CONSTITUTIONAL LAW CASE DIGEST

VOLUME II

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Philip Kichana
Executive Director

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PREFACE

Constitutional interpretation in Kenya continues to raise novel issues, which add to the evolution of the Kenyan Constitutional Jurisprudence.

In the previous Constitutional Law Case Digest[1] we considered the trend of the Constitutional Jurisprudence in the enforcement of fundamental rights and freedoms in Kenya between 1990 and 2003.

This issue is an expansion of the first edition and it addresses *inter alia,* rights to property, suffrage and public policy. The digest focuses on the emergent interpretation of fundamental principles and doctrines of constitutional law namely, constitutionalism, separation of powers, the rule of law and parliamentary supremacy.

In a nutshell, this case digest seeks to establish:

- The extent to which courts have addressed other Constitutional guarantees such as property, and matters of public policy.
- The approach taken by courts in addressing these guarantees.
- The extent to which the court has applied the doctrine of purposive interpretation of the Constitution.
- The extent of inconsistencies in constitutional interpretation

The cases analyzed in this digest are not exhaustive and final but only highlights some of the key decisions. The digest brings out the conflicts in interpretation of various sections of the Constitution.

The trend appears to be intermixed. The Constitutional Court in Kenya is at crossroads torn between numerous schools of thought thus, creating anarchy and contradiction over the proper canons of interpreting the Constitution.

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[1] Constitutional Law Case Digest: Fundamental Rights and Freedoms, 2004

For instance, in Gachiengo[2] case the court adopted a liberal interpretation of the issues while the Meme[3] case totally discredited the former, thanks to the two schools of thought. An observation of the trend reveals that there is need for a more open approach to constitutional matters.

Most constitutional matters involve challenging the exercise of public authority on violations. Citizens pursuing matters against state organs are likely to be helpless unless the Constitutional Court opens up to address their cases. In some decisions there has been palpable hostility towards the liberal interpretation of the constitution.

In some instances the court has been tied to the procedure even where doing so would amount to injustice. Other questions that still need to be addressed are such as who decides what constitutes a constitutional issue and at what stage this is to be done. There exist procedures meant to sieve the cases which are not constitutional, however, if not well applied and checked these procedures might sacrifice merited cases.

Some of the cases outlined herein are an addition to our constitutional law jurisprudence by affirmation of what has come to be described as the doctrine of the purposive interpretation of the Constitution which is emphatic that the Constitution must be construed in a liberal manner rather than in a restrictive and conservative manner. The *Timothy Njoya Case* [4]is one such case. In this case the doctrine of parliamentary supremacy was in issue and Parliament's powers of amendment were radically reduced.

The Court in choosing this position, cited with approval, and affirmed both the Kenyan Constitutional Court's ruling in *Njogu –vs- Attorney General*[5] and the Tanzanian Court of Appeal's ruling in *Ndyanabo –vs-*

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[2] High Court Miscellaneous Application No. 302 of 2000
[3] Miscellaneous Criminal Application No. 495 of 2003
[4] Miscellaneous Application 82 of 2004 (OS)
[5] Criminal Application No. 39/2000

Attorney General[6] while simultaneously casting the death upon the "*Elmann Doctrine*" by refusing to construe the provisions of the Constitution relating to fundamental rights in a restrictive way.

In instances where a case has not in real terms raised serious questions of constitutional adjudication and where the principles they have upheld have had little controversy and where they appear to have been generally accepted in principle, it has been easy, for the court appears willing to address the issues.

In other instances however, some of the cases have raised issues, which have been more involving and controversial. Githu Muigai in his article '*The Judiciary in Kenya and the Search for a Philosophy of Law: A case of Constitutional Adjudication*[7]", addresses the dichotomies that exist in constitutional interpretation. As Githu Muigai notes in the article, the court has to balance between competing values and desires in developing the constitutional jurisprudence. This however depends on which values are more powerful and also on the inclinations of a judge being political, religious, or moral. He suggests that where the court is faced with a situation of competing claims they should be guided by the instructive words of Lord Denning;

> '*Where there is any conflict between the freedom of the individual and any other rights or interest then no matter how great or powerful those others may be, the freedom of the humblest citizen shall prevail*[8]

There are instances where the High Court sitting as a Constitutional Court has refused to address Constitutional issues brought before it arguing that the matters can be addressed through other avenues thus deciding the matter at a preliminary level. This ends up denying the applicants *locus standi* to raise matters desired. Such a conservative approach was taken in *Rashid Odhiambo Aloggoh and 245 others*[9], despite the matter having

[6] [2001] 2 E.A 485 at p. 493
[7] See Appendix
[8] Lord Denning: Freedom under the Law [1949] pp.4
[9] Civil Appeal No. 110 of 2001

been declared as raising constitutional issues, the two judges sitting as a Constitutional Court declined to determine the issues and advised the applicants to pursue their claims through other Acts of Parliament. This appears to state that statutes are the ones that concretely grant the parameters of the enforcement of constitutionally entrenched fundamental rights and not the statutes being weighed against the Constitution.

The Lordships' view in this case appears to be that constitutional rights may be abridged by ordinary statute. In acting the way it did the High Court was in effect allowing further abridgment of individual rights under the Constitution. In the case of *Angaha –vs- Registrar of Trade Unions*[10] the High Court similarly took a conservative approach in refusing to enforce the applicant's right to associate.

Another controversial issue is on Presidential Elections. The Court of Appeal has no powers to sit on appeal on such a matter. However, the court can sit on appeal in other election petitions. In the case of *Daniel Toroitich Arap Moi –vs- John Harun Mwau*[11] the Court of Appeal could not decide on matters raised as constitutional arguing that the court had no appellate jurisdiction on such matters. Even though this rule must have intended to cure some mischief, it fundamentally denies parties their right of having their matters determined by the highest court in the land. Thus, the issue ought to be addressed to curb against arbitrariness and injustice.

Various features have characterized our Judiciary over time and this may help explain the kind of judicial philosophy that the courts have espoused. Our Judiciary has been characterized by lack of independence and instances of corruption. This has been evident in judicial decisions and the constitutional decisions have not been spared.

[10] [1973] E.A
[11] Civil Application No. 131 of 1994

Another observable trend is that courts have tended over time to decide cases based on technicalities as opposed to substantive justice. There is no argument that courts are meant to apply the law in a certain manner in pursuit of justice. But constitutional issues being fundamental owing to the fact that they touch on the supreme law, must not be made to suffer at the preliminary level simply because of a certain technical omission or commission.

On the issue of Constitutional supremacy, the Kenyan courts appear to favour that which upholds some form of strict separation of powers undiluted by any notion of legislative supremacy. The Courts are vigilant to protect and promote Constitutional supremacy as was illustrated in the matter of *Republic –vs- Hon. E. K. Maitha exparte Joseph Okoth Waudi*[12].

Given that the constitutional jurisprudence emerging is in favour of the Liberal interpretation, it would be futile to continue holding onto the *Elmann Doctrine* as some courts have done. Some of the rulings in this digest have the profound effect of liberating the Kenyan constitutional law and practice from the clutches of the application of the *Elmann Doctrine* line of jurisprudence. This leaves the Kenyan constitutional jurisprudence to develop along the lines of the more liberal interpretation with its attendant constitutional guarantees.

As a word of caution however, wisdom dictates that one should not emerge from reading this with the distinct impression that constitutional law and practice in Kenya is primitive and unreservedly out of touch with the times, at least where constitutional guarantees are concerned. Suffice it is to say that courts approach issues with sobriety and particular regard to tenets which are generally intrinsic to constitutional practice and fundamental human rights.

[12] Miscellaneous Civil Application No. 802 of 2003

The impact that has been made by some of the cases in the digest on the Kenyan constitutional jurisprudence is quite profound and quite far-reaching in setting the trend of constitutional interpretation.

Our findings herein continue to form the basis of the crusade for a Constitutional Court for consistency and predictability of constitutional decisions. At the moment, differently constituted benches address different constitutional issues. Thus, there is need for a Constitutional Court to address the myriad of issues and it should be a court with finality. The ICJ Kenya believes that for the development of a consistent and principled constitutional jurisprudence we need an independent, efficient and accountable Judiciary. The Judiciary should be independent in terms of institutional and financial autonomy, freedom from undue executive, parliamentary or private sector interference, independence in administrative operations, and also the independence of the individual judges.

In conclusion, we observe that the court needs to take a more vibrant position in interpreting constitutional issues to give life to constitutional provisions thus ensuring compatibility with a liberal society. The Judiciary must continue enforcing civil liberties and not sacrifice the same on the altar of social and or political aspects or legitimating the Executive authority.

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Importance

Under Section 60 of the Constitution, the High Court is vested with original and unlimited jurisdiction to deal with irregularities and the inherent jurisdiction to nullify and quash them. In this matter, the applicants contended that the court lacked jurisdiction to grant the order of *certiorari* for reasons that the offending rule was published more than one year before the commencing of the proceedings in question. Order 53 Rule 2 and 7 provide that no application for relief can be entertained by the court outside the 6 months limit imposed by these rules and by Section 9 of the Law Reform Act.

The court held that it has inherent powers to strike down any *ultra vires* acts or decisions without any restrictions. The court stated that it would be tantamount to constitutional heresy if it were to shy away from doing so and for this reason it averred that it would not allow itself to be fettered by restrictions based on time limits in rules of procedure or in an Act of Parliament.

Summary of Facts

On 24th February 2004, the President of the Republic of Kenya appointed a Judicial Commission of Inquiry into the Goldenberg Affair under the Commission of Inquiry Act Cap. 102 of the Laws of Kenya. The President set out the scope of the Commission to include the "summoning of any person or persons concerned to testify on oath and produce any books, plans and documents the Commission may require."

On 14th March 2003, the Chairman of the Commission formulated rules and procedures to govern the conduct and management of the proceedings of the Inquiry under Section 9 of the Commissions of Inquiry Act. These rules ranged from Rule (a) to (i). The application was brought contesting rule (i) which read:

> " The Commissioners may summon any person or persons to testify on oath and may call for the production of books, plans and documents that the commissioners may require."

The complainants (the *ex-parte* subjects) herein brought a judicial review application before the court contending that:

a) Although the Commission was just about to wind up its affairs after spending considerable amount of public funds, both the Commission and the Commissioners had not summoned witnesses as required under Section 3(a) ii and Section 10 of the Cap. 102.
b) The rule (i) referred to above was *ultra vires* Sections 9 of the Cap. 102 and that because of the alleged *ultra vires* or non compliance, the Commission would not be able to make a full, faithful and impartial inquiry in accordance with the provisions of Section 7 of the Commission of Inquiry Act, Cap. 102.

The Respondents submitted that the court lacked jurisdiction to grant the order of *certiorari* because the offending rule was published on 24 March 2003 and more than one year had elapsed between then and the filing of the application. The Respondents submitted that Order 3 rules

2 and 7 provided that no application for relief could be entertained by the court outside the 6 months limit imposed by the rules.

The respondents filed grounds of opposition against the application as follows:

1. That the court lacked jurisdiction to grant an order of *certiorari* as prayed.
2. That the order of prohibition sought if granted would amount to correcting the course, practice and procedure of the Judicial Commission of Inquiry into the Goldenberg Affair as laid down by law.
3. That the Honourable court lacked power to compel the Judicial Commission of Inquiry into the Goldenberg Affair to summon witnesses as the Commission had a discretionary power to do so.
4. That an order of *mandamus* could not be issued against the 2nd, 3rd and 4th respondents in their individual capacity.
5. That paragraph 7 of the supporting affidavit was pre-emptive and prejudicial to the proceedings of the Commission as the same showed that the deponent had already reached a decision on the sponsors, architects, facilitators and beneficiaries of the Goldenberg Affairs.
6. The application was based on speculation and inconclusive proceedings of the 1st respondent.
7. The 1st respondent had no powers to compel the named persons to testify before the said Commission of Inquiry.

Held

1. A careful scrutiny of Section 9 of the Law Reform Act pursuant to which rules under Order 53 of Cap. 21 were made and in particular rules 2 and 7 which it is contended denies this court jurisdiction to grant or give orders of *certiorari* outside 6 months reveals that only formal judgments, orders, decrees, conviction or other proceedings of an inferior court or Tribunal fall within the six months period stipulated.

2. The act of publishing a rule cannot be said to be a proceeding or any of the orders mentioned in Order 53. Order 53 rule 2, which prescribes the time limit, does not also include anything covered by the principle of *ultra vires* or any nullities or decisions made without jurisdiction at all.
3. The High Court's jurisdiction or power is not fettered or ousted by Rule 2.
4. In the context of an on going Commission of Inquiry such a body can be compelled by an order of mandamus to perform its statutory duties. The decision to summon or not to summon witnesses is being made every other day by the Commission as the inquiry proceeds and the authority of such a decision based on an invalid rule cannot reasonably have a time limit especially where an aggrieved applicant moves the court for a remedy in the course of a public inquiry's proceedings and before their closure.
5. The summoning or not summoning of a witness is a matter that goes or touches in a big way the mandate or jurisdiction of the Inquiry and therefore no exclusion clause whether procedural or statutory can oust the jurisdiction of the court. Failure to perform an essential preliminary such as summoning witnesses who are concerned goes to jurisdiction and exclusion terms would not be available where there is lack of jurisdiction or excess of jurisdiction and this court must determine the matter. In this case, the respondents' Counsel has admitted that the ten concerned persons have been served with adverse notices and Section 3 (3) (a) demands that the Inquiry complies with the entire provisions in respect of such persons. It is therefore held that in law if a prescription is mandatory and it is not done, what is done is invalid and if the prescription is directory, disobedience may be treated as an irregularity not affecting validity.
6. Under the Constitution Section 60, the High Court has original and unlimited jurisdiction to deal with illegalities and in addition the court has inherent jurisdiction to nullify and quash them. Any statute or rule that purports to take that jurisdiction away or is inconsistent with that jurisdiction is void to the extent of the inconsistency under

Section 3 of the Constitution and it would be abdication of this court's powers to impose on itself any fetters not imposed by the Constitution itself.

7. The inquiry had a duty under law to issue summons to the concerned persons and accordingly the court found that it had jurisdiction to grant any deserved judicial review orders.
8. Rule (i) of the Inquiry's Rules and procedures violates the mandatory terms requiring the Commission to summon any person or persons concerned in accordance with the provisions of Section 10 (1) of the Commissions of Inquiry Act.

   Rule (i) also violates the instructions contained in Section 3 (3) (a) ii. Under this Section, the Act has directed in mandatory terms how the Commission shall be executed in terms of summoning the persons concerned.

   The court therefore came to the finding that the Inquiry did not have the power to make Rule (i) in discretionary terms and had no jurisdiction to make the rule in those terms at all. The rule was declared *ultra vires* the Commission and the Commissions of Inquiry Act, Cap. 102 of the Laws of Kenya.

   The High Court in this regard issued the following Orders:

   (a) Order of *certiorari* removing Rule (i) of the Rules and procedures as published in the Gazette Notice No. 1566 of 14th March 2003.
   (b) Order of prohibition to prohibit the respondents from presenting the inquiry report to the President until the concerned persons have been issued and served with the summons and the Commissioners fully comply with the orders herein.
   (c) Order of *mandamus* compelling the respondents to perform their statutory duty by issuing and serving summons on the concerned persons stipulated in the Commission and Sections 3 (3)(a) ii, Sections 7, 9 and 10 of the Commissions of Inquiry Act.

Authorities referred to:

1. R –vs- Communications Commission of Kenya (2000) IEA 199
2. Rustin Shalmon Kitololo –vs- Kenya Review Authority HCCC No. 1969 of 1996
3. Tsikata –vs- Newspaper Publishing PLC (1997) 1 ALL ER 655
4. R –vs- Examinations Council *ex parte* Njoroge & 9 others CA 266 of 1996
5. Job Kilach –vs- Judicial Commission of Inquiry into the Goldenberg Affair & 3 others CA 77/2003
6. DPP –vs- Hutchings (1990) AC 783
7. Githunguri –vs- Republic (1986) KLR 1
8. The King –vs- Postmaster General 1 KB 291
9. London –vs- Clydeside Estates vs Aberdeen DC (1980) 1 WLR 182 at 189
10. Smith Elloe RDC (1956) AC 736
11. R –vs- Secretary of State for Environment *ex parte* 1977 QB 122
12. Anisminic –vs- Foreign Compensation (1969) 2 AC 147
13. R –vs- Attorney General *ex parte* Biwott 1 (2000) KLR 668
14. R –vs- Judicial Service Commission *ex parte* Peter Stephen Pareno Miscellaneous Civil Application No. 1025 of 2003

Analysis and Relevant Excerpts

One of the first issues to be tackled by the Court dealt with matters of the Court's jurisdiction. The question the court grappled with was whether the court had jurisdiction to grant an order of *certiorari* where the application was instituted more than six months after the act complained of had taken place. Order 53 of the Civil Procedure Rules states that the order of *certiorari* can only be granted where the application for judicial review is instituted six months after the act and that no application for relief can be entertained by the court outside the six months limit imposed by the rules. The court examined an English case, *Smith Elloe RDC [1956] AC 736* in which it was suggested that an Order that is patently *ultra vires* may be impugned outside the six weeks limitation.

The High Court reflecting the above views stated:

> "*We find that it would be serious abdication of jurisdiction and powers of this court if we were to shy away from quashing a nullity because in essence the doctrine of ultra vires permits the courts to strike down decisions or acts made or done by bodies exercising public functions which they have no power to make. The courts have a specific mission and a duty to uphold the rule of law. Indeed the doctrine of ultra vires was one of the original pillars upon which judicial review was founded.*"

The court added that under the Constitution Section 60, it had original and unlimited jurisdiction to deal with illegalities and it had inherent jurisdiction to nullify and quash them. The court stated that this jurisdiction must as stipulated in the Judicature Act be exercised in accordance with:

1. the Constitution
2. Written laws
3. Doctrines of common law and equity as at 12th August 1897

In this regard therefore any Statute or Rule purporting to take that jurisdiction away or that is inconsistent with that jurisdiction would be declared void to the extent of the inconsistency under Section 3 of the Constitution.

The court examined the provisions of Order 53 that reads: -

> " Leave shall not be granted to apply for an order of certiorari to remove any **judgment, order, decree, conviction** or other proceedings for the purpose of its being quashed unless the application for leave is made not later than six months after the date of the proceedings or such shorter period as may be prescribed by any Act, and where the proceeding is subject to appeal and time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired." [Emphasis added]

The court was of the opinion that that the above rule covered only the specific matters mentioned. The act of making an *ultra vires* rule was outside the limitation specified in the above Rule. The court added that if the Rule (i) in question was *ultra vires* the Commission, it was accordingly void *ab initio* and of no effect. The court accordingly stated:

> "*We hold that nullities are not covered by the six months limitation both on the wording of the rules and as a matter of principle due to the nature of nullities.*"

Prof. Julius Meme –vs- Republic (Through the Kenya Police - Anti-Corruption Unit) & The Principal Magistrate, Anti-Corruption Court

-And-

Dr. Augustine Muita Kahare (Interested Party)

High Court of Kenya at Nairobi, Miscellaneous Criminal Application No. 495 of 2003

RAWAL & NJAGI, JJ. OJWANG, Ag. J

Constitution- the Constitutionality and legality of the Anti-Corruption Court-Constitutional and jurisdictional authority for the Chief Justice to create an Anti-Corruption Court-Whether the Anti-Corruption & Economic Crimes Act is unconstitutional in form and application

Summary of Facts

In 2002, the then Chief Justice, Bernard Chunga launched the Anti-Corruption Court under the existing arrangement of Subordinate Courts. The court was established for the purpose of handling cases of corruption and was to exercise the same jurisdiction as Magistrates' Courts as set out in various statutes. (A year earlier in 2001, the Anti-Corruption Police Unit and the Anti-Corruption Prosecution Unit under the Director of Public Prosecutions had been established.) During the launch, the Honourable Chief Justice stated that the establishment of this court was purely administrative. The Chief Justice named a Chief Magistrate and a Principal Magistrate to preside over the two initial Anti-Corruption Courts in Nairobi. The Chief Justice thereafter issued a practice note detailing the type of cases to be brought before the Anti-Corruption Court.

On 9th April 2003, the Applicant was arrested by police officers from the Anti-Corruption Police Unit (A.C.P.U) following investigations that had been conducted earlier by this unit regarding the loss of the sum of

Kenya Shillings 51 million which belonged to the Kenyatta National Hospital where he was the Director between 1992 and 1998. The Applicant was subsequently charged with two counts of abuse of office contrary to Section 101 (1) of the Penal Code (Cap. 63) and the Attorney General gave the consent to prosecute by virtue of powers conferred upon him by Section 101 (3) of the Penal Code. On 10th April 2003, the Applicant (the first accused) and the interested party (the second accused) were formally charged with offence at the Anti-Corruption Court. Later on the 30th April 2003, the Anti-Corruption and Economic Crimes Act (Act No. 3 of 2003) was enacted but did not enter into force until 2nd May 2003. It is only after the entry into force of the said Act that the Applicant filed a Constitutional reference on 22nd July 2003. The trial was to commence on 18th June 2003 but on the said date, the Applicant and Interested party applied by virtue of Section 67 (1) of the Constitution for their cases to be referred to the High Court for constitutional adjudication. The Magistrate allowed the application and the Applicant then moved the High Court to determine eight questions stated to have a bearing on the interpretation of the Constitution. These questions were:-

i) Whether the so-called "Anti-Corruption Court" was a Court known to law and whether the same had been duly established by law in accordance with the provisions of the Constitution.
ii) Whether the Magistrate serving at the Anti-Corruption Court was a Magistrate known to law and whether the trial Magistrate could try the matter in the context of the Anti-Corruption and Economic Crimes Act (Act No. 3 of 2003).
iii) Whether the accused was likely to be denied the 'presumption of innocence' secured by Section 77(2) (a) of the Constitution.
iv) Whether having regard to all the circumstances of the matter, the first accused (the Applicant) was likely to be denied a fair trial by an independent and impartial Court established by law and whether the charges against the first accused were against the principles of natural justice.

v) Whether the prosecutor was established by law to prosecute the matter and whether Section 26 of the Constitution had been breached or was likely to be breached.
vi) Whether the Anti-Corruption and Economic Crimes Act was unconstitutional in form and application.
vii) Whether the charges preferred against the accused were null and void under the Anti-Corruption and Economic Crimes Act, whether the charges preferred were based on impliedly (sic) repealed legislation and whether the High Court was the right Court to try the accused.
viii) Whether the proceedings were an abuse of the process of the Court and, if so, whether any subordinate court could try the matter.

Held

1. The Anti-Corruption Court is a division in the Magistrates' Courts system lawfully established by the Chief Justice by virtue of powers conferred upon him by the Magistrates Courts Act (Cap. 10), Section 13 (2).
2. The trial Magistrate in the Anti Corruption Case No. 22 of 2003 lawfully held the appointment made by virtue of powers provided for under Section 69 of the Constitution and was therefore fully competent to try the abovementioned anti-corruption case.
3. The applicant was unlikely to be denied the presumption of innocence secured by Section 77 (2) of the Constitution as trials at the Anti-Corruption were regulated by rules of procedure and evidence and guided by normal judicial practice as found in all courts forming part of the judicial system.
4. The Applicant was unlikely to be denied a fair trial by an independent and impartial court as the trial court was guided in every respect by the principle of judicial independence.
5. The prosecutor had lawful authority to prosecute the matter as the conduct of prosecution was being conducted under the authority of the Attorney General who has prosecutorial powers by virtue of Section 26 of the Constitution.

6. The question as to whether the Anti-Corruption and Economic Crimes Act (Act No. 3 of 2003) was unconstitutional in form and application was misconceived as the Act had no relevance with the offence with which the Applicant was being charged.
7. The charges being brought against the Applicant are in respect of Section 101 of the Penal Code and have no relationship to Act No. 3 of 2003 and therefore it was no tenable for the Applicant to impugn the provisions of the said Act in this constitutional application or even to suppose that the Act had repealed the offence specified in Section 101 of the Penal Code. The proper court to try the Applicant was the Subordinate Court.
8. The proceedings in the trial court were not an abuse of the process of court and the prosecution had a basis for proceeding on the criminal charges laid against the Applicant.

Authorities referred to:

1. Departed Asians Property Custodian Board –vs- Jaffer Brothers Ltd. [1999] 1 E.A 55 (SCU)
2. Ruturi & Another –vs- Minister of Finance & Another [2001] 1 EA 253
3. Her Majesty The Queen –vs- Imre Finta [1993] 1 SCR 1138
4. Gachiengo –vs- Republic [2000] 1 EA 52 (CAK) (Distinguished)
5. In the Estate of Shamji Visram & Kurji Karsan –vs- Shankerprasad Maganlal Bhatt & Others [1965] EA 789
6. Jaffer Gulamhussein Ismail –vs- Republic [1963] EA 55
7. R –vs- Fisher [1969] 1 All ER
8. Kenneth Njindo Stanley Matiba –vs- The Attorney General Miscellaneous Application No. 666 of 1990
9. Dr. Timothy Njoya & Others –vs- The Hon. Attorney General & Others Miscellaneous Civil Application No. 82 of 2004 (O.S)
10. Hinds & Others –vs- The Queen [1976] 1 All ER 353
11. R –vs- Carr-Briant [1943] 2 All ER 156
12. Anarita Karimi Njeru –vs- Republic [1979] KLR 154

Analysis and Relevant Excerpts

The Anti-Corruption Courts Act was enacted by Parliament pursuant to its legislative power under Section 30 of the Constitution. The Applicant alleged that the Act was unconstitutional. The court stated that the Applicant did not properly isolate provisions impugned as unconstitutional and said as follows:

> *"We are in agreement with the Learned Director of Public Prosecutions that a blanket charge of unconstitutionality such as is claimed by the Applicant is improper and a more convincing case could be made by isolating the provisions impugned as unconstitutional and demonstrating how they relate to the criminal case that led to these proceedings."*

The threshold issue, the judges said, was whether or not the constitutional reference was rightly made. The High Court in *Anarita Karimi Njeru –vs- Republic* set out considerations that should guide parties in seeking to file constitutional references in the High Court. These were as follows:

> *"We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference from the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed."*

The judges were unanimous in deciding that the application failed to meet the above basic test and stated that the Applicant's case was founded on generalised complaints "without any focus on fact, law or the Constitution". The court declared that that the application, founded on the presence or lack of constitutionality of the Anti-Corruption and Economic Crimes Act, was misconceived as the applicant was never charged under the Act. The court held that the challenge to Act No 3 of 2003 had nothing to do with any constitutional rights of the Applicant. The court said:

" We also found a rather strange circularity of reasoning by which the Applicant has attempted to found a lateral impeachment of the Penal Code charge against him, through discrediting the Anti-Corruption and Economic Crimes Act (Act No. 3 of 2003). Even as the Applicant maintains that Act No. 3 of 2003 is unconstitutional, he would allow it for reasons which are entirely unclear, such a minimum of validity as would have the effect of repealing by implication Section 101 of the Penal Code; and the outcome should then be that the Applicant will not be tried under Act No. 3 of 2003, nor under the Penal Code, Section 101. This may be an ingenious argument but this Court cannot allow it to prevail, because it entails a subterfuge that is, in effect destined to undermine the process of justice, particularly in the domain of criminal law."

On the first issue on whether the Anti-Corruption Court was a Court known to law and consistent with the Constitution, the court held that the court was properly set-up by the Chief Justice under the Magistrates Courts Act (Cap. 10). It was fully demonstrated through the submissions of counsel and through case law *Hinds and Others –vs- The Queen* that the establishment of the Anti-Corruption Court, represented a normal and practical approach to the management of the Court system for the purpose of achieving the efficient disposal of cases.

The Applicant impugned Act No. 3 of 2003 on the basis that Section 3 thereof makes provision for the designation of Special Magistrates to try cases of corruption. The applicant argued that any appointment made under Section 3 (1) of the abovementioned Act was a nullity because it was establishing a new, unknown category of Magistrates called 'Special Magistrates'. Section 3 (1) of the said Act reads:

"(1) The Judicial Service Commission may, by notification in the Kenya Gazette, appoint as many Special Magistrates as may be necessary for such area or areas or for such case or group of cases as may be specified on the notification to try the following offences, namely: -

(a) Any offence punishable under this Act

(b) Any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in paragraph (a). "

The court however rejected this argument and stated as follows:

> "It *has been demonstrated to our satisfaction that the term 'Special Magistrate' denoted no more than that some ordinary and regularly – appointed Magistrates are being posted at the newly created Magisterial set of courts called Anti-Corruption Courts, as a way to achieve greater efficiency in the trial of normal criminal matters which are in some way linked to fraud, particularly in relation to public assets."*

It is thus obvious from the foregoing that the trial of the Applicant in the Magistrate's Anti-Corruption Court was not intended to deny him his constitutional and ordinary legal rights.

The criminal case against the applicant had been based on investigations conducted by the Anti-Corruption Police Unit and charges were brought against the applicant under the Penal Code (Cap. 63) well before the enactment and entry into force of Act No. 3 of 2003. Despite the charges being brought under Cap. 63, the Applicant challenged the constitutionality of the Anti-Corruption and Economic Crimes Act (Act No. 3 of 2003) in relation to the criminal case filed against the applicant. Counsel for the applicant argued that Section 73 (1) of Act No. 3 of 2003 was unconstitutional because by this section, the powers of the Attorney General and the Commissioner of Police were being transferred to a new agency, contrary to Section 26 of the Constitution conferring what the applicant argued to be exclusive powers of investigation and prosecution on the Attorney General and the Commissioner of Police.

The court in this respect failed to uphold this argument and stated that the Anti-Corruption Police Unit in this matter exercised prosecutorial powers. The court held that investigative powers are not the preserve of the Commissioner of Police under the Constitution as the Police Commissioner derives investigative powers from the Police Act (Cap. 84) and not from the Constitution.

The Court being asked to adjudicate on the constitutionality of the Anti-Corruption Crimes Act held that there was no basis presented before the court for disputing the constitutionality of the said Act and therefore declined to do so. The court however stated that it was the duty of the court to uphold the sanctity of the Constitution and it would not hesitate to strike out any provisions of statute law found to be inconsistent with the Constitution.

Kimani Wanyoike –vs- Electoral Commission of Kenya & Another, Court of Appeal at Nairobi, Civil Application Number 213 of 1995
Omolo, Tunoi and Shah JJA

Constitution- constitutional provisions regulating the Electoral Commission of Kenya- procedure applicable to election petitions in Kenya- applicability of Rule 5(2)(a) of the Court of Appeal Rules

Summary of Facts

The applicant made an application to the Court of Appeal under Rule 5(2)(b) of the Court of Appeal Rules seeking orders that the respondents, by themselves, servants or agents or any of them or otherwise howsoever be restrained from further refusal to accept the applicant's nomination papers for the Kipipiri parliamentary election, the 1st respondent be ordered to include the applicant's name and other necessary particulars in the ballot papers to be issued in respect of the said parliamentary election, any further order consequential upon the above as will enable compliance with National Assembly and Presidential Elections Act and Regulations there under and for costs of the Application.

The 1st Respondent was organizing a parliamentary election in Kipipiri constituency after the death of the immediate Member of Parliament. The 2nd Respondent was appointed as the returning officer by the 1st respondent to supervise the election. In the meantime two members of the applicant's political party, Peter Njuguna and James Githinji, filed a suit in the Chief Magistrates Court, Nakuru by way of plaint accompanied by a chamber summons application seeking orders *inter alia* to restrain the Ford Asili Secretary General from declaring the Defendant, Kimani Wanyoike, as the party nominee for Kipipiri constituency parliamentary elections.

The application was heard *ex-parte* and an injunction granted in the terms sought. Having been served with the orders, the applicant sought to set aside the orders and filed an *"ex parte* originating summons" under section 65(2) of the Constitution seeking a declaration that the order of the Chief Magistrates Court, Nakuru is a nullity or alternately, the order be stayed pending the hearing and determination of the application. The order was granted on the nomination day and the applicant and his advocate arrived two or so minutes to the time set by the 1st respondent for receipt of nomination documents. The 2nd respondent rejected the documents on the basis that they were presented outside the stipulated time.

The application then filed the present suit seeking mandatory injunctions against the respondents.

Held:

1. The Court of Appeal will grant an injunction or a stay if it is shown that the intended appeal is an arguable one. The appeal should not be frivolous and if the stay or injunction is not granted, the eventual success of the appeal would be rendered nugatory
2. Where there is clear procedure for the redress of any particular grievance prescribed by the constitution or an Act of Parliament, that procedure should be strictly followed. In the circumstances, the procedure for addressing grievances arising from elections is through an election petition.
3. The power of an election court to find a person guilty of an election offence can only be exercised in a hearing of an election petition and not in a suit commenced by way of plaint.
4. The procedure adopted by the applicant of filing a suit by way of plaint is incorrect and hence the court is not satisfied the appeal is arguable.
5. The application is dismissed with costs to the respondents.

Authorities referred to:

1. Richard Chirchir & Another –vs- Henry Cheboiwo & Another, Civil Application No. 253 of 1992 (Unreported)
2. The Speaker of the National Assembly –vs- The Hon James Njenga Karume, Civil Application No. 92 of 1992 (Unreported)
3. Raphael Samson Kithika Mbondo –vs- Luka Daudi Galgalo Paul Joseph Ngei, Election Petition No. 16 of 1974
4. The Queen –vs- The County Judge of Essex and Clark (1887) 18 QB 704

Analysis and Relevant Excerpts

The question for determination for the court was in regard to the appropriate procedure for moving to court in instances of election disputes. The court brought to rest the controversial issue of how to approach the court in matters that touch on provisions of section 17 of the National Assembly and Presidential Elections Act. Since that section only recognizes the 'election court' which is the High Court as the court with jurisdiction to address the matters under section 17, then it is obviously wrong for any party to attempt to seek a remedy in any other court.

