REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

PETITION NO. 625 OF 2009

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL HIGH COURT PRACTICE RULES AND PROCEDURES 2006.

IN THE MATTER OF: SECTIONS 72, 75 AND 84(1) OF THE CONSTITUTION OF KENYA (REPEALED)

BETWEEN

MWANGI STEPHEN MUREITHI .....PETITIONER

AND

HON. DANIEL TOROITICH ARAP MOI E.G.H.,.....RESPONDENT

RAYMARK LIMITED .....INTERESTED PARTY

JUDGMENT

This Petition was filed by **MWANGI STEPHEN MURIITHI** on 23/10/2009. He pleads sections 72, 75 and 84(1) of the Constitution of Kenya (now repealed), which I shall for the purposes of this Petition and for

ease of reference refer to as 'the Constitution'. The said constitution was repealed upon the promulgation of the new Constitution of Kenya on 27/8/2010.

In his petition **MWANGI STEPHEN MURIITHI** ('the petitioner') states that **HON. DANIEL TOROITICH ARAP MOI E.G.H.,** (who was at all material times, the President of the Republic of Kenya, and who I shall henceforth refer to as 'the respondent') was his business partner and that they owned shares in three companies and several properties whose details appear here below:

· ***Fourways Investments Limited,*** *in which the petitioner held 40% while the respondent held 19% of the shares, with the balance being held by two other shareholders, was the registered proprietor of the properties situate in the city of Nairobi and more specifically known as L.R. No.209/4383 (situate along Muindi Mbingu Street), L.R. 209/2464 (situate along Kimathi Street) and L.R. No. 209/2385 (situate along Moi Avenue). On these parcels were situate buildings known as Ruprani, Kenwood and Atlas.*

· ***Sheraton Holdings Limited,*** *in which the petitioner held 40% while the respondent held 19% of the shares, with the balance being held by two other shareholders, was the registered proprietor of the property known as L.R. No. 209/1846 situate along Mama Ngina Drive in Nairobi on which stood Corner House.*

· ***Mokamu Limited,*** *in which company, they each held 33% of the shares, with a third party holding a further 33%, and which company was the registered proprietor of the farm property known as L.R. No. 11793 situate in Solai Nakuru District within the Republic of Kenya, measuring approximately 1020 acres.*

I shall refer to the three companies as 'the companies' and to the land and buildings as the 'subject properties'.

The petitioner claims that sometimes in the year 1982, the respondent while using his powers as the President of the Republic of Kenya, without any lawful cause and excuse, ordered and caused his detention without trial for the purpose of illegally and unconstitutionally depriving the petitioner of his rights to the said companies and the subject properties. He thus avers that the reasons for his detention were personal to the respondent and meant to achieve ulterior commercial advantages for the respondent and that in detaining him without trial, the respondent acted in abuse of office as President of the Republic of Kenya; that it was during the time of his detention and thereafter, that the respondent caused to be sold and ravaged his interests in the aforementioned companies and the subject properties without accounting for the same to him; that he has refused and continues to refuse to give the petitioner an account of his dealings in the said companies and the subject properties; that he has prevented him from accessing any information whenever he sought an account, and that a result of the aforesaid acts he has not only suffered loss, but that the respondent has trampled upon his fundamental rights as enshrined in sections 72 and 75 of the Constitution.

This petition thus comprises of various paragraphs and is supported by the petitioner's affidavit. The

petitioner, who was represented by Mr. Paul Mwangi, also filed submissions on 11/5/2010. He feels that the aforementioned acts and the consequences arising there from negate his Constitutional rights and values as enshrined in Chapter V of the Constitution under which he is entitled to protection. He therefore prays for the following declarations:

· ***That his detention was caused by the respondent for the achievement of ulterior commercial advantages for the respondent and was illegal and unconstitutional and contravened his rights under Section 72 of the Constitution.***

· ***That the sale of the subject properties, which belonged to the said companies, was illegal and an infringement of his Constitutional right to property under Section 75 of the Constitution.***

He also prays for compensation and for the costs of this suit.

Sections 72 and 75 of the Constitution, which he relies on, stipulate that:

72. *"(1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases -*

(a) in execution of the sentence or order of a court, whether established for Kenya or some other country, in respect of a criminal offense of which he has been convicted;

(b) in execution of the order of the High Court or the Court of Appeal punishing him for contempt of that court or of another court or tribunal;

(c) in execution of the order of a court made to secure the fulfillment of an obligation imposed on him by law;

(d) for the purpose of bringing him before a court in execution of the order of a court;

(e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offense under the law of Kenya;

(f) in the case of a person who has not attained the age of eighteen years, for the purpose of his education or welfare;

(g) for the purpose of preventing the spread of an infectious or contagious disease;

(h) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community;

(i) for the purpose of preventing the unlawful entry of that person into Kenya, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Kenya or for the purpose of restricting that person while he is being conveyed through Kenya in the course of his extradition or removal as a convicted prisoner from one country to another; or

(j) to such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within Kenya or prohibiting him from being within such an area, or to such extent as may be reasonably justifiable for the taking of proceedings against that person relating to the making of any such order, or to such extent as may be reasonably justifiable for restraining that person during a visit that he is permitted to make to a part of Kenya in which, in consequence of the order, his presence would otherwise be unlawful.

(2) A person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.

(3) A person who is arrested or detained -

(a) for the purpose of bringing him before a court in execution of the order of a court; or

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he is not brought before a court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.

(4) Where a person is brought before a court in execution of the order of a court in any proceedings or upon suspicion of his having committed or being about to commit an offence, he shall not be thereafter further held in custody in connexion with those proceedings or that offence save upon the order of a court.

(5) If a person arrested or detained as mentioned in subsection (3) (b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall, unless he is charged with an offence punishable by death, be released either unconditionally or upon

reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

(6) A person who is unlawfully arrested or detained by another person shall be entitled to compensation therefor from that other person".

