**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.*

**RULING**

**ANG’AWA J, LENAOLA AND EMUKULE AJJ:** On 13 May 2002, Livingstone Maina Ngare (hereinafter referred to as “the applicant”) filed the instant constitutional matter as a direct reference, under sections 65, 77(1), 77(2)(*a*) and 84(1) of the Constitution of Kenya. He also relied on the inherent powers of the High Court and all other enabling provisions of the law. In the originating summons, the applicant is challenging the constitutionality of the anti-corruption Court at which he had been charged with a number of offences under the Prevention of Corruption Act (Chapter 65) Laws of Kenya. The matter was placed before the Honourable Chief Justice and parties appeared before him on 30 July 2003, 30 September 2003 and finally on 19 February 2004 when His Lordship constituted this three Judge bench to determine the matter in question. *The Objection* When the application came for hearing on 2 June 2004, the director of public prosecution (DPP), Mr Philip *Murgor* raised a preliminary objection on points of law and procedure notice of which he had given to the applicant on 28 March 2004. Counsel for the applicant, Mr George *Sichangi* sought time to prepare for the preliminary objection and his request was granted. On 9 June 2004, the learned DPP commenced submissions on the preliminary objection with support by counsel for the Kenya Anti-Corruption Commission, Mr Evans *Monari*. The commission had by this time been enjoined in the proceedings as the second respondent. The grounds for the preliminary objection were as follows: “(1) That the application (by way of an originating summons) 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 (the Constitution of Kenya, Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules of 2001, Legal Notice number 133/2001. (2) That the application is bad in law as it does not conform with the provisions of the Civil Procedure Act, and in particular Order XXXVI of the rules under the Civil Procedure Act. (3) That the application is incompetent and bad in law as it offends the provisions of the Constitution since what the applicant prays for does not touch on the provisions of section 70-83 (inclusive) of the Constitution. (4) That the application is frivolous and an abuse of court process as it is only tailored to delay the proceedings in the lower court. (5) That the application is misconceived, bad in law and incompetent and should be struck out”. Only grounds 1, 4, and 5 were argued and it was the submission of the DPP, that from the record of the anti-corruption Court, it was clear that the application before us 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. That being the case, the reference is invalid and should be dismissed. Section 84(1) provides as follows: “Subject to subsection (6) if a person alleges that any of the provisions of section 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if another person’s alleges a contravention in relation to the detained person), then without prejudice to any other action with respect to the same matter which is lawfully available that person can/or that other person) may apply to the High Court for redress”. Subsection (6) provides as follows: “The Chief Justice may make rules with respect to practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it by or under this section (including rules with respect to the time within which application may be brought and references shall be made to the High Court)”. The rules envisaged by subsection (6) were made *vide* Legal Notice number 133 of 2001 by the Bernard Chunga CJ (as he then was) and they are known as “The Constitution of Kenya, Protection of Fundamental Rights and Freedom of the Individual Practice and Procedure Rules, 2001” (herein after referred to as “the Rules”). The DPP submitted that whereas the application before court was brought *inter alia* under section 84(1) aforesaid the application failed to take cognisance of rules 2, 3, and 4 of the rules. Rule 2 provides as follows: “Where an accused person in a criminal case or a party to a civil suit in a subordinate court alleges contravention of his fundamental rights or freedoms under section 70 to 83 inclusive of the constitution in relation to himself, *he shall apply informally to the presiding Magistrate during the pendency* of the proceedings before that court can file a reference to the High Court to determine the question of the alleged violation”. (emphasis added) Rule 3 provides as follows: “If the presiding Magistrate is satisfied that there is merit in the allegation, and that it has not been made frivolously merely to delay the trial, he shall grant the application, whereupon the applicant shall frame the question to be determined by the High Court”. Rule 4 provides as follows: “Where the presiding Magistrate refuses to grant the application under rule 3, he shall proceed with the trial, without prejudice to the right of the applicant to renew the application in the High Court in any appeal that may follow his conviction by the Magistrate or conclusion of the matter in the subordinate court”. In the light of the clear procedure set out above, and there being no issues framed in the subordinate court, we were urged to find there was nothing to determine at this stage and the application before court had been fatally defective. In any event, we were further told, the only procedure known to the rules by which an applicant can file a direct reference to the High Court is rule 9 which in any event does not apply to the circumstances of this case and is therefore unhelpful to the applicant and the Court. Rule 9 provides as follows: “Where contravention of fundamental rights and freedoms is alleged otherwise than in the course of proceedings in a subordinate court or the High Court, an application shall be made directly to the High Court”. The learned DPP then referred this Court to the cases below: 1. *K arani and others v Chairman (KANU) and others* High Court Miscellaneous civil case number 238 of 2002 (Oguk and Rimita JJ (UR)) This was a case where three life members of a political party, the Kenya African National Union (KANU) filed a constitutional reference by way of an originating motion seeking certain orders that are not of relevance here. A preliminary objection was taken by the respondents as to their capacity to be sued as officials of a society and in their official capacity. While holding that the society was not a legal person with capacity to sue or be sued, the Court also noted that a person alleging contravention of fundamental rights must adhere to the procedure and practice as set out in the rules made under section 84(6) of the Constitution. 2. *K ipruto arap Chelashaw v Republic* High Court miscellaneous criminal application number 693 of 2003 In this case, a Constitutional reference was filed under section 84 and the applicant sought orders *inter alia* that the anti-corruption Court which was trying him in criminal case number 27 of 2003 was: “not a court established by the constitution, statute or parliament under section 65 of the constitution and therefore not a court established by law or a court of competent jurisdiction as provided or envisaged by section 77 of the constitution and the Court does not have the requisite attributes to try the case under the constitution”. The declaration sought in that case was therefore very similar to the orders sought in the matter before this Court, and we were urged to follow the findings of Kubo J on a preliminary objection taken by State. The objection was partly based on the fact that whereas there were pending proceedings before the subordinate court, the applicant chose, as has the applicant herein, to come to the High Court directly. The Learned Judge categorically held that the procedure to come to the High Court was clearly set out in the rules under Legal Notice number 133 of 2001 (*supra*) and therefore it was unprocedural for the applicant to allege infringement of fundamental rights and freedoms by directly saying so to the High Court, without first making the same allegation and applying to file a constitutional reference, to the subordinate court. The Learned Judge upheld the objection. *Reply to the objection* In reply to the arguments above, learned counsel for the applicant urged this Court to find that the preliminary objection was misconceived and in showing that fact he submitted on four basic points:

1. That in interpreting Constitutional matters, courts should do so liberally and give it the widest possible interpretation, more so in questions regarding fundamental rights.

2. That section 84(1) and (3) of the Constitution confers on an applicant unlimited right of access to the Constitutional Court *viz* the High Court.

3. That the rules made under Legal Notice number 133 of 2001 are unconstitutional to the extent that they attempt to derogate from the applicant’s right of access to the High Court.

4. That the nature of the matter before court is such that it cannot 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. We were urged to look to the Constitution of Kenya and in interpreting the relevant sections in as far as this matter is concerned, we should take the liberal approach and in that regard we were referred to the cases of: (*a*) *Republic v EL Mann* [1969] EA 357 In this case, the Court held *inter-alia* that where there was no ambiguity in the riding of the Constitution, then the same should be construed according to the ordinary and natural sense of the words. (*b*) *Okunda and another v Republic* [1970] EA 45 Mwendwa CJ, Chana Singh and Simpson JJ The Court in this case held that where laws of the East African community were inconsistent with the Constitution of Kenya, the same would be void under section 3 of that constitution. Similarly, we were urged to find that where any law is found to be inconsistent with our constitution, then the same should be declared void. The applicant argued on this point that sections 84(1) and (3) of the Constitution granted him an unlimited right of access directly to the High Court. This being the case, it does not matter that he did not initially make his complaint regarding allegations of violations of his fundamental rights and freedoms at the anti-corruption Court. It was his contention therefore that he was properly before this Court. Section 84(3) provides as follows: “If in proceedings in a subordinate court a question arises as to the contravention of any of the provisions of sections 70 to 83 (inclusive) the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous and vexatious”. Subsection (4) then provides that: “where a question is referred to the High Court in pursuance of subsection (3), the High Court shall give its decision upon the question and the Court in which the question arose shall dispose of the case in accordance with that decision”. Mr *Sichangi* argued that his client’s case is that the anti-corruption Court is unconstitutional and if it is, then it cannot for example take the directions under subsection (4) above. Further, that his client has chosen not to submit to such a court hence the application to challenge its constitutionality directly to the High Court. He relied on the following authorities on the point: (*a*) *Njeru v Republic* [1979] KLR 154 (number 1) In that case the applicant was refused an adjournment to call a witness in her criminal trial. She did not file a constitutional reference at that time as she was entitled to do under section 84(3) of the Constitution and was convicted and sentenced. She applied for leave to appeal out of time. The application was refused. She then applied to the High Court under section 84(1) of the Constitution alleging violation of her right to reasonable facilities to conduct a defence as enshrined in section 77(*e*) of the Constitution. It was held: “that although failure to ask the trial court to refer a question under section 84(3) did not preclude a subsequent application under section 84(1), the application would be refused since the applicant (by applying for leave to appeal out of time and raising on that application the issue of the refusal of an a adjournment) availed herself of an “other action” available to her and the Court should not be asked to adjudicate more than once on the same issue”. Mr *Sichangi* also read out portions of the ruling in the *Karimi* case whose import was that section 84(1) and section 84(3) are not mutually exclusive but he further urged the point that the applicant in that case accessed the High Court directly and rules under section 84(6) were not an impediment to her doing so. (*b*) *Ngui v Republic* [1985] KLR 268 The applicant had filed an application under section 84(1) of the Constitution for an order that section 123 of the Criminal Procedure Code (Chapter 75) was inconsistent with section 72(5) of the Constitution as it purported to make her ineligible for bail for the offence of robbery with violence contrary to section 296(2) of the Penal Code. That section of the Criminal Procedure Code is therefore