



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
PETITION NO. 19 OF 2015

IN THE MATTER OF: THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
UNDER ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 24, 25, 28, 29, 31, 43, 47, 48, 49, 50, 238, 239, 243, 244
AND 245 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: CONTRAVENTION OF SECTION 3 OF THE PREVENTION OF TERRORISM
ACT

BETWEEN

- 1. MUSLIMS FOR HUMAN RIGHTS (MUHURI)
- 2. HAKI AFRICA.....PETITIONERS

VERSUS

- 1. THE INSPECTOR-GENERAL OF POLICE
- 2. THE CABINET SECRETARY MINISTRY OF INTERIOR AND
COORDINATION OF NATIONAL GOVERNMENT
- 3. THE HON. ATTORNEY GENERAL
- 4. THE DIRECTOR OF PUBLIC PROSECUTIONS
- 5. THE FINANCIAL REPORTING CENTRE
- 6. THE CENTRAL BANK OF KENYA.....RESPONDENTS

AND

- 1. KATIBA INSTITUTE.....FIRST AMICUS CURIAE
- 2. THE KENYA NATIONAL HUMAN RIGHTS COMMISSION.....SECOND AMICUS CURIAE

JUDGMENT

THE PETITION

1. This Judgment relates to a Petition dated and filed on 13th April, 2015 and seeks the following reliefs –
 - a. **A Declaration that the Special Issue of the Kenya Gazette Volume CXVII No. 36 Gazette Notice Number 2326 particularly those parts purporting to notify of intention to recommend to the Cabinet Secretary for Interior and Coordination of National Government that an order be made declaring the First and Second Petitioners herein as specified entity were made in violation of the Constitution and the applicable law;**
 - b. **A Declaration that the Respondents acted ultra vires the Constitution and the law and in excess of his powers in purporting to publish those parts of the Special Issue of the Kenya Gazette Volume CXVII No. 36 Gazette Notice Number 2326 particularly those parts purporting to notify of intention to recommend to the Cabinet Secretary for Interior and Coordination of National Government that an order be made declaring the First and Second Petitioners herein specific entity;**
 - c. **A Declaration that the freezing of the accounts of the First and Second Petitioners was unconstitutional and/or illegal and in violation of the First and Second Respondents fundamental rights and freedoms.**
 - d. **A Conservatory order removing and/or lifting the suspension of their Bank Accounts specified in paragraphs 10 and 11 of the Petition until the hearing and determination of the Petition;**
 - e. **A Conservatory order by way of an injunction restraining the First Respondent from recommending to the Cabinet Secretary Interior and Coordination of National Government to declare the First and Second Petitioners as specified entity until the hearing and determination of the Petition;**
 - f. **A Conservatory order restraining the Second Respondent from declaring the First and Second Petitioners as specified entities.**
 - g. **An interlocutory order lifting the suspension of the First and Second Petitioner's bank accounts specified in paragraphs 10 and 11 of the Petition pending the hearing and determination of the Petition;**
 - h. **Cost of the Petition;**
 - i. **Any other or further relief that this court may deem fit and just to grant.**

PERSONAE DRAMATIS

2. THE PETITIONERS

1. The First Petitioner is a Non-Governmental Organization (NGO), registered with the Office of the President under the Non-Governmental Organization Coordination Act, and was so registered on 12th March, 2009. The Petitioner brings the Petition for itself and in the public interest;
2. The Second Petitioner is a project of Haki Centre a Non-Governmental Organization (NGO) registered in the Office of the President under the Non-Governmental Organizations Coordination Act and was so registered on 5th July, 2012. This Petitioner brings this Petition for itself and in public interest as well.

THE RESPONDENTS

3. The **First** Respondent is the Inspector-General and Commander of the National Police Service (NPS) established under Article 245 of the Constitution of Kenya 2010, and sections 12 and 24 of the National Police Service Act. The First Respondent is responsible for the maintenance of law and order, preservation of peace, protection of life and property and investigation of crime among others.
4. The **Second** Respondent is the Cabinet Secretary appointed in accordance with Article 152 of the Constitution of Kenya 2010 (“the Constitution”) and is in charge of the Ministry of Interior and Coordination of the National Government. Under section 3(4) of the Prevention of Terrorism Act 2012, he is the person responsible for declaring an entity as a specified entity.
5. The **Third** Respondent is the Principal Legal Advisor to the National Government of Kenya (“the Government”) by virtue of Article 156 of the Constitution.
6. The **Fourth** Respondent is the Director of Public Prosecutions, an independent office established under Article 157 of the Constitution.
7. The **Fifth** Respondent is the Financial Reporting Centre, an office established under the Proceeds of Crime and Money Laundering 2009 (No. 9 of 2012), and was enjoined following the Ruling of this court on 11th June, 2015 that **Gulf African Banking Limited** and **NIC Bank Limited**, the **original Fourth** and **Fifth** Respondents were recipients of instructions and acted upon those instructions and were consequently struck out of the Petition without costs by a Ruling dated 11th June, 2015.
8. The **Sixth** Respondent is the Central Bank of Kenya a statutory agency of the National Government of Kenya charged with the custody of Kenya’s fiscal and monetary policy along with the National Treasury.

THE AMICUS CURIAE

9. By a Ruling dated and delivered on 23rd July, 2015, **KATIBA INSTITUTE** was enjoined as **First Amicus Curiae**, while the Kenya National Human Rights Commission was enjoined as the **Second Amicus Curiae**.

THE PROCEDURAL ISSUES FOR DETERMINATION OF THE PETITION

10. By common understanding of counsel for the various parties, it was determined that the Petition as Amended be determined by way of written submissions, and be highlighted by respective counsel.
11. Accordingly, the Petitioners counsel filed on 3rd September, 2015 their written submissions dated on 3rd September, 2015. The submissions for the First, Second and Third Respondents dated 18th September, 2015 and were filed on 2nd October, 2015. The **Fourth** Respondent’s written submissions and List of Authorities dated 21st September, 2015 were filed on 22nd September, 2015. The **Fifth** Respondent made no representations on the Petition. The **Sixth** Respondent filed on 7th September, 2015 a Replying Affidavit sworn on 4th September, 2015, together with written submissions dated 4th September, 2015.
12. The First Amicus Curiae, Katiba Institute, filed its submissions and List of Authorities dated 4th

September, 2015 on 7th September, 2015. The Second Amicus Curiae, the Kenya National Commission on Human Rights filed its written submissions dated 3rd September, 2015 and of the same date (3rd September, 2015).

THE SUBMISSIONS

13. The submissions were highlighted by respective counsel for the Petitioners, the Respondents and Amicus Curiae on 2nd October, 2015. The submissions by the Petitioners were highlighted by Willis Otieno on behalf of Paul Muite (SC), along with Yusuf Aboubakar and Salim Wampy.

THE PETITIONERS SUBMISSIONS

14. Mr. Willis Otieno, learned counsel for the Petitioners submitted that he adopted the Petitioners' submissions dated 3rd September, the submissions on the Applications, as well as the oral submissions by lead counsel Paul Muite, Senior Counsel. The reliefs sought, counsel submitted and set out in the Amended Petition are –

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

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

15. **Firstly**, in terms of the Constitution, counsel submitted that the Gazette Notice was unreasonable it being contrary to Article 47 of the Constitution of Kenya 2010 (the Constitution). Counsel opined that actions under Article 47 must be both reasonable and procedurally fair. The Gazette Notice gave twenty-four (24) hours to appear in Nairobi while the Petitioners are residents of Mombasa, then accounts were frozen. Such conduct counsel submitted was not reasonable. To walk from Nairobi to Mombasa would at least take thirty-two (32) days. Counsel submitted that the Inspector-General of Police, (the First Respondent) clearly did not intend the Petitioners to comply.

16. The **second** test of fair administrative action under Article 47 of the Constitution counsel submitted is that written reasons must be given of the action proposed or better, an existential threat to the Petitioners, written reasons must be given. The Gazette Notice gave no reasons for declaring the Petitioners terrorist organizations, it failed those tests, counsel submitted.

17. The **third** test counsel submitted is that the action must be lawful, founded on the law not capricious, not whimsical. Counsel referred to Article 238 of the Constitution which sets out the principles of national security which must be promoted and guaranteed within –

(a) authority of the Constitution and Parliament;

(b) be pursued with utmost compliance within the law – the Prevention of Terrorism Act.

18. It was counsel's submission that the First Respondent did not comply with either the principles of the Constitution under Article 238, nor section 3 of the Prevention of Terrorism Act as the Petitioners were not accorded an opportunity to be heard. Instead they were required to travel to Nairobi while their Bank accounts were frozen.

19. **Thirdly**, the manner of communication was also in violation of the law, counsel submitted. The First Respondent must be satisfied that there are grounds before he can publish in the Gazette, as conclusion that grounds exist that the organization is engaged in terrorism. It was counsel's submission that the First Respondent has no jurisdiction to issue any Gazette Notice, that only, the Cabinet Secretary, (the Second Respondent) has authority to publish a Notice in the Gazette, and he cannot do so before preliminary issues are determined. If he does so, he destroys the reputations of the Petitioners and other innocent people.

20. **Fourthly**, counsel submitted that seven months since the Gazette Notice was issued, not a single director of the Petitioners has been charged with any terrorism offence, as a body corporate acts through its directors and officials. If such an organization supports terror, then those officials are the ones to be charged, that publication of the Petitioners in the Gazette Notice was not a way to fight terrorism.

21. Al Shabaab was specified in the Gazette Notice as a terrorist organization, names were given, and a bounty was put on its head. In Mombasa, a Billboard on the way from Moi International Airport was erected with names and faces, that is the way to fight terrorism not by associating innocent Petitioners with terrorism.

22. **Fifthly**, the Petitioners right to fair hearing and presumption of innocence, guaranteed under Article 50 of the Constitution was violated. Even an accused person, even one charged with an offence of terrorism is presumed innocent until the contrary is proved. In this case counsel submitted, the Petitioners are not charged with any offence but sanctions are applied to them, their accounts are frozen. If a person previously charged is deemed innocent, why should sanctions be applied to a mere suspect" The Inspector-General of Police cannot act as the accuser, the prosecutor and Judge. To impose a penalty, is a violation of the right to fair trial.

23. **Sixth**, on the question of freezing of the Petitioners accounts, counsel referred to Regulation 11 of the Prevention of Terrorism (Implementation of the United Nations Security Council Resolutions on Suppression of Terrorism) Regulations, 2013 ("**the POTA Regulations**") vests upon the Cabinet Secretary, either on his or her own motion or at the request of **Ministerial Committee on Counter Financing of Terrorism**, authority to make an order freezing the property or funds of a designated entity, whether held directly or indirectly by the entity or by a person acting on behalf of or at the direction of the entity, in accordance with the Regulations. Counsel submitted that there was no provision under which the **Fifth** and **Sixth** Respondents were acting. The country is governed by and under the rule of law, not jungle law, particularly as Article 10 of the Constitution (on national values and principles of governance) binds all state organs. Both the Central Bank of Kenya and the Committee are state organs, and are bound by the provisions of Article 10. They must follow the law not only establishing them, but also rely on the principles of governance, and the rule of law. They are obliged to inquire into the legality of the proposed action, that the Petitioners are terrorists, there has to be a basis, the Prevention of Terrorism Act, and the POTA Regulations.

24. It was counsel's submission that to freeze an account of any person without satisfying oneself on both the constitutionality and legality of the proposed freezing was an abdication of the rule of law by the **Fifth** and **Sixth** Respondents. Counsel submitted that they cannot plead that they merely received instructions and acted on them. These Respondents cannot run away from their responsibility to follow the law. They are equally culpable counsel submitted.

25. It was counsel's Willis Otieno's further submission that the Petitioners are listed as associates with Al Shabaab. The law POTA, requires that the terror organization be first specified, and then specify the suspects, not the other way round. If Al Shabaab is not specified, it is a dereliction of duty, but the

Respondents are already freezing the Petitioners' accounts.