75. *"(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied -*

(a) the taking of possession or acquisition is necessary in the interests of defense, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit; and

(b) the necessity therefor is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and

(c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

(2) Every person having an interest or right in or over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court for -

(a) the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled; and

(b) the purpose of obtaining prompt payment of that compensation:

Provided that if Parliament so provides in relation to a matter referred to in paragraph (a) the right of access shall be by way of appeal (exercisable as of right at the instance of the person having the right or interest in the property) from a tribunal or authority, other than the High Court, having jurisdiction under any law to determine that matter.

(3) The Chief Justice may make rules with respect to the practice and procedure of the High Court or any other tribunal or authority in relation to the jurisdiction conferred on the High Court by subsection (2)

or exercisable by the other tribunal or authority for the purposes of that subsection (including rules with respect to the time within which applications or appeals to the High Court or applications to the other tribunal or authority may be brought).

(4) and (5) (Deleted by 13 of 1977, s. 3.)

(6) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) or (2) -

(a) to the extent that the law in question makes provision for the taking of possession or acquisition of property -

(i) in satisfaction of any tax, duty, rate, cess or other impost;

(ii) by way of penalty for breach of the law, whether under civil process or after conviction of a criminal offence under the law of Kenya;

(iii) as an incident of a lease, tenancy, mortgage, charge, bill of sale, pledge or contract;

(iv) in the execution of judgments or orders of a court in proceedings for the determination of civil rights or obligations;

(v) in circumstances where it is reasonably necessary so to do because the property is in a dangerous state or injurious to the health of human beings, animals or plants;

(vi) in consequence of any law with respect to the limitation of actions; or

(vii) for so long only as may be necessary for the purposes of an examination, investigation, trial or inquiry or, in the case of land, for the purposes of the carrying out thereon of work of soil conservation or the conservation of other natural resources or work relating to agricultural development or improvement (being work relating to the development or improvement that the owner or occupier of the land has been required, and has without reasonable excuse refused or failed, to carry out),and except so far as that

provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society; or

(b) to the extent that the law in question makes provision for the taking of possession or acquisition of -

(i) enemy property;

(ii) property of a deceased person, a person of unsound mind or a person who has not attained the age of eighteen years, for the purpose of its administration for the benefit of the persons entitled to the beneficial interest therein;

(iii) property of a person adjudged bankrupt or a body corporate in liquidation, for the purpose of its administration for the benefit of the creditors of the bankrupt or body corporate and, subject thereto, for the benefit of other persons entitled to the beneficial interest in the property; or

(iv) property subject to a trust, for the purpose of vesting the property in persons appointed as trustees under the instrument creating the trust or by a court or, by order of a court, for the purpose of giving effect to the trust.

(7) Nothing contained in or done under the authority of an Act of Parliament shall be held to be inconsistent with or in contravention of this section to the extent that the Act *in question makes provision for the compulsory taking possession of property or the compulsory acquisition of any interest in or right over property where that property, interest or right is vested in a body corporate, established by law for public purposes, in which no moneys have been invested other than moneys provided by Parliament".*

The respondent who was represented by Mr. Ochieng' Oduol filed a chamber summons application dated 25/1/2010 seeking to strike out this petition. Though he did not file a replying affidavit, he also opposes this petition by way of a preliminary objection, and it is his stand that:

· ***It is bad in law and an abuse of process so far as it seeks Constitutional redress against an***

individual who is not the custodian of Fundamental Freedoms under the Constitution.

· ***He is not a guarantor of such Fundamental Rights under Chapter V of the Constitution.***

· ***Fundamental Rights and Freedoms are owed, guaranteed, secured by the State and are enforceable as against the Government as a respondent.***

· ***No constitutional issues have been demonstrated to entitle the petitioner to invoke the Constitutional jurisdiction.***

· ***No issues have been raised as regards the infringement of Fundamental Rights and Freedoms as to require the intervention of the Constitutional Division of the High Court.***

· ***As drawn, it does not raise any issues which require the intervention of the Constitutional Division of the High Court and which ought to be litigated.***

· ***It raises stale claims on issues of Company law which are in any event time barred by dint of the Limitations of the Actions Act, Chapter 22 of the Laws of Kenya.***

· ***It raises the stale claims on issues of Company law which have been mischievously disguised as issues relating to infringement of fundamental rights and freedoms.***

· ***Any issues of Company law ought to be adjudicated upon by the Commercial Division of the High Court and not the Constitutional Division of the High Court.***

Raymark Ltd., which company applied to be enjoined in these proceedings as an interested party and which was represented by Mr. Kiplenge, claims that it is the registered proprietor of one of the subject properties namely, L.R. No. 11793, which it states has never been the property of Mokamu Ltd. It has however not availed any proof in support of its contention that the property in Solai property was never owned by Mokamu Limited.

It also opposes this petition on lines similar to those raised by the respondent, and thus urges this court

to dismiss the petition.

The respondent thus raised the following issues as preliminary points for determination:-

(a)Jurisdiction

(b)Application of fundamental rights

(c) Particulars of infringement

(d)Legality of detention

(e) Non disclosure of material facts

(f) Limitation of Action;

(g)Costs for abuse of process.

I shall now attempt to review the submissions of the able counsel on the stated issues.

(a) ON JURISDICTION

Mr. Ochieng Oduol contended, and rightly so, that this court is obliged to first determine whether it has jurisdiction to entertain this matter. He relied on the decision in the case of **The Owners of The Motor Vessel "Lilians" Vs. Caltex Oil (Kenya) Ltd [1989] KLR**, where the Court of Appeal stated as follows:-

"Jurisdiction is everything. Without it a court has no power to make a step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of appeal, I refer to the following passage which will show that what I have already said is consistent with authority:

By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of the matters presented in a formal way for its decisions. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the jurisdiction shall extend, or it may partake of these characteristics. If the jurisdiction is of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must enquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts

exists. Where the court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given".

He argued that since the properties in issue were owned by companies which are distinct entities from the petitioner, this court would have no jurisdiction under S. 84(1) of the Constitution or under Fundamental Rights and Freedoms of the Individuals (High Court Practices and Procedure Rules) 2006, to adjudicate on fundamental rights or grant relief to persons or entities who are not before the court.

