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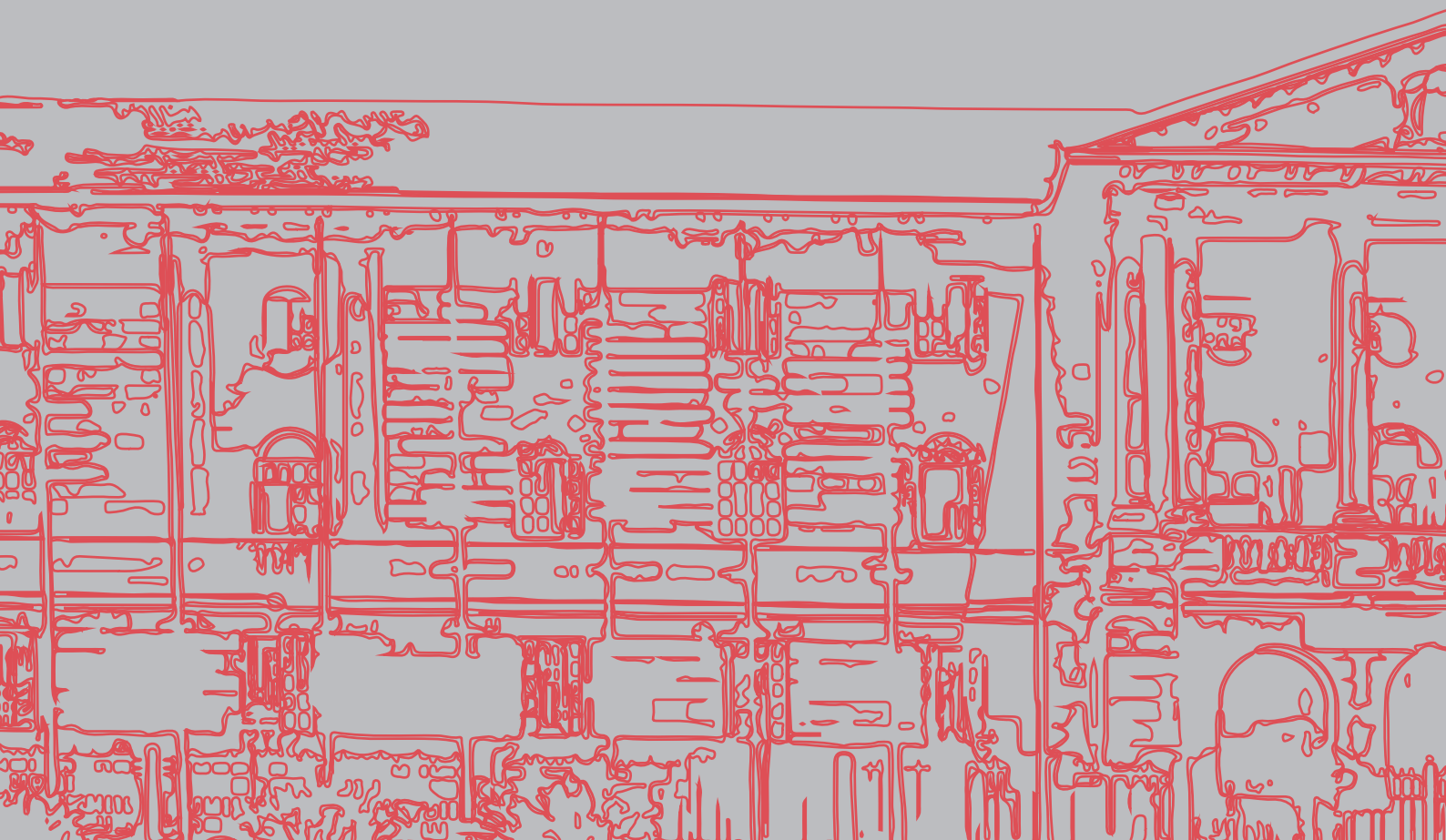
Public Interest Litigation in Kenya

Compendium



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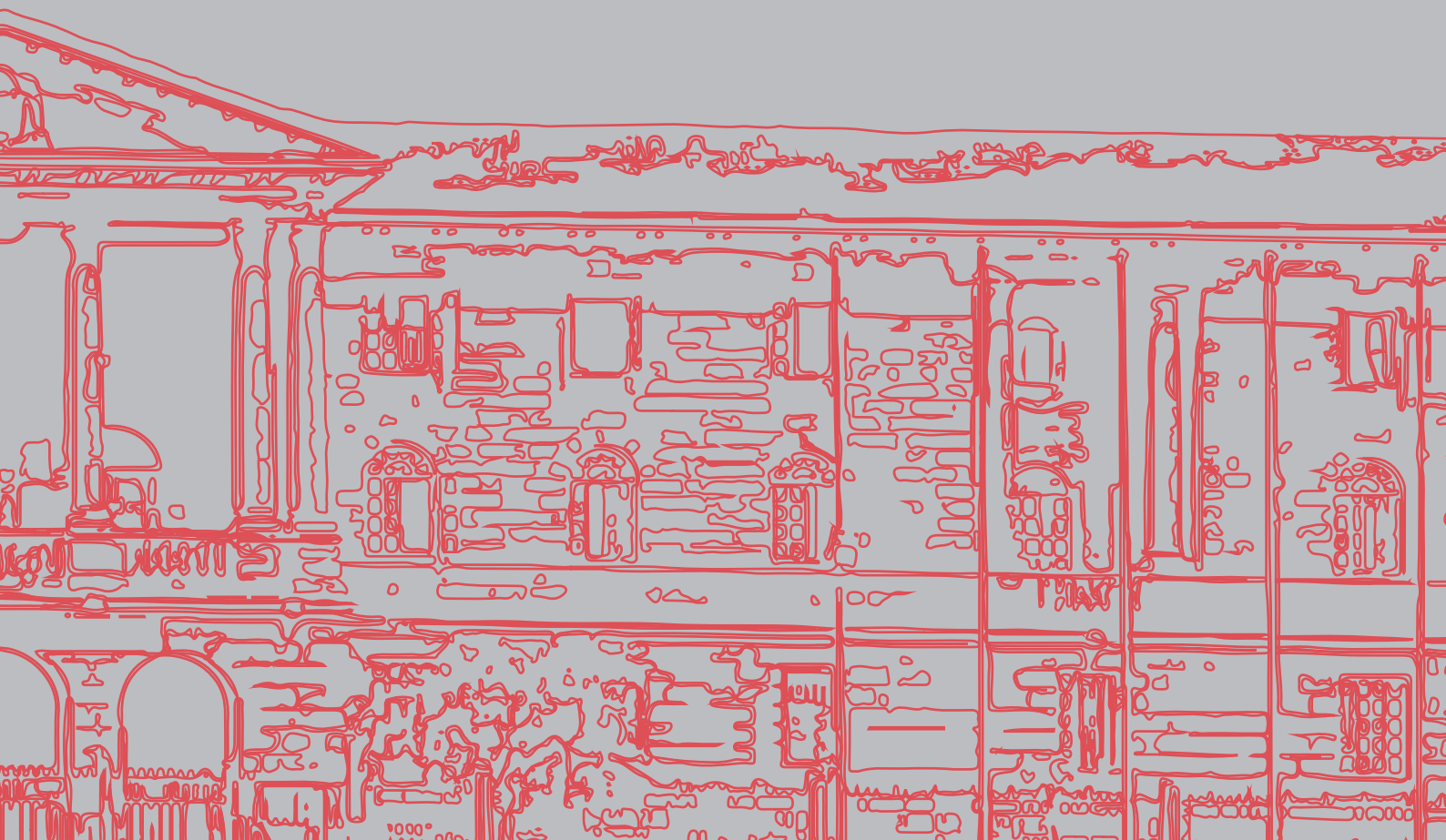

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BILL OF RIGHTS

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Bill of **Rights**

A.M.N & 2 others v Attorney General & 5 others [2015]

CASE NUMBER: Petition No. 443 of 2014
REGION: Nairobi
COURT: High Court
DATE OF DECISION: 13 February 2015
RELEVANT LAW: Constitution, Articles 43, 53, 159
Births and Deaths Registration Act, Cap.149
Laws of Kenya, UK's Surrogacy Arrangements Act, 1985
DECISION: The mother of surrogate children is the surrogate mother.

SUMMARY

Facts

In the petition dated 8 September 2014, the petitioners aver that X was diagnosed with secondary infertility after losing one child at infancy and having had four miscarriages, each in the first trimester. She then sought advice on 13 July 2011 from the 4th respondent and the latter advised her to seek an egg donor IVF/ET treatment as the most suitable fertility option and both X and her husband, Y, accepted the advice. The egg donor option was undertaken when an anonymous donor's eggs were identified, but the procedure failed as X had no endocervical canal and so access to her cervix was impossible.

X and Y sought further advice from the 4th respondent and it was agreed that a surrogate arrangement was the next best option and Z agreed to be the surrogate host. Her husband was also agreeable to the arrangement and a surrogacy agreement was subsequently signed on 6 June 2012. By that agreement, Z inter-alia consented to have three embryos transferred to her and to hand over the born baby to the genetic parents. On 7th June 2012, Z underwent the embryo transfer at the 4th respondent's facility and on 5th February 2013, she delivered twin babies of the female gender at the Kenyatta National Hospital, the 3rd respondent.

Thereafter and after taking legal advice from the Attorney General, Kenyatta National Hospital issued a birth notification certificate indicating that X and Y were the parents of the twins and the 2nd respondent issued their birth certificates on 12 June 2013 with those particulars recorded. The twins also received Kenyan passports on 19 June 2014.

What triggered the filing of the petition was the fact that X and Y, sometime after June 2014, applied for British citizenship for the children and to enable them travel to the United Kingdom but the application was unsuccessful and the response from the UK passport office dated 4 August 2014 was inter-alia as follows:

"In order to establish British citizenship for J and G there are two options available to you.

1-Adoption under Article 23 of the 1993 Hague Convention on the Protection of Children and

Co-operation in Respect of the Inter-Country Adoption – certificates issued under The Hague Convention Article 23 are acceptable for passport services.

2-Registration as a British citizen – it is open to you to contact the United Kingdom Visa & Immigration service (UKV&I) with a view to registering the children as British citizens. You should contact UKV&I via the website www.gov.uk"

X and Y applied for a review of the said decision and in response, the UK passport office stated as follows, by letter dated 23 August 2014:

"From the information we were given in the application, your daughters' claim would be based on the fact that they had a British parent named on their birth certificate. Information provided in support of your daughters claim has raised concerns that the details given on the birth certificate were found not to be true…"

Decision

The surrogate mother is the legal mother and the genetic father is the legal father until a legal process is invoked to transfer legal parenthood to the mother. An order was issued that, pending a fast-tracked adoption process for the surrogate twins herein, their birth certificates and Kenyan passports shall be amended and/or altered to indicate that Z and not X is their biological mother.

The adoption proceedings contemplated in (a) above shall be fast-tracked and an order was issued directing the Deputy Registrar of the Family Division to fast-track the adoption proceedings in the interests of justice.

It was determined that in cases of surrogacy, the surrogate mother shall be registered as the mother of a born child pending legal proceedings to transfer legal parenthood to the commissioning parents.

The Attorney General was directed to fast track the enactment of legislation to cater for surrogacy arrangements in Kenya.

Abel Odhiambo Onyango & another v Cabinet Secretary Ministry of Health & 2 others

CASE NUMBER: Petition No. 13 of 2014
REGION: Nairobi
COURT: High Court Of Kenya, court of first instance
DATE OF DECISION: 7 May 2014
RELEVANT LAW: Constitution, Articles 27[2014], 54
Medical Laboratory Technicians and Technologists Act (Cap 253A)
DECISION: The petitioner serves out the remainder of his term as a member and chairman of the Medical Laboratory Technicians and Technologists Board unless removed therefrom for lawful cause and in accordance with the Constitution

SUMMARY

Facts

The 1st petitioner, a person with disability who was serving as the chairperson of the Medical Laboratory Technicians and Technologists alleged that he had been removed from the position of the board chair by the Cabinet Secretary (CS) because of his disability, against the rules of natural justice and in violation of Article 27 of the Constitution. He maintained that he was not given any notice prior to the appointment of the 3rd respondent (Alex Chemutai) nor was his appointment revoked, and it is his case therefore that the appointment by the CS was illegal and unprocedural.

The respondents submitted that Abel Odhiambo Onyango was involved in activities that are illegal, hence justifying his removal. Counsel for Mr Abel Odhiambo submitted that no disciplinary proceedings have been taken against his client and that there were no integrity issues as claimed by the Attorney General. The petitioner sought orders that a declaration that he was a legitimate member of the Board, and chairman of Kenya Medical Laboratory Technicians and Technologists Board (KMLTTB) and that the appointment of the 3rd respondent as chairman of the KMLTTB violates and offends Articles 27 and 54 of the Constitution. Counsel for the respondents argued that the petition did not disclose any violation of the petitioner's rights, but in any event, his rights under Article 27 and 54 were not absolute and were limited by Article 24.

Decision

The judge in her determination noted that there was no indication that the initial appointment of the petitioner was on the grounds of his disability and neither was the chairman position reserved for a person with disability, and therefore on the face of it, she failed to see any discrimination based on Article 27 grounds. She also noted that the board acts as an entity and therefore for the

chairperson alone to face the blame for any integrity issues raised questions as to the revocation of the chairperson's appointment. Therefore, she held that the totality of the material before her suggested a level of discrimination against the petitioner, which was a violation of the provisions of Article 27.

The High Court declared that the purported removal of the petitioner as a member and chairman of the Medical Laboratory Technicians and Technologists Board was null and void and directed that Mr Abel Odhiambo serve out the remainder of his term as a member and chairman of the Medical Laboratory Technicians and Technologists Board unless removed therefrom for lawful cause and in accordance with the Constitution.

Ali Ahmed and 49 Others v County Government of Mandera

CASE NUMBER: Petition No. 4 of 2015
REGION: Garissa
COURT: The High Court of Kenya at Garissa, court of first instance
DATE OF DECISION: 23 July 2015
RELEVANT LAW: Constitution, Article 258
DECISION: The petitioners did not demonstrate a violation or threatened violation of any constitutional rights, and also did not demonstrate entitlement to any of the reliefs sought. The petition therein was dismissed.

SUMMARY

Facts

The petitioners brought the petition alleging violation of their constitutional rights. They claimed to be residents and traders in Mandera town and that the respondent, the County Government of Mandera, issued a notice to the residents of Mandera town informing them that they would demolish the market in the town, and later indicated that they would soon demolish the said market and also evict livestock traders selling livestock in another market known as Bulgara Market. It was the petitioners' position that they had locus standi to institute the petition under Article 258 of the Constitution of Kenya 2010 as Kenyan citizens in their own interest, or in the interest of others whose constitutional rights were violated or threatened with violation. They also maintained that the assertion by the respondent that the unlicensed make-shift structures posed a security risk and had previously been used as hideouts for terrorists who carried out attacks in the town were false, as the respondents had actually been collecting operating fees from the traders every month, and that was why the structures had not been demolished 40 years down the line. The petitioners stated that the respondents thus owed them a duty to relocate them to another trading area if they were to demolish the market.

Decision

In the judge's view, the petitioners had locus standi to approach the court under Article 258 (1) and (2) (b) of the Constitution. They did not have to prove ownership of markets, as they were licensed as operators, not as owners of the structures. The licence was a sufficient interest to give rise to locus standi in the constitutional petition. Both as licensees at a fee, as well as on behalf of other residents of the county, the petitioners had locus standi to bring the constitutional petition.

The second issue was whether the constitutional rights of the petitioners, or those they had sued for, had been, or were threatened to be violated. The petitioners claimed to have gone to court also for the wider interests of residents of Mandera County. The violation or threatened violation of any of the constitutional rights is a constitutional issue. Other violations of the law however

are not issues for the constitutional court, but ordinary civil claims to be pursued in the normal manner through the civil process. As such courts held that a petitioner who comes before the constitutional court has a duty to demonstrate with some degree of precision the right(s) s/he alleges have been or are threatened with violation, the manner of the violation and reliefs s/he seeks for the said violation.

Perusal of the receipts filed revealed that some payments were for auction of single animals like camels, some were for dash fees, and others were for auctions. This meant that the petitioners' right to operate lasted for the period or activity indicated in the receipt. The action by the respondent, therefore, did not amount to a constitutional violation of the petitioners' social or economic rights.

As the petitioners did not demonstrate a violation or threatened violation of any constitutional rights, and also did not demonstrate entitlement to any of the reliefs sought, the petition therein was dismissed.

Andrew Ireri Njeru et al. v County Assembly of Embu; Speaker of the County Assembly; Speaker of the County; Senate

CASE NUMBER: Constitutional Petition. No. 8 of 2014

REGION: Embu

COURT: High Court; Court of first instance; reviewable by Court of Appeal

DATE OF DECISION: 14 May 2014

RELEVANT LAW: Constitution, Articles 35, 196 and 10

DECISION: The state has an obligation to publish and publicise information relating to a person's removal from elective office.

SUMMARY

Facts

Andrew Ireri Njeru and 34 other Kenyan citizens residing, voting, and working in Embu County and "vested with a constitutional duty to respect uphold and defend the Constitution", filed this petition against the County Assembly of Embu, the Speaker of the County Assembly, and the Senate seeking orders from the court to restrain the Speaker of the Senate from introducing a debate on the removal of the Governor of Embu County or discussing his impeachment . The Embu residents argued that during the impeachment proceedings, the County Assembly had failed to enable public participation and to provide access to information as provided under Article 35 of the Constitution. They alleged that the Speaker and the Assembly's failure to notify voters and citizens of the commencement of the process violated Article 35(3) of the Constitution which provides that "[t]he State shall publish and publicise any important information affecting the nation". Furthermore, they argued that this provision needed to be read with Article 196(1)(b) of the Constitution requiring the County Assembly to "facilitate public participation and involvement in the legislative and other business of the assembly and its committees". They also submitted that Article 10 of the Constitution imposes an obligation on the Assembly to observe principles of public participation, good governance, integrity, transparency, and accountability. The County Assembly and its Speaker countered that there was no breach of constitutional provisions. They suggested that it was the role of the members of the County Assembly to "maintain close contact with and consult the electorate" and that various committees had been formed to carry out the investigations and public inquiries which led to the tabling of a motion to remove the Governor.

Decision

The court found that the County Assembly, as a state organ, had the obligation to "publish and publicise the information relating to the removal motion of the Governor". Although the court alluded to the lack of Kenyan jurisprudence on Article 35(3), it suggested that the state is

obligated to publish "information of a national character that affects the welfare of the nation as a whole" including information "that directly and substantially affects any of the Bill of Rights or their enforcement" and "information which a provision of the Constitution itself requires to be published – such as statutes and gazettes and also reports required to be published by independent offices or commissions". According to the court, information about removal from elective office should be published based on the fundamental right to hold elective office upon due election under Article 38 of the Constitution and this was not unusual given the publication of political office vacancies under the Elections Act.

Baby 'A' (suing through the Mother E.A) & another v Attorney General & 6 others [2014]

CASE NUMBER: Petition No. 266 of 2013

REGION: Nairobi

COURT: High Court, court of first instance; reviewable by the Court of Appeal

DATE OF DECISION: 5 December 2014

RELEVANT LAW: Constitution, Articles 2, (1), (4)& (5), 10, (1), (2a&b), 19(1), (2) & (3), 22(1) & (2), 23 (1) & (3), 27(1), (2), (4), (5), (6) & (7), 28, 29(a, c, d & f), 31(c) 43(a), 52(1), 53(a, c, d & e), (2), 65(3), 258 and 260

Part II of the Children Act

DECISION:

SUMMARY

Facts

On or about 3 May 2009, one E.A. who is the mother of the 1st petitioner, gave birth to a baby who was born with both male and female genitalia. On 10 May 2009, the 2nd respondent, Kenyatta National Hospital, issued E.A with various documents used in the process of carrying out genitogram tests, x-rays and scans on that baby who was named Baby A for purposes of these proceedings and a question mark '(?)' was inserted for the column indicating the child's sex. To-date, the child has never been issued with a birth certificate and in the petition dated 24 May 2013, the petitioners' claim that the entry of a question mark on the child's medical and treatment notes offends the child's rights to legal recognition, erodes its dignity and violates the right of the child not to be subjected to inhuman and degrading treatment. The court determined:

1. Whether Baby A is an intersex person and if so, whether the baby suffers lack of legal recognition because of Sections 2(a) and 7 of the Births, Deaths Registration Act and whether these provisions are inconsistent with Article 27 of the Constitution.
2. Whether there is need for guidelines, rules and regulations for surgery on intersex persons.
3. Whether there is need to collect data on inter-sex persons in Kenya and if so, who is mandated to do so?

Decision

Board of Management of Uhuru Secondary School v City County Director of Education, Duncan Juma & Teachers Service Commission

CASE NUMBER: Petition No. 359 of 2015

REGION: Nairobi

COURT: The High Court, Human Rights and Constitutional Division

DATE OF DECISION: 22 September 2015

RELEVANT LAW: Constitution, Articles 22, 258, 259

DECISION: The honourable judge found and held that the petitioner had the legal standing to commence and prosecute the petition.

SUMMARY

Facts

One Mr Andrew Oroo Obaga (hereinafter 'the principal') was in April 1983 engaged by the 3rd respondent as a teacher. He rose the ranks and as of 2014 he was the Principal of Uhuru Secondary School ('the Schoo'). The 3rd respondent wrote to the principal and reminded him that his last day of service as a teacher would be 31 August 2015. The principal would have struck the compulsory retirement age of sixty then.

Following such developments the petitioner sought to intervene. The petitioner urged for an extension of the principal's period of service for at least two years. This was to allow the principal to complete a "project of securing the school's real property". The 1st respondent did not budge. Consequently the petitioners moved the court. The petitioner filed the present petition basically challenging the principal's retirement.

The 1st respondent opposed the application stating that the petitioner had no locus to commence and proceed with the petition, as the principal had not authorised the filing of the petition. Further, that as the petitioner was contesting the procedure of removal of an employee, the right forum to contest the same was the Employment and Labour Relations Court.

The 2nd and 3rd respondents urged for the dismissal of the application for conservatory orders. They submitted that the dispute before the court was not a constitutional issue but rather a dispute over a contract of service. In the result, the petitioner had no locus to file the petition on behalf of the principal, as the latter was perfectly capable to sue on his contract of service. They further submitted that Article 22 of the Constitution envisaged only a situation where a person's fundamental rights have been violated and the victim then moves the court. He denied that there had been any infringement or violation of the Constitution.

Decision

The petitioner claimed to have filed the petition on behalf of the principal and/or the students of the school whose rights the petitioner alleged had been violated or are/were on the fringe of being violated. Article 22 of the Constitution grants "any person" the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. Clause (2) of the said Article expands the sphere of locus. Under the Constitution the grievant need not personally file a claim. A person acting on his behalf may. Likewise, a person acting on behalf of, or a member of a group or class of persons may also file a claim. So too may a person acting in the public interest.

Article 22 like all other articles of the Constitution is not to be read in isolation and simply textualised. It ought and must be read alongside Articles 258 and 259. As was conceded by the 1st respondent's advocate, the avenues were opened wider by the Constitution. A party need not necessarily have been personally affected by the alleged violation of any constitutional provision or right. The purposes, values and principles of the Constitution would be better served if the doors were not shut to any litigant so long as the litigant is not simply a busybody, but a person with a genuine grievance and concern. The rights and fundamental freedoms can be better advanced if a wider and more liberal, as opposed to a limited reading of Articles 22 and 258 is effected.

The Honourable Judge did not believe that the applicant herein was a busybody. The applicant had an apparent genuine grievance and concern as far as the students of the school were concerned. The principal could certainly act in his own name but all the students of the school could not. It was also not in his view that the petitioner filed the instant petition for any personal gain or ill motives and discounted the respondents' joint submissions to like effect.

The honourable judge found and held that the petitioner had the legal standing to commence and prosecute the petition.

Dennis Edmond Apaa & 2 Others v Ethics & Anti-corruption Commission & Another (2012)

CASE NUMBER: Petition No. 317/2012
REGION: Nairobi
COURT: Milimani High Court, Constitutional Court
RELEVANT LAW: Constitution, Article 50
Criminal Procedure Code Section 150 (Chapter 75 of the Laws of Kenya)
DATE OF DECISION: 5 November 2012
DECISION: The petition was dismissed with no order as to costs.

SUMMARY

Facts

This case concerns the right to a fair trial guaranteed under Article 50 of the Constitution and the issue for determination relates to the nature and extent of disclosure by the prosecution of evidence, material and witnesses to the defence and whether such a duty is one-off at the commencement of the trial or whether it is a continuous duty in light of the circumstances of this case.

On 19 March 2012, John Kiumi Wambugu, the tenth prosecution witness (PW10), was called to the stand to testify. The petitioners' advocate raised an objection on the ground that his name and witness statement had not been included in the list of witnesses and statements provided by the prosecution at the commencement of the trial. Counsel for all the accused objected to the witness as they viewed his testimony as an ambush and a breach of the right to a fair trial guaranteed under Article 50 of the Constitution.

The prosecuting counsel informed the court that the reason the names of witnesses and their statements and the exhibits had not been furnished was because the witnesses had allegedly been threatened. The prosecutor also contended that the duty to disclose the names of witnesses and evidence was a continuous one throughout the trial and that the prosecution should be allowed to proceed with the trial.

On 28 March 2012, the Honourable Magistrate ruled that he would not disallow the testimony of PW10 but would step him down so that defence can go through his statement and prepare for the case.

After the magistrate had given her ruling, the prosecutor informed the court that he still wished to rely on nine witnesses whose names and statements had not been disclosed. An objection was raised by counsel for the accused and the magistrate ruled that the defence counsels be supplied with all the statements of the witnesses with full particulars.

The petitioner's grievance is that having ruled on 28 March 2012 that the defendants were entitled to be informed in advance of the evidence the prosecution intended to call, the magistrate could not thereafter have allowed the prosecution to call any other witnesses whose statements had not been duly furnished, nor to produce any exhibits that were not availed to the defence on the onset of the trial. They contend that it was also wrong in law, for the magistrate to allow the prosecution to call in witnesses whose evidence was taken after the trial had begun.

The petitioners argue that their fundamental rights, including the right to a fair hearing guaranteed under Article 50 have been breached by the magistrate allowing evidence that had not been made available to the petitioners at the onset of trial and the right to challenge that evidence and sought relief as follows:

- A permanent injunction order restraining the 1st respondent from adducing any evidence not disclosed to the petitioners pursuant to the commencement of the proceedings in Anti-Corruption Case No. 37 of 2011.
- Further and/or in alternative to prayer A above, an order of prohibition to prohibit the respondents from adducing and entertaining respectively the evidence of any witnesses whose statements and exhibits were not disclosed to the petitioners pursuant to the commencement of proceedings in Anti-Corruption case No. 37 of 2011.
- A declaration that the respondent's purported calling of witnesses whose statements and exhibits were not disclosed to the petitioners pursuant to the commencement of proceedings aforesaid is unconstitutional, null and void.
- Exemplary damages and costs of and incidental to this petition.

Decision

"The duty of the magistrate conducting a trial is to give any necessary directions to protect the rights of the accused to a fair trial and I am satisfied that on the whole that there was no misdirection on the part of the Honourable Magistrate in Nairobi Anti-Corruption Criminal Case No. 37 of 2011 and in the circumstances, the petition lacks merit."

The petition was dismissed with no order as to costs.

Friends of Lake Turkana Trust v Attorney General and 2 others

CASE NUMBER: ELC Suit No. 825 of 2012

REGION: Nairobi

COURT: Environment and Land Court; appealable to the Court of Appeal

DATE OF DECISION: 19 May 2014

RELEVANT LAW: Constitution, Articles 3, 26, 27, 28, 35 42, 44, 47, 50(1) and 69(1)

DECISION: The state as the trustee of the environment and natural resources has a duty and obligation to ensure that the resources of Lake Turkana are sustainably managed, utilised and conserved.

SUMMARY

Facts

The petitioner's case was based on an alleged memorandum of understanding entered into by the Government of Kenya and the Government of Ethiopia in the year 2006 for the purchase of 500 MW of electricity from Gibe III, as well as an US$800 million grid connection between Ethiopia and Kenya. The Government of Ethiopia had launched a 25-year national master plan to increase production of electricity through the construction of dams to generate hydroelectric power along the Omo River. The three schemes were to take place on the upstream part of the river. The generated electricity would be exported to Kenya, Djibouti and Sudan.

The petitioner sought for an order of mandamus compelling the Government of Kenya and the Kenya Power and Lighting Company Limited to make full and complete disclosures of all the agreements entered into with the Government of Ethiopia on the proposed dam and the Memorandum of Understanding signed in 2006. It also sought an order of prohibition enjoining and prohibiting the Government of Kenya and the Kenya Power and Lighting Company Limited from entering into further agreements and/or making further arrangements with the Government of Ethiopia on the dams and implementation of the Memorandum of Understanding signed in 2006 until and when a full and thorough independent environmental impact assessment on the potential effects of Gibe III project on Lake Turkana and the affected communities has been undertaken.

