REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTITIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.500 OF 2013

BETWEEN

ZIPPORAH SERONEY…..……..……1ST PETITIONER

MARGARET CHEPKOSGEI……..……...…….2ND PETITIONER

ROSE JEMUTAI SERONEY……...……..3RD PETITIONER

FLORENCE CHEPCHIRCHIR SERONEY……....……4TH PETITIONER

DAVID KIPKEMBOI……..……..…5TH PETITIONER

CHRISTINE CHEPKORIR SERONEY……...6TH PETITONER

AND

DANIEL TOROITICH ARAP MOI…….1ST RESPONDENT

ATTORNEY GENERAL…….……2ND RESPONDENT

RULING

Introduction

1. Before me are two applications that seek the striking out of the present Petition. The first is dated 29th April 2014 by the 1st Respondent and the second is dated 21st August 2014 by the 2d Respondent. They are premised on **Rules 3(8) and 5(d)(i)** of the **Constitution** of Kenya **(Protection of Rights and Fundamental Freedoms) Practice** and **Procedure Rules, 2013 ("The Mutunga Rules")**

2. To put matters into context, the Petition dated 17th October 2013 was filed by the Petitioners, being members of the family of the late John Marie Seroney, a former Member of Parliament. Their substantive complaint is that as a result of the late Seroney's detention without trial between an unclear date in 1975 and 11th December 1978, their fundamental rights were breached and/or violated by the actions of the 1st Respondent and of agents and/or servants of the Government of Kenya. That they are therefore entitled to damages for breach of those rights under the Constitution and also under the **Law Reform Act** for pain and suffering.

The Application dated 29th April 2014

3. In the above application, the 1st Respondent contends that the Petition as drawn does not disclose any cause of action capable of being litigated as a constitutional question because;

i. It seeks constitutional redress against an individual who was not the custodian of Fundamental Rights and Freedoms under the **Repealed Constitution**.

ii. The 1st Respondent was not a guarantor of the Petitioners' Fundamental Rights and Freedoms under **Chapter V** of the **Repealed Constitution.**

iii. The Fundamental Rights and Freedoms under **Chapter V** of the Repealed Constitution of Kenya (Repealed) were owed, guaranteed, secured by the State and are enforceable as against the Government as a Respondent.

That in any event, the claim under the **Law Reform Act** is time-barred.

4. It is also the 1st Respondent's contention that this Court lacks the jurisdiction to determine the Petition as the detention of the late John Marie Seroney was made pursuant to the law as existing at the time and any complaint regarding such detention ought to have been raised with the independent tribunal mandated to deal with such a complaint under **Section 83(2)(c)** of the **Repealed Constitution**. Further, since the late Seroney did not himself raise any complaint regarding his detention by processes known to the **Preservation of Public Security Act** as read with **Section 85** of the **Repealed Constitution**, this Court lacks jurisdiction to entertain the Petition.

5. In addition to the above, the 1st Respondent has contended that the Petitioners are non-suited ad/or lack the capacity to institute these proceedings under **Section 84(1)** of the **Repealed Constitution**.

6. I will return to the submissions by Counsel when determining the specific issues raised by the parties to the Application.

Application dated 21st August 2014

7. The 2nd Respondent's Application is premised on the following grounds;

"(i) The Petition does not disclose any claim against the 2nd Respondent or the agencies it represents.

(ii) The Petition does not allege any particular violation of the Petitioners' or John Marie Seroney's (deceased) rights and freedoms by the Government.

(iii) The violations as particularized under paragraph 14(a) – (c) of the Petition are not attributable to the Government and or its agents.

iv. ***It is admitted in paragraph 12 of the 1st Petitioner's Supporting Affidavit that her husband was a victim of political transgressions and was subjected to harassment on account of the 1st Respondent's strict instructions.***

v. ***As a result, the 1st Petitioner severally sought audience with the 1st Respondent who declined to see her. The 1st Petitioner then filed this Petition in the hope that the Court would compel the 1st Respondent's attendance thereby according her the opportunity to cross-examine him.***

vi. ***It is in the Court record that the 1st Petitioner was adamant that she only wanted to cross-***

examine the 1st Respondent in Court.