He contended that this cause is an abuse of court process and does not meet the prerequisites of such action and as such the court should exercise its inherent power and summarily dismiss this petition. To elucidate the meaning of abuse of court process, the respondent has cited the decision in the case of **Mitchell & Others v Director of Public Prosecutions & another (1985) LRC (Const) 127** where the court held at page 129 as follows:-

"In a civilised society, legal process is the machinery used in the courts of law to vindicate man's rights or to enforce his duties. It can be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive, for some collateral one or to gain some collateral advantage which the law does not recognise as a legitimate use of that process. But the circumstances in which the abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the steps taken and sometimes on extrinsic evidence only. But is and when it is shown to have happened, it would be wrong to allow the misuse of the process to continue. Rules of the court may and usually provide for its frustration in some instances. Others attract res judicata rule. But apart from and independent of these there is an inherent jurisdiction of every court of justice to prevent an abuse in its process and its duty to intervene and stop the proceedings or put an end to it."

He maintained that the petitioner has raised several issues of company of law which can best be addressed through the avenues of commercial courts as provided by under the Companies Act, Cap 486 Laws of Kenya, and that the filing of this petition has a collateral purpose.

He fortified the above position by citing the decision of the Constitutional court in the case of **Abraham Kaisha Kanzika alias Moses Savala Keya T/A Kapco Machinery Services & Milano Investments Limited v The Governor of The Central Bank Of Kenya & 2 others H.C. Misc Civil Application No. 1759 of 2004** where it was held inter alia that *"textually there is no known reason for constitutional vindication of commercial or contractual matters unless there is compulsory acquisition or taking away as the American would call it. I think the parties and the courts have a responsibility not to trivialise constitutional jurisdiction. This is a claim that was well provided for under the general law of land and in particular contract law but the applicant now wants to go behind that law ostensibly to escape from the applicable or available defences on limitation. This court cannot allow it."*

He further maintained that the fundamental rights and freedoms as enshrined under the Constitution of Kenya are only owned as against the State and not private individuals and that disputes as between individuals whether or not they involve infringement of the fundamental rights and freedoms fall under the province of private law.

Mr. Mwangi, however made strong response thereto, and it his view, this court has jurisdiction to

determine this matter under section 84 of the Constitution which provides that Constitutional Petitions can be made and entertained *"without prejudice to any other action in respect of the same matter which is lawfully available.*"

(b)APPLICATION OF FUNDAMENTAL RIGHTS AND FREEDOMS.

Mr. Ochieng Oduol also urged the court to dismiss the petition for having been preferred against an individual who is not the custodian of the fundamental rights, and it is his stand that the petition is fatally defective as the petitioner has failed to sue the Attorney General as the representative of the State, which is the custodian of individual rights and freedoms of the individual, and also because, it is an abuse of the process. He has cited the decision in the case of **Kenya Bus Service Ltd v Attorney General & 2 others. Nairobi H.C Misc Application No. 13 of 2005** (Unreported) where Nyamu J. (as he then was), held that, *"fundamental rights are contained in the Constitution and are principally available against the State because the Constitution's function is to define what constitutes Government and the governed and it regulates the relationship between the Government and the governed. On the other hand, the rights of the individual interests are taken care of in the province of private law and are invariably redressed as such."*

(c) PARTICULARS OF INFRINGEMENT

Mr. Ochieng Oduol argued that even if the petitioner were to be given a chance to ventilate his grievances, his petition would not satisfy the prerequisites for a Constitutional application for failure to give the particulars of the sections which it is claimed were infringed and the manner in which they were infringed.

He relied on the decision in the case of **Anarita Karimi V. Republic (1979) KLR 154** where Trevelyan and Hancox JJ stated at page 156 that *"we would however again stress that if a person is seeking redress from the High Court or an order which invokes a reference to the Constitution, it is important (if only to ensure that justice is done in his case) that he should set out with reasonable degree of precision that of which he complains the provisions said to be infringed and the manner in which they are alleged to be infringed and further state that it is not enough to merely state the particular sections allegedly infringed. The Petitioner must as of necessity explain how the particular sections have been infringed. That has respectfully not been done here."*

He also relied on the decision in the case of **Peter O. Ngoge v Francis Ole Kaparo & 4 others H.C Misc. Application No. 22 OF 2004** where the court held inter alia that:-

"The mere allegation of contravention of Chapter 5 of the Constitution provisions per se, without particulars of contravention and how that contravention was perpetrated would not justify the courts intervention by way of any an inquiry where the particulars of contravention and how the contravention

took place are plainly lacking in the pleading. Indeed there is a wealth of authorities on this point... Any such inclination to demand an inquiry every time there is a bare allegation of constitutional violation would clog the court with unmeritorious constitutional references which would in turn trivialise the constitutional jurisdiction and further erode the proper administration of justice by allowing what is plainly an abuse of the court process. Where facts are pleaded in this case, do not plainly disclose any breach of fundamental rights or the constitution there cannot be any basis for an inquiry."

(d)LEGALITY OF THE PETITIONER'S DETENTION

The respondent contends that the petitioner's detention was underpinned in the Statute and in particular section 4(2)(a) of the Preservation of Public Security Act, Cap 57 of the Laws of Kenya (now repealed) as read together with the Public Security (Detained and Restricted Persons) Regulations (now repealed). The relevant Regulation would be 6 (1) and (2) and (3) which provides that:

" (1) If the Minister is satisfied that it is necessary for the preservation of public security to exercise control beyond that afforded by a restriction order, over any person, he may order that that person shall be detained.

(2) Where the detention order has been made in respect of any person, that person shall be detained in a place of detention in accordance with these Regulations, for as long as the detention is in force, and, while so detained shall be deemed to be in lawful custody.

(3)The Minister may not any time revoke a detention order."

He argued that under the relevant law (as cited above), it was the Minister who was in charge of Internal Security at the material who was responsible for the petitioner's detention and the President of the Republic was not mentioned anywhere in the Regulations save all that was required of him was to sign the relevant Gazette Notice so as to operationalise section 85 of the Constitution of Kenya; and that given that, the petitioner ought to have sued the said Minister, not in his personal capacity, but as an agent of the State.