These were on the grounds that the actions would deprive the members of the affected communities of their livelihood, lifestyle and cultural heritage and attachment to Lake Turkana, in violation of Articles 26, and 28 of the Constitution, that the community had not had access to the agreements between the Kenyan and Ethiopian governments and that the Government of Kenya had failed to act as a public trustee, in violation of Article 62 and 69 of the Constitution, by failing to conduct a full, proper and thorough comprehensive environmental impact assessment on the potential effects of construction and operation of Gibe III before committing itself to the purchase of the said 500MW. Lastly, that the arrangements between the Government of Kenya and Government of Ethiopia will jeopardise the environment for the present communities around Lake Turkana and also threaten their cultural heritage. The issues were:

i. Whether the Environment and Land Court had jurisdiction over claims arising from an agreement entered between the Kenyan government and a foreign government.

ii. Whether there had been, or there were threats to the right to life, the right to human dignity and the right to a clean and healthy environment arising from the construction of the dams in Ethiopia.

iii. Whether there was a violation of the right to access information as concerned the agreements and memorandum of understanding between Kenya and Ethiopia.

Decision

The court held that it had jurisdiction, even if the violations arose from a transboundary agreement between Kenya and Ethiopia and because effectively it was not making determinations that would bind the Ethiopian Government. It however held that there was insufficient evidence tendered to establish the impact of the electricity generation project and the violation of rights to life, dignity, livelihood and cultural heritage and the right to a clean and healthy environment.

On the right to access environmental information the court stated that article 69(1)(d) of the Constitution of Kenya 2010 placed an obligation on the state to encourage public participation in the management, protection and conservation of the environment. This would only be possible where the public had access to information and was facilitated in terms of their reception of different views. The risk of environmental harm posed by the importation of electric power from Ethiopia also placed a duty on the Kenyan government to provide information on the importation and transmission of electric power from Ethiopia. The petitioner's interests could be safeguarded by providing access to information and facilitating public participation in the making of such decisions.

The court further held that the government, as the trustee of the environment and natural resources, had a duty and obligation to ensure that the resources of Lake Turkana were sustainably managed, utilised and conserved. The state had a duty to prevent any environmental harm that could arise from the agreements and projects entered into with the Government of Ethiopia.

The court made an order of mandamus compelling the respondents to make full and complete disclosure of the agreements or arrangements entered into with the Government of Ethiopia for purposes of the supply of electric power. The Government of Kenya was also directed to take steps to ensure that the natural resources of Lake Turkana were sustainably managed, utilised and conserved in any engagement, agreement or arrangement entered into with the Government of Ethiopia.

Gabriel Nyabola v AG edited

George Maina Kamau v the County Assembly of Murang'a, the Speaker-County Assembly of Murang'a & the Governor, Murang'a County

CASE NUMBER: Petition No. 15 of 2015

REGION: Nyeri

COURT: The Employment and Labour Relations Court at Nyeri, court of first instance.

DATE OF DECISION: 9 October 2015

RELEVANT LAW: Constitution, Article 22 and Rules 3, 4, 13, 19 and 23, Practice and Procedure Rules

DECISION: The preliminary objection as urged for 1st and 2nd respondents was dismissed with costs and parties were invited to take further directions on the further steps towards hearing and determination of the application and the petition on record.

SUMMARY

Facts

One of the issues for determination was whether the petitioner was entitled to file a petition under the relevant provisions of the Constitution (Article 22) and the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

Decision

The court returned that the petitioner was entitled to file a petition and application as set out in the cited rules and articles, and the petitioner moved the court procedurally by way of a petition in view of the pleadings and prayers made in the petition, as it was not necessary to file a statement of claim. Also, the Employment and Labour Relations Court has jurisdiction to entertain and determine claims of breach of fundamental rights under Articles 22 and 23 or enforcement of the Constitution under Article 258 of the Constitution, as pertains to employment and labour relations matters. The court held that its jurisdiction court was essentially the jurisdiction of the High Court, but within this court's jurisdictional subject matter being matters related to employment and labour relations.

Githunguri Residents Association v Cabinet Secretary Ministry of Education & 5 others

CASE NUMBER: Petition No. 464 of 2013

REGION: Nairobi

COURT: High Court, Constitutional & Human Rights Division, appealable to the Court of Appeal

DATE OF DECISION: 29 May 2015

RELEVANT LAW: Constitution of Kenya, Article 53

Basic Education Act, No. 53 of 2013

DECISION: The respondents' actions were in violation of the children's rights to education, for failure to ensure access to free and compulsory basic education to the children attending public schools within Githunguri.

SUMMARY

Facts

The petitioner sued the respondents on behalf of parents and students in Githunguri District, Kiambu on the complaint that the public schools within the district had been charging fees despite government policy on free primary education. They had other complaints that included malpractices in the Board of Governors' elections, nepotism, lack of transparency and accountability in the use of school resources and fees collected, and removal of children from schools for failure to pay fees. The issues were:

i) Whether the respondents' actions were a violation of the rights of children attending public schools within Githunguri to access free and compulsory education as provided under article 53(b) of the Constitution.

ii) Whether the court could then make orders of prohibition and mandamus if the court finds there was a violation of human rights.

Decision

Education is both a human right in itself and an indispensable means of realising other human rights. Section 29(1) of the Basic Education Act, No. 53 of 2013 was passed to give effect to the right to education. The right to education has a corresponding duty to the child to enjoy the right, hence the "compulsory" free education. This guarantee of free education is too important to be left to the financial capabilities of parents. Any fees payable would therefore be a breach of the right to free basic education.

On the second issue, the court held that the remedy envisioned by articles 22(1) and 23(3) of the Constitution granted the High Court jurisdiction to give an appropriate relief, which includes judicial review where rights are denied, threatened or violated.

The court made an order of mandamus to compel the Cabinet Secretary Ministry Of Education to audit the accounts of a number of schools; a mandamus compelling the District Education Board Githunguri to disclose signatories of its account and provide a statement on all the withdrawals and an account on the use of the funds withdrawn from the account; and an order of prohibition restraining it from imposing any unapproved activity fees. The court further held that if it was found from the audit that specific unlawful fees were levied, then the Cabinet Secretary Ministry of Education was at liberty to order a refund to affected parents.

Hussein Abdillahi Ndei Nyambu v Inspector General of Police & Another [2014]

CASE NUMBER: Petition No. 387/2013

REGION: Nairobi

COURT: Milimani High Court, Constitutional and Human Rights Division

DATE OF DECISION: 14 March 2014

RELEVANT LAW: Constitution, Article 49, 50

DECISION: The petitioner's rights and fundamental freedoms under Article 49(1) (f) of the Constitution were violated when he was detained for a period of more than 24 hours in police custody on 9 December 2012.

SUMMARY

Facts

The petitioner testified that on 9 December 2012 at about 3 pm, while he was having lunch at Habibas Restaurant in Pumwani Majengo, Armed General Service Unit (GSU) police officers stormed the premises and arrested him and others customers. He states that during the arrest, he was subjected to inhuman treatment while being frisked, he was pushed to the ground with blows and kicks, and made to lie facing down on dirty ground while being assaulted. He further testified they were all brutally forced into a waiting police lorry, which was driven to Shauri Moyo Police Station. On arrival at the police station, the names of the persons arrested were recorded on foolscap paper but not in the occurrence book. They were then locked up in the police cells overnight.

The next day at around 4.00 pm his photo, fingerprints and identity card numbers were taken. At that time some of the arrested people were released. At about 5.00pm, the deputy officer in charge of the station assured him that he would be released as long as he had identification documents. He was also informed that he was at a restaurant where there was a notorious criminal who the people in the restaurant failed to identify. The petitioner states that he was released unconditionally on 10 December 2012 at about 9.00 pm without any charges being preferred against him.

He sought the following orders:

i. A declaration that the arrest and detention of the petitioner by the officers of the 1st respondent was a contravention of the petitioner's constitutional right to be informed promptly in a language that he understands of the reason of his arrest, the right to remain silent and the consequences of not remaining silent; the right to be taken to court within 24 hours of his arrest; and the right to access justice.

ii. Reasonable compensation for violation of constitutional rights herein.

iii. The costs of this petition.

Decision

It was found that there was a violation of Article 49(1) (g) of the Constitution when he was detained for a period of more than 24 hours in police custody on 9 December 2012. The petitioner was awarded Ksh 10,000 as nominal damages given that the intent for his detention was neither intentional nor malicious The petitioner was awarded costs of the petition assessed at Ksh 10,000.00 exclusive of filing fees and disbursements to be certified by the deputy registrar.

Jane Achieng & Another v University of Nairobi

CASE NUMBER: Petition No.2144 of 2015

REGION: Nairobi

COURT: The Employment And Labour Relations Court

DATE OF DECISION: 10 April 2015

RELEVANT LAW: Constitution, Article 27

DECISION: University of Nairobi to adhere strictly to the law in filling the existing vacancies within the library establishment and within the university generally and to examine its establishment mix bearing in mind the ethnic diversity in Kenya while undertaking any future recruitment.

SUMMARY

Facts

This case arose from an unresolved discourse on the concept of fair play between the University of Nairobi and two of its employees, Jane Achieng and Esther Obachi, who worked in the library department of the university. The two alleged that the failure by the university to shortlist them for job advertisements in the library department and opting for external candidates amounted to discrimination contrary to the Constitution. The university denied the claimants' allegations of ill motive and discrimination and stated that only candidates who had met the stipulated criteria were shortlisted for the advertised positions. They further stated that they were guided by their staff recruitment, selection training and development policies, which was not contrary to the provisions of any Kenyan law or the rules of natural justice and that it is an equal opportunities employer and is guided by both the law and its own policies in the recruitment of staff.

Decision

The court noted that it did not interfere with disputes between employers and employees as long as they complied with the relevant legal and policy parameters. In quoting STAWU obo Members vs South African Airways (Pty) Ltd and Others (JAS54/13) [2014] ZALAC 40; [2015] 2BLLR 137 (LAC) 14, where it was held that, 'an employer against whom an allegation of unfair discrimination is made by an employee is required to prove that the action complained of was in fact fair.' The claimants went ahead and brought out the issues but the respondents chose to ignore the issues brought forth and did not give any response.

The court also took notice that prior to filing this action the claimants had raised their grievances with the university management but received no response. Since the respondent pleaded that recruitment had already taken place and binding employment contracts signed with the successful candidates, the court declined to issue the claimants with the specific remedies sought but issued directions to the university concerning future recruitments as there had been shown to be more slots that had yet to be filled.

JL (suing as next friend of ML, a minor) v SL, and 2 others

CASE NUMBER: Petition No. 8 of 2014
REGION: Nakuru
COURT: High Court, appealable to the Court of Appeal
DATE OF DECISION: 15 September 2014
RELEVANT LAW: Constitution Articles 53(1)(b) and (2), 27, 43(1)
Children's Act No.8 of 2001, Section 4(2 and (3), 5, 7 and 22
DECISION: The court ruled for the petitioner and awarded damages.

SUMMARY

Facts

ML, a minor, had to change schools as she had a heart ailment that required specialised treatment. The petitioner sought to enroll her to MP School to join standard 5. The 1st respondent, MP School initially denied her admission to the school on the basis that she had not attained the required examination marks for admission to standard 5, so admitted her to standard 4, but reluctantly. The petitioner averred that the 1st respondent instructed teachers not to record the child's attendance in the school register or mark her schoolwork.

The respondents did not file any replies or enter an appearance during the proceedings despite being served. The issues were: (i) whether the respondents' actions violated the petitioner's right to education; (ii) whether an award for general and exemplary damages was merited.

Decision

The court declared that the conduct of the respondents was discriminatory and the child's rights under article 53 and 27 of the Constitution were violated. The 3rd respondent was ordered to reinstate and register the child in the school and she was to remain there until she completes her basic education. The 3rd respondent was also ordered to treat the petitioner equally with other students and to provide a conducive learning environment for her to enjoy her right to basic education.

The petitioner was awarded damages of Ksh 50,000 to be paid jointly or severally by the school and its management committee.

John Kabui Mwai & 3 Others v Kenya National Examination Council & 2 Others

CASE NUMBER: Petition No. 15 of 2011
REGION: Nairobi
COURT: High Court of Kenya
DATE OF DECISION: 16 September 2011
RELEVANT LAW: Constitution, Article 27
DECISION: The policy directive contained in "JKM3" and "JKM 4" (to give children from public schools more slots in the national school selection compared to private schools) was not discriminatory to the private schools and the children in those schools

SUMMARY

Facts

The applicant filed the petition on behalf of the Kenya Private Schools Association under Article 27 of the Constitution. He sought orders that the policy be found to be discriminatory against candidates from private schools and therefore unconstitutional.

Decision

The court in its determination, explained that it should be noted that discrimination, which is forbidden by the Constitution, is that which is unfair or prejudicial treatment of a person or group of persons based on certain characteristics (James Nyasora Ngarangi And Others v Attorney General, HC. Petition No. 298 of 2008 at Nairobi)) and therefore the element of what is unfair or prejudicial treatment has to be determined objectively in the light of the facts of each case (President of the Republic of South Africa & Another v John Phillip Hugo 1997 (4) SAICC Para 41). Article 27 (6) allowed the minister to come up with the policy, as the previous policy based on merit alone was unfair and prejudiced against the students from private schools. The court found that the transformative agenda proposed in the Constitution could only be realised through such a policy.

It was held that the policy contained in "JKM3" and "JKM 4" was not discriminatory to the applicant, their schools, or the children in those schools in relation to accessing form one places in national schools.

Joseph Letuya & 21 others v Attorney General & 5 others

CASE NUMBER: ELC Civil suit No. 821 of 2012
REGION: Nairobi
COURT: Environment and Land Court
DATE OF DECISION: 17 March 2014
RELEVANT LAW: Constitution, Sections 71 and 82, Articles 21(2), 26, 28, 43(1) and 63(2)
DECISION: The forceful eviction of the applicants and the members of the Ogiek community from the Mau East complex without resettlement was a violation of their right to life, dignity and economic and social rights.

SUMMARY

Facts

The applicants filed the case as representatives of the Ogiek community living in the East Mau forest, which is their ancestral land, and they depend on it for their livelihood as hunters and gatherers. According to the applicants, their ancestral land was declared a forest during the colonial period. Since that declaration, the Ogiek community has led a very precarious life, which has been deteriorating over the years. Between 1919 and 1939, land was set aside for other communities as trust land but none was set aside for the Ogiek. As a consequence, no titles to land were issued to its members as no adjudicating rights and registration of titles could take place. A settlement scheme was established by the government using a part of the forest land. Other communities from other parts of the country were allocated land that was originally occupied by the Ogiek. The Ogiek continued to face harassment and eviction from their ancestral land leading to the filing of the suit. The court had to decide:

i. Whether the members of the Ogiek community had recognisable rights arising from their occupation of parts of East Mau Forest.

ii. Whether in the circumstances of the instant case, the rights of the Ogiek had been infringed by their eviction and allocation of the land to other communities.

iii. Whether in the circumstances, the settlement schemes in East Mau Forest by the respondents were ultra vires, null and void.

iv. Whether the applicants are entitled to the reliefs sought in the application before court.

Decision

The court found that the Ogiek community's rights to life, dignity and their economic and social rights had been violated following the forced evictions from the Mau forest. The court held that the evictions without resettlement were in contravention of their right not to be discriminated

under section 82 of the previous constitution and Articles 27 and 56 of the 2010 Constitution, as it unfairly prevented them from practising their culture as farmers, hunters and gatherers in the forests.

The court directed the National Land Commission to, within one year of the judgment, identify and open a register of members of the Ogiek community in consultation with the Ogiek Council of Elders and identify land for the resettlement of the Ogiek in the excised areas, and in line with recommendations in the Report of the Government Task Force on the Conservation of the Mau Forest Complex.

June Seventeenth Enterprises Ltd (suing on its own behalf and on behalf of and in the interest of 223 other persons being former inhabitants of KPA Maasai village Embakasi within Nairobi) v Kenya Ports Authority & 4 others

CASE NUMBER: Petition No. 356 of 2013
REGION: Nairobi
COURT: High Court
DATE OF DECISION: 14 February 2014
RELEVANT LAW: Constitution, Articles 21, 27, 28, 40, 43(1)(b) and 47
DECISION: The court ruled for the petitioners

SUMMARY

Facts

The petitioners were owners of LR No. 209/13418, 209/13419, 209/13420 and 209/13421 situated along North Airport Road, Embakasi, an area next to the Jomo Kenyatta International Airport. On 29 October 2010 officers from the Kenya Ports Authority, the City Council of Nairobi and the police descended on the suit property with bulldozers and earthmover machines demolishing all residential and commercial structures and evicted the occupants from the area. They filed this petition stating that their rights under Articles 21, 28, 29, 43 and 47 of the Constitution had been violated because of the brutal manner of the evictions, not being given an opportunity to salvage their property, being left homeless and not being given reasonable notice before the evictions. The court had to decide:

(i) Whether the petitioners had locus standi to sue as a representative suit

(ii) Whether the petitioners' rights had been violated by the respondents.

Decision

On the issue of locus, the court held that there was no legal impediment for a corporation to file a suit on behalf of persons agitating for their rights or filing a suit in public interest. Article 22 does not also provide for any requirement for a petitioner to seek leave to file a representative suit. The court held that the petitioners' rights under Articles 28, 29, 43 and 47(1) had been violated. It also held that there was a violation of Article 21 by the failure of the state to develop and enact a policy and legislation to deal with forced evictions. Each petitioner was awarded damages of Ksh 150,000.

Kenya Council of Employment & Migration Agencies & Evans Nyambega Akuma v the Attorney General & 5 Others

CASE NUMBER: Petiton No. 327 of 2015

REGION: Nairobi

COURT: High Court of Kenya, Constitutional and Human Rights Division; court of first instance

DATE OF DECISION: 7 October 2015

DECISION: The objections raised by the interested party as to forum, as well as standing, were dismissed.

SUMMARY

Facts

The 1st petitioner is a civil society organisation. The 2nd petitioner, Evans Nyambega Akuma, is a private citizen. The petitioners state that this is public interest litigation and they simply aim to protect members of the public. The petition alleged that the 1st, 2nd and 3rd interested parties had been appointed to sit on the board of the 4th interested party by the 5th interested party, yet at the time of the appointments there existed no board duly constituted which could have acted to nominate and appoint the 1st, 2ndand 3rd interested parties. The petitioners further alleged that there was a lack of fair administrative action on the part of the 5th respondent, whilst appointing the 1st 2nd and 3rd interested parties. The petitioners also stated that the appointments were all void for having been conducted in breach of the constitutional provisions. Promptly, upon service of the petition, the 1st, 2nd and 4th interested parties also filed a Notice of Preliminary Objection. The Notice read as follows:

a. That the Application and the entire Petition as filed is fatally defective as it is brought before a Court that lacks jurisdiction

b. The First Petitioner lacks the locus standi to institute the Petition on its behalf and on the 2nd Petitioner's behalf.

Decision

There was no controversy that the petitioner had a right to file a petition on behalf of other parties. It had been alleged, but without any inkling of proof, that the petition was brought in bad faith and for personal gains. In addition, the judge was satisfied that the petitioner, if the action was commenced on behalf of others, need not show any personal prejudice. Articles 22(2)(b) and 258(2)(b) of the Constitution grant standing to third parties to institute proceedings on behalf of another party in relation to violation of human rights and other constitutional violations. An association acting in the interest of one or more of its members may also commence proceedings. The fairly universal Article 258, further allows every person the right to institute court proceedings

claiming that the Constitution has been contravened or is threatened with contravention. Both Articles 22 and 258 of the Constitution allow persons with or without direct interest in a matter to approach the courts. The rather progressive Article 258 has ensured to a greater extent that access to justice for all persons as required under Article 48 is achieved with minimal restrictions as well. With caution, the standard guide should be that access to justice ought not to be impeded by a requirement as to standing and Article 258 should always be liberally interpreted with a view to admitting constitutional petitions rather than locking them out. In the circumstances of this petition, the honourable judge was not convinced that the petitioner was a mere busybody. There would certainly be a genuine concern by members of the public over the appointment of board members to the 5th interested party, more so as the 5th interested party is not a private corporate entity. He was also not satisfied that the petition was prompted by personal gain. Rather, he was satisfied that the petitioner had the requisite capacity and standing to sustain the petition. He therefore dismissed the objections raised by the interested parties as to forum as well as standing.

Kenya Society for the Mentally Handicapped (KSMH) v Attorney General & 7 others

CASE NUMBER: Petition No.155A of 2011
REGION: Nairobi
COURT: High Court; appealable to the Court of Appeal
DATE OF DECISION: 18 December 2012
RELEVANT LAW: Constitution, Articles 21(3), 28,27,43(1), 47,54

SUMMARY

Facts

The petition was filed by the Kenya Society for the Mentally Handicapped. It relied on a study carried out by the Kenya National Commission on Human Rights titled, "Silenced minds; the systemic neglect of mental health systems in Kenya; a human rights audit of the mental health systems in Kenya". The report indicated the stigma and discrimination faced by persons with mental illness, the neglected mental health facilities and the inadequate and ineffective legislative, policy, programmatic and budgetary measures to realise the right to the highest attainable standards of mental health.

The petitioner averred that the state had failed in formulating and developing policies to achieve equal opportunities of education and employment of persons with mental disability and failed to implement policies under the national health programme by the Ministry of Health for prevention and early identification of disability of persons with mental or intellectual disability. It also challenged the failure of the state to have a policy framework governing the education of mentally and intellectually disabled children and the lack of sufficient, reliable and comprehensive structures to promote adequate provision of mental health care in public health institutions. The court had to decide whether the respondents had violated the petitioner's rights to human dignity, health, education and non-discrimination.

Decision

The petition was dismissed on the grounds that the petitioner had failed to present facts and evidence that would entitle them to relief. While noting the challenges faced by persons with mental, intellectual and psychosocial disability in accessing education, health and employment, the court stated that it could only adjudicate issues based on evidence and facts, in order to reach conclusions and thereafter grant appropriate relief. It held that the court's purpose was not to prescribe certain policies but to ensure that policies followed by the state meet constitutional standards. According to the court, the petitioner had not set out specific policies for the court to examine and make an appropriate assessment for itself. There was also no clarity on their

grievances and therefore the court could not in an objective manner weigh them against the Constitution. On the budgetary allocation on mental health, the court stated that the bland statement that persons with disability are not provided for adequately was not sufficient to find the respondents to have violated the rights of persons with mental disability.

Kevin Turunga Igathi v Officials of The Kenya Judges and Magistrates Association

CASE NUMBER: Petition No. 442 of 2015
REGION: Nairobi
COURT: The High Court of Kenya, Constitutional and Human Rights Division
DATE OF DECISION: 26 October 2015
RELEVANT LAW: Constitution, Articles 22 and 258
DECISION: The petitioner was not a "busybody". He had the locus standi to go to court as a party. The petition was also not so vague as not to disclose what the petitioner claimed were constitutional concerns. On this basis the petition was not struck out.

SUMMARY

Facts

The petitioner contended that the Kenya Magistrates and Judges Association (KMJA) had, since its registration, been embroiled in illegalities and irregularities. Its business had been conducted irregularly, unlawfully and unconstitutionally. The petitioner also asserted that the officials of the KMJA were in office illegally and improperly and had continued to conduct themselves in a manner not expected of state officers pursuant to Article 10 of the Constitution. For completeness, the petitioner stated that all the alleged illegalities and irregularities were set to affect the important election that the Kenya Magistrates and Judges Association was expected to conduct, that is the election of one of the commissioners of the Judicial Service Commission. The respondents then averred that the petitioner lacked the requisite standing to present and prosecute the petition. The petition did not raise any constitutional questions and was imprecise in so far as the petitioners' grievances were concerned. The alleged breaches, contraventions and illegalities, if at all, should have been subjected to a statutory provided avenue of dispute resolution, that is to say; that appropriate complaints ought to have been lodged with the Registrar of Societies and appropriate action taken thereat. The respondents further contended that the petitioner had not demonstrated any rights as infringed or threatened with infringement so as to be entitled to present the petition.

Decision

The Constitution under both Articles 22 and 258 grants 'any person' the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened with violation or infringement. Article 258(1) is even more expansive. Any person may move the court claiming that the Constitution has been contravened or is threatened with contravention. A party need not necessarily be personally affected by the alleged violation of any constitutional provision. The idea, in the judge's view, is to ensure that any person is in a position to protect and defend the Constitution by all means, including litigation. A restricted reading of both Articles 22 and 258 of the Constitution ought, consequently, to be

discouraged. He was not convinced that the petitioner was "a busybody" as was stated by the respondents. He apparently had genuine grievances and concerns and would be entitled to come to court as a party. As the judge was also not convinced that the petition had been filed for any personal gain or ill motives, he saw and had no reason to shut out the petition. In his judgment, the standard and rather more universal guide to the issue of locus standi still remained the more complete Article 258 of the Constitution. He also held the view that the petition was not so vague as not to disclose what the petitioner claimed were constitutional concerns. He therefore did not strike out the petition on that basis.

Kituo cha Sheria & Another v Central Bank of Kenya & 8 Others [2014]

CASE NUMBER: Petition No.191 of 2011

REGION: Nairobi

COURT: Milimani High Court, Constitutional and Human Rights (Constitutional Court)

DATE OF DECISION: 22 September 2014

RELEVANT LAW: Public Procurement and Disposal Act No.3 of 2005, Section 3

DECISION: Petition has no merit in the consolidated petition and is therefore dismissed with no order as to costs

SUMMARY

Facts

The petitioners first approached the court separately under Certificates of Urgency on 18 October 2011 and 18 November 2011 respectively, seeking diverse orders against the respondents in respect of various contracts alleged to have been entered into, with, or awarded to the 5th, 6th and 7th respondents on the grounds that:

a) the respondents had acted in contravention of the values and principles enshrined in the Constitution by directly procuring currency-printing services from the 5th, 6th and/or the respondent without a competitive process

b) that the actions of the respondents amounted to vulture funding; there was no openness in the transactions

The petitioners sought a mandatory injunction restraining the 1st and 2nd respondents from entering into a contract with the 5th, 6th and 7th respondents for the purchase of shares in the 6th respondent.

In the petition dated 18th October 2011, the petitioner seeks the following orders:

- A declaration that the respondents should make public the transaction in which the respondents contract to issue the interested parties with a 10 year exclusive contract to print currency.
- The respondents to provide the petitioner with all the documents in relation to the intended contract and/or any other contracts entered into between the respondents and any other parties with respect to printing of Kenyan currency.
- An order of permanent injunction restraining the respondents jointly and severally from executing any agreement for either sale of shares or printing of Kenyan currency, to the interested parties jointly or severally.

Decision

"From the constitutional and statutory provisions, the role of the Central Bank vis-à-vis government in general and the cabinet in particular is one that requires co-operation, collaboration and information sharing. In the absence of evidence that the decision alleged to have been made on the basis of a cabinet memo was made at all, or was made without input from the Central Bank, it is difficult to see a basis on which the court can declare the said decision null and void. It is expected that the Central Bank, in playing its role in 'formulat(ing) and implement(ing) monetary policy', and in 'support(ing) the economic policy of the Government', would engage with government at the cabinet level and that decisions would be made that impact on the supply of currency in the country such as is alleged to have taken place in this case. In the circumstances, I am unable to find any violation of the Constitution as alleged by the petitioners.

I must also commend the petitioners for their dedication in attempting to foster constitutionalism and good governance in Kenya. The limitation that I have observed is the reliance on press articles that, as is trite law, have no probative value. What would be of greater benefit would doubtless be greater diligence in research before filing suit and demand for information from state institutions with regard to contracts entered into, and resort to court action if such information is not forthcoming, so that the court can be moved in a matter such as this on the basis of credible and reliable information."

Luco Njagi and 21 others v Ministry of Health and 2 others

CASE NUMBER: Petition No. 218 of 2013
REGION: Nairobi
COURT: High Court, appealable to the Court of Appeal
DATE OF DECISION: 28 January 2015
RELEVANT LAW: Constitution, Articles 21, 26(1), 27 and 43(1)

SUMMARY

Facts

The petitioners' case was on their difficulty in accessing adequate health. They were patients undergoing dialysis at Kenyatta National Hospital (KNH). Although being the main public referral hospital in the country, the KNH had 20 haemodialysis machines, with only 6 functioning and the others out of order when the petition was filed. The hospital prioritised access to the dialysis machines on the basis of the urgency and seriousness of each patient. It is this prioritisation that the petitioners are aggrieved by, terming it discrimination and violation of their constitutional rights. The petitioners sought orders to have the Ministry of Health compelled to meet the cost of medical dialysis on their behalf at eight private medical facilities, or to subsidise the cost of medical dialysis at the named private medical facilities at the rate at which the petitioners would have accessed treatment at Kenyatta National Hospital. The petitioners averred that the failure by the Ministry of Health and the KNH to buy dialysis machines and have a deliberate policy for alternative dialysis treatment for those who cannot access treatment at KNH, and the failure by the National Health Insurance Fund to have subsidising medical fees for dialysis in private medical institutions, was a violation of their right to life and the right to health care services. The respondents contend that they have done the best they can with the available resources, and are still doing their best to improve the situation. The court had to decide:

i. Whether the petitioners' right to health had been violated.

ii. Whether the state has taken any policy and legislative measures to ensure realisation of the right to health.

iii. Whether the court can grant the relief sought.

