the life of a nation.

11. It was imperative to note that the curfew orders and restriction orders were issued as a result of an unfortunate terrorist attack. Terrorism was classified as an international threat and its suppression involved a combined multi-national and multi-agency approach. Internationally, Kenya was core in the fight against terrorism having been a victim of the heinous attacks.

12. The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (Siracusa Principles) provided for the limitation and derogation principles in the International Covenant on Civil and Political Rights (ICCPR). The principles defined which public emergencies fell under article 4 of the ICCPR and provided for example, that public health may be invoked to trigger emergency provisions for the purpose of allowing a State to take measures dealing with a serious threat to the health of the population or individual members of the population. Those measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured. The Siracusa Principles specifically stated that restrictions should, at a minimum, be:

    1. provided for and carried out in accordance with the law,
    2. directed toward a legitimate objective of general interest,
    3. strictly necessary in a democratic society to achieve the objective,
    4. the least intrusive and restrictive available to reach the objective,

5. based on scientific evidence and neither arbitrary nor discriminatory in application; and,
6. of limited duration, respectful of human dignity, and subject to review.

13. In relation to the ICCPR, the Siracusa Principles specified that limitation clauses based on the covenant provisions could only be invoked if they were necessary, based on one of the grounds justifying limitations recognized by the covenant, responding to a pressing social need, pursuing a legitimate aim, were necessary in a democratic society, and proportional to the nature of the threat.
14. During the Covid 19 pandemic the Human Rights Committee in its statement on derogations from the covenant in connection with the Covid-19 pandemic, specified that the pandemic had put an onus on member states to take effective measures to protect the right to life and health of all individuals within their territory and all those subject to their jurisdiction, and that such measures may result in restrictions on the enjoyment of individual rights guaranteed by the covenant
15. The very nature of curfew orders was to limit movement of people so as to maintain security, law, and order. The operating hours of the curfew were between 6.30 pm and 6.00 am. Those hours were reasonable and it was justifiable for this right to be limited for the duration of the curfew. The need to preserve the right to life, after over a hundred lives were lost in the terrorist attack, outweighed the limitation on the restriction of business trading hours. In any event, during the curfew period, the residents were notified of the curfew and were therefore obliged to adjust their business trading hours.
16. Segregation and infringement of the freedom of religion, the appellant urged that sections 8 and 9 of the Public Order Act spoke to the issuance of curfew orders against a class of persons. A reading of the provision shows that the curfew orders applied to every member of any class of persons specified in the curfew order and that the exception was only granted to persons who had a written permit from the authority. The curfew order applied to all the residents of the four counties and did not segregate any class of persons as alleged. It was unfortunate that the curfew run during the month of Ramadhan thereby restricting the Muslims from attending night prayers. However, the limitation of the freedom of religion was justifiable in the circumstances. The limitations were justifiable and reasonable in the circumstances and that there was no violation of the enjoyment of human rights as alleged by the appellant.

Appeal dismissed.

Orders

Each party to bear its own costs, the security for costs to be refunded to the appellants.

Citations

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2. *East Africa Cables v Public Procurement Complaints Review Appeals Board & another* Civil Application Nai 109 of 2007; [2007] KECA 80 (KLR) - (Mentioned)
3. *Joho, Hassan Ali & another v Suleiman Said Shahbal & 2 others* Civil Appeal 12 of 2013; [2013] KECA 435 (KLR) - (Followed)
4. *Kandie, Karen Njeri v Alassane Ba & another* Petition 2 of 2015; [2017] KESC 13 (KLR) - (Explained)
5. *Katiba Institute & another v Attorney General & another* Constitutional Petition 209 of 2016; [2017] eKLR - (Mentioned)
6. *Law Society of Kenya v Attorney General & another* Petition 4 of 2019; [2019] KESC 16 (KLR) - (Explained)
7. *Law Society of Kenya v Attorney General & another: National Commission for Human Rights & another (Interested Parties)* Petition 132 of 2020; [2020] eKLR - (Mentioned)
8. *Munya, Gatirau Peter v Dickson Mwenda Kithinji & 2 others* Petition 2B of 2014; [2014] eKLR - (Mentioned)
9. *Muslims for Human Rights (MUHURI) & 4 others v Inspector-General of Police & 2 others* Petition 19 of 2015; [2015] KEHC 1165 (KLR) - (Explained)
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1. *Hamdarddawa Khana v Union of India and others* 1960 AIR 554 - (Mentioned)
2. *Reserve Bank of India v Peerless General Finance & Investment Co Ltd & others* [1987] 1 SCC 424 - (Explained)

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Kenya

1. Constitution of Kenya articles 23, 24, 26, 27, 28, 29, 32, 37, 58, 95 - (Interpreted)
2. Prevention of Terrorism Act (cap 59B) In general - (Cited)
3. Public Order Act (cap 56) sections 8, 9 - (Interpreted)
4. Witchcraft Act (cap 67) section 7(1)(2) - (Interpreted)

Malawi

Malawian Constitution, 1994 section 45 - (Interpreted)

Instruments

1. American Convention on Human Rights, 1969 article 27
2. European Convention on Human Rights, 1950 article 15
3. International Covenant on Civil and Political Rights (ICCPR), 1966 article 4

Advocates

Mr Jibril Noor & Ms Sumayyah Mukku for the petitioner
Ms Wamuyu for the Attorney General

June 23, 2023, the Court delivered the following Judgment:

A. Introduction

1. This appeal challenges constitutionality of the provisions of section 8 and 9 of the *Public Order Act* which provides for the mandate of the Cabinet Secretary of Interior and a police officer in charge of a county or division to issue curfew orders and curfew restriction orders respectively.

2. The appellant also submits that as a result of the said curfew orders specific constitutional rights and freedoms of the citizens were infringed or violated including the right to life under article 26; the right to equality and freedom from discrimination under article 27; the right to liberty under article 29; freedom of conscience, religion, belief under article 32 and the right to movement under article 39 of the *Constitution*.

3. The appellant instituted this case before the High Court Constitutional & Human Rights division challenging the directive issued by the then Cabinet Secretary for Internal Security imposing a curfew in Wajir, Garissa, Mandera and Tana River Counties from 6.30pm to 6.30 am between the months of April 2015 to June 2015. The curfew orders and restrictions were

imposed following a heinous terrorist attack on April 2, 2015 at Garissa University where at least 148 innocent Kenyans were killed and numerous others injured.

4. Both the High Court and the Court of Appeal dismissed the appellant's case and made a finding that section 8 and 9 of the *Public Order Act* was not unconstitutional and that the alleged limitation of human rights and freedoms within section 8 and 9 of the *Public Order Act* is justifiable, reasonable and necessary under article 24 of the *Constitution*.

B. Background

i. Proceedings in the High Court

5. The appellant filed a constitutional petition before the Garissa High Court petition No 6 of 2015 which challenged constitutionality of sections 8 and 9 of the *Public Order Act*, on which the curfew was predicated. It also contended that the continued enforcement of the curfew severally curtailed the residents' rights of movement and worship. The effect of the curfew reduced the number of hours in the day leading to a serious negative impact on the socio-economic activities and livelihoods of the people living in these counties since economic activities in these areas are particularly active during the night due to the severe high temperatures, these activities include but not limited to retail trading, video shows, travel, and social gatherings.

6. The appellant prayed for the High Court to grant inter alia the following orders; An order of injunction restraining the respondents, whether by themselves, agents, police, military officers, or other assigns, from continuing to enforce the orders of curfew affecting Garissa, Wajir, Mandera, and Tana River County residents and interfering with the free movement of the residents of the aforementioned counties, an order lifting the curfew and a declaration that that curfew imposed on the aforementioned counties is illegal, unconstitutional, and null and void.

7. The appellant also prayed for a declaration that sections 8 and 9 of the *Public Order Act* are unconstitutional and void, that the 1st respondent acted without authority to impose the curfew on the counties, that the citizens' right to religion especially during the month of Ramadhan be safeguarded and an order for the payment of damages to communities and residents to be assessed.

8. The High Court identified four key issues for determination: whether the petition can be allowed even though the respondent and the interested party did not file replying affidavits; whether sections 8 and 9 of the *Public Order Act* are unconstitutional; whether the curfew imposed on the residents of Garissa, Wajir, Mandera, and Tana River Counties infringed on their fundamental rights and was unconstitutional, null and void, and whether the prayers sought can be granted.

9. On March 14, 2017, the High Court (Dulu J) dismissed the petition with no order as to costs and made the following findings. On the issue of failure by respondents and the interested party to file replying affidavits to the petition, the learned judge found that the points in dispute were legal rather than factual therefore, a replying affidavit was not necessary as it is only required when controverting facts.

10. On the question of the unconstitutionality of sections 8 and 9 of the *Public Order Act*, the learned judge observed that powers to declare a state of emergency are different from those of the imposition of a curfew or curfew restriction orders. The presidential powers to declare a state of emergency under article 58 of the *Constitution* require the national assembly, however, there was no such requirement for curfew orders and curfew restriction orders. Therefore, the powers conferred on the President to declare a state of emergency differ from the powers bestowed on the Cabinet Secretary to declare curfew orders and curfew restrictions. Ultimately, it found that sections 8 and 9 of the *Public Order Act* were not unconstitutional.

11. On the violation of the fundamental rights and freedoms, the learned judge while admitting that certain fundamental rights had been limited by the imposition of the curfew due to the prevalence of insecurity, held that the curfew order was justified at the time it was imposed and not unconstitutional.

ii. Proceedings in the Court of Appeal

12. The appellant being aggrieved by the judgment delivered by the High Court lodged an appeal raising the following grounds of appeal, that the learned judge erred in: holding that sections 8 and 9 of the *Public Order Act* vis a vis article 58 of the *Constitution* are constitutional; failing to consider the effect or consequence of sections 8 and 9 of the *Public Order Act*; failing to consider its submissions; and for holding that the appellant had not pointed out any specific article of the *Constitution* which was violated.

13. The Court of Appeal distilled four issues for determination as follows. Whether the appellant set out his case precisely to the required standard; whether the learned judge considered the appellant's submissions; whether sections 8 & 9 of the act infringe on human rights and freedoms protected by the *Constitution* and are therefore unconstitutional; and whether sections 8 & 9 of the act are acceptable limitations of the rights and freedoms as envisioned under article 24 of the *Constitution*.

14. The Court of Appeal dismissed the appeal with no order as to costs and made the following findings. On the question of whether the appellant set out his case precisely to the required standard, the superior court found that the appellant had laid out the purported infringed constitutional provisions, and its submissions were considered.

15. On the legality and constitutionality of sections 8 and 9 of the *Public Order Act*, the court held that the curfew order imposed in the four counties forestalled further loss of life, injury, and destruction of property and the purpose and effect of the impugned provisions were in the circumstances justifiable. The court further held that the provision is not open-ended in so far as it donates power to authorities to declare curfews. The court found that the authorities are mandated to issue curfews where it is in the interest of public order. It was also held that the daylight hours are stipulated in section 8 while Section 9 unequivocally prohibits the issuance of a curfew restriction order for more than 28 days. Furthermore, the court found that the Commissioner of Police also has the authority to vary or rescind the curfew orders. Ultimately, it found sections 8 and 9 of the *Public Order Act* constitutional.

16. On whether sections 8 & 9 of the Act are acceptable limitations of the rights and freedoms as envisioned under article 24 of the *Constitution*, the Court of Appeal found that where public order or safety has been or is at risk of being violated due to factors which include terror attacks or criminal insecurity, the limitation of the affected person's rights and freedoms within the context of sections 8 and 9 of the act is justifiable, reasonable and necessary under article 24 of the *Constitution* to ensure the delicate balance of the rights of the citizens.

iii. Proceedings in the Supreme Court

17. Aggrieved by the Court of Appeal's decision, the appellant has now filed the instant petition. The condensed grounds of appeal are that: the learned judges erred holding that sections 8 and 9 of the *Public Order Act* are constitutional vis a vis article 58 of the *Constitution*; the checks under the *Public Order Act* are constitutional and proper and yet the powers are not subjected to parliamentary or judicial control like powers of the President under article 58.

18. The appellants urged the learned judges erred in holding that sections 8 and 9 of the *Public Order Act* are constitutional vis a vis articles 39, 28, 29, 32, 26, 37, and 43 of the *Constitution* and International human rights instruments and that the limitations of human rights by the impugned sections 8 and 9 of the *Public Order Act* are acceptable and justifiable in the circumstances. The appellants also argued that the learned judges failed to consider article 23 of the *Constitution* on the justiciability of a threat to human rights vis a vis actual violation. Lastly, that the learned judges made a contradictory finding that sections 8 and 9 of the *Public Order Act* are legal, checked through judicial oversight but depriving any party the basis to challenge the powers under the impugned provisions by holding that the provisions are constitutional.

19. The reliefs sought are for this court to: allow the petition, set aside the Court of Appeal judgment and order, and declare sections 8 and 9 of the *Public Order Act* unconstitutional.

D. Parties' Submissions

i) Appellant's submissions

20. The appellant submits that sections 8 and 9 of the *Public Order Act* give sweeping powers to the Cabinet Secretary and the police without checks and balances and lack parliamentary and judicial oversight contrary to articles 58 and 95 of the *Constitution*. Furthermore, that the provision does not provide timelines on the duration of curfews, contrary to article 58, which stipulates the duration of a state of emergency. The appellant also submits that the impugned provisions are too intrusive on the bill of rights.

21. The appellant urged that sections 8 and 9 of the *Public Order Act* is archaic, draconian and unreasonable as it is incompatible with Kenya's modern and progressive *Constitution* having been inspired by the Native Passes Regulations 1900 and Ordinance 1903, the 1906 Master and Servant's Ordinance, and the Vagrancy (Amendment) Ordinance of 1925, a colonial legislation was used regulate African Labour and African Movements. The appellant argues that owing to the historical context of the impugned provisions having been enacted more than 70 years ago, such law did not consider human rights and good governance for lack of constitutional provisions such as articles 238, 10, and 73. To reinforce this assertion, the appellant referred to the case of *Attorney General v Salvatory Abuki* [1999] UGSC 7 where the Supreme Court of Uganda whilst declaring section 7 (1) and 7 (2) of the *Witchcraft Act* unconstitutional held that the aforesaid provisions must give way to the new constitutional order.

22. The appellant urges the court to look at similar provisions in the United Kingdom, Turkey, and Malawi. With reference to the United Kingdom, the appellant points out the repeal of the *Prevention of Terrorism Act 2005* which had a "control order" that prevented and restricted terrorism suspects' movement and activities to fight terrorism. It is also pointed out that the Terrorism Prevention and Investigation Measures Act 2011 was later enacted to provide for broad judicial oversight of the system, including a requirement for High Court permission to impose the measures, full review of each case in which measures are imposed and rights of appeal for the individual against refusal of a request to revoke or vary the measures.

23. The appellant also cites the curfew declared by Turkish Authorities under the Provincial Administrative Law during the upsurge in violence and terrorism by insurgents of the Kurdistan Workers Party. The European Commission For Democracy (through Law Venice Commission) Opinion on the legal framework governing curfews urged Turkish authorities to no longer use the provisions of Provincial Administration Law as a legal basis for declaring curfews and to ensure that the emergency measures including curfews are carried out in

compliance with constitutional and legislative framework showing due regard to relevant international standards and complying with national values and international obligations concerning the protection of fundamental rights. The Venice Commission further advised the Turkish authorities to introduce necessary amendments to state emergency laws so that there is a clear description in the law of the material, procedural and temporal arrangements for the implementation of curfews, particularly the conditions and safeguards to which they must be subjected including parliamentary and judicial supervisions.

24. The appellant also referred to the State (on the application of) *Esther Cecilia Kathumba and 4 others v President of Malawi and 5 others*, Constitutional Reference No 1 of 2020, where the Malawian Court in declaring the lockdown rules unconstitutional held that a state of emergency was imposed without following section 45 of the *Malawian Constitution* that provides for checks and balances.

ii) The 1st, 2nd and 3rd respondent's submission

25. The 1st, 2nd, and 3rd respondents submit that there was a general rebuttable presumption that a statute or statutory provision is constitutional and that the burden of proof rests on the person who alleges unconstitutionality. The respondents cited *Katiba Institute & another v Attorney General & another* [2017] eKLR, *Law Society of Kenya v Attorney General & another* SC. petition No 4 of 2019 [2019] eKLR to support their assertion.

26. On whether sections 8 and 9 of the *Public Order Act* violate human rights as guaranteed by the *Constitution*, the respondents submitted that there was no infringement of the appellant's rights. They also submit that in cases where public order or safety is at risk of being violated by factors such as terror attacks or insecurity, the limitation of the affected persons and freedom rights is justifiable, reasonable, and necessary under article 24 of the *Constitution*. They further submit that the imposition of the curfew was necessary to ensure public safety and security and to maintain public order.

27. The respondents also argue that the curfew order issued was in line with the precautionary principle as elucidated in the *Republic v Ministry & 3 other Ex-Parte Kennedy Amdany Langat & 24 others* [2018] eKLR. They urge that the curfew did not only apply to Muslims but all the residents of the four counties, therefore, they did not violate the right to freedom of religion. It is also their argument that the appellant failed to address the question of proportionality between the claim to their rights and public interest and further that they did not produce evidence to support their claim for violation of its rights. The respondents cited the case of *East Africa Cables v Public Procurement Complaints Review Appeals Board & Another* [2007] eKLR.

28. The respondents argue that the imposition of the curfew was part of the government's mandate to ensure the provision of security to its people as stipulated under article 238

(2) of the *Constitution*. In this regard, reliance is placed on the *Law Society of Kenya v Attorney General & another: National Commission for Human Rights & another (Interested Parties)* [2020] eKLR, *National Super Alliance Kenya vs Cabinet Secretary for Interior and Coordination of National Government & 3 others* [2017] eKLR and *CKW v Attorney General & another* [2014] eKLR. Lastly, the respondents urge that the appellant has no valid grievance before this court and that the limitation was reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.

E. Issues for Determination

29. From the pleadings and the parties' submissions, the following issues crystallize for determination:

    i. Whether sections 8 and 9 of the *Public Order Act* are unconstitutional vis a vis article 58 of the *Constitution*.

    ii. Whether the imposition of curfew in Wajir, Garissa, Mandera, and Tana River violated the rights enshrined under articles 26, 27, 29, 32 and 39 of the *Constitution*.

F. Determination

30. We shall first dispense with the issue of jurisdiction. The appellant has filed this appeal as a matter of right pursuant to article 163(4)(a) of the *Constitution*. The guiding principles set by this court to interpret whether this court has jurisdiction to hear and determine this appeal have been set out in several cases by this court. In the case of *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another* [2012] eKLR and *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others* [2013] eKLR, this court established that an appeal must originate from a matter where the issues contested revolved around the interpretation or application of the *Constitution* and the same is now being contested before the Supreme Court. Where the case has 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) of the *Constitution*.

31. We have reviewed the record of appeal and heard the submissions by the parties and find that this appeal faults the challenges the Court of Appeal's finding on whether the provisions of sections 8 and 9 of the *Public Order Act* are constitutional vis a vis article 58 and the rights and freedoms under articles 26,27,29,32 and 39 of the *Constitution* which were purportedly violated as a result of enforcement of curfew orders and restrictions in Wajir, Garissa, Mandera and Tana River Counties between April 2, 2015 and June 18, 2015. We find that this appeal is properly before us pursuant to article 163(4)(a) of the *Constitution*.

(i) Whether sections 8 and 9 of the public order are unconstitutional?

32. The second issue for our determination is whether sections 8 and 9 of the *Public Order Act* is constitutional vis a vis article 58 of the *Constitution*. We shall reproduce the provisions and analyse constitutionality thereof.

> " 8. Curfew orders
>
> (1) The Cabinet Secretary, on the advice of the Inspector-General of the National Police Service may, if he considers it necessary in the interests of public order so to do, by order (hereinafter referred to as a curfew order) direct that, within such area and during such hours as may be specified in the curfew order, every person, or, as the case may be, every member of any class of persons specified in the curfew order, shall, except under and in accordance with the terms and specified in the curfew order, remain indoors in the premises at which he normally resides, or at such other premises as may be authorized by or under the curfew order.
>
> (2) (a) It shall be a condition of every permit granted under subsection (1) of this section that the holder thereof shall at all times while acting under the authority thereof during the hours of darkness carry a light visible at a distance of twenty-five feet.
>
> (b) Subject to paragraph (a) of this subsection, a permit under subsection (1) of this section may be granted subject to such conditions, to be specified in the permit, as the authority or person granting it may think fit.
>
> (3) A curfew order shall be published in such manner as the authority making it may think sufficient to bring it to the notice of all persons affected thereby, and shall come into force on such day, being the day of or a day after the making thereof, as may be specified therein, and shall remain in force for the period specified

therein or until earlier rescinded by the same authority or by the Minister as hereinafter provided:

Provided that no curfew order which imposes a curfew operating during more than ten consecutive hours of daylight shall remain in force for more than three days, and no curfew order which imposes a curfew operating during any lesser number of consecutive hours of daylight shall remain in force for more than seven days.

(4) Deleted by Act No 19 of 2014, s. 4(b).

(5) The variation or rescission of a curfew order shall be published in like manner as that provided in subsection (3) of this section for the publication of a curfew order.

(6) Any person who contravenes any of the provisions of a curfew order or any of the terms or conditions of a permit granted to him under subsection (1) of this section shall be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and such imprisonment.

(7) A certificate under the hand of the authority making, varying or rescinding a curfew order, specifying the terms, and the date and manner of publication, of such order, variation or rescission, shall be prima facie evidence thereof in all legal proceedings.

(8) Any person who, without lawful excuse, carries or has in his possession, in any area in which a curfew order is in force and during the hours during which the curfew imposed thereby is operative, any offensive weapon shall be guilty of an offence:

Provided that no person shall be convicted of an offence under this section if he proves to the satisfaction of the Court that he carried or had in his possession the offensive weapon—

i. solely for domestic or defensive purposes within enclosed premises which he lawfully occupied or in which he was lawfully present; or

ii. with the authority of his employer and solely for domestic or defensive purposes within enclosed premises in the lawful occupation of his employer".

33. Section 9 of the *Public Order Act* provides for curfew restriction orders as follows:

> "(1) A police officer in charge of the police in a county or a police officer in charge of a police division may, if he considers it necessary in the interests of public order within the area of his responsibility so to do, by order (hereinafter referred to as a curfew restriction order) prohibit, during such hours as may be specified in the curfew restriction order, all persons, or, as the case may be, all members of any class of persons specified in the curfew restriction order, from entering, being or remaining, except under and in accordance with the terms and conditions of a written permit granted by an authority or person specified in the curfew restriction order, in or at any premises specified in the curfew restriction order:
>
> Provided that no person shall, by or in pursuance of a curfew restriction order, be prohibited or prevented from entering, being or remaining in any premises at which he normally resides, or, during reasonable hours of business, work or employment, any premises at which he normally has his place of business, work or employment.
>
> (2) A permit under subsection (1) of this section may be granted subject to such conditions, to be specified in the permit, as the authority or person granting it may think fit.
>
> (3) A curfew restriction order shall be published in such manner as the authority making it may think sufficient to bring it to the notice of all persons affected thereby, and shall come into force on such day, being the day of or a day after the making thereof, as may be specified therein, and shall remain in force for such period, not exceeding twenty-eight days, as may be specified therein or until

earlier rescinded by the same authority or by the Cabinet Secretary as hereinafter provided.

(4) Every curfew restriction order shall, forthwith on its being made, be reported to the Commissioner of Police, and the Commissioner of Police may, if he thinks fit, vary or rescind the curfew restriction order.

(5) The variation or rescission of a curfew restriction order shall be published in like manner as that provided in subsection (3) of this section for the publication of a curfew restriction order.

(6) Any person who contravenes any of the provisions of a curfew restriction order or any of the terms or conditions of a permit granted to him under subsection (1) of this section shall be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and such imprisonment.

(7) A certificate under the hand of the authority making, varying or rescinding a curfew restriction order, specifying the terms, and the date and manner of publication, of such order, variation or rescission, shall be prima facie evidence thereof in all legal proceedings".

34. Article 58 of the *Constitution* provides as follows on the declaration of a state of emergency:

" 1) A state of emergency may be declared only under article 132 (4)(d) and only when—

a. the State is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and

b. the declaration is necessary to meet the circumstances for which the emergency is declared.

2) A declaration of a state of emergency, and any legislation enacted or other action taken in consequence of the declaration, shall be effective only—

a. prospectively; and

b. for not longer than fourteen days from the date of the declaration, unless the National Assembly resolves to extend the declaration.

3) The National Assembly may extend a declaration of a state of emergency—

a. by resolution adopted—

i. following a public debate in the National Assembly; and

ii. by the majorities specified in clause (4); and

b. for not longer than two months at a time.

4) The first extension of the declaration of a state of emergency requires a supporting vote of at least two-thirds of all the members of the National Assembly, and any subsequent extension requires a supporting vote of at least three-quarters of all the members of the National Assembly.

5) The Supreme Court may decide on the validity of—

a. a declaration of a state of emergency;

b. any extension of a declaration of a state of emergency; and

c. any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.

6) Any legislation enacted in consequence of a declaration of a state of emergency—

a. may limit a right or fundamental freedom in the Bill of Rights only to the extent that;

i. the limitation is strictly required by the emergency; and

ii. the legislation is consistent with the Republic's obligations under

international law applicable to a state of emergency; and

b. shall not take effect until it is published in the gazette.

7) A declaration of a state of emergency, or legislation enacted or other action taken in consequence of any declaration, may not permit or authorize the indemnification of the State, or of any person, in respect of any unlawful act or omission".

35. Having set out the legislative provisions on curfew orders and curfew restriction orders under contention as against constitutional provisions on state of emergency, we now turn to the analysis of constitutionality of the legislative provisions.

36. We have previously pronounced ourselves on the test on determining constitutionality of legislative provisions. In the case of *Law Society of Kenya v Attorney General & another* petition No 4 of 2019[2019] eKLR this court held as follows at paragraph 36:

> "Before determining the above issues, we consider it pertinent to restate the approach that every court should take when determining the question whether any statutory provision is unconstitutional or not. It is alleged in the petition of appeal that the cited provisions of WIBA should be struck off for being in violation of the former and present constitutions. In addressing that issue, it must always be borne in mind that the legislature's primary constitutional mandate is the making of laws. Those laws set the ultimate direction of all activities in a State and the actions of all persons. Thus, there exists principles that underline the determination of constitutional validity of a statute or its provisions because it is the function of the courts to test ordinary legislation against the governing yardstick: *Constitution*."

37. This court further enumerated on the applicable presumption and onus dischargeable as follows at paragraph 37:

> "At the forefront of these principles is a general but rebuttable presumption that a statutory provision is consistent with *Constitution*. The party that alleges inconsistency has the burden of proving such a contention. In construing whether statutory provisions offend *Constitution*, the courts must therefore subject the same to an objective inquiry as to whether they conform with *Constitution*."

38. Additionally, in the same paragraph, the Supreme Court enumerated the principle that, "the true essence of a statutory provision as well as its effect and purpose must be considered."

39. Reference is also made to this court's precedent and findings made by the courts on legislative interpretation in the following respective cases; *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR, and *Hamdarddawa Khana v Union of India and others* 1960 AIR 554 and *Pepper v Hart* [1992] 3 WLR.

40. The Supreme Court of India in the case of *Reserve Bank of India v Peerless General Finance & Investment Co Ltd & others* [1987] 1 SCC 424 considered the intent of text and context in interpretation and held as follows.

> " Interpretation must depend on the test and the context. They are the bases of interpretation. One may well say if the test is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual."

41. The appellant contends that the provisions of section 8 and 9 of the *Public Order Act* are unconstitutional as they give sweeping powers to the Cabinet Secretary and the Police without checks and balances or parliamentary and judicial oversight contrary to the provisions of article 58 and 95 of the *Constitution*. It is its case that the provisions do not provide timelines on duration of curfews and further that the provisions infringe on an array of human rights. The appellant also contends that the provisions are archaic and contrasted the provisions to the colonial statutes on issuance of passes which were written permits granted by an authority under inter alia the Native Passes Regulations 1900.

42. It is the respondents' case that the impugned provisions are not unconstitutional as they meet the objective of the *Public Order Act* which is to attain the legitimate purpose of ensuring safety, peace, and order at the attainment of national security in a given area of the country. Further that sections 8 and 9 of the Act presuppose a state of security, peace, and stability that is free from criminal activities and violence.

43. The court in determining the purpose of a curfew held as follows in the case of *Muslims for Human Rights (MUHURI) & 4 others v Inspector General of Police & 2 others* [2014] eKLR

> " The underlying objective of a curfew is to enable security personnel to move into an area affected by criminal acts leading to public disorder, or such other acts that affect normal operations of the residents of the affected area..."

44. In analyzing constitutionality of sections 8 and 9 of the *Public Order Act*, we shall begin by considering the purpose of the Act. The long title of the Act provides that the objective of the Statute is to make provision for the maintenance of public order and for purposes connected therewith. With reference to curfew orders, the Cabinet Secretary responsible for

Internal Security is mandated to issue the order which is premised on advice of the Inspector General of Police. The order is issued in the interests of maintaining public order.

45. In the circumstances of this case, the curfew orders in dispute were issued following a heinous terrorist attack in Garissa and it was necessary in the circumstances to forestall any other attacks as well as maintain public order while investigations relating to the attack were conducted whilst maintaining law and order in the affected county as well as the neighboring counties. Therefore, the 2nd respondent legitimately issued the curfew order which was also a precautionary measure to avert any further potential risk upon the lives of the residents in the four (4) counties.

46. In the case of *Republic v Ministry & 3 others Ex-parte Kennedy Amdany Langat & 27 others*, Judicial Review Case No 2 of 2018 and JR 709 of 201 (Consolidated) [2018] eKLR held as follows on the application of the precautionary principle.

> " 126. Therefore, applying the precautionary principle, which principle is designed to prevent potential risks, I find and hold that it is the duty of the state to take protective measures without having to wait until the reality and seriousness of those risks are fully demonstrated or manifested. This approach takes into account the actual risk to public health, especially where there is uncertainty as to the existence or extent of risks to the health of consumers. The state may take protective measures without having to wait until the reality and the seriousness of those risks are apparent."

47. Further, there was need to maintain national security considering that the nature of terrorism translates across the victim country's borders. Article 238 (2) of the *Constitution* provides that the principles of national security are that it is subject to the authority of the *Constitution* and Parliament, it shall be pursued in compliance with the law and utmost respect for the rule of law, democracy and human rights and fundamental freedoms and that national security organs shall respect the diverse culture of the communities within Kenya.

48. Sections 8 and 9 of the *Public Order Act* provide for the duration of hours to remain indoors and which applies to every member of any class except with a written permit. Additionally, curfew restriction orders are issued by the police in charge of a county or division restricting persons from entering, being or remaining in any premises. The *Black's Law Dictionary* defines a curfew as 'a regulation that forbids people from being outdoors or in vehicles during certain hours.' Although the statutory provisions do not state the hours for the curfew operation, the proviso in section 8(3) caters to the limitation of hours to a curfew as it prohibits the operation of a curfew order for more than ten (10) hours consecutive hours of daylight for three (3) consecutive days or for less consecutive hours for more than seven

(7) days. Further, a curfew restriction order should not exceed twenty-eight (28) days. We therefore find that the law does provide for the operation hours of a curfew which is not excessive but rational to meet the objective of the issuance of the orders.

49. On publication of the orders, sections 8 and 9 of the *Public Order Act* provides that the authority making the order shall in a manner it may think sufficient notify all persons of the day the curfew shall come into force and its duration. We, therefore, find that although the proviso does not state how the publication should be issued, the 2nd respondent has the onus to ensure that the publication is widespread and that all affected persons are informed on the issuance of the curfew.

50. The appellant contends that the provisions of sections 8 and 9 of the *Public Order Act* should be considered vis a vis article 58 of the *Constitution* on a declaration of a state of emergency. A reading of article 58 of the *Constitution* provides that a state of emergency is declared in the limited circumstances where the State is threatened by war, invasion, general insurrection, disorder, natural disaster, or other public emergency. The declaration is for an initial period of fourteen (14) days and any subsequent extension is subject to the approval by National Assembly and its validity or legislation enacted pursuant to the declaration can be challenged in the Supreme Court.

51. *Constitution* anticipates that a declaration of a state of emergency is likely to limit the enjoyment of rights and freedoms and provides that the limitation should strictly be required by the emergency and be consistent with the Republic's obligation under international law applicable to a state of emergency.

52. Therefore, in contrast to the legislative provisions on curfew orders and curfew restriction orders, it is apparent that a declaration of a state of emergency affects the entire State. Consequently, the declaration must be subjected to oversight by Parliament and any legal challenge arising thereof be resolved by the courts and in this instance, the jurisdiction is limited to the Supreme Court. On the other hand, curfew orders and curfew restriction orders are limited to a particular area and therefore will not require Parliamentary approval. However, any legal challenge arising from the declaration of a curfew can be adjudicated upon in the courts. The duration of a curfew restriction order shall not exceed a period of twenty-eight (28) days which we opine is a reasonable period upon recommendation by the authority making it.

53. Consequently, gleaning on the considerations above we find that the appellant's arguments fail and hold that the provisions of sections 8 and 9 of the *Public Order Act* attain constitutional threshold as well as meet the intent and purpose of the Act.

(ii) Whether the imposition of the curfew orders violated the rights enshrined under articles 26, 27, 29, and 39 of the *Constitution* and whether the limitation was justifiable?

54. The appellant contends that the curtailing of movement of people had the effect of depriving people of their livelihood contrary to article 26 of the *Constitution* on the right to life, and that the voluntary limitation violated the right to liberty under article 29 of the *Constitution*, that sections 8 and 9 of the *Public Order Act* provides that the curfew can be imposed on members of a specific class which purportedly causes segregation thereby violating the right to equality and freedom from discrimination contrary to article 27 of the *Constitution*; that persons in the areas that the impugned curfew orders were declared are majority Muslim faithful who could not conduct night prayers during the holy month of Ramadhan thereby curtailing the freedom of religion contrary to article 32 of the *Constitution*, and that the movement of persons where the curfew and restriction orders were imposed was in contravention of the right of movement under article 39 of the *Constitution*.

55. The respondents in opposition urged that there was no infringement of rights but the orders merely limited the enjoyment of certain rights. It is their case that the right of movement was limited to ensure safety and security and maintain public order as many lives had been lost during the terrorist attack. Additionally, that the orders applied to all residents and did not discriminate against the Muslim residents right to freedom of religion.

56. We now turn to the principles applicable. With reference to international law, some human rights treaties include special provisions allowing for derogations from particular rights in times of war or other emergencies threatening the life of the nation.

57. Article 4 of the *International Covenant on Civil and Political Rights* specifies that:

> "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the states parties to the present covenant may take measures derogating from their obligations under the present covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin".

58. Other treaties containing a derogation clause include article 15 of the *European Convention on Human Rights*, article 4 of the *International Covenant on Civil and Political Rights*, article 27 of the *American Convention on Human Rights and part v of the European Social*

Charter. These provisions generally require states to officially notify the respective treaty regime and indicate the reasons for their derogation as well as the duration.

59. The derogation clauses are included because, during exceptional times, it can be crucial to curtail rights in order to preserve their long-term existence. This is important because human rights themselves come under threat in situations where there is no public order. In addition, the measures must be of an exceptional and temporary nature and only in a situation that amounts to a public emergency threatening the life of a nation.

60. In this matter, it is imperative to note that the curfew orders and restriction orders were issued as a result of an unfortunate terrorist attack. Terrorism is classified as an international threat and its suppression involves a combined multi-national and multi-agency approach. Internationally, Kenya is core in the fight against terrorism having been a victim of the heinous attacks on occasions we do not wish to recollect.

61. The Siracusa Principles drafted in 1958 provide for the limitation and derogation principles in the *International Covenant on Civil and Political Rights - ICCPR*. The principles define which public emergencies fall under article 4 of the ICCPR and provide for example, that public health may be invoked to trigger emergency provisions for the purpose of allowing 'a State to take measures dealing with a serious threat to the health of the population or individual members of the population.' These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.

62. The Siracusa Principles specifically state that restrictions should, at a minimum, be:

    i. "provided for and carried out in accordance with the law;

    ii. directed toward a legitimate objective of general interest;

    iii. strictly necessary in a democratic society to achieve the objective;

    iv. the least intrusive and restrictive available to reach the objective;

    v. based on scientific evidence and neither arbitrary nor discriminatory in application; and

    vi) of limited duration, respectful of human dignity, and subject to review."