void to that extent. The Court held that it had jurisdiction to consider the matter under section 84(1) of the Constitution. Again, no mention was made of the rules under section 84(6). (*c*) *Githunguri v Republic* [1986] KLR 1 Madan Ag CJ Aganyanya, Gicheru JJ The relevance of this case to the matter at hand is that as we were informed, the High Court once seized of a matter under section 84(3) can return an opinion to guide the subordinate court. In the matter before us, we were told that serious and weighty issues would be raised and require determination so that the subordinate court would be properly guided on issues of procedure and law. A further point raised was that this Court should look to the substance of the issue before it and not to the procedure used as substance is weightier than procedure. (*d*) *Chizondo and others v Republic* [1998] LLR 5308 (HCK) The Chief Magistrate, Mombasa, Aggrey Muchelule Esq referred a question to the High Court under section 84(3). Ang’awa J heard arguments whether the matter could be heard by a single Judge. The Learned Judge after hearing the parties ordered that the file be placed before the Chief Justice to constitute a three Judge bench to determine the question. The learned Chief Justice while remitting the matter back to the High Court for hearing by a single Judge also stated that notwithstanding the absence of rules under section 84(6), the High Court can properly determine the matter under section 84(1) and that the party could approach the Court by more than one way known to our practice and procedures. (*e*) *Riungu v Republic* High Court criminal application number 472 of 1996 O’Kubasu and Owuor JJ The Court held that a party seeking a constitutional remedy, such as the one the applicant in that matter was seeking, could approach, the Court either directly under section 84(1) or by a reference by the subordinate court under section 84(3). We were urged to find that the approach under section 84(1) by the applicant herein is an option available and properly taken by him. Further reliance was placed on the case of: (*f*) *Kuria wa Gathoni and another v Attorney-General* High Court miscellaneous application number 1384 of 2001 The point that is of relevance as regards this case is that in matters of preservation, protection and enforcement of fundamental rights, court should not fetter itself nor attach conditions in granting those rights and therefore section 84(1) is a correct vehicle to bring parties to the protective arms of the High Court. Although only partly raised in the substantive application, Mr *Sichangi* attacked, the rules made *vide* Legal Notice number 133 of 2001 because having argued that an applicant has a constitutional right to come to the High Court directly, the rules, specifically rule 2 in as far as is ties the applicant’s hands to the subordinate Court is unconstitutional. He also urged the point that since in the applicant’s mind the rules were unconstitutional and the Court itself unconstitutional, he could not submit to it by following the rules and specifically the one requiring him to initially raise the allegation of violation of rights in the Subordinate Court. Further that all the anti-corruption Court does as regards the applicant’s case is a nullity for all these reasons. In furtherance of this point, reliance was then placed on the cases of: (*a*) *Wasike v Swala* [1985] KLR 425 It was held in this case that where a trial Magistrate proceeded to determine a subject matter whose value exceeded his pecuniary jurisdiction, the Court had no jurisdiction, and its proceedings a nullity. (*b*) *Nyangau v Nyakwana* [1986] KLR 712 The point here was that, where an arbitral tribunal heard the dispute outside of the time allowed, its decision subsequently was rendered a nullity. (*c*) *Halsbury’s Laws of England* Volume 9 (1954 ed) on the oft-quoted statement that where an inferior tribunal exceeds its jurisdiction, the High Court has jurisdiction to declare its proceedings a nullity and issue the writ of prohibition. It was urged on behalf of the applicant that in proceedings of this nature: “where violation of fundamental rights are being alleged, issues arising, cannot be disposed of by way of preliminary objections. The reason given is that the issues are so fundamental that the Court ought to make a determination based on all the matters raised and not just those of form or procedure. In the instant reference, it was therefore argued that the issues raised in points 1 to 3 above are so weighty and touch on an individual’s fundamental rights and freedoms and violation thereof, that this