Decision

The court held that the government has the primary obligation to ensure that the petitioners and other citizens enjoy the highest attainable standard of health. The state has a duty to make the necessary budgetary allocation, as well as to take the necessary legislative and policy measures, to ensure that the right to health is realised. Article 20(5)(b) imposes a duty to the state to channel its resources in respect to social and economic rights while giving priority to ensuring the widest possible enjoyment of the right having regard to prevailing circumstances, including

the vulnerability of particular groups or individuals. In this case, it is the respondents, in the face of limited resources such as functioning haemodialysis machines at Kenyatta National Hospital Renal Unit, who are best placed to make that all important and difficult judgment call with regard to whom, between chronically ill renal patients such as the petitioners and the in-patients with acute renal failure, it should give priority in the provision of dialysis.

The court acknowledged the petitioners' difficulty in accessing treatment stating that the state could improve in its provision of health care and ensuring access to citizens, thus realising its obligation with regard to the right to health. It was the court's position that it would be an order in vain for the court to tell the state to have a certain number of dialysis machines at a certain period or that it must ensure access to these machines in private institutions when the court cannot determine the availability of resources or the impact of diversion of resources to meet the petitioners' individual demands.

The court stated that it was unable to find a violation of the rights of the petitioners under articles 26, 27, 28 and 43 of the Constitution, and therefore unable to issue any of the orders that they sought. The court was satisfied that the measures taken by the respondents to ensure access to haemodialysis by the petitioners are reasonable in the circumstances and could not therefore grant the prayers sought.

Mathew Okwanda v Minister of Health and Medical Services, Minister Special Programmes, Minister for Housin & the Attorney General

CASE NUMBER: Petition No. 94 of 2012
REGION: Nairobi
COURT: High Court, appealable to the Court of Appeal
DATE OF DECISION: 17 May 2013
RELEVANT LAW: Constitution, Articles 20(5), 43 and 57
International Covenant on Economic, Social and Cultural Rights, Article 12
Committee on Economic, Social and Cultural Rights, General Comment No. 14
DECISION: The petition was dismissed

SUMMARY

Facts

The petitioner was diagnosed with diabetes mellitus in 1996. This required him to have proper care, diet and medication. Since he had retired from active service and had no means to take care of himself, his health was at risk of imminent and further deterioration, having already been diagnosed with benign hypertrophy, a life threatening terminal disease. He therefore required special medical care and attention particularly in view of his advanced age. He stated that he was in dire need of urgent medical attention and assistance of the court to enforce fundamental rights and freedoms under Article 43 of the Constitution, which protected social and economic rights. He also wanted the court to declare that the respondents had a duty and obligation to furnish him with drugs and medication, or an alternative monthly stipend of Ksh 11,400 for his lifetime, and as an older member of society, he was entitled to receive reasonable care and assistance as provided by Article 57 of the Constitution.

Decision

There was no evidence before the court to show that the state had breached its constitutional obligations in relation to provision of health services. The issue of the prohibitive costs involved in accessing treatment and whether such treatment should be free and the requirement to progressively realise these rights, was not explored during the submissions and therefore the court could not make any findings. The petition was dismissed.

Mohamed Balala & 11 Others v Attorney General & 7 Others

CASE NUMBER: Petition No. 41 of 2011; Petition No. 191 of 2012

REGION: Mombasa

COURT: High Court of Kenya at Mombasa, Court Of Appeal at Mombasa

DATE OF DECISION: 13 March 2014

RELEVANT LAW: Constitution, Articles 27, 10

DECISION: The decision of the high court was upheld. The precondition requiring presidential consent before transferring property that is situated on the 1st and 2nd row beach plots was held to be illegal and discriminative against the owners. The state, Commissioner of Lands, Registrar of Titles and the Registrar of Lands were prohibited from requiring presidential consent before transfer of the said property.

SUMMARY

Facts

The state and the Commissioner of Lands were alleged to have introduced a requirement that an application for registration of transfer of the plots should be accompanied by a presidential consent obtained from the office of the Provincial Commissioner of Coast province. The petitioners argued that the requirement was not provided for in law and was therefore clearly unconstitutional, in addition to denying the owners of property in the said areas the right to equitable access to land and cause unnecessary delays. The state/Commissioner of Lands responded that the requirement concerning the plots fronting the sea was placed for reasons of national security and the plots were next to territorial waters and thus part of the nation's borders raising issues of security concern to ensure that such plots were not used as bases for illegal activities.

Decision

The High Court judge, in issuing her judgment, held that there was no legal basis for requiring the consent and that it amounted to discrimination contrary to Article 27 it was also in contravention of the national values set out in the Constitution under Article 10.

The state filed an appeal raising an issue on whether it was proper for the court to prohibit a

directive that does not exist on paper, admitting that the requirement indeed existed and had been in existence from President Jomo Kenyatta's time, even though not anchored in any legal regime. The state further submitted that President enjoys a certain degree of discretionary powers by virtue of his executive authority. The Court of Appeal held that the discretionary powers of the President according to Article 131 of the Constitution in fact obligated him to champion human rights and fundamental freedoms and the rule of law, which will not be realised if the President is found to be practising power not anchored in law and therefore exercised in an opaque manner.

On the security issue, the court of appeal held that national security was subject to the Constitution and Parliament and was to be pursued in compliance with the law and the state had failed to demonstrate this to the court, as such a decision must be premised in law to prevent abuse.

Muslims for Human Rights (Muhuri) & 4 Others v Inspector General of Police [2014]

CASE NUMBER: Petition No. 62 of 2014

REGION: Mombasa

COURT: High Court

DATE OF DECISION: 23 December 2014

RELEVANT LAW: Constitution Articles Other law

DECISION: The court directed the respondent, in consultation with the petitioners, to meet and develop a revised scheme of such measures as will, consistently with the Bill of Rights, meet the public safety and security needs for the affected region; then to report to court. To be done within 14 days.

SUMMARY

Facts

A curfew was imposed after the Mpeketoni attacks. The court had to decide whether the imposition or continuation of a curfew was unconstitutional. Did the first petitioner have standing to sue?

Decision

The petitioners had standing under Articles 22 and 258. In fact as residents they were personally affected. Just because the Constitution does not mention curfew does not mean it is prohibited. The Inspector General of Police appears to be the successor to the Commissioner of Police by virtue of s. 33 Schedule 6 of the Constitution and therefore has the powers that office had under the Public Order Act. There is an arguable case that the curfew unconstitutionally restricts rights. There may be less restrictive means to achieve the objectives of the curfew (Article 24). Therefore, the court "directs the respondent in consultation with the petitioners, within 14 days from today, to meet and develop, and report to the court, a revised scheme of such measures as will, consistently with the Bill of Rights, meet the public safety and security needs for the affected region". If this is not done the curfew order will be extinguished.

A prayer to lift the curfew for the duration of the Eidd ul Adh'a festival was granted ex parte when the matter first came to court on the 3 October 2014.

See Law Society of Kenya v Inspector General Kenya National Police Service & 3 others. This suggests that the curfew continued till April – though it was not clear to the judge in that case that it had been formally renewed. It does not seem that this case went to trial.

Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company; Edward Njoroge; Attorney General

CASE NUMBER: Petition No. 278 of 2011

REGION: Nairobi

COURT: High Court. Court of first instance; reviewable by Court of Appeal

DATE OF DECISION: 13 May 2013

RELEVANT LAW: Constitution, Articles 35, 33, 34, 24,10, 31, 232

Universal Declaration of Human Rights, Article 19

International Covenant on Civil and Political Rights, Article 19(2)

African Charter on Human and Peoples' Rights, Article 9

DECISION: Although the state has a positive obligation to provide information to a citizen under Article 35(1) (a) unless it can show that non-disclosure serves a legitimate aim, a corporate entity is not a citizen and, therefore cannot seek enforcement of the right to access information provided under Article 35(1). Furthermore, under Article 35(1) (b), a private entity does not have an obligation to provide access to all information demanded by a journalist or media house.

SUMMARY

Facts

Nairobi Law Monthly Company Limited (NLM), a magazine publisher, filed this petition against the Kenya Electricity Generating Company (KenGen); Edward Njoroge, KenGen's Chief Executive Officer (CEO); and the Attorney General. The International Commission of Jurists (Kenya) Limited (ICJ) and Kenya Revenue Authority (KRA) joined as interested parties while Transparency International and Article 19 joined as amici curiae. Six months prior to filing the petition, the NLM had been investigating KenGen transactions and published a report in an October 2011 edition of the magazine implicating KenGen and Njoroge in corrupt dealings with various companies involving the geothermal well drilling. After both denied the allegations, the NLM wrote to KenGen demanding information about the issues addressed in the report. When the company refused to comply, the NLM took legal action, arguing that this constituted a violation of Article 35(1)(b) of the Constitution, which provides a right of access to "information held by another person and required for the exercise or protection of any right or fundamental freedom."The NLM requested a compulsory order mandating KenGen and Njoroge's release of all documentation pertaining to negotiations and contracts entered into with various companies and an injunction ordering the two to list, compile, and submit to the NLM, copies of all the documents pertaining to the negotiation and conclusion of contracts with the companies, including board documents, tender minutes, and telephone logs. The NLM argued that such documentation was "held in trust for the Kenyan public"; that the parties' were violating its constitutional right to access this information; and that their provision of the information would enable the NLM to publish more accurate stories. In addition, the NLM suggested that KenGen had not indicated why it refused

to disclose the information and thereby failed to meet the requirements for the limitation of the right under Article 24 of the Constitution, which provides that some rights and fundamental freedoms may be limited under certain conditions. However, it also argued that even if KenGen and Njoroge could show harm in disclosing the information, the disclosure would still be justified since its benefits exceeded the harm when "weighed against the public interest". At the same time, it argued that the nondisclosure constituted a violation of Article 33 of the Constitution on freedom of expression, Article 34(1) on the freedom and independence of the media, and Article 10 on national values and principles of good governance.

The government refuted these claims. KenGen, Njoroge, and the Attorney General maintained that no constitutional violation had occurred and the former two informed the court that they intended to file a defamation suit against the NLM. The Attorney General also argued that the right to information was limited by the right of privacy and that the NLM's constitutional rights had not been violated. Although KenGen and its CEO conceded that they held information beneficial to the public, they argued that KenGen's status as a publicly listed company meant that disclosure of information could only be made pursuant to the State Corporations Act, the Companies Act, the Capital Markets Authority Act and other rules and regulations thereunder, which were inconsistent with constitutional provisions. At the same time, they submitted that although the government held a large stake in KenGen, it was not part of the government and, hence its disclosure of information could not be made under statutory, and not constitutional provisions. Relatedly, they asserted that the NLM was not a "citizen" under the law and thereby ineligible to seek enforcement of the right to information.

The ICJ Kenya Chapter, Transparency International, and Article 19 filed submissions emphasising the constitutional right of access to information. Transparency and Article 19 highlighted international best practices and standards with regard to this right. The ICJ contended that KenGen was a public authority for the purposes of the enforcement of the right to information and that the NLM was a corporate citizen for the same purposes. It also suggested that the requested disclosure would serve the public interest unless there were "compelling reasons" for nondisclosure.

However, the KRA, which had sought to be enjoined in the proceedings in order to benefit from interpretation of the "parameters and contextual applicability of Article 35 of the Constitution" contended that the NLM was not a citizen who could enjoy the right to access information and that the KRA was a non-state entity to which Article 35 did not apply. It also emphasised limitations on the right to information under Article 24 and that the NLM could not assert its rights against individuals. It further submitted that the NLM was not a media house entitled to special treatment with regard to access to information and, as such, public servants and non-state entities had no duty to disclose information to it.

Decision

The court held that although KenGen was a state entity with a duty to provide information to citizens under Article 35(1)(a) of the Constitution, the NLM was not a citizen and could not seek to enforcement of the right to information under Article 35(1). At the same time, the court held that under Article 35(1)(b), private entities do not have a positive obligation to provide access to all information demanded by a journalist or media house seeking to exercise its freedom of expression and freedom of the media. It recognised the right to information as a right "at the core

of the exercise and enjoyment of all other rights by citizens" as recognised in the Constitution and other international conventions to which Kenya is a party and forming part of Kenyan law based on Article 2(6) of the Constitution. According to the court, these include: Article 19 of the Universal Declaration of Human Rights on freedom of opinion and expression, including freedom to "seek, receive and impart information"; Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) on freedom of expression, including freedom to "seek, receive, and impart information and ideas of all kinds, regardless of frontiers"; and Article 9 of the African Charter on Human and Peoples' Rights on the right to receive information. The court recognised that Parliament was yet to enact legislation governing the right to information and its enforcement. Nevertheless, it took the view that international standards and judicial precedents from jurisdictions that have enacted Freedom of Information legislation were "instructive" and drew on Brummer v. Minister For Social Development 2009 (II) BCLR 1075 (CC) (Constitutional Court of South Africa) and General Comment No. 35 (CCPR/C/GC/34) on Article 19 of the ICCPR to emphasise the centrality of access to information to the realisation of other rights such as freedom of expression and the press.

The court also highlighted three other considerations. First, it emphasised that Article 35(3) imposes an obligation on the state to "publish and publicise any important information affecting the nation" and ensure "open access" to information that people might require. Second, it suggested that despite Kenya's lack of freedom of information legislation, international standards offer guidance, promoting maximum disclosure, limited restrictions and exceptions of access to information, a right to access information regardless of citizenship status, the non-requirement of a particular interest or reason for the request, characterisation of "information" as including all information held by a public body, and public bodies' obligation to prove legitimate denial of access. At the same time, drawing on Article 19(3) of the ICCPR on restriction of certain rights and Article 24 of the Constitution on the limitation of rights, the court recognised the need to narrowly restrict some access to information and "subject to strict 'harm' and 'public interest' tests, and to the rights and interests of others". Finally, it emphasised the need for a "clear" and speedy process for accessing information with non-prohibitive costs to citizens.

Based on Article 260 of the Constitution which defines the 'state', the State Corporations Act, and other legislation, the court found that KenGen, 70% of which was government owned, was a state corporation or public entity, bound by national values and principles elaborated in the Constitution, including "transparency and provision to the public of timely, accurate information" under Article 232 concerning public service. The court thus found that KenGen (and the KRA), had a duty to provide information under Article 35(1)(a) of the Constitution, with international standards providing parameters for the extent of this duty.

Agreeing with the ICJ, Transparency International, and Article 19, the court indicated that "the reasons for nondisclosure must relate to a legitimate aim; disclosure must be such as would threaten or cause substantial harm to the legitimate aim; and the harm to the legitimate aim must be greater than and override the public interest in disclosure of the information sought". It provided national security, defence, commercial interests, safety, and integrity of government decision making as some examples that might pass this test.

Although the court recognised that it may have been unnecessary to consider the implications of the right to information under Article 35(1)(b, since KenGen was determined to be a state and not a private entity, it addressed this issue because the NLM hinged its claim on it along with Articles 33 and 34. It found that a citizen seeking enforcement of this right would need to show both, that the information is in fact held by the person claimed, and that it is required "for the

exercise or protection of another right". Thus, since the NLM claimed that access to information was required in order for it to exercise its rights of freedom of expression under Article 33(1) and of freedom and independence of the media under Article 34(1), it would need to show that the information was required to exercise or protect another right (see Shabalala and 5 Others v. Attorney General of the Transvaal and the Commissioner of South African Police CCT/23/94 [1995]; Cape Metropolitan Council v. Metro Inspection Services Western Cape CC and Others (10/99) [2001] ZASCA 56; and Unitas Hospital v. Van Wyk and Another (231/05) [2006] ZASCA 34). Citing a Constitutional Court of South Africa case, Brümmer v Minister for Social Development and Others (CCT 25/09) [2009] ZACC 21, 2009, the court suggested that access to the information was critical to the NLM's reporting. It also found that it gave effect to Article 10 national values and principles of governance. Nevertheless, drawing on Prabha Dutt v Union of India (1982) 1 SCC AIR 1982 SC, the court recognised the need for some limitations on the right to access information.

Despite the fact that Kenyan courts have not yet interpreted the phrase: "for the exercise of protection of another right" in Article 35(1)(b), the court disagreed with the NLM's contention that KenGen and Njoroge's refusal to provide the information it sought, led to a violation of its rights under Articles 33 and 34 of the Constitution. Rather than implying that a private entity has a positive obligation to furnish information a citizen needs to exercise his/her freedoms, the Constitution only imposes this obligation on the state. The court found this to be in accord with the position in jurisdictions like South Africa, whose Constitution (i.e. Section 32(1)(a)) contains similar provisions to Article 35(1)(a) and whose jurisprudence maintains a distinction between the "right to know" availability of public-sector information and "need to know" availability of private-sector information.

The court thus held that the denial of information to NLM was not a violation of its rights under Articles 33, 34 and 35(1)(b) of the Constitution since the media does not have a special status elevated above other state entities. With regard to KenGen's status, both the company and Njoroge argued that it was a juristic and not natural person. However, the court drew on two sources (Famy Care Limited v. Public Procurement Administrative Review Board & Another High Court Petition No. 43 of 2012 in which the court found that the right to information under Article 35 can only be enforced by natural persons and not juridical persons and on jurisprudence from the United States of America) to find that despite the fact that the NLM was a Kenyan company with Kenyan directors and shareholders, it was itself a legal person who could not enjoy rights under Article 35(1) which are reserved for citizens (see Pembina Consolidated Silver Mining and Milling Company v. Pennsylvania 125 U.S 181; 8 S Ct. 737;31 L. Ed. 650; 1888 U.S. LEXIS 1926).

Ndoria Stephen v Minister for Education & 2 others

CASE NUMBER: Petition No. 464 of 2012
REGION: Nairobi
COURT: High Court
DATE OF DECISION: 30 July 2015
RELEVANT LAW: Constitution, Articles 21(2), 53(1)(b), 56(b), 27,10,43(1)(f) and 26
International Covenant on Economic, Social and Cultural Rights (ICESR),Article 2(1)
Convention on the Rights of the Child (CRC), Article 28
DECISION: The government had not failed in its obligations to set policies that would have accorded children in marginalised areas to access basic education.

SUMMARY

Facts

The petitioner's case was that children from marginalised areas, that is, north and north eastern Kenya, and some parts of the Rift Valley and coastal regions have been sidelined by policies that have denied them equal access to education to enable them to compete fairly with the rest of the children in the country, for the few slots in secondary schools and public universities. The petitioner alleged that because of the discriminatory educational policies by the government, children in those areas are unable to access the right to education on the same basis as children in other developed parts of the country. The petition sought to have the court make orders restraining the respondents from issuing Kenya Certificate of Primary School Education (KCPE) and Kenya Certificate of Secondary Education (KCSE) examinations for the year 2012 in the entire country and an order compelling the respondent to produce its policies and quotas used to ensure children in marginalised areas are not disadvantaged, unequally examined or discriminated against using KCPE and KCSE. The court had to decide:

i. Whether the government had violated the right to education of children from marginalised areas.

ii. Whether there was discrimination in government resource allocation to schools in marginalised areas that has resulted in the violation of its obligation to provide access to basic and compulsory education to all children.

iii. Whether the respondents had failed to provide learning facilities equitably, as a result of which children from marginalised areas were learning under extreme hardship; thereby, the respondents had violated the provisions of the Constitution and had to be compelled to provide a mechanism that would ensure that facilities were availed to those children.

iv. Whether KCPE and KCSE should be abolished for being unconstitutional and in violation of the right to equality before the law and equal enjoyment of the benefit of the law.

v. Whether the court could order the respondents to produce before it the policies and quotas

to be used to ensure that the students from marginalised areas are not disadvantaged or discriminated against.

Decision

While noting that there are many shortcomings in the education system in Kenya, the court noted that there were efforts being made to ensure access to education for the petitioner's target group and therefore did not grant any of the orders sought by the petitioner.

The court held that the government had taken steps with respect to realisation of the right to education for all. It therefore held that there was no basis for alleging discrimination against the children by government. On formulation of policy, the court found that the state had met its obligation to "take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43." It had also shown that it had policies in place, and that it had been taking measures, including affirmative action, to ensure that children in marginalised areas accessed education. Measures included the quota system for admission of children from marginalised areas to secondary and university education, setting up of grants and bursaries, mobile schools, boarding primary and secondary schools, and in some cases, lunch programmes in school.

According to the court, making a declaration to the effect that children from marginalised and hardship areas were entitled to special provision in the admission to secondary schools and public universities in the circumstances would have been redundant, as the state was already doing that which the petitioner wished it to be compelled to do. It stated that the state was taking deliberate steps to ensure that children in marginalised areas had access to education on the same level with children in other areas of the country, though the implementation and effectiveness of such programmes was not clear.

The court held that the prayer by the petitioner to abolish KCPE and KCSE was reckless and the court could in good conscience not contemplate scrapping them as the national examinations through an order of the court, without careful consideration of the advantages or benefits of such action against the shortcomings of the present situation. It could not work for the benefit of the children in marginalised areas.

Professor Njuguna S. Ndung'u v Ethics & Anti-Corruption Commission; Director of Public Prosecutions; Inspector General of the National Police Service; and Attorney General

CASE NUMBER: Petition No. 73 of 2014

REGION: Nairobi

COURT: High Court (Constitutional and Human Rights Division), court of first instance; reviewable by Appeals Court

DATE OF DECISION: 10 June 2014

RELEVANT LAW: Constitution, Articles 35, 24

Universal Declaration of Human Rights, Article 19

International Covenant on Civil and Political Rights, Article 19(2)

African Charter on Human and Peoples' Rights, Article 9

DECISION: An individual seeking to enforce the right to information must demonstrate that the information sought is held by the state or another person and that (s)he requested the information from this entity.

SUMMARY

Facts

Professor Njuguna S. Ndung'u, Governor of the Central Bank of Kenya (CBK), brought this case against the Ethics & Anti-Corruption Commission (EACC), the Director of Public Prosecutions (DPP), the Inspector General of the National Police Service (IG NPS) and the Attorney General. He sought an order that the EACC provide copies of correspondence exchanged with the Chief Justice with respect to a case featured in a Daily Nation Newspaper article published on 23 April 2014 with the title, "Graft team protests over CBK boss case". According to Professor Ndung'u, the article alleged, among other things, that the EACC was corresponding with the Chief Justice about a case involving him and that in February 2014 the file was moved abruptly from one judge to another. His lawyer had requested copies of the material referenced in the publication in order to institute contempt proceedings against both the EACC and the Nation media house, arguing that the publication provided false and misleading information and would interfere with the course of justice. According to him, full disclosure of the correspondence between the EACC and Chief Justice was necessary for him to enforce his rights, particularly his rights to a fair and impartial hearing under Article 50 of the Constitution. However, citing Section 33 of the Anti-Corruption and Economic Crimes Act, 2003, the EACC argued that it was prohibited from disclosing confidential information on ongoing investigations unless lawfully authorised to do so. At the same time, it asserted that since it was not the source of the newspaper article it could not be compelled to produce documentation on which the publishers might have relied or be

accused of contempt.

The EACC further argued that Professor Ndung'u had not demonstrated that the information he requested was necessary for the protection of his fundamental rights and why he had not requested it from the Chief Justice and the 'Nation', which was not a party to the proceedings. For the Commission, the Professor had not exhausted efforts to obtain the information and had brought the case in bad faith as a delaying tactic. The DPP argued that Article 35 on freedom of information had not been pleaded in the petition despite forming the basis for the application. It also suggested that no violation of Article 35 had been demonstrated and that, in fact, the correspondences in a court case were public documents accessible in the court file. Furthermore, it suggested that a court decision would involve the Nation Media Group Limited, which was not a party and that Professor Ndung'u was simply trying to delay the court process.

Decision

The court dismissed the petition with costs to the EACC, DPP, IG NPS, and the Attorney General, on the grounds that Professor Ndung'u had failed to show that the EACC was in possession of the information he sought and that he had a "compelling reason" for not requesting the information from the Chief Justice. It found that although the EACC was a state organ with the obligation to provide citizens with information, that Professor Ndung'u had not met a "crucial condition" by not demonstrating that the EACC possessed the information he sought. Only after he did so would the EACC need to provide a "legitimate justification" for why the information should not be disclosed (see Nairobi Law Monthly vs. Kenya Electricity Generating Company & Others NBI HC Petition No. 278 of 2011). As such, not only had he come to the court "prematurely", but the Nation media house should also have been joined to the proceedings. However, the court agreed with the Professor in finding that the Anti-Corruption and Economic Crimes Act applied to investigations and there was no showing that the correspondences he sought were made during investigations.

Nevertheless, the court drew on Nelson O Kadison vs. The Advocates Complaints & Another NBI HC Petition No. 549 of 2013, Steffans Conrad Brummer vs. Minister for Social Development & Others Constitutional Court of South Africa Case No. CCT 25/09, and extensively from Dr. Christopher Ndarathi Murungaru vs. The Standard Limited & Others Nairobi HCCC (Civil Division) No. 513 of 2011, to emphasise the importance of access to information within a democratic society. The court also recognised the right of access to information as provided in Article 35 of the Constitution, Article 19 of the International Covenant on Civil and Political Rights, Article 19 of the Universal Declaration of Human Rights, and Article 9 of the African Charter on Human and Peoples' Rights, all of which form part of Kenyan law under Article 2 of the Constitution, although there is some debate about whether implementing legislation is required. It indicated that "the principle of maximum disclosure establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances", with the onus on the public authority to justify a refusal.

P.A.O & 2 others v Attorney General

CASE NUMBER: Petition No. 409 of 2009
REGION: Nairobi
COURT: High Court, appealable to the Court of Appeal
DATE OF DECISION: 20 April 2012
RELEVANT LAW: Constitution, Articles 26(1), 28 and 43(1)
Anti- Counterfeit Act, 2008 sections 2, 32 and 34
DECISION:

SUMMARY

Facts

The petitioners described themselves as adults living with HIV/AIDS. They had been taking HIV drugs since the generic anti-retroviral HIV drugs were made available following the enactment of the Industrial Property Act, 2001. The petitioners' case was that their rights under the Constitution were under threat by the enactment of the Anti-Counterfeit Act, 2008, as the provisions at sections 2, 32 and 34 would likely affect their access to affordable and essential drugs and medicines, including generic drugs and medicines, thus infringing their fundamental right to life, human dignity and health as protected under articles 26(1), 28 and 43 of the Constitution. The state had failed to specifically exempt generic drugs and medicines, as well as providing a clear definition of counterfeit goods under section 2 of the Act. This would then allow generic drugs to be included in the said definition, thereby effectively prohibiting importation and manufacture of generic drugs and medicines in Kenya, which the petitioners use. The petitioners also averred that the respondents had failed to take into account the provisions of the HIV and AIDS Prevention and Control Act, which required the state to take necessary steps to the maximum of its resources to ensure healthcare services, including essential medicines at affordable prices by persons with HIV/AIDS and those exposed to the risk of infection. The court had to decide whether sections 2, 32, and 34 of the Anti-Counterfeit Act threaten to violate the right to life, right to dignity and right to the highest attainable standards of health.

Decision

The court held that sections 2, 32 and 34 of the Anti-Counterfeit Act was a threat to the right to life, human dignity and the right to the highest attainable standard of health of the petitioners as it would prevent access, and also limit or threaten to limit access, to affordable and essential drugs and medicines including generic drugs and medicines for HIV/AIDS.

The court found that the Anti-Counterfeit Act prioritises enforcement of intellectual property rights in dealing with the problem of counterfeit medicine. However, the right to life, dignity and health of people like the petitioners who are infected with the HIV virus could not be secured by the vague proviso in a situation where those charged with the responsibility of enforcement of the law may not have a clear understanding of the difference between generic and counterfeit

medicine. It would be in violation of the state's obligations to the petitioners with respect to their right to life and health, to have included in legislation ambiguous provisions subject to the interpretation of intellectual property holders and customs officials when such provisions relate to access to medicines essential for the petitioners' survival.

Paul Pkiach Anupa & Another v Attorney General & Another [2012]

CASE NUMBER: Petition No. 93 of 2011

REGION: Nairobi

COURT: High Court, court of first instance; reviewable by the Court of Appeal

DATE OF DECISION: 7 November 2012

RELEVANT LAW: Constitution, Articles 22(2)(b) and (c), 258(2)(b) and (c), 27(4), 41(1) and (2)(b) Persons with Disabilities Act, Sections 15 and 21.