Mr. Mwangi was however of the view that the right to personal liberty is one of the internationally recognised fundamental civil liberties and is protected by the aforesaid section 72 of the Constitution which states inter alia the ***"anyone who is unlawfully arrested or detained by another person shall be entitled to compensation therefore from that other person."***

He maintained that Rule 5 of Article 9 of the International Covenant on Civil and Political Rights reiterates the position and that it provides inter alia that ***"anyone who has been a victim of unlawful arrest or detention shall have an enforceable right to compensation."*** It was his submission that his client was detained for closely over 3 years and that the only question would be whether his detention was caused by the respondent and also whether it was unlawful.

In his sworn on 22/2/2010 the petitioner has deposed at paragraph 20 that *"the respondent has in the past and before witnesses admitted that he wronged me by detaining me without a legally justifiable cause and has also before witnesses apologised for these wrong doings."*

He maintains that his detention was intended by the respondent to secure a personal and ulterior commercial advantage as there was no reason contemplated under section 2 of the Preservation of Public Security Act and it is inadequate for the respondent to allege that the detention was ordered by the Minister in charge of Internal Security in accordance with the law, and in that regard he urges the court to make the following presumptions:-

1. That the Minister of State in Kenya cannot detain any person under the Preservation of Public Security Act without the knowledge and consent of the President of the Republic.

2. As the Deputy Director of Intelligence and Deputy Commissioner of Police of the Republic of Kenya, the Petitioner could not be detained under the Preservation of Public Security Act without the knowledge and consent of the President of the Republic.

3. As a business partner of the Respondent who was the President of Kenya, the Petitioner's detention could not be done without the Respondent's full knowledge and consent.

4. By apologising for the detention of the Petitioner, the Respondent acknowledged that he ordered the said detention.

(e) NON-DISCLOSURE OF MATERIAL FACTS

The respondent contended that the petitioner is guilty of non-disclosure of material facts mainly because he failed to disclose some pertinent facts relating to the matters in issue, which in his view is an omission made with the sole intention of misleading the court, which he contends is an abuse of the process of this court, in that, he avers that the petitioner failed to inform the court or disclose the full facts of the other case of **Muriithi v Director of Criminal Investigations Department & another (1988) KLR 629,** which he claims to be the genesis of these proceedings, and in which case. He alleged that Chesoni J. made a finding to the effect that the petitioner had been lawfully detained under the Preservation of Public Security Act and the Regulations thereunder.

He therefore argues that he had nothing to do with the alleged detention and reiterates that the same was ordered by the Minister in charge of Internal Security, and that in any event, the petitioner cannot after a period of 28 years seek to question the validity of his detention, which in his view was found to be

lawful and was so declared by a court of law in the aforementioned matter and that to reopen the matter is an abuse of court process as the issues are now res judicata.

He relied on the decision in the case of **Booth Irrigation Ltd., (No. 2) High Court Misc. Civil Application No 1052 OF 2004** where the court stated that *"even as regards Constitutional applications, the non disclosure of material facts to the court must lead to their dismissal because the process of the court ought not to be abused by the applicants who appear before it."*

The Petitioner however denied nondisclosure of material facts and urged that the court to find that the case of **Muriithi Vs Director of Criminal Investigations Department & another,** was a habeas corpus application, made to establish his whereabouts after he disappeared for three 3 days. Being a habeas corpus application, based on the matters which were at hand then, I am inclined to agree with him that the issue of the legality of his detention was not the issue before the court and as such he cannot be said to have withheld material facts as the respondent would urged this court to find.

(f) LIMITATION OF ACTION:

The respondent contends that the petitioner's claim is stale as per the Limitation of Actions Act, Cap 22 of the Laws of Kenya and the Public Authorities Limitation Act, Cap 39 of the Laws of Kenya. He relies on the aforementioned decision in the case of **Booth Irrigation v Mombasa Water Company,** where Nyamu J (as he then was) stated that *"I wish to reiterate and reinforce the principles I endeavoured to define and establish in my recently ruling in the case of Labhsons Ltd V. Manula Hauliers Ltd HCCC NO. 204 OF 2005 where I held inter alia that in the articulation of and enforcement of fundamental principles of law such as res judicata, limitation, laches and if I may add to the list, estoppel, waiver and comprise... our Constitution does assume that there are also fundamental principles of law in existence although the Constitution does not occupy the position of the superstructure. The superstructure has a foundation and one of the foundations is the existence of fundamental principles of law. It is reckless for applications to ignore the fundamental principles of law when filing or articulating constitutional applications. Many of the identified fundamental principles of the law are based on the public policy principles of fairness and justice"*

However in response, the petitioner's counsel submitted that limitation of actions cannot apply in that the respondent was protected by section 14 of the Constitution from any criminal or civil proceedings. He further maintains that section 84 of the Constitution does not contain any period of limitation for a claim such as this one which he has elected.

As stated earlier, the interested party supported the stand taken by the respondent. It had, filed on its behalf a replying affidavit in which it claims the ownership L.R. No 11793. It's learned counsel associated himself with the respondent's counsel and also made brief submissions, which were for all purposes and intent a replica of those made by the respondent's learned counsel Mr. Ochieng Oduol, save that, in essence the interested party intention is to secure the above mentioned parcel of land.

ANALYSIS

I have taken considerable time to go through the pleadings, submissions and authorities supplied to the court by the able counsel. I do appreciate the fact that this being the first matter of its nature in our courts, it will no doubt have an input in the jurisprudence on Constitutional law more so in human rights litigation in Kenya.

The first issue that any court ought to determine in any matter before it would be whether it has the jurisdiction to hear that matter for without it, it cannot proceed at all, and so, does this court have the jurisdiction to entertain the petition herein, for while the respondent ant the third party argue that I lack the relevant jurisdiction the Petitioner argues otherwise.

In my view, there is not much substance in the respondent's, and the interested party's argument for the following reasons that section 60(1) of the Constitution provides that ***"there shall be a High Court, which shall be a superior court of record, and which shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this constitution or any other law."***

Further thereto, section 84(1) of the said Constitution provides that ***"subject to Subsection (6), if a person alleges that any of the provisions of Sections 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in case of a person who is detained, if another alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress."***

Needles to say, it is clear from the above provisions of the Constitution that a person who alleges (not "proves") that his fundamental rights have been contravened has a Constitutional right to seek redress in the High Court. It would amount to grave injustice to lock out a petitioner from filing his claim purely because the respondent believes that the claim has no merit. The issue of merit is substantive while the filing of the claim is procedural and in that regard, upon filing his claim, a petitioner such as this petitioner has a further and I must say a heavier burden to discharge, this being that, he ought to prove his claim to the required standard, and hence my order during the initial hearing stage, that the respondent's preliminary objection be dealt with during the main hearing.