vii. ***An oral application to that effect was made by the Petitioner on 25th March 2014 against her Advocate's advice. The explanation offered by her Advocate was that the Petitioner understood that the former Head of State would come to face her.***

viii. ***The Court dismissed the said Application on 25th March 2014 on grounds that the 1st Respondent is not an accused person and that the Court could not compel his attendance.***

ix. ***It is therefore obvious that the Petitioner does not have any claim against the 2nd Respondent and does not seek any remedy as against the 2nd Respondent. It is only just that the 2nd Respondent is removed from the suit."***

Petitioners' Response to the Applications

8. On 21st May 2014, the Petitioners filed a response to the 1st Respondent's Application dated 29th April 2014 and contended that reading paragraphs 14 of the Petition, a specific cause of action is disclosed as against the 1st Respondent who at all material time was either the Vice President and/or Minister for Home Affairs and therefore a State agent duly liable, jointly and severally, with the State of Kenya as represented by the 2nd Respondent in the present proceedings.

9. Further, that the Petition as drawn has disclosed such a cause of action as to warrant a response which was duly filed by the 1st Respondent notwithstanding the fact that the 1st Respondent has misapprehended the Petitioners' claim as solely based on the late Seroney's detention without trial.

10. In any event, that matters requiring proof by the tabling of evidence cannot be dismissed as disclosing no cause of action before the said evidence has been interrogated at the hearing thereof.

11. Lastly, that they are suited to file their Petition under **Article 22(1)** and **(2)** of the **Constitution 2010** because the State, manifested by individuals who occupy or occupied State offices such as the 1st Respondent, ought to be tried pursuant to the applicable law including the **Constitution** and the **Government Proceedings Act** by virtue of **Section 20(1)** of the **Repealed Constitution**.

12. For the above reasons, the Petitioners pray that the 1st Respondent's Application ought to be dismissed with costs.

13. In their submissions filed on 10th September 2014, the Petitioners adopted the above responses as sufficient to answer the 2nd Respondent's Application dated 21st August 2014.

Determination

14. Whereas the substantive prayer (save that of costs) that the Respondents seek is that the Petition ought to be struck out, the issues raised for determination of the two Applications are the following;

i. Whether the Court has jurisdiction to hear and determine the Petition.
ii. Whether the Petitioners are non-suited to institute the Petition under **Section 84(1)** of the **Repealed Constitution.**
iii. Whether the Petition discloses any cause of action against the Respondents, individually.
iv. Whether the Petitioners' claim under the **Law Reform Act** is time-barred.

15. I propose to determine all the issues as I have framed above and conclude by determining whether the Petition should be struck out as prayed. However before doing so, it is important to address the jurisdiction to strike out a Constitutional Petition.

16. In that regard, **Rule 3(8)** and **Rule 5(d) (i)** of the **Mutunga Rules** which was cited by both Respondents as the basis for their Applications provide as follows;

> ***"3 These Rules shall be interpreted in accordance with Article 259(1) of the Constitution and shall be applied with a view to advancing and realizing the –***
>
> 1. **…**
> 2. **…**
> 3. **…**
> 4. **…**
> 5. **…**
> 6. **…**
> 7. **…**
> 8. ***Nothing in these Rules limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."***
>
> ***AND***
>
> ***"5 (d)(i)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-***
>
> 1. ***Order that the name of any party improperly joined , be struck out; and***
> 2. ***…."***

17. A plain reading of the above provisions and the **Mutunga Rules** would show that the striking out of Petitions has not been specifically provided for but the names of Parties improperly joined may be struck out on the application of a party or by the Court *suo motu*. The inherent jurisdiction of the Court to do all such things as may be necessary in the interests of justice is however saved and the question therefore is whether the striking out of the Petition is necessary for the reasons advanced by the Respondents.

18. Further, in exercise of that jurisdiction, this Court will be the last to strike out any Constitutional Petition that has a modicum of comprehension even if it is inelegantly drafted. As was stated in **Trusted Society for Human Rights Alliance vs AG & 2 Others Petition No.229 of 2012,** where a Petition that is not the epitome of precise, comprehensive or elegant drafting nonetheless raises concrete issues to warrant substantive consideration by the Court, the same must then be determined on its merits.

19. Similarly, I am alive to the dicta of Onguto J. in **Chandoo vs Hussein Petition No.374 of 2015** where he stated that no Court should be in a hurry to declare a Petition fatally defective and that instead all attempts to ensure that the ends of justice are met, must be made. I am also aware that there is debate as to whether the principle in **Anarita Karimi Njeru [1976 – 1980] KLR 1272** that there must be reasonable precision in the framing of issues in Constitutional Petitions, is good law but I am certain that none of the higher Courts has expressly overruled it – See **Trusted Society of Human Rights Alliance and Peter M. Kariuki vs AG C.A 79 of 2012** per the Court of Appeal. Having so said, I must now settle the other issues arising.