DECISION: The current physical structure of the Milimani Law Courts hinders access to justice owing to the physical barriers that make it hard for persons with physical disabilities to access the courts.

SUMMARY

Facts

The matter involved two different causes that were linked by the matter relating to disability. However for the benefit of this brief we focus on the question of access to justice. The application was based on the question of the challenges faced by the disabled to access courts, in particular the Milimani Courts. It was supported by the affidavit of Timothy Wanyonyi Wetangula, who said he had been unable to accompany his advocate to court due to the inaccessibility of the court building and in addition access to the Constitutional and Human Rights Division. This was as a result of barriers and the absence of ramps. The petitioner sought a declaration that:

i. The New Milimani Law Court Rooms 1, 2 and 3 on the third floor and the Supreme Court in Nairobi are not accessible to persons with disabilities due to concrete barriers/stairs and or elevations.

ii. All the courts in Kenya be fitted with ramps to facilitate access to all courtrooms for all persons with all forms of disabilities.

iii. In the alternative, to compel the Minister for Special Programmes to issue a notice in the Gazette to the effect that all ministries, departments of government and local authorities shall ensure that there is a provision of suitable ramps in public buildings including the courts in Kenya.

Decision

The right of access to justice, articulated in Article 48, includes infrastructure necessary to ensure justice is available to all persons. It must necessarily entail physical access to courts and the personnel, information, process and procedures that relate to them. Mobility or accessibility of public buildings, including courthouses, is one such effort in aiding access to justice for all Kenyans.

The current physical structure of the Milimani Law Courts is such that it is a hindrance to justice-seekers owing to the physical barriers that make it difficult for persons with disabilities to access the courts. The court found:

- Access to the entry lobby of the building is restrictive to people with wheel chairs since there is a step to the reception area.
- The witness boxes in various courts are raised by a platform, which makes it difficult for the physically challenged, particularly those on wheel chairs, to access the stand.
- The parking bays are set at a lower level to the general ground which poses a challenge to move to the raised ground over the concrete kerb stone.
- Some of the entrances to the courtrooms are not wide enough for wheel chairs.
- Access to the courtrooms that comprise the Constitutional and Human Rights Division located on the third floor is particularly limited to persons with disabilities and to get to the fourth floor court, one has to use the narrow fire escape stairs.

The court held that there were already timelines provided under section 22 of the Persons with Disabilities Act, requiring all state institutions to upgrade their facilities to comply with the provisions of the Act in order to realise the rights of persons with disabilities. Therefore no purpose would be served by issuing the declarations and orders against the government and the Judicial Service Commission. Furthermore the requirement contemplated by section 22 of the Act falls within the measures the state is obliged to take, under Article 27(6) to redress the disadvantage suffered by persons with disabilities.

Peter Mule Muthungu v Kenyatta National Hospital

CASE NUMBER: Civil Suit No. 364 of 2007

REGION: Kenya

COURT: High Court, court of first instance, reviewable by Court of Appeal

DATE OF DECISION: 13 May 2013

RELEVANT LAW: Constitution, Article 35

DECISION: An individual has a right to access information needed to exercise a fundamental right or freedom, including confidential medical records that an estate administrator may need to bring in a medical negligence case.

SUMMARY

Facts

Peter Mule Muthungu, the administrator and personal representative of the estate of Jane Mueni Ngui, sought a court order that Kenyatta National Hospital (KNH) should release all records relating to the deceased's treatment and the management of the disease she suffered immediately prior to her death (including doctors' and nurses' notes, the nursing cardex, and theatre operation notes for a period between January and May 2009). Claiming to waive the confidentiality rights of the deceased, he alleged that these documents contained evidence that would form the basis of a medical negligence claim and were necessary to a fair and just trial. He also contended that they were his property as administrator of the deceased's estate. However, the KNH asserted that even prior to filing suit, Muthungu "was convinced" that he had sufficient evidence in his possession. Furthermore, it asserted that discoveries had been conducted and the parties had exchanged documents reflected on their document list, in keeping with the requirements of a fair hearing and trial. For the hospital, Muthungu already had sufficient documentation to articulate his claim and the burden of proof was on him to make a case. However, the documents he requested were Ngui's and the doctor's confidential documents to which doctor-patient confidentiality applied, even after Ngui's demise . The KNH additionally averred that doctor-patient confidentiality was "personal and not transferable," hence Muthungu could not waive it as he had purported to do. Breaking this relationship would "jeopardise future management of patients…and would throw future management of patients into jeopardy". Furthermore, according to the hospital, granting the orders Muthungu requested would violate fair hearing and equal treatment before the law (p. 2). It would be tantamount to the court advancing Muthungu's view rather than maintaining its neutral umpire/ex cathedra position.

Decision

Based on Article 35(1)(b) on a citizen's right to access information held by another person and required for the exercise of his/her rights or freedoms, the court ordered the KNH to produce the documents requested within 14 days of the ruling and to pay costs due to its earlier refusal to furnish them . The court found that Muthungu needed the documents as evidence of what went wrong and as such, it was "imperative" that the KNH provide any document relating to his claim.

Pius Atok Ewoton v Hon. Joseph Koli Nanok; Paul Ekuwam Nabuin; Controller of Budget; Attorney General

CASE NUMBER: Petition No. 554 of 201**3**

REGION: Nairobi

COURT: High Court (Constitution & Human Rights Division), court of first instance; reviewable by Appeals Court

DATE OF DECISION: 8 July 2014

RELEVANT LAW: Constitution, Article 35

DECISION: An individual seeking to enforce the right to information held by the state must show that the state holds the information, and refused or failed to provide it following a request.

SUMMARY

Facts

Paul Atok Ewoton filed this constitutional petition against the Governor of Turkana County, Honourable Joseph Koli Nanok; the County Executive Member in Charge of Finance, Paul Ekuwam Nabuin; the Controller of Budget; and the Attorney General. He alleged that the approved budget estimates for Turkana County for the 2013-2014 fiscal year had been altered by the Turkana County executive and that the implementation of this budget would negatively affect the county residents. Thus, based on Article 35(1) of the Constitution on the right to information, he requested copies of the approved budget estimates for the fiscal year 2013-2014, the altered budget submitted to the Controller of Budget by the Turkana County executive, and the Turkana County final warranty No. 1 of 2013/2014. Ewoton asserted that as a resident of Turkana County, he was directly affected by resource allocation in the county and that he was also under an obligation to respect, uphold, and defend the Constitution. In response, the Controller of Budget and Attorney General argued that the petition had been brought late because the Controller was working on the documents that the petitioner requested and would submit them to him in the course of the day.

When the matter first came to the court, it had directed the Governor, County executive, Controller, and Attorney General to provide the information requested, but they still had not provided it by the time the matter next came before the court, approximately two months later. The Governor and County executive asked for and were granted seven days to produce the documents. However, Ewoton later alleged that although he had been provided with a copy of a warrant addressed to the County Executive for Finance and Planning, he had procured from an anonymous source a copy of the warrant to the Controller of Budget, which is different from that submitted to him. The Governor and County executive submitted that they had complied with the information request by supplying the two documents he requested and that he had

not requested the warrant. Ewoton requested that, in light of the Governor's and Controller's failure to provide the requested documents, they be ordered to do so by the court in order to enable him to take appropriate legal action against them for constitutional violations. However, the Governor, County executive, and Controller asserted that Ewoton had not demonstrated a violation of Article 35(1) because he already had the information at the time he filed the petition. The Controller and Attorney General averred that they had inadvertently forgotten to inform Ewoton to pick up documents made available to him after his initial oral and written requests but that they had subsequently submitted the requested documents.

Decision

The court dismissed the petition, finding no violation of Ewoton's rights under Article 35(1)). It found that the government had complied with Ewoton's demand for information. It was puzzled that he sought to be provided with a document already in his possession, since he had obtained it from an anonymous source. However, the origin of the latter document was not clear and he had failed to demonstrate that the government entities had it in their possession or that they had failed or refused to give it to him. Nevertheless, the court praised Ewoton for his "vigilance" in raising concerns about the budget irregularities.

Republic v Rashid Juma & Another [2015]

CASE NUMBER: Criminal Case No. 49/2014
REGION: Mombasa
COURT: Mombasa High Court
DATE OF DECISION: 15 July 2015
RELEVANT LAW: Constitution, Article 49
DECISION: The judge declined to grant the two accused persons bond

SUMMARY

Facts

An oral application for bond was first made by the counsel for the 1st accused on 28 November 2014, but the prosecution was not ready and it was deferred to 9 December 2014 and heard on 16th December 2014. Before a ruling could be delivered, the 2nd accused was arrested and Criminal Case No. 49 of 2014 was consolidated with Criminal Case No. 52 of 2014. A fresh bond application was made by Mr Khatib, counsel for the 2nd accused, and the court ordered that a single ruling be delivered in respect of both applications.

The two accused persons faced four charges of murder contrary to section 203 as read with section 204 of the Penal Code. On the eve of the last general election a rag tag militia styled as the military wing of Mombasa Republican Council (MRC) attacked and brutally murdered in cold blood four policemen who were on duty on that fateful night. Five suspects were later arrested and charged in Court vide Criminal Case No. 12 of 2013, which is still on going. Bond for the accused persons in that case was denied save for one. One and a half years later the two accused persons were arrested at different times and their cases were consolidated.

The respondents submitted that before their arrest they had been at large since the commission of the said offence and police had difficulties in tracing their whereabouts. It was feared that if admitted to bail there they would abscond, as they were also influential members of the MRC.

Decision

The judge decided that, "Upon a careful analysis of the facts before this court, I am satisfied that the prosecution has proved on a balance of probabilities that there are compelling reasons to deny the accused persons bond, which were:

(a) That this is a very serious case with considerable security implications.

(b) That the accused persons have been on the run and the possibility that they will attend court if granted bond is very minimal."

The judge accordingly, declined to grant the two accused persons bond.

Refugee Consortium of Kenya & another v Attorney General & 2 others [2015]

CASE NUMBER: Petition No. 382 of 2014

REGION: Nairobi

COURT: High Court

DATE OF DECISION: 18 December 2015

RELEVANT LAW: Constitution Articles 24, 27, 28, 29, 47, and 53

Children Act s. 4; International law: United Nations Convention on the Rights of the Child (CRC)

African Charter on the Rights and Welfare of the Child (African Children's Charter)

Universal Declaration of Human Rights (UDHR)

International Covenant on Civil and Political Rights (ICCPR)

African Charter on Human and Peoples' Rights (ACHPR)

1951 Convention Relating to the Status of Refugees

1967 Protocol Relating to the Status of Refugees

1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa.

SUMMARY

Facts

A large number of people were arrested by the police. Many were detained, and some taken to refugee camps (many of them being refugees from various countries). Many left children behind, including at least one who was still breast-feeding her child.

Decision

There was a violation of Article 47 of the Constitution on fair administrative practice because it was made hurriedly, without consideration of individual circumstances. There was a violation of Article 53 on the rights of the child (and of the equivalent provision in the Children Act); the best interests of the child were not even considered. The directive on the basis of which the police acted did not satisfy Article 24 of the Constitution; "the State has not provided any evidence whatsoever to show that the relocation of urban refugees, who are lawfully registered by itself, will address the current security challenges. No evidence has been adduced to prove that there is a clear nexus between lawfully registered and law-abiding refugees and security challenges."

But the petitioners had not established:

Violation of Article 27 (discrimination) because they had not complained that refugees we treated like this and others were not, but discriminated as between refugees, but had failed to prove this.

Violation of Article 29 on security of the person because they had not made any arguments to this effect

Violation of Article 28 on dignity, for the same reason.

The judge ordered: an order of mandamus to reunite the affected children and their parents; an order of invalidity of the directive and Gazette statement as regards the children affected and their parents; a declaration that the respondents violated Article 53; compensation of Ksh 50,000 to each child.

Richard Were & 11 others v Permanent Secretary Ministry of Health & 3 others

CASE NUMBER: Petition No. 568 of 2012
REGION: Nairobi
COURT: High Court
DATE OF DECISION: 31 July 2013
RELEVANT LAW: Constitution, Articles 21, 27, 28 and 43(1)(b)
Employment Act, Section 31
Universal Declaration of Human Rights Articles 25
International Covenant on Economic, Social and Cultural Rights, Article 11
DECISION: The court ruled against the petitioners

SUMMARY

Facts

The petitioners were civil servants who were transferred from the Ministry of Medical Services to other ministries as part of a reshuffle. After this transfer, they were expected to vacate their houses to enable hospital staff to occupy the houses. They were residing at the Mathari Hospital Servants quarters by virtue of being employees of the then Ministry of Health and Ministry of Medical Services. They were issued with eviction notices resulting in the filing of the petition on the grounds that their right to housing under Article 43 had been violated, as their net salaries are minimal and deductions having been made by the Ministry of Health and the Government for the benefit of securing housing, they could not afford alternative housing. In their prayers they sought to have the respondents provide alternative housing and the eviction notices be declared unconstitutional.

Decision

The court held that an employee's right to occupy the employer's premises is subject to the employment contract. The deployment of the petitioners to other ministries meant that the benefit of housing that came with their association with the hospital came to an end. The court held that the right to housing under Article 43 had not been violated as the housing allowance enables employees to secure accommodation. They were given two months to vacate the premises.

C K (a child) through Ripples International (as her guardian & next friend) & 11 others v Commissioner of Police/Inspector General of the National Police Service & 3 others [2013]

CASE NUMBER: Petition No. 8 of 2012
REGION: Meru
COURT: High Court
DATE OF DECISION: 27 May 2013
RELEVANT LAW: Constitution: Articles 21(1), 21(3), 22, 27,28,29,48,50(1), 53(1) (c), 244.
Universal Declaration of Human Rights, Articles 1-8 and 10
Convention on the Rights of the Child, Articles 2, 4, 19, 34 and 39
African Charter on the Rights and Welfare of the Child, Articles 1, 3, 4,16 and 27
African Charter on Human and People's Rights, Articles 2 to 7 and 18

SUMMARY

Facts

All the child petitioners alleged they had been defiled and had complained to the police who had taken no action, in some instances asking for bribes to do so.

Decision

All the petitioners including Ripples International had the right to bring actions under Article 22. Failure of the police caused grave harm to the petitioners and created a climate of impunity for defilement. This infringed the petitioners' fundamental rights and freedoms under inter alia: Articles 21(1),(3), 27,28,29,48,50(1) and 53(1), (d) of the Constitution of Kenya, 2010 and the general rules of international law; the Convention on Rights of the Child notably Article 2, 3, 4, 5, 6, 7 and 8; the African Charter on Human and People's Rights notably Articles 2, 3, 4, 5, 6, 7 and 18; Convention on Elimination of all

Forms of Discrimination against Women notably Articles 1 and 2; and the International Convention on Civil and Political Rights notably Articles 3, 7, 9 and 26.

Harm to the petitioners consisted in showing disbelief, blaming the victims, humiliating them, yelling at and ignoring them, vigorously cross-examining them and failing to take action. This caused psychological harm, including self-doubt, self-loathing, self-blame, and low self-esteem.

In addition, the petitioners had to seek protection from the 12th petitioner leading to their separation from their close family members etc.

The court issued (i) declaration that the rights of the child petitioners had been violated, namely: to special protection as members of a vulnerable group, to equal protection and benefit of the law; not to be discriminated against; to dignity; to security of the person; not to be subjected to any form of violence torture or cruel or degrading treatment; and to access to justice; (ii) the police behaviour amounted to violation of the Universal Declaration of Human Rights, the Convention on the Rights of the Child; the African Charter on the Rights and Welfare of the Child, and the African Charter on Human and People's Rights; and (iii) order of mandamus to 1st respondent to conduct prompt, effective, proper and professional investigations into the 1st to 11th petitioners' complaints; (iv) order of mandamus to 1st respondent to implement Article 244 [on police professionalism etc.] of the Constitution so far as relevant to the matters raised in the petition.

Petitions seeking order of mandamus directing formulation of National Policy Framework envisioned by Section 46 of the Sexual Offences Act, making the framework a mandatory component of the training curricula at all police training colleges and an order directing the respondents to regularly and/or account to the court on compliance with the court's orders were denied without reason given.

Samson Kiogora Rukunga v Zipporah Gaiti Rukunga

CASE NUMBER: Petition No. 308 of 1994
REGION: Meru
COURT: High Court of Kenya at Meru
DATE OF DECISION: 17 February 2011
RELEVANT LAW: Constitution, Article 27
DECISION: The respondent was entitled to inherit from her father's estate.

SUMMARY

Facts

The petitioner died intestate and left 15 survivors, among them sons and daughters. The proposed mode of distribution suggested by Kiogora Samson, the 3 deceased's son made no provision for daughters. Consolata , the deceased's surviving wife's daughter, had been married and was divorced and so was staying on her late mother's piece of land. Witnesses confirmed that she was indeed divorced. Kiogora however alleged that she frequently visited her ex-husband and that their son even stayed with him. The court was to determine whether Consolata was entitled to her father's inheritance.

Decision

Kiogora justified that she was not entitled as she was married even though she was not living with her husband. At this, Consolata submitted that she had been divorced since 1991 and had been living on the plot earmarked for her mother. The judge said that it did not matter whether a daughter is married or not, she was entitled to her father's inheritance. The judge invoked Article 60(f) of the Constitution that provides for elimination of gender discrimination in respect of land. The court held that not only was Kiogora forbidden by Article 60 but by Article 27 of the Constitution with an emphasis on (3), (4) and (5).

The Institute for Social Accountability (TISA) & Another v The National Assembly & Three Others

CASE NUMBER: Petition No. 71 of 2013
REGION: Nairobi
COURT: High Court of Kenya, Constitutional and Human Rights Division.
DATE OF DECISION: 20 February 2015
RELEVANT LAW: Constitution
The Constituencies Development Fund Act, Act No. 30 of 2013
DECISION: The Constituencies Development Fund Act, Act No. 30 of 2013 was declared unconstitutional.

SUMMARY

Facts

The Constituencies Development Fund Act, Act No. 30 of 2013 (CDF Act), establishes the fund known as the Constituencies Development Fund (CDF). The fund has, for the last decade, been disbursed to the constituencies to finance and implement development projects. The Act was to ensure that the government set aside 2.5% of its ordinary revenue and channel it to the CDF to be utilised at the constituency level to finance grassroots infrastructure. The objective of the CDF Act as set out in the preamble was, "to provide for the establishment of the Constituencies Development Fund and for connected purposes". For purposes of administration of the CDF fund, a national CDF Board was established and at the constituency level CDF committees were established with the respective Member of Parliament being the committee patron.

The petitioners sought a declaration that the Constituencies Development Fund Act, Act No. 30 of 2013 is unconstitutional based on the process that led to its enactment and its content. The petitioner sought for, among other, the following orders: that the Act violated the separation of powers principle; any organ or body established by the act was illegal; that the failure to involve the Senate in its enactment renders it invalid; that there was insufficient public participation in its enactment; that the numerous provisions violating the constitution render the entirety of the Act untenable.

The first respondent, the National Assembly, argued that the role of the Member of Parliament was clearly demarcated as an ex-official member of the CDF committee and therefore, was not involved in executive roles. However, in addition he argued that complete separation of powers did not exist. Also, that there was public participation and that the National Assembly had discretion on how to conduct public participation. The third and fourth respondents, the CDF Board, concurred with the first respondent on all the issues raised. The second respondent, the Senate, did not make any submissions. On the separation of powers, for example, the third respondent, the Attorney General, argued that the fund is administered by the Board and the constituency

committee, of which the MP is not a member. The third respondent, however, said that the Act is not unconstitutional though the management and administration of the CDF should be under the direction and control of the county government. The interested party, the Commission on the Implementation of the Constitution (CIC), argued that the Act was unconstitutional on various grounds including failure to observe the provisions of section 14 of the Sixth Schedule as read together with section 2(3)(b) of that Schedule, which requires that before any laws relating to Chapter Eleven and Twelve are enacted, the CIC and the Commission on Revenue Allocation (CRA) must be consulted and be given at least 30 days to consider the proposed legislation; also, that it failed to exclude the CDF from the Consolidated Fund as provided for under Article 206(1) of the Constitution.

Decision

The court identified the following issues for determination: whether the process leading to the enactment of the CDF was constitutional; on the nature of the CDF and whether it violates principles of public finance and division of revenue; whether it violates the division of powers and functions; and whether it offends the principle of separation of powers. The court ruled in favour of the petitioner in all but one issue. It found and held that the Act is unconstitutional on the ground that the Senate was not involved in the enactment of the Bill; but ruled that there was sufficient public participation leading to its enactment and that there was no violation of section 14 of the Sixth Schedule to the Constitution with regard to consultation with the CIC and the CRA. The court, however, established that the Act violates the principle of public finance and division of revenue; that it also violates the division of powers and functions and that it offends the principle of separation of powers.

Veronica Njeri Waweru & 4 others v City Council of Nairobi & 2 others

CASE NUMBER: Petition No. 58 of 2011
REGION: Nairobi
COURT: High Court
DATE OF DECISION: 2 March 2012
RELEVANT LAW: Constitution, Articles 24, 40, 43 and 47
DECISION: The court ruled against the petitioners

SUMMARY

Facts

The petitioners' case was that they had been operating businesses for over ten years in the suit property, which they acknowledged was on public land that was supposed to be a road reserve. It was adjacent to a property belonging to the Provincial Administration. The petitioners were issued with notices to vacate by the Provincial Administration Kasarani and the City Council of Nairobi even though they had been issued with licences to operate businesses by the City Council of Nairobi and paid the requisite fees. They argued that they had a legitimate expectation that having been licensed for the year 2011 and paid revenue, they deserved protection of the law. The petitioners filed the petition alleging violations of their rights under Articles 40, 43, 47 and 24 of the Constitution.

Decision

On the right to property, Justice Mumbi held that since they had conceded that they were occupying public land/property, a road reserve, and they had only business licences, they had no proprietary interest, and therefore there was no violation of the right. The court also found that there was no violation of the right to housing as this right did not encompass persons in the circumstances of the petitioners who were operating businesses such as garages, hardware and furniture shops on a road reserve. She further noted that, "Article 43 cannot therefore be interpreted to impose a duty on the respondents to provide alternative business premises to businessmen who can afford to invest millions in their businesses".

The court held that there was no violation of Article 47 as there was reasonable notice given, stating that since the land was a road reserve and the public interest demands that such land should be used for the purpose it is intended; it should therefore not be appropriated for private use.

The petitioners were given sixty days to find an alternative area for their businesses and vacate the road reserve so that it could be put to its proper use by the respondents.

Walter Osapiri Barasa v Cabinet Secretary Ministry of Interior & National Coordination & 6 Others [2014]

CASE NUMBER: Petition No. 488 of 2013

REGION: Nairobi

COURT: Milimani High Court Constitutional and Human Rights Division

DATE OF DECISION: 31 January 2014

RELEVANT LAW: Constitution,

DECISION: The ICC proceedings in respect of a warrant of arrest are special proceedings which do not entitle the petitioner to an opportunity to be given a hearing prior to his arrest.

SUMMARY

Facts

Following the post-election violence of 2007-2008 in the Republic of Kenya, the International Criminal Court at The Hague (ICC), in December 2010, indicted some Kenyan leaders deemed to be most responsible for the situation in Kenya. On 2 August 2013, pursuant to an ex parte application by the ICC Prosecutor dated 18 July 2013, under Article 58 of the Rome Statute of the International Criminal Court (hereinafter the Rome Statute), the Single Judge of Pre-Trial Chamber II of the ICC issued a warrant for the arrest and surrender of the petitioner. The petitioner is alleged to be criminally responsible for three counts of corruptly influencing witnesses and attempting to corruptly influence witnesses at, or near, Kampala, in the Republic of Uganda.

Following the issuance by the ICC of the orders for arrest and surrender, and request for search and seizure, the ICC Registrar issued an under seal request for arrest and surrender ("the Request") of the petitioner on 18 September 2013. It is trite that under the Rome Statute the ICC does not exercise police powers, nor do its personnel have a direct right of arrest. Accordingly, the Request – together with accompanying documentation and identifying information under Article 91 of the Rome Statute – was transmitted for execution on 23 September 2013, to the Cabinet Secretary, Ministry of Interior and Co-operation of Kenya, by way of a request for co-operation pursuant to Article 89 of the Rome Statute.

The Prosecutor had announced the issuance of the arrest warrants soon after transmission of the Request. The matter acquired great public notoriety through the national and international press and other media, which triggered the filing of this petition by the petitioner in anticipation of arrest, which led to a temporary order that the petitioner be accorded police protection from arrest.

The petitioner sought the following orders:

a) A declaration be issued to declare that the procedure set out in Part IV of the International

Crimes Act, 2008 in respect of Arrest and Surrender of Persons to the International Criminal Court is fundamentally flawed and invalid under Articles 1, 10, 24, 27, 29, 35, 47 and 50 of the Constitution.

b) A declaration be issued to declare that by dint of Article 1, 2, 24, 27, 29, 35 and 47 and 50 of the Constitution read with Sections 9-19 of the International Crimes Act, 2008 the respondents are enjoined to ensure that the petitioner is tried before a competent court in Kenya for offences against administration of justice alleged against him by the International Criminal Court.

c) A declaration be issued to declare that the first and second respondents have violated the petitioner's fundamental rights and freedoms enshrined in Articles 27, 28, 29, 35, 47 and 50 of the Constitution, by commencing proceedings under Part IV of the International Crimes Act, 2008, before notifying and furnishing the petitioner with the information and evidence upon which the International Criminal Court seeks his arrest and surrender.

d) A declaration be issued to declare that by dint of Articles 2, 10, 27, 29, 47 and 50 of the Constitution the respondents are enjoined under Section 19 (2) of the International Crimes Act, 2008 to refuse the request for arrest and surrender of the petitioner to the ICC in view of the existing exceptional circumstances that make it unjust and oppressive to surrender the petitioner to the ICC for prosecution.

e) A declaration be issued to declare that by dint of Articles 20, 24, 27, 29 and 50 of the Constitution the respondents are prohibited from instituting and/or maintaining proceedings affecting the petitioner under Part IV of the International Crimes Act, 2008 unless and until the first respondent makes the regulations provided for under Sections 172 and 174 of the said Act.

f) An order of prohibition be issued to restrain the first respondent from conducting proceedings under Part IV of the International Crimes Act, 2008 for the arrest and surrender of the petitioner to the ICC unless and until the Director of Public Prosecutions has made the decision under Section 19 (2) on whether the existing exceptional circumstances make it unjust or oppressive to surrender the petitioner to the ICC for prosecution.

g) Pursuant to Article 23, 24, 27,29,35,47 and 50 of the Constitution an order of certiorari be issued to bring to the High Court and quash the decision of the first respondent to request a judge to issue a warrant for the arrest of the petitioner pursuant to Section 29 of the International Crimes Act, 2008 and any proceedings that may have been undertaken pursuant to the said request.

h) An order of mandatory injunction be issued to compel the first and second respondents to furnish to the Director of Public Prosecutions (third respondent) a copy of the Request of the International Criminal Court for arrest and surrender of the petitioner and supporting documents in order for the third respondent to determine under Section 19(2) of the International Crimes Act, 2008 whether the existing exceptional circumstances make it unjust or oppressive to arrest and surrender the petitioner to the ICC.

i) A mandatory order of injunction be issued to compel the Inspector General of Police – the fourth respondent – to provide the petitioner with such security as may be necessary to protect the petitioner from arrest by investigators or agents of the ICC in the event of an order by this Honourable Court that the petitioner be tried in Kenya - before a competent court for the offences against administration of justice alleged by the ICC.

Decision

The petitioner's prayers numbered (a) to (h) set out in the petition are hereby declined as it was found that this was not the right forum to vent the issues relating to appropriateness of the issuance of the arrest warrant. The petitioner's allegations are therefore premature at this stage. Accordingly, "I find and hold that the ICC proceedings in respect of a warrant of arrest are special proceedings which do not entitle the petitioner to an opportunity to be given a hearing prior to his arrest".

Zacharia Keangso Mecha v Hon. Beauttah Omanga

CASE NUMBER: Petition No. 8 of 2015
REGION: Kisii
COURT: The High Court of Kenya at Kisii, court of first instance
DATE OF DECISION: 17 July 2015
RELEVANT LAW:
DECISION: The petitioner's application tilts in favour of the respondent not to grant the prayer sought.

SUMMARY

Facts

The petitioner petitioned the court for the grant of conservatory order by way of an order restraining the respondent from chairing any procurement meeting in Nyamira County Assembly (tender and procurement award) till the hearing and determination of this application interpartes. He claimed that the respondent is his member of County Assembly who was elected by the Bogichora electorate and by virtue of the respondent chairing the County Tender Committee Board, the said Board evaluated the tender for provision of insurance cover for members of the County Assembly and their families. Consequently, the respondent signed the minute as the chairman while the procurement officer signed as a secretary. Thereafter, the clerk of the County Assembly and other members of the County Board were subjected to interrogation by the Public Investment and Accounts Committee of Nyamira County (PIAC). Later, the said report was used to sack the Speaker of the County Assembly but selectively left the respondent still in office despite the recommendation to have him dismissed. Therefore, the petitioner now contends that upon the irregular award of the insurance tender aforesaid, the acting clerk of the Assembly hastily prepared the payment voucher and paid a company by the name Johncele Insurance Brokers.

