It is not Compulsory for Liquidation of a Company to be an Option of Last Resort Where a Company Failed to Pay its Debts

Children Adoptees Have a Right to Know the Identity of their Parents, the Parent’s Origin and the Existence, if any, of their Siblings.

Government’s Access to Cell-site Records to Track Physical Movements of Individuals Contravenes their Reasonable Expectation of Right to Privacy Protected Under the Fourth Amendment of the Constitution of the United States.
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Kenya Law once again achieved a "Very Good" score in the performance measurement and management understanding of the financial year 2016/2017. On achieving its core mandate, which includes the tracking of jurisprudence from the superior courts of record and the revision and consolidation of the Laws of Kenya, Kenya Law achieved 99 per cent and scored 100 per cent in all other perspectives, including customer relations and innovation and learning. This is an affirmation that we are working towards achieving our set objectives and it can only be an upward trajectory from now on.

As the Chief Justice stated in his speech during the launch of the performance Management and Measurement Understanding Evaluation Report, the Kenyan Judiciary stands out globally as one of the few that have put in place a well-structured performance system and are helping others benchmark with us as we lead the way. Indeed, Kenya Law has led the way in law reporting and law revision in Africa. During this quarter, we received a delegation from the Law Development Centre in Uganda who came to benchmark with Kenya Law on law reporting and law revision. This was closely followed by a visit from the Republic of South Sudan which seeks to establish an official law reporting institution for their country. In the month of June, Kenya Law was invited by the Judiciary of the Republic of Tanzania and the Tanzania Legal Information Institute (TanzLii) to provide specialist training on law reporting and the compilation of legislative databases. Further still, we hosted the Coordinator of the Ghana Legal Information Institute (GhanaLii) who was on a benchmarking trip to learn how Kenya Law carries out its law reporting and law revision functions. This in itself is an attestation to the important role that Kenya Law plays in carrying out its mandate and setting the pace for other jurisdictions.

As you will see from this edition of the Bulletin, the Judiciary is constantly producing progressive decisions in response to the unique disputes and circumstances facing our jurisdiction. This includes a decision on the constitutionality of the Election Laws (Amendment) Act and one on the rights of children adoptees to know the identity of their parents. It is our pledge to continue enhancing the quality of our work in in tracking the robust and indigenous jurisprudence of our courts in order to continue being the benchmark in law reporting and law revision for various jurisdictions.
I am delighted to welcome you all here today for the launch of our performance evaluation results. At about this time last year, we had a similar event and I made a promise to the people of Kenya that each year, I will be releasing the Judiciary Performance Scorecard detailing how each of our court stations has been fairing over the assessment period. This is significant in many ways. For one, by opening ourselves up for evaluation and speaking openly about our successes and challenges, we earn the trust of Kenyans. Secondly, on the part of our officers, it is impressive how quickly they have become accustomed to constant monitoring and evaluation of their individual outputs.

Not too long ago, some of our colleagues were opposed to the introduction of performance measurement instruments. They feared that the system would erode their independence and interfere with the way things were done in the courts. Today, I can confirm with great confidence that these fears have been proven to be unfounded: Our judges, judicial officers and other staff have fully embraced the system and are successfully implementing it throughout the country. Indeed, our Judiciary stands out globally as one of the few that have put in place a well-structured performance management system. We are ready to help others benchmark with us as we lead the way in the delivery of justice. The Performance Evaluation Report we are launching today is the culmination of the successful implementation of the second cycle of Performance Management and Measurement Understandings (PMMUs) that were signed by more than 257 implementing units comprising Courts, Registries, Directorates and other administrative units.

The report details the achievements of the courts and other units measured against variables that are critical to the success of our work, with a particular focus on our blueprint, Sustaining Judiciary Transformation. These include reduction of case backlog especially those that are older than 5 years; determination of cases within the set timelines and delivery of judgments and rulings on the date first scheduled, among others. I am happy to announce that during the period under review, there was a dramatic improvement in the performance of our courts. For example, the number of resolved cases increased by 58 per cent, from 192,100 cases in 2015/2016 to 304,182 in 2016/2017. Resolved criminal cases increased from 156,024 to 218,796 while civil cases increased from 36,076 cases to 85,386 cases over the same period.

In regard to case backlog, the number of cases older than five years came down by 15 per cent, from 139,256 in 2015/2016 to 118,566 cases in 2016/2017. Resolved criminal cases increased from 156,024 to 218,796 while civil cases increased from 36,076 cases to 85,386 cases over the same period.
Judge’s Productivity of 331 cases. This means that one judge was able to hear and determine these many cases within the year. These units, besides receiving recognition certificates, will receive a cash reward of Sh150000 to use on a project of their choice. Let me congratulate these units for their sterling efforts. Well done and keep it up.

The Judiciary continues to implement various strategies that are aimed at enhancing efficiency and effectiveness in the delivery of justice. These include initiatives such as Service Weeks, Justice at Last, Circuit Courts, enhancement of Court User Committees and so on. I am convinced that these interventions are bearing fruit.

As we continue with other measures such as the introduction of case management systems and other technological interventions, we can only produce better results in the coming years. I wish to thank the Performance Management and Measurement Steering Committee and the Performance Management Directorate for working tirelessly to put this report together. Well done and keep it up.

Hon. David K. Maraga, EGH,

Chief Justice And President of The Supreme Court of Kenya.
What they said

“… the Wildlife Conservation and Management (Compensation Scheme) Regulation 2015 which contemplate how to deal with claims for human death or injury and crop and property damage caused by wildlife, is yet to be implemented. There is therefore urgent need for parliament to pass into law the said regulations to make the compensation process provided for in the Act functional.”

“… globally, the insurance sector is so advanced that there are insurance covers available for virtually any conceivable type of loss that may be suffered. Consequently, one would reasonably expect an owner of land adjoining a Game Reserve to take an insurance policy, to cover the crop against possible destruction by wildlife. By so doing, they avoid the contingency of hefty losses being suffered due to destruction of the crop by wildlife. Indeed, an owner of land that has close proximity to a National Park or Game Reserve is expected to insure his crop, failing which a Court of law would have to apportion to him a degree of negligence. Consequently, based on the apportionment, the claimant only recovers part of the loss incurred as opposed to the full amount. In view of this, it is our recommendation that the Legislature ought to consider whether or not affected parties such as farmers, ought to take up mandatory insurance policies.”

“… upon gazettement of nominated members of County Assemblies, any aggrieved party would have to initiate the process of challenging the said nominations by filing an election petition at the Resident Magistrate Court designated as an Election Court under Section 75 of the Election Act. In this instant matter therefore, upon the gazettement of the name of the 3rd respondent as a nominated member of County Assembly for Bungoma County, any aggrieved party ought to have filed an election petition before an Election Court. It is only upon such filing and determination by an Election Court, and where such a matter rises through the ordinary appellate process, that other Courts in the judicial hierarchy can rightly assume jurisdiction with powers to give any consequent orders.”

“There is no requirement under the Insolvency Act or the Companies Act which stipulates that liquidation of a company should be as a last resort. Liquidation is one of the options under the Insolvency Act which a creditor such as the respondent in the case, could pursue to secure payment of a debt, especially a debt that remains unpaid for several years and in respect of which the appellant has been given adequate time, opportunity and indulgence.”
I am convinced that the respondent is just using the winding up avenue to put pressure on the appellant to settle the debt in question. This in my view is the wrong route... The petition for winding up order of a company should never be presented as a means of exerting pressure to pay even an admitted debt where there is no evidence of insolvency and inability to meet the deb"
Feature Case

Court holds that the Installation of a DMS System Device with the Capacity to Access Information Belonging to Subscribers of Certain Networks in the Telecommunications Industry is Unconstitutional
Kenya Human Rights Commission v Communications Authority of Kenya & 4 others
Constitutional Petition No 86 of 2017
High Court at Nairobi
Constitutional and Human Rights Division
April 19, 2018
J M Mativo, J
Reported by Long’et Terer

The Kenya Human Rights Commission brought a petition challenging the introduction of a Device Management System (DMS) by the Communications Authority of Kenya (CAK) into the networks of Safaricom Limited, Airtel Networks Kenya Limited and Orange-Telkom Kenya, the 3rd, 4th and 5th Respondents, respectively. These Respondents provide various telecommunication services to their customers and those services include mobile telephone, data, internet, and mobile money transfers. The proposed system device had the capacity to access customers’ information, which could only be accessed in a manner prescribed by law, and was therefore said to be a violation of the right to privacy. The petition also challenged the manner in which the device was introduced. The Petitioner stated that the device was introduced without public participation and there was no guarantee that the information accessed would remain confidential. The Petitioner said that the intended purpose of the introduction of the DMS, which was the blocking of fake and duplicate IMEI, was capable of being achieved without intruding into the privacy of Kenyans. The Petitioner also complained about the proposal to block phone gadgets without affording the affected person a hearing. Therefore, the Petitioner stated, the device created unjustified limitations to the right to privacy and also the rights guaranteed under articles 40, 46, 47 and 50 of the Constitution. In determining the matter, the court disposed of the following issues:

Whether the DMS system threatened the right to privacy of the subscribers of the third, fourth and fifth Respondents or their Consumer Rights; if yes, did the limitation meets the Article 24 analysis test?

The Court held that article 2(4) of the Constitution provided that any law that was inconsistent with the Constitution was void to the extent of the inconsistency. Similarly, any act or omission in contravention of the Constitution would be invalid. Further, it stated that article 259 of the Constitution provided that the Constitution would be interpreted in a manner that promoted its purposes, values and principles, advanced the rule of law, and human rights and fundamental freedoms in the Bill of Rights and contributed to good governance. Consequently, the Court would examine the object and purport of legislation, an act or omission, at issue, in order to read such legislation, act or omission in conformity with the Constitution.

The court outlined the principles of constitutional interpretation to include:

i. The Constitution is not interpreted like an ordinary statute. The spirit and tenor of the Constitution must permeate the process of judicial interpretation and judicial
discretion. A narrow, mechanistic, rigid and artificial interpretation is to be avoided in favour of a broad liberal and purposive interpretation. On the other hand, it is not always true that generous and purposive interpretation would coincide. It may be necessary for generosity to yield to purposiveness.

ii. In interpreting the Constitution close scrutiny should be given to the language of the Constitution in ascertaining the underlying meaning and purpose of the provision in question.

The Court held that the right to privacy was a fundamental human right, enshrined in numerous international human rights instruments. It was central to the protection of human dignity and forms the basis of any democratic society. This right, it was held, supported and reinforced other rights, such as freedom of expression, information, and association. Further, the court expounded, the right to privacy embodied the presumption that individuals should have an area of autonomous development, interaction, and liberty, a “private sphere” with or without interaction with others, free from arbitrary state intervention and from excessive unsolicited intervention by other uninvited individuals. Activities that restrict the right to privacy, such as surveillance and censorship, could only be justified when they are prescribed by law, necessary to achieve a legitimate aim, and proportionate to the aim pursued. A person’s right to privacy entailed that such a person should have control over his or her personal information and should be able to conduct his or her personal affairs relatively free from unwanted intrusions. Privacy, in its simplest sense, allowed each human being to be left alone in a core which was inviolable. Yet the autonomy of the individual was conditioned by her relationships with the rest of society. The court went on to explain that equally, new challenges had to be dealt with. The emergence of new challenges was exemplified by this case, where the debate on privacy was being analyzed in the context of global information based society. In an age where information technology governs virtually every aspect of our lives, the task before the Court was thus to impart constitutional meaning to individual liberty in an interconnected world. The constitution protects privacy as an elemental principle, but the Court had to be sensitive to the needs of and the opportunities and dangers posed to liberty in a digital world.

In the same breath, the court provided that data protection was an aspect of safeguarding a person’s right to privacy. It provided for the legal protection of a person in instances where such a person’s personal particulars (information) were being processed by another person or institution (the data user). Processing of information generally referred to the collecting, storing, using and communicating of information. The processing of information by the data user/responsible party threatens the personality in two ways: a) First, the compilation and distribution of personal information creates a direct threat to the individual’s privacy; and (b) second, the acquisition and disclosure of false or misleading information may lead to an infringement of his identity.

The Court Stated that Article 19 of the Constitution stipulated that the Bill of Rights was the cornerstone of democracy in Kenya. It enshrined the rights of all people in the country and affirmed the democratic values of human dignity, equality and freedom. Article 31 provides the right to privacy of the person, home or property searched. It recognized the right of every person to privacy, which includes the right not to have their person searched; their possessions seized; information relating to their family or private affairs unnecessarily required or revealed; or the privacy of their communications infringed. The recognition and protection of the right to privacy as a fundamental human right in the Constitution provided an indication of its importance.

A persons’ right to privacy, the court provided, entailed that such a person should have control over his or her personal information and should be able to conduct his or her own personal affairs relatively free from unwanted intrusions. Information protection is an aspect of safeguarding a person’s right to privacy. This right provided for the legal protection of a person in instances where such a person’s personal particulars are being processed by another person.
or institution. Processing of information generally refers to the collecting, storing, using and communicating of information. ‘Privacy,’ ‘dignity,’ ‘identity’ and ‘reputation’ are facets of personality. Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Personal choices governing a way of life are intrinsic to privacy. Privacy attaches to the person since it is an essential facet of the dignity of the human being.

The court went on to state that technological change has given rise to concerns which were not present several decades ago and the rapid growth of technology may render obsolescent many notions of the present. Hence the interpretation of the Constitution must be resilient and flexible bearing in mind its basic or essential features. Like other rights which form part of the fundamental freedoms protected by the Bill of Rights, privacy is not an absolute right. A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights.

According to the Court, privacy has both positive and negative content. The negative content restrains the state from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the state to take all necessary measures to protect the privacy of the individual. The right of privacy is a fundamental right. It protects the inner sphere of the individual from interference from both State, and non-State actors and allows the individuals to make autonomous life choices.

Two letters dated January 6, 2017 and January 31, 2017 were exhibited by the Petitioner and the Communications Authority of Kenya (CAK) did not dispute writing the letters. The letter dated January 31, 2017 indicated that the purpose of the DMS system was to access information relating to mobile telephone subscribers. Such access to information could only be lawful if it was permitted within the parameters if section 27A of the Kenya Information and Communications Act (KICA). For the DMS system to be lawful, the reason given for it had to not only be lawful but also meet the requirements of article 24 of the Constitution.

The Court held that under article 24 of the Constitution, a limitation placed on the enjoyment of a fundamental right and freedom had to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, considering all relevant factors including the nature of the right or fundamental freedom, the importance of the purpose of the limitation, the nature and extent of the limitation, the need to ensure that the enjoyment of rights and fundamental freedoms by any individual would not prejudice the rights and fundamental freedoms of others and the relation between the limitation and its purpose and whether there were less restrictive means to achieve the purpose.

The reason offered for the device by CAK was that it would help combat illegal mobile telecommunication devices. The question that arose from that was whether the reason was a limitation that was reasonably justifiable in a democratic society. The court averred that that question ought to be answered in light of the standards of review laid down by courts for situations when the validity of a statute was challenged, which included two main standards:-

i. The rationality test.

ii. The reasonableness or proportionality test. The limitation would have to be reasonable and justifiable in an open and democratic society.

In determining reasonableness relevant factors include an assessment as to whether there was a valid, rational connection between the limitation and a legitimate public interest to justify it and that connect would need to be not so remote as render the decision arbitrary or irrational. A second factor in determining reasonableness was whether there were alternative means of exercising the right that was threatened.

With regard proportionality, the court held that the test of proportionality was applicable in determining whether a limitation paced on rights was justified. It involved assessing whether there was a legitimate objective and whether the means in service of the objective were reasonably connected to the objective. It was also necessary to assess whether
those means had the effect of minimally impairing the enjoyment of the right in light of alternative means of achieving that objective. An assessment of the balance between the beneficial and negative effects of the limitation, including the balance between public interest and private rights would be done. The Court thus found that a limitation on the enjoyment of constitutional rights would be permissible if-

i. It was designated for a proper purpose,

ii. The measures undertaken to effectuate such limitation were rationally connected to the fulfillment of that purpose,

iii. The measures undertaken were necessary in that there were no alternative measures that could achieve that same purpose with a lesser degree of limitation,

iv. A proper relation (“proportionality strictu sensu” or “balancing”) between the importance of achieving the proper purpose and the special importance of preventing the limitation on the constitutional right was necessary.

Whether the installation of the DMS system fell within the statutory mandate of the CAK

The court held that there were lawful and less restrictive means to achieve the stated objective. Illegal devices were not manufactured in Kenya. There were importation laws, laws governing counterfeit goods, the Kenya Bureau of Standards to monitor standards, the Kenya Revenue Authority and the National Police Service. Those laws and institutions were not shown to be insufficient. In the past it was shown that 1.89 million illegal devices were switched off. Mobile Network Owners were able to identify and block black listed devices.

Subscriber information could only be released under terms prescribed in section 27A of the Kenya Information and Communications Act. There was no evidence tendered to show that the DMS system in question fit into the circumstances contemplated under the said section 27A.

The DMS system could only pass the test provided for in article 24 of the Constitution, for the limitation of fundamental rights and freedoms if it was adopted legally. It was therefore necessary to assess whether it was legally adopted.

It was the Court’s view that the mandate of combating illegal devices was not within the scope of the mandate of CAK. There were statutory bodies mandated to combat counterfeits, ensure standards and curb the importation of illegal devices. Therefore, the DMS system did not satisfy the article 24 analysis test. Where the CAK purported to perform functions vested on other statutory bodies it was acting ultra vires its functions. Combating illegal and counterfeit devices was not within the CAK’s mandate.

Whether the process leading to the decision to the acquisition and installation of the DMS system in the first, second and third Interested Parties Mobile Networks was subjected to adequate public participation

The Court was of the view that there was a catena of foreign and local court decisions holding that an analysis of the Constitutional provisions yields a clear finding that public participation plays a central role in legislative, policy as well as executive functions of the Government. All these decisions are in agreement that public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is also an established jurisprudence that any decision to exclude or limit fundamental participatory rights must be proportionate in order to be lawful.

In determining this particular issue, the court held that the key consideration was whether the CAK acted reasonably in the manner it facilitated and engaged the third, fourth and fifth Respondents in the particular circumstances of this case and the failure to engage the subscribers and the general public. It was held that the nature and the degree of public participation that was reasonable in a given case would depend on a number of factors. These included the nature and the importance of the policy or decision, and the intensity of its impact on the public. The public whose data is held by the third, fourth and fifth Respondents and whose constitutional right to privacy is at risk in the event of breach must as of necessity be involved in the engagements.
Thus, the process must be subjected to adequate public participation wide enough to cover a reasonably high percentage of affected population in the country. The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect CAK to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say. In the circumstances of this case and applying the above considerations, the conclusion becomes irresistible that there was absolutely in adequate public participation prior to the attempt implement the DMS system.

**Whether CAK violated the Petitioners’ Rights to Fair Administrative Action**

The court provided that it must always be remembered that the courts were concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. Once it had been established that a statutory body had made its decision within its jurisdiction following all the statutory procedures, unless the decision was shown to be so unreasonable that it defies logic, the court could not intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court.

From the evidence tendered in this Petition, the court held that it was clear that the subscribers or the general public were not engaged at all, yet the law demands otherwise. In light of the principle of legality which required the CAK’s actions must conform to the law, the Court found that failure to engage the public and the subscribers offends the provisions of the Fair Administrative Action Act. Put differently, the question was whether, properly construed, the manner in which the DMS system was implemented conforms to the above sections and the constitution. When the constitutionality or legality of a decision made by a public body in the exercise of its statutory mandate was questioned, the duty of the court was to determine whether the impugned decision was capable of being read in a manner that was constitutionally compliant or as in the present case whether it could be read in a manner that conformed to the relevant statute. Every act of the state or public bodies must pass the constitutional test. Put differently, it must conform to the principal of legality.

A contextual or purposive interpretation of the challenged decision must of course remain faithful to the actual wording of the statutes, namely the Fair Administrative Action Act, the Constitution, KICA and the Regulations made there under and the Consumer Protection Act. The challenged decision must be capable of sustaining an interpretation that would render it compliant with the Constitution and the statutes; otherwise the courts were required to declare it unconstitutional and invalid. The Court noted that that a contextual interpretation of the impugned decision, therefore, must be sufficiently clear to accord with the rule of law. Mindful of the imperative to read the challenged decision in conformity with the Constitution and the relevant statute, I find and hold that the DMS was introduced in a manner not in conformity with the law and is tainted by illegality.

From the facts of this case, the court was of the view that it was clear that the impugned decision fell within the definition of an administrative action as contemplated under the act. The decision affected the subscribers and the public generally, that the subscribers and the general public were never involved at all nor where they supplied with reasons for the decision, hence was the conclusion of the Court that CAK violated the provisions of Article 47 and the Fair Administrative Action Act.

**Whether the impugned decision violated consumer rights of the subscribers of the third, fourth and fifth Respondents;**

From the definition in section 2 of the Act and the Preamble and purpose of the Act, it was clear that the whole tenor of the Act was to protect consumers. The Act must therefore be interpreted keeping in mind that its focus is the protection of consumers. The court thus held that consumer rights litigation was not a game of win-or-lose in which winners must be identified for reward, and losers for punishment and rebuke. It is a process in which litigants and the courts assert the growing power of the expanded
Bill of Rights in our transformative and progressive Constitution by establishing its meaning through contested cases.

The Court stated that the proper approach to constitutional construction was embodying fundamental rights and protections. What was to be avoided was the imparting of a narrow, artificial, rigid and pedantic interpretation; to be preferred was one which served the interest of the Constitution and best carried out its objects and promoted its purpose. All relevant provisions were to be considered as a whole and, where rights and freedoms were conferred on persons, derogations there from, as far as the language permits, should be narrowly or strictly construed.

In line with the dictates of the Constitution, the court held that it would reject the narrow, literal reading of the above provisions and opt for a construction that promotes wider access to protection of consumer rights. Article 46 (3) provided that the Article applied to goods and services offered by the public entities or private persons. First, the consumers were never involved in the discussions, hence, they were never provided with information on the device. This was a breach of their constitutional and statutory rights. Secondly, the court reiterated that their constitutionally guaranteed right to privacy. The court therefore found and held that the DMS was introduced in a manner that was inconsistent with the constitutionally and statutory guaranteed rights of the consumers and or subscribers of the third, fourth and fifth Respondents.

What was the appropriate order regarding costs?

The Court held that this was a constitutional Petition seeking to enforce constitutional Rights and obligations and brought in public interest. It was common knowledge that courts have been reluctant to award costs in constitutional Petitions seeking to enforce constitutional rights brought in public interest. Relying on the the phrase “Justice is open to all, like the Ritz hotel” attributed to a 19th Century jurist, the court stated that costs have been identified as the single biggest barrier to public interest litigation in many countries. Not only does the applicant incur their own legal fees; they run the risk of incurring the other sides. For all potential litigants, the risk of exposure to an adverse costs order is a critical consideration in deciding whether to proceed with litigation. Should the fear of costs prevent an issue of public importance and interest from being heard? The Judge borrowed from Lord Diplock’s dictum stating: “… it would, in my view, be a grave lacuna in our system of public law if a pressure group... or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the lawful conduct stopped...”.

The court held that the petition sought to enforce constitutional rights and obligations in public interest. Courts were reluctant to award costs in such public interest litigation. In public interest litigation costs were a potential barrier to access to justice as the fear of incurring legal fees could prevent an issue of public importance and interest from being heard. In constitutional litigation, the primary consideration with respect to costs was the way in which a costs order would hinder or promote the advancement of constitutional justice. The nature of the issues raised in the petition would be more important that the parties’ financial ability. Accordingly, a frivolous or vexatious petition could attract costs.

What were the appropriate reliefs in this case?