<u>Whether the Court has jurisdiction to determine the Petition</u>

20. In submissions by Parties, only the Petitioners addressed this question although the Applicants seemed to have abandoned it at the hearing. In any event, it is the Petitioners' position that reading **Article 23** together with **Article 165(3)** of the **Constitution**, this Court has the jurisdiction to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

21. Looking at the Petition in that context, at paragraph 14 thereof, the Petitioners have claimed that the 1st Petitioner's rights under **Article 29 (freedom and security of the Person), Article 43 (economic and**

social rights), and **Article 45(3) (equal rights in a marriage)** had been violated by the Respondents. **Article 28 (right to inherent human dignity)** has also been cited.

22. Without belabouring the point, once a party has invoked **Articles 23** and **165(3) (d)** of the **Constitution,** then this Court is automatically clothed with jurisdiction to determine the issues raised. Jurisdiction is different from the merits or lack thereof of the claims made. Merit depends on the evidence and the law and not on the mandate of the Court to determine the issues placed before it for determination. The Respondents, as I have stated above did not address the issue at all and that is all there is to say on that issue.

23. In the end, I find and hold that this Court has jurisdiction to hear and determine the issues raised in the Petition herein.

Whether the Petitioners are non-suited to institute the Petition under Section 84(1) of the Repealed Constitution

24. According to the Respondents, a complaint under **Section 84(1)** of **Repealed Constitution** can only be made by a person who is directly affected by the allegations of contraventions of the Bill of Rights save that in the case of a detained person, another person other than the detainee can do so. That in the present case, while the late John Marie Seroney was indeed detained in 1975, no Petition was filed on his behalf during the said period of detention and the Petitioners cannot now purport to do so on his behalf or on behalf of his estate.

25. Secondly, that reliance on the **Law Reform Act, Cap.26** is misguided as Constitutional Petitions are neither civil nor criminal in nature and therefore the said Act cannot be invoked in *sue generis* constitutional actions. Reliance in that regard has been made on the decision in **Chawana & Others vs Kenya Defence Forces & Others [2014] eKLR.**

26. Thirdly, that the Petitioners have relied on **Article 22(1)** and **(2)** of the **Constitution 2010** to anchor their claims but that the actions complained of were undertaken in 1978 and therefore the **Constitution 2010** cannot be applied retrospectively. Reliance in that regard has been placed on the decisions in **Waga vs AG Petition No.94 of 2011** and **Shumari Njiroine & Anor vs Naliaka Marovo [2014] eKLR.**

27. On their part, the Petitioners submitted that the **"action is brought under the current Constitution and not the Repealed Constitution and they rely on Section 6 of Schedule VI"** which states that **"except to the extent that this Constitution expressly provides to the contrary, all rights and obligations, however arising of the Government of the Republic and subsisting immediately before the effective date shall continue as rights and obligations of the National Government or the Republic under this Constitution"**. That therefore the following rights in the **Universal Declaration of Human Rights(UDCHR)** have not been destroyed by the non-retrospectivity principle;

"(i) The right to life, liberty and security of the person (Article 3)

ii. ***The right not to be subjected to torture or to cruel inhuman or degrading treatment or punishment. (Article 5)***

iii. ***Equality before the law (Article 27)***

iv. ***The right to effective remedy for acts violating fundamental rights (Article 8)***

v. ***The right not to be subjected to arbitrary arrest, detention or exile(Article 9)***
vi. ***The right to fair and public hearing by an independent impartial tribunal(Article 10)***

vii. ***The right not to have interference with privacy, family, home or correspondence, nor to attacks upon honour and reputation (Article 12)***

viii. ***The right to property(Article 17)***

ix. ***The right to social security (Article 22)***

x. ***The right to a standard of living adequate for the health and well-being of oneself and family including food, clothing, housing and medical care (Article 25)***

xi. ***The right to education(Article 26) "***

28. In the circumstances, it is the Petitioners' case that they are properly suited and the Petition is also properly before the Court.

29. In addressing the above issue, I note that **Section 84(1)** of the **Repealed Constitution** provides as follows;

> ***"Subject to Sub-section (6), if a person alleges that any of the provisions of Section 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress. (Emphasis added]***

30. The Section requires no more than a literal interpretation namely, that a person alleging violation of fundamental rights and freedoms can directly Petition the High Court for redress but if the person is detained, another may do so on his behalf.