26. The final submission by counsel for the Petitioners was reference to the Non-Governmental Organizations Act under which the Non-Governmental Organizations Coordination Board is established and is housed in the Presidency. The NGO Board regulates and audits on how NGOs conduct their activities annually. There is not even a single adverse report against the Petitioners, and the NGOs Board is not even a party and has not sought to be enjoined in these proceedings.

27. On those submissions and the authorities submitted and referred to in the written submissions, counsel urged the court to allow the Petition, the Constitution being the yardstick. The Respondents should not be allowed to breach the law.

28. In addition, Mr. Aboubakar also counsel for the Petitioners followed Mr. Willis Otieno's submissions. The Respondents have had opportunity to fill the gaps and show the terrorist activities by the Petitioners but have failed to do so. With all difficulties, the Respondents did respond to the summons by the Gazette Notice within twenty-four hours, the directors of the Petitioners were grilled, their offices were searched and documents carted away, but that the Respondents have failed to fill the gaps which they thought they would achieve by breaching the Petitioners' constitutional rights.

29. Mr. Aboubakar therefore urged the court to grant the orders sought under the Petition as well as general damages and costs for the months they have stayed without operations.

THE SUBMISSIONS FOR THE FIRST, SECOND AND THIRD RESPONDENTS

30. The Petition was opposed by the Attorney-General on behalf of the First to Third Respondents. Mr. Ngari Litigation Counsel adopted his written submissions dated 18th September, 2015 and filed on 21st September, 2015. Learned Litigation counsel posed four questions in his submissions –

(i) Whether the publishing of Gazette Notice No. 2326 (of 7th April, 2015) violated Article 47 of the Constitution with respect to the Petitioners"

(ii) Whether the publishing of Gazette Notice Number 2326 was beyond (ultra vires) the First Respondent's powers granted by the provisions of section 3(2) of the Prevention of Terrorism Act and section 24(c) and 49(1) and (4) of the National Police Service Act,

(iii) Whether the "freezing" of the Petitioners accounts is a violation of the Petitioners rights, hence unconstitutional"

(iv) Whether the Petitioners are entitled to costs and other reliefs.

31. In rejecting the Petitioners' counsel's arguments that these Respondents breached the constitutional rights of the Petitioners on the grounds of security counsel relied upon the decision of the court in **KENYA ANTI-CORRUPTION COMMISSION VS. LANDS LIMITED & 7 OTHERS [2008] eKLR 508** page 516 in which the learned Judge said inter alia –

"Crime detection, prevention and control must in today's world constitute one of the principal objectives of the modern state. The objective of a democratic state are intended to be uniform and of general application except where there is a recognized margin of appreciation reserved for an individual state due to its special circumstances. While the objective of crime detection, prevention and control might be explicit under chapter 5 of the Constitution, except as a

limitation under section 75(6), I hold that these objectives are clearly embraced in section 1A of the Constitution which states “the Republic of Kenya shall be a multiparty democratic state.”

32. The learned Judge stated at paragraph 40 of the Ruling –

“Our Constitution is not a planet moving at its pace, speed and on its own axis and in the prevailing circumstances of the early 1960’s, when it came into force. It is intended to be a living and dynamic document to meet the evolving needs of this nation in order to safeguard her democracy and freedom. Take for example the emergence of terrorism as a topic affecting democratic states. Over two decades ago, its importance was perhaps confined to a few states which were fighting fundamentalism and factionalism. It has since reared its head and has propelled itself to the top of the world as one of the most important concerns of all modern nations. It has changed world travel and security more than anything else known in modern times and the world appears to literally turn on its axis because it has spread like a hydra affecting nearly every sphere of modern life. ”

33. The learned Judge concluded –

“It follows that any constitutional interpretation that overlooks the need to effectively tackle terrorism would be irrelevant, misguided and utopian, and just as terrorism has forced itself to the top, everywhere, the anti-corruption and economic crimes agenda occupies a central place as an objective in the emerging nations in particular. It must be fought with all available tools known to law and the instrument of law as a vehicle of social change must be at the heart of that fight, hence the challenge it poses to the relevance of constitutional law as an instrument of change in any societies, ours included.”

34. Counsel therefore urged this court to be guided by the above sentiments and proceed to hold that the freezing of the Petitioners accounts for purposes of investigation cannot constitute a violation of the Petitioners right to property in light of paragraph 8 of the Respondents Replying Affidavit as related to investigations on terrorism.

34. In this regard counsel argued that sections 3(2) of the Prevention of Terrorism Act (POTA) is clear, precise and unambiguous, that before making a recommendation to the Cabinet Secretary, the First Respondent (IGP), is required to afford an entity (such as the Petitioners) an opportunity to demonstrate why it should not be declared as a specified entity, that the Gazette was the most appropriate notice to the Petitioners. In support of his submissions, counsel relied, **firstly** on the case of **EGAL MOHAMED OSMAN VS. INSPECTOR GENERAL OF POLICE & 3 OTHERS [2015]eKLR**, in which my noble and learned brother, Korir J found that the First Respondent had not violated any of the Petitioner’s rights at the stage he published his name in the impugned Gazette Notice. The learned Judge reasoned-

“43. I say so because the Gazette Notice specifically notified the Petitioner and other entities set out in the Notice to demonstrate within twenty-four hours why he should not be declared as a specified entity. Indeed, this notification is in accordance with section 3(2) of POTA which requires the First Respondent to accord the entity an opportunity to demonstrate why it should not be declared a specified entity. The law is clear that all that is required of the First Respondent at that stage is to give the opportunity to demonstrate why the First Respondent should not recommend to the Second Respondent to enlist the Petitioner as a specified entity. The law as I understand it does not call upon the First Respondent to give reasons to the Petitioner at that stage as to why the First Respondent has reasonable basis to believe that the Petitioner has committed or is prepared to commit or has facilitated a terrorist act. ”

“44. I do not see any violation of Article 47 of the Constitution because the Petitioner would have to undergo various stages before he is so specified as an entity. In that regard section 3 of POTA is safe checking and ensures that the decision of both the Inspector General and the Cabinet Secretary are in accordance with the law...”

35. Counsel urged the court to distinguish the cases of **REPUBLIC VS. ETHICS AND ANTI-CORRUPTION COMMISSION & 2 OTHERS, ex parte Erastus Gatebe** and **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA & OTHERS VS. SOUTH AFRICA RUGBY FOOTBALL UNION & OTHERS (CCT. 16/98)2000 SAI**, from the present Petition, in relation to Article 47, and find that section 3(1) of POTA does not require the First Respondent, (the IGP) to reveal any evidentiary material in his possession, and that the principles of natural justice have found expression in the Constitution, and that the First, Second and Third Respondents would make a decision in due course.

36. The Court of Appeal in **DAVID SIRONGA OLE TURAI VS. ARAP MUGE & 2 OTHERS [2014]eKLR** in which the court held **“that once an issue has been expressly and comprehensively provided for by legislation, the courts cannot invoke the substance of the common law, the doctrines of equity and statutes of general application to contradict the provisions of the Kenyan statute.”**

37. On the question whether the Gazette Notice was **ultra vires** the power of the First Respondent, counsel relied upon the decision of the court in **Mohamed Osman vs. Inspector-General of Police** (supra) and submitted that it was not.

38. On whether the freezing of accounts was a violation of the Petitioners rights, counsel once again relied upon the decision of the court in the case of **Kenya Anti-corruption Commission vs. Lands Limited** (supra), where the court analyzed whether the rationale behind freezing of accounts by investigators is prejudicial or not, and that it may well be justified when the rights of individuals are balanced with the public interest.

39. On the question of costs, counsel expressed the view that the Petition raises a great deal of public interest and parties should meet their own costs.

40. Finally, counsel submitted that the Gazette Notice met the requirements of Article 47, that the Petitioners have not complained that twenty-four hours was too short as parties are bound by their pleadings, that the actions of these Respondents were based on the law and in particular section 3 of the Prevention of Terrorism Act. The fact that Petitioners have not been charged entirely lay with the Office of the Director of Public Prosecutions, and criminal prosecution has no limitation period. Counsel urged the court to disregard evidence presented from the Bar and dismiss the Amended Petition.

THE FOURTH RESPONDENT’S CASE

41. The case of the Director of Public Prosecutions (DPP), was urged by Jami A. Yamina, Principal Prosecution Counsel assisted by Daniel S. Wamotsa, Senior Prosecution Counsel, on behalf of the DPP. They relied upon their submissions dated 21st September, 2015 and filed on 22nd September, 2015, and the cases cited in the List of Authorities of even date with the submissions.

42. Counsel Jami anchored the DPP’s joinder in the Petition under Article 157(1) which gives the DPP mandate in the public interest to avoid abuse of legal process. He associated himself with the submissions by Mr. Ngari on behalf of the First, Second and Third Respondents, and also the Replying Affidavit of Inspector Bwire sworn on 25th April, 2015. The DPP advises on Prevention of Terrorism Act

and the Regulations thereunder on detection, prevention of terror activities and connected purposes, thus the funds frozen are forfeited under POTA. Counsel emphasized that the DPP **vehemently** oppose the Petition and orders sought in the interest of security.

43. On the impugned Gazette Notice, Mr. Jami submitted that the First Respondent understood the procedure, and gave the Petitioners an opportunity to show cause why such recommendation should not be made, that the Gazette Notice was clear, it was not unreasonable, and that is why the Petitioners complied with the notice within twenty-four hours on 8th April, 2015, and that the court should ignore the analogy of thirty-two days walk from Mombasa to Nairobi. Counsel submitted that the communication through the Gazette Notice was efficient, the Petitioners understood the allegations, and in terms of Section 3 of POTA, that the Petitioners had demonstrated they are not associated with Al Shabaab.

44. On the question of Notice, counsel submitted that neither POTA, nor the Fair Administrative Action Act 2015 do provide a method of giving notices, that the Gazette Notice was very practical, that there were eighty-eight organizations, and it could not contain the reasons for such action, the reasons counsel submitted, were confidential! Counsel relied upon the case of **KENYA REVENUE AUTHORITY VS. MENGINYA SALIM MURGANI** (Civil Appeal No. 108 of 2009) where the Court of Appeal held **inter alia-**

“There is ample authority that decision-making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures provided that they have the degree of fairness appropriate to their task it is for them to decide how they will proceed.”

45. This counsel also reiterated reliance on the decision of the court in **Egal Mohamed Osman vs. Inspector-General of Police** (supra) stating that the notification in the Gazette Notice was not in contravention of Article 47 of the Constitution.

46. This counsel further maintained that there was no deprivation of property in terms of Article 40 of the Constitution, because the term “freeze” is defined under Regulation (2) of the POTA Regulations, and that the funds remain in the ownership of the Petitioners. This, Mr. Jami submitted was in keeping with the precautionary principle discussed in the case of **KADI VS. COUNCIL & COMMISSION, 2005 ECR 3649** and as discussed by Odunga J. in **REPUBLIC VS. KENYA REVENUE AUTHORITY COMMISSIONER OF CUSTOMS ex parte Europa Healthcare Limited [2014] eKLR**.

47. Mr. Jami reiterated his submissions that the Constitution contemplates the act of freezing of accounts and relied upon the provisions of section 35 and 45 of the POTA, the constitutionality of which is not challenged, whereas the limitation is prescribed; that freezing of accounts is allowed.

48. Counsel also submitted that there was no error or failure in not citing Al Shabaab as a terrorist organization, since the TOPA Regulations adopt the UN Resolution 1267/137 in which Al Shabaab is a designated entity, and regulations are part of Kenyan law, under Article 2 of the Constitution. In this regard counsel relied upon the decision of Odunga J. in **COALITION FOR REFORM AND DEMOCRACY (CORD) & ANOTHER VS. REPUBLIC OF KENYA & ANOTHER [2015]eKLR**.

