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Justice be our Shield and Defender

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 605 OF 2014

IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE 19, 20, 21 AND 23 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 26, 27, 28, 29, 31, 33, 35, 43, 45 AND 46 OF THE CONSTITUTION OF KENYA

BETWEEN

SWK.....1ST PETITIONER

PAK.....2ND PETITIONER

GWK.....3RD PETITIONER

AMM.....4TH PETITIONER

KENYA LEGAL AND ETHICAL ISSUES NETWORK

ON HIV & AIDS (KELIN) .....5TH PETITIONER

AFRICAN GENDER AND MEDIA INITIATIVE TRUST (GEM).....6TH PETITIONER

AND

MEDECINS SANS FRONTIERES – FRANCE.....1ST RESPONDENT

PUMWANI MATERNITY HOSPITAL.....2ND RESPONDENT

MARIE STOPES INTERNATIONAL.....3RD RESPONDENT

COUNTY EXECUTIVE COMMITTEE MEMBER IN CHARGE OF HEALTH SERVICES – NAIROBI COUNTY.....4TH RESPONDENT

CABINET SECRETARY, MINISTRY OF HEALTH.....5TH RESPONDENT

THE HON. ATTORNEY GENERAL.....6TH RESPONDENT

AND

SECRETARIAT OF THE UNITED NATIONS PROGRAMME

ON HIV/AIDS (UNAIDS) SECRETARIAT.....1ST AMICUS CURIAE

PROF. ALICIA ELY YAMIN.....2ND AMICUS CURIAE

NATIONAL GENDER AND EQUALITY COMMISSION.....3RD AMICUS CURIAE

AND

INTERNATIONAL COMMUNITY OF WOMEN LIVING WITH HIV (ICW).....1ST INTERESTED PARTY

INTERNATIONAL COMMUNITY OF WOMEN LIVING WITH HIV-(ICW-KENYA).....2ND INTERESTED PARTY

1ST RESPONDENT'S SUBMISSIONS

A. Background

1. These are the 1st respondent's submissions in respect of the amended petition dated 10th September 2015. The submissions are also in response to the petitioners' submissions dated 25th March 2021.

2. The 1st respondent has filed the following documents in support of its case:

   a) Affidavit sworn by Beatrice Runo on 22nd April 2015.
   b) Affidavit sworn by Benta Awuor Onyango on 22nd April 2015.
   c) Affidavit sworn by MA on 22nd April 2015.
   d) Affidavit sworn by PB on 22nd April 2015.
   e) Affidavit sworn by SW on 22nd April 2015.
   f) Affidavit sworn by EAM on 22nd April 2015.

3. The proceedings show that EAM, who the 1st respondent intended to call as a witness, died before she could testify. The proceedings also show that counsel were not opposed to her affidavit remaining on record.

4. The 1st respondent called five witnesses – Beatrice Runo (DW1), Benta Anyango Owuor (DW2), SW (DW3), MA (DW4) and PB (DW5) and closed its case on 18th January 2019.

B. Facts

5. The 1st respondent ran Blue House Clinic in Mathare (Blue House) from September 2008 to November 2012. Blue House offered services to people infected with HIV/AIDS in the Mathare area. The services included laboratory, counselling, food portions (including formula milk for children) and referral services. To effect these services, the 1st respondent employed doctors, nurses, social workers and counsellors.

6. The 1st to 4th petitioners, the 1st respondent's witnesses and thousands of people living in Mathare area and its environs received services from the 1st respondent free of charge.

7. The 1st respondent also ran a program known as Prevention of mother to child (HIV/AIDS) transmission (PMCT). This program was crucial and was availed by the 1st respondent to members of the public for free.

8. The 1st respondent did not however offer certain critical services at the Blue House. These included maternity and family planning method which required an operation to be performed. Since some of the persons (living with HIV/AIDS) needed these services but could not afford them, the 1st respondent would refer such persons to the 2nd and 3rd respondents as it had a memorandum of understanding (MoU) with the 2nd respondent. The MoU between the 1st and 2nd respondent is produced at page 9 to 11 of the annexure to DW1's affidavit sworn on 22nd April 2015.

9. That MoU shows that the patients who came to Blue House were referred to the 2nd respondent for delivery services and pre-natal and post-natal care.

10. The 1st and 3rd respondent did not have a formal MoU. A referral note was used when referring patients to the 3rd respondent.

C. A summary of the petitioners' case against the 1st respondent

11. The 1st petitioners case as stated at paragraph 4 of the amended petition and paragraph 30 of her affidavit sworn in support of the petition is that the nutritionist at Blue House (Benta Anyango Owuor) informed her that if she did not undergo bilateral tubal ligation (BTL), she would not qualify to receive food portions and be paid for the maternity bill at the 2nd respondent.

12. The 1st petitioner also alleges at paragraph 6 of the petition that Benta Anyango Owuor informed her that she would not get formula milk for her children or food portions unless she had proof that she had undergone BTL.

13. The 2nd petitioner alleges at paragraph 10 of the amended petition and paragraph 13, 14 and 15 of her affidavit that Benta Anyango Owuor would tell her that she should undergo BTL each time she went to the clinic and was told that if she did not have proof of having undergone BTL, she would not qualify to receive the formula and food portions anymore.

14. The 2nd petitioner has also alleged that DW2 referred her to a community health worker (paragraph 16 of the 2nd petitioner's affidavit and paragraph 11 of the amended petition).

15. The 3rd petitioner alleges at paragraph 20 of the amended petition and paragraph 24 of the affidavit that she went to receive formula from Blue House when a nurse asked her whether she was on any form of family planning. She states that she informed the nurse that she had undergone BTL. The nurse apparently asked her to go back and get proof of the procedure before she could get formula milk and when she returned, she was given formula milk.

16. The 4th petitioner has not made any allegation against the 1st respondent in the amended petition.

17. The 5th petitioner alleges at paragraph 9 of its affidavit that the coerced sterilization was carried out by the 2nd and 3rd respondent on the advice of the agents of the 1st respondent.

18. The 5th petitioner also alleges at paragraph 29 of its affidavit that the acts of the 1st respondent while handling the petitioners was contrary to Article 10 of the Constitution of Kenya, 2010.

19. The petitioners allege at paragraph 5 of their submissions that the personnel of the 1st respondent coerced the 2nd and 4th petitioners into attending a family planning clinic at Lions Health Centre in Huruma where they were then sterilized.

D. The 1st respondent's submissions on the case against it

20. The parties filed an agreed list of issues as submitted at paragraph 44 of the petitioners' submissions.

21. The only issue for determination as relates to the 1st respondent is issue number 2 in the agreed list of issues which is ***whether the actions of the 1st respondent amounted to coercion of the 1st, 2nd and 3rd petitioners to undergo sterilization by way of bilateral tubal ligation.***

22. The other collateral issue is whether the petitioners are entitled to the reliefs sought against the 1st respondent, in their amended petition, including the quantum of damages submitted at paragraph 205 of their submissions.

23. The 1st respondent's submissions on these two issues is set out below.

a) Whether the actions of the 1st respondent amounted to coercion of the 1st, 2nd and 3rd petitioners to undergo sterilization by way of bilateral tubal ligation

24. At the outset, the 1st respondent wishes to point out that during his cross examination, Dr Khisa Weston admitted that he could not tell when BTL was conducted on any of the petitioners. (*Page 41 of the proceedings*).

25. The petitioners allege that the actions of the 1st respondent amount to coerced sterilization. The 5th petitioner alleges at paragraph 9 of its affidavit that the coerced sterilization was carried out by the 2nd and 3rd respondent on the advice of the agents of the 1st respondent. It is alleged that the coercion came in the form of threats to withhold food, formula milk and lifesaving ingredients from the 1st to 3rd petitioners.

26. Aside from their statements, the petitioners have not led any evidence to show that food, formula milk or lifesaving ingredients were withheld from them or there were threats to withhold the same if they did not undergo any form of family planning or show proof of them being on a form of family planning.

27. The petitioners' failure to produce evidence to support their case against the 1st respondent means that they not discharged their evidentiary burden of proof which lies with them. Mativo J in ***Liwell Mwangi Kahwai & 8 others v Kiambu County [2017] eKLR***

Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in Britestone Pte Ltd vs Smith & Associates Far East Ltd[9] :- "The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him" Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the constitution and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses...It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. I have carefully considered the Petition before me and the response by the Respondents together with the submissions filed by both parties and I find that the Petitioners have failed to prove the alleged violation to the required standard. (*Page 3-4 of the 1st respondent's bundle of authorities*).

28. GWK conceded in cross examination that the 1st respondent did not ask her to show evidence of having undergone BTL (*See page 27 of the proceedings*). SWK also stated in cross examination that none of the nurses and doctors at Pumwani Hospital forced her to undergo BTL. She also stated that she had no problem with Blue House *(Page 33 of the proceedings*). PAK stated in cross examination that when she went to the 3rd respondent's facility, she informed the 3rd respondent that she had consented to undergo BTL *(Page 37 of the proceedings).*

29. In her testimony, DW2 refuted the petitioners' unsupported claims. She testified that the services offered at Blue House (which greatly helped persons living with HIV/AIDS) was not predicated on HIV positive mothers undergoing family planning. She also testified that she had no authority to withdraw formula and to her knowledge, no mother was denied food or formula. She has provided evidence of what the 1st and 2nd petitioner used to receive. (*Page 64 to 66 and Page 60 to 61 of the exhibit marked BAO1).*

30. It is also clear that prior to the filing of this petition, the petitioners did not raise any complaint regarding what they now say happened at Blue House.

31. DW3 is one of the persons who regularly attended Blue House. She testified that DW2 is a mother who has been living with HIV/AIDS and was never denied any milk or food yet she was not on any family planning method. She also stated that she was not aware of anyone who was denied formula milk or food. In addition, she testified that she regularly saw the 2nd petitioner (PAK) getting milk.

32. In response to paragraph 81 and 93 of the petitioners' submissions, the 1st respondent's position is as clarified by DW2- her role in identifying mothers in need of family planning is tied to the role of a nutritionist as the health of the mother is a key concern. These two go hand in hand.

33. DW2 testified that she always had a nurse or doctor supervising her when she performed her duties. It is therefore absurd for the petitioners to allege, without proof, that DW2 was unsupervised.

34. The petitioners have alleged at paragraph 95 of their submissions that the 1st respondent's witnesses are not credible. It is not disputed that the petitioners received the same support as some of the 1st respondent's witnesses. The support or services received cannot therefore be the basis for dismissing the 1st respondent's evidence given under oath and tested through cross-examination.

35. It is absurd for the petitioners to claim that one of the 1st respondent's witness did not provide any evidence that she had undergone the procedure with informed consent. This was not an issue in the proceedings and the petitioners cannot purport to frame a case for the 1st respondent's witnesses in order to bolster their own.

36. As stated above, there is no evidence provided to show that the 1st respondent threatened to withhold or withheld food/formula milk from the petitioners to coerce them into undergoing BTL. What there is evidence of an organization which did good by alleviating the suffering of persons living with HIV/AIDS in poor neighbourhoods. Such an organization does not deserve condemnation but appreciation. It is quite telling that despite the publicity this case has drawn, majority of those who received services from Blue House appreciate it and have not joined the petitioners in their frivolous quest.

b) Whether the petitioners are entitled to the remedies sought

37. It is alleged at paragraph 37 of the amended petition that the 1st respondent failed in its obligation to respect, protect and fulfil the fundamental rights of the petitioners. The petitioners therefore seek general and exemplary damages on an aggravated basis for physical and psychological suffering occasioned by the unlawful and unconstitutional sterilization.

38. The 1st respondent maintains that it did not fail to protect or fulfil the petitioners' rights as alleged or at all. To the contrary, it provided the much needed support and expended resources to alleviate the plight of persons infected with HIV/AIDS at a time when stigmatization was rife in Kenya. Sadly, the petitioners have chosen to pay the good that was done to them by making spurious claims which are unsupported by any evidence.

39. The petitioners case of failure to protect their constitutional rights does not meet the test set out by the Court of Appeal in ***Anarita Karimi Njeru vs Republic (1979) eKLR*** where the court set out the tests as follows-

> *We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the*

provisions said to be infringed, and the manner in which they are alleged to be infringed. (Page 7 of the 1st respondent's bundle of authorities)

40. While the petitioners have cited a number of constitutional provisions and made allegations of the breach, without evidence to show the breach, the petition ought to fail. The judgment in ***David Gathu Thuo v Attorney General & Another [2021] eKLR*** supports this argument. The court cited *Anarita Karimi Njeru* (supra) and the Court of Appeal case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR* and dismissed the petitioners case. It was held:

> *The Articles of the Constitution which entitles rights to the Petitioner must be precisely enumerated and the claim pleaded to demonstrate such violation with the violations being particularized in a precise manner. Furthermore, the manner in which the alleged violations were committed and to what extent must be shown by way of evidence based on the pleadings... Although the Petitioner has pleaded provisions of the Constitution, he has not demonstrated to the required standard how his individual rights and fundamental freedoms were violated, infringed or threatened by the respondents. He has not adduced any evidence to demonstrate the alleged violations. Even assuming that this petition was competent, it would not pass the test of the burden of proof. It is trite law that he who alleges must prove his claim. The claim must be propounded on an evidentiary foundation. In saying so, I rely on the case Leonard Otieno Vs. Airtel Kenya Limited [2018] eKLR* (Page 15 and 16 of the 1st respondent's bundle of authorities)

41. Based on the above, the allegations that the 1st respondent breached the petitioners' rights should be dismissed and no damages are consequently payable.

42. Out of the 15 prayers sought in the amended petition, only 3 prayers are sought against the 1st respondent (*being prayer (b), (l), and (n) as stated in paragraphs 183 of the petitioner's submissions*).

43. Prayer (n) of the amended petition is a blanket prayer requiring the *respondents... to file affidavits in court detailing out their compliance with orders d, e, f, g, h, i, j, k, k and l.* The order sought does not relate to the 1st respondent and the 1st respondent cannot be directed to comply with any orders which it cannot comply with. Court orders are not issued in vain. Ojwang J (as he then was) stated as follows in ***B v Attorney General [2004] eKLR:***

> *The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.* (Page 30 of the 1st respondent's bundle of authorities)

44. By the same prayer (n), the petitioners are seeking the equitable remedy of a mandatory injunction against the 1st respondent. The Court of Appeal in ***Eric V. J. Makokha & 4 Others V Lawrence Sagini & 2 Others [1994]eKLR*** stated:

> *Equity, like nature, will do nothing in vain". On the basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced.* (Page 41 of the 1st respondent's bundle of authorities)

45. Prayer (n) of the petition should therefore not be granted as against the 1st respondent.

46. On quantum of damages, the first respondent submits that the sum of Kshs. 30 million sought by the petitioners at paragraph 205 of their submissions is extremely excessive and unsupported by relevant authorities. The authorities of ***Michael Rubia***, ***Edward Akong'o Oyugi*** and ***Koigi Wamwere*** referred to at paragraph 204 of the petitioners' submissions and indeed all the other authorities relied upon are irrelevant and of no guidance at all for the following reasons-

    a. The petitioners in the 3 Kenyan cases were victims of the vilest and most egregious abuses perpetuated by agents of the state over a long period of time. The abuses were well documented and proved. Such abuses are no match to what the petitioners are complaining about in this petition.

    b. The foreign authorities such as the South African case of ***Isaacs v Pandie*** and the Canadian case of ***Muir*** related to demonstrable abuses which occasioned disability to the victims and in the South African case loss of ability to earn income. The same cannot be said of the petitioners' herein who have presented no evidence to show any injury or disability suffered and whose expert witness could not even tell when they were sterilized.

    c. The only cases which may be of little relevance in assessing quantum of damages are the cases of ***Wachira Weheire*** and ***GSN*** relied on by the petitioners at paragraph 203 of their submissions. While these were cases of clear and demonstrable violations of constitutional rights resulting to injuries, the petitioners in those cases were awarded Kshs. 2.5 million and Kshs. 2 million respectively.

