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# BENCH BULLETIN

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July - September 2021

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# Editor's Note

**T**he Bench Bulletin Issue 54, highlights significant range of ground breaking jurisprudence from the superior courts of record in Kenya and also from international jurisdiction.

From the Supreme Court we highlight the case of *William Musembi & 13 others v Moi Educational Centre Co. Ltd & 3 others [2021] eKLR* where the issue of the demolition of the petitioners' houses and property and their forced eviction by the 1<sup>st</sup> and 2<sup>nd</sup> respondents without a valid court order was a violation of their fundamental right to inherent human dignity and security of the person and whether the demolition of the petitioners' houses and property and their forced eviction by the 2nd and 3rd respondent was a violation of the fundamental rights of children guaranteed under article 53 of the Constitution. The Court held that the principles laid out by the High Court in *Mitubell* and *Satrose Ayuma* case which were crystallised in law in section 152(a) to (h) of the Land Act were applicable to the case. The principles included the duty to give notice in writing; to carry out the eviction in a manner that respected the dignity, right to life and security of those affected; to protect the rights of women, the elderly, children and persons with disabilities and the duty to give the affected persons the first priority to demolish and salvage their property. Those principles flowed from United Nations Guidelines on Evictions: General Comment No.7 were intended to breathe life into the right to dignity and the right to housing under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights respectively.

In the case of *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR*. The Supreme court dealt with *inter-alia* the issue whether the imposition of a mandatory death sentence for other capital offences including treason, robbery with violence and attempted robbery with violence were constitutional and whether the decision in the *Muruatetu* case was applicable to all capital offences, sexual offences and all other statutes prescribing mandatory or minimum sentences. The Supreme court held that the decision of *Muruatetu* applied only in respect to sentences of murder under sections 203 and 204 of the Penal Code.

From the High Court we feature the case of *Wilson Macharia v Safaricom Plc [2021] eKLR* on the question of whether an employment candidate who was invited for an interview by an employer, who could not fully evaluate him due to lack of software and later withdrew a letter of offer of employment on grounds that it had been issued erroneously, had been discriminated and had his rights to dignity and fair administrative action violated. The High Court held that the failure to provide the software needed by the petitioner at the time of recruitment was a violation of the petitioner's right to fair administrative action. Under article 47 of the Constitution everyone had the right to administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair.

The Bulletin also features International Jurisprudence where we highlight the case of *Eskort Limited v Stuurman Mogotsi & 2 Others JR1644/20* from the Labour Court of South Africa, Johannesburg, where the Court dealt with the issue whether the dismissal of an employee on account of gross misconduct and gross negligence, related to his failure to follow and/ or observe COVID-19 related health and safety protocols put in place at the workplace was fair . The court held that the 1st respondent's conduct was not only irresponsible and reckless, but was also inconsiderate and nonchalant in the extreme. He had ignored all health and safety warnings, advice, protocols, policies and procedures put in place at the workplace related to COVID-19, of which he was fairly aware of given his status not only as a manager but also part of the Coronavirus Site Committee.

These are just a few extracts from this issue of the Bench Bulletin, it is our hope that it shall be educative and enlightening to you.

Ag. Editor/CEO & Senior Assistant Editor

*Janet Munywoki*



# CJ's Message

Hon. Lady Justice Martha K. Koome, EBS

*Chief Justice and President of The Supreme Court of Kenya*

## **KEYNOTE ADDRESS BY HON. JUSTICE, MARTHA K. KOOME, EBS, CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT OF KENYA, DURING THE LAUNCH OF THE VISION OF THE CHIEF JUSTICE AND THE PERFORMANCE MANAGEMENT AND MEASUREMENT UNDERSTANDINGS (PMMUs) EVALUATION REPORT 2019/2020 ON 16<sup>th</sup>, SEPTEMBER 2021 AT THE SUPREME COURT BUILDING, NAIROBI**

The Honourable Deputy Chief Justice and Vice President of the Supreme Court of Kenya The Speaker of the National Assembly, The Deputy Speaker of the Senate, The Head of the Public Service The Hon. Attorney General Supreme Court Justices Present, The President of the Court of Appeal, The Principal Judges of the High Court, ELC and ELRC JSC Commissioners here present, Chair and Members of Judiciary's Administration of Justice and Performance Management Committee (AJPMC), The Chief Registrar of the Judiciary , The CEO, Ethics and Anti-Corruption Commission, The Inspector General of the Police, The Chairperson of the Senior Counsel Bar My Colleague Judges, Judicial Officers and Judiciary Staff, Development Partners, Distinguished Guests, Ladies and Gentlemen

**Good Afternoon,**

I want to start by thanking you all for finding time to join us today as we launch two important documents that will be central to the operations of the Judiciary going into the future. These are My Vision for the Judiciary and the Report on the Sixth Cycle of the Performance Management and Measurement Understandings (PMMUs) in the Judiciary.

**Ladies and Gentlemen,**

On 21st May 2021, I took the oath of office as Kenya's 15<sup>th</sup> Chief Justice following a transparent and competitive recruitment process by the Judicial Service Commission. Today, I want to share with you the road map for the future of the Judiciary under my stewardship. I see my tenure as Chief Justice as affording me and all who work in the Judiciary, the opportunity to champion the cause of realising the dream of many Kenyans for this institution as signalled in the Constitution. That dream is to see the Kenyan Judiciary develop into an independent, vibrant, efficient, and accessible institution that is responsive to the aspirations of Kenyans and serves as a true guardian of the rule of law and our democracy. It is within this context that I consulted with the leadership of the Judiciary, management, and my office assisted by Dalberg International to develop my Vision for the Judiciary.

My Vision for the Judiciary builds on the achievements of previous judicial reforms encompassed in the two preceding Judiciary Blueprints: The Judiciary Transformation Framework (JTF) (2012-2016) and the Sustaining Judicial Transformation (SJT) (2017-2021) and is aligned with the Judiciary Strategic Plan 2019-2023.

**Ladies and Gentlemen,**

This Vision for the Judiciary is drawn from the pronouncement in the preambular provisions of the Constitution, that acknowledges the Almighty God who is the creator and author of Justice, Article 10 on the Values and Principles of National Governance, and Article 19(2) on the Purpose of the Bill of Rights. These provisions highlight and affirm that the Constitution of Kenya, 2010 is a Charter for Social Transformation. Thus is the anchor for this Vision.

The Constitution in its values, principles and rules reflects the desire by Kenyans to break with our country's past of authoritarian governance and unequal society and strike in a radically different path of creating a democratic, accountable, participatory, and egalitarian state and society. It means that Kenyans by enacting the 2010 Constitution intended to create a Responsive State geared towards enhancing public welfare and constructing a just society.

**Ladies and Gentlemen,**

It is the social transformation foresight of the Constitution that informs this Vision for the Judiciary that we have christened "Social Transformation through Access to Justice (STAJ)". It is a vision born out of the reality that justice is cross-cutting and is a natural desire, a legitimate expectation of every person to be treated justly and to treat others justly. We consider all people and parties, stakeholders in the delivery of justice whilst also recognizing that we in the Judiciary do not serve ourselves but are established to serve others. The Judiciary under this leadership will therefore be focused on opening and broadening its doors to litigants and rendering justice to all who seek it within our borders.

But this goal of widening access to justice will only be attained when we have in place an efficient, cost-effective, accessible, expeditious, and fair system of delivery of justice. Bearing all these in mind, this Vision is predicated on eight guiding principles, which are: Accessibility and Efficiency; Transparency and Accountability; Inclusiveness and Shared Leadership; Cooperative Dialogue and Social Justice.

**Ladies and Gentlemen,**

The implementation of the Social Transformation through Access to Justice Vision under these principles is geared towards ensuring that the Kenyan Judiciary is a strong institution that is accessible, efficient, and protects the rights of all especially the vulnerable; the team of Judges, Judicial officers, and Judiciary Staff are inspired and committed to excellence in the delivery of Justice; the institution's financial mechanisms are strengthened to support the independence and Integrity of the Judiciary; we have in place strong and deep partnerships that enhance co-ordination in the administration of justice; and that public trust and confidence in the judicial system is enhanced.

**Ladies and Gentlemen,**

The reforms envisioned are informed by the realisation that despite tremendous achievements realised in the past 10 years, the Judiciary continues to face challenges related to access and responsive justice, case backlog, and accountability.

Addressing these challenges requires an approach which recognizes the gains made but also seeks to chart a path that ensures that we meet the goal of building an institution that is truly accessible, responsive to public needs and inspires and engenders the confidence of the people that we serve. In addition, while access to justice is crucial, the Judiciary should always strive to establish itself as a world-class institution with effective structures, norms, and systems which position the institution as an engine for the societal transformation envisioned in the Constitution. Towards this end, we will strive to remove barriers to access to justice and ensure that all persons especially, the most vulnerable in our society are enabled to seek and obtain redress for their grievances through formal and informal institutions of justice in compliance with human rights standards. In addition, we will endeavour to ensure that the public has confidence in the institution by dealing firmly, and swiftly but also fairly with concerns related to integrity and corruption that may arise within the institution.

To comply with the constitutional demands that we must guarantee justice for all persons regardless of status; deliver justice expeditiously and without undue regard to technicalities; and take effective steps

to reduce the obstacles that hinder access to justice, we will place particular and determined focus on reducing proximity and physical access to courts; and ensuring that we hear and determine cases expeditiously. We should not have any litigant travelling more than One Hundred (100) kilometres to access a court; and no court case should be dragging in judicial corridors for more than three (3) years in a Trial Court and one (1) year in an Appellate Court.

The main thrust of this Vision for the Judiciary is to ensure that we have a Judiciary that is efficient in delivery of services running from the Magistrates' and Khadhi's Courts, Tribunals, Superior courts all the way to the Apex Court. What this means is that every Court station will strive to be a "Centre of Excellence" in the delivery of justice.

To ensure our Courts and Tribunals become "centres of excellence", the Judiciary's efforts will be focused on implementing strategies and innovations geared towards eliminating case delays and backlog. This will involve the embrace of active case management, Judges and Judicial Officers overseeing the cases under their dockets, reforming the operations of our registries to ensure that all files are monitored so that they don't stay inactive in the registries, reforming our court practices so that the practice of adjournment of scheduled proceedings is eliminated, and the enhancement of the place of technology in our operations. We will also seek to improve the work environment to ensure that Judges, Judicial officers, staff and members of the Tribunals, operate in an enabling environment that supports optimal performance and improves litigants' experiences.

**Ladies and Gentlemen,**

It would be remiss not to mention and express my gratitude to all judges, judicial officers, members of Tribunals, and staff of the Judiciary for the hard work they have and continue to put in to ensure that our Courts are running efficiently since the COVID-19 pandemic struck in 2020. The pandemic has changed the way our Courts operate. It has forced us to accelerate the uptake and use of ICT in our operations.

I thank all the actors in the Justice Sector, Judges, Judicial Officers, Judiciary staff, members of the Bar, office of the DPP, litigants, and other stakeholders for embracing these changes even as we work to resolve the teething problems experienced to ensure that our processes get more efficient. Our aim is to improve our service delivery and litigants' experiences in the post-pandemic social transformation era.

The process that follows the launch of this Vision is the development of the next 10-year Judiciary Blueprint which will guide operations for the next 10 years and standardise our values, systems, and operational manuals, especially in the way we manage Courts and Registries to support reporting, learning and performance.

The Judiciary will focus on infrastructure development, with particular emphasis on establishing a State-of-the-Art Supreme Court Headquarters, a modern Judicial Training Academy, enabling Mediation Suites in every Court Station to support alternative dispute resolution and a Tribunals Plaza to coordinate the operations of Tribunals across the country. The collective efforts of all in the justice sector will be critical in driving this intent forward. I appreciate the Executive and Legislative Arms of Government for their support and willingness to join us in delivering the Constitution's promise to deliver Social Transformation through Access to Justice.

**Ladies and Gentlemen,**

As you will see from the Vision, the path the Kenyan Judiciary has deliberately chosen is the path of societal transformation and change, the path of accountability for results, the path of transparency and openness, the path of quick and effective dispensation of justice and the path of provision of quality services to litigants placing a lot of emphasis on Results-Based Management. This goal of engendering results-based management includes the institutionalization of a rewards system for high performers. To that effect, we are happy to present to you, our guests and viewers, the best performing implementing units during the Sixth Cycle of implementing Performance Management and Measurement Understandings (PMMUs) in the Judiciary.

Ladies and Gentlemen,

The results that we are releasing today have categorised courts based on the number of filled cases. They show that the best performing High Court Stations in the different categories were Makueni, Milimani Civil Division and Nakuru, while in the Employment and Labour Relations Court Kisumu and Nakuru were leading in performance. In the Environment and Land Court, Murang'a, Milimani, and Nakuru Courts were the best performing stations.

There were six (6) best performing Magistrate's Courts in the different categories. These were Limuru, Marsabit, Mombasa, Engineer, Tonomoka Children's Court and Gatundu Magistrate Courts. On the performance of the Kadhis Courts Garissa and Voi Kadhis' Courts emerged the top performers. The best performing Tribunals were Cooperatives Tribunal and National Environment Tribunal (NET).

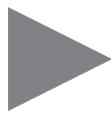
Finally, the best performing Administrative Units were Office of the Chief Registrar of the Judiciary, Office of the Registrar Environment and Land Court, Directorate, Supply Chain Management, and the Judiciary Training Institute. Kindly join me in appreciating the performance of these Courts, Tribunals and Administrative Units. Their exemplary performance will be an anchor-piece to the Vision's intention of internal benchmarking to create centres of excellence in the delivery of Justice. This exercise will commence with the Nakuru Law Courts.

I direct the Judiciary Training Institute, Directorate of Planning and Organisational Performance (DPOP) and Chief of Staff, to design Performance Case Studies from these exemplar performers to be used in training and excellence building exercises going forward.

I recognise the Committee led by Hon. Lady Justice Agnes Murgor, JA for the work exhibited in delivering this report and inform that starting next week, my office will commence an intense period of Town Hall Meetings led by the DCJ and I to discuss these findings with Judges, Judicial Officers, and members of Staff. Our performance radar will be gauged on how well we serve the public.

Thank you and God bless you all!

**HON. JUSTICE MARTHA K. KOOME, EBS.  
CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT OF KENYA**



# What they said

**Supreme Court Judges - PM Mwilu, DCJ & VP; MK Ibrahim, SC Wanjala, NS Ndungu & I Lenaola, SCJJ in William Musembi & 13 others v Moi Educational Centre Co. Ltd & 3 others [2021] eKLR**

*"It was the responsibility of the State to ensure that the rights guaranteed in article 43 of the Constitution were realized progressively. The obligation to ensure the rights of petitioners under article 43 thus fell on the State, and the State was imbued with the duty to ensure that those rights were realized, in consideration of prevailing circumstances such as the availability of resources, or the implementation of policy and structural programs to ensure that the rights were realized. The mandate to ensure the realization and protection of social and economic rights did not extend to a private entity. Although the State seemed to be at the forefront in the realization of article 43 of the Constitution rights, more was yet to be done, especially in the realization aspect. As for the enforcement of those rights, nothing much could be achieved if the legislative and policy processes were at the nascent stage. Those acts by the State could be regarded by some as acts of regression which ended up depriving the people of the rights that they should be enjoying. They were a contradiction to the progressive realization principle and constituted a violation of those rights. Those acts, ..., were counter-intuitive to the realization of social economic rights under article 43 of the Constitution."*

**Supreme Court Judges- MK Koome, CJ & P, PM Mwilu ,DCJ & VP, MK Ibrahim, SC Wanjala, I Lenaola, NS Ndungu & W Ouko, SCJJ, in Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR**

*"The Supreme Court's decision did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute. The decision was not an authority for stating that all provisions of the law prescribing mandatory or minimum sentences were inconsistent with the Constitution. At paragraph 71 of its judgment, the court nullified paragraphs 6.4-6.7 of the Judiciary Sentencing Policy Guidelines which were to the effect that courts had to impose the death sentence in all capital offences in accordance with the law. The nullified paragraphs were no longer in effect. In respect of other capital offences such as treason under section 40 (3) of the Penal Code, robbery with violence under section 296 (2) of the Penal Code, and attempted robbery with violence under section 297 (2) of the Penal Code, a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in the decision in question could be reached."*

**Supreme Court Judges PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala, NS Ndungu & I Lenaola, SCJJ in Pati Limited v Funzi Island Development Limited & 4 others [2021] eKLR**

*"The status of the suit land was as a matter of law declared in Proclamation No. 44 of 1932, and subsequently in Legal Notice No. 174 of 1964, and the said land was situated between the high and low water-mark on the Coast of Kenya. The inescapable conclusion was that the suit land fell within the frontiers of what constituted a mangrove forest as per the Proclamation. The same could therefore, not have been available for allocation within the meaning of the repealed Constitution or the Trust Land Act."*

**Court of Appeal Judges - PO Kiage, SG Kairu & F Sichale, JJA in Judicial Service Commission & another v Lucy Muthoni Njora [2021] eKLR**

*"The Constitution of Kenya, 2010, changed the fundamental underpinnings of judicial review from the common law as codified in the Law Reform Act to article 22(3)(f) of the Constitution which recognized judicial review as an appropriate relief for human rights violations. Superior courts in Kenya had spoken with near unanimity that the existing constitutional and statutory landscape called for a more robust application of judicial review to include, in appropriate cases, a merit review of the impugned decision. There was nothing doctrinally or jurisprudentially amiss or erroneous in a judge's adoption of a merit review in judicial review proceedings. It would be erroneous for a judge to do so under a misconception that judicial review was limited to a dry and formalistic examination of the process while strenuously and artificially avoiding merit."*

**High Court Judge - JA Makau, J in Wilson Macharia v Safaricom Plc [2021] eKLR**

*"The respondent failed to demonstrate that it was impossible to employ the petitioner because he was visually impaired. Sight was not necessary for purposes of operating and working while using a computer in modern society. Under article 2 of the Convention of the Rights of Persons with Disability, reasonable accommodation meant necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure persons with disabilities enjoyed or exercised on an equal basis with others all human rights and fundamental freedoms. If the respondent had employed the petitioner, it would have had to make adjustments to its entire system and that was not viable in the short run due to budgetary constraints. However, the respondent could have ensured that there was an available alternative to cater for the interviewee with visual impairment. The petitioner had demonstrated that its rights to dignity under articles 48 and 54(1) had been violated and the petitioner was entitled to compensation amounting to Kshs. 6, 000, 000."*

**High Court Judge- FM Gikonyo, J in Letiyia ole Maine v Republic [2021] eKLR**

*"Forfeiture was divesture or confiscation of one's property in consequence of a crime, offense or breach of obligation. The UN Nations Convention against Corruption (UNCAC) defined confiscation as the permanent deprivation of property by order of a court or other competent authority. Under section 24(f) of the Penal Code, forfeiture was one of the punishments that a court could inflict. Forfeiture divested a person's property without compensation and it was necessary to ensure that the process leading to forfeiture adhered to the requirements of due process to avoid claims of violations of the right to property, right to privacy, right to fair administrative action, and right to fair trial guaranteed in article 40, 31, 47 and 50 of the Constitution, respectively."*

**African Court on Human and Peoples' Rights President and Judge- ID Aboud in Request for an Advisory Opinion Submitted by the Pan African Lawyers Union (PALU)**

**Request No. 001/2020**

*"The Court is of the view that even though the decision to conduct or not to conduct elections, remains with the competent organs of the State concerned, because of the situation of a public health emergency or a pandemic, a consultation of health authorities and political actors, including representatives of civil society, is necessary to ensure the inclusiveness of the process. The consultation should concern not only the decision to hold elections but also the measures necessary to ensure that they are conducted in a transparent, free and fair manner. In this regard, the Court recalls that the provisions of the ECOWAS Protocol on Democracy and Elections, which requires that the consent of the majority of political actors needs to be obtained when substantial changes are made to the electoral laws within six (6) months before the elections, are an important source of inspiration for states that decide to conduct elections during a situation of public health emergency."*

**Labour Court of South Africa, Johannesburg Judge-Tlhotlhalema in Eskort Limited v Stuurman Mogotsi & 2 Others**

**JR1644/20**

*"Upon investigating the matter after Mogotsi had tested positive, it was discovered that not only had he hugged Kwaieng who had comorbidities, but that he had also walked around the workplace without a mask. The questions that need to be posed despite the applicant having all of these fancy COVID19 policies, procedures and protocols in place, is whether more than merely dismissing employees for failing to adhere to the basic health and safety protocols is sufficient in curbing the spread of the pandemic? How can it be, that in the midst of the deadly pandemic, the applicant still allows mask-less 'huggers' walking around on the shop floor? Of further importance is notwithstanding all of these protocols and awareness campaigns about this pandemic, why would any employee in the workplace, especially one with comorbidities, hug or reciprocate hugging in the middle of a pandemic? Does a basic principle such as social distancing mean anything to anyone at the workplace? Furthermore, what is the responsibility of the applicant and its employees when other employees or even customers, are seen roaming the workplace or shopfloor mask-less? Of even critical importance is what steps were taken in ensuring the health and safety of all the employees and customers, where at least from 20 July 2020, Mchunu's test results were known? All of these questions need to be addressed in the light of Mogotsi's version that after Mchunu's test results were made known, business at the store had continued as usual, hence he had continued reporting for duty."*



# Feature Case

## Mandate of the state in progressive realization of the right to accessible and adequate housing.

William Musembi & 13 others v Moi Educational Centre Co. Ltd & 3 others [2021] eKLR

Petition No. 2 of 2018

Supreme Court of Kenya

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

July 16, 2021

*Reported by Janet Munywoki*

At the High Court, the appellants/petitioners filed a petition concerning the alleged forceful and illegal eviction of the petitioners, who were inhabitants of City Cotton and *Upendo* villages, two informal settlements within the County of Nairobi.

The petitioners' claim was that they had settled on the suit property sometime in 1968, which they contended, was alienated public land, and that since settlement, they had constructed semi-permanent houses and business structures; had been supplied with social amenities and services such as water and electricity, and had been legally licensed to carry on and operate businesses on the suit property. They also alleged that their children attended nearby public primary schools.

In its Judgment delivered on October 14, 2014, the High Court found that the demolition of the petitioners' houses and their forced eviction from the suit property without providing them and their children with alternative land or shelter was a violation of their fundamental right to inherent human dignity, security of the person and access to adequate housing, a violation of the fundamental rights of children guaranteed by article 53 of the Constitution of Kenya, 2010 (Constitution) and a violation of the rights of elderly persons guaranteed by article 57. In addition to those declarations, the Court awarded the Petitioners, damages.

Aggrieved by the decision of the High Court, the respondents filed an appeal, Nairobi Civil Appeal No.363 of 2014. The Court of Appeal set aside parts of the decision of the High Court, and the appeal was rendered partially successful. The appellate court substituted the judgment with a declaration that the forced evictions and demolition of the petitioners' houses without a valid court order was a violation of their right to inherent human dignity and security of

the person. The appellate court found that there was no evidence placed before the trial court to enable it assess damages and that whereas it was the duty of the State to take measures, (legislative, policy and other measures) to achieve the progressive realization of the rights guaranteed under article 43 of the Constitution, it was not under a positive obligation to provide the evictees with housing.

Aggrieved by the judgment and orders of the appellate Court, the appellants/petitioners filed the instant petition of appeal arguing that the learned Judges of the Court of Appeal erred in law and in fact in failing to find that the 1<sup>st</sup> respondent violated the petitioners' right to adequate housing and for not awarding damages.

The issues for determination were whether the constitutional guarantees of the right to property extend to property that had been unlawfully acquired; what were the obligations of the State in applying article 43 rights (economic and social rights – provided in article 43 of the Constitution); whether the mandate of the progressive realization of economic and social rights by the State extended to private entities; whether the questions and issues that a court had to consider in order to make an award of damages with regards to constitutional violations was different to what the court would consider in say, tortious or civil liability claim; whether the demolition of the petitioners' houses and property and their forced eviction by the 1<sup>st</sup> and 2<sup>nd</sup> respondents without a valid court order was a violation of their fundamental right to inherent human dignity and security of the person and whether the demolition of the petitioners' houses and property and their forced eviction by the 2<sup>nd</sup> and 3<sup>rd</sup> respondent was a violation of the fundamental rights of children guaranteed under article 53 of the Constitution.

The Supreme Court noted that the constitutional guarantees of the right to property ownership and entitlement under articles 40 of the Constitution were only in relation to property that had been legally acquired, and did not extend to property that had been unlawfully acquired. In that regard, article 40(6) of the Constitution was instructive and provided that the rights under article 40 did not extend to any property that had been found to have been unlawfully acquired.

The Supreme Court held that the High Court correctly held that the issue of the legality of the letter of allotment would be better determined by the National Land Commission as provided under section 152(C) of the Land Act, and which provision further allowed for the procedure to be followed in the event of an eviction(s).

The court noted that the procedures enacted in the amendments to the Land Act, through the Land Laws (Amendments) Act No. 28 of 2016, amended the provisions of the Land Act to include the powers of the National Land Commission in land eviction matters, and were only enacted in September, 2016, when the instant matter had already been instituted and determined by the High Court. The High Court also correctly held that the relevant court seized of jurisdiction over land matters – the Environment and the Land Court – should have determined that question.

The court held that forced evictions generally constituted a violation of fundamental rights and freedoms and an abuse of inherent human rights and dignity under article 43 of the Constitution, including, but not limited to, the right to the highest attainable standards of health and healthcare services, accessible and adequate housing, freedom from hunger and to adequate food, clean and safe water, social security and education. The onus of ensuring that those rights and freedoms were attained and provided for fell squarely under the ambit of the State; and it was the obligation of the State to ensure that those rights and freedoms were not limited without reasonable justification in an open and democratic society based on human dignity, equality and freedom as provided for under article 24(1) of the Constitution.

The court found that in ensuring that social and economic rights were protected, the State had to strike a delicate balance between the rights of those that were most vulnerable in the society and those that were in economic advantage. The State thus had to ensure that in the protection of the rights of an individual or group of persons, it did not inadvertently abuse the rights of other individuals or other groups of persons. There was no abuse of the rights of the parties and thus, the State's negative

obligation not to abuse or violate those rights and fundamental freedoms was carried out.

The Supreme Court found that eviction of the petitioners was violent and did not accord with the expected constitutional obligation of the State to ensure that those in informal settlements were treated with the dignity that was conferred on article 28 of the Constitution. The petitioners were evicted when the 1<sup>st</sup> respondent had already acquired certain private rights over the suit property but they entered the land well aware of the presence of the petitioners who occupied the land when it was public land. Even without prescriptive rights, where the landless occupied public land and established houses thereon, they acquired no title to the land, but a protectable right to housing over the same.

The Supreme Court found that participation of State agents in violent evictions only pointed to the fact that the 1<sup>st</sup> respondent ultimately acquired favoured status outside the law in acquiring ultimate and total control of the suit property at the cost of violation of the rights of the petitioners including the elderly and children.

The Supreme Court held that the principles laid out by the High Court in *Mitubell* and *Satrose Ayuma* which were crystallised in law in section 152(a) to (h) of the Land Act were applicable to the instant matter. The principles included the duty to give notice in writing; to carry out the eviction in a manner that respected the dignity, right to life and security of those affected; to protect the rights of women, the elderly, children and persons with disabilities and the duty to give the affected persons the first priority to demolish and salvage their property. Those principles flowed from United Nations Guidelines on Evictions: General Comment No.7 were intended to breathe life into the right to dignity and the right to housing under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights respectively.

The Supreme Court found that the trial court was correct to hold that it was redundant to ask whether the eviction of the petitioners resulted in a violation of their rights under the Constitution. Even the ordinary man in the street, confronted with the facts before him/her, would answer the question in the affirmative

The Supreme Court found that the Court of Appeal, whose judgment embodied the generalities of the doctrine of progressive realization as pronounced in General Comment No. 4 of the Committee on Economic, Social and Cultural Rights, correctly held that it was the responsibility of the State to ensure that the rights guaranteed in article 43 of the Constitution were realized progressively. The

obligation to ensure the rights of petitioners under article 43 thus fell on the State, and that the State was imbued with the duty to ensure that those rights were realized, in consideration of prevailing circumstances such as the availability of resources, or the implementation of policy and structural programs to ensure that the rights were realized.

The court held that the mandate to ensure the realization and protection of social and economic rights did not extend to the 1<sup>st</sup> respondent, a private entity. Even though the 1<sup>st</sup> respondent had a negative obligation to ensure that it did not violate the rights of the petitioners, it was not under any obligation to ensure that those rights were realized, either progressively or immediately. The Court of Appeal thus correctly held that the progressive realization of article 43 rights (economic and social rights) was the mandate of the State, and that obligation did not extend horizontally to private entities. Private entities had the obligation, under article 20(1) not to violate article 43 rights as, non-violation of all rights in the Bill of Rights applied both horizontally and vertically and bound both the State and all persons.