63. In relation to the ICCPR, the Siracusa Principles specify that limitation clauses based on the covenant provisions can only be invoked if they are necessary, based on one of the grounds justifying limitations recognized by the covenant, responding to a pressing social need, pursuing a legitimate aim, are necessary in a democratic society, and proportional to the nature of the threat.

64. During the Covid 19 pandemic the Human Rights Committee in its 'statement on derogations from the covenant in connection with the Covid-19 pandemic', specifies that the pandemic has put an onus on member states to take effective measures to protect the right to life and health of all individuals within their territory and all those subject to their jurisdiction, and that such measures may result in restrictions on the enjoyment of individual rights guaranteed by the covenant

65. Article 24 of the *Constitution* provides as follows on the limitation of rights and fundamental freedoms; that

> " 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".

66. This court in the case of *Karen Njeri Kandie v Alassane Ba & another* SC petition No 2 of 2015 [2017] eKLR held at paragraph 78 that:

> " Before applying the 'reasonable and justifiable' test, therefore, a court must first determine whether a right has been limited under a particular law . . .it is important to consider the factors set out in Constitution that will assist us to answer this question including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation and the fact that the need for enjoyment of the right one individual does not prejudice the rights of others, as well the consideration of the relationship between the limitation and its purpose, and whether there is a less restrictive means to achieve that purpose''

67. Chaskalson P, of Constitutional Court of South Africa held as follows on the limitation test in the case of *S v Makwanyane and another* [1995] ZACC 3 at paragraph 104:

> " The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of s 33(1). The fact that different rights have different implications for democracy and, in the case of our Constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by- case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question."

68. Turning to the contention by the appellant, on the alleged infringement on the right of movement, we opine that the very nature of curfew orders is to limit movement of people so as to maintain security, law, and order. The operating hours of the curfew were between 6.30 pm and 6.00 am. These hours are reasonable and it was justifiable for this right to be limited for the duration of the curfew. On the alleged infringement of the right of life whose enjoyment the appellant urged infringed on the rights of the good people of the Wajir, Mandera, Garissa and Tana River counties to livelihood as the curfew orders restricted persons from being in their business premises, we find as follows. In the circumstances, the need to preserve the right to life, after over a hundred lives were lost in the terrorist attack, outweighed the limitation on the restriction of business trading hours. In any event, during the curfew period, the residents were notified of the curfew and were therefore obliged to adjust their business trading hours.

69. On the alleged discrimination, segregation and infringement of the freedom of religion, the appellant urged that sections 8 and 9 of the *Public Order Act* speaks to the issuance of curfew orders against a class of persons. A reading of the provision shows that the curfew orders apply to "every member of any class of persons specified in the curfew order" and that the exception is only granted to persons who have a written permit from the authority.

In this instance, the curfew order applied to all the residents of the four counties and did not segregate any class of persons as alleged. It was unfortunate that the curfew run during the month of Ramadhan thereby restricting the Muslims from attending night prayers. However, the limitation of the freedom of religion was justifiable in the circumstances.

70. Consequently, relying on the provisions of *Constitution*, International Law, and the principles on the reasonable and justifiable test and taking into account all factors attendant to this cause, we find that the limitations were justifiable and reasonable in the circumstances and that there was no violation of the enjoyment of human rights as alleged by the appellant.

G. Orders

i. The appeal is hereby dismissed

ii. Each party shall bear its own costs.

iii. We hereby direct that the sum of Kshs 7,000/-, deposited as security for costs upon lodging of this appeal, be refunded to the appellants.

Githiga & 5 others v Kiru Tea Factory Company Ltd (Petition 13 of 2019) [2023] KESC 41 (KLR) (16 June 2023) (Judgment)

Supreme Court of Kenya

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

Neutral citation: [2023] KESC 41 (KLR)

Jurisdiction *– jurisdiction of the Supreme Court – appellate jurisdiction – jurisdiction to determine matters involving the interpretation and application of the Constitution – where the appeal originated from an application at the Court of Appeal and the Court of Appeal was a court of first instance - whether the Supreme Court under article 163 (4) (a) of the Constitution had the jurisdiction to determine an appeal of an that originated at the Court of Appeal as a court of first instance – whether a claim that the Court of Appeal violated an appellant's right to fair hearing by failing to consider their pleadings was a matter warranting determination by the Supreme Court on grounds that they raised matters of constitutional interpretation/application - Constitution of Kenya, 2010, article 163(4)(a).*

Contempt of Court *– nature and purpose – standard of proof - enabling legislation - what principles were courts to apply when dealing with contempt of court proceedings - what legislation guided contempt of court proceedings considering that the Contempt of Court Act had been declared unconstitutional by the High Court - Judicature Act, cap 8 section 5.*

Contempt of Court *– guiding principles that courts were to apply in determining contempt of court applications – where it was alleged that a court ignored pleadings of a contemnor and condemned the contemnor unheard - whether a court hearing a contempt application could revive the original un-amended contempt of court application in chambers, prosecute and convict on the same upon striking out the amended contempt application - whether a court in presiding over proceedings which had been heard fully on an amended pleading can upon striking out the amended pleading proceed suo motu to determine the original pleading without invitation and participation of either party in the proceedings - whether a court hearing a contempt of court application could convict the alleged contemnors without affording them a hearing - Judicature Act, cap 8 section 5.*

Constitutional Law *- fundamental rights and freedoms – right to a fair hearing – where it was alleged that a court declared one a contemnor without considering their pleadings – whether the action of a court declaring one a contemnor without considering the contemnor's pleadings was a breach of the right to a fair hearing – Constitution of Kenya, 2010, article 50.*

Words and Phrases *– miscarriage of justice – definition - a grossly unfair outcome in a judicial proceeding as when a defendant is convicted despite lack of evidence on an essential element of the crime; also termed a failure of justice - Black's Law Dictionary, 11th Edition.*

Brief facts

The instant appeal contested the decision of the Court of Appeal to hold the appellants liable for contempt of court. The appellant's contention was that the Court of Appeal deliberately ignored their responses on record thereby condemning them unheard. Specifically, they claimed that Court of Appeal did not make any references to their responses. On the other hand, the

respondents contended that the Supreme Court lacked any jurisdiction to determine the matter as there was no jurisprudential or cardinal issues revolving around the interpretation or application of the Constitution.

Issues

i. Whether the Supreme Court under article 163 (4) (a) of the Constitution had the jurisdiction to determine an appeal that originated at the Court of Appeal as a court of first instance.

ii. What principles would the court apply when dealing with contempt of court proceedings?

iii. What legislation guided contempt of court proceedings considering that the Contempt of Court Act had been declared unconstitutional by the High Court?

iv. What was the standard of proof to condemn contemnors in contempt of court proceedings?

v. Whether a court presiding over contempt proceedings had a right to ignore deliberately the responses/defences placed before it by the cited contemnors.

vi. Whether a court hearing a contempt application could revive the original un-amended contempt of court application in chambers, prosecute and convict on the same upon striking out the amended contempt application.

vii. Whether a court when presiding over proceedings which had been heard fully on an amended pleading could upon striking out the amended pleading proceed *suo motu* to determine the original pleading without invitation and participation of either party in the proceedings.

viii. Whether a court hearing a contempt of court application could convict the alleged contemnors without affording them a hearing.

Held

1. A matter coming for determination on appeal before the Supreme Court under article 163 (4) (a) of the Constitution must have progressed through the appropriate appellate mechanisms and revolve around the interpretation and application of the Constitution. The substratum of the instant appeal did not emanate from the determination of the High Court but from the determination of the Court of Appeal in Civil Application No 137 of 2017 which sought to review the court's contempt order of February 22, 2019. The contempt proceedings and the interpretation and application of the Constitution arose at the Court of Appeal making it a court of first instance.

2. Article 159 of the Constitution vested judicial authority derived from the people in courts and judicial tribunals. Article 159(2) provided that justice shall be done to all, irrespective of status; the word, 'shall' connoted a mandatory obligation. Courts in exercising judicial authority should ensure that the purpose and principles of the Constitution were protected and promoted.

3. Article 259 of the Constitution required courts to interpret the Constitution in a purposive manner that advanced the rule of law and adhered to human rights. In addressing the

question of its jurisdiction under article 163(4) (a) of the Constitution the Supreme Court should keep an open mind and evaluate the issues raised on a case-by-case basis.

4. Due to the quasi-criminal nature of contempt proceedings and the gravity of the consequences that flowed from contempt proceedings, courts were required to adhere to the principles of natural justice, procedural fairness, and the right to a fair hearing. That was because, in contempt proceedings, the liberty of the subject was usually at stake, therefore, if a party alleged breaches of his fundamental rights and freedoms as envisaged under the Constitution albeit, at the Court of Appeal, the Supreme Court could not afford to shut its eye to such serious legal issues that called for settling as the apex Court.

5. Due to the uniqueness and peculiarity of the case, it was important for the Supreme Court to settle how the Court of Appeal procedurally and substantially dealt with contempt proceedings where violation of rights was questioned for the first time at the Court of Appeal. The instant case raised exceptional circumstances that warranted the court to depart from the jurisdictional requirement that a case concerning the interpretation and application of the Constitution had to progress through the appropriate appellate mechanism so as to reach the Supreme Court on appeal to enable it to exercise its jurisdiction under article 163(4)(a) of the Constitution. The Supreme Court had jurisdiction to entertain the appeal.

6. Courts possessed the inherent power to enforce compliance with their lawful orders through sanctions imposed through contempt of court. The Contempt of Court Act having been declared unconstitutional in Kenya Human Rights Commission v Attorney General & Another [2018] eKLR; the instructive provision remained section 5 (1) of the Judicature Act which granted the High Court and the Court of Appeal the power to punish for contempt.

7. In enforcing compliance with lawful court orders, the procedures adopted by the court must be fair and reasonable and be such as that a full opportunity was given to an alleged contemnor to defend himself or herself. That was because contempt proceedings being quasi-criminal, required a higher standard of proof than in normal civil cases, and one could only be committed to civil jail or penalized on the basis of evidence that left no doubt as to the contemnor's culpability.

8. Article 50(2) of the Constitution on the right to a fair trial imposed a duty on the court to guarantee the parties to contempt proceedings procedural justice by evaluating the evidence brought forth by all parties. While there existed no fixed content on the duty to afford procedural fairness, the fairness of procedure depended on the nature of the matters in issue and that would constitute a reasonable opportunity for parties to present their cases in any given circumstance. Procedural fairness in the administration of justice involved the fair hearing rule and the rule against bias. The fair hearing rules required a decision maker to *inter alia* afford a person an opportunity to be heard before making any decision affecting his/her interests.

9. Procedural fairness in decision-making required courts not to deprive any person of their right without due process of the law, a fundamental precept that implied that the right of a person affected by any adverse decision or action was present before a tribunal that pronounced judgment upon the question of life, liberty, or property in its most comprehensive sense, to be heard by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bore on the question of right in the matter involved. The doctrine of due process encompassed the right to be treated fairly, efficiently, and effectively in the administration of justice. Courts were required to adhere to the principles of procedural fairness and due process in the administration of justice.

10. The Court of Appeal did not specifically take into account the responses by the 1st appellant. The Court of Appeal like all courts in Kenya, was required to adhere to the principles of procedural fairness and due process when dispensing justice. Therefore, when considering the contempt proceedings, the court did not have a right to deliberately ignore the appellants' defenses or responses. Such action violated the principle of procedural fairness and due process which required meaningful participation in matters before the court. The Court of Appeal did not have the jurisdiction to deliberately ignore the defenses or responses by the 1st and 2nd appellants and by doing so, fell into fatal error.

11. The right to a fair trial was a non-derogable right. The appellate court should have expressly made it clear in its directions issued on August 7, 2018 that the application dated December 13, 2017 was coming up for hearing on November 15, 2018. Failure to expressly list the application was detrimental to the appellants because they had no prior notice that the application was coming up for hearing on that day. It was not enough for the appellate court to conclude that parties before it on November 15, 2018 understood and appreciated that the substance of the proceedings before it was contempt proceedings in terms of the contempt applications. The right to a fair hearing dictated that an individual shall not be penalized by a decision affecting his rights or legitimate expectations unless the individual had been given prior notice of the case against him, a fair opportunity to answer, and the opportunity to present his case.

12. Hearing the application dated December 13, 2017 without expressly listing the same amounted to trial by ambush. Given the quasi-criminal nature of contempt proceedings, the court ought to have given the appellants the opportunity to be heard and that opportunity must have been reasonable. The appellate court denied the appellants a reasonable opportunity to be heard by failing to expressly list the application dated December 13, 2017 for hearing. The 1st and 2nd appellants' rights to a fair hearing were violated by the appellate court's action of convicting them without affording them a hearing.

13. The Court of Appeal was granted the power to punish for contempt under section 5 of the Judicature Act. However, in the exercise of that jurisdiction, the court was required to adhere to the tenets of the Constitution and section 3B (1) (a) of the Court of Appeal Act which provided that the Court of Appeal was to handle all matters with the aim of ensuring

just determination of proceedings. Article 159 of the Constitution obligated courts to ensure that the procedures in the administration of justice would not lead to a miscarriage of justice. Thus, the overriding objective as stipulated under section 3A and 3B of the Court of Appeal Act and article 159 of the Constitution required the appellate court to ensure they were just and fair when handling cases to ensure procedural and substantive justice.

14. The Court of Appeal overlooked a miscarriage of justice and proceeded to convict the 1st and 2nd appellants and fine each of them Kshs 400,000/- or in default to serve a term of seven (7) months imprisonment. To the extent that striking out the amended application dated May 28, 2018 had the legal effect that the application dated December 13, 2017 stood unamended and was properly on record. However, once the appellate court had determined that the application dated December 13, 2017 was properly on record it ought to have informed the parties as such and given them another hearing date to enable the parties to canvass the application.

15. The failure to issue another hearing date for the original unamended application amounted to reviving the application dated December 13, 2017 in chambers, prosecuting and convicting the appellants without giving them an opportunity to be heard. The decision was made in error.

Appeal allowed.

Orders

i. *Declaration that the 1st and 2nd appellants' right to a fair hearing was breached by the Court of Appeal in Nyeri Court of Appeal in Civil Application No 137 of 2017.*

ii. *The Ruling of the Court of Appeal delivered on March 28, 2019 in Civil Application No 137 of 2017 was set aside.*

iii. *The Ruling of the Court of Appeal delivered on February 22, 2019 in Civil Application No 137 of 2017 in regard to the 1st and 2nd appellants was set aside.*

iv. *Any monies paid by the 1st and 2nd appellants as punishment for contempt of court shall be refunded to them forthwith by the Registrar of the Court of Appeal.*

v. *Costs to the 1st and 2nd appellants.*

vi. *The sum of Kshs. 6000 deposited as security for costs upon lodging of the appeal to be refunded to the appellants.*

Citations

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1. *Asanyo, Geoffrey M & 3 others v Attorney General* Petition 21 of 2015; [2018] KESC 10 (KLR) - (Explained)
2. *Bellevue Development Company Limited v Francis Gikonyo & 3 others* Petition 42 of 2018; [2020] KESC 43 (KLR) - (Mentioned)

3. *Chevron (K) Ltd v Harrison Charo Wa Shutu* Civil Appeal 17 of 2016; [2016] KECA 248 (KLR) - (Mentioned)
4. *Erad Suppliers & General Contractors Ltd v National Cereals & Produce Board* Petition 5 of 2012; [2012] 2 KLR 454 - (Explained)
5. *In the matter of the Interim Independent Electoral Commission* [2011] 2 KLR 32 - (Explained)
6. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] 3 KLR 518 - (Explained)
7. *Joho & another v Shahbal & 2 others* [2014] 1 KLR 111 - (Explained)
8. *Kenya Human Rights Commission v Attorney General & another* Constitutional Petition 87 of 2017; [2018] eKLR - (Explained)
9. *Kenya Power & Lighting Company Limited v Margaret Akoth Olang* Civil Appeal 72 of 2016; [2017] KECA 532 (KLR) - (Mentioned)
10. *Kidero, Evans Odhiambo & 4 others v Ferdinand Ndungu Waititu & 4 others* Petition 18 & 20 of 2014; [2014] KESC 11 (KLR) (Consolidated) - (Mentioned)
11. *Kiru Tea Factory Company Limited v Stephen Maina Githiga & others* Civil Application 137 of 2017; [2019] KECA 868 (KLR) - (Explained)
12. *Msagha v Chief Justice & 7 others* [2006] 2 KLR 553 - (Mentioned)
13. *Mutua, Alfred v Boniface Mwangi* Civil Case E025 of 2021; [2022] KEHC 2230 (KLR) - (Explained)
14. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] KESC 9 (KLR); [2012] 2 KLR 804- (Explained)
15. *Rai & 3 others v Rai & 4 others* [2013] 1 KLR 685 - (Explained)
16. *Republic v Ahmad Abolfathi Mohammed & another* Petition 39 of 2018; [2019] KESC 48 (KLR) - (Explained)
17. *Republic v Principal Magistrate's Court & 2 others ex-parte Jack and Jill Supermarkets Limited* Judicial Review Case 185 of 2009; [2014] eKLR - (Explained)
18. *Rutongot Farm Ltd v Kenya Forest Service, Attorney General, Permanent Secretary Ministry of Forest and Wildlife & Commissioner of Lands* Petition 2 of 2016; [2018] KESC 27 (KLR) - (Explained)
19. *Salat, Nicholas Kiptoo Arap Korir v Independent Electoral and Boundaries Commission & 7 others* Petition 23 of 2014; [2015] eKLR - (Explained)
20. *Steyn, Hermanus Phillipus v Giovanni Gnecchi-Ruscone* Application 4 of 2012; [2013] KESC 11 (KLR) - (Explained)
21. *Thoya, Gerald Iha v Chiriba Daniel Chai & Independent Electoral & Boundaries Commission* Election Appeal 1 of 2018; [2018] KECA 637 (KLR) - (Explained)
22. *Wangui, Phoebe v James Kamore Njomo* Civil Suit 367 of 2010; [2012] KEHC 2830 (KLR) - (Explained)

Uganda

Kalema v Ssekibinge Civil Suit 104 of 2018; [2019] UGHCLD 10 - (Explained)

Nigeria

Adeotun Oladeji (NIG) v Nigeria Breweries PLC SC 91/2002 - (Mentioned)

India

Zahira Habibullah Sheikh & another v State of Gujarat & others AIR 2006 SC 1367 - (Explained)

United States

1. *Goldberg v Kelly* 397 US 254 (1970) - (Explained)
2. *Re Oliver* 333 US 257 (1948) - (Explained)

Texts

Garner, BA., (Ed) (2019), *Black's Law Dictionary* St Paul Minnesota: Thomson Reuters 11th Edn

Statutes

Kenya

1. Appellate Jurisdiction Act (cap 9) section 3B(1)(a)- (Interpreted)
2. Constitution of Kenya articles 25, 50(1); 159(2)(a)(e); 160(1); 163(4)(a); 259 - (Interpreted)
3. Contempt of Court Act (cap 8F) In general- (Cited)
4. Judicature Act (cap 8) section 5(1) - (Interpreted)
5. Supreme Court Act (cap 9B) section 3- (Interpreted)

Advocates

Mr. Millimo for the appellants (Millimo Muthomi & Co Advocates
Mr. Kithinji Marete for the respondents (Kithinji Marete Advocates)

June 16, 2023, the Court delivered the following Judgment:

A. Introduction

1. The petition of appeal dated April 3, 2019 and lodged on April 26, 2019 is brought pursuant to article 163(4)(a) of the *Constitution*. It arises from the ruling of the Court of Appeal at Nyeri (Ouko (P) (as he then was), Sichale & Otieno-Odek, JJA) in Civil Application No 137 of 2017 delivered on March 28, 2019. The Court of Appeal dismissed the applicants' application seeking to review a contempt ruling delivered on February 22, 2019.

B. Background

2. On or about July 9, 2009, Kiru Tea Factory Company Ltd (KTFC) and Kenya Tea Development Agency Holdings Limited (KTDA-HL) entered into a management agreement with KTDA-HL being an agent of KTFC. In turn, KTDA- HL assigned its obligations under the agreement to Kenya Tea Development Agency Management Services

Limited (KTDA-MS) creating a further agency relationship. KTDA-HL through its agent, KTDA-MS provided KTFC with company secretarial services as and when required through their Company Secretary, John Kennedy Omanga. This arrangement continued until September 11, 2017 when the Board of Directors of KTFC replaced John Kennedy Omanga with Benard Kiragu Kamau as its Company Secretary responsible for the conduct of elections in its Electoral Areas and Buying Centre Committees.

3. However, on October 5, 2017, John Kennedy Omanga on behalf of KTDA-HL and KTDA-MS purportedly published an announcement in the daily newspapers convening an Annual General Meeting (AGM) of KTFC scheduled for November 20, 2017. Further, on October 9, 2017, John Kennedy Omanga allegedly issued a notice of a meeting in the Company's Buying Centre Committee in two Electoral Areas known as Mioro and Kiambuthia. As a consequence, a dispute arose between various members of the Board of Directors of KTFC and its Company Secretary. The dispute involved two factions, having a war of attrition with each faction competing for control of the affairs of the KTFC. One faction was led by Mr Geoffrey Chege Kirundi (Kirundi) while the opposing faction was led by Mr Stephen Maina Githiga (Githiga). The subject matter of the dispute was the holding of a general meeting and the nomination of persons as members of the Board of Directors of KTFC or Tea Buying Centre Committees.

(i) Proceedings at the High Court

4. Aggrieved by the actions of KTDA-MS, KTFC filed a suit against KTDA-HL and KTDA-MS in the High Court at Nyeri being, Nyeri HCCC No 18 of 2017, where it claimed that the Management Agreement between KTFC and KTDA-HL did not oust the lawful authority of KTFC's Board of Directors over the company's affairs and the latter remained KTFC's apex decision making body legally responsible for the affairs of KTFC. Furthermore, it contended that the notices issued by John Kennedy Omanga on behalf of KTDA-HL and KTDA-MS were issued without the authority of KTFC. It claimed further that, the motive of KTDA-HL and KTDA-MS was to conduct the elections and convene the AGM to ensure the election of malleable candidates that would supplant KTFC's Board of Directors and silence the then-current Board of Directors of KTFC which was allegedly resolute in its accountability, transparency, and corporate governance principles. In the suit, KTFC sought inter alia a declaration and affirmation that the authority and mandate to determine the affairs of KTFC was solely vested in its Board of Directors and prayed for an injunction restraining KTDA-HL and KTDA-MS from interfering with the conduct of elections for nominees to the Board of KTFC.

5. While Nyeri HCCC No 18 of 2017 was still pending determination, Kirundi, the Chairman of the Board of Directors of KTFC, filed on his own behalf an application by way of Chamber Summons being Nyeri JR Misc Application No 5 of 2017, Geoffrey Chege

Kirundi The Dispute Resolution Committee of KTDA-HL and KTDA-HL seeking inter alia: judicial review orders of certiorari, prohibition, and mandamus against the Dispute Resolution Committee of KTDA-HL and KTDA-HL; leave to stay the decisions made by KTDA- HL dated October 13, 2017 and October 18, 2017 respectively; and leave to stay the elections to the zonal representatives to KTDA-HL's Board of Directors in Zone 3 of the company's electoral zone that were scheduled for October 24, 2017.

6. In response, the Dispute Resolution Committee of KTDA-HL filed a preliminary objection stating that it was an ad hoc committee established under the Election Rules and Regulations of KTDA-HL whose term expired on October 18, 2017, when it stood dissolved, therefore, it was not a legal person capable of suing or being sued. It added othat KTDA-HL filed a preliminary objection on the ground that it was a public limited liability company incapable of being sued in a judicial review proceeding and that there existed another suit Milimani HCCC No 105 of 2017 Stephen Maina Githiga v Kiru Tea Factory Limited & 3 Others, which substantially raised similar issues to the subject matter in that suit and therefore the interlocutory orders sought were *sub judice*.

7. The learned Judge of the High Court (Matheka, J) in determining the application for judicial review, found that the Dispute Resolution Committee of KTDA-HL was a non-legal entity incapable of being sued or suing and that the suit was sub-judice in view of Milimani High Court Civil Suit No 106 of 2017. As a corollary, she found that she had no jurisdiction and therefore struck out the application with costs.

(ii) Proceedings at the Court of Appeal

8. Dissatisfied by the decision of Matheka J, KTFC filed Nyeri Civil Application No 132 of 2017 where it sought an injunction against KTDA-HL and KTDA-MS from inter-alia convening and/or conducting any AGM of KTFC or nominating any person as a member of KTFC's Board of Directors or Tea Buying Centre Committees or confirming the nomination of any person to the office of KTFC.

9. Similarly, before the court was a Notice of Motion dated October 24, 2017 lodged on November 27, 2017 by Kirundi being Nyeri Civil Application No 133 of 2017 seeking to stop the purported parallel AGM of KTFC, convened by the opposing faction led by Githiga. These two applications were consolidated.

10. On December 6, 2017, the Court of Appeal (GBM Kariuki, Sichale & Kantai JJA) directed that *status quo* be maintained and that no elections be held until a ruling is delivered. In disregard of the Court of Appeal's injunctive orders, an AGM was held on December 14, 2017. Pursuant to the said AGM, three key resolutions were made as follows: that Githiga's faction was mandated to take over the Board, as Chairman; that any and all purported previous resolutions and/or authority granting Messrs Kirundi, Paul K Muite, and Kithinji

Marete & Company Advocates mandate to plead, depone, appear, act and/or represent the respondent in court proceedings was revoked in its entirety; and that Dr John F Kennedy Omanga be reinstated as KTFC's Company Secretary.

11. On lis, filed through the firm of Kithinji Marete & Company Advocates. Subsequently, without leave of the court, the application was amended on May 28, 2018.

12. During the pendency of the contempt proceedings, another application was filed by Githiga in the name of KTFC on January 31, 2018, through a different firm, Njoroge Regeru Company Advocates, seeking the withdrawal of the contempt proceedings for having been filed without the sanction of the company. This application was dismissed *vide* a Ruling dated May 11, 2018. Aggrieved by this decision, KTFC through Githiga filed another application dated May 29, 2018 seeking to review the Court of Appeal's Ruling dated May 11, 2018 on the grounds that in the said Ruling, the Court of Appeal determined the issue of representation and failed to hear the parties on the withdrawal application hence, the court *suo motu* considered the withdrawal application and proceeded to dispose of the same without hearing the parties' Advocates.

13. Correspondingly, the 2nd appellant, Mr Eston Gakungu Gikoreh also filed a third application dated August 3, 2018, seeking to strike out both the original and the amended contempt application dated December 13, 2017 and May 28, 2018 respectively, as well as further affidavits in support thereto filed by Kirundi on the grounds that they had been filed without the sanction of KTFC and that the amended contempt application was filed without leave of the court.

14. On August 7, 2018, the Court of Appeal scheduled the applications dated May 28, 2018, May 29, 2018, and August 3, 2018 for hearing on September 19, 2018. The three applications were heard consecutively on November 15, 2018, culminating in three rulings by the Court of Appeal, which were all delivered on February 22, 2019 as follows:

    i. The first ruling upheld the application dated May 29, 2018 seeking a review of the appellate court's order on the ground that the court *suo motu* considered the withdrawal application without hearing the parties' Advocates.

    ii. The second ruling partially allowed the 2nd appellant's motion of August 3, 2018, with the effect that the amended application dated May 28, 2018, and certain affidavits, were struck out for having been filed without leave. The application dated December 13, 2017 was held to be properly on record.

    iii. The third ruling was in respect of the contempt application dated December 13, 2017. The appellants were convicted of contempt, and for disobeying the *status quo* Order issued by the Court of Appeal on December 6, 2017.

15. Aggrieved by the third ruling on contempt, the appellants filed two applications seeking review and rescission of the ruling of the appellate court on contempt. The attempt to review the contempt ruling was unsuccessful. The Court of Appeal (Ouko, (P) (as he then was), Sichale and Otieno-Odek JJA), on March 28, 2019, dismissed their application for review of the contempt ruling, on grounds that there was no new evidence to warrant a reopening of the proceedings. The court, thereafter, proceeded to summon the appellants to appear before it in person on April 4, 2019, for mitigation and sentence. It is this ruling dated March 28, 2019 that the appellants are challenging before this Court.

(iii) Proceedings before the Supreme Court

16. Aggrieved by the ruling of the Court of Appeal, the appellants filed this petition arguing that the Court of Appeal committed a grave miscarriage of justice and breach of articles 27(1), 50(1), and 159(2)(a) & (e) by:

    i. Finding that the appellants were heard on the application dated December 13, 2017 despite the fact that it was not amongst the motions listed for hearing as per the Court of Appeal's order dated August 7, 2018 and further despite their responses on contempt allegations being on record, the court deliberately ignored the same, thus condemning them unheard;

    ii. Finding that the appellants were heard on the application dated December 13, 2017 on 15th November 2018 despite the said application being non-existent by virtue of its amendment *vide* the application dated May 28, 2018 which amended application was fully heard on merit and conclusively determined with the effect of it being struck out in its entirety; and

    iii. Finding that the ruling on contempt could stand yet the Limited Liability Companies by virtue of which relationship as either directors or employees the appellants had been cited for contempt were not parties to the contempt proceedings nor cited as alleged contemnors.

17. The appellants seek the following reliefs:

    i. A declaration that the appellants' constitutional rights were breached by the Court of Appeal in the impugned proceedings in Nyeri Civil Application No 137 of 2017 so as to render the proceedings and findings therein null and void.

    ii. That the Court of Appeal's ruling delivered on March 28, 2019 in Civil Application No 137 of 2017 be and is hereby set aside.

iii. That the Court of Appeal's ruling on contempt in Civil Application No 137 of 2017 delivered on February 22, 2019 be reviewed, rescinded, and set aside.

C. Parties Submissions

(i) The appellants' submissions

18. The appellants' submissions are dated January 17, 2020 and filed on January 20, 2020. On the question of failure by the appellate court to list the application dated December 13, 2017 for hearing, yet it proceeded to hear the same on November 15, 2018, they submitted that the court had gone contrary to its express order granted on August 7, 2018 which did not list the application dated December 13, 2017 for hearing on November 15, 2018. They urged that this act amounted to amending the court order without informing the appellants, hence denying them the right to reply and an opportunity to be heard. Furthermore, they argued that one of the tenets of the right to be heard is that one should be granted a reasonable opportunity to present their case. They cited the case of *Mbogholi Msagha v Chief Justice & 7 others Nairobi* HCMCA No 1062 of 2004 to support that assertion.

19. The appellants also argued that the appellate court's ruling that the application dated December 13, 2017 had been listed for hearing by virtue of prayer 2 of the application dated August 3, 2018 was erroneous as the said prayer 2 was in respect of striking out the application for contempt dated December 13, 2017. In addition, they submitted that contempt of court orders being quasi- criminal in nature, should be specific and be responded to specifically as was held in *Republic v Principal Magistrate's Court & 2 others ex-parte Jack and Jill Supermarkets Limited* [2014] eKLR.

20. Furthermore, the appellants submitted that once a pleading has been amended, the original pleading is superseded and no longer exists. As such, it was their view that the application dated December 13, 2017 ceased to exist upon the filing of the amended application dated May 28, 2018 and that, as of August 7, 2018, there was no doubt to either of the parties and the Court of Appeal as to the non-existence of the application dated December 13, 2017. They cited *Kenya Power & Lighting Company Limited v Margaret Akoth Olang* Civil Appeal No 72 of 2016 to support this argument.

21. They also posited that once an amended pleading has been fully argued on merit and concluded with a judicial decision, that ought to mark an end to the proceedings; and that a court can only be moved further in the same proceedings by way of review or appeal. Expounding on this submission, they contended that the amended application was fully prosecuted on its merits on November 15, 2018; that one of their defences was that the said contempt proceedings were defective for want of the court's leave prior to the amendment. In addition, they claimed that this defence was contained not only in their replying affidavits,

their oral and written submissions but also expressly in an application dated August 3, 2018; that the Court of Appeal agreed with the appellants and struck out the contempt proceedings as argued *vide* the amended motion dated May 28, 2018. They urged that the legal effect of the striking out was that there was nothing left upon which the Court of Appeal would have proceeded to determine on matters contempt. In this regard, they fault the Court of Appeal for reverting to the original pleading *suo motu* without provocation of either party and subsequently delivering the impugned ruling.

22. The appellants asserted that a judicial process is anchored on the legitimate expectation that every party is given a fair hearing which includes equal consideration of evidence submitted by parties. They submitted that the failure of the Court of Appeal to consider their defences in response to the contempt allegations rendered the decisions delivered on February 22, 2019 and March 28, 2019 null and void.

23. They submitted in addition that, for a company to institute proceedings, such a step must be authorized by the company itself through its Board of Directors in a duly convened meeting and a board resolution passed thereof under seal; that this legal requirement is essential in guarding unauthorized litigations in the name of public companies whilst pursuing private interests and more so, where there are wrangles amongst directors. In this regard, they contended that the 1st to 4th appellants are the directors of the KTFC and are still serving; that the four appellants form a quorum of 4 directors under the Articles of Association of KTFC; that their responses to the contempt proceedings were to the effect that there was no board meeting or board resolution passed to authorize the commencement of those proceedings.

24. In addition, they contended that a board resolution of KTFC dated December 14, 2017 under seal was presented to the court which resolution was express that the company had not authorized institution of proceedings in Civil Application No 137 of 2017 and; that despite their objections and the board resolution, Kirundi continued with the contempt proceedings and swore an affidavit on his own behalf.

25. Further, it was their submission that the question of legal representation which the court purported to resolve could only have followed after the issue of whether the company was properly before the court was answered. As such, the appellants invited this court to review the application dated December 13, 2017, verify that it had no board resolution, and strike out the entire contempt proceedings on this ground. For this proposition, they relied on the case of *Chevron(K) Ltd v Harrison Charo wa Shutu* [2016] eKLR.

26. They furthermore averred that all actions done by directors and or staff of a company are done for and on behalf of the company and; that nowhere were the appellants accused of acts done in their private capacities on their own frolics yet nowhere was KTFC cited as a respondent or contemnor for the alleged breaches. As such, they posed the question of how

the appellants could be liable for acts allegedly done for and on behalf of the company yet the company had not been found guilty in the first place. For this reason, they posited that this was an error that was tantamount to lifting the corporate veil without any proceedings having been prosecuted and orders thereof granted.

27. Regarding the issue of whether contempt proceedings can lie against the 1st to 3rd appellants, they submitted that the 1st to 3rd appellants were not parties to the primary proceedings which gave rise to the contempt proceedings and that the orders of December 6, 2017 were not directed against them, therefore, they should not have been cited for contempt. In view of the foregoing, the appellants urged that their appeal be allowed.

ii) Respondent's Submissions

28. KTFC's submissions are dated May 26, 2020 and filed on May 28, 2020. The main thrust of KTFC's case is that the petition presents no jurisprudential or cardinal issues revolving around the interpretation or application of the *Constitution* and that there is a deliberate and laboured effort by the appellants to invite the court to delve into matters that do not meet the settled threshold to invoke this court's jurisdiction. Further, it submitted that the petition is an attempt to mislead this court through a well-orchestrated conspiracy to defeat the course of justice.

29. KTFC pointed out that the appellants have invoked this court's jurisdiction under section 3 of the *Supreme Court Act*, 2011 which provision does not clothe it with the jurisdiction to determine the subject petition.

30. According to KTFC, among the issues for determination was whether or not the appellants were heard by the Court of Appeal and whether or not they were in contempt of its orders made on December 6, 2017. In this regard, it submitted that the answer lies in the court proceedings of November 15, 2019 and the hearing notice of the material day where all counsel for the parties were heard exhaustively on whether or not there was contempt of the order made by the Court of Appeal on December 6, 2017.

31. KTFC submitted that tracing the trajectory of the issues from the High Court to the Supreme Court, no issues involving constitutional interpretation or application arose. It further argued that at all material times, the issue remained the election of Directors and usurpation of the roles of the Board of Directors of KTFC which issue remains so to date.

32. KTFC submitted that it sought to cite among others, the appellants for contempt of the court orders of December 6, 2017 in *Kiru Tea Factory Company Limited v Stephen Maina Githiga & others*, Nyeri Civil Application No 137 of 2017 and that this contempt application was amended without leave thus the amendment was declined by the Court of Appeal. As such, the hearing and determination of the contempt charges proceeded

on the basis of the original contempt application. In addition, it argued that the effect of this amendment cannot mutate into a question of interpretation and application of the *Constitution*.