47. While it is the 1st respondent's contention that the petitioner's case against it is unmerited, should the court however find in favour of the petitioners, the award of Kshs. 500,000/- for the 1st, 2nd and 3rd petitioners are more than sufficient compensation.

E. Conclusion

48. The petitioners have not proved that the 1st respondent threatened to or withheld any food portion or formula milk from them. It has also not been demonstrated that the 1st to 3rd petitioners were coerced into undergoing BTL with the promise of food and formula milk or the threat that food would be withheld from them. It has also not been shown by

evidence that the respondent told the 1st to 3rd petitioners, or indeed any other person, that they should not get any more children since they were HIV positive as alleged at paragraph 3 of the submissions.

49. The allegation against the 1st respondent of coerced sterilization has not been proved.

50. The petition should therefore be dismissed with costs.

DATED at NAIROBI this 15th day of July 2021

HAMILTON HARRISON & MATHEWS
Advocates for the 1st respondent

Drawn & filed by:

Hamilton Harrison & Mathews
Advocates
Delta Office Suites, 4th Floor, Tower A
Waiyaki Way
P.O. Box 30333 – 00100
NAIROBI

Email: litigation.kenya@dentons.com
Mobile Tel: 0722515553
(Ref: 22. 0013287.00079)

To Be Served upon:

Allan Achesa Maleche (Practice No: LSK/2021/02706); and
Nyokabi Njogu (Practice No: LSK/2021/02707)
C/O KELIN
Karen C, Kuwinda Lane, Off Langata Road.
P O Box 112 - 00202 KNH
NAIROBI

E-Mail: amaleche@kelinkenya.org
Mobile No: +254 708 389 870

J.K. Kibicho & Co. Advocates
Ack Garden House, 2nd Floor, Wing A
1st Ngong Avenue
P.O. Box 73137-00200
NAIROBI

Kithi & Company
Advocates
Maendeleo Hse, 4th Floor
Monrovia Street/ Utalii Lane
NAIROBI

The Hon. Attorney General
State Law Office
Sheria House
Harambee Avenue
P.O. Box 40112
NAIROBI

Nungo, Oduor &Waigwa
Advocates
Maisonette No. 1, Court 30
Mombasa Road, Off Bunyala Road
P.O Box 70678-00400
NAIROBI

Ligunya Sande & Company
Advocates
Silverpool Office Suites 2nd Floor, Suite B26,
Jabavu Lane Off Argwings Kodhek Road
NAIROBI

Rachier & Amollo
Advocates
Mayfair Centre, 5th Floor
Ralph Bunche Road
P.O. Box 55645-00200
NAIROBI

National Gender & Equality Commission
Solutions Tech Place
1st Floor, Longonot Road,
NAIROBI

Jackson Awele
Advocates LLP
Chaka Place, 2nd Floor,
Argwings Kodhek Road, Hurlingham
P.O. Box 22701, 00100
NAIROBI

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 605 OF 2014

IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE 19, 20, 21 AND 23 OF THE CONSTITUTION OF KENYA

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INTERNATIONAL COMMUNITY OF WOMEN LIVING WITH HIV-(ICW-KENYA).....2ND INTERESTED PARTY

1ST RESPONDENT'S LIST AND DIGEST OF AUTHORITIES

No.	Authority	Page
1.	*Liwell Mwangi Kahwai & 8 others v Kiambu County [2017] eKLR* Mativo J held that a petitioner in a constitutional petition must present clear evidence in support of an allegation that their constitutional right has been violated. This requirement is not a technicality. (Page 3-4 of the 1st respondent's bundle of authorities) In this case the petitioners have failed to produce evidence to support the allegation that the 1st respondent coerced them into undergoing sterilization by way of bilateral tubal ligation. Since they have failed to discharged their evidentiary burden of proof, the case against the 1st respondent must fail.	1-5
2.	*Anarita Karimi Njeru vs Republic (1979) eKLR* The court held that a petitioner in a constitutional petition must set out, with a reasonable degree of precision, the provision said to be infringed and the manner in which they have been infringed. (Page 7 of the 1st respondent's bundle of authorities). While the petitioners have cited a number of constitutional provisions and made allegations of the breach, without evidence to show the breach, the petition ought to fail. There has not been a demonstration of how the constitutional rights have been breached. In that case, justice cannot be done to any of the parties.	6-11
3.	*David Gathu Thuo v Attorney General & Another [2021] eKLR* The court in this case cited Anarita Karimi Njeru and held that the manner in which the alleged violations were committed and to what extent must be shown by way of evidence based on the pleadings. (Page 15 and 16 of the 1st respondent's bundle of authorities) In the absence of evidence that the petitioners' constitutional rights were violated, the petition must fail.	12-17

4.	*B v Attorney General [2004] eKLR:* Ojwang J (as he then was) held that the court does not and ought not to be seen to make orders in vain. Otherwise the Court would be exposed to ridicule. (Page 30 of the 1st respondent's bundle of authorities) In this case, it would be ridiculous for the court to grant prayer (n) of the amended petition which is a blanket prayer requiring the *respondents... to file affidavits in court detailing out their compliance with orders d, e, f, g, h, i, j, k, k and l.* The order sought does not relate to the 1st respondent and the 1st respondent cannot be directed to comply with any orders it cannot obey.	18-32
5.	*Eric V. J. Makokha & 4 Others V Lawrence Sagini & 2 Others [1994]eKLR* The Court of Appeal held that equity does nothing in vain and a court cannot make a mockery of itself by issuing orders it cannot enforce. (Page 41 of the 1st respondent's bundle of authorities) The petitioners are seeking a mandatory injunction (which is an equitable remedy) directed at the 1st respondent to file affidavits in court detailing their compliance with other orders sought. The 1st respondent cannot comply with orders that cannot relate to it.	33-45

DATED at NAIROBI this 15th day of July 2021

HAMILTON HARRISON & MATHEWS
Advocates for the 1st respondent

Drawn & filed by:

Hamilton Harrison & Mathews
Advocates
Delta Office Suites, 4th Floor, Tower A
Waiyaki Way
P.O. Box 30333 – 00100
NAIROBI

Email: litigation.kenya@dentons.com
Mobile Tel: 0722515553
(Ref: 22. 0013287.00079)

To Be Served upon:

Allan Achesa Maleche (Practice No: LSK/2021/02706); and
Nyokabi Njogu (Practice No: LSK/2021/02707)
C/O KELIN
Karen C, Kuwinda Lane, Off Langata Road.
P O Box 112 - 00202 KNH
NAIROBI
E-Mail: amaleche@kelinkenya.org
Mobile No: +254 708 389 870

J.K. Kibicho & Co. Advocates
Ack Garden House, 2nd Floor, Wing A
1st Ngong Avenue
P.O. Box 73137-00200
NAIROBI

Kithi & Co Advocates
Maendeleo Hse, 4th Floor
Monrovia Street/ Utalii Lane
NAIROBI

The Hon. Attorney General
State Law Office
Sheria House
Harambee Avenue
P.O. Box 40112
NAIROBI

Nungo, Oduor &Waigwa
Advocates
Maisonette No. 1, Court 30
Mombasa Road, Off Bunyala Road
P.O Box 70678-00400
NAIROBI

Ligunya Sande & Company
Advocates
Silverpool Office Suites 2nd Floor, Suite B26,
Jabavu Lane Off Argwings Kodhek Road
NAIROBI

Rachier & Amollo Advocates
Mayfair Centre, 5th Floor
Ralph Bunche Road
P.O. Box 55645-00200
NAIROBI

National Gender & Equality Commission
Solutions Tech Place
1st Floor, Longonot Road,
NAIROBI

Jackson Awele Advocates LLP
Chaka Place, 2nd Floor,
Argwings Kodhek Road, Hurlingham
P.O. Box 22701, 00100
NAIROBI

KENYA LAW
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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 64 OF 2015

In the matter of Articles 1, 2, 22, 27, 40, 46 and 47 of the constitution of Kenya, 2010

And

In the matter of Articles 165 (3) and (6) of the Constitution of Kenya, 2010

And

In the matter of alleged contravention of Article 174, 175, 184, 196 and 232 of the constitution of Kenya 2010

BETWEEN

Liwell Mwangi Kahwai.....1st Petitioner

James Ongaki.....2nd Petitioner

Rosemary Wanjiru Gituhiu.....3rd Petitioner

Benjamin Mutuku.....4th Petitioner

Lydia Muthoni.....5th Petitioner

Hellen Nyandiko.....6th Petitioner

Peter Maina.....7th Petitioner

Jackline Katulu.....8th Petitioner

Bradina Igoki Mungania.....9th Petitioner

(All for themselves and on behalf of Makongeni Traders Thika Sub-County, Kiambu County)

and

The Kiambu County.....Respondent

JUDGEMENT

The petitioners have instituted this suit on their behalf and on behalf of traders in Makongeni estate in Thika Sub-County of Kiambu County and that they have been conducting lawful businesses and paying the requisite fees and that the Thika Municipal Council has approved some of their structures. It is averred that on 20 February 2015 some traders were served with notices to remove their structures, which notice the petitioner claim was issued unlawfully an in violation of their fundamental rights in that the traders affected have single permits, that the notice did not specify the premises to be removed, that the notice was short , discriminative and violates provisions of the constitution and also infringes the County Governments Act[1] and Urban Cities Act.[2]

It is also averred that the Respondent has not offered alternative relocation to the affected traders and that it has no regard to the economic and social liberty of the petitioners. The petitioners seek orders that forceful evictions would be unconstitutional and also restraining orders stopping the evictions until " public participation is done."

Respondents case

In a Replying affidavit filed on 5 March 2015, sworn by Hannah N. Maranga, the Respondent states *inter alia* that the Respondent served notices for removal of structures build on a road reserve and public utility land, that the structures offend the provisions of the Physical Planning Act, that the petitioners have erected dangerous Kiosks around Madaraka Market and other designated market places thereby competing unfairly with *bona fide* occupants of the legitimate market stall who are equally entitled to livelihood. It is also averred that here are numerous complaints of insecurity, lack of sanitation, blocking entrances to existing structures including blocking emergency services like ambulance and fire, poor drainage, blocking service lanes. Further, initial licenses were accompanied by type-plans but over time the petitioners reproduced letters and sold them to unsuspecting petty traders leading to sprawl of Kiosks outside the designated areas and that the petitioners are attempting to clothe their illegal and immoral conduct with constitutionalism and that it will be impossible to maintain law and order if such illegal encroachment is allowed on public roads and public utility land.

Petitioners Replying Affidavit

In a Replying affidavit filed on 13 March 205, the petitioners denied the above allegations and averred that their structures are not illegal, that the structures have been in existence since 1992.

Petitioners Advocates submissions

Counsel for the petitioners submitted that the notice served upon the petitioners did not take into account basic constitutional provision and violated several provisions of the constitution, international obligations and cited two High court decisions, namely *William Musembi & Others vs Moi Education Centre*[3] and *Micro and Small Enterprises Association vs Mombasa County Govt & Others.*[4]

Respondents submissions

Counsel submitted that the petitioners lack proprietary interests in the land, hence they cannot enjoy constitutional protection and cited the decision in *Njuguna Peter Kinyagia vs The counbty Government of Kiambu*[5] and *Niaz Mohsmed vs Commissioner of Lands*[6] and that the petitioners also filed yet

another suit in court being Civil suit No. 199 of 2015 at the Thika Chief Magistrates Court and pointed out that some of the annextures to the petitioners affidavit are documents issued to persons who are not parties to this suit.

Expert reports

On 1st February 2016 Justice Ngugi ordered the parties to engage experts in physical planning to visit the grounds and file reports indicating the location of the petitioners premises in relation to road reserves and public utilities such as sewer lines and power lines among other services.

Pursuant to the said order on 20 June 2016, a report duly signed by the Sub-County Planer, Thika was filed in court. The report states inter alia that the Kiosk owners never sought planning approval from the planning authority, that "their placement is wanting as they are sporadic and haphazardly placed and seem to be swallowing up the once well planned residential neighbourhood" and that the Kiosks are on the road reserve where the secondary power lines are located and that the Kiosks have resulted to interfering with both the vehicular and pedestrian traffic and pose a danger to the vendors and buyers and that the Kiosks on road reserves are encroaching on the main carriage way thus impeding the flow of traffic.

Determination

The above report is fairly illuminating in that it demonstrates the danger posed by the structures in question. It confirms that the structures are not approved as required. This means that the structures are illegal. The rights claimed by the petitioners are not absolute, but fall under the category of rights that can be limited under justifiable conditions such as public interest considerations among them the need to ensure order in the city streets. Granting licences or permission to operate in the city's open spaces is the mandate of the County Government and this court will be reluctant to interfere with such mandate unless it is shown that the person in question acted in excess of his legal authority or violated the law or that the decision complained of is unreasonable and unjustifiable in the circumstances.

I am not persuaded that the Respondents breached the law in any manner in issuing the notices in question. Courts have over the years established that for a party to prove violation of their rights under the various provisions of the Bill of Rights they must not only state the provisions of the Constitution allegedly infringed in relation to them, but also the manner of infringement and the nature and extent of that infringement[7]and the nature and extent of the injury suffered (if any).

In my view the petitioners have failed to discharge the burden of prove to the required standard. All cases are decided on the legal burden of proof being discharged (or not). **Lord Brandon** in *Rhesa Shipping Co SA vs Edmunds*[8] remarked:-

"No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."

Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by **Rajah JA** in *Britestone Pte Ltd vs Smith & Associates Far East Ltd*[9] **:-**

"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"

Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the constitution and inevitably result in ill considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses..

It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. I have carefully considered the Petition before me and the response by the Respondents together with the submissions filed by both parties and I find that the Petitioners have failed to prove the alleged violation to the required standard. On the whole, I find that this petition has no merits. Consequently, I dismiss this petition with costs to the Respondent.

Orders accordingly.

Dated at Nairobi this **27th** day of **March** 2017

John M. Mativo

Judge

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[1] Act No. 17 of 2012

[2] Act No. 13 of 2011

[3][3] Petition no. 264 of 2013

[4] Pet No 3 of 2014

[5] Pet No. 687 of 2007

[6]{1996}eKLR

[7] See John Kimanu vs Town Clerk, Kangema NBI Pet. No. 1030 OF 2007

[8] {1955} 1 WLR 948 at 955

[9]{2007} 4 SLR (R} 855 at 59

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MISCELLANEOUS CRIMINAL APPLICATION NO 4 OF 1979

ANARITA KARIMI NJERU .....APPLICANT

VERSUS

REPUBLIC .....DEFENDANT

JUDGMENT OF THE COURT

The applicant moves this Court for a declaration that during her trial before the Resident Magistrate Meru upon two charges of stealing by a person employed in the public service (involving respectively Shs 46,574/40 and Shs 9,936) the provisions of section 77 of the Constitution of Kenya were contravened. She further asks for orders that her trial be nullified or otherwise disposed of under those provisions.