The other point that was addressed was as regards the procedure of approaching the court. There appears to be conflicting decisions by the court on the procedure with some opting for a liberal interpretation and thus not to being bogged down by the procedure as in the case of *Richard Chirchir & Another –vs- Henry Cheboiwo, Civil Application No. 253 of 1992(unreported)*. Others have categorically stated that the procedure set out should be strictly followed as was held in the case of *The Speaker of the National Assembly –vs- the Hon James Njenga Karume, Civil Application No. 92 of 1992*. The Highest court needs to reconcile these two decisions to give a clear position on the procedure; otherwise Applicants have to just depend on the school of thought of a particular court.

Republic –vs- Hon. E. K Maitha & The Attorney General, *Ex Parte* Joseph Okoth Waudi, High Court of Kenya at Nairobi, Miscellaneous Civil Application No. 406 of 2001

Constitutional and judicial review issues- Constitutional supremacy - Section 33 of the Constitution as read with section 26 and 27 of the Local Government Act – Powers of the Minister under section 27(2) - whether section 27(2) of the Local Government Act is unconstitutional – constitutional amendment versus a statutory amendment

Summary of Facts

This was an application brought under section 8(2) of the Law Reform Act, Cap 26 Laws of Kenya, Order 53 Rule 1 of the Civil procedure Rules, Section 33 of the Constitution of Kenya and Sections 26 and 27 of the Local Government Act, Cap 265, Laws of Kenya. The Prayers sought were *inter alia*:

I. An order of *certiorari* to remove and quash the decision of the first respondent contained in the Kenya Gazette of 20th June 2003 that revoked the nomination of Joseph Okoth Waudi as a councillor in the Mombasa Municipal Council
II. An order of *certiorari* to remove and quash the decision of the first respondent contained in the Kenya Gazette of 20th June 2003 nominating councillors in various Local Authorities
III. Costs.

The Applicant was nominated by the National Rainbow Coalition (NARC) Party as a councillor in the Municipal Council of Mombasa. His nomination was accepted by the Electoral Commission of Kenya who then forwarded his name to the Minister for Local Government for formal appointment. The Minister proceeded to make the appointment

and gazetted the Applicant as a lawfully nominated councillor of the said council. On 20th June 2003, the Minister revoked the nomination and proceeded to nominate one Fred Oyucho as a councillor vide Gazette Notice No. 4200 of 20th June 2003.

The applicant thus came to court challenging the minister's action. The Advocate for the applicant urged the court to find that this is the section that should check any excessive use of power by the Minister and to ensure that he consults when making certain decisions. This section outlines the mode of nomination of Nominated Members of Parliament. This section was to be read together with sections 26 and 27 of the Local Government Act. Section 26 provides that the appointment of councillors shall follow the procedure set out under section 33 of the Constitution. Section 27 of the said Act provides that the term of office of every nominated councillor shall be five years or the minister may specify a shorter period. The Proviso thereto reads,

> 'Provided that the ministry may at any time in his discretion terminate the nomination of a councillor by notice in writing delivered to the councillor…'

Mr. Orengo for the applicant urged the court to find that where the minister revokes a councillors nomination, he ought to deliver notice to the councillor, and that gazettement is not such a notice. Further that the proviso to section 27(2) is repugnant to section 33 of the Constitution and should not be allowed to stand.

The respondents on the other hand argued that they were not bound to consult with the Electoral Commission of Kenya as regards revocation of nominations and that section 27(2) is not unconstitutional, that it merely vests discretionary power on the Minister, which he may exercise at any time.

The judge addressed the history behind the amendment to section 33 of the Constitution noting that the amendments were meant to ensure an equitable representation in parliament on nominations. The essence of

section 33 was to remove the discretion to nominate from the President and vest the same with the Electoral Commission. This section was to apply *Mutatis Mutandis* to the nomination of councillors as provided by the enactment of Act No. 10 of 1997, which drastically reduced the powers of the Minister for Local Government to appoint councillors.

The judge felt that the discretion to the Minister to nominate councillors having been either taken away or made subject to consultations, the minister couldn't revoke the appointment without the same process of consultation.

Held

1. That the proviso to section 27(2) of the Local Government Act in so far as it purports to contradict section 33 of the Constitution is inconsistent and that a Constitutional Amendment subsequent to a statutory amendment is always superior.
2. That since section 33 of the Constitution has no revocation clause; the revocation by the minister of the appointment of the Applicant under section 27(2) is void.
3. That section 27(2) gives the term of a councillor who is nominated as five years or such shorter period as the Minister may determine. In the Applicants case the judge found the term to be five years.
4. That from the affidavit evidence produced before court, the Minister did not in appointing the new councillor follow the procedure and the effect is that the latter appointment is itself illegal and should not stand.
5. As regards the orders of *certiorari*, the judge found that since the decision by the Minister was void and one that cannot be given the clothing of law, the same was removed and quashed. In effect Gazette Notice Nos. 4200 and 4201 contained in the Kenya Gazette of 20th June 2003 were removed and the decisions therein stand quashed.

No authorities were cited.

Analysis and Relevant Excerpts

This is a case that attempted to chart the way on the apparent conflict between section 33 of the Constitution and section 27(2) of the Local Government Act. The introduction of section 33 was to address the process of nominations of Members of Parliament. Prior to Act No. 7 of 1997 which introduced Section 33 aforesaid, the President would appoint nominated members of the National Assembly without consultations with any other person or authority. Thus the section addressed the powers of the President to appoint ministers and as such it was to the effect that nominated Members of Parliament should be nominated from all parliamentary political parties. This procedure would ensure that political parties and the President do not nominate persons who do not meet the criteria set out by section 33. The President's powers were reduced to receiving the vetted names and to appoint under section 33(1). These changes would thus ensure equitable representation of all political parties in Parliament.

Equally, Act No. 10 of 1997 introducing section 26(2) Local Government Act was meant to address the same issue but this was in regard to the nominations of councillors. This section was to follow the procedure set out under Section 33 on appointment of councillors. The introduction of this section appears to have been to drastically reduce the powers of the minister as regards nomination of councillors. Given the intention and intended purpose of section 33 of the Constitution and section 26(2) of the Local Government Act, the introduction of section 27(2) of the latter Act appears mischievous, as it tends to be in conflict with not only section 33 of the Constitution but also section 26(2) of the Act. This is because it gives the minister increased discretionary powers contrary to the spirit of the aforesaid sections. No doubt then the same had to be declared unconstitutional. This is a clear case where the court took up the task of interpreting the law and it is a given that the powers of Government (through its organs) must be exercised in accordance with the written Constitution, and that it is the Court's function to ensure compliance with the Constitution[13].

[13] Supra note 11 at p. 63.

Samuel Muciri W'Njuguna –vs- Republic
High Court of Kenya at Nairobi, Miscellaneous Criminal Case No. 710 of 2002
K.H Rawal, J and L. Kimaru, Ag J.

Constitutional law-Constitutional Reference-Fundamental Rights and Freedoms-Jurisdiction of the High Court in enforcing fundamental rights and freedoms-Application for anticipatory bail-Factors to be considered in granting anticipatory bail Criminal Law- Criminal Procedure Code-Grant of Bail

Importance

Can the High Court grant the remedy of anticipatory bail, a remedy not specifically provided for under Kenyan law? The High Court in this case decreed that it could. Previous decisions on this issue were conflicting; with some decisions stating that the court has power to grant anticipatory bail (*Daniel M. M'Kirimania –vs- Attorney General, Nairobi H.C Miscellaneous. Criminal Application No. 998 of 2001*); with others stating that the right to anticipatory bail or bail pending arrest does not exist and thus cannot be granted. (*Peter Mwangi Kahutu –vs- Republic H.C Criminal Revision No. 9 of 1999 (unreported)*.

The High Court in this case took a liberal interpretation of S. 84 (1) and (2) of the Constitution and stated that despite anticipatory bail not being specifically provided for under Kenyan law, the High Court can grant it and by doing so would be exercising its supervisory powers to ensure enforcement of fundamental rights and freedoms. This case reinforces the importance of the Constitution as the bastion for securing good governance under the rule of law.

Summary of Facts

The applicant, Samuel Muciri W'Njuguna was a small-scale tea farmer and a spokesman for tea farmers at Mataara and Theta tea factories. He was also a politician who unsuccessfully vied for the Gatundu North Parliamentary seat in 1997 on an National Democratic Party (NDP) ticket. The Applicant claimed that his championing of the small-scale farmers' cause and his exposition of corruption and mismanagement of the small-scale industry earned him enemies both within the tea industry and on the political front. He further claimed that he had on several occasions prior to this suit been issued with death threats. His problems worsened once he entered into a relationship with one Teresia Nyaciuma Mukui whose four sons were against the relationship and contrived to make the applicants life unbearable for the duration of the relationship.

According to the applicant, the lady's children had exhibited open hostility towards them on various occasions and he gave the court an instance when a gang of about fifty people attacked his home on 19th July 2002. He deponed that the gang was led by two of the woman's sons, Joseph Gititu Mukui and John Kimata Mukui, and that he was assaulted, abducted and had death threats made against him. His vehicle was damaged and several household goods were set on fire and the said Teresia Mukui was abducted. He raised an alarm and neighbours came to his rescue. He later learnt that enraged local residents burnt down Joseph Mukui's house after they discovered Teresia Mukui, who had been kidnapped during the raid, in the house. He further stated that following the incident, he recorded a statement with the police, after which on the 27th July 2002, the police went to his Karen residence and ransacked the same with a view of arresting him. He went into hiding fearing arrest but was subsequently arrested by the police at his Karen home on 29th November 2002 and charged with the offence of arson. He was however acquitted of the charge after the Prosecution failed to avail witnesses. The applicant stated that the police were aware of the crime but were unwilling to pursue the perpetrators.

The applicant fearing further harassment from the police and fearing for the safety of his life after several death threats being made against him, had previously sought to be granted bail pending arrest but was advised by his advocate that the said remedy was not available under Kenyan law. The Applicant, not to be deterred then brought a constitutional reference before a Constitutional Court to determine whether the remedy of bail pending arrest would be available to him.

The Applicant argued that S.84 (1) of the Constitution offers any litigant alternative and direct access to the High Court where there is an allegation that his fundamental rights and freedoms have been breached. It was further argued that an applicant need not prove that his fundamental rights have been violated; a threat of violation or a likely breach of the said rights can be just cause to invoke the jurisdiction of the High Court under S. 84 of the Constitution. Where a breach of fundamental rights and freedoms is anticipated, the High Court should be able to grant orders to prevent or forestall the occurrence of the said event. The Applicant conceded that although the right to anticipatory bail was not specifically stated in the Constitution, the mere fact that it relates to an important aspect of the enforcement of fundamental rights and freedoms means that the High Court is vested with jurisdiction to grant it.

Held:

1. The Applicant's fundamental rights and freedoms under S. 70, 72 and 76 of the Constitution were contravened by the Respondent.
2. The remedy or grant and relief of anticipatory bail or bail pending arrest is constitutionally provided for and the same is lawfully available to persons under the provisions of Chapter V and S. 84 (1) of the Constitution.

Authorities referred to:

1. Stanley Munga Githunguri –vs- Republic [1986] KLR
2. Caroline Auma Owino –vs- Republic, Nairobi H.C Miscellaneous Criminal Application No. 952 of 2001
3. Daniel M. M'Kirimania –vs- Attorney General, Nairobi H.C Miscellaneous Criminal Application No. 998 of 2001
4. Samuel Murimi Karanja & Others –vs- Republic, Nairobi H.C Criminal Application No. 412 of 2003 (unreported)
5. Williams –vs- Spautz [1992] Australian Law Reports 583
6. Peter Mwangi Kahutu –vs- Republic H.C Criminal Revision No. 9 of 1999 (unreported)
7. James Ratiri K'owade –vs- Attorney General, Nairobi H.C Miscellaneous Criminal Application No. 85 of 2003
8. Titus Musyoka –vs- Republic H.C Criminal Appeal No. 143 of 2004

Analysis and Relevant Excerpts

This Constitutional reference was brought pursuant to the provisions of Sections 70, 72, 76, 84 (1) (6) and S. 123 (8) of the Constitution. The question in this case relates to the right to anticipatory bail and whether the High Court has jurisdiction to grant the same despite the lack of it being specifically mentioned in the Constitution.

Anticipatory bail is a direction to release a person on bail, issued even before the person is arrested. One interesting issue that this case raises is that under the current Constitution the right of bail pending arrest (anticipatory bail) is not enshrined. Counsel for the Respondent argued that nowhere in the entire Bill of Rights- Chapter 5 of the Constitution, is the right of anticipatory bail provided for, nor is it provided for under the Criminal Procedure Code, Cap.75, Laws of Kenya. The Applicant gave the Indian example in respect of anticipatory bail which the Respondent argued against submitting that under the Indian Criminal Procedure Code, there were specific provisions relating to bail pending arrest. In comparison with Kenya, it was argued, the Criminal Procedure Act, Cap. 75 does not provide for anticipatory bail.

Cap. 75 at Section 123 has provisions for bail pending trial, bail pursuant to police investigations and bail pending appeal. These provisions envisage that a person must first be arrested and brought to court before bail can be granted. Anticipatory bail on the other hand is granted to a person apprehensive of getting arrested on false or trumped up charges. This person has a right to move to court for a grant of bail in the event of his arrest and the court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

The issue of jurisdiction of the High Court as pertains to anticipatory bail was raised. The Respondent submitted that by granting anticipatory bail, the High Court usurped the role of Parliament in enacting laws. It was further submitted that the role of the High Court was to interpret the Constitution in line with the existing laws; the existing law being that the only bail provided for is under Section 123 of the Criminal Procedure Code and S. 72 (5) of the Constitution providing for a grant of bail after arrest. Indeed, this was the position that the court had followed in previous decisions. In *Peter Mwangi Kahutu –vs- Republic in Nairobi H.C Criminal Revision No. 9 of 1999* (unreported), it was held that the legal right to anticipatory bail did not exist in the Criminal Procedure Code. Recent decisions by the High Court have also revealed an inclination towards this position. For example, in *Titus Musyoka –vs- Republic H.C Criminal Appeal No. 143 of 2004* it was held that the right to anticipatory bail does not exist under Kenyan law and therefore the High Court was precluded from granting it.

The jurisdiction of the High Court is constitutionally set out in S. 60 of the Constitution, which provides that the High Court is vested with unlimited original jurisdiction in all civil and criminal matters. Section 84 provides the High Court with original jurisdiction to hear and determine an application made by a person under S. 84 and the court may make such orders, issue such writs and give such directions as it may consider appropriate for the purposes of enforcing or securing the enforcement of any of the provisions set out in Section 70 - 83 of the Constitution.

Although it is evident that the right to anticipatory bail or bail pending arrest is not specifically provided for by statute, the court in this instance declared that the High Court in granting anticipatory bail, would be exercising its supervisory powers to prevent the abuse of powers granted. The court noted that although there is no specific provision in our laws for the granting of anticipatory bail, courts in Kenya have applied the practice and procedure of the High Court of Justices in England. This was the case in *David M'Kirimania –vs- Attorney General Nairobi H.C Miscellaneous Criminal Application No. 998/2002 (unreported)***.** The court also took the position that this right is envisaged by Section 84 (2) of the Constitution. A person who feels that his/ her rights are about to be breached or have been breached should be able to go to court and claim protection of the Constitution. The Constitution of Kenya guarantees this protection under the provisions pertaining to fundamental rights.

It would be a tragedy if the Constitution did not provide a remedy to a citizen whose fundamental rights have been violated. The court took the position that lack of a law providing the remedy for anticipatory bail does not preclude the court from granting the same. The court declared that to deny a person a remedy, whose rights have been infringed, would be a complete antithesis of the spirit of the Constitution that provides for the protection of fundamental rights and freedoms of every citizen. The court stated: -

> *"We are of the humble opinion that the right to anticipatory bail has to be culled out when there are circumstances of serious breach of a citizen's rights by an organ of the state that is supposed to protect the same."*

Furthermore, the court in a comparative view with India, noted that in India, the right to anticipatory bail was granted by the courts even before legislation in respect of the same existed. The court noted that if the High Court in Kenya were to wait for Parliament to legislate the right to anticipatory bail, it would be shirking its responsibility as mandated by Section 84 (1), of enforcing the bill of rights.

The court noted: -

> *"When the statute is silent, the court cannot become a toothless watchdog of the Constitution which we have sworn to defend. Furthermore the Constitution itself has granted wide discretion to the High Court presumably to fill in gaps which the statutes have left. This in our humble view is not usurping the powers of Parliament or to violate the sacrosanct separation of powers."*

In this far-reaching statement, the court reiterated its role as the guardian and champion of human rights and the Constitution.

The liberal interpretation of S. 84 (2) seems to vest in the High Court wide discretion to apply its jurisdiction to enforce and secure enforcement of constitutional provisions. In a seemingly radical departure from previous decisions where the court held that since anticipatory bail did not exist under the Criminal Procedure Code it could not be granted, the court held that this right is envisaged by S. 84 (2) of the Constitution. It emphasized however, that this right would not give a person a right not to appear before the Police or any authority wishing to question a person in connection with a commission of an offence. In granting anticipatory bail, the High Court would be exercising its supervisory powers to prevent the abuse of the powers granted to the executive to the detriment of the individual.

The High Court therefore laid down the principle that the right to anticipatory bail or bail pending arrest is a fundamental right as opposed to a legal right.

Rafiki Enterprises Limited –vs- Kingsway Tyres & Automart Ltd. Court of Appeal at Nairobi, Civil Application No. 375 of 1996
Omollo, Tunoi & Pall, JJA

Constitutional law- Section 84 (1) of the Constitution- Jurisdiction of the Court of Appeal-Inherent powers of the Appellate court-Legality of the appointment of Acting Judges of Appeal- Section 8 of the Judicature Act

Importance

This case shows that Acting Judges of Appeal can be lawfully appointed even when there are eight substantive Judges of Appeal. The Court of Appeal also declared its jurisdiction to hear applications concerning Constitutional interpretation arising within proceedings in that court

Summary of Facts

The Respondents, Kingsway Tyres and Automart Ltd, filed a suit in the High Court claiming the sum of Ksh.1,755,816.65/= from the Applicant. The Applicant failed to enter an appearance or file a defence and *ex-parte* judgement was entered against the applicant. Thereafter, the applicant filed an application to set aside the *ex-parte* judgement and by a ruling dated 4th October 1995, Hayanga J allowed the application and set aside the *ex-parte* judgement. The respondents being dissatisfied with these orders filed an appeal No. 220 of 1995 in the Court of Appeal. On 14th November 1996, a three-judge bench consisting of Gicheru and Lakha, JJ.A and Bosire, Ag J.A gave a unanimous judgement allowing the Respondent's appeal and restoring the *ex-parte* judgement.

The Applicant however, was dissatisfied with this judgement and went on to file an application in the Court of Appeal praying for orders that

inter alia, the Appeal Case, No. 220 of 1995, "be re-heard and if it thought fit, by a full bench of the court." A total of ten grounds were set out as warranting the making of the orders sought. Some of the reasons given in the accompanying affidavit sworn by the Chairman of the applicant were that the bench of the Court of Appeal that heard the appeal included Justice Samuel Bosire who was an Acting Appellate Judge at the time. It was further alleged that the appointment of Justice Bosire under Section 61 (2) of the Constitution was in breach of Section 64 (2) of the Constitution and Section 7 (2) of the Judicature Act (Cap.8) stating that:

> *"…for the purposes of section 64 (2) of the Constitution, the number of Judges of Appeal shall be eight."*

The Applicant went on to aver that as there were already eight appellate judges at the time, the appointment of Justice Bosire was in breach of Section 7(1) of the Judicature Act and Section 61 (5) of the Constitution. The chairman of the Applicant company claimed that the court that heard the Applicant's was improperly constituted and that this was a breach of the Applicant company's right to protection of law under Section 77 (9) of the Constitution requiring courts adjudicating and determining civil rights to be as established by law.

The court therefore had to determine whether Justice Bosire was lawfully sitting in the Court of Appeal and whether the original appellate bench consisting of Justice Gicheru, Justice Lakha and Justice Bosire was lawfully constituted. The first issue to be addressed however was whether the application raising constitutional interpretation issues should have been raised in the High Court or in the Court of Appeal.

Held

1. The Court of Appeal does not have jurisdiction to recall and nullify a judgement already delivered in the Appellate Court.
2. The Court of Appeal has jurisdiction to determine constitutional issues raised before it in the course of an application or hearing already before it. If and when a matter touching on the interpretation of the Constitution arises in the Court of Appeal, the court must

itself determine the issue as part of the issues it is called upon to determine in the exercise of its appellate jurisdiction.
3. The contention that Justice Bosire's appointment as Acting Judge of Appeal is baseless in law and without merits.
4. The application brought before the court is an abuse of the process of the court and is struck out.

Analysis and Excerpts

The Court of Appeal explored the issue of acting judges and their legality and constitutionality. The court began by examining the power and jurisdiction of the Court of Appeal vis-à-vis the High Court. The jurisdiction of the High Court is original and unlimited, while the Court of Appeal is vested with appellate jurisdiction. The jurisdiction and powers the latter has are: - *"…. in relation to appeals from the High Court…."* which are conferred on it by law. In this regard, when Rule 1 (3) of the Court of Appeal Rules confers: -

> *" …inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court",*

Such inherent powers must relate to the hearing of appeals from the High Court. These inherent powers can however only be exercised within and in the course of hearing an appeal.

The first question the Court of Appeal had to contend with was whether the application raising constitutional interpretation issues should have been raised in the High Court. The Court of Appeal however rejected this view as untenable and impractical for two reasons. One was that since the application was challenging the court's jurisdiction, the Court of Appeal itself is vested with power to determine whether or not it has jurisdiction. It stated that every court has a duty to determine whether or not it has jurisdiction in a particular matter. Secondly, the court stated that as there was no provision in Kenyan law providing that an issue arising in the Court of Appeal touching on interpretation of the Constitution should be referred to the High Court, the Court of Appeal should be able to determine it. In this regard, the court laid down the principle that if an issue concerning the interpretation of the Constitution

arose during its proceedings, the Court of Appeal does have jurisdiction to determine this issue without reference to the High Court.

> *"… It cannot be said that no issue touching on the interpretation of the Constitution could ever arise in the Court of Appeal…. In the case of Subordinate Courts, if an issue arises touching on the interpretation of the Constitution, Section 67 (1) of the Constitution provides that the Subordinate Court shall refer it to the High Court. There is no similar provision regarding what is to happen if such an issue arises in the Court of Appeal."*

Concerning the legality of Justice Bosire's appointment as Acting Judge of Appeal, the court examined Section 61 (5) of the Constitution setting out the various circumstances necessitating the appointment of an acting judge, either in the High Court or in the Court of Appeal. These circumstances are: -

1. If the office of puisne judge or a Judge of Appeal is vacant;

2. If a puisne judge or a Judge of Appeal is appointed to act as Chief Justice;

3. If a puisne Judge or Judge of Appeal is for any reason unable to discharge the functions of his office; and

4. If the Chief Justice advises the President that the state of business in the High Court or in the Court of Appeal so requires. **(**emphasis added)

Concerning the appointment of Justice Bosire as an acting Appellate Judge, the court held that it was perfectly legal having been made under the fourth head, namely that the Chief Justice advised the President that the state of business in the Court of Appeal required it. The court rejected arguments that no acting appointments can be lawfully made when there were eight subsisting judges of appeal. It took the position that such an interpretation would render Section 61 (5) of the Constitution

meaningless. It further stated that even if Section 7 (2) of the Judicature Act (concerning provisions on the number of appellate judges) was to be interpreted as constituting an absolute bar to acting appointments, it would be void as it would be in conflict with the Section 61 (2) of the Constitution.

On a further note, concerning the application to review the judgement delivered by the Court of Appeal of which Bosire was a member, the court unequivocally stated that it had no jurisdiction to recall and nullify a judgment already delivered.

Hon. John N Michuki & Another –vs- the Attorney General, the Electoral Commission and the Constitution of Kenya Review Commission

High Court of Kenya at Nairobi, Miscellaneous Application No. 975 of 2001
Mbogholi Msagha & Juma, JJ

Constitutional Law- Protection of fundamental rights and freedoms- Supremacy of the Constitution- Section 27 of the Constitution Review Act, Cap. 3A Laws of Kenya - Districts and Provinces Act, No 5 of 1992-Creation of districts outside the provisions of the Constitution

Importance

The case shows the ability of an Act of Parliament to create new districts and the constitutionality of such new districts and the Act itself. It also shows that an Act of Parliament cannot amend the Constitution, only Parliament can through a 65% vote of all members.

Summary of Facts

The Applicants by an Originating Motion dated 4th September 2001, moved to the court for several declarations and/or orders on the basis that the Respondent had breached or were about to breach their constitutional rights. Later on in the proceedings, the second applicant, Hon, Onesmus K Mwangi withdrew from the proceedings.

The Applicant listed a total of 27 prayers and in an attempt to narrow down the issues, the court listed the salient prayers as: -

a) A declaration that Kenya has only 40 Districts
b) A declaration that the Districts and Provinces Act, 1992 is *ultra vires* the Constitution and therefore null and void.
c) A declaration that the creation of districts under the Districts and Provinces Act, 1992 is unconstitutional, null and void.
d) A declaration that the existing 210 Constituencies are *ultra vires* the Constitution.
e) An order that the second respondent (The Electoral Commission) do re-draw the Constituency boundaries to give effect to the one-person-one vote principle in every part of the country.
f) A declaration that under Section 27 of the Constitution of Kenya Review Act, only the 40 districts named should supply three representatives to participate in the National Constitutional Conference.

The Applicant alluded to Section 27 of the 1963 Independence Constitution providing that Kenya shall be divided into 40 districts in the Nairobi area. Since 1963, several amendments to the Constitution were effected but the provisions of Section 27 were not affected. Significantly, the Constitution of Kenya (Amendment) Act No. 16 of 1968 provided;

> "4. Notwithstanding the repeal by this Act of subsections (1) and (2) of Section 36, section 91 and Schedule II of the Constitution, those provisions shall except as may be otherwise provided for by or under an Act of Parliament, continue in force as if they had been re-enacted as part of this Act."

However the enactment of the Districts and Provinces Act No. 5 of 1992 seems to have brought a problem. Section 5 of this Act provided that:-

> "Section 4 of the Constitution of Kenya (Amended) Act 1968 is amended."

The Applicant was questioning the creation of new districts outside the provisions of the Constitution. The court took cognisance of the fact

that the Applicant had on previous occasions raised the same question in Parliament.

The Applicant contended that the Districts and Provinces Act, 1992 was *ultra vires* the Constitution and was thus null and void. The Applicant's main contention was that creation of additional districts under the 1992 Act was illegal and that the Act was unconstitutional to the extent of its provision purporting to amend the Constitution.

Held

1. Section 5 of the Districts and Provinces Act, 1992, is unconstitutional, null and void in purporting to amend the Constitution of Kenya (Amendment) Act, 1968.
2. The creation of districts under the Districts and provinces Act, 1992, is not unconstitutional as the power is derived from the Constitution itself.
3. The creation of the disputed districts was therefore lawful and within the ambit of the Districts and Provinces Act.
4. The Applicant has faulted the Electoral Commission sufficiently enough to require it (The Commission) to address the issues raised.

Analysis and Relevant Excerpts

The Districts and Provinces Act (1992) came into operation on 26th June, 1992 and provided for divisions of Districts and Provinces. This Act was enacted pursuant to Section4 of the Constitution of Kenya (Amendment) Act No. 16 of 1968 providing that: -

> "4. Notwithstanding the repeal by this Act of subsections (1) and (2) of Section 36, section 91 and Schedule II of the Constitution, those provisions shall except as may be otherwise provided for by or under an Act of Parliament, continue in force as if they had been re-enacted as part of this Act."

The preamble to the 1992 Act provides as follows: -

> "An Act of Parliament to prescribe the districts and provinces into which Kenya is divided."

Section 5 of the said Act reads as follows:

> "5. Section 4 of the Constitution of Kenya (Amendment) Act 1968 is amended."

The court upholding the Principle of Supremacy of the Constitution over all other laws including Acts of Parliament stated that an Act of Parliament cannot amend the Constitution which requires 65% or more Members of Parliament to do so. The court pronounced Section 45 of the Act null and void.

Concerning the Constitutionality and legality of the creation of new districts the court ruled that the creation was lawful and within the provisions of the Constitution. The court had this to say in this regard: -

> *"Be that as it may, we are not in agreement with the applicant and the Attorney General that the creation of the additional districts under the 1992 Act was necessarily illegal. The said Act as we have observed hereinabove was unconstitutional to the extent of its provision purporting to amend the Constitution, but not so in the creation of the disputed districts. We say so because whereas Section 4 of the 1968 amendment repealed the provisions relating to the number and boundaries of districts as set out in the Independence Constitution, the said provisions were to continue in force as if they had been re-enacted as part of the said Act "except as may, be otherwise provided by or under an Act of Parliament." [Emphasis added.]*

The court made it clear that the Constitution conferred the powers of creating districts upon the Districts and Provinces Act, 1992 and the creation of districts was therefore lawful and done within the ambit of the Act. The Applicant also raised the issue and prayed for a declaration that 'the existing 210 constituencies are *ultra vires* the Constitution. This

issue lies within the ambit of the Electoral Commission of Kenya (ECK), a creature of the Constitution at Section 41.

Section 42 of the Constitution confers upon the ECK the authority to prescribe the boundaries and names of the constituencies into which Kenya is divided. Parliament prescribes the minimum number of constituencies. The minimum number currently is 188 and the maximum number is 210.

Section 42 (3) reads as follows: -

> "All constituencies shall contain as nearly equal numbers of inhabitants as appears to the Commission to be reasonably practicable, but the Commission may depart from this principle to the extent that it considers expedient in order to take account of:
>
> (a) the density of population, and in particular the need to endure adequate representation of urban and sparsely populated rural areas.
> (b) population trends;
> (c) the means of population trends;
> (d) geographical features
> (e) community of interest; and
> (f) the boundaries of existing administrative area and, for the purposes of this subsection, the number of inhabitants of any part of Kenya shall be ascertained by reference to the latest census of the population held in pursuance of any law."

The Applicant claimed that the second respondent, the Electoral Commission had no national criteria for determining the size of a constituency and no system for weighing the criteria set out in Section 42 (3) of the Constitution. The Applicant contended that as a result of the arbitrary exercise of its powers, the Electoral Commission had infringed on his freedom of assembly and association and further that the principle of one person-one vote had been compromised. The Applicant referred to Section 4 and 4A of the National Assembly and

Presidential Elections Act Cap. 7, Laws of Kenya as read with Section 32 of the Constitution. It was his contention that Sections 4 and 4A of Cap. 7 were a violation of S. 32 of the Constitution.

The court examined Section 32 (2) of the Constitution providing for the capacity of a person registered in a constituency to vote in accordance with the law and the requirements set out in Section 4A of Cap. 7, which are that such a person must be a Kenyan citizen who must have attained the age of majority as evidenced by a National identity card or a passport. The court found that the requirements of Cap. 7 were not in conflict with the Constitution and stated that the requirements merely serve to reinforce provisions of Section 32 of the Constitution. In this regard, the court examined principles of equal representation and principles of one person - one vote and refereed to the United States Supreme Court reports, Lawyers Edition, Second series Volume 12 and in particular referred to the paragraph at page 526: -

> *"It would defeat the principle solemnly embodied in the Great compromise- equal representation in the House for equal numbers of people- for us to hold that, within the states, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a congressman than others...Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and impaired fashion is bedrock of our political system.... And, if a state should provide that the votes of citizens in one part of the state should be given two times, or five items, or 10 times the weight of votes of citizens in another part of the state, it could hardly be contended that the right to vote of those residing in the disfavoured areas had not been effectively diluted..."*

The court agreed with the sentiments of the above paragraph and found that the second Respondent had indeed faulted the Applicant in respect of the one-man one vote principle in terms of unequal representation.

The court however declined to grant the order prayed for by the Applicant to the effect that the Electoral Commission should redraw the constituency boundaries to give effect to the one person - one vote principal in every part of the country. The courts stated: -

> *"…. the order if granted can be devastating. The court can only give an order that it is able to supervise in default thereof."*

The court while acknowledging that the Applicant's right to equal representation had been infringed, nevertheless shied away from declaring district boundaries as unconstitutional.

Mwai Kibaki –vs- Daniel Toroitich Arap Moi, S.M. Kivuitu, the Electoral Commission of Kenya
High Court of Kenya at Nairobi, Election Petition No.1 of 1998
E. O'kubasu, M. Mbogholi and M. Ole Keiwa, JJ

Constitutional Law- Section 41, 42A and 44 of the Constitution- Election Petition – The National Assembly and Presidential Election Act Cap 7 Act No.10 of 1997 amendment in section 20(1) (a) concerning personal service of election petitions – Whether rule 14 of the Election Petition Rules is ultra vires the Powers of the Rules Committee – Does rule 14 have any application in relation to respondents who are not elected members – Do the Civil Procedure rules apply to election petitions – How has the court dealt with the conflict between section 20(1) of the Presidential Election Act and Rule 14 of the Election Petition Rules.
Common Law- Principle of precedent and stare-decisis

Importance

This case has dealt with the issue whether both presentation and service of an election petition has to be effected within 28 days and whether personal service of petition on Respondent is required. The court examined Sections 41, 42A and 44 of the Constitution, Section 20 of the National Assembly and Presidential Elections Act and Rules 10 and 14 and National Assembly and Presidential Elections (Election Petition) Rules.

This case also highlights the requirement that applications for cross-examination cannot be hinged on matters not contained in the affidavit. The Rules Committee made Rule 18 of the Election Petition Rules to apply to Election Petitions and therefore Order 18 of the Civil Procedure Rules cannot be said to apply to Election Petitions, save as provided.