Court should not shut the door in his face so early in the proceedings”. In support of this contention we were asked to follow the holdings in: (*a*) *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 In this case the Court expressed displeasure at the practice of raising preliminary objections and further stated that such objections can only be raised where there is an issue of pure law whose determination at that point would dispose of the suit. The Court is therefore not being asked to delve into disputed matters of fact. (*b*) *Niazsons (K) Ltd v China Road and Bridge Corporation* [2001] 2 EA 502 Following the decision in Mukisa Biscuit above, where the respondent in the above matter raised a preliminary objection going to the validity of the dispute resolution clause in the contract between the parties, the Court found that the objection was improperly raised as it required the Court to consider whether it was incapable to perform the contract by dint of the allegedly invalid clause. The objection was disallowed as consequence. We were urged to disallow the preliminary objection for all of the above reasons and get to the merit of the applicant’s constitutional reference. *Findings I. Constitutional Interpretation* We have been asked to look at the issues raised in the originating summons and approach them liberally. We agree, matters of fundamental rights and alleged violations of these rights are serious issues and as was said by their Lordships in the case of *Kuria wa Gathoni* (*supra*) the provisions relating to fundamental rights: “were meant to assure the people of this country to come, before this Court unhesitantly and without any constraint where there has been, there is or there is a likelihood of a breach of rights enshrined in sections 70 to 83 (inclusive) of the Constitution”. We also take the view that in interpreting the Constitution, regard must be had to the language and the wording of the Constitution so that where there is clearly no ambiguity we have no reason to depart therefrom. Thankfully, in the instant case no ambiguity has been claimed. Ambiguity and inconsistency cannot be the same thing. The approach taken in *Republic v El Mann* shall therefore be our approach in this matter. We are not alone in taking that approach as the Constitutional Court in *Njoya and others v Attorney-General and others* [2004] 1 EA 194 (HCK) only recently took the same approach and approved the decision in the case of; *Njogu v Republic* [2000] LLR 2275 (HCK) *II. Does section 84(1)(3) unlimited access to the High Court?* It is our considered view on this question that regard must be had to the fact that all the authorities quoted by the applicant’s Counsel can be categorised into two groups: (*a*) those that were delivered prior to September 2001 when Legal Notice number 133 of 2001 was issued, and (*b*) those that were delivered subsequent to the said legal notice In category (*a*) therefore will fall the cases of: (i) *Njeru v Republic* – 1979 ( ii) *Ngui v Republic* – 1985 (iii) *Githunguri v Republic* – 1986 (iv) *Riungu v Republic* – 1996 ( v) *Chizondo v Republic* – 1998 (vi) *Pattni v Republic* – 1998 In category (*b*) are the following cases: (i) *Kuria wa Gathoni v Republic* – 2001 ( ii) *Karani v Chairman KANU* – 2002 (iii) *Kipruto arap Chelashaw v Republic* – 2003 Very obviously, the reason why in category (*a*), section 84(6) and the rules made thereunder was not considered was precisely because there were no rules then existing. A party would therefore apply under section 84(1) directly as there was no other way save for the procedure under section 84(3) that a person could access the Constitutional Court in matters of alleged violation of fundamental rights. In the *Karimi* case specifically, the applicant could not come to the High Court under section 84(3) because the subordinate Court had became *fundus officio* and therefore, the applicant could only then approach the High Court by the alternative procedure under section 84(1). The argument by Mr *Sichangi* that no mention of the rules was made in those decisions is therefore spurious. Regarding the procedures under section 84(1) and that under section 84(3), we agree with the interpretation given in the *Riungu* case (*supra*). The Court said: “it would appear that there are two ways in which a party may make an application for constitutional remedy. Under section 84(3) of the Constitution there is what we may call direct application to the High Court and under section 84(1) of the Constitution, the applicant would come to the High Court by way of reference by a Subordinate Court”. The applicant