The Supreme Court noted that although the Court of Appeal conceded that it was within the mandate of the trial court to make an order for the award of damages for constitutional violations against the petitioners by the respondents, it did not however, show how the award, as issued, went against the provisions of article 23(3) of the Constitution. It had to be shown or established that the judge proceeded on the wrong principle or misapprehension of the evidence to arrive at a disproportionate award.

The Supreme Court found that there was sufficient evidence that was presented before the trial court which enabled it to arrive at the decision that it did. With regard to the 1<sup>st</sup> respondent, they admittedly stated that they had participated in, and engaged with the 2<sup>nd</sup> respondent in the unlawful and illegal demolition of property belonging to and eviction of the petitioners from the suit property. The evidence presented before the trial court was that the demolition and evictions were carried out without lawful court orders, that the evictions and demolition were carried out in a manner that violated the petitioners' right to human dignity and security, and that there was a violation of their rights to exercise and enjoy social and economic rights pronounced under article 43, as read together with articles 53 and 57 of the Constitution.

The Supreme Court noted that the Court of Appeal in disturbing the award of damages issued by the trial court did not also show how the court abused its discretionary powers to award damages, or that the court exercised its discretion whimsically or capriciously. The appellate court also held that an

appellate Court should not disturb an award of damages on the mere notion that if it had tried the matter in the first instance, it would have awarded differently. The question therefore should not have been what it would have awarded, but rather whether the trial court had proceeded on the wrong principle. An appellate court in deciding whether it was justified in disturbing the quantum of damages awarded by a trial court in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of that, the amount was so inordinately low or so inordinately high that it had to be a wholly erroneous estimate of the damage.

The court found that what the Court of Appeal failed to consider, in our opinion, was that the questions and issues that a Court had to consider in order to make an award of damages with regards to constitutional violation was manifestly different to what the court would consider in say, tortious or civil liability claim. In the latter, the issues were clear cut and quantification of the appropriate award was in most instances, straight forward. The same, however, was not true of constitutional violation matters, such as the instant one. Quantification of damages in such matters did not present an explicit consideration of the issues; other issues such as public policy considerations also come into play.

The Supreme Court held that a court obligated and mandated in evaluating the appropriate awards for compensation in constitutional violations did not have an easy task; there was no adequate damage standard that had been developed in our jurisprudence that recognized that an award for damages in constitutional violations was quite separate and distinct from other injuries. In that regard, the Court of Appeal was unclear on what other material that the petitioners needed to present before the trial court to establish that there was a violation of their constitutional rights by the respondents, and that the court therefore abused its discretionary powers in issuing the award of damages.

The Supreme Court noted that there was a working formula, approach and guidelines to unravel problems brought about by the Constitution which was with inconsistencies, grey areas, contradictions, vagueness, bad grammar and syntax, legal jargon, all hallmarks of a negotiated document that took decades to complete. Courts when interpreting the Constitution owe that interpretative framework of its interpretation to the Constitution itself.

The court found that it was indeed a sad state of affairs that ten years into the promulgation of the Constitution in 2010, the State sought to rid itself of its mandate and obligations by hiding behind

the perceived inconsistencies sometimes presented in the Constitution, and in the present context, the provisions of article 21(2) of the Constitution, and to abdicate its role in ensuring that article 43 rights were realized. Article 21(2) did not protect the State from realizing those rights, but rather sought to ensure that even though those rights were not immediately achieved, there was at least some modicum of effort by the State to realize those rights. There should have been continued concerted efforts by the State in the progressive realization of those rights and therefore, the State should have taken deliberate steps, both immediately and in the future, towards the full realization of the rights.

The court held that policy and legislative formulation and lack of adequate resources had been the reasons given by the State in the realization of article 43 of the Constitution rights. It was evidenced as such; in October 2009, the Ministry of Lands formulated the Eviction and Resettlement Guidelines, which provided that forced evictions were not only illegal and unjust, but also counterproductive to economic growth and development. The guidelines also provided for insights and procedures on how to deal with the issue of evictions and resettlement by the State, noting that the State was under an obligation to provide alternative resettlement to those that had been evicted.

The Supreme Court noted that in 2012, a Bill was presented in the National Assembly titled the Evictions and Resettlement Procedures Bill No.44 of 2012. The Bill had never gone past the 1<sup>st</sup> Reading – on September 12, 2012. The Senate also introduced the Preservation of Human Dignity and Enforcement of Economic and Social Rights Bill No.27 of 2018. The Bill proposed that each County should have an integrated development plan and to establish mechanisms to monitor and promote adherence to article 43 of the Constitution. It had not gone past the 1<sup>st</sup> Reading – on September 25, 2018.

The Supreme Court noted that those could be just some of the few, if not only, legislative and policy structures that the State had sought to come up with in the past few years. Nevertheless, few amendments had been made to land laws, and in particular the Land Act, through the Land Laws (Amendments) Act No. 28 of 2016, which amended sections 152 of the Land Act, to include provisions for the procedures of eviction of illegal settlers in both public and private land. Those amendments were made following the decision of the High Court in *Satrose Ayuma* and indeed the language of the amendments to section 152(a)to(g) was borrowed directly from that decision. Although the State could therefore seem to be at the forefront in the realization of article 43 of the Constitution rights, more was yet to be

done, especially in the realization aspect. As for the enforcement of those rights, nothing much could be achieved if the legislative and policy processes were at the nascent stage.

The Supreme Court finally found that those acts by the State could be regarded and considered by some, as acts of regression, which ended up depriving the people of the rights that they should be enjoying. They were a contradiction to the progressive realization principle and constituted a violation of those rights. Those acts, unless they were limitations to the realization of those rights which were justifiable and reasonable in accordance with article 24(1) of the Constitution, were counter-intuitive to the realization of social economic rights under article 43 of the Constitution. The State had to take a more drastic and purposive approach to its mandate and obligations in ensuring that the rights to the people of Kenya were not violated, or in the very least, that those rights were not deprived or denied.

*Appeal partly allowed; costs awarded to the petitioners.*

#### **Orders:**

- i. *A declaration that the demolition of the petitioners' houses and property and their forced eviction by the 1<sup>st</sup> and 2<sup>nd</sup> respondents without a valid court order was a violation of their fundamental right to inherent human dignity and security of the person guaranteed under articles 28 and 29(c) of the Constitution.*
- ii. *A declaration that the demolition of the petitioners' houses and property and their forced eviction by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents was a violation of their fundamental right to inherent human dignity, security of the person, and to accessible and adequate housing guaranteed under article 43 of the Constitution*
- iii. *A declaration that the demolition of the petitioners' houses and property and their forced eviction by the 2<sup>nd</sup> and 3<sup>rd</sup> respondent was a violation of the fundamental rights of children guaranteed under article 53 of the Constitution.*
- iv. *A declaration that the demolition of the petitioners' houses and property and their forced eviction by the 2<sup>nd</sup> and 3<sup>rd</sup> respondent was a violation of the fundamental rights of elderly persons guaranteed under article 57 of the Constitution.*
- v. *The 1<sup>st</sup> respondent were to pay a sum of Kenya Shillings One Hundred and Fifty Thousand (Kshs.150,000) to each of the petitioners.*
- vi. *The State was to pay a sum of Kenya shillings One Hundred Thousand (Kshs.100,000) to each of the petitioners.*

# Supreme Court

## Supreme Court issues guidelines for its decision on the constitutionality of the mandatory death sentence for the offence of murder in the Muruatetu case.

Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021]

eKLR

Petition 15 & 16 (Consolidated) of 2015

Supreme Court of Kenya

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

July 6, 2021

*Reported by Beryl Ikamari*

**Criminal Practice - court orders- meaning and effect of court orders - scope of applicability of a court order - where the Supreme Court determined that the mandatory death sentence imposed under section 203 and 204 of the Penal Code for the offence of murder was unconstitutional - whether the decision was applicable to all capital offences and all statutes prescribing minimum or maximum sentences.**

### Brief facts

The appellants were convicted of murder and sentenced to death. They were challenging the legality of the mandatory nature of the death sentence imposed by the High Court and affirmed by the Court of Appeal. They also challenged the indeterminate nature of a life sentence and asked whether the court ought to assign a definite number of years of imprisonment, subject to remission rules, which would constitute life imprisonment.

The court issued a judgment dated December 14, 2017, which stated that it could not determine the issues related to the sentence of life imprisonment as they were not canvassed before the High Court or the Court of Appeal. In its judgment, the Supreme Court found that the mandatory nature of the death sentence as provided under section 204 of the Penal Code was unconstitutional. However, that would not disturb the constitutionality of the death sentence as contemplated under article 26(3) of the Constitution. The court ordered for the appellants matter to be re-heard on the question of sentencing only on a priority basis. The court also ordered for the Attorney General, the Director of Public Prosecutions and other relevant agencies to prepare a detailed professional review in the context of the judgment and order made with a view to setting up a framework to deal with sentence re-hearing of cases similar to that of the petitioners herein. The Attorney General was granted twelve (12) months from the date of the judgment to give a progress

report to the Supreme Court in that regard.

In its judgment the court directed that the judgment be placed before the Speakers of the National Assembly and the Senate, the Attorney-General, and the Kenya Law Reform Commission, urgently, for any necessary amendments, formulation and enactment of statute law, to give effect to the judgment on the mandatory nature of the death sentence and the parameters of what ought to constitute life imprisonment.

The progress report on the framework proposed for the re-hearing of similar cases was not filed within 12 months as ordered by the court but it was filed on October 11, 2019. The reason for the delay in filing the progress report, offered by counsel for the Director of Public Prosecutions, was that there were no re-sentencing guidelines necessary to address the numerous pending matters on re-sentencing. On behalf of Katiba Institute, it was stated that delay in filing the report resulted in inability by the Supreme Court to confirm compliance to its orders and it compounded violations of the appellants' constitutional rights. It was stated that the absence of anticipated guidelines had created inconsistency, confusion and uncertainty with the criminal justice system about the death sentence.

### Issues

- i. Whether the decision in the *Muruatetu* case was applicable to all capital offences, sexual offences and all other statutes prescribing mandatory or minimum sentences.
- ii. Whether Magistrate's Courts had jurisdiction to conduct a re-hearing on sentencing and revise sentences that had been confirmed at the High Court and/or the Court of Appeal.
- iii. Whether the decision in the *Muruatetu* case was an authority for stating that all provisions of the law prescribing mandatory or minimum sentences were inconsistent with the law.

- iv. Whether it was necessary for specific matters to be instituted before appropriate courts to determine the question as to whether the imposition of a mandatory death sentence for other capital offences including treason, robbery with violence and attempted robbery with violence were constitutional.

#### **Held**

1. Contrary to the orders of the court, the appellants had not been afforded a re-sentencing hearing by the High Court.
2. As the progress report was being waited for, courts below the Supreme Court had embarked on their own interpretation of the judgment in question and had applied it to section 296(2) of the Penal Code and to sexual offences, while assuming that the decision was equally applicable to other statutes prescribing mandatory or minimum sentences. That assumption of applicability was never contemplated in the context of the decision in question.
3. The course that courts below the Supreme Court had taken had resulted in incertitude and incoherence in the sentencing framework in the country and it had given rise to an avalanche of applications for re-sentencing. Sentences that were confirmed at the High Court and the Court of Appeal, had been returned to the Magistrate's Courts by appellants and they had been revised. Magistrate's courts had entertained such applications for re-sentencing without jurisdiction. Additionally, some appellants whose appeals under various statutes prescribing mandatory or minimum sentences, that were pending hearing and determination, either in the High Court or the Court of Appeal, had also had their sentences revised by the Magistrate's Courts without disclosing the fact that pending appeals existed in Superior Courts.
4. There was no harmony when revision of sentences was done by the courts. Sentences imposed after re-sentencing ranged from commutation to the period served, probation, reduction of sentences to some specific period, or the preservation of the maximum sentences.
5. The Supreme Court's decision did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute. The decision was not an authority for stating that all provisions of the law prescribing mandatory or minimum sentences were inconsistent with the Constitution.
6. At paragraph 71 of its judgment, the court nullified paragraphs 6.4-6.7 of the Judiciary

Sentencing Policy Guidelines which were to the effect that courts had to impose the death sentence in all capital offences in accordance with the law. The nullified paragraph were no longer in effect.

7. In respect of other capital offences such as treason under section 40 (3) of the Penal Code, robbery with violence under section 296 (2) of the Penal Code, and attempted robbery with violence under section 297 (2) of the Penal Code, a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in the decision in question could be reached.
8. The recommendations of the Task Force report went beyond the terms of the orders of December 14, 2017 and dealt with, for example, matters that were within the legislative province of Parliament or in the court's exclusive jurisdiction and judicial discretion.

*To obviate further delay and to avoid confusion, the court issued the following guidelines:-*

- i. *The decision of Muruatetu and the guidelines herein applied only in respect to sentences of murder under sections 203 and 204 of the Penal Code.*
- ii. *The Judiciary Sentencing Policy Guidelines were to be revised in tandem with the new jurisprudence enunciated in Muruatetu.*
- iii. *All offenders who have been subject to the mandatory death penalty and desired to be heard on sentence were entitled to re-sentencing hearing.*
- iv. *Where an appeal was pending before the Court of Appeal, the High Court would entertain an application for re-sentencing upon being satisfied that the appeal had been withdrawn.*
- v. *In re-sentencing hearing, the court had to record the prosecution and the appellant's submissions under section 329 of the Criminal Procedure Code, as well as those of the victims before deciding on the suitable sentence.*
- vi. *An application for re-sentencing arising from a trial before the High Court could only be entertained by the High Court, which had jurisdiction to do so and not the subordinate court.*
- vii. *In a sentence re-hearing for the charge of murder, both aggravating and mitigating factors such as the following, would guide the court;*
  - a) *Age of the offender;*
  - b) *Being a first offender;*
  - c) *Whether the offender pleaded guilty;*

- d) Character and record of the offender;
  - e) Commission of the offence in response to gender-based violence;
  - f) The manner in which the offence was committed on the victim;
  - g) The physical and psychological effect of the offence on the victim's family;
  - h) Remorsefulness of the offender;
  - i) The possibility of reform and social re-adaptation of the offender; and,
  - j) Any other factor that the court considered relevant.
- viii. Where the appellant had lodged an appeal against sentence alone, the appellate court would proceed to receive submissions on re-sentencing.
  - ix. The guidelines would be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They would also apply to sentences imposed under section 204 of the Penal Code before the decision in Muruatetu.

### Forest land is not available for reallocation.

Pati Limited v Funzi Island Development Limited & 4 others [2021] eKLR

Petition 37 of 2019

Supreme Court of Kenya

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

July 16, 2021

Reported by Beryl Ikamari

**Land Law - nature of land - forest land - difference between forest land and trust land - claim that Proclamation No 44 of 1932 declared disputed land as a mangrove forest - whether Proclamation No 44 of 1932 was still in effect by virtue of the provisions of the Third Schedule of the Forest Conservation and Management Act - whether the disputed land was forest land which was unavailable for reallocation - Forest Conservation and Management Act No. 34 of 2016, section 77.**

**Land Law - trust land - setting aside of trust land - applicable legal requirements - whether the setting aside of purported trust land while changing the size of the land to be set aside and the purpose of the setting aside without effecting legal instrument reflecting those changes meant that the land had been set aside irregularly - Constitution of Kenya (repealed) sections 115 and 117(1)(c).**

#### Brief facts

A dispute arose when the Commissioner of Lands, for and on behalf of the County Council of Kwale allocated land to the appellant while the 1<sup>st</sup> to 3<sup>rd</sup> respondents contended that it was forest and public land. They sought orders of *certiorari* to set aside the land allocation and orders of prohibition to prevent the appellant from engaging in dealings with the land. The 4<sup>th</sup> and 5<sup>th</sup> respondents argued that the land was Trust Land and the legal procedures relating to its allotment under the Trust Land Act had been complied with. An issue was raised as to whether the 1<sup>st</sup> to 3<sup>rd</sup> respondents had *locus standi*. On the issue of *locus standi* the court held that it was the Minister in Charge of forests that could challenge the allocation. The High Court dismissed the application. It stated that the 1<sup>st</sup> to 3<sup>rd</sup> respondents did not prove that the

land was forest land.

The decision of the High Court on the issue of *locus standi*, on whether the land was trust land or forest land and on whether the legal requirements for allotment of the land had been complied with, was challenged by the 1<sup>st</sup> to 3<sup>rd</sup> respondents at the Court of Appeal. The appeal was unanimously allowed and an order quashing the allocation of the suit land to the appellant was granted.

The appellant lodged an appeal at the Supreme Court.

#### Issues

- i. When would land be deemed to be forest land?
- ii. When would legal requirements regarding the setting aside of trust land to third parties have been complied with?

#### Held

- 1. Section 4 of the Forests Ordinance, Cap 176, allowed for proclamations that any areas of native land would be forest land. Under Proclamation No 44 of 1932, mangrove swamp forest reserves were declared as all land between high water and low water marks (ordinary spring tides) in the localities as described below, viz on the mainland and islands adjacent to the coast from Chale Point in the North, to the boundary of the Trust Territory of Tanganyika in the South. Subsequently, under Legal Notice No 174 of 1964, mangrove swamp forests in Mombasa, Kwale, Lamu and Kilifi Districts were declared as comprising those pieces of land approximately 111.366 acres, situated between the high and low water marks on the coast of

- Kenya, which were declared to be forest areas by Proclamation No 44 of 1932.
2. The Forest Act, Cap 385, was enacted in 1942 and revised in 2012 and under section 4 it provided that the Minister could by notice in the gazette declare any unalienated government land to be a forest area. In the subsidiary legislation to the Forest Act, Cap 385, all proclamations under section 4 of the Forest Act, Cap 385, were omitted, by virtue of section 5 of the Revision of the Laws Act.
  3. The Forest Act, Cap 385, was repealed by the Forest Act No. 7 of 2005 while the latter was repealed by the Forest Conservation and Management Act No. 34 of 2016. It should be noted that Proclamation No. 44 of 1932 was not made under the Forest Act, Cap 385. The Proclamation was made under the provisions of the Forests Ordinance Cap 176, which was not one of the laws repealed by the Forest Act Cap 385, the Forest Act No 7 of 2005 or the Forest Conservation and Management Act No. 34 of 2016. Of significance, was the fact that the Minister, never degazetted the suit land as a mangrove forest. A clear reading of section 5 of the Revision of Laws Act, left no doubt that Proclamation No. 44 of 1932 could not have formed part of the contents of that which was omitted by section 4 of the Forests Act, Cap 385.
  4. Section 77 of the Forest Conservation and Management Act No. 34 of 2016, were to the effect that any land that was a forest or nature reserve under the repealed Act had to be deemed to be a state or local authority forest or nature reserve under the succeeding Act. Under the Third Schedule of the Forest Conservation and Management Act public forests included swamp forests declared as such under Notice No 44 of 1932. The word "Notice" therein made reference to "Proclamation" and it could only be referring to Proclamation No 44 of 1932. Therefore, the legal status of mangrove forests as declared in Proclamation No. 44 was saved by the Third Schedule of the Forest Conservation and Management Act.
  5. The status of the suit land was as a matter of law declared in Proclamation No. 44 of 1932, and subsequently in Legal Notice No. 174 of 1964, and the said land was situated between the high and low water-mark on the Coast of Kenya. The inescapable conclusion was that the suit land fell within the frontiers of what constituted a mangrove forest as per the Proclamation. The same could therefore, not have been available for allocation within the meaning of the repealed Constitution or the Trust Land Act.
  6. Section 115 of the repealed Constitution vested all trust land within the jurisdiction of any County Council in the County Council for the benefit of the residents in that land. Section 117 (1)(c) of the repealed Constitution provided that trust land could be set aside by the County Council for use and occupation by any person or persons for a purpose which in the opinion of that County Council was likely to benefit the persons ordinarily resident in that area or any other area of Trust land vested in that County Council, either by reason of the use to which the area so set apart was to be put or by reason of the revenue to be derived from rent in respect thereof.
  7. If the land in question had been trust land, it would not have been allocated in compliance with the law. Gazette Notice 3831 of 1994 specified the size of the land to be allocated as 0.7 hectares and the Msambweni Land Control Board gave consent to set aside the same 0.7 hectares but the size of land set aside was 3.126 hectares. Further, contrary to section 7(3) of the Trust Land Act (repealed) Gazette Notice No. 3831 of 1994 did not specify a date before which applications for compensation were to be made to the District Commissioner. Lastly, while there was no notice for change of purpose of setting aside, the land which was set aside for use as a boat landing base had a five-star hotel constructed on it.

*Petition of Appeal dismissed. Appellant to bear costs of appeal.*

## **The Declaration of an Act as Unconstitutional by the Courts did not Prohibit Parliament from Subsequent Enactment of Law that would Repeal the Impugned Unconstitutional Act.**

Institute of Social Accountability & another v National Assembly of Kenya & 3 others [2021] eKLR

Petition No. 1 of 2018

Supreme Court of Kenya

**P.M. Mwilu, DCJ & VP; MK Ibrahim, SC Wanjala, NS Ndungu & W Ouko, SCJJ**

August 6, 2021

*Reported by John Ribia*

**Evidence Law – judicial notice – judicial notice of the Hansard – applicability of the Hansard in proceedings before a court of law - whether courts could make reference to the Hansard while making judicial determinations.**

**Constitutional Law – separation of powers – Legislature – parliamentary privilege – extent of parliamentary privilege - whether parliamentary privilege extended to acts that could be considered a violation of the Constitution.**

**Legal Systems – Acts of Parliament – constitutionality of Acts of Parliament – where an Act had been declared unconstitutional – whether the declaration of a law as unconstitutional by the courts prohibited Parliament from subsequent enactment of law that would repeal the impugned unconstitutional Act.**

**Civil Practice and Procedure – appeals – hierarchy of courts – where an issue was pending before the High Court but a party was seeking determination of the issue in a higher appellate court - whether a party could seek determination of a matter that was still pending in the High Court at the Supreme Court.**

### **Brief Facts**

The petitioners moved to the Supreme Court *vide* a petition of appeal that sought to overturn the judgment and orders of the Court of Appeal save for the declaration that sections 24(3)(c) and (f) and 37(1)(a) of the Constituencies Development Fund Act, 2013 violated the principle of separation of powers. In essence, they sought to invalidate the Constituencies Development Fund Act 2013 as amended by the Constituencies Development Fund (Amendment) Act 2015 for various reasons stated in the petition. On its part, the 1<sup>st</sup> respondent filed a notice of cross appeal that sought to uphold the Court of Appeal's decision.

The petitioners filed an application that sought leave to attach additional evidence, being copies of the Hansard which were not available to them at the time of filing the petition of appeal. The petitioners claimed that the additional evidence removed any vagueness or doubt over the case and had a direct bearing on the main issue in the suit and the

respondents could easily respond to and the Court could as well take judicial notice of the evidence. Further, that the additional evidence fit the issues framed in the petition relating to the Constituency Development Fund Act offending the division of functions, principles of public finance and division of revenue.

The respondents objected to the application on grounds that the additional evidence was not directly relevant to the matter and that the petitioners should not be allowed to patch up points that they had not raised at the trial court at the appellate court.

### **Issues**

- i. Whether courts could make reference to the Hansard while making judicial determinations.
- ii. Whether parliamentary privilege extended to acts that could be considered a violation of the Constitution.
- iii. Whether the declaration of a law as unconstitutional by the courts prohibited Parliament from subsequent enactment of law that would repeal the impugned unconstitutional Act.
- iv. Whether a party could seek determination of a matter that was still pending in the High Court at the Supreme Court.

### **Held**

1. Under section 60(1)(b) of the Evidence Act, the courts had to take judicial notice of the general course of proceedings and privileges of parliament, but not the transactions in their journals. It was not uncommon for courts to make reference to the Hansard in making their determinations as they had done in the past. As elected representatives of the citizens, there was public interest in allowing citizens to access proceedings of Parliament which included broadcast to the public particularly under the dispensation of the Constitution of Kenya, 2010. Such proceedings were reduced into a Hansard that was readily accessible to the public which could explain why the petitioners had ready access to it, notwithstanding that it was

- not an original or a certified copy.
2. Parliament in Kenya could not enjoy privilege, immunities and powers which were inconsistent with the fundamental rights guaranteed in the Constitution. Thus, whereas parliamentary privilege was recognized, it did not extend to violation of the Constitution hence Parliament could not flout the Constitution and the law and then plead immunity; where a claim to parliamentary privilege violated Constitutional provisions, the court's jurisdiction would not be defeated by the claim to privilege; that the concept of statutory finality did not detract from or abrogate the Court's jurisdiction in so far as the complaints made were based on violation of Constitutional mandates or non-compliance with rules of natural justice; that whereas the people of Kenya gave the responsibility of making laws to Parliament, and such legislative power had to be fully respected, the courts could however interfere with the work of Parliament in situations where Parliament acted in a manner that defied logic and violated the Constitution.
  3. The parliamentary privileges and immunities were not absolute in the event of a valid grievance by a litigant based on the violation of the Constitution. The petitioners had brought action against the National Assembly alleging infringement of the Constitution. At the instant juncture, before the appeal was heard, the court could not say that Parliament had violated the Constitution in debating or expressing itself on any legislative action. That issue had to await the hearing and determination of the appeal and parties allowed to respond to the new evidence, if at all it was eventually admitted.
  4. The proposed additional evidence was subject to litigation before the High Court in which the petitioners were involved. There was no justification for destabilizing the same to enable the Supreme Court to render itself, as the apex court, on an issue that could otherwise end up before it using the normal litigation and appellate channels. The evidence sought to be introduced would be best interrogated in those pending litigations before the High Court and subsequently through appeal should it have come to that.
  5. The relevance of the debates to the appeal was not readily apparent to the deponent. The instant proceedings did not relate to the Constitutionality of the National Government Constituency Development Fund and the Division of Revenue Bill 2021. A perusal of the issues for determination and reliefs sought in the petition of appeal and the notice of cross appeal before the Supreme Court revealed that the remedies sought related to the constitutionality of the Constituency Development Fund Act, 2013.
  6. While the High Court had declared the Constituency Development Fund Act as unconstitutional, the order of invalidity was suspended for a period of 12 months and the National Government was allowed to remedy the defect within the suspension of invalidity period or by repeal whichever came first. That did not prevent Parliament from subsequent enactment of law that would repeal the impugned Constituency Development Fund Act 2013. The National Government Constituency Development Fund Act was enacted in that context.
  7. The Constitution gave recourse for any party to challenge the Constitutionality of any laws to the extent of the contravention. The petitioners were engaged in challenging the National Government Constituency Development Fund Act before the High Court as alluded to earlier in the ruling.
  8. The additional evidence should have been admitted. Introducing evidence seven years after the time the Constituency Development Fund Act was enacted in 2013 and to seek that such evidence be considered in determining the Constitutionality of the 2013 statute was quite inappropriate as it not only introduced fresh facts but also introduced them at the penultimate stage of the proceedings before the apex court. That was compounded by the fact that the main appeal was ready for hearing. The interests of justice were better served in having the appeal disposed with expeditiously.

*Application dismissed, costs would abide with the outcome of the main appeal*

# High Court

**The rights to human dignity and fair administrative action of an employment candidate were violated by an employer who invited him for interview without having the software necessary to evaluate and enable the candidate to work.**

Wilson Macharia v Safaricom Plc [2021] eKLR

Petition 434 of 2019

High Court at Nairobi

**JA Makau, J**

July 8, 2021

*Reported by Beryl Ikamari*

*Labour Law - employment - recruitment - persons with disability - reasonable accommodation for persons with disability - where an employer was unable to fully evaluate a candidate with visual impairment due to a failure to acquire the necessary software - whether a candidate who was invited for an interview by an employer who knew that it lacked the means to fully evaluate the employee was treated fairly - Constitution of Kenya 2010, article 47; Convention on the Rights of Persons with Disability, article 2; Persons with Disability Act, No 14 of 2003, section 12.*

*Constitutional Law - fundamental rights and freedom - right to dignity, right to fair administrative action and right to equality and freedom from discrimination - differential treatment - where an employer lacked software to evaluate and enable a visually impaired candidate to undertake his duties but nonetheless invited the candidate and allowed him to undergo the full recruitment process but later withdrew a letter of offer of employment on grounds that it was issued erroneously - where a visually impaired employment candidate failed to show that he had been treated differently from other visually impaired candidates - whether the employment candidate was discriminated or had his rights to fair administrative action and dignity violated - Constitution of Kenya, 2010, articles 47, 27 and 28.*

## Brief facts

The petitioner alleged that the respondent denied him an employment opportunity on the basis of having a disability. He further stated that the respondent's actions breached his rights to equality and freedom from discrimination and his rights to dignity. He also alleged that the respondent had breached sections 12(1), 12(2), 15(1) and 15(2) of the Persons with Disabilities Act as well as article 1 and 27(1)(a) of the Convention on the Rights of Persons with disabilities.