Summary of Facts

The Petitioner, Mwai Kibaki, lost the 1997 Presidential Elections and subsequently filed an election petition in the High Court Election Petition No.1 of 1998, which is the proper court with jurisdiction to determine election petitions as provided for in sections 10 and 44 of the Constitution, the National Assembly and Presidential Elections Act (Cap 7) as well as the Election Offences Act. The Respondents had applied to have the filed petition struck out with the 1st Respondent stating that the Petition was never served within the mandatory twenty-eight days after the date of publication of the results in the Kenya Gazette but that he had learnt of the Petition in the Local Newspapers. The 2nd Respondent deponed that he was indeed served with the Election Petitions between the end of January and the beginning of February 1998 but pointed out that he was not served with this particular Election Petition on either his own behalf or on behalf of the 3rd Respondent.

The Petitioner applied for the cross-examination of the 1st and 2nd Repondents on their respective supporting affidavits, which application was based on O.18 R.2 (1) of the Civil Procedure Rules. The court in the exercise of ordinary jurisdiction is vested with the discretionary power to allow cross-examination on application. However, the court found that the Petitioner had not disputed the only issue raised by the Respondents, namely, lack of personal service of the Petition. The court therefore had to examine what the Petitioner wanted to establish by the proposed cross-examination.

The Petitioner argued that that the Respondents were properly served in accordance with the applicable law but did not specifically refer to the issue of personal service of the petition. He stated that the 1st Respondent's affidavit does not disclose how this Respondent came to instruct advocates if he had not been served or how such party should want to obtain a copy of the petition. The court noted that they were not dealing with the application to strike out the petition, at the moment but with the application for cross-examination of the Respondents.

The Respondents on the other hand contended that the power to order cross-examination is discretionary and is only exercised after a proper basis has been laid. The court stated its agreement with this submission and further stated that nothing in the Respondents' affidavits was seriously contested by the Petitioner to warrant the cross-examination. The court noted that the Petitioner wished to cross-examine the 1st Respondent on what he had not deponed to in his affidavit and that this cannot be permitted because matters stated were irrelevant to the issue at hand, that is, they related to the appointment of the advocate, obtaining a copy of the petition from the court and the knowledge that the copy of the court and the knowledge that the copy of the petition is obtainable from the court registry.

Held

1. The High Court had no power to overrule the Court of Appeal and was bound by the principles of precedent and *stare decisis*. Nevertheless, it had the right and duty to critically examine and to follow those decisions unless they could be distinguished from the case under review on some other principles such as *obiter dictum* if applicable.
2. The court in the exercise of its ordinary civil jurisdiction has discretion to order or not to order cross-examination of a deponent and it is only exercised after a proper basis has been laid.
3. Order 18 of the Civil Procedure Rules no longer has general application to Election Petitions (save as provided) since Rule 18 of the Election Petition Rules applies to them.
4. The Legislature or its agents determine the extent of the applicability of O.18 of the Civil Procedure Rules to Election petitions and it is not open to the court to extend the applicability of O.18 to Election petition matters.

Authorities referred to

1. Chelaite –vs- Njuki and others (1998) LLR 2184 (CAK)
2. Mudavadi –vs- Kibisu and another (1970) EA 85
3. Maitha –vs- Said and another (1996) LLR 854 (CAK)
4. Murathe –vs- Macharia (1998) LLR 2233 (CAK)
5. Wamukota –vs- Donati (1986) LLR 2306 (CAK)
6. Young –vs- Bristol Aeroplane Co. Ltd
7. Bahner –vs- Marwest Hotel Co. Ltd (1969) 6 DLR (3rd) 322, 69 WWR 462
8. Fraser –vs- Wilson (1969) 6 DLR (3rd) 531
9. Mc E Irvy –vs- Cowper – Smith and Woodman (1967) 62 DLR (2nd) 65
10. MC Kinnon –vs- F W Woolworth Co. Ltd and Johnson (1968) 70 DLR (2nd) 280
11. Fogg –vs- McKnight (1968) NZ LR 330
12. Australian Consolidated Press –vs- Uren (1967) 3 A11 ER 523
13. Broadway Approvals Ltd –vs- Odhams Press Ltd (1964) 2 A11 ER 904
14. Broome –vs- Cassel and Co. Ltd (1971) 2 A11 ER 187
15. Cassel and Co. Ltd –vs- Broome and another (1972) 1 A11 ER 801 – APP
16. Dodhia -vs- National and Grindlay's Bank Ltd and another (1970) EA 195-APP
17. Fielding –vs- Variety Incorporated (1967) 2 A11 ER 497
18. Hutton –vs- Jones (1908-10) A11 ER 29
19. Ley –vs- Hamilton (1934) 151 360
20. Mafo –vs- Adams (1969) 3 A11 ER 1404
21. Mc Carey –vs- Associated Newspapers Ltd (1964) 2 A11 ER 335
22. Minister of Social Security –vs- Amalgamated Engineering Union (1966) 1 A11 ER 335
23. Rookes –vs- Barnard (1964) 1 A11 ER 367; (1964) AC 1129
24. Uren –vs- John Carfax and Sons Pty Ltd (1967) ALR 25

Analysis and Relevant Excerpts

The Petitioner's contention was that the Respondents must have been served in order to have known that there was an Election petition filed against them and he therefore wanted the court to give him a chance to cross-examine the Respondents on the contents of their respective petitions. In *Comet Products U.K. Ltd. –vs- Hawkex Plastics Ltd. (1971) ALL ER 1141*, cross-examination was refused because it was irrelevant to the particular matter at hand and it was held that:

> *"……in the present case, because the cross examination was likely to have little reference to the issue to be decided in the contempt motion in comparison with its effect on the matters in litigation between the parties as a whole,…"*

Order 18 of the Civil Procedure Rules has no general application to election petitions, save as provided, as rule 18 of the Election Petition Rules now applies to these petitions. The Court of Appeal in *CA No.171 of 1998, David Wakairu Murathe –vs- Samuel Kamau Macharia,* held, election petitions are governed by a special and self-contained regime and Civil Procedure Rules are inapplicable except where expressly stated.

In *Re A Debtor exp. Taylor (1918) 1 All ER 129,* the counsel for the petitioning creditor had requested leave to cross-examine the debtor, which was opposed by counsel on behalf of the debtor. It was held that the Registrar had discretion to allow or refuse cross-examination.

In *Comet Products U.K. Ltd. –vs- Hawkex Plastics Ltd.*, where the Defendant's affidavit had been read, Lord Denning MR said:

> *"If he had filed an affidavit, and in addition, if he has gone on to use it in court, then he is liable to be cross-examined on it if the court thinks it right so to order. I would not say that the mere filing is sufficient, but I do say that when it is not only filed but used, the defendant does expose himself to a liability to be cross-examined if the judge so rules. So that brings me to the final question: Ought a judge to rule that the second*

defendant should be cross-examined on his affidavit? It is to be remembered that this power to cross-examine is a matter for the discretion of the judge who is trying the case"

Cross LJ said

"…I have no doubt that the judge had jurisdiction to order cross-examination and that the only question for determination on this appeal is whether he was right to order it." In my view, therefore, the registrar had discretion. Did he exercise it wrongly? As Cross LJ observed in a further passage in Comet Productions case: "It is, I think only in a very exceptional case that a judge ought to refuse an application to cross-examine a deponent on his affidavit." But in my view the circumstances in the present case justify the Registrar's decision. The petitioning creditor had filed no evidence. He was asserting no new facts and does not appear to have been controverting any specific statements in the debtor's affidavit. No specific issue was formulated by the petitioning creditor in respect of which it was formulated by the petitioning creditor in respect of which it was suggested that cross-examination would be material. The fact is that what the petitioning creditor wanted was a roving commission to cross-examine the debtor generally in the hope that something might emerge to the discredit of the debtor which might justify a submission that it was not a proper case to grant an annulment. It seems to me that such cross-examination could well be oppressive and that, in the absence of any attempt on behalf of the petitioning creditor to define clear issues of fact to which cross-examination could be directed, the registrar was quite right in his decision."

These passages confirm that cross-examination will not be ordered to permit an application to rove in search of matters that are not material or relevant to the particular proceeding before the court, as such roving cross-examination would as well amount to oppressing the deponents and should therefore not be permitted. The application for cross-examination was thus wrongly based and therefore dismissed with costs to the Respondents.

The 1st Respondent submitted that rules must be read together with the particular Act of Parliament and that the rules will not be so read so as to contradict a clear enactment of Parliament from which the rules derive authority and if the rules cannot be reconciled, they must give way. The Respondent relied on the ruling of Gicheru JA in *Emmanuel Karisa Maitha –vs- Said Hemen Said & Hotham Nyange CA No.292 of 1998 and Nair –vs- Tiek (1967) 2 ALL ER 34* where Lord Upjohn spoke of an inconsistency between the Malasyian Election Rules 10 and 15, similar in terms to our Rules 10 and 14. He stated that the petition must be served in terms of Rule 15 and service in terms of Rule 10 were irrelevant. The requirement in Rule 14 that a petition be served within ten days of its presentation is no longer a valid provision of law so far as this provision does not form part of section 20(1)(a).

The court felt that though the cases of *Chelaite –vs- Njuki CA No.150 of 1998* and *Murathe –vs- Macharia CA No.171 of 1998* were decided correctly, some of the observations therein had been stated too widely and were obiter dicta and as such were not binding on the court. In the former case, service was effected in accordance with rule 14 but not in terms of the new section 20(1)(a). That service was held to be invalid and the petition struck out.

The courts are said to have persistently held that Rule 10 does not govern service of a petition and have expressly stated it is rule 15 (Malaysia) and Rule 14(Kenya) that apply. The court in *Nair –vs- Tiek (1967) 2 ALL ER 34* at page 39 stated:

> *"Notice of presentation of the petition was advertised in the Gazette on July 23, 1964. This notice was clearly out of time. The first question whether lodgment of the petition on the registrar was sufficient compliance with the rules. That was literal compliance with Rule 10, but it appears to their Lordships that in respect of service of petitions there is an inconsistency between Rule.10 and Rule.15, in view, however, of the very explicit provisions of Rule 15 (which itself refers to Rule 10) it appears clear to their Lordships that a petition must be served in accordance with the terms of Rule 15 and that service thereof merely in accordance with Rule 10 is insufficient."*

In order to rule on the disputes before then in *Chelaite –vs- Njuki* and *Murather –vs- Macharia*, it was not necessary for the Court of Appeal to determine the issue as to whether Section 20 and Rule 14 were in conflict.

Any pronouncements by the court on this issue in those judgments therefore amounted to judicial dicta and were not binding on the High Court. Thus, the issue of whether Section 20 (1)(a) was in conflict with Rule 14 (1) was still open to the High Court to discuss in this present. The Learned Judges was of the view that there was no reason to differ with the High Court's conclusion that Rule 14 was in direct conflict with Section 209(1)(a) and accordingly, did not apply to petitions concerning that Section.

The court noted that the National Assembly and Presidential Elections Act (Chapter 7) and the rules made thereunder form a complete regime with regard to election petitions and no other legislation or rules could apply unless made applicable by the Act or Rules. Though Section 20(1)(a) of the Act did not prescribe any particular mode of service, the best form of service was personal and the courts were obliged to go for that form of service. The Appellant had therefore failed to comply with Section 20(1)(a) and the appeal would be dismissed.

These two appeals apart from the undeniable fact that they involve persons of no mean status, in Kenya, raised issues very crucial to the jurisprudence of our legal systems. The third Respondent is a body created by Section 41 of the Constitutional and by virtue of Section 42A of the Constitution the Third Respondents functions are tabulated to be:-

a) The registration of voters and the maintenance and revision of the register of voters;
b) Directing and supervising the Presidential National Assembly and local Government elections;
c) Promoting free and fair elections; and
d) Such other functions as may be prescribed by law.

It is clear from the above tabulation that the Third Respondent and its chairman the Second Respondent are crucial to the democratic system of governance.

The principles of precedent and *stare-decisis* are so well established in the commonwealth jurisdictions that even the ever-crusading Lord Denning was hardly able to make any appreciable dent in them. In *Broome –vs- Cassel and Co. Ltd* (1971) 2 A11 ER 187, Lord Denning took on the House of Lords in these words:

> *"Yet, when the House of Lords came to deliver their speeches, Lord Devin threw over all that we ever knew about exemplary damages. He knocked down the common law as it had existed for centuries. He laid down a new doctrine about exemplary damages and all the other Lords agreed with him."*

Here was Lord Denning not only criticising but refusing to follow the case of *Bookes –vs- Barnard* (1964) 1 A11 ER 367; (1964) AC 1129 which was a decision of the House of Lords, a court superior to the Court of Appeal of England where Lord Denning, as the Master of Rolls, presided.

In the case of *Dodhia –vs- National and Grindlay's Bank Ltd and Another* (1970) EA 195, it was held that:

> *"The Court of Appeal while it would normally regard a previous decision of its own binding, should feel free in both civil and criminal cases to depart from such decisions when it appears right to do so."*

The Kenya Court of Appeal has steadfastly remained loyal to this principle and the consequence of that is that the courts of this country have continued to adhere to the principles of precedent and *stare decisis* and that is why the Judges in this bench joined the appellant and his counsel in asserting the continued adherence to the principles.

The second issue was the examination of whether Section 20(1)(a) of the Act was in an irreconcilable conflict with Rule 14 of the Rules.

Section 20(1) after its amendment by Act 10 of 1997 now reads: -
A petition:-

a) to question the validity of an election shall be presented and served within 28 days after the date of publication of the result of the election in the Gazette,
b) to seek a declaration that a seat in the National Assembly has not become vacant, shall be presented and served within 28 days after the date of publication of the notice published under Section 18,
c) to seek a declaration that a seat in the National Assembly has become vacant, maybe presented at any time.

Before the amendment of 1997, Section 20(1)(a) merely provided that a Petition was to be presented within 28 days but the 1997 amendment introduced the requirement, namely that not only must a petition be presented within 28 days but that it must also be served within the same 28 days.

> "14 (1) Notice of presentation of a petition, accompanied by a copy of the petition, shall within ten days of the presentation of the petition, be served by the petitioner on the Respondent.
> (2) Service may be effected either by delivering the notice and copy to the advocate appointed by the Respondent under Rule 10 so that in the ordinary course of post, the letter would be delivered within the time above mentioned, or if no advocate has been appointed, or no such address has been given, by a notice published in the Gazette stating that the petition has been presented and that a copy of it may be obtained by the Respondent on application at the office of the Registrar."

The conflict which the Respondents asserted was that Section 20(1) (a) of the Act requires that the Petition be filed and served within 28 days while Rule 14 provides that it can be served within 10 days after the date of presentation. The Appellant, on the other hand, contended that there was no such irreconcilable conflict between Section 20(1) (a) of the Act and Rule 14. The Appellant's contention, however, was that the Court of Appeal itself had decided in at least two cases that there was in fact no conflict between Section 20(1) (a) of the Act and Rule 14. These cases are *Chelaite –vs- Njuki and Others (1998) LLR 2184 (CAK)* and

Murathe –vs- Macharia (1998) LLR 2233 (CAK). In *Chelaite's* case, Kwach JA is recorded saying.

> *"Assuming for the purposes of argument only that Rule 14(1) is in conflict with Section 20(1) (a) of the Act then under the ordinary canons of statutory interpretation, the provisions of the Act must prevail. I am satisfied that Parliament has properly exercised the powers given to it by Section 44 of the Constitution and that there is no conflict between that section of the Constitution and Section 20(1) (a) of the Act. I am equally satisfied that in dealing with the issue of service under Section 20(1) (a) of the Act rather than leaving it to the Rules Committee, Parliament acted within its legislative authority and did not usurp the power of the Rules Committee. As a matter of construction, Rule 14(1) can still be reconciled with Section 20(1) (a) of the Act and there is really no conflict between the two provisions."*

Earlier on, the Learned Judge of Appeal had said:

> *"All that Section 20(1) (a) of the Act says is that a petitioner must present and serve his petition within 28 days from the date of publication of the result of the election in the Gazette. In fixing the date of presentation of the petition the petitioner must make sure not only that service is effected on the Respondent within ten days as required by Rule 14(1), but also that this is done within 28 days, from the date of publication of the result of the election. So in effect presentation is governed by publication of the election in the Gazette, while service is governed by presentation and both steps must be taken within 28 days."*

The third member of the court, Owuor JA, originally had reservations of her own, but in the end, she agreed with the other members of the court and concluded:

> *"In the course of argument, I was inclined to think that there was indeed a conflict between Section 20(1) (a) of the National Assembly and Presidential Elections Act Chapter 7 and Rule 14(1) of the National Assembly Elections (Elections Petition) Rules, but on reflections and having read my brothers judgments, I am satisfied that there is none. The efficiency*

of Rule 14(1) has not been affected by the amendment of Section 20(1) (a) of the Act introduced by Act number 10 of 1997."

Thus the Appellant is fully justified in saying that in the *Chelaite* case, the Court of Appeal had held that there was in fact no irreconcilable conflict or any other conflict between Section 20(1) (a) of the Act and Rule 14(1) if the Rules.

In the *Macharia* case, Kwach JA said:

"The result of the election was published in a special issue of the Kenya Gazette dated 6th January 1998 and for the purposes of Section 20(1) (a) of the Act, 28 days allowed for presentation and service of petitions started to run on 7th January, 1998. So anyone who wished to present a petition had to do so, and also have it served on or before 3rd February, 1998, subject to compliance with Rule 14 (1) of the National Assembly Elections (Elections Petition) Rules."

Pall JA repeats:

"But to me there seems to be no conflict. As the electorate of the constituency in particular and Kenya in general are entitled to know as soon as possible who has been validity elected from that particular constituency. Parliament in its wisdom has cut down the period of 38 days previously allowed for the presentation and service of the petition to 28 days. The two provisions can easily be reconciled. The period of 28 days now is the overall period within which a petition must not only be presented but also served and, not going beyond this period of 28 days Rule 14(1) says the petition must be served within 10 days of the presentation."

Tunoi JA Says in his judgment:

"In my view it is a fallacious contention to aver that only the Act was amended but the Rules remained intact, for if it were so, that legislative intent would have been devoid of concept of purpose and would have reduced the amendment to futility. Further, since election petitions have elaborate procedures of their own relating to filing and serving elections petitions the Civil Procedure Rules and or any other statutes should not be applied when computing time…"

None of the Judges in this bench dissented. And it was unanimous in its decision that there is in fact no conflict between Section 20(1) (a) of the Act and Rule 14(1).

The High Court in their ruling stated:

> *"We see the core issue to be decided in the Chelaite –vs- Njuki case as being whether service of the petition was good given the fact that it was effected outside the twenty eight days period provided under Section 20(1) (a) of the Act but within the ten days provided under Rule 14 of the Election Petition Rules. The other matters were obiter dicta which do not bind this court."*

The Judges of the High Court who decided the matter recognised that they were bound by the decisions of the Court of Appeal, but it is also apparent that they equally knew that if the Court of Appeal purports to decide a matter which does not fall for consideration in a particular case, that is a matter which it is not necessary to decide in order to arrive at a decision disposing of the particular case, then they are not bound by such a 'side' decision.

The learned Judge of the High Court who decided this petition referred to Halsbury's Laws of England (4) Volume 26 paragraph 573 which deals with the question of the *ratio decidendi* in a decided case. It therein states:

> *"The enunciation of the reason of principle upon which a question before a court has been decided is alone binding as a precedent. This underlying principle is called the ratio decidendi, namely the general reasons given for the decision or general grounds, upon which it is based, detached or abstracted from the specific peculiarities of the particular case which gives rise to the decision. What constitutes the binding precedent is the ratio decidendi and this is almost always to be ascertained by analysis of the material facts of the case, for judicial decision is after reached by a process of reasoning involving a major premise consisting of a pre-existing Rule of Law, either statutory or judge-made and a minor premise consisting of the material facts of the case under immediate consideration."*

What would constitute the general principle, the *ratio decidendi* which would be applied in all subsequent cases, is that section 20(1) (a) of the Act prescribes 28 days as the period within which a petition is incompetent and must be struck out. It is this general principle, which would be binding on the courts. The Learned Judges agreed that the pronouncements made in the petitions in *Chelaite's* and *Murathe's* cases to the effect that Section 20(1) (a) is not in conflict with Rule 14 amounted to no more than "judicial dicta" and were not binding on the High Court.

On the same point the Learned Judges were referred to the case of *Murathe –vs- Macharia, Civil Appeal Number 25 of 1999 (unreported)* which appeal involved a petition which had been filed pursuant to Section 20(1) (c) of the Act for a declaration that a seat in the National Assembly had become vacant. They however held that this case was irrelevant to the issue at hand.

The Learned Judges held that if the two provisions (Section 20(1) (a) of the Act and Rule 14) are not in conflict with each other then their understanding was that each of them must be given its full application. The rule binds a petitioner to lodge and serve the petition within ten days from the date of lodging the petition. If this rule is to be given its full application then it would mean that a petitioner who lodges a petition on the 20th day for example, would still be entitled under the Rule, to ten days from that date which would carry the matter to the 30th day.

Gicheru JA in *Maitha –vs- Hemed* stated:-

> *"Rules must be read together with their relevant Act, they cannot repeal or contradict express provisions in the Act from which they derive their authority. If the Act is plain the Rule must be interpreted so as to be reconciled with it, or if it cannot be reconciled the Rule must give way to the making of the Rules consistent with the Act must prevail unless it was clearly passed with a different object and then the two will stand together."*

The Judges accordingly agreed with the High Court that Section 20(1) (a) of the Act is in direct conflict with Rule 14 and that being so; Rule 14 must give way to the plain words of Section 20(1) (a) of the Act. Accordingly, Rule 14 of the Rules can no longer apply to petitions which concern Section 20(1) (a) of the Act.

The next issue is the mode in which an election petition is to be served. Section 20(1) (a) does not say who is to serve and how service is to be effected. Under Rule 10 of the Rules:

> "A person elected may at any time after he is elected send or leave at the office of the Registrar a notice in writing signed by him or on his behalf appointing an advocate to act as his advocate in case there should be a petition against him or stating that he intends to act for himself, and in either case giving an address in Kenya at which notices addressed to him may be left or if not such writing is left all notices and proceedings may be given or served by leaving them at the office of the registrar."

Rules 9 and 21 of Order 5 of the Civil Procedure Rules, deal specifically with service on a party or his agent. The general tenor of service under this Order is that unless there is an appointed agent or unless a defendant cannot be found service is normally personal.

Service of petitions upon an elected person by way of publication in the Kenya Gazette in view of Section 20(1) (a) of the Act cannot be proper service. Rule 14 of the Parliamentary Election Petition Rules of 1868 states:

> "Where the respondent has named an agent or given an address, the service of an election petition may be by delivery of it to the agent, or by posting it in a registered letter to the address given at such time that, in the ordinary course of post, it would be delivered within the prescribed time."

The commentary found immediately under the English Rule 14 is set out below:

> "In other cases, service must be personal on the Respondent, unless a Judge, on an application made to him not later than 5 days after the petition is presented on affidavit showing what has been done, shall be satisfied all reasonable effort has been made to effect personal service and cause the matter to come to the knowledge of the Respondent, including when practicable, service upon an agent for election expenses, in which case, the Judge may order that what has been done shall be considered sufficient service, subject to such conditions as he may think reasonable."

The court declared that election petitions are of such importance to the parties concerned and to the general public that unless Parliament had itself specifically dispensed with the need for personal service, then the court must insist on such service. It cannot be read from Section 20 (1) (a) that Parliament intended to dispense with personal service. It said that the other modes of service were only alternative modes of service to personal service.

Section 20 (1) (a) of the Act does not prescribe any mode of service and in those circumstances, the courts must go for the best form of service which is personal service.

The Appellant did not offer any reason before the court why he did not go for personal service as correctly pointed out by the Judges of the High Court, no effort to serve first Respondent was made.
In the event the Court of Appeal judges were satisfied that the three learned Judges of High Court were fully justified in holding that as the law now stands only personal service will suffice in respect of election petitions filed under Section 20(1) (a) of the Act.

G. B. M. Kariuki and Hon. Fred Kwasi Apaloo
The Court of Appeal at Nairobi, Civil Appeal No. 122 of 1994
Akiwumi J.A, Gachuhi J.A, Omolo J.A

Judicature Act – Section 6 of the Judicature Act on immunity of Judges - Whether Immunity absolute – Immunity when judge acting judicially within Jurisdiction –Immunity when judge acting outside Jurisdiction and need for a judge to act in good faith – Immunity when the judge is functus officio *- Whether court has inherent jurisdiction to strike out the plaint – when to exercise the summary procedure to strike out a plaint - Whether necessary to set out the grounds for striking out the plaint*

Importance

The case raises important issues of public interest and the extent of immunity for judges under the Judicature Act, Cap 8, Laws of Kenya, as well as the independence of the Judiciary.

Summary of Facts

This appeal involves a suit, which was brought by the Appellant who was a member of the legal profession against the Chief Justice of the country, the Respondent. The appeal arose out of alleged defamatory words published by the Respondent in his letter of 22nd March 1994 addressed to the Appellant's client, a well-known political figure, one Mr. Kenneth Matiba.

Mr. Matiba was a presidential candidate for the 1992 presidential elections and upon losing the elections to President Moi, brought an election petition to unseat him. An application to strike out the petition as being incompetent was dismissed by the election Court and a Notice of Appeal

against the dismissal was filed in the Court of Appeal by the Appellant. The Appellant thereafter on behalf of Mr. Matiba, unsuccessfully moved the court in *Miscellaneous Application No. 241 of 1993* to strike out the Notice of Appeal. President Moi was subsequently granted leave by the High Court to appeal to the Court of Appeal and filed *Civil Appeal No. 176 of 1993*. The Appellant then sought through *Civil Appeal No. 179 of 1993* in the Court of Appeal to reverse the leave to appeal granted by the High Court. The Appellant had then on behalf of his client requested the Respondent to constitute a bench of five judges to hear both appeals no. 176 and 179 all of 1993. Mr Matiba lost his appeal.

Subsequently, the Appellant brought a defamation suit against the Respondent herein who was sued in his capacity as the Chief Justice of Kenya. The defamatory words were said to have been published and/or uttered by the Respondent in the course of hearing the above suits. In the plaint, the Appellant alleged that the Respondent had on 30th March 1993 in the presence of at least eight advocates confirmed that he had been angered by the implication in the Appellant's correspondence that the Respondent would not act fairly in considering whether to constitute a bench of five judges. The appellant further averred in the plaint that on 30th March 1994, the Respondent had admitted to some eight senior members of the Kenya Bar that he had written the alleged libelous words in his letter of 22nd March 1994 for the same reason. The alleged defamatory letter by the Respondent was in response to a letter by Mr. Matiba of 18th March 1994 who had written to the Respondent in his capacity as Chief Justice complaining about the length of time it was taking to give the reasons for the decisions in the appeals. The Appellant alleged that the Respondent had published defamatory matters about the Appellant in the response letter referred to.

The alleged defamatory words are as follows:

> *"…I believe you cannot have understood the legal rationale for the different constitution of the Court of Appeal in Appeals No. 179 and 176 of 1993 on one side and the Civil Application No. 20 of 1994*

on the other. I suggest you obtain competent legal advice preferably from a lawyer of standing who would have no motive to misrepresent the true position to you…"

The alleged defamatory words can only be explained by the fact that Mr. Matiba in his letter written by himself complained not only about the delay in giving of reasons by the courts for its decisions in the appeals but had also criticized the Respondents refusal to constitute a bench of five judges to hear the appeals. It must however be noted that the alleged defamatory words do not specifically name the Appellant. It is also notable that those to whom the words were published namely Mr. Matiba, his secretary and that of the Respondent were not aware of the special facts narrated surrounding the matter.

In *Bruce v. Oldham Press Ltd (1936) 1 AER 287,* Green LJ noted that defamatory statements which do not appear by their words to refer to the plaintiff, have got to be made referable to the plaintiff by reason of special facts and circumstances which show that the words can be reasonably construed as relating to the plaintiff.

The Appellant argued that by asking Mr. Matiba to seek competent legal advice from a lawyer of standing then the Chief Justice imputed that the Appellant was not competent.

As the Appellant set out in the plaint the Respondent was acting at all times in his capacity as the Chief Justice. The plaint stated:

"At the time of writing and publishing the words complained of the Defendant was the Chief Justice in charge of administration of justice in Kenya."

The appellant thus alleged that the Respondent had maliciously defamed him as a result of the said Respondent's actions. In the original suit the case was dismissed as frivolous, vexatious and disclosing no reasonable cause of action and being an abuse of the court process. On appeal to the Court of Appeal, the decision of the High Court dismissing the suit was upheld.

Held

1. The order striking out the plaint in lower court was proper and the same was upheld on appeal.

   'Where an action is brought with the intent to embarrass, the dismissal of such as a suit for such a reason may 'often be required by the very essence of justice to be done to prevent parties being harassed and put to expense by frivolous, vexatious or hopeless litigation.'(Per Lord Blackburn in Metropolitan Bank –vs- Pooley, (1885) 10 AC, p210).

2. The learned Judge further noted that that the Chief Justice, the respondent herein was acting in the discharge of his judicial duty within his jurisdiction and under section 6 of the judicature Act was absolutely privileged. The court found that even though the Respondent was *functus officio* nevertheless he was still exercising a continuing judicial duty when answering a criticism of his decision and that Mr. Matiba's letter to the Respondent and his reply thereto all directly flow from the Respondents refusal to constitute a bench of five judges and this letter can be said to be an extension of his earlier judicial act *(Law –vs- Llewellyn(1904-7)All ER 536).*

3. The Respondent's act in writing the letter of 22nd March 1994, containing the alleged defamatory words was part of a Judicial Act of the Respondent acting within Jurisdiction and was according to s. 6 of the Judicature Act absolutely privileged. In this case therefore the Respondent has absolute immunity from civil action. (*Anderson –vs- Gorie (1895) QBD 668*. Even if the words are defamatory, they would still be privileged under section 6 of the Judicature Act

4. The court found that where a judge was acting judicially in respect of a matter over which he has jurisdiction, he is clothed with absolute immunity from civil action and is not required to show that he acted in good faith or to answer the allegation of malice. *(Sirros –vs- Moore (1974) 3 All ER 776*, per Lord Denning M.R

5. As regards judicial acts done without jurisdiction, it was held (per Denning MR and Omrod LJ) that a judge was protected since although he had been mistaken in his belief that he had jurisdiction, he had acted judicially in good faith. It is the onus of the plaintiff to show that the judge did not act in good faith.

6. On the issue of the jurisdiction of the court to strike out a plaint without requiring the basis of the application to strike out to be first pleaded. The court found that this was not necessary particularly so when the application is based on statutory law. The Respondent, a judge, holding administrative office of Chief Justice while executing his judicial duties or administrative duties within his jurisdiction enjoys absolute privilege from being sued civilly for his expression either in writing or verbally. This is so under the common law and under the provisions of S. 6 of the Judicature Act.

7. The Learned Judge of Appeal was guided by the case of *Anderson –vs- Gorie (1895) 1 QB 668* in finding that no action lies against a judge in respect of any act done by him in his judicial capacity even though he acted oppressively.

8. The application of the common law and statutory provision in S. 6 of Cap 8 gives absolute privilege to the Respondent. This immunity rendered the appellant's suit to be struck out and dismissed by the superior court.

9. The appeal is dismissed.

Authorities referred to

1. Jeraj Sharrif and Co. –vs- Chotai Fancy Stores (1960) EA 374
2. Law –vs- Llewellyn (1904 - 7) All ER 536
3. Sirros –vs- Moore (1974) 3 All ER 776
4. The Riches cases (Doesn't have citation.)
5. Fray –vs- Blackburn 122 ER 217
6. Anderson –vs- Gorrie (1895) QBD 668
7. Mc C –vs- Mullan and others (1984) 3 All ER 908

Analysis and Relevant Excerpts

Gachuhi J.A. concurring with the judgment of Akiwumi J. found that the argument in this case hinged on absolute privilege enjoyed by the Respondent.

This is a unique case in that it was the first case in which an action for defamation had been brought against a judicial officer. It raised important issues of public interest and the independence of the Judiciary. The Judiciary has the power and function to interpret and apply the laws of the country to adjudicate and make the final determination on questions of a civil, criminal or admiralty nature. As such judicial officers as was reiterated in this case should be independent of any interference either by individuals or institutions.

A court is staffed by qualified judges and magistrates or Kadhis who need their independence to execute their very sensitive duties. The case reiterated the absolute immunity from civil action conferred to judicial officers by S. 6 of the Judicature Act in respect of judicial acts performed in exercise of the officer's jurisdiction. Section 6 of the Judicature Act states:

> " No judge or magistrate, and no other person acting judicially shall be liable to be sued in a civil court for an act done or ordered by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided he, at the time, in good faith believed himself to have jurisdiction to do or order the act complained of."

This position is derived from the common law position, which has been enunciated in many judgments of the English courts. In *Anderson –vs-Gorie (1895) QBD 668* Lord Esher M.R, stated that no action shall lie against a judge of a court of record for doing something within his jurisdiction but doing it maliciously and contrary to good faith. He went on to find that if such an action was to lie the judges would lose their independence and that the absolute freedom and independence of the judges is necessary for the administration of justice.

This position was reiterated in *Sirros –vs- Moore (1974) 3All ER 776* by Lord Denning. Who felt that a judge would only be liable if *"… shown that he was not acting judicially, knowing that he had no jurisdiction to do it."*

Even if a judge utters defamatory words as long as this is done within jurisdiction, in the course of official business, then he/she is not liable. As long as communication by the judicial officer is done within the course of trial or even if it is after trial but relating to the matter then it is still privileged.

This case thus sets out a precedent on the absolute immunity of judicial officers when acting within jurisdiction. They cannot be liable for actions such as defamation. This enables the judicial officer to administer justice without fear or favour.