herein by his own admission and election in his application chose to come by way of section 84(1). Chesoni CJ in the *Chizondo* case (*supra*) in discussing that section quoted the case of *Juando v Attorney-General* [1971] AC 9972. The Learned Judge specifically restated the statement of the judicial committee in Guyana where it was held that: “The right to apply to the High Court for redress conferred by article 19(1) (this article is in all material respects, similar to section 84(1) of the Constitution of Kenya) was expressed to be subject to paragraph 6 of that article and since neither parliament nor the rule-making authority of the Supreme Court had exercised their power under article 19(6) to make provision with respect to practice and procedure the method was unqualified and the right wide enough to cover application by any form of procedure by which the High Court could be approached to invoke its power”. The reason therefore why a party could come directly under section 84(1) was because the absence of rules under section 84(6) made the approach unqualified and a party could come by any procedure including as Chesoni J said, even by way of a plaint. “However, Counsel for the applicant did not note that section 84(1) and its application is subject to section 84(6). Where there were no rules made under section 84(6) it would be superfluous, to subject section 84(1) applications to procedures and practices under section 84(6) because they did not exist. It is our view, however, that once rules were made, then a party ought to follow those rules because: (i) Section 84(1) and section 84(6) should be read together and not as Mr *Sichangi* has done, selectively and to the exclusion of each other. ( ii) Whereas section 84(1) is the section which protects the fundamental rights, section 84(6) gives the procedure for approaching the High Court to enforce these rights. (iii) The Constitution specifically gave the Chief Justice the power to enact the rules and the Chief Justice did so under Legal Notice number 133 of 2001. A party cannot now ignore these rules as if they did not exist. As Kubo J said in *William Kipruto arap Chelashaw v Republic* (*supra*) and we agree. “Procedural rules are not made for fun but for a purpose”. We also take note that the Court of Appeal was emphatic way back in 1992 that procedures that are enacted should be followed. This was the holding in *Speaker of the National Assembly v Karume* [1992] LLR 3070 (CAK). Where the Court of Appeal stated: “In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance by the Constitution or an Act of Parliament, that procedure should be strictly followed”. Having said so it is instructive that all the authorities in category (*b*) above applied the rules as framed by the Chief Justice. In *Kuria wa Gathoni* (*supra*) the Court stated as follows: “We note that this application has been appropriately made under the rules”. Even in the *Kamlesh Pattni* case (*supra*), the Court therein observed that; “Section 84(1) as it provides is only subject to the practice and procedure of rules when made under section 84(6)”. This was said a year before the rules were enacted, and the Court clearly understood that the rules under section 84(6) are applicable, once enacted. We have said enough to show that access to the High Court under section 84(1) has to be by way of the procedure set out under section 84(6), and necessarily therefore the rules should be applied. We have not been called upon to discuss as yet the constitutionality or otherwise of the anti-corruption Court and we shall not proceed on that line. Whether therefore its decision either way will be a nullity is a matter for decision on another day. As regards the rules however, we have shown above that they are indeed made pursuant to a constitutional duty imposed on the Chief Justice. He has discharged that obligation and in time too. The lamentation of Judges such as Ang’awa J in *Ali Chizondo* (*supra*) and the bench in the *Kamlesh Pattni* case regarding lack of rules under section 84(6) has come to an end and parties should follow the rules, since they now exist and they exist to be followed unless properly challenged. We are also aware in finalising this point that the purpose of legislation must be looked at to see whether or not it is unconstitutional. Section 84(6) so far as we see was intended to create a procedure for bringing section 84(1) applications. We have not seen anything in those rules nor have we been shown that their purpose has been defeated. As was said in the landmark constitutional case in the Supreme Court of Uganda *Ssemogerere and*

