



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NUMBER 44 OF 2012

BETWEEN

JOHN GITHONGO1ST PETITIONER
TOM MBOYA.....2ND PETITIONER
NDUNGU WAINAINA.....3RD PETITIONER

AND

HARUN MWAU.....1ST RESPONDENT
NDURA WARUINGI.....2ND RESPONDENT
MICHAEL KIRAGU.....3RD RESPONDENT
KENNETH MUNGAI.....4TH RESPONDENT
LIVINGSTONE NGUGI.....5TH RESPONDENT

AND

GEORGE.....1ST INTERESTED PARTY
FRED BUNDE.....2ND INTERESTED PARTY
EDWIN MUTURI.....3RD INTERESTED PARTY
TAWEZA NI SISI.....4TH INTERESTED PARTY
THE ATTORNEY GENERAL.....5TH INTERESTED PARTY

RULING

Introduction

1. This ruling deals with the important issue of the jurisdiction of the High Court to determine matters concerning the Constitution and enforcement of fundamental rights and freedoms and whether the court, in exercising jurisdiction to enforce fundamental rights and freedoms, can set aside an order of a High Court judge given in a separate pending suit.

The Application

2. The application for consideration by the court is the petitioners' chamber summons dated 10th February 2012 made under the provisions of **rule 20 and 21** of the Constitution of Kenya (***Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual, High Court Practice and Procedure***) Rules (***“the Gicheru Rules”***), **the Inherent Power of the Court, sections 1A and 1B of the Civil Procedure Act and Articles 29, 32, 33, 34, 37 and 50(1)** of the Constitution. The application seeks the following prayers;

(1) *This matter be certified urgent and be heard ex-parte in the first instance.*

(2) *Pending the interpartes hearing and determination of this application, this Honourable Court do grant a conservatory order and pursuant thereto;*

(a) *Stay the ex-parte order issued by Hon. Lady Justice Nyamweya on 9th January 2012; and*

(b) *Stay the proceedings filed by the 1st respondent in Milimani High Court Civil Case Number 586 of 2012, including the inter partes hearing of the 1st respondent's application dated 27th December 2012.*

(3) *Pending the hearing and determination of the petition herein, the 1st respondent be restrained from infringing or interfering in any manner with the applicants rights as guaranteed in Articles 29, 32, 33, 34, 37, and 50(1) of the Constitution and in particular the applicants' right to comment on issues related to drug trafficking in Kenya.*

(4) *The entire proceedings filed by the 1st respondent in Milimani High Court Civil Case Number 586 of 2012 be transferred to the Constitutional Division of the High Court of Kenya and be consolidated and heard concurrently with the Constitutional petition filed by the Applicants in these proceedings.*

(5) *The ex-parte order issued on 9th January 2012 by Hon Justice Nyamweya be set aside and be discharged forthwith.*

(6) *The cost of this application be borne by the 1st respondent.*

3. The application is supported by the affidavit of John Githongo sworn on 10th February 2012. The application was filed together with a petition dated 10th February 2012. For purposes of this ruling prayers 1, 2 and 3 of the application are spent and I shall consider prayers 4 and 5.

The Civil Suit

4. The facts necessary for consideration of this application are matters of court record and may be summarised as follows.

5. The genesis of this proceedings is a civil suit filed against the petitioners by the 1st respondent, Hon. Harun Mwau being ***Nairobi High Court Civil Case No. 586 of 2011, Harun Mwau Versus John Githongo, Ndung'u Wainaina, Twaweza ni Sisi, Tom Mboya, Ndura Waruingi, Michael Kiragu, Kenneth Mungai, Fred Bunde, Edwin Muturi, George, and the Honourable Attorney General (“the civil suit”)***.

6. The plaintiff, in the civil suit, accused the defendants of orchestrating public demonstrations against

him whose effect was to defame him and infringe of his constitutionally protected fundamental rights and freedoms. He has sought general and exemplary damages for slander and libel. In addition, the plaintiff has prayed for injunctive relief and various declarations referring to the breach of his fundamental rights and freedoms under the Constitution.