In view of the above provisions of the Constitution, I find that the only instance where the arguments by both the respondent and the interested party would hold any water, would be if the court were to delve deeper to make a finding that the petitioner was actually aware of, and that he did not raise any objections to the transactions which led to the disposal of the subject properties. Having deposed that he was not a party to the said transactions and in view of the fact that his deposition was not controverted at all, it would be very safe to assume, and I accordingly assume, that the respondent acted outside the ambits of the provisions of the Companies Act. He cannot now be heard to urge this court to find that it has no jurisdiction to hear the matter as the issues would be well canvassed in the civil courts.

The petitioner has been able to establish that he was deprived of his rights at a time when he was not in a position to defend those very rights, due to his detention, and in a manner that defied company law.

I need not belabour the point any further, for this court has the jurisdiction to entertain this petition.

The next point for my determination would be whether the petitioner is guilty of non disclosure of material particulars.

I have considered the issues raised, pertaining the case of **Muriithi Vs Director of Criminal Investigations Department & another** (supra), and **i**n my humble opinion, being a habeas corpus application, I have no doubt in my mind that, the issue of the legality of the petitioner's detention was not the issue before the court and as such he cannot be said to have withheld material facts as the respondent would urge this court to find.

Having found as such, the following are the additional issues which should be addressed:-

§ **Do fundamental rights apply vertically or horizontally"**

§ **Is there limitation period in constitutional matters"**

§ **Does the petitioner's claim lie within the province of constitutional law or commercial law"**

§ **What is the nexus between the petitioner's detention and sale of his property and the respondent"**

§ **Are these proceedings defective for want of particulars of the alleged infringement"**

§ **Who between the three parties herein should bear the costs of this litigation"**

Having laid down the issues, I shall now attempt to determine each of them.

· **Do fundamental rights apply vertically or horizontally"**

In the Kenyan experience or rather our jurisdiction, the courts have on several occasions previously held that human rights are applicable vertically and not horizontally.

A case in point would be that of **Kenya Bus Service Ltd & 2 Others V Attorney General [2005] KLR 788,** where Nyamu J stated inter alia that *"an individual or a group of individuals cannot owe duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or group of individuals to another under the fundamental rights provisions of the Constitution. No action for a declaration that there has been a duty under the provision can be maintained... Moreover, fundamental rights and freedoms are contained in the* ***Constitution*** *and are principally available against the state because the constitution's function is to define what constitutes government and the governed and it regulates the relationship between the government and the governed. On the other hand, the rights of the individual interests are taken care of in the province of private law and are invariably redressed as such."*

In their attempts to convince the court that the petitioner case seriously lacks in merit, the respondent and the interested party embrace the above stated position.

Counsel for the respondent and the interested party may as well argue that the horizontal application of human rights does not arise, while the petitioner would celebrate such a finding by this court.

But it is worthy to note that in other jurisdictions, fundamental rights are applicable both vertically and horizontally; a case in point would be South Africa where the Constitution court which is the highest court in the land has held so. In the case of **Hoffmann V South African Airways 2000(11) BCLR 1211 CC**, the said court held that the applicant had been unfairly discriminated by the respondent in being denied employment on the basis of his HIV status which, action was unconstitutional. It is important to note that that particular respondent was not the State, nor was it a State agent yet it was found to have violated a fundamental right.

The rigid position that the human rights applies vertically is being overtaken by the emerging trends in the development of human rights law and litigation. We can no longer afford to bury our heads in the sand, for we must appreciate the reality, which is that private individuals and bodies such as clubs and companies wield great power over the individual citizenry, who should as of necessity be protected from such non-State bodies who may for instance discriminate unfairly, or cause other Constitutional breaches.

The emerging jurisprudence in Kenya tends now to lean towards the South African stand, and that there are instances when the non-State actors can be and have been held liable for breach of fundamental rights.

The major challenge to horizontal application of human rights is the fact that it a novel area and the courts bear great responsibility of examining each individual situation so as to decide each case on its own merit as horizontal application does not and should not cut across the board.

In my humble opinion, it is important to embrace the progressive trends, for that is the only way in

which we can move towards developing our jurisprudence to be tandem with other jurisdictions, and obviously with a view to ensuring that fundamental rights are enjoyed in the manner enshrined in our Constitution. Needless to say, being members of the International Community, and must secure our niche therein.

Waweru J. embraced this new concept in the case of **Beatrice Abongo v. National Oil Corporation HCCC No 1268 0f 2004,** where he applied the principle and held that a non-State operator was liable for breach of fundamental rights.

I need not point out that this is the beginning of a new dawn for Kenya; one that should be embraced enthusiastically by all and it will not matter who the duty holder is, rather, what matters is who should enjoy the rights as enshrined in the Constitution.

It must be clear by now that I find that the fundamental rights are applicable both vertically and horizontally, save that horizontal application would not apply as a rule but it would be an exception, which would obviously demand that the court do treat on a cases by case basis by examining the circumstances of each case before it is legitimised.

- **Limitation period in Constitutional matters.**

Mr. Mwangi made submissions to the effect that the general rule is that there is no period of limitation for an actions brought under Section 84 of the Constitution, and I am inclined to agree with him, for nowhere in the Constitution or in any other law is a period of limitation set for Constitutional references. The issue that would however arise would be whether it would be unreasonable to imagine that litigants can file cases in court as and when they please, for one might as well ask whether that would go against the grain of good policy and administration of justice.