The Court held that this was a proper case for it to fashion appropriate reliefs as the justice and circumstances of the case demanded. The Court was empowered by article 23 (3) of the Constitution to grant appropriate reliefs in any proceedings seeking to enforce fundamental rights and freedoms such as the instant case. Appropriate relief would in essence be relief that was required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief could be a declaration of rights, an interdict, a mandamus or such other relief as could be required to ensure that the rights enshrined in the Constitution were protected and enforced. If it was necessary to do so, the Court could even have to fashion new remedies to secure the protection and enforcement of those all-important rights. The Courts had a particular responsibility in that regard and were obliged to forge new tools and shape innovative remedies,
if need be to achieve that goal. The court therefore allowed the petition and granted the following orders:

a. A declaration be and is hereby issued declaring that the first Respondents request and or purported intention and or decision and or plan contained in its letter dated 31st January 2017 addressed to the first, second and third interested parties seeking to integrate the DMS to the first, second and third interested parties networks to inter alia create connectivity between the DMS and the first, second and third Interested Parties system to access information on the IMEI, IMSI, MSISDN and CDRs of their subscribers on their network is a threat to the subscribers privacy, hence a breach of the subscribers constitutionally guaranteed rights to privacy, therefore unconstitutional null and void.

b. A declaration be and is hereby issued decreeing that the decision, policy or regulation seeking to implement the DMS System was adopted in a manner inconsistent with the provisions of the Constitution, Section 5 (2) of KICA and the Consumer Protection Act, hence the said decision, policy and or regulation is null and void for all purposes.

c. Further and or in the alternative a declaration be and is hereby issued decreeing that the decision, policy and or regulation seeking to implement the DMS System was adopted in a manner inconsistent with the Constitution, Section 5 (2) of KICA and the Consumer Protection Act in that there was no adequate public participation prior to its adoption and implementation with the first, second and third interested parties and further the subscribers of the first, second and third Interested Parties were not engaged at all in the public consultations, hence the same is null and void for all purposes.

d. A declaration be and is hereby issued decreeing that the first Respondent was obligated to craft and implement a meaningful programme of public participation and stakeholder engagement in the process leading to the decision, policy and or regulation or implementation of the DMS System.

e. A declaration be and is hereby issued declaring that the first Respondents request and or purported intention and or decision and or plan contained in its letter dated 31st January 2017 addressed to the first, second and third interested parties seeking to integrate the DMS to the first, second and third interested parties networks to inter alia create connectivity between the DMS and the first, second and third Interested Parties system to access information on the IMEI, IMSI, MSISDN and CDRs of their subscribers on their network is a threat to the subscribers privacy, hence a breach of the subscribers constitutionally guaranteed rights to privacy, therefore unconstitutional null and void.

f. A declaration be and is hereby issued declaring that the first Respondents decision to set up connectivity links between the DMS and the first, second and third Interested Parties networks communicated in its letter dated 6th February 2017 is unconstitutional, null and void to the extent that it was arrived at unilaterally, without adequate public participation and that it a threat to the right to privacy of the first, second and third interested parties subscribers and a gross violation of their constitutionally and statutory protected consumer rights.

g. An order of prohibition be and is hereby issued prohibiting the first Respondent, its servant or agents from implementing its decision to implement the DMS System to establish connectivity between the DMS and the first, second and third Interested Parties system to access information on the IMEI, IMSI, MSISDN and CDRs of their subscribers on their network.

h. That this being a public interest litigation there will be no orders as to costs.
Supreme Court

Kenya Wildlife Service is Liable for Destruction of Crops and Animals Caused by Wildlife Migration

Kenya Wildlife Service v Rift Valley Agricultural Contractors Limited
Petition No 11 of 2015
Supreme Court of Kenya
April 27, 2018
M K Ibrahim, J B Ojwang, S C Wanjala, S N Ndungu, I Lenaola, SCJJ
Reported by Ian Kiptoo

Tort Law—negligence—negligence of a statutory duty—where a provision imposed an obligation but not a remedy for compensation for negligence—whether a claimant could enforce a common law action of negligence for destruction of crops by wildlife against the Kenya Wildlife Service even though it was not given provision for under the Wildlife (Conservation and Management) Act—Wildlife (Conservation and Management) Act, section 3A (I)

Stare decisis—Rylands v Fletcher—strict liability—applicability of the principle—factors a court takes into consideration in applying the principle—whether the principle of strict liability in Rylands v Fletcher relied upon by the Respondent was applicable in determination of the suit

Stare decisis—Donoghue v Stevenson—neighbour principle—applicability of the principle—factors a court takes into consideration in applying the principle—whether the neighbor principle relied upon by the Respondent in Donoghue v Stevenson was applicable in determination of the suit

Statutes—interpretation of statute—interpretation of section 3A of the Wildlife (Conservation and Management) Act in regards to liability of Kenya Wildlife Service vis-à-vis the liability of County Governments in regards to destruction of crops by wildlife—whether it was the Appellant who was liable for compensation for destruction of crops by wildlife in the Maasai Mara or the Narok County Government—Constitution of Kenya, 2010 article 62; Wildlife (Conservation and Management) Act, section 3A (I) and section 18

Tort Law—Negligence—defences—act of God—what amounted to an act of God—whether the Appellant could rely on the defence of act of God for the destruction of crops caused by the migration of wildlife

Words and Phrases—agriculture—definition—the science, art, or practice of cultivating the soil, producing crops, and raising livestock and in varying degrees the preparation and marketing of the resulting products—Merriam-Webster Online dictionary

Words and Phrases—act of God—definition of—an overwhelming, unpreventable event caused exclusively by forces of nature, such as an earthquake, flood, or tornado. The definition has been statutorily broadened to include all natural phenomena that are exceptional, inevitable, and irresistible, the effects of which could not be prevented or avoided by the exercise of due care or foresight—Black’s Law Dictionary

Brief facts

The matter before the Court was a petition of appeal anchored on the grounds that the Court of Appeal erred:

a) In wrongly finding that the Judge of the High Court was right in his analysis of the statutory duties of the Appellant as set out in section 3A (c) and (I) of the Wildlife Act.
b) In finding that the Appellant was liable to compensate the Respondents.
c) In finding that the rules in Ryland v. Fletcher applied to the case before the Court.
d) In failing to find that migration of wildlife was a natural phenomenon hence an act of God.

Issues

i. Whether a claimant could enforce a common law action of negligence for destruction of crops by wildlife against the Kenya Wildlife Service even though it was not given provision for under the Wildlife (Conservation and Management) Act.

ii. Whether the principle of strict liability in Rylands v Fletcher relied upon by
the Respondent was applicable in
determination of the suit.

iii. Whether the neighbor principle in
    Donoghue v Stevenson relied upon by
    the Respondent was applicable in
determination of the suit.

iv. Whether it was the Appellant who
    was liable for compensation for
    destruction of crops by wildlife in the
    Maasai Mara or the Narok County
    Government.

v. Whether the Appellant could rely
    on the defence of act of God for the
    destruction of crops caused by the
    migration of wildlife.

Relevant Provisions of the Law

Wildlife (Conservation and Management)
Act

Section 3A

"The functions of the Service shall be to—
...
(c) manage National Parks and National
Reserves;
...
(l) render services to the farming and
ranching communities in Kenya necessary
for the protection of agriculture and
animal husbandry against destruction by
wildlife."

Held

1. Section 3A (l) was unequivocal that the
   Appellant, the Kenya Wildlife Service
   (KWS), had the obligation of rendering
   services to communities in Kenya, such
   as would be necessary for the protection
   of agriculture and animal farming against
   destruction by wildlife. It could not be
   gainsaid that the services to be rendered
   by the Appellant pursuant to section
   3A (l) of the Wildlife (Conservation and
   Management) Act (Wildlife Act) was
   to ensure crops cultivated, as well as
   animals reared on land were protected
   from destruction by wildlife. Any other
   interpretation of the provision would
   be grossly narrow and simplistic. The
   Court had to determine whether the
duty to protect the crops and animals
reared on the land was accompanied
by a corresponding duty to compensate
for destruction to crops, occasioned by
wildlife.

2. It was clearly established in all common
   law jurisdictions that public bodies
   could be held liable in negligence for
   the negligent exercise of statutory duties
   and powers. A simple claim of a breach
   of statute could not be maintained on
   its own. As statutes rarely specifically
   conferred a common law right of action
   on individuals, a common law right of
   action could however be inferred in the
   interpretation of the statute if the statute
   was intended to protect a particular
   class of persons. A second claim of the
   negligent or careless performance of
   a statutory duty or power could be
   maintained provided the Plaintiff could
   establish the first claim of breach of
   statutory duty.

3. Though there was no obligation
   expressly imposed on the Appellant
   under the Wildlife Act to compensate
   for destruction of crops by wildlife, the
   statutory duty imposed under section
   3A (l) of the Act was actionable under
   common law. It would therefore be liable
   under the tort of negligence despite the
   lack of an express provision of statute
   to that effect. Under the tort four
   elements had to be proved - a duty of
care, a breach of that duty, causation and
   damage. A defendant had to owe a duty
   of care to the person bringing the claim,
in the sense that they fell within a class
   of interests which the law considered
   would be protected; if there was a breach
   of that duty involving a failure to take
   reasonable care; causation had to be
   proved and the type of damage alleged
   had to be protected by the law.

4. In the instant case, section 3A without a
   doubt imposed a duty on the Appellant
   to protect the crops from destruction by
   wildlife. In addition, the Respondents
   had demonstrated to the Court that
   their crops were destroyed by migrating
   wildlife hence; the duty imposed by
   section 3A was towards persons such
   as the Respondent. Furthermore, the
   Respondents had also demonstrated that
   the loss they suffered was a direct result
   of the migration of wildlife.

5. Article 62 of the Constitution of Kenya,
   2010 (Constitution) brought to bear
   that national parks and game reserves
were not among the land that vested in county governments. In the same vein, management of national parks and game reserves was not a function that had been devolved to the County Government under the Fourth Schedule to the Constitution. The Court was not privy to the arrangement between the Appellant and the Narok County Government, which was not a party in the appeal, concerning the management of the game reserve in question.

6. Where a statutory obligation was imposed on a person, such obligation could not be abdicated by that person even if it was expressly permissible under the Constitution or statute to do so. The express provisions imposing the obligation would trump any agreement, whether contractual or not, purporting to relinquish such obligation. The Appellant’s obligations under section 3A (1) could not and were not abdicated in favour of, or transferred to Narok County Government. Therefore, breach of section 3A (1) imposed a liability on the Appellant to compensate for destruction of crops by wildlife.

7. The elements of the principle in *Rylands v. Fletcher* were:
   i. the Defendant must make a non-natural use of his land;
   ii. the Defendant must bring something onto his land which is likely to do mischief if it escaped;
   iii. the thing in question must actually escape; and,
   iv. Damage must be caused to the Plaintiff’s person or property as a result of the escape.

The principle in *Rylands v. Fletcher* was not applicable in the instant case; because, first, the presence of the wildlife on the land was not a non-natural use of the land in question—even without delving into the question whether the Appellant was the owner of the land. Secondly, the Appellant did not bring the wild animals onto the land. Thirdly, the escape had to be from land in occupation of and/or under the control of the Appellant. The Appellant was not in occupation of the land in question, neither was the land under its control. It was not in doubt that the land in question was owned and managed by the Narok County government. There had been recent developments in the principle in *Rylands v. Fletcher* such as the inclusion of the element of foreseeability. However, the Court would not delve into that as the principle was not applicable.

8. The principle in *Donoghue v Stevenson* was applicable in respect of where a person owes a duty of care to persons who are closely and directly affected by his act, so that he ought to reasonably foresee they will be affected. However, the principle, to the effect that a manufacturer owes a duty of care to the consumer of his goods was inapplicable in the instant case since it had nothing to do with the manufacture of goods.

9. For an act of God; there had to be an aspect of natural causation; the event or act ought to have been one that could not have been foreseen; that nature had to be the exclusive or sole cause; and, the effects could not have been avoided by reasonable due care or foresight on the part of the Defendant. The element of foreseeability was commonly taken into consideration in determining whether an impugned act was an act of God.

10. The Courts ought to have limited the applications of act of God to events that could truly be classified as extraordinary and unforeseen in view of the readily available knowledge of weather patterns and climate change. In like manner, the migration patterns of wild animals were predictable and adequate preparation had to be made by relevant authorities to ensure that loss arising from migration was avoided. In the instant case, the defence of an act of God was inapplicable for the reason that migration of wildlife, especially within the land in question was an annual occurrence hence foreseeable to any reasonable person. Similarly, the occurrence of drought was reasonably foreseeable within the region in question. Therefore, the Appellant’s claim of act of God inevitably failed.

11. The provisions of section 3A of the Wildlife Act were very clear as to who bore the obligation to protect agriculture and animal husbandry – it was KWS. Though the Government would ideally be expected to have control of the
wildlife, factually it was KWS which had the duty of control of the wildlife by dint of section 3A of the Wildlife Act. Consequently, the liability for the damage occasioned fell on it.

12. A global comparison of laws and jurisprudence relating to animal and wildlife management normally provided that an entity charged with such a management task also collected the revenues generated from activities relating to the same. The rationale being that such revenue supported the costs of management and any related outcomes, including compensation for damage made by animals and wildlife. The architecture of the Wildlife Conservation and Management Act No.47 of 2013 followed the rational principle – that the management of national parks lay with Kenya Wildlife Service which was also the revenue collector at the parks, with the exception of the Maasai Mara National Park. In the case of Maasai Mara, although the management of the park lay with Kenya Wildlife Services, the recipient of revenue collection belonged to the County of Narok.

13. The Wildlife Act gave responsibility to Kenya Wildlife Service as the Park revenue collector to compensate for damage occasioned by wild animals. That had been the procedure in all other parks in Kenya. However, the instant case was an interesting one, where the Kenya Wildlife Service which did not collect revenue from the Maasai Mara but had been found liable for compensation by dint of the law and the County that received the revenue was not liable. Therefore, when the issue of compensation was raised, its application and resolution appeared disjointed compared to the norm as practiced elsewhere in Kenya and the world. The Court deemed it fit to recommend the dilemma ought to be studied and possibly remedied by Parliament.

14. Whereas compensation for damage occasioned by wildlife had been devolved to counties under section 18 of the Wildlife Conservation and Management Act: compensation for loss to crops, livestock or other property from wildlife was subject to the rules made by the Cabinet secretary, which had not yet been enacted. Similarly the Wildlife Conservation and Management (Compensation Scheme) Regulations 2015, which contemplated how to deal with claims for human death or injury and crop and property damage caused by wildlife, was yet to be implemented. Therefore, there was an urgent need for parliament to pass into law the said regulations to make the compensation process provided for in the Act functional.

15. The insurance sector was so advanced that there were insurance covers available for virtually any conceivable type of loss that might have been suffered. Consequently, one would reasonably expect an owner of land adjoining a game reserve to take an insurance policy to cover the crop against possible destruction by wildlife. By so doing, they avoided the contingency of hefty losses being suffered due to destruction of the crop by wildlife. An owner of land that had close proximity to a national park or game reserve was expected to insure his crop, failing which a court of law would have to apportion to him a degree of negligence. Consequently, based on the apportionment, the Claimant only recovered part of the loss incurred as opposed to the full amount. In view of that, it was the Court’s recommendation that the Legislature ought to consider whether or not affected parties such as farmers, ought to take up mandatory insurance policies.

Orders

i. The Judgement of the Court of Appeal dated October 10, 2014 was upheld.

ii. For the avoidance of doubt, the Judgement of the High Court delivered on July 27, 2011 awarding the Respondent Kshs.31,500,000 was affirmed.

iii. Each party would bear its own costs.
Court of Appeal has no Jurisdiction to Determine Electoral Disputes Involving Nominated Members of County Assembly

Independent Electoral and Boundaries Commission v Jane Cheperenger and 2 others
Petition No 5 of 2016
Supreme Court of Kenya
April 27, 2018
M K Ibrahim, J B Ojwang, S C Wanjala, N S Ndungu, I Lenaola; SCJJ
Reported by Ian Kiptoo

Civil Practice and Procedure-appeals-appeals to the Supreme Court-pleadings-where an appellant filed submissions out of the prescribed time-whether the Petitioner’s failure to file its record of appeal and submissions within the prescribed timelines rendered the appeal fatally defective-Constitution of Kenya, 2010, article 159; Supreme Court Rules, 2012, rules 31, 33 and 53

Jurisdiction-jurisdiction in election petitions-jurisdiction of the Court of Appeal vis-à-vis the Resident Magistrate Court-where a nominated member of county assembly had been gazetted-whether the Court of Appeal had jurisdiction to revoke the nomination and election of a member of county assembly after gazettement-Election Act, section 75

Civil Practice and Procedure-reliefs-enforcement of reliefs-where a Judgement from a court with no jurisdiction initiated Constitutional processes-whether the Court could make an order for appropriate remedy where a court’s decision initiated Constitutional processes that made it difficult to revert to the original process

Brief facts
The Petitioner filed her appeal to the Supreme Court stating that the Court of Appeal lacked jurisdiction to entertain and determine the 1st Respondent’s appeal in light of article 87(1) of the Constitution of Kenya, 2010 (Constitution), and section 75(1A) of the Elections Act; by directing the 2nd Respondent to conduct fresh nominations and that the Court of Appeal’s jurisdiction in relation to nomination of parties to special seats ceased to exist immediately after the gazettement of the nominees.

Issues
i. Whether the Petitioner’s failure to file its record of appeal and submissions within the prescribed timelines rendered the appeal fatally defective.
ii. Whether the Court of Appeal had jurisdiction to revoke the nomination and election of a member of county assembly after gazettement.
iii. Whether the Court could make an order for appropriate remedy where a court’s decision initiated Constitutional processes that made it difficult to revert to the original process.

Held
1. Ordinarily and in accordance with rules 31 and 33 of the Supreme Court Rules, 2012, where a party was aggrieved by a decision of the Court of Appeal and desired a further appeal to the Supreme Court, such a person ought to have filed a Notice of Appeal within 14 days after the delivery of the Court of Appeal decision. The Notice of Appeal signified an intention to appeal. Upon the filing of the Notice of Appeal, the intending Appellant would file his petition and record of appeal within 30 days. In the instant case, the Petitioner did not file the Notice of Appeal within time necessitating it to approach the Court seeking an extension of time to file the said Notice of Appeal.
2. The concerned consent order did not specifically provide for the time within which service should have been effected. The Order read, the Applicant would file their record of appeal and submissions within 10 days. The 3rd Respondent was under the impression that service of the record ought to have taken place simultaneously with the filing of the record. Whereas that would have been a valid expectation, the Court Order was silent as to when service ought to have taken place. Therefore, the 3rd Respondent’s strong objection and utmost refusal to file any response on the basis of late service was questionable. Irrespective of the time
when service would have been effected, the Respondents still had 10 days within which to respond.

3. The Court affirmed the general principle of law which was recognized in the Constitution of Kenya, 2010 (Constitution) that where a particular time is not prescribed for performing a required act, the act should be done without unreasonable delay. In the instant case, the 3rd Respondent did not indicate when service was effected and hence the Court could only speculate whether service was done within a reasonable time or not. Consequently, the 1st Respondent’s objection was unmerited and without any basis. Furthermore, the 3rd Respondent was not in any way prejudiced as to handicap him from responding to the Petitioner’s case within 10 days after service of the record.

4. The Petitioner’s submissions were filed out of time. Whereas that would have given the 3rd Respondent a basis, if at all, for objecting, it was not upon the 3rd Respondent to decide on the punitive measure to befall upon a party who failed to comply with the directions of the Court, as every other party had a respective individual obligation to honour Court’s directions. Underscoring the importance of complying with Court orders and directions given especially with regard to filing and service of documents within the requisite time. Cognizance was taken of rule 53 of the Supreme Court Rules, 2012 which gave the Court power to extend the time limited by the Rules, or by any decision of the Court. Therefore, to that extent the late filing of submissions was not patently incurable.

5. It had been more than a year since the Petitioner filed its submissions and effected service on the 1st Respondent on the same day. Since then, as could be deduced from the various mentions that had been before the Deputy Registrar, counsel for the 1st Respondent had repeatedly affirmed his position that he would not respond to the Petitioner’s case since the Petitioner had failed to comply with the Court Orders. One such mention was where counsel for the 3rd Respondent sought to vacate the Consent Orders and stated that the Petitioner needed to first make a formal application in Court seeking extension of time to file the documents out of time.

6. Although the Petitioner’s conduct of filing submissions 30 days after the initial agreed period was inexcusable, the Court was at pains to understand why the 1st Respondent’s counsel would fail to respond at all to the Petitioner’s case which had been lying in the Court for more than a year.

7. The 3rd Respondent’s objection was at the very least an epitome of infringement of article 159 of the Constitution which not only dissuaded the Court from being tied to the ropes of procedural technicalities but also reminded it that justice delayed was justice denied. Most unfortunate was the fact that Kenya was at another election cycle and matters such as were in the instant case which emanated from 2013 general elections were still pending in the Court. Whereas breach of timelines was not condoned by the Court, the 1st Respondent was not prejudiced by the late filing of submissions since she still had 10 days within which to respond. Accordingly, the 1st Respondent’s objection was dismissed.

8. Counsel ultimate duty was to the Court first. They were officers of the Court and were meant to help the Court in its role of dispensation of justice. Hence, it was absurd when an advocate appeared before Court, especially the Supreme Court, not prepared to advance his client’s case. That unpreparedness flew on the face of an advocate’s role as an officer of the Court, and also bordered on breach of his duty to the client and the obligation to diligently represent his/her client. Consequently, before appearing in Court to represent a client, it was of paramount importance that advocates got all the necessary facts clear and appeared in Court prepared in order to properly advance their clients’ case. Counsel’s conduct in the instant case notwithstanding, the Court was not absolved from undertaking its duty which was to dispense justice and neither would the said conduct prejudice
the Court in execution of its mandate as before the Court, were legal issues which had been clearly fleshed out.

9. Upon gazettement of nominated members of County Assemblies, any aggrieved party would have to initiate the process of challenging the said nominations by filing an election petition at the Resident Magistrate Court designated as an Election Court under section 75 of the Election Act. Therefore in the instant case, it was only upon such filing and determination by an election court, and where such a matter rose through the ordinary appellate process, that other courts in the judicial hierarchy could rightly assume jurisdiction with powers to give any consequent orders. Therefore to that extent, the Court of Appeal had no jurisdiction to revoke the nomination and election of the 3rd Respondent or to issue any other consequent orders.

10. Though the Court of Appeal had no jurisdiction to revoke the Gazette Notice and issue any consequent orders, as a result of the Court's pronouncement, other constitutional processes were initiated which culminated in the nomination of the 1st Respondent as the URP member of Bungoma County Assembly. Therefore, the Court was constrained to make any order which would defeat the resultant electoral process.

Appeal allowed

Orders

i. The Court affirmed that the Court of Appeal had no jurisdiction to revoke the nomination of the 3rd Respondent or to give any consequent orders.

ii. The resultant electoral process that culminated in the removal of the 3rd Respondent was sustained.

iii. For the avoidance of doubt, the status quo remained.

iv. Parties would bear their own respective costs.
**Court of Appeal**

**It is not Compulsory for Liquidation of a Company to be an Option of Last Resort Where a Company Failed to Pay its Debts**

Prideinn Hotels & Investments Limited v Tropicana Hotels Limited [2018] eKLR
Civil Appeal No. 98 of 2017
Court of Appeal at Mombasa
March 22, 2018.