The respondent explained that the petitioner and other persons with disabilities were amongst

the candidates shortlisted for an employment opportunity. The petitioner was unable to take the SHL Computerized aptitude test as he was visually impaired and he was asked to proceed to the oral phase of the interview as the respondent arranged for the aptitude test.

Despite not having undertaken the technical part of the interview, the petitioner was invited to undergo a medical test. There were no special facilities or modifications that could enable the petitioner to undergo the technical part of the interview. Upon making inquiries, the petitioner was informed that the medical test was for readiness for when the respondent would have adequate software to enable the petitioner to take the technical test. On September 7, 2017, the petitioner received a letter to join the respondent as a Trainee Customer Experience Executive. He was to undergo an eight week induction and training session starting from September 11, 2017 in Eldoret. Thereafter, the respondent argued that the offer made to the petitioner was an inadvertent error. Among the reasons as to why it was an error was that the petitioner had not sat and passed the technical and oral interview and he could not expect an appointment without having done so.

The respondent explained that despite the fact that it had employed its best efforts, it had not been able to integrate its customer service platform with the requisite software to enable the petitioner to work as a Customer Experience Executive.

## Issues

- i. Whether it was possible for a visually impaired person to be employed where an employer failed to acquire the software that would enable that person to work.
- ii. Whether an employment candidate who was invited for an interview by an employer, who could not fully evaluate him due to lack of

software and later withdrew a letter of offer of employment on grounds that it had been issued erroneously, had been discriminated and had his rights to dignity and fair administrative action violated.

### Held

1. Diligent efforts had been made to have a system integration software that could allow visually impaired persons to work as Customer Experience Executives. Unfortunately, the respondent explained that such software integration was not possible due to conflicting software configurations that could arise. Therefore, the respondent's failure to provide reasonable accommodation to the petitioner was a failure to provide an opportunity to the petitioner on account of lack of software but not on account of his visual disability and as such there was no infringement of the petitioner's rights to equality.
  2. The respondent failed to demonstrate that it was impossible to employ the petitioner because he was visually impaired. Sight was not necessary for purposes of operating and working while using a computer in modern society.
  3. Under article 2 of the Convention of the Rights of Persons with Disability, reasonable accommodation meant necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure persons with disabilities enjoyed or exercised on an equal basis with others all human rights and fundamental freedoms. If the respondent had employed the petitioner, it would have had to make adjustments to its entire system and that was not viable in the short run due to budgetary constraints. However, the respondent could have ensured that there was an available alternative to cater for the interviewee with visual impairment.
  4. The respondent knew that the petitioner required software in order to work and allowed the petitioner to undergo the internal recruitment process. The idea that the respondent was unable to install the software was introduced as an afterthought. The petitioner was invited for induction as a successful candidate but was rejected when he reported for the induction and training. That subjected the petitioner to ridicule and humiliation amongst other candidates and it lowered the petitioner's dignity.
  5. The failure to provide the software needed by the petitioner at the time of recruitment was a violation of the petitioner's right to fair administrative action. Under article 47 of the Constitution everyone had the right to administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair.
  6. The respondent failed to meet its statutory obligation under section 12 of the Persons with Disability Act to ensure that there was reasonable accommodation of the persons with visual disability like the petitioner. The respondent was accommodative of the petitioner who was allowed to go through all stages of recruitment process except for technical evaluation that required the special software which respondent had not acquired.
  7. The petitioner had not shown how he was discriminated; he had not shown that a visually impaired person was favoured by the respondent while he was discriminated. He did not show that he was given differential treatment compared to other candidates on the basis of disability. No evidence was tendered to show that the respondent discriminated against the petitioner.
  8. The respondent had a duty to act fairly. It invited the petitioner for interviews while knowing that it lacked special facilities or modifications which were required or necessary at the workplace to accommodate the petitioner. The petitioner could not fully be evaluated at the interview stage due to the respondent's failure to procure the necessary software. The respondent then erroneously issued the petitioner with a letter of offer and the manner in which the offer was withdrawn did not comply with article 47 of the Constitution.
  9. The respondent did not provide reasons to the petitioner as to why it acted the way it did. The respondent had not acted fairly from the time it invited the petitioner for the interview and when the letter of offer was withdrawn on grounds that it had been issued erroneously.
  10. The petitioner had demonstrated that its rights to dignity under articles 48 and 54(1) had been violated and the petitioner was entitled to compensation amounting to Kshs. 6, 000, 000.
- Petition allowed with costs to the petitioner.*

## **Audio-visual recordings of a deceased person's wishes cannot be used to revoke a written will.**

In re Estate of Kevin John Ombajo (Deceased) [2021] eKLR

Succession Cause 555 of 2018

High Court at Nairobi

LA Achode, J

July 7, 2021

*Reported by Beryl Ikamari*

***Succession Law - probate - validity of a will - testamentary capacity - whether the maker of a will was of sound mind - whether allegations that a deceased person was too ill to understand things and was amenable to manipulation and misguidance at the time that an alleged will was made, were established in evidence - Law of Succession Act, cap 160, section 5.***

***Succession Law - probate - validity of a will - validity of an oral will that was intended to make changes to a written will - where the maker of an oral will died seven months after the making of the oral will - whether an oral will could revoke a written will - whether audio-visual recordings made seven months before the death of a deceased person met the legal threshold for a valid oral will - Law of Succession Act, cap 160, sections 8, 9, 11 and 18(2).***

### **Brief facts**

The petitioner was the wife to the deceased who died testate. She filed a petition for probate of the written will dated February 20, 2012, in which she was a joint executrix with the deceased's sister. Her efforts to file a joint petition with her co-executrix were unsuccessful but, in her petition, she sought for the probate of the deceased's will to be granted to them jointly.

The respondent opposed the petition and filed an objection and a petition by way of cross application. In the application she sought a grant of representation of the deceased's estate on grounds that the deceased's last will was recorded in an audio-visual medium on December 23, 2016 and that the written will dated February 20, 2015 stood revoked.

### **Issues**

- i. What were the circumstances in which the maker of a would lack testamentary capacity on grounds related to soundness of mind?
- ii. Whether an audio-visual recording, meant to make changes to a written will, met the legal requirements of a valid oral will and could revoke a written will.

### **Held**

1. The Law of Succession Act did not provide for audio-visual recordings. However, the Evidence Act under sections 78A, 106A and

106B provided for the conditions upon which electronic records were admissible in court. The electronic evidence tendered met the conditions for admissibility set out under section 106B (2) of the Evidence Act.

2. The audio-visual recording had to be tested strongly against the well-established principles of wills. The validity of a will was dependent on the capacity of its maker and whether it was made in proper form. The law on testamentary capacity was set out in section 5 of the Law of Succession Act. The maker of a will ought to be a person of sound mind and not a minor.
3. Under section 5 of the Law of Succession Act, the soundness of mind of the maker of a will had to be presumed unless at the time of executing the will the maker was in a state of mind, whether arising from mental or physical illness, drunkenness, or from any other such cause, as not to know what he was doing. The burden of proving that the maker of a will was not of sound mind lay on the person alleging that the deceased lacked such capacity.
4. The petitioner's allegation that at the time the audio-visual recording was made the deceased was too ill to understand things and was amenable to manipulation and misguidance was not supported by evidence. No report by a medical officer or other professional was tendered to prove the allegations. The witnesses present during the recording session said that the deceased had clarity of thought and they believed that he was of testamentary capacity even though he had lost his sight.
5. Section 8 of the Law of Succession Act provided that a will could either be written or oral. The deceased had a written will dated February 20, 2015. As required under section 11 of the Law of Succession Act, that written will was executed by the deceased and attested by two witnesses. The contents of the written will and the deceased's testamentary capacity at the time of executing the will were not challenged.
6. The making of the audio-visual recording was for purposes of making changes to the will of

February 20, 2015. The recordings were made on December 23, 2016. The question that arose was whether audio-visual recordings qualified as an oral will. Under section 9 of the Law of Succession Act an oral will had to be made before two competent witnesses and the testator had to die within three months of the making of the will. The audio-visual recording was made before three witnesses but the deceased died seven months after the recording.

7. Sections 17 and 18 of the Law of Succession Act provided for the revocation of wills. Under section 18(2) of the Law of Succession Act, a written will could not be revoked by an oral will.
8. The audio-visual recordings made by the deceased in December 23, 2016 were intended to be a will and they were to be reduced into

writing and witnessed before Christmas but the deceased died before that could be done. Although there was an attempt at making a will, the legal threshold enabling it to be considered as a valid will capable of being enforced by the court, was not met.

*Objection dated August 1, 2018 and cross-petition dated August 20, 2018, were dismissed. Petition for probated dated April 16, 2018 allowed.*

Orders: -

- i. *That the will executed by the deceased herein dated February 20, 2015 was declared to be valid will of the deceased.*
- ii. *That distribution of the deceased's estate was ordered to in terms of the deceased will dated February 20, 2015.*
- iii. *No orders as to costs.*

## Due process requirements and forfeiture proceedings under section 68 of the Forest Conservation and Management Act.

Letiyia ole Maine v Republic [2021] eKLR

Criminal Appeal 40 of 2019

High Court at Narok

**FM Gikonyo, J**

July 27, 2021

Reported by Beryl Ikamari

**Criminal Procedure** - forfeiture proceedings - item used in the commission of a crime - claim that a lorry was used to carry forest produce that was removed without a permit - whether an order would be issued for the lorry to be forfeited to the State - Criminal Procedure Code, Cap 75, section 389A; Forest Conservation and Management Act, No 34 of 2016, section 68.

**Criminal Procedure** - forfeiture proceedings - due process requirements - issuance of a notice to show cause and fair hearing - whether forfeiture proceedings complied with due process requirements - Criminal Procedure Code, Cap 75, section 389A; Forest Conservation and Management Act, No 34 of 2016, section 68.

**Constitutional Law** - fundamental rights and freedoms - rights to fair administrative action, fair hearing and right to property - whether the forfeiture of a lorry used to commit a crime to the State, pursuant to a court order, was a violation of rights to fair administrative action, fair hearing and right to property - Constitution of Kenya, 2010, articles 47, 50 and 40.

### Brief facts

An accused person was charged with the offence of removal of forest produce contrary to section 64(1) (a) as read with section 68(1) of the Forest

Conservation and Management Act. It was alleged that he had ferried 250 pieces of cedar posts from Loita Forest without a permit from the chief conservator of forests, Narok. Pursuant to section 389A of the Criminal Procedure Code, the owner of the lorry which was used to ferry the forest produce was summoned by the trial court to show cause why the lorry should not be forfeited to the state. The owner of the lorry appeared in court to show cause why his lorry should not be forfeited. The trial court made the decision that the lorry should be forfeited to the state. The lorry's owner lodged an appeal against the forfeiture decision.

The appellant premised his appeal on grounds that the trial court made a premature forfeiture order based on unreliable evidence from the prosecution. Additional grounds were that the appellant was not party to the offence that caused the lorry to be forfeited and that the trial court failed to inquire into the ownership of the lorry before making the order. He argued that he did not consent to the lorry being used to carry forest produce.

### Issues

- i. What were the key elements to be proved in proceedings for the forfeiture of an item used in the commission of a crime?

- ii. What were the due process requirements applicable to forfeiture proceedings?
- iii. Whether the issuance of a forfeiture order against an item used in the commission of a crime was a violation of rights to fair administrative action, fair hearing and property.

**Held**

1. Forfeiture was divesture or confiscation of one's property in consequence of a crime, offense or breach of obligation. The UN Nations Convention against Corruption (UNCAC) defined confiscation as the permanent deprivation of property by order of a court or other competent authority.
2. Under section 24(f) of the Penal Code, forfeiture was one of the punishments that a court could inflict. Forfeiture divested a person's property without compensation and it was necessary to ensure that the process leading to forfeiture adhered to the requirements of due process to avoid claims of violations of the right to property, right to privacy, right to fair administrative action, and right to fair trial guaranteed in article 40, 31, 47 and 50 of the Constitution, respectively.
3. Due process safeguards applicable before a forfeiture order was made included a notice that had essential details *inter alia* of the time and place of the forfeiture proceedings and the property to be forfeited. The notice would be issued to the person who was affected by the forfeiture requiring that person to attend the forfeiture hearing and determination. The court had to conduct an inquiry or hearing for forfeiture and the affected person would have a chance to participate in the forfeiture proceedings and tender evidence to show cause why the property should not be forfeited. The affected person could appear through legal counsel or in person.
4. In addition to imposing a fine or imprisonment for the commission of an offence, under section 68 of the Forest Conservation and Management Act, the trial court could order that the vessels, vehicles, tools or implements used in the commission of the offence be forfeited to the Service. Such an order of forfeiture could only be made after the owner of the property which was the subject of forfeiture, was given notice and an opportunity to show cause why the item should not be forfeited. The owner of the property could be the person accused of the crime in which that property was used or a third party.
5. In proceedings for forfeiture under section 68 of the Forest Conservation and Management Act where a principal-agent or employer-employee relationship between an accused and a third party had been claimed, mitigating explanations or evidence on whether the crime in which certain property was used was committed without the wilful negligence or any blameworthiness on the part of the owner of the property was an important consideration.
6. The State bore the burden of proving that the lorry, which was the property that was subject to forfeiture proceedings, was used to unlawfully remove forest produce under the terms of section 64 of the Forest Conservation and Management Act. The opportunity to be heard under section 68 of the Forest Conservation and Management Act was to be complimented by the procedure set out in section 389 A of the Criminal Procedure Code on forfeiture meaning that a forfeiture determination should not be made unless the indictment or information contained notice to the owner of the vessel or vehicle. Forfeiture could also be sought under section 24 of the Penal Code.
7. Notice was duly given to the applicant to show cause why the lorry should not be forfeited. He also appeared through counsel and made presentations. The court conducted a proper forfeiture inquiry and hearing.
8. The key elements in an application by the State for forfeiture in criminal proceedings were that:
  - 
  - a) The state had to establish the requisite nexus between the property and the offence.
  - b) The court's determination could be based on evidence already on record including any plea and/or adduced evidence accepted by the court as relevant.
  - c) If the court sought to forfeit a specific property, a notice of the order had to be sent to any person who reasonably could appear to be a potential claimant with standing to contest the forfeiture in the proceedings.
  - d) That was more so when in practical terms the seized property would be in the hands of an agent, employee, or servant of the person with a proprietary interest or right.
9. Evidence showed that the appellant was the registered and beneficial owner of the lorry in question and that the accused person was the designated driver of the lorry. Additionally, there was evidence showing that the lorry was used in the commission of a crime for which the

- driver was charged and convicted. Therefore, the State established a nexus between the lorry and the commission of the offence.
10. There was evidence that the lorry had previously been used to carry forest produce unlawfully and that it was released to the owner with a warning. That prior incident provided evidence towards culpable wilful negligence on the part of the owner of the lorry.

11. The forfeiture order was proper, correct and regular. It was issued in accordance with the requirements of due process and it was not a violation of the right to fair administrative action, or fair hearing or property rights under article 47, 50 and 40 of the Constitution, respectively.

*Appeal dismissed.*

## Jurisdiction of the Kadhi's Court is not limited in monetary terms or by the value of an estate property in a succession suit

In re Estate of Wario Guracha Dambi (Deceased) [2021] eKLR

Misc Succession Cause No. E002 of 2021

High Court at Marsabit

**JN Njagi, J**

July 8, 2021

*Reported by Kakai Toili*

**Jurisdiction – jurisdiction of the Kadhi's Court – limitations on the jurisdiction of the Kadhi's Court – whether the Kadhi's Court was limited in monetary terms or by the value of the estate property in a succession suit – what were the options available to a party who did not wish to submit to the authority of the Kadhi's Court – Constitution of Kenya, 2010, article 170; Kadhi's Court Act, Cap11, section 5.**

### Brief facts

The applicant filed the instant application seeking for among others, orders that any grant of letters of administration issued in the estate of the deceased herein in Marsabit Succession Cause No.E003 of 2021 (succession cause) be revoked and that the succession cause be referred to the High Court for hearing and determination. The applicant claimed that the Kadhi's Court in the succession cause did not have pecuniary jurisdiction to deal with the suit properties which were over Ksh.50 million shillings.

The 1<sup>st</sup> respondent opposed the application and deposed that the Kadhi's Court had jurisdiction to deal with the matter as it involved a question on inheritance of the estate of a deceased Muslim. Further, the 1<sup>st</sup> respondent claimed that there was no limitation on the pecuniary jurisdiction on the Kadhi's Court as the applicable substantive law was the Holy Quran. The 1<sup>st</sup> respondent submitted that the applicant had not objected to the jurisdiction of the Kadhi's Court before that court itself but had instead filed all his replies to the petition and even an application for an injunction, only for him to rush to the instant court to challenge the jurisdiction of the Kadhi's Court before the ruling on the injunction was delivered.

### Issues

- What were limitations set by the law on the jurisdiction of the Kadhi's Court?
- Whether the Kadhi's Court was limited in monetary terms or by the value of the estate property in a succession suit. What were the options available to a party who did not wish to submit to the authority of the Kadhi's Court?

### Relevant provisions of the law

#### Constitution of Kenya, 2010

##### Article 170(5)

*The jurisdiction of a Kadhi's court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts.*

#### Kadhi's Court Act, Cap11 Laws of Kenya

##### Section 5

*A Kadhi's court shall have and exercise the following jurisdiction, namely the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion; but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it.*

##### Held

- Jurisdiction was the starting point on every judicial determination. For a court of law to entertain a matter when not ceased of jurisdiction was an exercise in futility. Neither could the court arrogate unto itself jurisdiction that it did not have. The jurisdiction of each

- court flowed from either the Constitution or legislation. The jurisdiction of the Kadhi's Courts was established under article 170 of the Constitution of Kenya, 2010 (Constitution) and was replicated in section 5 of the Kadhi's Court Act, Cap11 Laws of Kenya.
2. The only limitation set by the law on the jurisdiction of the Kadhi's Court was the subject matter of the claim or dispute (that was whether the matter related to personal status, marriage, divorce or inheritance of a Muslim), whether both parties professed the Muslim faith and the choice on whether or not both parties submitted to the jurisdiction of the Kadhi's Court. There was no requirement of the value of the subject matter both under the Constitution and under the Kadhi's Act. The court could not thereby set a limitation on what was not provided for by the law.
  3. The Kadhi's Court was not limited in monetary terms or by the value of the estate property. In any case there was no valuation report produced to ascertain the estimated value of the estate. The argument that the value of the estate in the matter under consideration was beyond the monetary limit of the Kadhi's Court connoted wrong interpretation of the law. The Kadhi's Court had the pecuniary jurisdiction to entertain the subject matter.
  4. Article 170(5) of the Constitution gave a party the choice on whether or not to submit to the authority of the Kadhi's Court. A party who did not wish to submit to the authority of the
- Kadhi's Court had, by dint of provisions of section 5 of the Kadhi's Court Act, the option of taking the matter to the High Court or a Magistrate's Court that had jurisdiction to entertain succession matters.
5. The parties in the subject succession cause were Muslims. It related to inheritance in accordance with Muslim law. It did not matter that the subject matter of the succession cause was land. The matter was therefore properly before the Kadhi's Court. If the Kadhi's Court had made any irregular orders in the succession cause that could be dealt with through other provisions of the law such as review or appeal.
  6. There was no evidence placed before the court that the applicant declined to submit to the authority of the Kadhi's Court at Marsabit. His supporting affidavit did not mention anything to that effect. It was only his advocate who in his submissions stated that the applicant did not agree to so submit. Those were only statements made from the Bar that were of no effect.
  7. The applicant had submitted to the authority of the Kadhi's Court by responding to the petition. The act of the applicant in filling the instant application when he had already submitted to the authority of the Kadhi's Court was an abuse of the process of the court. The Kadhi's Court had the requisite jurisdiction to entertain Marsabit Succession Cause No. E003 of 2021.

*Application dismissed with costs to the 1<sup>st</sup> respondent.*

## **Section 5 of the Public Order Act is unconstitutional as it places unjustified limitations on the enjoyment of several fundamental rights and freedoms.**

Law Society of Kenya v Attorney General & another [2021] eKLR

Constitutional Petition E327 of 2020

High Court at Nairobi

**AC Mrima, J**

August 18, 2021

*Reported by Beryl Ikamari*

**Constitutional Law** – construction of the Constitution- interpretation- definition of a person under the Constitution - legal status of the National Security Advisory Committee (NSAC) - where NSAC was not created by the Constitution, statute or any law - whether NSAC was a person within the Constitution - Constitution of Kenya 2010, article 260.

**Constitutional Law** - independence of a constitutional commission - the National Police Service and its Inspector General - issuance of directives to the National Police Service - whether the directives of the National Security Advisory Committee (NSAC) made on October 7,

2020 and ratified by the Cabinet on October 8, 2020, could lawfully be issued to the National Police Service for enforcement - Constitution of Kenya 2010, articles 10(2)(a), 245(2)(b) and 245(4).

**Statutes** - constitutionality of statutory provisions - constitutionality of section 5 of the Public Order Act - constitutionality of provisions related to notification to an authorized officer by an organizer of an intended public meeting or procession, the grant or denial of permission for the meeting and procession and also the offence of unlawful assembly - whether limitations placed by the statutory provisions on the enjoyment

*of constitutional rights such as freedom of conscience, religion, belief and opinion, freedom of association, freedom of expression, media freedom, right to assembly and freedom of movement were reasonable and justifiable.*

### Brief facts

The petitioner challenged the constitutionality of section 5 of the Public Order Act and the directives issued by the National Security Advisory Committee (NSAC). The petitioners questioned the legal existence of NSAC and the legality of its power to direct the 2<sup>nd</sup> respondent (the Inspector General of the National Police Service) in the enforcement of the Public Health (Covid-19 Restrictions of Movement of Persons and Related Measures) Rules, 2020, the Public Order Act and the National Cohesion and Integration Act. The petitioners stated that the directives by NSAC were a culmination of decisions made between March 15, 2020 and October 8, 2020 which were discriminatorily and selectively enforced and implemented by the 2<sup>nd</sup> respondent for purposes of combating the spread of Covid-19. The effect of those directives, according to the petitioner, was to limit the rights and freedoms of Kenyans as recognized under the Constitution.

The petitioners accused the respondents of using section 5 of the Public Order Act to suppress divergent opinions, limit freedom of expression and restrict freedom of association. The petitioners also complained that section 5 of the Public Order Act limited the rights and freedoms of opinion, expression, media, association, assembly, demonstration and campaigning for a political cause by preconditioning the exercise of those rights and freedoms to the issuance of a notice to a police officer, who was empowered to decline to grant permission for the exercise of those rights, without providing good reasons for the refusal as required under article 47 of the Constitution. The constitutionality of section 5 of the Public Order Act was also question on grounds that it permitted a police officer to disperse a peaceful meeting or procession.

The 1<sup>st</sup> respondent stated that the impugned directives were issued to ensure safety, peace and to order the attainment of national security. The 1<sup>st</sup> respondent added that the petition sought to usurp the policy preferences of the National Executive in favour of the value judgments of the court and that was contrary to the principle of separation of powers. The Attorney General (the 1<sup>st</sup> respondent) explained that section 5 of the Public Order Act provided limitations on the enjoyment of constitutional rights which were reasonable and justifiable.

On his part, the 2<sup>nd</sup> respondent stated that the directives of NSAC were lawful governmental

measures meant to combat the spread of Covid-19 and they were enforced in public interest.

### Issues

- i. Whether the National Security Advisory Committee was a State organ or person within the terms of the Constitution of Kenya 2010.
- ii. Whether, in light of the independence of the National Police Service and its Inspector General, it was lawful for the directives of the National Security Advisory Committee which were made on October 7, 2020, and ratified by the Cabinet on October 8, 2020, to be implemented by the National Police Service.
- iii. Whether section 5 of the Public Order Act, which provided for notification to an authorized officer by an organizer of an intended public meeting or procession, the grant or denial of permission for the meeting and procession and also the offence of unlawful assembly, was constitutional.

### Held

1. Under article 260 of the Constitution, a state organ meant a commission, office, agency or other body established under the Constitution. NSAC was not a state organ because the Constitution did not provide for it. NSAC was also not created by any statute or any law. However, NSAC fit into the description of a person under article 260 of the Constitution because a person was defined under the Constitution to include a body of persons whether incorporated or unincorporated. NSAC was a body of persons within the administrative structure of the National Executive.
2. The directives of NSAC were to be enforced by the National Police Service. The independence of the 2<sup>nd</sup> respondent was constitutionally recognized. Apart from the Director of Public Prosecutions, no other person, body or entity had power to give any form of directions to the 2<sup>nd</sup> respondent on how to discharge its mandate. Even the powers donated to the Cabinet Secretary under article 254(4) of the Constitution to issue directives to the 2<sup>nd</sup> respondent were limited to policy issues.
3. The Inspector General as the one in command of the National Police Service while discharging the duties of the office should not be under the direction or control of any person or authority and should not take any orders or instructions from organs or persons outside his/her ambit. The only exception was what was provided for in article 157(4) of the Constitution relating to the powers of the Director of Public Prosecutions over the Inspector General. Therefore, not even

- the NSAC, the Cabinet or the constituents of the Cabinet could give directions on how the Inspector General would discharge his duties.
4. NSAC and the Cabinet were not part of the National Police Service. The Cabinet was an independent office or organ under the Constitution just like the Inspector General. NSAC and the Cabinet issued directives and orders to the National Police Service on how to conduct its duties. The directives and orders were in contravention with the Constitution. In particular, they contravened article 10(2) (a) on the rule of law and article 245(2)(b) and 245(4) of the Constitution.
  5. The directives issued by NSAC on October 7, 2020 and ratified by the Cabinet on October 8, 2020 were unconstitutional, ineffective and void *ab initio* for directing the law enforcement officers on how to discharge their duties.
  6. The Court of Appeal in Nairobi Civil Appeal No. 261 of 2018 *Haki Na Sheria Initiative v Inspector General of Police & 3 others* made a determination that section 5 of the Public Order Act was unconstitutional. The High Court was bound by that finding of the Court of Appeal unless the decision was distinguishable. The court had its own views about the constitutionality of the impugned section 5 of the Public Order Act but found that the position of the Court of Appeal should prevail.
  7. Section 5(1) of the Public Order Act provided that nobody could hold a public meeting or procession except as provided for in the impugned section. There were two reasons why the provision could be questioned. One was that it failed to recognize that the Constitution provided for fundamental rights related to public meetings and processions and it purported to contend that it was the only provision that applied to public meetings and processions. Secondly, the provision negated any other law that was applicable to public meetings and processions.
  8. Section 5(3)(b) of the Public Order Act restricted the holding of public meetings and processions to between six o'clock in the morning and six o'clock in the afternoon. In effect, the provision excluded the holding of peaceful public meetings between six in the afternoon and five in the morning. The section criminalized meetings such as overnight prayer meetings in churches and prayers at mosques at night and early mornings because churches and mosques were public places. The provision was therefore an affront to rights such as freedom of conscience, religion, belief and opinion, freedom of association, right to assembly and freedom of movement.
  9. Under section 2 of the Public Order Act, a public meeting meant any meeting held or to be held in a public place which the public or any section of the public or more than 50 persons were permitted to attend whether on payment or otherwise. A public place was defined under the provision to mean any place to which the public or a section of the public was entitled or permitted to have access whether on payment or otherwise and, in relation to any future meeting it included any place which would be used for purposes of the meeting. According to the definition, a meeting of less than 50 persons was not a public meeting. That differentiation between a meeting of less than 50 and a meeting of more than 50 was not justifiable in an open and democratic society based on human dignity, equality and freedom. The provision infringed article 27 of the Constitution on equality and freedom from discrimination.
  10. Under section 5(4) of the Public Order Act, there was only one reason why a regulating officer could decline to allow a public meeting or procession. The reasons were that it was not possible to hold the proposed meeting or procession because there was another meeting or procession on the proposed, date, time and venue, that the regulating officer had been notified of. That position was impermissible. A regulating officer had to exercise discretion on the basis of a wide range of considerations and in line with powers and duties provided for in the Constitution, Police Act and any other law.
  11. Under section 5(7) of the Public Order Act, the organizer of a public meeting or procession had to assist the police in the maintenance of peace and order at the meeting or process. The manner in which that assistance was to be provided to the police was not defined. The police work was technical and training for it was necessary. Placing such a duty on a citizen was to an extent an abdication of duty on the part of the police.
  12. Section 5(8) of the Public Order Act allowed the police to issue orders and directions to stop or prevent the holding of a public meeting or procession and it required such orders to be obeyed. The provision granted blanket powers to the police and it could be used to issue unlawful orders. The powers had to be qualified to allow the issuance of orders and directives that were lawful. The provision was a threat

to the Constitution and the law. Since the provision was in contrast with the Constitution and the Police Act, it had to give way.