33. It was KTFC's case that the Court of Appeal sentenced 6 contemnors out of a possible 14 therefore the proposition that the 6 appellants were not heard was illusory. It was their case that they were heard to exhaustion on whether or not they were in contempt of court orders.

34. KTFC also argued that the Court of Appeal was not at any point invited to determine any issue on articles 50(1), 159(2)(a) & (e), and 160(1) of the *Constitution*, therefore, no issue of interpretation and application in the context of article 163(4)(a) of the *Constitution* arose. In addition, they submitted that the subject of this appeal is premised on the decision of the Court of Appeal declining to review its decision finding the appellants in contempt. Hence, according to it, the appellant's failure to meet the threshold for consideration of their review application cannot be construed to mean an invigorating discourse over cardinal issues of constitutional application and interpretation.

35. KTFC took issue with the appellants' submissions on the ground that they argued a case entirely different from what led them to this court. KTFC opined that whereas in their petition they pleaded one ground with three branches, in their submissions the ground mutated to seven distinct grounds. Consequently, KTFC urged that this was an abuse of the court process as parties are bound by their pleadings. It also submitted that the evidence that was at variance with pleadings ought to be rejected. For this proposition, KTFC relied on the holding of the Supreme Court of Nigeria in the case of *Adeotun Oladeji (NIG) v Nigeria Breweries PLC*, SC 91/2002.

36. It was KTFC's position that neither of the parties nor the court was dealing with the "Hermeneutic Aspect" or "Constitutional Construction" as contextualized by this court in the case of *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others* [2014] eKLR. It was submitted instead that, what was before the Court of Appeal was the issue of whether the appellants were heard or not and whether they were in breach of the court's orders of December 6, 2017.

37. On the issue of costs, KTFC urged the court to consider an award of costs to it against the appellants jointly and severally both in the Supreme Court and the Court of Appeal. To buttress this position reliance was placed on the case of *Bellevue Development Company Limited v Francis Gikonyo & 3 others*, [2020] eKLR.

D. Analysis and Determination

38. This court in a ruling in SC Application No 12 of 2019 delivered on September 4, 2020 framed the following issues for determination;

i. Whether a court presiding over contempt proceedings has a right to ignore deliberately the responses/defences placed before it by the cited contemnors.

ii. Whether a court hearing a contempt application can revive the original un-amended contempt of court application in chambers, prosecute and convict on the same upon striking out the amended contempt application.

iii. Whether a court in presiding over proceedings which have been heard fully on an amended pleading can upon striking out the amended pleading proceed *suo motu* to determine the original pleading without invitation and participation of either party in the proceedings.

iv. Whether a court hearing a contempt of court application can convict the alleged contemnors without affording them a hearing.

v. Whether a court hearing a contempt of court application can overlook a miscarriage of justice to convict for contempt.

39. Before interrogating the issues as framed, we would like to address two preliminary issues. The first issue is on the jurisdiction of this court to entertain the appeal. we note that even though the issue of jurisdiction was determined by this court *vide* a ruling dated September 4, 2019, it is important to elaborate on the same as it was argued by the parties during the hearing. Second, we shall also address ourselves to the issue of striking out of the 3rd, 4th, 5th, and 6th respondents from the proceedings.

a) Jurisdiction of the Court to entertain the matter

40. It is now settled that a matter coming for determination on appeal before this court under article 163(4)(a) of the *Constitution* must have progressed through the appropriate appellate mechanisms and revolve around the interpretation and application of the *Constitution*. This has been the position taken by this court in several decisions. *In the matter of the Interim Independent Electoral Commission* SC Application No 2 of 2011 [2011] eKLR, we stated thus:

> "the High Court has been entrusted with the mandate to interpret the *Constitution*. This empowerment by itself, however, does not confer upon the High Court an exclusive jurisdiction; for, by the appellate process, both the Court of Appeal and the Supreme Court are equally empowered to interpret the *Constitution*, certainly in respect of matters resolved at first instance by the High Court." (Emphasis added).

41. Likewise, in *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another*, SC Petition No 3 of 2012 [2012] eKLR, *Erad Suppliers & General Contractors Ltd vs National Cereals & Produce Board* SC Petition No 5 of 2012 [2012] eKLR and *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 others* SC Petition No 10 of 2013 [2014] eKLR this court reiterated that an appeal lies to this court if the issues before it revolved around the interpretation and application of the *Constitution* and that the interpretation of the *Constitution* formed the basis for the determination at the superior courts below, and the issues had also progressed through the normal appellate mechanisms to reach this court.

42. Furthermore, in *Rutongot Farm Ltd v Kenya Forest Service & 3 others* SC Petition No 2 of 2016 [2018] eKLR, this court further reiterated that to evaluate its jurisdictional standing under article 163(4)(a) of the *Constitution*, the test to apply is whether the appeal raises a question of constitutional interpretation or application and whether such a constitutional issue has been canvassed in the superior courts leading to the present appeal. it thus noted that to establish these facts, the court needs to ask itself the following questions:

    i. What was the question in issue at the High Court and the Court of Appeal?

    ii. Did the superior courts dispose of the matter after interpreting or applying the *Constitution*?

    iii. Does the instant appeal raise a question of constitutional interpretation or application, which was the subject of judicial determination at the High Court and the Court of Appeal?

43. Coming back to the instant case, we note that the substratum of the appeal before us did not emanate from the determination of the High Court but from the determination of the Court of Appeal in Civil Application No 137 of 2017 which sought to review the court's contempt order of February 22, 2019. In the said application for review, the appellants cited a breach of their constitutional right to a fair hearing before a court of law and equal protection of the law which the appellate court found not to have been violated as they were duly heard and no rules of natural justices were violated. From the above, it is our considered opinion that the contempt proceedings and the interpretation and application of the *Constitution* arose at the Court of Appeal making it a court of first instance.

44. Taking into consideration the peculiarity and the unique nature of this matter, does this court have jurisdiction to entertain the appeal? The instructive provision in this regard is article 159 of the *Constitution* which vests judicial authority derived from the people in

courts and judicial tribunals. In the exercise of this judicial authority courts are to be guided by principles embodied under article 159(2) of the *Constitution* which provides:

> " In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
>
> (a) justice shall be done to all, irrespective of status...
>
> (e) the purpose and principles of this Constitution shall be protected and promoted."

The word shall as used in the context of article 159(2) connotes a mandatory obligation, thus, courts in exercising judicial authority should ensure that the purpose and principles of the constituted are protected and promoted.

45. Furthermore, article 259 of the *Constitution* reads:

> " (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...".

46. The above-quoted provisions require courts to interpret the *Constitution* in a purposive manner that advances the rule of law and adheres to human rights. Thus, *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 this Court stated:

> " [54] Certain provisions of the *Constitution* of Kenya have to be perceived in the context of such variable ground situations, and of such open texture in the scope for necessary public actions. A consideration of different Constitutions shows that they are often written in different styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a constitution

> takes such a fused form in its terms, we believe, a Court of law ought to keep an open mind while interpreting its provisions...."

47. Hence in addressing the question of its jurisdiction under article 163(4)(a) of the *Constitution* this court should keep an open mind and evaluate the issues raised on a case-by-case basis as was held in *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others* SC Petition No 10 of 2013 [2014] eKLR where we rendered ourselves 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*. 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."

48. Furthermore, in Joho supra, we stated:

> " [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)."

49. Also in *Geoffrey M Asanyo & 3 others v Attorney General* Petition No 21 of 2015 [2018] eKLR we stated in paragraph 62 that:

> " (62) ...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.

(63) 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."

50. Due to the quasi-criminal nature of contempt proceedings and the gravity of the consequences that flow from these proceedings, courts are required to adhere to the principles of natural justice, procedural fairness, and the right to a fair hearing. This is because, in contempt proceedings, the liberty of the subject is usually at stake, therefore, if a party alleges breaches of his fundamental rights and freedoms as envisaged under the *Constitution* albeit, at the Court of Appeal, this court cannot afford to shut its eye to such serious legal issues that call for settling as the apex court.

51. As a consequence, due to the uniqueness and peculiarity of this case, it is important for this court to settle how the Court of Appeal procedurally and substantially deals with contempt proceedings where violation of rights is questioned for the first time at the Court of Appeal. In our view, this case, therefore, raises exceptional circumstances that warrant us to depart from the now-settled jurisdictional requirement that a case concerning the interpretation and application of the *Constitution* must progress through the appropriate appellate mechanism so as to reach this court on appeal to enable it to exercise its jurisdiction under article 163(4)(a) of the *Constitution*. Ultimately, we find that we have jurisdiction to entertain the appeal.

(b) Whether the names of the 3rd, 4th, 5th, and 6th appellants should be struck out?

52. Vide an application dated October 17, 2022, the respondent seeks to strike out the names of the 3rd, 4th, 5th, and 6th appellants. Its claim is based on the fact that the 3rd to 6th appellants were not parties to the review application before the Court of Appeal since they withdrew their application for review before the Court of Appeal hence, they cannot be parties to the present petition of appeal.

53. A perusal of page 13 of the record reveals that only the 1 and 2nd appellants were parties to the impugned ruling of the Court of Appeal which is the subject of the present appeal. Therefore, it is our considered view that the orders given could only affect the two appellants as stated. The 3rd, 4th, 5th, and 6th appellants were not subject to the orders given therein.

54. Accordingly, we restate the position adopted by this court in Lawrence Nduttu (*supra*) that an appeal must originate from the Court of Appeal where issues of contestation revolved around the interpretation and application of the *Constitution* and as a corollary, only parties before those courts should have an audience before this court. Any exception to that rule must be sufficiently explained and appreciated by this court. Having withdrawn their review application, the Court of Appeal did not interrogate any issues affecting the 3rd to 6th appellants. As a consequence, being not parties to the impugned ruling subject of the petition herein we hereby strike out the names of the 3rd, 4th, 5th, and 6th appellants from the present appeal.

55. We now turn to the issues as framed by this court in regard to the 1st and 2nd appellants:

i. Whether a court presiding over contempt proceedings has a right to ignore deliberately the responses/defences placed before it by the cited contemnors?

56. The appellants' core contention was that the appellate court deliberately ignored their responses on record thereby condemning them unheard. Specifically, they claimed that in its ruling of February 22, 2019, the court did not make any references to their responses.

57. Courts possess the inherent power to enforce compliance with their lawful orders through sanctions imposed through contempt of court. We note that the *Contempt of Court Act* having been declared unconstitutional in *Kenya Human Rights Commission v Attorney General & Another* [2018] eKLR on November 9, 2018 the instructive provision remains section 5(1) of the *Judicature Act* which grants the High Court and the Court of Appeal the power to punish for contempt. It provides:

> " 5. (1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England and that power shall extend to upholding the authority and dignity of subordinate courts.

58. In enforcing compliance with lawful court orders, the procedures adopted by the court must be fair and reasonable in which full opportunity is given to an alleged contemnor to defend himself or herself. This is because contempt proceedings being quasi-criminal, require a higher standard of proof than in normal civil cases, and one can only be committed to civil jail or penalized on the basis of evidence that leaves no doubt as to the contemnor's culpability.

59. This was the position taken by this court in *Republic v Ahmad Abolfathi Mohammed & another* SC Criminal Application No 2 of 2018 [2018] eKLR where we stated:

> It is, therefore, evident that not only do contemnors demean the integrity and authority of courts, but they also deride the rule of law. This must not be allowed to happen. We are also conscious of the standard of proof in contempt matters. The standard of proof in cases of contempt of court is well established. In the case of *Mutitika v Baharini Farm Limited* [1985] KLR 229, 234 the Court of Appeal held that:
>
> > "In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature."

60. Accordingly, article 50(2) of the *Constitution* on the right to a fair trial imposes a duty on the court to guarantee the parties to contempt proceedings procedural justice by evaluating the evidence brought forth by all parties. We note that, while there exists no fixed content to the duty to afford procedural fairness, the fairness of procedure depends on the nature of the matters in issue and that would constitute a reasonable opportunity for parties to present their cases in any given circumstance. Procedural fairness in the administration of justice involves the fair hearing rule and the rule against bias. The fair hearing rules require a decision maker to *inter alia* afford a person an opportunity to be heard before making any decision affecting his/her interests.

61. Likewise, procedural fairness in decision-making requires courts not to deprive any person of their right without due process of the law, a fundamental precept that implies that the right of a person affected by any adverse decision or action is present before a tribunal that pronounces judgment upon the question of life, liberty, or property in its most comprehensive sense, to be heard by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved.

62. Accordingly, the doctrine of due process encompasses the right to be treated fairly, efficiently, and effectively in the administration of justice. This court acknowledged that due process is a fundamental pillar of the rule of law under the *Constitution* that should be observed by all courts in the administration of Justice in *Nicholas Kiptoo Arap Korir Salat v Independent*

Electoral and Boundaries Commission & 7 others SC Petition No 23 of 2014 [2015] eKLR where we stated:

> " [97] All courts must consider the principles and values of the rule of law, participation of the people, equity, inclusiveness, equality, human rights, transparency, and accountability. This is because the four corners of due process of the law, specifically the right to be heard and the right to a fair hearing require that both parties be heard if an issue is raised before the court in order to accord the court the opportunity to pronounce itself on the issue."

63. Similarly, the United States Supreme Court in *Goldberg v Kelly*, 397 US 254, 267 (1970) emphasized that the fundamental requisite of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.

64. From the foregoing, courts are required to adhere to the principles of procedural fairness and due process in the administration of justice. The question that begs therefore is, did the Court of Appeal have a right to ignore deliberately the responses placed before it?

65. The Court of Appeal in its ruling for contempt delivered on February 22, 2019, stated as follows:

> " 8. In opposing the application for contempt, in an affidavit dated April 25, 2018 by Dr John Kennedy Omanga, the 15th respondent avers that he is aware Mr Geoffrey Chege Kirundi filed Nyeri HCCC No 18 of 2017 but he did so without the authority of KTFC Limited and Mr Kirundi had no authority to appoint any advocate to act for KTFC.....
>
> Dr Omanga further avers that he is aware of the present contempt of court proceedings but due to the jurisdictional issue raised that Mr Kirundi had no authority to act for and on behalf of KTFC and also in view of the application by Njoroge Regeru & Co Advocates seeking to withdraw the contempt proceedings, he is constrained and refrains from answering the contempt allegations in this matter."

66. Further, the appellate court states:

> " 13. Learned counsel Mr Millimo for the 5th to 15th respondents in opposing the application cited submitted that a *status quo* order

> cannot form a basis for conviction for contempt of court as it is too vague and subject to multiple interpretations and is a term of ambiguity; that the 5th to 15th respondents are not decision makers of KTFC and cannot in any way pass any resolutions for the Company..."

67. A perusal of page 570 of the record of appeal reveals first that, Dr, John Kennedy Omanga swore the affidavit on his own behalf and not on behalf of the other respondents therein. Secondly, his replying affidavit was specifically in response to an application dated January 31, 2018 and not the application for contempt of court dated December 13, 2017.

68. We note therefore that the Court of Appeal did not specifically take into account the responses by the 1st appellant (Stephen Maina Githiga), who filed his response on August 20, 2018 in response to the application dated May 28, 2018, and 2nd appellant (Eston Gakungu Gikoreh). Did the Court of Appeal have a right to ignore the defenses or responses by the appellants?

69. The United States of America Supreme Court in *Re Oliver*, 333 US 257, 265 (1948), observed that the question of a grand jury's power to punish summarily is limited by the higher principle that, every contempt procedure must conform to the standards of due process applicable to regular court proceedings.

70. The Court of Appeal like all courts in Kenya, is required to adhere to the principles of procedural fairness and due process when dispensing justice. Therefore, when considering the contempt proceedings, the court did not have a right to deliberately ignore the appellants' defenses or responses. Such action violates the principle of procedural fairness and due process which require meaningful participation in matters before the court. We, therefore, find that the Court of Appeal did not have the jurisdiction to deliberately ignore the defenses or responses by the 1st and 2nd appellants and by doing so, fell into fatal error.

ii. Whether a Court hearing a contempt of Court application can convict the alleged contemnors without affording them a hearing?

71. With regards to the right to a fair hearing, the appellants' case was that the Court of Appeal despite not listing the application dated December 13, 2017 for hearing, proceeded to hear the same on November 15, 2018. They claimed that the only applications listed for hearing on November 15, 2018, were applications dated May 28, 2018, May 29, 2018, and August 3, 2018. Therefore, hearing the application dated December 13, 2017 without prior listing denied the appellants the right of reply and the opportunity to be heard.

72. Article 50(1) of the *Constitution* provides for the right to a fair hearing, it states:

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

73. This right to a fair trial is a non-derogable right as stipulated under article 25 of the *Constitution* which 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; and
>
> d. the right to an order of habeas corpus."

74. In a concurring opinion, Njoki Ndungu, SCJ in the decision of *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others* SC Petition No 18 of 2014 as consolidated with Petition No 20 of 2014 [2014] eKLR expounded 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* 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."

(261) It is important to restate that a literal reading of the provisions of the *Constitution* 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).

75. In the instant case, the appellate court in the impugned ruling acknowledged that on August 7, 2018, it gave directions that the pending applications dated May 28, 2018, May 29, 2018, and August 3, 2018 be listed for hearing back-to-back and that the hearing finally took place on November 15, 2018. Furthermore, the Court of Appeal stated thus:

> "In addition, the amended notice of motion dated May 28, 2018 is substantially similar to the Motion dated December 13, 2017 save for the addition of eleven more individuals cited for contempt of court...
>
> With the foregoing in mind, the notes on the proceedings before this court on November 15, 2018 clearly indicate that all parties understood and appreciated that the substance of the proceedings before the court were contempt proceedings in terms of the contempt applications...

> In other words, the record of proceedings before this court on November 15, 2018 aptly shows that the contempt application was argued and submissions made by all parties."

76. It was uncontested that the proceedings of November 15, 2018 were never availed as part of the record therefore; we are not able to verify what happened on that particular day. However, from the contents of the impugned ruling and the record of appeal, did the Court of Appeal deny the appellants the right to a fair hearing by failing to specifically list the application dated December 13, 2017 for hearing?

77. We are persuaded by the position taken by Odunga J (as he then was) in *Alfred Mutua v Boniface Mwangi* [2022] eKLR where he held that:

> " 22. In my view, considering the seriousness with which the Court takes contempt of court proceedings, every stage of the hearing must be expressly clear to the Defendant and any ambiguity must be resolved in favour of the Defendant since such proceedings are quasi-criminal in nature, otherwise, a benefit of doubt would inure to the benefit of the Defendant."

78. From the foregoing, the appellate court should have expressly made it clear in its directions issued on August 7, 2018 that the application dated December 13, 2017 was coming up for hearing on November 15, 2018. Failure to expressly list the application was detrimental to the appellants because they had no prior notice that the application was coming up for hearing on that day. It is our considered view that it is not enough for the appellate court to conclude that parties before it on November 15, 2018 understood and appreciated that the substance of the proceedings before it was contempt proceedings in terms of the contempt applications. The right to a fair hearingndictates that an individual shall not be penalized by a decision affecting his rights or legitimate expectations unless he has been given prior notice of the case against him, a fair opportunity to answer, and the opportunity to present his case.

79. It is our considered opinion that hearing the application dated December 13, 2017 without expressly listing the same amounted to trial by ambush. Given the quasi-criminal nature of contempt proceedings, the court ought to have given the appellants the opportunity to be heard and that opportunity must be reasonable as was held in *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others*(*supra*). The appellate court denied the appellants a reasonable opportunity to be heard by failing to expressly list the application dated December 13, 2017 for hearing. As a consequence, we find that the 1st and 2nd appellants' rights to a fair hearing were violated by the appellate court's action of convicting them without affording them a hearing.

iii. Whether a court hearing a contempt of court application can overlook a miscarriage of justice to convict for contempt?

80. The *Black's Law Dictionary*, 11th Edition defines 'miscarriage of justice' as:

> " A grossly unfair outcome in a judicial proceeding as when a defendant is convicted despite lack of evidence on an essential element of the crime..... also termed a failure of justice."

81. This court stated in *Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone* SC Application No 4 of 2012 [2013] eKLR that:

> " [63] From the example thus given, it is clear that "miscarriage of justice" is more consistent with failings in the judicial process of a rather glaring nature, and threshold trial stages, than with the adjudication of complex questions of law at tertiary-level courts."

82. In *Zahira Habibullah Sheikh & another v State of Gujarat & others* AIR 2006 SC 1367, the Supreme Court of India stated:

> " It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted...Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, the condemnation should be rendered only after the trial in which the hearing is a real one, not a sham or mere farce and pretence....The fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice"

83. As stated earlier in this Judgment, the Court of Appeal is granted the power to punish for contempt under section 5 of the *Judicature Act*. However, in the exercise of this jurisdiction,

the Court is required to adhere to the tenets of the *Constitution* and section 3B(1)(a) of the *Court of Appeal Act* which states:

> "(1) For the purpose of furthering the overriding objective specified in section 3A, the court shall handle all matters presented before it for the purpose of attaining the following aims-
>
> a. The just determination of proceedings...."

84. Furthermore, article 159 of the *Constitution* obligates courts to ensure that the procedures in the administration of justice would not lead to a miscarriage of justice. Thus, the overriding objective as stipulated under section 3A and 3B of the *Court of Appeal Act* and article 159 of the *Constitution* required the appellate court to ensure they are just and fair when handling cases to ensure procedural and substantive justice.

85. From the foregoing, it is our finding that the Court of Appeal overlooked a miscarriage of justice and proceeded to convict the 1st and 2nd appellants and fine each of them Kshs 400,000/- or in default to serve a term of seven (7) months imprisonment.

iv. Whether a court hearing a contempt application can revive the original un-amended contempt of court application in chambers, prosecute and convict on the same upon striking out the amended contempt application?

86. The appellants' case in this regard was that once an amended pleading has been heard and a determination given by the court, the court can only be moved through review or appeal. They contended that once the amended application dated May 28, 2018 seeking amendment of the contempt application dated December 13, 2017 was disallowed the Court of Appeal could not revert and determine the original pleading suo motu.

87. In *Phoebe Wangui (Formerly known as Phoebe Wangui Kamore) v James Kamore Njomo*, Nairobi High Court Civil Suit No 367 of 2010, the court held that:

> "I have read the decision of Ringera, J (as he then was) in *Mutuku & 3 others v United Insurance Company Ltd* (*supra*). Whereas I agree that the effect of an amended pleading is to supersede and replace the original pleading, that is only true with respect to the issues for determination. That, in my view, does not mean that the only relevant document is the amended pleading. In my view, that is the rationale behind the provision that the amendment in the amended pleading be legible and ought not be obliterated. To say that once an amended pleading is struck out, the party has no pleading on record would ignore the fact that a suit is not instituted by an amended pleading but by original pleading. Order 8 rule 2 for example empowers the court to disallow or strike out an amended pleading if

the same was improperly amended. That rule does not state that in that event the whole suit is struck out." (emphasis added)

88. Similarly, in *Gerald Iha Thoya v Chiriba Daniel Chai & another*[2018] eKLR the court found that:

> "...that where an amended petition is struck out, the original petition is not obliterated. The original petition is revived by the act of striking out the amendments and if the original petition is capable of being heard, then the election court should hear and determine the same on merit." (emphasis added)

89. Also, in *Kalema v Ssekibinge* (Civil Suit 104 0f 2018) [2019] UGHCLD 10 (13 March 2019) the High Court of Uganda held:

> "I find that there was no amended plaint on the record to be withdrawn by the Plaintiff and as such, the alleged withdrawal did not vitiate or remove the original plaint filed on February 21, 2018. I also agree with the defendant's application to struck out the amended plaint *Vide* Misc Application No 1789 of 2018."

90 Persuaded by the above decisions, we agree with the Court of Appeal that to the extent that striking out the amended application dated May 28, 2018 had the legal effect that the application dated December 13, 2017 stood unamended and was properly on record. However, we opine that once the appellate court had determined that the application dated December 13, 2017 was properly on record it ought to have informed the parties as such and given them another hearing date to enable the parties to canvass the application.

91. It is our considered view the failure to issue another hearing date for the original unamended application amounted to reviving the application dated December 13, 2017 in chambers, prosecuting and convicting the appellants without giving them an opportunity to be heard. We find that decision to have been made in error and we have stated why.

v. Whether a Court in presiding over proceedings which have been heard fully on an amended pleading can upon striking out the amended pleading proceed suo moto to determine the original pleading without invitation and participation of either party in the proceedings?

92. We reiterate our reasoning above that the Court of Appeal upon striking out the application dated May 28, 2018, ought to have given the parties a hearing date for the application dated December 13, 2017 as it was not among the applications expressly listed for hearing that day. Thus, the Court of Appeal erred by *suo motu* proceeding to determine the application dated December 13, 2017 without the invitation and participation of the parties to the

proceedings and particularly, the appellants. A court presiding over contempt proceedings must make every stage of hearing expressly clear to the contemnors since such proceedings are quasi- criminal as was held in *Alfred Mutua v Boniface Mwangi (supra).* This is to ensure meaningful participation of the contemnors in contempt proceedings.

93. Flowing from the above, it is our finding that the appeal herein must succeed. On costs, in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others*, SC Petition No 4 of 2012; [2013] eKLR we found that costs follow the event, therefore the 1st and 2nd appellants shall have costs of the appeal.

B. Orders

94. Consequently, we issue orders as follows:

1. The appeal dated April 3, 2019 is allowed.
2. A declaration that the 1st and 2nd appellants' right to a fair hearing was breached by the Court of Appeal in Nyeri Court of Appeal in Civil Application No 137 of 2017.
3. The Ruling of the Court of Appeal delivered on March 28, 2019 in Civil Application No 137 of 2017 is hereby set aside.
4. The Ruling of the Court of Appeal delivered on February 22, 2019 in Civil Application No 137 of 2017 in regard to the 1st and 2nd appellants is hereby set aside.
5. Any monies paid by the 1st and 2nd appellants as punishment for contempt of court shall be refunded to them forthwith by the Registrar of the Court of Appeal.
6. Costs to the 1st and 2nd appellants.
7. We hereby direct that the sum of Kshs 6000/- deposited as security for costs upon lodging of this appeal to be refunded to the appellants.

95. It is so ordered.

Member of Parliament Balambala Constituency v Abdi & 7 others (Petition 21 (E023) of 2020) [2023] KESC 35 (KLR) (16 June 2023) (Judgment)

Supreme Court of Kenya

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

Neutral citation: [2023] KESC 35 (KLR)

Constitutional Law *– coordination of National Government – administrative units – creation and delimitation of administrative units - creation of administrative units vis a vis electoral units - distinction in the creation of administrative units vis a vis electoral units - whether delimitation of administrative units could happen by way of advertisements issued by a deputy county commissioner – Constitution of Kenya, 2010, article 88(4)(c) and 89; National Government Coordination Act, (cap 127), sections 2, 4 and 14.*

Electoral Law *– electoral units – constituencies - delimitation of constituency boundaries - whether creation of administrative units influenced or affected constituency boundaries - whether movement of locations from one constituency to another amounted to delimitation of constituency boundaries - Constitution of Kenya, 2010,article 89(7).*

Statutes *– retrospective application of statutes - retrospective application of the National Government Coordination Act - whether the National Government Coordination Act applied retrospectively to matters that happened in 2010 before the enactment of the Act.*

Constitutional Law *– national values and principles – public participation - whether public participation was required in the recruitment of administrative officers to coordinate Government functions - Constitution of Kenya, 2010, article 10; National Government Coordination Act, cap 127, section 15.*

Words and Phrases *– judgment in rem - an action in rem was one in which the judgment of the court determined the title to the property and the rights of the parties, not merely as between themselves, but also as against all persons at any time dealing with them or with the property upon which the court had adjudicated - Black's Law Dictionary, Ninth Edition.*

Words and Phrases *– judgment in personam - an action was said to be in personam when its object was to determine the rights and interests of the parties themselves in the subject matter of the action, however the action could arise, and the effect of a judgment in such an action was merely to bind the parties to it. A normal action brought by one person against another for breach of contract was a common example of an action in personam - Black's Law Dictionary, Ninth Edition.*

Brief facts

On May 15, 2015, the 2nd respondent (Cabinet Secretary for Interior and Coordination of National Government) issued two advertisements advertising for the position of Chief Grade II Job Group 'H' and Assistant Chief II, Job Group 'F' in Garissa sub-county. In the advertisements, the position for chief was for the area known as Abdisamit Location in Central division and the assistant chief's position was for two sub-locations; Auliya Sub-Location within Abdisamit Location, Sankuri

Division and Laago Sub-Location, Modika Location in Central Division. All the areas advertised fell within Garissa County.

Aggrieved by the advertisements, the 1st respondent filed a petition at the High Court claiming that the advertisements were erroneous contending that in the advertisement for the chief position, it purported to show that Abdisamit Location was in Central Division of Garissa Sub-County yet it was in Dertu Division, Dertu Ward in Daadab Constituency; and that for the position of Assistant Chief, the advertisement erroneously indicated that Auliya Sub-Location was in Abdisamit Location of Sankuri Division yet it was in Laago sub-location in Modika Location. The 1st respondent contended that by issuing the advertisements, the 2nd respondent had purportedly created new administrative units namely, Auliya and Laago sublocations without participation from the citizens.

The 1st respondent challenged the creation of the administrative units on two grounds. First, he claimed that there was no public participation and secondly, that there had already been a determination on those elective/administrative boundaries by the High Court in Nairobi Judicial Review Application No. 120 of 2012 that was heard and consolidated with *Republic v Independent Electoral and Boundaries Commission & another Ex-Parte Councillor Eliot Lidubwi Kihusa & 5 others*, Judicial Review Misc. Application No. 94 of 2012 [2012] eKLR where the dispute involved the delimitation of boundaries of Balambala and Dujis Constituencies of Garissa County. The High Court found that the decision in *Republic v IEBC & 2 others*; Nairobi Judicial Review Miscellaneous Application No. 94 of 2012 related to the issues raised in the instant petition and that the judgment stood.

The High Court found that the 2nd respondent's decision to create the administrative units violated the decision in Nairobi Judicial Review Miscellaneous Application No. 120 of 2012. The court observed that there was no proper public participation or any serious engagement with the public. The High Court further granted an order of *certiorari* quashing the decision of the 2nd respondent contained in the advertisement and an order of *mandamus* directing the 2nd and 3rd respondents to comply with the decision rendered in Nairobi Judicial Review Application No. 120 of 2012. Aggrieved, the appellant filed an appeal at the Court of Appeal which dismissed the appeal. Further aggrieved, the appellant filed the instant appeal.

Issues

i. Whether creation of administrative units influenced or affected constituency boundaries.
ii. Whether movement of locations from one constituency to another amounted to delimitation of constituency boundaries.
iii. Whether delimitation of administrative units could happen by way of advertisements issued by a deputy county commissioner.
iv. What was the distinction in the creation of administrative units *vis a vis* electoral units?
v. Whether the National Government Coordination Act applied retrospectively to matters that happened in 2010 before the enactment of the Act.

vi. Whether public participation was required in the recruitment of administrative officers to coordinate Government functions.

Held

1. The contested issues in the appeal were issues of constitutional controversy that had been determined before the High Court and the Court of Appeal and involved the interpretation and application of the Constitution of Kenya, 2010 (Constitution). The matter was properly before the court and thus the court had jurisdiction under article 163(4)(a) of the Constitution to determine it.
2. From a reading of the orders issued in *Republic v IEBC & 2 others*; Nairobi Judicial Review Miscellaneous Application No. 94 of 2012, the High Court and the Court of Appeal completely misapprehended the case before them. The High Court specifically failed to interrogate the proper question before it, which was on the legality of the advertisements for the positions of chief and assistant chiefs for the administrative units which issue was completely different from the question of delimitation of constituency boundaries.
3. Legal Notice No.14 of 2012 was headed; "The National Assembly Constituencies County Assembly Wards Order, 2012" and was enacted to determine the number, names and delimitation of boundaries for constituencies and county assembly wards; and the specific geographical and demographical details relating to such determination. It had nothing to do with the question before the two courts below. An advertisement for administrative positions could not create constituencies. The superior courts, by finding to the contrary, were misguided.
4. The issues from the grounds in support of the 1st respondent's petition before the High Court challenging the two advertisements did not relate to constituencies but to administrative units. The former being the mandate of Independent Electoral and Boundaries Commission (IEBC) while the latter was the mandate of the 2nd respondent. The superior courts ought to have limited themselves to addressing the main ground raised in the petition which was; whether the 2nd respondent, by issuing the two advertisements, had moved the locations in dispute without any justification in law.
5. There was no relationship between the three administrative units in question before the trial court and the decision in *Republic v IEBC & 2 others*; Nairobi Judicial Review Miscellaneous Application No. 94 of 2012. The orders issued in Nairobi Judicial Review Application No. 120 of 2012 were not interlinked and neither did they have any effect on the petition before the High Court. The petition before the High Court, quite simply, challenged the legality of the advertisements. It was therefore improper for the superior courts to make determinations that Nairobi Judicial Review Application No. 120 of 2012 raised the same issues as the petition before the High Court.
6. Although there was reference to alleged movement of locations from one constituency to another, that claim alone would not mutate the question before the superior courts to one of delimitation of constituency boundaries as opposed to the narrow issue of recruitment of a

chief and assistant chief for a specific location and sub-locations. The High Court in Nairobi Judicial Review Miscellaneous Application No. 94 of 2012 only considered the question of delimitation of electoral units as provided for under article 89 of the Constitution.

7. The general rule was that orders issued in a judgment in *personam* were personal in nature and did not affect third parties and were binding only to the parties in it. The decision by the Court of Appeal in *Peter Odoyo Ogada & 9 others v Interim Independent and Electoral Boundaries Commission & 14 others*; Civil Appeal No. 307 of 2012 being an appeal from *Republic v IEBC& 2 others*; Nairobi Judicial Review Miscellaneous Application No. 94 of 2012 was with respect to only two electoral units being Suba North and Suba South constituencies. Therefore, the Court of Appeal judgment was one in *personam* as it only applied to parties in that appeal on matters that involved the delimitation of boundaries of Suba North and Suba South constituencies. The judgment had completely no relation to any of the issues raised in the petition before the trial court and did not apply to the subject matter of the proceedings before the trial court.

8. The IEBC was mandated under article 89 of the Constitution to delimit boundaries and constituencies after which IEBC gave those electoral units names and numbers and thereafter, published the electoral units in the Gazette. The National Government Coordination Act, 2013 was passed to establish an administrative and institutional framework for the coordination of National Government functions at the national and county levels of governance and; to give effect to articles 131(1)(b) and 132(3)(b) of the Constitution. The procedure for the creation of administrative units was as provided for under section 14 of the National Government Coordination Act.

9. Section 14 of the National Government Coordination Act expressly authorized the 2nd respondent with the approval of the President, and through a notice in the Kenya Gazette to establish National Government service delivery coordination units. Section 14(4) specifically provided that locations and sublocations in existence before the commencement of the National Government Coordination Act shall continue to exist as national government service delivery units.

10. Administrative units were different from electoral units in relation to the manner in which they were created. From a reading of article 89 of the Constitution and section 14 of the National Government Coordination Act, the establishment of the administrative units was a preserve of the National Government and the same was done by the Cabinet Secretary as defined under section 2 of the Act while the creation of electoral units was done by the IEBC as mandated under article 88(4)(c) of the Constitution. The argument that electoral units needed not conform to administrative units was borne out by the law. The Constitution was specifically clear about the considerations that the IEBC would take into account when delimiting boundaries.

11. When IEBC was delimiting constituency boundaries, administrative units were not one of the factors to be considered. The submission that it was good practice if the boundaries

of administrative units conformed to those of electoral units was attractive. Still, instances may arise where the two did not conform and that fact alone did not render the boundaries unlawful. The creation of administrative units did not influence or affect constituency boundaries. Article 89(7) of the Constitution provided in detail, the procedure for altering constituency and ward boundaries.

12. The orders made in Nairobi Judicial Review Application No. 120 of 2012 were made with respect to the delimitation of electoral units in Garissa County and not administrative boundaries. The High Court and Court of Appeal completely misunderstood the orders issued in Nairobi Judicial Review Application No. 120 of 2012 by finding that they applied to the instant matter.

13. The National Government Coordination Act could not apply retrospectively in the instant case. That was because the administrative units comprising Abdisamit Location and Auliya and Laago sub-locations were created in 2010 and an Act passed in 2013 could not apply to matters that happened in 2010 before the enactment of the Act. Statutes did not have retrospective application unless by express implication. The Court of Appeal erred in upholding the finding by the High Court that the 2nd respondent had contravened the provisions of section 4 of the National Government Coordination Act by creating new administrative units.