A. Visram, M. Koome & W. Karanja, JJA
Reported by Kakai Toili

**Civil Practice and Procedure** – appeals – appeals from the High Court to the Court of Appeal – procedure - what was the procedure to be followed when appealing against a decision of the High Court to the Court of Appeal - Court of Appeal Rules, rule 75 (1) & (2)

**Land Law** – lessor and lessee relationship – where a lessee owed a lessor money – where the lessee failed to pay the lessor money owed – in duplum rule – applicability of the in duplum rule - whether the in duplum rule applied to a lessee who owed money to a lessor

**Insolvency Law** – creditors – where a company owed a creditor – where the creditor failed to pay the debt - options available to a creditor - liquidation -whether liquidation of a company was to be an option of last resort which a creditor could pursue to secure payment of a debt

**Company Law** – companies – winding up of companies – mandatory winding up by a court order – where a company was alleged to be unable to pay its debts - whether winding up of a company was to be an option of last resort where a creditor sought the winding up of a company by a court order

**Words and Phrases** – file – definition of file - to deliver a legal document to the court clerk or record custodian for placement into the official record, also termed lodge

**Brief Facts:**

By a lease agreement between the Respondent, the Appellant and the Respondent’s Guarantors, the Respondent leased out the suit premises to the Appellant. The parties later on entered into an agreement to carry out renovations and other works on the suit premises. The Respondent was to carry out the renovations and other works and would be reimbursed by the Appellant with interest for over a 5 year period. The parties entered into a surrender of the lease agreement. However, neither the Appellant nor its Guarantors honoured the terms of the surrender of the lease. The Appellant and its Guarantors made a payment proposal and undertaking which was accepted by the Respondent. The Appellant paid the agreed amount save for the principal renovation amount and interest thereon. The Appellant drew monthly posted cheques beginning May, 2012. However, the cheque in respect of the month of July, 2012 upon presentation was dishonoured.

The Appellant did not make any further payments and subsequently the Respondent served the Appellant with a notice demanding payment of the amount which stood at Kshs.69,353,908.20. After the lapse of 21 days from the date of service of the notice, the Respondent filed a petition in the Trial Court seeking the winding up of the Appellant. The Trial Court issued orders that the Appellant had shown inability to pay the debt owed to the Respondent and placed it into liquidation among other orders. Aggrieved by that decision the Appellant filed the instant Appeal. The Respondent also filed an application for the striking out of the Notice of Appeal and the Record of Appeal for allegedly being filed out of time. The Notice of Appeal bore the Trial Court stamp indicating that it was filed on September 25, 2017 and an endorsement by the Deputy Registrar that it was lodged in the same court on November 21, 2017.

**Issues:**

i. Whether liquidation of a company was to be an option of last resort which a creditor could pursue to secure
payment of a debt.

ii. What was the procedure to be followed when appealing against a decision of the High Court to the Court of Appeal

iii. Whether the in duplum rule applied to a lessee who owed money to a lessor.

Relevant Provisions of the Law:

Insolvency Act

Section 384

(1) For the purposes of this Part, a company is unable to pay its debts—

(a) if a creditor (by assignment or otherwise) to whom the company is indebted for hundred thousand shillings or more has served on the company, by leaving it at the company's registered office, a written demand requiring the company to pay the debt and the company has for twenty-one days afterwards failed to pay the debt or to secure or compound for it to the reasonable satisfaction of the creditor;

Held

1. Under rule 75 (1) of Court of Appeal Rules (the Rules), any person who desired to appeal to the Court had to give a notice in writing which had to be lodged in duplicate with the Deputy Registrar of the High Court. Rule 75 (2) of the Rules stipulated that the notice had to be lodged within 14 days of the date of the decision against which it was desired to appeal. There was no distinction between filing and lodging a document in court, those words meant one and the same thing.

2. The Appellant presented the Notice of Appeal at the High Court registry, paid the requisite fees and a stamp was affixed on the face of it signifying its receipt. The Notice of Appeal was lodged/filed on the date reflected by the High Court stamp. Taking into account that the impugned decision was delivered on September 22, 2017 the Notice of Appeal, which was filed on September 25, 2017, was filed within time.

3. The purpose of the Deputy Registrar endorsing a Notice was to indicate the date it was lodged in the Trial Court. As to why the Deputy Registrar, in the instant case, signed the Notice of Appeal in question on November 21, 2017 as opposed to the date it was filed was a question which could only be answered by the said Deputy Registrar. The Appellant could not be held responsible for the Deputy Registrar's late action. The Appeal before the Court was competent.

4. The Court's mandate under rule 29(1) (a) of the Rules as the first Appellate Court was to re-appraise the evidence and draw its own inferences of fact. The decision of the Trial Court was entitled to some measure of deference unless the conclusions made on the evidential material on record were perverse or the decision as a whole was bad in law. The Petition was properly before the Court. The Ruling dated July 9, 2017 was not subject of the appeal before the Court.

5. From the facts of the case it was without doubt that the parties entered into several agreements which regulated their relationship and obligations thereunder. The appeal turned to a substantial extent on the construction of those agreements. There was no element of coercion against the Appellant. Apart from alleging that it was coerced by the directors of the Respondent. The Appellant did not adduce any evidence to show coercion in entering into the lease agreement. With respect to misrepresentation, the Deed of variation was crystal clear on the Appellant's willingness to continue with the lease even after the earlier lease in favour of Caracas was terminated hence it could not rely on the same to vitiate the lease.

6. The object of construction of terms of a contract was to ascertain its meaning or in other words the common intention of the parties thereto. Such construction had to be objective, the question was not what one or the other parties meant or understood by the words used, rather what a reasonable person in the position of the parties would have understood the words to mean.

7. There was no evidence that the parties concluded an oral agreement. Accordingly, it could not be a basis
of varying the terms of the payment proposal. In light of the circumstances of the case and more so, the fact that the Appellant had not met its obligations under the surrender of lease and payment proposal, the Respondent’s aforementioned obligations thereunder had not arisen. Under clause 8 of the Surrender of Lease, the Appellant was entitled to refund of the deposit only after paying Kshs.25,000,000 for the renovation and the interest thereunder. Similarly, under clause 9, the Respondent was to reimburse the Appellant the sum of Kshs.25,000,000 after 7 years and 6 months of payment of the same or after the sale of the suit premises whichever came earlier. The Respondent did not owe the appellant any money.

8. There was no bonafide dispute on the Appellant’s indebtedness. As to the extent of its indebtedness, the amount which stood at Kshs.44,910,724 on April 4, 2012 when the payment proposal was made, had escalated to Kshs.69,353,908 on account of accrued interest. The in duplum rule was not applicable, the said rule was only applicable in cases of loans or financial facilities offered by financial institutions as defined under the Banking Act.

9. The Appellant did not make any payments after being served with a notice of demand by the Respondent hence the Respondent was entitled to bring a petition for liquidation of the Appellant on the ground of its inability to pay its debt. There was no requirement under the Insolvency Act or the Companies Act which stipulated that liquidation of a company should be as a last resort. Liquidation was one of the options under the Insolvency Act which a creditor such as the Respondent in the case, could pursue to secure payment of a debt, especially a debt that remained unpaid for several years and in respect of which the Appellant had been given adequate time, opportunity and indulgence.

Appeal dismissed with costs

Per W.Karanja, JA(Dissenting)
1. Before an aggrieved creditor could file a winding up petition against a company or before the Court could give orders of winding up of a company, there had to be evidence that all other efforts to recover the debt had failed to yield the desired result. The Court that was called upon to make a winding up order should establish if there existed an alternative remedy to the creditor that was less draconian than a winding up order that was because winding up had to be the last resort.

2. If the winding up order was sought because the company had been unable or reluctant to pay a debt, the Court had to consider if alternative remedies existed which could at the end yield the same result. In the instant case the debt was admitted. Even if the debt was disputed the Respondent would file a suit for summary judgment in an ordinary civil suit, that remedy would be just as fast and expedient as a winding up order.

3. There had to be other ways for the Respondent to recover its debt than by way of liquidation of the Appellant which was still on its feet, perhaps limping, but definitely still on its feet. The Respondent was using the winding up avenue to put pressure on the Appellant to settle the debt in question, that was the wrong route.

4. The Appellant owed other people or institutions money and was servicing its debts with the banks. The Appellant was not insolvent to an extent that the only cure available for it was a quick dispatch to the netherworld. An order winding up the company was not the best remedy in the circumstances of this suit.

Appeal would have been allowed with no orders as to costs
Court of Appeal Affirms High Court Decision to Nullify the Results of the Wajir County Gubernatorial Elections.

Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others
Election Petition Appeal No 2 of 2018
Court of Appeal at Nairobi
April 20, 2018
P N Waki, Asike-Makhandia & P O Kiage, JJ A
Reported by Beryl A Ikamari

**Statutes**-interpretation of statutory provisions-
section 85A of the Elections Act-appellate jurisdiction in election petitions-appeals from the High Court to the Court of Appeal-the requirement that election petition appeals to the Court of Appeal were to be founded on questions of law only-the nature of questions that would constitute questions of law-Elections Act, No 24 of 2011, section 85A.

**Jurisdiction**-jurisdiction of the High Court-jurisdiction of the High Court in an election petition-jurisdiction over issues relating to the nominations stage and qualifications of candidates nominated to contest for posts-questions relating to the educational qualifications of such candidates-whether questions or disputes relating to the nominations stage were exclusively within the competence of the Independent Electoral and Boundaries Commission (IEBC)-Constitution of Kenya 2010, article 88(4)(e); Elections Act, No 24 of 2011, section 22(2).

**Electoral Law**-elections-stages in an election-extent of activities that would form part of an election-whether an election was a process or an event and whether nominations were part of an election.

**Electoral Law**-gubernatorial elections-qualifications necessary for candidate to vie for the post of Governor-educational qualifications-bachelor’s degree-effect of failure by an elected Governor to show possession of the requisite educational qualifications-Elections Act, No 24 of 2011, section 22(2).

**Brief facts**
The Appellant was the declared winner of the Wajir gubernatorial elections held on August 8, 2017. The 1st and 2nd Respondents, who were his closest competitors in the elections challenged the result of the election at the High Court. The result of the election was challenged at the High Court on grounds which included the alleged failure of the Appellant to have the required educational qualifications to vie for the post of Governor, unlawful assisted voting, incorrect tallying of votes, an excess in votes cast as compared to registered voters in some polling stations, tampering with the number of registered voters as indicated in the public portal, making of false entries, manipulation of results which caused striking coincidences and incredible figures, commission of electoral offences and failure to secure ballot papers and boxes.

At the High Court, the Appellant’s election as Governor was nullified. The Appellant appealed to the Court of Appeal. His grounds of appeal included wrongful assumption of jurisdiction by the High Court over matters, concerning educational qualifications, that ought to have been handled at the nomination stage, the High Court’s alleged failure to appreciate that the 1st and 2nd Respondents ought to have proved the accusations they made against the Appellant and that all the clerical irregularities, if any, did not affect the outcome of the election or give the Appellant a numerical advantage. The Appellant also asserted that the High Court finding that he was not validly elected as the Governor of Wajir County was wrongful.

**Issues**

i. What issues or questions would constitute questions of law in an election petition?

ii. Whether an election was a process or an event.

iii. Whether the High Court had jurisdiction to determine whether a candidate met all the qualifications, including educational qualifications, for nomination in order to contest in a gubernatorial election.

iv. Whether the Appellant satisfied the legal qualification criteria applicable to candidates who were nominated to vie for the post of Governor.

**Held**
1. All the grounds of appeal, with the
exception of the alleged wrongful assumption of jurisdiction over the issue on educational qualifications required for purposes of contesting for the post of Governor, raised both issues of fact and law. Section 85A of the Elections Act expressly stipulated that appeals to the Court of Appeal in election matters would be limited to questions of law only.

2. For purposes of election petitions, questions of law are questions or issues involving the following:
   a) the interpretation of a provision of the law in the High Court concerning membership of the National Assembly, the Senate, or the office of the County Governor;
   b) the application of a provision of the law in the High Court concerning membership of the National Assembly, the Senate, or the office of the County Governor;
   c) conclusions arrived at by the High Court concerning membership of the National Assembly, the Senate, or the office of the County Governor where it was claimed that the conclusions were not based on evidence or were so perverse or illegal that no reasonable tribunal would have made them but it was not enough to contend that the High Court would have arrived at a different conclusion on the basis of the evidence.

3. In electoral matters there was no such thing as questions of mixed law and fact. Grounds of appeal that were of such a mixture were clearly inappropriate and probably incompetent. It was therefore appropriate to strike out all grounds of appeal presented by the Appellant on factual foundations. The appeal would be based on two legal issues only, namely, whether the Appellant had met the constitutional and statutory qualifications to vie for the post of Governor and whether the High Court had jurisdiction to enquire into the issue which related to the Appellant’s nomination to vie for the post.

4. Jurisdiction is everything and without it a Court has no power to make one more step. Jurisdiction is the soul, source, breath and life blood of judicial authority. Orders made without jurisdiction were empty nullities with neither coercive nor compulsive authority.

5. The issue as to whether the IEBC under article 88(4)(e) of the Constitution had the exclusive mandate to make determinations as to whether a candidate met the legal qualifications for nomination, including academic qualifications, rested on a determination on whether an election was a process. An election was a process and not an event and hence, the High Court, as an election court, was possessed of jurisdiction to enquire into matters of nomination. Nominations were part of the continuum consisting of a plurality of stages that made up an election.

6. The election Court had jurisdiction to enquire into a question as to the qualification of a candidate which went to his eligibility to vie in cases where the matter had not been handled with finality by any other body constitutionally or statutorily mandated to do so.

7. The case was first and foremost about whether or not the Appellant had the requisite degree qualification for one to run for Governor under section 22(2) the Elections Act. At the High Court some evidence was tendered to show that the Appellant did not have a valid degree certificate from Kampala University.

8. Evidence was adduced to show that the Appellant did not have qualifications that would allow him to be admitted to study for a degree at Kampala University. It was shown that while being vetted for an ambassadorial posting to Saudi Arabia, the Appellant made a statement on oath before a committee of the national assembly on September 3, 2014, stating that he was yet to graduate. It was shown that after being posted to Riyadh there was no evidence that he attended classes at Kampala University. It was also shown that in his statutory declaration for purposes of contesting in the gubernatorial elections, the Appellant indicated that his highest educational qualification was a bachelor’s degree yet he produced before the IEBC a Master’s degree dated March 12, 2015. There was no evidence that he engaged in full time accelerated post-graduate studies to
qualify for the Master's degree and the Appellant’s name did not appear in the university’s graduation booklet.

9. The Appellant did not deny any of the allegations concerning his educational qualifications. His response was that the issue concerning those allegations had been litigated at the Ugandan High Court and that High Court dismissed the case. The Appellant did not attend the High Court proceedings and was not cross-examined on his replying affidavit. Therefore, his replying affidavit was robbed of probative value.

10. The High Court’s finding that prima facie evidence had been tendered to prove the invalidity of the bachelor’s degree certificate dated March 1, 2012 and that the evidential burden of proof had shifted to the Appellant to discharge that evidence, could not be faulted. The legal burden of proof remained with the 1st and 2nd Respondent but the evidentiary burden shifted to the Appellant.

11. Unless the parties agreed by consent to have affidavit evidence admitted without cross-examination of the deponent, the Election Petition Rules required the Appellant to avail himself for cross-examination on his replying affidavit. No explanation was given for the Appellant’s failure to testify. The consequences of non-attendance were that where there was evidence tending to prove a particular fact, albeit slender, silence in circumstances where a party was expected to controvert that evidence would potentially convert that evidence into proof.

12. The High Court’s conclusion that the Appellant was not legally cleared to vie for the position of Governor as he did not satisfy the qualification criteria set out in section 22(2) of the Elections Act, was justified. The consequence of the finding was that the Appellant’s election had to be invalidated.

13. A person who was not qualified to vie for a particular seat could not hold onto his false victory by pointing to the margin of his vote vis-a-vis his competitors. He ought not to have been in the race in the first place and the alleged victory would be a distortion of reality and a subversion of the electoral process.

Appeal dismissed.
**High Court**

**Children Adoptees Have a Right to Know the Identity of their Parents, the Parent’s Origin and the Existence, if any, of their Siblings.**

D W T v B N T & 3 others [2018] eKLR
Petition No. 46 Of 2016
High Court at Nairobi
Milimani Law Courts
Constitutional & Human Rights Division
April 18, 2018
J.M. Mativo, J
Reported By Felix Okiri

**Constitutional Law**- fundamental rights and freedoms – rights of a child - rights of an adoptee – application to know biological parents and circumstances of adoption - whether an adopted child had a right to know his or her biological parents- what were the limitation of that right - Constitution of Kenya, 2010 articles 24,27, 28, 29, 35 and 45

**Constitutional Law**- fundamental rights and freedoms- rights of a child- enforcement of the Bill of Rights- whether a right to the information of the child’s background and the identifying information about his/her biological parents could be articulated as a fundamental right guaranteed in the Bill of Rights.

**Civil Practice & Procedure**- parties to a suit -joinder of parties-where a party was improperly enjoined in the suit- whether joinder, misjoinder or non-joinder of a party was sufficient to defeat a constitutional Petition - whether the Petition was bad for misjoinder of parties and for raising several causes of action- Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

**Brief facts**

The Petitioner, a male adult, was an adopted son of the 1st and 2nd Respondents. He sought to know his biological parents and circumstances of his adoption from the 3rd Respondent. The Petitioner claimed that his rights under articles 27, 28 and 35 of the Constitution had been violated in that the adopting parents adopted him under circumstances unknown to him, yet they had denied him parental compassion, love, care and support.

The Petitioner claimed that he lived with the 1st and 2nd Respondents until he was 17 years when he was compelled by adverse treatment to leave their home. He stated that sometimes in 2011, he was charged, tried and convicted of the offence of violently robbing the 2nd Respondent. His appeal against the said conviction was pending in the Court of Appeal.

The Petitioner sought a declaration that despite not being their biological son and regardless of criminal proceedings against him, he was part of the 1st and 2nd Respondents’ family, and was consequently eligible to parental care, love and support and was entitled to enjoy the right to dignity, security of person, family and equality like other members of the family to the greatest extent possible.

The Petitioner had also enjoined the fourth Respondent, the British High Commission in the instant Petition.

**Issues**

i. Whether an adopted child had a right to know his or her biological parents.

ii. Whether a right to the information of the child’s background and the identifying information about his/her biological parents could be articulated as a fundamental ‘right’ guaranteed in the Bill of Rights.

iii. Whether the Petition was bad for misjoinder of parties and for raising several causes of action.

**Relevant Provisions of the Law**

**Convention on the Rights of Child 1989**

**Article 8**

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name
and family relations as recognized by law without unlawful interference.

2. Where the child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.”

Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption.

Article 30

(1) The competent authorities of a contracting State shall ensure that information held by them concerning the child’s origin, in particular information concerning the identity of his or her parents, as well as the medical history, is preserved.

(2) They shall ensure that the child or his or her representative has access to such information, under appropriate guidance, in so far as is permitted by the law of that State.”

The Declaration on Social and Legal Principles relating to the Protection and Welfare of Children

Article 9

... need of a foster or an adopted child to know about his or her background was to be recognized by persons responsible for the child’s care, unless that was contrary to the child’s best interests.

The Evidence Act

Section 107 (1)

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Sub-section (2) provides that “when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.


Rule 5(b)

A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.

Rule 5 (d)

“The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—

(i) order that the name of any party improperly joined, be struck out; and

(ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court to adjudicate upon and settle the matter, be added”.

Held

1. A person was significantly shaped by his identity as a person who was adopted and his biological identity was as much a part of his life as was his adopted identity. That information which was critical to the formation of a person’s identity was often inaccessible to most adopted children, who did not know who their biological parents were.

2. Whereas the law in Kenya merely provided for adoption, it did not address any concerns or the rights of adopted children to know the identity of their biological parents, the circumstances that led to their adoption, and the suitability of the adopting parents.

3. Whereas pertinent questions were determined by the court handling the adoption, there was no provision stating that such information was to be provided to the child either during minority or upon attaining the age of majority. Part X11 of the Children’s Act lay down parameters as to who could adopt and under what conditions, but other than parental rights, it did not address pertinent rights of the adopted child such as: the right to identity, the right to be informed about his or her biological parents, the right to be informed of the circumstances leading to his adoption, and the right to know the whereabouts of her/his biological parents or the suitability of the adopting parents.

4. Every person had the right to know where they came from and their family lineage. A big dilemma however arose in adoption cases. Adoption processes throughout the world were shrouded in secrecy, perhaps due to the sensitive nature of the
relationship that was being severed or created out of the adoption exercise. The Children’s Act was silent on the question of whether or not adopted children had a right to know their origin. Further, the Act was also silent on what information the children could or could not access and at what age. The information on the origin of the child was in the custody of the government and adoption agencies and the court handling the adoption. That lacuna in Kenya’s law led the Court to resort to international law as a source of law in Kenya.

5. Article 8 of the Convention on the Rights of the Child provided that States Parties were to undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. It further provided that where the child was illegally deprived of some or all of the elements of his or her identity, States Parties had to provide appropriate assistance and protection, with a view to re-establishing speedily the child’s identity. Article 30 of the same convention provided that the competent authorities of a Contracting State were to ensure that information held by them concerning the child’s origin, in particular information concerning the identity of the child’s parents, as well as the medical history, was preserved. It required State parties to ensure that the child or his or her representative had access to such information, under appropriate guidance, in so far as was permitted by the law of that State.

6. The law in the United Kingdom provided that children could apply for a copy of their original birth certificate and for information about their birth family from the adoption agency, which arranged the adoption. Adult adoptees and birth family members could also apply to the Registrar General for entry of their names on the Adoption Contact Register which included the names of adopted persons and the relatives of adopted persons. In other Jurisdictions, the right was guaranteed once one reached the age of majority.

7. From the child study report, one would be able to gather information as to who were the biological parents of the child, if the biological parents were known. There could be no objection in furnishing to the adoptive parents particulars in regard to the biological parents of the child taken in adoption, but it was to be made clear that it was to be entirely at the discretion of the adoptive parents whether and if so when, to inform the child about its biological parents. But if after attaining the age of maturity, the child wanted to know about its biological parents, there could not be any serious objection to the giving of such information to the child because after the child had attained maturity, it was not likely to be easily affected by such information and in such a case, the adoptive parents could, in exercise of their discretion, furnish such information to the child if they thought fit.

8. In Kenya, when issues of the need for the child to know the biological parents arose, the Court could refer to the Constitution for reference and guidance. Article 35 of the Constitution provided that every citizen had the right of access to information held by the State, information held by another person and required for the exercise or protection of any right or fundamental freedom. Information regarding adoption of children in Kenya was held by the State and adoption agencies. Article 35 enabled the child either during the age of minority through her legal guardian or after attaining the age of majority to apply to be furnished with information about their biological parents.

9. Article 31 of the Constitution provided that every person had the right to privacy, which included the right not to have information relating to their family or private affairs unnecessarily required or revealed. That provision brought about a competition of rights and interests. The biological parents of the child had the right to have their matters kept in secrecy but the child on the other hand had the right to the information and to know their true identities. Article 53 of the constitution provided that the best interest of the child was of paramount importance in all matters affecting the child. Children adoptees had a right to know the identity of their parents, the parent’s origin and the existence if any
of their siblings. In pursuing the right to know one’s origins as a fundamental right, the three interests that emerged were - medical, legal and genetic. Also, when enjoying the right, one had to strike a balance between the need for one to know the biological parents, and protection of confidentiality/privacy of the biological and adopting parents.

10. The need to know one’s parentage and background was crucial to children and adults who did not have that information. That right to know one’s origins meant having the information and identity of one’s biological parents and conditions of birth. The right to know stemmed from the desire to know the identity of self. Social scientists had considered the meaning of identity to be determined by three main aspects: - self-definition, coherence of personality and a sense of continuity over time.

11. Identity was thus seen as essentially ‘self-in-context.’ That meant that identity was often determined by social changes and one’s definition of self was affected by how a relationship was seen in the social context. Adoption transgressed the notions of identity and the journey of identity development in Kenya was complex and problematic for adopted persons. Adoption was governed by different kinds of social arrangements; those arrangements had implications on the development of the identity of the child.