13. Section 5(2) of the Public Order Act dealt with notifying the police of the public meeting and procession. The requirement was totally in order. The police had to be notified so that they could integrate such meetings and processions in their planning.
14. The offence of unlawful assembly proscribed under section 5(10) of the Public Order Act and the offence of taking part in an unlawful assembly under Chapter IX of the Penal Code had different ingredients. The provisions of section 5(10) of the Public Order Act created confusion, uncertainty and unsettled the law in the Penal Code.
15. The Public Order Act was enacted on June 13, 1950. By then Kenya was under the colonial rule. In fact, that was the period when Kenyans began resisting the colonial rule through personalities and movements like Mekatilili wa Menza, the Mau Mau and many others. The Act was, hence, specifically designed to deal with and suppress such initiatives by the locals in the name of maintaining law and order. Section 5 of the Public Order Act could not, hence, stand in the advent of the Constitution of Kenya, 2010 which Constitution provided a robust and well-guarded Bill of Rights.
16. The Police Act, which was enacted on August 30, 2011, comprehensively covered all aspects of public order. The Police Act incorporated the relevant provisions of the Constitution in its 132 sections and the Schedules thereto.

*Petition allowed.*

*Orders:* -

- i. *A declaration that all the directives made by the National Security Advisory Committee on October 7, 2020 and ratified by the Cabinet on October 8, 2020 for the use of section 5 of the Public Order Act Cap 56 of the Laws of Kenya to contain, restrict and prohibit public gatherings, meetings and processions in the name of combating Covid-19 and containing the weaponization of public gatherings were unlawful, unconstitutional and in violation of articles 10(2)(a) and 245(2) (b) and (4) of the Constitution for directing the law enforcement officers on how to discharge their duties.*
- ii. *An order of certiorari calling into the court and quashing the entire directives made by the National Security Advisory Committee on October 7, 2020 and ratified by the Cabinet on October 8, 2020, for the use of section 5 of the Public Order Act Cap 56 of the laws of Kenya to contain, restrict and prohibit public gatherings, meetings and processions in the name of combating Covid-19 and containing the weaponization of public gatherings.*
- iii. *An order of prohibition restraining the Inspector General of Police whether by himself or any police officer under its command from taking directives from the National Security Advisory Committee and/or any other person, organ, body or entity in the manner in which the Inspector General of Police or its officers should carry out their constitutional and statutory duties save for the provisions of Articles 157(4) and 245(4) of the Constitution.*
- iv. *There were no orders as to costs as the matter was a public interest litigation.*

### **The applicable law in a situation where a vehicle was alleged to be overloaded while being driven at a national highway.**

Martin Nyongesa Barasa v Traffic Commandant & 2 others [2021] eKLR

Constitutional Petition 11 of 2019

High Court at Bungoma

**SN Riechi, J**

July 30, 2021

*Reported by Beryl Ikamari*

**International Law – East Africa Community Law - applicable law - applicability of the provisions of the East African Community Vehicle Load Control Act, 2016 - which law was applicable to a situation where a vehicle was allegedly overloaded while being driven on a national highway - East African Community Vehicle Load Control Act, 2016.**

**Constitutional Law - institution of a constitutional petition - availability of alternative remedies that**

*had not been exhausted - whether a petition was filed prematurely where alternative remedies had not been exhausted - whether a constitutional petition for enforcement of property rights for a truck that had been detained could be heard and determined where remedies available under the East African Community Vehicle Load Control Act, 2016 had not been exhausted.*

#### **Brief facts**

According to the petitioner, on December 1, 2019,

the petitioner's truck was at Kanduyi on the Bungoma - Webuye Highway, when the respondent's officers asked the petitioner's driver to alight from the truck and removed the registration plates from the truck without offering an explanation. The petitioner alleged that the conduct of the 2<sup>nd</sup> respondent's officers infringed on his rights as recognized in articles 10(1), 40(1), 40(2)(a), 40(2)(b), 47(1), 47(2), 50(1) and 50(2) of the Constitution.

The respondents explained that the petitioner's truck was intercepted by officers at Kanduyi while it was overloaded with wet sand. According to them, the driver refused to stop when flagged and they chased him but when they caught up with him, the driver abandoned the truck. The respondent stated that the number plates were removed and delivered to the Registrar of Motor Vehicles.

On March 29, 2020, the respondent alleged that the petitioner's truck was found along the Bungoma-Mumias Road without number plates in contravention of the orders given on December 1, 2019 and was towed to the Bungoma Police Station. Orders for the truck to be detained pending compliance by the owner were successfully granted in Miscellaneous Criminal Application Number 78 of 2020.

The respondents also stated that the petitioner had filed the petition prematurely as he had not exhausted the procedure provided for in section 12 of the East African Community Vehicle Load Control Act, 2016. In addition, the respondents filed a preliminary objection on grounds that the court lacked jurisdiction to handle the matter and that the petitioner's application and petition failed to comply with section 67 of the Kenya Roads Act.

#### **Issues**

- i. What was the applicable law and procedure in situations where a vehicle was found to be overloaded while in transit along a highway?
- ii. Whether a petition that was filed without exhausting available statutory remedies was filed prematurely.

#### **Held**

1. While the petitioner's truck was being driven along the Eldoret-Malaba Road, it was found to have had an excess weight of 8,000 kilograms when weighed scientifically. The truck's driver left and the 2<sup>nd</sup> respondent's officers removed its registration plates and issued Prohibition Order Number 14070. Under the First Schedule of the East African Community Vehicle Load Control Act, 2016, the road between Mombasa and Malaba was a Regional Trunk Road Network to

which the provisions of the Act were applicable.

2. Section 8(1) of the East African Community Vehicle Load Control Act, 2016, required a transporter of a vehicle with a gross weight of 3,500 kilograms or more to present the vehicle for weighing at every weighing station situated along the Regional Trunk Road traversed by the vehicle. Under section 17 of the East African Community Vehicle Load Control Act, 2016 where a vehicle was found to be overloaded by an authorized officer, the officer had to issue a weighing report setting out the overload particulars and the amount of overload fees payable. The officer was required to disallow the vehicle to continue the journey unless the load was redistributed to comply with the load limit or the vehicle was offloaded to allow it to carry weight that was of a permissible load limit. The transporter was required to sign and acknowledge the weighing report in the prescribed manner and was liable to pay overload fees which were recoverable as a summary debt by the national roads authority of the fact of overloading was not disputed.
3. When the fact of overloading was disputed, an authorised officer would indicate the dispute in the weighing report and the transporter who received the report, could pay the overloading fees on a without prejudice basis to secure the release of the vehicle. The transporter could also make the necessary adjustments to the load as directed by the authorized officer and lodge an appeal against the fees.
4. There was no evidence that the petitioner disputed that the truck was overloaded or that he had paid overload fees. The petitioner alleged that his truck had been detained and that his rights to property had been violated.
5. There were elaborate mechanisms applicable to situations where a vehicle was allegedly overloaded in contravention of the provisions of the East African Community Vehicle Load Control Act, 2016. It was the petitioner's duty to ensure that the provisions of the Act had been complied with and that he had exhausted the remedies provided under the Act. The petitioner had not exhausted the remedies available under the Act and the petition was prematurely before the court.

*Petition dismissed with no order as to costs.*

## **The Employment and Labour Relations Court has jurisdiction to determine the constitutionality of provisions of the Employment Act, 2007**

Elias Kibathi & another v Attorney General [2021] eKLR

Constitutional Petition No. 115 of 2020

Employment and Labour Relations Court at Kisumu

MN Nduma, J

June 7, 2021

*Reported by Kakai Toili*

**Jurisdiction – jurisdiction of the Employment and Labour Relations Court** - jurisdiction to determine the constitutionality of statutory provisions - whether the Employment and Labour Relations Court had the jurisdiction to determine the constitutionality of a provision of the Employment Act, 2007 – Constitution of Kenya, 2010, articles 62(2) and 165; Employment and Labour Relations Court Act, 2011, section 12.

**Constitutional Law** - constitutional petitions - form and content - particulars to be pleaded - requirement to set out provisions of the Constitution claimed to have been infringed and the manner in which they were alleged to have been infringed - what was the effect of failure to specify articles of the Constitution alleged to have been violated by a statutory provision in a constitutional petition.

**Constitutional Law** – constitutionality of statutes – constitutionality of section 90 of the Employment Act, 2007 – where section 90 provided for a limitation period of 3 years for actions founded on contract of employment - whether section 90 of the Employment Act contradicted the Constitution – Employment Act, 2007, section 90; Limitation of Actions Act, Cap. 22, section 4(1).

### **Brief facts**

The petitioners filed the instant petition on the ground that section 90 of the Employment Act, 2007, was unconstitutional, illegal and void in its entirety or alternatively to the extent that it denied persons a right to seek an extension of time where delay in instituting a suit was excusable and to the extent that it sought to create a different period of limitation of time between contracts and contracts of service. The petitioners further claim that section 90 purported to deny persons from seeking an extension of time even where the delay in instituting a suit was excusable.

The respondent filed a preliminary objection that the court lacked jurisdiction in the matter since only the High Court by dint of articles 165(3)(d)(i) of the Constitution of Kenya, 2010 (Constitution) had jurisdiction to determine the question whether any law was inconsistent with or in contravention of the Constitution.

### **Issues**

- i. Whether the Employment and Labour Relations Court had the jurisdiction to determine the constitutionality of a provision of the Employment Act, 2007.
- ii. What was the effect of failure to specify articles of the Constitution alleged to have been violated by a statutory provision in a constitutional petition?
- iii. Whether section 90 of the Employment Act contradicted the Constitution by providing for a limitation period of 3 years for actions founded on contract of employment as opposed to other contracts.

### **Relevant provisions of the law**

#### **Employment Act, 2007**

#### **Section 90**

*Notwithstanding the provisions of Section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.*

#### **Held**

1. Article 162(2)(a) of the Constitution authorized establishment of courts of equal status with the High Court to hear and determine disputes relating to employment and labour relations. The instant court was duly established in terms of the Employment and Labour Relations Court Act, 2011, as amended in 2014. Under section 12 of that Act, the court had exclusive original jurisdiction to hear and determine matters relating to employment and labour relations. Article 165 of the Constitution established the High Court and set out its original jurisdiction.
2. The jurisdiction of courts established in terms of article 162(2) of the Constitution included interpretation and application of the Constitution of Kenya, 2010, with regard to matters related and or arising from

- employment and labour relations as set out under article 162(2) as read with section 12 of the Employment and Labour Relations Court Act.
3. A petition which sought to have a provision of Employment Act, 2007, declared null and void was a matter related to employment and labour relations. Indeed, the Employment Act, was the key legislation that governed employment and labour relations in Kenya. It was inconceivable to think of a more suited matter for hearing and determination by the court than the instant one. The court had jurisdiction to interpret the provisions of the Employment Act, *vis a vis*, various provisions of the Constitution and pronounce its legality or otherwise.
  4. The prayer in the petition lacked clarity in that it did not disclose what specific articles of the Constitution section 90 of the Employment Act violated. Matters of general limitation of actions were not canvassed in the Constitution. The question of section 90 or section 4(1) in the Limitation of Actions Act contradicting a specific provision of the Constitution did not arise.
  5. Parliament had the sole authority to legislate and derived that power under article 94(1) of the Constitution. Both the Employment Act, 2007 and Limitation of Actions Act Cap. 22 Laws of Kenya were enacted by Parliament prior to promulgation of the Constitution of Kenya, 2010. That notwithstanding, article 24(1) of the Constitution provided for the limitation of rights and fundamental freedoms.
  6. In the part titled the legal foundation of the petition, the petitioner generally referred to various articles of the Constitution without specifying which particular provision had been contradicted by section 90 of the Employment Act. One could only guess that the petitioners' reference to article 48 of the Constitution which provided that every person had the right to access justice, meant that being denied a hearing on the merits on the basis of late filing of a suit negated the right to access to justice, that did not come out at all from the pleadings by the petitioners.
  7. Pleadings ought to clearly and specifically have set out facts in order to have enabled the court to grasp what the cause of action was and what orders to have considered. The petition did not specify what articles of the Constitution that section 90 of the Employment Act had violated. The petition also did not seek a specific finding or orders to the effect that section 90 of the Employment Act violated a specific article of the Constitution. To that extent, the petition lacked precision and clarity in material respects and ought to have failed on that ground alone.
  8. Section 4(1) in the Limitation of Actions Act, Cap. 22, Laws of Kenya provided a six-year limitation period for actions founded on contract. Whereas section 90 of the Employment Act placed a limitation period of 3 years for actions founded on contract as opposed to other contracts, it was for stakeholders in the sphere of employment and labour relations who necessarily were part and parcel of the process leading to enactment of the Employment Act who intended a shorter period within which actions based on employment and labour relations should have been filed. The petitioner had not demonstrated any illegality and or unlawfulness in that respect.
  9. The Employment Act was a latter legislation and so the intention of the Legislature was clear and definitive that it intended suits emanating from employment contracts to have a shorter limitation period. Parliament had legislative authority to legislate in the manner it did provided that the legislation did not contradict a specific article of the Constitution. The provision of a shorter period under section 90 of the Employment Act did not contradict the Constitution and did not become unlawful simply because it provided a shorter period for specific contract.
  10. With regard to the issue of extension of time, Part III of the Limitation of Actions Act provided for extension of periods of limitation based on disability, acknowledgment and part payment; fraud, mistake, and ignorance of material facts, upon application for leave of court to enlarge time upon which the suit could be filed out of time. The provision of section 90 of the Employment Act did not specifically refer to Part III of Limitation of Actions Act and did not state expressly that enlargement of time, if sought on sound grounds could not be extended. The petitioner had not therefore established any unconstitutionality, illegality or unlawfulness in that regard.
- Preliminary objection dismissed; petition dismissed with no order as to costs.*

## **Legal framework applicable to contempt proceedings after the Contempt of Court Act was declared unconstitutional**

Henry Musemate Murwa v Francis Owino, Principal Secretary, Ministry of Public Service, Youth and

Gender Affairs & another [2021] eKLR

Judicial Review No. 9 of 2021

Employment and Labour Relations Court at Nairobi

**M Onyango, J**

August 6, 2021

*Reported by Chelimo Eunice*

**Civil Practice and Procedure - contempt of court - contempt of court proceedings - applicable legal framework to contempt of court proceedings - where the Contempt of Court Act had been declared unconstitutional - whether section 5 of the Judicature Act providing for the application of English law on contempt of court in force at the time of the commission of the alleged act of contempt would be applicable in the circumstances - Judicature Act, (Cap 8) section 5.**

**Civil Practice and Procedure - contempt of court - contempt of court proceedings - failure to comply with a court order - elements necessary in proving civil contempt where non-compliance with a court order was alleged - whether an applicant had established that the respondents were guilty of contempt of court.**

### **Brief facts**

The applicant asked the court to, among others, find the respondents in contempt of court orders issued on July 26, 2018 and to be subsequently committed to civil jail for a period not exceeding 6 months pending payment of the decretal sum due. The applicant argued that the court had issued an order of mandamus in his favour directing the respondents to comply with and satisfy the decree in ELRC Cause No. 564 of 2011 in the sum of Kshs. 7,033,338.00 and accrued interest standing at Kshs. 2,532,001.68 (decretal sum due). He posited that despite having been in court and having been duly served with the order of mandamus, the respondents had elected to disobey the court order and declined to satisfy the decretal sum.

The respondents opposed the application arguing that it was incurably defective and incompetent as the Ministry of Public Service and Gender Affairs ought not to be a party to the suit since the applicant was an employee at the Ministry of Lands and Housing and that the 1<sup>st</sup> respondent could not be cited for contempt. They further argued that the respondents were not liable because they were not parties to ELRC Cause No. 564 of 2011 and that the 1<sup>st</sup> respondent was no longer the Principal Secretary and thus the orders of contempt could not issue against him.

### **Issues**

- i. What was the legal framework applicable to contempt of court proceedings in Kenya?
- ii. What would a party have to prove in order to establish civil contempt in relation to a court order?

### **Held:**

1. Section 5 of the Judicature Act was one of the provisions that were repealed by the Contempt of Court Act, 2016. The Contempt of Court Act had, however, been declared unconstitutional. That being the case, all the provisions of the Contempt of Court Act, including the repeal of section 5 of the Judicature Act, became a nullity. It was as if the Contempt of Court Act was never enacted. That meant that section 5 of the Judicature Act was reinstated, thus section 5 of the Judicature Act was in force.

2. In order to succeed in civil contempt proceedings, the applicant had to prove;

- a) the terms of the order,
- b) knowledge of those terms by the respondent,
- c) failure by the respondent to comply with the terms of the order.

Upon proof of those requirements, the presence of willfulness and bad faith on the part of the respondent would normally be inferred, but the respondent could rebut that inference by contrary proof on a balance of probabilities.

3. There were essentially four elements that had to be proved to make the case for civil contempt. The applicant had to prove to the required standard, which in civil contempt cases was higher than civil cases, that;

- a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- b) the defendant had knowledge of or proper notice of the terms of the order;
- c) the defendant had acted in breach of the terms of the order; and
- d) the defendant's conduct was deliberate.

4. There was a judgment delivered by the court on August 20, 2015 in favour of the applicant. There was further a judgment delivered on July

- 26, 2018 in which the applicant's application was allowed and the court issued an order of *mandamus* directed to the 1<sup>st</sup> respondent to comply and pay the applicant the decretal sum due. The respondents were aware of the two judgments as they had been represented by counsel in all the proceedings and they filed responses in both suits.
5. The respondents' argument that they were not liable because they were not parties to ELRC Cause No. 564 of 2011 was immaterial as judgment was entered against them in JR. Misc. Application. No. 128 of 2017. In the proceedings therein, counsel for the respondents had admitted that the money was duly owed and severally promised to rally his clients to pay. It was only after the promises were not actualized that the judgment was delivered. Having admitted the debt and having not appealed or applied to set aside the judgment, the respondent's argument could not hold.
6. The argument that it was unconstitutional to hold a public officer liable to settle a public debt was incorrect. The prayers in the motion did not require the cited alleged contemnor to personally settle the debt. The prayers were that the alleged contemnor, being the accounting officer, having failed to obey the court order

requiring him, in his capacity as accounting officer to settle the debt, had failed to comply with the court order.

7. The authorities cited by the respondents in respect of personal service upon the contemnor were not valid as knowledge of court orders was sufficient. Knowledge superseded personal service. Where a party clearly acted and showed that he had knowledge of a court order, the strict requirement that personal service had to be proved was rendered unnecessary.
8. The respondents did not file any affidavit to contest the averments in the application. The averments by the respondents that the 1<sup>st</sup> respondent was not the Principal Secretary was not supported by any evidence. Submissions could not take the place of evidence.
9. The applicant had two judgments which had not been set aside. No appeal had been filed in respect thereto. The two judgments were valid. The respondents were aware of both but had, since the judgments were delivered, failed to pay.

*The 1<sup>st</sup> respondent was found guilty of disobedience of the court's orders of July 26, 2018 and was directed to appear in court on September 28, 2021 for purposes of sentencing.*

**Nature of benefits that an Acting Chief Executive Officer is entitled to.  
Jane Wanja Muthaura v Ethics and Anti-Corruption Commission [2021] eKLR**

Petition 16 of 2015

(Consolidated with E&LRC Cause 722 of 2015)

Employment and Labour Relations Court at Nairobi

**J Rika, J**

July 28, 2021

*Reported by Beryl Ikamari*

**Labour Law - employment - appointment of an Acting Chief Executive Officer (CEO) of the Ethics and Anti-Corruption Commission - where the authorisation of the Director and Assistant Directors was required before the appointment was made but the Director and Assistant Directors were unavailable as they had been relieved of their duties and their roles had been abolished - whether the appointment of the Acting CEO was legal.**

**Labour Law - employment - benefits - acting allowances, special duty allowance and responsibility allowance - allowances payable to an Acting Chief Executive Officer (CEO) who was assigned a special duty - whether the Acting CEO was entitled to an acting allowance and a special duty allowance - whether an Acting CEO was entitled to a responsibility allowance.**

**Labour Law - employment - termination - whether an employment contract that was terminated, without the issuance of notice or the giving of reasons, terminated was lawfully terminated.**

**Brief facts**

The petitioner was employed by respondent's precursor, Kenya Anti-Corruption Commission [KACC] as the Principal Officer [Finance & Accounts] on April 18, 2006. Under the Ethics and Anti-Corruption Act, the previous law was repealed and by operation of the law, the respondent's Director and Assistant Directors were relieved of their duties. The petitioner was then appointed to coordinate and oversee the respondent's affairs during the transition period. On December 2, 2011, she was appointed, in an acting capacity, to serve as the Secretary to the newly created Ethics

and Anti-Corruption Commission (EACC.) The petitioner was the Acting Chief Executive Officer (CEO) of the Commission from December 2, 2011 to September 27, 2012. On January 18, 2012, she was appointed as the Accounting Officer by the Permanent Secretary, Treasury in the Office of the Deputy Prime Minister and Ministry of Finance.

The Human Resources Department of the Commission informed the petitioner that she was entitled to an acting allowance and the allowance was processed and paid. She was also advised that in the absence of the Director of Finance and Administration she would oversee that role and would be entitled to a special duty allowance. That allowance was paid.

Two commissioners were appointed to the commission on September 27, 2012 and October 1, 2012 and the petitioner was advised to hand over the Finance and Administration Directorate to Mr. Wambua. The petitioner was an Acting CEO but she did not attend the meeting in which the handover instructions were issued. She handed over the directorate to Mr. Wambua.

The petitioner was advised that she had received allowances above what was advised by the Permanent Secretary in charge of the Public Service. That advise was reversed when it was realized that the respondent was an independent commission. Allowances were reverted back to what was in the respondent's remuneration policy. However, effective from October 1, 2012, the respondent stopped the petitioner's allowances but the rest of the coordinators continued to receive allowances.

On December 11, 2012, the petitioner was advised that a new Acting CEO had been appointed and that she had to go back to her role as Principal Officer, Finance and Accounts. It meant that the petitioner would serve under Mr. Wambua.

A new CEO was appointed on January 21, 2013. Barely one and a half months after that CEO was appointed, the CEO terminated the petitioner's contract. There was no notice or reasons given for the termination. The petitioner underwent a vetting process aimed at justifying the decision but no findings of the vetting process were provided. The petitioner alleged that the termination of her employment violated her rights to fair labour practices, fair administrative action, fair hearing, the principles of natural justice and equality and non-discrimination.

### Issues

- i. Whether an Acting Chief Executive Officer of the Ethics and Anti-Corruption Commission was lawfully appointed where her appointment included an appointment letter by the Head of Public Service.
- ii. Whether an Acting Chief Executive Officer of the Ethics and Anti-Corruption Commission was entitled to an acting allowance, a special duty allowance and a responsibility allowance.
- iii. Whether an employment contract that was terminated without notice or reasons being given was terminated lawfully.

### Held

1. It could not be disputed that the petitioner acted as the CEO of the respondent. Similarly, it could not be argued that she did not have authority or that the authority was flawed. She was the respondent's CEO and accounting officer.
2. The petitioner was entitled to an acting allowance. In the absence of a definitive transitional law on the amount to be paid as acting allowance, the Governance Manual would continue to apply.
3. Clause 7.5 of the Governance Manual provided for an acting allowance at the rate of the full difference, between an officer's salary and the minimum salary of the scale assigned to the higher post. The minimum salary of the scale assigned to the CEO was uncontested, at Kshs. 975,000 monthly. The claimant as Principal Officer earned basic salary of Kshs. 384,000. The petitioner was paid a monthly acting allowance of Kshs. 591,000 legally, under the Governance Manual. The acting allowance outstripped her basic pay as Principal Officer, but that was not prohibited in the Governance Manual or any law cited by the respondent. The huge acting allowance paid to the petitioner reflected the chasm between what was earned by the CEO and the Principal Officers. It was not contrary to the law.
4. The applicable provision on the acting allowance in the Governance Manual required the petitioner to work in an acting capacity for at least 30 days and that she should otherwise have been qualified to work in the higher post. It also required the acting appointment to be in writing, having been approved by the Director upon recommendation of the respective Assistant Director.
5. There was no Director and there were no Assistant Directors at the time of the petitioner's appointment, to discharge the function of the Director and Assistant Director under clause 7.5 of the Governance Manual. The appointment

- was in writing as shown in the letters of the Advisory Board, Permanent Secretary Treasury and Head of Public Service.
6. The Petitioner was acting in the place of the Director. She had authority to act from the Advisory Board and Permanent Secretary in the Treasury. It was not possible to fulfil the requirement that Director and Assistant Director would be involved in authorisation of the acting role. They were no longer in place, and the petitioner was discharging their role in the transition.
  7. The petitioner served as an Acting CEO. The acting allowance was payable to the petitioner and it was paid regularly.
  8. Special duty allowance was provided for under clause 7.6 of the Governance Manual. Appointment for special duty had to be in writing. The rate payable was one-third of the difference between the officer's substantive basic salary and the minimum salary of the higher post. That was calculated and paid to the petitioner at Kshs. 197, 000.
  9. The petitioner's special duty was overseeing the Finance and Administration Directorate. The petitioner discharged the special duty from September 8, 2011 to December 1, 2011 and she was paid the special duty allowance. The petitioner was entitled to the special duty allowance and it was paid regularly.
  10. The petitioner's appointment letter from the Advisory Board was buttressed by an appointment letter by the Head of Public Service. Although the Head of Public Service had no legal role on the running of the respondent, the letter came in the background of an appointment already made by the Advisory Board. The letter from the Head of Public Service did not affect the legitimacy of the acting appointment, conferred upon the petitioner by the Permanent Secretary, Treasury and by the Advisory Board.
  11. The High Court in the case of *African Centre for International Youth Exchange [ACIYE] and 2 others v Ethics and Anti-Corruption Commission & another* [2012] e-KLR (the ACIYE decision) issued orders for the petitioner to be sworn in as the Acting CEO but the respondent's commissioners disregarded the orders and appointed a new Acting CEO. The petitioner's replacement was illegal.
  12. The termination of the petitioner's employment contract was unlawful. There were no allegations made against the petitioner, there was no letter to show cause, there were no charges, there was no disciplinary hearing and no findings that the petitioner was involved in any employment offence.
  13. The termination of the petitioner's employment could be remedied under the employment Act, without the aid of the Constitution. While the petitioner's employment contract was unfairly and unlawfully terminated, the court was hesitant to conclude that the petitioner suffered constitutional violations.
  14. The petitioner had not established that she was entitled to loss of acting allowance as the Coordinator of Finance and Administration and acting allowances for October 2012 to January 21, 2013. She was not acting for the period claimed.
  15. The petitioner did show that she was entitled to responsibility allowance while acting as the CEO. The acting role did not attract payment of other benefits due to the substantive office. It was not proper to demand a responsibility allowance in addition to the acting allowance as she was not the substantive CEO.
  16. The declaratory orders sought, except for an order declaring the termination unlawful and unfair, would not add value.
  17. The petitioner's employment contract was terminated on March 28, 2013 but it was indicated that she worked up to April 2, 2013 and she was offered an additional Kshs. 39, 336 for the two days worked. The court would endorse that payment as offered by the respondent.
- Petition partly allowed.*
- Orders: -*
- i. *The claim by the respondent in the petition, under Cause Number 722 of 2015, which was consolidated with the petition herein, for a sum of Kshs. 3,012,976, costs and interest, against the petitioner was declined.*
  - ii. *It was declared that the termination of the petitioner's contract was unfair and unlawful.*
  - iii. *The respondent had to pay to the petitioner; Kshs. 39,336 as salary for 2 days worked; compensation for unfair termination equivalent of the petitioner's 12 months' gross salary at Kshs. 5,652,000; 3 months' salary in notice pay at Kshs. 1,413,000; annual leave of 18 days at Kshs. 326,076; and service gratuity at Kshs. 2,810,880 - total Kshs. 10,241,292.*
  - iv. *Costs to the Petitioner.*
  - v. *Interest allowed at court rates from the date of judgment, till payment is made in full*

## **NEMA could be held liable for violating a person's rights to a clean and healthy environment for failing to stop pollution.**

Isaiah Luyara Odando & another v National Environment Management Authority & 2 others; County

Government of Nairobi & 5 others (Interested Parties) [2021] eKLR

Constitutional Petition 43 of 2019

Environment and Land Court

**K Bor, J**

July 15, 2021

*Reported by Ribia John*

### ***Constitutional Law – social and economic rights***

*– right to a clean and healthy pollution – what were the statutory and constitutional obligations set on individuals as regards to the protection of the environment - what were the roles of the National Environment Management Authority (NEMA), county governments and the Nairobi Metropolitan Services (NMS) as regards to environmental pollution – Constitution of Kenya. 2010 article 42, 61(1)(g), 69 and 70; Environmental Management and Co-ordination Act section 3.*

***Constitutional Law – social and economic rights – right to a clean and healthy environment – factors that the court considered in determining whether a person's right to a clean and healthy environment was violated - whether an applicant that sought redress for breach or threat of breach of the right to a clean and healthy environment had to demonstrate that a person had incurred loss or suffered injury - Constitution of Kenya, 2010 article 70.***

***Environmental Law – precautionary principle – what was the precautionary principle – application of the precautionary principle - what duty did the precautionary principle set on the State or on State organs in environmental law - Environmental Management and Co-ordination Act section 2.***

***Environmental Law – disposal of water waste – onus of setting water quality standards and standards for the discharge of effluents to water bodies - which State organ had the role of establishing the criteria for measurement of water quality standards, recommending the minimum water quality standards for different purposes, analysing the conditions for the discharge of effluents, recommending measures for the treatment of effluents before they were discharged into the sewerage system –Environmental Management and Co-ordination Act (EMCA) section 71.***

***Civil Practice and Procedures – remedies – remedies for violations of social and economic rights – structural interdicts - what was a structural interdict and what did that remedy entail - whether the remedy of structural interdicts was applicable to state organs when tasked to enforce the right to a clean and healthy environment.***

***Words and Phrases – eliminate – definition of - to remove or get rid of something - The Oxford Advanced Learner's Dictionary.***

### **Brief Facts**

The petitioners' filed the instant class action suit against the National Environment Management Authority (NEMA) and all the counties that the River Tana traversed. The suit claimed that NEMA and the county governments had not stopped the pollution of the River Tana and Nairobi River, that in particular, the Nairobi Metorpolitan Service (NIMS) had not stopped the air and water pollution by the Dandora Dumpsite.