49. The Petitioners had not been deprived of their funds counsel submitted. The Petitioners were at liberty to move appropriate persons for appropriate reliefs. The court must balance the Petitioners need and use of funds with the necessity by the state, to detect and prevent terrorist acts.

50. The POTA Regulations adopt the UN Rules on Prevention of Terrorism, and the Petitioners did not require notice to show cause why their accounts should not be frozen. This, counsel submitted did

not mean that the Petitioners are terrorists, that the freezing of accounts is an administrative act. It may well turn out the First Respondent had no case to present. The element of surprise was underscored by the court in the case of **AHMED ALI YUSUF & AL BARAKAT INTERNATIONAL FOUNDATION VS. COUNCIL OF THE EUROPEAN UNION AND COMMISSION OF THE EUROPEAN COMMUNITIES CASE 306/01**. Similar sentiment was expressed in the UK case of **REPUBLIC VS. SECRETARY OF STATE OF THE HOME DEPARTMENT, ex parte Heneball [1977] 1 W.L.R. 766**. And in **R (WRIGHT & OTHERS VS. SECRETARY OF HEALTH & ANOTHER [2009] UKHL3** where the UK's highest court held that the freezing of accounts is not deprivation of property.

51. Counsel also submitted that the First Respondent never made a decision to freeze the Petitioners' accounts. That is not his role; his decision to investigate should not be used to crumble because the accounts were frozen.

52. The issue, counsel submitted was whether the Petitioners were associated with Al Shabaab a terrorist organization, and were "invited" to answer the allegations. It was this counsel's final submission that the sole purpose of the Petition was to create a situation where the funds frozen are released and dissipated "**to the four winds**". For these reasons, counsel urged the court to dismiss the Petition.

THE SUBMISSIONS OF MR. DANIEL N. WAMOTSA, SENIOR PROSECUTION COUNSEL (SPC) FOR THE 4TH RESPONDENT DPP

53. In addition to the submissions of Mr. Jami, Mr. Wamotsa submissions were on the running themes on terrorism, its detection and prevention, an element of surprise is important, hence the freezing of accounts so that the purposes of POTA are not defeated, that there is no challenge on any of the provisions of POTA. Counsel relied upon Regulation 12 of the POTA Regulations which provides for conditions of freezing of accounts. As a member of the United Nations Kenya was merely implementing UN Resolutions on the prevention and suppression of terrorism through POTA and POTA Regulations, that the freezing of the accounts is not permanent but temporary and more importantly it is not unconstitutional per the decision in **KADI VS. COUNCIL AND COMMISSION & OTHERS** (supra).

54. Counsel reiterated that the impugned Gazette was lawfully issued. The First Respondent gave reasons that from their responses, the Petitioners knew the case, that there is a second stage of investigations when the Petitioners can apply for release of the funds. Counsel urged this court to follow the decision in **Egal Mohamed Osman vs. IPG & Others (supra)**, and find the Gazette Notice was lawfully issued, and dismiss the Petition challenging the Gazette Notice.

55. In the final analysis there is no evidence of breach of any provision of the Constitution or any constitutional rights. He urged this court too, to dismiss the Petition.

56. Mr. Lusi, learned counsel who appeared for the Sixth Respondent urged the court to dismiss the Petition against them. The Sixth Respondent had embraced its mandate under the terms of the various enactments and that the allegations of abdication of duty are unfounded. Counsel divided his submissions into two issues –

- (a) Whether the Petitioners had established a reasonable cause of action against the Respondents, and
- (b) Whether Regulation 35 of POTA Regulations affords a limited qualified privilege from proceedings such as the Petition herein.

57. It was counsel's general submission that having reviewed the Amended Petition and the submissions by counsel for the Petitioners as well as counsel for the First to Fourth Respondents that it is clear that the Petition was not about acts done by conspirators, but actions taken by different state agencies, acting independently according to their legal mandate.

58. On the first issue whether there is a cause of action against the Central Bank of Kenya (CBK), CBK is a creature of statute, the Central Bank of Kenya Act (Cap 491, Laws of Kenya). Similarly the Fifth Respondent, the **Financial Reporting Centre** (FRC), is a creature of statute pursuant to section 21 of the Proceeds of Crime and Anti-Money Laundering Act 2009 (No. 9 of 2009).

59. Counsel invited the court to take judicial notice of the spate of terror attacks as well as the grave allegations against the Petitioners. Counsel submitted that Article 24 of the Constitution permits the limitation of any rights and fundamental freedoms by legislation. And looking at the spate of terror attacks and the gravity of allegations must have precipitated Parliament to enact the legislation on terrorism (POTA and its POTA Regulations) and Proceeds of Crime and Money-Laundering Act.

60. On the question whether the law anticipated instances where assets and property may be frozen under the overriding theme of detection and prevention, POTA, section 35 recognizes that the state may freeze assets of certain persons, juridical or natural. The question is whether the actions of freezing is lawful, counsel submitted that such action is lawful, it was anticipated by the law.

61. Further, counsel submitted section 37 of POTA (which recognizes the power to freeze accounts) read together with section 44 of POTA (which obliges disclosure of information of parties suspected of holding funds or property which supports or otherwise is complicit towards the commission of acts of terror, (the Sixth Respondent did not suggest he had such information), but that where such information is availed to the relevant bodies mandated to do so, they are legally mandated to freeze accounts of suspects.

62. Mr. Lusi submitted that Regulation 11 of POTA Regulations designates the state authorities mandated to take decisions to freeze accounts that is, the Minister and the Counter Financing of Terrorism Inter-Ministerial Committee established under Regulation 4 of POTA, which material is in a letter dated 7th April, 2015 addressed to the Deputy Governor, and paragraph 6 of the letter directed the Sixth Respondent to freeze the accounts, be done without notice to the affected parties.

63. It was counsel's submission also that it was within the wisdom of the makers of the Regulations to provide for qualified immunity, and that all be done expeditiously and **without** requiring reporting institutions to act without delay, and under Regulation 35, the affected entities may request for partial release of funds hitherto frozen. In other words, counsel submitted, there were instances established by law where assets may be frozen, identifies the administrative authority to act in freezing accounts and assets, and to grant relief to the affected entity.

64. At the point where the Sixth Respondent received instructions, counsel submitted, the Sixth Respondent complied with the law in transmitting the administrative decision that had been made to the entities that actualized the freezing. The only issue concerning the Sixth Respondent is that it transmitted the decision to freeze it did not make the decision.

65. Its decision to transmit was **prima facie** lawful. Counsel conceded however that the allegations facing the Petitioners may well be without merit, but the Central Bank of Kenya Act does not give it either the mandate and neither does it have the technical capacity to supervise the making of the decision to freeze. In the circumstances, there is no reasonable cause of action against the Sixth Respondent. It

had no capacity to question the antecedents to the decision. Relying upon the decision of the court in **KENYA ANTI-CORRUPTION VS. LANDS LIMITED** (supra) counsel submitted that it may be necessary to take limited actions in the administration of the law. The Sixth Respondent was not in a position to question the limits or merits of the decision.

66. On the second issue whether the Sixth Respondent enjoys any immunity or qualified privilege, counsel cited Regulation 35 of the POTA Regulations which grants the Sixth Respondent immunity or qualified privilege except when it acts in bad faith when it would lose such immunity or privilege.

67. Counsel submitted that there is no allegation of bad faith or malice against the Petitioners. In fact, counsel submitted, it would be an offence for the Sixth Respondent to fail to act on instructions of the FRC, that the Sixth Respondent followed the law, and complied with the law, that the Sixth Respondent would not on its own question the bona fides of the letter of 7th April, 2015.

68. The Nuremberg principle requires an officer must have had a moral choice, otherwise it is not a defence to an unlawful act, that the officer was carrying out the commands or directive from the commanding or superior officer.

69. In this case, counsel submitted, the Sixth Respondent lawfully discharged not merely its legal duty but also the only moral choice. Its action was lawful, it acted in accordance with its mandate, transmitted to it in the letter of 7th April, 2015. The issue, counsel submitted, was not whether the transmission was lawful but rather whether the freezing was unlawful, and concluded that none of these acts were unlawful.

70. On the question whether there was procedural fairness, counsel submitted that there was a constitutional provision, and law limiting the rights and the cases cited show that the action by the Sixth Respondent was lawful.

71. On whether notice to the Petitioners was necessary, POTA Regulations expressly negate the necessity to give any notice, and in addition, the Petitioners had not pleaded that the Regulations were unlawful. On procedural fairness, counsel submitted that, the Sixth Respondent was not privy to the reasons for which the decision was taken; the Sixth Respondent acted in terms of the communication of FRC, and urged the court to dismiss the Petition.

SUBMISSIONS OF KATIBA INSTITUTE – FIRST AMICUS CURIAE

72. Submissions for Katiba Institute, the First **Amicus Curiae**, were made by Waikwa Nyoike and Ms. Koge. Mr. Nyoike submitted on the outset, **firstly** that as an amicus curiae (a friend of the court) their position to the Petition was entirely based upon the interpretation of the Constitution, and **secondly** that in anything the court does, in anything the person does, the Constitution is the starting point.

73. **Thirdly**, on his preliminary points, counsel for the Amicus Curiae urged the court to apply the principles developed by the Supreme Court of Canada in the context of purpose and effect in the case of **re SECESSION OF QUEBEC [1998] 2SCR 217**.

74. **KATIBA's** substantive submissions were that the First Respondent ought to have shown –

(a) he obtained or gathered information,

(b) he analyzed the information and found some credibility and that information led him to suspect that

the two Petitioners may be involved in terrorism activities, and

(c) notify the Petitioners that he has information and that notification shall express or give sufficient information on the case to meet (Article 50),

(d) given the suspects sufficient time to respond. A case under Article 50 cannot be met where a suspect has no information to answer – not arbitrariness on whether to refer to the Cabinet Secretary or not to do so in accordance with the requirements of Article 47 before the application of Article 80, and then the provisions of POTA.

75. KATIBA emphasized the court must not convolute the requirements of the Constitution with the provisions of POTA. For the Respondents to succeed they must show –

(a) that the First Respondent followed the law, Articles 47, 50 and then POTA and also the provisions of the Fair Administrative Action Act, 2015; that sets out in section 4(3) in determining whether the action was likely to adversely affect the Petitioners.

(b) that the First Respondent should also show that he had reasons to show the “intentions”, there must be grounds, and those grounds must be “**reasonable**” and to be reasonable, there must be “**credible**” evidence. In the absence of such reasonable and credible evidence Article 29 (the freedom and security of the person – the Petitioners) is breached.

76. The Respondents, counsel had not brought the evidence, even in Chambers if it is sensitive. That evidence is lacking, counsel submitted.

77. On the question of limitation of rights authorized under Article 24 of the Constitution, and enacted in section 35 of POTA, counsel submitted **firstly** that POTA was enacted after the promulgation of the Constitution. **Secondly**, the provisions of Article 47 of the Constitution had not been limited.

78. KATIBA also submitted on the ambiguity of the commencement of the twenty-four hours Gazette Notice which was published on 7th April, 2015 that had been signed on 4th April, 2015. It was unclear, as to when the time began to run, from 6.00 a.m. or 6.00 p.m. Counsel relied on the case of **STEPHEN NENDELA VS. COUNTY ASSEMBLY OF MOMBASA & 4 OTHERS [2014] eKLR** where the court held that a period of sixteen (16) hours to prepare to cross-examine a witness was too short.

79. KATIBA also submitted that contrary to the provisions of Article 47 of the Constitution as now further clarified under section 4(3) of the Fair Administrative Act, 2015, no reasons were given to the Petitioners for the court to evaluate whether they satisfy the limitation under Article 24 of the Constitution.

80. The evidence given in the Replying Affidavit of IP Bwire relates to the terrorist attack and carnage at Garissa University College. The evidence counsel submitted should relate to the Petitioners, not generalities.