Judicial officers consisting of judges and magistrates fill a constitutional public office and part of their independence consists in the fact that no one should give them orders on how to perform their work. The only subordination which a judge is subjected to is to the existing body of legal doctrine. Given the nature of judicial work, then it is inevitable that in the course of performing his judicial functions, a judge may displease an indefinite number of people on an indefinite number of occasions without any personal consequences ensuing to him.

On the other hand they are liable if they act in bad faith when acting without jurisdiction. This then is for the court to determine whether the officer acted in good faith. How will a judicial officer decide or impute bad faith on his or her brother or sister. It may therefore appear that it will be absolutely difficult to prove a case of lack of good faith on the part of a judicial officer. It might it be necessary then to have a commission constituted to deal with such cases where likelihood of bias is apparent.

Given then the kind of immunity enjoyed by the judges, beyond any interference whatsoever, then it means that those appointed to the judicial office should be eminently suitable to dispense justice. If the right individual were not chosen in the first place, then it would be disastrous if they cannot be challenged on the exercise of their powers, which are open to abuse.

Royal Media Services Ltd –vs- Commissioner of Customs & Excise High Court of Kenya at Nairobi, Miscellaneous Application No. 383 of 1995
RAWAL, J.

Constitutional Law- Right to own property: Section 75 of the Constitution- Unlawful seizure of property- Supremacy of the Constitution
Customs & Excise Duty Act,-Duty and powers of the Commissioner of Customs & Excise to seize goods- Injunctions- Interim injunctions against the government- Government Proceedings Act

Summary of Facts

In 1990, Kenya Television Network (KTN) imported various television and radio electronic broadcasting equipment. While KTN was applying for exemption/remission of duty on the goods, the said goods were stored in various warehouses. Pending the formalisation of the exemption application, Jared Benson Kangwana, a former chairman of KTN sued KTN claiming ownership of the imported goods. He eventually obtained an order for release of the goods in *HCCC No. 4529 of 1994*. Following this, Royal Media Services Ltd (the Applicant herein) entered into a sale agreement with Kangwana. The said goods consisting of 53 packages were then sold and released to Royal Media. KTN later sued Kangwana and Royal Media in *HCCC No. 1058 of 1995* for ownership of the goods.

On 20th March 1997, advocates for KTN and Kangwana recorded and filed a consent in *HCCC No. 1058 of 1995* to the effect that the parties had settled the matter with no orders as to costs. However, Royal Media was not party to the said consent. In any event, pursuant to the consent order filed in HCCS No. 1058 of 1995, several correspondences were exchanged focusing on the release of the goods. Kangwana wrote a letter

on 24th March 1995 confirming the sale to Royal Media and delivery of the goods to him that were cleared on 3rd March 1995 and subsequently delivered to Royal Media. Thereafter, the Commissioner of Customs and Excise was asked by the Treasury through a letter to collect the duty on the imported goods. The Commissioner acted on this letter immediately and on 9th March 1995, a notice of seizure was issued to Kangwana and the goods were seized pursuant to the said notice from the warehouses in which they were in storage. Thereafter, correspondence was exchanged between the concerned parties and the Commissioner but the Commissioner did not change his position of seeking payment of duties on the whole consignment including penalty and storage charges.

Later, by a letter of 8th May 2000, the Commissioner demanded a duty of Kshs. 256,146,955/= within 14 days failing which the Commissioner threatened to sell the goods. At an advanced stage of the proceedings, KTN applied to be enjoined in the suit claiming legal ownership of the goods. However it later withdrew its claim for further rights during the hearing of the application.

Royal Media then filed this application seeking declaratory remedies against the Commissioner on the seizure of the goods. The issues before the courts were: -

1. To determine whether the court has jurisdiction to grant injunction against the Government or the Commissioner as prayed by Royal Media and whether Royal Media has established its right and is infringement by the Commissioner.
2. Whether the seizure of the goods was lawful and whether it offended S. 75 of the Constitution.

Held

1. Royal Media Services *prima facie* proved its right over the goods that were seized.

2. The right of Royal Media over its goods was infringed and offended under Section 75 of the Constitution.
3. Royal Media has made a case to enable the court to make an interlocutory order directing the Commissioner his agent and/or servant not to sell the goods until the determination of the suit.

Authorities referred to

1. Rwigara Assinpol –vs- Commissioner of Customs & Excise HCCC No. 2786 of 1992 (unreported)
2. Nemu Investment Ltd. –vs- Jacob Matipei HCCC No. 1275 of 1999 (unreported)
3. Peter Mwangi Githibwa In the Matter of the Chief Magistrate, Nairobi Miscellaneous Criminal Application No. 8722 of 2000 (unreported)
4. Jaundoo –vs- A.G of Guyana (1971) A.C 972
5. M –vs- Home Office & Another (1993) 3 All E.R 537

Analysis and Relevant Excerpts

Section 75 of the Constitution provides protection to the citizen from deprivation of property except in certain circumstances and where certain conditions are satisfied; that is,

(a) The taking possession or acquisition is necessary in the interests of defence, public safety, public order, public mortality, public health, town and country planning or the development or utilization of property so as to promote the public benefit.
(b) The necessity therefore is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and
(c) Provision is made by the law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

The Constitution itself gives power to the Commissioner to take possession of or acquisition of property in satisfaction of any tax, duty, rate, cess or other imposition.

There is however a proviso to the exercise of that right to the effect that the provision of law or the thing done under the authority thereof is shown to be reasonably justifiable in a democratic society.

In this case, Royal Media Services contended that the goods were unlawfully seized by the Commissioner. The Respondent submitted that the procedure in which the goods were seized was under Section 158 of the Custom & Excise Act. This section deals with the procedure to be followed in case of short levy of duty or refund of excess payment.

The subject goods were seized on the ground that they were short levied, as the application for partial exemption was later withdrawn by KTN. The goods were then released to Kangwana on his assertion that he was their legal owner. On 8th March 1995, a letter was written on behalf of the Commissioner to the Manager of Transami who released the goods to Kangwana. Later, the company by a letter dated 14th march 1995 sent documents on the goods to the Commissioner. However, in the meantime, the goods had already been seized on 9th March 1995 under the notice of seizure. The court came to the finding that prior to this seizure, no investigation had been carried out as contended by the Commissioner. It was stated that officers of the Customs Department "pounced on the goods and seized them.'

The Court examined Section 158 and came to the conclusion that the procedures therein were not followed by the Commissioner. There was no evidence adduced by the Respondent to show that the disposal of the goods by Kangwana to Royal Media Services was done in a manner inconsistent with the purpose for which they are granted relief from duty. The court thus came to the conclusion that procedures under Section 158, 185 and 200 of the Act were not followed and thus the right of Royal Media Services had been infringed by the Commissioner. The court

specified that the Commissioner did not follow the provision of the Custom & Excise Act. Royal Media Services therefore proved a *prima facie* case that its proprietary rights had been infringed using wrong procedures and that the powers conferred upon the Commissioner were being enforced in a discriminatory and undemocratic manner by the Commissioner.

The court stated: -

> *" …any Judiciary worth its salt should grasp and uphold the letters and spirit of the Constitution of its country and stand as a strong well against any action of the officials of the government which is irrational, capricious or arbitrary and term the same unconstitutional."*

The Respondent had argued that as none of the provisions of the Acts were prayed to be declared unconstitutional, the court could not rule on the constitutionality or otherwise of the Commissioner's actions. In response to this the court stated that Section 84 (2) gave power to the court "to make such orders, issue such writs and give such direction 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.

The court echoed the firm stand taken by Hon, Chief Justice Chunga in the case of *Peter Mwangi Githibwa- In the Matter of the Chief Magistrate, Nairobi Miscellaneous Criminal Application No. 877/2000* in which he said:-

> *"I want to stress once again in this ruling that the courts in this country are going to be firm, strong and fearless in the discharge of their Judicial duties in accordance with the Constitution and the Judicial oath of office. I want to stress also that the courts in this country will never, on any occasion, implement or give any effect to any law which is in conflict with the Constitution. Interpretation of the Constitution and other laws as well as protection of fundamental or Constitutional rights are functions of the Courts given to us by Sections 67 and 84 of the Constitution of Kenya. The courts will discharge those functions firmly and vigorously no matter the ridicule derisions and invectives needlessly thrown in their faces.*

In essence, the court upheld the supremacy of the Constitution over all Acts of Parliament and actions of government officials. It restated the fact that whenever powers conferred under an Act of Parliament are enforced in a discriminatory and undemocratic manner, the Constitution is granted the power to remedy this deviation. The court restated the words of Justice Suba Sao warning that: -

> *"Official arbitrariness is more subversive of the doctrine of equality than statutory discrimination. In respect of a statutory discrimination, one knows where one stands but the wand of official arbitrariness can be waved in all directions indiscriminately".*

Jackson Ekaru Nakusa –vs- Paul K Tororei, Francis Igwaton Achuka & The Electoral Commission of Kenya
In The High Court of Kenya at Nairobi, Election Petition No. 4 of 2003
HAYANGA, OUNA, G.B.M KARIUKI, JJ

Constitutional law- Violation of fundamental rights and freedoms- Guarantee of fundamental rights and freedoms under Section 77 of the Constitution- Protection from discrimination- Interpretation of the Constitution
National Assembly and Presidential Elections Act (Cap. 7) Laws of Kenya- Section 21 of Cap. 7 –Requirement for security deposit under section 21

Importance

The Constitution prohibits discrimination on the basis of race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex according to Section 82 (3) of the Constitution. This Election Petition alleged among other things, discrimination on the basis of economic status. The court recognized that the list in Section 82 of the Constitution was not exhaustive and that economic status can be a possible category for discrimination because it is possible to deny people of a particular economic means or status their constitutional rights. The court emphasized that an applicant alleging violation of his/her constitutional rights and freedoms must show by evidence that the law being challenged and anything done under the said law is inconsistent with the Constitution, as there exists a presumption that the Legislature has acted constitutionally and that the laws passed by the Legislature are necessary and reasonable.

Summary of Facts

The Petitioner, Jackson Ekaru Nakusa, was a registered voter in Turkana South Constituency in the general elections held in Kenya on December 27 2002. Having voted in the Constituency, he felt aggrieved by the manner in which the election was conducted in the constituency and lodged a petition praying *inter alia*, that the parliamentary election for Turkana South Constituency be declared null and void and that the election of Francis Igwaton Achuka as the Member of Parliament for Turkana South Constituency be declared null and void. Under Section 21 of the National Assembly and Presidential Elections Act (Cap. 7), the Petitioner was required to remit into court within 3 days of lodging the Petition a sum of Ksh. 250,000/= as security for costs. The Petitioner did not remit this required amount and consequently, the second Respondent on 4th April 2003 and the 1st and 3rd Respondents on 2nd April 2003 filed applications seeking orders to strike out the Petitioner's Election Petition.

The Petitioner then made an application under Sections 3, 60,65, 85 of the Constitution and Rule 10 (a) and (b) of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules 2001 seeking a declaration that section 21 of Cap 7 requiring the giving of security for costs is inconsistent with the Constitution and therefore null and void to the extent of the inconsistency in that the said provision offends Section 60 of the Constitution by placing an obstacle to the Applicant's right of access to the High Court by requiring the deposit of Kshs. 250,000/= as a condition precedent for seeking redress.

The Petitioner's case for the declaration and the orders to strike down Section 21 of Cap. 7 was based on the averment that the provisions of Section 21 perpetuated discrimination on the grounds that the Petitioner was a man of humble means, hailing from Turkana District that he described as marginalized area of the Republic of Kenya and in which people live in abject poverty. The Petitioner averred that it is impossible

for the ordinary Turkana people to establish and 'do business that can generate income to enable the depositing of Ksh. 250,000/= in court as security for costs.

The Petitioner further relied on Section 77 (9) of the Constitution to support his contention that the requirement for security deposit under Section 21 amounts to a miscarriage of justice and/or a denial of a fair hearing as the Petition is prejudged, in his view without hearing its merits. The Petitioner went further and invoked Section 82 of the Constitution and alleged that the demand of the security deposit only from the Petitioner and not from the other parties, afforded differential treatment to parties and such differential treatment is discriminatory practice. In addition, the Petitioner argued that Section 21 was against public policy and offended the delineation of functions of government under the Constitution.

Held

1. On the face of it Section 21 of Cap. 7 does not appear to be inconsistent with the Constitution.
2. The Petitioner has not shown that the section is designed to or does discriminate against the people of Turkana on the ground that they come from that region. The Petitioner has also failed to show that the provisions of Section 21 of Cap. 7 are inconsistent with the Constitution.
3. The Petitioner's application is dismissed.

Authorities referred to:

1. Dominic Arony Amoto –vs- The Hon. Attorney General H.C Miscellaneous Application No. 494 of 2003
2. Republic –vs- El Mann (1969) E.A 357
3. Patel –vs- Attorney General (1968) ZLR 99 (Zambia)
4. Gran –vs- US Law Ed. 212

5. Stanley Munga Githunguri –vs- Republic Nairobi HC Criminal Application No. 271 of 1985
6. Brown –vs- Board (1954) 347 US 483

Analysis and Relevant Excerpts

The matter before the court was predicated on the grounds that Section 21 of the National Assembly and Presidential Election Act (Cap. 7) was discriminatory and thus against Section 77 (9) of the Constitution.

Section 21 of Cap. 7 reads:

> " 21. (1) Not more than three days after the presentation of a petition, the petitioner shall give security for the payment of all costs that may become payable by the petitioner.
> (2) The amount of security under this section shall be two hundred and fifty thousand shillings and shall be given by deposit of money.
> (3) If no security is given as required by this section, or if an objection is allowed and not removed, no further proceedings shall be had on the petition, and the respondent may apply to the election court for an order directing the dismissal of the petition and for the payment of the respondent's costs; and the costs of hearing and deciding that application shall be paid as ordered by the election court, or if no order is made shall form part of the general costs of the petition."

In 1993 before the above Section was enacted, the deposit required by a petitioner was Kshs. 50,000/=. The number of election petitions filed in that year was over one hundred. With the enactment of Section21, the number of election petitions filed in 2003 was about thirty. Thus the Petitioner did have a valid point about the astronomical figure exacted by Section 21. The Petitioner argued that the requirement for Kshs. 250,000/= was punitive and discriminatory against people who are not able to raise such an amount of money. The petitioner went ahead and stated that he was a man of humble means hailing from Turkana District,

which he termed as a marginalized area of Kenya that is lagging behind the other regions of Kenya economically.

In essence, the petitioner averred that Section 21 of Cap. 7 offended

- Section 60 of the Constitution by placing an obstacle to the applicants right of access to the High Court for redress through the requirement for the deposit of Kshs. 250,000/=
- Section 77 (9) of the Constitution providing protection from forms of discrimination.

The court began by outlining the broad principles relating to the policy of the court in interpreting the Constitution. The court recognized that it had a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure the enforcement and protection of the citizen's fundamental rights and freedoms. The courts quoted the words of Prof. M.V Pylee in his book, "Constitution of the World",

> *"The courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed but to give broader connotation to such words and connotation in the context of the changing needs of time."*

It was stated in *Republic –vs- El Mann*: -

> *"... in one cardinal respect we are satisfied that a Constitution is to be construed in the same way as any other legislative enactment, and that is, where the words used are precise and unambiguous they are to be construed in their ordinary and natural sense."*

In the American case of *Gran –vs- US 77 Law Ed. 212* cited in *Patel –vs- Attorney General*, a Zambian decision, the court had this to say about the interpretation of the Constitution: -

> *" the provisions of the Bill of Rights are to be broadly construed so that they may be protected against gradual encroachment that seeks to deprive them of their effectiveness."*

Having examined these authorities, the court stated in regard to principles of interpreting the Constitution that the interpretation of the Constitution must keep pace with changing societal circumstances to give meaning to what was intended. The court was therefore minded to look at the Petitioner's claim of discrimination objectively in trying to ascertain whether Section 21 of Cap. 7 was inconsistent with the Constitution and if it was discriminatory against the Petitioner.

> *"Even if it be at the risk of appearing intransigent "sentinels" of personal liberty, the court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right."*

Having laid down the principles of interpreting the Constitution, the court examined the Petitioner's application. In determining whether Section 21 was discriminatory or not, the court applied an objective test to determine if the Petitioner suffered any discrimination as a result of the said section. The court recognized that the alleged discrimination was not based on race, tribe or place of origin, as there were probably people in Turkana District who could afford to pay the deposit. Stating that the inability of the Petitioner to pay the deposit was a peculiarity personal to him, the court rejected the notion that Section 21 created discrimination against the Petitioner. The court stated:

> *"....but we are sure that there are many persons in other areas of our country, who may not afford the payment of the deposit required under Section 21 of Cap. 7. Does this create discrimination against them? If we were to agree with the Petitioner, we would in effect be saying that any law that creates levy on Kenyans that does not recognize that there are people in our society who cannot afford to pay would be inconsistent with the Constitution. The Authorities that levy taxes to run the government would be saddled with a problem. Litigants who cannot afford court fees would demand like treatment. Such a decision would be a recipe for chaos."*

The court while recognizing that economic status is a possible category for discrimination declared that the Petitioner had not provided any

evidence of existence any class of people in Turkana District who are targeted by Section 21 of Cap. 7. Therefore the Petitioners application could not succeed.

Obiter Dictum

As an obiter dictum, the Court articulated its opinion that the deposit required under Section 21, Cap. 7 was rather high and was in effect stifling litigation in the area of election petitions. The court expressed its hope that the Attorney General would look into the matter with a hope of reducing the amount.

Republic –vs- Judicial Service Commission of Kenya *Ex Parte* Stephen S. Pareno
Miscellaneous Civil Application No. 1025 of 2003

Constitutional Law- Constitutional office-Judicial Service Commission-Judicial Service Commission Act Cap. 185-Dismissal of judicial officers-Statutory protection for magistrates available but not constitutional
Judicial Review- Scope of Judicial Review- Wednesbury principle defined and applied-Discretion of the court on whether or not to grant the order of certiorari

Importance

The court affirmed that there is no protection from removal under the Constitution for magistrates. Magistrates, as opposed to judges, do not enjoy security of tenure.

Summary of Facts

The Applicant, Stephen S. Pareno, a former Resident Magistrate brought a judicial review application seeking an order of certiorari to remove to the High Court for purposes of quashing the decision of the Judicial Service Commission dismissing him from service as a Resident Magistrate. The circumstances leading to the dismissal are as follows:

In Machakos *Criminal Case No. 2586 of 2001*, the applicant delivered a judgment which had been prepared by another magistrate, Mr. Soita, who was unable to deliver the judgment as a result of his transfer to Kisii. The Applicant is said to have read the judgment by outlining the charges facing the accused persons and finished off by stating that the accused was innocent and proceeded to acquit the accused under section

215 of the Criminal Procedure Code. The Applicant stated that he later learnt that in the main body of the judgment there were some convictions in respect of certain counts. As there was no specific count or counts mentioned in the last sentence of the judgment, he (the applicant herein) mistakenly believed that the acquittal was in respect of all the counts facing the accused. Upon realizing the error, the file was placed before the High Court for revision whereupon the High Court made an order that the judgment be read again in full on 15th March 2003. The accused was subsequently sentenced to 18 months on probation.

The Applicant was charged with professional dishonesty, misconduct and breach of trust and for 'doctoring' the said judgment. On 10th July, the applicant was notified of the charge framed against him and was asked to show cause why disciplinary action should not be taken against him in respect of his suspected gross misconduct. The Applicant, by a letter dated 22nd July 2003, conceded that he had acted mistakenly and contended that the error on his part was inadvertent. The Applicants response was forwarded to the Respondent, the Judicial Service Commission, which reached the decision to dismiss the Applicant from service with effect from 31st July 2003 on account of gross misconduct. The Applicant was informed of the Judicial Service Commission's decision and was also informed of his right to appeal against the decision as per Regulation 27 of the Judicial Service Regulations. The Applicant failed to appeal and subsequently brought the application for judicial review of the Judicial Service Commission's decision to dismiss him. The Applicant contended *inter alia* in his judicial review application that:-

- The disciplinary procedure set out under Regulation 26 of the Judicial Service Regulations was not complied with; thus the dismissal was not lawful
- The office of Resident Magistrate is a Constitutional Office under Section 69 of the Constitution and therefore the Applicant is entitled to Constitutional protection from dismissal.

- The admitted error in reading the final part of a judgment which resulted in an unintended acquittal ought not to have attracted the penalty of dismissal.

Held

1. The process leading to the dismissal was clearly flawed in not setting up a commission to inquire and in denying the applicant of a hearing. Regulation 26 ought to have been followed, although the Respondent in causing a notice to show cause to issue, receiving the reply and taking it to the Commission did to some extent mitigate the harshness of the violation.
2. Section 69 of the Constitution only relates to the vesting of power to appoint and to discipline on the Judicial Service Commission. There is no protection afforded to Magistrates under the Constitution. Magistrates can be dismissed and removed in accordance with the Regulations made under the Judicial Services Commissions Act, Cap. 185, Laws of Kenya.

Authorities referred to:

1. Chief Constable of North Wales Police –vs- Evans 1982 1 WLR p. 1173
2. Associated Provincial Picture Houses –vs- Wednesbury Corporation [194] 1 KB 223
3. Johnson & Shrewsbury and Birmingham Ry Co English Reports Vol. XLIII Ch
4. B Surindher Singh Kanda and Government of the Federation of Malaya 1962 AC 323
5. Regina –vs- Hampton Justices *ex parte* Green [1976] QB II
6. R –vs- The Commissioner for Co-operative Development & Another *ex parte* David Mwangi & 3 others (unreported) HC Miscellaneous 805 of 1990
7. Eric Makokha –vs- University of Nairobi & 2 others (unreported) CA 20 of 1994

8. Ochieng Nyanogo & Another –vs- Kenya Posts and Telecommunication (unreported) CA Nairobi 204 of 1993

Analysis and Relevant Excerpts

The Judicial Service Commission is mandated under the Section 69 of the Constitution to appoint judicial officers, exercise disciplinary control over those persons and is given the power to remove those persons from office. The offices over which the Judicial Service Commission exercises its powers include: -

a) The office of Registrar or Deputy Registrar of the High Court
b) Magistrates and Kadhis, including the Chief Kadhi
c) Such other offices or member of any court as may be prescribed by Parliament.

The Applicant, having been dismissed by the Judicial Service Commission averred that the office of a Resident Magistrate is a Constitutional office by virtue of Section 69 of the Constitution. The court, quite rightly, ruled that the provisions of section 69 only relate to the vesting of power to appoint and to discipline to the Judicial Service Commission, meaning that there is no protection from removal under the Constitution for magistrates. The court stated that if the tenure of office as provided in the case of judges under Section 62 of the Constitution was intended to apply to magistrates as well, it would have been specifically stipulated. Regulations made pursuant to Section 13 of the Service Commission Act further lay down the disciplinary procedures to be used in dismissing magistrates and other judicial officers. These regulations clearly provide for punishment, dismissal or retirement and the steps to be taken in each case. The court therefore declared that the Regulations applied to magistrates in cases concerning their appointment and dismissal.

The court stated: -

> *"In the case of the Judges the Constitutional provisions clearly prevent removal except as outlined and for the reasons specifically identified in the*

> *Constitution… In the case of magistrates there is no specific provision either under the Constitution or the Service Commission Act or the applicable Regulations which prevents removal."*

The court however stated that although magistrates are not protected under security of tenure, the Regulations do provide some protection to the said officers making it difficult for the relevant body (the Judicial Service Commission) to terminate their services. The court averred: -

> *"It is clear to the court that the intention behind the making of the Regulations was to enable the magistrates to enjoy some protection in order to effectively discharge their duties."*

Thus, the security of tenure constitutionally bestowed on judges is not available to other judicial officers such as magistrates. The court ruled that the Judicial Services Commission were right in exercising their disciplinary authority over the applicant.

Raila Odinga –vs- Professor George Saitoti & 7 Others
High Court of Kenya at Nairobi, Miscellaneous Application No. 31 of 1995
Pall & Juma, JJ

Constitution- Extent of the Attorney General's powers to take over a private criminal prosecution under Section 26 (3) of the Constitution and Section 82 (1) of the Criminal Procedure Code-Legality of the exercise of such powers Criminal law-Private prosecution- Courts powers of revision of judgment and ruling under Sections 362 and 364 of the Criminal Procedure Code-Whether charge sheet is valid if not signed by magistrate- Validity of summons issued under Section 92 of Criminal Procedure Code in absence of signed charge sheet'

Importance

Section 26 (3) of the Constitution vests the Attorney General with the power to institute and undertake criminal proceedings against any person or body. This section gives the Attorney General a residuary control over every criminal proceeding at any stage thereof. This case reiterates the fact that the Constitution gives the Attorney General the right not only to take over any criminal proceedings at any stage but also grants the Attorney General the discretion to either continue or discontinue the proceedings at any time before the verdict or judgment is given.

Summary of Facts

The Applicant applied under Sections 362 and 364 of the Criminal Procedure Code to the High Court for revision and examination of the Nairobi Magistrate's Court Private Prosecution No. 1 of 1995 for the purposes of examining the correctness, legality and propriety of the orders made by the Chief Magistrate on 15th March 1995 and 3rd May 1995.

The background to this matter is as follows: -
On 9th March 1995, the Applicant filed a written complaint together with proposed charges against the Respondents as a private prosecution. On 10th March, the Applicant's counsel appeared before the Chief Magistrate seeking summons to issue to the Respondents through the Commissioner of Police. During the course of the proceedings, the Director of Public Prosecutions, Mr. Chunga, representing the Attorney General, applied to be allowed to appear in the proceedings as *amicus curiae*. The application was allowed and concerning the application by the Applicant, the Chief Magistrate issued orders that summons be issued and served upon all the Respondents through the Commissioner of Police to appear in court on the 28th March 1995.

On 14th March 1995, Mr. Chunga wrote to the Applicant's advocate that the said private prosecution would be mentioned before the Chief Magistrate on 15th March 1995. On the said date, neither the Applicant nor his counsel appeared in court and in their absence, Mr. Chunga purporting to exercise the powers conferred on him by Section 26 (3) of the Constitution on behalf of the Attorney General, applied to take over the proceedings. The Chief Magistrate allowed the application and immediately after purporting to exercise his powers under Section 82 of the Criminal Procedure Code, the Attorney General entered a *nolle prosequi* in the said proceedings and the Chief Magistrate terminated the said private proceeding.

On 16th March 1995, the Applicant applied to the Chief Magistrate to vacate the said order and restore the private prosecution. The Attorney General then raised a preliminary objection challenging the Chief Magistrate's jurisdiction to entertain the said application. On 3rd May 1995, the Chief Magistrate allowed the Attorney General's said objection and declared that she had no jurisdiction to entertain the said application. These events led to the application herein being brought before the High Court by the Applicant.

The Applicant's application was based on the grounds that the Attorney General had no *locus standi* to take over the private prosecution and enter a *nolle prosequi* because: -

1. Section 89 (4) of the Criminal Procedure Code had not been complied with in that the Chief Magistrate had not drawn up or caused to be drawn up and signed by her a formal charge containing a statement of the offence with which the Respondents were charged.
2. The Chief Magistrate had not ascertained whether or not the Respondents had been served with the summons.
3. The Respondents had not yet appeared before the Chief Magistrate and the charges had not yet been read out to them are required by Section 207 of the Criminal Procedure Code.

Held

1. The record shows that the complaint was made in accordance with Section 89 (1) of the Criminal Procedure Code. The learned Chief Magistrate admitted the complaint obviously includes sufficient information or allegations to show that *prima facie* an offence has been or offences have been committed. It has all the ingredients of a complaint as defined by Section 2 of the Criminal Procedure Code. The Chief Magistrate followed it up by issuing summons on the Respondents to appear before her. She duly signed the summons as required by law.

2. There were enough proceedings before the Chief Magistrate when the *nolle prosequi* was entered.

3. The *nolle prosequi* was duly entered in conformity with the provisions made in Section 26 of the Constitution and Sections 82 and 89 of the Criminal Procedure Code.

Authorities referred to

1. Abubakar Kakyama Mayanja –vs- Republic (1960) EA 23
2. Richard Kimani –vs- Nathan Kihara Criminal (Revision) Case No. 11 of 1983 (unreported)
3. Shah –vs- Patel (1954) 21 EACA 236
4. R –vs- West London Justices *ex parte* Klahn (1979) 2 All ER 221
5. R –vs- Manchester Stipendiary Magistrate *ex parte* Hill (1983) 1 AC 328
6. R –vs- William ole Ntimama Criminal Revision No. 23 of 1995.

Analysis and Relevant Excerpts

The court had to determine whether the Attorney General had the *locus standi* to take over and then terminate a public prosecution. The court examined the relevant provisions on the office of the Attorney General under the Constitution and found that the Attorney General did have the power to do so. Section 26 of the Constitution provides the Attorney General's powers and reads in part: -

> "26. (3) The Attorney General shall have power in any case in which he considers it desirable so to do –
>
> a) To institute and undertake criminal proceedings against any person before the court (other than a court martial) in respect of any offence alleged to have been committed by that person.
>
> b) To take over and continue such criminal proceedings that have been instituted or undertaken by other person or authority.
>
> c) To discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or another person or authority.

Section 82 (1) of the Criminal Procedure Code reads as follows: -

> "82 (1) In any criminal case and at any stage thereof before verdict or judgment, as the case may be, the Attorney General may enter a *nolle prosequi* either by stating in court or by informing the court

> in writing that the Republic intends that the proceedings shall not continue and thereupon the accused shall at once be discharged in respect of the charge for which the *nolle prosequi* is entered and if he has been committed or if on bail his recognizance shall be discharged…."

The Chief Magistrate had held that the Attorney General did in fact have the power to take over a private prosecution and accordingly dismissed the private prosecution instituted by the Applicant on these grounds. The High Court agreed with the Chief Magistrate that Section 26 of the Constitution gives the Attorney General the power to take over and dismiss a private prosecution. The High Court then examined the issue whether the Attorney General had *locus standi* to take these actions since Section 89 (4) of the Criminal Procedure Code had not been complied with.

The thrust of the Applicant's submissions before the High Court was that the Attorney General was not empowered to enter *nolle prosequi* unless and until there were 'criminal proceedings'. The Applicant submitted that the complainant made a complaint in writing under Section 89 (1) of the Criminal Procedure Code. Under Section 89 (3) of the Criminal Procedure Code, it is mandatory for a complaint to be signed by both the complainant and the magistrate. In this case though the complainant signed the complaint, the magistrate did not sign it. It was further argued that the Chief Magistrate did not sign the charge sheet drawn by the complainant. Therefore since these two mandatory provisions were not complied with, the applicant argued that there were no criminal proceedings before the court and the Attorney General could therefore not take over and discontinue the proceedings that did not exist.

The Court declared that although the Magistrate had erred in not countersigning the complaint and the charge nevertheless proceedings had been instituted. The court stated that the Magistrates issuance of summons was therefore not null and void and quoted Section 90 (2) of the Criminal Procedure Code to the effect that:

> *"… the validity of any proceedings taken in pursuance of a complaint or charge or by the fact that a summons or warrant was issued without a complaint or a charge."*

Having found that proper proceedings had been instituted by the Applicant, the court went on to hold that the Attorney General properly exercised his powers under Section 26 of the Constitution and Section 82 (1) of the Criminal Procedure Code to take over the private proceedings. In *Shah –vs- Patel***,** the then Court of Appeal for Eastern Africa held at page 237 that:

> *"Even in a private prosecution, the prosecutor in law is the Crown at the instance of the private prosecutor whoever it may be. …This flows directly from the provisions of Section 82 of the Criminal Procedure Code which gives the Attorney General a residuary control over every criminal proceeding at any stage thereof.*

The High Court agreeing with the above sentiments stated:

> *"Thus it is clear that the Attorney General has overall control on all criminal proceedings including a private prosecution at every stage thereof before a verdict or judgment is pronounced. The Constitution gives him the right not only to take over any criminal proceedings at any stage thereof but also in his absolute discretion either to continue or discontinue the proceedings at any time before the verdict or judgment is given. He need not give any reasons therefor."*

The court followed a precedent set in a previous decision, *Republic –vs- William Ole Ntimama* in which the Applicant therein had similarly argued that the Attorney General had no *locus standi* to enter a *nolle prosequi* because the accused was not present in court in obedience to the summons and the trial magistrate had not yet caused to be drafted a formal charge. Lady Aluoch and Mr. Justice Sheikh Amin rejected the argument and held that the nolle prosequi was duly entered in conformity with the provisions made in Section 26 of the Constitution and Sections 82 and 89 of the Criminal Procedure Code.

Director of Pensions –vs- Cockar,
Court of Appeal, Miscellaneous Application No. 50 of 1999
Gicheru, Shah & Owuor, JJA

Constitutional Law – Holders of Constitutional Office – Remuneration - Payment of Pensions – Calculation of pension payable – Applicable law – Failure to amend statute to reflect new salary structure - Calculation of pension based on old structure – Whether Appellant erred in relying on old salary structure – Constitution sections 99, 104 and 112
Pensions Act (Chapter 189), sections 3 and 10 - Constitutional Offices (Remuneration) Act Chapter 423, section 2(1) - Regulations for the granting of pensions, Gratuities and other allowances to - Officers in the first schedule to the Pensions Act, regulation 20(1)(a)
Judicial Review – Orders of certiorari and mandamus – whether the orders of Certiorari and mandamus available - Words and Phrases – "May" – whether use of word confers discretion to compute or not to compute pension – Pension Act Chapter 189 section 3(1).

Importance

This case confirms that the Constitution is supreme to all other laws. The power given to the Minister by Section 3 of the Pensions Act, and delegated by him to the Director of Pensions by Legal Notice No. 317 of 1974, though connoting a discretionary power to grant pensions did not empower the Appellant to deprive a person who was eligible for a pension of that pension. If there is such a discretion, its use has to be judicious and computation of a pension on the basis of a job group that did not exist for the pension in question would be an injudicious and arbitrary exercise of that discretion. The import of this case is the setting down the principle that the courts will come to the rescue of a person about to be harassed by operation of official policy or discretion. The court's duty is to ensure that where there is discretion, it is used judiciously and not arbitrarily.