The manner in which the Constitution is said to have been infringed is set out in the supporting affidavit dated 5th January 1979 of Mr Mwirichia, of counsel, who has appeared for the applicant both at the trial and in the proceedings before us. Paragraphs 5 to 9 respectively of that affidavit state:

5. That the submissions under section 210 of the Criminal Procedure Code occupied 13th and 19th September 1978 and a ruling under section 211 of the Criminal Procedure Code was made at the close of the proceedings on 19th September 1978.

6. That the defence applied for summons to issue on a defence witness resident at Nyeri immediately following the ruling of court on 19th September 1978 in accordance with section 211 (2) of the Criminal Procedure Code.

7. That summons were issued returnable on 21st September 1978.

8 That on 21st September 1978 the summons were returned unserved.

9. That the Court refused a defence application to adjourn the hearing suitably to enable the serving officer to effect service of the summons on the witness.

The witness referred to in this part of the affidavit was Richard Francis Mase, the resident manager in Nyeri of Pannell , Bellhouse Mwangi & Co, the firm of accountants who audited the accounts of the St Mary's Girl's Secondary School, Egoji, Meru, of which the applicant was headmistress until 26th July 1974, in which capacity she was convicted of committing these offences. Mr Mwirichia's affidavit and its seven exhibits are filed with these proceedings. They comprise the auditor's report, the balance sheet and income and expenditure account for the calendar year 1973, together with correspondence passing

between the firm and the applicant's successor, Mrs Njue, relating to payment of the firm's charges for preparing those accounts. Their charges were not in fact paid until 25th January 1978.

In paragraph 13 of Mr Mwirichia's affidavit it is further alleged that the Court refused a defence application for an adjournment to enable the applicant to secure the attendance of witnesses other than Mr Mase, of whom it is said the defence had notified the Court. These matters are also covered in paragraphs 10 and 21of the applicant's petition of appeal. This appeal was not heard because the application to file the intended appeal out of time was rejected by Cockar J on 22nd December 1978. Mr Mwirichia quite rightly agreed that he was precluded from raising before us any of the remainder of his grounds in the applicant's petition of appeal, that is to say those not dealing with points validly attributable to the Constitution.

On the morning of the commencement of the hearing before this Court Mr Muttu representing the Republic raised a preliminary objection. After hearing it, we then invited Mr Mwirichia to give us further and better particulars of precisely that which he is alleging under the second head of his complaint, that is to say that the applicant was not given facilities to procure the attendance of witnesses other than Mr Mase. In the event he did not do so; and in our opinion he could not validly do so, for he is on record as having said to the magistrate, after he had returned to conduct the applicant's defence, that the only evidence the defence wished to call was that of Mr Mase. Accordingly, in our view, the only complaint that can lie of an alleged refusal to afford the defence such facilities (and we accept that this means "reasonable facilities" under section 77(2) (e) of the Constitution) is as respects Mr Mase. We mention that we also sought to be enlightened as to which of the paragraphs of section 77 of the Constitution were thereby alleged to have been infringed, and Mr Mwirichia referred to his list of authorities (filed on to the day preceding the hearing) which mentioned both paragraphs (c) and (e) of subsection (2) of that section. This was a rather curious manner of bringing a statutory provision to the notice of a court of law, but, at all events, we were prepared to permit Mr Mwirichia to develop his arguments under both paragraphs. In the event, on the second day of the hearing before us, Mr Mwirichia abandoned the position he had previously taken up under paragraph (c) . We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

While we are dealing with matters of this kind we also draw attention to the way in which the proceedings are instituted. They are numbered "Miscellaneous Criminal Application No 4 of 1979". This was because the firm of advocates acting for the applicant drafted the papers in this way. We observe that both *East African Community v The Republic* [1970] EA 457 and *Okunda v The Republic* [1970] EA 453 (to both of which authorities we were referred in argument) were filed specifically as constitutional references. Though we do not wish to make an issue of this at this stage, we are nevertheless satisfied that that is the correct form of heading. We are also satisfied that the rest of the heading "In the matter of the Constitution of Kenya" and so on, is appropriate to a reference of this nature.

What Mr Muttu argued in support of his submission was that the application was incompetent for one of two reasons, that it was too late for the applicant now to seek redress because she could and should have sought it whilst on trial in the subordinate court; and that, having appealed or sought to appeal to this Court against her convictions and sentences, she should not be allowed to come here again for what is in effect the same purpose. She was attempting, under the guise of a Constitutional reference, to get us to resolve grounds of appeal which this Court had said it would not entertain. For his part, Mr Mwirichia urged us to hold that the fact that the applicant had not sought a reference to this Court whilst on trial was of no consequence; and that, though she had taken other proceedings in this Court, she had

been frustrated in her purpose and had had no alternative but to apply to us, for otherwise the decision of the trial magistrate (which he said was unjust) would have to stand. We should invoke the spirit of the Constitution in the applicant's favour to protect a fundamental right which the Constitution had given, and the magistrate had taken, from her.

We will deal with the last point first. The Constitution is a liberal document and we are concerned with that part of it appearing in a chapter which is headed "Protection of Fundamental Rights and Freedoms of the Individual", but we apprehend it to be required of us to proceed on the lines set out in a *dictum* of Das J in *Keshava Menon v State of Bombay* [1951] SCR 228 which this Court adopted in *The Republic v El Mann* [1969] EA 357, 360, and which reads:

An argument founded on what is claimed to be the spirit of the Constitution is always attractive for it has a powerful appeal to sentiment and emotion: but a Court of law has to gather the spirit of the Constitution from the language of the Constitution. What one may believe or think to be the spirit of the Constitution cannot prevail if the language of the Constitution does not support that view.

What then are the facts, the law and the arguments upon which we must resolve the preliminary objection set before us" The facts are these. The applicant, whilst on trial, was denied an adjournment to enable her to call a witness, did not thereupon ask for a reference to this Court as to whether or not such denial was constitutional and allowed the trial to go on and to be completed. Then having been convicted and sentenced, she drew up a petition of appeal (which, *inter alia*, contained the points which she would now wish us to resolve) and being out of time to lodge it in this Court as of right, applied for leave to appeal, which Cockar J refused. The law is to be found in Chapter V of the Constitution and comprises sections 70 to 86, and particularly section 77(2)(e) which reads:

Every person who is charged with a criminal offence ... (e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the Court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the Court of the same conditions as those applying to witnesses called by the prosecution ...

and section 84 (1) to (4) which provides:

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

(2) The High Court shall have original jurisdiction (a) to hear and determine any application made by any person in pursuance of subsection (1) (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3), and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of section 70 to 83 (inclusive) [of this Constitution].

(3) If in any proceedings in any subordinate -court any question arises as to the contravention of any of the provisions of sections 70 to 83 (inclusive) [of this Constitution], the person presiding in that Court may and shall if any party to the proceedings so requested, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous and vexatious.

(4) Where any question is referred to the High Court in pursuance of subsection (3), the High Court shall

give its decision upon the question and the Court in which the question arose shall dispose of the case in accordance with that decision.

The arguments were these. Mr Muttu asked us to hold that because section 84(3) specifically deals with proceedings in subordinate courts, section 84(1) has no application where a question as to the contravention of a fundamental right or freedom of the individual has arisen in such a Court, and that in any event the applicant having applied for redress in other proceedings cannot now apply under section 84(1) for the same redress, even if (contrary to what he had primarily urged) subsections (1) and (3) of section 84 are not mutually exclusive. To support his argument he drew our attention to Durga Das Basu's *Commentary on the Constitution of India* (5th Edn) Vol 1, where, on page 193 under the subhead "(X) The question must be raised at the proper stage", the author says:

(A) USA. In the United States, it has been established that Constitutional questions must be raised "reasonably", that is at the earliest practicable moment. As a result of this rule "A constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it".

The application was not "reasonably" raised, he said. He also referred us to the wording of section 84(2) which, he claimed, drew the distinction he was making for him because its paragraph (a) refers to applications made under section 84(1) and its paragraph (b) refers to the determination of questions arising from references made under section 84(3). He asked us to adopt a passage from *Craies on Statute Law* (6th Edn) which is reproduced in *The Republic v El Mann* [1969] EA 357, 359, and which reads:

The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. "The tribunal that has to construe an Act of a Legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to enquire what is the subject-matter with respect to which they are used and the object in view.

and we are content to do so. Mr Mwirichia urged upon us that section 84(1) applies, as it says, to "any person" and speaks of "any of the provisions of sections 70 to 83 (inclusive)", pointing to section 77 being possible of contravention only in a Court. He asked us to hold that section 84(3) is what he called "permissive", meaning that an accused may, in a subordinate court, ask for a reference, but may resolve not to do so without forfeiting his rights under section 84(1) because he would yet be "any person" within it. He told us, "You cannot expect section 84(3) to be utilised every time there is a refusal of an adjournment". He contended that the other steps which the applicant had taken did not prevent her from making (and succeeding in) her instant application because section 84(1) was always there to be utilised. When, however, we drew attention to the words which appear in the subsection in brackets and asked him whether he was saying that an unsuccessful application (say for *habeas corpus*) could be followed by an application for the same relief under section 84(1), he said that it was not possible. But he drew a distinction between such a situation and that now before the Court because "There is no prior decision on this issue".

We are in general agreement with the arguments which Mr Mwirichia advanced as to the relationship of subsections (1) and (3) of section 84; we do not believe that the two subsections are mutually exclusive. Section 84(1) refers, without qualification, to sections 70 to 83 (inclusive) and section 77 is one of those sections. Nor can we convince ourselves, and here we have in mind the principle to which we were referred, that in a document enshrining the rights and freedoms of the individual it was seen fit to limit to a single moment that time when redress must and can only be sought for the contravention of such

rights. We are well aware of the maxim", *ignorantia juris neminem excusat*; but the Legislature of this country could surely not have ignored the fact that the great majority of persons accused of criminal offences before the Courts are not represented by counsel. Moreover, though it would be unwise for us, without argument, to essay an analysis of section 84(3) we think it right nonetheless to say that it appears to us to contain nothing to suggest that which Mr Muttu would have us hold, and it does not say that the contraventions for which it caters must have occurred in a subordinate court, only that they must have arisen in proceedings before such Court, which may not necessarily be the same thing.

We must now consider the expression "without prejudice to any other action with respect to the same matter" in section 84(1); and we shall deal first with the words "without prejudice to" and then go on to consider those which follow them. It is clear that a person may utilise the section 84(1) to enable him to secure redress if no other action has ever been available to him; but what if such other action is or had been ,available" Mr Mwirichia would interpret "without prejudice to," in its context as meaning "apart from"; but we prefer "without derogating from," the Latin "*prae*" meaning (for our purpose) before in point of time and "*judicium*" meaning judgment, which leads us to the conclusion that you can apply under section 84(1) before, but not after, you have taken other action, and it is to be observed that section 84(1) says "any other action ... which is lawfully available", it does not say "which was lawfully available".

Accordingly, we read section 84(1) as providing the individual with a means of obtaining redress only if he has never had or has not already utilised such other action as was lawfully available to him. The applicant cannot, therefore, now be heard on this application if the steps she has taken amount to such other action. But to what does "action" refer" Unfortunately, neither counsel dealt with this point. Section 86(1) of the Constitution (which is the definition provision covering section 84) does not interpret the word, whilst section 3 of the Interpretation and General Provisions Act defines it (save where there is something in the subject or context inconsistent with such construction or interpretation, and except where it is expressly otherwise provided) as "any civil proceedings in a Court and includes any suit as defined in section 2 of the Civil Procedure Act". On the other hand, the dictionary meanings (so far as they can apply to the matter under discussion) are "a lawsuit" or "proceedings in a Court".

There can be no doubt that for certain alleged contraventions civil proceedings would be an appropriate way of seeking redress, but what of contraventions offending section 77(2) which concerns itself only with criminal offences" Presumably prerogative writs might go, but in *Re Keshavlal Punja Parbat Shah* (1955)22 EACA 381 it was held that this Court had jurisdiction to entertain proceedings for prerogative writs on the criminal or the civil side of its jurisdiction according to the nature of the proceeding and we take the view that in its context "action" in section 84(1) cannot properly be limited only to civil proceedings. Were this not so, it would enable applications to be made thereunder whenever an alleged contravention set before a Court in a criminal cause had been turned down, but not otherwise; unless, that is, subsections (1) and (3) of section 84 are (contrary to our view) mutually exclusive. Utilising the dictionary meaning seems to us to be the correct approach and we believe that in its context the word "action" means proceedings in a Court. And there were such proceedings in this case, ie those before Cockar J although they were prematurely determined. In those proceedings there were grounds of appeal with respect to the same matters which Mr Mwirichia wishes us now to consider. Nor are we attracted by the argument that whatever may have been done in the past, no other remedy is now available; *interest reipublicae ut sit finis litium* commends itself to us and, as Mr Mwirichia conceded, a Court ought not to be asked to adjudicate more than once on the same issues. We do not think it right to go behind the order which this Court made. Cockar J has in fact said to the applicant "You are too late to raise these questions" and we do not think that we should now add "but not in respect of one or two of them". The preliminary point taken before us thus succeeds, but having heard Mr Mwirichia on the merits we shall now discuss them.

Trevelyan J then described the details of the events before the magistrate on 19th,, 20th and 21st September 1978 and concluded: The Defence left the matter until the submission of no case had been rejected on 19th September, before applying for the witness summons. We are not impressed by Mr Mwirichia's contention that he was taken by surprise because the prosecution called only twenty-three witnesses, instead of the anticipated thirty-two, and thus concluded their case earlier than expected. It may well be that Mr Mase was on vacation in August, and that the accountants' head offices were in Nairobi. Nonetheless there remained nearly three weeks within which to secure his attendance. They could have applied for a summons well before 19th September. In our view the defence was not entitled to take it for granted that the magistrate would accede to its submissions of no case, or await its rejection, before applying for the summons. Even were this not so, the summons was issued on 19th September, and it was by no means impossible for it to be served on Mr Mase, 90 miles away though he was, and for him to have attended on 21st September.

Mr Mwirichia at this juncture referred us to *Muyimba v Uganda* [1969] EA 433, in which Russell J is recorded as having said that it was unreasonable to expect a professional man to drop everything and hasten 80 miles by road to the Court. But that was said in relation to an advocate defending an accused person, and moreover the trial magistrate was under a misapprehension as to the advocate's knowledge of the hearing date, a fact which appears to have been induced by his clerk. In a similar case, that of *Dixon Gokpa v Inspector-General of Police* [1961] 1 All NLR 423 it was said that there had been a denial of a fair trial.

At all events in the instant case, we are satisfied that the defence were well aware of the nature of the evidence they needed, and by whom it would be given, at latest by 16th August, and very probably well before that. Given the circumstances we have set out we are quite unable to say that the magistrate's discretion exercised under section 211 (2) of the Criminal Procedure Code, was unjudicially or in any way improperly, exercised. This does not necessarily mean that had either of us been trying the case we would have exercised the discretion in the same manner; although we might very well have done so. It follows that, in our view, the claim that the defence was not afforded reasonable facilities to procure the attendance of the witness Mr Mase fails, since we have not been persuaded that the magistrate's discretion, which was undoubtedly exercised, was exercised un-judicially or improperly.

Application dismissed.

