**Ngare v Attorney-General and another**

**Division:** High Court of Kenya at Nairobi

**Date of ruling:** 5 July 2004

**Case Number:** 173/03

**Before:** Ang’awa, Lenaola and Emukule AJJ

**Sourced by:** E Monari

**Summarised by:** A Mwanzia

*[1] Constitution of law – Procedure – Fundamental rights and freedoms – Reference to High Court –*

*Applicant not following procedure under the rules – Whether applicant must first make application to*

*subordinate court – Whether section 84(1) to be read subject to section 84(b) of the Constitution –*

*Whether rules prescribing procedure for Constitutional references unconstitutional – Whether*

*preliminary objection may be raised in a constitutional reference – Sections 84(1) and (6) Constitution of*

*Kenya.*

**Editor’s Summary**

The applicant filed a constitutional matter as a direct reference, under sections 65, 77(1), 77(2) and 84(1) of the constitution of Kenya. The applicant was challenging the constitutionality of the Anti-Corruption Court to which he had been charged with a number of offences under the Prevention of Corruption Act (Chapter 65) Laws of Kenya. The DPP contended that the application was bad in law as it did not comply with the procedure set out by the rules made under section 84(6) of the Constitution ie the Constitution of Kenya, Protection of Fundamental Rights and Freedoms of the Individual Practice and Procedure Rules of 2001, Legal Notice number 133 of 2001. He averred that the application being in the manner of a constitutional reference was made directly to the High Court without regard to the procedure set out by the rules made pursuant to section 84(6) as read with section 84(1) of the constitution. The applicant had not first applied to the subordinate court where his trial was being heard before making the reference to the High Court. The applicant countered the preliminary objection on four grounds; that in interpreting constitutional matters, courts should do so liberally and give it the widest possible interpretation, more so in questions regarding fundamental rights; that section 84(1) and (3) of the constitution confers on an applicant unlimited right of access to the constitutional Court *viz* High Court; that the rules made under Legal Notice number 133 of 2001 were unconstitutional to the extent that they attempt to derogate from the applicant’s right of access to the High Court; and that the nature of the matter before the Court was such that it could not be determined by a preliminary objection and the applicant ought to be allowed to canvass his application fully and that it be determined on its merit.

**Held** – Matters of fundamental rights and alleged violations of those rights were serious issues and the provisions relating to fundamental rights were meant to assure the citizens to come before the High Court unhesitantly and without any constraint. *Kuria wa Gathoni and another v Attorney-General* High Court miscellaneous application number 1384 of 2001. An aggrieved party had access to the High Court under section 84(1) of the Constitution but subject to the procedures under section 84(6) of the Constitution. The rules made under section 84(6) of the constitution *vide* Legal Notice number 133 of 2001 were not inconsistent with the constitution as neither the purpose nor the object of the rules had been shown to be invalid. Application struck out.

**Cases referred to in ruling:**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*Chizondo and others v Republic* [1998] LLR 5308 (HCK) – **C**

*Githunguri v Republic* [1986] KLR 1 – **C**

*Karani v Chairman (KANU) and others* High Court miscellaneous civil case number 238 of 2002 – **C**

*Kipruto arap Chelashaw v Republic* High Court miscellaneous criminal application number 693 of 2003

– **F**

*Kuria wa Gathoni and another v Attorney-General* High Court miscellaneous application number 1384

of 2001 – **F**

*Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 –**C**

*Ngui v Republic* [1985] KLR 268 – **C**

*Niazsons (K) Ltd v China Road and Bridge Corporation* [2001] 2 EA 502

*Njeru v Republic* [1979] KLR 154 – **C**

*Njogu v Republic* [2000] LLR 2275 (HCK) – **C**

*Njoya and others v Attorney-General and others*[2004] 1 EA 194 (HCK)

*Nyangau v Nyakwana* [1986] KLR 712 – **C**

*Okunda and another v Republic* [1970] EA 45 – **C**

*Pattni v Republic* – 1998 – **F**

*Republic v EL Mann* [1969] EA 357 – **AP**

*Riungu v Republic* High Court criminal application number 472 of 1996 – **F**

*Speaker of the National Assembly v Karume* [1992] LLR 3070 (CAK) – **C**

*Ssemogerere and others v Attorney-General* (3) [2004] 2 EA 276 (SAF) – **AP**

*Wasike v Swala* [1985] KLR 425 – **C**

***Canada***

*Queen v Big M-Drug Mart Ltd* [1986] LRC 332 – **C**

***United Kingdom***

*Juando v*