NEMA, the 1st respondent, argued that petitioners did not specify the measures to be taken under the precautionary principle to prevent the alleged pollution. They claimed that the 1<sup>st</sup> respondent had done and continued to do the best it could within its means to prevent pollution through the application of various environmental management tools and principles.

### **Issues**

- i. What was the role of National Environment Management Authority (NEMA) as regards to environmental protection?
- ii. Whether NEMA's role was limited to being an investigator and prosecutor of offenders of environmental laws.
- iii. Whether NEMA could be held liable for violating a person's rights to a clean and healthy environment by failing to stop pollution.
- iv. Which State organ had the role of establishing the criteria for measurement of water quality standards, recommending the minimum water quality standards for different purposes, analysing the conditions for the discharge of effluents, recommending measures for the treatment of effluents before they were discharged into the sewerage system.
- v. What was the role of Nairobi Metropolitan Services (NMS) and county governments as regards environmental protection?
- vi. Whether the measures taken by NMS to reduce air and water pollution in Nairobi River by commissioning the Michuki National Park were satisfactory.
- vii. What factors did the court consider in determining whether a person's right to a clean and healthy environment was violated?

- viii. What were the statutory and constitutional obligations set on individuals as regards to the protection of the environment?
- ix. What was the precautionary principle in environmental law?
- x. What duty did the precautionary principle set on the State or on State organs in environmental law?
- xi. Whether an applicant that sought redress for breach or threat of breach of the right to a clean and healthy environment had to demonstrate that a person had incurred loss or suffered injury under article 70 of the Constitution.
- xii. What was a structural interdict and what did that remedy entail?
- xiii. Whether the remedy of structural interdicts was applicable to state organs when tasked to enforce the right to a clean and healthy environment.

#### **Held**

1. The measures taken up by National Environment Management Authority (NEMA) and Nairobi Metropolitan Services (NMS) address the air and water pollution which the petitioners complained of from upstream had been implemented over time. No mention was made when it was anticipated that the initiatives the respondents claimed to be undertaking would address the pollution of the Nairobi River near Korogocho and Mukuru slums, or when the entire River Athi which covered approximately 390 kilometres from its source up to its mouth where it emptied into the Indian Ocean, was expected to be cleaned up and freed from pollution. The respondents were not forthcoming on when the rehabilitation of Michuki Park was done and what efforts had been made to clean up the river beyond the Michuki Park.
2. The Environmental Management and Co-ordination Act (EMCA) defined the environment to include the physical factors of the surroundings of human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics. It included both the natural and the built environment. The environment went beyond the physical settings to include issues such as social, economic and cultural conditions that influenced the life of an individual or a community. People formed part of the environment which was why it was critical to eliminate processes that posed danger to human health.
3. EMCA defined pollution as any direct or indirect alteration of the physical, thermal, chemical, biological, or radioactive properties of any part of the environment by discharging,
4. Article 42 of the Constitution guaranteed every person the right to a clean and healthy environment, which included the right to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in article 69, and to have obligations relating to the environment fulfilled under article 70.
5. Section 3 of EMCA gave effect to the entitlement to a clean and healthy environment which was enshrined in article 42 of the Constitution. Every person had a duty to safeguard and enhance the environment. That section empowered persons alleging that the right to a clean and healthy environment had been or was being denied, violated, infringed or threatened to apply to the Environment and Land Court (ELC) for redress.
6. NMS undertook the measures it claimed to have put in place to reduce the pollution of Nairobi River but that did not satisfactorily address the air and water pollution complained of by the petitioners. The respondents placed a lot of emphasis on the commissioning of the Michuki National Park and hailed it as a success story in terms of the initiatives they had put in place to address the environmental degradation of the Nairobi River.
7. Section 9(1) of the EMCA made NEMA the principal instrument of government in the implementation of all policies relating to the environment. Consequently, NEMA had to play a primary role in the elimination of processes and activities that endangered the environment. EMCA bestowed specific roles on NEMA in relation to preventing air and water pollution in the country. NEMA was not just an investigator emitting or depositing wastes so as to affect any beneficial use adversely, to cause a condition which was hazardous or potentially hazardous to public health, safety or welfare, or to animals, birds, wildlife, fish or aquatic life, or to plants or to contravene any condition, limitation or restriction which was subject to a licence under EMCA. Article 69(1)(g) of the Constitution of Kenya, 2010 (Constitution) obligated the State to eliminate processes and activities that were likely to endanger the environment. Eliminate was defined as to remove or get rid of something. The Constitution behoved the respondents to remove or get rid of all the processes and activities that caused pollution of the Nairobi and Athi Rivers, and to stop the air pollution from the toxic substances emanating from Dandora dumpsite which formed the subject matter of the instant petition.

- and prosecutor whose success was measured in terms of successful investigations and prosecutions, rather, as the principal instrument of government it had a bigger mandate towards the people of Kenya in the implementation of all policies relating to the environment.
8. NEMA argued that it had satisfactorily performed its obligations under the law and that it had taken a raft of measures to eliminate pollution of the Nairobi River including the five-year Multi-Agency Urban Rivers Regeneration Programme, enacting the Water Quality Regulations, conducting inspections, arresting offenders, planting trees on riparian land, cleaning up the Kirichwa Kubwa river up to Michuki Park, opening Michuki Park and coming up with the Adopt a River Initiative. While those measures were laudable, they did not directly address the claims made by the petitioners regarding the violation of their rights to a clean and healthy environment and the risk of people contracting diseases from the air and water pollution from the sources the petitioners complained of. Looking at the evidence adduced by the petitioners, the activities and processes causing pollution of Nairobi River both upstream and downstream had not been stopped altogether.
9. There was much more that the law enjoined NEMA to do pursuant to section 9 of EMCA. It should exercise co-ordination, advisory and technical support functions with a view to ensuring the citizens' right to a clean and healthy environment was safeguarded and in the instant case, to ensure that the pollution of the Nairobi and Athi River was eliminated. The success and efficiency of NEMA would ultimately be seen in the realisation of the right to a clean and healthy environment by every Kenyan more than the information on its website as it urged the petitioners to acquaint themselves with. In light of the nationwide challenge posed by urban waste, NEMA had to be proactive and had to take the lead in enforcing the law and assist NMS and the county governments to develop and implement policies and strategies for dealing with the disposal and management of urban waste in a safe manner that did not derogate from every citizen's right to a clean and healthy environment.
10. The Water Act 2016 guaranteed every person the right to access water. Section 63 of the Water Act provided that every person in Kenya had the right to clean and safe water in adequate quantities and to reasonable standards of sanitation as stipulated by article 43 of the Constitution. The right to clean and safe water was an implicit component of the right to adequate standard of living and the right to health.
11. Some of the measures NEMA mentioned that it had taken concerning the state of Nairobi River included enacting the Air Quality Regulations in 2014. The affidavits and photographic evidence of environmental degradation presented by the petitioners confirmed the fact that NEMA had not sufficiently anticipated, prevented and attacked the causes of environmental degradation. NEMA had not discharged its statutory mandate effectively in terms of eliminating the processes and activities that caused air and water pollution in Nairobi especially in Korogocho, Mukuru and other informal settlements.
12. The respondents had failed to eliminate the processes and activities that caused air pollution in Korogocho and Mukuru kwa Reuben slums which were attributed to the Dandora dumpsite. The respondents had also failed to stop the pollution of Nairobi and Athi River and were responsible for violating the petitioners' rights to a clean and healthy environment under article 42 of the Constitution. The Respondents have also violated the Petitioners' rights to the highest attainable standard of health and to clean and safe water enshrined in Article 43 of the Constitution
13. Article 69(1)(a) to (h) of the Constitution gave the broad obligations of the State in relation to the environment. It was only article 69(1) (d) which brought citizens into the picture by requiring the State to encourage public participation in the management, protection and conservation of the environment. Article 69(1) confirmed that the State carried a bigger burden in relation to the management and protection of the environment. Article 69(2) provided that every person had a duty to cooperate with State organs to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. The role of citizens under the Constitution was to cooperate with State organs, such as the respondents, for the protection and conservation of the environment. The duty to eliminate processes and activities that polluted the environment fell on the State and its agencies.
14. The onus of establishing the criteria for measurement of water quality standards, recommending the minimum water quality standards for different purposes, analysing the conditions for the discharge of effluents, recommending measures for the treatment of effluents before they were discharged into the

- sewerage system and making recommendations for the monitoring and control of water pollution fell within the docket of the Cabinet Secretary responsible for environmental matters on NEMA's recommendations under Section 71 of EMCA.
15. Section 9 of EMCA obligated NEMA to perform tasks such as coordinating environmental management activities being undertaken by lead agencies and promoting the integration of environmental considerations into development policies. It was also required to audit and determine the value of natural resources and their utilisation and conservation. Article 260 of the Constitution defined natural resources as the physical non-human factors and components which were either renewable or non-renewable and included surface and groundwater. The River Athi was a natural resource whose conservation was the responsibility of NEMA.
  16. Kenyans owed future generations a duty to sustain the environment for their benefit, as highlighted in the preamble to the Constitution. The court was required by section 3 of EMCA to be guided by principles of inter-generational and intra-generational equity when exercising its jurisdiction in claims where a person alleged that the right to a clean and healthy environment had been denied or violated. Intergenerational equity enjoined the instant generation while exercising its rights to the beneficial use of the Nairobi and Athi River to maintain or enhance the health, diversity and productivity of this river for the benefit of future generations. A polluted river of death spewing poison was not what the principle of inter-generational equity expected the instant generation to bequeath to future generations. It behoved every person, including the petitioners, to ensure that the environment was not degraded or polluted through the proper disposal of solid and hazardous wastes, limiting the use of non-biodegradable items such as plastics and not disposing solid and hazardous materials into the river.
  17. It was not in contention that there were in place legal provisions and policies for the protection of natural resources such as the Nairobi and Athi River. The challenge was on implementation of the laws protecting the environment mainly because the State agencies entrusted with the protection of the water bodies continued to fail in their given role. Section 142 of EMCA created offences relating to pollution and criminalised the discharge of dangerous materials, substances, and oil mixtures into water, air or the aquatic environment. The court could direct the polluter to meet the cost of cleaning up the polluted environment and of removing the pollution. NEMA had to be satisfied about the clean-up of the polluted environment and removal of the effects of the pollution.
  18. Section 5 of EMCA tasked the Cabinet Secretary (CS) responsible for matters relating to the environment and natural resources to promote co-operation among public departments, county governments and organisations engaged in environmental protection programs. The CS was responsible for policy formulation and directions for purposes of EMCA, and set the national goals and objectives besides determining policies and priorities for the protection of the environment.
  19. The precautionary principle was not only to be enforced after conducting public participation. Article 70 of the Constitution empowered the court to give redress where a person alleged that their right to clean and healthy environment had been or was threatened with violation did not make public participation a factor for consideration when the court made the orders specified in that article. Section 3(5) of EMCA anticipated that public participation was to be taken into consideration in the development of policies and processes for the management of the environment but not that the principle should shield the respondents from fulfilling their statutory obligations for the management of the environment.
  20. Section 2 of EMCA defined the precautionary principle as the principle which postulates that where there were threats of damage to the environment, whether serious or irreversible, lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation. The section mirrored Principle 15 of the Rio Declaration on Environment and Development.
  21. The precautionary principle directed the judges to offer scientifically based structural solutions and policies that responded creatively to weak, ineffective regulation even in the absence of regulation.
  22. The onus lay on NEMA to prove that it had anticipated, prevented and addressed the causes of environmental degradation. Its contention that the petitioners should have provided a solution and specified which measures the respondents should have carried out under the precautionary principle was misplaced. EMCA was replete with measures and actions which the respondents were to implement in order to address air and water pollution.
  23. River Athi flowed through many counties

- before reaching the Indian Ocean. Those counties were added to the instant petition as interested parties. Considering the importance of the Athi for irrigation purposes, notably the Galana Kulalu Food Security Project on the Galana River and the Thwake Dam once it was completed, it was necessary to apply precaution for the protection of human health and plant health by stopping the pollution emanating from the Dandora dumpsite and the water pollution in the Nairobi and Athi River. The food grown with the contaminated water from River Athi inevitably found its way to our tables whether it be vegetables from the market or the Kenyan staple food, ugali made from maize which was probably grown in the Galana food project, sold to the national cereals board and milled for people's consumption. There was no doubt that the air and water pollution posed potential high risk to human health. Rather than wait to react after confirming through scientific means that the air and water pollution in the Nairobi River was the cause for the increase in cancers, respiratory and other diseases in Nairobi and the country generally, the respondents need to adopt a strategy of precaution.
24. Harm could have occurred to people living near the Dandora dumpsite, Korogocho and Mukuru as individuals, population or even the entire ecosystem of the Athi River. The effects of the air and water pollution of the Athi River could be distributed disproportionately. The environmental pollution in Korogocho, Mukuru and other informal settlements along the Nairobi River coupled with the fact that those people were least capable of protecting themselves predisposed them to damage to their health.
25. What the precautionary principle implied was that the State had a duty to prevent environmental harm and health risks as well as conduct what could be harmful even where conclusive scientific evidence regarding the harmfulness was not available. The respondents had to take precautionary actions aimed at reducing exposure to potentially harmful substances, activities and conditions to minimise significant adverse effects to health and the environment.
26. One way of implementing the precautionary principle was by shifting the burden of proof to the polluters and exploring alternatives to the harmful actions such as the Dandora dumpsite. The precautionary approach to be adopted by the State should have focused on how much harm could be avoided rather than consider how much could be tolerated.
27. Under the precautionary principle, the State would rather be wrong in acting instead of failing to act at all because the damage the pollution was likely to cause to human health and the environment could take years to be ascertained scientifically. The respondents should have minimised the future costs of being wrong about environmental and health risks posed by air and water pollution in the country. Applying the precautionary principle in stopping air and water pollution would prevent the actual causes of respiratory and other diseases as well as other underlying risks to health. That would entail examining the evidence of risk and uncertainty to determine the possibility of a significant health threat and the need to take precautionary action. That could only be done by reducing pollution at the source.
28. What NEMA, NMS and county governments needed to ask themselves was how much contamination could be avoided? For NMS, what were the alternatives to the Dandora dumpsite and the sources of pollution to the river? How would it achieve the desired goal of waste management for Nairobi County? There had to be structures for the independent and public monitoring of alternatives taken to ameliorate potential harm to the environment from the pollution. The respondents did not demonstrate that there were no alternatives available for handling the waste being dumped at Dandora dumpsite causing pollution. The respondents confirmed that there were plans to relocate the dumpsite from Dandora and rehabilitate the site.
29. Rather than presume that water and air pollution did not cause the diseases the Petitioners alluded to, the State should err towards protecting the environment and public health. The responsibility of preventing harm fell on the Nairobi County Government and NMS under the deed of transfer of some of the county's functions. The petitioners and others who potentially would be affected by substances and activities regarding the pollution to the Nairobi and Athi River had to have a say in the decision-making process. The decision-making process had to be transparent and provide a structure for the involvement of citizens.
30. In managing the waste from Nairobi city, NMS should have employed options that were least prone to environmental or health damage. Decisions taken regarding Nairobi waste management and the pollution of Nairobi and Athi River had to protect health and the environment. The decision to be made would encompass new activities and had to address

- potential hazards that already existed.
31. The petitioners failed to prove that their rights under articles 26(3) and 29(f) of the Constitution had been violated by the respondents and the 5<sup>th</sup> interested party.
  32. To conserve basically entailed protecting something or preventing it from being changed or destroyed. Conservatory orders were interim measures or orders which the court gave pending hearing and determination of the suit or appeal, their aim being to protect and preserve the substratum of the case until the case was heard and determined. Conservatory orders would not encompass the final disposal orders the court made after hearing a suit.
  33. The ELC was mandated by section 3 of EMCA to make orders, issue such writs or give directions it could deem appropriate to prevent, stop or discontinue any act deleterious to the environment. The court could also compel a public officer to take measures to prevent or discontinue any act or omission deleterious to the environment or compel the persons responsible for the environmental degradation to restore the environment to the position it was in before the damage, and to provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of the act of pollution. That section stipulated that a person bringing a suit regarding the entitlement to a clean and healthy environment did not need to show that the defendant's act or omission caused him personal injury or loss. All the person needed to show was that his suit was not frivolous, vexatious or an abuse of the court process. EMCA did not require a person who claimed that their right to a clean and healthy environment had been violated to establish a *prima facie* case with probability of success and show the harm they stood to suffer if the orders were not granted.
  34. The Petitioners did not have to demonstrate that they had suffered injury from the air and water pollution they complained of because they and all other persons are entitled to clean and healthy environment that was not polluted. They also had a right to seek redress from the court. The court was empowered by the Constitution and EMCA to make appropriate orders to prevent, stop or discontinue the air pollution attributable to the Dandora dumpsite and the pollution of the Nairobi and Athi River
  35. NMS outlined measures it intended to take concerning the Dandora dumpsite and other forms of pollution affecting the petitioners' access to a clean and healthy environment. The court could issue a structural interdict to ensure that there were remedies in place to redress the petitioners' concerns regarding the pollution of the environment.
  36. A continuing *mandamus* or structural interdict or structural injunction as a relief given by the court through a series of ongoing orders over a long period of time, directing an authority to fulfil its obligation in general public interest. Such an order is issued in a situation which could not be remedied instantaneously but required a solution over a long time and could even go on for years. It was a procedural innovation through a writ of *mandamus* or a mandatory order through which the court monitored compliance with its orders by seeking periodic reports from the authorities on the progress in implementing the court orders.
  37. Owing to the nature of pollution and the harm caused to the Nairobi and Athi River, the aquatic life in it and the effects of the polluted water on human health, the ELC needed to issue a structural interdict or an injunction to be enforced by the respondents for the period of time that it would take for the Nairobi and Athi River water to be restored to a point where it was free from the pollution. Ridding the Nairobi River of the pollution could not be done instantaneously and would require a long period of time.
  38. Granting a statutory interdict or continuing orders would give effect to article 70(2) of the Constitution which gave the ELC the discretion to make orders or give directions which it considered appropriate to prevent, stop or discontinue any act or omission that was harmful to the environment.
  39. An applicant that sought redress for breach or threat of breach of the right to a clean and healthy environment did not have to demonstrate that any person had incurred loss or suffered injury under article 70 of the Constitution.
  40. One could not tell with certainty the number of people who had been affected by the pollution from the Dandora dumpsite and the Nairobi River. The court could only order that compensation be paid to specific persons whose details were supplied in the suit, which in the instant case was the two petitioners.
- Petition allowed. The respondents were directed to adopt the precautionary principle in the management of the environment in which the petitioners resided by taking the following measures to stop the air pollution and prevent the pollution of the Nairobi and Athi River by:*
- i. *Within 30 days of the date of the judgement, the respondents were to identify materials and processes that were dangerous to the environment and human health in relation to the people living*

- in Nairobi and more specifically in Korogocho, Mukuru, and the areas surrounding the Dandora dumpsite. They were also directed to prescribe measures for the management of the materials and processes identified as obligated by section 86 of EMCA.*
- ii. *The respondents were directed to prescribe measures and formulated methods for the management and safe disposal of waste from the City County of Nairobi in accordance with section 86 of EMCA read with Part 2(2)(g) of the Fourth Schedule to the Constitution.*
  - iii. *The Nairobi Metropolitan Services was to ensure that all the waste from the City County of Nairobi was disposed of in an environmentally sound manner in accordance with the Environmental Management and Coordination (Waste Management) Regulations of 2006.*
  - iv. *The Nairobi Metropolitan Services was directed to take steps to decommission the Dandora dumpsite and relocate it to another site within six months of the date of the instant judgement. The Nairobi Metropolitan Services was to shut down the Dandora dumpsite within six months of the date of the instant judgement and rehabilitate the dumpsite.*
  - v. *In the intervening period, the Nairobi Metropolitan Services would take all practical steps to ensure that the waste in the Dandora dumpsite was managed in a manner which protected human health and the environment against adverse effects from the waste. The Nairobi Metropolitan Services had to ensure that there was no burning of plastic or other waste in the Dandora dumpsite.*
  - vi. *In establishing the new landfill for the safe disposal of the waste from Nairobi County, the Nairobi Metropolitan Services would in conjunction with NEMA, make concerted efforts aimed at waste reduction, separation of biodegradable and organic waste, and prioritise the implementation of recycling strategies.*
  - vii. *The respondents were directed to develop a plan and strategy for the cleaning up of the Nairobi and Athi River. The respondents were directed to undertake an urgent clean-up of the Nairobi River from the source up to the estuary at Sabaki River in Malindi until the whole river was clean and free of pollution. NEMA would take the lead role in the development of an environmental action plan for the cleaning up of the Nairobi and Athi River.*
  - viii. *The respondents would file reports in court every four months showing the water quality of samples of water taken from a minimum of twelve different points of the Nairobi and Athi River, including samples of water taken from all the counties which River Athi passed through.*
  - ix. *NEMA would oversee the survey of the Nairobi and Athi River for purposes of protecting it from encroachment and other harmful activities.*
  - x. *NEMA was directed to perform its duties under EMCA and the Environmental Management and Coordination (Water Quality) Regulations of 2006 and to file reports in court every four months showing the measures taken to rid the Nairobi and Athi River of pollution such as stopping the discharge of effluent, poison, toxic, noxious, radioactive waste or other pollutants which did not conform to the standards set by law into the river.*
  - xi. *All the counties which the Nairobi and Athi River coursed through were directed to eliminate all pollution from the river and to act in a precautionary manner by eliminating activities along the river which could pose a risk to human health or the environment.*
  - xii. *The Nairobi Metropolitan Services and NEMA would ensure that they complied with the requirement for public participation in the implementation of the judgement.*
  - xiii. *NEMA was directed to undertake programmes intended to create public awareness, enhance environmental education on the pollution of the Nairobi and Athi River and to develop and disseminate guidelines relating to the prevention of pollution and degradation of the Nairobi and Athi Rivers in accordance with section 9 of EMCA. That would be done with the relevant lead agencies and the necessary public participation.*
  - xiv. *The court awarded the 1<sup>st</sup> and 2<sup>nd</sup> petitioners compensation of Kshs. 10, 000/= each against the respondents. The petitioners were awarded the costs of the petition, which would be borne by the respondents.*

## Feedback For Caseback Service

By Emma Mwobobia, Ruth Ndiko & Patricia Nasumba, Law Reporting Department

**D**uring the reporting period 1<sup>st</sup> July – 30<sup>th</sup> September 2021, 818 cases were casebacked. Out of these, 317 were allowed, 48 were partly allowed and 453 were dismissed. Out of 215 cases skipped for caseback, 124 had no case history statement and 83 had no judicial officer's information. This information is very useful for effective caseback and we therefore urge judicial officers to be including it in the judicial decisions.

Hon. PE Nabwana  
Resident Magistrate  
Mpeketoni Law Courts

» I have learnt something new on sentencing and I will definitely apply the principles learnt herein. Case back is indeed a great tool in the administration of justice.

Hon. Hosea Mwangi  
Ng'ang'a  
Senior Resident  
Magistrate  
Gatundu Law Courts

» An efficient tool in developing Jurisprudence from the magistracy to the superior Courts. Thank you caseback.

Hon. GM GITONGA  
Principal Magistrate,  
Milimani Law Courts

» I really appreciate your caseback service. It builds confidence in the lower courts as the judicial officers learn from the superior courts application of the law.  
Thank you

Hon. Athman Abduhalim  
Hussein  
Principal Kadhi  
Isiolo Law Courts

» I appreciate your effort. Its effect in the improvement of our decisions is monumental.

Hon. Mary Immaculate  
Gwaro  
Senior Principal  
Magistrate  
Kitale Law Courts

» I take this opportunity to thank you for the e-mail. It does go a long way to help me see my errors and grow in my knowledge of the law as well as improve on my jurisprudence.

# ► Legislative Updates

By Brian Kulei & Christian Ateka, Laws of Kenya Department

This is a synopsis of Acts of Parliament and Bills from the National Assembly and the Senate. This legislative update covers the period between 1<sup>st</sup> June 2021 and 30<sup>th</sup> August 2021.

## A. ACTS OF PARLIAMENT

<b>Act Name</b>	<b>SUPPLEMENTARY APPROPRIATION (NO. 2) ACT, 2021</b>
<b>Act No.</b>	6 of 2021
<b>Assent Date</b>	29 <sup>th</sup> June, 2021
<b>Commencement Date</b>	30 <sup>th</sup> June, 2021
<b>Objective</b>	This Act seeks to authorize the Treasury to issue the sum of twenty-two billion eight hundred fifty-six million three hundred eighty-seven thousand seven hundred twenty-six shillings (Ksh. 22,856,387,726) out of the Consolidated Fund and apply it towards the supply granted for the service of the year ending on the 30th June, 2021.
<b>Act Name</b>	<b>APPROPRIATION ACT, 2021</b>
<b>Act No.</b>	7 of 2021
<b>Assent Date</b>	29 <sup>th</sup> June, 2021
<b>Commencement Date:</b>	1 <sup>st</sup> July, 2021
<b>Objective</b>	The principal object of this Act is to authorize the Treasury to issue out of the Consolidated Fund and apply towards the supply granted for the service of the year ending on the 30th of June 2022, the sum of Kenya Shillings one trillion four hundred ninety-five billion seven hundred eighty-four million seven hundred ninety thousand eight hundred twenty-two (Ksh. 1,495,784,790, 822), and that sum shall be deemed to have been appropriated as from 1 <sup>st</sup> July, 2021, for the services and purposes specified in the Schedule.
<b>Act Name</b>	<b>FINANCE ACT, 2021</b>
<b>Act No.</b>	8 of 2021
<b>Assent Date</b>	29 <sup>th</sup> June, 2021
<b>Commencement Date(s)</b>	Various dates as per section 2 of the Finance Act (No. 8 of 2021)
<b>Objective</b>	<p>This Act amends the following laws relating to various taxes and duties:</p> <ul style="list-style-type: none"> <li>a) Income Tax Act (Cap. 470)</li> <li>b) Value Added Tax Act (No. 35 of 2013)</li> <li>c) Excise Duty Act (No. 23 of 2015)</li> <li>d) Tax Procedures Act (No. 29 of 2015)</li> <li>e) Miscellaneous Fees and Levies Act (No. 29 of 2016)</li> <li>f) Stamp Duty Act (Cap. 480)</li> <li>g) Capital Markets Act (Cap. 485A)</li> <li>h) Insurance Act (Cap. 487)</li> <li>i) Kenya Revenue Authority Act (No. 2 of 1995)</li> <li>j) Retirement Benefits Act (No. 3 of 1997)</li> <li>k) Central Depositories Act (No. 4 of 2000)</li> </ul>

<b>Act Name</b>	COUNTY ALLOCATION OF REVENUE ACT, 2021
<b>Act No.</b>	9 of 2021
<b>Assent Date</b>	29 <sup>th</sup> June, 2021
<b>Commencement Date</b>	14th July, 2021
<b>Objective</b>	The principal object of this Act is to provide for: the equitable allocation of revenue raised nationally among the county governments for the 2021/2022 financial year; the responsibilities of national and county governments pursuant to such allocation; and to facilitate the transfer of allocations made to counties under this Act from the Consolidated Fund to the respective County Revenue Funds pursuant to Article 218 (1) b of the Constitution.