I have perused the decision by Nyamu J. in the case of **Rodgers Mwema v Attorney General** where the learned Judge stated that, *"I wish to reiterate and reinforce the principles I endeavoured to define and establish in my recent ruling in the case of Labhsons Ltd V Manula Hauliers Ltd HCCC No 204 of 2005 where I held inter alia that in the articulation of the enforcement of the fundamental rights, this court cannot disregard fundamental principles of law such res judicata, limitation, laches and if I may add to the list, estoppel, waiver and compromise."*

As stated earlier, there is no set time limit for filing petitions of the nature that is before me. One might as well argue that this would create a loophole for exploitation and abuse by litigants. It cannot be ruled out that litigants who are certain that their claims would be otherwise stale, may decide to disguise them as Constitutional matters, with a view to escape the available defences of time-bar. It is for the court to ensure that the process is not abused by such litigants who for one reason or another might appear to have slept on their rights for far too long, only to wake up from what would be described as 'a deep slumber' after the expiry of what would be the limitation period under other aspects of the law, and decide to shield under the Constitution. Although I have found that there would be no time limitation in Constitutional matters that cannot and should not be interpreted to mean that a litigant can elect when to file his matter regardless of the period.

In the Trinidad and Tobago case of **Durity v Attorney General [2002] UKPC 20** the court held at

page 212 inter alia that:

"When the court is exercising jurisdiction under section 14 of the Constitution and has to consider whether there has been some delay such as would render the proceedings an abuse, it would disentitle the claimant to relief, it will usually be important to consider whether the impugned decision or conduct was susceptible of adequate redress by a timely application to the court under its ordinary, non constitutional jurisdiction. If it was and if such an application was not made and would now be out of time, then failing a cogent explanation, the court may readily conclude that the claimant's constitutional motion is a misuse of the courts constitutional jurisdiction. An application made under section 14 solely for purpose of avoiding the need to apply in the normal way for the appropriate judicial remedy for unlawful administrative action is an abuse of process."

Back home, in the case of **Lt Col. Peter Ngari Kagume & others v The Attorney General, H.C. Petition No. 128 of 2006**, the court held inter alia that:-

"The Petitioners had all the time to file their claim under the ordinary law and the jurisdiction of the court but they never did and are now counting on the Constitution. None of the Petitioners has given any explanation as to the delay for 24 years. In my view the Petitioners are guilty of inordinate delay and in the absence of any explanation on the delay; this instant petition is a gross abuse of the court process...in view of the specified time limitation in other jurisdictions, the court is in a position to determine what a reasonable period would be for an applicant to file a constitutional application to enforce his or her violated fundamental rights. I do not wish to give a specific time frame but in my mind, there can be no justification for the Petitioners delay for 24 years. A person whose constitutional rights have been infringed should have some zeal and motivation to enforce his or her rights. In litigation of any kind, time is essential as evidence may be lost or destroyed and that is possibly the wisdom of time limitation in filing cases."

I would readily agree with the concept and add that where it is alleged that a petitioner has taken his sweet time in preferring a claim, the burden of convincing the court that he had a good reason for moving late, lies with him, and he must explain the delay and time taken with a view to convincing the court that he could not have moved earlier.

This petitioner claims that he was detained in 1982 for about three years. This fact is not disputed. He did not file this petition until the year 2009, which was 27 years after his release. His explanation is that the respondent who was the President of Kenya at the material time was protected by section 14 of the Constitution which provides that:

"(1) No criminal proceedings whatsoever shall be instituted or continued against the President while he holds office, or against any person while he is exercising the function of the office of the President.

(2) No civil proceedings in which relief is claimed in respect of anything done or omitted to be done shall be instituted or continued against the President while he holds office or against any person while he is exercising the functions of the office of the President."

The fact that the respondent retired from office in the year 2003 is not disputed either. It therefore took the petitioner 6 years to file this petition.

A period of 6 years would appear to be a long time by normal standards, and one may argue that had he been zealous, he could have filed his case much earlier to show that he is not motivated by any other reason apart from his quest for justice, but given the surrounding circumstances, it cannot be said that there was an inordinate delay on his part, and I would not hold it against him especially because as stated earlier, our Constitution has not laid down specific time limit.

He shall have the benefit of doubt in the circumstances.

· **Is the Petitioner's claim Constitutional or Commercial"**

The respondent and the interested party are of the view that the petitioner's claim is rather confusing or mixed up, and that it contains what appears to fall within the province of Constitutional law but that a keen scrutiny would reveal otherwise.

The pleadings before me reveal that the petitioner's claim is hinged on unlawful detention and alleged sale of the subject properties, which he held a stake in and which were disposed of while he was in what he claims was in unlawful detention.

While I have no difficulty in appreciating that detention abrogates the freedom or right to liberty and that is certainly a Constitutional matter, the problematic issue is the one of sale of property, for a sale is a commercial transaction which is within the province of commercial law.

The petitioner states as follows in his submissions, on the particulars of infringement:-

*"The submission is strange because from the heading of the petition to prayers, it is clearly stated that the petition is brought under section 72 and 75 of the Constitution. The petition is also clear about the manner of infringement to wit, unlawful detention and the stealing and ravaging of property.***"**

The respondent states that it not clear the circumstances under which the petitioner's right was violated under section 75 of the Constitution, wherein the protection from deprivation of property is guaranteed. His view is that if his property was stolen, he could have gone to an ordinary court to seek criminal sanctions or to the civil court for orders of conversion of property or any other available remedy. Besides that, the properties in question are not personal but held by companies which are distinct legal

personalities with the capacity to sue the respondent.

The fact that the subject properties were disposed of while he was in detention is not disputed. In view of the fact that the subject properties were then held by companies, in which the petitioner was only one of the several shareholders while decisions in a company are taken through resolutions by the majority, the issue that would then arise would be whether, the disposal would give rise to the infringement of his rights as enshrined under section 75 aforesaid.

Many would clearly state that the Constitutional jurisdiction of the High Court should not be trivialised, and that where a litigant has access to court in the ordinary civil manner, that should be the right channel to pursue, and although it might appear impressive to file a claim in the Constitutional court, many would again argue that the Commercial and Tax Division of the High Court is best suited and that it would be more expeditiously handled as a commercial dispute. Besides that, there is a presumption that the ordinary laws that are applied by our courts meet the Constitutional threshold and that they are interpreted to promote the core values and the spirit of the Constitution.