31. In that context and with respect, the Respondents have misunderstood the Petition as framed. While the events surrounding the detention of the late John Marie Seroney are cited at paragraphs 10-13 of the Petition, the Petitioners have set out the facts upon which they base their Petition and the facts are all about their own allegations of violations of fundamental rights and freedoms against them directly and not violations against the late John Marie Seroney per se.

32. Having said so, at paragraph 14 of the Petition, the Petitioners have set out particulars of alleged breaches against certain rights due to the late John Marie Seroney but the words used are in fact completely misplaced and are either a result of bad drafting or typographical errors and the Petition as I understand it cannot turn on them in any event.

33. Further to the above, I agree with the submissions by the Petitioners that the Petition is predicated on rights under the **Constitution 2010** and not **Section 84(1)** of the **Repealed Constitution** *per se*. Nowhere in their Petition have they cited **Section 84(1)** which was introduced to the proceedings by the submissions of the 1st Respondent only. I note also that in the Petition, the violations alleged by the Petitioners relate to **Articles 28, 29, 43** and **49(3)** of the **Constitution 2010** and not any of the provisions of the **Repealed Constitution**. Whether they are able to prove those allegations is another matter but to that extent only, they are properly before this Court.

34. The above finding must however be read with the question of non-retrospectivity of the **Constitution 2010**. While the decision in **Waga (supra)** was to the effect that **Schedule VI** of the **Constitution 2010** did not entitle the Court to retrospectively apply the Constitution, it is also true that certain rights existing in the **Repealed Constitution** are either non-derogable and no excuse of any kind can be given for their violation or transcend the principle of non-retrospectivity as well as the transitional provisions of **Schedule VI** and proof of violation thereof is all that a Court requires because they existed prior to and continue to exist in the **Constitution 2010**.

35. In that regard, I have elsewhere above also reproduced a list of fundamental rights and freedoms that the Petitioners claim were violated as against them but they are not in the Petition, as would have been expected, but were instead introduced in submissions as predicated on the **UDCHR.** It is their case in any event that those rights existed prior to the **Constitution 2010** being promulgated and are therefore

enforceable notwithstanding the non-retroactivity principle. Reading **Schedule VI** can it be said that those rights were **"subsisting immediately before the effective date"?** While the Petitioners did not relate them to provisions of the **Repealed Constitution**, I find (and of relevance) to the present Application that;

i. **Section 70** of the **Repealed Constitution** protected the right to **"life, liberty, security of the persons and the protection of the law".**

The Petitioners have invoked **Article 29** of the **Constitution** which *inter alia* protects **"the right to freedom and security of the person"** and the right not to be **"subjected to torture in any manner"** the latter having been the same as in **Section 74(1)** of the **Repealed Constitution**.

ii. **Article 28** of the **Constitution 2010** also protects the right to **"inherent dignity and the right to have that dignity respected and protected." Section 74(1)** of the **Repealed Constitution** protected the right not to be subjected **"to inhuman or degrading punishment or other treatment".** The two rights are not the same in word but the latter exists in the context of **Articles 28** and **29.**

iii. **Article 43** provides for economic and social rights such as to health, housing, clean and safe water, social security and education. These are called third generation rights and I do not know of their equivalent in the **Repealed Constitution.** I note however that the right to education is limited to education for religious instruction under **Section 8(2)** and **(3)** of the **Repealed Constitution** which is irrelevant to the present proceedings.

iv. **Article 45(3)** of the **Constitution 2010** protects the rights of parties within a marriage. I do not know of any similar provision in the **Repealed Constitution.**

From my analysis above, it follows that only the claims under **Articles 28** and **29** of the **Constitution 2010** can properly be ventilated in the present Petition based on my reading of it and the Petitioners' own submissions. All others are caught up by the principle of non-retrospectivity and the reason is obvious.

36. In holding as above, I respectfully disagree with the position taken by the Court in **B.A & Anor vs Standard Group Ltd & 2 Others [2012] eKLR** cited by the 1st Respondent as regards the right to human dignity. That right ought not to be given or taken away by the State because it is inherent in every human being. It is the basis of all other rights and inheres in every human being by fact of being a human being. As Lugakingira J. stated in **Mutikila vs AG, Dodoma HCCC No.5/1993** such a right is **"reposited in a person by reason of his birth and [is] therefore prior to the State and the law."**

I agree and my findings above are sufficient to address the issue under consideration.