*others v Attorney-General* [2004] 2 EA 276 (SCU) and quoting from a decision in *Queen v Big M-Drug*

*Mart Ltd* [1986] LRC 332: “Both purpose and effects are relevant in determining constitutionality, either purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realised through the impact produced by the operation and application of the legislation. Purpose and effect respectively in the sense of the legislation’s object and its ultimate impact are linked, if not indivisible. Intended and actual effects have often been looked to for guidance in assessing the legislation’s object and thus the validity”. As we said earlier, neither the purpose nor the object of the rules have been shown to be invalid and we so rule. We agree that when Sir Newbold, president of the Court in *Mukisa Biscuits* (*supra*) derided the practice of raising unnecessary preliminary objections, he stated what is the rule regarding what proper preliminary objections are, that is, they are in the nature of a demurrer. A demurrer would put the entire matter to rest. The question before us is simple; does the High Court have the jurisdiction to hear this matter where, there has been a clear breach of procedure that flows directly from the Constitution? When confronted with this question, the bench in the *Eliphaz Riungu* case had this to say: “In our view we thought that if the learned DPP wanted to challenge the jurisdiction of this Court to entertain this application, then that should have been raised as a preliminary point of objection, and by so doing save everybody’s time in the, event that this Court has no jurisdiction”. If indeed as it is true that a preliminary objection would dispose of a matter completely, what better time to raise it than at the very earliest? If the applicant ought not to be in this Court and should be sent back where he came from, more so for breach of procedure, what better time to tell him so, than at his maiden appearance before this Court? We do not find merit in the contention that the preliminary objection was raised prematurely and we so rule. We were asked by Mr *Murgor* to dismiss the application for the reasons that we have enumerated above. Our position however is that where a preliminary objection is raised and upheld as we have, then the right thing to do is to strike out the application which we hereby proceed to do. Accordingly, the preliminary objection is hereby allowed as prayed. 1. O n the question whether section 84(1) allows an applicant to access the High Court directly, we have ruled that he can only come to the High Court using the procedure contained in the rules made under section 84(6) of the Constitution. 2. O n whether the rules aforesaid are unconstitutional, we have held that in the circumstances and context of this case, we see no such, unconstitutionality. 3. O n whether, a preliminary objection of the nature of the one raised here is properly so raised, we hold that it is so and the same is hereby upheld. 4. I n reaching our conclusion, we have had regard to the language and tenor of the Constitution and the matter at hand and taken a literal/liberal interpretation of the issue before us.

The application dated 13 May 2002 is therefore struck out with costs to the respondents.

Orders accordingly.

For the applicant:

*G Sichangi* instructed by *Sichangi and Co*

For the first respondent:

*P Murgor* instructed by Attorney-General

For the second respondent:

*E Monari* instructed by *Daly and Figgs and Co*