81. The contention that section 3(2) of POTA does not require disclosure, is contrary to Article 50, counsel submitted.

82. Counsel for KATIBA urged the court to consider the consequences of the actions of the First Respondent, to persons who are employers of the Petitioners, and whether he owed any duty to them, their spouses, and children!

83. Ms. Koge, for the KATIBA, took the court through the cases of **ORION EAST AFRICA LIMITED VS. PERMANENT SECRETARY MINISTRY OF AGRICULTURE & ANOTHER [2012] eKLR** (Petition No. 100 of 2012), where the court held *inter alia* –

“...that the purported ban of the Petitioner’s dimethoate products effected through the advertisement campaign as evidenced by the “SOMA LEBO” advert appearing in the Daily Nation of 20th January 2012 was a breach of the Petitioner’s right to fair administrative action protected under Article 47 (1) [of the Constitution].”

84. On the question of what constitutes proper notice, counsel relied on the case of **GEOTHERMAL DEVELOPMENT COMPANY LIMITED VS. ATTORNEY-GENERAL & 3 OTHERS [2013] eKLR**, where the court also held the Petitioner’s rights under Article 47(1) were violated by the Second, Third and Fourth Respondents, and proceeded to quash the notices, on the grounds that the Petitioner had not been accorded proper notice.

85. On the question of unlawfulness of administrative action, KATIBA’s counsel relied on the decision of the court in **GRACE A. OMOLO VS. ATTORNEY-GENERAL & 3 OTHERS [2012] eKLR** where the court declared that by failing to institute and commence disciplinary proceedings within a reasonable time, the Petitioner’s rights under Article 47 of the Constitution were violated by the Permanent Secretary Ministry of Education and the Public Service Commission and also awarded the Petitioner damages.

86. The decision in **KEROCHE INDUSTRIES LIMITED VS. KENYA REVENUE AUTHORITY & 5 OTHERS [2007]eKLR** was relied upon by KATIBA for the proposition that discretion is not unfettered, it is subject to rules or principles, it cannot be whimsical. **And in JAYNE MATI & ANOTHER VS. ATTORNEY-GENERAL [2011] eKLR** where Majanja J. discussed widely at paragraph 42 the duty of the court in a Petition–

“42. Every failure to follow the letter of the Constitution harms the Constitution itself, breeds cynicism and encourages impunity where such failure stems from a deliberate effort to undermine the Constitution. The responsibility of the court is to weigh the facts of the breach against the letter and spirit of the Constitution and determine whether the relief should be granted to protect the Constitution.”

87. At paragraph 47, the learned Judge added –

“47. What is clear to me is that the court must exercise its role in a manner that promotes constitutionalism and supports state organs, authorities and state and public officers to work together in concert to realize the dream of a new Kenya granting the declarations sought will only sow seeds of confusion and undermine government processes, policies and programs that are planned in accordance with the annual budget cycle.”

THE SUBMISSIONS ON BEHALF OF KENYA NATIONAL COMMISSION ON HUMAN RIGHTS – SECOND AMICUS CURIAE

88. The Kenya National Commission on Human Rights was the Second Amicus Curiae. Mr. Karani who represented the Commission emphasized the role of the Commission on human rights, that it’s the Commission’s brief to maintain absolute loyalty to the Constitution and the Bill of Rights, and invited the court to make a finding on the observance of human rights by all parties in the Petition.

89. The first principle counsel referred to was the right to property under Article 40 of the Constitution, and that no law shall be enacted to deprive anybody of property which is defined under Article 260 to include any vested or contingent right to property negotiable instruments. Counsel cited the decision of the Privy Council in the case of **THE ATTORNEY-GENERAL OF THE GAMBIA VS. MOMODOU JOBE (P.C.) [1984] 1AC 689**, where Lord Diplock said at page 700, letter H –

“A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction. “Property” in section 18(1) is to be read in a wide sense. It includes choses in action such as a debt owed by a banker to his customer.

The customer’s contractual right against his banker to draw on his account (i.e. to claim repayment of the debt or any part of it on demand), is embraced in the expression “right over or interest” in the debt, while compulsory “acquisition” of any right over or interest in property includes (as is evident from section 18(2)(a)(vii) temporary as well as permanent requisition. To confer upon a member of the public service, in the exercise of executive powers of state, a power at his own executive discretion to prevent the bank’s customer from exercising his contractual right against the bank to draw on his account on demand, in their Lordship’s view, amount to a compulsory acquisition of a right over or interest in the customer’s property in the debt payable to him by his banker, and a law which provided for the exercise of such executive discretion would contravene section 18 of the Constitution. It would be ultra vires and therefore void.”

90. Counsel also cited the case of **EDWARD THOMAS FOLEY VS. THOMAS HILL & OTHERS [1848] 9 E.R.1002** on the relationship of a Banker and its Customer.

“The relation between a Banker and Customer who pays money into the Bank, is the ordinary relation of debtor and creditor with a super added obligation arising out of the custom of bankers to honour the customer’s drafts; and that the relation is not altered by the agreement by the Bank to allow interest on the balances in the Bank.

The relations of Banker and Customer does not partake of a fiduciary character nor bear analogy to the relation between Principal and Factor or Agent, who is quasi trustee for the principal in respect of the particular matter for which he is appointed factor or agent. The court therefore held –

that an account between the Bankers and their Customer, no long nor complicated, but consisting of a few items and interest, is not a fit subject for a bill in equity.”

91. This theme of Banker and Customer relationship was explored by Lord Atkinson in the case of **JOACHIMSON VS. SWISS BANK CORPORATION [1921]EKB110** at page 127 –

“The question turns upon the terms of the contract made between the Banker and the Customer in ordinary course of business when a current account is opened by the bank. It is said on the one hand that it is a simple contract of loan; it is admitted that there is added, or super added, an obligation of the Bank to honour the customer’s drafts to any amount not exceeding the credit balance at any material time; but it is contended that this added obligation does not affect the main contract. The Bank has borrowed the money and is under the ordinary obligation of a borrower to repay. The lender could sue for his debt whenever he pleases.”

92. If that be that the relationship of banker and his customer, under Article 40(3) (b) where the state

deprives a person of his property, it must be for a public purpose, and be done in accordance with the Constitution. For the deprivation to be lawful, it must be subject to court orders. Counsel relied on the case of **FINANCING CLEARING CORPORATION VS. ATTORNEY-GENERAL (OF THE BAHAMA) [2000] LRC**, where the Supreme Court of the Commonwealth of the Bahamas, answering the question whether the Applicant's property was compulsorily acquired by the actions of the Financial Intelligence Unit the equivalent to Kenya's Financial Reporting Centre said –

“Compulsory acquisition, in my view means the kind of acquisition which amounts to deprivation. I have no doubt that the actions of the Financial Intelligence Unit in stopping the compilation of transactions on the account for seventy-two hours and the subsequent freezing of the account, deprived the person owning the account from the enjoyment which normally accompanies rights to, or interest in the money in an account including the freedom to withdraw, transfer, spend, or invest it, and is a compulsory acquisition. ”

93. The Supreme Court of the Commonwealth of the Bahamas were fortified in their decision by the views expressed by Lord Diplock in the **ATTORNEY-GENERAL OF THE GAMBIA VS. MOMODOU** (supra) at page 565 where he also said –

“Compulsory acquisition of any right over or interest in property includes (as is evident from section 18 (2)(a)(vii) temporary as well as permanent requisition.”

94. Counsel urged the court to find that there was deprivation of the property or that there was justification.

95. On the question of rights to fair administrative action, counsel associated himself with the submissions by Mr. Waikwa Nyoike, counsel for the First Amicus Curiae. He however added that where a person is likely to be adversely affected, a futuristic intent, then that person is entitled to a written notice with a right to be heard, **“audi alteram partem,”** a rule of great antiquity, no one should be condemned unheard. Counsel relied on the text - BROOMS Legal MAXIMIS 12th Edition by Dr. H. K. Saharay page 61–

“Audi Alteram Partem – No man shall be condemned unheard – it has been a received rule, that no one is to be condemned, punished, or deprived of his property in any judicial proceedings, unless he had an opportunity of being heard. It is an indispensable requirement of justice that the party who has to decide shall hear both sides, giving an opportunity of hearing what is urged against him.”

The principles of the rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the courts of law.

96. Relating these maxims to the Gazette Notice of 7th April, 2015, requiring the Petitioners to show cause why they should not be specified as an entity engaged in terrorism, and in addition, the Petitioners funds having been frozen, and rendered impecunious, operationally comatose, the Notice really said, we have already commenced action against you and you now will, within 24 hours, come and tell us, why we should stop. That is the situation here. The principles of natural justice require that there be adequate notice and reasons for the action. Counsel relied upon the decision of the court in **ONYANGO OLOO VS. ATTORNEY-GENERAL [1980-1986] E.A. 456** where the Commissioner of Prisons denied a prisoner the right of remission granted under section 46(2) of the Prisons Act (Cap 90, Laws of Kenya). The Court of Appeal said that–

“the principle of natural justice applies when ordinary people would naturally expect those making decisions which will affect others to act fairly. In this instant case, reasonable people would expect the Commissioner (of Prisons) to act fairly in considering whether or not to deprive an inmate of his right of remission earned in accordance with the provisions of the Prisons Act. Reasonable people would expect the Commissioner to act on reports containing information concerning the appellant. The Reports will have been prepared by the officer-in-charge of the Kamiti Main Prison. The inmate may or may not be aware of the reports on him. There was no evidence here that he was made aware of what was afoot.”

97. In **O'REILLY VS. MACKMAN [1982] 3 ALL ER 680**, Lord Parker said –

“The rules of natural justice is a duty to act fairly.”

98. And Nyarangi JA in **Oloo Onyango vs. AG**, said –

“...denial of the right to a hearing to a prison inmate is null and void ab initio.”

99. A decision against the rules of natural justice is not

curable. It renders the decision however well-meaning null and void **ab initio**. In **SUSSEX JUSTICES, ex parte McCarthy [1921] 1KB, 250**, the court said that justice should not only be done but be manifestly seen to be done.

100. Counsel emphasized that counter-terrorism and the Petitioners rights are not mutually exclusive to each other; infact they re-enforce each other. The Commission is alive to the challenges posed by terrorism, but that black hole of terrorism is dealt with in Article 238, that the issue of terrorism be dealt with according to law. Counsel relied upon the decision in the English case of **SECRETARY OF STATE FOR THE HOME DEPARTMENT VS. AF (NO. 3)** and related Appeals [2009] UKHL28, which conferred the right to a fair hearing under UK's Prevention of Terrorism Act 2005 (ss 2(a) and 3(10) and the Human Rights Act 1998, SCRT Part 1 Article 6. The court held –

“A controlled person had to be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that that requirement was satisfied there could be fair trial notwithstanding that the controlled person was not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, the open material consisted purely of general assertions and the case against the controlled person was based solely or to a decisive degree on closed materials the requirement of fair hearing would not be satisfied however cogent the case based on the closed materials might be. Strong policy considerations supported the rule that a trial procedure could never be considered fair if a party to it is kept in ignorance of the case against him. In a hearing under section 3(1) of the 2005 Act the Judge would have to consider not merely the allegations that had to be disclosed but whether there was any other matter whose disclosure was essential to the fairness of the trial. The appeal was allowed.”

101. The last submission by counsel for the Second Amicus Curiae was to urge the court whether a case had been made out against the Petitioners!

102. Mr. Jaffer also submitted on behalf of the Second Amicus Curiae. Relying on the decisions on **Onyango Oloo vs. The Attorney-General** (supra) counsel submitted that the fact that the Petitioners responded to the notice did not justify the breach of the rules of natural justice. Counsel also relied on

the Mauritius case of **NOORDALLY VS. ATTORNEY-GENERAL [1987] LRC (Const), 599 Moolan C.J.** said at 603 –

“The whole of our Constitution clearly rests on two fundamental tenets, the rule of law and the juxtaposition (or separation as it is more often called) of powers. We conclude therefore that it is not in accord with the letter or spirit of the Constitution, as it is presently stands, to legislate so as to enable the Executive to overstep or bypass the judiciary in its essential roles, namely those of the law and, as guardian of the Constitution, to ensure that no person’s human rights or fundamental freedoms are placed in jeopardy.”