Dated and delivered at Nairobi this 29th day of January 1979

E. TREVELYAN

JUDGE

A.R.W HANCOX

JUDGE

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CONSTITUTION PETITION NO. 2 OF 2019

DAVID GATHU THUO.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

JUDGEMENT

This Petition is brought under Articles 19(1), 3a), c)20(1) for alleged violation of the National Values and Principles of Governance enshrined in Article 31(1), 232 and 244(c) of the Constitution of Kenya whereas the petitioner alleges infringement and violation of his rights and fundamental freedoms as provided for in Articles 27(1) and 2, 29(d) and (f). It is also alleged that the petitioner's rights as provided in Article 47 and Articles 165(b), 20(3) and 23(1) of the Constitution were violated.

1. The Petition dated 1st April 2019 was supported by the affidavit of one DAVID GATHU THUO and seeks the following reliefs:-

a) A declaration that the impugned acts and omissions of the 2nd and 3rd Respondents' agent violated the Constitution of Kenya, 2010;

b) A declaration that the plaintiff is entitled to the payment of damages and compensation for violations and contraventions of his fundamental rights and freedoms under the aforesaid provisions of the Constitution;

c) General and exemplary damages on an aggregated scale under Article 23(1) of the Constitution of Kenya for the unconstitutional conduct by the respondent's agents;

d) That the Respondents bears the costs of this Petition with interest.

2. The Respondents came on record by filing a Notice of Appointment dated 24th May, 2019 and then filed grounds of opposition in response to the Petition, dated 24th May, 2019.

3. The parties agreed that the Petition be disposed off by way of written submissions which both parties exchanged and filed accordingly

The Petitioner's Case

4. The Petitioner deposes that between September 1981 and April 2002, he was serving as a police officer stationed at Endarasha

Police Post and had earlier worked in other stations. Alongside other police officers, he was arraigned in Nyeri High Court in Criminal Case No. 1 of 2007 whereas he was charged with the offence of murder of the deceased Paul Kimani Wambiru. That he was not given the chance to explain himself in breach of Article 48 and 50(1) of the constitution.

5. That in breach of Article 27(1) of the Constitution, the petitioner was discriminated against for the charges were not supported by cogent evidence for he was subsequently acquitted by the court having spent three (3) years in prison custody which was in breach of Article 29(a) of the Constitution.

6. That during the pendency of the trial, the petitioner suffered financial hardship, psychological torture which continued even after acquittal in that he was not reinstated to his job which was his livelihood.

The Respondents case

7. The respondents in their grounds of opposition dated 24/05/2019 stated that the petition lacks merit and does not meet the threshold of a Constitutional petition, neither does it demonstrate how any of the alleged violations were done, and that the petitioner's claim lies in the tort of malicious prosecution which is time barred prompting the petitioner to circumvent this by filing a constitutional petition.

The Petitioner's Submissions

8. The Petitioner urged the court to consider the facts of the petition and the contents of the supporting affidavit and to further make a reference to the chronological events as brought forth in the petition.

9. The Petitioner lamented that at the time he filed his submissions on 05/08/20, the respondent had not filed a replying affidavit or filed their submissions and as such the petition remained uncontroverted.

The Respondents' Submissions

10. The respondents submitted that this petition did not meet the threshold of a constitutional petition and is indeed a claim of malicious arrest and prosecution whose time for filing had long expired. It was further stated that this petition may be regarded as an employment dispute disguised as a Constitutional Petition.

11. The respondents cited the case of **Gabriel Mutave & 2 others Vs Managing Director, Kenya Ports Authority [2016] eKLR** where the court held that the Constitution is not a general substitute for normal procedures for invoking redress under substantive law and that the proper cause is to bring the claim under that law but not under the Constitution.

12. The respondents relied on the case of **Anarita Karimi** and that of **Mumo Matemu Vs. Trusted Society of Human Rights Alliance & 5 others [2013]eKLR** in arguing that the petition does not set out with reasonable precision the rights that were violated and in what manner thus falling short of the threshold set out in these cases.

13. That the respondents acted honestly and reasonably within its statutory mandate in preferring charges against the petitioner following a justifiable complaint of a criminal nature. It was further argued that the mere fact that an accused has been acquitted of a criminal charge does not necessarily connot malice on part of the prosecutor. On this argument, the respondent relied on the case of **James Karuga Kiiru Vs. Joseph Mwamburi and 3 others Nairobi Civil appeal No. 171 of 2000** and urged the court to dismiss the Petition being an abuse of the court process.

The Issues for Determination

14. The following issues are identified for determination:-

a) Whether the new Constitutional provisions cited are applicable in this Petition;.

b) Whether the petition meets the threshold of a Constitutional Petition;

c) If the answer for (a) is in the affirmative, the court ought to decide whether the Petitioner is entitled to a remedy.

d) Who between the parties should meet the costs of the petition.

15. This court is empowered by Article 165 to hear and determine Constitutional Petitions which article provides:-

Subject to clause 5, the High Court shall have :-

(a) Unlimited original jurisdiction in criminal and civil matters.

(b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of rights has been denied, violated, infringed or threatened.

Article 165 therefore empowers this court to hear and determine this petition.

The Law

16. The Petitioner alleges violation of a host of constitutional rights falling under several articles of the Constitution of Kenya 2010 as follows:-

i. Article 27(1);

Every person is equal before the law and has the right to equal protection and equal benefit of the law.

ii. Article 29.

Every person has the right to freedom and security of the person, which the right not to be—

(a) deprived of freedom arbitrarily or without just cause;

iii. Article 48 provides that;-

The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

iv. Article 50(1) provides that;-

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

17. I have perused the proceedings in Criminal Case No. 1 of 2003 wherein the petitioner and four(4) others were jointly charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. Okwengu J (as she then was) delivered her ruling on 25th May 2005 aquitted all the accused persons of the charge under Section 210 of the Criminal Procedure Code. Under the law of torts, the petitioner would have filed a case for damages against the respondents soon after the acquittal and pursued his right of compensation.

Whether the Provisions of the Constitution 2010 is applicable herein.

18. The petitioner was charged and convicted during the period of the repealed Kenyan constitution in 2003 and his case was concluded in 2005. The 2010 constitution which contains the Bill of Rights with a host of individual rights and freedoms was enacted several years later. Article 50 which confers upon an accused person the right of fair trial is a part of the new Constitution.

19. The repealed Constitution provided for compensation in civil suits where one's rights were proved to have been violated or infringed.

20. The petitioner herein had a right to claim compensation in a civil court on the tort of malicious prosecution after he was acquitted in 2005. He filed this petition in 2019 which was about fourteen(14) years after his acquittal rendering the tort claim time barred.

21. It was held in the High Court case of **Bernard Murage Vs.Fineserve Africa Ltd & 3 others [2015]eKLR that;-**

"Where there exists an alternative remedy through statutory law, then it is desirable that such statutory remedy be pursued first"

22. The petitioner failed to claim his right and it is tantamount to an abuse of the due process of the court to bring forth a Constitutional Petition fourteen years after acquittal. By using the provisions of the new Constitution that provide for rights that did not exist in the repealed constitution, the petitioner is in a legal gamble to seek a remedy a bit late in the day.

23. It is trite law that the law will not apply retrospectively and I am of the considered view that the petitioner cannot claim that rights which did not exist at the time of his acquittal were violated

Whether the Petitioner's petition was pleaded with reasonable precision as per the required standard in Constitutional Petitions;

24. It is now a well-developed principle that in constitutional litigation, a party that alleges violation of his or her rights must plead with reasonable precision in regard to the manner in which there has been such alleged violation. This proposition was enunciated in the case of **Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272** where the court stated:-

"Constitutional violations must be pleaded with a reasonable degree of precision.

25. The Articles of the Constitution which entitles rights to the Petitioner must be precisely enumerated and the claim pleaded to demonstrate such violation with the violations being particularized in a precise manner. Furthermore, the manner in which the alleged violations were committed and to what extent must be shown by way of evidence based on the pleadings.

26. The Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** provided the standard of proof in Constitutional Petitions.

The Court of Appeal judges stated;-

*"...The principle in **Anarita Karimi Njeru (supra)** that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of **Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639** holds true today:*

"The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."

The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19,20 and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in

paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars.

We wish to reaffirm the principle holding on this question in ***Anarita Karimi Njeru (Supra).*** *In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting," without requiring remedy by the 1st respondent..."*

27. Lenaola J. while referring to the **Anarita Karimi** and **Mumo Matemu** Cases in **Dr. Rev. Timothy Njoya vs The Hon. Attorney General and Kenya Review Authority HC Constitutional and Human Rights Division Petition No. 479 of 2013** stated:-

"The Petitioner cannot come to court to seek facts and information he intends to use to prove the very case that he is arguing before the court. He must also plead his case with some degree of precision and set out the manner in which the Constitution has been violated by whom and even state the Article of the Constitution that has been violated and the manner in which it has been violated."

28. I find the Dr. Timothy Njoya case (Supra) by Lenaola J. persuasive while that of **Mumo Matemu (Supra)** being a Court of Appeal decision is binding on this court.

29. Looking at the Petitioner's pleadings, the evidence as well as the submissions of the parties, it is my conserved view that the Petitioner has not met the requirements of a Constitution Petition. Although the Petitioner has pleaded provisions of the Constitution, he has not demonstrated to the required standard how his individual rights and fundamental freedoms were violated, infringed or threatened by the respondents. He has not adduced any evidence to demonstrate the alleged violations.

30. Even assuming that this petition was competent, it would not pass the test of the burden of proof. It is trite law that he who alleges must prove his claim. The claim must be propounded on an evidentiary foundation. In saying so, I rely on the case **Leonard Otieno Vs. Airtel Kenya Limited [2018]** where Mativo J. held that:-

"It is fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the proposition he asserts to prove his claim. Decisions on violation of Constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the constitution an inevitable result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses."

31. The petitioner was charged alongside four(4) other people. He has not pleaded the manner in which he was discriminated under Article 27(1). Neither has he adduced any evidence to support the alleged violation of the right. Similarly, the petitioner has not explained how he was denied a fair hearing under Article 50(1). Article 48 is about access to justice and the petitioner has failed to plead or show how this right was violated by the respondents.

32. I reach a conclusion that this petition has not been pleaded with a reasonable degree of precision and that the alleged violations have not been proved.

Whether the Petitioner is entitled to compensation;

33. Consequently, I am of the considered view that the Petitioner has not met the threshold of a Constitutional Petition and therefore the issue of award of damages does not arise herein.

Costs of the Petition

34. It is trite law that costs follow the event. The petitioner having presented a petition that offends the set down Constitutional principles, ought to meet the costs of the said petition.

35. It is my finding that this petition lacks merit and it is hereby dismissed with costs.

36. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 25TH DAY OF FEBRUARY, 2021.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 25th day of February 2021.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 1609 OF 2003 (OS)

B ..... APPLICANT

VERSUS

ATTORNEY GENERAL ..... RESPONDENT

RULING

The dispute which is the subject of the present application is an old one, going back to the 1998/99 period. But the issues falling for the decision of the Court have a more recent background. Ms MB filed an Originating Summons which was drawn on the same day of filing, on 19th December, 2003. While using this application to originate her case, she also, at the same time, sought interim relief by way of an interlocutory Chamber Summons.

The prayers in the Originating Summons application were as follows:

(i)that the matter be heard *ex-parte* in the first instance;

(ii) that an injunction do issue restraining the defendant by himself, his servants or otherwise howsoever from executing the content of a deportation order issued by the Minister of State in the Office of the President on or about the 11th of September, 2001 for the deportation of SPL;

(iii) that a declaration do issue that the deportation order issued by the Minister of State in the Office of the President on or about the 11th September, 2001 during the subsistence of a wardship order in respect of SPL granted by the High Court on 12th August, 1998 was illegal and is a threat to the rights of the child to the protection of the law and was an act in violation of the best interest of the child.

Against the background of the Originating Summons, the applicant promptly filed a Chamber Summons application, by virtue of order XXXIX rules 1,2,3,5, of the Civil Procedure Rules, sections 4(3) and 18 of the Children Act (No 8 of 2001), rules 3(a), 3(2) and Part 1 of the High Court Practice and Procedure Rules, and section 3A of the Civil Procedure Act. She prayed for Orders as follows:-

(i) that this application be certified urgent and service thereof be dispensed with in the first instance;

(ii) that leave be granted for this application to be heard during the court vacation;

(iii) that a temporary injunction do issue restraining the respondent by himself, his agents, servants or otherwise whosoever from executing the content of the deportation order issued by the Minister of State in the Office of the President on or about the 11th September, 2001 for the deportation of SPL pending the hearing and determination of the substantive application;

(iv) that the costs of this application be provided for.

A summary of the grounds for the Chamber Summons application was given as follows:

(a) due to a technicality, a judicial review application in Misc Application No 1080 of 2001, challenging the said acts of the Minister, was struck out, thus leaving the child, SPL, without any legal protection against orders made by the Minister in the Office of the President;

(b) the respondent's deportation order issued on or about 11th September, 2001 is unlawful and contravenes the tenets of natural justice;

(c) there is a real and imminent danger that the respondent, unless restrained by the court, will proceed to execute the said deportation order in violation of the law, of the order of the Court made on 12th August, 1998 which made SPL and his siblings wards of the Court, and of the rights of the said children to the protection of the law;

(d) it is in the interest of justice that the defendant be restrained from executing the said deportation order pending the hearing and determination of the suit.

The Chamber Summons application was further supported by the affidavit of the applicant. The critical details of this affidavit may be set out as follows:-

(i) the applicant is the mother of three children – CSL; JPL and SPL;

(ii) on 12th August, 1998 Mr Justice Oguk made an order in High Court Miscellaneous Suit No 910 of 1998 (OS) that CSL; JPL and SPL were placed under the protection of the Court;

(iii) the said order made on 12th August, 1998 was subsequently confirmed by the Court of Appeal, in Civil Appeal No 97 of 1999;

(iv) on 11th September, 2001 CSL was taken from Tigini Girls School by immigration officials accompanied by police officers, pursuant to a deportation order issued by the Minister of State in the Office of the President;

(v) on 11th September, 2001 JPL was taken from Greensteds School by immigration officials accompanied by police officers pursuant to a deportation order issued by the Minister of State in the Office of the President;

(vi) on 11th September, 2001 SPL was being taken from Peponi House Preparatory School by immigration officials accompanied by police officers, pursuant to a deportation order issued by the Minister of State in the Office of the President; but the applicant took custody of the child;

(vii) the children who were thus taken by immigration officials; were subsequently ordered to record statements without legal advice and in the absence of the applicant; and subsequently, both CSL and JPL were deported and are now in Belgium;

(viii) the applicant currently has the custody of SPL;

(ix) at all materials times, the Immigration Department was well aware that there was a custody dispute in respect of the children in question, and this had taken the form of High Court Miscellaneous Suit No 910 of 1998 (OS); and they were also well aware that the three children in question were wards of the Court;

(x) the applicant has in no way contravened the provisions of the Immigration Act (cap 172) and the regulations made thereunder;

(xi) the said three children were at all material times in possession of valid dependants' passes issued under Part IV of the Immigration Rules made pursuant to section 17 of the Immigration Act (cap 172);

(xii) the said deportation order issued by the Minister of State in the Office of the President was issued without any notice or service to the applicant as the mother and custodian of the said children;

(xiii) the deponent believes that the Minister of State in the Office of the President had no right to cause the removal of the said children from her custody without the leave of the High Court;

(xiv) the judicial review application in Miscellaneous Application No 1080 of 2001 challenging the acts of the Minister of State in the Office of the President, was struck out on a technicality on 19th December, 2003 leaving the child, SPL, without any legal protection whatsoever from such orders as might issue from the Minister of State in the Office of the President;

(xv) the deponent apprehends that the Government may at any time take steps to deport her child, SPL, from Kenya;

(xvi) the deponent believes that the actions of the Government in deporting her children, and in threatening to deport the one child still remaining, are in contravention of sections 4 and 18 of the Children Act, 2001;

(xvii) the deponent believes it would be in the best interests of the child, SPL, that the Government of the Republic of Kenya be restrained from removing or in any way assisting any person to remove the child from the Court's jurisdiction.