Summary of Facts

On 1 January 1993, the Kenyan Judiciary was detached from the rest of the civil service and a new, higher salary structure was put in place for those in the judicial service. New job groups were then introduced for the Judiciary, which were J1, J2 and J3. The Respondent joined the Kenyan Judiciary as a Resident Magistrate on 2 October 1961 and rose through the ranks to become the Chief Justice on 28 December 1994. He served in that capacity until he retired on 3 December 1997. According to the Respondent's letter of appointment, his salary was to be within salary scale J3 and he was to enter the salary scale at the maximum entry point. However, unbeknown to the Respondent, the Constitutional Offices (Remuneration) Act, Chapter 423, Laws of Kenya of 1987, which governed the remuneration of the holders of Constitutional offices, had not been amended to incorporate the higher salary structure enjoyed by officers in the Judiciary and continued to reflect the Chief Justice as being in job group T.

In spite of this anomaly, the Respondent and all other holders of Constitutional offices within the Judiciary were paid in accordance with the new salary structure. On 2 December 1997, a claim form for the Respondent's retirement pension was filled in and forwarded to the treasury setting out the rates of salary and pension allowances that he had been receiving for his last three year of service and on which his pension was to be calculated based on the Pensions Act, Chapter 423 and regulation 20(1) of the Pensions Regulations. According to these figures the Respondent was due to receive a monthly pension of KSh.56, 067.59 and a lump sum gratuity of KSh. 4,485,407.80.

However, in a letter dated 3 December 1997, the Appellant whose duty it was to calculate and pay pensions, informed the Respondent, that his monthly pension had been assessed at KSh. 22, 990.60 and his lump sum gratuity at KSh. 1,839,247.90. This calculation by the Appellant was based on the Constitutional Offices (Remuneration) Act which she claimed governed, *inter alia*, the calculation of pensions, and according

to which the Respondent was still earning on the lower salary scale, group T. The Respondent filed a notice of motion against the Appellant seeking orders of *Certiorari* and *Mandamus* to quash the Appellant's decision and compel her to assess his pension and gratuity on the basis of the full annual pensionable emoluments he enjoyed at the date of his retirement. The court ruled in his favour and found that his actual salary at the time of his retirement should have been the basis of computing his pension.

The Appellant appealed on the grounds that the court erred in granting the orders of *certiorari* and mandamus since the power to grant pensions was discretionary and the court could not substitute its own discretion for that of the Appellant. Further, the Appellant's counsel argued that in calculating the Respondent's pension the Appellant was enjoined in law to rely on his salary as set out in the Constitutional Offices (Remuneration) Act and any attempt by her to compute the pension outside that Act would have been illegal. Counsel for the Respondent argued that the salary paid to judicial officers had been approved by Parliament annually, that the government could not run away from its obligations and that the Pensions Act was the statute applicable to the situation. He further submitted that, as the Appellants actions were of an administrative nature, the orders of *certiorari* and *mandamus* had to issue.

Held

1. Power given to the Minister by Section 3 of Pensions Act and delegated by him to the Director of Pensions by Legal Notice No. 317 of 1974, does not empower the Appellant to deprive a person who was eligible for a pension of that pension. Even if such discretion existed, its use had to be judicious. The computation of a pension on the basis of a job group that did not exist for the pension in question would be an injudicious and arbitrary exercise of that discretion.

2. The creation of a new salaries structures for judicial officers must have been done after due consideration by the government and the government could not now say that it had made no provisions for the payment of the pensions on the new structure.
3. Plea that Respondent's salary was not in conformity with the Constitutional Offices (Remuneration) Act fails in the face of the provisions of regulation 20 of the Pensions Regulations which clearly provided that a pension was to be calculated by reference to the period of three years immediately preceding the person in question's date of retirement.
4. The Appellant came to a decision that was contrary to the Constitution, the Pensions Act, Chapter 189 and the Constitution Offices (Remuneration) Act and as such *certiorari* would lie to quash the decision.
5. The issue of *mandamus* should have been limited to a direction requiring the Appellant to perform the legal duty by computing the Respondent's pension and gratuity in accordance with the law, as would have been futile to ask her to recalculate the pension.

Authorities referred to

1. Kenya National Examination Council –vs- Njoroge and others Civil Appeal No. 266 of 1986 (unreported).
2. Raichand Khimji and Co. –vs- Attorney General (1972) EA 536.
3. R –vs- Minister of Health *Ex parte* Committee of Visitors of Glamorgan Country Mental Hospital (1939) 1 KB 232 CA; (1938) 4 ALL ER 32.
4. Rederiaktiebologet Ampitrite –vs- R (1921) 3 KB 500.
5. Reilly –vs- R (1934) AC 176.
6. Robertson –vs- Minister of Pensions (1948) 2 ALL ER 767.

Analysis and Relevant Excerpts

As per Gicheru JA

Section 104(1), (2), (3) and 5 of the Constitution of Kenya provides that:

> "104 (1) There shall be paid to the holders of the offices to which this section applies such salary and such allowances as may be prescribed by or under an Act of Parliament.
>
> (2) The salaries and any allowances payable to the holders of the offices to which this section applies shall be charged upon the consolidated fund.
>
> (3) The salary payable to the holder of an office to which this section applies and his other terms of service (other than allowances that are not taken into account in computing, under any law in that behalf, any pension payable in respect of his service in that office) shall not be altered to his disadvantage after his appointment.
>
> (4) This section applies to the offices of Judge of the High Court, Judge of the Court of Appeal, member of the Public Service Commission, Attorney General and Controller and Auditor-General."

Under Sections 60(2) and 64(2) of the Constitution of Kenya, the Chief Justice is both a Judge of the High Court and the Court of Appeal. Section 104, is therefore applicable to him.

Section 3(1) of the Pensions Act, Chapter 189 of the Laws of Kenya provides that:

> "3 (1) Pension, gratuities and other allowances may be granted by the Minister, in accordance with the Pensions Regulations, to officers who have been in the service of the government."

The power of the Minister under the aforesaid section is delegated to the Principal Pensions Officer of the Pensions Division of the Treasury now called the Director of Pensions, the Appellant in this case. Regarding this appeal, Regulation 20(1)(a) of the Regulations for the granting of pensions, gratuities and other allowances to officers in the First Schedule to the Pensions Act, hereinafter referred to as the Regulations, is in the following terms:

> "20(1) For the purpose of computing the amount of the pension or gratuity of an officer who has had a period of not less that three years' pensionable service before his retirement.
>
> (a) In the case of an officer who has held the same office for a period of three years immediately preceding the date of his retirement, the full annual pensionable emoluments enjoyed by him at that date in respect of that office shall be taken."

The Respondent joined the service of the Government of Kenya as a civil servant on 2 October 1961 and rose through the ranks until he became a Chief Justice on 29 December 1994. The Kenya Judiciary was de-linked from the Kenya Civil Service with effect from 1st January 1993 and those in the Judiciary enjoyed a higher salary structure than that applicable to the Kenya Civil Service. On his retirement with effect from 3 December 1997, the Respondent had been enjoying the higher salary structure of the de-linked Kenya Judiciary and therefore the computation of his pension and lump sum gratuity ought to have been in accordance with the higher salary structure enjoyed by those in the service of the de-linked Kenya Judiciary.

By her assessment dated 3 December 1997 and addressed to the Respondent, the Appellant assessed the Respondent's monthly pension at the rate of Kshs.22, 990.60 and a lump sum gratuity of Kshs. 1,839,247.90. The determinant in this assessment was the Constitutional Offices (Remuneration) Act, Chapter 423 of the Laws of Kenya, which

had not been amended to incorporate the higher salary structure enjoyed by holders of Constitutional offices in the de-linked Judiciary.

According to the Respondent's counsel, Mr. Muigai, the Appellant's only problem was the appropriate salary to be taken into account when computing the pension payable to the Respondent. The Appellant was enjoined in law in this regard to rely on the Respondent's salary as set out in the Act. However, the salary drawn by the Respondent as at the date of his retirement was not in conformity with the Act. This according to counsel, could only be attributed to the failure by the Attorney General to bring to Parliament for enactment an amendment to the Act to incorporate the higher salary structure enjoyed by holders of Constitutional offices in the de-linked Kenya Judiciary. To counsel, the Appellant obeyed the law and any administrative directive in relation to the computation of the Respondent's pension and lump sum gratuity outside the Act was illegal.

The first and second grounds of the Appellant's appeal concerned the grant of the orders of *certiorari* and *mandamus* by the superior court as sought in that court by the Respondent.

According to Mr. Muigai, the power to grant pension is discretionary and the exercise of that power by the Appellant as it affects the Respondents was regular and in accordance with the Pension Act. The superior court could not therefore constitute itself as an appeal court from the administrative decision of the Appellant. Nor could it substitute its own discretion with that of the appellant. Thus, the superior court could not compel a specific act to be done which itself could not order.

The Appellant's third and fourth grounds of appeal were on the computation of the Respondents pension on the basis of the salary he was drawing at the date of his retirement as opposed to that set out in the Act and the failure to effect the requisite amendments to the Pensions Act to reflect the pension awardable to the members of the de-linked

Kenya Judiciary. According to Mr. Muigai, it was impossible to compute pension for the holders of Constitutional offices in the de-linked Kenya Judiciary unless the Act was appropriately amended. Otherwise the Appellant could not be faulted for acting within the provisions of the Pensions Act.

Counsel for the Respondent responded to the above submission and said that the salary paid to the judicial officers had been approved by Parliament from year to year and that the government of Kenya could not run away from its own obligations which are already in place. He further stated that the administration of the Pensions Act is a matter of law and the Appellant could not escape from the obligations imposed by the Act. He said that the Appellant acted outside her jurisdiction and as her role remained administrative, the order of *certiorari* and *mandamus* had to issue. Gicheru JA agreed with Counsel for the Respondent on this point and stated that failure by the Appellant to compute the Respondent's pension and lump sum gratuity was without jurisdiction and because of this, the learned superior court Judge was right in granting the order of certiorari as sought by the Respondent in the superior court.

Shah JA

He was of the opinion that the Judiciary was de-linked from the civil service in 1993 and since then those in the judicial service have enjoyed a new salary structure. The Respondent's appointment as the Chief Justice was pursuant to the provision in Section 61(1) of the Constitution of Kenya. His letter of appointment reflects the same.

The dispute in this matter was regarding the new salary structure. The Appellant, the Director of Pensions, stated that she could not go by the new salary structure of the judicial offices and that she was bound by the Schedule to the Act as a result of which she could only calculate the pension on the basis of the salary of a person employed in job group T.

The Director of Pensions in the Ministry of Finance is by virtue of such position the Principal Pensions Officer of the pensions division of the Treasury. The power given by Section 3(1) of the Act to the Minister was delegated to the Director of Pensions by Legal Notice No. 317 of 1974. The Appellant accepts the fact that the Respondent is a pensionable officer within the meaning of the Act. The Appellant lays stress on the word "may" used in Section 3(1) as well as in regulation 4 of the Act, which provides:

> "Subject to the act and those Regulations, every officer holding a pensionable office in the service of the government, who has been in that service in a civil capacity for ten years or more, may be granted on retirement a pension at the annual rate of five hundredth of his pensionable emolument for each complete month of his pensionable service but no pension commencing after 1 July 1997 shall be less than sixty pounds per annum."

Mr. Githu Muigai who appeared for the Appellants stressed that the use of the word "may" in Section 3(1) of the Act means that pension payment is at the discretion of the Minister and therefore Director of Pensions. The learned judge rejected this submission and was of the view that although the word "may" does connote discretionary power in the Director of Pensions, what happens when the proposed recipient of the pension becomes by law entitled to that pension? If the Minister or the Director can withhold such pension because of the use of the word "may" the power to withhold it becomes arbitrary and goes against the grain of common sense. He examined Section 70 of the Constitution providing:

> "70. Whereas every person in Kenya is entitled to the fundamental rights and freedom of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex, but subject to respect for the rights and freedom of others and for the public interest, to each and all of the following namely
>
> c) Protection for the privacy of his home and other property and from deprivation of property without compensation.

Property includes choses in action, money, or pension. No person who is eligible for pension can be deprived of his pension at the whim of the Director. Once pension becomes due, the Director has no choice but to pay the pension. The judge rejected the Appellants submission that payment of pension is discretionary as per Section 3(1) of the Act as read in conjunction with Section 104 (3) of the Constitution. Statute law is subservient to the Constitution. Section 104(3) reads:

> "The salary payable to the holder of an office to which this section applies (that is to Constitutional office holders) and his other terms of service (other than allowances that are not taken into account in computing, under any law in that behalf, any pension payable in respect of his service in that office) shall not be altered to his disadvantage after his appointment."

Therefore, if emoluments cannot be curtailed then the pension cannot also be curtailed. It would not be judicious to compute pension on the basis of a job group that does not exist in respect of a judicial officer.

The learned judge said: -

> *"Can Parliament by its inaction deprive a citizen of this country of his rightful pension? I think not. This will go against Section 10 of the Act and Section 3(5) of the Act. Therefore the Director is duty bound to compute that pension. When the government includes in its annual budgets an enhanced sum for payments of new salaries it cannot say the said act was illegal. The Appellant cannot now be heard to say that as Parliament did not gazette the new salaries or that as it did not amend the Schedule to Chapter 423, pension can be calculated only in terms of the schedule or it still stands."*

The judge was reinforcing the view that when an officer enters into the service of the Judiciary, even if the employment is on permanent and pensionable terms, the employment is in essence a contract between the government and the employee. The employee must upon retirement, which qualifies him for receipt of pension, be paid his pension dues. In the case of *Robertson –vs- Minister of Pensions (1948) 2 All ER 767*, Denning

J (as he then was) when considering whether or not the crown is bound by the assurances it gives said at 770:

> *"The next question is whether the assurance is binding on the Crown. The Crown cannot escape by saying that estoppel does not bind the Crown, for that doctrine has long exploded. Nor can the crown escape by praying in aid the doctrine of executive necessity i.e. the doctrine that Crown cannot bind itself so as to fetter future executive action. That doctrine was propounded by Rowlett J, in Rederiaktiebologet Aampitrite –vs- R [(1921) 3 KB 500, but it was unnecessary for the decision, because the statement there was not a promise which was intended to be binding but only an expression of intention. Rowlett J. seems to be influenced by those cases on the right of the crown to dismiss its servants at pleasure but those cases can now be read in the light of the judgement of Lord Atkin in Reilly –vs- R (1934) AC 176. That judgment shows in regard to contracts of service, that the Crown is bound by its express promise as much as any subject. The cases where it has been entitled to dismiss at pleasure are based on implied terms which cannot exist where there is an express term dealing with the matter …"*

The Appellant had raised an important procedural point. It was argued on the appellant's behalf that in this case, an order of *certiorari* could not lie. The Appellants counsel said that the Learned Judge was in error in proceeding on the assumption that a Constitutional office holder can have the pension looked at otherwise than in accordance with Chapter 423. He further argued that in any case prayer for *mandamus* does not lie when an order for *certiorari* lies.

In response to this the judge held that the Director of Pension came to a decision, which is totally contrary to the spirit of the Constitution, the Act and Chapter 423. *Certiorari* would lie to quash this decision. He said:

> *"The case of R –vs- Minister of Health Ex parte Committee of Visitors of Glamorgan Country Mental Hospital (1939) 1 KB 232 CA; (1938) 4 all ER 32 relied upon by Mr. Muigai decided that the Minister had not*

acted without jurisdiction, and that his decision could not be questioned by a grant of certiorari. In that case, the proceedings were regular upon their face. There was no want of jurisdiction. The Appellant, in this case, however, declined and in fact refused to go by the Constitution, the Act and Chapter 423 to calculate the pension due to the Respondent. In my view she acted unconstitutionally and illegally and in such a case an order of certiorari must go forth.

It was pointed out by this court in the case of *Kenya National Examination Council –vs- Republic, ex parte Geoffrey Gathenji Njoroge and Others Civil Appeal No. 266 of 1986 (unreported)* as follows:

"*What do those principles mean? They mean that an order of mandamus will compel the performance of a duty which is imposed on a person or a body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed."*

The duty imposed on the Appellant was to calculate and pay to the respondent the pensions he was entitled to upon his retirement.

The court noted that the scope of judicial review is being broadened so as to correct *ex-facie* wrong administrative decisions by judicial review or declaratory suits. The judge was of the opinion that on the issue of *mandamus*, the superior court should have ordered the Appellant to calculate the pension due to the Respondent according to the principles laid down in the Constitution and the two Acts. He dismissed the appeal with costs.

(Owuor JA concurred in the judgments of Shah JA).

The Court in summary stated the following on the institution of constitutional matters: -

"As for the correct procedures of instituting and approaching the court for Constitutional matters we have as far as possible tried to let the cases speak for themselves but we wish to in summary reiterate that there is in existence the Constitution of Kenya (Protection of Fundamental Rights

and Freedoms of the Individual) Practice and Procedural Rules, 2001 (hereinafter referred to as the Rules) that clearly show how one should litigate around protection of fundamental rights and freedoms from Sections 70 to 83 (both inclusive) of the Constitution, the judges have helped beef up with case law. We found it necessary to make a mention of how to approach the court because the above procedural rules formulated by Chief Justice as per Section 84(6) only relate to enforcement of fundamental rights and freedoms. The Rules are not applicable to other sections of the Constitution.

When a question arises as to the contravention of fundamental rights in proceedings be they civil or criminal in the Subordinate Courts the magistrate presiding should refer the question to the High Court upon determining that the question is not frivolous or vexatious under section 84(3)"

In the *Francis Cyrus Mugo case* it was held that it is not mandatory for the magistrate to refer the question to the High Court if the parties do not make the request. Where however the request for the question to be referred to the High Court is raised by any of the parties the magistrate shall refer the question to the High Court unless he determines that the request is frivolous or vexatious.

Essentially barring a finding that the request is frivolous and vexatious the magistrate has no discretion, the reference to the High Court must be made. The decision in *Stephen Wamwea Kabue Matter* sheds some light on what question can be dismissed as frivolous. The Chief Justice in his ruling expressed that the question in order not to be rejected as frivolous and vexatious should be of such a nature that the trial cannot proceed further without a guiding decision thereon from the High Court.

According to the Rules it is upon the applicant to frame the question to be determined by the High Court, which should be served upon all the parties. Such a reference has precedence in allocation of hearing date. The Rules expressly provide that the reference should be determined expeditiously by such number of judges as the Chief Justice may determine.

Rev. Timothy Njoya & 5 Others –vs- The Attorney General, The Constitution of Kenya Review Commmission, Kiriro Wa Ngugi & Koimate Ole Kina
The Muslim Consultative Council and Chambers of Justice (Interested Parties)

-and-

[The Law Society of Kenya appearing as *Amicus Curiae*]
High Court of Kenya at Nairobi, Miscellaneous Civil Application No. 82 of 2004 (OS)
A.G Ringera, B.P Kubo JJ, Mary Kasango, Ag.J

Principles of Constitutional interpretation –Fundamental principles /Doctrines of Constitutional law under Sec.3 and 123(8) of the Constitution of Kenya- separation of powers – Constitutional supremacy vs. Parliamentary supremacy - the interpretation of Sec. 47, 27 and 28 of the Constitution –Applicability of the provisions of the Constitution Review Act in regard to the constitutional review process- The role of the Judiciary in constitution making

Importance

This Case attempted to interpret section 47 of the Kenyan Constitution as regards the power of Constitution making. The case raises novel issues on Constitution making and had a great impact on review process. High Court declared that constitutional interpretation in regard to the constituent power of the people and its implication should be given a proper approach. This case reiterated the fact that the Constitution is not an Act of Parliament and it should thus be construed broadly, liberally and purposely so as to give effect to the values and principles it embodies. The constitutional right to equal protection of the law and non-discrimination as well as the scope of power of Parliament under Section 47 of the Constitution of Kenya, which section limits the power of

Parliament to only amendment of the Constitution, all recognize that the residual power to constitute a framework of government is a power that belongs residually to the people of Kenya.

This exercise of constituent power cannot be undertaken by any other organs established by existing Constitution. It could be exercised by a Constituent Assembly, which is so called because its exercises people's sovereign power to the Constitution. The fact that Kenya is a multiparty democratic state means more than just that there would be in Kenya more than one party and that the country is a democratic state. From this premise, a further principle is derived that in a democratic state, sovereignty is vested in the people. Section 3 connotes that the fact that the Constitution is supreme over all laws and that it is a recognition of sovereignty of the people by and for whom the Constitution is made

Additionally, the court stated that the scheme of protection of fundamental rights envisaged by the Constitution is one where individual as opposed to community or group rights are the ones enforced by the courts. There is no room for representative actions or public–interest litigation in matters subsumed by Sections 70-83 of the Constitution

Summary of Facts

In 1997, the Government of Kenya published a Bill to facilitate the people of Kenya to participate in the process of Constitutional Reform. This Bill was enacted as the Constitution of Kenya Review Commission Act of 1997. It was subsequently amended four times with the intention of making the process all-inclusive and 'people-driven' and the end result was the Constitution of Kenya Review Act, Cap. 3A, Laws of Kenya. Section 4 of this Act provided that the five organs through which the review process was to be conducted were the Constitution of Kenya Review Commission (CKRC), the Constituency Constitutional Forums, the National Constitutional Conference (NCC), the Referendum and the National Assembly.

The main function of Constitution of Kenya Review Commission as provided in the Act was to "collect and collate the views of the people of Kenya on proposals to alter the Constitution and on the basis thereof, to draft a Bill to alter the Constitution for presentation to the National Assembly. The Commission was given a period of twenty-four months (extendable by Parliament on the strict basis of demonstrated necessity) to complete its work. The Constitution of Kenya Review Commission in this regard, organized constituency constitutional forums and facilitated numerous other fora enabling people to give their views on the review process; it collected and collated views of Kenyans and complied a report together with a summary of its recommendations for discussion and adoption by the National Constitutional Conference and prepared a draft Constitutional Bill for debate and adoption by the National Constitutional Conference. It went ahead to convene the National Constitutional Conference as required by Parliament. The National Constitutional Conference (also referred to as Bomas) started its work of debating the Commissions report and draft Bill in April 2003. During this phase the process was legally challenged by the Application No. 82 of 2004 brought by interested parties before a Constitutional Court.

The applicants Rev. Dr. Timothy Njoya, Kepta Ombati, Joseph Wambugu Gaita, Peter Gitahi, Sophie Ochieng, Muchemi Gitahi and Ndungu Wainaina, were delegates in the Constitutional Review Process representing different bodies, and/or as interested parties, were dissatisfied with the foregoing and the manner in which the review process was conducted and went ahead to apply to court seeking orders to halt the process as they felt aggrieved by the legal issues which surrounded the Constitutional Review Process and they therefore sought legal redress in terms the prayers hereunder against, the Attorney General, the Constitution of Kenya Review Commission, Kiriro Wa Ngugi and Koimate Ole Kina. The Muslim Consultative Council and the Chambers of Justice were included as interested parties.

Before the summons could be heard, the 2nd Respondent raised several preliminary points of objection, *inter alia*,

i. The application did not raise any matters requiring interpretation of the Constitution but merely interpretation of an Act of Parliament.
ii. If the orders sought were granted by the High Court, the court would be usurping the powers of Parliament contrary to principles of separation of powers.
iii. The applicants had failed to show that the matters complained of had or were likely to contravene any rights vested upon them personally.

The court upheld these preliminary points of objection on certain prayers and directed that the other prayers should proceed to hearing on their merits. The application originally contained 19 prayers which were then reduced to seven substantive prayers after the hearing of preliminary objections. The following are the prayers:

1. That the declaration be and is hereby issued declaring that sec 26(7) and 27(1) (b) of the Constitution of Kenya Review Act, Cap. 3A (herein the Act) transgresses, dilutes and vitiates the constituent power of the people of Kenya including the applicants to adopt a new Constitution which is embodied in sec. 3 of the Constitution of Kenya Review Act.

2. That a declaration be and is hereby issued declaring that subsection (5), (6) and (7) of section 27 of the Act are unconstitutional to the extent that they convert the applicants' right to have a referendum as one of the organs to reviewing the Kenyan Constitution into a hollow right and privilege dependent on the absolute discretion of the delegates of the National Conference.

3. That a declaration be and is hereby issued declaring that section 27(2) (c) and (d) infringes on the applicants' rights not to be discriminated against and their right to equal protection of the law embodied in Section 1A, 70, 78, 79, 80 and 82 of the Constitution.

4. That the declaration be and is hereby issued declaring that Section 28 (3) and (4) of the Constitution of Kenya Review Act is inconsistent with section 47 of the Constitution and therefore null and void.

5. That a declaration be and is hereby issued declaring that the Constitution gives every person in Kenya an equal right to review the Constitution which rights embodies the right to participate in writing and ratifying the Constitution through a Constituent Assembly or National Referendum.

6. That a declaration be and is hereby issued declaring that Article 21 of the Universal Declaration of Human Rights (UDHR) 1948, which is embodied and implied in section 82 of the Constitution bars the respondents from constituting the Constitutional Conference in a discriminatory manner.

7. That the National conference at Bomas of Kenya be and is hereby stopped for a period of six months pending compliance of the review process with the constitution and rectification of the defects in the Constitution of Kenya Review Act (Cap.3A)

The following was held by a majority of the three-judge bench, Ringera, J and Kasanga, J (with Kubo, J dissenting):

Held

1. Parliament has no jurisdiction or power under Section 47 of the Constitution to abrogate the existing Constitution and enact a new one in its place. Parliament's power is limited to only alteration of existing Constitution. The power to make a new Constitution (the constituent power) belongs to the people of Kenya as a whole, including the applicants. In the exercise of that power, the applicants together with other Kenyans are, in the circumstances of this case, entitled to have a referendum on any proposed new Constitution;

2. The applicants have not established that they have been discriminated against by virtue of the composition of National Constitutional Conference;

3. The applicants are not entitled to an injunction to stop the National Constitutional Conference; and

4. Every party will have to their own costs of the originating summons.

Accordingly, declarations were issued that;

(a) Subsection (5), (6) and (7) of section 27 of the Constitution of Kenya Review Act are unconstitutional to the extent that they convert the applicant's right to have a referendum as one of the organs of reviewing of the Kenyan Constitution into a hollow right and privilege dependent on the absolute discretion of the delegates of the National Constitutional Conference and are accordingly null and void.

(b) Section 28(4) of the Constitution of Kenya Review Act is inconsistent with Section 47 of the Constitution of Kenya and is therefore null and void.

(c) The Constitution gives every person an equal right to review the Kenyan constitution which right embodies the right to ratify the Constitution through the National referendum.

Authorities referred to

1. Crispus Karanja Njogu –vs- Attorney General Criminal Application No. 39 of 2000
2. Republic –vs- Elman (1969) E.A
3. Ndyanabo –vs- Attorney General (2001) E.A
4. Reynolds –vs- Simms (377 US 533,12 L Ed)
5. Adar & 7 Others –vs- Attorney General & Other Miscellaneous Application No. 14 of 1994
6. Kenneth Njindo Matiba –vs- the Attorney General HC Miscellaneous Application No. 666 of 1990 (unreported)
7. Mtunga –vs- Republic (1968) KLR
8. Kessevandanda –vs- State of Kerela (1973) ALR
9. Minerva Mills Ltd –vs- Union of India (1881) I.S.C.R (India)
10. Teo So Lung –vs- Minister for Home Affairs (1990) R.C
11. Uganda –vs- Commissioner of Prisons, *Ex Parte* Matovu [1966] EA 514
12. Githunguri –vs- Republic [1986] KLR 1
13. Nganga –vs- Republic [1985] KLR 121
14. B.A Reynolds –vs- M.O Sims [377] US 533 (USA)

Analysis and Relevant Excerpts

This case affirmed the principle entrenched in Kenyan jurisdiction, that of liberal construction of the Constitution. The Constitution must be construed in a liberal manner rather than in a restrictive and conservative manner. The court in line with this principle of liberal interpretation held that the concept of constituent power and the exercise of the same through the Constituent Assembly and Referendum can be inferred from the pertinent provisions of the Constitution as fundamental principles embodied therein.

The constitutional jurisprudence emerging from this judgement seems to rate the Legislature's (Parliament's) power and jurisdiction under Section 47 as being limited to only alterations of the Constitution. Both Justice Ringera and Justice Kasanga were of the view that Parliament's powers to alter the Constitution cannot be used to destroy

its identity or change its basic structure. This judgement entrenches the view that Parliament has no power and cannot on the pretext of amending the Constitution, change its basic features, abrogate it or enact a new one in its place.

Justice Ringera's Judgment

a) The proper approach to Constitutional Interpretation

Section 3 of the Constitution states: -

> "This Constitution is the Constitution of the Republic of Kenya and shall have the force of the law throughout Kenya and subject to Section 47, if any other law is inconsistent with this constitution, this Constitution shall prevail and the other laws shall, to the extent of inconsistency, be void"

The applicants argued that the Constitution being the Supreme law should not be interpreted as an Act of Parliament. This principle had been earlier laid down in a number of previous decisions. In *Crispus Karanja Njogu –vs- Attorney General, Criminal Application No. 39 of 2000 (unreported),* the High Court stated that the Constitution being the supreme law of the land existing separately from Statutes ought to be interpreted broadly or liberally and not in a pedantic manner. Ringera, J said:

> *" We hold that, due to its supremacy over all other written laws, when one interprets an Act of Parliament in the backdrop of the Constitution, the duty of the court is to see whether that Act meets the values embodied in the Constitution."*

The position before this judgment, was laid down in a decided case, *Republic –vs- El Mann [1969] EA 357,* in which the High Court had held that a Constitution is to be interpreted as any Act of Parliament in that where words are clear and unambiguous they are to be construed in their ordinary and natural sense. Counsel for the 2nd Respondent urged the Court to adopt this approach, also known as the *El Mann doctrine*, to constitutional interpretation in this case.

The Judge in this matter however adopted the liberal approach to Constitutional interpretation as laid down in the *Crispus Karanja* case stating: -

> *"The Constitution is not an Act of Parliament and is not be interpreted as one. It is the Supreme law of the land; it is a living instrument with a soul and a consciousness; it embodies certain fundamental values and principles and must be construed broadly, liberally and purposely to give effect to those values and principles…. And what are those values and principles? I would rank Constitutionalism as the most important. The concept of Constitutionalism betokens limited government under the rule of law. Every organ of government has limited powers, none is inferior or superior to the other, and none is supreme. The Constitution is supreme and they all bow to it.*
>
> *I would also include the thread that runs throughout the Constitution- the equality of all citizens, the principle of non-discrimination…. and the enjoyment of fundamental rights and freedoms."*

b) The Constituent Power of the People and its Implications

There was a contention by the Applicants that the Constitution vests in all Kenyans a constituent power to participate in the making and adoption of a new Constitution of Kenya through the machinery of a Constituent Assembly and referendum. Their contention was that this constituent power had been vitiated, diluted and transgressed by the provisions of the Act to the extent that the National Constitutional Conference was not a Constituent Assembly and there was no provision for a compulsory referendum on the final draft Bill prepared by the Constitution of Kenya Review Commission.

The court examined the meaning of the phrase 'constituent power of the people'. In his book, *Presidentialism in Commonwealth Africa, L. Hurst & Company, 1974*, B.O Nwabwezi wrote at p. 392:

> *"The nature and importance of the constituent power need not be emphasized. It is a power to constitute a frame of Government for a community, and a Constitution is the means by which it is done. It is a primordial power, the ultimate mark of a people's sovereignty. Sovereignty has three elements: the power to constitute a frame of government, the power to choose those to run the government and the powers involved in governing. It is by means of the first, the constituent power, that the last are conferred."*

The submissions of the applicants on this point was that this concept of constituent power was to be found by implication in Sections 1, 1A, 3 and 47 of the Constitution. Section 1 and 1A of the Constitution provides that Kenya is a sovereign, multiparty democratic state. The applicants contended that when the Constitution declared Kenya to be a sovereign republic, it was vesting the sovereign powers in the people of Kenya. Further, the applicants derived the principle that since in a democratic state, sovereignty was vested in the people, it followed that the constituent power was vested in them. As regards Section 3 of the Constitution, it was argued that the assertion of supremacy of the Constitution over all other laws is a recognition of the Sovereignty of the people by whom Constitutions are made. With respect to Section 47 it was argued that the makers of the Constitution in limiting the power of Parliament to only amendment of the Constitution recognized that the residual power to constitute the frame of Government is a power belonging to the people.

The Applicants further argued that though the Constitution of Kenya Review Act (Cap. 3A) was a good attempt towards providing a mechanism to people to exercise their constituent power, nevertheless it was a faulty mechanism based on the faulty premise that the alteration of a Constitution was equivalent to the making of a new one. The Act was premised on the assumption that Parliament could enact a new Constitution through its power of amendment. It was the applicants' view that the constituent power could not be undertaken by any of the organs established by the existing Constitution. It could only be exercised through a Constituent

Assembly and a referendum. Within the framework of the Act there was neither a Constituent Assembly nor a referendum. They also argued that the National Constitutional Conference was not a Constituent Assembly strictly speaking as its membership on the whole was not directly elected by the people for the purposes of making a new Constitution.

The judge in arriving to a decision on the above raised issues recognised the sovereignty of the people of Kenya imparting to them a power to constitute and/or reconstitute as the case may be, their framework of government. This power is a primordial one and the basis of the creation of the Constitution. It cannot therefore be conferred or granted by the Constitution. He stated that if the makers of the Constitution were to expressly recognize the sovereignty of the people and their constituent power, they would do so only *ex abundanti cautela* (out of the excessiveness of caution). Lack of its express textualization is not however proof of its want of juridical status.