103. Counsel concluded that the freezing of accounts without notice is a breach of the rules of natural justice, because when the decision to freeze is taken, the Executive has not given opportunity to hear from the suspect, and the power to freeze accounts should be addressed by the judiciary.

104. The burden of proof should never be reversed. He who alleges must prove, section 107 of the Evidence Act (Cap 80, Laws of Kenya). The Gazette Notice shifted the burden of proof – that the Petitioners should give evidence why they should not be declared a designated entity. The Respondent must first lay prima facie evidence against the Petitioners if the evidential burden is to be created on those shoulders - **WINFRED NYAWIRA MAINA VS. ROBERTSON ONYIEGO GICHANA [2015] eKLR**. Similar sentiments were expressed in **JOHN MURUMBA CHIKATI VS. RETURNING OFFICER TONGAREN CONSTITUENCY & 2 OTHERS [2013] eKLR**.

RESPONSE BY PETITIONERS COUNSEL TO THE RESPONDENTS SUBMISSIONS

105. Mr. Aboubakar, counsel for the Petitioners responded to the submissions, and in particular on the decision in **Egal Mohamed Osman vs. Attorney-General** (supra). Counsel faulted the impression created by the decision in that case that the Gazette Notice of 7th April, 2015 was a Notice to the Petitioners. It was not, for the POTA does not say how the notice is to be served upon the Petitioners, but the National Police Service Act does, under which the First Respondent can summon any person for purpose of inquiry; that is under the criminal procedure system.

106. **Secondly**, counsel submitted that court fell into error of interpretation by referring to the Cabinet Secretary.

107. **Thirdly**, the communication by the Gazette Notice was not a summons but communication of a decision.

108. **Fourthly**, the decision in **Egal Mohamed Osman** case failed to consider the need to promote the purpose and principles of the Constitution as provided by Article 259(1) of the Constitution, and neither did the court consider the requirements of Article 50 which is not limited by Article 24. Counsel submitted that POTA imports the provisions of Article 47, and that is the reason why the Petitions had not challenged the provisions of section 3 of POTA.

109. **Fifth**, there were no consequences in the **Osman** case. His account had not been frozen, unlike those of the Petitioners.

110. **Sixth**, counsel submitted that the submissions of the Respondents assumed that the Petitioners had been designated a specified entity whereas there had been no such declaration by the Cabinet Secretary as only the Cabinet Secretary can freeze the accounts, and the freezing of accounts could only be done after being designated as an entity.

111. **Seventh**, Regulations 10 and 11 refer to UN Sanctions List, but no such list was scheduled, and it is erroneous to rely on those regulations.

112. **Eighth**, on the sense of balance referred to in **KACC VS. LANDS LIMITED**, (supra), the limitation must be defined by law, in that case the Anti-Corruption and Economic Crimes Act.

113. **Ninth**, section 35 of POTA takes effect after the designation by the Cabinet Secretary, not before.

114. In conclusion, the submissions of counsel on behalf of the Respondents should only be brought to court if they acted in good faith and within the law. To act within the law, is to look at the law, and if a party acts without looking at the law, it acts in bad faith. If the Sixth Respondent had looked at the law, they would not freeze the accounts of the Petitioners, and that even under the Nuremberg principles, the Sixth Respondent cannot act without reference to the law, and not merely the moral conscience.

FURTHER RESPONSE BY MR. JAMI FOR THE FIRST – THIRD RESPONDENTS

115. Mr. Jami urged the court to consider carefully, KRA case ex parte Europa, and the cases cited therein. The point is that the Petitioners responded to the Gazette Notice, that the Notice is comparable to a charge, that particulars are given, but not the evidence!

RESPONSE BY COUNSEL FOR THE SIXTH RESPONDENT

116. Mr. Lusi, counsel for the Sixth Respondent submitted that the Central Bank of Kenya is not a member of the Financing Reporting Centre and it is an offence under section 10 of the Proceeds of Crime and Anti-Money Laundering Act to reveal any information on FRC, and that this provision absolved the Sixth Respondent from liability.

117. Counsel submitted that section 35(2)(b) of POTA should be construed in line with Article 24(a) – (d) of the Constitution for the purposes of carrying out investigations to facilitate prevention and detection of acts of terrorism.

118. The limitations recognized under Article 24 have been followed under section 35(2) (b) of POTA, construed alongside the decision in **KACC VS. LANDS LIMITED** (supra).

119. Regarding Regulation 11(1), counsel submitted that it is the Cabinet Secretary or the Committee which made the decision to freeze. And on the Nuremberg principles, it is not that the Sixth Respondent acted on directives of a superior, but rather that the Sixth Respondent acted in accordance with the law, as the exercise of a moral choice must be examined in accordance with the law. He urged the court to dismiss the Petition against the Sixth Respondent.

ANALYSIS ISSUES AND ANALYSIS

120. In light of the magnitude and ramification of the issues raised by Petitioners, (violation of human rights), and by the Respondents (the importance of security, and the public interest), I have set at **in extenso**, the submissions by counsel for each of the counsel who appeared for the respective parties. In that light therefore I have considered carefully, the submissions by counsel for the Petitioners and by counsel for the Respondents and Amicus Curiae. The issue which I perceive both the Petitioners and the Respondents raise is but one point, that is to say, whether the Respondents erred and breached the Petitioners constitutional rights in particular to fair administrative action as guaranteed under Article 47 of the Constitution. Both the Petitioners and Respondents counsel argued at length for and against the

alleged breach and violation of the Petitioners rights under the Constitution.

121. Although the Petitioners did not specify which provision of the Constitution was violated, this failure may be regarded as a technicality both from the point of view of Article 22(3)(b) – (proceeding by informal documentation), and 159(2)(d), (justice shall be administered without undue technicalities). The Respondents argued strenuously that no right under the Constitution, or law was breached, and in particular in light of sensitive security issues entailed, the Petitioners rights were not absolute and had been limited by POTA and the POTA Regulations, enacted pursuant to Article 24 of the Constitution. This court was urged to follow the principles in the Constitution and enacted legislation which excluded the application of the principles of both the common law and equity, as the Court of Appeal had found and faulted me in my application of those principles in the case of **DAVID SORONGA OLE TUNAI VS. ARAP MUGE & 2 OTHERS** (supra). The common denominator between the Petitioners and the Respondents, and the Amicus Curiae is therefore the Constitution, the Prevention of Terrorism Act and the POTA Regulations, the Proceeds of Crime and Anti-Money Laundering Act 2009. The starting point is therefore the Constitution.

THE CONSTITUTION OF KENYA 2010 – THE UNDERLYING PRINCIPLES

122. Our Constitution is primarily a written one; the product of no less than 47 years (from the Independence Constitution of 1963 to the consolidation of the various amendments into Constitution of Kenya 1969, to the promulgation of the Constitution 2010). So behind the written word is an historical lineage stretching over those years and in particular the last 15-20 years before the two referenda of 2005, and 2010. That lineage aids in the consideration of the underlying constitutional principles. These principles set out in Article 10 of the Constitution inform and sustain the constitutional text. They are the expressed provisions upon which the constitutional text is based. The principles stated in Article 10 are not exhaustive. Article 10(2) says –

“(1)

(2) The national values and principles of governance include -

- a. **patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;**
- b. **human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;**
- c. **good governance, integrity, transparency and accountability; and**
- (d) sustainable development.”**

123. Article 10(1) declares that these national values and principles of governance bind all State organs, State officers, Public officers and all persons whenever any of them –

- (a) applies or interprets this Constitution,
- (b) enacts, applies or interprets any law; or
- (c) makes or implements public policy decisions.

124. The following discussion addressed the four functional constitutional principles that are most germane to the resolution of this Petition –

- (a) democracy
- (b) constitutionalism
- (c) the rule of law
- (d) and respect for the marginalized and minorities

125. These defining values and principles function in symbiosis. No single value or principle can be defined in isolation from the others, nor does any value or principle trump or exclude the operation of the other. This is part of the “tree” doctrine. While considering the Constitution of the United Republic of Tanzania regarding a restriction to access the court, the Court of Appeal for Tanzania in the case of **NDYANABO VS. THE ATTORNEY-GENERAL [2001] 2A.A. 485** at page 493 had this to say –

“We propose to allude to general principles governing constitutional interpretation... These principles may, in the interest of brevity be stated as follows. First, the constitution of the United Republic of Tanzania is a living instrument, having a soul and consciousness of its own as reflected in the Preamble and Fundamental Objectives and Directive Principles of State Policy. Courts must therefore, endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in time with the lofty purposes for which its makers framed it... Secondly, the provisions touching fundamental rights have to be interpreted in a broad and liberal manner. Restrictions on fundamental rights must be strictly construed.” (underlining added)

126. In the case of **DAVID TINYEFUZA VS. ATTORNEY-GENERAL (OF UGANDA)**, (Petition No. 1 of 1996) (unreported), the Uganda Court of Appeal held –

“The second principle is that the entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness and the rule of paramountcy of the written constitution.... I think it is now also widely accepted that a court should not be swayed by considerations of policy and propriety while interpreting provisions of a constitution.” [emphasis added]

127. Our constitution has an internal architecture, a basic constitutional structure. The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole. These values and principles of the Constitution breathe life into it. Indeed the theme of the rule of law is in the very nature of the Constitution. This equally applies to all other principles under consideration in this discussion. These principles dictate major elements of the Constitution itself and are such its lifeblood.

128. These values and principles assist in the interpretation of the text and delineation of spheres of jurisdiction, observance of and respect for these principles is essential to the on-going process of implementation and evolution of our Constitution into a living instrument (Dyanabo vs. Attorney-General) supra, and a “living tree” – **Edwards vs. Attorney-General for Canada [1990] A.C. 124 (P.C.)**, at page 136.

129. These are compelling reasons to insist upon the primacy of the Constitution. The Constitution promotes legal certainty and predictability and provides a foundation and a touchstone for the exercise of constitutional judicial review, and in the exercise of that jurisdiction is subject only to the Constitution and the law and shall not be subject to the control or direction of any person or authority (Article 160(1)).

130. These values and principles (set out in Article 10), give rise to express substantive obligations (“**full legal effect**”) which constitute substantive limitations on government action. The values are not merely descriptive; they are invested with powerful normative force, and are binding upon both the courts and government, national or county level. I now turn to the discussion of those principles.

DEMOCRACY

131. The Respondents argument is that the POTA and POTA Regulations, and the Proceeds of Crime and Anti-Money Laundering Act, which limited the rights of the Petitioners and citizens were enacted pursuant to Article 24 of the Constitution. Article 24 provides –

“24(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity equality and freedom, taking into account all relevant factors, including –

- a. **the nature of the right or fundamental freedom;**
- b. **the importance and purpose of the limitation;**
- c. **the nature and extent of the limitation;**
- d. **the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and**
- e. **the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.**

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom -

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit the right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation, and;

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content;

(3) the State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority the requirements of this Article have been satisfied.”

4 – 5 (not in issue)

132. Kenya is a young nation but democracy is a fundamental value in our constitutional law and political culture. While it was not expressly urged as such, democracy has both an institutional and an individual aspect more importantly in the sense of the supremacy of the people as is declared under

Article 1(1) of the Constitution. “**All sovereign power belongs to the people of Kenya and shall be exercised in accordance with the Constitution and the power is exercised by the people directly or indirectly through their democratically elected representatives; at the national or county level.**”

133. The principle of democracy is what informs the constitutional structure which acts as an essential interpretive structure; it provides for the existence of certain political institutions at the national and county levels. Democracy is the baseline against which the framers of the Constitution and subsequently elected representatives and the state officers, under it operate. The Constitution declares that Kenya shall be a multi-party democratic state founded on the national values and principles of governance referred to in Article 10 (Article 4(3)).