This application first came before me *ex parte*, within the framework of the Court's Vacation Rules, on 22nd December, 2003. Mr Majanja for the applicant made a formal presentation of the Chamber Summons application with its supporting affidavit. Counsel submitted that the threat to deport SPL was real, as his siblings who like him had been wards of court, had already been deported without any hearing accorded to the applicant as mother and custodian of the children. Mr Majanja submitted that if the child were deported, this would be a violation of the child's rights to liberty, as well as an infringement of court orders already made. Counsel invoked sections 4 and 18 of the Children Act (No 8 of 2001) which guarantee the liberty of children, and place a duty on the Courts of law to act in the best interests of the child.

After hearing the application, which, I believe, was genuinely an urgent one and was properly heard *ex parte*, I made a ruling as follows:

"Upon reading the Chamber Summons application dated 19th December, 2003 and filed on the same date;

"Upon reading the grounds given to support the Chamber Summons application;

"Upon reading the supporting affidavit sworn by MB;

"Upon hearing the submissions of counsel for the Applicant *ex parte;*

It is ordered -

1. That this application be and is hereby certified urgent.

2. That this matter be and is hereby heard during the court vacation.

3. That a temporary injunction do issue and is hereby issued restraining the respondent by himself, his agents, servants or otherwise howsoever from executing the content of the deportation order issued by the Minister of State in the Office of the President on or about the 11th of September, 2001 for the deportation of SPL pending the hearing and determination of the substantive application.

4. That the costs of this application be and are in the cause.

5. That this matter be and is listed for *inter partes* hearing on Wednesday, 14th January, 2004.

6. That the applicant do serve papers on all parties within the next eight days."

On the 14th of January, 2004 the hearing of the application *inter partes* did not proceed, even though counsel for both parties were present, Mr Majanja for the applicant and Mrs Kajwang for the respondent. Mrs Kajwang, representing the Attorney-General, requested more time to file a replying affidavit. Mr Majanja requested a date for the hearing, given the urgency which had attended the application from the beginning. I made the following order:

"Upon hearing counsel's submissions, and in particular taking into account the urgency of this matter, it is ordered that the parties do appear before the duty judge on 2nd February, 2004 for the purpose of securing a hearing date. Interim Orders shall remain in force until the hearing date."

On 2nd February, 2004 the matter moved from the duty judge to the Honourable Lady Justice Mugo who heard the parties and gave further directions leading to the hearing which is the basis of today's ruling.

What came before the Honourable Lady Justice Mugo was another Chamber Summons application, dated 16th January, 2004 and filed on the same day under Certificate of Urgency. The wording of the Certificate of Urgency, signed by Ms Muthoni Kimani, Chief Litigation counsel on behalf of the Attorney-General, is as follows:

"I, Muthoni Kimani, Chief Litigation Counsel in the Attorney-General's Chambers, do certify that this application is extremely urgent as the *ex parte* injunction order granted on 19th December, 2003 was extended on 14th January, 2004 to 2nd February, 2004 and unless the application is heard and disposed of urgently, it is likely to affect the cordial relationship between the Kenya Government and the Kingdom of Belgium."

The Attorney-General's application was made under order XXXIX rules 4 and 5 of the Civil Procedure Rules, section 3A of the Civil Procedure Act (cap 21) and the Children Act (Act No 8 of 2001).

The Attorney- General sought orders as follows:

(i) that this application be certified as urgent and be heard *ex parte* in the first instance;

(ii) that the *ex parte* injunction granted to the applicant restraining the respondent and/or his agents from executing the deportation order issued by the Minister of State on the 11th of September, 2001 for the deportation of SPL be discharged and/or set aside.

Quite clearly, the Honourable Lady Justice Mugo was concerned about the inexplicably rushed manner in which the Attorney-General's application was being place before her. The learned judge thus remarked:

"The application was heard *ex parte* before me on the same date [of filing, namely 16th January, 2004], the file having been brought to me at 5.00 pm from the duty judge's chambers. The application was not on the cause list for the day but was under Certificate of Urgency. I am unable to understand how the file was brought before me at that late hour when the date given for it was the 2nd of February, 2004 as noted thereon."

The following passage in the ruling of the learned judge is relevant:

"The above notwithstanding the application dated 16th January was argued *ex parte* before me in the belief that the same was urgent and in the interest of public duty. It was only after the Chief Litigation Counsel, Miss Kimani concluded her submissions and the Court apprised itself on the previous recordings on file that it became clear that the degree of urgency was not as pressing as to warrant orders being made there and then. Miss Kimani and Miss Kajwang expressly agreed that the ruling of the Court could await today's date [2nd February, 2004]. On further perusal of the file I noted that the issues before the Court have been addressed previously at different levels of the Judiciary and certain orders made."

The Honourable Lady Justice Mugo observed that, at the first occasion for an *inter partes* hearing of the Chamber Summons application of 19th December, 2003 an adjournment had been sought, with leave to file a replying affidavit, by Ms Kajwang appearing for the Attorney-General; and adjournment was allowed, with leave to file a replying affidavit also granted. Was this opportunity to file a replying affidavit properly used" The Honourable Lady Justice Mugo remarked on this point as follows:

"Instead of filing a replying affidavit as undertaken by the Attorney-General, the present application dated 16th January, 2004 was brought in the circumstances already stated."

The impressions, with respect, rightly gained by the learned judge on the occasion of hearing the Attorney-General's application of 16th January, 2004 led to the ruling which she delivered on 2nd February, 2004. The learned judge ruled, correctly with respect, as follows:

"Being guided by the judgement of the Court of Appeal in Civil Appeal No 97 of 1999, I find myself without the power or jurisdiction to vacate or even entertain a review of the orders made... on [19th December, 2003]. The parties have not exhausted the opportunities given to them for an *inter-partes* hearing, the process of which has been agreed between the applicant and the respondent herein. Much as the issues herein may be causing irritation with their sensitive and pressing nature, the rule of law is universal and demands that parties to a dispute be given an equal right to be heard, in order that justice may be done and be seen to have been done."

The learned judge declined to make any orders as requested by the applicant at this stage. She stated, quite correctly, with respect:

"Parties having previously agreed that the issues before them be settled by way of *inter partes* hearing, the best way forward is to have this matter mentioned before the duty judge as previously ordered and for an urgent hearing date to be taken."

The learned judge set the stage for the hearing which is the subject of the ruling today. In accordance with her orders, both parties were represented before the duty judge on 6th February, 2004. The duty judge ordered as follows: "Applications dated 19th December, 2003 and 16th January, 2004 for hearing on 12th February, 2004 at 9.00 am as it is a lengthy and protracted application."

At the hearing which took place before me on 12th February, 2004 Ms Muthoni Kimani for the Attorney-General opened her submissions by speaking to both Ms MB's Chamber Summons application of 19th December, 2003 and her own application of 16th January, 2004. She submitted that as the Chamber Summons application of 16th January, 2004 was really a response to Ms MB's of 19th December, 2003 the two could be heard together in a consolidated hearing guided by just two sets of submissions. Mr Majanja objected to the suggestion that the Attorney- General's Chamber Summons application of 16th January, 2004 be accommodated; he stated that he was seeing this application for the first time right in court, and besides, this application carried an affidavit which was new and to which Ms MB (who I will throughout refer to as the applicant) would need to respond. To this clearly valid objection, counsel for the Attorney-General did not have an answer; she, however, graciously conceded that there was no need to proceed with the Chamber Summons application of 16th January, 2004. The effect, of course, was that counsel for the Attorney-General would also have to dispense with the supporting affidavit attached to the Chamber Summons application of 16th January, 2004. She expressed the willingness to withdraw that application, and Mr Majanja for the applicant was able to accommodate this position. I made a formal order withdrawing the respondent's Chamber Summons application of 16th January, 2004; and it was now well understood that counsel for the respondent could only make submissions on points of law, since the Attorney-General had not filed any affidavit even after being given leave to do so on 14th January, 2004.

Before Ms Kimani for the respondent could begin on her preliminary objections, Mr Ongicho addressed the Court regarding his status as counsel holding a watching brief on behalf of the Embassy of the Kingdom of Belgium in Nairobi. He stated that the Embassy's interest in this matter arises from the fact that the child in question, SPL, is a national of the Kingdom of Belgium. This assertion of fact was not, however, the subject of any deposition and is not, indeed, of any particular relevance in the application which is the subject of this ruling. Mr Majanja for the applicant submitted that Mr Ongicho should be accorded no audience in court, as he had not applied to be joined in the suit. The Chief Litigation counsel, by contrast, submitted that since Mr Ongicho had been present in court constantly during motions related to the applicant's claim, the applicant would suffer no prejudice on account of Mr Ongicho's presence. I had to make a ruling on this point, and this went as follows:

"From the submissions of counsel, it seems to me that the presence of Mr Ongicho in Court will cause no prejudice to the Court or to the parties.In the circumstances, I do allow him to be in attendance in Court though without a right of audience. If and when he needs to exercise this right he will make a formal application at the right time, and the Court will determine the question appropriately."

The Chief Litigation counsel had objections to the applicant's Chamber Summons application of 19th December, 2003. Although Ms Kimani stated that her grounds of objection had been duly filed on 13th January, 2004, they are not on file; and I must therefore deal with her submissions just on the strength of

their verbal presentation.

Ms Kimani objected to the applicant's application on three separate grounds. Firstly, it was argued that there was no provision of the law under which an interlocutory application could be made seeking orders of injunction against the Government. Secondly it was urged that the *ex parte* injunction granted against the respondents on 19th December, 2003 was contrary to the provisions of the Government Proceedings Act (cap 40). Thirdly it was argued that the applicant was abusing the process of the Court. Counsel then made more detailed submissions on these general points.

Counsel for the respondent had doubts whether the Children Act (Act No 8 of 2001) and in particular its sections 4 and 18 supported the applicant's case and the temporary injunction granted the applicant on 19th December, 2003. In counsel's view, the only correct procedure in the conduct of the applicant's case was through judicial review, but the judicial review application which the applicant had filed was struck out on 19th December, 2003. Ms Kimani argued that in these circumstances, the applicant had been left with one option only, namely, to appeal to the Court of Appeal to reverse the decision to strike out the judicial review application. She argued that as the applicant had filed no appeal, the present application was fatally defective. I must admit that I had some difficulty appreciating the merits of this particular argument.

Ms Kimani also considered the applicant's application fatally defective, for the reason that the applicant had filed an Originating Summons, and then sought interim relief through the Chamber Summons application. Once again, I had difficulty appreciating the merits of this argument, as counsel made the bald condemnation of the procedure followed by the applicant, without stating what was professionally or technically objectionable. My difficulty here arises from the fact that, as I understand it, an interlocutory application would normally come within the ambit of a larger motion, which itself takes the form of a plaint, but could also take the form of an Originating Summons. And in this case the applicant's Chamber Summons application of 19th December, 2004 is to be seen against the background of the Originating Summons which had been filed on the same day. It did not appear to me that counsel for the respondent, on this question was raising an issue of merit in respect of which she entertained professional conviction.

Hearing could not continue on 12th February, 2004 and it was adjourned to 18th February, 2004 when the applicant was represented by Mr Majanja and Ms Sheikh, and the Attorney-General by Ms Kimani.

Ms Kimani doubted whether the applicant's case could be argued on the basis of the Children Act (No 8 of 2001). She stated that this Act has its own procedures which are set out under Legal Notice No 74 of 20th May, 2002 as read together with section 73 of the Act. Counsel submitted that section 73 of this Act provides for the creation of the Children's Court, to resolve claims such as those raised by the applicant. She argued that under sections 4 and 8 of the Children Act, the proper forum if the applicants had any grievances at all, was the Children's Court. Ms Kimani submitted that the High Court would, in these circumstances, have no jurisdiction unless there were constitutional rights issues raised by virtue of section 84 of the Constitution. Counsel argued that all the matters set out in the applicant's Originating summons belonged in their entirety to the jurisdiction of the Children's Court.

From this line of argument, counsel for the respondent submitted that the applicant's Chamber Summons application and the entire proceedings leading to the orders of the Court made on 19th December, 2003 was an abuse of court process; and that the application had been made for the improper purpose of obtaining the injunction orders.

Again, I was unable to see the force or merit of this charge of abuse. Abuses of the process of the Court invariably speak for themselves. In this case I could only see an applicant whose child was about to be deported, seeking the only available recourse: the High Court as a court of unlimited jurisdiction, empowered to hear all litigious matters civil and criminal, and to give authoritative orders.

Counsel for the respondent further impugned the proceedings of 19th December, 2003 which led to the issue of temporary injunctions in favour of the applicant, on the basis that the applicant had not made full disclosure regarding other cases in court bearing on the gravamen of the present application: Miscellaneous Cause No 910 of 1998 (which has yet to be heard and determined); and Civil appeal No 97 of 1999.

Now this charge is not valid. The applicant indeed, in her affidavit of 19th December, 2003 did annex both the pleadings and order in High Court Miscellaneous Suit No 910 of 1998 (OS) and the ruling and order of the Court of Appeal in Civil Appeal No 97 of 1999. The order in High Court Miscellaneous Suit No 910 of 1998 (OS), indeed, makes all the three children of the applicant wards of this High Court. From this fact alone the applicant would have a clear entitlement under the law to move this Court whenever the said wardship status is endangered; and this can only confirm that the applicant did have a right of access to this Court by her application of 19th December, 2003.

Miss Kimani did submit as follows: "There can be no clearer case of abuse of court process than where an *ex parte* injunction has been in force for five years." She did not, however, make any submissions on the legal limits of the longevity of an *ex parte* injunction. Due to the nature of an *ex parte* injunction, having been obtained by one party in the absence of the other, the party in whose absence the order was made always has a right to organise himself professionally and to mount a challenge in court, to enable the Court to consider whether or not to set aside the injunction. It is not clear at all that the Attorney-General has ever taken such formal, professional steps to have the *ex parte* injunction in question set aside. This can only mean that the Attorney-General has no complaint against that injunction, or no professional preparedness to challenge that *ex parte* injunction. Now, so long as an injunction remains undischarged, it is irrelevant whether it was obtained *ex parte* or *inter partes*, because all that matters is that it remains the binding order of the Court.

The questions of law pertaining to the impugned *ex parte* injunction had indeed been considered by the Court of Appeal, in *OPL v MB,* Civil Appeal No 97 of 1999. The learned judges of the Court of Appeal held:

"After a thorough consideration of both counsel's submissions, we are satisfied that we have no ground upon which to interfere with the learned judge's decision. The orders restraining the removal of the three infants out of the jurisdiction of the Court and making them wards of the Court shall remain undisturbed."

It is clearly improper, in respect of those very orders which have been upheld by the Court of Appeal, to ascribe to the applicant in the present application a charge of abuse of court process. The submission made in this regard by counsel for the respondent, is thus unsustainable.

It is against this background that counsel for the respondent had argued that the applicant was not entitled to the injunctive orders of 22nd December, 2003.Counsel had indeed gone ahead to cite as authority for her proposition the case *Uhuru Highway Development Ltd v Central Bank of Kenya and Two Others,* Civil Application No Nai 140 of 1995, in which the following passage appears in the ruling of the Honourable Mr Justice Omolo (PP 2 – 3):

"Once the learned judge was satisfied, as he was, that the applicant had obtained the order by

concealing other relevant material, he was entitled not to consider the applicant's application any further for the courts must be able to protect themselves from parties who are prepared to deceive..."