14. Delimitation of administrative units could not happen by way of advertisements issued by the Deputy County Commissioner. Section 15 of the National Government Coordination Act provided for the procedure of recruitment of administrative officers to coordinate National Government functions, and most importantly for the purposes of the appeal, that applied to chiefs and assistant chiefs. It was on the basis of section 15 that the advertisements for the position of Chief of Abdisamit location and Assistant Chiefs for Auliya and Laago sub-locations were issued.

15. Section 15 of the National Government Coordination Act was clear on the procedure for the recruitment and appointment of National Government administrative officers. A reading of that provision indicated that the Public Service Commission, in consultation with the 2nd respondent, had the authority to recruit administrative officers to coordinate Government functions. There was no requirement for public participation because an application for employment was an individual affair that did not require the participation of the public. To require public participation in such an exercise would be an absurdity. Moreover, the advertisement announced to all and sundry the existence of the vacancy for general information and transparency.

16. In the making or implementation of any public policy that touched on the interest of the public, public participation was mandatory. It was one of the national values and principles of governance provided for under article 10 of the Constitution as participation of the people. The act of the 2nd respondent issuing an advertisement while acting within the provisions of section 15 of the National Government Coordination Act could not be said

to be acts that involved making or implementing public policy decisions. Such an act was merely an administrative act to enable the proper day-to-day operations within a county.

17. If saying that advertisements inviting applicants to fill in vacancies for all positions should be subjected to public participation would result in more harm than any intended good, that would mean that public bodies would have to subject all their operative decisions to public participation. Therefore, decisions such as issuing advertisements inviting applicants to fill out vacancies, albeit involving administrative units, needed not be subjected to public participation.
18. One of the guiding principles for public participation was allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation was to be determined on a case to case basis.
19. From the record, the High Court and Court of Appeal, while interrogating the evidence before them, failed to consider the peculiar circumstances of the case in determining whether it was one where lack of public participation would automatically vitiate the process of calling out for candidates for the positions advertised. At no point were the superior courts called upon to determine any issue involving the lack of public participation in the creation of administrative units.
20. The appellate court failed to rightly appreciate the applicability of public participation as a principle in the Constitution. The Court of Appeal erred in its findings on the meaning, scope and application of public participation.

Appeal allowed.

Orders

i. *The petition of appeal dated December 16, 2020 and filed on December 21, 2020 was allowed.*
ii. *The judgment of the Court of Appeal dated November 20, 2020 was set aside.*
iii. *The judgment of the High Court dated October 4, 2017 was set aside.*
iv. *The amount of Kshs. 6,000 deposited in court as security for costs was released to the appellant.*
v. *Each party shall bear the costs of the instant appeal.*

Citations

Cases

Kenya

1. *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)* Petition 5 of 2017; [2019] KESC 15 (KLR) - (Followed)
2. *Kenya Association of Air Operators v Kenya Airports Authority & another* Civil Appeal 285 of 2013; [2018] KECA 884 (KLR) - (Explained)

3. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] 3 KLR 199 - (Followed)
4. *Nakumatt Holdings Limited v Commissioner of Value Added Tax* Civil Appeal 200 of 2003; [2011] KECA 295 (KLR) - (Explained)
5. *Ogada, Peter Odoyo & 9 others v Independent Electoral and Boundaries Commission of Kenya & 14 others* Civil Appeal 307 of 2012; [2013] KECA 356 (KLR) - (Explained)
6. *Rai & 3 others v Rai & 4 others* Petition No 4 of 2012; [2014] 2 KLR 253 - (Followed)
7. *Republic v Independent Electoral and Boundaries Commission & another Ex-Parte Councilllor Eliot Lidubwi Kihusa & 5 others* Judicial Review 94 of 2012; [2012] KEHC 3571 (KLR) - (Explained)

Texts

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

Statutes

Kenya

1. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 53 rule 2 - (Interpreted)
2. Constitution of Kenya articles 1, 2, 6(3); 10(2)(a)(b)(c); 47; 81; 88(4)(c); 89(2)(3)(7); 131(1)(b); 132(3)(b); 159; 163(4)(a); 189; 201(d); 232 - (Interpreted)
3. Districts and Provinces Act,1992 (Repealed) (Act No 5 of 1992) In general - (Cited)
4. Law Reform Act (cap 26) section 9(3) - (Interpreted)
5. National Government Coordination Act (cap 127) sections 4, 14(1); 15- (Interpreted)

Advocates

Mr. Ongoya for the appellant
Mr. Mokua Ndubi for the 1st respondent
Mr. Thande Kuria for the 2nd, 3rd & 4th respondents
Mr. Otieno for the 5th respondent
Mr. Kipkogei for the 8th respondent

June 16, 2023, the Court delivered the following Judgment:

A. Introduction

1. Before the court is a petition dated December 16, 2020 and filed on December 21, 2020. The appeal is filed pursuant to article 163(4)(a) of the *Constitution* and is anchored on the interpretation and application of articles 10, 189, 201(d) and 232 of the *Constitution*. It revolves around the purported creation of new administrative units by the 2nd respondent (Cabinet Secretary for Interior and Coordination of National Government) within Garissa County and challenges the decision of the Court of Appeal which upheld the decision of

the High Court (Mativo, J), in Constitutional & Human Rights, Petition No 238 of 2015 delivered on October 4, 2017.

B. Factual Background

i) Proceedings at the High Court

2. On May 15, 2015, the 2nd respondent issued two advertisements in the form of notices, Ref Nos DC/HR/1/30/105 and DC/HR/1/30/106 respectively, advertising for the position of Chief Grade II Job Group 'H' and Assistant Chief II, Job Group 'F' in Garissa sub-county. In the advertisements, the position for Chief was for the area known as Abdisamit Location in Central division and the Assistant Chiefs position was for two sub-locations. The first Assistant Chief position was for 'Auliya' sub-location within Abdisamit Location, Sankuri division while the other position was for Laago sub-location, Modika location in Central division. All the areas advertised fell within Garissa County.

3. After the advertisement was issued, the 1st respondent, a resident of Garissa County, filed before the High Court, Constitutional Petition No. 238 of 2015, claiming that the advertisements were erroneous contending firstly, that in the advertisement for the Chief Position, it purported to show that Abdisamit Location is in Central Division of Garissa sub-county yet it was in Dertu Division, Dertu Ward in Daadab Constituency. Secondly, for the position of Assistant Chief, the advertisement erroneously indicated that Auliya sub-location was in Abdisamit Location of Sankuri Division yet it was in Laago sub-location in Modika Location.

4. The 1st respondent contended that by issuing these advertisements, the 2nd respondent had 'purportedly created' new administrative units namely, Auliya and Laago sublocations without participation from the citizens either directly or through their elected leaders. He also alleged that the advertisements restricted those interested in applying for the positions to only residents of the mentioned location and sub-location.

5. The 1st respondent therefore challenged the creation of the administrative units on two grounds. First, he claimed that there was no public participation and secondly, that there had already been a determination on those elective/administrative boundaries by the High Court in Nairobi Judicial Review Application No 120 of 2012 that was heard and consolidated with *Republic v Independent Electoral and Boundaries Commission & another ex-parte Councillor Eliot Lidubwi Kihusa & 5 others*, Judicial Review Misc Application No 94 of 2012 [2012] eKLR which case involved several consolidated Judicial Review applications among them Nairobi Judicial Review Application No 120 of 2012 where the dispute involved the delimitation of boundaries of Balambala and Dujis Constituencies of Garissa County.

6. The 1st respondent maintained that this decision had never been reviewed, appealed against or varied yet the 2nd respondent, in total disregard of those orders, moved Abdisamit location from Dertu division to Central division of Garissa sub-county and Auliya sub-location, from Dertu ward of Daadab Constituency to Abdisamit location of Sankuri division to Modika location. He alleged that Auliya and Abdisamit geographically fall within Dertu Location of Daadab Constituency and that the intended creation of these new sub-locations into Balambala Constituency would relocate Daadab residents to seek services at Balambala which would in turn, subject them to unnecessary hardship and would therefore be a violation of their right to fair administrative action under article 47 of the v *Constitution* as well as article 10 on the national values and principles of governance, article 88 that mandates IEBC, the 8th respondent to delimit constituencies as well as article 159 of the *Constitution*.

7. The 2nd and 3rd respondents on their part, denied the alleged violations of the *Constitution* and the law and the violation of existing court orders. They maintained that it was within their mandate to create administrative units and that the issues before the trial court differed from those in the previous suit. They further maintained that their decision was in conformity with the provisions of the *Districts and Provinces Act*, 1992 (repealed). They furthermore pleaded that the units were created in response to an urgent need to bring services closer to the people, to aid in the maintenance of security along the Kenya-Somali border and, to aid in the provision of relief food. It was also their case that the judgment in *Republic v Independent Electoral and Boundaries Commission and another ex-parte Councillor Eliot Lidubwi Kihusa & 5 others*; Nairobi Judicial Review No 94 of 2012 [2012] eKLR which included the Judicial Review application filed by one Peter Odoyo Ogada in respect of Suba South and Suba North Constituencies (hereinafter referred to as "*Republic v IEBC & 2 others*; Nairobi Judicial Review Miscellaneous Application No 94 of 2012) only dealt with electoral boundaries and not administrative boundaries.

8. The 8th respondent, also opposing the petition, claimed that its constitutional mandate did not include the creation of administrative units, a function vested in the 2nd respondent, and therefore the petition was misguided and ought to be dismissed.

9. In its Judgment delivered on October 4, 2017, the High Court Mativo, J (as he then was) found that the decision rendered by the High Court in *Republic v IEBC & 2 others*; Nairobi Judicial Review Miscellaneous Application No 94 of 2012 that also made orders with respect to Nairobi Judicial Review Application No 120 of 2012 related to the issues raised in the present petition and that the judgment still stands. It was therefore the learned Judge's finding that the 2nd respondent's decision to create the said administrative units violated the decision in Nairobi Judicial Review Miscellaneous Application No 120 of 2012.

10. On the issue of whether the 2nd respondent acted within the confines of the law while creating the said administrative units, it was the trial court's finding that the provisions of section 4 of the *National Government Coordination Act* as well as the provisions of articles 10 and 189 of the *Constitution* offer the guiding principles in the creation of such units. More fundamentally, the trial court observed that there was no proper public participation or any serious engagement with the public as expressly provided for under article 10 of the *Constitution* which lists public participation as one of the values and principles of governance that bind all state organs, officers, public officers and all persons whenever any of them applies or interprets the *Constitution*, enacts, applies or interprets any law or makes or implements public policy decisions. The trial court, in addition, found that there was a violation of the provisions of article 47 on the right to fair administrative action as the decision by the 2nd respondent complained of was illegal or *ultra vires* as it was undertaken in violation of a court decision and hence, not grounded on the law.

11. For the above reasons, the trial court proceeded to conclude that the 2nd respondent violated the provisions of articles 10, 189, 201(d), 232, 47 and 159 of the *Constitution*, the guiding principles in section 4 of the *National Government Coordination Act* No 1 of 2013 by purporting to create new administrative units in violation of the law and disregarding the court decision rendered in Nairobi Judicial Review Application No 120 of 2012 and made a declaration to that effect. The trial court further granted an order of *certiorari* quashing the decision of the 2nd respondent contained in the advertisement dated May 15, 2015 and an order of *mandamus* directing the 2nd and 3rd respondents to comply with the decision rendered in Nairobi Judicial Review Application No 120 of 2012.

ii) Proceedings at the Court of Appeal

12. Aggrieved by the decision of the High Court, the appellant filed an appeal, Nairobi Civil Appeal No 424 of 2017, on six grounds, claiming that the learned Judge erred in law by:

    a. Failing to determine whether the appellant was properly suited in the High Court in HC Constitutional Petition No 238 of 2015.

    b. Failing to find that the proceedings and consequential declarations in Peter Odoyo were in rem and consequently applied to the subject matter of the proceedings in HC Constitutional Petition No 238 of 2015;

    c. Finding that the judgment in Peter Odoyo was limited to that appeal and did not apply to other consolidated causes in JR No 94 of 2012;

    d. Failing to determine the material question whether Abdisamit Location and Laago and Auliya sub-locations were always in Garissa District and in Dujis Constituency

prior to the delimitation of boundaries which created Balambala and Daadab Constituencies or that the same had been created on May 15, 2015 *vide* the disputed advertisements;

e. Finding that JR No 120 of 2012 in any event had made any orders in respect of Abdisamit Location and Laago and Auliya sub-locations.

f. Applying the provisions of the National Government and Coordination Act to administrative units created way back in 2010.

13. The Court of Appeal (Makhandia, Kiage & Murgor, JJA) identified one main issue for determination: whether the trial court had a basis or was justified in arriving at its conclusion.

14. On the issue raised by the appellant that he was wrongly joined as a party to the petition on grounds that a Member of Parliament is not a juristic person capable of suing or being sued, the Court of Appeal noted that the appellant had participated in the proceedings before the trial court by opposing the petition and could not go on to claim that he had not been properly joined in the petition.

Further, the Court of Appeal held that there were other remedies available to the appellant if he was aggrieved as a party and that by choosing to participate in the proceedings and seek costs, he denied himself the remedy of being struck off the petition. The appellate court thus dismissed the said allegation.

15. While addressing the issue of whether the advertisements made by the 2nd respondent that led to the creation of administrative units were done without public participation, the Court of Appeal in agreeing with the High Court, held that there was no public participation in the creation of the new administrative units as required by articles 1, 2, 10 of the *Constitution* as well as section 4 of the *National Government Coordination Act*. The appellate court noted that the creation or alteration of administrative units is very sensitive, emotional and weighty as the public has a stake in it. For this reason, the appellate court agreed with the trial court's finding that the provisions of section 4 of the National Government Coordination Act 2013 were not complied with.

16. On the issue as to whether the petition before the trial court was *res judicata*, the Court of Appeal held that the appeal filed against the orders issued in *Republic v IEBC & 2 others*; Nairobi Judicial Review Miscellaneous Application No 94 of 2012 in the filed appeal of *Peter Odoyo Ogada & 9 others v Interim Independent and Electoral Boundaries Commission & 14 others*; Civil Appeal No 307 of 2012 [2013] eKLR (hereinafter referred to as "Civil Appeal No 307 of 2012; *Peter Odoyo Ogada v IEBC & 14 others*") only set aside the decision regarding two constituencies, Suba North and Suba South Constituencies, hence the said decision was independent and distinct to the said constituencies. It was thus the appellate

court's finding that the judgment was in personam and was therefore not applicable to the petition filed before the trial court. In that regard, the appellate court found that the learned Judge was right in finding that the 2nd respondent had no authority to interfere with the boundaries or to create new administrative units outside Legal Notice No 14 of 2012, which was the legal notice that led to the filing of the Judicial Review cases before the High Court on the issue of constituencies and wards, and that doing so amounted to undermining the court orders issued in Nairobi Judicial Review Application No 120 of 2012 and also contravened the provisions of section 4 of the *National Government Coordination Act* as well as articles 10, 189, 201(d) and 232 of the *Constitution*.

17. On the issue raised on retrospective application of the provisions of the *National Government Co-ordination Act*, 2013 to administrative units created in the year 2010, the Court of Appeal, while agreeing with the High Court, held that the *National Government Co-ordination Act*, having come into force in 2013 and the disputed advertisements having been made in 2015, then the trial court was right in reaching the conclusion it did on the issue of retrospective application of the Act. It was therefore the appellate court's finding that the High Court was right in holding that the 2nd respondent had contravened section 4 of the Act as well as articles 10, 189, 201 (d) & 232 of the *Constitution*. In conclusion, the Court of Appeal agreed with the finding of the trial court and with that finding, dismissed the appeal.

iii) Proceedings at the Supreme Court

18. Aggrieved by the decision of the appellate court, the appellant has filed the present appeal reiterating the six grounds that he raised before the Court of Appeal as follows; That the learned Judges erred:

    a. In failing to determine whether the appellant was properly suited in High Court Constitutional Petition No 238 of 2015;

    b. In failing to find that the proceedings in *Peter Odoyo Ogada & 9 others v IEBC & 14 others* [2013] eKLR were in rem and consequently applied to the subject matter of the proceedings in HC Constitutional Petition No 238 of 2015;

    c. In finding that the holding by the Court of Appeal in *Peter Odoyo Ogada & 9 others v IEBC & 14 others* [2013] eKLR were limited to that appeal and did not apply to other consolidated cases in Judicial Review Misc Application No 120 of 2012, *Republic v Independent Electoral and Boundaries Commission & another ex-parte Councillor Eliot Lidubwi Kihusa & 5 others* [2012] eKLR;

    d. In failing to determine the material question whether Abdisamit location as well as Laago and Auliya sub- locations have always been in Garissa District and in Dujis

constituency prior to the delimitation of boundaries which created Balambala and Daadab Constituencies or whether the same had been created on 15/5/2015 vide advertisement reference number DC/HR/1/30/105;

e. In finding that Judicial Review Misc Application No 120 of 2012 as consolidated with Judicial Review Misc Application No 94 of 2012, in any event had made any orders in respect of Abdisamit Location, Laago sub- location and Auliya sub-location; and

f. In applying the provisions of the *National Government Coordination Act*, 2013 to administrative units created way back in the year 2010.

19. The appellant raises the following issues for determination:

i. Whether the appellant was properly suited in the High Court in Constitutional Petition No 238 of 2015;

ii. Whether the proceedings and consequential declarations in *Peter Odoyo Ogada & 9 others v IEBC & 14 others* [2013] eKLR are in rem and consequently applied to the subject matter of the proceedings in HC Constitutional Petition No 238 of 2015;

iii. Whether the findings and determinations of the Court of Appeal in particular in *Peter Odoyo Ogada & 9 oothers v IEBC & 14 oothers* [2013] eKLR were limited to the said case and had no relevance to other boundary delimitation cases;

iv. Whether the *National Government Coordination Act* 2013 was applicable to establishment of new administrative units in the year 2010; and

v. Whether the 5 Judge Bench in High Court Judicial Review No 120 of 2012 as consolidated with Judicial Review No 94 of 2012 made any orders in respect of Abdisamit location, Laago sub-location and Auliya sub-location.

20. Consequently, the appellant seeks the following orders:

a. That this petition be allowed.

b. That the Judgment of the Court of Appeal dated 20/11/2020 in Civil Appeal Number 424 of 2017 and the Judgment of the High Court dated 4/10/2017 in Constitutional Petition Number 238 of 2015 be set aside.

c. That High Court Constitutional Petition Number 328 of 2015 dated 8/06/2015 be dismissed.

d. That the costs of this petition be provided for.

C. Parties Submissions

i) Appellant's submissions

21. The appellant's submissions are dated November 2, 2022 and filed on even date. Therein, he submits that the appeal concerns the relationship between the three administrative units in question and the decision in Nairobi Judicial Review Application No 120 of 2012. He submits that the question of the three administrative units and the two High Court decisions and the Court of Appeal decision being *Republic v IEBC & 2 others*; Nairobi Judicial Review Miscellaneous Application No 94 of 2012 as consolidated with Nairobi Judicial Review Application No 120 of 2012 and Civil Appeal No 307 of 2012; *Peter Odoyo Ogada v IEBC & 14 others* ought to be determined firstly, by establishing the relationship that the administrative units have with each of the decisions and secondly, the relationship the three decisions have with each other.

22. The appellant argues that the superior courts based their decisions on the ground that the issue of the administrative units had been dealt with in *Republic v IEBC & 2 others*; Nairobi Judicial Review Miscellaneous Application No 94 of 2012 which he submits, was not the case. He urged that the issue of the administrative units in the petition before the High Court and the subject of Nairobi Judicial Review Application No 120 of 2012 as was determined in *Republic v IEBC & 2 others*; Nairobi Judicial Review Miscellaneous Application No 94 of 2012 related to different entities.

23. Further to this, the appellant submits that in Nairobi Judicial Review Application No 120 of 2012, the administrative units addressed were in Medina sub-location and Alango-Arba sub-location while before the trial court, the administrative units in question were in Abdisamit location and Auliya and Laago sub-locations respectively. He contends that there was no mention of these three administrative units in Nairobi Judicial Review Application No 120 of 2012 and for this reason, urges that the appeal should succeed.

24. Additionally, the appellant submits that the High Court in *Republic v IEBC & 2 others*; Nairobi Judicial Review Miscellaneous Application No 94 of 2012 only considered the question of delimitation of electoral units as provided for under article 89 of the *Constitution*. That article 89 of the *Constitution* only deals with electoral units as constituencies while the issue before the High Court dealt with administrative units-locations and sub- locations.

25. In that regard, the appellant argues that the provisions of article 89 of the *Constitution* do not apply to the decisions of the 2nd respondent while determining boundaries and naming administrative units. Also, that article 89 of the *Constitution* only applies to IEBC, the 8th respondent, and only when delimiting electoral units. It is therefore the

appellant's argument that the decision in *Republic v IEBC & 2 others*; Nairobi Judicial Review Miscellaneous Application No 94 of 2012 on the delimitation of electoral units cannot be said to have determined a petition before the High Court on boundaries of administrative units where the IEBC lacks power to delimit.

26. Furthermore, the appellant argues that even when the IEBC refers to administrative units when describing an area covered by electoral units, the said description does not limit other state bodies from delimiting administrative units as long as the boundaries of electoral units are not moved. This, the appellant argues, is because article 89 of the *Constitution* only gives IEBC power to determine the names and boundaries of an electoral unit and not the administrative units. The appellant thus submits that this is because IEBC is the only body mandated under article 89 to alter boundaries of wards and constituencies and that the decision by the 2nd respondent on delimiting administrative units cannot be said to be inconsistent with the provisions of article 89 of the *Constitution*.

27. Regarding the Court of Appeal decision in *Peter Odoyo Ogada v IEBC & 14 others*; Civil Appeal No 307 of 2012 he submits that the Court of Appeal declared that the decision of the High Court to delimit electoral units by itself on the ground that the IEBC had done it wrongly was unconstitutional. Therefore, in his opinion, though the Court of Appeal made these declarations while considering the case of Suba North and Suba South constituencies, the wording of the findings was clear that in every instance where the High Court arrogates itself the mandate of IEBC in delimitation, the same is unconstitutional. Consequently, it cannot be argued in his view, that the decision to delimit or name other electoral units apart from Suba North and Suba South remained constitutional simply because the decisions were not appealed. For the reasons above, he prays that his appeal be allowed.

ii) 1st Respondent's submissions

28. The 1st respondent's submissions are dated October 26, 2022. In opposing the appeal, he proceeds to respond to the five grounds in support of the appeal as framed by the appellant. On the first issue-whether the appellant was properly suited before the High Court- it is his submission that the Court of Appeal considered the issue of alleged misjoinder and found that the appellant participated in the proceedings before the trial court by opposing the petition. Therefore he cannot claim that both superior courts below failed to determine whether the appellant was properly suited.

29. On the second issue- whether the proceedings and consequential declarations in *Peter Odoyo Ogada v IEBC & 14 others*; Civil Appeal No 307 of 2012 were in rem- the 1st respondent submits that both superior courts rightly found that the proceedings and finding were in personam and consequently, did not apply to the subject matter of the proceedings before the High Court; that the Court of Appeal correctly found that decision in *Peter Odoyo*

Ogada v IEBC & 14 others; Civil Appeal No 307 of 2012 only set aside the decision regarding Suba North and Suba South constituencies hence it was independent and distinct; and that the petition before the trial court was therefore not res judicata.

30. On the third ground- whether the decision in *Peter Odoyo Ogada v IEBC & 14 others*; Civil Appeal No 307 of 2012 was only limited to that case and had no relevance to other boundary delimitation cases- the 1st respondent submits that the same is an issue of fact being raised on a second appeal and the appellant has not shown that both superior courts below considered matters they ought not to have considered or failed to consider matters they ought to have considered or that the entire decision is perverse.

31. On the fourth ground-whether the *National Government Coordination Act, 2013* was applicable in the establishment of new administrative units- the 1st respondent submits that both superior courts below did not err in finding that Nairobi Judicial Review Application No 120 of 2012 had made orders in respect of Abdisamit location, Laago and Auliya sub-locations.

32. Lastly, on the fifth ground-whether the decision in Nairobi Judicial Review Application No 120 of 2012 made any orders with respect to Abdisamit location and Auliya and Laago sub-locations- the 1st respondent submits that the dispute at the High Court related to an advertisement dated May 15, 2015. To him, the Court of Appeal correctly found that the *National Government Coordination Act 2013* having come to force in 2013 and the advertisements having been made in 2015, then it was proper for the High Court to conclude that the 2nd respondent had contravened certain provisions of the Act.

2nd, 3rd and 4th Respondents' submissions

33. The 2nd, 3rd and 4th respondents' written submissions are dated November 7, 2022. They address two issues, namely; (a) the applicability of article 89 of the *Constitution*; and (b) orders of *certiorari* issued for decisions that are more than 6 months old.

34. On the applicability of article 89 of the *Constitution*, they submit that under article 6(3) of the *Constitution*, the national government is empowered to create administrative units for purposes of service delivery and execution of its functions. In contrast, article 89 grants the IEBC power to delimit electoral units. In that regard, they urge that both superior courts below made a fundamental error in arriving at the impugned decision on the creation of administrative units based on Nairobi Judicial Review Application No 120 of 2012 that was heard and consolidated with *Republic v IEBC & 2 others*; Nairobi Judicial Review Miscellaneous Application No 94 of 2012. They argue that the two High Court cases dealt with the creation of electoral units in terms of wards and constituencies, whose mandate lies with the IEBC as provided for under the provisions of articles 89(2) and (3) of the

Constitution. They thus submit that the provisions of article 89 do not deal with the creation of administrative units in terms of locations and sub-locations. This mandate, they maintain, is of the 2nd respondent and the provisions of article 89(2) do not deal with the creation of administrative units which is the mandate of the IEBC, the 8th respondent.

35. Further, it is their submission that both superior courts below made a mistake in finding that there was no public participation in the creation of Abdisamit location, Laago and Auliya sub-locations in 2015. That both superior courts below also failed to appreciate that the administrative units in question were created on November 3, 2010 despite sufficient evidence demonstrating the same. Consequently, they fault both superior courts below for retrospectively applying the provisions of the *National Government Coordination Act* to administrative units created in 2010 whereas the Act was enacted in 2013.

36. They further urge that both superior courts below failed to appreciate that even in instances where the High Court is called upon to review the question of how the IEBC has exercised its power under article 89, the court cannot substitute the decision of the IEBC with that of its own. Therefore, they contend that even assuming that the decision of the 2nd respondent was wrong, the High Court erred in making a decision that had the effect of creating administrative units and boundaries. In their view, the court could only have quashed the decision of the 2nd respondent and ordered for a fresh exercise in such circumstances.

37. On the issue of orders of certiorari for decisions that are more than 6 months, they submit that section 9(3) of the *Law Reform Act* as read with order 53 rule 2 of the *Civil Procedure Rules*, impose a mandatory 6-month limitation period for seeking orders of *certiorari* for purposes of quashing an administrative decision. For this proposition they rely on the decisions in *Nakumatt Holdings Limited v Commissioner of VAT*, Civil Appeal No, Nai 200 of 2003; [2011] eKLR and *Kenya Association of Air Operators v Kenya Airports Authority & anothera*, Civil Appeal No Nai 285 of 2013 [2018] eKLR, where the Court of Appeal held that an order of *certiorari* must be applied for within 6 months from the date of the impugned decision. It is on this basis that they submit that the administrative units in question, having been created in 2010, which was 5 years before the filing of the suit before the High Court, could not be legally overturned by an order of certiorari in the circumstances since the statutory period of 6 months had lapsed. In view of the foregoing, they urge this court to grant the orders sought by the appellant in this appeal.

iv) 8th Respondent's Submissions

38. The 8th respondent's submissions are dated and filed on November 4, 2022. Therein, IEBC, the 8th respondent, begins by clarifying that when it embarked on the delimitation of electoral boundaries for constituencies and wards, the administrative units of Abdisamit location, Auliya sub-location and Laago sub- location were not in existence and hence did

not form part of the boundary descriptions published vide Legal Notice No. 14 of 2012. IEBC contends that in that case two issues arise. Firstly, whether the decision in *Peter Odoyo Ogada v IEBC & 14 others*; Civil Appeal No 307 of 2012 was in rem and secondly, whether there is a nexus between the delimitation of electoral boundaries by the IEBC and the creation of administrative boundaries.

39. With regard to the first issue, IEBC submits that the decision of the Court of Appeal in *Peter Odoyo Ogada v IEBC & 14 others*; Civil Appeal No 307 of 2012 was a decision in rem therefore binding not only to both the parties but to every other person and remained as the legal position on the subject from the date of its making and that the decision was to be applied progressively rather than retrospectively since if it were to apply retrospectively, it would lead to uncertainty in the law on the question on boundaries. However, IEBC has added that the decision is only in rem as far as the creation of electoral units is concerned.

40. On the issue of whether there is a nexus between the delimitation of electoral and administrative boundaries, IEBC submits that article 89 of the *Constitution* and the IEBC Act stipulate the mandate of IEBC to be the delimitation and review of electoral units. IEBC contends that this mandate does not include the creation or delimitation of administrative boundaries and; that it is the 2nd respondent who is vested with such powers under section 14(1) of the *National Government Co- ordination Act* to establish administrative units as national government service delivery units which are headed by national government administrative officers appointed under section 15 of the Act with the approval of the President and by a notice in the Gazette.

41. Further to the above, they argue that there is a general nexus between electoral boundaries and administrative units as sub-locations form the basic units for the delimitation of ward and constituency boundaries. IEBC however submits that the 2nd respondent's power to create sub-locations as administrative units is under- regulated and under the discretion of the national government which then implies that the parameters used by IEBC to delimit electoral boundaries change with the national government's service delivery agenda and would have the effect of indirectly hampering with IEBC's mandate to delimit boundaries. Further, that this unregulated discretion avails avenues for indirect gerrymandering by actors in the national government executive which in effect compromises the principles of our electoral system enshrined in article 81 of the *Constitution*.

42. To curb this, IEBC argues that the 2nd respondent, while exercising its power to create administrative units as provided for under section 14(1) of the *National Government Coordination Act*, should ensure that the establishment of administrative units and their boundaries should conform or align with electoral boundaries to avoid confusion of IEBC's mandate on the delimitation of electoral units to the public.

43. For these reasons, the 8th respondent urges this court to partially allow the appeal to the extent that the Court of Appeal erred in finding that the decision in *Peter Odoyo Ogada v IEBC & 14 others*; Civil Appeal No 307 of 2012 was not a decision in personam but a decision *in rem* and therefore applied to the proceedings before the trial court and to find that this decision applied only to issues that arose after its determination and not retrospectively so as to nullify acts undertaken by IEBC in obeying the orders issued in *Republic v IEBC & 2 others*; Nairobi Judicial Review Miscellaneous Application No 94 of 2012.

D. Issues for Determination

44. From the above submissions, the following issues crystalize for determination:

i. Whether thiscourt has jurisdiction to determine the appeal;

ii. The effect of the proceedings and consequential declarations by the High Court in Nairobi Judicial Review Application No 120 of 2012 that was heard and consolidated with *Republic v Independent Electoral and Boundaries Commission & another; ex-parte Councillor Eliot Lidubwi Kihusa & 5 others*, Judicial Review Misc Application No 94 of 2012; [2012] eKLR as well as *Peter Odoyo Ogada v IEBC & 14 others*; Civil Appeal No 307 of 2012 [2013] eKLR;

iii. The difference between electoral units and administrative units.

iv. Whether there was need for public participation in the creation of administrative units and if so;

v. Whether the provisions of section 4 of the *National Government Coordination Act* were applicable in the creation of administrative units;

We shall determine each issue separately as here below.

E. Analysis

i) Whether this Court has jurisdiction to determine the Appeal

45. The 1st respondent raised the issue of jurisdiction and was emphatic that this court lacks jurisdiction to hear this matter. The question of this court's jurisdiction to handle appeals filed as of right under article 163(4)(a) is one that the court embarks on before determining a matter on its merits. It thus has to be settled first, in any event, as the 1st respondent, a party before the court, is opposed to this court's jurisdiction to determine the present appeal.

46. That being said, the question of whether this appeal is properly before this court was answered and settled by this court in a ruling delivered on October 8, 2021. In that ruling, we found that the contested issues in this appeal were issues of constitutional controversy that had been determined before the High court and the Court of Appeal and involved the interpretation and application of the *Constitution*. It was our finding in that regard that:

> "From the above, it is evidently clear that though section 4 of the *National Government Coordination Act* was the basis upon which the trial court adjudicated on whether the administrative actions of the 2nd respondent were done within the confines of the law. The provisions of Section 4 were founded on the provisions of articles 10, 189, 201(d) & 232 of the *Constitution*, and it is these constitutional provisions that the 2nd respondent was found to be in breach of."

47. The upshot therefore is that this matter is properly before us and we hold and find that we have jurisdiction underarticle 163(4)(a) of the *Constitution* to determine it.

48. We now proceed to interrogate the issues of constitutional interpretation or application that form the substratum of the appeal.

ii) The effect of the proceedings and consequential declarations in Nairobi Judicial Review Application No 120 of 2012 that was consolidated and heard with Judicial Review Misc Application No 94 of 2012 [2012] eKLR and *Peter Odoyo Ogada v IEBC & 14 others*; Civil Appeal No 307 of 2012 [2013] eKLR.

49. The appellant contends that Nairobi Judicial Review Application No 120 of 2012 did not address the administrative units that were the subject of the petition before the High Court in this appeal. The appellant has thus urged this court to appreciate that in Nairobi Judicial Review Application No 120 of 2012, the judgment delivered was in relation to the administrative units known as Medina and Alango-Arba sub-locations only and not the units in issue before us.

50. Further to the above, the appellant contends strongly that since the administrative units in question before the trial court were Abdisamit location and Auliya and Laago sub-locations, there was therefore no relationship between the three administrative units in question before the trial court and the decision in Nairobi Judicial Review Application No 120 of 2012 that concerned Medina and Alango-Arba sub-locations. In light of this, he claims that the High Court and Court of Appeal erred in finding that the administrative units that were the question before the trial court were the same as those before the High Court in Nairobi Judicial Review Application No 120 of 2012. In the appellant's view, the Petition before

the trial Court could not have been determined by relying on Nairobi Judicial Review Application No 120 of 2012.

51. The 1st respondent in response submits that both superior courts below did not err in finding that Nairobi Judicial Review Application No 120 of 2012 had made orders in respect of Abdisamet location, Laago and Auliya sub- locations. Instead, he argues that the delimitation of these administrative units had already been settled and therefore, there was no need for judicial intervention.

52. In the above context, whether there was a judgment issued with respect to the mentioned administrative units is one issue. What is more important from the outset and needs to be addressed are two issues. Firstly, what was the grievance before the High Court as presented in the Petition and secondly, what were the grounds raised in support of that grievance?

53. We note, in that regard, that the 1st respondent had filed before the High Court, a petition challenging two advertisements; one for the position of Chief for Abdisamit location in Central Division of Garissa sub-county and one other for the position of two Assistant Chiefs with one position being for Auliya sub- location in Abdisamit location of Sankuri Division and the other for Laago Sub- Location in Modika Location.

54. The 1st respondent then sought before the High Court, orders to wit:

> " (i) A declaration that, by the 1st respondent purporting that Abdisamit Location is in Central Division of Garissa sub-county and that Auliya sub-location is in Abdisamit Location of Sankuri Division and that Laago sublocation is in Modika location and that the 1st respondent has breached the provisions of article 10(2)(a), (b) and (c), articles 47 and 159 of the *Constitution* by usurping himself powers not conferred by the *Constitution* and/or the law.
>
> ii. An order of *certiorari* do issue moving to the High Court for purposes of quashing and to quash the decision of the Ministry of Interior and Coordination of National Government contained in an advertisement dated 15/5/2105 Ref: DC/HR/1/30/105 purporting to relocate;
>
> a. The newly created location of Abdisamit to the Central Division of Garissa Township Constituency from its proper and current domicile in Dertu Division within Garissa County.

b. The newly created Auliya sub-location to a purported location referred to as Abdisamit in Sankuri Division of Balambala Constituency from its proper and/or current domicile in Dertu location of Dertu Division in Daadab Constituency of Garissa County.

c. The newly created Laago sub-location to a purported Modika Location of Central Division from Alango Arba location of Derta Division/Ward of Daadab Constituency within Garissa County".

55. From the submissions and the facts before the court, a major focal point for both parties are the orders issued in Nairobi Judicial Review Application No 120 of 2012 as consolidated with *Republic v IEBC & 2 others*; Nairobi Judicial Review Miscellaneous Application No 94 of 2012. It therefore warrants that the orders issued therein be interrogated. What exactly were the orders issued?