## B. NATIONAL ASSEMBLY BILLS

<b>NATIONAL ASSEMBLY BILL</b>	SUSTAINABLE WASTE MANAGEMENT BILL, 2021
<b>Dated</b>	12 <sup>th</sup> May, 2021
<b>Objective</b>	This Bill seeks to establish the legal and institutional framework for the sustainable management of waste and to ensure the realization of the constitutional provision on the right to a clean and healthy environment.
<b>Sponsor</b>	<i>Amos Kimunya, Leader of the Majority Party.</i>
<b>NATIONAL ASSEMBLY BILL</b>	NATIONAL DISASTER RISK MANAGEMENT BILL, 2021
<b>Dated</b>	18 <sup>th</sup> May, 2021
<b>Objective</b>	This Bill seeks to establish the Intergovernmental Council on Disaster Risk Management and the National Disaster Risk Management Authority to ensure that there is co-ordination of disaster risk management issues at the national and county level. The Bill further seeks to establish County Disaster Risk Management Committees in each of the 47 counties.
<b>Sponsor</b>	<i>Amos Kimunya, Leader of the Majority Party.</i>
<b>NATIONAL ASSEMBLY BILL</b>	ASIAN WIDOWS' AND ORPHANS' PENSIONS (REPEAL) BILL, 2021
<b>Dated</b>	18 <sup>th</sup> June, 2021
<b>Objective</b>	This Bill seeks to repeal the Asian Widows' and Orphans' Pensions Act (Cap.193) in light of the enactment of the Public Finance Management Act, 2012.
<b>Sponsor</b>	<i>Amos Kimunya, Leader of the Majority Party.</i>
<b>NATIONAL ASSEMBLY BILL</b>	PROVIDENT FUND (REPEAL) BILL, 2021
<b>Dated</b>	18 <sup>th</sup> June, 2021
<b>Objective</b>	The principal object of this Bill is to repeal the Provident Fund Act (Cap. 191) in light of the enactment of the Public Finance Management Act, 2012.
<b>Sponsor</b>	<i>Amos Kimunya, Leader of the Majority Party.</i>
<b>NATIONAL ASSEMBLY BILL</b>	PUBLIC PROCUREMENT AND ASSET DISPOSAL (AMENDMENT (NO. 2) BILL, 2021.
<b>Dated</b>	9 <sup>th</sup> July, 2021

<b>Objective</b>	The principal object of this Bill is to amend the Public Procurement and Asset Disposal Act (No. 33 of 2015) to subject the open tender method of procurement to a two-envelope bid process. The two-stage process is proposed to be concluded within the evaluation period. The proposal further seeks to amend the maximum prescribed period for evaluation of open tenders from the current thirty days to thirty business days; and to waive the requirement on bidders to provide evidence of compliance with tender criteria to reduce the current reliance on technicalities to disqualify bidders during tender evaluation.
<b>Sponsor</b>	<i>Gladys Wanga, Chairperson, Departmental Committee on Finance and National Planning</i>
<b>NATIONAL ASSEMBLY BILL</b>	<b>CHILDREN BILL, 2021</b>
<b>Dated</b>	20 <sup>th</sup> August, 2021
<b>Objective</b>	The principal object of this bill is to repeal the Children Act (No. 8 of 2001); to provide for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children; to make provision for the administration of children's institutions; and to give effect to the provisions of the Constitution. The Bill seeks to align the Children Act with the Constitution of Kenya, 2010, international and regional treaties and instruments dedicated to the promotion and protection of the rights of the child.
<b>Sponsor</b>	<i>Amos Kimunya, Leader of the Majority Party.</i>

### C. SENATE BILLS

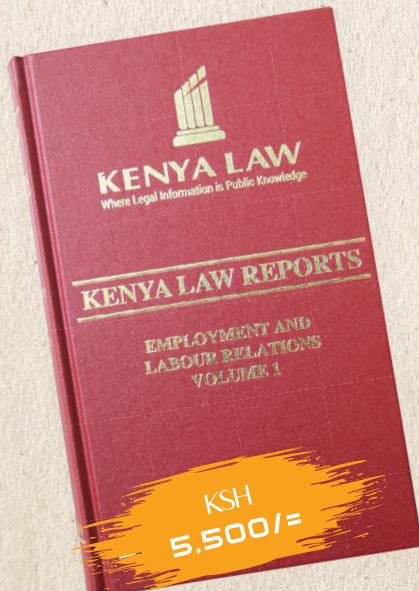
<b>SENATE BILL</b>	<b>COCONUT INDUSTRY DEVELOPMENT BILL, 2021</b>
<b>Dated</b>	16 <sup>th</sup> April, 2021
<b>Objective</b>	The principal object of this Bill is to establish the Coconut Industry Development Board with the aim of revamping the policy and institutional framework and strengthening the institutional framework within which the industry operates. The Bill proposes to provide an avenue for appreciating the medicinal, aesthetic, touristic and artistic value of coconut by encouraging value addition in the processing of coconut and its products. It further proposes an amendment to the Crops Act (No. 16 of 2013).
<b>Sponsor</b>	<i>Njeru Ndwiga, Chairperson, Standing Committee on Agriculture and Fisheries</i>
<b>SENATE BILL</b>	<b>PUBLIC PROCUREMENT AND ASSET DISPOSAL (AMENDMENT) BILL, 2021</b>
<b>Dated</b>	30 <sup>th</sup> April, 2021
<b>Objective</b>	The principal purpose of this Bill is to amend the Public Procurement and Asset Disposal Act (No. 33 of 2015) by proposing to reduce the number of days for evaluation of proposals from 21 days to 7 days. It further seeks to allow variations in terms of quantity which might be occasioned due to unforeseen circumstances within a period less than twelve months provided the subject variations are within outlined limits/thresholds.
<b>Sponsor</b>	<i>Samuel Poghisio, Senate Majority Leader.</i>
<b>SENATE BILL</b>	<b>KENYA CITIZENSHIP AND IMMIGRATION (AMENDMENT) BILL, 2021</b>
<b>Dated</b>	12 <sup>th</sup> May, 2021
<b>Objective</b>	The principal purpose of the Bill is to make amendments to the Kenya Citizenship and Immigration Act (No. 12 of 2011) to put in place mechanisms for the protection of the interests of Kenyans living abroad and to ensure their active participation in the socio-economic development of the country. The Bill has also proposed enhanced Kenya mission services and provided a framework for the voluntary establishment of associations of Kenyans living abroad.
<b>Sponsor</b>	<i>Irungu Kang'ata, Senator.</i>

<b>SENATE BILL</b>	<b>ALTERNATIVE DISPUTE RESOLUTION BILL, 2021.</b>
<b>Dated</b>	12 <sup>th</sup> May, 2021
<b>Objective</b>	<p>This Bill seeks to implement Article 48 and 159(2)(c) of the Constitution with respect to enhancing access to justice and promoting the use of alternative dispute resolution mechanisms in resolving disputes by putting in place a legal framework for the settlement of certain civil disputes by conciliation, mediation, and traditional dispute resolution. The Bill further proposes to amend the following statutes:-</p> <ul style="list-style-type: none"> <li>a) Nairobi Centre for International Arbitration Act (No. 26 of 2013)</li> <li>b) Civil Procedure Act (Cap. 21)</li> </ul>
<b>Sponsor</b>	<i>Sylvia Mueni Kasanga, Senator.</i>
<b>SENATE BILL</b>	<b>COUNTY GOVERNMENTS GRANTS BILL, 2021.</b>
<b>Dated</b>	25 <sup>th</sup> May, 2021
<b>Objective</b>	The principal object of this Bill is to make provision for the transfer of conditional allocations from national governments share of revenue and from development partners to the county governments for the financial year 2021/22.
<b>Sponsor</b>	<i>Charles Kiburu, Chairperson, Committee on Finance and Budget.</i>
<b>SENATE BILL</b>	<b>COUNTY GOVERNMENTS (AMENDMENTS) BILL, 2021.</b>
<b>Dated</b>	27 <sup>th</sup> May, 2021
<b>Objective</b>	This Bill seeks to amend the County Governments Act (No. 17 of 2012) to provide clarity in the operations of the County Assembly Service Board in instances where the office of a speaker becomes vacant. The Bill further seeks to provide a framework for consultation between members of Parliament, the county executive, county assembly and the national executive.
<b>Sponsor</b>	<i>Moses Otieno Kajwang', Senator.</i>
<b>SENATE BILL</b>	<b>LIFESTYLE AUDIT BILL, 2021</b>
<b>Dated</b>	27 <sup>th</sup> May, 2021
<b>Objective</b>	The principal purpose of the Bill is to provide a legal framework for the carrying out of a lifestyle audit on public officers. The Bill seeks to incorporate the values and principles of governance under Article 10 of the Constitution into the public or state officers' public work. The Bill proposes amendments to the Public Officers Ethics Act (No. 4 of 2003).
<b>Sponsor</b>	<i>Farhiya Ali Haji, Senator.</i>
<b>SENATE BILL</b>	<b>COUNTY E-HEALTH BILL, 2021</b>
<b>Dated</b>	25 <sup>th</sup> June, 2021
<b>Objective</b>	This Bill seeks to provide a framework for the implementation of section 104 of the Health Act (No. 21 of 2017), the provision of telemedicine services and the establishment and management of e-health infrastructure and services at the national and county levels of government. The principal object of this Bill is to enhance the delivery of medical services through the provision of e-health at the county level.
<b>Sponsor</b>	<i>Judith Pareno, Senator.</i>
<b>SENATE BILL</b>	<b>MILITARY VETERANS BILL, 2021</b>
<b>Dated</b>	2 <sup>nd</sup> July, 2021
<b>Objective</b>	The objective of this Bill is to provide for the welfare and benefits of military veterans and their dependants. These benefits include compensation for physical injuries and psychological trauma, healthcare services, access to training and employment opportunities.

<b>Sponsor</b>	<i>Judith Pareno, Senator.</i>
<b>SENATE BILL</b>	<b>ELECTIONS (AMENDMENT) BILL, 2021</b>
<b>Dated</b>	9 <sup>th</sup> July, 2021
<b>Objective</b>	The purpose of this Bill is to amend the Elections Act (No. 24 of 2011), to enable a person who can read and write to be nominated as a candidate for elections as a Member of Parliament or County Assembly.
<b>Sponsor</b>	<i>Kipchumba Murkomen, Senator.</i>
<b>SENATE BILL</b>	<b>ELECTIONS (AMENDMENT) (NO. 2) BILL, 2021</b>
<b>Dated</b>	9 <sup>th</sup> July, 2021
<b>Objective</b>	The principal object of this Bill is to amend the Election Act (No. 24 of 2011) to ensure equality to all candidates who aspire to vie as members of a county assembly during elections.
<b>Sponsor</b>	<i>Ledama Ole Kina, Senator.</i>
<b>SENATE BILL</b>	<b>SPECIAL NEEDS EDUCATION BILL, 2021</b>
<b>Dated</b>	23 <sup>rd</sup> July, 2021
<b>Objective</b>	The main objective of this Bill is to provide for the education of learners with special educational needs and for the conduct of educational institutions as regards special needs learners.
<b>Sponsor</b>	<i>Getrude Musuruve, Senator Margret Kamar, Senator.</i>
<b>SENATE BILL</b>	<b>COUNTY RESOURCE DEVELOPMENT BILL, 2021</b>
<b>Dated</b>	12 <sup>th</sup> August, 2021
<b>Objective</b>	The principal objective of the Bill is to ensure that county governments make maximum use of the resources within their location in the interests of economic development. The Bill further enables the formation of economic blocs between counties and makes provisions for a sample of a written agreement for an economic bloc. The Bill also proposes a means of resolution of disputes within the economic bloc and a mechanism for the resolution of disputes over resources between the national government and the county government. It also seeks to enjoin youth, women and marginalized groups in the exploitation of resources within the county.
<b>Sponsor</b>	<i>Rose Nyamunga, Senator.</i>
<b>SENATE BILL</b>	<b>CONSTITUTION OF KENYA (AMENDMENT) BILL, 2021</b>
<b>Dated</b>	12 <sup>th</sup> August, 2021
<b>Objective</b>	The object of this Bill is to amend the Constitution of Kenya to ensure that resources and services are brought closer to the people by splitting the vast expansive Kitui County into two Counties of Kitui and Mwingi respectively.
<b>Sponsor</b>	<i>Enoch Wambua, Senator.</i>
<b>SENATE BILL</b>	<b>ANTI-CORRUPTION AND ECONOMIC CRIMES (AMENDMENT) BILL, 2021</b>
<b>Dated</b>	12 <sup>th</sup> August, 2021
<b>Objective</b>	The principal purpose of the Bill is to create a framework for amnesty for corruption cases under deferred prosecution agreements. It allows a person suspected to have committed a corrupt or economic offence to enter into a deferred prosecution agreement with the Director of Public Prosecutions.

<b>Sponsor</b>	<i>Farhiya Ali Haji, Senator.</i>
<b>SENATE BILL</b>	<b>ANTI-CORRUPTION AND ECONOMIC CRIMES (AMENDMENT) BILL, 2021</b>
<b>Dated</b>	20 <sup>th</sup> August, 2021
<b>Objective</b>	The principal objective of this Bill is to amend the Social Assistance Act (No. 24 of 2013) to include caregivers of persons with disabilities among the beneficiaries who receive social assistance from the State.
<b>Sponsor</b>	<i>Millicent Omanga, Senator.</i>
<b>SENATE BILL</b>	<b>PENAL CODE (AMENDMENT) BILL, 2021</b>
<b>Dated</b>	20 <sup>th</sup> August, 2021
<b>Objective</b>	The principal object of the Bill is to amend the Penal Code (Cap. 63) in order to ensure that persons living with mental disability are not referred to in a derogatory manner and enhance protection of vulnerable victims. Further, the Bill decriminalizes attempted suicide to ensure that victims are provided with the necessary assistance in line with the Mental Health Act (Cap. 248).
<b>Sponsor</b>	<i>Abshiro Halake, Senator.</i>

## KENYA LAW REPORTS EMPLOYMENT & LABOUR RELATIONS VOL 1



The first of a series, Employment and Labour Relations volume contains selected cases from the Employment and Labour Relations Court touching on employment matters such as:

- Employment contracts
- Employer-employee relationship
- Termination of employment
- Fair labour practices
- Interpretation of employment related statutes
- Jurisdiction of the Employment & Labour Relations Court

# ► Legal Supplements

By Brian Kulei & Christian Ateka, Laws of Kenya Department

This article provides a summary of Legislative Supplements published in the Kenya *Gazette* on matters of general public importance for the period between June, 2021 and August, 2021.

*To view the schedule please visit [www.kenyalaw.org](http://www.kenyalaw.org), click on the Laws of Kenya tab that leads you to Legal Notices section.*

DATE OF PUBLICATION	CITATION	PREFACE
18 <sup>th</sup> June, 2021	Universities Act (No. 42 of 2012)—  <b>Charter for National Defence University – Kenya</b>  (L.N.95/2021)	The Cabinet Secretary for Education in exercise of the powers conferred by section 24 of the Universities Act (No. 42 of 2012) certifies that the Charter set out in the Schedule hereto has been granted to National Defence University-Kenya in accordance with the provisions of the Act.
18 <sup>th</sup> June, 2021	Universities Act (No. 42 of 2012)—  <b>National Intelligence and Research University College Order, 2021</b>  (L.N. 96/2021)	The Cabinet Secretary for Education in exercise of the powers conferred by section 20(3) of the Universities Act, 2012, makes the National Intelligence and Research University College Order, 2021.
25 <sup>th</sup> June, 2021	Industrial Training Act (Cap. 237)—  <b>Industrial Training (Trade Testing) Rules, 2021</b>  (L.N. 100/2021)	The Cabinet Secretary for Labour and Social Protection in exercise of the powers conferred by section 29(f) of the Industrial Training Act (Cap. 237) makes the Industrial Training (Trade Testing) Rules, 2021.
23 <sup>rd</sup> July, 2021	Forest Conservation and Management Act (No. 34 of 2016)—  <b>Declaration of Chitambe (Webuye) Hill Forest</b>  (LN. 106/2021)	The Cabinet Secretary for Environment and Forestry in exercise of the powers conferred by section 31(2) of the Forest Conservation and Management Act, declares that the area described in the Schedule hereto be a forest area.

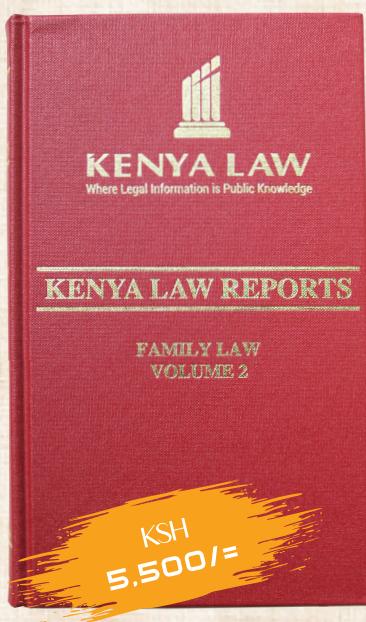
23 <sup>rd</sup> July, 2021	Forest Conservation and Management Act (No. 34 of 2016)—  <b>Declaration of Public Forest, Karaini Hill Forest</b>  (L.N. 107/2021)	The Cabinet Secretary for Environment and Forestry in exercise of the powers conferred by section 31(2) of the Forest Conservation and Management Act, declares that the area described in the Schedule hereto be a forest area.
	Forest Conservation and Management Act (No. 34 of 2016)—  <b>Declaration of Public Forest, Wajir Town Forest</b>  (L.N. 108/2021)	The Cabinet Secretary for Environment and Forestry in exercise of the powers conferred by section 31(2) of the Forest Conservation and Management Act, declares that the area described in the Schedule hereto be a forest area.
	Forest Conservation and Management Act (No. 34 of 2016)—  <b>Declaration of Public Forest, Katan-guo Hills Forest</b>  (L.N. 109/2021)	The Cabinet Secretary for Environment and Forestry in exercise of the powers conferred by section 31(2) of the Forest Conservation and Management Act, declares that the area described in the Schedule hereto be a forest area.
	Forest Conservation and Management Act (No. 34 of 2016)—  <b>Declaration of Public Forest, God Nyango Forest</b>  (L.N. 110/2021)	The Cabinet Secretary for Environment and Forestry in exercise of the powers conferred by section 31(2) of the Forest Conservation and Management Act, declares that the area described in the Schedule hereto be a forest area.
	Forest Conservation and Management Act (No. 34 of 2016)—  <b>Declaration of Public Forest, Bute Malaba Forest Ranges</b>  (L.N. 111/2021)	The Cabinet Secretary for Environment and Forestry in exercise of the powers conferred by section 31(2) of the Forest Conservation and Management Act, declares that the area described in the Schedule hereto be a forest area.

*To view the Schedules cited above (LNs 106 – 111 of 2021) please visit [www.kenyalaw.org](http://www.kenyalaw.org), click on the Laws of Kenya tab that leads you to Legal Notices section.*

30 <sup>th</sup> July, 2021	Public Service Commission Act (No. 10 of 2017)—  <b>Public Service Commission (Performance Management) Regulations, 2021</b>  (L.N. 114/2021)	The Public Service Commission in exercise of the powers conferred by section 92 of the Public Service Commission Act (No. 10 of 2017) makes the Public Service Commission (Performance Management) Regulations, 2021.
30 <sup>th</sup> July, 2021	Universities Act (No. 42 of 2012)—  <b>Laikipia University Statutes</b>  (L.N. 116/2021)	The Council of Laikipia University, in exercise of the powers conferred by section 23 of the Universities Act (No. 42 of 2012), and the Laikipia University Charter, 2013, make the Laikipia University Statutes.
13 <sup>th</sup> August, 2021	Anti-Counterfeit Act (No. 13 of 2008)—  <b>Anti-Counterfeit (Recordation) Regulations, 2021</b>  (L.N. 118/2021)	The Cabinet Secretary for Industrialization, Trade and Enterprise Development, in exercise of the powers conferred by section 37 of the Anti-Counterfeit Act (No. 13 of 2008) makes the Anti-Counterfeit (Recordation) Regulations, 2021.
12 <sup>th</sup> August, 2021	Water Act (No. 43 of 2016)—  <b>Water Services Regulations, 2021</b>  (L.N. 168/2021)	The Cabinet Secretary responsible for matters relating to water in exercise of the powers conferred by section 142 of the Water Act (No. 43 of 2016), makes the Water Services Regulations, 2021.

12 <sup>th</sup> August, 2021	Water Act (No. 43 of 2016)—  <b>Water Harvesting and Storage Regulations, 2021</b>  (L.N. 169/2021)	The Cabinet Secretary responsible for matters relating to water in exercise of the powers conferred by section 142 of the Water Act (No. 43 of 2016), makes the Water Harvesting and Storage Regulations, 2021.
12 <sup>th</sup> August, 2021	Water Act (No. 43 of 2016)—  <b>Water Resources Regulations, 2021</b>  (L.N. 170/2021)	The Cabinet Secretary responsible for matters relating to water in exercise of the powers conferred by section 142 of the Water Act (No. 43 of 2016), makes the Water Resources Regulations, 2021.
3 <sup>rd</sup> September, 2021	Breast Milk Substitutes (Regulation and Control) (No. 34 of 2012)—  <b>Breast Milk Substitutes (Regulation and Control) (General) Regulations, 2021</b>  (L.N. 184/2021)	The Cabinet Secretary responsible for matters relating to public health, in exercise of the powers conferred by section 28 of the Breast Milk Substitutes (Regulation and Control) (No. 34 of 2012), makes the Breast Milk Substitutes (Regulation and Control) (General) Regulations, 2021.

## FAMILY LAW VOLUME 2



The Family Law volume contains judgments from the decisions of the Supreme Court of Kenya, the Court of Appeal, and the High Court between the years 2012-2018. It contains cases touching on:

- Children rights,
- Adoption,
- Gender equality,
- Marriage,
- Matrimonial property,
- Inheritance,
- Parental responsibility; and
- Jurisdiction of various courts.

# International Jurisprudence

**Dismissal of an employee on account of gross misconduct and gross negligence, related to his failure to follow and/or observe COVID-19 related health and safety protocols put in place at the workplace held to be substantively fair**

Eskort Limited v Stuurman Mogotsi & 2 Others

JR1644/20

Labour Court of South Africa, Johannesburg

**E Tlhothlalemape, J**

March 28, 2021

*Reported by Faith Wanjiku*

**Employment Law – dismissal – grounds for dismissal – gross misconduct and gross misconduct and gross negligence – where an employee who had tested positive for COVID-19 failed to observe the required COVID-19 guidelines in the workplace and to self-isolate thereby endangering himself, his colleagues and the workplace - whether the dismissal of an employee on account of gross misconduct and gross negligence, related to his failure to follow and/or observe COVID-19 related health and safety protocols put in place at the workplace was fair.**

**Arbitration – arbitral award – setting aside of an award on grounds of unreasonableness – where an arbitrator failed to apply his mind to the evidence placed before him leading to a disconnect on the issue of the appropriateness of the sanction and the relief granted - whether an arbitral award could be set aside for unreasonableness where the arbitrator had failed to properly apply his mind to the evidence placed before him.**

## Brief facts

The case concerned the 1<sup>st</sup> respondent and his dismissal from work by the applicant for failure to self-isolate on testing positive for COVID-19. The applicant had COVID-19 policies, procedures, rules and protocols in place, and all employees had been constantly reminded of those through memorandum and other various means of communications posted at points of entry and also through emails. Of further significance however, was that the 1<sup>st</sup> respondent was also a member of the in-house Coronavirus Site Committee, and was responsible for *inter alia*, putting up posters throughout the workplace, informing all employees what to do and not to do in

the event of exposure or even if they suspected that they could have been exposed to CoVID-19, and the symptoms they had to look out for.

A day after he had received his positive COVID-19 results, the 1<sup>st</sup> respondent was observed on a video footage at the workplace, hugging a fellow employee who happened to have had a heart operation some five years earlier and had recently experienced post-surgery complications. He was also observed walking on the workshop without a mask. Upon his test results being known, and after further investigations and contact tracing, a number of employees who had contact with him had to be sent home to self-isolate, amongst them some who had other comorbidities.

The 1<sup>st</sup> respondent's main contention was that he was aware of his colleague, Mr Philani Mchunu's health condition and positive COVID-19 test results, as far back as July 20, 2020, and that he had informed management of his contact with him. He alleged that he was not given any clear directive as to what to do, but was instead, subjected to victimization when his medical certificates were questioned, and when he was informed of changes to his job description, and further given other tasks to perform. He had personally handed a copy of the results of his test to the store and acting managers in their offices, and was subsequently sent home. He came back on August 28, 2020 and was informed of the scheduled disciplinary enquiry.

The 2<sup>nd</sup> respondent in giving out the arbitral award stated that the applicant in the light of its own disciplinary code and procedure which called for a final written warning in such cases, failed to justify the sanction of dismissal, and had thus deviated from

its own disciplinary code and procedure. It further stated that the sanction of dismissal was therefore not appropriate on account of that deviation, making the dismissal substantively unfair. To that end, the 1<sup>st</sup> respondent was to be reinstated retrospectively, without back-pay, and a final written warning placed on his record. The applicant thus approached the court for a review of the arbitral award stating that the (commissioner) 2<sup>nd</sup> respondent had failed to properly apply his mind to the evidence placed before him, and made findings that were not those of a reasonable decision maker.

### Issues

- i. Whether the dismissal of an employee on account of gross misconduct and gross negligence, related to his failure to follow and/or observe COVID-19 related health and safety protocols put in place at the workplace was fair.
- ii. Whether an arbitral award could be set aside for unreasonableness where the arbitrator had failed to properly apply his mind to the evidence placed before him.

### Held

1. In determining the appropriateness of a sanction of dismissal, a commissioner of the Commission for Conciliation, Mediation and Arbitration (commissioner) was obliged to make an assessment of the nature of the misconduct in question, determine if whether, combined with other factors and the evidence led, the misconduct in question could be said to be of gross nature. Once that assessment was made, and the invariable conclusion to be reached was that the misconduct in question was of such gross nature as to negatively impact on a sustainable employment relationship, then the sanction of dismissal would be appropriate.
2. In approaching the dismissal dispute impartially, a commissioner would take into account the totality of circumstances. He or she would necessarily take into account the importance of the rule that had been breached. The commissioner had to of course consider the reason the employer imposed the sanction of dismissal, as he or she had to take into account the basis of the employee's challenge to the dismissal. There were other factors that would require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction could result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record.
3. The 1<sup>st</sup> respondent had at the very least, from July 20,2020, been aware that he had been in contact with his colleague, who had tested positive for COVID-19. On his own version, he had experienced known symptoms associated with COVID-19 as early as July 6, 2020. It could not therefore be probable for him to allege that he was not aware of the known symptoms, nor did he not know he had those symptoms. He had over that period until August 11, 2020, recklessly endangered not only the lives of his colleagues, and customers at the workplace, but also those of his close family members and other people he could have been in contact with.
4. The 1<sup>st</sup> respondent's conduct came about in circumstances where on the objective facts, and by virtue of being a member of the Coronavirus Site Committee, he knew what he ought to have done in an instance where he had been in contact with his co-worker and where on his own version, he had experienced symptoms he ought to have recognised. He nonetheless had continued to report for duty as if everything was normal, despite being told on no less than two occasions to stay at home in July 2020.
5. The 1<sup>st</sup> respondent's conduct was not only irresponsible and reckless, but was also inconsiderate and nonchalant in the extreme. He had ignored all health and safety warnings, advice, protocols, policies and procedures put in place at the workplace related to COVID-19, of which he was fairly aware of given his status not only as a manager but also part of the Coronavirus Site Committee. He had through his care-free conduct, placed everyone he had been in contact with whether at the workplace or at his residence at great risks. Even more perplexing was the reason he would go about the workplace mask-less and hugging fellow employees, in circumstances where he knew or ought to have known the consequences of his actions, especially after having become aware of his co-worker's results.
6. The 1<sup>st</sup> respondent could only come up with the now often used defence that he was victimised. At no point did he show any form of contrition for his conduct. At most, the evidence presented before the 2<sup>nd</sup> respondent pointed out to the 1<sup>st</sup> respondent as an employee who was not only grossly negligent and reckless, but also dishonest. He had failed to disclose his health condition over a period of time, sought to conceal the date upon which he had received his COVID-19 test results, and completely disregarded all existing health and safety

- protocols put in place not only for his own safety but also the safety of his co-employees, and the applicant's customers. It followed that a dismissal was indeed an appropriate sanction.
7. The 1<sup>st</sup> respondent's care-free conduct also brought into question the seriousness with which the applicant and its own employees also attached to the dangers posed by the pandemic at the workplace, and whether the measures it had in place were adhered to, and effective in mitigating the effects of the pandemic. That was particularly so in circumstances where the colleague had reported ill since July 1, 2020, and particularly after July 20, 2020, when his positive COVID-19 test results were made known.
  8. Upon investigating the matter after the 1<sup>st</sup> respondent had tested positive, it was discovered that not only had he hugged a fellow employee who had comorbidities, but that he had also walked around the workplace without a mask. The questions that needed to be posed despite the applicant having all of these fancy COVID-19 policies, procedures and protocols in place, were whether more than merely dismissing employees for failing to adhere to the basic health and safety protocols was sufficient in curbing the spread of the pandemic. It could not be that in the midst of the deadly pandemic, the applicant allowed mask-less 'huggers' walking around on the shop floor.
  9. Of further importance was notwithstanding all of those protocols and awareness campaigns about the pandemic, why any employee in the workplace, especially one with comorbidities, hug or reciprocate hugging in the middle of a pandemic. A basic principle such as social distancing had to mean something to someone at the workplace. There was responsibility of the applicant and its employees when other employees or even customers, were seen roaming the workplace or shop floor mask-less. Of even critical importance was the steps taken in ensuring the health and safety of all the employees and customers, where at least from July 20, 2020, the co-worker's test results were known.
  10. The applicant had as per its evidence, taken disciplinary measures against other employees for violating the health and safety protocols put in place, including dismissals. However, the facts of the case clearly compelled the need for serious introspection by the applicant and all other employers in light of the above questions

posed, in regard to whether existing health and safety measures and protocols in place were being taken seriously by everyone affected. It was one thing to have all the health and safety protocols in place and on paper. Those were however meaningless if no one, including employers, took them seriously.