The judge accepted the declaration of Kenya as a sovereign Republic and a democratic state as reposing the said sovereignty in the people. He defined the most important attribute of a sovereign people as their possession of a constituent power. He acknowledged that the Constitution is supreme because it is made by the people in whom the sovereign power is reposed. He stated that the constituent power of the people has a juridical status within the Constitution of Kenya and is not an extra-constitutional notion without import in Constitutional adjudication as had been argued by the Second Respondent.

Constitution making involves the collation of views, processing those views into constitutional proposals, debating the proposals and finally their concretisation as the text of a document bearing the form and the name of a Constitution. The judge recognized that it was impossible for all this to be done by a people directly and it would have to be done by representation through a Constituent Assembly. The people are represented by those they have elected to make the Constitution and subsequently the Constitution is made by these representatives. The people have the right and duty to adopt or ratify the Constitution, and this is where a referendum comes in.

The applicants' complaint was that they along with other Kenyans had not been afforded the machinery of the Constituent Assembly and referendum. Their assertion was that the National Constitutional Conference at Bomas because of its non-representative membership did not have the mandate of the people to make a new Constitution. The court however took into consideration the fact that out of the 629 delegates, 210 were elected members of Parliament who could claim to have been directly elected by the people.

The Judge said: -

> *"Although they were not directly elected for the specific purpose of making a new Constitution, it is a notorious fact of which the court may take judicial notice that one of the issues in the general elections of 2002 was the delivery of a new Constitution. To this extent the elected members could claim to have had the direct mandate of the people to participate in the making of a new Constitution."*

He also noted that in a Constituent Assembly it was permissible to have some un-elected membership, as there is need to have a representation of various interests and from both majorities and minorities.

Nonetheless, the majority of the membership of the Constitutional Conference must trace their roots to direct election by the people in whose name they are participating in Constitution making. The judge noted that only one-third of the membership were directly elected by the people. Can such a body be said to be representative of the people? The judge did not think so. He was of the opinion that the National Constitutional Conference failed the test of being a body with the people's mandate to make a Constitution.

> *"In reaching the conclusion I must confess that I have been tempted to affirm the validity of the National Constitutional Conference as a Constituent Assembly considering the colossal amount of time and resources expended on the process so far and the fact that all shades of political opinion and various social formations and interests had seats there. I have in the end formed the conviction that Constitution making is not an everyday*

> *or every generation's affair. It is an epoch-making event. If a new Constitution is to be made in peace time and in the context of an existing valid constitutional order (as is being done in Kenya) as opposed to in a revolutionary climate or as a cease fire document after civil strife it must be made without compromise to major principles and it must be delivered in a medium of legal purity. Sound Constitution making should never be sacrificed at the altar of expediency. [Emphasis added]*

The Judge therefore came to the conclusion that the applicants had been denied the exercise of their constituent power to make a Constitution through a Constituent Assembly. He issued a declaration that subsection (5), (6), and (7) of Section 27 of Cap. 3A were unconstitutional to the extent that they convert the applicants' right to have a referendum as one of the organs of reviewing the Constitution and a declaration that the National Constitutional Conference is constitutionally and statutorily obligated to conduct its business fairly and democratically.

However, he declined to grant Prayer 1 declaring that Section 26 (&) and 27 (1) (b) of Cap. 3A transgresses, dilutes and vitiates the constituent power of the people of Kenya to adopt a new Constitution.

Section 26 (&) of the Act merely indicates that one of the functions of the Commission is to compile its report together with a summary of its recommendations and on the basis thereof draft a Bill to alter the Constitution. Section 27 (1) (b) mandates the Commission to convene the National Constitutional Conference for discussion, debate, amendment and adoption of its report and draft Bill.

c) The Constitutional Right to Equal Protection of the Law and Non-Discrimination

Prayers 7 and 14 were in essence complaints that the applicants' rights to equal protection of the law and non- discrimination had been contravened by the inequality of representation evident in the composition of the National Constitutional Conference. The applicants'

quoted under-representation of provinces and districts as an indicator of inequality of representation. They also alleged that their constitutional rights not to be discriminated against and their rights to freedom of expression, freedom of conscience and association had been curtailed.

The Respondents and the interested parties argued that the applicants had not properly invoked the jurisdiction of the High Court under Section 84 of the Constitution is respect of the abovementioned prayers. The judge agreed with the Respondents on this point and stated that the scheme of protection of fundamental rights envisaged by the Constitution is one where individual as opposed to community or group rights are the ones enforced by the courts. There is no room for representative actions or public–interest litigation in matters subsumed by Sections 70-83 of the Constitution. As none of the applicants' demonstrated how their personal right to equality before the law had been contravened, they court held that that they had not sufficiently invoked the jurisdiction of the court under Section 84 of the Constitution. The judge quoted the High Courts ruling in *Dr. Korwa Ader & Others –vs- Attorney General:*

> *"As this court stated in the case of Matiba –vs- Attorney General, HCCC Miscellaneous Application No. 666 of 1990, an applicant in an application under Section 84 (1) of the Constitution is obliged to state his complaint, the provision of the Constitution which he considers has been infringed in relation to him and the manner in which he believes they have been infringed. Those allegations are the ones which if pleaded with particularity, invoke the jurisdiction of this court under that section. It is not enough to allege infringement without particularizing the details and manner of infringement."*

It was therefore held that there was no merit in prayers 7 and 14 concerning infringement of fundamental rights.

d) Inconsistency of Section 28 (3) and (4) of the Act with Section 47 of the Constitution

Section 47 of the Constitution vests Parliament with power to alter the Constitution through a Bill passed by sixty-five percent (65%) of members of Parliament.

Section 28 (3) and (4) of Cap. 3A was in effect a legislative direction to the Attorney General to publish the draft National Constitutional Conference (Bomas) product in form of a Bill to alter the Constitution and to the National Assembly to enact such a Bill within 7 days of the Attorney General introducing it. It was argued that the Section was inconsistent with Section 47 of the Constitution in that the said draft, though required to be published in the form of a Bill to alter the Constitution, was in reality not a Bill to alter the Constitution but was really a Bill to enact a new Constitution and repeal the existing one.
The issue arising therefrom was whether Parliament could in exercise of its amendment power under Section 47 repeal the Constitution and enact a new one. Counsel for the applicants argued that Parliament had no power under Section 47 to repeal or abrogate the Constitution and to enact another one in its place.

The judge held in this case that Parliament has no power under the provisions of Section 47 of the Constitution to abrogate the Constitution and/or to enact a new one in its place. He stated that the alteration of the Constitution does not involve the substitution thereof with a new one or the destruction of the identity or existence of the Constitution altered.

Additionally, he noted that Parliament being one of the creatures of the Constitution could not make a new Constitution. He applied the doctrine of purposive interpretation of the Constitution as follows: -

> *"Since the (i) Constitution embodies the peoples sovereignty; (ii) Constitutionalism betokens limited powers on the part of any organ of government; and (iii) the principle of the supremacy of the Constitution precludes the notion of unlimited powers on the part of any organ; it*

> *follows that the power vested in Parliament by Sections 30 and 47 of the Constitution is limited power to make ordinary laws and amend the Constitution; no more and no less."*

He further stated that an interpretation that Parliament had the power to abrogate or enact a new Constitution would lead to a farcical and absurd spectacle. He opined that the framers of the Constitution could not have contemplated or intended such an occurrence. He found that Section 28 (4) of Cap. 3A was inconsistent with Section 47 of the Constitution to the extent that the Act is directing Parliament to pass a Bill for the replacement of the Constitution with a new one. This was in effect inviting Parliament to assume a jurisdiction it didn't have- to enact a new Constitution and secondly taking away the Constitutional discretion of Parliament to accept or reject a Bill to alter the Constitution. He however found that Section 28 (3) of the Act was not inconsistent with the Constitution.

In conclusion on this point, the judge stated:

> *"From what I have stated so far it should be manifestly clear that the bane of the Act is the inherent presumption that the making of a new Constitution could be accommodated within the power of Parliament to alter the Constitution. As demonstrated herein, the two are entirely different processes requiring the exercise of different powers. The former requires the exercise of the people's constituent power and the latter requires the exercise of Parliament's limited amendment power."*

Justice Kasango's Judgment *(Concurring with Ringera, J)*

a) Constituent Power

The learned judge concurred with Justice Ringera in finding that the constituent power of the people has a juridical status within the Constitution of Kenya and is not an extra-constitutional notion without import in Constitutional adjudication as had been argued by the Second Respondent.

The Honourable Judge stated that the concept of constituent power could be found within the Constitution of Kenya. It was her contention that the Constitution at Section 1A gives Kenyans the right to be consulted over any change of the Constitution.
Section 1A of the Constitution provides: -

"The Republic of Kenya shall be a multiparty democratic state."

She defined democracy as the exercise of sovereign power by citizens of a country directly or indirectly through the system of representation. She thus agreed with the Counsel for the Law Society of Kenya who submitted that constituent power is a collective power of the people to express their will which right pre exists any written law and it pre exists the existing Constitution. She declared that constituent power exists whether or not people or authorities acknowledge or recognise it and stated that it (constituent power) can be exercised through a referendum, as it would be impracticable for the whole nation to give their views on the Constitution and its review.

The judge examined Section 47 of the Constitution and agreed with Ringera, J that the section did not give Parliament powers to enact a new Constitution. The judge stated: -

> *"Looking at Section 47 one finds that, and particularly in Section 47 (6) (b) the mention of the word provision. Provision is mentioned three times. The subsection states alteration in this section means amendment, modification or re-enactment of any provision of the Constitution, suspension or repeal of that provision and the making of a different provision. This clearly to the court's mind indicate that any amendment, modification, re-enactment, suspension or repealing would be limited to provision of the Constitution and not to the whole Constitution. In other words, this section does not envisage a wholesale repealing of the Constitution."*

She concurred with Ringera, J that Section 28 (4) was inconsistent with Section 47 of the Constitution. It was the learned Judge's considered view that Section 47 of the Constitution did not envisage the total destruction of the Constitution but it envisaged the amendment and repealing, of certain provisions in the Constitution.

The judge dissented from Ringera, J and Kubo, J and found that there was inconsistency between Section 28 (3) of the Constitution Review Act and Section 47 of the Constitution in this regard. Further, the learned judge declared that every Kenyan had the equal right to ratify the Constitution through a National Referendum.

In considering the Applicants prayer No. 14 to the effect that Section 82 of the Constitution was a bar to the Respondent from constituting the National Constitutional Conference in a discriminatory manner, the judge dissented from Ringera J's and Kubo J's judgement by granting it on the grounds that the Applicant's had satisfactorily shown that there existed discrimination in constituting the National Constitutional Conference. The judge stated that even though there was discrimination on the number of delegates representing each province as argued by the applicant's advocate, the court took the view that the number of population per province could not be the only criteria for deciding the number of delegates to represent each province. The judge posited that if the criteria were based on the number of population alone, it would mean that the province with less population would be disadvantaged. In considering what criteria to use, the judge said it ought to be broad, balanced and representative of the views of Kenyans. The judge held that there was discrimination in the constitution of the delegates at the National Constitutional Conference which was done in accordance with Section 27 (2) of the Constitution Review Act. She stated that there was discrimination whereby the provinces with less population were represented by more delegates than provinces with higher population. She held that prayer 14 succeeded.

Justice Kubo's Judgment (Dissenting)

The Honourable Judge generally dissented from the ruling of Ringera, J and Kasanga, J and found that prayers 3 and 12 failed. In concurrence with them however, he similarly declined to grant prayer 1, 7 and 14.

a) Sovereignty of the People (Constituent Power)

The submissions of the applicants' on this point was that the concept of constituent power was to be found by implication in Sections 1, 1A, 3 and 47 of the Constitution. Ringera, J agreed with these submissions and found that lack of its express mention was not however proof of its want of juridical status. He found that indeed the concept of the constituent power of the people was implied in the above sections.
Kubo, J disagreed and found that a Constituent Assembly was one of the various alternative modes of exercising constituent power. He was of the view that since it was not provided for in the Constitution or in ordinary law, if Kenyans decided to have it as their mode of Constitution making, it would have to be expressly provided for. He was of the view that it cannot be inferred.

Concerning the Referendum, Kubo, J held that there was no provision for referendum in the Constitution. He referred to Jowitts Dictionary of English Law that defined the term referendum as follows:

> *"Referendum [Fr. Plebiscite], a direct vote of electors upon a particular matter."*

He stated:

> *"The Applicants contend that [the referendum] is a mandatory constitutional right. It is not. This process, important though it must be, is one of the several alternative ways of legitimising a Constitution. I put in the same category as Constituent Assembly. If Kenyans want referendum as a mandatory right, it has in my respectful view, to be provided for expressly."*

The learned judge added that in his view Sections 26 (7) and 27 (1) (b) of Cap. 3A had not transgressed, diluted or vitiated the applicants' power to adopt a new Constitution under Section 3 of the Act. He took into account affidavit evidence to the effect that various fora were availed for the people's participation countrywide in making constitutional proposals. He also noted that the 1st and 2nd applicants had participated in the conference as observers and had even addressed the Conference.

b) The Constitutional Right to Equal Protection of the Law and Non-Discrimination

The Applicants' argued that Section 27 (2) (c) and (d) are discriminative because:

a) *They don't set out criteria for equal treatment of all Kenyan districts, irrespective of their population.*
b) *They require the same treatment of all registered parties irrespective of size of membership at the time the section was enacted.*

In this respect, the Applicants' urged the court to declare Cap. 3A unconstitutional to the extent that it provides in Section 27 (2) (c) and (d) for unequal representation at the National Constitutional Conference.

The Applicants referred to the USA case of *B.A Reynolds -vs- M.O Sims [377 US 533]* decided in 1964 and made the following points: -

a) *The nature of representative democracy is that all persons must be treated equally in all representative bodies, whether in Parliament or at the National Constitutional Conference and that as long as those bodies are representative, all persons should be treated equally.*
b) *The right to franchise is very important and preservative of all rights and all other rights depend on this.*

Section 82 of the Constitution defines the term discriminatory as follows:-

> "82. (3) In this section the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."

The Applicants' claim of discrimination did not fall under the above definition of discrimination. The Honourable judge concurred with Ringera, J on prayers 7 and 14 and found that the applicants had not proved any discrimination against them personally as required by the law. He held that the applicants should have successfully shown that certain aspects of provisions of the law they sought to be declared unconstitutional violated their individual rights as set out in the Bill of Rights, which they failed to do. He also stated that Article 21 of the Universal Declaration of Human Rights, 1948 that was quoted by the Applicants, could not be inferred from Section 82 of the Constitution.

c) Inconsistency of Section 28 (3) and (4) of the Act with Section 47 of the Constitution

The applicants' submitted that the power vested in Parliament was a limited power and did not include: -

a) Power for Parliament to make, adopt or enact a new Constitution
b) Power for Parliament to abrogate or repeal the existing Constitution.

It was submitted that the power to make the Constitution belongs to the people in the exercise of their constituent power and that Parliament has no power outside the Constitution. The Respondents on the other hand submitted that the contention by the applicants' counsel that Section 47 of the Constitution simply allows Parliament to amend the Constitution but not to repeal or replace it was erroneous. They averred that the supremacy of the Constitution under Section 3 was expressly made subject to Section 47. Section 47 (6) (b) states:

> "References to the alteration of this Constitution are references to amendment, modification, re-enactment with or without amendment or modification, of any provision of this Constitution, the suspension or repeal of that provision and the making of a different provision in place of that provision."

The judge examined the meaning of the term 'alteration' in *Black's Law Dictionary* (7th Ed. 1999) and stated that the term refers to abrogation of an existing law by a legislative act.

He stated in this regard:

> *" In view of sections 47 (6) (b) and 123 (9) (b) of the Constitution, it is my respectful view that it is legitimate to interpret Parliament's alteration power under Section 47 to mean that if Parliament can alter one provision, it can alter more; and if it can alter more, it can alter all."*

The judge was of the considered opinion that Section 47 of the Constitution does not limit the power of Parliament to amend or repeal the Constitution and to replace it with a new one. He adopted as a persuasive authority the utterances of the High Court of Singapore in Teo So Lung –vs- Minister for Home Affairs (1990) R.C whereby it was stated:

> *"If the framers of the…Constitution had intended limitations on the power of amendment, they would have expressly provided for such limitations."*

He noted that the words of Section 47 of the Constitution were adequately clear and did not impose limitations on the power of Parliament to amend, re-enact, repeal and/or replace the Constitution. He noted that Section 30 of the Constitution vested in Parliament legislative power which Section 28 (4) of Cap. 3A reinforced by providing for the draft Bill to be presented to the National Assembly for 'enactment.'

In a differing view from Ringera, J, he stated that Section 28 (4) did not purport to confer any power on Parliament but merely acknowledged Parliament's power. He held that Section 28 (3) is consistent with Section 47 of the Constitution - concurring with Ringera, J and that Section 28 (4) is similarly consistent with Section 47 of the Constitution - dissenting from the other two Honourable Judges.

Makueni County Council –vs- Alois Mwaiwa Muia
High Court of Kenya at Machakos, HCCC No. 164 of 2000 (Machakos) & HCCC No. 1313 of 2000 (Nairobi)
J. W Mwera, J

Constitutional Law- Alienation of Trust Land-Section 115 and 118 of the Constitution-Procedure in alienating trust land by Local Authority- Alienation of trust land under the Land Adjudication Act (Cap. 284) Laws of Kenya

Summary of Facts

The two cases above were consolidated on grounds agreed by the parties that the parties, the subject matter and the relief's sought were similar in substance. The prayers in Nairobi *HCCC No. 1313/2000* were to injunct the respondent County Council not to sell, transfer, alienate or otherwise deal with L.R No. 12968 contrary to Section 115 of the Constitution. One of the thirteen applicants' therein, Alois M. Muia, swore an affidavit to oppose the application for injunction filed by the respondent County Council in Machakos *HCCC 164/2000*. In Machakos *HCCC No. 164/2000* the main prayer in the suit was to issue a permanent injunction against the defendants therein who were the Plaintiff's/Applicant's in Nairobi *HCCC 1313/2000* from interfering with the suit land, EMALI TOWNSHIP BLOCKS 3 AND 4.

The defendant in this consolidated suit submitted that the intended alienation of about 1000 hectares of trust land by the Makueni County Council was contrary to the Constitution. The 13 applicants in *HCCC 1313/2000* averred that they resided in the land in issue that was vested as trust land in the Makueni County Council. The plaintiff, Makueni County Council on the other hand submitted that it was within its power to sell the land in issue to raise cash, pay off debts and otherwise finance

the operations of the council and that the thirteen applicants in any case had no *locus standi* to institute the proceedings against the County council. The county council further submitted that the land to be sold was open and vacant land and that it had received consent from the Minister of Local Authorities to hive off 1000 hectares of 3500 acres of trust land under its authority for the purposes of raising money to settle debts and finance other operations. In response to this, the defendant argued that alienation of trust land was never meant for such objects and that the County Council did not follow the procedure granted under the Constitution and specifically set out under the Trust Land Act (Cap. 288), Laws of Kenya.

Held

The court held that the County Council had not followed the procedure granted under the Constitution and the Trust Land Act. The intended alienation was neither under the Land Adjudication Act (Cap. 284) nor was the tenure changing under the Land Consolidation Act (Cap. 283).

The court further held that the purposes for which the County Council was proposing to sell the land were not the purposes proscribed under the Constitution for the setting aside of trust land. The court declared that the consent by the Minister by virtue of the Local Authorities Act (Cap. 265) could not prevail over the express provisions of the Constitution. The court thus declared the Minister's consent invalid in the face of the Constitution.

The thirteen plaintiffs had *locus standi* as residents in the land in issue and they were granted a temporary injunction against the Council preventing the Council from proceeding to sell the land in issue until determination of the suit.

Authority referred to

1. Francis Karanja & Another –vs- Kiambu County Council & Another Nairobi HCCC No. 2956 of 1995

Analysis and Relevant Excerpts

Under Section 115 of the Constitution, all trust land vests in the County Councils within whose area of jurisdiction the land is situated. Sub-section 2 of the said section reads:

> "(2) Each county council shall hold the Trust land vested in it for the benefit of the persons ordinarily resident on that land and shall give effect to such rights, interests or other benefits in respect of the land as may, under the African customary law for the time being in force and applicable thereto, be vested in any tribe, group, family or individual…"

Both parties in this case were agreed that the land in issue was trust land. It was also accepted that the County Council got consent from the Minister of Local Authorities to sell 1000 hectares of trust land under its authority to sell and raise money to settle various debts. The defendant however submitted that this consent was improper and lacked legality. The court agreed with these sentiments and stated as follows: -

> *"It needs no reminding that if that consent was by virtue of the Local Authorities Act (Cap. 265) it cannot prevail over the express provisions of the Constitution. The Constitution has set out the manner and the objects to focus on while changing the tenure of trust land and Cap. 265 cannot supersede it. The Minister's consent is thus invalid in the face of the Constitution."*

The court followed the precedent set out in *Francis Karanja & Anor –vs- Kiambu County Council & Another Nairobi HCCC 2956/95* reiterating that the cardinal principle that authority such as that granted under a Statute could not prevail over the Constitution. In the same regard, it held that that the Minister's authority granted under statute did not have superiority over the Constitution.

The court was of the mind that the County Council had not followed the procedure granted under the Constitution and that the purpose for which the land was alienated was not provided under the Constitution.

Section 118 of the Constitution provides that where the President is satisfied that the use and occupation of an area of Trust land is required for purposes mentioned in sub-section 2 of the same section, he may give written notice to the County Council that the land is required to be set apart for use and occupation for those purposes. The purposes for which Trust land may be set apart under the Constitution are: -

(a) The purposes of the Government of Kenya
(b) The purposes of a body corporate established for public purposes by an Act of Parliament.
(c) The purposes of a company registered under the law relating to companies in which shares are held by or on behalf of the Government of Kenya;
(d) The purpose of the prospecting for or the extraction of minerals or mineral oils.

The court examined the reasons the plaintiff herein, Makueni County Council was selling the land and found that the said reasons did not fall in any of the above categories.

Daniel Toroitich Arap Moi –vs- John Haron Mwau
Court of Appeal at Nairobi, Civil Application No. 131 of 1994
Cockar CJ, Omolo & Akiwumi JJ.A

Elections- striking out notice of appeal- determination of validity of Presidential elections- whether the Court of Appeal has jurisdiction under section 10(1) and section 44 of the constitution to entertain an appeal on the validity of a presidential election- whether the issue of election nominations set out under section 5(3)(b) of the Constitution can affect the validity of a presidential election – Whether failure to provide for the issue of nominations for elections under the Presidential and Parliamentary Elections Regulations denies jurisdiction to the High court sitting as an electoral court to pronounce on the validity of the nominations- whether technicalities in the nomination process may render a candidacy void.

Importance

This case goes to interpret the provisions regarding the election of the president of Kenya. Under section 44(5) of the Constitution, no appeal may lie from a decision of the High Court as regards determination of a presidential election. This provision may be beneficial ensuring continuity in the governance of the country while on the other hand it denies the aggrieved party a chance of appealing to the highest court on the land. One must then weigh the political justification for this denial versus the right to a fair trial under our constitution. The decision exposes the lack of a checks system to address election issues with finality and a likelihood of abuse of powers by the High Court. The absence of a right to appeal also implies that there is no binding decision that can be made by one High Court sitting as an Electoral Court over another such court.

Editor's Summary

The Applicant in the present application is former President of Kenya, Daniel Toroitich Arap Moi. The Respondent Mr. John Harun Mwau is one of the unsuccessful candidates in the Presidential elections held on 29th December 1992. The present application is to strike out the Respondents Notice of Appeal dated 30th may 1994 on the ground that no appeal lies to this court against the decision of the High Court of 30th May 1994. This decision emanated from the election Petition brought by the respondent challenging the election of Mr. Moi as President of the Republic. It was submitted on behalf of the applicant that since section 44 of the Constitution applied by virtue of section 10(1) of the Constitution to the determination of the question whether a person has been validly elected as a President sub section (5) of the section introduced into the Constitution in 1984 clears any doubts in to the issue. The same is to the effect that:

> 'The determination by the High Court of any question under this section whether the decision be interlocutory or final shall not be subject to appeal'.

Mr. Kilonzo for Mr Moi argued that the said section denied the respondent a right of appeal to the Court of Appeal from the decision of the High Court sitting as an Election Court in the election petition brought by the respondent. The Court of Appeal in determining the application first reminded itself that it was a creature of statute and thus it has only such powers and jurisdiction as are conferred on it by law. Further the court has no inherent jurisdiction on any matter and its jurisdiction cannot be implied from circumstances. Mr. Kilonzo for Mr. Moi argued that the decision of the High Court was a final determination of the election petition and as such the Court of Appeal has no jurisdiction to hear an appeal from the High Court decision. It could have been another matter had the Appeal been in respect of matters unrelated to the determination whether the President had been validly elected.

The election petition filed in the High Court sought to challenge the validity of the election of the President on the ground that initial steps of the election process, namely the nomination had been faulty making the election void. The Petititoner had argued that the process was faulty as Mr. Moi was said to not have complied with the requirement to present forty standard sheets of foolscap papers to the Electoral Commission on the nomination day as required under section 5(3) (b of the Constitution as read with regulation 12 of the Presidential and Parliamentary Election Regulations. Mr. Mwau thus urged that the nomination of Mr. Moi and his subsequent election as President was in his view invalid and should be nullified. The High Court had dismissed the petition finding that the dimensions of "standard sheets of foolscap papers " as submitted by the respondent was not in the Kenyan context, the "standard Sheets of foolscap papers" referred to in Regulation 12 of the Presidential and Parliamentary Election Regulations and that in any case there was no mandatory requirement under section 5(3) (b) of the Constitution with respect to the use of such papers. Relying on section 72 of the Interpretation and General provisions Act, The High Court had further held that this omission did not render the candidacy void. The said section provides *inter alia* that:

> "Form prescribed by a written law, shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document and is not calculated to mislead".

Mr. Mwau thus dissatisfied with the High Court decision filed a Notice of Appeal, which Mr. Kilonzo for Mr. Moi now argues for dismissal. Mr. Mwau argued that he, contrary to Mr. Kilonzo's contention, had a right of appeal to the Court of Appeal in that:

I. He had advanced other grounds in the petition which the High Court opted to ignore basing its decision only on the issue whether the nomination papers complied with section 5(3) (b) of the Constitution.

II. He argued that the Presidential and Parliamentary Elections Regulations did not deal with the issue of nominations and thus the High Court did not have the jurisdiction to pronounce on the validity of the nomination of the applicant.

The Court of Appeal stated in this application that indeed that the issue of nomination was an issue of substance which according to section 5(3) (b) of the Constitution can affect the validity of a Presidential Election and which need not be included in the Regulations. The Court of Appeal further noted that section 19 of the National Assembly and Presidential Elections Act which makes further provisions, *inter alia* for the holding of Parliamentary and Presidential Elections as prescribed in the Constitution provides in line with sections 10 and 44 of the Constitution that an application under the Constitution to determine whether a person has been validly elected as a President shall be by way of a petition and shall be tried by an election court consisting of three judges. The Court observed that this process was followed during the hearing in the High Court. The Court further observed that the applicant had in the High Court admitted that the issue of the nomination papers could not lie as it was merely relating to the dimensions of the applicants nomination papers only and not as to their invalidity for purposes of nomination.

Held

I. The court found that nomination is an integral part of the election process and it falls squarely within the provisions of sections 10 and 44 of the Constitution thus the High Court had jurisdiction to address it.
II. The Court of Appeal therefore found that since the matter intended to be appealed against was an election petition, which squarely fell within the ambit of sections 10 and 44 of the Constitution, no appeal lies from the final decision in that election petition to this court. The Court therefore could not

go into the merits of the appeal since it had no jurisdiction and thus found that the application to strike out the notice of appeal succeeds and the Notice of Appeal filed by the Respondent Mr. Mwau was thus struck out with costs.

III. The Court of Appeal found in this application that the decision by the High Court however flawed it may have been, finally disposed off the respondents election petition and according to the law no appeal can lie to the Court of Appeal.

IV. In response to Mr. Mwau's argument that section 123(8) of the Constitution in support of the contention that the Court of Appeal has jurisdiction to hear the appeals from the decision of the High Court in an election petition, the court found that the said provision of the Constitution does not give the Court of Appeal jurisdiction.

Authorities referred to

1. Kenneth Stanley Njindo Matiba –vs- Daniel Toroitich Arap Moi, Civil Application No. 241 of 1993 (NAI. 103/ 93 UR) Unreported)
2. Munene –vs- Republic (No. 2) [1978] KLR 105 at pg. 112
3. The Owners of the Motor Vessel "Lilian S" –vs- Caltex Oil (Kenya Ltd. Civil Appeal No. 50 of 1989 (unreported)

Analysis and Relevant Excerpts

The High Court sitting as an electoral court is mandated to hear election petitions. In cases where the court sits to hear Presidential Election Petitions, the court is the final arbiter and its decision is not appellable from. The relevant constitutional provisions in matters of Presidential Elections are section 10(1) (2), section 44(5) which give the High Court the final jurisdiction. Sub section (5) of section 44 of the Constitution denying any right of appeal from the High Court appears to have been introduced into the Constitution in 1984 to remove any doubts.

All courts in Kenya are a creature of statute as set out under our Constitution. As such a court can only exercise powers set out under the statute. In this instance the jurisdiction of the Court of Appeal is outrightly ousted under section 44(5) of the Constitution. It is only the High Court that has inherent jurisdiction while the Court of appeal has none. In *Munene –vs- Republic (No. 2) (1978) KLR 105 at pg 112*, the court stated as follows:

> *'We will not usurp Jurisdiction. We will interpret liberally the extent of our jurisdiction…."*

In this case no matter how liberal the Court of Appeal would have wished to go, the court's jurisdiction is completely ousted. The court could only entertain an appeal in respect of matters unrelated to the determination whether the President had been validly elected as such.

Despite the above, the Court of Appeal may decide a matter either conservatively or liberally and the court has not always applied the liberal interpretation.

The introduction of subsection (5) to section 44 of the Constitution seems to have been intended to leave no doubt that decisions by the High Court on Presidential Elections are not appellable from. Election petitions in Kenya have been known to drag on for years with the result that the incumbent whose election could have been nullified may survive for the full term by default. There is thus the need to determine these petitions expeditiously and on a priority basis. Given the sensitive nature of presidential elections there is need to ensure that the dispute as to the President elect is declared at the earliest opportunity to avoid an anarchy and the government of the country continues uninterrupted. However, one may be forced to question the fairness of the provision given that it ousts the jurisdiction of the Court of Appeal thus denying the litigants their fundamental right to be heard.

The Court in this case also reiterated that the Constitution being the supreme law cannot be undermined by mere Acts of Parliament and in this case the Presidential and Parliamentary Election Regulations.

Referring to the case of *Kenneth Stanley Njindo Matiba –vs- Daniel Toroitich Arap Moi (Civil Application No. NAI 241 of 1993((Unreported))*, the court stated that since it is a creature of statute, it only has powers and jurisdiction as is conferred on it by law. The court has no inherent jurisdiction and as such the courts competent jurisdiction is that which is either conferred upon it either under the Civil Procedure Act or by particular statutes and the court has no competent jurisdiction where this is specifically denied as it is by section 44(5) of the Constitution in this case. The court reiterated that the definition of the word 'court' under the Interpretation and General Provisions Act, 'any court of Kenya of competent Jurisdiction.'

Given this finding, the Court of Appeal's hands are tied by the judgment of the High Court. The court stated that the High Court decision may be a bad decision all the same there can be no appeal. Of course the Court of Appeal appears helpless in the matter and it is a sad day for the development of our legal jurisprudence where decisions are not tested by the highest court on the land. The court all the same went on to interpret various constitutional provisions including section 123(8) by stating that this section can only apply where the court has jurisdiction conferred upon it. The main issues raised by the litigants were thus not addressed as the court addressed the preliminary issue on striking out the appeal.

Though the High Court has original jurisdiction in all matters, however unless for very serious reasons, the right of Appeal should not be denied to a litigant. Given the weighty nature of the issues in Presidential Elections and the need for expeditious hearings of the issues, a suggestion would be to constitute a Court which would address among others the validity of the election. A condition would be that the judges determining the issue would have to be a full bench of nine. This suggestion was influenced by the provisions in Ugandan Constitution.

Alicen J. R. Chelaite (Appellant) –vs- David Manyara Njuki, Simon Ole Kerore & The Electoral Commission of Kenya (Respondents) In The Court of Appeal at Nairobi, Civil Appeal No. 150 of 1998
(Kwach,Pall, & Owuor, JJ. A)

Constitutional matters- Election petitions- Constitutionality of amendment by parliament of section 20(1) (a) of the Presidential and Parliamentary Elections Act – form of a notice of Presentation – whether a notice of presentation is a principal document while filing an election petition – consequence of non compliance with rule 5 of the rules- whether order 6 rule 13 of the civil procedure rules applies to election petitions – technicalities versus substance - consequence of service of petition out of time

Summary of Facts

This was an appeal from the decision of Aluoch J. given on 2nd July 1998 by which she struck out the Election Petition filed by the Appellant herein which the petitioner had filed in the superior court to challenge the election of David Manyara Njuki(the 1st Respondent herein).The 2nd Respondent herein was the returning officer and the Electoral Commission the third Respondent is the statutory authority charged with the responsibility of organizing and conducting Local Authority, Parliamentary and Presidential Elections in Kenya.

The Petitioner had contested the seat for Nakuru town but lost to the first respondent. She then filed a petition alleging a multiplicity of irregularities and offences against the first and second respondents and sought an order nullifying the election of the first respondent as the Member of Parliament. Pursuant to regulation 40(1)(b) and (2) (b) of the Presidential and Parliamentary Elections Regulations, 1992, the third

respondent published the election of the first respondent in a special issue of the Kenya Gazette dated 6th January, 1998 being Gazette Notice No. 80 of 1998.