As already stated above, the circumstances of deceit contemplated in the *Uhuru Highway Development* case did not exist in the present application.

To the respondent's objection, counsel for the applicant made extensive submissions which I will now set out.

Firstly, Mr Majanja argued, in effect, that what counsel for the respondent had presented went beyond the recognised practice with regard to preliminary objections. Mr Majanja submitted, correctly, with respect, that a preliminary objection should be founded on pure points of law, and should be truly prefatory and preparatory to the issues of substance in the claim in question; such an objection may also touch on uncontested facts, on the basis of which a decision by the Court would dispose of the whole matter coming before it *in limine*. It was indeed clear that counsel for the respondent had raised neither a fateful point of law, nor of uncontested fact, which could lead to the discontinuance of the applicant's case *in limine*. The effect was that the applicant's interlocutory case now has been fully heard *inter partes*, and the orders to be given at the end of this Ruling, unless varied on appeal, will set the direction for the determination of the main action brought by the applicant.

Counsel for the applicant made his submissions in the context of two questions:

(a) whether the Chamber Summons application of 19th December, 2003 is properly founded on the Children Act (No 8 of 2001);

(b) if so, whether this Court can properly issue an injunction against the Government under that Act.

Mr Majanja submitted that both questions must be answered in the affirmative.

Counsel submitted that the object of the Children Act is, firstly, to provide for the care and protection of children; and secondly, to give effect to the body of international law relating to the rights and welfare of children. The Children Act, 2001 it was submitted, is the national legal instrument in Kenya governing the rights and welfare of children. Part II of the Act is entirely concerned with the rights and welfare of the child; and Parts II and IV place specific obligations on the Government, with regard to the protection of the rights and welfare of the child. Section 3 of the Act requires the Government to take steps to give realisation to the rights of the child, which rights are defined in section 4 of the Act. Section 4(2) specifically places responsibility on organs of Government, including the Court to endeavour at all times to uphold and protect the best interests of the child. Section 4(3) of the Act requires the Judiciary to be guided, in its decision-making, by the best interests of the child. The specific rights of the child which are protected, and in respect of which the Government and the Courts are required to play the role of instruments of implementation and protection, are set out in sections 5, 6,7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20 of the Children Act, 2001.

Counsel submitted that in respect of all the rights of the child set out in the Act, the enforcement provision is section 22. This section authorizes an application to be made to the High Court, whenever any of the child rights is threatened, irrespective of any other remedy such as may be available. Section 22(2) empowers the High Court to hear and determine any such application made before it, and to make appropriate orders for giving effect to Sections 4 –19 inclusive of the Act.

Mr Majanja submitted, quite correctly, with respect, that the High Court did have jurisdiction to

entertain any complaint turning on the rights of the child as set out in the Children Act, 2001. Counsel submitted that the role of Children's Courts is specifically defined and does not in any way qualify the broader mandate of the High Court in respect of safeguards to the rights of the child.

Against this background, counsel for the applicant submitted that this was a fit case for the grant of an injunction in favour of the applicant. He noted that the main cause, as set out in the Originating Summons of 19th December, 2003 attributed certain breaches of the welfare of the child, SPL, to Government. To the application is attached a supporting affidavit carrying facts which, if true, would entitle the applicant to relief under the Children Act, 2001. Counsel submitted that the High Court had the jurisdiction to determine the question; and the rationale of this argument is that section 22 of the Act which confers the jurisdiction is indeed *in pari materia* with section 84 of the Constitution which gives direct access to the High Court where there are perceptions of violation of the fundamental rights of the individual. Counsel submitted that it was for the applicant to elect, and she could have proceeded under the Children Act or under the Constitution of Kenya, section 84; and that the applicant did make her election in favour of the Act. Counsel submitted that the main recourse in the enforcement of the Children Act, 2001 is the High Court, and consequently its jurisdiction in respect of child rights claims cannot be questioned.

On the question whether the High Court can give an injunction in a case such as the present one, counsel submitted that the Court is empowered under section 22(2) of the Act, to hear and determine an application and to issue such writs, orders or decisions as it may deem fit. Counsel submitted that Parliament had thus reposed in the High Court the authority to make any such orders as may be appropriate, notwithstanding any other provisions of the law, and that no exception is in this regard made for such legislation as the Government Proceedings Act (cap 40) which otherwise would confer certain immunities upon the Government. In these circumstances, Mr Majanja submitted, *prima facie* an injunction can issue against the Government, to protect the rights guaranteed under the Children Act. And sections 3 and 4 of the Act have placed upon the Government the duty and responsibility to protect the rights, and promote the welfare, of the child. Counsel submitted that section 22 of the Act creates a special jurisdiction for the Court, which the Court must give full effect, a task which will entail the issuance of all appropriate orders in a proper case, orders which include injunctions to any party including officers of the Government.

Counsel for the applicant stated that the Children Act has vested certain rule-making powers in the Chief Justice, and that by virtue of this empowerment, already the Chief Justice has made certain rules:

(i) Legal Notice No 74 of 2002 (dealing with the provisions in section 29 of the Act);

(ii) Legal Notice No 75 of 2002 (dealing with the provisions in section 112 of the Act);

(iii) Legal Notice No 76 of 2002 (dealing with the provisions in section 185(1) of the Act); and

(iv) Legal Notice No 77 of 2002 (dealing with the provisions in sections 29, 112 and 185(1) of the Act).

So far, counsel submitted, none of such rules has addressed section 22(3) of the Act. However, counsel submitted, and correctly, with respect, that the non-issuance of rules in respect of section 22(3) would in no way compromise the jurisdiction of the High Court to resolve disputes relating to rights-claims under the Children Act. Hence, as counsel submitted, an applicant is entitled to approach the Court in any manner consistent with the general rules of procedure applicable in the Court. To doubt this position, counsel rightly submitted, would be to subscribe to questionable jurisprudence which holds that, in the absence of subsidiary legislation made by the Chief Justice in an administrative capacity, then all

the childrights stipulated in sections 4 – 19 of the Children Act are a nullity.

Counsel for the applicant disputed the respondent's contention that the procedure followed in filing the application was in any way questionable. He provided authorities to demonstrate that the Court is required to give effect to the words of the statute, aided in a general sense by the scheme and purpose of the particular statute. Counsel cited the High Court case, *Royal Media v Telkom Kenya* [2001] 1 EA 210, in which it was held (P 212):

"The Court could, in a proper case, issue injunctive relief against Government officers. This relief is similar to the coercive orders that are issued under the judicial review power. This relief would be available not only where the officer was exceeding his authority but also where he was acting in his ostensible authority." (per Visram, J).

The learned judge in that case goes on to state the law as follows (PP 226 – 227):

"The provisions of section 84(2)... give clear power to this Court to ensure that constitutional rights and freedoms are upheld. To do that the Court is given power to 'make such orders, issue writs and issue such directions as it may consider appropriate'. In the light of this clear power, there is no justification whatsoever to state that this Court has no power to issue [an] injunction against officers of the Government if that remedy is necessary for [the] enforcement of fundamental rights and freedoms under the Constitution. In fact, the statement that no injunction can be issued against officers of the Government has no support in the practice of this Court...."

In her response to the applicant's case, Ms Kimani for the Attorney-General maintained that once the application was made against the Attorney- General, then, that moment, the application of the Government Proceedings Act (cap 40) was attracted, and consequently injunctive relief was out of the question. Counsel maintained that the Children Act was an ordinary statute, on a par with other enactments, and consequently it would not claim to trump the Government Proceedings Act.

Ms Kimani also submitted that the application did not properly fall under the prescriptions of section 22 of the Children Act, and should be treated as belonging entirely to the framework of the Civil Procedure Act (cap 21) and Rules, in which case it was not possible for the applicant to escape the limitations imposed by the Government Proceedings Act (cap 40). Counsel argued that the High Court lacked jurisdiction to grant an interim injunction against the Government, even if it were held that Section 22 of the Children Act was relevant to the application.

Ms Kimani further submitted that even if it was held that an interim injunction could properly be issued in this case, then such injunction could not lie against the Attorney-General and had to be in respect of a particular cited officer alleged to be in breach. Counsel urged that, by citing the Attorney-General the applicant had automatically invoked the Government Proceedings Act (cap 40), which disentitled the Court from granting an injunction.

As I considered the last argument above to entail new matter, I invited counsel for the applicant to respond. Mr Majanja submitted that the Attorney–General as an officer in the public service and the principal adviser to the Government, is in a position to ensure compliance once the injunction is issued; and indeed the Attorney-General was duty-bound to ensure compliance once the injunction was issued. Counsel saw no legal impediment to a suit against the Attorney-General as the legal representative of the Government; and he cited as supporting case law the *Guyanese* Case, *Olive Casey Jaundoo v Attorney- General of Guyana* [1971] AC 972, which went to the Privy Council on appeal, and all along no issue was raised as to the joinder of parties. Counsel submitted that, where breach of the Children Act

(Act No 8 of 2001) was alleged against the Government, as in the present matter, the right person to be made the respondent was the Attorney-General.

The emerging factual terrain in the present application may be summarized as follows:-

(a) A decree of divorce was pronounced between MB and OPL at the Court of First Instance Sitting at Nivelles, in Belgium, on 23rd December,1997

(b) On 12th August, 1998 MB drew and filed in this High Court Miscellaneous Civil Suit No 910 of 1998 (OS) seeking grant of custody in respect of the children of the marriage who were infants: CSL (born 30th October, 1986); JPL (born 10th April, 1988); and SPL (born 4th September, 1992)

(c) Miscellaneous Civil suit No 910 of 1998 (OS) has not yet been heard and disposed of; and therefore its gravamen is still alive, and this is well known to the parties and to the Government of Kenya. The plaintiff has not yet secured the prosecution of the suit to a conclusion. The defendant has made no application before this Court, regarding the status of the suit. These details are well known to the State Law Office and to counsel representing the Attorney-General.

(d) On the basis of Miscellaneous Civil Suit No 910 of 1998 (OS), the applicant on 12th august, 1998 made an application before this Court under the Guardianship of Infants Act (cap 144), the Judicature Act (cap 8), the High Court (Practice and Procedure) Rules, order XXXVI of the Civil Procedure Rules, and all other enabling provisions of the law. This Court, on that occasion, made several orders two of which are of special relevance in the present matter:-

(i) That an injunction do issue and is hereby issued restraining both the applicant, and the respondent from removing any child of theirs namely CSL – born 30/ 10/1986, JPL – born 10/04/1988, SPL– born 04/09/1992 from the jurisdiction of this Honourable Court.

(ii) That the said children CSL, JPL, SPL be and are hereby placed under the protection of this Honourable Court.

These orders were made by Mr Justice Oguk on 12th August, 1998 and were extracted and issued by the Deputy Registrar of the Court on 20th August, 1998.

(e) Mr OPL lodged an appeal against the orders of the High Court in Civil Appeal No 97 of 1999. This appeal was dismissed in clear terms:

"After a thorough consideration of both counsel's submissions, we are satisfied that we have no ground upon which to interfere with the learned judge's decision. The orders restraining the removal of the three infants out of the jurisdiction of the Court and making them wards of the Court shall remain undisturbed"

(f) The three children, therefore, by the orders of Kenya's Court of Unlimited Jurisdiction, namely the High Court, and the highest court, namely the Court of Appeal, became wards of the Court, to be, under the regular law, kept always, in the absence of any further order to the contrary, within the jurisdiction of the High Court of Kenya. This position represented the lawful and sacrosanct legal position of the Republic of Kenya requiring the compliance of all persons be they members of the Executive arm of Government or not.

(g) On 11th September, 2001 the three children who were lawfully ordered to be kept within the jurisdiction of the High Court of Kenya, namely CSL, JPL and SPL were arrested at the schools in

Nairobi which they, respectively attended, by immigration officials working in collaboration with the police; and while the applicant managed to wrest control of SPL, the other two children, CSL and JPL were subjected to Immigration interrogation without access to counsel, and were abruptly deported under orders made by the Minister of State in the Office of the President.

(h) The said three children, namely CSL, JPL and SPL were at all material times in possession of valid dependants' passes issued under part IV of the Immigration Rules made pursuant to section 17 of the Immigration Act (cap 172).

The facts set out above will be the basis of an analysis of the submissions made by counsel, and this will lead to the decision and final orders of this Court.

The respondent's case has been argued mainly on technicalities of procedure; but as already remarked, I have not been convinced by the weight of these particular submissions, as no authoritative material has been cited to support counsel's several contentions. I have not, for instance, been able to see any serious defect in the applicant's Chamber Summons application brought within the ambit of the Originating Summons. I have also not been able to see why the case being made for SPL, born in 1992 and therefore, only 12 years old, cannot be made within the framework of the Children Act (Act No 8 of 2001). Similarly I do not agree that claims based on child-rights, so comprehensively provided for in the Children Act, with a clear jurisdiction vested in the High Court, must exclusively be taken up before the Children's Magistrate's Courts. Moreover, on these very points, counsel for the applicant has submitted with much conviction that the application was properly placed before the High Court. The plain words of section 22 of the Children Act entrust to the High Court full jurisdiction in resolving disputes pertaining to the rights of children. Persuasive authority has been produced by counsel, showing that injunctive relief may be made against Government Officials in a proper case.

The Attorney-General's Office is the State Law Office, a core instrumentality of the process of legality in the conduct of governance in this Republic. Not only is this office expected and required to assist the Courts in upholding the supremacy of the law in Kenya; it is required to advise all Departments of Government and all Ministers, competently, efficiently and in good faith, on the correct path of decision-making in compliance with the law of the land. The State Law Office is required to functionalise all instruments of law to support lawful decision-making in Government, and to give to the State an image of credibility as a lawabiding nation, within the international community of Nation-States.

It is clear from the facts as summarized earlier, that the deportation of CSL and JPL was a blatant violation of the law of this country. Is it the case that such action was taken without the knowledge of the State Law Office" Kenya is, besides, a party to the United Nations Convention on the Rights of the Child (ratified in January, 1990), and the enactment of the Children Act was partly for the purpose of giving effect to the principles embodied in that Convention. It is expected that the State Law Office will make it one of its primary tasks to advise Government on the due implementation of the Convention, through the instrumentality of the Children Act, 1989.

Counsel submitted, quite correctly, with respect, that to deport a child who has been made a ward of this Court, is a breach of the Child's rights. I would add that any deportation effected in those circumstances is a contempt of this Court. It must not be allowed to happen because this would show that a decision is being taken within the Executive arm of Government which is in defiance of the law, and in contempt of the Court process. The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people, including children.