12. Many adopted persons felt the need to know information about their birth parents. That need translated to an assertion of the right to know one’s origins. There were three main needs to have that information –

a. There was often the desire to know one’s medical and health history and for that purpose, knowing the medical history of one’s parents and ancestors became important.

b. One’s legal interest in property, which blood relationship could confer on children. Those two interests were subsidiary interests.

c. The primary interest was a psychological need for identity. The psychological need to know one’s roots or identity was found to be the most important reason as to why adoptees wanted to know about their biological parents since it underlay the need to know and could shape the identity of an adopted person.

13. It could now be claimed with some confidence from the available evidence that there was a psychological need in all people, manifest principally among those who grew up away from their original families, to know about their background, geneology, and personal history, if they were to grow up feeling complete and whole. The idea of the importance of blood ties and genes was common to most people and they felt profoundly deracinated if brought up with no knowledge of their blood origins. That psychological need to know one’s origins had now been recognized as sufficiently fundamental or vital to give rise to a human right. It was an important element in one’s psychological balance to know where one came from and that everyone had a right to know the truth about their origins.

14. Adopted persons who did not have information about their roots often had difficulty establishing a personal identity. Problems with identity formation were particularly acute during adolescence and at crisis points in adulthood. A diminished sense of self was also related to genealogical bewilderment. Genealogical bewilderment could occur when children either did not have any knowledge of their biological parents or possessed only uncertain knowledge and the resulting State of confusion and uncertainty fundamentally undermined children’s sense of security, thus affecting their mental health. In addition to the psychological need, medical crises also often precipitated the need for information about biological relatives. Ranging from allergies to searches for transplant donors, medical needs could have left adoptees without sufficient information to get proper treatment. Short of a crisis, impending marriage and childbearing led to concerns about genetic disease and hereditary traits. Other reasons for open records advanced by adoptees included inheritance rights,
religion, and simply a longing to meet their birth parents.

15. It was beyond doubt that there was an international recognition of the Child's Right to identity as a fundamental right. That psychological need to know one's identity had been articulated as a right in the Convention for the Rights of the Child 1989 (CRC) in articles 7 and 8. The CRC had gone on to protect several rights of the child, such as the right to identity that were not recognized as fundamental human rights before, a recognition that it was a right worthy of international recognition. "Identity" was not defined under the CRC and only instances of identity such as nationality, name and family relations were listed.

16. Article 8 was particularly meant to address unusual conditions such as natural parents versus adoptive parents and other such conditions. Article 8, therefore imposed an obligation on the State to not only preserve the identity of a child i.e. to preserve all the information relating to the biological parents of the adopted child, but also not to deprive the child of such information and to assist the child in getting such information.

17. The CRC thus affirmed that an adoptee could seek a right against the State or any person for providing him/her information about her identity and about her biological parents. In addition to the CRC, the child's right to know her identity was also protected in the Hague Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoption. In article 30, it required State authorities to ensure that information held by them concerning the child's origin, in particular information concerning the identity of his or her parents, as well as the medical history, was preserved and that the child or his or her representative had access to such information, under appropriate guidance, in so far as it was permitted by law in that State.

18. The child's right to know his or her origin was derived from the general right to privacy guaranteed under article 17 of the International Covenant on Civil and Political Rights 1966. The right to privacy would include the right to know and receive information of one's family and private life and guaranteed against arbitrary interference with the same. The right to privacy and family life was also guaranteed under article 8 of the European Convention of Human Rights.

19. That need of the child to know about her background was also recognized in the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally in article 9 which stated that the need of a foster or an adopted child to know about his or her background was to be recognized by persons responsible for the child's care, unless that was contrary to the child’s best interests.

20. The competing rights such as the right to privacy for the biological parents and the adopting parents all had to be balanced. With those competing interests, courts were obligated to ensure that the best interests of the child where the child was still a minor, had to prevail over all interests of all other parties. On the other hand, where the child had attained the age of majority as in the instant case, the reasons for refusal to supply the information had to satisfy the limitations test under article 24 of the Constitution.

21. The law in Kenya was in favour of the disclosure. First, the adopted person had a constitutional right to dignity and privacy which included right to know their biological parents. By insisting on the information, the person was seeking to exercise a fundamental right recognized in Kenya's Constitution and international Instruments discussed above. Article 35 of the constitution provided that every citizen had the right of access to information held by the state, information held by another person and required for the exercise or protection of any right or fundamental freedom.

22. Information regarding adoption of children in Kenya was held by the State and adoption agencies. The only limitation in the case of a minor would be the best interests of the child contemplated under article 53 (2) of the Constitution. For an adult as in the present case, the reasons for refusal could only pass constitutional muster if they satisfied limitation of rights under article 24. For example, the
need to ensure that the disclosure did not prejudice the rights and fundamental freedoms of others. Examples here would have included the right to privacy of the biological parents and the Adoptive parents, but even then, the burden lay on the person who sought to justify the limitation to demonstrate to the Court that the requirements of article 24 of the Constitution had been satisfied.

23. There was no material before the Court to demonstrate that the 3rd Respondent handled the adoption in question or had in its custody, care or control the information sought. The adoption was done in Court. The Petitioner did not avail the court proceedings, judgment and documents produced in court in the adoption proceedings to demonstrate that indeed the 3rd Respondent was involved in the Adoption. The Court had the Petitioner's averments on one side and a denial by the 3rd Respondent on the other and it was expected to make a determination.

24. All cases were decided on the legal burden of proof being discharged (or not). No Judge liked to decide cases on the burden of proof if he could legitimately avoid having to do so. There were cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof was the only just course to take. Whether one liked it or not, the legal burden of proof was consciously or unconsciously the acid test applied when coming to a decision in any particular case. The court’s decision in every case was to depend on whether the party concerned had satisfied the particular burden and standard of proof imposed on him.

25. It was a fundamental principle of law that a litigant bore the burden of proof in respect of the propositions he asserted to prove his claim. Decisions on violation of constitutional rights were not to be made in a factual vacuum. To attempt to do so had the impact of trivializing the Constitution and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights was not, a mere technicality; rather, it was essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights could not be based upon the unsupported hypotheses.

26. There was also no evidence that the Petitioner ever requested the information in question from the 3rd Respondent or any of the Respondents and was denied. There had to be a request for information before a party entitled to that information could allege a violation. Even where a citizen was entitled to seek information under article 35(1), he or she was under an obligation to request for it. Only if it was denied after such a request could a party approach the court for relief.

27. Failure by the Petitioner to adduce evidence to link the 3rd Respondent with the adoption led the Court to the irresistible conclusion that there was no material for the Court to conclude that the 3rd Respondent handled the adoption in question or had in their custody, control or power the information sought. Consequently, the answer to the issue under consideration was in the negative.

28. The 1st and 2nd Respondents cited provisions of the Civil Procedure Rules and heavily relied on decisions rendered in civil cases. They over looked the fact that the case was a constitutional Petition seeking to enforce fundamental rights and that the same was expressed under the provisions of the Constitution. The proceedings were governed by the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

29. It was evident both from the Constitution and the rules which required that substantive justice be done that the joinder, misjoinder or non-joinder of a party was not sufficient to defeat a constitutional Petition. Those rules were in accord with the requirements of the Constitution that in exercising judicial authority, the Court was to seek to do substantive justice, hence the provisions of article 159 (2)(d) of the Constitution which provided that justice was to be administered without undue regard to procedural technicalities. In the circumstances, the objection which premised on the alleged misjoinder of parties failed.

30. In a mathematical proof, elegance was the minimum number of steps to achieve
the solution with greatest clarity. In
dance or the martial arts, elegance was
minimum motion with maximum effect.
In filmmaking, elegance was a simple
message with complex meaning. The
most challenging games had the fewest
rules, as do the most dynamic societies
and organizations. An elegant solution
was quite often a single tiny idea that
changed everything. Elegance was
the simplicity found on the far side of
complexity.

31. While elegance in a pleading was not
a precondition to its legitimacy, it was
an aspiration which, if achieved, could
only but advance the interests of justice.
A poorly drawn pleading, on the other
hand, which did not tell a coherent story
in a well ordered structure, would fail
to achieve the central purpose of the
exercise, namely communication of the
essence of case which was sought to be
advanced.

32. Pleading was not to be dismissed as
a lost art. It had an important part to
play in civil litigation conducted within
the adversarial system. Crafting a good
pleading called for precision in drafting,
diligence in the identification of the
material facts marshaled in support of
each allegation, an understanding of the
legal principles which were necessary to
formulate complete causes of action and
the judgment and courage to shed what
was unnecessary.

33. Although a primary function of a
pleading was to tell the defending party
what claim it had to meet, an equally
important function was to inform the
court or tribunal of fact precisely what
issues were before it for determination.

34. The function of a pleading in civil
proceedings was to alert the other
party to the case they needed to meet
and hence satisfy basic requirements of
procedural fairness and further, to define
the precise issues for determination so
that the court could conduct a fair trial.
The cardinal rule was that a pleading
had to state all the material facts to
establish a reasonable cause of action (or
defence). The expression material fact
was not synonymous with providing all
the circumstances. Material facts were
only those relied on to establish the
essential elements of the cause of action.
The instant pleading was not so prolix
that the opposite party was unable to
certain with precision the causes of
action and the material facts that were
alleged against them. The issues raised
in the Petition were not confusing. The
objection based on the said ground thus
failed.

35. The Petitioner was an adult in his late
thirties or thereabouts. He could not be
heard to say he had a fundamental right
to receive financial support from his
parents or even to be facilitated to travel
abroad as of right as he alleged. Failure
to visit him in prison could have been
distressing but the victims of the crime
were his parents. They could have been
distressed too.

36. The apprehension that the adoptee could
have been disinherited remained a mere
apprehension. Courts did not deal with
hypothetical situations. Differently put,
whether or not the Petitioner’s fear of
his right to inherit his parents could be
canvassed in the instant Petition raised
common law principles in relation to
what were called abstract, academic or
hypothetical questions. The principle
is called ripeness; it prevents a party
from approaching a court prematurely
at a time when he/she has not yet been
subjected to prejudice, or the real threat
of prejudice, as a result of the conduct
alleged to be unconstitutional.

37. The essential flaw in the applicants’ cases
was one of timing referred to as ‘ripeness’.
The doctrine of ripeness serves the useful
purpose of highlighting that the business
of a court is generally retrospective; it
deals with situations or problems that
have already ripened or crystallised, and
not with prospective or hypothetical
ones. Although, the criteria for hearing a
constitutional case were more generous
than for ordinary suits, even cases for
relief on constitutional grounds were not
decided in the air. The time of the instant
Court was too valuable to be frittered
away on hypothetical fears of corporate
skeletons being discovered.

38. It had always been a fundamental feature
of Kenya’s judicial system that the Courts
decided disputes between the parties
before them; they did not pronounce
on abstract questions of law when there
was no dispute to be resolved. It was
perfectly true that usually the court did not solve hypothetical problems and abstract questions and declaratory actions could not be brought unless the rights in question in such action had actually been infringed. The requirement of a dispute between the parties was a general limitation to the jurisdiction of the Court. The existence of a dispute was the primary condition for the Court to exercise its judicial function. Ripeness asked whether a dispute existed, that was, whether the dispute had come into being.

39. In the instant case, a dispute on the alleged inheritance rights did not exist. Before the Court was a constitutional Petition seeking declarations premised on alleged violation of constitutional rights but not a succession dispute. A dispute premised on alleged inheritance right was a matter primarily to be determined in succession proceedings where beneficiaries were identified and their rights over the property, if any, determined.

40. On the question of ripeness, the court was being asked to make a declaration on an issue whether the Petitioner was part of the 1st and 2nd Respondents family, despite not being their biological son and regardless of criminal proceedings against him. The Petitioner had however not demonstrated that a dispute existed. There was nothing on record to show that the parents had denied, disowned the Petitioner as their son.

41. Courts decided disputes between the parties before them; they did not pronounce on abstract questions of law when there was no dispute to be resolved. The court did not solve hypothetical problems and abstract questions and declaratory actions could not be brought unless the rights in question in such action had actually been infringed. The declaration sought if granted in the instant Petition, owing to the peculiar circumstances of the case, would have been tantamount to determining succession rights or property rights or declaring the Petitioner a beneficiary which would have had far reaching consequences because it would have amounted to encroaching in to the mandate of the succession court in the event of a succession dispute.

Orders
Petition dismissed with no orders as to costs.

Constitutionality of the Election Laws Amendment Act, 2017 after the Annulment of the August 8, 2017 Elections
Katiba Institute and 3 Others V. Attorney General and 2 Others
Constitutional Petition No. 548 of 2017
High Court at Nairobi
April 6, 2018
E. C Mwita, J
Reported by Robai Nasike Sivikhe and Faith Jepchirchir

Electoral Law - structure of the Independent Electoral and Boundaries Commission- the office of the Chairperson of the Commission- the functions and powers of the Chairperson of the Commission- what was the definition of a person qualified as chairperson of the Independent Electoral and Boundaries Commission- whether any other person in the commission, including the vice chairperson, could take over the position and function of the chairperson of the IEBC- whether IEBC Commissioners had the power to select a chairperson of the IEBC from amongst themselves- Independent Electoral and Boundaries Commission Act, 2011 sections 2, 7A (4), 7A (5), 7A (6) and paragraphs 5 and 7 of the Second Schedule

Electoral Law- transmission and declaration of results- the process of transmission of results- whether the amendment that made no requirement regarding a prescribed form in which results could be transmitted was unconstitutional- whether section 39 (1D) as read with section 39 (1C) of the IEBC Act created a potential tension between physically transmitted results and electronically transmitted results- whether live streaming of election results was crucial to the electoral process and section 39 (1G) that seemed to curtail live streaming of election results was unconstitutional- whether the Chairperson could declare a person as President Elect even though results from some constituencies were yet to be transmitted- Elections Act, 2011 sections 39(1C) (a), 39(1D), 39(1E), 39(1F), 39(1G), and 83


**Jurisdiction**- jurisdiction of the High Court-
co-shared jurisdiction of the High Court and
Supreme Court with regard to interpretation of
the Constitution- whether the Supreme Court
had determined the issue regarding amendments
made to section 83 of the Elections Act- whether
court had jurisdiction to determine the issue of the
constitutionality of the amendment to section 83
of the election act although the issued had been
raised before the Supreme Court.

**Brief Facts**

The Petitioners challenged the Election Laws
Amendment Act, 2017 which was enacted by the 3rd Respondent to amend various
provisions of the Elections Act, 2011, the
Independent Electoral and Boundaries
Commission Act, and the Election Offences
Act contending that the amendments
were unconstitutional. The Petitioners
contended that the amendments introduced
after the annulled 2017 Presidential election
violated national values and principles in
articles 10, 81 and 86 of the Constitution
in that they tended to inhibit rather than
enhance transparency and accountability
of the electoral process. They argued that
those amendments were unconstitutional
and violated not only articles 10, 81 and 86
of the Constitution, but also were intended
to circumvent the majority Judgment of
the Supreme Court in *Raila Odinga and
another v Independent Electoral and Boundaries
Commission & 2 others*.

**Issues**

i. What was the definition of a person
qualified as chairperson of the
Independent Electoral and Boundaries
Commission?

ii. Whether any other person in the
commission, including the vice
chairperson, could take over the position
and function of the chairperson of the
IEBC

iii. Whether IEBC Commissioners had the
power to select a chairperson of the
IEBC from amongst themselves.

iv. Whether the amendment that made
no requirement regarding a prescribed
form in which results could be
transmitted was unconstitutional

v. Whether section 39(1D) as read with
section 39(1C) of the IEBC Act created
a potential tension between physically
transmitted results and electronically
transmitted results.

vi. Whether live streaming of election
results was crucial to the electoral
process and section 39(1G) that seemed
to curtail live streaming of election
results was unconstitutional

vii. Whether the Chairperson could declare
a person as President Elect even though
results from some constituencies were
yet to be transmitted.

viii. Whether court had jurisdiction
to determine the issue of the
constitutionality of the amendment to
section 83 of the election act although
the issued had been raised before the
Supreme Court.

**Relevant provisions of the Law**

**Constitution of Kenya, 2010**

**Article 88 (5)**

The Commission shall exercise its powers
and perform its functions in accordance with
this Constitution and national legislation.

**Article 137 (1)(C)**

A person qualifies for nomination as a
presidential candidate if the person -(c)...
...is nominated by a political party, or is an
independent candidate.

**Article 250(2)**

The chairperson and each member
of a commission, and the holder of an
independent office, shall be—
(a) identified and recommended for
appointment in a manner prescribed by
national legislation;
(b) approved by the National Assembly; and
c) appointed by the President.

**Article 250(3)**

... to be appointed, a person shall have the
specific qualifications required by this
Constitution or national legislation.

**Article 259(1)**

This Constitution shall be interpreted in a
manner that –
(a) promotes its purposes, values and
principles;
(b) advances the rule of law, and the human
rights and fundamental freedoms in the Bill
of Rights; (c) permits the development of the
law; and (d) contributes to good governance

**Article 259 (3)**

Every Article of the Constitution should be
construed according to the doctrine that the
law is always speaking and that
(a) a function or power conferred by
the Constitution on an office may be
performed or exercised as occasion
requires, by the person holding the office
The Independent Electoral and Boundaries Commission Act

Section 2

“Chairperson” means "the Chairperson of the Commission appointed in accordance with Article 250(2) of the Constitution or the Vice chairperson or a member of the Commission when discharging the functions of the chairperson”.

Section 7B

(i) Whenever the chairperson is absent, the vice-chairperson shall assume the duties of the chairperson and exercise the powers and responsibilities of the chairperson;
(2) Whenever the chairperson and the vice-chairperson are absent, members of the Commission shall elect from amongst themselves a member to act as the chairperson and exercise the powers and responsibilities of the chairperson;
(3) the provisions of section 6(1) shall not apply to the vice chairperson or a member acting as chairperson under this section”.

The Elections Act

Section 83

“(l) A Court shall not declare an election void for non-compliance with any written law relating to that election if it appears that-
(a) the election was conducted in accordance with the principles laid down in the Constitution and in that written law; and
(b) the non-compliance did not substantially affect the result of the election.
(2) Pursuant to section 12 of the Interpretation and General Provisions Act, a form prescribed by this Act or the regulations made thereunder shall not be void by reason of a deviation from the requirements of that form, as long as the deviation is not calculated to mislead.”

Section 39 (1C)

“For purposes of a presidential election, the Commission shall-
(a) electronically transmit and physically deliver the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre; (b) tally and verify the results received at the constituency tallying centre and the national tallying centre; and (c) publish the polling result forms online public portal maintained by Commission.”

Held

1. The Constitution, in article 250(2), provided that there should be a chairperson identified and appointed in accordance with a national legislation. In the case of the Independent Electoral and Boundaries Commission (IEBC), the Chairperson had to be identified in accordance with the Independent Electoral and Boundaries Commission Act and appointed in accordance with the Constitution. Once appointed, the Chairperson performed constitutional functions that only the person appointed in accordance with the Constitution could perform. In that regard therefore, there could be only one chairperson who was appointed in the manner provided for by the Constitution and the IEBC Act. The Vice Chairperson or any other member, however appointed, could not be defined as Chairperson.

2. The definition in the amended section 2 IEBC Act was too broad and overboard. It conferred a title and status on a person who was not intended by the Constitution. That was because section 6(1) of the IEBC Act provided for qualifications one had to have to be appointed chairperson of the Commission. He had to be qualified to hold the office of Judge of Supreme Court.

3. Only a person, who possessed the requisite qualifications, could qualify to be appointed chairperson of the Commission. And only a person appointed as required by the Constitution could fall in the definition of chairperson. Therefore, the definition of chairperson had to be limited to the person who met the qualifications and was appointed in accordance with the Constitution. Anyone else, whether in acting capacity, or not could not be defined as chairperson. There was no justification to have a different definition assigned to the chairperson of IEBC. The former definition was in line with the Constitution as opposed to the new one.
4. The import of the amendment introduced by section 7A(4) of the IEBC Act was that the vice chairperson could act as chairperson and discharge the full constitutional responsibilities of the chairperson should a vacancy occur in that office. Although that could, on the face appear a simple issue, one had to bear in mind that the chairperson appointed in accordance with the Constitution, performed some critical constitutional functions only reserved for the chairperson. The role and authority of the chairperson emanated from the Constitution. In a nutshell, he was the head and spokesperson, provided leadership and direction to the Commission. On being appointed, he/she took the oath of office to execute his mandate as such.

5. It was not possible for a person who had not met the qualifications required to assume and perform constitutional functions of the Chairperson. Ordinarily, the vice chairperson would perform certain minimal administrative functions in the absence of the chairperson. That would not however entitle him/her to assume the full duties and perform critical functions including constitutional mandate of the Chairperson when he does not meet the qualifications to be chairperson, and has not been appointed in accordance with the Constitution. When the Constitution provides that chairperson be appointed in a particular manner, there can be no shortcut but to stick to the constitutional dictates. An appointment done in any other manner would be unconstitutional.

6. The qualifications for the chairperson set out in section 6(1) IEBC Act was anchored in the Constitution and were mandatory. A person without those qualifications could not by any means be chairperson whether in acting capacity or not, since the Constitution left no option. Some of the chairperson’s mandate were clearly spelt out in article 138(10) of the Constitution to declare presidential results. That was a responsibility that only the chairperson identified, recommended and appointed as required by the Constitution could perform.

7. The purpose and effect of the sections 7A(4) and 7A(5) IEBC Act was to allow a person who was not the chairperson, had no qualifications required by section 6(1) and not appointed in accordance with the Constitution to take over leadership of the Commission and perform constitutional functions of the chairperson. That was a clear violation of the Constitution and in particular articles 138(10) and 250(2) and (3).

8. It was more intriguing that section 7A(6) of the IEBC Act suspended section 6(1) of the IEBC Act with regard to qualifications of the chairperson. At that time section 7A(4) and 7A(5) IEBC Act became applicable notwithstanding that the person could perform and exercise full responsibilities of the chairperson. In essence, section 7A(6) IEBC Act read purposively, had the singular effect of suspending article 250(3) of the Constitution regarding the qualifications of the Chairperson. When the framers of the Constitution included sub article 3 in article 250, they had no illusion that it would be followed.

9. Where the Constitution provided the manner of appointment and went further to state in a plain and unambiguous language that the qualification contained in the national legislation that one had to meet to be appointed to a particular position had to be strictly followed. Parliament, as the legislative organ of state, had only one option; to obey and observe that constitutional decree. It could not, in the exercise of its legislative authority, enact a law whose effect was to circumvent that constitutional command. Short of that, such a law would fall to be declared unconstitutional as demanded by article 2(4) of the Constitution.

10. Article 259(3) had to be read purposively and in harmony with article 250 of the Constitution. In the case of IEBC the person holding the office had to be placed in that position as required by the Constitution and the law. Article 259(3) could not be the motivation for enacting a legislation that overrode the Constitution. Moreover, the chairperson’s appointment had to be differentiated from that of the vice chairperson who was elected by Commissioners under article 250(10).
and a vacancy in that office filled in accordance with article 250(11). If the Constitution provided how a vacancy in the vice chairperson’s position should be filled, that of the Chairperson had to, in the same vain, be filled in accordance with the Constitution as read with the section 6(1) of the IEBC Act to give the Constitution a harmonious reading. Therefore, section 7A(6) of the IEBC Act was unconstitutional.

11. A reading of section 7B of the IEBC Act had a similar effect as section 7A(4), (5), and (6). Even though a dully appointed chairperson could be in office, the section empowered the vice chairperson to exercise the chairperson’s functions for reasons other than inability to discharge his functions under the Constitution and the law. The same applied to a situation where both the chairperson and vice chairperson were absent which would allow members of the Commission to elect an unqualified member of the Commissioner to act as chairperson and exercise responsibilities of the chairperson. The Act had not defined the word absent. However, taken in its ordinary meaning and context; that absent meant not being present in a place, at an occasion or as part of the meeting, the section created mischief. Section 7B(3) of the IEBC Act also suspended section 6(1) of the IEBC Act in such an eventuality.