Decision

In the honourable judge's humble view, the petitioner had not made a prime facie case. The report, which recommended the chairman and the vice chair of the County Tender Committee to take responsibility for leading and guiding a board meeting that approved the award and payment by fraudulent process, remained a recommendation and there is no evidence that the same was actually adopted or endorsed by the County Assembly of Nyamira. Also the petitioner has not attached any documentary evidence detailing and showing the circumstances that led to the impeachment of the Speaker of Nyamira County. The fact that the committee recommended that the speaker and the vice chair of the tendering committee should take responsibility for their action did not per se mean that the speaker and his vice chair should relinquish their chairman and vice chair seat in the tendering committee. Therefore, for the above reasons, the petitioners' application tilts in favour of the respondent not to grant the prayer sought.

Citizenship

Bashir Mohamed Jama Abdi v Minister for Immigration and Registration of Persons & 2 Others [2014]

CASE NUMBER: Petition No. 586 of 2012

REGION: Nairobi

COURT: High Court

DATE OF DECISION: 7 March 2014

RELEVANT LAW: Constitution, Articles 13(1) (2), 14(5) 27, 47, 50

DECISION: The court ruled that the petitioner was not a citizen of Kenya since he had lost his citizenship when he gained British citizenship. He was however entitled to apply to regain his citizenship. His freedom of movement had not been violated because that was a right reserved to citizens. His rights to non-discrimination (27), fair administrative action (47) and fair hearing (50) were violated.

SUMMARY

Facts

The petitioner was born in Kenya in 1952 and acquired both Kenyan and British citizenship. He lived in Kenya for 62 years and had both a Kenyan ID and a birth certificate. Both his parents were Kenyan citizens who held Kenyan passports. In 2011 he applied for Kenyan Passport but it was denied on the basis that he had not renounced his British Citizenship under Section 97 of the former Constitution by 21 March 1975. He had acquired British citizenship by claiming that he was a Somalia national.

In July 2012 the petitioner travelled to Nairobi but upon arrival at the airport he was deported back to Britain on the allegation that he was involved in terrorism. No action was ever taken against him while in Britain. The issues were:

- That failure to issue him with a passport was a violation of his right to citizenship under Articles 13(1) (2) and 14(5) of the Constitution.
- The government refusal to admit him to Kenya was a violation of his freedom of movement.
- His deportation was a violation of his right to non-discrimination (Article 27); fair administrative action (47); and right to fair hearing (50).

Decision

The Court ruled that the petitioner was not a citizen of Kenya since he had lost his citizenship when he gained British citizenship and therefore was not entitled to a Kenyan passport. He was however entitled to apply to regain his citizenship. His freedom of movement had not been

violated because that was a right reserved to citizens. His rights to non-discrimination (27), fair administrative action (47) and fair hearing (50) were violated.

Reasoning:

The former constitution did not allow for dual citizenship. As such the petitioner lost his citizenship when he gained British citizenship. However, given that the new constitution allowed dual nationality, he was entitled to apply to regain citizenship since it had been proven through DNA evidence that he was born of Kenyan parents. However he had to meet the constitutional and statutory standards necessary to regain citizenship, but was not entitled to a Kenyan passport until he had regained his citizenship. His right to movement was not violated since that was a right reserved to Kenyans under Article 39. However, the right to non-discrimination, fair administrative action and fair hearing were rights available to everyone. By alleging that he was involved in terrorism and using it as a basis to deport him to Britain while providing no evidence of his involvement in terrorist activities, failing to provide him with any disclosure, and failing to give him an opportunity to explain his case, the Director of Immigration violated his rights. It was also disturbing that immigration had dealt with such serious allegations in such a casual manner.

The petitioner had asked for an order of damages (Ksh 25 million). However, the court stated that since he was also to blame for some of his predicament, including that he had lied about his nationality to obtain his British citizenship, the court could not be seen to be abetting his illegality by awarding him damages.

Bishop Donald Kisaka Mwawasi v Attorney General & 2 Others [2014]

CASE NUMBER: Civil Appeal No. 280 of 2013
REGION: Nairobi
COURT: Court of Appeal
DATE OF DECISION: 4 June 2014
RELEVANT LAW: Constitution, Articles 99 and 78(2)
DECISION: The court ruled in favour of the petitioner with provisos.

SUMMARY

Facts

The appellant (Bishop Kisaka) was a Kenyan citizen by birth, who had acquired US citizenship in 2011. He joined the Agano Party and was nominated to run for the Taita Taveta Senate seat by that party. However, IEBC published the requirements for qualification to be a candidate for elective position as an MP, which included that a candidate could not be a dual citizen. The appellant moved to the High Court seeking a declaration that prohibition of persons holding dual citizenship from being nominated was unconstitutional. The issues were: that the IEBC erred in its interpretation of the Constitution as prohibiting a dual citizen from being eligible as a candidate of MP position; that the only offices for which dual citizen were not eligible for nomination were those of the President and the Deputy President.

Decision

The court ruled that a dual citizen was eligible for nomination or appointive position of a state officer. However, s/he could not assume the office until s/he has renounced the citizenship of the other country unless the other country did not have laws to provide and facilitate renunciation of citizenship.

Reasoning:

- While a citizen by birth does not lose citizenship by acquiring the citizenship of another country and while a dual citizen is by virtue of Article 12(1) entitled to rights, privileges and benefits of citizenship by rights to leadership, including political participation, are limited by Article 78(2).
- Parliament, in enacting section 31 of the Leadership and Integrity Act, interpreted Article 78(2) correctly. The proscription in Article 78(2) is not against a dual citizen being elected or being appointed as a state officer. The restriction is against leadership by dual citizen in the specified state offices, and it does not all apply unless and until a person is elected and/or appointed to a state office. That is a material fact, which must be borne in mind.

- A dual citizen is eligible to seek nomination for election as a member of Parliament or member of county government and to stand as a Member of Parliament or county government in an election and also eligible to hold any state office.
- However, a dual citizen is disqualified upon election or appointment to a state office from assuming office before voluntarily and officially renouncing his other citizenship howsoever granted in accordance with the Kenya Citizenship and Immigration Act unless as Article 78(3) provides, he has no ability under the laws of the other country to renounce citizenship of the other country.
- The High Court erred in law to the extent that it held that a dual citizen is disqualified from nomination and from standing for election as a Member of Parliament

Hersi Hassan Gutale & Another v Attorney General & Another [2013]

CASE NUMBER: Petition No. 50 of 2011
REGION: Nairobi
COURT: High Court, Constitutional & Human Rights Division
DATE OF DECISION: 21 January 2013
RELEVANT LAW: Constitution, Articles 12, 14 & 47
DECISION: The Principal Registrar of Persons was given 45 days to consider and make a determination on the application by the petitioners.

SUMMARY

Facts

The applicants claimed to be Kenyan Citizens of Somali ethnic background, holders of the old generation ID cards and passports, who had been denied new generation ID cards. The denial was based on Gazette Notice 5320, which required that every person of Somali ethnic descent be vetted by a committee (Yusuf Haji Task Force), which would confirm the veracity of their citizenship. The first petitioner was found (by the task force) not to be a citizen of Kenya and even charged for illegally having a Kenyan ID card, but the DPP entered a nolle prosequi. A challenge on the constitutionality of Gazette Notice 5320 of 10th November 1989 for being discriminatory against persons from the Somali community failed (Nairobi HC Misc. Application No. 774 of 2004 Hersi Hassan Gulate and Abdullahi Mohammed Ahmed v Principal Registrar of Persons & Attorney General). The issues were:

i. Whether the petitioners are citizens of Kenya by birth within the meaning of Articles 12 and 14 of the Constitution.

ii. Whether under Articles 12 and 14 of the Constitution of Kenya, 2010, each of the petitioners is entitled to be issued with a national identity card and/or any other document or identification as Kenya citizens.

iii. Whether the screening exercise conducted pursuant to Gazette Notice No. 5320 was and remains null and void ab initio for being in violation of the rights of members of the Somali community in Kenya, including the petitioners, enshrined in Articles 27 and 28 of the Constitution.

Decision

The Principal Registrar of Persons was given 45 days to consider and make a determination on the application by the petitioners to be issued with second generation ID cards.

Reasoning:

The question whether the petitioners were citizens and hence entitled to benefits of citizenship (under Article 12 and 14) had not been answered by previous judicial processes and hence they were entitled to have that dispute adjudicated by the courts, especially given how sacrosanct the issue of citizenship is.

There was nothing on the record to show how the Registrar conducted his assessment on whether the petitioners were entitled to second generation ID cards.

"The duty to carry out appropriate inquiries and to hear the petitioners is a duty cast upon the Registrar by the Registration of Persons Act. In exercising such authority the Registrar must act in accordance with the law bearing in mind the provisions of the Constitution, particularly the fundamental rights and freedoms of the petitioners, which entitle the petitioners to fair administrative action guaranteed under Article 47. It is not for this Court to substitute itself as the Registrar unless the decision of the Registrar contravenes the Constitution and the law."

Jisvin Chandra Narottam Hemraj Premji Pattni v Director of Immigration & Another [2015]

CASE NUMBER: Petition No. 251 of 2014
REGION: Nairobi
COURT: High Court
DATE OF DECISION: 17 September 2015
RELEVANT LAW: Constitution, Articles 13(1) (2) and 14(5)
DECISION: The court ruled against the petitioner.

SUMMARY

Facts

The petitioner was born in Kenya in 1952 and acquired both Kenyan and British citizenship. He lived in Kenya for 62 years and had both a Kenyan ID and a birth certificate. Both his parents were Kenyan citizens who held Kenyan passports. In 2011 he applied for a Kenyan Passport but it was denied on the basis that he had not renounced his British Citizenship under Section 97 of the former Constitution by 21 March 1975. The issue was that failure to issue him with a passport was a violation of his right to citizenship under Articles 13(1) (2) and 14(5) of the Constitution.

Decision

The court ruled that the petitioner was not a citizen of Kenya since he had lost his citizenship by operation of Section 97(3) of the former Constitution when he turned 21, because he never renounced his British citizenship. Articles 12, 13, 14 and 15 did not apply to him since he was not a citizen. No rights of the petitioner (Article 47) had been violated.

Reasoning:

i. That the former constitution did not allow for dual citizenship. While he had Kenyan citizenship before he turned 21, that citizenship was extinguished when he failed to renounce his citizenship upon turning 21 , as was required by Article 97. The Kenyan ID he held was therefore not a valid document. In any event, the petitioner had remained in Kenya because he had a work permit.

ii. The petitioner's right to fair administrative action (Art. 47) had not been violated because he had received a letter from immigration which indicated that he had lost his citizenship once he failed to renounce his British citizenship upon attaining the age of 21.

Khatija Ramtula Nur Mohamed & Another v Minister for Citizenship and Immigration & 2 Others [2013]

CASE NUMBER: Petition No. 38 of 2012
REGION: Mombasa
COURT: Mombasa High Court
DATE OF DECISION: 2 September 2013
RELEVANT LAW: Constitution, Articles 27, 28 and 45
DECISION: The court ruled against the petitioner.

SUMMARY

Facts

The petitioner was married to a Kenyan in 2011 at a time when he was in Kenya on a business permit. He severed relationships with his business partners – hence his immigration status lapsed and did not seek renewal status. At the time he approached the court he had no valid legal status in Kenya. The issue was that S. 37(d) of the Kenya Citizenship and Immigration Act 2011 (CIA) is unconstitutional to the extent that it requires a foreigner married to a Kenyan to establish subsistence of marriage for three years in order to qualify for permanent resident status. This requirement offends Article 27 in that it is discriminatory and also is a violation of the right to family under Article 45.

Decision

The court ruled that it could not grant the petitioner the relief sought because she was out of status at the time of filing the petition. Regardless, the Court went on to decide the following: that the three-year requirement for eligibility for permanent residence under the CIA was not unconstitutional because it was a limitation that was reasonably justifiable in a free and democratic society. The court however recommended that the state consider providing in law for temporary status of a foreigner married to a Kenyan during the three-year waiting period.

Reasoning:

i. On constitutionality of the three-year requirement under CIA, because the right to family is a fundamental right; any legislation that hinders consortium limits that right. However, that limitation is justifiable in a free and democratic society because a country has the right to decide its immigration policies and often such policy is guided by the demands of the market or the strain on resources or impact on culture.

ii. On recommending that government considers providing temporary status to foreign nationals married to Kenyan citizens: because it is the duty of the state to promote and fulfil human rights, it should provide in law the right to temporary residence for foreign nationals married to Kenyans especially in order to promote the right to family.

This judgment was confirmed on appeal.

Republic v Cabinet Secretary for Ministry of Interior & Coordination of National Government & 2 Others ex parte Patricia Olga Howson [2013]

CASE NUMBER: Civil Application No. 324 of 2013
REGION: Nairobi
COURT: Nairobi High Court – Judicial Review Division
DATE OF DECISION: 20 December 2013
RELEVANT LAW: Citizenship and Immigration Act, Article 15(1) and Section 11
DECISION: Order of mandamus issued

SUMMARY

Facts

The applicant, Olga, (a British citizen) had been married to a Kenyan citizen since 1966. In March 2013 she applied for grant of citizenship under Article 15(1) and Section 11 of the Citizenship and Immigration Act (CIA) on the basis that she was married to a Kenya citizen and had met all the necessary requirements for the granting of citizenship on the basis of marriage. Despite making various inquiries over time on the status of her application from the Director of Immigration, she received no response as to the status of her application. The issues were that the delay in processing her application was a violation of her right to fair administrative action and that the delay in granting her citizenship was an illegal use of power and resulted in violation of her other rights.

Decision

The court ruled that the right to fair administrative action is entitled to everyone not just citizens; that the applicant's right to fair administrative action had been curtailed by the delay in processing her application; an order of mandamus was issued requiring the Cabinet Secretary (CS) and the Director of Immigration to issue her with citizenship within 30 days.

Reasoning:

i. That the explanation that the delay in processing the application was caused due to the delay by the National Intelligence Services (NIS) on security was not a reasonable ground since there was no indication as to when NIS would be through; yet the Constitution (Article 259(8))

had provided that where no timeline is prescribed in the law the necessary action had to be undertaken with expedition.

ii. Because no reason had been provided by the CS and the Director of Immigration as to why the citizenship should be granted; then there was a justification to issue an order for mandamus.

Devolution

Cereal Growers Association & Another v County Government of Narok & 10 Others [2014]

CASE NUMBER: Petition No. 385 of 2013
REGION: Nairobi
COURT: High Court
DATE OF DECISION: 11 September 2014
RELEVANT LAW: Constitution, Article 22 (1), 163(6)
Nairobi City County Finance Act 2013
County Governments Act
Kiambu County Finance Act
County Government Public Finance Management Transition Act
Agriculture, Fisheries and Food Authority Act, 2013
Nakuru County Finance Act No. 3
DECISION: The court gave an order directing the affected county governments (1st – 8th respondents) to stop the levying/charging of agricultural produce cess or related tax in their areas of jurisdiction, until such time as they would have enacted a supportive framework or until they could produce evidence of such a legal framework within the following 30 days.

SUMMARY

Facts

The members of the 1st petitioner (Cereal Growers Association) through the 2nd petitioner (Hugo Wood), claimed that they were not satisfied with the mode, legality and use of agricultural produce cess which they had been paying to the Municipal, County and City Councils up to 4 March 2013 and subsequently to the 1st to 8th respondents. They claimed that the actions of the 1st to 8th respondents in levying agricultural produce cess and related tax without a supporting legal framework violates the provisions of Article 210(1) of the Constitution that provides that no tax or licensing fee may be imposed, waived or varied except as provided by legislation. Further, that the county governments are violating the Constitution to the extent that they are charging agricultural produce cess in a discretionary and arbitrary manner in violation of Article 209(5) of the Constitution, which requires that taxation and other revenue-raising powers of any county shall not be exercised in a way that prejudices the national economic policies and activities across county boundaries, or the national mobility of goods, services, capital or labour.

Decision

The court found that agriculture produce cess is a tax; hence it must be imposed in accordance with the law and must be anchored in an Act of Parliament or an Act of a County Assembly; to do otherwise would be in violation of Article 209 (3) and 210(1) of the Constitution. The court, however, agreed with the respondents that the court cannot direct the 1st – 8th respondents County Assemblies on how to exercise their mandate of levying agriculture produce cess and how to administer the same. In their view, as the law making bodies of each county, they must legislate having taken into consideration public views, their policies as well as the revenue intended to be raised. It is not the place of the court to direct them on how to carry out any of those administrative or legislative functions

County Government of Nyeri v Cabinet Secretary, Ministry of Education, Science and Technology & Another

CASE NUMBER: Petition No. 3 of 2014
REGION: Nyeri
COURT: High Court of Kenya
DATE OF DECISION: 17 February 2014
RELEVANT LAW: Constitution, Articles 23 and 27
DECISION: The court ordered that the petition proceeds for hearing and determination on its merits.

SUMMARY

Facts

The petitioner, the County Government of Nyeri, stated that by a letter dated 15th November 2013 to all County Directors of Education, District Education Officers and all principals of secondary schools in Kenya, the 2nd respondent issued guidelines for form one selection for 2014. The same was not followed in schools within Nyeri county, thereby violating the Constitutional provision under Article 27 of the Constitution: by discriminating against the students from Nyeri County and its various districts; by having negligible students admitted from its host district schools; and by staggering students from other counties admitted into its schools over and above the 40% prescribed in the guidelines.

The petitioner prayed for a declaration that the selection process was discriminatory to Nyeri residents, and that it should be annulled and a new selection be ordered for the extra county secondary schools in Nyeri County. Also for an order stopping any admission of form one candidates in the extra county secondary schools. The respondent objected to the prayers on account of lack of jurisdiction on the part of the court and that it did not follow the Intergovernmental Relations Act and the Constitution (articles 159 and 189).

Decision

On the issue of jurisdiction, the court established that indeed it was based on article Article 165 of the Constitution which give this court a) an unlimited original jurisdiction in criminal or civil matter and b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or limited. Further, the court observed that the requirement for use of the court as the last resort in disputes between the county and the national government did not apply to the situation, since the dispute between governments is a dispute in relation to the functions and exercise of powers between the different level of government, which was not the case in the issue that was before it. It said that the issue was an

allegation of violation of fundamental rights. Having established jurisdiction, the court dismissed the objection with cost being in the cause and ordered that the petition proceeds for hearing and determination on its merits.

LSK v Transition Authority & 2 Others

CASE NUMBER: Petition No. 190 of 2013
REGION: Nairobi
COURT: High Court of Kenya, Constitutional and Human Rights Division
DATE OF DECISION: 14 June 2013
RELEVANT LAW: Constitution, Section 17 of the 6th Schedule
National Government Co-ordination Act 2013
DECISION: The petition was dismissed on the basis that no dispute existed that needed to be resolved by the parties in the litigation.

SUMMARY

Facts

The national government structured the provincial administration under the National Government Coordination Act 2013. In the structure, the County Commissioners, Assistant County Commissioners, Chief and Assistant Chief were created as officers under the national government. The petitioner challenged the form the structuring took.

The petitioner stated that the petition sought to resolve competing interests and conflicts between the county government and office of the Governor vis-à-vis the Provincial Administration and County Commissioners. The petitioner sought for a declaration that the creation of the public office of County Commissioner, Assistant County Commissioner, Chief and Assistant Chief as offices under the national government is inconsistent with the provisions under the Constitution requiring that the national government shall structure the system of administration, commonly known as the provincial administration, to accord with and respect the system of devolved government established under the Constitution. That, subsequent to that, Section 15 and 20 of the National Government Co-ordination Act 2013 are inconsistent with the principles of devolution as set out in Article 1 and Article 174 of the Constitution and are accordingly null and void to the extent of the inconsistencies, and all appointments by the 2nd and 3rd respondents to offices created under the sections are invalid, null and void. The petitioner sought for an order that provincial administration purported to be structured under the National Government Co-ordination Act 2013 be deemed to be appointments under the County Government Act 2012 and accountable to the Governor and County Assembly.

The respondent argued that there exists a constitutional and legislative mechanism to resolve disputes between the county and national governments, which should be utilised in such a case. They further argued that the issues between the national government and the county government fall within the realm of implementation and in case of disputes, then the mechanisms provided by the law must be utilised, as court proceedings are the last resort.

Decision

The court agreed with the respondents that the current case was not ripe for determination by the court in view of the dispute resolution mechanism provided, since judicial proceedings should be a last resort as provided in section 35 of the Act. It further observed that if indeed there was a dispute, then it is either the national government or the county government that should declare the dispute and invoke the statutory provisions and not the Law Society. The court further refused to grant the declarations sought by the petition as no factual basis had been laid for any determination and no dispute existed capable of being resolved between the parties to the litigation.

Okiya Omtata Okoiti & 1 Other v Attorney General & 6 Others

CASE NUMBER: Petition No. 593 of 2013

REGION: Nairobi

COURT: High Court of Kenya, Constitutional and Human Rights Division

DATE OF DECISION: 6 August 2014

RELEVANT LAW: Constitution, Part 1 Section 23 of the Fourth Schedule,
Part 2 Section 2(a) of the Fourth Schedule, Section 15 of the Sixth Schedule, Articles 62(1)(b), 62(2)(b), 6(2), 174.
Transition to Devolved Government Act, 2012, Sections 23 and 24.
Local Government Act, Section 160 - 167; Section 145
National Government Co-ordination Act, 2013 Section **21**

DECISION: The court did not make a ruling on which specific health facilities or functions belong to which level of government and stated that it was a matter of policy and not for the courts to rule. The court also declined to quash the legal notices that had been issued by the Transitional Authority.

SUMMARY

Facts

In the Legal Notice No. 137 of 2013 published in the Kenya Gazette Supplement No. 116 on 9 August 2013, the Transition Authority (TA), the body charged with the management of the transfer of functions to the county governments, gazetted a number of functions that were to be transferred to counties. Among them were "county health services" which included the transfer of services and facilities that initially belonged to the national government. Subsequently, the petitioner decided to petition in seek of inter-alia an interpretation of Section 23, Part 1 of the Fourth Schedule to the Constitution and Section 2, Part 2 of Fourth Schedule of the Constitution 2010 as regards the meaning of the words "national referral health facilities" and "County health facilities". The petitioners particularly claimed that the respondents (the Attorney General, the Transitional Authority, COG) and the 2nd Interested Party (Committee for the Implementation of the Constitution), had given a wrong interpretation to the words "national referral health facilities" in Section 23, Part 1 of the Fourth Schedule and the words "county health facilities and pharmacies" in Section 2(a), Part 2 of the Fourth Schedule to the Constitution. The petitioners argued that, the words "national health referral facilities" do not mean only the Kenyatta National Hospital and Moi Teaching and Referral Hospital, but mean all public hospitals from level 2 to level 6, as designated by the Ministry of Health. Further, that the words "county health facilities and pharmacies" refer to health facilities previously managed by local authorities, or which presently, counties may and are reasonably expected to establish. The petitioners asked for up to 13 declarations and orders including that the court gives a declaration that the national referral health facilities existing before the effective date and referred to in Part 1 Section 23 of the Fourth Schedule were not devolved to the county governments, and remain a core function of the national government.

The first respondent, the Attorney General (AG), opposed the petitioners' interpretation that national referral health facilities that belong to the national government are levels 2, 3, 4, 5 and 6 health facilities and county health services are the primary health services inherited from local government. The AG said that such an interpretation would defeat the decentralisation of state organs, their functions and services from the capital of Kenya. Further, that such an interpretation renders Articles 174(h) as read with Article 186(1) and Sections 23 of Part 1 of the Fourth Schedule and Section 2 of Part 2 of the Fourth Schedule inapplicable in respect to the health sector. He thus argued that only the Kenyatta National Hospital and, Moi Teaching and Referral Hospital qualify for the description of national referral health facilities in Kenya.

The second respondent, the Transitional Authority argued that the issues raised in the petition are res judicata as they were subject of the issues raised in Nairobi High Court J.R No. 317 of 2013. Also, that the petition offends the doctrine of separation of powers, is speculative and vague and ought to be dismissed. The second respondent further argued that the petition as presented did not disclose any cause of action capable of being resolved by this court and that the petitioners had failed to demonstrate how the Constitution has been violated. The respondent further argued that he had acted within its jurisdiction and followed statutory procedures in its actions, which he believed were reasonable. He further submitted that county governments are not synonymous with the defunct local authorities considering that in the present case, the two levels of government are distinct.

The third respondent opposed the petitioners' interpretation that the 'County health facilities' mean the health institutions run by former local authorities. He said that the health facilities were limited to municipal councils only and that only five municipal councils (Nairobi, Eldoret, Kisumu, Mombasa, Nakuru) had such health facilities. He thus argued that the Constitution did not intend to limit these services to 5 out of 47 counties, which he said would violate the spirit of devolution. He also supported the separation of power argument in policy decisions and urged the court to dismiss the petition.

The first interested party, the Kenya National Union of Nurses supported the petition and agreed with the petitioners' submissions.

The second interested party, the Commission for the Implementation of the Constitution, opposed the petition. It submitted that not all level 2 to level 5 health facilities have the capacity to perform policy functions and that it would be impractical and unworkable to include those health facilities as 'national referral health facilities' as envisaged by Section 23, Part 1 of the 4th Schedule to the Constitution. Further, that the phrase 'county health facilities and pharmacies' does not refer only to health facilities that used to be managed by local authorities under the Local Government Act and that the Constitution does not restrict a county government from providing goods and services for persons from other counties; and that it is not impossible for a county government to operate a specialised health facility that caters for referrals from other counties, as long as that provision is funded by tax payers' monies allocated by Parliament.

The third interested party, the Kenya Medical Practitioners, Pharmacists and Dentists Union did not file an answer to the petition and it did not participate in the proceedings.

The amicus curiae, the Katiba Institute (KI), submitted that the complexity of the issues made the petition unsuitable for the court to make declarations as prayed by the petitioners; that discussions on the complexity, meaning and application of the Fourth Schedule should be informed by several factors, such as past institutional practices, especially on technical aspects such as

medical referral, strategies put through policies, expert assessment of the sector by specialists, the set standards and the transition period which, KI argued, the court lacked. KI argued that the intergovernmental dispute resolution mechanism would be the proper mechanism to resolve the dispute.

Decision

On the issue of res judicata, the court ruled that the petition did not raise the same matters that were raised in J.R. No.317 of 2013; thus the principle of res judicata could not be invoked. On the need to apply the provisions of Article 189 (intergovernmental dispute resolution) to the proceedings, the court ruled that there was no dispute between two levels of government or between counties, hence the requirement for the matter to be first solved through the intergovernmental dispute resolution mechanism does not hold. The court further established jurisdiction on the basis that the petitioners had invoked the jurisdiction of this court to interpret the Constitution as provided under Article 165(3)(d) of the Constitution. Having established jurisdiction, the court went on to dismiss the case arguing that it was not the best judge as regards the transfer of functions and powers between the two levels of government. It said further that the Constitution and Statutes have created adequate safeguards and institutional arrangements on the subject and the court's intervention cannot be sought in the manner that the petitioners did.

Richard Bwogo Birir v Narok County Government & Two Others

CASE NUMBER: Petition No. 1 of 2014
REGION: Nairobi
COURT: Industrial Court of Kenya.
DATE OF DECISION: 14 March 2014
RELEVANT LAW: Constitution, Articles 47 and 236
Employment Act, Section 41
County Government Act 2012, Section 31
DECISION: Dismissal from office was unconstitutional and unlawful on account of violation of sections 31(a) of the County Government Act, 2012 as read with Articles 47 and 236 of the Constitution of Kenya and section 41 of the Employment Act

SUMMARY

Facts

The petitioner was offered an appointment to serve in the position of Executive Committee Member for Agriculture, Livestock and Fisheries of the County Government of Narok with effect from 14.05.2013 and as conveyed in the letter dated 16.05.2013. He accepted the offer through his letter, dated 20.05.2013. The petitioner served until he received the letter dated 23.01.2014 signed by the 2nd respondent, dismissing him from his duties. The petitioner stated that his removal from office was motivated by apparent malice and ill will against him. He argued, however, that this undermined his constitutional and statutory rights. He further argued that the Constitution binds all persons including the respondent, and such persons are required to uphold the Constitution (Article 3). Further, that the Constitution in Article 10 binds the respondents and that the petitioner is entitled to the protection of Article 232 of the Constitution on values and principles of public service. The petitioner further argued that he was entitled to the protection of section 41 of the Employment Act, 2007 and that the dismissal was in contravention of Article 41(1) of the Constitution, which entitled the petitioner to fair labour practices and 41(2) (b) that entitled him to reasonable working conditions. Lastly, that he is protected under article 47 of the Constitution on fair administrative action.