Whether the Petition discloses any cause of action against the Respondents

37. Elsewhere above, I stated that the Court has jurisdiction to determine the Petition and that there are aspects of it that are justiciable and therefore triable. If that be the case, any argument that there is no cause of action against the Attorney General would be misguided because he is being sued in his capacity as legal advisor and representative of the Government of the Republic of Kenya and at paragraph 14 of the Petition, it has been alleged that the actions of the Provincial Administration, National Intelligence Service and of the Regular and Administration Police form part of the evidence to be tendered at the hearing of the Petition. If that be the case, it is difficult to find any reason why the Attorney General should be removed from the proceedings.

38. As for the 1st Respondent, at paragraph 2 of the Petition, it is stated that he had been **"sued in both his private capacity and as the President of Kenya at the material time".** At paragraph 11 thereof, it is alleged that **"although the 1st Petitioner's husband was released from detention in 1978, he was politically targeted by the 1st Respondent and was unable to get any gainful employment during the**

entire period of his post-detention life"

39. I have seen no other mention of any alleged actions of the 1st Respondent despite paragraph 14 thereof which would point to the reason why he was sued in his personal capacity. In fact at the prayers section of the Petition, no specific prayers are sought against him in that capacity and in submission, Counsel for the 1st Respondent submitted that if the Petition is predicated solely upon the detention of the late John Marie Seroney (and I have held that it is not), then the actions of the 1st Respondent in signing his detention order were undertaken in his official capacity and not in his personal capacity. Relying on the decision in **Hon. D.T. Arap Moi vs Mwangi Stephen Muriithi & Anor, C.A 240 of 2011,** he therefore submitted that a detention order is an act of the State and by implication, to have petitioned Hon. D.T. Arap Moi in his personal capacity, was an error.

40. The Petitioners in response have stated that paragraph 14 of the Petition has set out with clarity and precision what constitutes a cause of action against the 1st Respondent at a personal level.

41. For avoidance of doubt, (and I have alluded to that fact above), paragraph 14 of the Petition states as follows;

> ***"The Petitioners aver that they lost property and suffered grave violations of their fundamental rights as guaranteed by the Constitution as a result of actions of the 1st Respondent and agents of the Government including Members of the Provincial Administration, National Intelligence Service and Members of Regular and Administration Police".(Emphasis added)***

42. The particulars of the above allegation are purportedly given in the same paragraph but none touches on the 1st Respondent ,personally (a matter I again alluded to elsewhere above).

43. On the facts therefore as pleaded in the Petition, it is very difficult to find any nexus creating a cause of action between the Petitioners' complaints and any actions of the 1st Respondent in his personal capacity.

44. In saying so, I am not stating that there are no instances where a former President can be sued directly and personally for alleged human rights violations under the **Constitution 2010** if credible evidence can be adduced in that regard. **Article 143** which grants immunity from legal proceedings does not, in my view, oust the provisions of **Articles 20(1), 22, 23** and **165(3)(d)** of the **Constitution** that every person is obliged to abide by the dictates of the Constitution and therefore the decisions cited by the 1st Respondent made in the context of the **Repealed Constitution** are irrelevant to proceedings under the **Constitution 2010**. Those decisions **are Kenya Bus Service Ltd vs AG & 2 Others, Misc.13 of 2005 and Rodgers Mwema Nzioka vs AG & 8 Others Petition No.613 of 2006** both made by Nyamu J. before the **Constitution 2010** was enacted.

45. Turning back to whether the 1st Respondent was properly sued, in the case of **Hon. D.T. Arap Moi vs Stephen Mureithi (supra)** at the Court of Appeal, it was held that the Appellant (the 1st Respondent in this Petition) could not be held personally liable for any acts of detention of any person while he was acting as President of Kenya. It has been argued, and I have agreed with the Petitioners, that the Petition is not premised solely on the detention of the late John Marie Seroney. If so, what other complaints, at a personal level, can be directed at the 1st Respondent?

46. I have shown above that none can legitimately be found and what is on record is so bare as not to create any cause of action against him. I so hold.