There is clear evidence of moves made by the respondent which would only tend to hurt the integrity of the legal process in resolving a dispute such as the one involved in this matter. An example of this is the persistent failure to file trial papers such as would enable a fair hearing to take place. Another is the somewhat inappropriate application which the respondent filed under Certificate of Urgency on 16th January, 2004, which stated that "unless the application is heard [and] disposed of urgently it is likely to affect the cordial relations between the Kenya Government and the [Kingdom] of Belgium". The Honourable Lady Justice Mugo did express her anxiety about that application, and ended with a vital statement of legal principle which suitors should always bear in mind:

"Much as the issues herein may be causing irritation with their sensitive and pressing nature, the rule of law is universal and demands that parties to a dispute be given an equal right to be heard, in order that justice may be done and be seen to have been done"

I must take judicial notice that all civilized countries subscribe to these values; and that the Belgian legal system, which has a substantial common ancestry with the French legal system, subscribes to a certain unwritten general body of law associated with good governance, known as *Principes généraux de droit.* These are explained in summary by Professor Sir Otto Kahn-Freund, Claudine Lévy and Bernard Rudden in their work, *A Sourcebook on French Law,* 2nd Ed (Oxford: Clarendon Press, 1997), at page 176 as follows:

'[*Principes généraux de droit]* ... are ... principles guiding the law-maker, ie the legislator, the judge, and the interpreter of existing legislation. The closest English parallels are perhaps the "Maxims of Equity' and Principles of Natural Justice (*'nemo judex in causa sua audiatur altera pars').* Rules such as that statutes are presumed not to be retroactive nor to taken away common law rights or remedies may be said to be general principles of law brought to bear on the interpretation of statutes."

More content is given to this definition by L Neville Brown and J F Garner in their work, *French Administrative Law,* 2nd Ed (London: Butterworths, 1973) at page 121:

"the other category is the more important and consists of the *Principes généraux* properly so called. These are those fundamental human rights, which are contained in the Declaration of the Rights of Man of 1789 and the preamble to the 1946 Constitution [of France] or which may be deduced from them. The executive .... Cannot transgress these principles. For, although the division of powers .....is now expressly regulated by the Constitution, the administrative judge is still entitled, indeed obliged, to examine the validity of governmental action by reference to those principles which constitute the very basis of the republican regime, such as the essential liberties of the citizen (*'Liberté'*), equality before the law (*'Egalité'*), the doctrine of separation of powers, the ....right to judicial review. Such fundamental rights, which are mostly entrenched in the text of the American Constitution, in France are protected to a large extent by resort to the unwritten *principes généraux."*

These principles will not support such blatant violation of the law as, in this country, was realized with the unauthorized deportation of two children, CSL and JPL. It follows that this Court, in its obligation to uphold the rule of law, must re-state the wardship status of SPL and declare it illegal and a contempt of Court, that anyone whosoever do deport him to the Kingdom of Belgium or anywhere else. In answer to the applicant's prayers in her Chamber Summons application of 19th December, 2003 I will make the following orders:-

1. That a temporary injunction do issue and is hereby issued, restraining the respondent by himself, his agents, servants or otherwise howsoever from executing the content of the deportation order issued by the Minister of State in the Office of the President on or about the 11th September, 2001 for the

deportation of SPL pending the hearing and determination of the substantive case.

2. That the costs of this application shall be in the cause.

Dated and Delivered at Nairobi this 23rd day of April 2004.

J.B.OJWANG

AG. JUDGE

KENYA LAW
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REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: APALOO, C.J., GACHUHI, COCKAR, OMOLO & AKIWUMI, JJ.A.)

CIVIL APPLICATION NO. NAI.20 OF 1994 (12/94 UR)

BETWEEN

ERIC V.J. MAKOKHA.....1ST APPLICANT

CHARLES F.K. NAMACHANJA.....2ND APPLICANT

DR. KORWA G. ADAR.....3RD APPLICANT

DR. J.W. OMARI ONYANGO.....4TH APPLICANT

CHURCHILL M. KIBISU.....5TH APPLICANT

AND

LAWRENCE SAGINI.....1ST RESPONDENT

FRANCIS GICHAGA.....2ND RESPONDENT

UNIVERSITY OF NAIROBI.....3RD RESPONDENT

(Application for a stay of execution in an intended appeal from the ruling of the High Court of Kenya at Nairobi (Justice A.B. Shah) dated 28th January, 1994

in
H.C.C.C. NO. 73 OF 1994)

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RULING OF THE COURT

The applicants invite us to exercise our discretionary jurisdiction under Rule 5(2)(b) of the Court of Appeal Rules to order a stay of execution of an order on a similar application which the High Court declined to grant them in its ruling of the 28th January, 1994. The upshot of the High Court's refusal was that the applicants were in immediate danger of being evicted from a subsidised housing which the University of Nairobi provided them in virtue of their employment by that University as lecturers. The Court gave them a seven-day respite to enable them repeat that application to this Court.

Hence this application to stay execution under the well known Rule 5(2)(b). Such an application is everyday fare in this court and the principles on which this court acts if invited to exercise that jurisdiction, is old hat. But the importance attached to this particular application and the depth of feeling it generated, was such that, in all, no fewer than fifty cases were cited to us. Some of these are of local origin and a good number are from English courts to which we not infrequently make recourse for help in determining doubtful and novel points of the commoWne laawr.e grateful to both Counsel and found ourselves helped by their research and industry and for the interesting and persuasive submissions they made to us.They should forgive us, if we have not found it possible to refer to and deal with a good many of them. We were simply overwhelmed by the sheer weight of their number.

It is elementary that the application of legal principles to any given case depends on the facts. We now relate them. The applicants were lecturers employed by the University of Nairobi under standard terms of service for the Academic staff. In addition to their emoluments, the University made available to them housing in various parts of Nairobi rented by itAste Ifs.ome imprecise point of time late last year or possibly a year before last, they and some of their colleagues were minded of registering their staff Association as a Trade Unions under the Trade Union Act. The Registrar of Trade Union refused to register it for a reason which is immaterial to this application. They were aggrieved and dissatisfied by the refusal and accordingly lodged an appeal to the High Court.

It appears that the University sided with the Registrar as it considered that the applicants Association was not unionisable. This seems to have angered the applicants. The Vice-Chancellor deponed in an uncontested affidavit placed before the court below, that three months before the 10th January last the applicants, in breach of their terms of contract, failed to perform their contractual duties. They refused to teach and also refused to report for duty. In addition to withdrawing their services, they incited and instigated other academic staff to join them on strike and obstructed teaching and other administrative processes at the University. The Vice-Chancellor swore that faced with this situation, he suspended the applicants and summoned them to appear before the Disciplinary Committee of the University Council on the 7th January, 1994. Such proceedings might result in the termination of their appointments.

The applicants were apprehensive of this and in order to forestall it, they filed a plaint in the High Court on the 7th January in which they sought a permanent injunction to restrain the defendants from hearing the disciplinary proceedings against themselves and terminating their services.

On that very day, they sought and obtained ex-parte, an injunction restraining the respondents from evicting them from their residences. This order was made by the then duty Judge Dugdale, J.

It appears that after bringing their plaint, they became aware that the disciplinary proceedings brought against them were concluded and as they feared, their appointments were terminated. So they amended their plaint and sought in addition to other reliefs, a declaration that the purported terminations of their appointments were void and an order of injunction to restrain the University from acting on their purported terminations. They also claimed a temporary injunction restraining the respondents from evicting them their premises. They amended their chamber summons accordingly.

The inter-partes hearing of the summons came before the new duty judge, Shah J on the 12th January, 1994. At that date, the other temporary injunctions they sought against the respondents were spent. They therefore refrained from presenting to the judge any argument on those. The only one they invited him to decide was whether the "defendants can be restrained from evicting" them from their official University residences until on this, they presented copious argument to the court.

The learned judge considering the application in some depth and the length of his ruling showed that he gave the matter a great deal of thought and took an equally great deal of trouble in the preparation of his ruling. He cited and relied on the rule-making case of Geilla v Cassman Brown and put to himself three questions namely, first, Did the applicants show a prima facie case with a probability of success" To answer this question, he examined the University of Nairobi Act and the regulations made under them. About four months before he commenced his deliberation, namely October, 1993, the Court of Appeal had handed down a ruling in which it held that a contract of employment entered into in that case had statutory underpinning and could not be determined on the ordinary law applicable to master and servant. That case in Civil Application No. NAI 204 of 1993 entitled Ochieng Nyamogo and another vs Kenya Posts and Telecommunications.That ruling has acquired some notoriety and we will refer to it hereafter, as the Nyamogo case. This ruling was brought to the learned Judge's attention, and predictably enough, he was invited to follow it. It was clearly of great assistance to the applicants because it decided the precise point which Shah J. was invited to decide.

In that ruling, the court granted a temporary injunction restraining the Corporation from retiring two of its servants and a further order restraining it from evicting them from their official residences until the hearing and final determination of the suit.

Having read that ruling and considered it alongside the Act and the regulations, the learned judge held that the regulations had no statutory backing and was made by the University under powers conferred on it by the Act for the internal guidance of the University only. The court held that the contract of employment entered into between the applicants and the respondent was not statutorily underpinned within that concept in the Nyamogo case. He held therefore that the applicants failed to present a prima facie case with a probability of success.

The answer to the second question; namely, whether the applicants would suffer irreparable loss, if the applications were denied, obviously gave him no trouble. He held that if it was established that the University was in breach of contract in termination the applicants' contracts, their loss could adequately be met by the payment of damages. In his opinion, the University would be in a position to meet the payment of any such compensation. The negative answer to these two questions entitled the judge to exercise his discretion against the applicants.

Obviously, ex abundati cautela, he also considered the third arm of the Geilla guidance, namely, where the balance of convenience lay, or put in another way, who had the greater justice. He concluded that it was the University. Before he considered this third arm of the Geilla ruling, he returned to the Nyamogo ruling. Clearly, it troubled him as this court had reached a decision diametrically opposite to the one he was minded to reach. In the end, he distinguished it by holding that it was in interlocutory

ruling and not a final judgment. But he thought that as that ruling appeared to have finally pronounced on the matter, it was binding on him under our doctrine of stare decisis. Although he did not treat that ruling with disrespect, he did not consider that it obliged him to decide this matter otherwise than his own appreciation of the law and facts obliged him to do. As we said, he found against the applicants and dismissed their plea for a temporary injunction.

The applicants invite us to exercise our original jurisdiction differently and hold that the contract of employment entered into between the University and themselves was statutorily underpinned within the meaning of those words in **the** Nyamogo case. As to the principle on which we should exercise this jurisdiction, they referred to two well-known cases, namely firstly, Githunguri v Jimba Credit Corporation Ltd., Civil Application No. 161 of 1988 decided on the 9th November, 1988 and J.K. Industries Ltd v Kenya Commercial Bank decided in September, 1987 reported in 1982 - 1988 1 KAR p 1088. Both laid down almost identical principles as the basis under which stay of execution pending appeal should be granted, namely, first, the applicant must present an arguable case for the consideration of the Court of Appeal and second, the application must show that if the stay is withheld, it would render the intended appeal nugatory. Both cases were decided on the basis of these principles. In Githunguri case, the application of that principle led to the grant of the stay sought, in the J.K Industries, it led to the opposite result, that is, that the application failed.

The divergent conclusions reached in these two cases on the application of the same principles show that, by and large, it is the facts of each particular case that determine the result.

Mr. Nowrojee, leading counsel for the applicants referred to these two cases and led us through various sections of the University of Nairobi Act and the Statute of the University enacted by the University itself and argued that these were enacted under the delegated power of the University and having derived their authority from Statute, guaranteed the employment of the applicants. He submitted, if we got him correctly, that that was the statutory underpinning as conceived in the Nyamogo case. He made other submissions which suggest that the terms of service and the removal provisions laid down in those conditions of service permitted the termination of the applicants only for good cause and the audi alteram partem rule of natural justice was implicit in these provisions. In sum, it is by this contention that he submitted that the test of the "arguable case" requirement of the two principles laid down in Githunguri and J.K. Industries was met.

The word "statutory underpinning" is not a term of art. It has no recognised legal meaning. If it has, our attention was not drawn to any. Accordingly, under the normal rules of interpretation, we should give it its primary meaning. To underpin, is to strengthen. In a case in which the issue is whether an employer can legitimately remove his employee, a term which suggests that his employment is guaranteed by statute is hardly of any help.

As a concept, it may also mean, the employee's removal was forbidden by statute unless the removal met certain formal laid down requirements. In Mbogo v Kenya Post Office Savings Bank Shelds J. said, he derived a great deal of assistance from the Scottish case of Mallock v Aberdeen Corporation especially in the speech of Lord Wilberforce whom he quoted as saying:

"pure master and servant cases which I take to mean there

is no element of public employment or service in support by

statute, nothing in the nature of an office or status which is capable

of protection....If any of these elements exist, there is, in my opinion,

in some inter partes aspects, the relationship may be essential procedural

requirements to be observed and failure to observe them may result in a

dismissal being declared null and void."

This speech is, we think, with respect, a trifle long winding, and if we understand it aright, it means, some employees in public positions may have their employment guaranteed by statute and could not be lawfully removed unless the formal requirements laid down by the statute were observed. It is possible this is the true meaning of what has become the charmed words "statutory underpinning". If this is correct, we can readily conceive of some of such public positions.For instance, under Section 61 of the Constitution of Kenya, judges are appointable by the President and removable by him. But he cannot lawfully exercise the power of removal unless for specified misdoings and unless a tribunal appointed specially for the purpose after investigating such conduct, recommends to him such removal. So it can accurately be said that the tenure of judges was protected by the Constitution. The same applies to other constitutional office holders such as the Attorney General, Auditor General and others. Even an ordinary office holder can be protected by statute. For instance, Section 23(3) of the University of Nairobi Act mandate the Council of the University to keep proper books and records of account of the University as well as its expenditure. The accounts must be audited by the Auditor General and subsection 4 says in telling words:

"The employment of an auditor shall not be terminated by the

Council without the consent of the Minister in concurrence with

the Controller and Auditor- General".

So to that extent the position of an auditor is statutorily underpinned. It is difficult to see in what sense the tenure of lecturers of the University of Nairobi can properly be said to be "statutorily underpinned". The record shows that the Section 19 of their terms of service, each category of academic staff can terminate his services with the University by giving notice according to their academic rank: If they should leave their appointments without giving the stipulated notices, they would have been in breach of contract. What remedy can the University have against them for this breach" It is well established that they cannot be forced to resume their office by the equitable remedy of specific performance. So, the only remedy the University can pursue against them would be a claim for damages for breach of contract.Equitable remedies are said to be mutual. If that is so, if the University itself commits a breach of contract against them, the mutuality rule would dictate that they, for their part, can only seek damages against the University for breach of contract. If the University can properly compel them to return to its service by the equitable remedy of specific performance, then, and then only, can they claim as a remedy against the University the co-ercive equitable remedy of specific performance. To compel performance of a contract of personal service in this way, will turn a contract of service into a status of servitude.

Section 23 of the conditions of service give the University power to remove a lecturer for good cause. This imports a duty of audi alleram pertem, that is, they must be afforded an opportunity of answering any allegations of any misconduct justifying removal. That is also provided by the manner in which the Disciplinary proceedings of alleged errant members of the University are dealt with or should be dealt with.In his affidavit, the Vice Chancellor deponed that proper disciplinary proceedings against

them were set on foot and a Committee which investigated the charges against them, found them guilty. It was on the strength of the findings that their services were terminated. The applicants, of course, dispute this in their plaint. The difference between their accounts and that of the University is yet to be resolved. If it is resolved in their favour, it is obvious that the only compensation they can lawfully receive, is damages. They cannot competently claim to be re-instated unless a statute to which they can point, expressly conferred this right on them and by that method, underpinned their continued employment. Although they produced a great deal of case and stature law, they did not refer to even one statute which underpinned their tenure for the very sufficient reason that there is none.So the only remedy that they can obtain at law, is the one that is ordinarily awardable for breach of a contract of employment. They cannot properly invoke any equitable remedy to underpin their tenure any more than they can obtain one to compel any breach of their employment. In our opinion, the law generally applicable is stated at Page 626 of the 27th Edition of Snells Principles of Equity as follows:

"The very first principle of injunction law is that prima facie, you do not

obtain injunction to restrain actionable wrongs for which damages are

a proper remedy".