134. Democracy is commonly understood as being a political system of majority. It is essential to be clear what this means. The evolution of Westminster style democracy which has mutated into various Constitutions at least within the common law system goes back to the **Magna Carta** (1215) (under which the Barons and landed nobility won rights against the king) and before, through the long struggle for Parliamentary supremacy which in England, culminated in the English Bill of Rights 1689, the emergence of representative political institutions in the colonial era, the development of what was referred to as responsible government within colonies and dominions such as Canada, moving towards universal suffrage and effective representation.

135. Democracy is not simply concerned with the process of government. On the contrary, it is fundamentally connected to substantive goals, most importantly, the promotion of human and people’s rights. Under Article 24(1) (supra), the limitation has to be reasonable and justifiable in a democratic society – based on human dignity, equality and freedom, taking into account all the relevant facts including the need to ensure that enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and freedoms of others.

136. The court must therefore be guided by the values and principles essential to a free and democratic society, which the Bill of Rights (under Chapter 4 of the Constitution), embody, to cite but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and **faith**, yes, **faith**, in social and political institutions which enhance the participation of individuals and groups in society.

137. In constitutional terms, democracy means that the National Assembly, the Senate (at the national level), and County Assemblies, (at the County level), are elected by popular franchise. The legislatures are at the core of the system of representative government. In individual terms, the political right to vote in elections to the National Assembly and the Senate and the County Assemblies and to be candidates in those elections is guaranteed under Article 38(e). Every citizen has a right to free, fair and regular elections based on universal suffrage and the free expression of the electorate for –

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

138. The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law. It is the law which creates the framework within which the “**sovereign will**” (Article (1), is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is to say, they must allow for the participation of and accountability to, the people,

through public institutions erected under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people. Our law's claim to legitimacy also rests on an appeal to moral values, many of which are embedded in the Bill of Rights. It would be a grave mistake to equate legitimacy with the "sovereign will" or majority rule alone, to the exclusion of other constitutional values and principles of governance.

139. Finally, a functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to the people, resting ultimately on public opinion reached by discussion and the inter play of ideas. No one has a monopoly of either ideas or the truth, and our Constitution (Article 10), is predicated upon the faith in the market place of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community will live.

CONSTITUTIONALISM AND THE RULE OF LAW

140. The principles of constitutionalism and the rule of law lie at the root of our system of government. It is a fundamental postulate of our constitutional architecture. The expression the **rule of law** conveys a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority. At its very basic level, the rule of law vouchsafes to the citizens and residents of Kenya, a stable, predictable and ordered society in which to conduct its affairs. Like our National Anthem says it is our shield and defender for individuals from arbitrary state action.

141. Elements of the rule of law include **firstly**, that the law is supreme over acts of both government and private persons. There is one law for all. **Secondly**, the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order, and **thirdly**, the exercise of all public power must find its ultimate source in a legal rule. Put in another way, the relationship between the state and the individual must be regulated by law.

142. The Constitutionalism principle bears considerable similarity to the rule of law, but they are not identical. The essence of Constitutionalism in Kenya is embodied in Article 2 of the Constitution of Kenya 2010, which provides –

“2 (1) This Constitution is the supreme law of the Republic and binds all persons and all state organs at both levels of government;

(2) No person may claim or exercise state authority except as authorized by this Constitution;

(3) The validity or legality of the Constitution is not subject to challenge by or before any court or other State Organ;

(4) Any law, including customary law, that is inconsistent with this Constitution, is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”

143. Again put differently, the constitutionalism principles require that all government action must

comply with the law, including the Constitution. The Constitution of Kenya 2010 transformed completely, our system of government from Parliamentary Supremacy to one of Constitutional Supremacy. The Constitution binds all government at the national and county levels, including the Executive Branch at those levels. They may not transgress its provisions, their sole claim to exercise lawful authority rests in the powers allowed to them under the Constitution and can come from no other source.

144. An understanding of the scope and importance of the principles of the rule of law and Constitutionalism is critical from three aspects. **Firstly**, the Constitution provides for fundamental human rights and individual freedoms, which could be susceptible to Government interference. Although democratic governments are usually solicitous of those rights there are occasions when the majority is tempted to ignore fundamental rights in order to accomplish collective goals more easily and effectively. Constitutional entrenchment ensures that those rights will be given due regard and protection. **Secondly**, a Constitution may seek to ensure that vulnerable minority identities are protected against assimilative pressures of the majority. **Thirdly**, a Constitution may provide for division of political power that allocates political power amongst different levels of government. That purpose would be defeated if one of these democratically elected levels of government could usurp the powers of the other simply by exercising its legislative power to allocate additional political power to itself unilaterally.

145. Constitutionalism facilitates, indeed makes it possible for a democratic political system by creating an orderly framework within which people make political decisions. Constitutionalism and the rule of law are not in conflict with democracy; rather they are essential to it (democracy). Without that relationship, the political will upon which democratic decisions are taken would itself be undermined.

PROTECTION OF MINORITIES

146. The **fourth** underlying constitutional principle concerns the protection of minorities. This is an independent principle set out in Article 56 (minorities and marginalized groups). The protection of minority rights reflects an important underlying constitutional value.

147. As it was held by the Supreme Court of India in **ADDITIONAL MAGISTRATE VS. SS SHUKLA & OTHERS [1976] AIR 1207, 1976 SCL 172** –

“The Constitution is the mandate. The Constitution is the rule of law. No one can arise above the rule of law. The suspension of a right to enforce fundamental rights has the effect that the emergency provisions of Part XVIII are by themselves the rule of law during the times of emergency. There cannot be any rule of law other than the constitutional rule of law. There cannot be any pre-constitutional or post-constitution rule of law which can run counter to the rule of law embedded in the Constitution nor can there be any invocation to any rule of law to nullify the Constitutional provisions during the times of emergency.”

THE ISSUES AND CONCLUSIONS

148. Having surveyed the submissions of respective counsel along with the authorities relied upon, and having also surveyed the principles of constitutionalism and the rule of law, I now turn attention to the issues raised in this Petition before drawing my conclusions. The issues which I will answer are these –

- (1) Whether Gazette Notice No. 2326 of 7th April, 2015 was ultra vires POTA and the POTA Regulations;
- (2) Whether the freezing of the Petitioners accounts under the POTA and POTA Regulations 10 and

11 was in contravention of the Petitioners' rights to property, and

(3) Whether Regulation 35 of POTA Regulations afford qualified privilege to the Sixth Respondent.

OF WHETHER GAZETTE NOTICE NO. 2326 OF 7TH APRIL, 2015 WAS ULTRA VIRES POTA AND POTA REGULATIONS

149. The contentious and applicable provisions of POTA are sections 2 and 3 which read –

“S.2 “Entity” means a person, group of persons, trust, partnership, fund or an unincorporated association or organization.

“Specified Entity” means an entity in respect of which an order has been made, and

S.3 Where the Inspector-General has reasonable grounds to believe that an entity has –

(i) committed or prepared to commit

(ii) attempted to commit or

(iii) participated in or facilitated the commission of a terrorist act, or an entity is acting –

(i) on behalf of;

(ii) at the direction of; or

(iii) in association with,

an entity referred to in paragraph (a), he may recommend to the Cabinet Secretary that an order be made under sub-section (3) in respect of that entity.

(2) Before making a recommendation under sub-section (1), the Inspector-General shall afford the affected entity reasonable opportunity to demonstrate why it should not be declared as a specified entity.

(3) Upon receipt of the recommendation under sub-section (1), the Cabinet Secretary may, where he is satisfied that there are reasonable grounds to support a recommendation made under sub-section (1), declare by order published in the Gazette, the entity in respect of which the recommendation has been made to be a specified entity.”

150. It was argued both at the Interlocutory proceedings, (subject of the Ruling of 11th June, 2015) and at the hearing of the Petition herein, that section 2 of POTA does not provide a method or procedure on how the Inspector-General would afford the Petitioners a reasonable opportunity to demonstrate why it or they should not be declared a designated entity under sub-section (3) of POTA. It was also submitted that since the Petitioners obeyed the summons under the Gazette Notice, the notice thereunder served the purpose.

151. Argument was also made, and reliance was placed on the decision of the court in **Kenya anti-Corruption Commission vs. Lands Limited** (supra), that matters of security are paramount since we do not live on an utopian state.

152. With profound respect to Counsel for the Respondents these are self-serving and self-defeating arguments because the POTA provisions are both clear and unambiguous. The Inspector-General is required to have reasonable grounds and to afford the Petitioners reasonable opportunity to demonstrate why they should not be declared designated entity/entities. The POTA (3(ii) supra, requires the Inspector-General to give reasons showing commission, preparation to commit, participation in or facilitation in the commission of a terrorist act, or acting on behalf of, in association with a designated entity.

153. More fundamentally, Article 47 of the Constitution is not one of those provisions limited under Article 24(1) of the Constitution. Article 47(1) provides –

“47 (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall –

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.”

154. The Fair Administrative Action Act 2015 (No. 4 of 2015) came into force on 17th June, 2015, after the filing of the Petition the subject matter of this judgment. It can thus be argued that it has no application to this Petition as legislation takes effect in the future, prospectively, not retrospectively. However section 4(3) of the Act amplifies and expands what the courts have said in different words in many a case including, **Moses Kiarie Kariuki & 4 others [2014] eKLR** where Majanja J stated –

“Article 47 intends to bring discipline to administrative action so that values and principles of the Constitution are infused in matters of public administration.” and

earlier in the case of Orion East Africa Limited vs. Permanent Sectary, Ministry of Agriculture and Another [2012] eKLR where the court, Majanja held that the term “administrative action” ...is not limited to decisions; it is an expansive term which includes any acts or omission that affects the rights and interests of citizens.”

155. Section 4(3) of the Fair Administrative Action Act, (FAAA), amplifies the provisions of Article 47(3) –

“Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision –

- a. prior and adequate notice of the nature and reasons for the proposed administrative action;**
- b. an opportunity to be heard and make representation in that regard;**
- c. notice of a right to review or internal appeal against an administrative decision, where**

applicable;

d. a statement of reasons;

e. notice of the right to legal representation, where applicable;

f. notice of the right to cross-examine or

g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.”

156. There is no question that the accusation of being associated with terrorism or terrorist organization has significant consequences, not least of which is everlasting stigma. In this regard, Legal Notice No. 2011 of 22nd November, 2013 on **THE PREVENTION OF TERRORISM (IMPLEMENTATION OF THE UNITED NATIONS SECURITY COUNCIL RESOLUTION ON SUPPRESSION OF TERRORISM) REGULATIONS**, 2013 are instructive. Regulation 2 provides the definition of a designated entity, “designation” or “listing”.

“2. “designated entity” means “an entity designated pursuant to the Act or the applicable United Nations Security Resolution adopted under Chapter VII of the United Nations Charter.

“Designation or Listing” means the identification of a person, organization, association or groups of persons that is subject to targeted sanctions pursuant to the applicable United Nations Security Council Resolutions or an entity specified under Section 3 of the Act.”

11(1) Subject to these Regulations the Cabinet Secretary shall either on his or her own motion or at the request of the Committee, make an order freezing the property or funds of a designated entity, whether held directly or indirectly by the entity or by a person acting on behalf of or at the direction of the entity in accordance with these Regulations.

(2) An order to freeze property or funds under paragraph (1) shall include an on-going prohibition against the provision of funds or financial services to the designated entity against which the order is made.

13(1) The Committee shall compile a domestic list comprising of specified entities under section 3 of the Act...

(5) The Committee shall circulate the domestic list to another state as specified in the relevant Resolution.