That being the case then, do the issues raised in this petition fall within the ambits of the Constitutional court or do they fall squarely within the preserve of private law"

It is imperative that I look at the next question, before I make a finding herein

· **Who detained the Petitioner and was the detention lawful"**

I have already made a finding detention would fall under Constitutional law since it is a derogation of the right to liberty, but there is no absolute right. The rights contained in the Bill of Rights or Chapter V of the Constitution have limitations. They are limited by other laws and the rights of others. A law of general application can validly limit the rights in the constitutional particularly if the said law is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

The petitioner was detained under the provisions the Preservation of Public Security Act as read together with the Public Security (Detained and Restricted Persons) Regulations, which are now repealed. The court has no knowledge of the exact reasons why the Petitioner was detained but the above mentioned law was one of the general application. There is no reason to believe, nor is there is an iota of evidence that the law had been passed to target the petitioner in particular, simply because the said law was for general application, for the security on the entire Nation.

The respondent’s argument is that the petitioner’s detention was underpinned in the Statute, but the details of why and how he was detained have not been supplied to court for reasons best known to the respondent, and in the circumstances this court cannot comment on the issue.

In his matter of habeas corpus (**Muriithi v Director Of Criminal Investigations and another)** the court was informed that the petitioner could not produced because he had been detained and that was the end of the matter before court, and rightly so for all that the court wanted to establish then was his whereabouts. In my view, the most critical question which would be the turning point in this case, would be who actually detained the petitioner" He states that he was detained for closely over 3 years. It is alleged that he was detained by the State, but can the respondent be one and the State"

It is a matter of public notoriety that at the material time the Respondent was the President of the Republic of Kenya. The petitioner attempts to link the respondent with the detention in the following manner:

1. An averment in his affidavit sworn on 22/2/2010 to the effect that the respondent has in the past and before witnesses admitted that he wronged him by detaining him without a legally justifiable cause and has apologised for the said wrongdoings.

2. The presumption that the Minister of State could not detain any person under the preservation of Public Security Act without the knowledge and consent of the President of the Republic.

3. The presumption that since the petitioner was a Deputy Director of Intelligence and Deputy Commissioner of Police in Kenya, he could not be detained under the said Act without the knowledge and consent of the President of the Republic.

4. *The presumption that the petitioner as a business partner of the Respondent, his detention could not be done without his knowledge and consent.*

Coupled with the above assertions, I now examine the evidence to establish whether the respondent was responsible for the detention of the petitioner.

As stated earlier, the respondent did not file an affidavit in response to the petition and the petitioner thus invites the court to make another presumption under the then Order VI Rule 9 of the Civil Procedure Rules wherein it provided as follows:-

"(1) subject to subrule (4), any allegation of fact made by a party in his pleadings shall be deemed to be admitted by the opposite party unless it is traversed by that party in his pleadings...

(2) A traverse may be made either by denial or by a statement of non-admission and either expressly or by necessary implication.

(3) Subject to subrule (4) every allegation of fact made in a plaint or counter claim which the party on whom it is served does not intend to admit shall be specifically traversed by him in his defence or defence to counter claim; and a general denial of such allegation; or a general statement of non-admission of them shall not be sufficient to traverse of them;

(4) Any allegation that a party has suffered damage and any allegation as to the amount of damages shall be deemed to have been traversed unless specifically admitted."

According to the petitioner, and going by the above provisions of the law, the complaints against the respondent contained in the petition must be taken as proved.

He maintained that the respondent was the custodian of fundamental liberties because of the Oaths of Office which he took and in which undertook '*to defend the Constitution of Kenya and to do right to all manner of people according to the laws and customs of the Republic without fear or favour, affection or ill will*'.

He further stated that the view that human rights are obligations of the State exclusively is now an old view that is overtaken by the development in human rights law. He relied on an observation made in a conference at an International Centre for Human Rights and Democratic Development in Canada in their report entitled **"Emerging Human Rights Issues"** where it is stated that:-

"While not ignoring the fact that States have to bear a fundamental responsibility for human rights, we see the emergence of a new paradigm that will include non-State actors in the matrix of human rights promotion and protection. This evolution of norms and policies of human rights is necessary in the era of globalisation, transnationalism and of failed and fragile States."

Mr. Mwangi also quoted Professor Andrew Clapman in his book **"Human Rights, Obligations of Non-State Actors"** at page 54 where the learned Professor propounds that *"to apply the traditional State/non-State distinction of human rights law risks obfuscating the real violators; to assist on the exclusive applicability of human rights law governments generates sense of Impunity for those who are undermining people's rights."*

On the averment deposed by the petitioner that the respondent has even apologised for detaining him, I

find it sufficient for the reasons that though the petitioner stated so under oath, the respondent who would have denied the fact, had he wanted to, did not deny it at all. It is a rule of evidence that the respondent has accepted all the matters raised in the affidavits (Section 3(2) of the Evidence Act and Order VI rule 9 of the Civil Procedure Rules).

The onus of proving the issues raised in the petitionlies on the petitioner. He must discharge that burden to the required standard without enlisting support from the court.

Though the respondent and the interested party raised it, I am of the view that the fact that the petitioner has not enjoined the Minister or the Attorney General in these proceedings is not fatal for the reasons adduced for the detention would not, in my view, apply to the two. In any event the evidence on record would tend to suggest that the detention was not carried out for purposes of the preservation of public security, and that being the case then he would not have any adverse orders to seek against the said two.

In my view the additional facts that are revealed in this petition, which again, are not denied, tend to show that the petitioner's detention was intended by the respondent to secure a personal and ulterior commercial advantage.

The law is clear in that the powers to order detention lie with the said Minister and not the President. However, there is no reason at all to believe that the said detention was carried out for the purposes which are laid down in the Preservation of Public Security Act, for in my view, it was not. Having held the high positions of Deputy Director of Intelligence and Deputy Commissioner of Police in the respondent's government, it is obvious that the respondent was very well aware of what was to befall his Police Chief and that he is the one who actually made the decision to have him detained, with the sole purpose of interfering with his personal liberties and his rights to the companies and the subject properties. In my humble view, the Minister's role was simply to execute that decision by his boss who happened to be this respondent. It is for these reasons that I find that the detention was not legal, nor was the decision official. In my mind, the respondent could not have, nor did he act in pursuance of his authority as the President of Kenya, for it clearly contradicted his oath of office.