56. While the Judicial Review application aforesaid consolidated a number of applications relating to boundaries of electoral units, of relevance to the present appeal are the orders issued in Nairobi Judicial Review Application No 120 of 2012. The application was on the delimitation of Balambala and Dujis Constituencies of Garissa County with the applicants claiming that the constituency and ward names and details of Garissa County had been altered without any demand and justification by creating the new Balambala Constituency and moving Alango-Arba and Medina Wards to that new constituency. The High Court allowed the application and made Orders which we have reproduced hereunder *verbatim* to wit;

"a. That Dujis Constituency be renamed Garissa Township Constituency.

b. That Medina sub-location be and is hereby removed from Sankuri Ward in Balambala Constituency and transferred to Galbet Ward in Dujis Constituency.

c. Galbet Ward will now comprise the following sub-locations; Galbet and Medina sub-locations with a population of 43,244.

d. That Alango-Arba sub-location be and is hereby removed from Sankuri Ward in Balambala Constituency and transferred to Dertu Ward in Dadaab Constituency.

e. Dertu Ward will now comprise the following sub-locations; Alango-Arba and Dertu with a population of 15,013

f. Sankuri Ward will now comprise the following sub-locations; Balicha, Simbir, Sankuri, Raya, and Athleleyley with a population 10,719

g. Legal Notice Number 14 of 2012 be and is hereby amended to this extent.

h. The maps of Dujis, Balambala, and Dadaab Constituencies in Vol III of the IEBC Final Report be and is hereby altered and amended to reflect the above changes and position."

57. In addressing the above orders, the High Court in the present matter stated thus;

> "29. The decision referred by the respondents was rendered in *R v Independent Electoral and Boundaries Commission & another ex-parte Councillor Elliot Lidubwi Kihusa & 5 other*. It involved several consolidated Judicial Review Applications among them No 120 of 2012 in which the dispute involved delimitation of boundaries of Balambala and Dujis constituencies of Garissa County. I find it useful to examine the facts in the said case, the decision rendered and the appeal decision to satisfy myself whether or not this case is indeed *res judicata*".

58. The learned judgeexamined the facts limiting himself to the delimitation of constituency boundaries-not locations or sub-locations- and rendered his decision as restated above. The Court of Appeal, while also affirming the finding by the High Court held:

> "It is common ground that the petition leading to the present appeal was based on the advertisements dated May 15, 2015. The advertisement was challenged because even though delimitation of boundaries had been carried out in 2010 and the same had been successfully challenged through Nairobi Judicial Review Application No 120 of 2012 as consolidated with JR No 94 of 2012 and which led to the amendment of Legal Notice No 14 of 2012, the 1st respondent moved the court on grounds that the 2nd respondent had contravened the decision of the court in making the advertisements and that it ran counter to the amended Legal Notice No 14 of 2012. As stated elsewhere in this judgment, the decision in Nairobi Judicial Review Application No 120 of 2012 amending Legal Notice

> No 14 of 2012 was not appealed against, set aside or reviewed and therefore the same was in force."

59. From our reading of the orders issued in *Republic v IEBC & 2 others;* Nairobi Judicial Review Miscellaneous Application No 94 of 2012, it clearly emerges that the learned Judge of the High Court and the learned Judges of Appeal completely misapprehended the case before them. The High Court specifically failed to interrogate the proper question before it, which was on the legality of the advertisements for the positions of Chief and Assistant Chiefs for the administrative units aforesaid which issue was completely different from the question of delimitation of constituency boundaries. Legal Notice No 14 of 2012 is headed; "The National Assembly Constituencies County Assembly Wards Order,2012" and was enacted to determine the number, names and delimitation of boundaries for constituencies and county assembly wards; and the specific geographical and demographical details relating to such determination. It had nothing to do with the question before the two courts below. Again, and in support of this finding, we reiterate that an advertisement for administrative positions cannot create constituencies, and the superior courts, by finding to the contrary, were misguided.

60. In addition to the above, we note that the grounds in support of the 1st respondent's petition before the High Court challenging the two advertisements were that the 2nd respondent had geographically moved Abdisamit location from Dertu Division to Central Division while Auliya and Laago sub-locations were moved from Dertu Ward in Daadab Constituency to Abdisamit location, situated within Sankuri Division in Modika location. These issues do not relate to constituencies but to administrative units- the former being the mandate of IEBC while the latter is the mandate of the 2nd respondent.

61. It is our finding therefore that the superior courts ought to have limited themselves to addressing the main ground raised in the petition which was;

> whether the 2nd respondent, by issuing the two advertisements, had moved the locations in dispute without any justification in law.

62. Indeed, the Court of Appeal, quite incorrectly, captured the case raised by the 1st respondent when it held:

> "It is common ground that the petition leading to the present appeal was based on the advertisements dated May 15, 2015. The advertisement was challenged because even though delimitation of boundaries had been carried out in 2010 and the same had been successfully challenged through Nairobi Judicial Review Application No 120 of 2012 as consolidated with JR No 94 of 2012 and which led to the amendment of Legal Notice No 14 of 2012, the 1st respondent moved

> the court on grounds that the 2nd respondent had contravened the decision of the court in making the advertisements and that it ran counter to the amended Legal notice No 14 of 2012. As stated elsewhere in this judgment, the decision in Nairobi Judicial Review Application No 120 of 2012 amending Legal Notice No 14 of 2012 was not appealed against, set aside or reviewed and therefore the same was in force."

63. Falling into further error, the Court of Appeal went on to find that the 2nd respondent had no authority to interfere with or create new boundaries by finding:

> " In the premise the 2nd respondent ought to have acted within the confines of the boundaries as per the Amended Legal Notice No 14 of 2012. It had no authority to interfere with the boundaries or create new administrative units outside the said Legal Notice as doing so amounted to undermining the court orders as well as the *Constitution*."

64. This is with respect, an apparent misrepresentation of the grounds in the 1st respondent's petition before the High Court. The appellant strongly argued that there was no relationship between the three administrative units in question before the trial court and the decision in *Republic v IEBC & 2 others*; Nairobi Judicial Review Miscellaneous Application No 94 of 2012. We are inclined to agree with this argument. The orders issued in Nairobi Judicial Review Application No 120 of 2012 were not interlinked and neither did they have any effect on the petition before the High Court. The petition before the High Court, quite simply, challenged the legality of the advertisements. It was therefore improper for the superior courts to make determinations that Nairobi Judicial Review Application No 120 of 2012 raised the same issues as the petition before the High Court. Although there was reference to alleged movement of locations from one constituency to another, that claim alone would not mutate the question before the superior courts to one of delimitation of constituency boundaries as opposed to the narrow issue of recruitment of a chief and assistant chief for a specific location and sub-locations.

65. Additionally, we agree with the appellant's submission that the High Court in Nairobi Judicial Review Miscellaneous Application No 94 of 2012 only considered the question of delimitation of electoral units as provided for under article 89 of the *Constitution*. Later in this judgment, we shall expound on the difference between electoral units and administrative units.

66. What of the issue raised by the appellant that the Court of Appeal finding in *Peter Odoyo Ogada & 9 others v Interim Independent and Electoral Boundaries Commission & 14 others*; Civil Appeal No 307 of 2012 [2013] eKLR; was it *in rem* or *in personam*?

67. The appellant contended that the Court of Appeal erred in finding that this decision was *in personam* and not *in rem*. They argue that the effect of the Court of Appeal decision was that it was binding not only to the parties before the courts but to every other person. For this reason, they argue that the decision was applicable before the proceedings at the trial court.

68. The *Black's Law Dictionary*, Ninth Edition, defines a judgment in rem to be:

> "An action in rem is one in which the judgment of the court determines the title to the property and the rights of the parties, not merely as between themselves, but also as against all persons at any time dealing with them or with the property upon which the court had adjudicated."

69. It then defines a judgment in personam to be:

> " An action is said to be in personam when its object is to determine the rights and interests of the parties themselves in the subject matter of the action, however the action may arise, and the effect of a judgment in such an action is merely to bind the parties to it. A normal action brought by one person against another for breach of contract is a common example of an action in personam."

70. The general rule therefore is orders issued in a judgment in personam are personal in nature and do not affect third parties and are binding only to the parties in it. The decision by the Court of Appeal in *Peter Odoyo Ogada & 9 others v Interim Independent and Electoral Boundaries Commission & 14 others*; Civil Appeal No 307 of 2012 being an appeal from *Republic v IEBC & 2 others*; Nairobi Judicial Review Miscellaneous Application No 94 of 2012 was with respect to only two electoral units being Suba North and Suba South constituencies.

71. Therefore, in our view, the Court of Appeal judgment was one *in personam* as it only applied to parties in that appeal on matters that involved the delimitation of boundaries of Suba North and Suba South constituencies. The judgment had completely no relation to any of the issues raised in the petition before the trial court and in this regard, we agree with the submission by the 1st respondent that the finding was in personam and consequently, did not apply to the subject matter of the proceedings before the trial court.

Difference between electoral units and administrative units

72. It is the appellant's argument that the provisions of article 89 of the *Constitution* that deal with the delimitation of electoral units only apply to the IEBC when it is performing its mandate as regards the delimitation of constituencies. That the provisions of article 89 of

the *Constitution* do not apply to the decisions of the 2nd respondent while determining boundaries and naming of administrative units.

73. The appellant also strongly contends that even when the IEBC refers to administrative units when describing an area covered by electoral units, the said description does not limit other state bodies from creating administrative units as long as the boundaries of electoral units are not moved. This, the appellant argues, is because article 89 of the *Constitution* only gives IEBC power to determine the names and boundaries of an electoral unit and not administrative units within an electoral unit.

74. The 2nd, 3rd and 4th respondents on their part, while also supporting the appellant's argument, urge the point that article 6(3) of the *Constitution* empowers the national government to create administrative units for purposes of service delivery and execution of its functions. That article 89 of the *Constitution* only grants IEBC power to delimit electoral units and that the two types of delimitation are fundamentally different.

75. The 8th respondent also argues that article 89 of the *Constitution* and the IEBC Act stipulate the mandate of IEBC to be the delimitation and review of electoral units. They contend that this mandate does not include the creation or delimitation of administrative boundaries and; that it is the 2nd respondent who is vested with such powers under section 14(1) of the *National Government Co- ordination Act* to establish administrative units as national government service delivery units with the approval of the President and by a notice in the Kenya Gazette.

76. It is not in doubt that the IEBC is mandated under article 89 of the *Constitution* to delimit boundaries and constituencies after which IEBC gives those electoral units names and numbers and thereafter, publishes the electoral units in the Gazette.

77. The *National Government Coordination Act 2013* was passed to establish an administrative and institutional framework for the coordination of national government functions at the national and county levels of governance and; to give effect to articles 131(1)(b) and 132(3)(b) of the *Constitution*. The procedure for the creation of administrative units is as provided for under section 14 of the *National Government Coordination Act* which provides as follows:

> " Service delivery co-ordination units.
>
> 14.
>
> 1. The Cabinet Secretary may, with the approval of the President and by a notice in

> the Gazette, establish national government service delivery co-ordination units.
>
> 2. In establishing the national government service delivery co- ordination units, the Cabinet Secretary shall accord and respect the county government decentralized units established under section 48 of the County Government Act, 2012 (No 17 of 2012).
>
> 3. Where a county government has not decentralised its units pursuant to section 48(1)(e) of the County Government Act, 2012, the national government may, where necessary, establish its own service delivery coordination units for purposes of coordination of national government functions.
>
> 4. For purposes of this section, the locations and sublocations in existence immediately before the commencement of this Act shall continue to exist as national government service delivery units.
>
> 5. The national government service delivery coordination units established under this section shall be headed by national government administrative officers appointed under section 15."

78. Section 14 of the *National Government Coordination Act* therefore expressly authorizes the 2nd respondent with the approval of the President, and through a notice in the Kenya Gazette to establish national government service delivery coordination units. Section 14(4) specifically provides that locations and sublocations in existence before the commencement of the National Government Coordination Act shall continue to exist as national government service delivery units.

79. We are therefore in agreement with the appellant's submission that administrative units are different from electoral units in relation to the manner in which they are created. We say so because our reading of article 89 of the *Constitution* and section 14 of the *National Government Coordination Ac*t leads us to the conclusion that the establishment of the

administrative units is a preserve of the national government and the same is done by the Cabinet Secretary as defined under section 2 of the Act while the creation of electoral units is done by the IEBC as mandated under article 88(4)(c) of the *Constitution*.

80. In addition, the argument by the 8th respondent that electoral units need not conform to administrative units is borne out by the law. The *Constitution* is specifically clear about the considerations that the IEBC will take into account when delimiting boundaries. Article 89(5) provides:

> "(5) The boundaries of each constituency shall be such that the number of inhabitants in the constituency is, as nearly as possible, equal to the population quota, but the number of inhabitants of a constituency may be greater or lesser than the population quota in the manner mentioned in clause (6) to take account of –
>
> a. geographical features and urban centres;
>
> b. community of interest, historical, economic and cultural ties; and
>
> c. means of communication.

81. Furthermore, when IEBC is delimiting constituency boundaries, administrative units are not one of the factors to be considered. The submission by the 8th respondent that it is good practice if the boundaries of administrative units conform to those of electoral units is attractive. Still, instances may arise where the two do not conform and that fact alone does not render the boundaries unlawful. We say so, having found that the creation of administrative units does not influence or affect constituency boundaries. Again, article 89(7) of the *Constitution* provides in detail, the procedure for altering constituency and ward boundaries by stating:

> "(7) In reviewing constituency and ward boundaries the Commission shall–
>
> a. consult all interested parties, and
>
> b. progressively work towards ensuring that the number of inhabitants of each constituency and ward is, as nearly as possible, equal to the population quota."

82. In that regard, having found that the creation of electoral units is fundamentally different from the creation of administrative units, what of the finding by the High Court and Court of Appeal that the decision in Nairobi Judicial Review Application No 120 of 2012 applies to this matter? Earlier in this judgment, we reproduced the orders that were made in Nairobi Judicial Review Application No 120 of 2012. We reiterate that the orders made therein were made with respect to the delimitation of electoral units in Garissa County and not administrative boundaries.

83. Having found as above, we reiterate that the High Court and Court of Appeal completely misunderstood the orders issued in Nairobi Judicial Review Application No 120 of 2012 by finding that they apply to the present matter.

The applicability of Section 4 of the National Government Coordination Act 2013

84. Having found that there is a difference between the creation of electoral units and administrative units, what of the question of whether the provisions of section 4 of the *National Government Coordination Act* were applicable to the present dispute?

85. The appellant faults the superior courts for finding that section 4 of the *National Government Coordination Act* applies arguing that the delimitation of boundaries was done in 2010 whereas the Act was enacted in 2013. He therefore argues that the superior courts erred in doing so as statutes do not apply retrospectively.

86. The 1st respondent on the other hand urges that the superior courts were indeed correct in applying the provisions of section 4 of the Act as the impugned advertisements were made in 2015 after the Act had been enacted in 2013 and that there was therefore no retrospective application of the same.

87. The High Court, in finding that the provisions of section 4 of the Act apply stated:

> "34. Regarding the issue whether or not the first respondent acted within the confines of the law while creating the said administrative units, section 4 of the *National Government Co- ordination Act* offers the guiding principles. It provides in clear terms that:-"In fulfilling its mandate, the national government shall act in accordance with the national values and principles of the *Constitution* in particular, those set out in articles 10, 189, 201(d) and 232." [Emphasis added]

88. The Court of Appeal, in agreeing with the High Court that the provisions of section 4 of the Act and while upholding the High Court's judgment held:

> "It is common ground that the petition leading to the present appeal was based on the advertisements dated May 15, 2015.The advertisement was challenged

> because even though delimitation of boundaries had been carried out in 2010 and the same had been successfully challenged through Nairobi Judicial Review Application No 120 of 2012 as consolidated with JR No 94 of 2012 and which led to the amendment of Legal Notice No 14 of 2012, the 1st respondent moved the court on grounds that the 2nd respondent had contravened the decision of the court in making the advertisements and that it ran counter to the amended legal notice No 14 of 2012. As stated elsewhere in this judgment, the decision in Nairobi Judicial Review Application No 120 of 2012 amending legal notice No 14 of 2012 was not appealed against, set aside or reviewed and therefore the same was in force. In the premise the 2nd respondent ought to have acted within the confines of the boundaries as per the Amended Legal Notice No 14 of 2012. It had no authority to interfere with the boundaries or create new administrative units outside the said legal notice as doing so amounted to undermining the court orders as well as the *Constitution*. The trial court was therefore right in holding that the 2nd respondent had contravened the provisions of section 4 of the Act and articles 10, 189, 201(d) & 232 of the *Constitution*. The Act having come into force in 2013 and the disputed advertisements having been made in 2015, the trial court was right in reaching the conclusion it did on the issue of retrospective application of the Act."

89. Delimitation of boundaries and creation of administrative units in Garissa County was done in 2010, a fact that has not been challenged by the parties. This was done through a letter dated 3rd November 2010 signed by the Permanent Secretary, Provincial Administration and Internal Security creating Abdisamit Location and Auliya and Laago sub-locations. The Court of Appeal found that the 2nd respondent had contravened the decision of the court in Nairobi Judicial Review Application No 120 of 2012 by interfering with the boundaries as set out in Legal Notice No 14 of 2012. That for this reason, the provisions of the National Coordination Act 2013 applied because it is through issuing the disputed advertisements in 2015 that the 2nd respondent contravened the provisions of section 4 of the *National Government Coordination Act*.

90. While the Court of Appeal agreed with the High Court that there was no retrospective application of the Act, we find to the contrary. Having found that the issue before the High Court concerned the legality of the advertisements issued in 2015 and not the creation of administrative units, it is clear to us that the National Government Coordination Act cannot apply retrospectively in this case. We say so because the administrative units comprising Abdisamit Location and Auliya and Laago sub-locations were created in 2010 and an Act passed in 2013 cannot apply to matters that happened in 2010 before the enactment of the Act. We say so having found in *Samuel Kamau Macharia & another v Kenya Commercial*

Bank Limited & 2 others; Application No 2 of 2011; [2012] eKLR that statutes do not have retrospective application unless by express implication. We held that:

> "(61) As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature."

91. In the premises, we have no option than to hold that the Court of Appeal erred in upholding the finding by the High Court that the 2nd respondent had contravened the provisions of section 4 of the *National Government Coordination Act* by creating new administrative units.

Public participation: was it a requirement?

92. Having found that the issue that was before the High Court was on the legality of the two advertisements and not the creation of administrative units, what do we make of the claim by the 1st respondent that the administrative units that the two advertisements purported to create was done without public participation?

93. The 2nd, 3rd and 4th respondents, while disputing this argument contend that the High Court and Court of Appeal erred in finding that there was no public participation in the creation of Abdisamit Location and Auliya and Laago sub- locations. It is their claim that the superior courts failed to appreciate that the administrative units in question were created on 3rd November 2010 despite there being sufficient evidence demonstrating this.

94. The learned Judge of the High Court in addressing that issue found that there was no proper public participation in the creation of the three administrative units by stating:

> " I am not persuaded that there was any serious engagement with the public. The earlier Judicial Review proceedings shows the public expressed their concerns and the court made a determination on the matter. The matter was determined by the court. But clearly the decision of the court was disregarded."

95. The Court of Appeal judges on their part also upheld the High Court's finding, by stating that constitutional and statutory provisions were not complied with in the creation of the administrative units. The learned Judges held:

> " The creation or alternation of administrative units is very sensitive, emotional and weighty matter. It is something in which the public as a whole has a stake in, especially an interest that justifies governmental regulation. It is clear from

the record that public participation was not factored in when creating the new administrative units."

96. Earlier in this judgment, we set out in detail, the procedure for delimitation of administrative units. Again, and we reiterate, delimitation of administrative units cannot happen by way of advertisements issued by the Deputy County Commissioner. Also, section 15 of the Act provides for the procedure of recruitment of administrative officers to coordinate national government functions, and most importantly for the purposes of this appeal, this applies to Chiefs and Assistant Chiefs.

97. Section 15 of the Act provides that:

> "Recruitment and appointment of the national government administrative officers.
>
> 14.
>
> (1) In accordance with the national government functions under the *Constitution*, this Act or any other written law, the Public Service Commission shall, in consultation with the Cabinet Secretary, recruit and appoint national government administrative officers to coordinate national government functions and to perform such other functions as may be assigned to them under this Act or any other law.
>
> (2) Pursuant to subsection (1), the Public Service Commission shall appoint—
>
> a. ...
>
> b. ...
>
> c. ...
>
> d. a chief in respect of every location;

e. an assistant chief in respect of every sub-location; and

f. any other national government administrative officer in respect of a service delivery unit established under section 14."

98. It is on the basis of this provision that the advertisements for the position of Chief of Abdisamit location and Assistant Chiefs for Auliya and Laago sub-locations were issued. In our view, section 15 is clear on the procedure for the recruitment and appointment of national government administrative officers. A reading of this provision indicates that the Public Service Commission, in consultation with the 2nd respondent, have the authority to recruit administrative officers to coordinate government functions. There is no requirement for public participation because an application for employment is an individual affair that does not require the participation of the public. To require public participation in such an exercise would be an absurdity. Moreover, the advertisement announced to all and sundry the existence of the vacancy for general information and transparency.

99. In finding as above, we take cognizance of our finding in *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party), SC Petition No 5 of 2017;* [2019] eKLR that:

> "(85) Public participation has been entrenched in our Constitution as a national value and a principle of governance under article 10 of the *Constitution* and is binding on all State organs, State officers, public officers and all persons whenever any of them: (a) applies or interprets the *Constitution*; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions."[emphasis added]

100. Therefore, in the making or implementation of any public policy that touches on the interest of the public, public participation is mandatory. It is one of the national values and principles

of governance provided for under article 10 of the *Constitution* as participation of the people.

101. The act of the 2nd respondent issuing an advertisement while acting within the provisions of section 15 of the *National Government Coordination Act* cannot be said to be acts that involve 'making or implementing public policy decisions'. Such an act is merely an administrative act to enable the proper day-to-day operations within a county. So where does article 10 of the *Constitution* come in? At what point was public participation supposed to be undertaken? Was it at the point of issuing the advertisement or after the advertisement to the public was made?

102. If saying that advertisements inviting applicants to fill in vacancies for all positions should be subjected to public participation would without a doubt, result in more harm than any intended good. This would mean that public bodies would have to subject all their operative decisions to public participation. Therefore, decisions such as issuing advertisements inviting applicants to fill out vacancies, albeit involving administrative units, need not be subjected to public participation.

103. Again, in the *BAT,* case we gave guiding principles for public participation with one of the principles being that:

> " (viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis."

104. From the record, it is clear that the High Court and Court of Appeal, while interrogating the evidence before them, failed to consider the peculiar circumstances of this case in determining whether it was one where lack of public participation would automatically vitiate the process of calling out for candidates for the positions advertised. To our minds, at no point were the superior courts called upon to determine any issue involving the lack of public participation in the creation of administrative units.

105. Therefore, upon evaluation of the Court of Appeal judgment, we find that the appellate court failed to rightly appreciate the applicability of public participation as a principle in the *Constitution*. The Court of Appeal erred in endorsing the High Court's analysis and finding on this issue, and we have explained why. We therefore find that the Court of Appeal erred in its findings on the meaning, scope and application of public participation.

F. Conclusion

106. In conclusion, the petition before the trial court was one for dismissal because it had no merit. In this judgment, we have demonstrated that the matter before the trial court did not involve delimitation of constituencies and it is our finding that an advertisement cannot purport to create administrative units, as there is a procedure for both delimitation of boundaries as well as creation of administrative units, which we have explained above.

107. In light of this finding, the orders issued by the High Court in the form of orders of certiorari quashing the advertisement dated May 15, 2015 and orders of mandamus order directing the 2nd and 3rd respondents to comply with the decision in Nairobi Judicial Review Application No 120 of 2012 cannot stand and are hereby set aside hereby lifted.

G. Reliefs

108. On reliefs, including costs, while the appeal is one for allowing, we are aware that costs ordinarily follow the event as we held in *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. In the instant case, like the Court of Appeal, we deem it fit that each party should bear its costs of the present appeal which is anchored on matters affecting the people of Garissa County generally.

H. Orders

109. Ultimately, upon our finding above, the final orders are that:

    a. The petition of appeal dated December 16, 2020 and filed on December 21, 2020is hereby allowed.

    b. The Judgment of the Court of Appeal dated November 20, 2020 is hereby set aside.

    c. The Judgment of the High Court dated October 4, 2017 is hereby set aside.

    d. The amount of Kshs 6000/= deposited in court as security for costs be and is hereby released to the appellant.

    e. Each party shall bear the costs of this appeal.

110. It is so ordered.

WMM v EWG (Petition 33 (E037) of 2022)
[2023] KESC 36 (KLR) (16 June 2023) (Judgment)

Supreme Court of Kenya

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

Neutral citation: [2023] KESC 36 (KLR)

Jurisdiction *– jurisdiction of the Supreme Court – jurisdiction of the Supreme Court to determine appeals as of right in matters involving constitutional interpretation – where an appeal arose from an interlocutory application from the Court of Appeal - whether Supreme Court's jurisdiction to determine appeals as of right in matters involving constitutional interpretation extended to appeals that challenged the exercise of discretion of the Court of Appeal in interlocutory applications - what were the circumstances in which the Supreme Court could exercise its jurisdiction to determine appeals as of right in matters involving constitutional interpretation to determine appeals arising from the Court of Appeal's interlocutory applications – Constitution of Kenya, 2010, article 163(4)(a); Matrimonial Property Act, (cap 152), section 7; Marriage Act, (cap 150), section 66(2); Court of Appeal Rules, 2010, (cap 9 Sub Leg), rule 5(2)(b).*

Brief facts

The petition emanated from a divorce cause that was filed at the High Court where it was held that the practice obtaining was that parties who sought to divorce filed a petition before the subordinate court and if they sought a declaration of their interest in any matrimonial property acquired during the marriage and subject to the value of the property, they would file the cause at the High Court. Nevertheless since the respondent was seeking the distribution of matrimonial property as part of her prayers, the High Court held that the selling of the matrimonial property and the equal sharing of the proceeds of the sale therefore bringing herself under the provisions of section 7 of the Matrimonial Property Act, then it would be effective and in the interest of justice for all the matters to be dealt with at the High Court.

Aggrieved the appellant moved to the Court of Appeal and filed an application under rule 5(2)(b) of the Court of Appeal Rules in which the appellant sought to have the proceedings before the High Court stayed pending hearing and determination of the appeal. The appeal was on grounds that the High Court erred in law and fact in usurping the Resident Magistrate's Court jurisdiction. The Court of Appeal, in agreeing with the trial court, held that the High Court had unlimited original jurisdiction under article 165(3)(a) of the Constitution in all matters and that section 66 (2) of the Marriage Act did not override or oust the unlimited jurisdiction of the High court to hear and determine matters related to the dissolution of marriages. The appellate court noted that in effect the provisions of article 165(3) of the Constitution superseded the provisions of section 66(2) of the Marriage Act. The Court of Appeal exercised its discretion and declined to issue the stay orders on the grounds that the appellant had failed to show that he had an arguable appeal.

Further aggrieved the appellant filed the instant appeal before the Supreme Court on grounds that the High Court and Court of Appeal erred in finding that the High Court's unlimited

and original jurisdiction in civil and criminal matters was only subject to 165(3)(a) of the Constitution and that article 165(3)(a) superseded the express limits on jurisdiction on dissolution of marriage in the Marriage Act.

Issues

i. Whether Supreme Court's jurisdiction to determine appeals as of right in matters involving constitutional interpretation extended to appeals that challenged the exercise of discretion of the Court of Appeal in interlocutory applications.

ii. What were the circumstances in which the Supreme Court could exercise its jurisdiction to determine appeals as of right and determine appeals arising from the Court of Appeal's interlocutory applications?

Relevant provisions of the Law

Court of Appeal Rules, 2010 (cap 9 Sub Leg) rule 5(2)(b)

5. Suspension of sentence, injunction, stay of execution and stay of proceedings

(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—

(b) in any civil proceedings where a notice of appeal has been lodged in accordance with rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.

Held

1. For an appeal to be properly before the Supreme Court under article 163(4)(a) of the Constitution, the appellant had to show how the Court of Appeal disposed of the matter by way of interpreting or applying particular provision[s] of the Constitution.
2. The Court of Appeal exercised discretionary powers in issuing orders under rule 5(2)(b) of the Court of Appeal Rules. The appeal arose from an interlocutory decision of the Court of Appeal challenging the exercise of discretion by the Court of Appeal under rule 5(2)(b) meaning that there was no substantive appeal before the Supreme Court. There was also no judgment from the Court of Appeal in which constitutional issues had been analyzed and a determination issued.
3. Appeals from rulings of the Court of Appeal under rule 5(2)(b) of the Court of Appeal Rules could not be disguised as appeals under article 163(4)(a) of the Constitution. Appeals were anchored on intended appeals that were yet to be heard and determined. The Supreme Court had no jurisdiction to determine the instant appeal.
4. It was necessary to distinguish between two situations regarding the Supreme Court's jurisdiction. First, when the Supreme Court found it lacked jurisdiction to handle appeals from interlocutory decisions of the Court of Appeal without substantive appeal pending. Second, when the Supreme Court did assume jurisdiction over appeals arising from interlocutory applications that originated in the High Court moved to the Court of Appeal and the Supreme Court.

5. There was need to distinguish the Supreme Court's finding on lack of jurisdiction to handle appeals arising from interlocutory decisions of the Court of Appeal where there was no substantive appeal pending before the Supreme Court to that where the Supreme Court had assumed jurisdiction in appeals that arose from interlocutory applications originating from the High court, through to the Court of Appeal and finally to the Supreme Court.
6. In the Joho, Hassan Ali & another v Suleiman Said Shahbal & 2 others (Petition10 of 2013; [2014] eKLR) (Joho Case), the issue for determination before the High Court that was presented by way of an application was on the constitutionality of section 76(1)(a) of the Elections Act in line with article 87(2) of the Constitution where the parties invited the High court to exercise its jurisdiction as conferred by article 165(3)(d)(i) to interpret Constitution and determine the validity of this provision of the the Elections Act. The High Court exercised its jurisdiction and rendered a decision which was then appealed to the Court of Appeal and ultimately, to the Supreme Court. The Supreme Court therefore made a determination that it had jurisdiction as the appeal emanated from a substantive determination of a constitutional question by the Court of Appeal. The Supreme Court's jurisdiction was triggered because the issue in dispute had been canvased right through from the High Court to the Court of Appeal, even though the substantive appeal on the outcome of the election petition was still pending before the Court of Appeal.
7. In the Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others (Application 10 of 2017; [2018] eKLR) decision, the Supreme Court considered the question of whether a determination in an interlocutory application legitimately lay on appeal before the Supreme Court as of right. The Supreme Court affirmed that the question was answered in the Joho Case hence its holding that an interlocutory application which was determined by the Court of Appeal could properly lay a foundation for an appeal before the Supreme Court. However, it was noted that just like in Joho, the resolution must be of a constitutional issue canvassed before the High Court where a determination was rendered, with the decision being appealed to the Court of Appeal and then finally rising to the Supreme Court.
8. As long as the twin issues of the monetary value of the properties in dispute and the nature of the relationship between the appellant and respondent were not determined by the High Court and Court of Appeal, the appellant had not properly invoked article 163(4)(a) of the Constitution by purporting to challenge the jurisdiction of the High Court. No appeal lay before the Supreme Court as of right. As long as the aforesaid issues were not determined by the two Superior Courts, the submissions by the appellant that there were constitutional determinations by the Superior Courts were merely preemptive.

Petition struck out.

Orders

i. *The Petition of Appeal dated November 23, 2022 and filed on November 24, 2022 was struck out for want of jurisdiction.*

ii. *The amount of Kshs 6000 that was deposited in Court as security for costs be and was released to the appellant.*

iii. *Each party was to bear their 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. *Criticos, Basil v Independent Electoral and Boundaries Commission & 2 others* Petition 22 of 2014; [2015] eKLR - (Explained)
3. *Erad Suppliers & General Contractors Ltd v National Cereals & Produce Board* Petition 5 of 2012; [2012] eKLR; [2012] 2 KLR 454 - (Explained)
4. *Joho & another v Shahbal & 2 others* Petition 10 of 2013; [2014] eKLR; [2014] 1 KLR 111 - (Explained)
5. *Muriithi, Deynes & 4 others v Law Society of Kenya & another* Petition 507 of 2014; [2015] KEHC 6945 (KLR) - (Explained)
6. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] eKLR; [2012] 2 KLR 804 - (Explained)
7. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2014] eKLR; [2014] 2 KLR 253 - (Explained)
8. *Teachers Service Commission v Kenya National Union of Teachers & 3 others* Application 16 of 2015; [2015] eKLR - (Explained)
9. *Waibara, Clement Kungu v Annie Wanjiku Kibeh & another* Civil Application 31 of 2020; [2020] KESC 5 (KLR) - (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 28, 29(c)(f); 40(1)(2); 45(3); 50(1); 87(2); 163(4)(a); 165(2)(a)(3)(5) - (Interpreted)
2. Court of Appeal Rules, 2010 (cap 9 Sub Leg) rule 5 (2) (b) - (Interpreted)
3. Elections Act (cap 7) section 76(1) (a) - (Interpreted)
4. Marriage Act (cap 150) sections 2, 66(2) - (Interpreted)
5. Matrimonial Property Act (cap 152) sections 4, 6, 7, 8, 9, 12(2)(3); 17(2)(b) - (Interpreted)
6. Supreme Court Act (cap 9B) sections 3, 15A- (Interpreted)
7. Supreme Court Rules, 2020 (cap 9B Sub Leg) rule 39 - (Interpreted)

Advocates

Mr. Manyara for the appellant

June 16, 2023, the Court delivered the following Judgment:

A. Introduction

1. The petition before this court is dated November 23, 2022 and filed on November 24, 2022. The appeal is filed pursuant to the provisions of article 163(4)(a) of the *Constitution*; section 15A of the *Supreme Court Act* and rule 39 of the *Supreme Court Rules 2020*. The appeal challenges the decision of the Court of Appeal (M'inoti, Omondi & Laibuta, JJ A) in Civil Application No E416 of 2021 delivered on November 4, 2022 declining to grant the appellant orders staying execution under rule 5(2)(b) of the *Court of Appeal Rules*.

B. Background

i. Proceedings at the High Court

2. The appellant and respondent had cohabited and lived as husband and wife since 2008. The respondent claimed that from the time she started living with the respondent as her husband, she helped the appellant either directly or indirectly to acquire various assets during their cohabitation despite the assets being registered in the respondent's name. The assets included parcels of land, motor vehicles and developments made on their matrimonial home in Thome (hereinafter referred to as 'matrimonial properties'). The respondent further claims that she and the appellant were unable to bear a child despite spirited attempts on their part and for that reason, her relationship with the appellant turned sour resulting in the respondent being kicked out of their matrimonial home, eventually resulting in their separation.

3. Subsequently, the respondent instituted by way of originating summons, proceedings for enforcement of the right to matrimonial home and property in High Court Civil Suit No 1 of 2019 under the provisions of article 28, 29(c) & (f), 40 (1) & (2) and 45(3) of the *Constitution*; sections 4,6,8,9, 12(2) & (3) and 17 of the *Matrimonial Property Act 2013* and other enabling laws seeking various orders *inter alia*; a temporary injunction restraining the appellant from alienating or interfering with the matrimonial properties pending determination and hearing of the originating summons; a declaration that the matrimonial properties are such properties within the meaning of the *Matrimonial Property Act* of 2013 and were acquired by the joint funds and efforts of the appellant and respondent; and an order that the said matrimonial properties be valued and sold and the net proceeds be divided equally between the appellant and the respondent.

4. The respondent then proceeded to file a notice of motion dated October 4, 2019 seeking to amend her originating summons where she sought to include particulars of other immovable properties not listed in her originating summons as well as amendments to the effect that her marriage to the appellant was based on long cohabitation and that she wanted to rely on presumption of marriage in the division of the matrimonial property. The respondent also sought two further declarations; that the appellant and respondent be presumed married between the year 2008 and 2018 and that the marriage between the appellant and respondent be dissolved.

5. The appellant opposed the application by claiming that the proposed amendments sought to introduce a new cause of action and also ousted the jurisdiction of the High Court to hear and determine the originating summons.