12. Section 7B of the IEBC Act not only flew in the face of article 250(2) and (3) of the Constitution just like section 7A(4), (5) and (6) but also generally made nonsense of the Constitution and the IEBC Act on the importance of the office of chairperson of the Commission. IEBC was an independent Commission that discharged critical mandate under article 88(4) of the Constitution. The framers of the Constitution were clear when they stated in article 88(5) that the Commission would exercise its powers and perform its functions in accordance with the Constitution and national legislation. They also tasked Parliament with the responsibility of enacting legislation to operationalize article 88. They said in plain language in article 250(3) that the qualifications for the chairperson had to be strictly followed.

Therefore, Parliament was alive to that when it enacted section 6(1) of the IEBC Act providing the qualifications one would have to meet to be appointed to the position of chairperson. It was inconceivable that the same Parliament would suspend operations of the same provision at some convenient time.

13. Weighing section 7B as read with section 6 of the IEBC Act against the articles of the Constitution, it emerged clearly that it was not only unconstitutional but it would also have unintended negative consequences. It would engineer divisions, fights, disharmony and cause disorientation within the Commission in the discharge of its constitutional mandate. The provision would also weaken the position of the Chairperson and cause unnecessary tension. Members of the Commission could take advantage of the chairperson’s absence to make fundamental decisions with serious ramifications to the Commission and the country, taking into account the divisive nature of politics in the country viz a viz the important role the Commission played in the management of elections. It could not be in the best interest of the Commission to allow commissioners to choose one of their own, albeit unconstitutionally, to exercise constitutional mandate of the chairperson who was lawfully in office.

14. The law had to be certain and support the functioning of an Independent Constitutional Commission given that the tenure of the chairperson once appointed, was guaranteed by the Constitution. Allowing Commissioners to choose one of them to act as Chairperson, was to allow them to oust the Chairperson and or his Vice from office should an opportunity present itself despite the fact that Chairperson’s tenure and independence was constitutionally protected. A provision such as section 7B weakened the Commission. It would most certainly affect its institutional independence guaranteed by the Constitution and emphasized under section 26 of the IEBC Act. It also exposed the Commission to external pressure or direction in violation of the Constitution.

15. The Commission was composed of 7
members including the Chairperson. The quorum for purposes of conducting business was half of the members but not less than three. Hence the Commission could comfortably conduct business with three out of seven members, a minority of the Commissioners. The new paragraph 7 of the second schedule to the IEBC Act which required that if there was no unanimous decision, a decision of the majority of the Commissioners present and voting would prevail had one fundamental flaw. With a quorum of three Commissioners, there was a strong possibility of three Commissioners meeting and two of them being the majority, making a decision that would bind the Commission despite being made by minority Commissioners. That would not augur well for an Independent Constitutional Commission that discharged very important constitutional mandate for the proper functioning of democracy in the country. Such a provision encouraged divisions within the Commission given that the Commission’s decisions had far reaching consequences on democratic elections as the foundation of democracy and the rule of law.

16. Quorum being the minimum number of Commissioners that had to be present to make binding decisions, only majority commissioners’ decision could bind the Commission. Quorum was previously 5 members out of the 9 commissioners including the Chairman, a clear majority of members of the Commission. With membership of the Commission reduced to 7, including the Chairperson, half of the members of the Commission, or 3 commissioners formed the quorum. Instead of making the quorum higher, Parliament reduced it to 3 which was not good for the proper functioning of the Commission. In that regard therefore, in decision making process where decisions were made through voting, only decisions of majority of the Commissioners could be valid. Short of that anything else would be invalid. Paragraphs 5 and 7 of the Second Schedule were plainly skewed and unconstitutional.

17. Looking at the amendments and reading the Act as a whole, from the definition of Chairperson, election of a member to exercise powers and functions of the Chairperson, to the quorum of the Commission for purposes of meetings, it was obvious that those amendments had a negative and unconstitutional effect to the functioning of the Commission. An unconstitutional purpose or an unconstitutional effect was enough to invalidate legislation. If the effect of implementing a statute or provision infringes a right, the impugned statute or section should be declared unconstitutional. The amendments to the IEBC Act were unconstitutional.

18. Prior to the amendments, section 39(1c) of the Elections Act required the Commission to electronically transmit, in the prescribed form, the tabulated results of an election for the president from a polling station to the constituency tallying centre and to the national tallying centre; (b) tally and verify the results received at the national tallying centre; and (c) publish the polling result forms on an online public portal maintained by the Commission. The difference between the old subsection (1C) and the new subsection was that:

a) whereas the results were to be transmitted only electronically, the new subsection required that election results be not only transmitted electronically but also delivered physically from the polling stations to the constituency tallying centres and the national tallying centre.

b) Whereas the results were to be transmitted in the prescribed form, there was no requirement for any particular form for purposes of transmission of results.

19. The problem was with regard to transmission of results from the polling stations to the constituency and national tallying centres as required by the new section 39(1C)(a) of the IEBC Act. There was no requirement for the results to be transmitted in any prescribed form which was an essential requirement in the deleted subsection. That was an essential safeguard that guaranteed verifiability, transparency and accountability of the election results transmitted from polling centres to the constituency and national tallying centres. That was made even more troubling by the fact that results
would also be physically delivered to the constituency and national tallying centres but in no particular prescribed form. That not only opened the results to possible adulteration and manipulation but also mischief. The amendment obviously reversed the gains the country had made in electoral reforms including results transmitted in a particular form.

20. The changes that had been introduced in the former section 39(1)(c) had been introduced in line with the dictates of the Constitution. For that reason, a law allowing election officials once again to troop to the Constituency and national tallying centres with hard copies of election results in no particular forms was to take several steps backward from the progress the country had made to guarantee free, fair and transparent elections in conformity with the Constitution. That amendment was clearly against the spirit of articles 10, 81 and 86 of the Constitution and could not pass the constitutionality test of validity.

21. Section 39(1D) of the Elections Act, on the face of it, appeared to be in line with article 138(3)(c) of the Constitution. However, section 39(1D) presented a problem when read together with section 39(1E). A reading of the two sub-sections created a potential tension between physically transmitted results and those transmitted electronically. First, the results were supposed to be from the same process, they should have been counted, tallied and verified before being transmitted. They therefore ought to have been the same. The way those sub-sections were crafted was not only vague and ambiguous but also created a conflict between the two modes of transmission of results thus opened a window for tinkering with election results.

22. Ambiguity or vagueness in a statutory provision made that provision void. A provision was said to be vague and or ambiguous when the average citizen was unable to know what was regulated and the manner of that regulation; or, where the provision was capable of eliciting different interpretations and different results. Such a provision would not meet constitutional quality.

23. The Constitution was very clear on the accuracy, verifiability and reliability of elections. Accuracy guaranteed democratic elections as the foundation of a democratic state. Section 39(1D) as read with 39(1)(F) of the Elections Act were vague and ambiguous on which results were the accurate record of the election as tallied verified and announced by the presiding officers since there could be only one result from an election. Those subsections downgraded the significance of accuracy and transparency of an election thus opened room for speculation and manipulation of election results. The Commission had the enviable role of not only guaranteeing the accuracy of elections and results therefrom, but also ensuring that they were in conformity with constitutional principles in articles 10, 81 and 86. There should never be room again in the election laws for the possibility of manipulating elections or results as that would undermine free and fair elections which were the hallmark of a democratic society.

24. Section 39(1F) of the Elections Act absolved presiding or returning Officers who, though without justification, failed to transmit or publish election results in an electronic format. The country’s experience over tinkered results was well known and would not like to go back there. It adopted electronic transmission of election results as a way of guaranteeing free, fair, accurate, transparent and accountable elections as required by the Constitution. The Election laws were enacted to ensure that counting was done at polling stations and presiding and returning officers electronically transmitted verified elections results in conformity with the spirit of the Constitution.

25. The enactment of section 39(1F) of the Elections Act was clearly a drawback on the very principle of accuracy, transparency and accountability of election results enshrined in the Constitution. Free and fair election was the process towards electoral democracy and the highway to a democratic state. Rather than a move forward, section 39(1F) was a backward step in so far as the requirements for free and fair elections were concerned. Juxtaposed against articles 10, 81 and 86
of the Constitution, it was obvious that section 39(1F) struck at the heart of the principles of the electoral system in the Constitution, for saving results that had not been transmitted as required by law. That violated constitutional principles and was invalid.

26. Live transmission of election results announced at the polling stations to the Constituency and national tallying centres was critical when it came to openness, transparency and accountability of the electoral process. Live transmission of election results was adopted after reforms were introduced in election laws as a means of avoiding situations where election results announced at the polling station would later significantly differ from those declared at the constituency and national tallying centres. The results announced at the polling stations formed the basis of any other results declared either at the constituency or national tallying centres.

27. The import of section 39(1G) was to make live streaming of results from polling stations of no value when it came to the finality of the declared results. If the intention of the legislature was that results streamed live from the primary source should not matter when it came to the final tally, why should the country invest heavily in technology as provided for in section 44 of the Act, have results streamed live from polling stations for public information only? Live streaming of election results was one way of conforming to the constitutional principles of transparency and accountability. Citizens should be able to compare the live transmitted results with the final declared results to confirm the accuracy of the election results.

28. When Parliament enacted a law that significantly eroded the element of transparency and accountability in the electoral process, such a law overrode the constitutional principles of the electoral systems contemplated in articles 10, 81 and 86 of the Constitution. You could not have results that were streamed live from polling stations but which were of no value when it came to declaration of final results. The results streamed live from polling stations were the primary source of those finally declared. Final results were a product of the same process. One process could not have two different results. Live streamed results played a significant role in determining the final results. Those results had to be as much correct as those finally declared. Section 39(1G) was a mockery of the requirements for free, fair and credible elections. It violated the principles of electoral systems in the Constitution. That amendment could not hold in the Kenya transformative constitutional dispensation.

29. Amendments introduced by section 39(1C)(a), 39(1D), 39(1E), 39(1F) and 39(1G) of the Election Act, had the effect of weakening rather than strengthening the electoral process. Any amendments that would have the effect of circumventing constitutional principles were unconstitutional.

30. The Constitution required that the Commission held elections in all the 290 Constituencies in the case of Presidential Elections. Therefore, it had to discharge its mandate by holding elections in each constituency and ensuring that voters in the constituency have had an opportunity to vote. In that regard, the reading of section 39(2) of the Elections Act was not that elections had not been held, but that the Commission had held elections, received election results and was satisfied that results from the Constituencies that were yet to transmit, would not affect the final tally. There was really nothing unconstitutional if final results
were announced when it was clear that those from the remaining constituencies would not change the election result as to who the winner was. There was no constitutional invalidity in those provisions. However, it was desirable that all results be received and tallied before a declaration of the winner was made.

32. Section 44 of the Elections Act dealt with use of technology and established an integrated electronic electoral system that enabled biometric voter registration, electronic voter identification and electronic transmission of results. Section 44(5) only required the Commission, in consultation with stakeholders, to come up with regulations on the implementation of the Integrated Biometric Voter Registration, Electronic Voter Identification and Electronic Transmission of results (KIEMS). The Petitioners had not demonstrated how, if at all, that provision violated the Constitution to require that it be declared unconstitutional. There was neither unconstitutional purpose nor effect in the implementation of that provision.

33. The complimentary mechanism contemplated in the new section 44A was only complimentary. It had not replaced the electronic voter identification system. The word “complimentary”, in the context in which it was used in that section, could only mean to assist or aid. It could only be resorted to in the event the principle voter identification system had failed. It was to be used only when there was technology failure. It could not be seen how that provision violated articles 10, 38, 81 and 86 on the values and principles of transparency and accountability of the electoral system. Rather, it was intended to aid and complement the main voter identification system in the event there was failure and ensure that the electoral process continued.

34. Even though the Constitution values the quality of elections, the amendment to section 83 had the effect of disregarding those principles when it came to considering whether or not to annul an election. That could not have been the intention of the framers of the Constitution when they included those principles of electoral system in the Constitution. Those principles were part and parcel of the Constitution and were important in holding free, fair, open, transparent, impartial and accountable elections. Those were constitutional and not statutory requirements. Parliament could not enact a legislation that had the effect of whittling down constitutional principles that had been harmonized and embodied in section 83 prior to its amendment by demanding that failures in complying with the Constitution or the law had to be “substantial” as to affect the result for an election to be annulled.

35. The existing amendment meant that for an election to be annulled there had not only to be failure to comply with the Constitutional principles and election laws but also the failures had to substantially affect the result of the election. The essence of that amendment was to allow violation of constitutional principles and election laws as long as they do not substantially affect the result. Any amendments had to be forward looking in order to make elections more free, transparent and accountable, than to shield mistakes that vitiated an electoral process.

36. There was no constitutional compulsion or rationale in amending section 83 of the IEBC Act to remove the disjunctive word ‘or’ and introduce the conjunctive word ‘and’ so that only where there were failures in complying with the constitution and election laws and they substantially affected the results should an election be annulled. Removing the twin test for annulling faulty election results negated the principles of electoral system in the Constitution. And allowing such an amendment would be to ignore constitutional principles in the transformative Constitution that there should be free, fair, transparent and accountable elections.

37. Parliament had a duty to defend and protect the Constitution and enact laws that were in conformity with its values and principles. Section 83(2) could not invite the aid of the Statutory Interpretations Act to shield violations of the Elections Act and Regulations enacted to enforce the Constitutional
principles.

38. Lady Justice Njoki Ndungu's opinion on the amendment to section 83 in *John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 3 others* [2017], was *obiter dictum*. The Supreme Court having decided to leave the issue for the High Court's determination, it was not an issue falling for determination by the Supreme Court and therefore, there was no decision by the Supreme Court on the matter that was binding on the High Court. That was one of those situations where the Supreme Court was faced with the question of co-shared jurisdiction on the interpretation of the Constitution. It declined jurisdiction and left the matter for the High court’s decision.

39. The introduction of section 86A was in response to the challenges the Commission faced after annulment of the 2017 presidential election and the subsequent disputes that followed, more so on the person who was eligible to participate in the fresh election. Section 86A cleared a *lacuna* that made the holding of the 2017 fresh presidential election a challenge to the Commission. The section clarified what would happen and the timelines. It also made it clear what would happen when only one candidate remained after withdrawal of the other candidates which was in tandem with article 138(1) of the Constitution. The section was necessary for clarity and efficiency. There was no constitutional invalidity.

40. Certain amendments introduced through the Election Laws (Amendment) Act No. 34 of 2017 failed the constitutional test of validity. All the amendments made to the Independent Electoral and Boundaries Commission Act, namely; section 2, on definition of the word chairperson, section 7A(4), 7A(5), and 7A(6), the entire section 7B and paragraphs 5 and 7 of the Second Schedule to the Act on the quorum for purposes of meetings of the Commission were unconstitutional. With regard to the Elections Act, 2011, the amendments introduced to section 39(1) (C) (a), 39(1D), 39(1E), 39(1F), 39(1G) and the entire section 83 failed the constitutionality test. There was no fault in the amended sections, 39(2), 39(3), 44(5), and 44A of the Elections Act, 2011.

Petition partly allowed.

Orders

i. Declaration issued to the effect that sections 2, 7A (4), 7A (5), 7A (6) of the IEBC ACT, 2011, and Paragraphs 5 and 7 of the Second Schedule to the Act were constitutionally invalid.

ii. Declaration issued to the effect that sections 39(1C) (a), 39(1D), 39(1E), 39(1F), 39(1G), and the entire 83 of the Elections Act, 2011 were constitutionally invalid.

In Addition to the Prayer for Production of the Persons or Bodies of the Persons who are the Subject of Habeas Corpus, Compensation can also be Sought for Violation of Rights and Fundamental Freedoms of the Subjects of Habeas Corpus

Law Society of Kenya & 2 Other v Attorney General & 2 others
Constitutional Petition No. 311 of 2016
High Court at Nairobi
April 13, 2018
E.M Muriithi, J
Reported by Robai Nasike Sivikhe and Safiya Awil

**Constitutional Law**—capacity to institute a suit—institution of a suit on behalf of another person—where the suit was a petition of Habeas corpus—whether the Law Society of Kenya could institute a suit of Habeas corpus on behalf of persons who had allegedly disappeared upon arrest—Constitution of Kenya, 2010, Article 22 (2)

**International Law**—international treaties—recognition of international treaties and conventions—recognition and application of treaties not ratified in Kenya—where a convention that was not yet ratified by Kenya made provisions on a matter that was of global concern—whether a convention that was not yet ratified by Kenya was applicable in Kenya by virtue of the fact that it made provisions on enforced disappearance which was a matter of global concern—Constitution of Kenya, 2010, Article 22 (2)
Kenya, article 2 (6)

Evidence law – standard of proof – the standard of proof in habeas corpus petitions – what was the established standard of proof in Habeas corpus proceedings – whether it had been proven to the required standard that the 2nd and 3rd Respondents had been detained by the Respondent hence requiring orders of habeas corpus

Evidence Law – hearsay evidence – admissibility of hearsay evidence – exclusion of hearsay statements that implicated the police – whether hearsay statements by witnesses were inadmissible and ought to be excluded

Constitutional Law – fundamental rights and freedoms – rights of an arrested person – the right of an arrested person to be availed to court within the proper time upon arrest – whether the 2nd and 3rd Petitioners were availed to Court within the proper time as stipulated by the Constitution upon their arrest – whether the 2nd and 3rd Petitioners were detained arbitrarily hence ought to be compensated – Constitution of Kenya, 2010, article 49 (1) (f)

Brief Facts

The 1st Petitioner was a statutory body corporate established under section 3 of the Law Society of Kenya Act. It had commenced the instant suit on behalf of the 2nd and 3rd Petitioners pursuant to article 22 (2) (a) and (c) of the Constitution. The 1st, 2nd and 3rd Respondents were offices established under articles 146, 157 and 245 of the Constitution respectively. Article 22(1) of the Constitution gave every person the right to institute court proceedings where fundamental freedom in the bill of rights had been denied, violated or infringed and a person who had been detained could be produced pursuant to an order of habeas corpus under article 51 of the Constitution.

The Petition sought an order of habeas corpus for the production of the 2nd and 3rd Petitioners who, it was alleged, were arrested by Administrative Police Officers on the June 1, 2016, a fact denied by the Respondents who, consequently, prayed that the application for habeas corpus be dismissed.

Issues

i. Whether the Law Society of Kenya could institute a suit of Habeas corpus on behalf of persons who had allegedly disappeared upon arrest

ii. Whether a convention that was not yet ratified by Kenya was applicable in Kenya by virtue of the fact that it made provisions on enforced disappearance which was a matter of global concern

iii. What was the established standard of proof in Habeas corpus proceedings

iv. Whether it had been proven to the required standard that the 2nd and 3rd Respondents had been detained by the Respondent hence requiring orders of habeas corpus

v. Whether hearsay statements by witnesses were inadmissible and ought to be excluded

vi. Whether the 2nd and 3rd Petitioners were availed to Court within the proper time as stipulated by the Constitution upon their arrest

vii. Whether the police officers who were involved in the arrest of the 2nd and 3rd Petitioners were open to investigation.

Held

1. The matter of disappearance of persons under police arrest or custody was a matter of public interest and a concern of the 1st Petitioner – the Law Society of Kenya in terms of its rule of law objectives under the Law Society of Kenya Act. The two Petitioners subject of the habeas corpus application were not in a position to sue and file depositions on their own behalf. The circumstances of the case were apt for invocation of the expanded standing provisions of article 22 (2) (a) and (c) of the Constitution.

2. Although Kenya had not ratified the United Nations International Convention for the Protection of all Persons from Enforced Disappearance, 2007 as to make it part of the law of Kenya under article 2 (6) of the Constitution, global concern over disappearance of persons gave the instant matter the grave moment which had to drive a deliberate effort to resolve cases of disappeared persons. Articles 1 and 2 of the Convention provide for protection against enforced disappearance for all circumstance so that the vice was indefensible by any justification or exceptional circumstances. The events proved by evidence in the instant case neatly fit the billing of an enforced disappearance within the Convention for which there was
a total ban under the international treaty law.

3. The burden of proof in *habeas corpus* petitions lay with the Petitioner until he proved detention by the Respondent, upon which the Respondent had to prove the lawfulness of detention. The arrest and detention of the 2 Petitioners subject of the proceedings was tenously denied with the Respondent’s implicated officers indicating arrest only on the material day of wholly unrelated persons. The burden of proving the arrest by the police of the 2nd and 3rd Petitioner rested wholly with the Petitioners which they had to discharge to the applicable standard of proof before the Respondents could be put on their defense, as it were, calling for evidence in rebuttal or lawful reasons for the arrest and detention.

4. Much of the statements made by witnesses PW3 and PW4 involving the police officers in the arrest and subsequent disappearance of the persons subject of the *habeas corpus* application was hearsay, and therefore inadmissible for purposes of proving the truth of those statements.

5. On the evidence presented before the Court, the Petitioner’s case was more probable than the defense version of events that they had not arrested the 2nd and 3rd Petitioners. It had been proven on a balance of probabilities that the three police officers arrested and detained the two Petitioners who were subjects of the *habeas corpus* proceedings.

6. In accordance with article 49(1) (f) of the Constitution, the arresting officers were obliged to produce the two petitioners before a court within 24 hours. That constitutional obligation was breached by the three police officers when they failed to produce the arrested persons before a court on June 2, 2016, and consequently, the 2nd and 3rd Petitioners were detained without trial within the meaning of article 29 of the Constitution. The Petitioners were consequently entitled to damages for unlawful arrest and detention without trial under article 29 of the Constitution.

7. As a rule of law country it sufficed to order for Mandamus to compel the police to investigate the matter and take appropriate action consistent with the finding of the investigations. The practical reality where impunity abounded could, however, not inspire too much confidence and since the Court had to give Orders, not suggestion or advice, needless to state, should the office of the Inspector General and the Director of Criminal Investigation or other relevant officer, abscond their statutory duty or refuse to carry out the investigation as directed by the court, the judicial review order of Mandamus as a suitable sanction of the Court could be invoked, not the least of them being article 245 (7) petition for removal of the Inspector General and prosecution for contempt of court under the Contempt of Court Act, 2016.

8. The police officers implicated had clearly an opportunity to be heard in the matter and together took benefit of that opportunity by granting one of them authority to plead and act for them whereupon he filed the Replying Affidavit on their behalf. They, however, did not make oral testimony before the Court at the oral hearing as directed by the Court and they could not be heard to say that they were not heard or given an opportunity to be heard in the matter.

9. The High Court as the Constitutional Court had a duty under article 23 of the Constitution to address denial or violation or infringement of, or threat to rights and fundamental freedoms in the Bill of Rights. The Judiciary was the custodian of the Judicial authority of the people of Kenya under article 1 (3) (c) of the Constitution. It had to take the lead role when applying and interpreting the Constitution, to uphold and promote the national value and principles of the Law entrenched under article 10 of the Constitution and, through it, help combat the specter as well as reality of impunity in the state and society of Kenya.

10. It was the height of impunity if Police Officers, who were constitutionally charged with the duty to maintain
law and order and to enforce the law for the protection of life, liberty and property and observation of the human rights and freedoms, were to arrest persons for whatever transgressions of the law only for such arrested persons to subsequently disappear and the Police to deny ever arresting such persons, cover up their actions and get away with it. It was cheating Justice. Not only should such Police Officers be held personally liable in a criminal process for their offences against the person but the State had to be held vicariously liable for the unlawful actions of its employees.

11. While the adjudication of the criminal aspect of the matter for conviction and punishment as appropriate of the officer ultimately found responsible had to take place consistently with the right to fair trial through the Criminal Courts established for the purposes, the liability of the State for the wrongful violation of rights arising out of the actions of its officers had to be determined under proceeding in that behalf before a Civil Court.