I need not re-emphasize the fact that public officers, which will include ex-Presidents of countries would now be held liable for illegal acts which they commit while allegedly acting under the ostensible authority of the law. The respondents acted in his personal capacity, and he cannot escape the responsibility for the said detention, for courts should protect fundamental rights and will, where a petitioner proves his case, grant orders for compensation for the derogation.

Arising from the foregoing, I find that the petitioner has demonstrated that it is the respondent who detained him and as such he is liable to compensate him for the detention, and in this regard I do find the decision the Second Circuit of the United States Court of Appeals in **Filartiga –vs- Pena Irala** at pg.

13 appropriate, for in upholding a suit for damages against a former official of Paraguay for acts of torture leading to death, the court held that:

"In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture. Spurred first by the Great War, and then the Second, civilized nations have banded together to prescribe acceptable norms of international behavior. From the ashes of the Second World War arose the United Nations Organization, amid hopes that an era of peace and cooperation had at last begun. Though many of these aspirations have remained elusive goals that circumstance cannot diminish the true progress that has been made, in the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest. Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed, for purposes of civil liability, the torture has become like the pirate and slave trader before him ***hostis human generis****, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfilment of the ageless dream to free all people from brutal violence."*

Though the court dealt with the issue of torture leading to death, the decision will most appropriately apply in circumstances where denial of fundamental human rights leads to a loss, be it physical or economic, and the court will in worthy cases award punitive and exemplary damages, in order to punish a respondent, for his irrational, arbitrary, oppressive and unlawful acts. Courts will of necessity consider not only the conduct of the respondent but also his means.

It is evident from the above facts, that not only was the respondent's action oppressive, arbitrary or unconstitutional, but that it was calculated to procure him financial benefits at the petitioner's expense, for which the latter deserves punitive damages. Based on the status of the respondent, I award the petitioner the sum of K.Shs.50,000,000/-.

The petitioner deposed, that among the subject properties, Ruprani House, Kenwood House that belonged to Fourways Investments Limited, Corner House which belonged to Sheraton Holdings Limited were all disposed of for specified sums. He also deposed that though he had no knowledge of how much Atlas building that belonged to Fourways Investments Limited was sold at, he is however aware that at the time of his detention the company had received an offer to purchase it at K.Shs. 13,000,000. He finally deposed that the land in Solai, which belonged to Mokamu Limited at the material time, and whose acreage was 1020 acres, was then valued at approximately K.Shs.100,000 an acre and that on it were 800 heads of cattle each valued at about K.Shs.65,000, as well as various miscellaneous assets then valued at about K.Shs. 20,000,000. Save for the interested party's claim that the property Solai was never owned by the companies, all the other deposition by the petitioner was not controverted. The pleadings reveal that by its replying affidavit, sworn on its behalf by its General Manager one Joseph Tole Maganga, the interested party on 28/4/2010, it is deposed that 'the piece of land stated as L.R. No. 11793 in Solai, Nakuru District belongs to the interested Party and has never been the property of M/S Mokamu' the deponent did not deem it necessary to avail proof to support that contention, and in view of that omission, and also in view of the fact that the respondent chose not to controvert the issues which the petitioner deposed on, I form the opinion that the said property formed part of the subject properties.

Be that as it may, the petitioner claims as follows:

(a) **His interest in Fourways Investments Limited from:**

Sale of Ruprani House and Kenwood House at – K.Shs.36,000,000.

Sale of Atlas Building - K.Shs.13,000,000.

TOTAL - K.Shs.49,000,000

His 40% shareholding - Kshs.19,600,000

(b) **His interest in Sheraton Holdings Limited.**

Sale of Corner House - K.Shs.20,354,300

40% Shareholding - K.Shs.8,141,720

Less advance received - K.Shs.5,000,000

TOTAL - K.Shs.3,141,720

(c) **His interest in Mokamu Limited.**

Value of L.R. NO.11793 at

K.Shs. 100,000 per acre - K.Shs.102,000,000

Value of 800 heads of cattle

at K.Shs.65,000 each - K.Shs.52,000,000

Value of miscellaneous assets - K.Shs.20,000,000

TOTAL - K.Shs. 174,000,000

33% shareholding - K.Shs.57,420,000

His total entitlements:

Fourways Investments Limited - K.Shs. 19,600,000

Sheraton Holdings Limited	-	K.Shs. 3,141,720
Mokamu Investments	-	K.Shs. 57,420,000
TOTAL		K.Shs. 80,161,720

I have considered his request and in as much as the sales are not denied by the respondents, I find it only fair to award him what would have been his share of the proceeds. I thus award him the sum of K.Shs. 80,161,720.

He also prays for interest, and bases his claim on the grounds that having been business partners with the respondent, and having denied an opportunity to earn from his investments, he suffered losses and in the circumstances, the court should award him the said interest at commercial rates of 35% p.a. with effect from 1/7/1982, by which date, the sales had been completed. He relies on the Kenya Court of Appeal decision in the case of **Shah v Guilders International Bank Ltd**. In as much as he deserves interest for the lost opportunities, I however feel that the rate of 35% p.a. would be on the higher side especially because he did not show how he had arrived at the said figure. I would thus award him, which I hereby do, an interest at court rates of 12% p.a. on a compounded basis, on the sum of K.Shs. 80,161,720 with effect from 1/7/1982 till payment in full.

Interest on the award of K.Shs. 50,000,000/- shall accrue at the rate of 12% p.a. from the date of this judgment till payment in full.

In view of my findings on the claims by the interested party, whose role was quite unclear, I decline to make any orders in its favour.

The upshot is that the petition is allowed with costs to the petitioner, to be borne by the respondent and the interested party.

Dated and delivered at Nairobi this 6th day of April 2011.

JEANNE GACHECHE

Judge

Delivered in the presence of:

For the petitioner – Mr. Mwangi

For the respondent – Mr. Ochieng Oduol

For the interested Party – No appearance