6. In a ruling dated and delivered on April 30, 2020, the High Court (Muchelule, J (as he then was) exercised his discretion and allowed the notice of motion and in effect, admitted the amended originating summons. The trial judge noted that the practice obtaining is that parties who seek to divorce file a petition before the subordinate court and if they seek a declaration of their interest in any matrimonial property acquired during the marriage and subject to the value of the property, they would file the cause at the High court. He however noted that for purposes of the application for amendment before the court, though it would be desirable for parties seeking the dissolution of marriage to initially file their cause in the subordinate courts, the High Court is nonetheless clothed with unlimited original jurisdiction in criminal and civil cases under article 165(2)(a) of the *Constitution* and that under section 17(2)(b) of the *Matrimonial Property Act*, an application or a declaration of rights to any property that is contested between spouses may be made as part of a petition in a matrimonial cause.

7. The trial judge was also of the view that since the respondent was seeking as part of her prayers, the selling of the matrimonial property and the equal sharing of the proceeds of the sale therefore bringing herself under the provisions of section 7 of the *Matrimonial Property Act*, then it would be effective and in the interest of justice for all the matters to be dealt with at the High court.

ii. Proceedings in the Court of Appeal

8. Aggrieved, the appellant moved to the Court of Appeal and filed a notice of appeal expressing their intention to appeal the decision of Muchelule J (as he then was) dated April 30, 2020. It is on the basis of that notice of appeal that the appellant also filed an application under rule 5(2)(b) of the *Court of Appeal Rules* in Nairobi Civil Application No E416 of 2021 seeking orders to have the proceedings before the High Court in the ruling delivered in Family Suit No 1 0f 2019 (OS) on April 30, 2020 stayed pending the

hearing and determination of the intended appeal. The appellant's intended appeal before the Court of Appeal was anchored on the grounds that the learned judge erred in law and fact by; allowing the respondent's application and by doing so, usurped the jurisdiction of the Resident Magistrate's Court in dissolving marriages as expressly conferred by section 2 of the *Marriage Act*; entertaining the originating summons pursuant to the *Matrimonial Property Act* despite the fact that no divorce proceedings have been initiated or concluded; and by declaring that the court is clothed with jurisdiction under article 165(2)(a) of the *Constitution* to determine divorce proceedings notwithstanding that a statute has plainly ousted that jurisdiction and granted it to the Resident Magistrate's Courts.

9. In its determination, the Court of Appeal (M'Inoti, Omondi & Laibuta JJA), after considering the grounds of appeal as set out in the appellant's intended appeal noted that in determining whether the appellant's application was meritorious, the appellant had to prove that he has an arguable appeal. The appellate court was of the view that the question as to whether the applicant has an arguable appeal turns on the court's finding on the question of whether the High Court has jurisdiction to hear and determine the respondent's summons relating to their marital dispute and matrimonial property.

10. The Court of Appeal, in agreeing with the trial court, held that the High Court has unlimited original jurisdiction under article 165(3)(a) of the *Constitution* in all matters and that section 66 (2) of the *Marriage Act* does not override or oust the unlimited jurisdiction of the High Court to hear and determine matters related to the dissolution of marriages. The appellate court therefore noted that in effect, the provisions of article 165(3) of the *Constitution* supersede the provisions of section 66(2) of the *Marriage Act*.

11. It was therefore the appellate court's finding that since the value of the matrimonial property in issue is claimed to have exceeded the pecuniary jurisdiction of the Magistrate's Court which is set at Kshs 20 Million for the Chief Magistrate's Courts and coupled with the unlimited jurisdiction of the High Court, the appellant had failed to prove that he had an arguable appeal with a probability of success.

12. The Court of Appeal exercised its discretion and declined to issue the orders sought under rule 5(2)(b) of the *Court of Appeal Rules* on the grounds that the appellant had failed to show that he had an arguable appeal. Having found that there was no arguable appeal, the court found no reason to address the nugatory aspect. The appellant's notice of motion was therefore dismissed.

iii. Proceedings in the Supreme Court

13. Aggrieved by the Court of Appeal's decision, the appellant has filed an appeal before this court laying out two grounds of appeal being:

i) That the learned judges erred in finding that pursuant to article 165(3) of the *Constitution*, the High Court's unlimited and original jurisdiction in civil and criminal matters is only subject to article 165(5) and that article 165(3)(a) supersedes the express limits on jurisdiction on dissolution of marriage in the *Marriage Act*;

ii) That the learned judges erred by making conclusive, definitive and/or final findings/ pronouncements on the law as regards the jurisdiction of the High Court to hear and determine divorce matters vis a vis the express provisions of the *Marriage Act* at the interlocutory stage thus preempting the determination of the intended appeal and hence prejudicing the appellant's right to appeal.

14. The appellant now seeks the following reliefs:

i) The ruling and orders of the Court of Appeal delivered on November 4, 2022 be set aside and there be substituted thereof an order allowing Nairobi Civil Application No E416 of 2021 in terms of prayer 2;

ii) Costs of this appeal be borne by the respondent

iii) Such consequential or further orders as this honorable court may deem just.

15. In response to the petition, the respondent filed a replying affidavit dated February 2, 2023 and filed on February 3, 2023. Therein, she opposes the appeal and depones that the notice of appeal is incurably defective for targeting a non-existent decision by quoting the wrong date for the respondent's application for amendment of her originating summons.

16. The respondent also depones that the Court of Appeal's ruling is unassailable, in that the High Court is vested with unlimited jurisdiction under article 165(3)(a) of the *Constitution* to handle civil and criminal matters; that under section 17(2)(b) of the *Matrimonial Property Act*, an application for a declaration of rights to any property between spouses may be made as part of a petition in a matrimonial cause and that; considering the value of the properties contested between the appellant and the respondent exceeded Kshs 20 Million, then the High Court is by dint of article 165(3)(a) and section 17(2)(b) of the *Matrimonial Property Act*, clothed with the jurisdiction to determine the dispute.

17. In conclusion, the respondent claims that the appellant is asking this court to make a determination on the merits of his intended appeal before the Court of Appeal which would be pre-emptive and embarrass the hearing of the pending appeal by the court. The respondent therefore claims that the appeal lacks merit, is an abuse of the court process, is intended to waste the court's time and that the same should be dismissed.

C. Parties' Respective Cases

i. Appellant's

18. The appellant's submissions are dated and filed on January 24, 2023. In them, he begins by addressing the question of the court's jurisdiction to handle appeals arising out of a determination of an interlocutory application. The appellant submits that appeals arising from interlocutory applications can be determined before this court as of right and relies on the court's decisions in *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others*, SC Petition No 10 of 2013 [2014] eKLR and *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others* [2018] eKLR where in both cases, this court held that it had limited jurisdiction to handle appeals arising out of an interlocutory determination by the High court

19. The appellant in that context argues that the High Court determined the question of jurisdiction in its ruling dated April 30, 2020, when it held that though it was desirable that a party seeking the dissolution of a marriage ought to commence proceedings at the subordinate court, the High court is still clothed with unlimited jurisdiction under article 165 (3)(a) of the *Constitution* in criminal and civil cases.

20. The appellant challenges the Court of Appeal's decision by submitting that the court erred by also affirming the finding by the High Court and further holding that the provisions of section 66(2) of the *Marriage Act* do not override or oust the unlimited jurisdiction of the High Court to hear and determine matters relating to dissolution of marriages. The appellant further faults the Court of Appeal for deciding such an issue in an application filed under rule 5(2)(b) of the *Court of Appeal Rules*. The appellant argues that though this was not a final determination, the finding is precedent and binding on the lower courts and that such a finding will bring confusion to the lower courts and therefore urges the Supreme Court to determine it with finality and offer guidance on the issue of jurisdiction as an issue of law.

21. Further expounding on his grounds of appeal, the appellant submits that the High Court cannot proceed to usurp the jurisdiction accorded to other courts, which in this case is the Resident Magistrate's Court that has jurisdiction to handle matters that involve the dissolution of marriages as provided for under the *Marriage Act 2014*. The appellant argues that it was not in error or accident that Parliament conferred the jurisdiction of dissolution of marriage to subordinate courts, but that it was a deliberate attempt to cure an existing lacuna or improve the existing one. The appellant also submits that it can be argued that as a matter of fact, Parliament purposefully and knowingly ousted the jurisdiction of the High Court in divorce matters.

22. In that regard, the appellant submits that the superior courts erred by arrogating the High court's jurisdiction through craft and innovation notwithstanding the plain limitation provided in the *Marriage Act* on account that the respondent, in her originating summons, wanted to have the issues of dissolution of marriage and division of matrimonial property handled concurrently and that since the value of the matrimonial property was above Kshs 20 Million, then the High Court could handle the filed summons. The appellant submits that such an interpretation defeats the intention of the Legislature in enacting the *Marriage Act 2014* and *Matrimonial Property Act 2013*. He argues that an application for the division of matrimonial property is filed under the provisions of section 17 of the *Matrimonial Property Act* and that the same should be filed after the dissolution of marriage.

23. The appellant therefore submits that if the interpretation by the High Court and subsequently by the Court of Appeal is followed, then nothing prevents a party from consciously and deliberately filing matters in the High Court which are reserved for tribunals by quoting the provisions of article 165(3)(a) of the *Constitution*. The appellant further contends that the Court of Appeal made such firm and categorical findings on grounds that were pending determination in the intended appeal and that such pronouncements were made in an application filed under rule 5(2)(b) of the *Court of Appeal Rules*. It is his submission therefore, that such a determination not only embarrasses the fair and proper adjudication of a dispute but also infringes on the appellant's right to a fair hearing before an independent and impartial court as guaranteed under article 50(1) of the *Constitution*.

24. The appellant concludes by urging the court to exercise its jurisdiction under section 3 of the *Supreme Court Act* and provide an authoritative and impartial interpretation of the *Constitution*.

ii. Respondent

25. The respondent filed no submissions and did not appear nor was she represented at the hearing although due notice was given to her.

D. Issues for Determination

26. Flowing from the foregoing, two issues arise for our consideration:

    i) Whether there is a substantive determination of a constitutional question by the Court of Appeal to warrant the invocation of this court's jurisdiction under article 163(4)(a) of the *Constitution* and;

    ii) Whether this court has jurisdiction to hear appeals arising from interlocutory orders of the Court of Appeal under rule 5(2)(b) of the *Court of Appeal Rules*.

We shall proceed to address the two issues concurrently.

E. Analysis

27. The appellant has approached this court under article 163(4)(a) of the *Constitution* which allows appeals as of right to the Supreme Court in all cases involving interpretation and application of the *Constitution*. While this court has on numerous occasions made determinations on the extent of its powers under article 163(4)(a) of the *Constitution*, the question of the extent of this court's jurisdiction is one we need to address before engaging our minds on the determination of appeals.

28. The question as to when this court assumes appellate jurisdiction over appeals filed under article 163(4)(a) has been addressed in a number of cases with the court coming up with guiding principles. In *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another* SC Petition No 3 of 2012; 2012] eKLR we held that

> "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)."

29. This position was further entrenched in the case of *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others*, SC Petition No 10 of 2013; [2014] eKLR, where we emphasized that:

> "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*."

30. Further, in *Erad Suppliers & General Contractors Ltd vs National Cereals & Produce Board*, SC Petition No 5 of 2012 [2012] eKLR this Court held that:

> "[13A] 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."

31. From the above decisions, we reiterate that for an appeal to be properly before this court under article 163(4)(a) of the *Constitution*, the appellant must show how the Court of Appeal disposed of the matter by way of interpreting or applying particular provision[s] of the *Constitution*. Therefore, the question before us that remains to be decided is whether article 163(4)(a) of the *Constitution* grants this court jurisdiction to entertain appeals challenging the exercise of discretion by the Court of Appeal under rule 5(2)(b) of the *Court of Appeal Rules*. The appellant admits that though this appeal arises from a determination of an interlocutory application, he argues that the High Court and Court of Appeal made a determination on a constitutional matter and we should therefore seize jurisdiction and determine the merits of his appeal.

32. In that regard, the appellant argues that the Court of Appeal erred by determining an issue of jurisdiction through an interlocutory application brought under rule 5(2)(b) of the *Court of Appeal Rules*. The appellant also contends that the appeal lies as of right as the issue for determination is the interpretation of article 165(3)(a) of the *Constitution* vis-a-vis the application of sections 2 and 66 of the *Marriage Act*.

33. The respondent however contests the jurisdiction of this court to determine this appellant's appeal by urging that the appellant having confirmed that he still has an intended appeal before the Court of Appeal, is still inviting this court to make pronunciations on the merits of that intended appeal which would in effect, be pre- emptive and embarrass the hearing of the intended appeal before the Court of Appeal.

34. The appellant now seeks this court's determination on whether the Court of Appeal erred by finding that the High Court had jurisdiction to determine the originating summons filed by

the respondent relating to both their marital dispute and matrimonial property and; whether such a finding defeats the intention of the provisions of the *Marriage Act* on the dissolution of marriages and *Matrimonial Property Act* on the division of matrimonial property, as both statutes provide for the relevant procedures as well as the courts to adjudicate on such disputes.

35. We note that the Court of Appeal, in arriving at its decision, considered whether the High Court has jurisdiction to determine the originating summons filed before it by the respondent. The appellate court held;

> "To our mind, the High Court's unlimited original jurisdiction in civil and criminal matters as conferred by article 165(3) (a) is only subject to clause (5). To that extent, section 66(2) of the *Marriage Act, 2014* does not override or oust the unlimited original jurisdiction of the High Court to hear and determine matters relating to dissolution of marriages. In effect, the provision of article 165(3) of the *Constitution* supersedes section 66(2) of the *Marriage Act*.
>
> To the extent that the value of the matrimonial property in issue is claimed as exceeding the pecuniary jurisdiction of the magistrates' courts, which is set at Kshs 20,000,000 in the case of Chief Magistrate's Courts, and coupled with the unlimited jurisdiction of the High Court, we reach the inescapable conclusion that the applicant has no arguable appeal with a probability of success."

36. The decision by the Court of Appeal flows from the High Court decision where the trial court, while determining whether it had jurisdiction to determine the filed originating summons held:

> "For the purposes of this application, I consider that, although it is desirable that a party seeking the dissolution of a marriage goes to the subordinate court, this court is under article 165(2)(a) of the Constitution clothed with unlimited original jurisdiction in criminal and civil cases. Under section 17(2) (b) of the Matrimonial Property Act, an application or a declaration of rights to any property that is contested between spouses may be made as part of a petition in a matrimonial cause. And now that the applicant seeks, as part of her prayers, the selling of the property and the equal sharing of the proceeds of such sale, and therefore bringing herself under section 7 of the Matrimonial Property Act, I consider it appropriate and effectual that all these matters be dealt with in this court."

37. Flowing from the above, it is not in dispute that the superior courts made determinations on the question of jurisdiction preliminarily. It is this determination that the appellant seeks to

convince us to decide on by claiming that such pronouncements shall have a compounding effect that will lead to the High Court determining matters reserved for tribunals and subordinate courts by arrogating itself jurisdiction whereas there are statutes that specifically provide for such jurisdiction.

38. We note that in its decision, the Court of Appeal considered whether the appellant had an arguable appeal, and in doing so, considered the question of jurisdiction, which was essentially, the appellant's main ground of appeal in his intended appeal to the Court of Appeal. The learned judges of appeal aptly captured this issue when they stated:

> "On our reading of the grounds on which the applicant's motion is founded, the draft memorandum of appeal, the affidavit in support thereof, and the written and oral submissions made to us, we are of the considered view that the question as to whether the applicant has an arguable appeal turns on our finding on a single question: whether the High Court has jurisdiction to hear and determine the respondent's summons relating to their marital dispute and matrimonial property."

39. In interpreting whether the appellant's application had merit, the Court of Appeal was guided by the provisions of rule 5(2)(b) of the *Court of Appeal Rules* which provides for stay of execution of proceedings pending the determination of a pending appeal or in the appellant's case, an intended appeal. The Court of Appeal considered that to be successful, an applicant must first show that the intended appeal is arguable and not merely frivolous and that secondly, the intended appeal, if successful, will be rendered nugatory if there is impending execution of/or further proceedings from the impugned judgment. For the court to determine the first limb it must be satisfied, prima facie, that the appeal or intended appeal is arguable. That is precisely the question the court was answering here, without expressing a definitive conclusion. That can only be done in the appeal.

40. Having so said, it is not in dispute that the appeal before us is an appeal arising from the interlocutory orders of the Court of Appeal issued under rule 5(2)(b) of the *Court of Appeal Rules*. The nature of appeals arising from orders issued under rule 5(2)(b) applications filed under the *Court of Appeal Rules* has previously been determined by this court in a number of cases. In *Deynes Muriithi v the Law Society of Kenya & another*, Civil Application No 12 of 2015, this court held:

> "...the main purpose of rule 5(2)(b) applications, is that the orders issued therein are for preserving the substratum of the appeal. This means that the Court of Appeal, at that stage, has not yet determined and disposed of the appeal; it is yet to set out its reasoning, in interpretation and application of the Constitution. The Appellate Court has yet to determine the main appeal which must have been

heard at the High Court, moving on to the Court of Appeal, and then to this court."

41. Also in *Teachers Service Commission v Kenya National Union of Teachers & 3 others*, Sup Ct Civil Application No 16 of 2015, the question before the court was whether article 163(4)(a) of the *Constitution* grants this court jurisdiction to entertain appeals arising from interlocutory orders of the Court of Appeal under rule 5(2)(b) of the *Court of Appeal Rules* where the exercise of discretion by the Court of Appeal is contested. In finding that we lacked jurisdiction to handle such appeals, we held that:

> " (35) The application before us contests the exercise of discretion by the appellate court, when there is neither an appeal, nor an intended appeal pending before this court.
>
> Moreover, the appeal before the Court of Appeal is yet to be heard and determined. An application so tangential, cannot be predicated upon the terms of article 163 (4) (a) of the Constitution. Any square involvement of this court, in such a context, would entail comments on the merits, being made prematurely on issues yet to be adjudged..., Such an early involvement of this court, in our opinion, would expose one of the parties to prejudice, with the danger of leading to an unjust outcome.
>
> (36) In these circumstances, we find that this court lacks jurisdiction to entertain an application challenging the exercise of discretion by the Court of Appeal under rule 5 (2) (b) of that court's rules, there being neither an appeal, nor an intended appeal pending before the Supreme Court." Emphasis ours]

42. In reiterating the above position, we affirm that the Court of Appeal exercises discretionary powers in issuing orders under rule 5(2)(b) of its rules. In the circumstances, we note that the appeal before us arose from an interlocutory decision of the Court of Appeal challenging the exercise of discretion by the Court of Appeal under rule 5 (2) (b) of that court's rules meaning that there is no substantive appeal before us. There is also no judgment from the Court of Appeal in which constitutional issues have been analyzed and a determination issued. Indeed, in *Basil Criticos v Independent Electoral and Boundaries Commission & 2 others*, SC Petition No 22 of 2014 [2015] eKLR while interrogating an appeal against orders

by the Court of Appeal denying the extension of time where there was no judgment by the Court of Appeal, we found that:

> " [50] It is clear to us that an appeal against a Court of Appeal decision declining to extend time is not a matter falling under the purview of article 163(4) (a) of the Constitution. In the absence of a judgment by the Court of Appeal, in which constitutional issues have been canvassed, what would this court be sitting on appeal over? We have no doubt that, had this fact been openly ventilated in Court in the initial application by the applicant, the ex parte order for stay would not have issued from the single-judge bench of this court." [Emphasis ours]

43. We reiterated this finding in *Clement Kungu Waibara v Annie Wanjiku Kibeh & another*, SC Civil Application No 31 of 2020 [2020] eKLR where while answering the question posed on what this court would be sitting on appeal over in the absence of a judgment by the Court of Appeal, we went on to find:

> " (12) Without a judgment of the Court of Appeal which would then create a finality to contested issues and then point parties to the specific limb in article 163(4) to which our intervention would be required, we cannot see how our jurisdiction under that article can be properly invoked."

44. We have restated the law on our jurisdiction elsewhere in this judgment as well as our findings in our decisions on the issue of interlocutory appeals to demonstrate that appeals from rulings of the Court of Appeal under rule 5(2)(b) cannot be disguised as appeals under article 163(4)(a) as such appeals are anchored on intended appeals that are yet to be heard and determined. On this basis, we decline the invitation by the appellant to find that we have jurisdiction to determine this appeal.

45. Before we conclude, and for clarity, we would like to distinguish this court's finding on lack of jurisdiction to handle appeals arising from interlocutory decisions of the Court of Appeal where there is no substantive appeal pending before us to that where we have assumed jurisdiction in appeals arising from interlocutory applications originating from the High court, through to the Court of Appeal and finally to this court. Of relevance are our decisions in *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others*, SC Petition No 10 of 2013 [2014] eKLR and *Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others*, SC Application No 10 of 2017; [2018] eKLR.

46. In the *Joho* case, the issue for determination before the High Court that was presented by way of an application was on the constitutionality of section 76(1)(a) of the *Elections Act* in line with article 87(2) of the *Constitution* where the parties invited the High court to exercise its jurisdiction as conferred by article 165(3)(d)(i) to interpret *Constitution* and determine the validity of this provision of the the *Elections Act*. The High Court exercised its jurisdiction and rendered a decision which was then appealed to the Court of Appeal and ultimately, to the Supreme Court. This court therefore made a determination that it had jurisdiction as the appeal emanated from a substantive determination of a constitutional question by the Court of Appeal. This court's jurisdiction was triggered because the issue in dispute had been canvased right through from the High Court to the Court of Appeal, even though the substantive appeal on the outcome of the election petition was still pending before the Court of Appeal.

47. In the *Bia Tosha* decision, we considered the question of whether a determination in an interlocutory application legitimately lies on appeal before this court as of right. The court affirmed that this question was answered in the *Joho* case hence its holding that an interlocutory application which is determined by the Court of Appeal could properly lay a foundation for an appeal before this court. However, we noted that just like in *Joho*, the resolution must be of a constitutional issue canvassed before the High Court where a determination is rendered, with the decision being appealed to the Court of Appeal and then finally rising to the Supreme Court.

48. In conclusion, we find that as long as the twin issues of the monetary value of the properties in dispute and the nature of the relationship between the appellant and respondent were not determined by the two superior courts, the appellant has not properly invoked article 163(4)(a) of the *Constitution* by purporting to challenge the jurisdiction of the High Court. In the circumstances, no appeal lies before us as of right. Further, as long as the aforesaid issues were not determined by the two superior courts, the submissions by the appellant that there were constitutional determinations by the superior courts are merely preemptive.

Costs

49. On costs, the principle that costs follow the event is the general rule in this court as we so held in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, SC Petition No 4 of 2012 [2014] eKLR. However, noting the nature of the appeal before us; the fact that the respondent did not appear and noting that the main suit is still pending before the High Court, we deem it fit that each party should bear its costs hereof.

F. Orders

50. From the foregoing analysis, we make the following orders:

i. The petition of appeal dated November 23, 2022 and filed on November 24, 2022 is hereby struck out for want of jurisdiction.

ii. The amount of Kshs 6000/= deposited in court as security for costs be and is hereby released to the appellant.

iii. Each party shall bear their costs of the appeal.

51. It is accordingly ordered.

Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment)

Supreme Court of Kenya

MK Koome, CJ & P, SC Wanjala, N Ndungu, I Lenaola & W Ouko, SCJJ

Neutral citation: [2023] KESC 40 (KLR)

Jurisdiction *- jurisdiction of the High Court - jurisdiction of the High Court in judicial review matters - jurisdiction to conduct merit review - when could the High Court excising its judicial review jurisdiction carry out a merit review of a case - whether the High Court could conduct a merit review where in a judicial review matter there were claims of violations of constitutional provisions - Civil Procedure Rules, 2010, order 53.*

Judicial Review *- judicial review under the Constitution - nature of judicial review under the Constitution - what was the nature of judicial review under the Constitution - whether the scope of judicial review under the Constitution included a merit review as opposed to a strict process review on the manner in which a decision was made or an action was undertaken.*

Constitutional Law *- fundamental rights and freedoms - enforcement of fundamental rights and freedoms - right to access information - nature of the right to access information - what were the requirements to be met for the enforcement of the right to access information held by another person and required for the exercise or protection of a right or fundamental freedom - Constitution of Kenya, 2010 article 35; Access to Information Act,(cap 7M), sections 2 and 4.*

Jurisdiction *- jurisdiction of courts - jurisdiction when reviewing prosecutorial powers - what were the guidelines to be considered by courts when reviewing prosecutorial powers.*

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

Civil Practice and Procedure *- doctrine of mootness - nature of the doctrine of mootness - what was the nature of the doctrine of mootness - existence of a live controversy between litigants - whether a matter had been overtaken by events - whether there was a live controversy where a decision to prosecute had already been made and orders were being sought to prevent the arrest and charging of suspects.*

Words and Phrases *- judicial review - definition of judicial review - a court's power to review the actions of other branches or levels of government; especially the court's power to invalidate legislative and executive actions as being unconstitutional; the constitutional doctrine providing for this power; a court's review of a lower courts or an administrative body's factual or legal findings; Black's Law Dictionary, 9th Edition.*

Brief facts

The 1st to 3rd appellants were senior employees of the 3rd respondent, a subsidiary of British American Asset Managers Company (K) Ltd (Britam). Sometime in 2013 and during the course of the appellants' employment, the 3rd respondent entered into a joint-venture project with Acorn Group Limited (Acorn) for the development of real estate and other business ventures, within Nairobi County and elsewhere.

A dispute arose between Britam and the appellants resulting in the resignation of the 1st to 3rd appellants. Subsequently, the 1st to 3rd appellants formed a rival company, the 4th appellant. As a consequence, the 3rd respondent instituted various civil suits against the appellants and Acorn seeking restitution of funds allegedly fraudulently transferred by the 1st to 3rd appellants to Acorn and its affiliates without its approval. The 3rd respondent also lodged complaints against the appellants with their various professional bodies. In addition, criminal proceedings against the appellants were instituted upon complaints lodged by the 3rd respondent. Aggrieved, the appellants filed two judicial review applications and a constitutional petition at the High Court. The suits were determined separately.

Judicial Misc Case No 435 of 2014, *Republic v Director of Criminal Investigation Department & 4 others Ex-Parte Edwin Harold Dayan Dande & 4 others*

The appellants sought an order of prohibition to prohibit the 1st respondent, Inspector General of the Police National Police Service (Inspector General) and the 2nd respondent, Director of Criminal Investigation Department (DCI) from arresting, harassing, and or otherwise interfering with their liberty and property. The remedies sought were premised on *inter alia* grounds that the Inspector General and DCI had ulterior motives in arresting them which amounted to abuse of power by the latter and that the manner in which they were handled during arrest, interrogation, and process leading to the decision to charge them by the 4th respondent, the Director of Public Prosecution (DPP) was discriminatory, unfair and irrational.

The High Court declined to grant the reliefs sought by the appellants stating that it would be pre-emptive and presumptuous to do so as the DPP was yet to make any decision on the matter. The court nonetheless issued an order prohibiting the Inspector General and DCI from taking any action in the nature of criminal proceedings until the DPP had determined whether to charge the appellants or not. Subsequently, the DPP decided to institute criminal proceedings in which the appellants were charged with two counts of theft by servant. Consequently, the 1st to 3rd appellants filed another judicial review application.

Judicial Review Application No 8 of 2017, *Republic v Director of Public Prosecutions & 2 Others Ex Parte Edwin Harold Dayan Dande & 3 Others*

In the application, the 1st - 3rd appellants applied for orders of *certiorari* to quash the decision of the DPP to institute criminal proceedings against them as well as the resultant criminal proceedings and prohibition barring the Chief Magistrate's Court from hearing and determining the criminal

case. The prayers were premised on *inter alia* grounds of abuse of power and unreasonableness by the DPP. They also claimed that the decision to prosecute them was in contravention of the order made by the High Court in Judicial Review Application No 435 of 2014 staying their arrest and prosecution pending the determination of their application for stay of execution. The High Court dismissed the appellants' case and stated that the power to quash criminal proceedings should only be exercised in exceptional cases.

Petition No 539 of 2016, *Edwin Harold Dayan Dande & 3 others v British American Investments Co (K) Ltd & another*

The 1st to 3rd appellants in the petition prayed for a declaration that the respondents violated their right to access information and an order compelling the respondents to provide them with the settlement agreement entered into between the 3rd respondent and Acorn in HCCC Nos 352, 353, 354, 361, and 362 of 2014; the forensic audit performed by KPMG on the books of the 3rd respondent; and the legal audit performed by Messrs Coulson Harney, Advocates. The prayers were premised on the grounds *inter alia* that the information and documents sought were for the vindication of the appellants' rights to human dignity and for the correction or deletion of untrue or misleading information affecting them. The High Court held that the appellants' rights to access information were violated and issued an order compelling the respondents to provide them with the documents sought.

The three decisions of the High Court triggered the same number of appeals at the Court of Appeal.

Civil Appeal No 246 of 2016, *Edwin Harold Dayan Dande & 4 others v Inspector General, National Police Service & 2 others*

The appeal was against the judgment of the High Court in Judicial Review Misc Application No 435 of 2014. The Court of Appeal dismissed the appeal and agreed with the findings of the High Court that the settled standards of judicial review known to Kenya's realm limit a judicial review court's intervention in any application for a merit review. In addition, it determined that, since no decision had at that point in time been made to charge the appellants, any such findings by the High Court would not only have been prejudicial but also in direct contravention of the constitutional provisions on the independence of the Inspector General and DCI in the investigation of crimes.

Civil Appeal No 378 of 2018, *Edwin Harold Dayan Dande & 3 others v Director of Public Prosecutions & 2 others*

The appeal was against the decision of the High Court in Judicial Review Application No 8 of 2017. The Court of Appeal held that the appeal was devoid of merit and dismissed it with costs on the main ground that there was no order of stay by any court directed at the DPP barring or prohibiting him from instituting a criminal case against the appellants as at the time he decided to charge them.

Civil Appeal No 147 of 2019, *British American Investments Co (K) Ltd & Another v Edwin Harold Dayan Dande & 3 others*

The 3rd respondent and the 6th respondent filed the appeal seeking that the judgment and decree of the High Court in Petition No 539 of 2016 be set aside and substituted with an order dismissing the

appellants' petition with costs. The Court of Appeal allowed the appeal with costs holding that the trial court erred in granting the orders sought. The court observed that a party seeking information from a private entity needed to show the right he sought to exercise or protect, the information which was required in order to exercise or protect the right, and how that information would assist him in exercising or protecting the right. The Court of Appeal further observed that a party requesting information from a private person must place before the court a demonstrable and sufficient link between the right sought to be exercised or protected and the information requested.

Dissatisfied by the judgments of the Court of Appeal, the instant consolidated appeal was filed before the Supreme Court.

Issues

i. When could the High Court in exercising its judicial review jurisdiction carry out a merit review of a case?
ii. What was the nature of judicial review under the Constitution of Kenya, 2010?
iii. What were the requirements to be met for the enforcement of the right to access information held by another person and required for the exercise or protection of a right or fundamental freedom?
iv. What was the nature of the right to access information?
v. What were the guidelines to be considered by courts when reviewing prosecutorial powers?
vi. What were the requirements for one to appeal to the Supreme Court as of right in any matter involving the interpretation or application of the Constitution?
vii. What was the nature of the doctrine of mootness?

Held

1. An appeal lay to the court under article 163(4)(a) of the Constitution of Kenya, 2010 (Constitution), if the issues placed before it revolved around the interpretation and application of the Constitution and the interpretation or application of the Constitution had formed the basis for the determinations at the superior courts below the court and the same issue had therefore progressed through the normal appellate mechanism to reach the court.
2. From a perusal of the record, the issues before the superior courts revolved around the interpretation and application of the Constitution. The basis of the superior courts' decisions revolved around the interpretation and application of the Constitution, and therefore, the appellants had properly invoked the jurisdiction of the court under article 163(4)(a) of the Constitution.
3. The doctrine of mootness required that controversy had to exist throughout judicial proceedings including at the appellate level. An appeal or an issue was moot when a decision would not have the effect of resolving a live controversy affecting or potentially affecting the rights of parties. Such a live controversy must be present not only when the action or proceeding was commenced but also when the court was called upon to reach a decision.

The doctrine of mootness was therefore based on the notion that judicial resources ought to be utilized efficiently and should not be dedicated to an abstract proposition of law and that courts should avoid deciding on matters that were abstract, academic, or hypothetical.

4. There existed no live controversy on the question of restraining the Inspector General, DCI and DPP from arresting and charging the appellants as the adverse decision to prosecute the appellants had already taken place and on the existing facts, there was no imminent threat to arrest or charge the appellant again.

5. Judicial review was introduced to Kenya from England in 1956 through sections 8 and 9 of the Law Reform Act, Cap 26. The jurisdiction to hear and determine judicial review was then vested in the High Court. Under that system, the High Court could issue orders of *mandamus*, prohibition, and *certiorari*. The grounds for the issuance of such orders were borrowed from common law. Prior to the promulgation of the Constitution of Kenya, 2010, there were two legal foundations for the exercise of the judicial review jurisdiction by the Kenyan courts found in sections 8 and 9 which constituted the substantive basis for judicial review of administrative actions on the one hand, and, order 53 of the Civil Procedure Rules which was the procedural basis of judicial review of administrative actions, on the other hand.

6. The entrenchment of judicial review under the Constitution of Kenya, 2010 elevated it to a substantive and justiciable right under the Constitution. Accordingly, judicial review was no longer a strict administrative law remedy but also a constitutional fundamental right enshrined in the Constitution. Thus, article 47 of the Constitution provided that every person had a right to an administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair.

7. The entrenchment of judicial review in the Constitution had led to the emergence of divergent views on the scope of judicial review. The first group postulated that judicial review was concerned with the process a statutory body employed to reach its decision and not the merits of the decision itself while the second group opined that under the current constitutional dispensation, courts could delve into both procedural and merit review in resolving disputes.

8. When a party approached a court under the provisions of the Constitution then the court ought to carry out a merit review of the case. However, if a party filed a suit under the provisions of order 53 of the Civil Procedure Rules and did not claim any violation of rights or even violation of the Constitution, then the court could only limit itself to the process and manner in which the decision complained of was reached or action taken and not the merits of the decision *per se*.

9. The appellants invoked the judicial review jurisdiction of the High Court alleging that their rights to among others, fair administrative action under article 47 of the Constitution were violated, and applied for judicial review orders under article 23 of the Constitution. The appellants had clothed their grievances as constitutional questions believing that their

fundamental rights had been violated. Therefore, that required the superior courts to conduct a merit review of the questions before them and dismissal of their plea as one requiring no merit review was misguided.

10. A court could not issue judicial review orders under the Constitution if it limited itself to the traditional review known to common law and codified in order 53 of the Civil Procedure Rules. The dual approach to judicial review existed but that approach must be determined based on the pleadings and procedure adopted by parties at the inception of proceedings.

11. The Office of the Inspector General of the National Police Service was established under article 245(1) of the Constitution. The power to investigate crimes was vested in the Inspector General by dint of article 245(4). Article 243(1) of the Constitution established the National Police Service, and the National Police Service Act gave full effect to that article. From a review of the constitutional and statutory provisions therein, the Inspector General and the Director, DCI had the mandate to perform multi-faceted functions as provided under articles 244 and 245 of the Constitution.

12. A court should only interfere with the powers granted to the Inspector General and the DCI under articles 244 and 245 of the Constitution and under the provisions of the National Police Service Act if the constitutional and statutory provisions were not adhered to or if the actions were illegal and unlawful.

13. A perusal of the record confirmed that even though the appellants alleged abuse of power by the Inspector General and DCI, no evidence was brought forth to prove that they actually acted beyond their constitutional mandate or that their actions amounted to an abuse of office. The appellants did not prove that the Inspector General and DCI abused their investigative or arrest powers as conferred by the Constitution and statute.

14. The Office of Director of Public Prosecution was established under article 157 of the Constitution. The functions of the DPP were provided for under article 157(6). The Constitution provided an inbuilt limitation on the powers of the DPP under article 157(11) which provided that in exercising the powers conferred by the article, the DPP 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.

15. Article 157(10) of the Constitution anticipated the independence of the office of the DPP in the performance of its constitutional obligation, providing that in the exercise of its powers or functions, it shall not be under the direction or control of any person. That was important as it protected the integrity of a criminal process.