11. The egregious nature of the 1<sup>st</sup> respondent's conduct, and its impact on both the applicant and its employees, the arbitration award of the 2<sup>nd</sup> respondent completely fell outside the bounds of reasonableness. It was in the light of all of those considerations that an order was made on the hearing date, that the dismissal of the 1<sup>st</sup> respondent was substantively fair.

*Application allowed, arbitration award set aside.*

#### **Relevance to Kenya's legal system**

The Constitution of Kenya, 2010, provides in article 41 (1) that every person has the right to fair labour practices. Sub-article (2) provides further that every worker has the right to reasonable working conditions.

The Employment Act, No.11 of 2007 provides in section 44 (41) matters that may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause. They include, among others:

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

Dismissal of an employee for failure to obey a lawful and proper command which it was within the scope of his duty to obey was also echoed in the case of *Bernard Ndungu Mbugua v Nairobi Water and Sewerage Company Limited* [2019] eKLR.

The Arbitration Act, No. 4 of 1995 provides in section 35 (2) that an arbitral award may be set aside by the High Court only if among others the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or the making of the award was induced or affected by fraud, bribery, undue influence or corruption or it's against public policy.

Dismissal of an employee from the workplace on account of failure to observe the set health and safety protocols in the midst of the COVID-19 pandemic is thus an emerging area in the field of gross misconduct and negligence at the workplace. COVID-19 being a global pandemic has affected the whole world and the fact that workplaces are operational everywhere, it is paramount that employees and employers observe and obey the guidelines set so as to protect themselves, their families and workplaces from the

adverse effects of the COVID-19.

The South African case is thus jurisprudential and critical in Kenya by acting as a guide at workplaces to both employers and employees who are needed to observe the COVID-19 protocols in their day to day duties and also self-isolation in cases where there are positive test results for the COVID-19 virus.

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The first of a series, the KLR 2016 volume 1 contains decisions from the Supreme Court of Kenya, the Court of Appeal and the High Court delivered in 2016. The report contains selected cases touching on various areas of the law such as

- Constitutional law,
- Civil practice and procedure,
- Intellectual property,
- Succession law,
- Labour law,
- Tort law,
- Evidence law, and
- Interpretation of statutes.

**Advisory opinion on the right to participate in the government of one's country in the context of an election held during a public health emergency or a pandemic, such as the COVID-19 crisis by the African Court on Human and Peoples' Rights**

Request for an Advisory Opinion Submitted by the Pan African Lawyers Union (PALU)

Request No. 001/2020

African Court on Human and Peoples' Rights

**ID Aboud, P; B Tchikaya, VP; B Kioko, RB Achour, S Mengue, M-T Mukamulisa, TR Chizumila, C Bensaoula, SI Anukam, DB Ntsebeza, M Sacko, JJ**

July 16, 2021

*Reported by Faith Wanjiku*

**Jurisdiction** - African Court on Human and Peoples' Rights – personal and material jurisdiction - advisory opinions - where the court was asked to interpret and lay down in terms of treaty law applicable to State Parties, standards for conducting elections during or affected by the Covid-19 crisis - whether the court could be seized with the question of the advisory opinion in terms of safeguarding the right to participate in government under articles 1 and 13(1) of the African Charter on Human and Peoples' Rights (Charter) in elections in Africa affected by the Covid-19 Crisis - African Charter on Human and Peoples' Rights, 1981, articles 1, 13; Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, article 4 (1)

**International Law** – Treaties- African Charter on Human and Peoples' Rights – right of citizens to participate in the government in the context of an election during the COVID-19 pandemic - obligations of state parties to protect that right - what, if any, were the applicable obligations of State Parties for ensuring effective protection of the citizen's right to participate in the government in the context of an election held during the pendency of a declaration of a public health disaster or emergency, such as the Covid-19 crisis, in light of the express provisions of articles 1 and 13 of the African Charter, and articles 2(1) (2) (3) (4) (10) and (13); articles 3(1) (4) (7) (10) and (11); articles 4, 5, 6, 7, 12, 13, 15, 17, 24, 25; articles 32(7)(8); articles 38(1) and 39 of the African Charter On Democracy, Elections And Governance (ACDEG)- African Charter on Human and Peoples' Rights, 1981, articles 1, 13

**International Law** – Treaties- African Charter on Human and Peoples' Rights – right of a citizen to participate freely in the government of his country-legal standards that ought to guide states in choosing to conduct elections or not to – where some states were precluded by reason of a public health emergency, such as the one caused by the Covid-19 pandemic, from organising elections as the basis of the democratic mandate of government - what, if any, were the legal standards founded in treaty law applicable to the State Parties that chose to conduct elections vis-à-vis member states that chose not to conduct elections during the

pendency of the Covid-19 disaster or emergency measures.

**Brief facts**

PALU (the author) submitted that the Covid-19 crisis presented unprecedented challenges for democratic governance and rule of law in Africa and that, in response to the Covid-19 pandemic, African Union (AU) Member States had mostly taken measures to protect the right to life by limiting such rights as freedoms of movement, assembly, association and information, and also the right of citizens to effectively participate in the governance of their respective states, especially (although not limited to) through regular, free and fair elections. The author affirmed that those measures taken also had the practical effect of constraining democratic competition, could preclude election observation, and potentially interfere with both campaigning and the exercise of franchise.

The author averred that across the continent, elections invariably framed stability. Their acceptability, or lack thereof, could be a useful predictor for instability or fragmentation. With the Covid-19 crisis, all African countries going through elections over 2021 confronted contemporaneous crises of public health, fiscal crunch, political stability and governmental legitimacy. In countries with limited institutional buffers, the consequences could be unpredictable for citizens, countries, regions and Africa's partners. The author further submitted that at least 22 AU Member States were currently scheduled to hold presidential and/or legislative and/ or local government elections in 2020. At least 11 of those were for the position of President or Prime Minister.

They averred that while State Parties unquestionably enjoy considerable latitude in managing the unprecedented public health emergency, it remained the case that, in the absence of formal derogations, State Parties remained bound by their obligations to safeguard the right to effectively participate in government as enshrined in the Constitutive Act

of the African Union, the African Charter and its Protocols, ACDEG and other legal instruments under the AU or regional economic communities (RECs) recognised by the AU.

### Issues

- i Whether the court could be seized with the question of the advisory opinion in terms of safeguarding the right to participate in government under articles 1 and 13(1) of the African Charter on Human and Peoples' Rights (Charter) in elections in Africa affected by the Covid-19 Crisis.
- ii Whether the court could interpret and lay down in terms of treaty law applicable to State Parties, standards for conducting elections during or affected by the Covid-19 crisis.
- iii What, if any, were the applicable obligations of State Parties for ensuring effective protection of the citizen's right to participate in the government in the context of an election held during the pendency of a declaration of a public health disaster or emergency, such as the Covid-19 crisis, in light of the express provisions of articles 1 and 13 of the African Charter, and articles 2(1) (2) (3) (4) (10) and (13); articles 3(1) (4) (7) (10) and (11); articles 4, 5, 6, 7, 12, 13, 15, 17, 24, 25; articles 32(7) (8); articles 38(1) and 39 of the African Charter On Democracy, Elections And Governance (ACDEG)?
- iv What, if any, were the legal standards founded in treaty law applicable to the State Parties that chose to conduct elections *vis-à-vis* member states that chose not to conduct elections during the pendency of the Covid-19 disaster or emergency measures?
- v What, if any, were the legal standards applicable to states precluded by reason of a public health emergency, such as the one caused by the Covid-19 pandemic, from organising elections as the basis of the democratic mandate of government?

### Held

1. In a request for an advisory opinion, given that such requests did not involve contestation of facts between opposing parties, the issue of territorial and temporal jurisdiction did not arise. For that reason, the court would only consider whether the request satisfied the requirements for personal and material jurisdiction.
2. To determine whether it had personal jurisdiction, the court had to satisfy itself that the request had been filed by one of the entities contemplated under article 4(1) of the Protocol To The African Charter On Human And Peoples' Rights On The Establishment Of An African Court On Human And Peoples' Rights (Protocol) on parties that could submit requests for advisory opinions to the court. In the instant case, the question that arose was whether the author was an African organization recognised by the AU in the meaning of the provision of the Protocol.
3. An organisation could be considered as African if it was registered in an African country and had branches at the sub-regional, regional or continental levels, and if it carried out activities beyond the country where it was registered. In the instant request, the author was registered in a member state of the AU, to wit, the United Republic of Tanzania and that it had structures at the national and regional levels as an umbrella organization of national and regional lawyers' associations. It also undertook its activities beyond the territory where it was registered.
4. The author and the AU signed an MoU to co-operate in undertaking activities concerning the rule of law, promoting peace and integration, and protecting human rights across the continent. The signing of an MoU was an accepted way by which the AU recognised non-governmental organisations. The author was an organization recognised by the AU within the meaning of article 4(1) of the Protocol. The court had personal jurisdiction to deal with the request.
5. Article 4(1) of the Protocol, whose provisions were restated in rule 82(2) of the Rules of Court (Rules), stipulated that the court could give an advisory opinion on any legal matter relating to the Charter or any other relevant human rights instrument. In the instant request, the court was requested to give its opinion about the application of articles 1 and 13 of the Charter, and articles 2(1)(2)(3)(4) (10) and (13); articles 3(1)(4)(7)(10) and (11); articles 4, 5, 6, 7, 12, 13, 15, 17, 24, 25; articles 32(7)(8); articles 38(1) and 39 of the ACDEG in relation to citizens' right to effective participation in the government of their states, especially (although not limited to), through regular, free and fair elections, in the context of the Covid-19 pandemic. In those circumstances, the court had material jurisdiction in respect of the request.
6. Article 4(1) of the Protocol, whose provisions were restated in rule 82(3) of the Rules, provided

that it could provide an advisory opinion provided that the subject matter of the opinion was not related to a matter being examined by the Commission. Rule 82(2) of the Rules, provided that any request for advisory opinion would specify the context or background giving rise to the request as well as the names and addresses of the representatives of the entities making the request. For determination of the admissibility of a request for advisory opinion, the court had to determine if the author of the request was properly identified, the request was not related to a matter pending before the Commission, and the circumstances of the request had been specified. According to the author, the request was admissible since:

- a) it was properly identified,
- b) the request did not relate to any application pending before the Commission; and
- c) the circumstances of the request have been specified.

The author was well identified and its representatives were explicitly indicated.

7. On 14 June 2021, in response to the court's request dated June 9, 2020, the Commission informed the Registry that no case related to the subject matter of the advisory opinion was pending before it. The author had provided the context within which the request arose, which was the political, economic and social crisis wrought upon Africa, and the rest of the World, by the Covid-19 pandemic and which posed serious challenges to democratic governance, the rule of law and the promotion and protection of human and peoples' rights, more generally, and the organisation of elections, more specifically. The request was thus admissible.
8. The citizens' right to participate freely in the government of their countries was very broad. It did not cover only direct and indirect participation in the government of their countries through elections. However, in the instant request, the author limited its question to the participation of citizens in the government of their respective countries within an electoral framework. Thus, the court's response would be limited to the material scope as set out by the author.
9. In exercising its advisory jurisdiction, the court did not resolve factual disputes between opposing parties. Its main duty was to provide its opinion by answering questions raised by the author of the request, as envisaged by article

4(1) of the Protocol. Any use of examples simply served to highlight the practical dimensions of the opinion and did not amount to a decision on any factual situation described in those illustrations.

10. The court's advisory opinions were designed to provide guidance to all member states of the AU in fulfilling their international human rights commitments. The opinion did not seek to examine the lawfulness of any specific elections that were held or postponed during the Covid-19 Pandemic, much less to assess the extent to which they were free, fair and transparent.
11. One of the fundamental principles of democracy was the regular conduct of transparent, free and fair elections aimed at creating the conditions for the possibility of democratic alternation and, at the same time, affording the electorate the opportunity to regularly evaluate and politically sanction the performance of those elected officials, through universal suffrage. State Parties could decide to conduct elections within the timeframe provided for by law, notwithstanding the situation of the Covid-19 pandemic, if they deemed it possible. Concerning the postponement, article 13(1) of the Charter, as supplemented by articles 2 and 3 of the ACDEG, by referring to domestic law, the determination of conditions for the exercise by citizens of the right to participate freely in the governance of their countries, gave the competent bodies of each state the power to decide to postpone elections in accordance with its domestic law.
12. In the absence of specific provisions on the postponement of elections, the provisions concerning the scheduling and holding of elections, including during a situation of emergency were applicable to their postponement. Those who could schedule elections also had to be able to call them off or postpone them if the conditions for holding the elections were not met because of the emergency situation, as was the case with the Covid-19 pandemic. If necessary, appropriate legislation could be adopted for the purpose. Even though the decision to conduct or not to conduct elections, remained with the competent organs of the State concerned, because of the situation of a public health emergency or a pandemic, a consultation of health authorities and political actors, including representatives of civil society, was necessary to ensure the inclusiveness of the

- process.
13. The consultation should concern not only the decision to hold elections but also the measures necessary to ensure that they were conducted in a transparent, free and fair manner. In that regard, the provisions of the ECOWAS Protocol on Democracy and Elections, which required that the consent of the majority of political actors needed to be obtained when substantial changes were made to the electoral laws within six (6) months before the elections, were an important source of inspiration for states that decided to conduct elections during a situation of public health emergency.
14. The electoral period provided a framework for the general mobilisation of political parties, candidates and their supporters, and public institutions involved in the electoral process, notably, those responsible for issuing documents and validating candidatures. National and international observers, and civil society organisations participating in the civic and voter education campaigns, were also involved in the electoral process. Conducting elections in a situation of emergency, as was the case with the Covid-19 Pandemic, a disease that was easily transmissible, including through contact between humans and between humans and contaminated objects, required that appropriate measures be taken to prevent its transmission, without undermining the integrity of the electoral process.
15. After the World Health Organisation (WHO) declared the Pandemic, a number of countries that organised elections took restrictive measures that negatively impacted the right of citizens to participate in the government of their countries through elections and the exercise of other rights during the election period. Those measures included restrictions on rights during the election period, including the right of movement of candidates and voters, to register, to obtain documents necessary for submission of candidatures, to participate in meetings related to elections, to access information related to the electoral process, as well as election observation by domestic and international observers.
16. Also following the declaration of pandemic, different national and international institutions, including the WHO itself, the AU's relevant bodies, Regional Economic Communities (RECs), and certain civil society organisations issued instructions or guidelines on measures to be taken to mitigate the spread of the disease, including in an electoral context. The Communiqué of the AU Peace and Security Council, recommended to States that decided to organise elections during that period to create the necessary conducive conditions to ensure safety and security of the population against Covid-19, in line with safeguard protocols issued by WHO and the CDC Africa, as well as to preserve the gains made and to maintain the current momentum in the fight against the pandemic and other public health emergencies.
17. The court as a judicial body, its role was not to develop policy guidelines for States on how to conduct elections in a situation of emergency. That role fell essentially on the entities that promoted human rights at the continental and domestic levels, which indeed had been doing so since the outbreak of the pandemic. In a pandemic context, where States took measures that were restrictive of human and peoples' rights or postponed elections, it was incumbent on the court to share with those concerned, through the opinion, the legal standards applicable to restrictions or suspension of rights under the Charter and other human rights instruments that the court interpreted and applied.
18. The Charter did not explicitly have provisions for derogation of rights even in emergency situations. That means that, under the Charter, States that chose to conduct elections during a state of emergency, as was the case with Covid-19, were obliged to respect human rights. Where they took measures that restricted human rights, they had to observe the provisions of article 27(2) of the Charter on the rights and freedoms of each individual being exercised with due regard to the rights of others, collective security, morality and common interest. Measures restrictive of rights had to also comply with article 2 of the Charter, which provided for the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind for every individual.
19. Applicable to the regime of restrictions were articles 4(1) and (2) of the International Covenant on Civil and Political Rights (ICCPR), which provides that states party to the ICCPR would take such measures that were not inconsistent with their other obligations under international law and did not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.

20. As regards proportionality, the restrictions had to be appropriate to the intended purpose, including their territorial extent and duration in time; they had to be necessary in a democratic society, in the sense that there were no alternative measures less burdensome for the rights of individuals and peoples; and they were not abusive (proportionality *stricto sensu*), in the sense that they were surrounded by safeguards so as to avoid their abusive application.
21. Measures restricting rights could not negate the essential content of the restricted rights. That was, the practical effect of the restrictions could not imply the annulment of the essential features of the restricted rights.
22. In the instant request, there were some aspects which formed the essential content of the right of citizens to freely participate in the government of their countries through elections. Those aspects comprised the effective participation in the electoral process, including campaigning, fair and equitable access to the State controlled media; the monitoring of the electoral process by candidates, political parties and the competent voter registration public institutions; the secret ballot; participation in the process of vote counting and publication of the election results by political parties, candidates and any other relevant actors for the transparency of the elections; the possibility of contesting the results before the competent administrative and judicial bodies, if appropriate. Those aspects of citizens' right to participate in the government of their countries could not be suppressed, even in an emergency situation such as the Covid-19 Pandemic, without undermining the integrity of the electoral process.
23. Particular attention should be given to the right of movement of persons during the election period, so restrictions on movement, besides not being absolute, other measures should be considered to mitigate restrictions such as creating conditions for meetings to be held virtually, which required improving the coverage of the telecommunications network, lifting restrictions on the use of online communication platforms, namely social media.
24. On polling day and at electoral events involving crowds of people, appropriate protective measures such as social distancing, the wearing of masks, the sanitation of polling booths and ballot papers, and the protection of polling agents were required, among other such measures that states could deem appropriate.
- Finally, measures restricting rights had to not be discriminatory. That was, a state should seek to ensure that, within the overall framework, the measures taken did not, in practice, create an advantage for one party, notably, the incumbent governing parties or candidates, to the detriment of other candidates or parties.
25. States should regularly conduct elections within the electoral calendar. In a situation of an emergency, such as the Covid-19 Pandemic, it was incumbent upon the States which were sovereign to determine when to conduct elections and to take appropriate measures to protect the health and life of people without undermining the integrity of the elections.
26. Unlike the holding of elections in a public health emergency or a pandemic, in which rights were restricted in order to protect the health and lives of the people, the postponement of elections entailed the suspension of the right of citizens to participate regularly in the governance of their countries through elections, as provided for in article 13(1) of the Charter and articles 2(3) and 3(4) both of the ACDEG.
27. The question could arise whether the Charter and other instruments which it applied were susceptible to suspension in whole or in part in emergency situations. The question of partial suspension of the Charter would arise only if the aspect of the right in question was directly governed by the Charter. Those provisions referred back to domestic law the definition of the conditions for the exercise by the citizens of their right to participate in the government of their countries through elections, including in particular their postponement. As those aspects were not directly regulated by the Charter and the ACDEG, it was for the domestic law to define the conditions for postponing elections, namely specific criteria for postponement and the regime applicable in the event the term of office of the elected officials expired without elections having been held.
28. The reference to domestic law to outline the criteria for postponing elections in declared emergencies was subject to certain conditions. The regime of restrictions provided for in article 27(2) of the Charter on the rights and freedoms of each individual being exercised with due regard to the rights of others, collective security, morality and common interest was applicable *mutatis mutandis* to the suspension of rights. That is, the postponement must be made in application of a general law, must aim at the

- legitimate purpose, be proportionate to the intended purpose and had to not undermine the essential content of rights.
29. A State concerned who invoked the situation of emergency to postpone elections, had to declare it through a general law. In the instant request, the postponement was legitimate if it aimed at protecting the health and life of the people, as well as allowing the creation of conditions for the holding of transparent, free and fair elections.
30. From the point of view of proportionality, the postponement of elections had to be a last resort, without which it would not be possible to protect the health and lives of the people and ensure the integrity of the electoral process. The period of postponement had to be strictly necessary to create the conditions that were required for the elections to take place under the best possible conditions, in accordance with acceptable international standards in the context of an emergency. The deferral period could not be used to undermine the obligation of regular legitimization of the elected officials and become a form of unduly prolonging their term of office.
31. Elections could be postponed and still be held before the end of the term of office of the elected officials. It was only the electoral timetable that had changed, without that implying the expiration of the term of office and the consequent lapse of the organs. In cases where elections were held after the end of the term of office of the organs or the electoral process was completed afterwards, there was a situation of expiration of the organs. The question then arose as to how the problem of the apparent vacancy of power was to be solved.
32. The exercise of the right of citizens to participate in the government of their countries was governed by domestic law. It was therefore for the latter to define the legal regime applicable when the term of office of elected officials expires. It was up to the law to define whether interim replacement mechanisms were triggered; whether the elected officials remained in office with full powers; or whether they remained in office but in a caretaker management arrangement, that was, with limited powers.
33. Situations of emergency were neither a new phenomenon for States, nor a new phenomenon for the law. Only the causes underlying their declaration varied. In principle, states had to have their own legislation on the consequences of the expiry of the term of office of elected officials without elections being held due to the declaration of a state of emergency.
34. If such legislation existed, it had to be applied otherwise new legislation should be enacted by the competent bodies. Considering that it was a specific context in which the rights of other political and social players were at stake, consultation with those actors was required before the legislation in question was enacted by the competent bodies.
- Request for advisory opinion allowed.*
- Orders:**
- On jurisdiction*
- i. Finds that it has jurisdiction to give the Advisory Opinion requested.
- On admissibility*
- ii. Declares that the Request for Advisory Opinion is admissible.
- On the merits*
- On the decision to conduct or not conduct elections in the context of a public health emergency or a pandemic
- iii. Finds that states may decide to conduct or not to conduct elections in the context of a public health emergency or a pandemic. Such a decision requires prior consultation with health authorities and political actors, including representatives of civil society.
- On the obligations of State Parties to ensure effective protection of citizens' right to participate in the government of their countries in the context of an election held during a public health emergency or a pandemic, such as the Covid-19 crisis
- iv. Finds that measures restricting rights, applied by States in elections conducted during a public health emergency or a pandemic, must, in accordance with Article 27(2) of the Charter, be in the form of general law; pursue a legitimate purpose; be proportionate; must not undermine the essential content of rights; must not derogate the rights provided for in Articles 6, 7, 8(1) and (2), in Articles 11, 15, 16 and 18, in accordance with Article 4(2) of the ICCPR; and must not be discriminatory.
- On the obligations of State Parties that decide to postpone elections because of a public health emergency or a pandemic, such as the Covid-19 crisis
- v. Finds that the postponement of an election because of a public health emergency or a pandemic must comply with Article 27(2) of the Charter mutatis mutandis and Article 4(1) of the ICCPR.
- On the standards applicable in the event the term of*

*office expires*

*vi. Finds that it is for domestic law to outline the applicable legal standards when the term of office of elected officials expires, including to an interim replacement, to an extension of term of office with full powers, or to a caretaker arrangement. Where appropriate legislation does not exist at the time of a public health emergency or a pandemic, a law may be enacted by the competent bodies, based on prior consultation with political actors, including representatives of civil society.*

### **Relevance to Kenya's legal system**

Article 38 of the Constitution on political rights provides that every citizen is free to make political choices, which includes the right—

- (a) to form, or participate in forming, a political party;
- (b) to participate in the activities of, or recruit members for, a political party; or
- (c) to campaign for a political party or cause.

Sub-article (2) provides that every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—

- (a) any elective public body or office established under this Constitution; or
- (b) any office of any political party of which the citizen is a member.

Sub-article (3) provides that every adult citizen has the right, without unreasonable restrictions—

- (a) to be registered as a voter;
- (b) to vote by secret ballot in any election or referendum; and Constitution of Kenya, 2010
- (c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.

Article 24 of the Constitution on limitation of rights and fundamental freedoms provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including; the nature of the right or fundamental freedom; the importance of the purpose of the limitation; the nature and extent of the limitation; the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

The Elections Act, No. 24 of 2011 in section 3 (1)

provides that an adult citizen shall exercise the right to vote specified in Article 38(3) of the Constitution in accordance with the Act.

Section 55B of the Elections Act on postponement of elections by the Commission provides that the Commission may, where a date has been appointed for holding an election, postpone the election in a constituency, county or ward for such period as it may consider necessary where—

- (a) there is reason to believe that a serious breach of peace is likely to occur if the election is held on that date;
- (b) it is impossible to conduct the elections as a result of a natural disaster or other emergencies,
- (c) that there has been occurrence of an electoral malpractice of such a nature and gravity as to make it impossible for an election to proceed.

Sub-section (2) provides that where an election is postponed under subsection (1), the election shall be held at the earliest practicable time.

Section 109 (1) (z) of the Elections Act provides that the Commission may make regulations generally for the better carrying out of the purposes and provisions of this Act, and in particular, but without prejudice to the generality of the foregoing, may make regulations with reasonable grounds for the postponement of elections.

Kenya is a state party to the African Charter on Human and Peoples' Rights having ratified it in January 23, 1992 and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights having ratified it on February 4, 2004 hence the decisions of the African Court on Human and Peoples' Rights such as advisory opinions form part of Kenyan law as per article 2 (6) of the Constitution of Kenya, 2010 (Constitution).

The advisory opinion of the African Court on Human and Peoples' Rights on conduction of elections during the COVID-19 pandemic while respecting the citizens' right to vote and participate in a free and fair election is therefore a jurisprudential and essential guide to Kenya, a member state of the Banjul Charter, which is set to hold its general elections in 2022. The advisory opinion will thus guide Kenya to decide whether it will hold its general elections in 2022 depending on how the situation will be in the country in relation to the COVID-19 pandemic.