Section 20(1) (a) of the National Assembly and Presidential Elections Act (Cap 7) requires that a Petition to question the validity of an election shall be presented and served within twenty eight days after the date of Publication of the result of the election in the Gazette which in this case happened on 6th January 1998, thus the last day of service was on 3rd February 1998. The petitioner presented her petition on 2nd February 1998 as required, however the Petition was never served on the first respondent till 10th February 1998. The second and third respondents were served on 11th February 1998.

The first respondent took out a notice of Motion under rules 9 and 14 of the National Assembly elections (Election Petition) Rules, 1993, seeking to have the petition struck out with costs. The reasons advanced were that the petition was incompetent and improperly presented in that service on the first respondent was irregular as it was out of time and that no notice of presentation of the petition had been served on him. Further that no notice of presentation of the petition was published in the Kenya Gazette within ten days of presentation as required. That the manner in which the petition was presented to court was in total disregard of the provisions of section 20 of the Act and rules 9, 15(1) and (2) of the National Assembly Elections Rules. Further that the petition had been drawn and filed by advocates with no authority under the Act to do so. The petitioner in reply contended that the petition was presented and served within the prescribed period and that the failure to file and serve a Notice of Presentation on the first respondent does not invalidate the petition. She also argued that the purpose of the notice of presentation is to confirm that the petition has indeed been presented to the court, a fact that was not disputed by the respondent.

Justice Aluoch found that the respondents were served with the petition out of time and that the failure to accompany the petition with a notice

of presentation of a petition was in breach of the mandatory provisions of rule 14(1) of the aforesaid rules. She rejected as untenable in law the submission by the petitioner's advocate that parliament acted in excess of its legislative authority in amending section 20(1) of the Act to reduce the period allowed for service of a petition on a respondent. She also rejected the submission that the receipt issued by the registrar of the superior court under rule 3 of the Rules is as good as the notice envisaged by rule 14 of the Rules.

In this appeal, the appellant/Petitioner's advocate argued the following main grounds:

I. That the learned judge erred in law in holding that the manner in which the respondents requested for particulars of the petition was competent and in accordance with rule 5 of the rules.
II. That the judge erred in failing to find that the notice that was served with the petition was a notice of presentation within the meaning of rule 14(1) of the rules
III. That the judge erred in law in holding that a notice of presentation of an election petition is a principal document for purposes of filing an election petition
IV. That the judge erred in law in holding that parliament had the power to amend section 20(1) (a) of the Act by Act No. 10 of 1997, in view of section 44(4)(a) of the Constitution.
V. That the judge erred in striking out the petition pursuant to order 6 rule 13 of the Civil Procedure rules

Held

I. The court of appeal found that the failure to comply with the procedure in the request for particulars did not cause any injustice or prejudice to the petitioner.
II. On the issue of the notice of presentation, the court upheld the High Court's finding that the receipt issued by the registrar was not a notice of presentation as required under the law and further that service of a petition without a notice of

presentation does not constitute a valid service.

III. That the legislative authority donated by section 44(4) of the Constitution is the property of Parliament and thus in amending section 20(1)(a) of the Act parliament exercised a power given to it by the Constitution.

IV. That even in that absence of an express power to do so, a court can strike out a petition or a pleading under its inherent powers and more so under section 23(2) of the Act where the application is an interlocutory one the same can be decided by any judge.

V. That courts are under a duty to interpret and apply the law regardless of the consequences and as such no failure of justice was caused by observance of technical aspects of the law.

Authority referred to

1. C. Devan Nair –vs- Yong Kuan Teik [1967] 2Acm 31

Analysis and Relevant Excerpts

The main constitutional issue raised in this Appeal is that Parliament acted unconstitutionally by amending section 20(1) (a) of the National Assembly and Presidential Elections Act (Cap 7).

Under the said section 20(1) (a) a petition: -

(a) To question the validity of an election shall be presented and served within twenty-eight days after the date of publication of the result of the election in the Gazette. The judge hearing the petition had been urged to find that Parliament acted in excess of its legislative authority in amending the section 20(1) of the Act to reduce the period allowed for service of a petition on a respondent. The judge at the High Court sitting as an electoral court found this argument untenable. Parliament is the legislative body in Kenya clothed with all powers to make and amend laws.

Under section 44 (4) of the Constitution:

'Parliament may make provision with respect to:

a) The circumstances and manner in which the time within which and the conditions upon which an application may be made to the High Court for the determination of a question under this section; and
b) The powers, practice and procedure of the High Court in relation to any such question.'

The powers are entrenched in the supreme law of the land. Parliament merely delegates this power to the rules committee. Thus Parliament cannot act outside its authority by doing what it is mandated to do. This can only arise if Parliament enacts a law that is in conflict with the Constitution. Parliament cannot be challenged as to the reasoning behind passing of any law unless the same is *ultra vires* the Constitution. The court can strike down legislation directed at contravening the Constitution. This is in the spirit of upholding the principle of separation of powers. Section 44 of the Constitution thus goes to enable Parliament make relevant rules regarding election petitions. The courts duty is to interpret and apply the law regardless of the consequences and it would amount to witch-hunt if one was to blame Parliament and the courts for non compliance with the law.

Rashid Odhiambo Aloggoh & 245 Others –vs- Haco Industries Ltd Civil Appeal No. 110 of 2001

Employment issues- whether the matter raised constitutional issues - whether the Chief Justice declaration of a constitutional matter final – At what stage can one object to a matter being considered as raising Constitutional issues-factors to determine the number of judges on a constitutional bench- Whether the Constitutional bench is obliged to determine the merit of matters factual before deciding whether a matter raises constitutional issues- whether Constitutional Courts jurisdiction ousted by existence of other lawful avenues for determination of an issue- the process of determination of matters on affidavit evidence by a Constitutional Court

Summary of Facts

This was an appeal from the ruling and decree of the High Court of Kenya at Nairobi by Msagha Mbogholi and Onyango Otieno JJ dated 6th June 2000.

The Appellants had instituted a suit in the High Court by way of an originating summons seeking *inter alia*:

I. A declaration that the applicants' right to associate guaranteed under section 80 of the Constitution of Kenya is being and has been contravened by the refusal of the Respondent to issue the applicants (Appellants) with letters of appointment.
II. A declaration that the respondent has contravened the rights of the Applicants not to be subjected to minimum treatment guaranteed under section 74 of the Constitution of Kenya and rights of the applicants not to be held in slavery or servitude guaranteed by section 73 of the Constitution by refusing/failing to recognize the Applicants as month to month and week to week employees of the Respondent company.

III. A declaration that the Applicants are month- to –month and / or week –to –week employees of the Respondent
IV. A declaration that the provisions of the Regulation of Wages and Conditions of Employment Act, Chapter 226 Laws of Kenya apply to both the Applicants and the Respondent.
V. A declaration that the Respondent has been in breach of the Employment Act Chapter 226 laws of Kenya.
VI. A declaration that the respondent is under an obligation to pay all the Applicants their unpaid overtime wages earned but not paid, wages and salaries earned but not paid, and leave days earned but not given and/or paid for.
VII. An order that the Respondent pays the Applicants their wages and salaries earned but not paid, overtime wages and salaries earned but not paid, house allowance earned but not paid, and leave days earned but not paid.
VIII. An order that the Respondent do pay the applicants costs of the suit.

The originating motion was based on the provisions of section 84(1) and 96) and sections 73, 74 and 80 of the constitution of Kenya, the Employment Act, Cap 226 of the Laws of Kenya, The Regulation of Wages and Conditions of Employment Act, Cap 229, Section 3 (1) of the Judicature Act, Cap 8 Laws of Kenya. One of the Applicants, Rashid Aloggoh had averred through his affidavit that he was employed by the Respondent in September 1995 and since then upto 1999, the employer had refused to give him a letter of appointment. That he and his colleagues had always been treated as casual employees thus denying them their entitlements under the Employment Act, the Regulation of Wages and Conditions of Employment Act and consequently they could not join or be members of a trade union and such other workers organizations like the National Social Security fund and the National Hospital Insurance fund. The Applicants/Appellants herein had argued that the refusal by their employer to confirm their employment for periods ranging from five to fifteen years on meager wages amounted to a deprivation of their right to associate with others in matters of trade unions and it also

amounted to being in slavery and servitude contrary to the provisions of the Constitution. The Applicants/Appellants contended that the Respondent was violating the provisions of the various statutes dealing with employment and because of that violation the Appellants were being deprived of their rights under the Constitution. The Applicants/ Appellants further averred in their grounds in support that;

i. The applicants have served the respondent for periods of time ranging between two years to seventeen years without the Respondent company giving them letters of appointment and/ or paying them decent wages and salaries
ii. By retaining the applicants as casual employees, the Respondent has denied the Applicants their right to earn a decent wage and to enjoy the minimum terms and conditions of employment
iii. The refusal/ failure by the respondent to issue the Applicants with letters of appointment has made it impossible for them to join any trade/workers union or to form one of their choice thus denying them the right of association
iv. The respondent has refused to recognize the Applicants right to join a union of their choice thus denying them the right of association.
v. The respondent has a statutory obligation to recognize the Applicants as month-to–month and /or week-to-week employees and accord them all their due rights and privileges under the statutes.

On the date set for the hearing the judge declared that the matter was a constitutional matter and thus a constitutional court had to be convened by the Lordship the Chief Justice.

When the matter was eventually mentioned before the Chief Justice for directions on constituting a Constitutional Court, he agreed with the previous judge that indeed the matter raised serious constitutional issues. He noted that the matter involved a large number of litigants, being 246 of them, that the application relates to employment thus the livelihoods

of the applicants and their dependents. He also observed that it was a case with implications of industrial relations between employer and employee. He proceeded to appoint a bench of two to hear the matter. It is to be noted that all along none of the parties objected to the matters in dispute being treated as matters raising constitutional issues and thus requiring determination by a Constitutional Court.

At the hearing, the Respondent contested all the averments by the appellants and contended that by virtue of being a manufacturing company, the Respondent had permanent employees, part time contractual employees and casual employees who were engaged from time to time as need arose and that being casuals the appellants were not entitled to letters of appointment. There was a joinder of issues in the suit, which needed to be resolved.

In the ruling of 6th June 2000, however, the Constitutional Court did not resolve these issues. It held that:

I. That the matter was properly before them and that they had jurisdiction to hear and determine it
II. That matters raised were really not Constitutional as they merely concerned the situation between an employer and employee and that being so they needed to be resolved in accordance with the provisions of Acts of Parliament dealing with issues of employment.

The judges in effect refused to consider the matter on its merits to establish the correctness of the allegations on the basis that there were other lawful avenues open to the appellants to pursue their case rather than in a Constitutional Court.

The appellants appealed to the Court of Appeal. In the appeal the court reiterated that the matter was treated by all as raising constitutional issues and indeed the first two declarations sought in the originating summons could not be treated in any other way than that they raised issues under the Constitution. The court went ahead to determine whether it was

right for the Constitutional Court to refuse to deal with those issues because there were other lawful avenues available to the Appellants.

The Court of Appeal found that:

I. The Constitutional Court ought to have resolved the dispute joined issues first to prove the facts on which the alleged contravention was based before determining whether the material facts amount to a contravention of the Constitution.
II. That only after establishing the relevant factual position would the court move to determine if the facts constitute a violation of the Constitution and if they did then the court would move to address the issue of remedies under section 84(2).
III. That under section 84(1) of the Constitution the availability of other lawful causes of action is no bar to a party who alleges a contravention of his rights under the Constitution (*Ramlogan – vs- The Mayor of San Fernando (1986) LRC (const) 377*
IV. That the Appellants ought to have been allowed to prove the allegations against the Respondents subsequent to which the Constitutional Court would have gone ahead to determine whether or not the allegations amounted to a contravention of the constitutional provisions on which the Appellants relied after which the court would have gone ahead to grant the necessary remedies.
V. That even if the appellants could still have invoked the ordinary civil jurisdiction of the High Court or instituted an industrial action, they were still entitled to invoke the jurisdiction of the High Court under section 84(1) of the Constitution.
VI. That the learned judges of the High Court erred in holding that the appellants had other lawful avenues in which they could to ventilate their grievances, thus denying them a hearing in the constitutional court.

The Court of Appeal therefore concluded that since the truth of the allegations raised by the appellants had not been tested and determined

at the court of first instance, the Court of Appeal would not sit on appeal of the issues. The Court of Appeal thus made the following orders:

1. The appeal was allowed
2. The order of the Constitutional Court declaring that the appellants application to that court had failed is hereby set aside
3. In place of the order, the court ordered the remitting of the application of the Appellants to the Constitutional Court for a rehearing *de novo* along the lines set out in the ruling.
4. The appellants were awarded costs of appeal

Authority referred to

1. Ramlogan –vs- The Mayor of San Fernando (1986) LRC (Const) 377, Pg. 378

Analysis and Relevant Excerpts

This is a case where clearly the High Court sitting as a Constitutional Court avoided addressing issues that had all along been declared constitutional. Despite the Chief Justice deciding that the matter was constitutional and appointing two judges to hear it, the issues were not determined by the Constitutional Court.

An issue that arises here is whether a litigant on constitutional issues can be shut out merely for the reason that there are other avenues available to pursue the matter. The Acts of Parliament merely provide the rights and obligations however when it comes to interpretation, one has to fall back on the Constitution. The Applicants raised serious issues for constitutional determination including right to associate in terms of trade unions and being held in slavery and servitude contrary to the provisions of the Constitution. They chose the Constitutional Court as the avenue to address the issue. It has been held before that the Constitution should not and must not be read as an ordinary statute as it contains a hierarchy of values which override other such values or provisions.

Further does not clarify who should decide on the constitutionality of an issue since the High Court judge who first heard the matter declared it as a constitutional matter and then referred it to the Chief Justice with specific directions for the Chief Justice to convene a Constitutional Court. The Chief Justice did more than just constitute the court. He first determined if the matter raised constitutional issues. He decided that since the matter raised serious constitutional issues, it merited being heard by more than one judge of the High Court. The Chief Justice appreciated that the High Court has original jurisdiction on all matters even constitutional matters.

All along the parties, their advocates and the judges treated the matter, as constitutional and one would have expected that the same be treated as such at the hearing. It is thus not clear why the judges in the High Court decided not to determine the issues and instead referred the applicants to resolve the matters using the provisions in other Acts of Parliament. In essence what the judges were saying is that the Applicants were in a way abusing the process of the Constitutional Court whose time would be used to address other matters, which they deemed constitutional. Obviously one would wonder why the court did not wish to determine the issues as requested. Probably the court felt that it could set a bad precedent where all and sundry would rush to the Constitutional Court for a determination of whatever matters they considered constitutional.

It appears the court in this case took a strictest interpretation of what constitutes constitutional matters, thus denying the Applicants the opportunity to be heard on issues of violation. This approach shows the need for an open rather than a conservative approach to constitutional matters if citizens are to have their rights under the constitution enforced. If our constitutional jurisprudence is to have meaning to the citizens, the court should not shy away from interpreting matters of different nature touching on constitutional aspects. Judges must not shy away from determining these issues if we are to settle a lot of outstanding matters touching on different aspects of the law and to enforce people's human rights.

Further it also shows a conflict as to who actually determines what is a constitutional matter. In some instances magistrates have been known to deny applicants a stay of proceedings pending a constitutional interpretation since in their assessment, they do not find the issues as raising constitutional issues. The High Court judges like in this case determined that the matter was constitutional and referred it to the Chief Justice who proceeded to make a ruling as to whether the matter was indeed constitutional. It is clear from the foregoing that the lack of uncertainty as to who decides if a matter is constitutional may sacrifice a lot of merited cases. If one alleges a breach of constitutional rights which better court would they need to vindicate their rights than a Constitutional Court?

The case of *Ramlogan v the Mayor of San Fernando* clearly expounds the provisions of the Kenya section 84(1) of the Constitution to the effect that:

> 'Subject to sub section (6) if a person alleges that any of the provisions of section 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or in the case of person who is detained, if another person alleges a contravention in relation to the detained person) then without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress'.

This section gives the High Court original jurisdiction to determine such allegations and as such once a litigant has chosen their issues to be determined by the High Court sitting as a Constitutional Court they should not be shut out just because they could approach the High Court in its Civil Jurisdiction. After all what the Applicants were seeking were declarations on their fundamental rights and not merely compensation.

This therefore indicates that the right of a litigant who alleges contravention of a constitutional right is neither conditional nor dependent on availability of any other remedy. This goes to show the fundamental nature of human rights and the need for their protection.

THE JUDICIARY IN KENYA AND THE SEARCH FOR A PHILOSOPHY OF LAW: THE CASE OF CONSTITUTIONAL ADJUDICATION

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INTRODUCTION

This essay is a preliminary enquiry into the manner in which judges decide cases in Kenya. It is an attempt to understand the nature of the judicial process as part of the larger political programme of reconciling conflicting social claims and values. Over the last ten years or so, I have read numerous judgments emanating of the High Court and the Court of Appeal all seeming to have different considerations of principle as justifying the results arrived at. As a student of the Judiciary and the judicial process I then began to ask myself whether it was possible for one to discern a distinct philosophy of law that informed those decisions and if so whether one could justify that philosophy as proper and if not whether it is possible in the circumstances of Kenya to prescribe a specific philosophy of law as being both desirable and necessary.

The entire corpus of Kenya law was too wide and too complex to provide reasonable analysis. I therefore choose the area of Constitutional Law and Constitutional Adjudication as providing the most graphic illustration of the need for a philosophy of law, hence the sub-title of this essay. I choose the area of Constitutional Law and Constitutional Adjudication for various reasons: To begin with the courts in constitutional cases face issues that are inescapably "political" in that they involve a choice between competing values and desires, a choice reflected in the legislative

or executive action in question which the court must either condemn or condone.[14] These competing values are inevitable and indeed desirable in a free and pluralistic society. When the courts decide constitutional cases they do more than interpret a statute. The Constitution is a charter containing the pact that is the social contract and therefore by its very nature a political document. Controversies that rage over the proper canons of interpreting the Constitution therefore conceal vital ideological, socio-political and economic views.[15]

This essay attempts to put the process of constitutional adjudication in a historical context by first examining the legacy of the colonial state in issues that touched on the limitation of Government power. By examining the case law chronologically it is hoped that the philosophy of law espoused both by the colonial Judiciary and the modern Kenyan Judiciary will emerge.

Finally an attempt will be made to critique the prevailing philosophy of the Judiciary in constitutional adjudication and to offer a tentative theory which we argue is more in consonance with the spirit of the Constitution.

The Legacy of the Colonial Judiciary

The first system of courts in the then East African Protectorate began after 1895 and grew out of the agreements made between the British Government and the Sultan of Zanzibar. A full judicial system was not established until 1897 when the East African Order in Council of that year facilitated the same.

[14] Herbert Wechster - Towards Neutral Principles of Constitutional Law: 73 (1959/60) H.L.R., 15.
[15] Obiuna Okere- Judicial activism or passivity in interpreting the Nigerian Constitution: (1987) 36 I.C.L.Q., 789–790.

The courts were divided into three categories. There were Native Courts, Muslim Courts and Colonial Courts, at the subordinate level.[16]At the superior level the courts were divided into two. One styled her Majesty's Court at Zanzibar and eventually to the Privy Council. The other was the Chief Native Court from which lay an appeal to the High Court.[17]

The judges of Colonial Kenya were appointed under the East African Order in Council of 1897. The tenure of the judge was similar to that enjoyed by ordinary civil servants. The judges held office at the pleasure of the Crown and could be dismissed by the Governor on the direction of the Secretary of State without any need for investigation.[18]

A number of features characterised the colonial Judiciary which features may help to explain the kind of judicial philosophy that the courts espoused. First under the dual court system, administrative officers and especially District Officers performed magisterial duties.[19] There was thus no independence of the Judiciary at the lower levels. The District Officer was both the executive and the judicial arm simultaneously. Administrative officers justified this non-separation of powers by arguing that traditionally Africans did not have a distinct legal system. This argument cannot be taken seriously. As professors Ghai and Macuslan have demonstrated there was a whole world of difference between the functions of a statutory native tribunal and a traditional judicial body.[20]

To facilitate the work of the lay-magistracy in form of District Officers, section 20 of the East African Order in Council of 1920 provided that:-

> *In all cases civil and criminal to which natives are parties, every court shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay. (emphasis mine)*[21]

[16] Those staffed by administrative officers and magistrates.
[17] This system lasted for five years only but contained the basic structure of the latter system.
[18] Anon. - Court judges in Colonial Territories – tenure of office (1954) C.L.J.; 2 – 7. See also Terrell v Secretary of State for Colonies (1958) 2 QB, 482.
[19] H. Morris and J. Read Indirect rule and the search for Justice (1972).
[20] Y. Ghai and P. MacAuslan Public Law and Political Change in Kenya (1970) Oxford University Press.
[21] (1934) Report CMD 4623.

The merging of the judicial and executive functions of the Colonial State in the administrative officers was the subject of much criticism. The Commission of Inquiry into the administration of justice in Kenya, Uganda and Tanganyika territory in criminal matters pointed out that the conferring of excessive jurisdiction on Magistrates Courts as one of the principle reasons the machinery of justice did not work well and could not work well. The Commission pointed out that the District Officer was essentially an administrative officer charged with maintenance of law and order in his district leaving to police the duty to investigate crimes. It was therefore not easy in the circumstances to "assume the judicial role and to proceed calmly and dispassionately to apportion responsibility and arrive at the proper sentence."[22]

The Governor and the Chief Native Commissioner were not persuaded by the report and as a result administrative officers continued to form the greater part of the Subordinate Court system.

The second feature of the colonial order that has a bearing on the Judiciary was the almost unlimited powers of the executive as personified by the Governor. The Governor enjoyed discretionary powers and despite his responsibility to the colonial office he was very much a power onto himself. The colonial Judiciary appears to have fully accepted and endorsed the Governor's view of his powers. The courts endeavoured to give the Governor as wide a latitude as possible. A number of cases help to illustrate this point. In *Ole Njogo & Others –vs- Attorney-General of the East African Protectorate*.[23] The East African Court of Appeal held that the Masaai as a race still enjoyed vestiges of sovereignty even after a Protectorate was declared over them by the British Government and therefore they could conclude a treaty with the protecting power, which treaty though not governed by international law was governed by rules analogous to International law and would be enforced by a Municipal Court!

[22] Opp. Cit par 45.
[23] 5(1914) E.A.L.R., 70.

In upholding the defence of an act of State in respect of the actions by the Governor against the Masaai, the Court stated:

> *"A native has no rights which he can enforce in a Court of law in respect of any kind of tortuous act committed upon the orders of or subsequently ratified by the Government, he has no remedy against the Crown in tort, and if he brings an action against an individual the latter can plead orders of the Government where upon the act becomes an act of the Government and one for which the only remedy is an appeal to the consideration of the government; the other remedies of diplomacy and war which might be available to a foreigner the subject of an independent stage not being available to a native of the Protectorate."*[24]

The logic of the decision was that the government could force the agreement on the Masaai, could then enforce their obedience to it and when challenged could decline to allow the matter to be judged in the courts and could prevent or punish any recourse to extra-legal remedies![25] Basically the courts were saying that they would not allow any challenges to the legal basis of colonialism.

This judicial attitude of giving "politics" as wide a latitude as possible is perhaps most graphically illustrated by the case of *Nyali Ltd. –vs- Attorney General*.[26] Where Denning L.J. (as he then was), in examining the legal limits of the powers of the Crown in a protectorate stated: -

> *Although the jurisdiction of the Crown in the protectorate is in law limited jurisdiction, nevertheless the limits may in fact be extended indefinitely so as to embrace almost the whole field of government ...The courts themselves will not mark out the limits. They will not examine the treaty or grant under which the Crown acquired jurisdiction nor will they enquire into the usage or sufferance or other lawful means by which the Crown may have extended its jurisdiction. The courts rely on the representatives of the Crown to know the limits of its jurisdiction and to keep within it. Once jurisdiction is exercised by the Crown the courts will not permit it to be challenged. (emphasis mine.)*

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[24] Opp. Cit. Pp. 96 – 7.
[25] Ghai & MacAuslan note 7 pp. 23
[26] (1956) 1 KB, 15.

The courts were therefore highly positivistic. They perceived of law in the simple Austinian model of commands backed by threats of sanction. The exercise of naked force of itself legitimated any action and the courts would not reopen the question. The result was that the executive got a blank cheque and the challenge of Governmental activity was invariably futile.[27]

In *Isaac Wainaina –vs- Murito-wa-Indagara*[28] the court took the view that the effect of the 1915 Crown Lands Ordinance and the two orders in Council which converted the Protectorate into a Colony was to take away all native rights in the land, vest all land they actually occupied. In *D.C. of Nairobi –vs- Wali Mohammed*[29] and *Earl of Errol –vs- Commissioner of Income Tax*[30] the courts held that the tax legislation enacted by the Legislative Council was valid notwithstanding the fact that the Legislative Council was unrepresentative. "No taxation without representation was not a principle that the court would give effect."

In *Corbett Ltd. –vs- Floyd*[31] we have a classic example of the willingness of the Judiciary to legitimate the Executive exercise of power even if the said use of power may be in violation of existing law. In 1930 an Emergency Powers Order in Council had been passed to provide for the administration of Kenya during the war period. When a state of emergency was declared on 20th October 1952 Section 6 of this emergency order in Council was applied to the Colony. In certain material aspects the legislative powers of the Governor became exactly co-extensive with those of the Legislative Council. The question arose as to whether or not the Governor, like the Legislative Council legislate retrospectively. Briggs V.P. held that the Order in Council was valid and therefore empowered the Governor accordingly.

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[27] Githu-Mungai - Constitutional Government and Human Rights in Kenya: (forth-coming Lesotho Law Journal).
[28] (1923) K.L.R., 103.
[29] (1914) 5 E.A.L.R.
[30] (1940) 7 E.A.C.A., 7.
[31] (1958) E.A.C.A., 389.

He opined that:-

> *"It has never in twenty years been suggested that the Order in Council was itself ultra-vires and although since the end of the war measures taken under it have been criticized as dictatorial, undemocratic and destructive of liberty, it has never so far as we are aware been suggested that such measures were incompetent."*[32]

This decision further illustrates that the colonial courts had no active constitutional role whatsoever in the limitation of executive authority.[33] The Colonial State and the colonial Judiciary were preoccupied with the question of public order and stability. At no time did a concern for civil liberties preoccupy the courts. The agenda of the courts was confined to legitimating the actions of the administration in the process of governance. This preoccupation is illustrated by the case of *Ugunda v R*[34] where the courts held as sedition public statements by a nationalist who accused the colonial state of having perpetrated undemocratic activities, including holding onto political power without the consent of the people.[35]

The third characteristic of the colonial Judiciary related to the personnel who manned the courts. The East African Order in Council of 1897 under which judges were appointed provided that one could be so appointed if he was a member of the bar England, Scotland or Ireland of not less than three years standing[36]. The Bench was inevitably filled up with Europeans, who obviously were not the cream of the profession in their countries. They essentially saw themselves as part of the civilizing mission of the colonial state and therefore consciously or unconsciously manifested a deep sympathy for the colonial state. The sympathy was not only racial sympathy but class sympathy as well and these manifested themselves quite clearly in the judgments. These sympathies became

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[32] Opp. Cit. Pp 392.
[33] Steven Pfeiffer - Notes on the Role of the Judiciary in the Constitutional Systems of East Africa since Independence. 10 (1978) Case Western Reserve Journal of Internal Law, 24.
[34] (1960) E.A., 745 (C.A.)
[35] Similar decisions from elsewhere in Africa are D.P.P. v Obi (1961) All N.L.R., 187 and Wallace-Johnson v R (1940) A.C. 231.
[36] Section 7(5)

most latent during the state of emergency declared in October 1952. Many of the emergency regulations and rules affected the operation of the legal system. In particular the regulations reduced the procedural and other safeguards surrounding a criminal trial and also took away judicial discretion as to the sentences that could be given. The purpose was to speed up trials and increase the rate of convictions. The rules of evidence relating to confessions made to police and administrative officers were relaxed and inducements to confess were held out.

Ghai and MacAuslan sum up the situation as follows:-

> *The Judiciary could not but accept this assault upon the safeguards of the criminal trial. In addition it is reasonable to suppose that they shared the horror of the administration and settlers at what they conceived to be the bestiality of Mau Mau.*[37]

The Judiciary accepted the ousting of its jurisdiction to review administrative acts as is illustrated by the *Re Milles Application (1958) E.A., 153*, where the court held that the Minister's order under the Immigration Act of 1950 could not be questioned in any court whatsoever since the Minister acted in an administrative as opposed to a judicial capacity.

In many respects therefore the Judiciary was neither free nor independent. It was far removed from the majority of the people it was meant to serve. For the African population the Judiciary was part and parcel of the colonial order, it was not humane and definitely not impartial.

Kenya therefore became independent with a Judiciary that was far from satisfactory both in terms of commitment to democratic values and to its impartiality. The Judiciary espoused a highly positivistic philosophy of law that was not compatible with a liberal society.

[37] PP. 160.

THE JUDICIARY AT INDEPENDENCE

As Kenya approached independence the British Government, the colonial government and the settlers all expressed great anxiety as to the future of the country. In both the 1960 and 1962 Constitutional Conferences questions arose as to the judicial protection of human rights, the impartiality and independence of the Judiciary and the entrenchment of the basic rights in the Constitution. A very paradoxical situation arose which Professor Yash Ghai describes as follows: -

> *"...the Constitution, which during the colonial period has never been a determinant of power relationship (sic), suddenly become the centre of all controversies ... There is tendency to view all political issues as problems for constitutional settlement."*[38]

The independence Constitution provided for a weak form of government. There was a marked contrast between the autocratic administrative structure inherited at independence and the liberal political order envisaged by the new Constitution. While the entire colonial edifice was built on power the new governments were expected to carry on the basis of new and fragile institutions.[39]

Suddenly new political and constitutional values which had never been part of the colonial order were introduced. These values were essentially liberal democratic and western.[40] At independence the Constitution provided for separation of powers and for a very central role for the Judiciary. The Chief Justice was appointed by the Governor General acting in accordance with the advice of the Prime Minister. The puisne judges were to be appointed by the Governor General acting in accordance with the advice of the Judicial Service Commission. Judicial tenure was guaranteed. Questions involving the interpretation of the constitutional document could be referred to the Supreme Court.

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[38] Constitutions and the Political order in East Africa (1972) 21 I.C.L.Q., 403.
[39] Opp. Cit. Pp 412 – 413.
[40] Patrick MacAuslan - The Evolution of Public Law in East Africa in the 1960s (1970) Public Law, 15.

To be able to appreciate the interpretation given to the Constitution by the courts in the years that followed, it is important to show the political context in which it took place. To begin with the KANU Government that took office in 1963 was most disgruntled about the nature of the inherited Constitution and almost immediately after independence and more so between 1964 and 1969 the Constitution was substantially amended.[41] The result of the constitutional amendments was not only to increase the powers of the Executive but also to decrease the powers of institutions whose function it was to control the Executive. In an uncanny way it was as if the presidency was being remodeled to approximate as much as possible the governship!

The increased powers of the executive and the relative decline in the supremacy of Parliament left the courts in a very vulnerable position one which was not far removed from the original position. To be able to appreciate the philosophy of law that the courts drew their inspiration from in the adjudication of constitutional claims we now turn to the decided cases.

THE CASE LAW

The case law in constitutional adjudication reveals three distinct traditions, which indicate three distinct approaches to the problem of constitutional adjudication. The first tradition illustrates the inflexibility of the conservative judicial culture inherited from the colonial Judiciary. The second tradition manifests a broadly liberal interpretation of the Constitution and the third tradition, which may well be a sub-set of the first tradition involves the Judiciary's total abdication from adjudicating on "political" constitutional claims. We shall examine each tradition in turn in an attempt to expose their philosophical underpinings.

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[41] Okoth-Ogendo - The Politics of Constitutional Changes in Kenya Since Independence, 1963-1969. 71 African Affairs, 9.

THE CONSERVATIVE TRADITION

The philosophy of the conservative tradition is best captured by the words of Sir Charles Newbold formerly President of the East African Court of Appeal when he says:-

> *The courts derive a considerable amount of their authority and perhaps, even more (important), the acceptance of their authority from their independence of the Executive, from their disassociation from matters political. In a democracy ... the determination of matters political ... rests ultimately with the will of the people through the ballot box. For that purpose the people elect the Executive and the Legislature and it is on these two branches ... that the primary responsibility rests.*
>
> *The third branch ... the Judiciary is not elected and should not seek to interfere in a sphere which is outside the true function of the judges ... it is the function of the courts to be conservative, so as to ensure that the rights of the individual are determined by the rule of law.* [42]

In *R –vs- El Mann*[43] Chief Justice Mwendwa expressed this basic conservative creed in constitutional adjudication, when he stated that "in one cardinal respect, we are satisfied that a Constitution is to be construed in the same way as any other legislative enactment." The case involved a charge against the appellant made under the Exchange Control Act. The applicant was compelled to give certain information in an official form which information tended to incriminate him. He sought to rely on section 77(7) of the Constitution as protecting him from self-incrimination. The court in rejecting that argument held that the appellant was only protected from self-incrimination at the trial itself and not during interrogation. Obviously, the court took the view that a basic constitutional right could be abridged by an ordinary statute, which is under Section 3 contrary to the express provisions of the Constitution. This is even the more surprising coming from Chief-Justice Mwendwa who in the case *Okunda –vs- R*[44] which came soon thereafter, vehemently stated that:-

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[42] The role of the judge as a Policy Maker: (1969) 2 E.A.L.R. 127, 133

[43] E.A. 357: (Sitting with Farrell and Chanan Singh J.J.). See also Charles Young Okany v R Criminal Case 1189 of 1979 (unreported).

[44] (1980) E.A. 453 (Sitting with Chanan Singh and Simpson, J).