12. The arrest of the 2nd and 3rd Petitioners by the Administration Police Officers named was proved on a balance of probabilities to the required high standard of proof applicable to the Petition. The arrests were not shown to have been justified on account of investigation of any crime, and were denied. The arrests were arbitrary, unlawful and an unconstitutional violation of the victims’ rights to liberty and to protection from detention without trial, under article 29 of the Constitution.

13. In accordance with section 193A of the Criminal Procedure Code, criminal prosecution and investigation were unaffected by the instant petition. The 2nd and 3rd Respondents were at liberty and obligation under the Constitution to investigate and prosecute such crimes as were established by such investigations. The officer charged with investigation in the matter, demonstrated reluctance or inability to investigate the matter despite report and deference to him.

14. Judicial review was available where a public body failed to exercise a constitutional or statutory duty. The Court in exercise of the delegated judicial authority of the people of Kenya under Article 1 (3) (c) of the Constitution directed the 2nd and 3rd Respondents to conduct investigations as appropriate and to bring to justice the persons found to have participated in the disappearance of the 2nd and 3rd Petitioners.

Petition partly allowed

i. The Petitioner’s Petition for an order of habeas corpus was declined as there was no evidence that the Respondents had custody of the 2nd and 3rd Petitioners.

ii. The 2nd and 3rd Petitioners were arrest by Administration Police Officers Benson Simiyu Makhoha, Simon Mbaa Muriithi and Kennedy Mburu Njoroge and thereafter disappearance in unclear circumstances, had to be investigated and appropriate action taken in the circumstances.

iii. The 3rd Respondent to pay on behalf of the National Police Service of the Government of Kenya Ksh.5,000,000/= each for the 2 petitioners - the 2nd and 3rd Petitioners - to be paid to the Petitioners’ respective mothers, Beatrice Kajairo and Sarah Khadi Muyera – as compensation for breach of the Petitioners’ rights under article 29 of the Constitution against deprivation of freedom arbitrarily and without just cause, and detention without trial upon arrest by the Administration Police Officers.

iv. A Judicial Review Order of Mandamus to issue to the 3rd Respondent directing him to carry out their constitutional and statutory function of investigation of crime under article 245 of the Constitution, and section 24 (e) of the National Police Service Act, and to the 2nd Respondent thereafter to consider the results of the investigation and to prosecute persons found culpable for any offence.

v. The costs of the Petition shall be paid by the 3rd Respondent to the Petitioners.
Dear CaseBack team,

Your feedback mechanism is awesome. The matters raised on appeal enrich our future decisions. You remain a treasured partner in the process.

Thanks to case back. Keep it up and save us the prospects of litigant citing before us decisions by court of appeal from our judgments before we learn of the same.

Thank you for your feedback which is highly appreciated. It goes a long way in helping me to improve in my understanding and application of the law, with special regard to Sustaining the Judiciary Transformation. I humbly request for more, even from my former station i.e. Nyeri Law Courts.

Well received, thanks. The fine distinction made by the Court of Appeal is noted.
## Legislative Updates

By Christine Thiong'o, Laws of Kenya Department

This is an outline of legislation that have been gazetted between March, 2018 and May, 2018.

### A. ACTS OF PARLIAMENT

<table>
<thead>
<tr>
<th>ACT</th>
<th>DIVISION OF REVENUE ACT, 2018</th>
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<tbody>
<tr>
<td>Act No.</td>
<td>1 of 2018</td>
</tr>
<tr>
<td>Commencement</td>
<td>11th April, 2018</td>
</tr>
<tr>
<td>Objective</td>
<td>The object and purpose of this Act is to provide for the equitable division of revenue raised nationally between the national and county levels of government for the financial year 2018/19 in accordance with Article 203(2) of the Constitution of Kenya, 2010.</td>
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<tr>
<th>ACT</th>
<th>SUPPLEMENTARY APPROPRIATION ACT, 2018</th>
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<tbody>
<tr>
<td>Act No.</td>
<td>2 of 2018</td>
</tr>
<tr>
<td>Commencement</td>
<td>7th May, 2018</td>
</tr>
<tr>
<td>Objective</td>
<td>This Act authorizes the issue of certain sums of money out of the Consolidated Fund and their application towards the service of the year ending on the 30th June, 2018. It appropriates those sums for certain public services and purposes.</td>
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<thead>
<tr>
<th>ACT</th>
<th>EQUALIZATION FUND APPROPRIATION ACT, 2018</th>
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<tbody>
<tr>
<td>Act No.</td>
<td>3 of 2018</td>
</tr>
<tr>
<td>Commencement</td>
<td>7th May, 2018</td>
</tr>
<tr>
<td>Objective</td>
<td>This is an Act of Parliament to authorize the issue of a sum of money out of the Equalization Fund and its application towards the service of the year ending 30th June, 2018 and to appropriate that sum for certain public basic services.</td>
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<tr>
<th>ACT</th>
<th>STATUTE LAW (MISCELLANEOUS AMENDMENTS) ACT, 2018</th>
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<tbody>
<tr>
<td>Act No.</td>
<td>4 of 2018</td>
</tr>
<tr>
<td>Commencement</td>
<td>21st May, 2018</td>
</tr>
</tbody>
</table>
| Objective | This is an Act of Parliament to make minor amendments to the following Laws-  
  i.) Pensions Act (Cap.189);  
  ii.) Pharmacy and Poisons (Cap. 244);  
  iii.) Clinical Officers (Training, Registration and Licensing) Act (No. 20 of 2017);  
  iv.) Environmental Management and Coordination Act, 1999 (No. 8 of 1999);  
  v.) Salaries Remuneration Commission Act (No. 10 of 2011);  
  vi.) Statutory Instruments Act (No.23 of 2013);  
  vii.) Occupational Therapists Training, Registration and Licensing Act (No.31 of 2017) |

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<tr>
<th>ACT</th>
<th>COMPUTER MISUSE AND CYBERCRIMES ACT, 2018</th>
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<tbody>
<tr>
<td>Act No.</td>
<td>5 of 2018</td>
</tr>
<tr>
<td>Commencement</td>
<td>30th May, 2018</td>
</tr>
<tr>
<td>Objective</td>
<td>This is an Act of Parliament to provide for offences relating to computer systems; to enable timely and effective detection, prohibition, prevention, response, investigation and prosecution of computer and cybercrimes; to facilitate international co-operation in dealing with computer and cybercrime matters; and for connected purposes.</td>
</tr>
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### B. NATIONAL ASSEMBLY BILLS

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<thead>
<tr>
<th>NATIONAL ASSEMBLY BILL</th>
<th>DIVISION OF REVENUE BILL, 2018</th>
</tr>
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<tbody>
<tr>
<td>Dated</td>
<td>6th March, 2018</td>
</tr>
<tr>
<td><strong>Objective</strong></td>
<td>The principal object of this Bill is to provide for the equitable division of revenue raised nationally among the national and county levels of government as required by Article 218 of the Constitution in order to facilitate the proper functioning of county governments and to ensure continuity of county services.</td>
</tr>
<tr>
<td><strong>Sponsor</strong></td>
<td>Kimani Ichung’wa, Chairperson, Budget and Appropriations Committee.</td>
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<thead>
<tr>
<th>NATIONAL ASSEMBLY BILL</th>
<th>GOVERNMENT CONTRACTS BILL, 2018</th>
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<tbody>
<tr>
<td>Dated</td>
<td>10th April, 2018</td>
</tr>
<tr>
<td><strong>Objective</strong></td>
<td>This Bill seeks to repeal and re-enact the Government Contracts Act and to provide for the powers of the Government to enter into contracts.</td>
</tr>
<tr>
<td><strong>Sponsor</strong></td>
<td>Aden Duale, Leader of Majority Party.</td>
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<tr>
<th>NATIONAL ASSEMBLY BILL</th>
<th>COUNTY GOVERNMENTS RETIREMENT SCHEME BILL, 2018</th>
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<tbody>
<tr>
<td>Dated</td>
<td>10th April, 2018</td>
</tr>
<tr>
<td><strong>Objective</strong></td>
<td>The principal object of this Bill is to establish the County Government’s Retirement Scheme as a mandatory Scheme for all County Government Officers; provide for the establishment of the Scheme’s Board of Trustees and provide for the Scheme’s management and administration. The Bill proposes to have the scheme offer lump sum payments as provident, periodic payments as pensions and income draw-downs. The proposed Scheme will transition the former local authorities’ and national Government employees under a national retirement scheme and retirement arrangements into one universal scheme for all the forty seven county governments besides being open to other public officers and any other person approved by the Board.</td>
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<tr>
<td><strong>Sponsor</strong></td>
<td>Aden Duale, Leader of Majority Party.</td>
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<tr>
<th>NATIONAL ASSEMBLY BILL</th>
<th>TAX LAWS (AMENDMENT) BILL, 2018</th>
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<tbody>
<tr>
<td>Dated</td>
<td>10th April, 2018</td>
</tr>
<tr>
<td><strong>Objective</strong></td>
<td>The Tax Laws (Amendment) Bill, 2018 seeks to make several amendments to the following tax-related statutes – i.) Income Tax Act (Cap. 470); ii.) Stamp Duty Act (Cap. 480); iii.) Value Added Tax Act, 2013 (No.35 of 2013).</td>
</tr>
<tr>
<td><strong>Sponsor</strong></td>
<td>Aden Duale, Leader of Majority Party.</td>
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<th>STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2018</th>
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<tbody>
<tr>
<td>Dated</td>
<td>10th April, 2018</td>
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</table>
### Objective

The Statute Law (Amendment) Bill, 2018 seeks to make various, wide ranging amendments to the following statutes:

- Judicature Act (Cap. 8)
- Oaths and Statutory Declarations Act (Cap. 15)
- Advocates Act (Cap. 16)
- Public Archives and Documentation Service Act (Cap. 19)
- Civil Procedure Act (Cap. 21)
- Foreign Judgment (Reciprocal Enforcement) Act (Cap. 43)
- Probation of Offenders Act (Cap. 64)
- Criminal Procedure Code (Cap. 75)
- Extradiation (Contiguous and Foreign Countries) Act (Cap. 76)
- Registration of Persons Act (Cap. 107)
- Public Holidays Act (Cap. 110)
- Law of Succession Act (Cap. 160)
- National Youth Service Act (Cap. 208)
- Kenya Ports Authority Act (Cap. 391)
- Kenya Airways Authority Act (No.3 of 1991)
- Traffic Act (Cap. 403)
- Kenya Post Office Savings Bank Act (Cap. 493)
- Export Processing Zones Act (Cap 517)
- Kenya Revenue Authority Act, 1995 (No. 2 of 1995)
- Higher Education Loans Board Act, 1995 (No. 3 of 1995)
- Kenya Information and Communications Act, 1998 (No. 2 of 1998)
- National Hospital Insurance Fund Act 1998 (No. 4 of 1998)
- Community Service Orders Act, 1998 (No. 10 of 1998)
- Environmental Management and Co-ordination Act, 1999 (No. 8 of 1999)
- Industrial Property Act, 2001 (No. 3 of 2001)
- Children Act, 2001 (No. 8 of 2001)
- Copyright Act, 2001 (No. 12 of 2001)
- Privatization Act, 2005 (No. 2 of 2005)
- Witness Protection Act, 2006 (No. 16 of 2006)
- Labour Institutions Act, 2007 (No.12 of 2007)
- Labour Relations Act, 2007 (No. 14 of 2007)
- Anti-Counterfeit Act, 2008 (No. 13 of 2008)
- Biosafety Act, 2009 (No. 2 of 2009)
- Proceeds of Crime and Anti Money Laundering Act, 2009 (No. 9 of 2009)
- National Youth Council Act, 2009 (No. 10 of 2009)
- Competition Act, 2010 (No. 12 of 2010)
- Judicial Service Act, 2011 (No. 1 of 2011)
- Tourism Act, 2011 (No. 28 of 2011)
- National Construction Authority Act, 2011 (No. 41 of 2011)
- Engineers Act, 2011 (No.43 of 2011)
- Land Registration Act, 2012 (No. 3 of 2012)
- Land Act, 2012 (No. 6 of 2012)
- National Authority for the Campaign Against Alcohol and Drug Abuse Act, 2012 (No. 14 of 2012)
- Kenya Defence Forces Act, 2012 (No. 25 of 2012)
- Kenya School of Law Act, 2012 (No. 26 of 2012)
- Legal Education Act, 2012 (No. 27 of 2012)
- National Transport and Safety Authority Act, 2012 (No. 33 of 2012)
- Universities Act, 2012 (No. 42 of 2012)
- Treaty Making and Ratification Act, 2012 (No.45 of 2012)
- Public Private Partnership Act, 2013 (No. 15 of 2013)
- Kenya Agricultural and Livestock Research Act, 2013 (No. 17 of 2013)
- Kenya Law Reform Act, 2013 (No. 19 of 2013)
- Nairobi Centre for International Arbitration Act, 2013 (No. 26 of 2013)
- Science, Technology and Innovation Act, 2013 (No. 28 of 2013)
- National Social Security Fund Act, 2013 (No. 45 of 2013)
- Wildlife Conservation and Management Act, 2013 (No. 47 of 2013)
- National Drought Management Authority Act, 2016 (No. 4 of 2016)
- Protection of Traditional Knowledge and Traditional Cultural Expressions Act, 2016 (No. 33 of 2016)
- Forest Conservation and Management Act, 2016 (No. 34 of 2016)
- Bribery Act, 2016 (No. 47 of 2016).

### Sponsor

Aden Duale, Leader of Majority Party.
**Objective**

This Bill is in keeping with the practice of making various amendments which do not merit the publication of separate Bills and consolidating them into one Bill. The Bill contains proposed amendments to the following statutes-

1. Betting, Lotteries and Gaming Act (Cap. 131);
2. Dairy Industry Act (Cap.336);
3. Co-operative Societies Act, (Cap. 490);
4. National Hospital Insurance Fund Act, 1998 (No. 9 of 1998);
5. Statistics Act, 2016 (No.4 of 2006);
6. Energy Act, 2006 (No. 12 of 2006);
7. Sacco Societies Act (No. 14 of 2008);
8. Urban Areas and Cities Act, 2011 (No.13 of 2011);
9. Micro and Small Enterprises Act, 2012 (No. 55 of 2012);
10. Public Private Partnership Act, 2013 (No. 15 of 2013);
11. Crops Act, 2013 (No. 16 of 2013);
12. Kenya Medical Supplies Authority Act, 2013 (No. 20 of 2013);
13. Technical and Vocational Education and Training Act, 2013 (No. 29 of 2013);
14. Public Procurement and Asset Disposal Act, 2015 (No.33 of 2015);

**Sponsor**

Aden Duale, Leader of Majority Party.

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**NATIONAL ASSEMBLY BILL**

**HEALTH LAWS (AMENDMENT) BILL, 2018**

**Dated**

10th April, 2018

**Objective**

This Bill seeks to make various, wide- ranging amendments to various health-related statutes on matters relating to health policy. The Bill contains proposed amendments to the following statutes-

1. Radiation Protection Act (Cap. 243);
2. Medical Practitioners and Dentists Act (Cap. 253);
3. Nurses Act (Cap. 257);
4. Kenya Medical Training College Act (Cap. 261);
5. Nutritionists and Dieticians Act (No. 18 of 2007);
6. Kenya Medical Supplies Authority Act, 2013 (No. 20 of 2013);
7. Counselors and Psychologists Act, 2014 (No. 14 of 2014);
8. Physiotherapists Act, 2014 (No. 20 of 2014);
9. Health Records and Information Managers Act, 2016 (No. 15 of 2016);

**Sponsor**

Aden Duale, Leader of Majority Party.

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**NATIONAL ASSEMBLY BILL**

**EQUALIZATION FUND APPROPRIATION BILL, 2018**

**Dated**

3rd May, 2018

**Objective**

This Bill seeks to authorize the issuance of a sum of money out of the Equalization Fund and its application towards the service of the year ending 30th June, 2018 and to appropriate that sum for certain public basic services.

**Sponsor**

Kimani Ichung’w’ah, Chairperson, Budget and Appropriations Committee.
C. **SENATE BILLS**

<table>
<thead>
<tr>
<th>SENATE BILL</th>
<th>RETIREMENT BENEFITS (DEPUTY PRESIDENT AND DESIGNATED STATE OFFICERS) (AMENDMENT) BILL, 2018</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dated</td>
<td>28&lt;sup&gt;th&lt;/sup&gt; February, 2018</td>
</tr>
<tr>
<td>Objective</td>
<td>The principal objective is to amend the retirement benefits (Deputy President &amp; Designated State Officers) Act. It seeks to ensure the executive does not intimidate or maltreat the entitled person. Establishes a joint committee within parliament to review decisions of the executive to alter or modify the personnel attached to the entitled person.</td>
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<tr>
<td>Sponsor</td>
<td>Ledama Olekina, Senator.</td>
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<tr>
<th>SENATE BILL</th>
<th>OFFICE OF THE COUNTY ATTORNEY BILL, 2018</th>
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<tbody>
<tr>
<td>Dated</td>
<td>2&lt;sup&gt;nd&lt;/sup&gt; March, 2018</td>
</tr>
<tr>
<td>Objective</td>
<td>This Bill establishes the Office of the County Attorney; provides for its functions &amp; powers; the discharge of duties &amp; the exercise of powers of the County Attorney and other related purposes. The County Attorney would be the principle legal adviser to the county executive. It also provides for the powers of the County Attorney &amp; the appointment of a County Solicitor &amp; County Legal Counsel.</td>
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<tr>
<td>Sponsor</td>
<td>Samson Cherarkey, committee on Justice, Legal Affairs and Human Rights.</td>
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<tr>
<th>SENATE BILL</th>
<th>PUBLIC PARTICIPATION BILL, 2018</th>
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<tr>
<td>Dated</td>
<td>5&lt;sup&gt;th&lt;/sup&gt; March, 2018</td>
</tr>
<tr>
<td>Objective</td>
<td>This Bill, gives effect to the constitutional principles of public participation &amp; participatory democracy as well enunciated in Articles 1(2), 10(2), 35, 69(1)(d), 118, 174(c) (d), 184 (1)(c), 196, 201(a) and 232(1) (d) of the Constitution; and for related purposes. It designates the responsible authorities for purposes of developing the specific guidelines &amp; offering oversight for public participation.</td>
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<tr>
<td>Sponsor</td>
<td>Amos Wako, Senator.</td>
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<tr>
<th>SENATE BILL</th>
<th>COUNTY GOVERNMENT RETIREMENT SCHEME BILL, 2018</th>
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<tbody>
<tr>
<td>Dated</td>
<td>7&lt;sup&gt;th&lt;/sup&gt; March, 2018</td>
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<tr>
<td>Objective</td>
<td>The objective of this bill is to establish a County Governments’ Retirement scheme for persons in the County Government Service as a mandatory scheme and for other related purposes. It applies to all 47 county governments, and is open to public officers and any other person approved by the Board. This Bill proposes to have the scheme offer lump sum payments as provident; periodic payments as pensions and income draw-downs. The Bill however, does not delegate any legislative powers nor does it limit fundamental rights and freedoms.</td>
</tr>
<tr>
<td>Sponsor</td>
<td>Johnson Sakaja, Chairperson, Committee of Labour &amp; Social Services.</td>
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<tr>
<th>SENATE BILL</th>
<th>COUNTY WARDS DEVELOPMENT EQUALISATION FUND BILL, 2018</th>
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<tbody>
<tr>
<td>Dated</td>
<td>7&lt;sup&gt;th&lt;/sup&gt; March, 2018</td>
</tr>
<tr>
<td>Objective</td>
<td>The objective of this bill is to provide for the establishment of a kitty for promoting development in the wards and to set up institutional framework for coordinating development initiatives and projects in the Wards, and for related purposes. This Bill seeks to promote the decentralization of development for coordinating development initiatives and projects in the Wards, for connected purposes. It seeks to promote the decentralization of development within the counties by identifying projects that are beneficial to the residents of the respective wards and the county generally &amp; providing a framework for the implementation of such projects.</td>
</tr>
<tr>
<td>Sponsor</td>
<td>Irungu Kang’ata, Senator.</td>
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| SENATE BILL | OFFICE OF THE COUNTY PRINTER BILL, 2018 |
| Dated | 9th March, 2018 |
| Objective | The objective is to establish the office of the county; to provide for the functions, mandate, management and administration of the office; and for connected purposes. It also publishes all authorized documents, advise and form partnerships on all matters relating to printing & publishing ensuring there is no plagiarism. |
| Sponsor | P.W. Lokorio, Senator. |

| SENATE BILL | LOCAL CONTENT BILL, 2018 |
| Dated | 21st March, 2018 |
| Objective | This Bill seeks to provide for a framework to facilitate the local ownership, control and financing of activities connected with the exploitation of gas, oil and other petroleum resources; to provide a framework to increase the local value capture along the value chain in the exploration of gas, oil and other petroleum resources. |
| Sponsor | Gideon Moi, Senator. |

| SENATE BILL | SALARIES AND REMUNERATION COMMISSION (AMENDMENT) BILL, 2018 |
| Dated | 23rd April, 2018 |
| Objective | The principal object of this Bill is to amend sections 7 and 9 of the Salaries and Remuneration Act, No. 10 of 2011, to provide for notification of the expiry of term for Commissioners in the Gazette and to provide for timelines for the filling of vacancies in the Commission upon the expiry of term for Commissioners. |
| Sponsor | Mohamed M. Mahamud, Chairperson, Senate Standing Committee on Finance and Budget. |

| SENATE BILL | COUNTY GOVERNMENTS (AMENDMENT) BILL, 2018 |
| Dated | 30th April, 2018 |
| Objective | The principal object of this Bill is to amend section 58 of the County Governments Act, No. 17 of 2012, to provide for the appointment of human resource management professionals as chairpersons of the County Public Service Boards. The Bill is intended to inject professionalism in the human resource functions of the County Public Service Boards to ensure quality service delivery in the counties. |
| Sponsor | Aaron Cheruiyot, Senator. |

| SENATE BILL | DIVISION OF REVENUE (AMENDMENT) BILL, 2018 |
| Dated | 15th May, 2018 |
| Objective | The principal object of this Bill is to provide for three additional conditional allocations to county governments in the financial year 2018/19 to be financed by loans and grants from donors. These additional conditional allocations had not been provided for in the Division of Revenue Act, No. 1 of 2018. |
### Sponsor
Mohamed M. Mahamud, Chairperson, Senate Standing Committee on Finance and Budget.

### SENATE BILL
**IMPEACHMENT PROCEDURE BILL, 2018**

**Dated**
21st May, 2018

**Objective**
This Bill seeks to clearly set out impeachment procedures that would ensure procedural justice for every person who is sought to be impeached. It also proposes a period within which court matters relating to impeachment proceedings shall be concluded so as to minimize anxiety over prolonged undecided fate of the chief executive of the Nation or a County or other members of their cabinets.

This legislative proposal is partly informed by challenges identified from the several proceedings for the removal of a governor and for the removal of a deputy governor that the Senate has conducted and the court proceedings to which some of the impeachment proceedings have been subjected on the basis of the procedures followed.

The Bill therefore seeks to provide for a harmonized procedure to be applied in considering a motion for the removal of a President, Governor, a Deputy Governor, a Cabinet Secretary or a County Executive Committee Member. It also proposes appropriate solutions to procedural gaps identified with respect to the provisions in the Constitution for the removal of a President, Deputy President or Cabinet Secretary.

**Sponsor**
Samson Cherarget, Chairperson Standing Committee on Justice, Legal Affairs and Human Rights.

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The preservation of peace and the guaranteeing of man’s basic freedoms and rights require courage and eternal vigilance: courage to speak and act - and if necessary, to suffer and die - for truth and justice; eternal vigilance, that the least transgression of international morality shall not go undetected and unremedied.  

— Haile Selassie
This article presents a summary of Legislative Supplements published in the Kenya Gazette on matters of general public importance. The outline covers the period between 21st March, 2018 and 31st May, 2018.