# LAW REFORM ISSUES July, 2021 - September, 2021

*Compiled by Faith Wanjiku*

LAW REFORM ISSUE	METADATA & BRIEF FACTS	HOLDINGS PERTINENT TO LAW REFORM
<p><b>A</b></p> <p>Nairobi City County Finance Act, 2018, declared unconstitutional for failure of adequate public participation and for not being published in the Kenya Gazette and the County Gazette and thereby infringing articles 10, 47, 174(c), 196(1)(b) and 201 of the Constitution, sections 87 and 115 of the County Governments Act, section 5(1) of the Fair Administrative Actions Act and Standing Order 131(3) of the Nairobi City County Assembly Standing Orders.</p>	<p><b>Kaps Parking Limited &amp; another v County Government of Nairobi &amp; another [2021] eKLR</b></p> <p><b>Petition No. 104 of 2020</b></p> <p><b>High Court at Nairobi</b></p> <p><b>AC Mrima, J</b></p> <p><b>July 1, 2021</b></p> <p><b>Brief facts</b></p> <p>The petitioners filed the instant petition challenging the enactment of the Nairobi City County Finance Act, 2018. The petitioners contested the manner in which the Nairobi City County Finance Act, 2018 (the Finance Act, 2018) was enacted into law on three main grounds. The first ground had three components, one was that the Finance Act, 2018 was passed outside the 90-days' timeline provided for by the Constitution, the Public Finance Management Act No. 18 of 2012 (the PFM Act) and the Nairobi City County Assembly Standing Orders, 2017 (the Standing Orders). The next component was that the Finance Act, 2018 was not published in the county gazette and the Kenya Gazette. The last component was that enactment of the Finance Act, 2018 was not preceded by the views of the Cabinet Secretary and the Commission on Revenue Allocation. The second ground by the petitioners was that the Finance Act, 2018 was passed without any or adequate public participation and the third ground was that the Finance Act, 2018 was discriminatory and punitive. The petitioners thus sought for among others; a declaration that the Finance Act, 2018 was unprocedural, unconstitutional, null and void</p>	<p>1. County legislation did not take effect unless published in the Gazette. Article 260 of the Constitution defined a gazette as the Kenya Gazette published by the authority of the National Government or a supplement to the Kenya Gazette. Thus, article 199(1) of the Constitution could equally be read as, that county legislation did not take effect unless published in the Kenya Gazette or a supplement to the Kenya Gazette. Article 199(1) imposed a mandatory obligation for publication of all county legislations in the Kenya Gazette or a supplement to the Kenya Gazette and it was only through such publication that a county legislation could gain legitimacy.</p> <p>2. The term county gazette was not defined nor provided for in the Constitution which only provided for a gazette. However, the County Governments Act defined a county gazette as a gazette published by the authority of the county government or a supplement of such a gazette. That showed that there was a clear distinction between a county gazette and a Kenya Gazette and the difference was; whereas the Kenya Gazette was published under the authority of the National Government, the county gazette was published under the authority of a county government.</p> <p>3. In essence, while the concept of a county gazette was introduced by the County Governments Act, the Constitution explicitly required county legislation to be published in the Kenya Gazette for them to take effect. The Finance Bill, 2018 was not published in either the Kenya Gazette or the county gazette. As a result, the legislation could not legally stand.</p> <p>4. Apart from article 10, the Constitution further called for public participation and consultation under articles 174(c), 196(1)(b) and 201(a). The County Governments Act also provided for citizen and public participation. Public participation as contemplated under articles 10, 174, 196 and 201 of the Constitution, sections 87 and 115 of the County Governments Act and the 2nd respondent's Standing Orders was so central in the affairs of public entities, including the legislative processes of the 2nd respondent.</p> <p>5. The effect of the constitutional and statutory parameters for public participation was to ensure that public participation was realistic and not illusory. Public participation should not be a mere formality, but must accord reasonable opportunity for people to have their say in what affected them. In that way, the dictates of the law would be achieved.</p> <p>6. The amendments to the Finance Act, 2015 were administrative actions. That was because the amendments affected the legal rights and interests of the petitioners among other classes of people. As such, the amendments had to pass the constitutional and statutory tests of lawfulness, reasonableness and procedural fairness.</p>

**B**  
**The Supreme Court Rules do not provide for Advocate-Client Bill of Costs as only sections 10 and 27 of the Supreme Court Act validate the taxing officer's taxation of the Advocate- Client Bill of Costs based on the Advocates Remuneration Orders.**

**Tom Ojienda & Associates v County Government of Narok**

**[2021] eKLR**

**Misc Appl No E 608 of 2019**

**High Court at Nairobi**

**MW Muigai, J**

**June 16, 2021**

**Brief facts**

The applicant sought orders for an award of Kenya shillings sixty four million, one hundred and sixty eight thousand, seven hundred and twenty two shillings and seventy cents made by a taxing officers to be set aside. The applicant wanted the court to assess, quantify and award the respondent the proper instruction fees and attendant costs payable under the applicable law or in the alternative, it wanted the court to remit the applicant's Bill of Costs for re-taxation at an appropriate court. The grounds for the application were that the Advocate-Client Bill of Costs was taxed under Part B Schedule 6 of the Advocate (Remuneration) (Amendment) Order 2014 which was applicable to High Court proceedings while the Bill of Costs in question arose from Supreme Court proceedings.

Additional grounds for the application were that the taxing officer did not give due regard to Part 9 of the Supreme Court Rules, 2012, which provided guidelines on the assessment of fees and costs and therefore ultimately misdirected himself by adopting a narrow and restrictive interpretation of rule 47 of the Supreme Court Rules, 2012 which provided for the taxation of costs arising out of any proceedings before the Supreme Court as between the parties by the registrar of that court. Further grounds for the application included placing undue reliance on a Valuation Report valuing certain property at USD. 23,437,500 (Ksh 2, 507,512,500/-), failing to consider the public interest involved in the matter and taxation principles that guided public law matters, increasing instruction fees by 50% while the applicable rules did not allow for such an increase and awarding the respondent costs based in unsupported claims and unproven disbursements.

1. The Registrar of the Supreme Court taxed Party to Party Costs arising from the trial court's award of costs in the specific matter. The Advocate- Client Bill of Costs was considered a commercial contract between the parties; the advocate and client(s) entered into an agreement; for the advocate to offer legal services and the client (s) to pay for the services rendered by the advocate and thus such a contract was enforced and taxed by taxing officers within the Commercial & Tax Division of the High Court.

2. Section 10 of the Supreme Court Act set out the functions of the registrar and the taxation of Advocate-Client Bills of Costs was not included except taxation of costs as awarded by the Supreme Court. Under section 27 of the Supreme Court Act, the decisions of the Supreme Court could be enforced by the High Court. The two provisions validated the taxing officer's taxation of the Advocate- Client Bill of Costs based on the Advocates Remuneration Orders as the Supreme Court Rules did not provide for Advocate-Client Bill of Costs. The Advocates Remuneration Order was applicable because the Third Schedule of the Supreme Court Rules only provided for Party to Party costs and not the Advocate-Client Bill of Costs.

C  
**The law of Succession Act does not envisage audio-visual recordings as part of the making of a will.**

**In re Estate of Kevin John Ombajo (Deceased) [2021] eKLR**

**Succession Cause 555 of 2018**

**High Court at Nairobi**

**LA Achode, J**

**July 7, 2021**

**Brief facts**

The petitioner was the wife to the deceased who died testate. She filed a petition for probate of the written will dated February 20, 2012, in which she was a joint executrix with the deceased's sister. Her efforts to file a joint petition with her co-executrix were unsuccessful but in her petition she sought for the probate of the deceased's will to be granted to them jointly. The respondent opposed the petition the grant of probate and filed an objection and a petition by way of cross application. In the application she sought a grant of representation of the deceased's estate on grounds that the deceased's last will was recorded in an audio-visual medium on December 23, 2016 and that the written will dated February 20, 2015 stood revoked.

1. The Law of Succession Act did not provide for audio-visual recordings. However, the Evidence Act under sections 78A, 106A and 106B provided for the conditions upon which electronic records were admissible in court. The electronic evidence tendered met the conditions for admissibility set out under section 106B(2) of the Evidence Act.
2. The audio-visual recording had to be tested strongly against the well-established principles of wills. The validity of a will was dependent on the capacity of its maker and whether it was made in proper form. The law on testamentary capacity was wet out in section 5 of the Law of Succession Act. The maker of a will ought to be a person of sound mind and not a minor.
3. The making of the audio-visual recording was for purposes of making changes to the will of February 20, 2015. The recordings were made on December 23, 2016. The question that arose was whether audio-visual recordings qualified as an oral will. Under section 9 of the Law of Succession Act an oral will had to be made before two competent witnesses and the testator had to die within three months of the making of the will. The audio-visual recording was made before three witnesses but the deceased died seven months after the recording.
4. The audio-visual recordings made by the deceased in December 23, 2016 were intended to be a will and they were to be reduced into writing and witnessed before Christmas but the deceased died before that could be done. Although there was an attempt at making a will, the legal threshold enabling it to be considered as a valid will capable of being enforced by the court, was not met.

**D**  
**Rule 13(4) of the Human Resource Management Professionals (Elections to the Council) Regulations, 2015 does not set the timeline within which the Cabinet Secretary ought to respond to an appeal of an unsuccessful candidate in council elections.**

**Benard Ambasa v Institute of Human Resource Management & 3 others; Lilian Ngala Anyango (Interested Party) [2021]**

eKLR

**Petition No. E040 of 2021**

**High Court at Nairobi**

AC Mrima, J

**July 22, 2021**

**Brief facts**

The petitioner was a member of the 1<sup>st</sup> respondent, the Institute of Human Resource Management (the Institute). He was one of the candidates in the elections of a member of the Institute's Council for Nairobi, Central and North Eastern Region. The elections were held between November 16, 2020 and November 18, 2020. The Institute appointed the 2<sup>nd</sup> respondent as the returning officer in the election. The interested party was declared the winner of the election and was thereafter gazetted by the 3<sup>rd</sup> respondent, the Cabinet Secretary for Public Service and Gender (Cabinet Secretary) as the duly elected member of the Council of the Institute (Council). Aggrieved by the outcome of the election, the petitioner instituted the instant proceedings.

Contemporaneously with the filing of the petition, the petitioner filed an application seeking conservatory orders. The application was supported by an affidavit sworn by the petitioner on even dates. The petitioner further filed a verifying affidavit sworn on February 2, 2021 and a supplementary affidavit which he swore on March 15, 2021 respectively. In the main petition, the petitioner prayed for among others a declaration that the Institute's Council elections were not free and fair; and an order of *certiorari* to quash the gazette notice issued by the Cabinet Secretary appointing the interested party to the Institute's board.

1. The two limbs of section 83 of the Elections Act should be applied disjunctively. In the circumstances, a petitioner who was able to satisfactorily prove either of the two limbs of the section could void an election. In other words, a petitioner who was able to prove that the conduct of the election in question substantially violated the principles laid down in the Constitution as well as other written law on elections, would on that ground alone, void an election. He would also be able to void an election if he was able to prove that although the election was conducted substantially in accordance with the principles laid down in the Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election.
2. The onus was upon a petitioner who sought the annulment of an election on account of non-conformity with the law or on the basis of irregularities to adduce cogent and credible evidence to prove those grounds to the satisfaction of the court. An election was a matter of public importance not to be lightly set-aside. The success of a candidate who had won at an election should not be lightly interfered with. Any person seeking such interference had to strictly conform to the requirements of the law. For a petition challenging an election to succeed, there had to be evidence attaining a certain threshold.
3. The law accorded the Cabinet Secretary the duty to consider the appeal. On procedural fairness, the Cabinet Secretary sought for the requisite information from the other respondents. On receipt of the information, the Cabinet Secretary was satisfied that there was nothing that affected the result of the election. In other words, the Cabinet Secretary wholly agreed with the 1<sup>st</sup> and 2<sup>nd</sup> respondent's position. The Cabinet Secretary received the objection (instead of an appeal) towards the end of December, 2020. The request for the information was made in January, 2021. The gazettlement of the interested party was on the January 19, 2021.
4. Rule 13(4) of the Regulations did not set the timeline within which the Cabinet Secretary ought to respond to the appeal. Ideally speaking, the Cabinet Secretary was expected to respond to the appeal before making the decision to gazette the interested party. However, given the lacuna in the Regulations coupled with the fact that the Cabinet Secretary found favour with the 1<sup>st</sup> and 2<sup>nd</sup> respondents' position, the response would have not aided the petitioner in anyway. The failure by the Cabinet Secretary to communicate the decision on the appeal to the petitioner did not in any way affect the result of the election. The petitioner did not seek any prayer against the Cabinet Secretary in the petition. The election did not infringe articles 35(1), 38(2) or 47(1) of the Constitution.

**E**  
**There were no specific provisions relating to an application for a stay of execution at the Supreme Court as the Supreme Court Rules generally provide that an interlocutory application can be brought by way of notice of motion and it has to be filed together with written submission.**

**George Boniface Mbugua v Mohammed Jawayd Iqbal (Personal representative of the Estate of the late Ghulam Rasool Jammohamed) [2021] eKLR**  
**Misc Application 7 (E011) of 2021**

**Supreme Court of Kenya**

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

**August 6, 2021**

**Brief facts**

The dispute related to a parcel of land along Ngong Road, Nairobi. In 1985, the parties entered into an agreement wherein the applicant was to purchase the land from the respondent (deceased) for a consideration of Kshs. 2, 000, 000. After making partial payments, the applicant took possession of the land. The dispute was about whether the applicant paid the full purchase price. While the applicant claimed that he had paid the full price, the respondent claimed that there was a balance of Kshs. 500, 000 and that the failure by the applicant to complete the transaction amounted to a repudiation of the agreement.

The applicant filed a suit at the Environment and Land Court seeking orders for the transfer of the suit premises to him as the purchaser. The respondent counterclaimed Kshs. 25,020,000 being rent for the period 1986 to 2011 and Kshs. 200,000 per month until judgment was entered. The Environment and Land Court dismissed the counterclaim and ordered for the specific performance of the sale agreement.

The Environment and Land Court decision was overturned in an appeal by the respondent at the Court of Appeal. The Court of Appeal declared that the applicant had breached the agreement by failing to pay the full purchase price. The Court of Appeal also made the finding that time was of the essence in the parties' agreement and that the applicant's failure to pay the full purchase price despite being granted many opportunities to do so, disentitled him from the benefit of an order of specific performance.

The applicant filed a notice of motion indicating an intention to challenge the entire Court of Appeal judgment but he withdrew it and filed a notice of motion at the Court of Appeal for a review of the judgment. The review application was dismissed. Before the Court of Appeal, the applicant sought certification that the appeal raised matters of general public importance but before that application could be determined, he filed an application for a stay of execution of the Court of Appeal judgment.

1. There were no specific provisions relating to an application for a stay of execution at the Supreme Court. The Supreme Court Rules generally provided that an interlocutory application could be brought by way of notice of motion and it had to be filed together with written submission.
2. The principles governing the grant of a stay of execution were that the applicant had to demonstrate that the appeal was arguable and not frivolous, that if the stay was not granted the appeal would be rendered nugatory and that it was in public interest to grant the order of stay.
3. Under rule 36 of the Supreme Court Rules, the Supreme Court's jurisdiction was invoked by filing a notice of appeal within fourteen days from the date of judgment or ruling which was the subject of appeal. The notice of appeal that would have allowed the Supreme Court to exercise jurisdiction was withdrawn.
4. Once a notice of appeal had been filed, an appeal could then be instituted by lodging, among others, a petition of appeal. No interlocutory application could be brought before a petition was lodged. An interlocutory application had to be based on an existing petition or reference.

F  
**The Community Executive Committee Member Finance & Economic Planning - County Government of Mombasa; the Clerk, County Assembly of Mombasa and the Controller of Budget need to establish County Budget and Economic Forum, which meets the requirements of the provisions of the section 137 of the Public Finance Management Act, 2012 not later than 90 days from the date of the instant judgement**

**Local Empowerment for Good Governance & 6 others v Community Executive Committee Member Finance & Economic Planning - County Government of Mombasa & 2 others [2021] eKLR**

**Petition No. 187 of 2018**

**High Court at Mombasa**

**EK Ogola, J**

**June 28, 2021**

**Brief facts**

The petitioners' case was that sometime in June 26, 2018, the County Assembly of Mombasa approved the Mombasa County Integrated Development Plan 2018/2022; Mombasa County Annual Development Plan for the Fiscal Year 2018/2019; Mombasa County Budget Estimate for the Fiscal Year 2018/2019; and hurriedly rushed through the 1<sup>st</sup> reading, 2<sup>nd</sup> reading, committee stage and 3<sup>rd</sup> reading of the Mombasa County Appropriation Bill 2018, all in one afternoon sitting and passed the same as the Mombasa County Appropriation Act 2018. The petitioner averred that the aforementioned approvals by the County Assembly of Mombasa were conducted in a manner and within a period contrary to timelines stipulated under the law and consequently, the timelines were not sufficient to permit any public participation in the budget making process.

It was also the petitioners' case that they sought to obtain the programme based budget for financial year 2016-2017 and 2017-2018; the final approved County Fiscal Strategy Paper (CFSP) Financial Year 2018/2019; the County Integrated Development Plan whether in its draft form or final approved form and the approved County Budget Review and Outlook Paper(CBROP) from the respondents' offices, since prior to the June 26, 2018, the requested documents were not available on the Mombasa County Government website. Therefore, the refusal by the 1<sup>st</sup> and 2<sup>nd</sup> respondent to publish and supply the documents to the petitioners and members of the public denied the residents of Mombasa County the opportunity to effectively participate in the legislative process by failing to give them any opportunity to study all the documents approved on June 26, 2018, and that was a contravention of the petitioners right under section 87 of the County Government Act and the right to access information as required under article 33(1) and (35) (1)(a) of the Constitution and under section 4(1) and 4(4) of the Access to Information Act, No. 31 of 2016.

The petitioners' also contended that the County Government of Mombasa to date had never established the County Budget and Economic Forum whose primary mandate was to provide a means for consultation by the County Government. Further, it was averred that the rushed approval of the budgetary documents by the 1<sup>st</sup> and 2<sup>nd</sup> respondents was designed to disenfranchise residents of the County of Mombasa, and deny them the opportunity to participate in the budget making process as contemplated under article 201 of the Constitution, which required the process to be open and accountable.

1. The burden of proving the allegations of the non-existence of the County Budget and Economic Forum lay squarely upon the petitioners. Whoever desired any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserted, ought to have proved that those facts existed. The burden of proof as to any particular fact lay on the person who wished the court to believe in its existence, unless it was provided by any law that the proof of that fact would lay on any particular person.
2. It was incumbent upon the 1<sup>st</sup> and 2<sup>nd</sup> respondents to adduce evidence showing that indeed section 137 of the Public Finance Management Act, 2012 had been complied with and that a County Budget and Economic Forum had in fact been established. In the absence of such evidence, the court had no option but to believe the petitioners.
3. Although the petitioners pleaded the issue of the non-formulation of the County Budget and Economic Forum, there was no specific prayer that sought for the creation of the County Budget and Economic Forum. The court as a court of equity and in exercise of its jurisdiction under article 23(3) of the Constitution was able to fashion a remedy that would be appropriate in the circumstances.

**G**  
**NEMA and NIMS directed to prescribe measures and formulated methods for the management and safe disposal of waste from the City County of Nairobi in accordance with section 86 of EMCA read with Part 2(2)(g) of the Fourth Schedule to the Constitution. They are also directed to develop a plan and strategy for the cleaning up of the Nairobi and Athi River.**

**Isaiah Luyara Odando & another v National Environment Management Authority & 2 others; County Government of Nairobi & 5 others (Interested Parties) [2021] eKLR  
Constitutional Petition 43 of 2019**

**Environment and Land Court**

**K Bor, J**

**July 15, 2021**

**Brief facts**

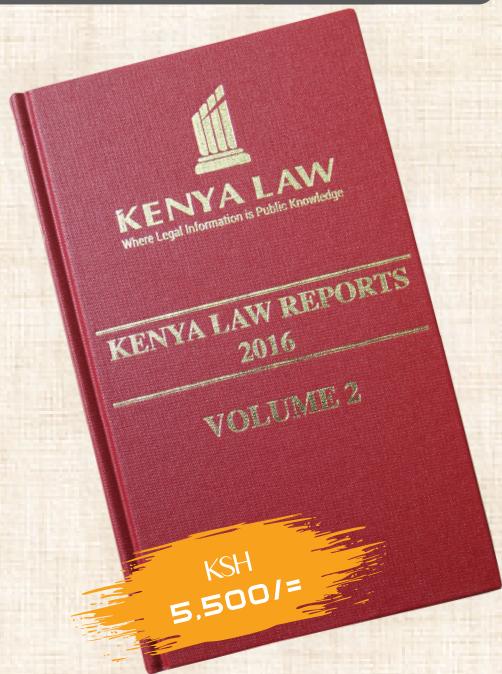
The petitioners' filed the instant class action suit against the National Environment Management Authority (NEMA) and all the counties that the River Tana traversed. The suit claimed that NEMA and the county governments had not stopped the pollution of the River Tana and Nairobi River, that in particular, the Nairobi Metropolitan Service (NIMS) had not stopped the air and water pollution by the Dandora Dumpsite.

NEMA, the 1st respondent, argued that petitioners did not specify the measures to be taken under the precautionary principle to prevent the alleged pollution. They claimed that the 1<sup>st</sup> respondent had done and continued to do the best it could within its means to prevent pollution through the application of various environmental management tools and principles.

1. There was much more that the law enjoined NEMA to do pursuant to section 9 of EMCA. It should exercise co-ordination, advisory and technical support functions with a view to ensuring the citizens' right to a clean and healthy environment was safeguarded and in the instant case, to ensure that the pollution of the Nairobi and Athi River was eliminated. The success and efficiency of NEMA would ultimately be seen in the realisation of the right to a clean and healthy environment by every Kenyan more than the information on its website as it urged the petitioners to acquaint themselves with. In light of the nationwide challenge posed by urban waste, NEMA had to be proactive and had to take the lead in enforcing the law and assist NMS and the county governments to develop and implement policies and strategies for dealing with the disposal and management of urban waste in a safe manner that did not derogate from every citizen's right to a clean and healthy environment.
2. The Water Act 2016 guaranteed every person the right to access water. Section 63 of the Water Act provided that every person in Kenya had the right to clean and safe water in adequate quantities and to reasonable standards of sanitation as stipulated by article 43 of the Constitution. The right to clean and safe water was an implicit component of the right to adequate standard of living and the right to health.
3. Some of the measures NEMA mentioned that it had taken concerning the state of Nairobi River included enacting the Air Quality Regulations in 2014. The affidavits and photographic evidence of environmental degradation presented by the petitioners confirmed the fact that NEMA had not sufficiently anticipated, prevented and attacked the causes of environmental degradation. NEMA had not discharged its statutory mandate effectively in terms of eliminating the processes and activities that caused air and water pollution in Nairobi especially in Korogocho, Mukuru and other informal settlements.
4. The respondents had failed to eliminate the processes and activities that caused air pollution in Korogocho and Mukuru kwa Reuben slums which were attributed to the Dandora dumpsite. The respondents had also failed to stop the pollution of Nairobi and Athi River and were responsible for violating the petitioners' rights to a clean and healthy environment under article 42 of the Constitution. The Respondents have also violated the Petitioners' rights to the highest attainable standard of health and to clean and safe water enshrined in Article 43 of the Constitution.
5. What NEMA, NMS and county governments needed to ask themselves was how much contamination could be avoided? For NMS, what were the alternatives to the Dandora dumpsite and the sources of pollution to the river? How would it achieve the desired goal of waste management for Nairobi County? There had to be structures for the independent and public monitoring of alternatives taken to ameliorate potential harm to the environment from the pollution. The respondents did not demonstrate that there were no alternatives available for handling the waste being dumped at Dandora dumpsite causing pollution. The respondents confirmed that there were plans to relocate the dumpsite from Dandora and rehabilitate the site.
6. Owing to the nature of pollution and the harm caused to the Nairobi and Athi River, the aquatic life in it and the effects of the polluted water on human health, the ELC needed to issue a structural interdict or an injunction to be enforced by the respondents for the period of time that it would take for the Nairobi and Athi River water to be restored to a point where it was free from the pollution. Ridding the Nairobi River of the pollution could not be done instantaneously and would require a long period of time.
7. Granting a statutory interdict or continuing orders would give effect to article 70(2) of the Constitution which gave the ELC the discretion to make orders or give directions which it considered appropriate to prevent, stop or discontinue any act or omission that was harmful to the environment.

<p><b>H</b></p> <p><b>Section 5 of the Public Order Act is unconstitutional as it places unjustified limitations on the enjoyment of several fundamental rights and freedoms.</b></p>	<p><b>Law Society of Kenya v Attorney General &amp; another [2021] eKLR</b></p> <p><b>Constitutional Petition E327 of 2020</b></p> <p><b>High Court at Nairobi</b></p> <p><b>AC Mrima, J</b></p> <p><b>August 18, 2021</b></p> <p><b>Brief facts</b></p> <p>The petitioner challenged the constitutionality of section 5 of the Public Order Act and the directives issued by the National Security Advisory Committee (NSAC). The petitioners questioned the legal existence of NSAC and the legality of its power to direct the 2<sup>nd</sup> respondent (the Inspector General of the National Police Service) in the enforcement of the Public Health (Covid-19 Restrictions of Movement of Persons and Related Measures) Rules, 2020, the Public Order Act and the National Cohesion and Integration Act. The petitioners stated that the directives by NSAC were a culmination of decisions made between March 15, 2020 and October 8, 2020 which were discriminatorily and selectively enforced and implemented by the 2<sup>nd</sup> respondent for purposes of combating the spread of Covid-19. The effect of those directives, according to the petitioner, was to limit the rights and freedoms of Kenyans as recognized under the Constitution.</p> <p>The petitioners accused the respondents of using section 5 of the Public Order Act to suppress divergent opinions, limit freedom of expression and restrict freedom of association. The petitioners also complained that section 5 of the Public Order Act limited the rights and freedoms of opinion, expression, media, association, assembly, demonstration and campaigning for a political cause by preconditioning the exercise of those rights and freedoms to the issuance of a notice to a police officer, who was empowered to decline to grant permission for the exercise of those rights, without providing good reasons for the refusal as required under article 47 of the Constitution. The constitutionality of section 5 of the Public Order Act was also questioned on grounds that it permitted a police officer to disperse a peaceful meeting or procession.</p> <p>The 1<sup>st</sup> respondent stated that the impugned directives were issued to ensure safety, peace and to order the attainment of national security. The 1<sup>st</sup> respondent added that the petition sought to usurp the policy preferences of the National Executive in favour of the value judgments of the court and that was contrary to the principle of separation of powers. The Attorney General (the 1<sup>st</sup> respondent) explained that section 5 of the Public Order Act provided limitations on the enjoyment of constitutional rights which were reasonable and justifiable. On his part, the 2<sup>nd</sup> respondent stated that the directives of NSAC were lawful governmental measures meant to combat the spread of Covid-19 and they were enforced in public interest.</p>	<ol style="list-style-type: none"> <li>Section 5(1) of the Public Order Act provided that nobody could hold a public meeting or procession except as provided for in the impugned section. There were two reasons why the provision could be questioned. One was that it failed to recognize that the Constitution provided for fundamental rights related to public meetings and processions and it purported to contend that it was the only provision that applied to public meetings and processions. Secondly, the provision negated any other law that was applicable to public meetings and processions.</li> <li>Section 5(3)(b) of the Public Order Act restricted the holding of public meetings and processions to between six o'clock in the morning and six o'clock in the afternoon. In effect, the provision excluded the holding of peaceful public meetings between six in the afternoon and five in the morning. The section criminalized meetings such as overnight prayer meetings in churches and prayers at mosques at night and early mornings because churches and mosques were public places. The provision was therefore an affront to rights such as freedom of conscience, religion, belief and opinion, freedom of association, right to assembly and freedom of movement.</li> <li>Under section 2 of the Public Order Act, a public meeting meant any meeting held or to be held in a public place which the public or any section of the public or more than 50 persons were permitted to attend whether on payment or otherwise. A public place was defined under the provision to mean any place to which the public or a section of the public was entitled or permitted to have access whether on payment or otherwise and, in relation to any future meeting it included any place which would be used for purposes of the meeting. According to the definition, a meeting of less than 50 persons was not a public meeting. That differentiation between a meeting of less than 50 and a meeting of more than 50 was not justifiable in an open and democratic society based on human dignity, equality and freedom. The provision infringed article 27 of the Constitution on equality and freedom from discrimination.</li> <li>Under section 5(4) of the Public Order Act, there was only one reason why a regulating officer could decline to allow a public meeting or procession. The reason was that it was not possible to hold the proposed meeting or procession because there was another meeting or procession on the proposed date, time and venue, that the regulating officer had been notified of. That position was impermissible. A regulating officer had to exercise discretion on the basis of a wide range of considerations and in line with powers and duties provided for in the Constitution, Police Act and any other law.</li> <li>Under section 5(7) of the Public Order Act, the organizer of a public meeting or procession had to assist the police in the maintenance of peace and order at the meeting or process. The manner in which that assistance was to be provided to the police was not defined. The police work was technical and training for it was necessary. Placing such a duty on a citizen was to an extent an abdication of duty on the part of the police.</li> <li>Section 5(8) of the Public Order Act allowed the police to issue orders and directions to stop or prevent the holding of a public meeting or procession and it required such orders to be obeyed. The provision granted blanket powers to the police and it could be used to issue unlawful orders. The powers had to be qualified to allow the issuance of orders and directives that were lawful. The provision was a threat to the Constitution and the law. Since the provision was in contrast with the Constitution and the Police Act, it had to give way.</li> <li>The offence of unlawful assembly proscribed under section 5(10) of the Public Order Act and the offence of taking part in an unlawful assembly under Chapter IX of the Penal Code had different ingredients. The provisions of section 5(10) of the Public Order Act created confusion, uncertainty and unsettled the law in the Penal Code.</li> <li>The Public Order Act was enacted on June 13, 1950. By then Kenya was under the colonial rule. In fact, that was the period when Kenyans began resisting the colonial rule through personalities and movements like Mekatitili wa Menza, the Mau Mau and many others. The Act was, hence, specifically designed to deal with and suppress such initiatives by the locals in the name of maintaining law and order. Section 5 of the Public Order Act could not, hence, stand in the advent of the Constitution of Kenya, 2010 which Constitution provided a robust and well-guarded Bill of Rights.</li> </ol>

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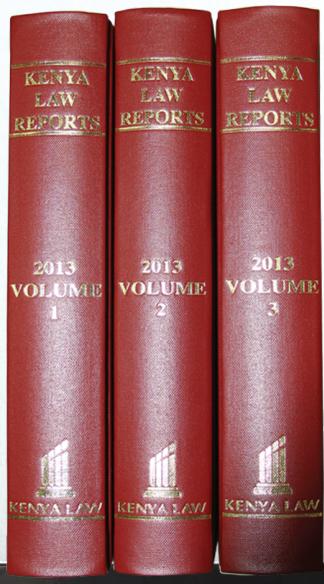
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