That is the holding of Owuor, J in the inter partes hearing of an application for injunction to restrain the P & T Corporation from retiring the then applicants in the Nyamogo case. The judge expressed herself as follows:

"At this stage it has not been shown to me that damages would

not be within the defendant's capacity to pay or would not adequately

compensate the plaintiff for the action which the defendant has taken

should it turn out to be unlawful. That is a sufficient reason for refusing the injunction".

The learned Judge found one other reason which, in her opinion justified the denial of the injunction sought. She expressed it in these words:

"There is an additional reason why the application must fail.

The application before me did not seek mandatory but restraining

orders.... The event complained was a past one and no application

for amendment was made to seek alternative or other reliefs".

This additional reason does not sound extremely weighty but its value will become apparent when we examined the decision and orders made in the Nyamogo case which has become the locus classic on the subject of statutory underpinning.

We must now examine the Nyamogo case. We must, of course, treat the holdings in that case with great respect. We are not sitting on appeal from that ruling and have no jurisdiction to make any orders on that case. But the holdings in that case and the orders made in it, have raised eye-brows in the profession as to its correctness. The conclusion is also at variance with the view of the law expressed in

the court below not only in the Nyamogo case itself but in the one expressed in the court below in the present application before us. It also seems, prima facie, at odds with the common law position as we know it. We think it in the interest of the profession to say which of these conflicting views is right. That explains the somewhat unusual composition of the court.

Some muted but not impolite observation was made about the numerical composition of the court by the applicants' counsel but the breadth and sophistication of the submissions made to us for four whole days, justified the strengthening of the normal bench of three by two more heads. Because of the hierarchial structure of the court, it is also the practice adopted to review to inconsistent decisions of this Court. But it would be technical and narrow to suggest that as the two consistent rulings of the High Court only differed from one ruling of the Court of Appeal, the practice of constituting 5 judges recommended and adopted in the Income Tax v T 1974 EALR 546 and followed as recently as October 1993 in Trouistik Union International and another v. Jane Mbeyu and another Civil Appeal No. 145 of 1990 should not be followed.

But before considering whether the now famous Nyamogo decision accords or offends the law or equity, we must relate the facts.We take them from the official record. Both applicants were employed sometime in 1976 and 1981 by the Kenya Posts and Telecommunications Corporation, (which we hereafter refer to as the Corporation). The first applicant is a legal officer and the second an engineer. they rose from the ranks and by April. 1993, each rose to the pensionable position of Senior Assistant Manager. Neither had in April 1993 reached the compulsory retiring age of 55. The 1st Applicant was 46 and the 2nd Applicant was 43 years of age. On the 7th April 1993, each received a letter in identical terms dated the previous day i.e 6th April 1993. The letter informed them that the Board of the Corporation had retired them with immediate effect. They were informed in that letter that they were each entitled to "full pension benefit". They were invited to fill the necessary forms for their pension documents to be processed.

The surprise each applicant felt was understandable. Six days after the notification of their retirements, each brought a plaint in the High Court contesting the validity of their enforced retirement. It was dated 13th April. They each sought:

(a) A declaration that the purported retirement of the

plaintiff is null and void;

(b) A declaration that the plaintiff is entitled to remain in the

defendant's employment;

(c) An injunction to restrain the defendant from evicting or

attempting to interfere with the plaintiff's occupation of his.....Corporation residence.

Each brought a contemporaneous chamber summons for orders that the Corporation be restrained from retiring them until they reached the statutory retiring age. The Corporation for its part, objected that they were not liable to be restrained by temporary injunction from retiring age. The Corporation for its part, objected that they were not liable to be restrained by temporary injunction from retiring the plaintiffs as they had done so already and that if such retirements were held to be illegal, the applicants' proper remedy lay in damages. The plaintiffs obtained routinely, the ex-parte orders in terms sought. It was the inter partes hearing of that application that we related earlier, failed before the High

Court.

As is not unexpected, the plaintiffs repeated this application before this Court and invoked its equitable jurisdiction under Rule 5(2)(b) to obtain the orders sought. They were successful. In a reserved ruling, this Court granted them

1.An interim injunction restraining the Corporation from retiring them until the hearing of the intended appeal; and

2.An order restraining the Corporation from evicting them from their Corporation provided house until the hearing and determination of the appeal.

This Court, in accordance with precedent, has to decide first, whether the applicants presented an arguable case, and second, whether the intended appeals would be nugatory if these interim orders were denied.

In apparent compliance with the first guideline, the court considered legal arguments presented to it on the various sections of the Pensions Regulations on which the parties relied.The Corporation admitted that it compulsorily retired the applicants as alleged but justified its action as authorised by the Kenya Posts and Telecommunications Corporation (Pensions) Regulations 1985 and in particular regulation 5(1)(d) thereof.

So, as this Court did in both the Githunguri and J.K. Industries, it considered whether the legal argument advanced in support of an arguable case, appeared ex facie, to have merit. It held in the Githunguri case that it had and that in the J.K. Industries case, that it had not.

It follows that in determining whether the applicants had an arguable case meriting the grant of injunction, the court had to construe the section of the regulations the Corporation relied upon as giving it statutory power to retire the applicants compulsorily - that is regulation 5(1)(d) which fully read as follows:

"No pension, gratuity, or allowances shall be granted under

these Regulations to an officer except on his retirement from

the public service

(d)on compulsory retirement for the purpose of facilitating

improvement in the organisation of the Corporation or the

department to which he belongs by which greater efficiency

or economy may be effected."

The court itself read this section and reproduced both it and the submissions made on it in its ruling. That submission, as recorded, was that the applicants retirement was done in accordance with that regulation and that as it was compulsory, the Corporation owed no duty to inform the applicants in advance of its intention to retire them compulsorily. That submission appears to us to be perfectly sound. The Court said it could not accept it and proceeded to hold that as the applicants did not apply to the

Corporation to take early retirement, the action of the Corporation violated the requirement of natural justice and "the relevant statutory provisions". It did not specify which the regulations it reproduced at great length in its ruling, the Corporation's action transgressed and which underpinned the applicant's employment. But the reason the Court gave for its decision, namely, that the applicants had not applied to take early retirement suggests that it was founding itself on regulation

8(2) of the Regulations which provides that:

"The Corporation may, with the agreement of an officer require

him to retire....after attaining the age of 50 years but before he

attains the age of 55 years".

This regulation entitles the applicants, with the consent of the Corporation to obtain early retirement. It had nothing to do with compulsory retirement which, on a plain reading of regulations, the corporation is entitled to do on its own motion if it considers that the Corporation should be reorganised to enhance efficiency or achieve economy.

The applicants were not accused of any wrong-doing. By necessary implication, the rules of natural justice which would have required that they be notified of their pending retirement were dispensed with by regulation 5(1)(d) which empowers the Corporation to retire the applicants compulsorily, their wishes notwithstanding. Our reading of the Pensions regulation shows that two types of compulsory retirement were envisaged. One is on attaining the age of 55, the other on reorganization by the Corporation designed to achieve improvement or to achieve economy in its operation.

It is the latter that entitled the Corporation to retire the applicants compulsorily subject to payment to them of pension. Had the court not omitted to consider and construe that particular regulation on which the Corporation relied, it would have been compelled to reach the conclusion that the Corporation's action was statutorily authorised and that the applicants failed to establish an arguable case within the meaning of the Githunguri and J.K. Industries holdings. As the Court omitted to do so, its decision was given per incuriam within the true meaning intendment of those words. That view is sufficient to deny the Nyamogo holding the authority of a binding precedent.

It must be borne in mind as a proposition of administrative law, that the power conferred on the Corporation to retire compulsorily some members of its staff in a re-organization or with the object of achieving economy in its operations, is discretionary. If it is exercised bona fide for the purpose for which it was conferred, it is not for the court to substitute its judgment for that of the competent organs of the Corporation. There is no suggestion here that in retiring the applicants, the Corporation exercised that power other than properly.The argument that the exercise of that power was impeachable either because the applicants had not reached the retiring age or that they were not given prior notice of their retirement was wholly misconceived.

There is one other reason on which the order of injunction granted in that case could be questioned. An application for injunction under Rule 5(2)(b) is an invocation of the equitable jurisdiction of the Court. So its grant must be made on principles established by equity. One of it is represented by the maxim that equity would not grant its remedy if such order will be in vain. As is said, "Equity, like nature, will do nothing in vain". On the basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes.If it will be impossible to comply with the injunction sought, the Court

will decline to grant it. In this case, the compulsory retirement which the applicants sought to injunct was effected on the 6th April 1993. In Rosslyn Estates Ltd v Underword, 22 EALR Page 196, Briggs, JA, speaking for the Court of Appeal for Eastern Africa holding that a remedy sought could not be effective said:

"This being a suit in equity, the relief which the Court could

grant had to be considered on the basis of the facts as they

were at the date of judgment, not as they were at the date of the filing of the plaint".

In this case, even at the date of the filing of the plaint

on the 13th April 1993, the action which the applicants

sought to prevent by an injunction had already taken place.

It took place on the 6th April 1993. When in October 1993,

the applicants repeated their application for interim injunction

to restrain the Corporation from compulsory retiring them and

evicting them from their residences, the Court's attention was

drawn to how pointless the granting of a temporary injunction

would be at that date. The Court itself recorded that Counsel

for the Corporation submitted that:

".....by the time, the applicants went to law, their retirement had already taken effect".

The Court rejected that submission. The upshot of this was that the highest court of the land, on the 8th October, 1993, solemnly granted a temporary order or injunction to restrain an action which took place as long ago as April 6 1993. It is plain to us that a Court of Equity would regard this order as a pious farce. And this in spite of the fact, that action, that is the compulsory retirement of the applicants, was, in our judgment, made according to law. We are wholly unable to accept either that the employments of the applicants were statutorily underpinned or that on the facts known to the court a temporary injunction to restrain the doing of an act which took place five months previously can be halted or undone by a temporary injunction issued in October 1993. We therefore find no fault with the learned Judge below for feeling himself unable to follow the Nyamogo ruling.

We have said enough to reach a conclusion on this application. But counsel for the parties made in great earnestness, a number of other contentions. We think we owe it to Counsel to make a short observation of some of the significant of these.

The learned Judge below was not able to hold that the University statutes was subsidiary legislation to support a contention that the applicants' appointments were statutorily underpinned. We were referred at great length to a number of sections of the University of Nairobi Act and various other

enacted laws to show that the Judge was in error in so holding. Counsel for the respondent urged with no less persuasiveness and by reference to other pieces of legislation that the statutes were not subsidiary legislation within the true legislative intent. The contentions on both sides were extremely subtle. In view of our holding, that even if the statutes were properly regarded as subsidiary legislation, the employment of the applicants was not protected by it, no useful object would be served in embarking on a further examination of that question. It would, we think, be merely academic and we decline to engage in such exercise.

It was also argued for the applicants that in view of the shortness of time that elapsed between the handing down of the Nyamogo decision, we would decline to depart from it. For this, we were referred to the decision of the English House of Lords, in the case of Secretary of State for Social Services. Hudson v sainz decided in 1971.

In that case, the House in a split decision of 4 to 3 held that a modified practice it introduced in 1966 in which the House laid down rules as to when it may depart from its previous decision should be used sparingly. Otherwise, its previous decisions should be followed. But we prefer the speech of Viscount Dilhorne that if a previous decision was clearly wrong it is easier to decide that a recent case should not be followed than one which has stood for a long time. We put the Nyamogo ruling in that category.

Furthermore, the House of Lords is a second appellate court from a decision of the High Court of Justice. It can afford the luxury of adopting a policy of keeping an erroenous decision alive for a great many years. But in Kenya, at least as at present, there is only one Appellate Court ordinarily manned by a bench of 3 judges. Even a five bench court cannot reverse its decision and substitute what it considered the right one for it.It is only limited to refusing to following it in a subsequent case. In the absence of a second tier appellate court in Kenya, the practice of constituting a bench of 5 judges to have a second look at a doubtful decision of a court of three is a sensible one and meets a felt judicial need of this country. Certainly of the law in a developing jurisprudence demands that a wrong decision should be quickly indetified and at least, pointed out that suffering it to remain a binding judicial precedent for a great length of time.

Our attention was drawn to a number of recent English decisions in which declarations were made as remedies for breaches of contracts of personal service. We were urged to accept that this is the emerging trend of English judicial attitude. These cases are few and their ratio decidendi are anything but consistent. We formed the view that this is not the generally shared attitude of English judges. We have noted a few powerful and well-reasoned dissents. In our opinion, the well settled rule that a breach of contract of personal service cannot be redressed by the equitable remedies of injunction and specific performance remains good law. The comparatively few cases in which declarations were made and injunctions were granted to restrain a breach of contract of personal service are exceptions to the general run of the common law.

In our opinion, the common law rule that damages are the generally accepted remedy for redressing breaches of contracts of personal service is too firmly established to be overthrown by side wind. While we note the emerging changed attitude and remedial changes they are bringing about, we cannot help feeling that the common law and the doctrines of equity which section 3 of Judicature Act obliges us to apply is the established and well known common law. It is on the faith of this that transactions are entered into.

On the main question debated in this case, we hold that in the event of the applicants being successful in their suit for wrongful termination of their appointments, their proper legal remedy is

damages and declaration. That being so, the contract of employment having gone, the fringe benefit of subsidised housing went with it.

Before we conclude this rather long judgment, we think it right to express to Counsel on both sides our gratitude and appreciation of the industry they both put into the preparation of the case and for their well-reasoned and powerful submissions. However, in view of what has fallen from out lips, we are driven with more than little regret to the conclusion that the orders prayed for by the applicants cannot be granted.

In view of the conclusion we reached on this application, the applicants will have to give up their official residences to the respondent University. But we do not think it right to order their immediate eviction. We think we should give them time to reflect on the views we expressed in this ruling. It may well be that the applicants may feel it right to review their position towards the University and enter into discussions which will entitle them to resume their University duties and retain their residences. We are inclined to think that on the basis of the legal advice rendered to them, they believed in good faith that they are legally entitled to retain their official residences until the hearing and determination of the substantive suit. They now know the true position.We have no doubt that the legal advice tendered to them by their lawyers, was on the part of the advocates equally well believed by them in their professional view to represent the law. They too must accept that we hold that those views were mistaken.

We propose to give the applicants a reasonable time to consider their position and hopefully resume their teaching portfolios.

We venture to hope, that the University for its part, will prove itself magnanimous in victory and respond favourably to any overtures that the applicants may make that may lead to the resumption of the normal functioning of the University. We believe the overall national interest dictates no other course.

But we realize that we cannot force a re-marriage on unwilling partners. Our order therefore, is that if the applicants fail to enter into arrangement satisfactory to the University on or before the 31st March next, there will be an order for their eviction from their University provided residences on the 1st April next. The applicants will pay the costs of this application. In view of the complexity of the matters canvassed before us, we certify costs for the respondent for two Counsel.

Dated and delivered at Nairobi this 1st day of March, 1994.

F.K. APALOO

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CHIEF JUSTICE

J.M. GACHUHI

.....

JUDGE OF APPEAL

A.M. COCKAR

.....

JUDGE OF APPEAL

R.S.C. OMOLO

.....

JUDGE OF APPEAL

A.M. AKIWUMI

.....

JUDGE OF APPEAL