<table>
<thead>
<tr>
<th>DATE OF PUBLICATION</th>
<th>LEGISLATIVE SUPPLEMENT NUMBER</th>
<th>CITATION</th>
<th>PREFACE</th>
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</table>
| 21st March, 2018     | 11                            | Public Finance Management (Senate Monitoring and Evaluation) Regulations, 2018 L. N. 71/ 2018 | The Parliamentary Service Commission makes the following Regulations in exercise of the powers conferred by section 24 of the Public Finance Management Act (No. 18 of 2012). The purpose of the Regulations is to guide the Senate Sessional Committee on Monitoring and Evaluation in the administration, disbursement and management of the Fund to ensure efficiency and effectiveness. The regulations –
  a) Specify the sources of monies to the Fund;
  b) Provide guidance on the administration and management of the Fund; and
  c) Provide the financial procedures for the Fund.
The object of the Fund is to facilitate a Senator to carry out monitoring and evaluation activities in exercise of the Senate’s oversight role over county governments in accordance with Article 96 of the Constitution. |
| 26th April, 2018     | 16                            | Traffic (Driving Schools, Driving Instructors And Driving Licences) Rules, 2018 L. N. 81/ 2018 | The Cabinet Secretary for Transport, Infrastructure, Housing and Urban Development makes the following Rules in exercise of the powers conferred by section 119 (1) (ga) of the Traffic Act (Cap. 403). These Rules apply to driving schools, driving instructors and to the issuance of driving licenses in Kenya.
The Schedules set out the various application forms to the Authority (the National Transport and Safety Authority).
The fees are set out in the Second schedule.
This legislation revokes the Traffic (Driving Schools) Rules (L.N 232/1971). |
| 31<sup>st</sup> May, 2018 | 29 | Judiciary Fund Regulations, 2018 | The Chief Justice makes the following Regulations in exercise of the powers conferred by section 14 of the Judiciary Fund Act (No. 16 of 2016).

These Regulations shall apply to all matters relating to the financial management of the Fund. The administration of the Fund is vested in the Chief Registrar.

The Regulations shall apply to a Judicial Officer or Judiciary Staff in exercise of any powers and functions relating to the administration of the Fund whether in exercise of delegated authority or otherwise.

The object and purpose of the Regulations is to-

a) provide for the proper management of the Fund;
b) set out a standardized financial management system of the Fund capable of producing accurate and reliable accounts, which will be useful in management decisions and statutory reporting;
c) ensure accountability, transparency and the effective, efficient and economic use of the Fund; and
d) ensure adherence to the principles of public finance set out in Article 201 of the Constitution in the management of the Fund.

The Regulations deal with:

i.) Budget Preparation;
ii.) Utilization of the Fund;
iii.) Expenditure in relation to Human Resource;
iv.) Imprest Management;
vi.) Accounts and Reporting; and
vii.) Internal Audit and Risk Management.

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| 31<sup>st</sup> May, 2018 | 29 | Kenya National Qualifications Framework Regulations, 2018 | The Cabinet Secretary for Education makes the following Regulations in exercise of the powers conferred by section 29 of the Kenya National Qualifications Framework Act (No. 22 of 2014).

These Regulations shall apply to any person who offers or who intends to award national qualifications in Kenya.

These Regulations provide for the-

a) Certification process;
b) Recognition, equation and approval of foreign qualifications and recognition of prior learning;
c) Termination, suspension and revocation of certificate of accreditation; and

d) Structures of the national qualifications framework.
Government’s Access to Cell-Site Records to Track Physical Movements of Individuals Contravenes their Reasonable Expectation of Right to Privacy Protected under the Fourth Amendment of The Constitution of the United States.

Carpenter V United States
Supreme Court of the United States
Certiorari to The United States Court of Appeals for The Sixth Court
No.16-402
June 22, 2018
Reported by Linda Aseur, Faith Wanjiku & Wanjiru Njihia

Brief Facts
In 2011, police officers arrested four men suspected of robbing a series of Radio Shack and T-Mobile stores in Detroit. One of the men confessed that, over the previous four months, the group had robbed nine different stores in Michigan and Ohio. The prosecutors applied for court orders under the Stored Communications Act codified at 18 U.S.C. §§ 2701–2712 (Stored Communications Act) to obtain cell phone records for Petitioner and several other suspects. That statute, as amended in 1994, permitted the Government to compel the disclosure of certain telecommunications records when it offered specific and articulable facts showing that there were reasonable grounds to believe that the records sought were relevant and material to an ongoing criminal investigation.

The Petitioner was charged with six counts of robbery and an additional six counts of carrying a firearm during a federal crime of violence. Prior to trial, the Petitioner moved to suppress the cell-site data provided by the wireless carriers. He argued that the Government’s seizure of the records violated the Fourth Amendment rights because they had been obtained without a warrant supported by probable cause. The District Court denied the motion. The agent produced maps that placed the Petitioner’s phone near four of the charged robberies. The Petitioner was convicted on all but one of the firearm counts and sentenced to more than 100 years in prison.

The Court of Appeals for the Sixth Circuit affirmed. It held that the Petitioner lacked a reasonable expectation of privacy in the location information collected by the FBI because he had shared that information with his wireless carriers. Given that cell phone users voluntarily conveyed cell-site data to their carriers as a means of establishing communication, the Court concluded that the resulting business records were not entitled to Fourth Amendment protection.

Held by the Majority
1. The Fourth Amendment protected the right of the people to be secured in their persons, houses, papers, and effects, against unreasonable searches and seizures. The basic purpose of the Amendment was to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. The Founding generation crafted the Fourth Amendment as a response to the reviled general warrants and writs of assistance of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity. The Fourth Amendment protected people, not places, and expanded the conception of the Amendment to protect certain expectations of privacy as well. When an individual sought to
preserve something as private and his expectation of privacy was one that society was prepared to recognize as reasonable, official intrusion into that private sphere generally qualified as a search and required a warrant supported by probable cause.

2. The case before the Court involved the Government's acquisition of wireless carrier cell-site records revealing the location of the Petitioner's cell phone whenever it made or received calls. That sort of digital data personal location information maintained by a third party did not fit neatly under existing precedents. Instead, requests for cell-site records lay at the intersection of two lines of cases, both of which informed the Court's understanding of the privacy interests at stake.

3. The question that the Court was confronted with was how to apply the Fourth Amendment to a new phenomenon: the ability to chronicle a person's past movements through the record of his cell phone signals. Such tracking partook of many of the qualities of the GPS monitoring. Much like GPS tracking of a vehicle, cell phone location information was detailed, encyclopedic, and effortlessly compiled.

4. At the same time, the fact that the individual continuously revealed his location to his wireless carrier implicated the third-party principle of Smith v. Maryland, (no expectation of privacy in records of dialed telephone numbers conveyed to telephone company) and United States v. Miller, (no expectation of privacy in financial records held by a bank) (Smith and Miller). While the third-party doctrine applied to telephone numbers and bank records, it was not clear whether its logic extended the qualitatively different category of cell-site records.

5. The Court declined to extend Smith and Miller to cover those novel circumstances. Given the unique nature of cellphone location records, the fact that the information was held by a third party did not by itself overcome the user's claim to Fourth Amendment protection. Whether the Government employed its own surveillance technology or leveraged the technology of a wireless carrier, an individual maintained a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. The location information obtained from the petitioner's wireless carriers was the product of a search.

6. A person did not surrender all Fourth Amendment protection by venturing into the public sphere. What one sought to preserve as private, even in an area accessible to the public, could be constitutionally protected. Individuals had a reasonable expectation of privacy in the whole of their physical movements. Society's expectation had been that law enforcement agents and others would not and indeed, in the main, simply could not secretly monitor and catalogue every single movement of an individual's car for a very long period.

7. Historical cell-site records presented even greater privacy concerns than the GPS monitoring of a vehicle. A cell phone almost a feature of human anatomy, tracked nearly exactly the movements of its owner. While individuals regularly left their vehicles, they compulsively carried cell phones with them all the time. A cell phone faithfully followed its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales. When the Government tracked the location of a cell phone it achieved near perfect surveillance, as if it had attached an ankle monitor to the phone's user.

8. The rule that the Court adopted had to take account of more sophisticated systems that were already in use or in development. While the records in the case reflected the state of technology at the start of the decade, the accuracy of CSLI was rapidly approaching GPS-level precision. As the number of cell sites had proliferated, the geographic area covered by each cell sector had shrunk, particularly in urban areas. In addition, with new technology measuring the time and angle of signals hitting their towers, wireless carriers already had the capability to pinpoint a phone's location within 50 meters. When the Government accessed CSLI from the wireless carriers; it invaded the Petitioner's reasonable expectation of privacy in the whole of
his physical movements.

9. The Government’s primary contention to the contrary was that the third-party doctrine governed the case. In its view, cell-site records were fair game because they were business records created and maintained by the wireless carriers. The Government recognized that the case featured new technology, but asserted that the legal question nonetheless turned on a garden variety request for information from a third-party witness. The Government’s position failed to contend with the seismic shifts in digital technology that made possible the tracking of not only the Petitioner’s location but also everyone else’s, not for a short period but for years and years. Sprint Corporation and its competitors were not the typical witnesses. Unlike the nosy neighbor who kept an eye on comings and goings, they were ever alert, and their memory was nearly infallible. There was a world of difference between the limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information casually collected by wireless carriers. The Government thus was not asking for a straightforward application of the third-party doctrine, but instead a significant extension of it to a distinct category of information.

10. The third-party doctrine partly stemmed from the notion that an individual had a reduced expectation of privacy in information knowingly shared with another. But the fact of diminished privacy interests did not mean that the Fourth Amendment failed out of the picture entirely. In mechanically applying the third-party doctrine to the case, the Government failed to appreciate that there were no comparable limitations on the revealing nature of CSLI. The Court had in fact already shown special solicitude for location information in the third-party context.

11. Given the unique nature of cell phone location information, the fact that the Government obtained the information from a third party did not overcome the Petitioner’s claim to Fourth Amendment protection. The Government’s acquisition of the cell-site records was a search within the meaning of the Fourth Amendment.

12. Although the ultimate measure of the constitutionality of a governmental search was reasonableness, warrantless searches were typically unreasonable where a search was undertaken by law enforcement officials to discover evidence of criminal wrongdoing. Thus, in the absence of a warrant, a search was reasonable only if it fell within a specific exception to the warrant requirement material to an ongoing investigation.

13. If the third-party doctrine did not apply to the modern day equivalents of an individual’s own papers or effects, then the clear implication was that the documents should receive full Fourth Amendment protection. The Court simply thought that such protection should extend as well to a detailed log of a person’s movements over several years. That was certainly not to say that all orders compelling the production of documents would require a showing of probable cause. The Government would be able to use subpoenas to acquire records in the overwhelming majority of investigations. Only a warrant was required in the rare case where the suspect had a legitimate privacy interest in records held by a third party.

14. The Court was obligated as subtler and more far reaching means of invading privacy had become available to the Government to ensure that the progress of science did not erode Fourth Amendment protections. The Court declined to grant the state unrestricted access to a wireless carrier’s database of physical location information. In light of the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information was gathered by a third party did not make it any less deserving of Fourth Amendment protection. The Government’s acquisition of the cell-site records was a search under that Amendment.

Kennedy, J Dissenting (Justice Thomas and Justice Alito Concurring)

1. Departure from relevant Fourth Amendment precedents and principles was unnecessary and incorrect, requiring
the respectful dissent. The new rule the Supreme Court seemed to formulate did put needed reasonable, accepted, lawful, and congressionally authorized criminal investigations at serious risk in serious cases, often when law enforcement sought to prevent the threat of violent crimes. And it placed undue restrictions on the lawful and necessary enforcement powers exercised not only by the Federal Government, but also by law enforcement in every State and locality throughout the Nation. Adherence to the Court’s longstanding precedents and analytic framework would have been the proper and prudent way to resolve the case.

2. Cell-site records were no different from the many other kinds of business records the Government had a lawful right to obtain by compulsory process. Customers like the Petitioner did not own, possess, control, or use the records, and for that reason had no reasonable expectation that they could not be disclosed pursuant to lawful compulsory process.

3. A person’s movements were not particularly private. When one traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination. The expectations of privacy in one’s location today, if anything, are even less reasonable than when the Court decided Knotts over 30 years ago. Millions of Americans chose to share their location on a daily basis, whether by using a variety of location-based services on their phones, or by sharing their location with friends and the public at large via social media. The records at issue revealed the Petitioner’s location within an area covering between around a dozen and several hundred city blocks. The troves of intimate information the Government could and did obtain using financial records and telephone records dwarfed what could be gathered from cell-site records.

4. The Court’s decision also would have ramifications that extended beyond cell-site records to other kinds of information held by third parties, yet the Court failed to provide clear guidance to law enforcement and courts on key issues raised by its reinterpretation of Miller and Smith.

5. First, the Court’s holding was premised on cell-site records being a distinct category of information from other business records. The Court did not explain what made something a distinct category of information. Whether credit card records were distinct from bank records; whether payment records from digital wallet applications were distinct from either; whether the electronic bank records available were distinct from the paper and microfilm records at issue in Miller; or whether cell-phone call records were distinct from the home-phone call records at issue in Smith, were just a few of the difficult questions that required answers under the Court’s novel conception of Miller and Smith.

6. Second, the majority opinion gave courts and law enforcement officers no indication how to determine whether any particular category of information fell on the financial-records side or the cell-site-records side of its newly conceived constitutional line. The Court’s multifactor analysis considering intimacy, comprehensiveness, expense, retrospectivity, and voluntariness put the law on a new and unstable foundation.

7. Third, even if a distinct category of information was deemed to be more like cell-site records than financial records, courts and law enforcement officers would have to guess how much of that information could be requested before a warrant was required. The Court suggested that less than seven days of location information would not require a warrant. But the Court did not explain why that was so, and nothing in its opinion even alluded to the considerations that ought to determine whether greater or lesser thresholds could apply to information like IP addresses or website browsing history.

8. Fourth, by invalidating the Government’s use of court-approved compulsory process, the Court called into question the subpoena practices of federal and state grand juries, legislatures, and other investigative bodies, yet the Court
failed even to mention the serious consequences that would have for the proper administration of justice. The Court’s new and uncharted course would inhibit law enforcement and keep defendants and judges guessing for years to come.

9. The case could be resolved by interpreting accepted property principles as the baseline for reasonable expectations of privacy. The Government did not search anything over which the Petitioner could assert ownership or control. Instead, it issued a court-authorized subpoena to a third party to disclose information it alone owned and controlled. That could suffice to resolve the case. Having concluded, however, that the Government searched the Petitioner when it obtained cell-site records from his cell phone service providers, the proper resolution of the case could have been to remand for the Court of Appeals to determine in the first instance whether the search was reasonable. The Court’s reflexive imposition of the warrant requirement obscured important and difficult issues, such as the scope of Congress’ power to authorize the Government to collect new forms of information using processes that deviated from traditional warrant procedures, and how the Fourth Amendment’s reasonableness requirement could apply when the Government used compulsory process instead of engaging in an actual, physical search. Those reasons all lead to the respectful dissent.

Alito J, Dissenting (Justice Thomas concurring)

1. The majority’s concern about the effect of new technology on personal privacy was shared, but it was feared that the decision would do far more harm than good. The majority’s reasoning fractured two fundamental pillars of Fourth Amendment law, and in doing so, it guaranteed a blizzard of litigation while threatening many legitimate and valuable investigative practices upon which law enforcement had rightfully come to rely.

2. First, the majority ignored the basic distinction between an actual search dispatching law enforcement officers to enter private premises and root through private papers and effects and an order merely requiring a party to look through its own records and produce specified documents. The former, which intruded on personal privacy far more deeply, required probable cause; the latter did not. Treating an order to produce like an actual search, as the decision made, was revolutionary. It violated both the original understanding of the Fourth Amendment and more than a century of Supreme Court precedent. Unless it was somehow restricted to the particular situation in the present case, the Court’s move would cause upheaval. Must every grand jury subpoena duces tecum be supported by probable cause? If so, investigations of terrorism, political would be stymied. And what about subpoenas and other document-production orders issued by administrative agencies?

3. Second, the Court allowed a defendant to object to the search of a third party’s property. That also was revolutionary. The Fourth Amendment protected the right of the people to be secure in their persons, houses, papers, and effects, not the persons, houses, papers, and effects of others. The majority had been careful to heed that fundamental feature of the Amendment’s text. That was true when the Fourth Amendment was tied to property law, and it remained true after Katz v. United States. By departing dramatically from those fundamental principles, the Court destabilized long established Fourth Amendment doctrine. It would be making repairs or picking up the pieces for a long time to come.

4. The majority inexplicably ignored the settled rule of Oklahoma Press Publishing Co. v. Walling in favor of a resurrected version of Boyd v. United States. That was mystifying. That ought to have been an easy case regardless of whether the Court looked to the original understanding of the Fourth Amendment or to the modern doctrine. As a matter of original understanding, the Fourth Amendment did not regulate the compelled production of documents at all. The Government received the relevant cell-site records pursuant to a court order compelling the Petitioner’s cell service...
provider to turn them over. That process was thus immune from challenge under the original understanding of the Fourth Amendment.

5. The type of order obtained by the Government almost necessarily satisfied that standard. The Stored Communications Act allowed a court to issue the relevant type of order only if the governmental entity offered specific and articulable facts showing that there were reasonable grounds to believe that the records sought were relevant and material to an ongoing criminal investigation. And the court could quash or modify such order if the provider objected that the records requested were unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider. No such objection was made in the instant case, and the Petitioner did not suggest that the orders contravened the Oklahoma Press standard in any other way. That was what made the majority’s opinion so puzzling.

6. It decided that a search of the Petitioner occurred within the meaning of the Fourth Amendment, but then it leapt straight to imposing requirements that until that point had governed only actual searches and seizures. Lost in its race to the finish was any real recognition of the century’s worth of precedent it jeopardized. For the majority, the instant case was apparently no different from one in which Government agents raided the Petitioner’s home and removed records associated with his cell phone.

7. To ensure that justice was done, it was imperative to the function of courts that compulsory process be available for the production of evidence. For over a hundred years, the Courts understood that holding subpoenas to the same standard as actual searches and seizures would stop much if not all of investigation in the public interest at the threshold of inquiry. A skeptical majority decided to put that understanding to the test. Compounding its initial error, the Majority also held that a defendant had the right under the Fourth Amendment to object to the search of a third party’s property. That holding flouted the clear text of the Fourth Amendment, and it could not be defended under either a property-based interpretation of that Amendment or the Court’s decisions applying the reasonable expectations of privacy test adopted in Katz. By allowing the Petitioner to object to the search of a third party’s property, the majority threatened to revolutionize a second and independent line of Fourth Amendment doctrine.

8. The Fourth Amendment guaranteed the right of the people to be secure in their persons, houses, papers, and effects. The Fourth Amendment did not confer rights with respect to the persons, houses, papers, and effects of others. Its language made clear that Fourth Amendment rights were personal, and as a result, the Court had long insisted that they would not be asserted vicariously. It followed that a person who was aggrieved only through the introduction of damaging evidence secured by a search of a third person’s premises or property had not had any of his Fourth Amendment rights infringed.

Gorsuch J, Dissenting

1. The instant Court said that judges could use Katz’s reasonable expectation of privacy test to decide what Fourth Amendment rights people had in cell-site location information, explaining that no single rubric definitively resolved which expectations of privacy were entitled to protection. But then it offered a twist. Lower courts could be sure to add two special principles to their Katz calculus: the need to avoid arbitrary power and the importance of placing obstacles in the way of too permeating police surveillance. While surely laudable, those principles didn’t offer lower courts much guidance. The Court did not say how far to carry either principle or how to weigh them against the legitimate needs of law enforcement.

2. The Court’s application of those principles supplied little more direction. The Court declined to say whether there was any sufficiently limited period of time for which the Government could obtain an individual’s historical location information free from Fourth Amendment scrutiny. But then it said that access to seven days’ worth
of information did trigger Fourth Amendment scrutiny even though the carrier produced only two days of records. Why was the relevant fact the seven days of information the government asked for instead of the two days of information the government actually saw? Why seven days instead of ten or three or one? And in what possible sense did the government search five days’ worth of location information it was never even sent? The Court did not know.

3. Beyond its provenance in the text and original understanding of the Amendment, that traditional approach came with other advantages. Judges were supposed to decide cases based on democratically legitimate sources of law like positive law or analogies to items protected by the enacted Constitution rather than their own biases or personal policy preferences. A Fourth Amendment model based on positive legal rights carved out significant room for legislative participation in the Fourth Amendment context, too, by asking judges to consult what the people’s representatives had to say about their rights. Nor was that approach hobbled by Smith and Miller, for those cases were just limitations on Katz, addressing only the question whether individuals had a reasonable expectation of privacy in materials they shared with third parties. Under that more traditional approach, Fourth Amendment protections for the papers and effects did not automatically disappear just because one shared them with third parties.

4. The Fourth Amendment jurisprudence already reflected that truth. Sealed letters placed in the mail were as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The reason, drawn from the Fourth Amendment’s text, was that the constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extended to their papers, thus closed against inspection, wherever they could be. It did not matter that letters were bailed to a third party (the government, no less). The sender enjoyed the same Fourth Amendment protection as he did when papers were subjected to search in one’s own household.

5. To be sure, courts had to be wary of returning to the doctrine of Boyd v. United States. Boyd invoked the Fourth Amendment to restrict the use of subpoenas even for ordinary business records and, as eventually proved unworkable. But if they were to overthrow Jackson too and deny Fourth Amendment protection to any subpoenaed materials, they would do well to reconsider the scope of the Fifth Amendment while they were at it. Their precedents treated the right against self-incrimination as applicable only to testimony, not the production of incriminating evidence. But there was substantial evidence that the privilege against self-incrimination was also originally understood to protect a person from being forced to turn over potentially incriminating evidence.

6. The case offered a cautionary example. It seemed to the court entirely possible a person’s cell-site data could qualify as his papers or effects under existing law. Yes, the telephone carrier held the information but designated a customer’s cell-site location information as customer proprietary network information and gave customers certain rights to control, use of and access to customer proprietary network information (CPNI) about themselves. The statute generally forbade a carrier to use, disclose, or permit access to individually identifiable CPNI without the customer’s consent, except as needed to provide the customer’s telecommunications services. It also required the carrier to disclose CPNI upon affirmative written request by the customer, to any person designated by the customer. Congress even afforded customers a private cause of action for damages against carriers who violated the Act’s terms. Plainly, customers had substantial legal interests in that information, including at least some right to include, exclude, and control its use. Those interests could even rise to the level of a property right.

7. Unfortunately, too, the case marked the second time the term that individuals had forfeited Fourth Amendment arguments based on positive law by
failing to preserve them. Litigants had fair notice that arguments like those could vindicate Fourth Amendment interests even where Katz arguments did not. Yet the arguments had gone unmade, leaving courts to the usual Katz hand-waving. Those omissions did not serve the development of a sound or fully protective Fourth Amendment jurisprudence.

The judgment of the Court of Appeals was reversed, and the case was remanded for further proceedings consistent with the above opinion.

Relevance to the Kenyan Situation

Kenya too has laws on protection of people’s privacy and unlawful searches and seizures of their person and possessions in relation to cell phone data stored by mobile service providers. The Constitution of Kenya, 2010 provides for the right to privacy in Article 31. It goes ahead to state that every person has the right to privacy, which includes the right not to have their person, home or property searched; their possessions seized; information relating to their family or private affairs unnecessarily required or revealed; or the privacy of their communications infringed.

There is also the Kenya Information and Communications Act, No. 2 of 1998 which states in its preamble that it is an Act of Parliament enacted to provide for the establishment of the Communications Commission of Kenya, to facilitate the development of the information and communications sector (including broadcasting, multimedia, telecommunications and postal services) and electronic commerce to provide for the transfer of the functions, powers, assets and liabilities of the Kenya Posts and Telecommunication Corporation to the Commission, the Telcom Kenya Limited and the Postal Corporation of Kenya, and for connected purposes.