Decision

The court identified five issues and questions that needed to be answered from the petition as follows: whether the pleasure doctrine applies in Kenya's public service and particularly in this case; the meaning and effect of the letter for dismissal dated 23.01.2014; whether the petitioner's dismissal was in contravention of the cited constitutional and statutory provisions; whether the judicial review order of certiorari is available in this case; and whether the petitioner is entitled to the remedies as prayed for. On the pleasure doctrine, the court argued that it is a legal principle under jurisprudence in England that public officers within Her Majesty's service hold office at

the pleasure of the crown. By reason of that doctrine, the public officers in Her Majesty's service could not question their dismissal from office in judicial proceedings and could only initiate other remedial measures such as political intervention. The court observed that under the former Constitution of Kenya that ceased operation effective 27.08.2010, the framework for Kenya's public service was modelled along the pleasure doctrine; thus public officers were servants of the President, serving at the pleasure of the President.

The court observed that, under the new constitutional dispensation, the string that flows through the constitutional provisions is that removal from public or state office is constitutionally chained with due process of law, and that at the heart of due process are the rules of natural justice. The court, therefore, concluded that the pleasure doctrine for removal from a state or public office has been replaced with the doctrine of due process of law. It particularly relied on Article 236 of the Constitution. The court thus concluded that the pleasure doctrine and the doctrine of servants of the crown did not apply and could not be legitimately invoked in the dismissal of the petitioner by the second respondent. Further, that it is through the application of the doctrine of servants of the people and the doctrine of due process of law that public and state officers in Kenya are subdued by the people, who are the holders of sovereign power in the new Republic. On the meaning and effect of the dismissal letter, the court said that the second respondent imposed the punishment of dismissal against the claimant without due process. The court relied on section 76 of the County Government Act, which prohibits the imposition of punishment contrary to the Constitution. Subsection 76(2) provides that no public officer may be punished in a manner contrary to any provision of the Constitution or any Act of Parliament. On whether the dismissal contravened the cited constitutional and statutory provisions, the court ruled that Articles 10, 41, 47, 50(1) and 236 of the constitution as read together with section 41 of the Employment Act, 2007 that entitled the claimant to a notice and a hearing before termination, were violated. On the review order of certiorari, the court observed that the order of certiorari was available as a remedy in the case since due process was not followed in the dismissal. Lastly, on whether the petitioner was entitled to the remedies requested for, the court answered in the affirmative based on the findings above. It, however, said that the prayer for "compensation for violation of the petitioner's rights and an inquiry into quantum be gone into" required specific consideration.

Speaker of the Senate & Another v Attorney General & 4 Others

CASE NUMBER: Advisory Opinion No. 2 of 2013

REGION: Nairobi

COURT: Supreme Court

DATE OF DECISION: 1 November 2013

RELEVANT LAW: Constitution, Articles 163(6), 260, 106(1), 93(1), 224, 110(3), 112, 113, 255(1), 114(3), 218(1)(b), 109(5), 10

Division of Revenue Act, 2013 (Act No. 31 of 2013)

DECISION: The Supreme Court has jurisdiction to give advisory opinions on matters concerning county governments and the Senate had a right and mandate to debate on the Division of Revenue Bill.

SUMMARY

Facts

On 2012/13 the National Assembly debated and passed the Division of Revenue Bill (DORB), which was meant to facilitate the vertical division of revenue between the national and county governments in Kenya. After passing the DORB, the speaker of the National Assembly passed it to the Senate for debate, which in turn varied the amount allocated to it. The Speaker of the National Assembly rescinded his earlier decision of passing the Bill on to the Senate and passed it to the President for assent, who ignored the advice of the Commission for the Implementation of the Constitution (CIC) and signed the DORB into law, citing unnecessary delays in the budget implementation process. The Senate approached the Supreme Court for an advisory opinion on whether the President should have assented to the law.

Decision

The court declined to declare the Act unconstitutional citing the need for it to exercise discretion based on the prevailing state of fact. The court observed that since the disagreement between the two chambers on the matter before the court emerged, another legislation, the County Allocation of Revenue Bill, had been deliberated upon, passed by the Senate and assented to by the President. Based on this development, the court ruled that the law-making efficacy was in favour of sustaining the legislation that had been achieved. The court, however, warned that it would not, in the future, compromise in a similar matter.

Stephen Nendela v County Assembly of Bungoma & Two Others

CASE NUMBER: Petition No. 4 of 2014
REGION:
COURT: High Court
DATE OF DECISION: 7 October 2014
RELEVANT LAW: Constitution, Article 50 (1)
County Government Act, 2012 Section 40
DECISION: The petition was allowed an order of certiorari issued.

SUMMARY

Facts

On or about 2013, the petitioner was appointed by the Governor of Bungoma to serve as the County Executive in charge of Roads and Public Works for the County of Bungoma, having been vetted by the Public Service Board and the appointment procedurally debated and approved by the County Assembly of Bungoma. Upon such appointment, the petitioner took office and started to discharge his duties as required.

The petitioner contends that he invited tenders for the execution of civil works in Bungoma County for the year 2013/2014 where upon several service providers were pre-qualified as determined by the Tender Committee. The petitioner further contends that he was promptly inundated by telephone calls, personal entreaties by several members of the County Assembly and persons associated with them requesting, inter alia, that the execution of road works in their respective areas of representation be placed under their control and that companies associated with their respective associates be given preferential treatment in the award of the tenders. He alleged that he declined the requests, which he claims is the basis for the motion being tabled and passed on 14th April 2014 before the County Assembly of Bungoma, which was seeking his removal from office. He was served with a letter to appear before a Select Committee of the Assembly the following morning to receive presentations for or against his removal from office. The petitioner contended that this was unconstitutional, capricious, arbitrary, pre-determined, injudicious and contaminated by and actuated by malice, self-interest and improper motive on some of the members of the Assembly and it violates the rules of natural justice.

The first, second and third respondents argued that the County Assembly may exercise oversight over the County Executive Committee (CEC) including the removal of a member of the CEC under section 40 of the County Government Act (CGA). They argued that the CEC had been in office since June 2013 and had not laid before the County Assembly any strategic work plan. They further argued that the County Assembly had observed section 9 (2) of the CGA by giving the petitioner sufficient time to respond and that no order of certiorari could be issued as no decision has been made by the respondents. They therefore urged that the petition be dismissed.

Decision

Having considered the various affidavits, written submissions and oral submissions, the court identified the following six issues that required determination: whether the petition is premature; whether the court has jurisdiction to hear this matter; whether the evidence of Noellah Musundi is admissible; whether the select committee violated Article 50 (1) (a), (c), (g) and (k) of the Constitution; whether certiorari can issue in the matter; and whether Section 40 (3) of the CGA is inconsistent with Article 50 of the Constitution.

On whether the petition was premature, the court held that the petition was perfectly within article 22(1) of the Constitution. The court also observed that there was clearly a claim that fundamental rights had either been violated or were threatened to be violated and thus ruled that the petition was not premature as contended by the respondents. On whether the court had jurisdiction to hear the matter, the court said that based on Article 22 (1) and Article 165 (3) (b) and (d) which gives the court jurisdiction where there is an allegation of the violation of the Constitution or infringement or threat to violation of fundamental rights and freedoms, nothing had been produced to show that this court is precluded from inquiring on the allegations of the breach of the petitioner's fundamental rights; thus the court had the jurisdiction to hear and determine the petition as amended. On whether the evidence of Noellah Musundi, who had sworn a supplementary affidavit in support of the petition, is admissible, the court ruled that part of it was admissible and part of it was not based on Section 106 B of the Evidence Act. Further, on whether the select committee violated Article 50 (1) (a), (c), (g) and (k) of the Constitution, the court ruled in the affirmative based on the refusal by the committee to grant the petitioner time to engage advocates; refusal of the request to cross-examine the witnesses and test the veracity of their testimonies; and the notice given to the petitioner was too short.

Furthermore, the court ruled that certiorari could issue in the matter since the petitioner's rights were clearly violated and there was interference with the separation of power principle. Lastly, on whether Section 40 (3) of the CGA is inconsistent with Article 50 of the Constitution, the court ruled that it was indeed inconsistent since it gives the County Assembly the role of the complainant or accuser and to also be the investigator, the prosecutor and the judge which increases the chance of being biased. Subsequently, the court ordered that no County Assembly should purport to remove a CEC member based on Section 40(3) of the CGA, as it fails to observe the principle of independence and impartiality under Article 50(1) of the Constitution.

The Institute for Social Accountability & Another v The National Assembly & Three Others

CASE NUMBER: Petition No. 71 of 2013
REGION: Nairobi
COURT: High Court of Kenya, Constitutional and Human Rights Division.
DATE OF DECISION: 20 February 2015
RELEVANT LAW: Constitution
The Constituencies Development Fund Act, Act, No. 30 of 2013
DECISION: The Constituencies Development Fund Act, Act No. 30 of 2013 was declared unconstitutional.

SUMMARY

Facts

The Constituencies Development Fund Act, Act No. 30 of 2013 (CDF Act), establishes the fund known as the Constituencies Development Fund (CDF). The fund has, for the last decade, been disbursed to the constituencies to finance and implement development projects. The Act was to ensure that the government set aside 2.5% of its ordinary revenue and channel it to the CDF to be utilised at the constituency level to finance grassroots infrastructure. The objective of the CDF Act as set out in the preamble was, "to provide for the establishment of the Constituencies Development Fund and for connected purposes". For purposes of administration of the CDF fund, a national CDF Board was established and at the constituency level CDF committees were established with the respective Member of Parliament being the committee patron.

The petitioners sought a declaration that the Constituencies Development Fund Act, Act No. 30 of 2013 ('CDF Act') is unconstitutional based on the process that led to its enactment and its content. The petitioner sought for, among others, the following orders: that the Act violated the separation of powers principle; any organ or body established by the act was illegal; that the failure to involve the Senate in its enactment renders it invalid; that there was insufficient public participation in its enactment; that the numerous provisions violating the constitution render the entirety of the Act untenable.

The first respondent, the National Assembly, argued that the role of the Member of Parliament was clearly demarcated as an ex-official member of the CDF committee and therefore, was not involved in executive roles. He, however, in addition, argued that complete separation of powers did not exist. Also, that there was public participation and that the National Assembly had discretion on how to conduct public participation. The third and fourth respondents, the CDF Board, concurred with the first respondent on all the issues raised. The second respondent, the Senate, did not make any submissions. On the separation of powers, for example, the third respondent, the Attorney General, argued that the fund is administered by the Board and the constituency

committee, of which the MP is not a member. The third respondent, however, said that the Act is not unconstitutional though the management and administration of the CDF should be under the direction and control of the county government. The interested party, the Commission on the Implementation of the Constitution (CIC), argued that the Act was unconstitutional on various grounds, including failure to observe the provisions of section 14 of the Sixth Schedule as read together with section 2(3)(b) of that Schedule, which requires that before any laws relating to Chapter Eleven and Twelve are enacted, the CIC and the Commission on Revenue Allocation (CRA) must be consulted and be given at least 30 days to consider the proposed legislation; also, that it failed to exclude the CDF from the Consolidated Fund as provided for under Article 206(1) of the Constitution.

Decision

The court identified the following issues for determination: whether the process leading to the enactment of the CDF was constitutional; on the nature of the CDF and whether it violates principles of public finance and division of revenue; whether it violates the division of powers and functions; and whether it offends the principle of separation of powers. The court ruled in favour of the petitioner in all but one issue. It found and held that the Act is unconstitutional on the ground that the Senate was not involved in the enactment of the Bill; but ruled that there was sufficient public participation leading to its enactment and that there was no violation of section 14 of the Sixth Schedule to the Constitution with regard to consultation with the CIC and the CRA. The court, however, established that the Act violates the principle of public finance and division of revenue; that it also violates the division of powers and functions and that it offends the principle of separation of powers.

Tom Luusa Munyasya & another v Governor Makueni County & another

CASE NUMBER: Petition No. 103 of 2014
REGION: Nairobi
COURT: Nairobi Industrial Court
DATE OF DECISION: 9 April 2014
RELEVANT LAW: Constitution, Article 41 Employment Act
DECISION: The respondents were restrained from making any substantive appointment to the positions earlier held by the claimants, until the hearing and determination of the suit and given 14 days to file the defence.

SUMMARY

Facts

On 28 January 2014, the respondents, without notice terminated the employment of the claimants, allegedly, contrary to the law. The first claimant, Tom Luusa Munyasya, was the Executive Committee Member ICT and Special Programmes whereas the second claimant, John Kennedy Muteti, was the County Secretary who had served the second respondent (county government) for 8 months. The claimants regarded themselves as diligent in their work but on 28 January 2014 they were terminated without due process or justification. They claimed that all efforts to seek audience and explanation from the respondents had been unsuccessful, hence the termination was inhumane and unfair. The claimants also state that they were not accorded a hearing or given the reasons for their termination against the rules of natural justice. Subsequently, the petitioner filed his application dated the same date, seeking for orders to restrain the respondents from terminating his employment and that status quo be maintained until the suit is heard. The respondents went forward to make appointments for the positions held by the claimants. In his petition, the petitioner relied on section 41 of the Employment Act, section 76(1) and (2) of the County Government Act, 2012 and section 33A of the Civil Procedure Act. The respondent argued that the first respondent, as an executive member of the second respondent, County, was appointed in accordance with section 30(d) of the County Government Act (CGA) upon approval by the County Assembly and can be dismissed by the Governor under section 31(a) and 40 of the CGA. The terms of service and termination of the County Secretary are governed by section 44 of the CGA and the claimants are misleading the court that they are governed by the Employment Act, 2007. Under Article 179 (6) of the Constitution members of the County Executive Committee are accountable to the Governor for the performance of their functions and exercise of their powers; they do not do procurement as outlined under the Public Finance Management Act and in the two positions held by the claimants the same are not governed by the County Public Service Board. That the Governor has the mandate within GCA to dismiss and terminate the services of both members of the County Executive Committee and the County Secretary for gross misconduct and abuse of office and when this was done to the claimants it was lawful and within the mandate of the Governor. The respondent also stated that before the claimants were terminated there were investigations on suspicious purchases, where the claimants were

directly involved. A special cabinet investigatory committee was appointed, which made findings that implicated the claimants in fraudulent procurement, which amounted to gross misconduct. It claimed that this was in violation of the law, as the first claimant signed an LPO contrary to the Public Procurement Act regulations, while the second claimant introduced to the second respondent a system of employment where the second respondent lost huge sums of money.

Decision

The court determined that the Employment Act was the substantive law with regard to employment relations and identified the main question to be whether in the exercise of these powers the first respondent acted in an appropriate manner and or in a manner that was necessary to do so in the circumstances of the case. The court argued that there were fundamental issues that the claimant needed to address with regard to their termination, for the court to determine as to whether the orders being sought should be granted. It said that the matters required evidence and could not be addressed as was in the application. To avoid frustration of any orders, however, that the court may grant eventually to the claimants and in order to facilitate the just, expeditious and proportionate resolution of the dispute in the case, the court ordered that the preservative orders granted in the interim remain in force. The court restrained the respondent from making any substantive appointment to the positions earlier held by the claimants until the hearing and determination of the suit herein; and allowed the respondent 14 days to file the defence and 7 days to make any response that may be found useful and or necessary, upon being served with the defence of the first and second respondent; and that the parties would be allocated a hearing date on priority basis at the Court Registry.

Land & **Environment**

Abdalla Rhova Hiribae & 3 Others v Attorney General

CASE NUMBER: Civil Case No.14 of 2010
REGION: Nairobi
COURT: High Court, appealable to the Court of Appeal
DATE OF DECISION: 4 February 2013
RELEVANT LAW: Constitution, Articles 2 (5) (6), 10, 19(2), 28, 42, 56, 60, 69 and 70
Environmental Management and Coordination Act
Water Act
Convention on Biological Diversity
United Nations Declaration on the Rights of Indigenous People
Convention on Migratory Species
Convention on Wetlands of International Importance
DECISION:

SUMMARY

Facts

The petitioners challenged the approvals by the respondents, who the petitioners alleged have the statutory responsibility in land allocation, environmental planning and management, planning approvals of projects that include shrimp and prawn farming, sugarcane farming and titanium extraction in the Tana Delta. The petitioners' case was that these approvals were done without the requisite land use plan and environmental impact assessment. The implementation of such projects without a multiple and comprehensive land use master plan would violate the rights of the petitioners and communities living within the Tana Delta wetlands. The issues were: whether the court has jurisdiction to hear and determine the petition; whether there was a misjoinder of parties; whether the respondents had violated the constitutional and statutory provisions and thereby violated or threatened to violate the petitioners' constitutional rights; and whether the court could grant the reliefs sought.

Decision

The court held that it had jurisdiction to determine the case under articles 22, 23 and 165 even though the petitioners had not raised any constitutional issues. One of the respondents argued that there was a misjoinder of parties, stating that only the Attorney General should have been made a party, as it is the state that protects and guarantees fundamental rights and freedoms. The court held that the Constitution binds all persons, a radical departure from the previous constitution, hence even the respondents could be held liable for violations of human rights.

The court ordered that:

i) Tana & Athi Rivers Development Authority (TARDA) and the Water Resources Management Authority to furnish the petitioners and other stakeholders, within 45 days of the judgment, the existing plans that are required under statute to prepare or obtain in respect to utilisation of land and resources in the Tana Delta.

ii) TARDA to evaluate its short-term, medium and long range plans for the Tana Delta in consultation and with the participation of the petitioners, the communities in the area and all state and private entities involved in the projects and ensure they comply with articles 60 and 70 of the Constitution.

iii) TARDA, Water Resources Management Authority and Mumias Sugar Company to facilitate periodic monitoring of the projects that have already commenced, to assess their impact on the Tana Delta wetlands and the interests of the communities that derive a living from the Tana Delta.

Lake Naivasha Friends of the Environment v Attorney General, Minister for Water and Irrigation & the Water Resources Management Authority

CASE NUMBER: Petition No. 36 of 2011
REGION: Nakuru
COURT: High Court, appealable to the Court of Appeal
DATE OF DECISION: 5 October 2012
RELEVANT LAW: Water Act 2002, Articles 10(2)(a) and (b), 63(4), 69 (1), Sections 15 and 107
DECISION: The court ruled against the petitioners

SUMMARY

Facts

The petitioner, a non-governmental organisation, is involved in the conservation of sustainable use of the waters of Lake Naivasha and the feeder rivers. It filed the suit claiming that article 10 (2) (a) and (b) had been contravened by the respondents in the implementation of the Naivasha Basin Water Allocation Plan 2011-2014, and this plan was developed in contravention of its right to be heard and protection of the law. The petitioners asked the court to restrain the respondents from implementing the plan because: it would interfere with the water distribution pattern; it was not sustainable due to changes in the environment; and it was unfair and unreasonable. The petitioner averred that there were no consultations and public participation and the actions of the respondents went against article 63(4) of the Constitution in dealing with community land except in terms of legislation, which had not been passed. The issues were: whether the respondents failed to comply with Article 10 of the Constitution, section 15 and 107 of the Water Act, 2002; whether the plan affects the community land and is in violation of article 63 (4) of the Constitution; and whether the plan is adverse to the interests of the stakeholders.

Decision

The court held that the respondents had complied with Article 10 of the Constitution, and section 15 and 107 of the Water Act, as the meetings and advertisements were sufficient consultation and hearing. Although the petitioner had stated that a large part of Naivasha is community land owned and occupied by the Maasai, the court held that in its view, the plan would not in any way interfere with community land because Lake Naivasha is not community land, but public land. It is also a natural resource, which is vested in the national government, which holds it in trust for all Kenyans. It therefore held that the petitioner has not demonstrated the violation of article 63(4) of the Constitution.

The court dismissed the suit holding that the applicants had not demonstrated that their rights have been breached as alleged. It stated that, "In implementing policy, it is impossible for the State to please each person or meet their individual interests. In some circumstances, the rights of the majority will be elevated over those of the individual. In the instant case, it seems the majority stake holders/users are satisfied with the consultation and inclusiveness availed them. The rights of the minority must bow."

Ledida Ole Tauta & Others v Attorney General, Kenya Forest Service & Kenya Electricity Generating Company Limited

CASE NUMBER: Petition No. 47 of 2010
REGION: Nairobi
COURT: High Court
DATE OF DECISION: 15 April 2015
RELEVANT LAW: Forest Act, Articles 22, 60, 62, 63(1) &(2), 69(2), 162(2)(b), 165(3), Section 46
DECISION: The court ruled against the petitioners

SUMMARY

Facts

The petitioners' claim was on the suit land known as Ngong Hills by virtue of being the sons of their fore/ancestral fathers who were the owners of the suit land. They averred that when Kenya was declared a protectorate around 1897, the British Imperial Government extended to the protectorate the 1894 Indian Land Acquisition Act, which was used to compulsorily acquire land for the railway line and the ten mile strip, either side of the railway line. The petitioners contended that the land occupied by the Maasai was not available for acquisition by the Commissioner pursuant to the Crown Lands Ordinance of 1902. Despite this, the British government alienated to European settlers 614,213 acres of Maasai land. The protectorate administration acquired the land occupied by native Maasai, by entering into agreements with the Maasai community. Pursuant to the Anglo-Maasai agreements signed between the Maasai and protectorate government on 15 August 1904 and 4 April 1911, the Maasai vacated the area/land known as Nairobi County and settled on the Ngong Hills and surrounding areas. In 1949, Ngong Hills was gazetted as crown land. It was then degazetted in 1963 and regazetted under trust land under Ol Kejuado County Council.

The petitioners submitted that they were entitled to the land by virtue of the native title deed bequeathed to them through successive inheritance from their fore fathers and having lived in the area as a community practising their culture and sustaining their economic lifestyle for decades. They averred that as indigenous people, they were entitled to the protection of the Constitution and their eviction would offend their fundamental rights and freedoms under the bill of rights. The issues were: whether the High Court or the Environment and Land Court had jurisdiction to hear and determine the case; whether the High Court was the appropriate body to carry out investigations or inquiry into the historical claims of the community; and whether it was premature for the petitioners to file their suit before exhausting the process of degazettement of the Ngong Hills as a forest.

Decision

On jurisdiction, the court held that whereas the jurisdiction to determine whether there had been a violation of any of the rights under the Bill of Rights was vested in the High Court under Article 165(3) (b), the said jurisdiction was subject to clause (5) which prohibited the High Court from exercising jurisdiction over matters that fell within the province of the courts established under Article 162(2). The case having been filed before the enactment of the Environment and Land Court Act could be filed in the Constitutional and Judicial Review division of the High Court.

The petition was not specific; it was merely of a general nature in that it failed to identify with precision the particular property to which the petitioners lay claim. Save for stating that they were entitled to 577 hectares of the suit land, the petitioners had not specified which portion of the 3077 hectares gazetted as Ngong Hills Forest they lay claim to. Even if the petitioners' claim were to be upheld it would invite a further exercise of determining what the claim related to. In Constitutional matters touching on the violation and/or infringement of the fundamental bill of rights and freedoms in as far as the same relate to the environment and land, both the High Court and the Environment and Land Court have concurrent jurisdiction to deal with such matters, and a party could bring such matters either before the High Court and/or before the Environment and Land Court. Therefore the Environment and Land Court had the jurisdiction to deal with the petition.

The Kenya Forest Service Board, as the manager and custodian of state forests, was expected under the doctrine of public trust, embodied under Article 10 of the Constitution, which provided for national values and principles of governance, to ensure there was sustainable development of forests in Kenya for the benefit of all citizens. In view of the fact that there were many other communities in Kenya with similar historical claims, which might have been vested in the public, the petition if allowed would only benefit the petitioners at the expense of the wider public who benefit from the forest.

Since Ngong Hills Forest had not been degazetted and its boundaries not varied, it could not be made available for alienation to the petitioners. The petitioners ought to have petitioned the minister through the Kenya Forest Service Board to consider whether any basis existed to have the Ngong Hills Forest degazetted to accommodate their interests. The Forest Act provided a procedure and mechanism for community participation in forest management under section 46, but did not make provision for individualised ownership of land that had been brought under the operation of the Act.

The High Court would not have been the right forum for the petitioners to ventilate their claim, which was founded on historical injustices. Doing so would be usurping the role of other institutions. The National Land Commission has the mandate to investigate historical land injustices and make appropriate recommendations for redress.

It was premature on the part of the petitioners to come to court without either exhausting the process of obtaining a degazettement of Ngong Hills Forest as a state forest under the provisions of the Forest Act and/or having the National Land Commission exercise its mandate under Article 67(2) (e) of the Constitution.

Mtana Lewa v Kahindi Ngala Mwagandi

CASE NUMBER: Civil Appeal No. 56 of 2014
REGION: Malindi
COURT: Court of Appeal
DATE OF DECISION: 17 July 2015
RELEVANT LAW: Constitution, Articles 24, 40, 62, 64 and 68
Land Act Sections 7, 135(3)(b) and 155(1)
Limitation of Actions Act, Sections 7, 13 and 38
DECISION: The doctrine of adverse possession under section 38 of the Limitation of Actions Act is not unconstitutional. The appeal was dismissed.

SUMMARY

Facts

This case was an appeal challenging the decision of the High Court, which had dismissed the appellant's preliminary objection that challenged the jurisdiction of the court to determine disputes, on the ground that section 38 of the Limitation of Actions Act was in conflict with Article 40 of the Constitution. At the High Court the dispute was between the appellant, who was then the defendant and the registered owner of the parcel of land and the plaintiff who was an adverse possessor of the land. The appellant's grounds of appeal were that the court erred in not upholding the preliminary objection, holding that the High Court had jurisdiction to determine the case and that Parliament could enact legislation under article 40(2)(a) and (b) of the Constitution to limit the right to property. The issues were:

i. Whether the doctrine of adverse possession under section 38 of the Limitation of Actions Act was unconstitutional as it was in violation of article 40 of the Constitution.

ii. Whether the right to property under article 40 of the Constitution could not be limited through legislation.

iii. Whether the limitation to the right to property arising from adverse possession was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

Decision

The court held that the fact that the Constitution did not make provision recognising the doctrine of adverse possession did not mean that it was outlawed. It did not also mean that since there was no provision outlawing it, the right to property was absolute. The Limitation of Actions Act provides for protection of the right to property by the application of specific rules that ensured due process before title could be lost to another party; hence the acquisition of land through adverse possession is not arbitrary and does not contravene article 40(2) (a) of the Constitution. Parliament, in appropriate cases can pass legislation that limits rights, but the limitation has to

satisfy Article 24 of the Constitution. The court stated that in determining the constitutionality of limitation of the right to property through adverse possession it has to test the doctrine of adverse possession as legislated in the Limitation of Actions Act against Article 24.

The court found that the doctrine of adverse possession is neither arbitrary nor an unconstitutional limitation of the right to property and dismissed the appeal.

Peter Makau Musyoka & 19 Others (suing on their own behalf and on behalf of the Mui Coal Basin Local Community) v Permanent Secretary Ministry of Energy & 14 Others

CASE NUMBER: Petition No. 305 of 2012, Consolidated with Petition No. 12 of 2014 (Formerly Nairobi Constitutional Petition No. 43 of 2014)

REGION: Machakos

COURT: High Court, appealable to the Court of Appeal

DATE OF DECISION: 18 September 2015

RELEVANT LAW: Constitution, Articles 10, 40, 43, 60, 69, 71 Environmental Management and Coordination Act (EMCA) section 58

DECISION: The petition was dismissed

SUMMARY

Facts

The Ministry of Energy started coal exploration in the Mui Basin that covers parts of Mwingi East, Mwingi Central, Mutitu and Kitui Central sub-counties of Kitui County in 1999. The aim was to establish the existence of commercially viable coal deposits in the region. The ministry started drilling coal exploration wells and by 2010, after drilling 73 coal exploration wells, they established the existence of commercially viable coal deposits amounting to at least 400 million metric tonnes. The government set up an Inter-ministerial Committee to concession the coal blocks for the purpose of exploration, exploitation and development. The coal mining activities were projected to last for 42 years and would involve relocation of members of the local community to a new area to give way to the coal mining activities.

During the pendency of the petitions, on 23 December 2013, the government entered into a Benefit Sharing Agreement with Fenxi. The petitioners' claim was that there was no information and public participation in awarding of the tender to explore, exploit, or develop the Mui Coal Basin Blocks – likely infringement of the right to property as they would likely be displaced, and a threat to their right to a clean and healthy environment as the mining activities would lead to environmental degradation.

The petitioners also sought to have the county government of Kitui be involved in the negotiations of the terms and conditions of the Coal Mining Agreement and in determining the appropriate levels of sharing of the benefits of the Coal Mining Project and have Parliament approve the Coal Mining Agreement before its execution. They also sought for a declaration that the failure to seek and obtain an environmental impact assessment (EIA) report, as required by article 69

of the Constitution as read together with Section 58 of the Environmental Management and Coordination Act, before the grant of any concession rights, rendered the concession invalid. The issues were:

(i) Whether there was a violation of Article 10 on public participation.