16. The following guidelines were to be considered by courts when reviewing prosecutorial powers;
    1. 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
    2. where it manifestly appeared that there was a legal bar against the institution or continuance of the 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.
17. The record revealed that the appellants did not provide any evidence to prove that the Office of the DPP did not meet the expectations required of it under article 157(11) of the Constitution or that the action to prosecute them amounted to abuse of the process of the court. At the time of instituting the criminal proceedings, there was no legal bar preventing them from prosecuting the appellants. The charges the accused were facing constituted offences under the laws of Kenya and therefore, it was proper that they be subjected to the due process of the law. Their innocence was intact and there was no apparent risk that they would not face a fair trial where the duty lay on the DPP to prove their culpability.
18. From section 193A of the Criminal Procedure Code, both civil and criminal jurisdictions could run parallel to each other and neither could stand in the way of the other unless either of them was being employed to perpetuate ulterior motives or generally to abuse of the process of the court in whatever manner. The circumstances in the Jirongo v Soy Developers Ltd & 9 others (Petition 38 of 2019) [2021] KESC 32 (KLR) (16 July 2021) (Judgment), (*Jirongo* case) were different from the instant case. In the *Jirongo* case, it was proved that the criminal case was instituted to force the accused person's hand to compromise the civil case between him and the complainant. Such unlawful action should not and could not be tolerated. However, in the instant case, the appellants did not prove that the same was perpetuated for ulterior motives or amounted to an abuse of the court process or office.
19. The right to access to information was a fundamental right upon which other rights guaranteed in the Bill of Rights could be realized. That right encompassed the right to seek and receive information and was guaranteed to every citizen. Traditionally, the right to access to information had been utilized to render public authorities accountable and to promote transparency in the public sector. However, there had been a paradigm shift in substantial measures from the demand for information from public bodies to private bodies and that was an important guard against abuses, mismanagement, and corruption. Therefore, the

codification of the right to information from private bodies in the Constitution was one of the major milestones in the protection of the right to access to information.

20. Article 35 of the Constitution provided for the right to access to information. Similarly, section 4 of the Access to Information Act, No 31 of 2016 which was enacted to give effect to the rights under article 35 provided for the right of access to information held by the State and information held by another person and was required for the exercise or protection of any right or fundamental freedom. The right to access to information was also contained in several international conventions and treaties ratified by Kenya.

21. The Access to Information Act defined both a public body and a private body under section 2. Under article 35(1)(b) of the Constitution, the right to access to information was not unlimited because a requester must, as a prerequisite, establish that he or she wished to exercise or protect a right and that access to the record was required in order to exercise or protect that right. A requester seeking to enforce his right under article 35(1)(b) needed to demonstrate the right to be protected; and that access to the information was required to exercise or protect that right. The appellants properly identified the rights that they sought to protect. The appellants did not establish a demonstrable link between the rights they intended to exercise or protected and the information requested.

Appeals partly allowed.

Orders

i. *The appeal was moot in regard to the issue of prohibition of the 1st and 2nd respondents from arresting and charging the appellants.*

ii. *Appeal No 6 (E007) of 2022 dated March 24, 2022 was disallowed save for a declaration that judicial review proceedings brought under the provisions of the Constitution must involve a review of merits.*

iii. *Appeal No 4 (E005) of 2022 dated March 9, 2022 was disallowed.*

iv. *Appeal No 8 (E010) of 2022 dated April 12, 2022 was disallowed.*

v. *The appellants were to bear the costs of all the three appeals to be paid to the 1st, 2nd, 3rd, 4th and 6th respondents.*

vi. *The court directed that the sum of Kshs 6,000 be deposited as security for costs in each of the appeals therein be refunded to the appellants.*

Citations

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Kenya

1. *Anarita Karimi Njeru v Republic* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR) - (Applied)

2. *Attorney General v Kituo Cha Sheria & 7 others* Civil Appeal 108 of 2014; [2017] KECA 773 (KLR) [2017] eKLR - (Applied)

3. *Attorney-General & 2 others v Ndii & 79 others; Prof Rosalind Dixon & 7 others (Amicus Curiae)* Petitions 12, 11 & 13 of 2021; [2022] KESC 8 (KLR) (Consolidated) - (Explained)
4. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petitions 14, 14A, 14B & 14C of 2014; [2015] KESC 13 (KLR)[2014] eKLR (Consolidated) - (Explained)
5. *Dande & 3 others v Director of Public Prosecutions & 2 others* Civil Appeal 378 of 2018; [2022] KECA 102 (KLR) - (Explained)
6. *Dande, Edwin Harold Dayan & 3 others v Director of Public Prosecutions* Judicial Review 8 of 2017; [2017] KEHC 5858 (KLR) - (Explained)
7. *Erad Suppliers & General Contractors Ltd v National Cereals & Produce Board* [2012] 2 KLR 454 - (Applied)
8. *Institute for Social Accountability & another v National Assembly & 3 others & 5 others* Petition 1 of 2018; [2022] KESC 39 (KLR) - (Explained)
9. *Jirongo v Soy Developers Ltd & 9 others* Petition 38 of 2019; [2021] KESC 32 (KLR) - (Applied)
10. *Joho & another v Shahbal & 2 others* [2014] 1 KLR 111 - (Explained)
11. *Judicial Service Commission & another v Njora* Civil Appeal 486 of 2019; [2021] KECA 366 (KLR) [2021] eKLR - (Applied)
12. *Khalid, Hussein & 16 others v Attorney General & 2 others* Petition 21 of 2017; [2019] eKLR - (Applied)
13. *Mahamud, Mohamed Abdi v Ahmed Abdullahi Mohamad & 3 others* Election Appeal 2 of 2018; [2018] KECA 677 (KLR)[2018] eKLR - (Explained)
14. *Maina & 4 others v Director of Public Prosecutions & 4 others* Constitutional Petition E106 & 160 of 2021 (Consolidated); [2022] KEHC 15 (KLR) - (Applied)
15. *Meixner & another v Attorney General* Civil Appeal 131 of 2005; [2005]1 KLR 189 - (Applied)
16. *Moracha, Martha Kerubo v University of Nairobi* Petition 459 of 2016; [2016] eKLR - (Applied)
17. *Muthiga, Benson Wachira v Nairobi City County Public Service Board & another* Petition 74 of 2015; [2015] eKLR - (Applied)
18. *Nairobi Law Monthly Company Ltd v Kenya Electricity Generating Company & 2 others* Petition 278 of 2011; [2013] eKLR - (Applied)
19. *Ndung'u, Njuguna S v Ethics & Anti-Corruption Commission (EACC) & 3 others* Civil Appeal 333 of 2014; [2018] KECA 47 (KLR) [2018] eKLR - (Applied)
20. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] KESC 9 (KLR); [2012] 2 KLR 804 - (Explained)
21. *Njeru, Anarita Karimi v Republic* Miscellaneous Criminal Application 4 of 1979; [1979] KEHC 30 (KLR) [1979] eKLR - (Applied)

22. *Njoya, Timothy M & 6 others v Attorney General & 4 others* Miscellaneous Civil Application 82 of 2004; [2004] KEHC 1467 (KLR)[2004] eKLR - (Explained)
23. *Nyawade, Mercy v Banking Fraud Investigations Department & 2 others* Petition 143 of 2017,[2017] eKLR - (Explained)
24. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2013] KESC 20 (KLR); [2013] 2 KLR 142 - (Explained)
25. *Republic v Commissioner of Police & another ex-parte Michael Monari & another* Judicial Review 68 of 2011; [2012] KEHC 4595 (KLR) [2012] eKLR - (Mentioned)
26. *Republic v Director of Public Prosecutions & 2 others; Evanson Muriuki Kariuki (Interested Party); ex parte James M Kahumbura* Judicial Review 298 of 2018; [2019] KEHC 8824 (KLR) [2019]eKLR - (Applied)
27. *Saisi & 7 others v Director of Public Prosecutions & 2 others* Petition 39 & 40 of 2019 (Consolidated); [2023] KESC 6 (KLR) - (Explained)
28. *SGS Kenya Limited v Energy Regulatory Commission & 2 others* Petition 2 of 2019; [2020] KESC 64 (KLR) [2020] eKLR - (Explained)
29. *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others* Civil Appeal 46 of 2012; [2016] KECA 729 (KLR) [2016] KLR - (Applied)

South Africa

1. *Afriform NPC and others v Eskom Holdings SOC Limited & others* (99984/2015) [2017] ZAGPPHC 199; [2017] 3 All SA 663 - (Explained)
2. *Brummer v Minister for Social Development & others* (CCT 25/09) [2009] ZACC 21 - (Applied)
3. *Cape Metropolitan Council v Metro Inspection Services Western Cape CC and others* (10/99) (2001) ZASCA 123 - (Applied)
4. *M&G Media Ltd and Others v 2010 FIFA World Cup Organising Committee South Africa Ltd and Another* 2011 (5) SA 163 (GSJ) - (Explained)

United Kingdom

Regina v Director of Public Prosecutions ex parte Kebeline and others [1999] 4 All ER 801 - (Applied)

India

1. *Arnab Rajan Goswami v Union of India,* (2020) 14 SCC 12 - (Applied)
2. *Mohammed Zubair v State of Nct of Delhi,* Writ Petition (Criminal) No 279 of 2022 - (Applied)

Canada

Borowski v Canada (Attorney General) [1989] 1 SCR 342 - (Explained)

Texts

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2. Ryan, M., Foster, S (2014), *Unlocking Constitutional and Administrative Law* Oxfordshire: Routledge pp 506

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Kenya

1. Access to Information Act (cap 7M) section 4(1)(b) - (Interpreted)
2. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 53 - (Interpreted)
3. Constitution of Kenya articles 22, 23(3)(f); 28; 32(2); 35(1)(b); 47; 48; 50; 157(10)(11); 163(4)(a); 165(3)(b); 244; 245(4); 259 - (Interpreted)
4. Law Reform Act (cap 26) sections 8, 9- (Interpreted)
5. National Police Service Act (cap 84) section 28- (Interpreted)
6. Supreme Court Act (cap 9B) section 15(2)- (Interpreted)
7. Supreme Court Rules, 2020 (cap 9B Sub Leg) rules 3(5); 31; 32 - (Interpreted)

Instruments

1. African Charter on Human and Peoples' Rights (Banjul Charter), 1981 article 9(1)
2. International Covenant on Civil and Political Rights (ICCPR), 1966 article 19(2)

Advocates

Prof. Ojienda Senior Counsel and *Ms. Awuor* for the appellants (Prof. Tom Ojienda & Associates)
Ms. Mwanza and *Ms. Ngalyuka* for the 1st, 2nd & 4th respondents (Office of the Director of Public Prosecutions)
Mr. Ngatia Senior Counsel for the 3rd & 6th respondents (Ngatia & Associates Advocates)

June 16, 2023, the Court delivered the following Judgment:

A. Introduction

1. The appellants filed three petitions of appeal before this court dated March 24, 2022, March 9, 2022 and April 12, 2022 pursuant to the provisions of article 163(4)(a) of the *Constitution*, section 15(2) of the *Supreme Court Act* No 7 of 2011 and rules 3(5), 31 & 32 of the *Supreme Court Rules, 2020*. The appeals arise out of the Judgments of the Court of Appeal at Nairobi (Makhandia, Ngugi & Nyamweya JJA) in Civil Appeal Nos 246 of 2016, 378 of 2018, and 147 of 2019 delivered on February 18, 2022, February 4, 2022, and March 4, 2022, respectively.

B. Background

2. The 1st - 3rd appellants were senior employees of British American Asset Managers Limited (BAAM), a subsidiary of British American Asset Managers Company (K) Ltd (Britam), responsible for Unit Trusts, Discretionary Portfolios, Cash Management Solutions, and Alternative Investments. At all material times, the 1st appellant was the Chief Executive

Officer, the 2nd appellant was the Senior Portfolio Manager and the 3rd appellant was the Assistant Company Secretary.

3. Sometime in 2013 and during the course of the appellants' employment, BAAM entered into a joint-venture project with Acorn Group Limited (Acorn) for the development of real estate and other business ventures, within Nairobi County and elsewhere. Acorn was to be responsible for the real estate development activities while BAAM was to be responsible for real estate finance and exit activities. It was also a term in the agreement that BAAM would acquire a 25% stake in Acorn with two seats on the Board and committee membership for oversight purposes. Thus, Acorn and BAAM became the special purpose vehicles for the sole purpose of executing specific projects.

4. Following the joint-venture agreement, BAAM successfully carried out several Investments and even launched the BAAM Cash Management System. However, when it attempted to launch the real estate business, the same was allegedly not received well by Dr Wairegi, the then Managing Director of Britam, who thought that the real estate should have been launched by Britam and not BAAM. In several instances therefore, Britam communicated its misgivings about BAAM's cooperation with Acorn alleging among other things that, Acorn was not an expert in real estate.

5. Soon thereafter, a dispute arose between Britam and the appellants. The main issue in contention was whether the 1st - 3rd appellants, as managers of BAAM, could commence any real estate project and sign agreements directly with BAAM clients without any benefit to Britam shareholders. As a result of the dispute, the 1st - 3rd appellants resigned from Britam on various dates between August and September 2014. Subsequently, the 1st - 3rd appellants formed a rival company, Cytonn Investments Limited (the 4th respondent).

6. As a consequence, BAAM instituted various civil suits against the appellants and Acorn on or about October 2014, seeking restitution of funds allegedly fraudulently transferred by the 1st - 3rd appellants to Acorn and its affiliates without BAAM's approval under the guise of investing in real estate as part of the joint venture aforesaid. BAAM also lodged complaints against the appellants with various professional bodies to which they belonged, namely the Advocates Disciplinary Committee, the Certified Financial Analyst Institute (CFA) and the Institute of Certified Public Accountants (ICPAK). In addition, criminal proceedings against the appellants were instituted upon complaints lodged by BAAM.

i. Proceedings at the High Court

7. Aggrieved, the appellants filed two judicial review applications and a constitutional petition at the High Court in Nairobi. The suits were subsequently determined separately. The details of those suits are set out hereunder.

a. Judicial Misc Case No 435 of 2014, Republic v Director of Criminal Investigation Department & 4 others Ex-Parte Edwin Harold Dayan Dande & 4 others.

8. The appellants sought an order of prohibition to prohibit the Inspector General of the Police National Police Service (Inspector General) and Director of Criminal Investigation Department (DCI) from arresting, harassing, and or otherwise interfering with their liberty and property. They also sought an order of *mandamus* to compel the Inspector General and DCI to return cell phones impounded from them. The remedies sought were premised on inter alia grounds that the Inspector General and DCI had ulterior motives in arresting them which amounted to abuse of power by the latter and that the manner in which they were handled during arrest, interrogation, and process leading to the decision to charge them by the Director of Public Prosecution (DPP) was discriminatory, unfair and irrational.

9. In a judgment dated September 14, 2016, Odunga J (as he then was), declined to grant the reliefs sought by the appellants stating that it would be pre- emptive and presumptuous to do so as the DPP was yet to make any decision on the matter. The court, furthermore, while declining to grant the orders in the manner sought by the appellants nonetheless issued an order prohibiting the Inspector General and DCI from taking any action in the nature of criminal proceedings until the DPP had determined whether to charge the appellants or not.

10. Subsequently, on or about November 4, 2016, the DPP decided to institute criminal proceedings in Nairobi Chief Magistrates Criminal Case No 1735 of 2016 *Republic v Edwin Harold Dande, Elizabeth Nailantei Nkukuu, Patricia Njeri Wanjama & Shiv Anoop Arora* in which the appellants were charged with two counts of theft by servant under section 281 of the Penal Code in the sums of Kshs 1,161,465,388 and Kshs 10,132,368.50.

11. Consequent to the above action and pursuant to leave granted on February 1, 2017, the 1st - 3rd appellants filed another judicial review application as below.

b. Judicial Review Application No 8 of 2017, Republic v Director of Public Prosecutions & 2 others ex parte Edwin Harold Dayan Dande & 3 Others

12. In the above application, the 1st - 3rd appellants applied for orders of certiorari to quash the decision of the DPP to institute criminal proceedings against them as well as the resultant proceedings in Criminal case No 1735 of 2016 *Republic v Edwin Harold Dayan Dande & 3 others*, and prohibition barring the Chief Magistrate's court from hearing and determining the criminal case. These prayers were premised on inter alia grounds of abuse of power and unreasonableness by the DPP. They also claimed that the decision by the DPP to prosecute them was in contravention of the order made by the High Court in Judicial Review Application No 435 of 2014 on November 1, 2016 staying their arrest and prosecution pending the determination of their application for stay of execution.

13. In a judgment delivered on September 11, 2018, Mativo J (as he then was), dismissed the appellants' case. While underscoring the point that the power to quash criminal proceedings amounted to the exoneration of a suspect before trial, the learned judge stated that such power should only be exercised in exceptional cases where there was clear evidence of abuse of power, abuse of discretion, or absence of any and obvious factual basis to mount the prosecution. The court also held that, determining the veracity of evidence against accused persons was a preserve of the trial court and that the High Court's intervention could only be invoked if there were clear constitutional violations. The court further observed that the appellants' pursuit of two applications in two separate courts seeking the same reliefs constituted an abuse of the court process. It also held that the appellants had not demonstrated that the DPP did not act independently and that there was no evidence or factual basis to justify a prosecution.

14. Correspondingly, after the institution of Criminal case No 1735 of 2016 *Republic v Edwin Harold Dayan Dande & 3 others*, the appellants' advocates requested for copies of a forensic audit carried out by KPMG and legal audit by Messrs Coulson Harney, Advocates, together with settlement agreements between the respondents and Acorn Group Limited which were recorded in HCCC Nos 352, 353, 354, 361, and 362 of 2014. They stated that they required the information to exonerate themselves in the criminal proceedings instituted by the DPP. The letter did not solicit any response. Unrelenting, the appellants filed a constitutional petition at the High Court in a bid to obtain that information.

c. Petition No 539 of 2016, *Edwin Harold Dayan Dande & 3 others v British American Investments Co (K) Ltd & another*

15. The 1st -3rd appellants in the above petition prayed for a declaration that the respondents violated their right to access information under article 35(1)(b) of the *Constitution* and section 4(1)(b) of the *Access to Information Act* No 31 of 2016; an order compelling the respondents to provide them with the settlement agreement entered into between the 3rd respondent and Acorn in HCCC Nos 352, 353, 354, 361, and 362 of 2014 which formed the basis of the court orders given on October 22, 2015 by Mbogholi Msagha, J; the forensic audit performed by KPMG on the books of the 3rd respondent as was mentioned in paragraph 5 of Ms Carol Akinyi Ouko-Misiko's witness statement sworn on October 27, 2014 and filed in HCCC No 354 of 2014; and the legal audit performed by Messrs Coulson Harney, Advocates, of all transactions handled by the appellants referred to in paragraph 17 of Jude Anyiko's affidavit sworn on October 27, 2016 and filed in HCCC No 354 of 2014.

16. The prayers were premised on the grounds inter alia that the information and documents sought were for the vindication of the appellants' rights to human dignity under article 28 of the *Constitution* and for the correction or deletion of untrue or misleading information

affecting them under article 35(2) of the *Constitution*. The appellants further averred that the charges brought against them in Criminal Cause No 1735 of 2016 related to the very sums that the respondents claimed in the civil suits, and that without access to the information, they could not adequately prepare their defence thus denying them a reasonable opportunity to a fair hearing.

17. Vide a judgment dated February 22, 2019, Mwita, J held that the appellants' rights to access information under article 35(1)(b) of the *Constitution* as read with section 4(1)(b) of the *Access to Information Act* No 31 of 2016 were violated and issued an order compelling the respondents to provide them with the documents sought plus costs of the petition. The learned judge in doing so, held that the appellants were entitled to know the outcomes of the audits, and the terms of the settlement agreement having been co-defendants in the civil suits. He further found that BAAM and the 6th respondents had failed to identify the commercial interests and prejudice to be suffered if the information was disclosed noting that the dispute was, in any event, already in the public domain.

ii. Proceedings at the Court of Appeal

18. The three decisions of the High Court triggered the same number of appeals at the Court of Appeal. Their details are set out below.

a) Civil Appeal No 246 of 2016, *Edwin Harold Dayan Dande & 4 others v Inspector General, National Police Service & 2 others*

19. The appellants filed an appeal, Civil Appeal No 246 of 2016, against the Judgment of Odunga J (as he then was) in Judicial Review Misc Application No 435 of 2014 seeking that the judgment of the High Court at Nairobi be reversed and that the appellants' Notice of Motion dated November 14, 2014 be allowed with costs.

20. In a judgment delivered on February 18, 2022, the Court of Appeal dismissed the appeal with no orders as to costs. In doing so, the Court of Appeal agreed with the findings of the High Court that the settled standards of judicial review known to our realm limit a judicial review court's intervention in any application for a merit review. In addition, it determined that, since no decision had at that point in time been made to charge the appellants, any such findings by the High Court would not only have been prejudicial but also in direct contravention of the constitutional provisions on the independence of the Inspector General and DCI in the investigation of crimes.

b) Civil Appeal No 378 of 2018, *Edwin Harold Dayan Dande & 3 others v Director of Public Prosecutions & 2 others*

21. Likewise, the appellants challenged the judgment of Mativo, J (as he then was) in Judicial Review Application No 8 of 2017 vide Civil Appeal No 378 of 2018. They raised seventeen grounds of appeal which the Court of Appeal collapsed into one issue; whether the appellants were deserving of the orders of certiorari and prohibition as sought in their substantive Motion before the High Court.

22. The Court of Appeal, in a judgment delivered on February 4, 2022, held that the appeal was devoid of merit and dismissed it with costs on the main ground that there was no order of stay by any court directed at the DPP barring or prohibiting him from instituting a criminal case against the appellants as at the time he decided to charge them on November 4, 2016. The court further observed that the order by Odunga, J in Judicial Review Application No 435 of 2014 was specifically directed at the Inspector General and the DCI. Further, the order was limited in its application and was rendered otiose when the DPP decided to charge the appellants. Therefore, it could not be said that the DPP was bound by the order.

23. The Court of Appeal also observed that even though no party pleaded abuse of the court process, the trial court's attention was drawn to Judicial Review Application No 435 of 2014, therefore, the trial court could not be faulted for holding that the proceedings before it was an abuse of the court process. The Court of Appeal also upheld the High Court's decision that there was no evidence demonstrating that the DPP had been influenced or pressured by BAAM.

    Moreover, there was no evidence that criminal proceedings were instituted to compel the settlement of the civil suits. The Court of Appeal, in addition, underscored the provisions of article 157(10) and (11) of the *Constitution* on the independence of the office of DPP in the exercise of its functions and ultimately found that the appellants were not deserving of the orders of certiorari and prohibition sought in their substantive Motion.

c) Civil Appeal No 147 of 2019, *British American Investments Co (K) Ltd & another v Edwin Harold Dayan Dande & 3 others*

24. BAAM and the 6th respondent also filed Civil Appeal No 147 of 2019 seeking that the judgment and decree of the High Court at Nairobi (Mwita, J) delivered on February 22, 2019 in Petition No 539 of 2016 be set aside and substituted with an order dismissing the appellants' petition with costs on inter alia the grounds that the Court of Appeal erred by failing to distinguish between the right to access to information held by a public body *vis-a-vis* a private person and in considering that a 'positive obligation existed' on the part of both a public and private body to release information and not appreciating that no credible

evidence was tendered to demonstrate that the intended prosecution of the appellants was as a consequence of any material in the privileged reports or that any exculpatory material was in the privileged reports.

25. The Court of Appeal in its judgment delivered on March 4, 2022, allowed the appeal with costs holding that the trial court erred in granting the orders sought. The court framed only one issue for determination; whether the trial court erred in its determination of the extent and scope of article 35(1)(b) of the *Constitution* and whether the petition at the High Court met the threshold set out therein.

26. In that regard, the court observed that a party seeking information from a private entity needs to show the right he seeks to exercise or protect, the information which is required in order to exercise or protect the right, and how that information would assist him in exercising or protecting the right. The Court of Appeal further observed that a party requesting information from a private person must place before the court a demonstrable and sufficient link between the right sought to be exercised or protected and the information requested. Once this is done, the onus is on the private person from whom information is requested to show why such information should not be disclosed. It thus held that the pleadings before the trial court did not meet the standard set for a request for information held by a private person and there was no demonstrable or sufficient connection between the requested information and the exercise or protection of the rights under articles 28, 32(2), 48 and 50 of the *Constitution*. It further observed that the civil suits in which the appellants were parties had been settled and the claims against them withdrawn by the time the request for information was made. There was therefore no sufficient link between the documents sought and the exercise or protection of rights with respect to the civil suits.

iii. Proceedings at the Supreme Court

27. Dissatisfied by the judgments of the Court of Appeal, three appeals were filed before the Supreme Court namely: Petition No 6 (E007) of 2022 dated March 24, 2022 and filed on March 31, 2022; Petition No 4 (E005) of 2022 dated March 9, 2022 and filed on March 11, 2022 and Petition No 8 (E010) of 2022 dated April 12, 2022 and was filed on April 14, 2022. The appeals therein raised several grounds and seek various reliefs from this court.

28. At the hearing of the appeal on February 2, 2023, the court consolidated the three appeals designating Petition No 6 (E007) of 2022 as the lead file. The 4th appellant was also granted leave to withdraw from the petitions of appeal.

29. The appellants seek the following reliefs in the consolidated appeal:

    i. The petitions of appeal be allowed.

ii. The judgments of the High Court in Judicial Review Misc Application No 435 of 2014 and Judicial Review Application No 8 of 2017 be set aside.

iii. The judgment of the High Court in High Court Petition No 539 of 2016 be reinstated.

iv. Judgments in Civil Appeal No 378 of 2018, Civil Appeal No 246 of 2016, and Civil Appeal No 147 of 2019 be set aside.

v. A permanent injunction does issue restraining the 1st and 2nd respondents from arresting, harassing, and in any other manner interfering with the petitioners with respect to the complaint lodged against them for theft by servant by BAAM;

vi. An Order to quash the charges against the appellants and the entire criminal proceedings in Nairobi Chief Magistrates Criminal Case Number 1735 of 2016 *Republic v Edwin Harold Dayan Dande, Elizabeth Nailantei Nkukuu, Patricia Njeri Wanjama, and Shiv Anoop Arora*;

vii. A permanent injunction restraining the DPP from charging, harassing, and prosecuting the Petitioners in Nairobi Chief Magistrates Criminal Case Number 1735 of 2016 *Republic v Edwin Harold Dayan Dande, Elizabeth Nailantei Nkukuu, Patricia Njeri Wanjama, and Shiv Anoop Arora*;

viii. An order of *mandamus* compelling the respondents to provide the appellants with:

a. The settlement agreement entered into between BAAM and Acorn Group Limited in HCCC No 352,353,354,361 and 362 of 2014 which formed the basis of the court orders given on October 22, 2015 by Honourable Mbogholi Msagha;

b. The forensic audit performed by KPMG on the books of BAAM as mentioned in paragraph 5 of Ms Carol Akinyi Ouko-Misiko's witness statement sworn on October 27, 2014 and filed in HCCC No 354 of 2014; and

c. The legal audit performed by Messrs Coulson Harney of all transactions handled by the appellants as referred to in paragraphs 17 of Mr Jude Anyiko's affidavit sworn on October 27, 2016 and filed in HCCC No 354 of 2014.

ix. Costs of the suit and the interest.

x. Any other or further relief that this court may deem fit to grant.

30. In opposing the appeal, BAAM filed three replying affidavits sworn by Jude Anyiko on May 4, 2022, March 18, 2022, and June 8, 2022. It also filed two preliminary objections dated March 18, 2022 and May 11, 2022. The preliminary objections were based on the grounds that there was no issue involving the interpretation or application of the *Constitution* both at the High Court and Court of Appeal and no certification had been granted by either the Court of Appeal or this court pointing to any matter of general public importance that this court should resolve.

31. The 4th respondent also filed a replying affidavit sworn by Peter Mailanyi on March 23, 2022 wherein he averred that the DPP independently reviewed the files as forwarded by the DCI and was satisfied that the evidence presented to him was sufficient to sustain a prosecution.

32. This court, in a ruling dated May 19, 2022 rendered itself on BAAM's notice of preliminary objection dated March 18, 2022 and stated that the matter involved the interpretation of article 157 of the *Constitution* and therefore the court has jurisdiction to determine the same. We shall determine BAAM's preliminary objection dated May 11, 2022 in this judgment.

C. Parties Submissions

i) The appellants' submissions

33. The 1st - 3rd appellants' submissions are dated August 15, 2022, July 13, 2022, and April 12, 2022. It was their joint case that this court is clothed with jurisdiction to entertain their appeal under article 163(4)(a) of the *Constitution* as it involves the interpretation and application of the *Constitution* and that they had challenged the constitutional powers of the Inspector General and DCI under article 245(4) of the *Constitution* before the superior courts below which issue is still live before this court.

34. The appellants also submitted that, article 47 of the *Constitution* as well as the Fair Administrative Actions Act, 2015 have widened the scope of judicial review and that courts can now apply the hard look doctrine and consider the merits of the administration's action or decision forming the subject of the judicial review proceedings. They argued that despite the Court of Appeal noting the advancements in judicial review cases, it adopted a contrary view and held that the High Court had no basis to reconsider the evidence obtained from investigations in clear violation of articles 22, 23(3)(f), 47, 165(3)(b) and 165(d) of the *Constitution*. To support this assertion, they cited *Judicial Service Commission & another v Lucy Muthoni Njora* [2021] eKLR and *Njuguna S Ndung'u v Ethics & Anti-Corruption Commission (EACC) & 3 others*[2018] eKLR.

35. They also faulted the Court of Appeal's finding that, since no decision to charge had been made by the time they filed the first judicial review Motion, then the appellants could not

get any redress for the threatened violation of their rights under articles 22, 23, 47, and 165 of the *Constitution*. Instead, they submitted that the Court of Appeal abdicated its role as a temple of justice and in effect closed the doors of the court to the appellants' contrary to the holding of the Supreme Court in India in *Arnab Rajan Goswami v Union of India,*(2020) 14 SCC 12 cited with approval in *Mohammed Zubair v State of Nct of Delhi,* Writ Petition (Criminal) No 279 of 2022. They thus asserted that, the respondents cannot violate the *Constitution* and still plead independence in their actions.

36. The appellants went on to submit that, the investigations, arrest, and institution of criminal proceedings against them were an abuse of power and in violation of articles 245 (4) and 157 of the *Constitution*. In addition, they argued that there was no factual basis for the prosecution because the complaint was based on fictitious and non-existent conclusions allegedly made in the KPMG Report and the Legal Audit by Messrs Coulson Harney, Advocates, aforesaid. Furthermore, they argued that the disbursements of monies leading to the criminal charges against them, were made in the ordinary course of duty upon approval and they were singled out for arrest and prosecution yet, they were not the only signatories with respect to the impugned disbursements. They also submitted that the disbursements were under the direct control of BAAM jointly with Acorn and that there was no money stolen by them. It was also their case that there were several checkpoints in so far as the disbursements were concerned and since the appellants had no stake whatsoever in Acorn, their prosecution was malicious and discriminatory.

37. They further submitted that the institution of criminal proceedings also amounted to an abuse of the prosecutorial powers of the Director of Public Prosecution. They cited this court's decision in *Jirongo v Soy Developers Ltd & 9 others*) (Petition 38 of 2019) [2021] KESC 32 (KLR) (16 July 2021) (Judgment, (*Jirongo* case) to support this assertion. In addition, they urged that the machinery of criminal justice was being deployed as a tool in the personal dispute between BAAM as an employer and the appellants as its former employees.

38. It was the appellants' other contention that the Court of Appeal adopted a narrow, artificial, rigid, and pedantic interpretation of the right to access to information held by a private body. They relied on the Court of Appeal's decision in *Attorney General vs Kituo cha Sheria & 7 others* [2017]eKLR to argue that, courts are commanded to be creative and proactive so that the Bill of Rights may have the broadest sweep, the deepest reach, and highest claims. They also cited the decision in *Mercy Nyawade v Banking Fraud Investigations Department & 2 others* [2017] eKLR where the court held that article 35 of the *Constitution* must not be constrained by a narrow interpretation.

39. They also posited that the only test to be met under article 35 is for a person to demonstrate that the information is required for the exercise or protection of a right or fundamental freedom under the *Constitution*. They argued in that context that the civil suits and the

criminal charges against them were based on a forensic audit conducted by KPMG and a legal audit by Messrs Coulson Harney, Advocates, which audits revealed that the appellants had allegedly participated in fraudulent activities. Therefore, the information sought was necessary and a prerequisite for the realization of the right to dignity which is the foundation of other rights. They cited *Martha Kerubo Moracha v University of Nairobi* [2016] eKLR, *Brummer v Minister for Social Development and Others* (CCT 25/09) [2009] ZACC 21; 2009 to buttress this point.

40. Additionally, they submitted that the information sought was necessary for the exercise of the right to access to justice under article 48 of the *Constitution* and that they required the information to enable them to approach the High Court to quash the criminal investigations and the intended prosecution which according to them had no factual basis. They cited the decision in *Republic vs Director of Public Prosecutions & 2 others; Evanson Muriuki Kariuki (Interested Party) ex parte James M Kahumbura* [2019]eKLR to support this contention.

41. They further submitted that the information they were seeking was necessary for the protection of the right to a fair hearing and fair trial. They cited the case of *Mohamed Abdi Mahamud vs Ahmed Abdullahi Mohamad & 3 others* [2018] eKLR in that regard where it was held that the right to a fair hearing is broad and includes the concept of the right to a fair trial and that a litigant should not be denied the opportunity to present his case effectively before a court. Furthermore, they faulted the Court of Appeal for failure to address itself to the connection between the protection of the right to a fair hearing and the information requested. In conclusion, they urged the court to allow the appeal as prayed.

ii) The 1st, 2nd and 4th respondents' submissions

42. The 0ffice of the DPP filed submissions on its behalf and on behalf of the Inspector General and DCI dated March 25, 2022, June 27, 2022, and July 7, 2022. They submitted that no proper case had been made before the courts to enable them to interfere or intervene in the exercise of powers of review of a decision to charge by the DPP. They argued that a court should only interfere with the decision of the DPP if it is in the opinion that grave violations of the rights of the suspects were occasioned during the investigation process. They relied on the case of *Maina & 4 others v Director of Public Prosecutions*) Constitutional Petition E106 & 160 of 2021) (Consolidated)) [2022] KEHC 15 (KLR) (Constitutional and Human Rights) (27 January 2022) (Judgment to support that contention.

43. It was also urged that, the powers of the office of DPP to prosecute are anchored in article 157 of the *Constitution* which provides for its independence in the exercise of its duties, and that article 157(11) enjoins the DPP to have regard to the public interest, the interest of the administration of justice and the need to prevent abuse of the legal process even though the decision to institute criminal proceedings is discretionary. Furthermore, they submitted

that the Court of Appeal correctly held that the appellants did not demonstrate that the DPP had acted *ultra vires* in making the decision to charge nor was the DPP's decision-making process demonstrated to be at variance with article 157(10) of the *Constitution*. They cited the Jirongo case to support this assertion and emphasized that the DPP's decision to institute charges is rarely interfered with unless actuated by dishonesty, bad faith, or exceptional circumstance as espoused in the case of *Regina v Director of Public Prosecutions ex parte Kebeline and others* [1999] 4 All ER 801

44. They also argued that the Judicial Review Court was not the proper forum to adjudicate the appellants' issues as that would require the court to interrogate the facts and evidence gathered by the Inspector General and DCI during investigations. They urged in that context that the appellants failed to demonstrate to the Court of Appeal that the Inspector General and DCI's investigations were blatantly illegal and an abuse of their constitutional power to warrant the court's intervention. To support this contention, they relied on the decisions in *Meixner & another v Attorney General* [2005] 1 KLR 189 and *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others,* [2016] KLR.

45. They submitted, in addition, that the investigation and eventual arrest of the appellants arose from a complaint lodged by BAAM with respect to their previous relationship as employer and employee and did not amount to an abuse of power. They further submitted that the appellants failed to demonstrate that the Inspector General and DCI did not act independently and that they were working at the behest of BAAM to necessitate this court's intervention.

46. It was their other submissions that the appellants have not demonstrated that it was unreasonable or discriminative for the Inspector General and DCI to arrest and investigate them or that the criminal proceedings were undertaken against them as a result of business rivalry. In addition, the DPP submitted that the choice of persons who should face prosecution is at its discretion. It further argued that the appellants have not demonstrated that it was unreasonable for the DPP to prefer charges against them and that the process was not discriminatory and that the burden of proving violation or threat of violation is upon the appellants as espoused in *Anarita Karimi Njeru v Republic,* Misc Criminal Application No 4 of 1979; [1979] eKLR.