Section 5 of Act provides for the Communications Commission of Kenya whose object and purpose shall be to licence and regulate postal, information and communication services in accordance with the provisions of the Act.

There has also been case law on the same as seen below.


The two Petitions challenged the introduction of a Device Management System (DMS system) device into the networks of the Interested Parties and Respondents respectively (Safaricom Limited, Airtel Networks Kenya Limited and Orange-Telkom Kenya) who provided various telecommunication services to their customers and those services included mobile telephone, data, internet and mobile money transfers. The Petitions alleged that the device had the capacity to access customers’ information, which could only be accessed in a manner prescribed by law and was therefore said to be a violation of the right to privacy. The Petitions also challenged the manner in which the device was introduced and that there was no guarantee that the information accessed would remain confidential.

The Court held that that the decision, policy or regulation seeking to implement the DMS System was adopted in a manner inconsistent with the provisions of the Constitution, section 5 (2) of KICA and the Statutory Instruments Act and the plan seeking to integrate the DMS to the Parties’ networks was a threat to the subscribers privacy, hence a breach of the subscribers’ constitutionally guaranteed rights to privacy, therefore unconstitutional, null and void.

It is clear that Kenyan law as it stands holds it unconstitutional to access customers’ mobile network information as it’s a breach of the right to privacy. The cell-site data conveyed to the mobile network providers by customers while establishing communication arouses reasonable expectation of privacy, the same as the holding by the United States Supreme Court which has held that the resulting business records are entitled to constitutionally guaranteed rights to privacy in and the Government could not breach that right to privacy by want of use of compulsory production of cell-site data records.
Court Declares Amendment Of Sections 35A (5) And 35I (B) Of The Pharmacy And Poisons Act Unconstitutional
Republic v The National Assembly and 7 others ex-parte Dr. George Wang’anga’a
High Court at Nairobi,
Miscellaneous Civil Application 391 of 2017
January 17, 2018
G V Odunga, J

Brief Facts
The Application before the Court challenged the Constitutionality of the Clinical Officers (Training, Registration and Licensing) Bill, 2016 in which section 34 of the said subject Bill amended sections 35A (5) and 35I (b) of the Pharmacy and Poisons Act. The said amendments were inserted by the National Assembly in the Bill during the Committee Stage through a notice of motion. It was averred that the substantive amendment to the Act in the said Bill was a different subject matter and unreasonably or unduly expanded the subject of the Bill and was not in logical sequence to the subject matter of the Bill. It was further stated that the Respondents’ failure to refer the impugned amendments of the Bill to the Senate violated articles 109, 110, 112,113, 122 and 123 of the Constitution of Kenya, 2010 (Constitution) and National Assembly standing orders No. 121 to 123

Issues
i. What was the extent and role of the judiciary in reviewing parliamentary proceedings?
ii. Whether the process of enactment of the Clinical Officers (Training, Registration and licensing) Bill 2016 under which section 34 intended to amend sections 35A (5) and 35I (b) of the Pharmacy and Poisons Act was unconstitutional for:
   a) Lack of public participation as provided for in article 10 and 118 of the Constitution of Kenya, 2010;
   b) For being unrelated to the substance of the Clinical Officers (Training, Registration and licensing) Bill 2016.
   c) Failure to involve the Senate in legislation that involved Counties.
iii. In regards to the shortcomings above, whether the presidential assent to the Bill was unconstitutional despite the Attorney General giving the Bill a clean bill of health.
iv. Whether the Parliamentary Powers and Privileges Act No. 29 of 2017 was meant to act retrospectively and therefore limit the Applicants’ right to challenge amendments to the Pharmacy and Poisons Act.

Holdings pertinent to Law Reform
1. The Constitution of Kenya, 2010 had been hailed as being a transformative Constitution as opposed to a structural Constitution; it was a value-oriented one. Its interpretation and application had to therefore not be a mechanical one but had to be guided by the spirit and the soul of the Constitution itself as ingrained in the national values and principles of governance espoused in the preamble and inter alia article 10 of the Constitution.
2. Kenya’s Constitution embodied the values of the Kenyan Society, as well as the aspirations, dreams and fears of the nation as espoused in article 10 of the Constitution. It was not focused on presenting an organisation of Government, but rather was a value system itself hence not concerned only with defining human rights and duties of individuals and state organs, but went further to find values and goals in the Constitution and to transform them into reality. Therefore, the Court was required in the performance of its judicial function to espouse the value system in the Constitution and to avoid the structural minimalistic approach.
3. The general rule or principle applying to legislation is that there is a presumption of constitutionality of statutes. Under article 1 of the Constitution, sovereign power belonged to the people and it was to be exercised in accordance with the
Constitution. That sovereign power was delegated to Parliament and the Legislative Assemblies in the County Governments; the National Executive and the Executive structures in the County Governments; the Judiciary and independent tribunals.

4. There was however a rider that the said organs had to perform their functions in accordance with the Constitution. The Constitution of Kenya, 2010 having been enacted by way of a referendum, was the direct expression of the people’s will and therefore all State organs in exercising their delegated powers had to bow to the will of the people as expressed in the Constitution. Article 2 of the Constitution provided for the binding effect of the Constitution on state organs and proceeded to decree that any law, including customary law, which was inconsistent with the Constitution, was void to the extent of the inconsistency, and any act or omission in contravention of the Constitution was invalid.

5. Where the Court was convinced that the orders ought to have been granted, the Court would not shy away from doing so. The Constitution was a living thing: it adopted and developed to fulfil the needs of living people whom it both governed and served. Like clothes, it ought to have been made to fit people and never to have been strangled by the dead hands of long discarded custom, belief, doctrine or principle. It had, of necessity, to adapt itself; it could not lay still. It had to adapt to the changing social conditions.

6. The doctrine of constitutionality of statutes, when in conflict with the constitutional obligation of the Court to investigate the constitutionality of a statute, had to give way to the latter. When any of the State Organs or State Officers stepped outside its mandate, the Court would not hesitate to intervene and that was appreciated. Therefore, the Court vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under article 165(3) of the Constitution, had the duty and obligation to intervene in actions of other State Organs where it was alleged or demonstrated that the Constitution had either been violated or threatened with violation.

7. As the Petition alleged a violation of the Constitution by the Respondents, it was the Court’s finding that the principle of independence of the Legislature did not inhibit the Court’s jurisdiction or prohibit it from addressing the Applicant’s grievances so long as they stemmed out of alleged violations of the Constitution. To the contrary, the invitation to do so was most welcomed as that was one of the core mandates of the Court.

8. The Constitution is the Supreme Law of the country and all State Organs have to function and operate within the limits prescribed by the Constitution. In cases where they step beyond what the law and the Constitution permit them to do, they could not seek refuge in independence and hide under that cloak or mask of inscrutability in order to escape judicial scrutiny.

9. The doctrine of independence had to be read in the context of Kenya’s Constitutional framework and where the adoption of the doctrine would clearly militate against the constitutional principles that doctrine or principle had to bow to the dictates of the spirit and the letter of the Constitution and the enabling legislation. It was not only the role of the Courts to superintend the exercise of such powers but their constitutional obligation to do so. In effect, the Legislature’s independence under the Constitution only remained valid and insurmountable as long as it operated within its legislative and constitutional sphere. Once it left its stratosphere and entered the airspace outside its jurisdiction of operation, the Courts were then justified in scrutinizing its operations.

10. The Constitution instilled a culture of justification, in which every exercise of power was expected to be justified. The stages through which a bill passed before being enacted were to be found in the National Assembly Standing Orders 120 to 139, which were made pursuant to the provisions of articles 109 to 113, 119, 122 and 123 of the Constitution and those stages were:

i. The publication of the Bill;

ii. Determination through concurrence of speakers of both houses on whether or not the Bill concerned County Governments;

iii. First Reading of the Bill;

iv. Committal of the Bill to the rel-
played distinctive and complimentary roles with one body having the regulatory role while the other ensuring quality assurance compliance, being two complimentary regulatory bodies under the Pharmacy and Poisons Act. While the Court appreciated that it was within the province of Parliament to delineate the respective roles where an enactment left a particular role unregulated without expressly stating that was its intention, it could only be deemed as a failure to consider relevant material.

14. It was true that Parliament had vide sections 62 & 63 of the Health Act, 2017 contemplated a single regulatory body for the regulation of health products and health technologies. However, what was contemplated was the creation of such body through future legislative enactment in accordance with the aforementioned sections. The effective and operational statutory law on regulation of medicines remained the Pharmacy and Poisons Act, Cap 244 Laws of Kenya, since apart from the purported transfer of sampling of medicinal samples under production and carrying out analytical testing for issuance of certificate of Analysis provided for under sections 35A (5) and 35K of Pharmacy and Poisons Act, it was the 3rd interested party’s mandate to issue certificate of analysis.

15. The effect of the amendment was clearly not just a formal amendment but a substantive one that required public input. The failure to seek the public input could not therefore be brushed aside. The Court not only had the power but the obligation to determine whether a particular legislation was in fact and in substance enacted in accordance with the Constitution and not to just satisfy itself as to the formalities or the motions of doing so.

16. By introducing totally new and substantial amendments to the Pharmacy and Poisons Act at the Committee Stage of the whole house, which was neither consequential amendment nor amendment within statute law (Miscellaneous) Bill, but concerned drugs-control of manufacture of medicines, Parliament not only set out to circumvent the constitutional requirements of public participation but, with due respect, mischievously short-circuited and circumvented the relevant Committee to commit it to public participation;

v. Second Reading of the Bill;
vi. Committal of the Bill to the Committee of the whole house;
vii. Third Reading of the Bill and passage into law.

It was clear that public participation took place between the First Reading and the Second Reading. In that case, the impugned amendments were introduced at the Committee Stage well after the period for the public participation.

11. Public participation was one of the national values and principles of governance enunciated in article 10 of the Constitution which bound all State organs, State officers, public officers and all persons whenever any of them inter alia enacted, applied or interpreted any law. One of the principles thereunder was the participation of the people. Therefore where the principle of public participation was not inculcated in the process of legislative enactment, the process of such enactment could not be said to meet the constitutional threshold. In the instant case, it was not contended that after the amendment the Bill was re-subjected to public participation. The result was that the public's input in the said amendment was ignored.

12. It was clear that the introduced amendment to the Pharmacy and Poisons Act, deleted section 35I (b) and also substituted the Director of National Quality Control Laboratory with the Pharmacy and Poisons Board in section 35A (5). In addition, it was clear that the aim and or motivation of the amendment was to transfer the GMP inspection functions from the National Quality Control Laboratory to the Pharmacy and Poisons Board, the resultant effect of the deletion of section 35I(b) which dealt with inspection of premises and issuance of certificates of compliance, left that important power unregulated. Therefore, the Applicant’s view that the effect of the amendment was an exposure of Kenyan citizens to dangerous substandard and counterfeit medicines could not be without merit.

13. By acting in the manner it did, the 1st Respondent improperly ignored the Court's earlier decision where it held that the Board and the Laboratory...
17. What was before the House was Clinical Officers (Training, Registration and Licensing) Bill, 2016 which repealed the existing Clinical Officers (Training, Registration and Licensing) Act, Cap. 260 of the Laws of Kenya which made provision for training, registration and licensing of Clinical Officers; to regulate their practice and to provide for the establishment, powers and functions of the Clinical Officers Council. The Pharmacy and Poisons Act on the other hand was an Act of Parliament to make better provision for the control of the profession of pharmacy and the trade in drugs and poisons.

18. Section 34, instead of 35 because section 22 was deleted, of the Clinical Officers (Training, Registration and Licensing) Act, which came in by virtue of the said amendment however read that the Board (Pharmacy and Poisons Board) or any person authorized in writing by the Board would have power to enter and sample any medicinal substance under production in any manufacturing premises and certify that the method of manufacture approved by the Board was being followed.

19. There was absolutely no nexus between section 34 and the rest of the sections of the Clinical Officers (Training, Registration and Licensing) Act. Clearly by amending the provisions of the Pharmacy and Poisons Act, which had nothing to do with the objectives of the Clinical Officers (Training, Registration and Licensing) Bill, 2016, the 1st Respondent purported to deal with a different subject and proposed to unreasonably or unduly expand the subject of the Bill and in a manner not appropriate or in logical sequence to the subject matter of the Bill. In other words, the 1st Respondent exceeded its powers conferred on it by the Constitution as read with the Standing Orders.

20. The 1st Respondent deleted a provision of the Act which there was no express intention to be deleted. In so doing, the 1st Respondent failed to consider or bound to ignore in making the decision were determined by construction of the statute conferring the discretion. Statutes might expressly state the considerations that need to be taken into account or ignored. Otherwise, they had to be determined by implication from the subject matter, scope and purpose of the statute. Had the 1st Respondent considered the effect of the late amendments no doubt it would not have passed the same in the manner it did.

21. It was expressly provided that control of drugs and pornography was the function of county governments. The Pharmacy and Poisons Act dealt with control of drugs. Therefore a bill proposing amendments to that Act ought to have necessarily been deemed as a Bill concerning county governments pursuant to article 110 of the Constitution and therefore ought to have been referred to the Senate.

22. There was no evidence of concurrence of the Speaker of the Senate having expressed that the Bill did not concern county governments. However, the final decision as to whether a bill concerned county governments had to rest on the Court. While the opinions of the Speakers of the two houses were entitled to their respect, the ultimate decision was vested in the Court. There was no evidence that the Bill in question was referred to and passed by the Senate as ought to have been done. Parliament as a law making body ought to have set standards for compliance with the Constitutional provisions and with its own Rules.

23. As regards the advice of the Attorney General, that opinion ought to have itself been lawful. In the case, with due respect to the office of the Attorney General, in a rather convoluted opinion, misdirected the President on the legality of the impugned amendments. The Attorney General, rightly in the Court’s view opined that section 34, which was unrelated to the substance of the Bill and which was inserted during the Committee Stage, intended to amend sections 35A(5) and 35I(b) of the Pharmacy and Poisons Act. He further opined that the National Assembly might not have acted strictly in accordance with its Standing Orders.

24. Despite those clear grave misgivings, the Attorney General proceeded to give the
whole Bill a clean bill of health by confirming that the Bill was consistent with the provisions of the Constitution and other existing laws and that the President could assent to the Bill, if he approved. The opinion was unsupported by the law and the authorities. The Bill ought not to have been signed in the manner in which it was passed and the Attorney General ought to have advised the President along those lines as was rightly proposed by the Chief of Staff and Head of the Public Service on April 18, 2017.

25. Consequently, the manner in which sections, 35A(5) and 35I(b) of the Pharmacy and Poisons Act, were amended by the impugned Clinical Officers (Training, Registration and Licensing) Act, was clearly unprocedural, unlawful and ultra vires and was consequently unconstitutional.

26. The Court was aware that on July 21, 2017, the Parliamentary Powers and Privileges Act, No. 29 of 2017 was assented to by the President. Under section 38(1) of the said Act the National Assembly (Powers and Privileges) Act was repealed. However the commencement date of the Act was indicated as August 17, 2017. Those proceedings were commenced before the commencement date of the said Act. Section 11 of the Parliamentary Powers and Privileges Act provided that no proceedings or decision of Parliament or the Committee of Powers and Privileges acting in accordance with the Act would be questioned in any court.

27. The general rule was that all statutes other than those which were merely declaratory or which relate only to matters of procedure or evidence were prima facie prospective and retrospective effect was not to be given to them unless by express words or necessary implication, it appeared that that was the intention of the legislature. There was no stipulation in the Parliamentary Powers and Privileges Act that it was meant to operate retrospectively. Before its commencement, the ex parte Applicant had the right to challenge the amendments to the Pharmacy and Poisons Act. Therefore, section 11 of the Parliamentary Powers and Privileges Act, No. 29 of 2017, assuming without deciding that the provision was in the first place constitutional, did not apply to those proceedings.

28. Section 12 only dealt with civil proceedings. Those were judicial review proceedings. High Court in the exercise of its judicial review jurisdiction exercised neither a criminal jurisdiction nor a civil one since the powers of the High Court to grant judicial review remedies was sui generis. However, in conducting its proceedings, Parliament was bound to adhere to the provisions of the Constitution and where its actions contravened the Constitution; the same was null and void.

Application allowed.

i. An Order of Certiorari removing into the Court for the purposes of being quashed all attendant proceedings and the decision of the 1st Respondent dated April 5, 2017 that passed the motion to amend sections 35A(5) & 35I(b) of the Pharmacy and Poisons Act under Clinical Officers (Training, Registration & Licensing) Bill 2016;

ii. A declaration that the amendment to sections 35A(5) & 35I(b) of the Pharmacy and Poisons Act under section 34 of the Clinical Officers (Training, Registration & Licensing) Bill 2016 was passed in a manner that breached the express provisions of the Constitution and was thus unconstitutional, null and void.

iii. Costs awarded to the Applicant.
Legality of the Offence of Criminal Defamation

By Linda Awuor & Kakai Toili

Introduction:
Criminal defamation can be defined as the action damaging the good reputation of someone that constitutes a crime and is subject to criminal penalties. Criminal defamation occurs when one purposely communicates to any person orally or in writing, any information which he or she knows to be false and knows will tend to expose any other living person to public hatred, contempt or ridicule. The issue of the legality or constitutionality of criminal defamation has been handled by various courts in Africa in landmark judgments.

Comparative case law analysis:
The African Court on Human and People’s Rights in Lohe Issa Konate v. Burkina Faso, Application No.00412013 was faced with the issue of the legality of criminal defamation. The Court held that restrictions on freedom of expression had to be assessed within the context of a democratic society and such an assessment had to be ascertained whether that restriction was a proportionate measure to achieve the set objective, the protection of the rights of others.

The Court held that the Respondent State failed to show how a penalty of imprisonment was a necessary limitation to freedom of expression in order to protect the rights and reputation of members of the judiciary. The Court further held that sections 109 and 110 of the Information Code and section 178 of the Penal Code of Burkina Faso on the basis of which the Applicant was sentenced to a custodial sentence, was contrary to the requirements of article 9 of the African Charter on Human and Peoples’ Rights (the Charter) and article 19 of the International Covenant on Civil and Political Rights (the Covenant).

The Court went on to hold that violations of laws on freedom of speech and the press could not be sanctioned by custodial sentences unless it was serious and very exceptional circumstances like incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people.

The Court was of the view that sentencing of the Applicant to a 12 months term of imprisonment for defamation, contempt and insult was inconsistent with the Charter, the Covenant and the Revised ECOWAS Treaty. Consequently, the Court held that enforcement of such laws amounted to a violation of the relevant human rights provisions in that regard.

The Court further held that the custodial sentence under the Burkina Faso's Information Code and the Penal Code constituted a disproportionate interference in the exercise of the freedom of expression by the Applicant as a journalist.

The High Court of Kenya in Jacqueline Okuta & another v Attorney General & 2 others, Petition No 397 of 2016 was also faced with a similar issue. The Court in this case held that the freedom of speech and expression carried with it the right to publish and circulate one’s ideas, opinions and views with complete freedom and by resorting to any available means of publication; subject to such restrictions as could be legitimately imposed under article 24 of the Constitution of Kenya. The Court went on to hold that the reasonable restrictions were those which were meant to prevent the expression of thought which was intrinsically dangerous to public interest and would not include anything else. The Court further held that the enabling power in article 24 of the Constitution to impose reasonable restrictions on the right conferred by article 33 of the Constitution was intended to safeguard the interests of the State and the general public and not of any individual, and therefore article 24 could not be regarded as the source of authority for section 194 of the Penal Code which made defamation of any person an offence.

The Court also held that defamation of an individual by another individual was a civil wrong or tort for which the common law remedy was an action for damages. The Court went on and stated that defamation of a private person by another person could not be regarded as a crime under the constitutional framework and hence, what was permissible was the civil wrong and the
remedy under civil law.

The Constitutional Court of Lesotho was also faced with this issue in Basildon Peta v Minister of Law, Constitutional Affairs and Human Rights and 2 Others, Constitutional Case No. 11 of 2016. Section 104 of Lesotho’s Penal Code provided that a person who publishes defamatory matter concerning another person commits the offence of criminal defamation. The Court in this case held that criminalizing defamation had a chilling effect on the journalistic freedom of expression, resulting in self-censorship by journalists and a less informed public. The Court cited with approval calls by the African Commission and United Nations Special Rapporteur on Freedom of Expression which encouraged states to repeal criminal defamation laws. The Court held that the extent of the section 104 of the Act encroached on the freedom of expression was not reasonable and demonstrably justified in a free and democratic society and that the crime of defamation had no place in Lesotho’s constitutional dispensation.

**Conclusion:**

From the foregoing, it is evident that courts in the region are moving towards doing away with criminal defamation. The courts dealt with criminal defamation in the context of a free and democratic society and viewed criminal defamation as encroaching on the freedom of expression which was not reasonable. The courts gave instances in which the freedom could be restricted and they included circumstances which were intrinsically dangerous to public interest. The courts were of the view that defamation was a civil wrong between a private person by another person and could therefore not be regarded as a crime.
Kenya Law Visits Kwetu Home Of Peace as part of it’s Annual CSR initiative.

Kenya Law Staff and children of Kwetu home of peace pose for a picture. Kenya Law welfare association visited the children’s home in Madaraka on Friday the 20th of April 2018 and donated food stuff, stationery, books, school bags, shoes, socks and other personal effects.

Nelson Tunoi, Chairman Kenya Law Welfare association receives a certificate of appreciation from the Director Kwetu Home of Peace Sr. Carol. Kenya Law welfare association visited the children’s home in Madaraka on Friday the 20th of April 2018 and donated food stuff, stationery, books, school bags, shoes, socks and other.

Kenya Law at the 5th Annual Devolution Conference

Kenya Law’s Senior Law Reporter Mr. Christian Atoka (Left) interacts with members of the public during the 5th Annual Devolution Conference held at Kakamega High School from 23rd to 27th April 2017.
Kenya Law Showcases at the Employment and Labour Relations Court Open Day (ELRC)

A Judicial Officer is all smiles after receiving a free copy of the Constitution from the Kenya Law stand during the Employment and Labour Relations Court Open Day (ELRC) held at the Milimani Commercial Court on 4th May, 2018.

Kenya Law Knowledge exchange Programme


Kenya Law’s team Wambui Kamau (Team Leader LoK), Linda Awar (Team Leader R&D) and Andrew Halomyere (Senior Law Reporter) presents the new Kenya Law Report volume to Prof. Moni Wekesa, Dean, School of Law, Daystar University.
Kenya Law Senior Law Reporters, Christian Ateka and Njeri Githanga (centre) together with a team from the Judiciary of Tanzania during a training session on Case Summarization for the Judiciary of Tanzania and TanzLII in Dar es Salaam, Tanzania.

Director of the African Legal Information Institute (Africanlii) centre together with representatives from Kenya Law (National Council For Law Reporting), Njeri Githanga (right) and Christian Ateka during a workshop on Case Summarization for the Judiciary of Tanzania and TanzLII in Dar es Salaam, Tanzania.

The Devolution Case Digest gives a synopsis of selected cases on devolution emanating from the Kenyan Courts and draws comparative lessons from other commonwealth jurisdictions.

The Digest is arranged thematically along the following seven key areas: Public Service; Public Finance Management; Equity and Inclusivity; Removal from Office and Suspension of County Governments; Transition to Devolved Government and Transfer of Powers and Functions; Intergovernmental Relations as well as Public Participation and Citizen Engagement.
It is not Compulsory for Liquidation of a Company to be an Option of Last Resort Where a Company Failed to Pay its Debts.

Children Adoptees Have a Right to Know the Identity of their Parents, the Parent's Origin and the Existence, if any, of their Siblings.

Government's Access to Cell-site Records to Track Physical Movements of Individuals Contravenes their Reasonable Expectation of Right to Privacy Protected Under the Fourth Amendment of the Constitution of the United States.