"The Constitution is the instrument which brought into being the entire state and government machinery that exist today. The Legislature, the Executive and the Judiciary owe their existence to the Constitution"[45]

In *Ooko –vs- R*[46] the appellant Patrick Paddy Ooko was detained under a detention order made by the Minister for Home Affairs under the Public Security (Detained and Restricted Persons) Regulations of 1966. He sought a declaration that his detention was illegal on two grounds. One that the person referred to as Patrick Peter Ooko was a different person and secondly that Section 27 of the Constitution had not been complied with in terms of serving detention grounds on the applicant.

Rudd J. disposed of the first ground by holding that there was no doubt as to who the detention order related to. As to the second ground the judge adjourned the matter for ten days to allow the Republic to supply "further and better particulars." At the resumed hearing where particulars had been supplied the judge dismissed the applicants case holding that the court had no jurisdiction to investigate the merits of the detention. This line of reasoning was later to become institutionalized in the Judiciary when cases challenging detention orders came. In *R –vs- Commissioner of Prisons, Exparte Kamonji Wachira, Edward Akong Oyugi and George Moseti Anyona*[47] the court reaffirmed its hesitation to look into the validity of the detention orders.[48] But the court went even further into the case of *Raila Odinga –vs- Attorney-General*[49] and held that if at any point the applicant acknowledges the sufficiency of the reasons on which the detention was based he was forever precluded from requiring further particulars and hence relying on that to invalidate his detention. Whereas Madan C.J. cited with approval the West Indies case of *Herbert –vs- Phillips and Sealey*[50] as authority for the proposition that the grounds of detention

[45] Opp. Cit. 457
[46] H.C.C.C. 1159 of 1966 (unreported).
[47] H.C.C.C. 60 of 1984 (unreported).
[48] In many subsequent cases the courts have stated in as many words that the mere production of the detention order exhausts the court's jurisdiction. See: Mirugi Kariuki v A-G. Daily Nation 24th December 1986.Ngotho Kariuki v A-G. Daily Nation 3rd February 1983.
[49] Miscellaneous Application 104 of 1986.
[50] (1967) 10 West Indian Rep. 435.

must be supplied to enable the detainee defend himself before the detainees tribunal, he went on to hold that the sufficiency or otherwise of the grounds is a relative matter.

It is perhaps useful to compare this highly positivistic interpretation of the law with other cases from other jurisdictions dealing with the issue of preventive detention.

In *Ram Krishnan –vs- Delhi*[51] the Supreme Court of India ordered the release of a detainee due to the insufficiency of the reason given for his detention and in *Rotimi Williams –vs- Majekodunmi*[52] the Supreme Court of Nigeria held that even in times of emergency the fundamental rights guaranteed can be invalidated only to the extent that such restriction is essential for the sake of some recognized public interest and no further. Furthermore where there is insufficient evidence that the restriction of the movement of a citizen is reasonably justifiable the court would make a declaration accordingly and if need be grant an injunction.

In *Attorney-General –vs- Lesinoi Ndeina and Two Others*[53] the Court of Appeal of Tanzania invalidated a detention order because the public seal was not affixed to the order as provided by law and in *Kaira –vs- Attorney-General*[54] the High Court of Zambia invalidated detention orders because the grounds of detention were insufficient and not rendered in time. These cases illustrate that there is a possibility of a different judicial attitude in respect of detention matters. The current judicial philosophy would lead a realist jurisprudence to proclaim that in Kenya the law is that all detention orders are *ipso facto* valid!

In *David Onyango Oloo –vs- R*[55] a young University of Nairobi student was charged with the offence of sedition allegedly for writing, publishing and possessing a seditious publication "a Plea to Comrades". After a

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[51] (1953) A.I.R., 318.
[52] (1962) 1 All Nig. L.R., 413.
[53] Criminal Appeal No. 52 & 53 of 1979.
[54] Quoted in Muna Ndolo & Kaye Turner: Civil Liberties in Zambia. (African Law Reports) pp. 240 – 263.
[55] Daily Nation Wed. Oct. 27, 1982.

number of defence lawyers had withdrawn from his case, the accused conducted his own defence. He sought to know from the prosecution and the court how his unfinished paper analysing contemporary social issues could promote disaffection, ill-will or try to overthrow the Government. He further sought to know the definition of treason and in particular "the demarcation point where somebody says here is where constructive criticism stops and this is where sedition begins?" The accused was jailed for six years for sedition.

Oloo's case illustrate the serious problem of weighing constitutional rights against limiting statutes and of the danger inherent in a theory of adjudication that allows the rights only subject to the statute. The judicial philosophy revealed appears to be that the statutes are the ones that concretely grant the parameters of the exercise of the rights and therefore in this context the right to freedom of expression is subject to the laws of sedition not the law of sedition subject to the freedom of expression! This is the attitude of the Kenyan colonial Judiciary in *Ugunda –vs- R*[56] and the Nigerian Judiciary in *D.P.P. –vs- Chike Obi,*[57] *R –vs- Amalgumated Press of Nigeria Ltd.* [58] Akimola – Agunda in commenting on the attitude of the Nigerian Judiciary at this time states: -

> *One must sympathize with the learned Chief Justice and his brethren who were quite knowledgeable of the English common law but had not developed a philosophy of the Nigerian law. Even at that time the concept of constitutionally entrenched fundamental rights was totally strange to them, at least in the system of judicial practice, which they had experienced.*[59]

Luckily the situation in Nigeria has now been rectified by the Federal Court of Appeal in the case of *Arthur Nwankwo –vs- The State.*[60] The case arose out of the publication of a "seditious publication" entitled "How Jim

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[56] (1960) E.A. 745. See also R v Mark Mithenya (1969) E.A.
[57] (1961) 1 All N.L.R., 186.
[58] (1961) 1 All N.L.R., 199.
[59] The Judiciary in a developing country: in M.L. Marasinghe & W.E. Candlin - Essays on Third World Perspectives in Jurisprudence (Singapore, Malasya Law Journal Ltd. 1984).
[60] F.C.A. 111/83 quoted in Obima Okere note 2 at pp. 806.

Nwobodo ruled Anambra State." The appellant was convicted of the offence by the High Court of Anambra. The Court of Appeal in quashing the conviction held that *D.P.P. –vs- Chike Obi* and *Wallace–Johnson –vs- King*[61] were "birds of their respective period which were inconsistent with the constitutional guarantees of the 1979 Constitution."

In *Angaha –vs- Registrar of Trade-Unions*[62] the appellants appealed against the decision of the Registrar of Trade Unions to refuse registration for their proposed trade union. The refusal was based on the ground that the interests sought to be protected by the proposed union were already substantially taken care of by existing trade unions. In the High Court the issue was raised as to whether the registrar's decision did not encroach on the applicant's freedom of association as enshrined in the Constitution. Muli J. answered the question in the negative. In his view: -

> *The right to be registered as a trade union is a contingent right acquired upon fulfilment of the requirements of the provisions of the Trade Unions Act.*

Quite clearly his lordship's view was that the constitutional rights of association may be abridged by either the policy of an ordinary statute or the bureaucratic considerations of an official in the Registrar's office. This view has held sway in a number of other cases.[63] This view can be usefully contrasted with the view of the High Court of Swaziland in the case of *Ngwenya –vs- Deputy Prime Minister.*[64]

The applicant was elected into the Swaziland Parliament in 1972. His election was not well received by the ruling party. Immediately after the elections a deportation order was made against him by the Deputy Prime Minister. He challenged the order claiming that he was "a person (who) belongs to Swaziland" and therefore could not be deported. His action

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[61] (1940) A.C., 231.
[62] (1973) E.A.
[63] The same argument runs through Ahokwe v Registrar of Trade Unions Nrb. Civil Appeal No. 26 of 1977 and Tera Aduda v Registrar of Trade Unions (1978) K.L.R. 119.
[64] Swaziland Civil Appeal No. 4 of 1973 Quoted in Akinola Aguda note 45 pp. 150.

failed in the High Court and while his appeal was pending the Immigration Act was amended in November 1972. The amendment created a special tribunal whose responsibility it was to determine whether "a person belongs to Swaziland." The decision of the tribunal was appealable to the Prime Minister whose decision was final and not subject to review by any court of law.

The Court of Appeal saw the amendment as an attempt to transfer a judicial function in the area of fundamental rights of the citizen from the Judiciary to the Executive and declared the Immigration (Amendment) Act *ultra-vires* the Constitution.[65]

In *Re Application by Mweu*[66] the application's passport had been impounded by the Immigration Department and he sought the order of *Mandamus* directed to the Principal Immigration Officer compelling him to return his passport. The applicant argued that Section 81 of the Constitution guaranteeing his freedom of movement had been infringed. The court held that Section 81 of the Constitution recognizes that a citizen has a right to leave Kenya but the right is not absolute and that in any event the immigration officials had no legal duty and therefore *mandamus* could not lie against them.

The attitude of the court compares very well with that of the Nigerian High Court in *Awolowo –vs- Minister of Internal Affairs*.[67] The plaintiff was charged with treasonable felony and conspiracy and had briefed a British Counsel who was at the time an enrolled practitioner of Nigerian law to defend him. The Minister of Internal Affairs acting under powers vested in him by the Immigration Act, prohibited the lawyer from entering Nigeria. The plaintiff then sued the Minister for contravening Section 21(5)(c) of the 1960 Constitution, which gives the individual the right to be defended

[65] See also Liganage & others v Queen (1967) A.C.
[66] Nairobi Law Monthly Numbers 12/13 January 1989. Compare this case with Shah v Attorney General reported in Nairobi Law Monthly Volume 19 and Munyimba v Uganda (1969) E.A. 433.
[67] Reported in Muna Ndolo & Turner note 40 pp. 113 – 124.

by counsel of his choice. The High Court held that section to mean that "the legal practitioner chosen must be someone who if outside can enter Nigeria as of right and is enrolled to practice in Nigeria.

In both Mweu's case and Awolowo's case the courts were faced with two conflicting but important values. In ruling the way they did the courts were in effect allowing further abridgement of individual rights beyond the constitutional limitations already imposed, by bureaucratic and political ill-will. This attitude is clearly wrong.

The Zambian case of *Shipango –vs- Attorney-General*[68] offers a very interesting contrast. The appellant was a Member of Swapo who was ordinarily resident in Zambia. Some political differences arose within the ranks of Swapo and the Government of Zambia apprehending that the situation might get out of hand, held the appellant and his colleagues in a small camp under armed guard. The High Court refused to grant *habeas corpus*. In allowing the appeal Baron C.J. stated:-

> *A person physically in Zambia or under Zambian territorial jurisdiction may be deprived of his liberty only if that definition is sanctioned by law, in the absence of some legal justification for the deprivation of a person's liberty whether legislative or under common law that deprivation is unlawful.(emphasis mine)*

The correct legal position might appear to be that once a citizen assents his constitutional right immediately the burden shifts or ought to shift to the state to show cause why the right ought not to be enforced and in cases where there must be a weighing of competing claims then the words of Lord Denning are instructive:-

> *Where there is any conflict between the freedom of the individual and any other rights or interest then no matter how great or powerful those others may be, the freedom of the humblest citizen shall prevail over it.*[69]

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[68] Criminal Appeal No. 902 of 1981.
[69] Lord Denning: Freedom Under the Law (1949) pp. 4

The above cases illustrate a very distinct trend and or underlying legal philosophy whose full implications will be discussed below. We now turn to examine the second tradition in our constitutional adjudication.

THE LIBERAL TRADITION

The liberal tradition in constitutional adjudication is essentially rights oriented and emphasises the protection of preferred or fundamental rights as against claims of state security or public order.

Akinoia – Agonda captures the spirit of this tradition very well when he writes:-

> *In interpreting the provisions of the Constitution itself, a judge must accept it as his duty to give full effect not only to the words of the Constitution guaranteeing basic human rights but also to its spirit. The judge must feel himself duty bound to give liberal interpretation to the provisions of the Constitution. A judge should not interpret any provision of the Constitution so as to defeat the ends the Constitution was designed to serve where another Constitution equally in accord and consistent with the words and spirit of such provision would serve to enforce and protect such ends.*[70]

A number of cases which are much fewer in number to those discussed in the conservative tradition illustrate that this judicial approach is viable and part of Kenya's electric constitutional jurisprudence. In a number of fairly celebrated cases the courts have enforced the right not be discriminated against especially on racial grounds,[71] as well as the sanctity of private property[72] and the attendant need for prompt compensation in cases of public acquisition.[73] In these cases the courts have emphasized the legal principle even in the face of very clearly articulated government policy compromising the former.

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[70] Opp. Cit. 150.

[71] See. *Fernades v Kericho Liquor Licencing Court (1968) E.A. 640* where it was held that failure to give a liquor licence to a non-citizen was discriminatory and constitutionally suspect.

Mandwa v City Council of Nairobi (1968) E.A., 406, where it was held that a distinction drawn between Africans and non-Africans in the allocation of Market stalls was discriminatory. See also: *Dent v Kiambu Liquor Licence Court (1968) E.A., Shar Vershi Devshi v Transport Licensing Board (1970) E.A. 631.*

[72] *New Munyu Sisal Estates Ltd. v Attorney-General (1971) K.H.C.D., 120; Haridas Chhaganlal v Kericho Urban Council (1965) E.A. 640;*

[73] *Meshur Jacob Samuel v Commissioner of Lands, Land Acquisition Appeal No. 2 of 1986*

The courts have similarly confirmed the right not to be held in servitude,[74] the right to refuse to participate in activity compromising the freedom of conscience[75] and the reluctance of the courts to interfere with matters of individual conscience.[76]

Whereas these cases have been important affirmation of constitutional principles they have not in real terms raised serious questions of constitutional adjudication. On the whole the principles they have upheld have had little controversy and appear to have been generally accepted in principle if not indeed. There are however a number of situations where the cases have raised issues which have been much more involving and controversial and where the constitutional principles are therefore that much more important.

In *Stanley Munga Githunguri –vs- Attorney-General* the constitutional question that arose for adjudication was whether the Attorney-General could institute criminal proceedings against a citizen despite the lapse of 8 years and despite repeated assurances that the matter had been put to rest. The case turned on the interpretation of Section 26(3) of the Constitution empowering the Attorney-General to commence and terminate criminal proceedings at his discretion.

The court held that the Attorney-General's powers were not absolute but were to be exercised reasonably with due regard to the rights of the accused person. Chief Justice Madan reading the unanimous decision of the Constitutional Court stated:-

> *We also speak knowing that it is our duty to ask ourselves what is the use of having a Constitution if it is not honoured and respected by the people. The people will lose faith in the Constitution if it fails to give effective*

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[74] *Mugaa M'ampwii v G.N. Kariuki (Nrb). H.C.C.C. 556 of 1981.*

[75] *Leljo Meghji Patel v Karsam Prenji (1976) K.L.R., 112.*

[76] High Court Miscellaneous Application No. 279 of 1985. This litigation has an interesting history. At the first instance a Constitutional Court set up under Section 67(1) of the Constitution determined the matter in favour of the applicant and 'hoped' that the A-G would not proceed with the prosecution. The A-G failed to terminate the proceedings and the applicant applied for an order of prohibition. The High Court (Aluoch J. and Schoffield J.) failed to reach a unanimous decision and the new Chief Justice constituted a new court.

protection to their fundamental rights. The people know and believe that destroy the rule of law and you destroy justice, thereby also destroying the society. Justice of any other kind would be as shocking as the crime itself. The ideals of justice keep people buoyant. The Courts of justice must reflect the opinion of the people. (emphasis mine)

This case is in my considered opinion the most important decision in the history of our legal system. But it is most important for having established the principle that the Constitution should not and must not be read as an ordinary statute; and that being the bedrock of an ordered society the interpretation of the Constitution must have regard to the results achieved socially as part of the process of arriving at the justice of the individual case. Secondly this case establishes the principle that the Constitution does contain a hierarchy of values and that the values enshrined in the basic rights will override other values of the Constitution where a conflict emerges.

This view was given another boost in the case of *Felix Njage Marete –vs- Attorney-General*. The plaintiff was a technical assistant in the Ministry of Agriculture and Livestock Development. On 15th December 1982 the District Development Officer purported to dismiss him. The plaintiff immediately objected to the alleged dismissal but that notwithstanding the Permanent Secretary in his Ministry on 25th January 1983 informed him that he had been suspended. He was not to leave his duty station without permission. From January 1983 to August 1985 he was without pay and work. In December 1986 he commenced an action in the High Court praying for a declaration that he had been suspected to inhuman, degrading or other treatment contrary to Section 74(1) of the Constitution and was entitled to damages under Section 84(2) of the Constitution.

Shields J. had absolutely no hesitation in granting the orders as prayed. He went further and pointed out that had he been invited to hold that the plaintiff had been held in servitude contrary to Section 73 of the Constitution, he would have so held. In awarding Kshs. 100,000/= as general damages for violation of constitutional rights Shields J. made an immortal pronouncement:-

> *The Constitution of this Republic is not a toothless bulldog nor is it a collection of pious platitudes. It has teeth and in particular these found in Section 84 are similar to the provisions of other Commonwealth constitutions. It might be thought that the newly independent states who in their constitutions enacted such provisions were eager to uphold the dignity of the human person and to provide remedies against those who wield power.*

In *Richard Mimani –vs- Nathan Kahara*[77] the High Court (Simpson and Sachdeva J.J.) held that the right of a private prosecution is a constitutional safeguard which is necessary to counteract attempts by wealthy and influential people to stifle, when offences by them are alleged in reports to the police. In *Margaret Magiri Ngui –vs- R*[78] the Court showed its willingness to strike down legislation directed at eroding fundamental rights. In 1982 the Government had amended the Criminal Procedure Code to provide that persons charged with capital offence could not be released on bail pending the hearing of their cases. The applicant was awaiting trial on a charge of robbery with violence. Her bail application was refuted on the basis that the offence was not bailable under the Criminal Procedure Code. The High Court held that the amendment to the Criminal Procedure Code limiting the right to bail was unconstitutional and therefore null and void.

These cases discussed above represent a reading of the Constitution emphasizing principle and not policy and shows very clearly the possibility of developing a coherent theory of constitutional adjudication that makes it possible to treat like cases alike.

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[77] For example section 77 (1) of the Constitution guaranteeing trials without delay would override the A-G's discretion to prosecute at any time under Sec. 26(a) of the Constitution. See however *John Harvin Mweu v Republic Nyeri Court of Appeal 128 of 1983* where it was held it was not inhuman treatment for the A-G to reopen proceedings after entering a *nolle prosequi*.

[78] Miscellaneous 668 of 1986. This decision prompted the 24th amendment of the Constitution to provide that no bail would be granted in capital offences. Criminal Application 39 of 1985. (H.C.C.C. Nrb). See also *Re Maangi (1968) E.A. 637*.

THE ULTRA-VIRES TRADITION

In a number of recent cases a very worrisome trend has began to emerge. The courts have gone out of their way to deny themselves jurisdiction to hear matters or have denied the plaintiff *locus standi* to raise the matters desired or worse still have refused to follow clear law or binding precedent. In most of these cases the issues never really go for trial as the matters are usually determined at the level of "preliminary objections."

The most important of the cases in this tradition was the case of *James Keffa Wagara and Rumba Kinuthia –vs- John Anguka and Ngaruro Gitahi.*[79] This case was the first of a long line of cases involving the interpretation of the issue whether the Court could offer redress to a member or the ruling party KANU who alleged that the nomination process of the Party had not been fair. In this particular case the plaintiffs argued that the plaintiffs had not been allowed to witness counting of the votes. The court entertained a preliminary objection raised by Counsel for the defendants relating to the court's jurisdiction to hear the matter. It was argued on their behalf that the matter was entirely regulated by the KANU nomination rules and therefore could not be the subject of the court's scrutiny.

It was argued for the plaintiffs that KANU was not a club but a political party and hence the "internal affairs rule" would not apply. Secondly that the Constitution of the Party was subject to the national Constitution and could not take away freedoms granted by the latter. Akiwumi J. in upholding the preliminary objection relied on the East African Court of Appeal decision in *Patel and Others –vs- Dhanji and Others*[80], which case dealt with the "hands off" approach to club affairs. He stated:

> *If the rules and regulations are not illegal or repugnant to justice and morality and no property rights are involved this court would be most reluctant to interfere with the decision of the office bearers of KANU taken in the*

[79] H.C.C.C. 724 of 1988.
[80] (1975) E.A. 301.

> *discharge of their powers derived from the Constitution of KANU or the Rules, unless bad-faith is proved against them. Decisions arrived at honestly and fairly or even mistakenly will not be disturbed and I am prepared to go further and say that in appropriate cases a court would give effect to them. (emphasis mine).*

In *Mathew Ondenyo Naribari –vs- David Onyancha & Another*[81] the same issues arose again. The same preliminary objection was taken up again. Tanui, J. upheld the objection. The court rejected the argument that the unlimited civil and criminal jurisdiction conferred upon it by the Constitution could not be abridged other than by an express constitutional provision and that in any event the High Court maintained a supervisory role over all judicial, quasi-judicial and other offices concerned with the administration of law.

These cases raise a number of legal issues. To begin with they are unprincipled. They ignore binding precedent to deny jurisdiction. In *Miller –vs- Miller* [82] the Court of Appeal a few months earlier and before the two cases were decided categorically stated:-

> *The unlimited and original jurisdiction of the High Court can be ousted only by an express provision in the Constitution.*

Secondly the decisions are misinformed on a number of issues. They equate a mass political party which is the sole avenue of political participation in the entire country with a mere club. They ignore constitutional principle to concentrate on an issue of private law! The large question raised by the two cases in this regard is whether the constitutional right to vote and to participate in the political process may be abridged by a party through its own rules but the court will not interfere at all since in the court's view that involves and internal matter!

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[81] H.C.C.C. 1528 OF 1988 (Unreported) See also Charles Nderitu Mukora v Attorney-General H.C. Miscellaneous Application 134 of 1988. Nairobi Law Monthly, March 1988.

[82] Civil Appeal No. 70 of 1988: Reported in the Nairobi Law Monthly April, 1988, 53.

In *Wesberry v Sanders*[83] the Supreme Court of the United States had observed that "no right is more precious in a free country than that of having a voice in the elections of (those) who make the laws under which as good citizens we must live. Other rights even the most basic are illusory if the right to vote is undermined."[84]

Thirdly, the courts intimated that they would only interfere if the plaintiffs property rights had been interfered with. This reinforces the view that the court feels most comfortable addressing seemingly non-controversial issues as property issues in a political set up dedicated to the preservation of private property.

In *Kamau Kuria –vs- Attorney General*[85] the court's denial of its own jurisdiction reaches new heights. In this case counsel for the plaintiff sought to have a Constitutional Court set up to hear and determine the issue of whether the impounding of the applicant's passport abridged his right to travel.

Chief Justice Miller in an unprecedented act of judicial ingenuity held that Section 84 of the Constitution was inoperative as no rules had been made thereunder and as such jurisdiction could not be invoked through Section 84. This decision was cited as authority to reach the same conclusion by Dugdale J. in the case of *Maina Mbacha and 2 others –vs- Attorney General*.[86] The applicants in this case sought to have a Resident Magistrate's court restrained by way of prohibition from continuing to hear a case against them because that would infringe their fundamental rights as set out under Sections 72, 77, 79 and 82 of the Constitution. Mr. Justice Dugdale did not entertain any arguments as to jurisdiction in a novel method of handling matters, he read a pre-typed ruling during

[83] 376 U.S. 1, 17 (1964).
[84] See also Reynolds v Sims 377 U.S. 533, 555 (1964) where the court said "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."
[85] Miscellaneous Civil Application 550 of 1988 15 Nairobi Law Monthly (March/April) 1989.
[86] Miscellaneous Civil Application 356 of 1989. See vol. 17 N.L.M.

the mention of the case holding that Section 84 of the Constitution was inoperative and dismissing the application. Attempts to have this "ruling" reviewed were also dismissed.

These two decisions are remarkable for a number of reasons. First because of their unprincipled rejection and indeed hostility to precedent. It is very hard to believe that both courts were unaware of close to twenty years of litigation centered on Section 84 of the Constitution, especially when in both cases the list of authorities were laid before the court before commencement of arguments.[87] In respect of Chief Justice Miller, it is even more surprising as he sat in the Court of Appeal when that court decided the case of *Anarita Karimi (2) –vs- Republic*[88] and when that court ruled that Section 84 of the Constitution vested original jurisdiction in the High Court.

The question of whether rules had or had not been made under Section 84 of the Constitution did not arise at all as the issue had long been settled by Chief Justice Madan in the case of *Raila Odinga –vs- Attorney-General and Detainees Review Tribunal*. Relying on the judgment of the Supreme Court of Guyana in the case of *Olive Carey Jaundo –vs-Attorney-General*[89] he held that the failure of a rule making authority to make rules to enforce legal rights does not defeat those rights.

The logical development of this judicial trend is to be found in the case of *Wangari Mathaai –vs- Kenya Times Media Trust Ltd*. which may be *sub judice* and therefore not amenable to scrutiny at this time.

THE JUDICIARY'S PHILOSOPHY OF LAW

Our discussion above illustrates that the Judiciary has an electic philosophy of law as relates to constitutional adjudication. It is however

[87] See a very exhaustive discussion of the same in "Is the Kenyan Bill of Rights Enforceable after 4th July, 1989" Algeisa Vazquez Nairobi Law Monthly, Vol. 20, 1990.
[88] Algeisa Vazquez. ibid
[89] (1979) C.L.R. 164.

possible to say that on the whole positivism enjoys a dominant position and appears to be the officially accepted one.

Positivism as a philosophy has a number of basic assumptions which are:-

(i) The emphasis is on the imperative nature of law.

(ii) There is a rigid separation of law from morals and other value systems. And a distinction between the law that "is" from the law that "ought" to be.

(iii) The adjudication process is characterized by a mechanical search for the legislatures intention and a conscious subordination of the Judiciary to the Legislature.

(iv) There is the illusion of value-neutral adjudication.

(v) There is the insistence that the Constitution be interpreted as any other statute.

The basic view in positivist jurisprudence is that the judicial process can be insulated from the political process, where ideology and other value-laden baggage is to be found and that cases can be decided on the logic of the law itself.

Professor Edward McWhinney has pointed out the dangers of this view, as follows:-

> *... the real danger of the whole positivist approach ... is that it is those judges who strain hardest in their search for the logical intensity of words ... who are most likely to be governed by "inarticulate major premises" – concealed judicial preferences for one or other set of consequences flowing from a particular decision.The vice of legal positivisms here would be, not That it leads to value oriented decisions ...but that the values operate covently producing results that are both undemocratic and also inefficient. (In so far as the judicial weighing of values and interests is at best impressionistic, without full and adequate consideration of the policy alternatives actually available to the court).*[90]

[90] See note 35.

The basic vice of positivism therefore is that it allows the courts to conceal value choices or "inarticulate premises" in the decisions made behind seemingly objective legal forms. The real advantage for its practitioners is that one makes serious political choices and still wears the mask of neutrality.

The argument that it is possible and indeed desirable for the Judiciary to ignore political and social issues whether in the interpretation of statutes or in the application of precedent is self-delusion.[91] But the real danger must lie in the possibility that the administration of law may eventually become an entirely political function and as an instrument of Government Policy.[92]

TOWARDS A THEORY OF CONSTITUTIONAL ADJUDICATION

We must begin by acknowledging that the Constitution by its nature is more of a political than a legal document in the sense that ultimately constitutional adjudication raises more political questions than legal. In the "penumbra cases" this is more so than in the ordinary cases. Mwendwa's C.J. opinion in *El Mann v R* that the Constitution can be interpreted as an ordinary statute is erroneous.

There are many theories which constitutional scholars hold as providing the solution to the problem of constitutional adjudication.[93] The historical approach entails ascertaining the words and intent of the framers of the Constitution as the sole source of Constitutional law. The institutional theory views the Constitution as a set of rules as an institution and therefore what the Constitution is about is not necessarily ascertainable by reference to rules.

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[91] Civil Case No. 5404 of 1989.

[92] Wolfgong Fiedman - Legal Theory, 436, and Legal Philosophy and Judicial Law Making 1961, Vol. 61 Columbia Law Review, 820.

[93] Quoted in John Dugald The Judicial Process Positivism and Civil Liberty, (1971) 88 S.A.L.J.

The concept theory holds that judges must address themselves in constitutional cases not so much to the original conceptions of the Constitution but to the concepts of the Constitution[94] and that therefore there can be fidelity to the Constitution alongside substantial departure from the text.

The Constitution – identity theory holds that even though the Constitution is a complex union of text and institutional practice, the text is still sufficiently central and remains very essential to ascertaining the constitutional identity of postulated claims.

Sometimes it is argued that constitutional adjudication can best proceed by way of first ascertaining neutral principles of constitutional law which principles must be adequately general and neutral and not any fitting and applicable to the instant case but to other cases as well as that the principle implies. The reason for this is given as being the need to keep out of the process of judicial reasoning ideology and intuition and the realization that all Judiciary reasoning should proceed on the basis of principle reasoning, consistent application of precedent and the demarcation of the separate spheres of the legislative and the Judiciary. But even this argument cannot ignore the basic problems of constitutional adjudication. That a judicial choice has to be made between conflicting values and that the Constitution must be flexible to answer to historical challenges.

It is also argued that the search for a consistent body of principles within a single constitutional document presents formidable problems but that it is however important to have an ordering of constitutional values as a prerequisite to constitutional adjudication. The task of a Constitutional Court is therefore twofold. First is to establish a hierarchy of values within the Constitution itself and secondly to apply those values and principles in the developing political system.

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[94] Wolfgung Fiedman - Judges, Politics and Law 8 (1951) Can. Law Rev.

In the context of Kenya a theory of constitutional adjudication must proceed from a number of basic realisations:-

(i) That the Kenyan policy is informed by two basic and complimentary assumptions one of "democracy" and the other of "constitutionalism." By the former is understood that government is rooted in popular rule and equality is observed and that there is accountability of public office. The latter is understood to mean that individuals hold certain basic rights against the government even where it articulates popular or majoritarian positions.

(ii) That by the very nature of our plural society and our desire to have a free society demands must be made on the Constitution by people of varied backgrounds, interests, fears and hopes and an attempt must be made to accommodate them.

(iii) That the bill of rights enshrined in Chapter Five of the Constitution contains the most fundamental values of the entire legal system which must take precedence over all other values.

(iv) That the overriding criteria for the validity of challenged action is that it be reasonably justifiable in a democratic society.

(v) That the Constitution is not the document itself *per se*. It is also the spirit, the traditions, the ideals, the practices and the values that our founding fathers envisaged for a free society.

To illustrate my rudimentary theory of constitutional adjudication, I will give an example. If A, has been convicted by a resident magistrates court of burglary contrary to Sec. 304 (2) of the Penal Code, he is liable to imprisonment for ten years together with corporal punishment, which is compulsory. Section 27 of the Penal Code provides for corporal punishment. Supposing A, made a reference under Section 84 of the Constitution in which he argues that Sec. 27 of the Penal Code and therefore Section 304(2) are unconstitutional in that corporal punishment amounts to torture, is inhuman and degrading treatment.

Under section 74 (2) it is provided that no punishment is to be held in contravention of the Section if it was lawful in Kenya on 11th December 1963.

A Constitutional Court has two ways of dealing with the matter. First the court may settle the matter by asking itself whether corporal punishment was administered in Kenya before 11th December 1963. Having answered the question in the affirmative, the court may then hold that on a plain-reading of the Constitution there is no doubt that the intention of the framers was to retain corporal punishment as a mode of punishing offenders. This is the positivistic interpretation.

On the other hand the court may begin by ascertaining as a fundamental value of our constitutional order the principle of inviolability of the human person. Secondly the court may then set a threshold requirement that the derogation from the value must be reasonably justifiable in a democratic society and the burden of proof lies with the one who wishes to have the derogation. The court may then find that corporal punishment fails the constitutional test and is therefore constitutional suspect.

On the other hand the court may ask itself whether we are forever bound by the concept of "inhuman and degrading" punishment that the framers of the Constitution had in mind on 11th December 1963 or whether the court will take into account all punishments in force on the day in question and test whether today they are "inhuman and degrading" and acceptable in a democratic society. The court may then argue that it could not have been the intention of the framers of the constitution to legalize for all time the punishments enforced by the colonial state.[95]

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[95] Historically, this has happened under Fascim, Communism and Apartheid.
- S.R. Munzer & J.W. Nickel Does the Constitution mean what it always meant? (1988) 77, Col. L.R., 1028.
- Grey - Do we have an Unwritten Constitution (1975) 27Stan. L. Rev. 703.
- K. Llewellyn - The Constitution as an Institution (1934) Col. L.R. Ronald Dworkin - Taking Rights Seriously (Havard), 1977.
- Political judges and the Rule of Law in A Matter of Principle (Havard, 1985).
- To appeal to a Conception is to appeal to a specific understanding or account of what the words mean. To appeal to a concept is to invite rational discussion and argument about what words used to convey some general idea mean.
- Herbert Wechster - Towards Neutral Principles of Constitutional Law. 73(1959) Harvard Law Review, 1.
- Walter Murphy -An Ordering of Constitutional Values (1980) 53,
- Southern California Law Review.
- Elly: On Discovering Fundamental Values 92 (1978) Harvard Law Rev., 5.

This argument can be similarly used to argue against death penalty cases,[96] and is more in conformity with principled adjudication that is positivism. This essay has been an attempt to discern the mode of constitutional adjudication in Kenya and to critique it. This essay also attempted to sketch out a rudimentary and incomplete theory of constitutional adjudication that more conforms with a democratic society. Our basic contention has been that the fundamental value and that the courts must allow themselves to take into account considerations of policy as opposed to principle[97] in the process of adjudication as that cannot ensure a coherent theory of adjudication and will eventually erode rights.

[96] The High Court observed in dicta in *Mriunga & Others v R*, that the death penalty cannot be unconstitutional.
[97] Ronald Dworkin: Hard Cases (1975) H.L.R., 1075).