14(1) The Centre shall publish the domestic list on its website and make available to the public, an electronic version of the list.”

157. The consequences of being declared a specified entity as demonstrated above includes among others, loss of privacy, negative reputation, loss of property, possibly loss of employment. However, one would want to read it, this clearly constitutes **adverse effect** for purpose of Article 47 of the Constitution. These consequences impose a greater duty on the administration to ensure that fair procedure is followed **before** and in **reaching** his or her decision.

OF PROCEDURAL FAIRNESS [Notice and opportunity to provide explanation]

158. It is a requirement under section 3(2) of POTA that before the Inspector-General can exercise his

power under section 3(1) he must afford the affected entity reasonable opportunity to demonstrate why it should not be declared a specified entity. Whereas the law does not, as already observed, prescribe what form this opportunity should take, it is unequivocal that it should be reasonable. Reasonableness is a question of fact. It depends on the circumstances of each case. According to Black's Law Dictionary – Eighth Edition **“Reasonable”** means fair, proper, or moderate under the circumstances. John Salmond, **JURISPRUDENCE**, (by Granville Williams 10th Edition 1947) says –

“It is extremely difficult to state what lawyers mean when they speak of “reasonableness”. In part the expression refers to ordinary ideas of natural law or natural justice, in part to logical thought, working upon the basis of the rules of law.”

159. In analyzing what constitutes adequate notice under Article 47, the court in **Geothermal Development Company Limited vs. Attorney-General** (supra) stated that an adequate notice on tax matters must –

“Clearly state to be such a notice, state the amount claimed, state the legal provision under which it is made and draw the tax payers attention to the consequences of failure to comply with the law and the opportunity provided by the law to contest the finding.”

160. Similarly, in **Multiple Hauliers East Africa Limited vs. Attorney-General [2013]eKLR**, the court found that notices given were

“not addressed to the Petitioner, and the Land Reference number to which they pertain would not, on a cursory glance thereat, give any indication that it was intended for or would affect the Petitioner’s property.”

161. In **Stephen Nendela vs. County Assembly of Bungoma & 4 Others** (supra) where the County Assembly of Bungoma had provided Mr. Nendela (a member of the County Executive), sixteen (16) hours within which to respond, Mabeya J stated –

“...the notice given to the Petitioner was between 4.12 p.m. of 14/4/2014 to 9.00 a.m. the following day. That was approximately 16 hours. The Petitioner requested for one extra day, 24 hours, but the request was turned down. He had indicated that the time requested was meant to enable him instruct his lawyers and prepare his defence....this court finds the notice of 16 hours given to the Petitioner to appear before the Select Committee to have been too short.”

162. Two issues arise, **firstly** whether the Gazette Notice constituted proper notice, and **secondly**, whether the 24 hours provided by the Inspector-General were sufficient to afford an opportunity to the Petitioners to adequately respond to the charges against them especially since there was no personalized service of the notification upon them when the Inspector-General issued the Gazette Notice (4th April, 2015), or the date when the Gazette was published (April 8, 2015). Even if the best scenario were taken, the time started running on the date when the notice was published in the Gazette, because the timeline **to respond** is couched in hours, it is unclear what time of the day when the Gazette was published and the time it started to run. Whatever the case, even assuming (for argument's sake) that the Petitioners had seen the Notice before the expiry of the time provided for them to respond, would it have been adequate notice, especially given the gravity of the accusation and lack of information as to why the accusations were being made" The answer to this question can only be one. There was no adequate notice to the Petitioners to adequately prepare and answer the accusations raised against them.

163. The answer to the **second** question **whether** the Inspector-General afforded the Petitioners adequate time to be heard, must also be in the negative. Considering the nature of the accusations against the Petitioners, (involvement in aiding terrorist activities or perhaps being terrorists themselves or sympathizers), the Petitioners needed time to prepare for the hearing. A notice of 24 hours was absolutely insufficient for them to prepare for the hearing (which would include the consideration of the accusations, consultation and hiring of advocates and preparation of response). Looking at the nature of the accusations (supra) and the seriousness of the attendant consequences of being listed a specified entity, the time of 24 hours cannot be regarded as adequate opportunity afforded to the Petitioners to be heard. It is no defence to say, the Petitioners responded, they did so, I believe, to express their innocence.

164. In my opinion therefore the action of the Inspector-General of Police the First Respondent, were invalid on the basis of procedural fairness.

OF THE LAWFULNESS OF THE ACTION OF THE FIRST RESPONDENT AND THE CONSTITUTIONAL PRINCIPLE AND THE RULE OF LAW

165. The concept of lawfulness in administrative context is derived from the greater concept of the rule of law under the Constitution. I have discussed at length (at paragraphs 120 – 147) both the constitutional principle and the rule of law. Put in brief, where a power or discretion is conferred upon a person or body under the Constitution, that power or discretion must be exercised in accordance with or subject to the Constitution. Likewise, if the power is conferred by or under a law, it must be exercised in accordance with that law. Administrators even when exercising their power of discretion must do so within the confines of the law. In **Reference re Secession of Quebec [1998]2 SCR 217**; the Supreme Court of Canada stated:

“[72]the rule of law principle requires that all government action must comply with the law, including the Constitution.”

166. In the Supreme Court of India case of Additional District Magistrate **Jabalpur vs. S.S. Shukla [1976] 1NSC 129**, (already discussed above), the court noted of the rule of law thus –

“[353] The rule of law which means, in the present context, the authority of the law courts to test all administrative action by the standard of legality. The administrative or executive action that does not meet the standard will be set aside if the aggrieved person brings the appropriate action in the competent court.”

167. In **Grace A. Omolo vs. Attorney-General & 3 others [2012] eKLR**, Majanja J. examined the concept of “**lawfulness**” in fair administrative action, and found that the Petitioner had not been subjected to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, allowed the Petitioner’s Petition and granted damages and costs.

168. **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others (supra)** Nyamu J. while holding that public administration must adhere to the rule of law further stated–

“On the issue of discretion, Professor Sir William Wade in his Book, Administrative Law has summarized the position as follows –

“The powers of public authorities are ...essentially different from those of private persons ... The whole conception of unfettered discretion is inappropriate to a public authority which

possess powers solely in order that it may use them for the public good. But for public bodies, the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of public rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfillment of duties, which it owes others; indeed, it exists for no other purpose... but in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith; only to indicate the better performances of the duties for whose merit it exists.”

169. Applying both the principle of constitutionality and the rule of law principle, and lawfulness (under the fairness consideration) the critical questions this court must consequently answer are –

(1) Whether the Inspector-General (the First Respondent) had power or authority to take action as against the Petitioners, and

(2) Whether the First Respondent (the Inspector-General of Police) followed and adhered to the procedure required by both POTA and the Regulations thereunder, and the Proceeds of Crime and Anti-Money Laundering Act.

OF WHETHER THE FIRST RESPONDENT (INSPECTOR-GENERAL) HAD POWER/AUTHORITY TO TAKE ACTION AGAINST THE PETITIONERS

170. The extent of power and authority of the Inspector-General is circumscribed by section 3(1) of POTA which gives the Inspector-General the power to recommend to the Cabinet Secretary that an order be made listing an individual/or organization he considers to be associated with terrorism as a specified entity. It is circumscribed because before making the recommendation, section 3(2) compels the Inspector-General to –

“afford the affected entity reasonable opportunity to demonstrate why it should not be declared as a specified entity.”

171. Similarly, and importantly, section 3(3) requires the Cabinet Secretary to declare through an order published in the Gazette that an entity recommended by the Inspector-General of Police to be specified is a specified entity then only if he is satisfied of the recommendation.

172. The issue here therefore is whether the Inspector-General had power to notify in the Gazette of his intention to recommend to the Cabinet Secretary. It is clear from section 3(2) of POTA that the power to gazette is given only to the Cabinet Secretary, and even then, only if he is satisfied with the recommendations and upon making an order that an entity is a specified entity. Consequently, in my humble view, the Inspector-General has no power to gazette under section 3, including an intention to recommend. The reasons why the Inspector-general has no such power to Gazette include the fact that announcing publicly that an individual or organization is likely to be associated with terrorism before a full determination is made is unfair and brings with it irreversible stigma as well as other consequences even if the Cabinet Secretary does not end up finding that the entity should be declared a specified entity. This raises the question of procedural requirements for the exercise of power or authority.

173. Clearly, section 3(1) of POTA authorizes the Inspector-General upon certain grounds to recommend to the Cabinet Secretary that an entity be classified as a specified entity. The answer to the question whether the Inspector-General acted lawfully is dependent also upon the question whether he acted reasonably. An additional question is what form should the notification under section 3(2) of POTA to the affected person take" Does this presuppose a public notification (Gazette Notice) or a private

notification to the affected party as the section also presupposes information may be provided to counter the charges by the Inspector-General"

174. Article 47(2) requires that a person has the right to be given written reasons whenever administrative action is likely or threatens to adversely affect their right or fundamental freedom. This is now confirmed by the Fair Administrative Action Act, 2015 (supra). The Right to reasons is considered a natural justice right. In **Geothermal Development Company Limited vs. Attorney-General** (supra) the court, Majanja J., recognized the correlation between natural justice and the right to reasons. The learned Judge noted at paragraph 30 –

“In many jurisdictions around the world, it has long been established that notice is a matter of procedural fairness and an important component of natural justice. As such information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be.”

175. Similarly, in **Joseph Mbalu Mutava vs. Attorney-General [2014]eKLR** (Odunga J.) the court found that JSC failed “to avail to him the testimony of the witnesses who gave evidence it relied on in reaching its decision and/or an opportunity to comment on the said testimony, and it breached Article 47(2) by **failure to give him written reasons** for its decision or a copy of the report.”

176. Likewise in **Jeremiah Gitau Kiereini vs. Capital Markets Authority & Another [2013] eKLR** the court held –

“the Petitioner was entitled to be informed of the formal findings against him or the charges which he was to face and given adequate opportunity to make representations on to those findings before enforcement action would be preferred.”

177. The requirements to give reasons is to ensure that the affected party knows what the case is, he is to meet. It is a right closely related to the right of disclosure in the context of fair hearing in criminal proceedings and enshrined under Article 50 of the Constitution. Considering the seriousness of the accusations and gravity of attendant consequences (not unlike those that result from criminal process) I find and hold that the duty to provide reasons was heightened.

178. In addition, the reasons given by the Inspector-General must be specific, because section 3(1) provides different grounds upon which the Inspector-General should base his decision – **firstly**, an entity has committed or prepared to commit, attempted to commit, or participated in, or facilitated the commission of, a terrorist act, or **secondly**, an entity is acting on behalf of, at the direction of, or in association with an entity acting in the commission of, or preparing to commit or participating or facilitating the commission of a terrorist act. Therefore providing clear reasons enhances both the right to procedural fairness since it enables the affected party, the Petitioners, to determine what it is that it needs to rebut or about what to provide an explanation and it also enhances the observance by the Inspector-General of the provisions of Article 47(2). Again the Inspector-general failed to do so.

THE DEFENCE OF LIMITATION OF RIGHTS UNDER ARTICLE 24

179. As noted earlier and it was argued on behalf of the Inspector-General and the Second, Third, and Fourth Respondents that even if it or they violated Article 47 rights of the Petitioners that such violation is justified on the basis of Article 24 of the Constitution.

180. The first limitation of rights is that the onus is on the state organ or state officer who seeks to limit

the right to establish that the limitation is justifiable based on Article 24 criteria. The onus is upon the First Respondent, the Inspector-General. The limitation is both global as concerns the right to fair administrative action, and also specific to the sub-rights within that right, the right to adequate notice, right to reasons and be right to be heard.

181. Where the state or any person seeks to justify a violation on the basis of Article 24, the first question is whether the **limitation** is provided for by law (Article 24(2)) which states –

“24 (1) [para 131 supra]

(2) Despite clause (1) a provision in legislation limiting a right or fundamental freedom -

(a) in a case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation;

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.”