Whether the Petitioners' claim under the Law Reform Act is time-barred

47. Before addressing this question, there is the larger question whether in fact a claim under the **Law**

Reform Act can be properly raised in a Petition under the Constitution. Without belabouring the point , the High Court under **Article 165** of the **Constitution** has *inter alia* two jurisdictions relevant to the present matter, namely;

i. Unlimited original jurisdiction in civil matters and;
ii. The jurisdiction to determine whether a right or fundamental freedom in the Bill of Rights has been denied, infringed or threatened.

48. Any interpretation or application of the **Law Reform Act, Cap.26 Laws of Kenya** would ordinarily be in the exercise of the High Court's unlimited original jurisdiction in civil matters and without going into the debate whether a purely civil matter can be addressed jointly with a claim under the Bill of Rights, the submissions by the Respondents are that reading **Section 2(1)** and **(3)** of the said **Act**, the claim thereof by the Petitioners has been caught by limitation of time and is time-barred and ought to be struck out. Further, that in fact the Petitioners, knowing very well that their claim under the **Law Reform Act** as read with the **Limitation of Actions Act** is time-barred, have clothed the same in the guise of a Constitutional Petition, an action the Court should not accept.

49. The 1st Respondent relied on the decision in **Abraham Kaisha Kanzika alias Moses Kavala Keya t/a Kapco Machinery Services & Miliano Investments Ltd vs Governor of Central Bank of Kenya & 2 Others [2006] eKLR** in support of that proposition.

50. With respect to the Petitioners, their submissions on this important question was limited to two short answers without clarification i.e.;

i. That a **"claim in tort can also be a claim under the Constitution and to the extent that the Law Reform Act, limits such a claim then to that extent the Law Reform Act would be inconsistent with the Constitution under Article 2(4)."**

ii. **"The law of limitation does not apply to claims for violation of the Bill of Rights provisions in the Constitution and this is now settled law in Kenya."**

51. In my view, the issue under consideration is not whether any claim under the Bill of rights can be limited by time nor whether the **Law Reform Act** is inconsistent with the Constitution but whether the claims in the Petition under the **Law Reform Act** are time-barred.

52. The above question is valid because in Prayer (b) of the Petition, the Petitioners seek **"damages under the Law Reform Act"** and not damages under the Constitution. Damages for breach of constitutional rights is the substance of Prayer (a) of the Petition and it is obvious that the Petitioners deliberately separated the two prayers for whatever reason. They cannot now turn around and claim that the two prayers are one and the same and then also claim that despite that fact, the **Law Reform Act** is unconstitutional.

53. Having so said, what is the claim in the Petition under the **Law Reform Act?** In the preamble to the said Act, it is stated that it is **"an Act of Parliament to effect reforms in the law relating to civil actions and prerogative writs."** Of the civil actions that are relevant to this matters, **Section 2** is important. It reads as follows;

"2. Effects of death on certain causes of action

1. ***Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of his estate; Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery.***

2. ***Where a cause of action so survives for the benefit of the estate of a deceased person, the***

damages recoverable for the benefit of the estate of that person –

a. Shall not include any exemplary damages;

b. …

c. Where the death of than person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included.

3. ***No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person unless either-***

   a. Proceedings against him in respect of that cause of action were pending at the date of his death; or

   b. Proceedings are taken in respect thereof not later than six months after his executor or administrator took out representation.

4. ***Where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of this Act, to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered.***

5. ***The rights conferred by this Part of the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the defendants of deceased persons by the Fatal Accidents Act (Cap. 32) or the Carriage by Air Act, 1932, of the United Kingdom, and so much of this Part as relates to causes of action against the estates of deceased persons' shall apply in relation to causes of action under those Acts as it applies in relation to other causes of action not expressly excepted form the operation of subsection (1).***

6. ***In the event of the insolvency of an estate against which proceedings are maintainable by virtue of this section, any liability in respect of the cause of action in respect of which the proceedings are maintainable shall be deemed to be a debt provable in the administration of the estate, notwithstanding that it is a demand in the nature of unliquidated damages arising otherwise than by a contract, promise or breach of trust"***

54. I have deliberately reproduced the whole Section for clarity and in that context and reading the submissions by the Petitioners, it is only paragraphs 7 and 20 of the Petition that seem relevant. They state as follows;

7. ***"The 1st Petitioner is accordingly a widow and administrator of the estate of John Marie Seroney and she brings this action for the benefit of herself and also on behalf of the estate and her two deceased children particularized in paragraph 8 hereinafter under the Law Reform Act, Cap26 of the Laws of Kenya and also under the Constitution of Kenya."***

AND

(20) "The nature of the Petition in respect of which damages for breaches of fundamental rights are sought is that at the time of his death, the late Hon. John Marie Seroney was aged 55 years of age. He was self-employed and the Petitioners were dependent on him for support and they were deprived of support and have suffered loss and damage."