47. In supporting the findings by the Court of Appeal, the DPP reiterated the point that the Court of Appeal did not make a pronouncement of guilt and factual holdings as alleged but only made a finding on whether the appellants ought to have been charged or not. He urged in that regard that, the court merely discharged its duty as the first appellate court and that the appellants themselves are inviting this court to delve into the realm of the trial court by making submissions on the roles they played and giving reasons as to why they ought not to be charged. It was the DPP's argument to the contrary that, consideration of the sufficiency

of the evidence is a duty of the trial court and cited the decision in *Meixner & another v The Attorney General* (2005)1 KLR 189 to support that submission.

48. In conclusion, the DPP submitted that the appellants' rights to a fair trial were not infringed and that this contention to the contrary is speculative since the said right is guaranteed and no evidence was presented to prove its violation.

iii) The 3rd and 6th respondents' submissions

49. BAAM and the 6th respondents filed submissions dated December 29, 2022, May 9, 2022, and July 17, 2022. They submitted that the appeal did not concern the interpretation or application of the *Constitution* before the superior courts and that the appellants only referred to constitutional provisions during submissions at the bar and that mere references to constitutional provisions do not confer the right to appeal under article 163(4)(a) of the *Constitution*.

50. Regarding the scope of judicial review, they submitted that the Court of Appeal correctly interpreted the scope of judicial review consistent with article 47 of the *Constitution* and the Fair Administrative Actions Act, 2015. They argued that contrary to the law, the appellants had invited the superior courts as well as this court to usurp the DPP's power of deciding whether or not the appellants should have been charged.

51. They further argued that the Court of Appeal did not find any proof that the investigations, arrest, and prosecution of the appellants were an abuse of power, vexatious, oppressive, or motivated by ill motive. Instead, the court found that the arrest and investigation were based on complaints made by BAAM and correctly appreciated the mandate of the Police to investigate criminal complaints including those made by BAAM without undue interference. They cited the case of *Republic v Commissioner of Police and Another ex parte Michael Monari & another* [2012] eKLR to support this claim.

52. It was also their case that the Court of Appeal correctly interpreted article 35(1)(b) guided by article 259 of the *Constitution* in a manner that balances the burdens of disclosure of private information with the right to privacy and that, under article 35(1)(b) of the *Constitution*, a citizen is entitled to information held by another person where that information is required for the exercise and protection of any right or fundamental freedom. Further, the extent of the disclosure of information held by an entity is provided under section 6(1) of the *Access to Information Act*, 2016 which states that pursuant to article 24 of the *Constitution* the right to access to information shall be limited in respect to information whose disclosure is likely to, amongst other considerations, involve unwarranted invasion of privacy and substantially prejudice the commercial interests of an entity.

53. They contended that the appellants did not at the trial court or at the Court of Appeal demonstrate what right they wished to exercise or protect and how that information would assist them in exercising or protecting that right, and that bare references to constitutional rights did not automatically guarantee the appellants the right to access information. Furthermore, they submitted that the appellants did not meet the threshold to access privately held information under article 35(1)(b) of the *Constitution*. They argued that a citizen must not only show that the information is held by the person from whom it is claimed but fulfil three ingredients; to state what right he seeks to protect; what information is required for that purpose, and how the information sought will assist him in enforcing that right or freedom. To support this argument, they relied on the decisions in *Benson Wachira Muthiga vs Nairobi City County Public Service Board & another* [2015] eKLR, *Nairobi Law Monthly Company Ltd vs Kenya Electricity Generating Company & 2 others* [2013] eKLR and *Cape Metropolitan Council v Metro Inspection Services Western Cape CC and others* (10/99)(2001)ZASCA.

54. Furthermore, they submitted that whereas the appellants had claimed that they were seeking the information for the protection of their right to dignity and access to justice, their case is predominantly hinged on the protection of a right to a fair trial as they had stated that the information was required to help them determine the basis of the respondents' complaint on misappropriation of funds and prepare their defence in Criminal Case No 1735 of 2016 yet at the time of filing the petition at the High Court, the appellants had not taken plea as the DPP had not made a determination on whether or not to prosecute them. Therefore their claim for information is unwarranted and is neither factually nor legally sustainable.

55. In addition to the above, BAAM and 6th respondent submitted that the appellants obtained stay orders from the High Court upon filing Judicial Review proceedings which proceedings are now the subject of Supreme Court Petition No 4 and 6 of 2022, and they were, for that reason, not arraigned in court, charged, or directed to take plea. Since the appellants had therefore not subjected themselves to a trial, they could not demonstrate which right they intended to protect and how the requested information would assist in protecting the said right. To support this assertion, they relied on the decision of this court in *Hussein Khalid & 16 Others vs Attorney General & 2 others* [2019] eKLR to state that the right to a fair trial under article 50(2)(j) of the *Constitution* accrues to an accused person and not an arrested person.

56. On disclosure of information held by private entities, they submitted that being private entities, they had no obligation to release the requested information given the prejudice they will suffer, and the Court of Appeal rightly held that there is no general duty on private persons to give a requester access to information. They added that to qualify for access to information from a private person, a person must establish and demonstrate a sufficient

connection between the right sought to be exercised or protected and the information requested. It is only once this is done that the burden shifts to the private person to show why such information should not be disclosed.

57. Lastly, they submitted that despite the appellants citing several rights that they sought to protect using the information, they failed to demonstrate any nexus between the information sought and the rights to be protected. They thus urged that they had discharged their burden by proving that the information sought was privileged and whose disclosure would be injurious to the respondents' commercial interests and customers. The information was therefore protected from arbitrary disclosure where no foundation had been laid and prayed that the appeal be dismissed with costs.

D. Analysis and Determination

58. Having considered the respective parties' pleadings and submissions in the appeal before us, the following issues emerge for determination;

    i. Whether the appellants have properly invoked this court's jurisdiction under article 163(4)(a) of the *Constitution*.

    ii. Whether the appeal, or any part of it, is moot, leaving no live controversy requiring adjudication.

    iii. Whether the scope of judicial review has evolved to include merit review of an administrative decision or other action complained of.

    iv. Whether the decision to investigate, arrest and prosecute the appellants constituted an abuse of power by the 1st and 2nd respondents.

    v. Whether the appellants are entitled to the right to access to information under article 35(1)(b) of the *Constitution*.

    vi. What relief is available to parties?

i. Whether the appellants have properly invoked this court's jurisdiction under article 163(4)(a) of the *Constitution*.

59. It was the appellants' case that this court has jurisdiction to entertain the appeal under article 163(4)(a) of the *Constitution* as it involves the interpretation and application of the *Constitution*. Particularly, the appellants contended that they challenged the constitutional powers of the Inspector General and DCI under articles 157(6) and 245(4) of the *Constitution* and therefore the matter before the superior courts involved the interpretation and application of the *Constitution*.

60. BAAM on its part emphasized that, although the appeal is brought under article 163(4)(a) of the *Constitution*, no issues requiring constitutional interpretation and application were raised in the High Court and the Court of Appeal. They also argued that since the appeal does not meet the threshold for admission under article 163(4)(a) of the *Constitution* then the only other option available to the appellants was to invoke this court's jurisdiction under article 163(4)(b) of the *Constitution*. It was their case in that context that, having failed to secure certification, there is no basis for the court to find that the appeal raises cardinal issues of law or jurisprudential moment and should strike out the appeal as consolidated.

61. This court has time and again determined the question of whether a litigant has properly invoked its jurisdiction under article 163(4)(a) of the *Constitution*. We set the guiding principles in the case of *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others,* SC Petition No 10 of 2013; [2014]eKLR and *Erad Suppliers & General Contractors Ltd v National Cereals & Produce Board* SC Petition No 5 of 2012; [2012]eKLR where we stated that an appeal lies to this Court under article 163(4)(a) if the issues placed before it revolved around the interpretation and application of the *Constitution* and that the interpretation or application of the *Constitution* had formed the basis for the determinations at the superior courts below this court and the same issue had therefore progressed through the normal appellate mechanism to reach this court.

62. In addition in *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another,* SC Petition No 3 of 2012 [2012] eKLR we stated:

> '(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).'

63. A perusal of the record reveals that the issues before the superior courts revolved around the interpretation and application of the *Constitution*. In particular, the superior courts rendered themselves on the role of the DPP under article 157(4)(10) and (11) of the *Constitution*. The superior courts also addressed the role of the Inspector General as provided for under article 245(4) of the *Constitution*. In this regard, the High Court in

Judicial Review Application 8 of 2017 *Republic v Director of Public Prosecutions & 2 others ex parte Edwin Harold Dayan Dande & 3 others*, observed as follows:

> ' 39. A reading of article 157 of the *Constitution* leaves no doubt that the DPP is required to not only act independently, but to remain fiercely so. It is also important to mention that article 245(4)(a) of the *Constitution* provides that: 'no person may give a direction to the Inspector General with respect to the investigation of any offence or offences.' Just like the constitutionally guaranteed independence of the DPP, this provision is aimed at ensuring that investigations are undertaken independently.'

64. Similarly, the Court of Appeal in Civil Appeal No 378 of 2018 *Edwin Harold Dayan Dande & 3 others v Director of Public Prosecutions & 2 others* stated as follows:

> ' The gist of this appeal really revolves around the exercise of powers bestowed on the 1st respondent by the *Constitution* and whether the trial court failed in its duty to protect the appellants from skewed and malicious prosecution. The question is simply this; did the 1st respondent act independently in instituting the criminal case against the appellants or was it orchestrated by ulterior motives?'

65. From the above, we are satisfied that the basis of the superior courts' decisions revolved around the interpretation and application of the *Constitution*, and therefore, the appellants have properly invoked the jurisdiction of this court under article 163(4)(a) of the *Constitution*.

ii. Whether the appeal or any part of it is moot.

66. Albeit not raised by the parties, it is imperative for this court to pronounce itself on the issue of mootness of some aspects of this appeal. The doctrine of mootness requires that controversy must exist throughout judicial proceedings including at the appellate level. An appeal or an issue is moot when a decision will not have the effect of resolving a live controversy affecting or potentially affecting the rights of parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. The doctrine of mootness is therefore based on the notion that judicial resources ought to be utilized efficiently and should not be dedicated to an abstract proposition of law and that courts should avoid deciding on matters that are abstract, academic, or hypothetical.

67. This court in *Institute for Social Accountability & another v National Assembly & 3 others* (Petition 1 of 2018) [2022] KESC 39 (KLR) (8 August 2022) (Judgment) in addressing mootness stated that:

> ' A matter is moot when it has no practical significance or when the decision will not have the effect of resolving the controversy affecting the rights of the parties before it. If a decision of a court will have no such practical effect on the rights of the parties, a court will decline to decide on the case. Accordingly, there has to be a live controversy between the parties at all stages of the case when a court is rendering its decision. If after the commencement of the proceedings, events occur changing the facts or the law which deprive the parties of the pursued outcome or relief then, the matter becomes moot.' [emphasis added]

68. Similarly, Lenaola SCJ in the case of *Attorney General & 3 others v David Ndii & 73 others: Prof Rosalind Dixon & 7 others (amicus curiae) (SC Petition 12, 11 & 13 of 2021 (Consolidated)* [2022] KESCA 8 (KLR) (Constitutional and Human Rights) (31 March 2022) (Judgment) (with dissent), quoted with approval the decision of the High Court of South Africa in *Afriform NPC and others v Eskom Holdings SOC Limited & others* 3 All SA 663 (GP) where it stated:

> ' The mootness barrier therefore usually arises from events arising or occurring after an adverse decision has been taken or a lawsuit has got underway, usually involving a change in the facts or the law, which allegedly deprive the litigant of the necessary stake in the pursued outcome or relief. The doctrine requires that an actual controversy must be extant at all stages of review and not merely at the time the impugned decision is taken or the review application is made.' [Emphasis added]

69. The instances in which a dispute is rendered moot were also discussed by the Supreme Court of Canada in *Borowski v Canada (Attorney General)* [1989] 1 SCR 342, where it stated that a repeal of a by-law being challenged; an undertaking to pay damages regardless of the outcome of an appeal; non- applicability of a statute to the party challenging the legislation; or the end of a strike for which a prohibitory injunction was obtained were some of the circumstances that render an appeal moot. The court further opined that determining whether an appeal is moot or not requires a two-step analysis. A court is first required to determine whether the requisite tangible and concrete dispute has disappeared rendering the issues academic. If so, it is then necessary to decide if the court should exercise its discretion to hear the case.

70. Noting the above expressions of the law, with which we agree, is there a tangible and concrete dispute concerning the prayer by the appellants seeking to restrain the Inspector General,

DCI and DPP from arresting and charging them? A perusal of the record reveals that at the time of filing Judicial Miscellaneous Application No 435 of 2014, *Republic v & 2 other ex-parte Edwin Harold Dayan Dande & 4 others* on November 17, 2014, there was an imminent threat of arrest and charging of the appellants, therefore, it was necessary on their part to seek an injunction restraining the Inspector General, DCI and DPP from arresting and charging them. However, on November 4, 2016 when the DPP instituted criminal proceedings against the appellants, the issue of restraining the Inspector General, DCI and DPP from arresting and charging the appellants became moot as this was no longer a live controversy.

71. It is our considered view that the above explains why at the time the appellants were filing Judicial Review Application No 8 of 2017, *Republic v Director of Public Prosecutions & 2 others ex parte Edwin Harold Dayan Dande & 3 others* they did not seek an order restraining the Inspector General, DCI and DPP from arresting and charging but they sought orders of *certiorari* to quash the decision to institute criminal proceedings against them and a prohibition against the hearing and determination of Criminal Case No 1735 of 2016.

72. Thus, it is our finding that there exists no live controversy on the question of restraining the Inspector General, DCI and DPP from arresting and charging the appellants as the adverse decision to prosecute the appellants has already taken place and on the existing facts, there is no imminent threat to arrest or charge the appellant again.

iii. Whether the scope of judicial review has evolved to include determinations of merit review of an administrative decision.

73. The appellants faulted the Court of Appeal for holding that the High Court had no basis to reconsider the evidence obtained from investigations in the Judicial review proceedings yet it noted that there have been advancements in judicial review allowing courts to do merit review of decisions in administrative or other actions.

74. The *Black's Law Dictionary, 9th Edition* defines judicial review as:

> ' A court's power to review the actions of other branches or levels of government; esp., the court's power to invalidate legislative and executive actions as being unconstitutional. 2. The constitutional doctrine providing for this power. 3. A court's review of a lower courts or an administrative body's factual or legal findings'.

75. Mark Ryan, in his book, '*Unlocking Constitutional and Administrative Law*', (3rd ed Routledge/Taylor & Francis Group, 2014) on page 506 defines Judicial Review as:

> ' The constitutionally justified as a legal control on the misuse of public law powers, including both statutory and common law prerogative powers.'

76. We note that judicial review was introduced to Kenya from England in 1956 through sections 8 and 9 of the *Law Reform Act*, cap 26. The jurisdiction to hear and determine judicial review was then vested in the High Court of Kenya. Under this system, the High Court could issue orders of mandamus, prohibition, and *certiorari*. The grounds for the issuance of such orders were borrowed from common law.

77. Prior to the promulgation of the *Constitution* in 2010 there were two legal foundations for the exercise of the judicial review jurisdiction by the Kenyan courts found in sections 8 and 9 of the *Law Reform Act* cap 26, which constituted the substantive basis for judicial review of administrative actions on the one hand, and, order 53 of the *Civil Procedure Rules* which was the procedural basis of judicial review of administrative actions, on the other hand.

78. However, the entrenchment of judicial review under the *Constitution* of Kenya 2010 elevated it to a substantive and justiciable right under the *Constitution*. Accordingly, judicial review is no longer a strict administrative law remedy but also a constitutional fundamental right enshrined in the *Constitution*. Thus, article 47 provides that 'every person has a right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

79. Furthermore, section 7 of the Fair Administrative Actions Act provides that:

> (1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to–
>
> (a) A court in accordance with section 8; or
>
> (b) A tribunal in exercise of its jurisdiction conferred in that regard under any written law.

80. Fundamentally also, article 23(3) of the *Constitution* provides that:

> (3) In any proceedings brought under article 2, 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; and

(f) An order of judicial review.

81. The entrenchment of judicial review in the *Constitution* has led to the emergence of divergent views on the scope of judicial review. The first group postulates that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself while the second group opine that under the current constitutional dispensation, courts could delve into both procedural and merit review in resolving disputes.

82. In *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* SC Petition No 14 Consolidated with 14A, 14B, & 14C of 2014 [2014] eKLR this court in resolving the controversy stated as follows:

> '[355] However, notwithstanding our findings based on the common law principles of estoppel and res- judicata, we remain keenly aware that the *Constitution* of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law. By clothing their grievance as a constitutional question, the 1st, 2nd and 3rd respondents were seeking the intervention of the High Court in the firm belief that, their fundamental right had been violated by a state organ. Indeed, this is what must have informed the Court of Appeal's view to the effect that the appellants (respondents herein) were entitled to approach the court and have their grievance resolved on the basis of articles 22 and 23 of the *Constitution*. [emphasis added]

83. Also, this Court in *SGS Kenya Limited v Energy Regulatory Commission & 2 others* SC Petition No 2 of 2019 [2020] eKLRobserved as follows:

> ' [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.'

> 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.'

84. More recently in *Praxedes Saisi & 7 others v Director of Public Prosecutions & 2 others)* (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment) *Praxedes Saisi* case this court stated that:

> 'It is our considered opinion that the framers of the *Constitution* when codifying judicial review to a constitutional right, the intention was to elevate the right to fair administrative action as a constitutional imperative not just for state bodies, but for any person, body or authority.'

85. It is clear from the above decisions that when a party approaches a court under the provisions of the *Constitution* then the court ought to carry out a merit review of the case. However, if a party files a suit under the provisions of order 53 of the Civil Procedure Rules and does not claim any violation of rights or even violation of the *Constitution*, then the court can only limit itself to the process and manner in which the decision complained of was reached or action taken and following our decision in SGS Kenya Ltd and not the merits of the decision per se.

86. Turning back to the instant case, we note that the appellants invoked the judicial review jurisdiction of the High Court alleging that their rights to among others, fair administrative action under article 47 were violated, and applied for judicial review orders under article 23 of the *Constitution*. In that context, the Court of Appeal in Civil Appeal No 246 of 2016 stated as follows:

> ' 28. While this may have been relevant and pertinent information, the question that arises is whether the judicial review court was the proper forum to determine and direct the information and evidence that was gathered during the investigations, and the manner of its collection by the 1st and 2nd respondents. In our view, it was not, in light of the standards of review which limit a judicial review court's intervention in merit review. It was emphasized by this court in *Suchan Investment Limited vs Ministry of National Heritage & Culture & 3 others*, (2016) KLR that while article 47 of the *Constitution* as read with the grounds for review provided by section 7 of the *Fair Administrative Action Act* reveals an implicit shift of judicial review to include aspects of merit review of administrative

> action, the reviewing court has no mandate to substitute its own decision for that of the administrator.'

87. With utmost respect to the learned Judges of the Court of Appeal, we disagree with the above reasoning and find that the appellants had clothed their grievances as constitutional questions believing that their fundamental rights had been violated. Therefore, this required the superior courts to conduct a merit review of the questions before them and dismissal of their plea as one requiring no merit review was misguided. A court cannot issue judicial review orders under the *Constitution* if it limits itself to the traditional review known to common law and codified in order 53 of the Civil Procedure Rules. The dual approach to judicial review does exist as we have stated above but that approach must be determined based on the pleadings and procedure adopted by parties at the inception of proceedings. Our decision in the *Jirongo* and *Praxedes Saisi* cases speaks succinctly to this issue. That is also why, the question below is pertinent to the present appeal.

iv. Whether the decision to investigate, arrest and prosecute the appellants constituted an abuse of power by the 1st, 2nd, and 4th respondents.

88. The crux of the appellants' claim is that their investigations, arrest, and prosecution by the Inspector General, DCI, and the DPP amounted to an abuse of power bestowed upon them by the *Constitution*. First, they contended that the investigations leading to their arrest as well as the arrest itself were an abuse of the investigative powers of the DCI and the Inspector General under article 245 of the *Constitution*. Second, they argued that the institution of criminal proceedings against them amounted to an abuse of prosecutorial powers by the DPP. We will proceed to deal with the two issues separately.

a) Abuse of investigative and arrest powers by the 1st and 2nd respondents.

89. The office of the Inspector General of the National Police is established under article 245 (1) of the *Constitution*. The power to investigate crimes is vested in the Inspector General by dint of article 245 (4) of the *Constitution* which provides that:

> ' (4) The Cabinet Secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to-
>
> (a) The investigation of any particular offence or offences;
>
> (b) The enforcement of the law against any particular person or persons; or

> (c) The employment, assignment, promotion, suspension, or dismissal of any member of the National Police Service." [Emphasis added]

90. Also, article 243(1) of the *Constitution* establishes the National Police Service, and the *National Police Service Act* gives full effect to this article. Thus, section 28 of the *National Police Service Act*, No 11 of 2011 provides that

> 'There is established the Directorate of Criminal Investigations which shall be under the direction, command, and control of the Inspector-General.'

91. A review of the constitutional and statutory provisions herein shows without any doubt that the Inspector General and the Director, DCI have the mandate to perform multi-faceted functions as provided under articles 244 and 245 of the *Constitution*. Accordingly, article 244 provides for the objects and functions of the National Police Services and article 244(c) in particular requires the National Police Services to comply with constitutional standards of human rights and fundamental freedoms in the discharge of its mandate. This is important because human rights and fundamental freedoms and the rule of law are founding values in our Constitution.

92. A court should only interfere with the powers granted to the Inspector General and the DCI under articles 244 and 245 of the *Constitution* and under the provisions of the *National Police Service Act* if the constitutional and statutory provisions are not adhered to or if the actions are illegal and unlawful. The questions that beg answers in the present appeal are whether the Inspector General and the DCI acted within their constitutional mandate and whether their actions amounted to an abuse of office.

93. The Court of Appeal had this to say in that regard:

> ' The 1st and 2nd respondent have in this respect demonstrated and it is not disputed that they acted pursuant to a complaint received from the 3rd respondent, and they have detailed the evidence they gathered in this respect. The basis of the complaint arose from the previous relationship between the appellants and 3rd respondent of employee/employer which is not disputed, and from transactions that took place during the period of such employment. The appellants did not provide any evidence of the 3rd respondent's influence or control to support their claim that the 1st and 2nd respondents acted under the aegis of the 3rd respondent, over and above the 3rd respondent's action of making a complaint as an aggrieved person. We are therefore constrained to find that the arrest and investigations of

> the appellants were not proved to be an abuse of power, vexatious, oppressive or motivated by ill motive in the circumstances.'

94. The appellants' claim of abuse of power by the Inspector General and DCI is based on the allegation that there was no factual basis for the arrest as the same was solely based on a complaint by BAAM and that there was no independent review on the part of the two offices aforesaid. The appellants also alleged that the complaint was based on fictitious and non-existent conclusions made in a KPMG Report and Legal Audit by Messrs Coulson Harney, Advocates and that the disbursements of monies to third parties were made in the ordinary course of duty after approval by relevant offices within BAAM. That therefore they are innocent of the charges against them and the same should be terminated by order of this court.

95. A perusal of the record confirms that even though the appellants alleged abuse of power by the Inspector General and DCI, no evidence was brought forth to prove that they actually acted beyond their constitutional mandate or that their actions amounted to an abuse of office. The claim that they acted at the behest of BAAM was merely speculative and the appellants failed to discharge the burden of proving that allegation. In fact, it is instructive that in the appeal before us, one of the prayers is release of the report and audit to them which they also claim to be evidence that the Inspector General and DCI acted on instructions of BAAM. If they do not have the report and audit, how can they also claim that the two documents are the source of their troubles? Without saying more, we are inclined to agree with the decision of the Court of Appeal that the appellants did not prove that the Inspector General and DCI abused their investigative or arrest powers as conferred by the *Constitution* and statute.

b) Abuse of prosecutorial powers by the DPP

96. The office of Director of Public Prosecution is established under article 157 (1) of the *Constitution*. The functions of the Director of Public Prosecution are provided for under article 157 (6) of the *Constitution* which states that:

> (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;
>
> (b) Take over and continue any criminal proceedings commenced in any court (other than a court martial)

that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

(c) Subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

97. The *Constitution*, as can be seen above, provides an inbuilt limitation on the powers of the DPP under article 157(11) of the *Constitution* which provides that; '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.'

98. Furthermore, article 157(10) of the *Constitution* anticipates the independence of the office of DPP in the performance of its constitutional obligation, providing that in the exercise of its powers or functions, it shall not be under the direction or control of any person. This is important as it protects the integrity of a criminal process.

99. This court, in the Jirongo case, expounding on the above provision stated as follows:

> ' 82. Although the DPP is thus not bound by any directions, control or recommendations made by any institution or body, being an independent public offence, 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.' [emphasis added]

100. Furthermore, in the same case, we were persuaded by the reasoning of the Supreme Court of India in *RP Kapur v State of Punjab* AIR 1960 SC 866 which laid down the following guidelines to be considered by courts when reviewing prosecutorial powers 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, e.g. 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.

101. Noting the above guidelines, which we also adopt, did the appellants prove that the expectations of article 157(11) of the *Constitution* were not met? It was the appellants' case in that context that their prosecution was instituted without any factual basis and that a prosecution should not be commenced or continued unless there is admissible, substantial, and reliable evidence that a criminal offence known to law has been committed by the accused persons. The appellants also alleged that the complaint was based on fictitious and non-existent conclusions made by a KPMG Report and Legal Audit by Messrs Coulson Harney, Advocates and that the disbursements were made in the ordinary course of duty after approval. The appellants also claimed that, when they resigned from BAAM, the latter instituted several civil suits being HCCC Nos 352, 353, 354, 361, and 362 of 2014 which were amicably settled to their exclusion.

102. We have no hesitation in holding that the record reveals that the appellants did not provide any evidence to prove that the office of DPP did not meet the expectations required of it under article 157(11) of the *Constitution* or that the action to prosecute them amounted to abuse of the process of the court. It is also clear to us that, at the time of instituting the criminal proceedings, there was no legal bar preventing them from prosecuting the appellants. The charges the accused are facing constitute offences under the laws of Kenya and therefore, it is proper that they be subjected to the due process of the law. Their innocence is intact and there is no apparent risk that they will not face a fair trial where the duty lies on the DPP to prove their culpability.

103. The appellants also claimed that the civil suits aforesaid were settled to their exclusion meaning that they were not parties to the suits. If so, what is the prejudice to them? And if the settlement is relevant to their innocence, what better forum is there than the trial court to raise that issue? Furthermore, section 193A of the Criminal Procedure Code provides as follows:

> ' PARA 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.'

104. The conclusion we draw from the above provision is that both civil and criminal jurisdictions can run parallel to each other and that neither can stand in the way of the other

unless either of them is being employed to perpetuate ulterior motives or generally to abuse of the process of the court in whatever manner.

105. Despite our conclusion above, we are alive to the fact that in the Jirongo case we held as follows:

> ' 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.'

106. We note that the circumstances in the Jirongo case are different from the current case. In Jirongo, it was proved to our satisfaction that the criminal case was instituted to force the accused person's hand to compromise the civil case between him and the complainant. Such unlawful action should not and could not be tolerated. However, in the present case, we reiterate our earlier finding that the appellants did not prove that the same was perpetuated for ulterior motives or amounted to an abuse of the court process or office.

v. Whether the appellants were entitled to the right to access to information as stipulated under article 35(1)(b) of the *Constitution*.

107. The appellants faulted the Court of Appeal for allegedly adopting a narrow, artificial, and rigid interpretation of the right to access to information held by a private body. It was their case that the only test to satisfy in seeking to enforce the right to access to information, is for a person to demonstrate that the information is required for the exercise or protection of a fundamental freedom under the *Constitution*. In their case, they argued that they needed the information to exercise their right to access to justice under article 48 of the *Constitution* to enable them approach the High Court to quash the criminal investigation and the intended prosecution which according to them had no factual basis. They also argued that the information was necessary for the protection of their rights to human dignity, fair hearing and fair trial.

108. The right to access to information is a fundamental right upon which other rights guaranteed in the Bill of Rights can be realized. This right encompasses the right to seek and receive information and is guaranteed to every citizen.

109. Traditionally, the right to access to information has been utilized to render public authorities accountable and to promote transparency in the public sector. However, there has been a paradigm shift in substantial measures from the demand for information from public bodies to private bodies and this is an important guard against abuses, mismanagement, and corruption. Therefore, the codification of the right to information from private bodies in the *Constitution* of Kenya 2010 is one of the major milestones in the protection of the right to access to information.

110. Accordingly, article 35 of the *Constitution* provides for the right to access to information in the following terms:

> ' 35.
>
> (1) Every citizen has the right of access to-
>
> a. Information held by the state; and
>
> b. Information held by another person and required for the exercise or protection of any right or fundamental freedom.
>
> (2). Every person has the right to the correction or deletion of untrue or misleading information that affects the person.
>
> (3). The state shall publish and publicize any important information affecting the nation.'

111. Similarly, section 4 of the *Access to Information Act*, No 31 of 2016 which was enacted to give effect to the rights under article 35 of the *Constitution* provides for the right of access to information held by the State and information held by another person and is required for the exercise or protection of any right or fundamental freedom.

112. The right to access to information is also contained in several international conventions and treaties ratified by Kenya. Article 19(2) of the *International Covenant on Civil and Political Rights (ICCPR)* for example makes the right to information imperative when it states that

> 'Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regard less of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.'

113. The right to access to information is also stipulated under article 9(1) of the *African Charter on Human and Peoples Rights* which states that

> 'every individual has the right to receive information.'

114. The *Access to Information Act* proceeds to define 'public body' as 'any public office, as defined in article 260 of the *Constitution*; or (b) any entity performing a function within a commission, office, agency or other body established under the *Constitution*.

115. It also defines 'private body' as a body which:

a. Receives public resources and benefits, utilizes public funds, engages in public functions, provides public services, has exclusive contracts to exploit natural resources (with regard to said funds, functions, services, or resources); or

b. Is in possession of information which is of significant public interest due to its relation to the protection of human rights, the environment, or public health and safety, or to exposure of corruption or illegal actions or where the release of the information may assist in exercising or protecting any right'.

116. In the instant case, we are concerned about the information held by a private body-BAAM- and which the appellants seek allegedly for the protection of rights enshrined under the *Constitution*. In that context, we must note that under article 35(1)(b) of the *Constitution*, the right to access to information is not unlimited because a requester must, as a prerequisite, establish that he or she wishes to exercise or protect a right and that access to the record is required in order to exercise or protect that right.

117. This was the position taken by the court in *Rev Timothy Njoya v Attorney General & another [2014] eKLR* where the learned judge stated as follows:

> ' While it is crystal clear to me that one would enforce the provisions of article 35(1] (b] where such information is required for the exercise or protection of a fundamental right and freedom, in the present Petition, the Petitioner has not stated what fundamental right or freedom he intends to protect or exercise were he to be given the information he is seeking.'

118. Further, in *M&G Media Ltd and athers v 2010 FIFA World Cup Organising Committee South Africa Ltd and another 2011 (5) SA 163 (GSJ)* the South Gauteng High Court observed as follows:

> ' (145) Following the dualistic scheme in s 32(1)(a) and (b) of the *Constitution*, PAIA provides that if access is sought to a record held by a public body, access must be provided as a matter of right, unless a valid ground of refusal is advanced.
>
> (146) By contrast, if access is sought to a record held by a private body, the requester must establish that he or she requires access to the record in order to exercise or protect a right. Once this has been shown, the requester has a right of access to the records, which may be defeated by a valid ground of refusal.'

119. Section 32 of the *Constitution* of South Africa is in pari materia with article 35 of our Constitution and we are also persuaded by the decision *Cape Metropolitan Council v Metro Inspection Services Western Cape and others* (2001) ZASCA 56 the Court stated as follows:

> ' Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information.

An applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required, and how that information would assist him in exercising or protecting that right.

120. In summary, a requester seeking to enforce his right under article 35(1)(b) needs to demonstrate:

a. The right that seeks to be protected; and

b. That access to the information is required to exercise or protect that right.

121. In that context, the appellants' arguments were that the information sought was necessary for the exercise of the right to access to justice under article 48 of the *Constitution* and that they had sought the information to enable them approach the High Court to quash the criminal investigation and the intended prosecution which according to them had no factual basis. They also submitted that the information was necessary for the protection of the right to a fair hearing and fair trial under article 50 of the *Constitution*. Without belabouring the point, we are satisfied that the appellants properly identified the rights that they sought to protect. The next and more fundamental question for us to determine is whether the information they were seeking was required to exercise or protect the identified rights.

122. The Court of Appeal in the instant matter observed that a party requesting information from a private person must place before the court a demonstrable and sufficient link between the right sought to be exercised or protected and the information requested. Once this is done, the onus is on the private person from whom information is requested to show why such information should not be disclosed. Having examined the pleadings and submissions, the appellate court held that the pleadings before the trial court did not meet the standard set for a request for information held by a private person and there was no demonstrable or sufficient connection between the requested information and the exercise or protection of the rights under articles 28, 32(2), 48 and 50 of the *Constitution*.

123. On our part, we are inclined to agree with the Court of Appeal that the appellants did not establish a demonstrable link between the rights they intended to exercise or protected and the information requested. We have reached that conclusion because firstly, the right to access to information is not an absolute right. Thus, section 6 of the *Access to Information Act* provides that:

> ' (1) Pursuant to article 24 of the *Constitution*, the right of access to information under article 35 of the *Constitution* shall be limited in respect of information whose disclosure is likely to:
>
> a. Undermine the national security of Kenya;
>
> b. Impede the due process of law;
>
> c. Endanger the safety, health, or life of any person;
>
> d. Involve the unwarranted invasion of the privacy of an individual, other than the

applicant or the person on whose behalf an application has, with proper authority, been made;

e. Substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;

f. Cause substantial harm to the ability of the Government to manage the economy of Kenya;

g. Significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;

h. Damage a public entity's position in any actual or contemplated legal proceedings; or

i. Infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.'

124. Secondly, looking at the submissions by the appellants, while on one hand they have identified the information required and the sources thereof, they have gone ahead to reach the incredible conclusion that the said information contains information that is adverse to them and is the sole basis for their arrest and prosecution. If that be so, of what benefit would an order of release be since they already purportedly know the contents of the KPMG report and the Legal Audit by Messrs Coulson, Harney, Advocates?

125. Thirdly, the court needs to balance the appellants' enjoyment of article 35 rights and the 3rd and 6th respondents' right to privacy under article 31 of the *Constitution*. Internal working documents, particularly internal investigation reports which may affect the rights of parties not involved in litigation such as BAAM's and Britam's clients cannot be wished away in granting access to information held by those parties. More fundamentally, failure by the appellants to establish the connection between the rights to be exercised or protected and the information requested connotes that if they were to be granted that information,

unwarranted invasion of the privacy of the BAAM and Britam would be unduly occasioned and may cause substantial prejudice to their commercial interests.

126. Fourthly and lastly, we reiterate that, at the trial court, the appellants will have the opportunity to interrogate all and any documents to be produced by the DPP. If those documents include the documents they now desire to have, they will have ample opportunity to study them and challenge their veracity. As it is, their request is misconceived and we have no hesitation in finding that the appellants were and are not entitled to the right to access to information under article 35(1)(b) of the *Constitution*.

Relief available to parties

127. We have said enough to show that the appellants' appeal is one for dismissal and the proper path for them to follow is to face the charges at the Chief Magistrate's Court and let that court determine their innocence or guilt. They have not persuaded us that they are entitled to any relief and we so find.

128. Regarding costs, the leading authority on that subject is *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others,* SC Petition No 4 of 2012; [2013] eKLR where we stated that costs follow the event but the court may in appropriate cases exercise discretion and with good reason, order otherwise.

Since the appellants have pursued the matter from the High Court to this court and the respondents who appeared before us have incurred costs, it would only be fair that the appellants bear the costs of the consolidated appeal.

E. Orders

129. Consequently, we issue orders as follows:

1. The appeal is moot in regard to the issue of prohibition of the 1st and 2nd respondents from arresting and charging the appellants.

2. Appeal No 6 (E007) of 2022 dated March 24, 2022 is disallowed save for a declaration that judicial review proceedings brought under the provisions of the *Constitution* must involve a review of merits.

3. Appeal No 4 (E005) of 2022 dated March 9, 2022 is disallowed.

4. Appeal No 8 (E010) of 2022 dated April 12, 2022 is disallowed.

5. The appellants shall bear the costs of all the three appeals to be paid to the 1st, 2nd, 3rd, 4th and 6th respondents.

6. We hereby direct that the sum of Kshs 6000/- deposited as security for costs in each of the appeals herein be refunded to the appellants.

130. It is so ordered.