182. POTA was enacted after the effective date of the Constitution, and it is therefore necessary to examine whether the Act expresses any intention to limit the right to fair administrative action. Section 35 of POTA is the only provision which relates to limitation of rights. It is entitled – Limitation of Rights and says –

“35(1) Subject to Article 24 of the Constitution, the rights and fundamental freedoms of a person or entity to whom this Act applies may be limited for the purposes, in the manner and to the extent set out in this section;

(2) A limitation of a right or fundamental freedom under subsection (1) shall apply only for the purposes of ensuring -

(a) the investigations of a terrorist act;

(b) the detection and prevention of a terrorist act, or

(c) that the enjoyment of the rights and fundamental freedoms by an individual does not prejudice the rights and fundamental freedoms of others;

(3) The limitation of a fundamental right and freedom under this shall relate to –

(a) the right to privacy to the extent of allowing –

(i) a person, home or property to be searched;

(ii) possession to be searched;

(iii) the privacy of a person's communication to be investigated, intercepted or otherwise interfered with;

(b) the rights of an arrested person specified under Article 49(1) (of of the Constitution may be limited only for the purposes of ensuring –

(i) the protection of the suspect or any witness;

(ii) the suspect avails himself for examination or trial or does not interfere with the investigations; or

(iii) the prevention of the commission of an offence under Act and preservation of national security;

(c) the freedom of expression, the media and conscience, religion, belief and opinion to the extent of preventing the commission of the offence under this Act.

(d) the freedom of security of a person to the extent of allowing investigations under this Act;

(e) the right to property to the extent of detaining or confiscating any property used in the commission of an offence under this Act.

183. I have carefully reviewed the above provision of POTA and it is my clear finding that Article 47 rights are not among the rights subject to the limitation under POTA. It is therefore my finding and holding within the provisions of POTA itself, Article 47 was not limited and the Respondents were bound by its provisions in line with fair administrative action.

184. However, (even for arguments sake), if the court were to say that the Respondents had established a case for limitation of Article 47, the Respondents are still bound to satisfy the court on all other elements of Article 24(1) that the limitation is justifiable in an open and democratic society based on human dignity, equality and freedom on the basis of –

(i) the nature of the right or freedom;

(ii) the importance of the purpose of the limitation;

(iii) the need to ensure that the enjoyment of the right does not prejudice the enjoyment by other individuals of their rights;

(iv) the relation between the limitation and the purpose, and

(v) whether the limitation adopted provides for the least restrictive means to achieve the purpose.

185. In my humble view, the Respondents jointly and severally have failed totally to demonstrate that failure to provide notice or adequate notice, failure to provide reasons or explanation why the Petitioners were being considered a specified entity, failure to give the Petitioners adequate opportunity to Respondent was the least restrictive means that were available to the State in limiting the Petitioners rights.

THE RELIEFS SOUGHT

186. Before I consider what reliefs to grant, I wish to briefly respond to the arguments of counsel for the Sixth Respondent, who in particular submitted that the Petitioners had no cause of action against it. The Sixth Respondent's counsel maintained that it was merely a messenger, a deliverer of mail to the Petitioners, the decision had been made elsewhere, it had no legal or moral obligation to the Petitioners and asked the court to dismiss the Petition against it.

187. The answer to the Sixth Petitioner's submission is to be found in the membership of the **Counter Financing of Terrorism Inter-Ministerial Committee** established under Regulation 4(1) of the "POTA Regulations". The **Committee** comprises among others of the Central Bank of Kenya as a member. The other members are –

- (a) the Cabinet Secretary responsible for matters relating to internal security who shall be the chairperson;
- (b) the Cabinet Secretary responsible for matters relating to finance;
- (c) the Cabinet Secretary responsible for matters relating to foreign affairs;
- (d) the Attorney-General;
- (e) the Director-General of the National Intelligence Service;
- (f) the Inspector-General of Police;
- (g) the Director-General of the Kenya Citizens and Foreign National Management Service;
- (h) [the Governor of the Central Bank of Kenya];
- (i) the Director of the Centre.

188. Regulation 11(5) of the POTA Regulations compels the Cabinet Secretary responsible for internal security, either on his/her own motion or at the request of the Committee to make an order freezing the property or funds of a designated entity whether held directly or indirectly by the entity or by a person acting on behalf of or at the direction of the entity, in accordance with the Regulations.

189. It is indeed correct that under the said Regulation 11(1) the Responsibility to freeze accounts is that of the Cabinet Secretary. However, the letter dated 7th April, 2015 is from the Fifth Respondent, the Financial Reporting Centre which has refused to participate in these proceedings that it is the agency designated by the Committee to be the agency responsible for the circulation of the Domestic List to supervisory bodies as specified in the First Schedule to the Proceeds of Crime and Anti-Money Laundering Act.

"... In this respect the Financial Reporting Centre hereby informs you that the Counter Financing of Terrorism Inter-Ministerial Committee has forwarded to the Centre the attached list for circulation in accordance with the Prevention of Terrorism (Implementation of the United Nations Security Council Resolutions on Suppression of Terrorism, Regulation, 2013."

190. It is clear from that letter that the Notice in the Gazette Notice was made by the Committee, of which the Sixth Respondent is a member. It cannot feign ignorance of the decision of the Committee. The Sixth Respondent too is bound by the provision of Article 10 (National Values and Principles of

Governance), and Article 47(2) fair administrative action. I find and hold that it too, was a party to the breach of both principles of the Constitution and the law.

191. Having disposed of the question of culpability of the Sixth Respondent as a member of the Committee, and having found and held that the First and Second Respondents, too infringed the Petitioners constitutional rights to fair administrative action, and the rule of law, the next question is what reliefs should be granted to the Petitioners.

192. I have made numerous reference to Article 2(4) on the supremacy of the Constitution, and that any law inconsistent with the Constitution, ... is void to the extent of the inconsistency, and **any act or omission** in contravention of the Constitution is invalid. Article 165(3)(b) grants this court jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. This court is therefore the primary custodian of the Constitution.

193. In **JAYNE MATI VS. ATTORNEY-GENERAL & ANOTHER (supra)**, the court citing from the Judgment of the Supreme Court of Kenya noted –

“In the matter of the Interim Independent Electoral Commission ... the Supreme Court stated – “the effect of the Constitution’s detailed provision for the rule of law in processes of governance, is the legality of executive or administrative actions to be determined by the courts, which are independent of the Executive Branch.”

194. Likewise, in the Supreme Court decision of **COMMUNICATIONS COMMISSION OF KENYA & OTHERS VS. ROYAL MEDIA SERVICES & OTHERS**, the court said –

“Article 47 in the circumstances is a deliberate step towards the attainment of a fair and dependable government advancing expeditious, efficient, lawful, reasonable and procedurally fair public policies. A breach of Article 47 attracts remedies in Judicial Review especially where an aggrieved person had cause to expect that the attendant aspects of fair administrative action would be adhered to. It is clear that the essence of Article 47 is to protect a party’s legitimate claim of entitlement that is, procedural solidity and not a mere promise of consideration. As such, the court can quash any decision arrived at unprocedurally or unfairly but reserves itself no right to engage in the administrative duties of the body in question. The court must remain a court.”

195. In **KITUO CHA SHERIA & OTHERS VS. THE ATTORNEY-GENERAL [2013]eKLR**, Majanja J addressed fair administrative action in the following terms –

“[67] The Respondent admitted that the Government directive was an administrative decision in strict compliance with the Act. I have no doubt that under the provisions of the Act, the Office of the Commissioner of Refugees is entitled to make decisions on administrative matters concerning refugees in Kenya set out in sections 6 and 7 of the Act. But such decisions must meet constitutional standards. It is the duty of the court to interrogate the policy and where it is inconsistent with the provisions of the Bill of Rights or the fundamental values and [and principles of governance] in the Constitution to declare that policy inconsistent with the Constitution... the Constitution requires the state to respect, protect, promote and fulfil the Bill of Rights, where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged to say so.”

196. In light of the principles of supremacy of the Constitution, declared in Article 2(4) of the Constitution, and explained in **Jayne Mati** (supra) this court is obliged to invalidate the decision of the First, Second and Sixth Respondents set out in the Gazette Notice which contravened Article 47(2) of the Constitution by way of the judicial review order pursuant to Article 23(3)(4) of the Constitution, as more expounded in the **Communications Commission of Kenya & Other vs. Royal Media Services & Others** (supra).

CONCLUSION AND FINAL ORDER

197. As it has been clear from the foregoing passages of this Judgment, I have come to the conclusion that the Petitioners' rights to fair administrative action afforded to them by Article 47(1) of the Constitution were violated by the publication of Gazette Notice Volume No. CXVII 36 Gazette Notice No. 2326 of 7th April, 2015. It was tainted with procedural impropriety for failure to afford the Petitioners fair administrative process hence the Gazette Notice is null and void **ab initio**. Being null and void, no action can be based upon it and cannot lie or stand. As it was stated by Lord Denning in **MacFoy vs. United Africa Company Limited [1963]3ALL ER 1169**, -

"...if an act is void, then it is a nullity. It is not only bad, but incurably bad. There is no need for the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so and every proceeding which is founded on it also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

198. The Petitioners in their Amended Petition sought seven orders. Under Article 23 of the Constitution, the court's duty is to frame appropriate relief which will vindicate the Petitioners' rights, and in light of my findings, I grant the following reliefs –

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

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

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

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

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

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

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

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

200. I reiterate once again, that our motherland Kenya, has fallen victim to its unjust share of terrorist attacks in the past. I mentioned the terrorist attack on the American Embassy in 1998, in Kikambala (2002), shooting at Westgate Mall in Nairobi in 2013, the Nairobi and Mombasa bus explosions (2014), the Mpeketoni and Lamu attacks (2014) and this year, the shooting at Garissa University College on 2nd April that left 148 students killed and another 79 injured. A Police officer guarding a local bank on Digo Road, Mombasa (not far from this court), was gunned down point-blank while at his place of work, only two months ago. There was a massacre of quarry workers and bus travellers in Mandera. The proscribed terrorist group Al Shabaab claimed responsibility for many of the attacks, including the Garissa Massacre of 2nd April, 2015.

201. In making these orders, the Respondents must not see or think of us, judicial officers or this Judge as not helping in the fight against terrorism, far be it from any member of the judicial staff, Judges or Magistrates. In making these orders, I am reminded of what the late Hon. Orwa Ojode, (may his spirit live according to the will of the Living God) said in Parliament on the fight against terrorism – that the **“tail”** [of terrorism] **lives in Mogadishu**, but **“the head”** resides in one of the commercial suburbs of the city of Nairobi. That is a matter for intelligence gathering and analysis. The courts are concerned with the interpretation of the law.

202. In these orders, I am merely emphasizing that the citizens of Kenya, such as the Petitioners, the ruled, those governed, and the rulers or governors, such as the Respondents are subject to the Constitution and the rule of law, that the fight against terrorism must be conducted in strict adherence to the letter and spirit of the Constitution, and the law, that is the rule of law, for the law was made for man, and not man for law.

204. Finally, I thank counsel for all sides, the Petitioners and the Respondents for their assiduous work, and courtesy.

Dated, Delivered and Signed at Mombasa this 12th day of November, 2015.

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Mr. Aboubakar }

Mr. Willis Otieno } for Petitioners

Mr. Salim }

Mr. Wamotsa for 1st and 4th Respondents

Mr. Wamotsa h/b Mr. Ngari for 2nd and 3rd Respondents

No Appearance for 5th Respondent

Mr. Adhoch h/b Mr. Lusi for 6th Respondent

Mr. Waikwa Nyoike for 1st Amicus Curiae

Mr. Peter Kamau }

Mr. Mohamed Jaffer } for 2nd Amicus Curiae

Mr. Silas Kaunda Court Assistant



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