55. It would seem therefore that prayer (b) on damages under the **Law Reform Act** flows from the above averment. If I properly understand the claim therefore, the Petitioners are saying that the Respondents

caused the death of the late John Marie Seroney and that as his dependants **"they have been deprived of his support and have suffered loss and damaged."** In addition, there is of course the claim for damages under the Constitution for alleged violation of constitutional rights.

56. In that regard, **Section 2(3) (b)** of the Act is clear that any claim under the Act such as the one filed by the Petitioners can only be admitted if it was filed six months after letters of administration had been taken out. While the Petitioners completely failed to address this issue, from the record, I have seen a ruling in **Kisumu H. C. Succession Cause No.206 of 1992 – In the Matter of the Estate of John Marie Seroney,** pleadings in **Nakuru H. C. Succession Cause No.246 of 1991** as well as pleadings in **Eldoret H. C. Succession Cause No.144 of 1990 – In the Matter of the Estate of John Marie Seroney.** It would seem that a grant of Letters of Administration had been issued to one, Paulina Jepkoech Seroney, in **Nairobi H.C Succession Cause No.35 "A" of 1984** on 21st August 1984 on 21st August 1984 and a similar grant issued to the 1st Petitioner in **Eldoret Succession Cause No.144 of 1990** on 13th February 1991. That grant is annexed to her Affidavit in support of the Petition as annexture "ZSI(i)".

57. If that be so, it follows that any claim under **Section 2** of the **Law Reform Act** should have been filed six months after the said grant was issued i.e. six months from 13th April 1991 and not simultaneously with a Petition substantively made under the Constitution. That is all there is to say on this aspect of the matter.

Conclusion

58. I have considered the Applications before me in the context of the law and the facts as I have seen them. I have however noted that the Supporting Affidavit to the Petition is strangely almost a reproduction of the Petition hence my refusal to refer to it at all.

59. Secondly, of the fourteen pages of the Petitioner's submissions, nine were spent justifying why the 1st Respondent should have been sued in his personal capacity and while the said submissions are elegant, they do not flow from the Petition as I have shown above and in the end, they were useless to the real issues in contest.

60. Thirdly, **Rule 3(2)** of the **Mutunga Rules** as read with **Rules 5** and **10** obligate this Court to do substantive justice to parties before it but similarly **Rule 8** obligates the Court to ensure that no party abuses the process of the Court.

61. The above statements are important because every party coming to this or any other Court must ensure that vendetta and revenge should not be the prime focus of litigation. I say so because on 27th February 2015, the 1st Petitioner refused to testify in open Court unless the 1st Respondent was personally in Court. This issue was revisited in the present Applications by the 2nd Respondent hence my reference to it.

62. Strange as that action appeared then, I declined the invitation to order the 1st Respondent to personally appear in Court and face the 1st Petitioner and the 1st Petitioner similarly refused to testify. Whatever her pain and whatever blame she has personally apportioned the 1st Respondent for that pain, the processes of this Court must be adhered to and only then can justice have real meaning to all parties whatever their status, past and present and whatever personal or other differences they may have.

Final orders

63. From what I have stated above, it follows that I shall not strike out the whole Petition as prayed but will instead make the following orders;

i. **As there is no cause of action against the 1st Respondent in his personal capacity, his name is struck off the proceedings. The 2nd Respondent shall remain the sole Respondent therefore.**

ii. **As the Petitioners' claim under the Law Reform Act, Cap.26 is time-barred, prayer (b) of the Petition is struck off.**

iii. **The Petition shall be fixed for hearing for evidence to be expeditiously taken on the remainder of the Petitioners' claims.**

iv. **The nature of the claim would be that each Party should bear its costs of the Application and the 1st Respondent shall specifically bear his own costs of the Application and Petition.**

64. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 18TH DAY OF DECEMBER, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Mr. Oduol holding brief for Mr. Imanyara for Petitioners

Miss Ruto holding brief for Mr. Kiplenge for 1st Respondent

Mr. Kamunya holding brief for Mr. Njoroge for 2nd Respondent

Order

Ruling duly read.

ISAAC LENAOLA

JUDGE