(ii) Whether there was a violation of the right to information.

(iii) Whether there was a threat to violation of the right to property and the rights to a clean and healthy environment of the petitioners.

(iv) Whether the fact that the environmental impact assessment was not done before concessioning of the project rendered the concession invalid.

Decision

- On the involvement of the county government, the court held that the prospecting and concessioning of minerals that potentially could affect hundreds of thousands of people in a county must be done in consultation with the county government – even if the primary activity is assigned to the national government in the scheme of devolution.
- There was no violation of the right to information, since during the course of the litigation the Attorney General entered a consent order to supply all the parties with copies of the Benefits Sharing Agreement, and supplied a copy to all parties to the litigation. This was therefore settled.
- There was no threat to violation of the right to property as the court found no concrete evidence to justify the petitioners' apprehension on compulsorily acquisition.
- On threats to the environment, the court stated that the fact that coal mining causes environmentally adverse effects was not a self-defining reason not to concession coal mining. There is a need to balance the need to utilise natural resources sustainably, so that it spurs economic development and on the other hand, the need to control and manage the use of environmental resources so that they do not generate unsustainable levels of pollution.
- On the EIA, the court held that section 58 of EMCA does not imply that investors who bid for mining contracts have to carry out an EIA before being awarded the bids. Fenxi had not begun mining. It had only responded to an advertisement for expression of interest for concessioning of the coal blocks for exploration and development and it was adjudged the winner. The Benefit Sharing Agreement also had as one of the preconditions to commencing the project to complete the EIA to the satisfaction of the relevant government authorities and be granted a licence by NEMA in relation to the concession project.
- On parliamentary ratification, the court held that Article 71 is inoperable until the envisaged Act of Parliament is enacted. This would therefore not bar operationalisation of the concessioning agreement.
- The petition was dismissed but the court ordered the respondents, the Attorney General, and Fenxi Mining Industry Company Limited, to continue to engage with the local community and provide reasonable opportunities for public participation during the process of preparing an environmental impact assessment and the process of resettlement as outlined in the Benefits Sharing Agreement.

Leadership & **Integrity**

Benson Riitho Mureithi v J. W. Wakhungu & 2 others [2014]

CASE NUMBER: Petition No. 19 of 2014

REGION: Nairobi

COURT: The High Court, court of first instance; reviewable by Court of Appeal

DATE OF DECISION: 28 February 2014

RELEVANT LAW: Constitution; Articles 33, 36, 35, 77(2), 79, 80, 99(2)(h), 193(2)(g), 137(1)(b), 148(1), 180(2) and 180(5)

DECISION: That the 1st respondent is under a duty under Article 73 in Chapter 6 of the Constitution read with the Fifth and Sixth Schedule to the Constitution, to have regard to the personal integrity, character, competence and suitability when making the appointment of the Chairman of the Athi Water Services Board.

SUMMARY

Facts

The petitioner challenged the constitutionality of the appointment of the interested party Ferdinand Waititu, as the Chairman of the Athi Water Services Board by the 1st respondent, for a term of three years vide Gazette Notice No. 115 dated 10 January 2014.

Decision

The court found jurisdiction on the matter and stated as follows; "… the situation is thus clearly unlike that obtaining with regard to persons seeking elective office, where the Independent Electoral and Boundaries Commission has a very clear constitutional and legislative mandate with regard to determining the eligibility of a person intending to vie for elective office as the Court found in the case of Michael Wachira Nderitu and 3 Others vs Mary Wambui Munene (supra)".

"It is indeed worth observing that the cases in which the High Court has recently held that it could not exercise its jurisdiction with regard to suitability for office for reasons of integrity because there was a mechanism provided related to elective office-see International Centre for Policy and Conflict –vs- The Attorney General and Michael Wachira Nderitu –vs- Mary Wambui Munene" (supra).

"In the Otieno Kajwang case which was also election related, the Court exercised jurisdiction to hear a matter pertaining to the integrity of the respondent because it found that the Independent Electoral and Boundaries Commission (IEBC), which had the mandate to deal with the issue, had failed to exercise its mandate and stated: "In the present case, as is evident from the provisions of the law set out in extenso above, I can find no mechanism provided by law for addressing the issues raised by the petitioner. Consequently, I am persuaded that in the circumstances of this case, the Court can properly inquire into the issue regarding the propriety of the appointment of the Interested Party as the Chairman of the Athi Water Services Board".

Commission for the Implementation of the Constitution v Parliament of Kenya & 5 others [2013]

CASE NUMBER: Petition No. 454 of 2012

REGION: Nairobi

COURT: The High Court, court of first instance; reviewable by Court of Appeal

DATE OF DECISION: 7 February 2013

RELEVANT LAW: Constitution, Articles 1,10, 33, 35, 36, 73(1) (a), (ii), (iv) and (b), 80, 94, 118(1); Leadership and Integrity Act, Sections 6 to 36; Ethics and Anti-Corruption Commission Act, 2011

DECISION: The court found that Leadership and Integrity Act was not unconstitutional and the petition was dismissed.

SUMMARY

Facts

Pursuant to Article 80, Parliament enacted the Leadership and Integrity Act, ("the Act") which was assented to by the President on 27 August 2012. It came into force on the same day. The Commission for the Implementation of the Constitution proceeded to the High Court saying that the Act did not meet constitutional muster and watered down the provisions of leadership and integrity under Chapter six.

Decision

"Declaring a statute as unconstitutional, needless to say is a serious issue with deep-seated ramifications and the court should not be overly enthusiastic in pronouncing, unless clear grounds known in law have been clearly established. On this, I agree with Transparency International, the 2ndAmicus curiae on the point that it is not for this court to dictate to Parliament what it should or should not pass, as that is the sole prerogative of Parliament. The court can only deal with the legislative results of Parliament".

The court also made a decision on the public participation issue and relied on the 'Doctor's for Life' case (Supra at para. 105), which stated that, "The international law right to political participation encompasses a general right to participate in the conduct of public affairs and a more specific right to vote and/or be elected into public office. The general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all; it includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation."

Evans Nyambega Akuma v Attorney General & 2 others [2013]

CASE NUMBER: Petition No. 513 of 2012

REGION: Nairobi

COURT: The High Court, court of first instance; reviewable by Court of Appeal

DATE OF DECISION: 20 September 2013

RELEVANT LAW: Constitution, Articles 10 73(1) (a), (ii), - (iv) and (b) Chapter Six of the Constitution, (2) (a) (i) Article 246, 166(5); National Police Service Act, Sections 5, 6 and 12; Leadership and Integrity Act, Section 42

DECISION: That where the Constitution or a statute has donated powers to certain institutions to undertake certain lawful processes, courts should be slow to assume those powers.

SUMMARY

Facts

The petitioner contended that:

- The process leading to the establishment of the National Police Service Commission (the 2nd respondent) was irregular and not in line with the provisions of the National Police Service Act.
- That the 3rd respondent, Johnstone Kavuludi was and is unqualified to be the Chairman of the National Police Service Commission.
- That the appointment of David Kimaiyo, Francis Ndegwa and Samuel Arachi as Inspector-General and Deputy Inspectors- General respectively was irregular and unlawful.

Decision

The court recognised its jurisdiction to rule that, "it is obvious that the 3rd Respondent was indeed qualified to be appointed as chairperson for the simple reason that the Petitioner admitted that the 3rdRespondent had a long career in public administration and was both Commissioner of Labour and Permanent Secretary of Labour Ministry. The above findings quickly dispose of the first set of complaints by the Petitioner and thirdly therefore, regarding whether Mr. Kavuludi lacks the requisite integrity to hold the office of Chairperson of the Commissioner, I will dispose of this issue by stating that the 3rd Respondent is already in office and therefore his removal must be guided by the Constitution and the Act".

"I also agree with the Respondents that the Petitioner had an opportunity to question the 3rd Respondent's integrity before the Selection Panel constituted in accordance with Section 6(1) of the Act. Apparently he did not. Once the 3rd Respondent therefore took office, his removal for alleged lack of integrity can only be done, not by a direct Petition to this Court, but by following

the procedure set out in Section 42 of the Leadership and Integrity Act No.19 of 2012."

The court relied on Speaker of the National Assembly vs. Karume, Civil Application No.92 of 1992 and Jimmy Mutinda vs. Independent Electoral and Boundaries Commission & 2 Others and Exparte Sheilesh Kumarnata Verbai Patel & 20 Others (2013) to rule that it had no jurisdiction to deal with the matters that were before it.

International Centre for Policy and Conflict & 5 others v Attorney General & 5 others [2013]

CASE NUMBER: Petition No. 552 of 2012 as consolidated with Petitions Nos. 554 of 2012, 573 of 2012 and 579 of 2012

REGION: Nairobi

COURT: High Court, court of first instance; reviewable by Court of Appeal

DATE OF DECISION: 15 February 2013

RELEVANT LAW: Constitution, Articles1, 2, 3, 10, 24, 25, 38, 50, 73, 75, 80, 88, 99 137, 140, 145, 159, 163, 165, 258, 259 and 260

DECISION: Court should not exercise jurisdiction where there are other adequate mechanisms to deal with the same matter.

SUMMARY

Facts

Six Kenyans had been identified by the International Criminal Court (ICC) as bearing the highest responsibility in connection to the 2007/2008 post-election violence. After the pre trial for the confirmation of the charges, cases against Uhuru Muigai Kenyatta, William Ruto, Joshua Sang and Muthaura Francis were confirmed. The 1st petitioner contended that after an examination of the evidence presented by the prosecution as well as the exculpatory evidence put forward by the respective defence teams, the judges of the Pre-Trial Chamber, by a majority, confirmed charges against four of the six suspects, namely, William Ruto, Uhuru Kenyatta, Joshua Arap Sang and Francis Muthaura. In committing them to full trial, the ICC observed that it was satisfied as to existence of "substantial grounds to believe" that they were either contributors or indirect co-perpetrators to inter alia, crimes against humanity committed in Kenya between December 2007 and January 2008.

The 1st petitioner further pointed out that the 3rd and 4th respondents had publicly indicated their desire to run for presidency and deputy presidency respectively in the 4th March, 2013 elections. The 1st petitioner conceded that under the Rome Statute establishing the ICC there are no specific prohibitions barring any suspect committed to trial from holding public office or state office in the Republic of Kenya.

The 1st petitioner noted that the Pre-Trial Chamber made it clear in its ruling that the ICC has no such jurisdiction. The Pre-Trial Chamber instead opined that any question as to who can hold a public or state office can only be determined in accordance with the Kenyan municipal laws.

Decision

The court recognised that it lacked jurisdiction to rule on matters of presidential elections and

thus held: "it is therefore clear from the foregoing that any question relating to the qualification or disqualification of a person who has been duly nominated to contest the position of President of the Republic of Kenya can only be determined by the Supreme Court. This includes the determination of the question whether such a person meets the test of integrity under Chapter Six of the Constitution in relation to Presidential elections. These two questions cannot be determined or considered by this Court outside the context of the elections that are due to be held on 4 March 2013.

In light of the above, the question placed for determination by the petitioners in this case essentially addresses issues that boil down to asking this court to make declarations whose ultimate aim would result in the determination of the question, whether the 3rd and 4th respondents are qualified to offer their candidature for the office of President and Deputy President respectively.

This is an issue that is within the exclusive jurisdiction of the Supreme Court. In the premises therefore, we are in agreement with the respondents that the High Court lacks jurisdiction to deal with a question relating to the election of a president. This is not to say that the High Court is divested of jurisdiction to inquire into matters of integrity relating to elective and appointive public office. The only caveat is that this particular matter is so intertwined to the issue of presidential elections in relation to the 3rd and 4th respondents. We therefore find that in light of the provisions of Articles 163 and 165, our jurisdiction in this matter has been limited to interpreting the provisions of the Constitution in respect of the provisions of Chapter Six.

Even if it was to be argued that the 3rd, 4th and 5th respondents do not meet the integrity and leadership qualification as spelt out under Article 99 (2) (h) and Chapter Six of the Constitution, then the institution with the Constitutional and statutory recognition would be the IEBC under Article 88 (4) (e) of the Constitution and Section 74 (1) of the Elections Act and Section 4(e) of the IEBC Act. This then divests the court of its original jurisdiction and places an exclusive mandate on IEBC. Matters would be different if IEBC had failed and/or refused to carry out its Constitutional mandate. It has not been demonstrated that the petitioners or any other person for that matter presented their grievances regarding the nomination of 3rd, 4th and 5th respondents to IEBC and it failed or refused to act."

Although the court ruled that it did not have jurisdiction, it considered the merit of the petition and awarded costs against the petitioners saying; "Costs follow the event, and are also at the discretion of the court. The petitions that have been brought were on a matter of public interest. However, the respondents have had to defend several petitions, and we hold they are entitled to costs. We award the 1st, 2nd, 3rd and 4th respondents costs of the petitions brought against them to be paid by the 1st, 2nd, 3rd, 5th and 6th petitioners, jointly and severally. We also award the 5th respondent costs to be paid by the 4th Petitioner. As regards the interested party we make no order as to costs."

Isaac Aluoch Polo Aluochier v Attorney General [2013]

CASE NUMBER: Petition No. 446 of 2012

REGION: Nairobi

COURT: The High Court, court of first instance; reviewable by Court of Appeal

DATE OF DECISION: 21 January 2013

RELEVANT LAW: Constitution, Articles 33, 36, 35, 77(2), 79, 80, 99(2)(h), 193(2)(g), 137(1)(b), 148(1), 180(2) and 180(5)

DECISION: The courts lacks jurisdiction to act where well established mechanisms to resolve a dispute have not been exhausted by the petitioner.

SUMMARY

Facts

The petitioner was aggrieved by the fact that despite the express provisions of the Constitution, state officers held political party positions; article 77(2) provides that, "Any appointed state officer shall not hold office in a political party. The petitioner therefore wanted any appointed state officer, including but not limited to Vice President, Prime Minister, Assistant Minister and nominated MP, be prohibited from holding office in a political party while also holding state office.

Decision

The court took the shortest time possible to render a three-page judgment and declined to take jurisdiction saying that there are sufficient mechanisms to deal with the same issue. The court stated "I reiterate my sentiments in Michael Wachira Nderitu and Another v Mary Wambui and Others Nairobi Petition No. 549 of 2012 (unreported) that, similarly, as concerns Chapter Six on "Leadership and Integrity" Article 80 has empowered Parliament to, "enact legislation establishing procedures and mechanisms for the effective administration of this Chapter… "Chapter Six on "Leadership and Integrity" captures the desire of Kenyans to instill values of integrity and leadership in those who are entrusted with the responsibility of state and public officers."

These provisions are not self-enforcing as Article 88(5) is clear that Parliament is required to enact legislation to give effect to those provisions. These provisions have been given effect by the Leadership and Integrity Act, 2012 which provides for procedures and mechanisms for enforcement.

I have considered the petition and supporting affidavit and I do not think that the petitioner has invoked any of the procedures or mechanisms prescribed by the Leadership and Integrity Act, 2012 and there is no evidence that the petitioner has lodged any complaint or grievance relating to the 1strespondent assuming, and without deciding, that the Act is applicable to Mary Wambui. In any case, my reading of Article 99(2) (h), relied upon by the petitioners, is clear that if any finding of contravention of Chapter Six must be made, it must be in accordance with law enacted for that purpose and that law includes the Leadership and Integrity Act, 2012."

Luka Angaiya Lubwayo & another v Gerald Otieno Kajwang & another [2013]

CASE NUMBER: Petition No. 120 of 2013
REGION: Nairobi
COURT: The High Court, court of first instance; reviewable by Court of Appeal
DATE OF DECISION: 21 January 2013
RELEVANT LAW: Constitution, Articles 33, 36, 35, 77(2), 79, 80 and 99(2) (h)
DECISION: In appropriate cases the court would assume jurisdiction even where mechanism is well established, but the body in charge of the mechanism does not act properly.

SUMMARY

Facts

The petitioner was aggrieved by the fact that despite the express provisions of Chapter Six on leadership and integrity, the Independent, Electoral and Boundaries Commission had cleared Gerald Otieno K'Ajwang to vie for the Homa Bay Senatorial seat even after he had been struck off the role of advocates nine times.

Decision

The court emphasised that "In our view there is considerable merit...that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. The court before exercising its jurisdiction under Article 165 of the Constitution in general, must exercise restraint and must first give an opportunity to the relevant constitutional bodies or state organs to deal with the dispute as envisaged under the relevant statute, the failure of the IEBC to exercise that jurisdiction is of great concern and without saying more, where such a situation obtains, then it is my view that this Court has the mandate to determine the matter. In stating so, I find support in the case of Narok County Council v Trans Mara County Council [2000] 1 EA 161 at page 164 where the Court of Appeal stated that: 'It seems to me to be plain beyond argument that the jurisdiction of the High Court can only be invoked if the Minister... refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter case his decision Page 15 of 24 can be challenged by an application to the High Court for a writ of certiorari because under the relevant section, the decision is to be made on a fair and equitable basis'.

After finding jurisdiction after the Independent Electoral and Boundaries Commission had failed to act in accordance with its mandate, the Court said that since Otieno K'Ajwang had been reinstated by the Law Society of Kenya with some conditions, he had no unresolved questions therefore distinguishing Trusted Society of Human Rights Alliance vs The Attorney General and Others, Nairobi High Court Petition No 229 of 201"

Mary Wambui Munene v Peter Gichuki King'ara & 2 others [2014]

CASE NUMBER: Petition No. 7 of 2014

REGION: Nairobi

COURT: Supreme Court; final appellate court

DATE OF DECISION: 5 May 2014

RELEVANT LAW: Constitution, Articles 1, 2, 4, 10, 38, 25, 27, 50(1), 87(1), 87(2), 86, 88(4), 163(7), 164(3)(b), 165(3); Election Act (2011), Sections 22(1) (b) 80, 76(1)(a), 83; Rule 33 (4) of the Elections (Parliamentary and County Elections) Petition Rules, 2013

DECISION: The Supreme Court may exercise its jurisdiction to give its constitutional interpretations retrospective or prospective effect. This derives from the broad mandate accorded this Court by Article 1, 10, 163, 159 and 259 of the Constitution, and Section 3 of the Supreme Court Act.

SUMMARY

Facts

The case started at the High Court in Nyeri. It was filed by Peter Gichuki Kingara against Mary Wambui Munene alleging malpractices in the 2013 General Election for the Othaya Constituency. The Justice Jairus Ngaah dismissed the petition and upheld the election of Mary Wambui on 12 September 2013 as the MP for Othaya saying that the errors were not serious enough as to render the election fundamentally flawed. Kingara, being dissatisfied with the decision filed an appeal in the Court of Appeal. The appeal was decided in favor of Kingara on the 13 February 2014 in a unanimous decision of Justices Koome, Odek and Visram. Wambui was also not satisfied by the decision and filed a final appeal to the Supreme Court.

Decision

The court recognised its jurisdiction to rule and set our issue for determination as whether these proceedings were a nullity ab initio, having been premised on a petition filed out of time at the High Court; whether the Court of Appeal in arriving at its decision exceeded its jurisdiction by delving into issues of fact; whether the Court of Appeal misdirected itself when it made its finding on the issue of scrutiny and re-count; when did the vacancy for the Member of the National Assembly for Othaya occur?

The court recognised the primacy of its jurisdiction in any matter and held: "the question of jurisdiction is a pure question of law. This Court has on several occasions adopted the dictum of Nyarangi J.A in the Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1 that it has to be determined from the start and that where the Court finds it has no jurisdiction, it should down tools. This is the approach this Court adopted when it considered the application for conservatory orders in this matter. We will, therefore consider this issue of nullity first, as it

touches on the jurisdiction of this Court".

The court opined that the electoral history of Kenya is replete with cases of delay in finalising matters, thereby denying the voters the opportunity to have their chosen representatives in the organs of democratic governance. It is clear that the sovereign power belongs to the people, and is exercised either directly or through their democratically elected representatives in the state organs, which include Parliament and the Legislative Assemblies in County Governments. The voters' rights in this regard are quite clear, from the terms of the Constitution (Article 1)(p. 16). To give effect to the foregoing principle, Article 87(1) of the Constitution directed Parliament to establish mechanisms for the timely settlement of electoral disputes; hence the Elections Act. Further, Article 87(2) made the provision requiring that election petitions for elections other than Presidential elections, be filed within 28 days after the declaration of the election results by the Commission.

The court relied on Raila Odinga v. Independent Electoral Boundaries Commission & Others Supreme Court Election Petition No. 5 of 2013, (The Raila Odinga case) and emphasised the need for adherence to the time limits provided by the Constitution. In a Ruling dated 3rd April, 2013 expunging a new affidavit from the record before the Court, while the principle of timely disposal of election petitions affirmed by the Court of Appeal, must be steadfastly protected by any Court hearing election disputes, or applications arising from those disputes, the interests of justice and rule of law must be constantly held paramount.

The court found Section 76(1) (a) of the Elections Act not to be in line with the Constitution; this Court is not precluded from considering the application of the principles of retroactivity or proactivity on a case-by-case basis. As such, in the instant matter, the issue of invalidity of Section 76(1)(a) of the Elections Act is bound to the issue of time. Time, as a principle, is comprehensively addressed through the attribute of accuracy, and emphasised by Article 87(1) of the Constitution, as well as other provisions of the law. Time, in principle and applicability, is a vital element in the electoral process set by the Constitution. This Court's decision in Joho was guided by this consideration."

Moses Masika Wetangula v Musikari Nazi Kombo

CASE NUMBER: Petition No. 12 of 2014

REGION: Nairobi

COURT: Supreme Court; final appellate court

DATE OF DECISION: 17 March 2015

RELEVANT LAW: Constitution, Articles 72(3)(b), 105(1), 73(1) and (2)(a), 87(1), 87(2), 86, 88(4), 163 (7), 164 (3), (b) 165 (3) (a), 80; Elections Act, No. 24 of 2011, Sections 85A, 56, 57, 58, 59, 60, 65, 66, 67

DECISION: The petition was upheld.

SUMMARY

Facts

This matter arises from the general elections held on 4 March 2013. Both the appellant and the 1st respondent were among candidates who contested the Bungoma senatorial election. After the counting and tallying of votes, the appellant was declared the winner, having garnered a total of 154,469 votes, against the 1st respondent's 125,853 votes. The 1st respondent was dissatisfied with the conduct of the elections, and filed a petition in the High Court at Bungoma, seeking to nullify the appellant's election. On 30 September 2013 the election court allowed the petition and nullified the election of the appellant.

Aggrieved by the judgment of the election court, the appellant filed Civil Appeal No. 443 of 2013 at the Court of Appeal in Kisumu. On 14 March, 2014 the Court of Appeal delivered its judgment and held, inter alia, that: "the appellant gave Ksh 260,000 to the pastors and bishops who were assembled at the Red Cross offices at Kanduyi on 22 February, 2013; Justice Gikonyo, sitting in Kisumu, found that indeed Wetangula had committed the said offenses and nullified his election on the 30 September, 2013". Aggrieved by the decision, Wetangula filed an appeal that was dismissed on 14 March 2014 by Justice Maraga, Azangalala, and Mohamed. He then proceeded to the Supreme Court that on 7 March 2015. The Supreme Court upheld the decision of the Court of Appeal.

Decision

The court recognised its jurisdiction to rule that; "bribery is a criminal offence in general penal parlance; but besides, it is a specifically-defined electoral offence, recognised as an incident capable of disrupting the due process of the electoral law. In the case of Mohamed Ali Mursal v. Saudia Mohamed and Others, Garissa Election Petition No.1 of 2013, Mutuku J described bribery in the context of an election petition, as follows: "Bribery is an electoral offence. It is also a criminal offence in ordinary life. Being such, proof of the same must be by credible evidence and in my

view, nothing short of proving this offence beyond reasonable doubt will suffice. There is no distinction as far as I am concerned, and rightly so, between bribery in a criminal case and one in an election petition. Bribery involves offering, giving, receiving, or soliciting of something of value for the purpose of influencing the action of the person receiving. Under the Act, bribery is an election offence under Section 64 and both the giver and the taker of a bribe in order to influence voting are guilty of this offence upon proof.

As we have already held that election-petition proceedings are not part of the normal criminal process, it is not appropriate for the appellant to invoke the regular scheme of the criminal trial, with its strict substantive and procedural safeguards for the rights of the accused. Such rights-safeguards, it is well known, include the right to silence. That does not apply in relation to the quasi-criminal offences attached to election proceedings – for here, there will be a duty resting upon the respondent, to make requisite averments and to rebut the allegation, so the election Court may dispose of the matter comprehensively.

There is an apparent difficulty in the interpretation of Section 87(1) of the Elections Act as the Court observed in Moses Wanjala Lukoye v. Benard Afred Sambu, there appears to be different interpretations to this Section. After considering the merits of such positions, we have come to the position that the nature of the relevant proceedings should be borne in mind: proceedings in an election petition.

"In such proceedings, what is at stake is the sanctity of a people's expression of their sovereign will. Consequently, all the findings seek in the first place, to establish whether the election was uncompromised by mischief or corrupt action. Election offences have the tendency to undermine the popular will that is the foundation of the governance system declared in the Constitution. The Court, as guardian of the solemn rights of that charter, is duty-bound to set its face firmly against any violation of the Constitution. Within the framework of the electoral law, the proper course of action has been prescribed; but as regards the operation of the ordinary criminal law, it falls to the Director of Public Prosecutions to move.

In accordance with Section 87(1) of the Elections Act, 2011 (Act No.24 of 2011) [Rev. 2012], the Registrar of the Supreme Court, by proper form, shall serve a report of the commission of the election offence of bribery by the appellant herein, upon the Director of Public Prosecutions; the Independent Electoral and Boundaries Commission; and the Speaker of the Senate."

Trusted Society of Human Rights Alliance v Attorney General & 2 others [2012]

CASE NUMBER: Petition No. 229 of 2012

REGION:

COURT: The High Court, court of first instance; reviewable by the Court of Appeal.

DATE OF DECISION: 20 September 2012

RELEVANT LAW: Constitution, Articles 10, 22 (3), 48,73, 77(2), 79, 80,99(2)(h), 165(3)(d)(ii), 193(2)(g), 137(1)(b), 148(1), 180(2) and 180(5), 251, 258, 260.

Section 6 of the Ethics and Anti-Corruption Commission Act, 201, Section 41 of the Leadership and Integrity Act, 2012, section 1A and 1B of the Civil Procedure Act, section 3A and 3B of the Appellate Jurisdiction Act

DECISION: The petition was upheld.

SUMMARY

Facts

The selection panel, comprising representatives from, among others the Office of the President; the Office of the Prime Minister; the Ministry of Justice, National Cohesion and Constitutional Affairs; the Judicial Service Commission; the National Gender and Equality Commission; the Kenya National Commission on Human Rights; the Media Council of Kenya; the Joint Forum of religious organisations and the Association of Professional Societies in East Africa, advertised the vacancies on 26 September 2011, shortlisted candidates on 4 November 2011 and thereafter invited the public on the same day to submit any relevant information on the candidates. In view of the statutory deadlines under section 6 of the Act, the selection panel conducted interviews on 8 November 2011, and thereafter recommended to the President three persons including the appellant, alongside four other persons for appointment as chairperson and members of the Commission respectively. After Mumo Matemo was appointed, the Trusted Society filed a petition at the High Court claiming that Mumo Matemo does not meet the requirement of Chapter six of the Constitution of Kenyan on integrity.

Decision

The court found jurisdiction on the matter and stated as follows. "We have already established that on available evidence the interested party faces unresolved questions about his integrity. The allegations that he is facing are of a nature that, if he is confirmed to this position, he will be expected to investigate the very same issues which form the gist of the allegations against him. It requires no laborious analysis to see that this state of affairs would easily lead many Kenyans to question the impartiality of the Commission or impugn its institutional integrity altogether. Were that to happen, it would represent a significant blow to the very institution the interested party is being recruited to head and lead in its institutional growth. In our view, this makes the interested party unsuitable for the position. As in the Centre for PIL and Another v Union of India (Supra), we

find that the appointing authorities did not sufficiently take into consideration the institutional integrity of the Commission or its ability to function effectively with the interested party at its helm when they made or approved the appointment.

For all these reasons, therefore, the court finds that the appointment of the interested party, Mr. Mumo Matemu as the Chairperson of the Ethics and Anti-Corruption Commission offends the requirements of the Constitution, and in particular Article 73, and holds the same to be unconstitutional. We hereby set the appointment aside."

National **Security**

Anthony Njenga Mbuti & 5 Others v Attorney General & 3 Others [2015]

CASE NUMBER: Constitutional Petition No. 45 of 2014

REGION: Nairobi

COURT: High Court (constitutional division)

DATE OF DECISION: 27 March 2015

RELEVANT LAW: Constitution, Articles 27, 28, 49 and 50(2), 39 Criminal Procedure Code (CPC), ss. 43-61A

DECISION: It was decided that the provisions were unconstitutional on the basis of Articles 27, 28, 49 and 50(2) of the Constitution and, in the case of the possibility of being confined to one's homedistrict, Article 39 on freedom of movement.

SUMMARY

Facts

The issue was whether provisions of the Criminal Procedure Code (CPC) that allowed individuals to be bound over – that is made to enter into a bond for a period, to provide sureties, and if unable or unwilling to do this they could be sent to prison, in some instances "be taken to the district in which his home is situated and be restricted to that district during a period of three years" – were constitutional.

The provisions covered habitual offenders and individuals "likely to commit a breach of the peace or disturb the public tranquillity, or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity suspected of offences" or "a person is taking precautions to conceal his presence … and that there is reason to believe that the person is taking those precautions with a view to committing an offence". The petitioners had all been subjected to such orders, but were not complaining about particular orders.

Decision

It was decided that the provisions were unconstitutional on the basis of Articles 27, 28, 49 and 50(2) of the Constitution and, in the case of the possibility of being confined to one's home district, Article 39 on freedom of movement. The decision said that "it would place an undue burden on the tax payer to order that the State pays compensation to the petitioners, for then it would need to make similar recompense to all those others who have been subjected to the peace bond statutes".

Coalition for Reform and Democracy (CORD) v Republic of Kenya

CASE NUMBER: Petition No. 628 of 2014 consolidated with Petition No. 630 of 2014 and Petition No.12 of 2015

REGION: Nairobi

COURT: Constitutional And Human Rights Division

DATE OF DECISION: 23 February 2015

DECISION :

RELEVANT LAW: Constitution: Articles 22, 165(3) (d, 258, 33 and 34, 31, 49, 50, 39, 12, 2(5) and 2(6), 238, 242, 245 24 Security Laws (Amendment) Act

SUMMARY

Facts

No specific dispute: Act had only just been passed. But on participation, very little time had been given.

Decision

Under Article 22, 165(3) (d) and 258 of the Constitution, the present controversy was ripe and justiciable . It cannot be left to the trial courts to determine whether or not the amendments to the Penal Code were unconstitutional. The separation of powers did not prevent the court from acting.

The KNCHR could take the government to court. The offence of undermining investigations or security operations by the National Police Service or the Kenya Defence Forces was unconstitutional because no rational connection was made between the limitation on publication and the stated object of the legislation, national security and counter terrorism. A similar decision was made for the offence of making a statement "likely to be understood as directly or indirectly encouraging or inducing another person to commit or prepare to commit an act of terrorism" – although a proved intention or a reasonable inference of intention were actually required. Again, broadcasting "any information which undermines investigations or security operations relating to terrorism" and publishing or broadcasting "photographs of victims of a terrorist attack without the consent of the National Police Service and of the victim". Similarly, penalising "insulting, threatening, or inciting material or images of dead or injured persons which are likely to cause fear and alarm to the general public or disturb public peace". Article 24 was not satisfied in these cases.

Some of the provisions violated the principle that "a law that limits a fundamental right and freedom must not be so vague and broad, and lacking in precision, as to leave a person who is required to abide by it in doubt as to what is intended to be prohibited, and what is permissible."

Provisions allowing interception of communications and covert operations by the National Intelligence Service limited the right to privacy, but met the criteria of Article 24. It did require a court order, and that wrongful interception of communications was a crime

The new Criminal Procedure Code provision allowed for a court to permit a period of detention for investigations of up to 90 days and extended a similar period in the Prevention of Terrorism Act (PTA) to a maximum of 360 days. Court held that the constitution does not prohibit people, once brought to court, from being held in custody.

The court held that:

- Provisions under various Acts (including the PTA) that "the prosecution may, with leave of court, not disclose certain evidence on which it intends to rely until immediately before the hearing" violates the right to a fair trial, and as a result of Article 25 could not be justified.
- A provision that where the subordinate (magistrates) court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of that order of the court, the order is stayed for a period not exceeding fourteen days – in other words the person remaining in custody was "an unnecessary affront to the accused's liberty earned through due process" and because granting bail is a matter for the courts so this "limits the judicial authority of the court".
- A provision relating to appeals (rather than to the review procedure) to the effect that the bail order "may" be stayed was not objectionable.
- A new provision in the Evidence Act was unconstitutional as a violation of the right to silence (also part of the fair trial) and to challenge evidence. It applied to a written statement; the accused was allowed to object to it – within a time limit – but if he did not he was presumed to have accepted it.
- A provision that simply allows the court to ask an accused person if they admit to a certain fact was held not to violate rights.
- A provision requiring a refugee living in a camp to seek permission to travel outside was not unconstitutional.
- A new provision intended to limit the number of refugees in Kenya to 150,000 would inevitably result in expulsion of refugees contrary to the principle of non-refoulement , which is part of Kenyan law.

The court rejected the argument that the Bill ought to have been passed by both houses because Article 238(2)(a) made this a matter subject to "Parliament".

The court a provision that the Cabinet Secretary – on the advice of the IGP – should declare curfews rather than the IGP personally not unconstitutional

The court found nothing unconstitutional in the provision that appointment of the Inspector General of Police was to be done by the President with the approval of Parliament.

The court found unconstitutional a provision creating a National Police Service Disciplinary Board within the police service – to inquire into matters related to the discipline of senior officers, to "undertake disciplinary proceedings in accordance with the regulations issued by the Commission" and to make recommendations to the Commission.

Other information: Obiter: "fair trial" in Article 25 did not just mean Article 50(2) that uses that expression but also Article 49 – the rights of arrested persons.

The case is also notable for the emphatic language of the court in connection with the concept and importance of fair trial.

Hussein Khalid and 16 Others v Attorney General & 2 Others [2014]

CASE NUMBER: Petition No. 324 of 2013
REGION: Nairobi
COURT: High Court
DATE OF DECISION: 26 August 2014
RELEVANT LAW: Constitution: Articles 24, 29, 33, 37, 49, 50, 157 S. 94(1), 78(1) and (2)
Penal Code, S. 80 Prevention of Cruelty to Animals Act, S. 3(1)(c) and (3)
DECISION: The judge ruled against the petitioners. The appeal is pending in the Court of Appeal and the criminal trial is stayed pending the appeal.

SUMMARY

Facts

In May 2013 the accused petitioners took part in a demonstration protesting against Parliament, which had received police permission. During the demonstration pigs were released into the street.

The demonstration was broken up with tear gas and water cannon. The petitioners were arrested and held for several hours before being told they were charged with cruelty to animals. Over the next few days two other two charges were added. The magistrate declined to listen to constitutional argument, or to refer the constitutional issues raised to the High Court. The issues were:

- whether the behaviour of the police amounted to a violation of the rights to expression (Art. 33) and assembly and demonstration (Art. 37);
- whether there was a violation of the rights of the arrested person because they were not told for some hours why they were arrested;
- whether the cruelty to animals charge was defective for want of particulars;
- whether it was wrong to charge both riot and conduct conducive to breach of the peace;
- whether the offence of conduct conducive to breach of the peace is unconstitutional for want of any mental element;
- whether the charges were unconstitutional as limitations on freedoms and rights that did not satisfy Article 24, being not proportionate to legitimate aims.

Decision

Riot and conduct conducive to a breach of the peace are arrestable without warrant. Though cruelty to animals is not arrestable without warrant it was all right to arrest because the offence

was committed in the presence of the police. Failure to inform the accused of why they were arrested should be raised at the criminal trial and is not a ground for stopping the trial. Those arrested were adequately informed of the substance of the charges. Being informed of the evidence etc. does not mean before the trial starts.

Whether the demonstration was properly stopped is relevant in the criminal trial and should be raised there. The fact that a charge is defective (if it is) is not a constitutional issue. The Constitution and the Penal Code on riot and breach of the peace are not in conflict. Rights under Articles 33 and 37 are not unlimited. The judgment disagrees that the motives of the police were suspect.

International Centre For Policy and Conflict v Attorney General & 2 Others [2014]

CASE NUMBER: Miscellanous Civil Case No. 226 of 2013
REGION: Nairobi
COURT: High Court
DATE OF DECISION: 27 March 2014
RELEVANT LAW: Constitution
National Police Service Act
DECISION: The IGP was within his rights to assign police commanders to counties, but is not able to appoint officers.

SUMMARY

Facts

The Inspector General of Police (IGP) had announced that he had appointed 47 county Police Commissioners. The issues were: whether the appointment of 47 county Police Commanders was within the power of the IGP; was this appointment or assignment of officers?

Decision

The IGP had assigned the officers as county commanders – which he had the power to do under Art. 245 of the Constitution, which states that no person may give directions to the IGP with respect to "the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service." However, the IGP has no power to appoint officers – that is for the PSNPSC.

Independent Policing Oversight Authority & Another v Attorney General & 660 Others [2014

CASE NUMBER: Petition No. 390 of 2014 (consolidated with 24 others)
REGION: Nairobi
COURT: High Court
DATE OF DECISION: 31 October 2014
RELEVANT LAW: Constitution Articles 10, 27, 35, 43, 47, 73, 232, 244, 246 and 249
National Police Service Act ss. 11, 13 Independent Police Oversight Authority Act s.6
DECISION: The IPOA does not have a supervisory role vis a vis the NPSC. But the IPOA can institute proceedings under Articles 22 and 258. The decision to nullify the recruitment exercise was correct.

SUMMARY

Facts

The National Police Service Commission (NPSC) carried out a recruitment exercise for police officers at many centres throughout the country. Then allegations of corruption, tribalism, nepotism and other malpractices emerged. The Independent Police Oversight Authority (IPOA) advised the NPSC to cancel the exercise, but the latter chose to set up a working party to investigate, and on the strength of its report cancelled recruitment at 36 centres. The issue was whether the IPOA had an oversight role over the NPSC.

Decision

The IPOA does not have a supervisory role vis a vis the NPSC. But the IPOA can institute proceedings under Articles 22 and 258. Though the NPSC had some guidelines for the exercise, they were not made public. The court gave the benefit of the doubt to the NSPC over whether there was public participation in the preparation of the guidelines. Although there was discrimination against pregnant women in the exercise, this was justified in the interests of the unborn children and the women themselves.

The recruitment committee formed by the NPSC was validly formed, because it included members of the Commission and there was a power to co-opt to committees.

S. 10 of NPSC Act allows delegation only to the Inspector General of Police (IGP), but the NPSC delegated the actual recruitment to sub-county committees. Even if they had delegated it to the IGP he had no power to delegate to the sub-county committees. Therefore the whole exercise was a nullity.

The NPSC did have the power to nullify the exercise on the basis of the Interpretation and General Provisions Act s. 51(1) that the power to appoint includes the power to dismiss and therefore they had the power to nullify the exercise. Before nullifying the recruitment in 36 centres the NPSC ought to have given the affected recruits a chance to put their case. The formula used to achieve diversity was unworkable, at least as affected Uasin Gishu, and ought to be revisited. The court rejected arguments that the exercise ought not to be cancelled, including in view of the inexperience of the NPSC, public interest in having a strong police force and expense. The court stressed the reports of corruption, and a need to adhere to procedures, and essentially to teach a lesson. Orders of certiorari, prohibition and mandamus were issued to cancel all aspects of the previous exercise and to carry out a fresh one.

The decision of the High Court was appealed to the Court of Appeal. The latter did not deliver judgment until May 8 2015. The High Court judgment was upheld (Civil Appeal No. 324 of 2014).

The Court of Appeal agreed on the issue of delegation, and it did not go into the other issues.

Washington Jakoyo Midiwo v Minister, Ministry of Internal Security [2013]

CASE NUMBER: Petition No. 538 of 2012
REGION: Nairobi
COURT: High Court
DATE OF DECISION: 5 April 2015
RELEVANT LAW: Constitution, Article 241(3)(c)
DECISION: The court found that there was no evidence of actual direct deployment of the KDF in Baragoi, but rather that they were "assisting civil authorities".

SUMMARY

Facts

The issue was whether parliamentary approval had been given to the deployment of the Kenya Defence Force (KDF) to parts of Samburu, Turkana and Garissa because of clashes between communities. The petitioner alleged that the troops had been "deployed" without National Assembly (NA) approval.

Decision

The court found that the NA had observed: "There was no evidence of actual direct deployment of the KDF in Baragoi in support of the National Police Service. KDF was responsible for providing logistical support." The judge treated this as meaning there was no deployment and the petitioners had not proved otherwise. The judge viewed the situation as coming under Article 241(30(b) (assisting civil authorities) rather than (c) (deployed to keep the peace), so no NA approval was needed. He declined to inquire further on the basis of separation of powers.

Kahindi Lekalhaile & 4 Others v Inspector General National Police Service & 3 Others [2013]

CASE NUMBER: Petition No. 25 of 2015
REGION: Nairobi
COURT: High Court
DATE OF DECISION: 12 November 2013
RELEVANT LAW: Constitution, Articles 35 and 27
DECISION: The judge ruled against the petitioners

SUMMARY

Facts

The petitioners were concerned about poaching and wanted the court to compel certain measures to combat it. The issues were: whether the respondents should be compelled to do an audit of ivory stocks; whether the Kenya Wildlife Service were police and thus subject to the Inspector General of Police.

Decision

There was no evidence that the petitioners had actually asked for the information about ivory stocks so they could not ask for compulsory release under Article 35. The Kenya Wildlife Service (KWS) is not a police force; Article 243, which provides for the composition of the National Police Service, did not anticipate the inclusion of KWS. Article 239 does not envisage KWS as part of the security forces.

Trophies are the property of the government, not the KWS (s. 39 of the KWS Act) so it was not appropriate to order the respondents to carry out an audit.

Masoud Salim Hemed & Another v Director of Public Prosecution & 3 Others [2014] (Consolidated with Okiya Omtatah Okoiti v Attorney General)

CASE NUMBER: Petition No. 7 of 2014
REGION: Mombasa
COURT: High Court
DATE OF DECISION: 8 August 2014
RELEVANT LAW: Constitution, Articles 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 39, 47, 48, 50 & 51
Criminal Procedure Code, S. 389
DECISION: The court ruled against the respondents

SUMMARY

Facts

The subject had been arrested by police, with a large number of others, during a raid by the police on an alleged jihadist convention at Masjid Musa Mosque. The subject was not produced in court within 24 hours and the Occurrence Book records at all police stations involved in the exercise did not show him as having been taken to any of the police stations. Nor was he in any mortuary. The police alleged he had escaped from custody. The issue was of habeas corpus – seeking the production of the body of the subject before the court.

Decision

The court said it had not been proved that respondents lost custody of the subject after the arrest; the case must further be investigated to determine the correct factual position. The order of habeas corpus must be held in abeyance until it is established that the respondents have custody or have regained custody. The subject's family was at liberty to file suitable proceedings for breach of human rights as and when appropriate. Habeas corpus was not an appropriate remedy for the disappearance. The court must assume the subject is "missing presumed dead" The relevant magistrate was ordered to hold an inquest and the CID was directed to carry out further investigations.

The court invited the Kenya National Human Rights Commission as amicus curiae to conduct investigations and jointly with the CID to prepare a report for the inquest and the court.

Muslims for Human Rights (MUHURI) & Another v Inspector-General of Police & 5 Others

CASE NUMBER: Petition No. 19 of 2015

REGION: Mombasa

COURT: Mombasa High Court

DATE OF DECISION: 12 November 2015

RELEVANT LAW: Prevention of Terrorism Act, Section 3

DECISION: The right to fair administrative action afforded to the petitioners by Article 47(1) of the Constitution was violated by the publication of Gazette Notice Volume No. CXVII 36 Gazette Notice No. 2326 of 7 April 2015. It was tainted with procedural impropriety for failure to afford the petitioners a fair administrative process; hence the Gazette Notice is null and void ab initio.

SUMMARY

Facts

The petition requested that:

(a) A declaration that Gazette Notice Number 2326 of 7th April, 2015 be quashed as it was made in contravention of the Constitution and the law

(b) A declaration that the freezing of the accounts was equally in contravention of the Constitution and the law.

Decision

The judge decided as follows:

"(1) I declare that the Special Issue of the Kenya Gazette Volume CXVII – No. 36 Gazette Notice Number 2326 particularly those parts purporting to notify of intention to recommend to the Cabinet Secretary for the Interior and Coordination of National Government that an order be made declaring the First and Second Petitioners herein as specified entity were made in violation of the Constitution and the applicable law;

(2) I declare that the first Respondent acted ultra vires the Constitution and the law and in excess of his powers in purporting to publish those parts of the Special Issue of the Kenya Gazette Volume CXVII No. 36 Gazette Notice Number 2326 particularly those parts purporting to notify of intention to recommend to the Cabinet Secretary for Interior and Coordination of the National Government that an order be made declaring the First and Second Petitioners herein as specified entity;

(3) I declare that the freezing of accounts of the First and Second Petitioners was unconstitutional, illegal and in violation of the First and Second Petitioners fundamental rights and freedom to own property;

(4) I direct that the freezing of the First and Second Petitioners accounts in their respective Banks be lifted forthwith;

(5) The First, Second, Fourth and Sixth Respondents shall bear the Petitioners' costs through the Office of the Third Respondent.

(6) For avoidance of doubt the interim orders first granted herein are spent.

Lastly, I want to reiterate what I said of Terrorism in my Ruling of 11th June 2015 and I quote –

'Terrorism is the calculated use of violence or threat of violence to inculcate fear; intended to coerce or intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological'."

The right to fair administrative action afforded to the petitioners by Article 47(1) of the Constitution was violated by the publication of Gazette Notice Volume No. CXVII 36 Gazette Notice No. 2326 of 7 April, 2015. It was tainted with procedural impropriety for failure to afford the petitioners a fair administrative process; hence the Gazette Notice is null and void ab initio.

National Conservative Forum v Minister of State for Provincial Administration and Internal Security & 2 Others [2014]

CASE NUMBER: Petition No. 31 of 2013
REGION: Nairobi
COURT: High Court
DATE OF DECISION: 10 October 2014
RELEVANT LAW: Constitution: Articles 21, 238
Universal Declaration of Human Rights Articles 3-11
Arms Trade Treaty
DECISION: The court ruled against the petitioners

SUMMARY

Facts

The petitioners complained of the failure of government to control the spread of pangas, firearms and other weapons. They also stated that Kenya faces safety and security challenges on many aspects, including from the violent activities of organised gangs. The issues were: whether the state was in violation of Article 21(1) that says the state must observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights? Was it risking violation of rights to dignity and life?

Had it infringed Article 238 (2)(b) on national security being in compliance with the law and respect for the rule of law and democracy?

Decision

The judge held that the petitioners had not established the nature of threats and risks, nor of the violation of the Constitution. The court said it did not have sufficient material upon which to make a determination on whether and how security organs have failed to provide security to Kenyans. Even if it had, it is not the place of the court to decide, for the simple reason that the court is not the maker of policies on security, nor the best judge of policies that have been undertaken to curb insecurity

Public **Finance**

Cereal Growers Association & Another v County Government of Narok & 10 Others

CASE NUMBER: Petition No. 385 of 2013

REGION: Kenya

COURT: Milimani High Court, Constitutional and Human Rights Court (court of first instance); decision reviewable by Court of Appeal

DATE OF DECISION: 11 September 2014

RELEVANT LAW: Constitution, Article 210

Local Government Act, Section 201 (Cap 265 Laws of Kenya) as read with the Agricultural Act, Section 192A (Cap 318 Laws of Kenya)

DECISION: That the respondents stop the levying/charging of Agricultural Produce Cess or related tax in their areas of jurisdiction, until they have enacted a supportive legal framework.

SUMMARY

Facts

The members of the 1st petitioner claimed that they are dissatisfied with the mode, legality and use of agricultural produce cess, which they have been paying to the Municipal, County and City Councils up to 4 March 2013 and subsequently to the 1st to 8th respondents. They filed a petition claiming that the actions of the 1st to 8th respondents in levying agricultural produce cess and related tax without a supporting legal framework violates the provisions of Article 210(1) of the Constitution and that the county governments are violating the Constitution by charging agricultural produce cess in a discretionary and arbitrary manner in violation of Article 209(5) of the Constitution.

The petition dated 25 July 2013, thus sought the following orders:

i. A declaration that the actions of the 1st to 8th respondents in continuing to levy/charge agricultural produce cess or related tax without a supporting legal framework, expressly violates the provisions of Article 210(1) of the Constitution that provides that that no tax or licensing fee may be imposed, waived or varied except as provided by legislation.

ii. An order directing the 1st to 8th respondents to stop the levying/charging of agricultural produce cess or related tax in their areas of jurisdiction, until such time as they would have enacted a supportive legal framework.

iii. A declaration under the provisions of Article 10 of the Constitution that it is mandatory for the 1st to 8th respondents to widely consult the public in the process leading to the preparation and enactment of any legal instrument to any form of taxation including the agricultural produce cess.

iv. An advisory opinion to be issued to the respondents to adopt administrative, policy, legal and regulatory mechanisms that will allow the development of legislation to levy agricultural produce cess in framework of maximum public/stakeholder participation.

v. An advisory opinion to be issued to the respondents to adopt administrative, policy, legal and regulatory mechanisms that will allow the transparent use of agricultural produce cess.

vi. An advisory opinion to be issued to the respondents to adopt short-term, medium-term and long-tern administrative, policy, and legal mechanisms to prevent double-taxation in the levying of agricultural produce cess in accordance with Article 209(5), that provides that the taxation and other revenue-raising powers of a county shall not be exercised in a way that prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour.

Decision

A declaration that unless there is a specific legal framework on the subject of the levying of agricultural produce cess, the actions of the 1st to 8th respondents in continuing to levy/charge agricultural produce cess, or related tax, without a supporting legal framework, expressly violates the provisions of Article 210(1) of the Constitution that provides that no tax or licensing fee may be imposed, waived or varied except as provided by legislation.

Robert N Gakuru & Others v Governor of Kiambu County & 3 Others [2014]

CASE NUMBER: Petition No. 532 of 2013
REGION: Nairobi
COURT: Milimani High Court, Constitutional and Human Rights Division
DATE OF DECISION: 17 April 2014
RELEVANT LAW: Constitution
DECISION: Kiambu Finance Act, 2013 gazetted vide Kiambu County Gazette Supplement No. 8 (Act No. 3) violates the Constitution and that the same is null and void.

SUMMARY

Facts

The petitioners and the applicants are seeking a declaration that the Kiambu Finance Act, 2013 gazetted vide Kiambu County Gazette Supplement No. 8 (Act No. 3) (referred to as the Act) violates various provisions of the Constitution and that the same is null and void. The grounds on which these matters were based were that no consultations took place and no invitations were made by the respondents before the said Act was enacted. It was further contended that the provisions of the said Act contravene the provisions of the Constitution as it contains levies and/or taxes, which the respondents are not empowered to impose.

Decision

There was no public participation as contemplated under the Constitution and the County Government Act, 2012. However it has not been alleged that any interests have been acquired under the said Act that would militate against the immediate nullification of the said Act and therefore the Kiambu Finance Act, 2013, gazetted vide Kiambu County Gazette Supplement No. 8 (Act No. 3) violates the Constitution and is null and void.

Speaker, Nakuru County Assembly & 46 Others v Commission on Revenue Allocation & 3 Others [2015]

CASE NUMBER: Petition No. 368/2014
REGION: Nairobi
COURT: Milimani High Court, Constitutional and Human Rights Division, Constitutional Court
DATE OF DECISION: 20 February 2015
RELEVANT LAW: Constitution Public Finance Management Act
DECISION: There was no merit in the petition and it was dismissed with no orders as to costs.

SUMMARY

Facts

This petition concerns the budgetary and related processes in county governments. All the petitioners are state organs established under the provisions of Article 178(1) of the Constitution with their mandate set out under Article 178(2) of the Constitution and include inter-alia to preside over the sittings of their respective County Assemblies. They have brought this petition pursuant to the provisions of the Constitution and on behalf of all the counties

On or about 22 April 2014 vide a circular Reference No. CRA/CGM/Vol.III/99 addressed to all county governments, demanded that the County Assemblies' budget allocations should comply with the aforesaid circular that put mandatory ceilings to financial allocation, failure to which the 2nd respondent (Controller of Budget) would not approve withdrawals from the County Revenue Fund or any other fund by county governments.

That at the date of the impugned circulars, none of the county governments had passed its County Finance Act for the financial year 2014/2015 to enable implementation of its budget. The petitioners therefore claim that the 2nd respondent acted ultra vires its mandate in issuing the said circulars to the counties.

Petitioners claimed a violation of Articles 73, 185, 189, 207, 216 and 228 of the Constitution by the respondents and sought the following orders:

i. A declaration that the circulars by the 1st and 2nd respondents to prescribe and/or put mandatory ceilings to financial allocation to any County Assembly in a County Budget for the Financial year 2014/2015 breached the petitioners' constitutional rights under Articles 27(1), 27(4), 27(5), 43 and 47(1) of the Constitution of Kenya, and were null and void for all intents and purposes.

ii. Judicial Review order of certiorari to quash the circulars issued.

iii. Judicial Review orders of mandamus to compel the 2nd respondent to oversee the

implementation of the budgets of county governments in Kenya for the financial year 2014/2015, in terms of Article 228(4) of the Constitution of Kenya, once county governments pass their respective budgets for the financial year 2014/2015.

Decision

There is no merit in the petition and the same is dismissed. Given the impugned circulars were not binding, yet were lawfully issued, it follows that the prayer for a declaration to quash the circulars does not apply.

Tyson Ngetich & Another v Governor, Bomet County Government & 5 Others [2015]

CASE NUMBER: Petition No. 415/2014

REGION: Nairobi

COURT: Milimani High Court, Constitutional and Human Rights Division

DATE OF DECISION: 29 May 2015

RELEVANT LAW: Public Finance Management Act, Sections 125,126,128,129,130,131; Article 201

DECISION: The budget making process of Bomet County for the financial year 2014-2015 was unlawful and unconstitutional.

SUMMARY

Facts

This petition seeks to impugn the budget making process undertaken by relevant organs of the Bomet County Government for allegedly having flouted the provisions of the Constitution, the Public Finance Management Act (PFMA) of 2012 and the County Government Act of 2012. It was alleged that the 1st, 2nd, 3rd and 4th respondents breached Article 201 of the Constitution by passing a law that was in clear violation of the provisions of Sections 125, 126, 128, 129, 130 and 131 of PFMA and also Article 196 of the Constitution, by not conducting public participation on the budget estimates for the financial year ending 2015 and therefore failed to subject the Appropriation Act to public scrutiny, contrary to the provisions of Article 10(2) of the Constitution.

The petitioners' claim that the County Executive Committee Member for Finance (CECF) had not issued any budget circular detailing the requirements of the budget for the 2014-2015 financial year and submit the annual development plan to the County Assembly for approval and that the budget estimates presented on 30 April 2014 to the County Assembly did not identify the Appropriations by Vote and programme as required by the law.

The petitioners prayed for the following declarations and orders:

(a) A declaration that the budget-making process of Bomet County for the financial year 2014-2015 be declared unlawful and unconstitutional.

(b) A declaration that the Bomet County Appropriation Act of 2014 and Bomet County Appropriation [Amendment] Act of 2014 are unprocedural, unconstitutional, null and void.

(c) A declaration that the CEC Finance Bomet County and the Governor of Bomet violated the Constitution by hijacking the budget making process for the year 2014-2015.

(d) An order that the Bomet County begins the budget process afresh in full compliance of the Constitution and the Public Finance Management Act, 2012.

(e) An order that the Controller of Budget only release one-half of the amount included in the budget estimates submitted to the County Assembly on the 5 June 2014 pending the passing of a new Appropriation Act that complies with the Constitution and statutes.

(f) Cost of the petition be awarded to the petitioners.

Decision

The court set out these issues for determination from the case:

- Whether the Bomet County Appropriation Act 2014 and the Bomet County Appropriation (Amendment) Act 2014 are unprocedural, unconstitutional and therefore null and void.
- Whether the 5th respondent had abdicated her constitutional duty by approving withdrawals based on non-existent law.

In concluding his determination, the judge stated that the office of the 5th respondent (Controller of Budget) is the organ constitutionally created to ensure that the principles of public finance, which are stipulated under Article 201 of the Constitution, are observed and fulfilled and must therefore be very keen in performing its function as the watchdog of the people on public finance. That, had it observed its duties faithfully, this petition would perhaps have been avoided and saved the taxpayers money that has already been expended in implementing a budget without a properly effective law in support thereof.

The court ruled that:

- A declaration that the budget-making process of Bomet County for the financial year 2014-2015 be declared unlawful and unconstitutional.
- A declaration that the Bomet County Appropriation Act of 2014 and Bomet County Appropriation [Amendment] Act of 2014 are unprocedural, unconstitutional, null and void.
- Each party bear its own costs as this matter was in the best interests of the residents of Bomet County and the public at large.

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