7. The suit is accompanied by a notice of motion dated 27th December 2011, filed under certificate of urgency, seeking orders of injunction restraining the defendants from interfering with plaintiff's rights in particular by restraining them from engineering public demonstrations. On 28th December 2011, the court directed that the application be served and fixed it for hearing inter-parties on 9th January 2011.

8. On 9th January 2012, the application came up for hearing before Hon. Lady Justice P. Nyamweya who granted the motion in part pending hearing of the application on 14th February 2012 or until further orders.

9. The order issued by the court on 9th January 2012 ("the order") was on the following terms;

(1) That the 1st to 10th Defendants/Respondents whether acting by themselves, their servants and or agents or any of them or otherwise howsoever be and are hereby restrained from engineering public demonstrations and chaos and or in any way interfering with or disrupting or dismantling or by use of placard messages targeting the first family, the plaintiff and or any of his businesses pending the hearing of the said application or until further orders.

(2) That the 1st to 10th defendants/respondents whether acting by themselves, their servants and or agents or any of them or otherwise howsoever be restrained from engineering and or stage manage public demonstrations and or in whatsoever manner act in order to excite and provoke the Police to react pending inter-parties hearing the said application or until further orders.

(3) That in the interest of justice, fairness and the war against the narcotics drugs trafficking, and in order to facilitate this application the 1st to 9th Defendants file before the Court and provide to the plaintiff and the Attorney General with a copy of the investigation report by the US and the UK Development Partners, a copy of the alleged classified round table document in discreet circulation and or any other information relating to narcotics drugs trafficking in order to facilitate the prosecution of the culprits pending the said or further orders.

(4) That in the interest of justice, fairness and in protection of the unjustified violation of the plaintiff's dignity, reputation, constitutional rights and fundamental freedoms, the 1st to 9th defendants be and are hereby restrained from publishing, circulating, posting defending, labelling and or in any manner whatsoever making any allegations on drug trafficking about the Plaintiff, whether directly or indirectly or whether by themselves, their associates, co-conspirators, servants and or agents and or by any other person or authority, pending the hearing of the said application or until further orders.

(5) That the application be heard inter-parties on 14th February 2012.

The Petition

10. It is the order in the civil suit that has aggrieved the petitioners. They have lodged this petition under the provisions of **Article 22** of the Constitution claiming infringement of their rights and fundamental freedoms. They seek the following prayers in the petition;

(i) A declaration that the very filing of the proceedings in HCCC No. 586 of 2011 by the 1st respondent is a breach of the constitutional rights of the petitioners and in particular their freedoms of opinion, expression and media as guaranteed by Article 32, 33, and 34 of the Constitution.

(ii) A declaration that the ex parte orders obtained by the 1st respondent on 9th January 2012 and

issued by Hon. Lady Justice Nyamweya were unjustified, unconstitutional and unlawful.

(iii) A declaration that the orders sought by the 1st respondent by his Notice of Motion dated 27th December 2012 are in a number of respects in themselves unconstitutional, unlawful and unjustified and are in breach of Articles 32, 33, 34 36 and 37 of the Constitution.

(iv) A declaration that by filing the proceedings in HCCC No. 586 of 2011 and subsequently obtaining *ex parte* orders on 9th January 2011 and the 1st respondent has;

(a) Contravened the petitioners' rights individually or in association with others to assemble and hold or participate in peaceful demonstrations as guaranteed under Article 37 of the Constitution.

(b) Contravened the petitioners' rights to individually or in association with others to express, seek, receive or impart their opinions, information or ideas as guaranteed under Articles 32 and 33 of the Constitution.

(c) Contravened the petitioners' rights to individually or in association with others to a free press or media and the right to broadcast, publish and otherwise disseminate their opinions and comment on matters whether of national importance as in this case or otherwise, guaranteed under Article 34 of the Constitution; and

(d) Contravened the rules of natural justice and further contravened the petitioners' rights individually or in association with others to a fair hearing as guaranteed in Article 50(1) of the Constitution.

(e) Contravened or threatened to contravene the petitioners' rights individually or in association to not be deprived of their freedom without just cause as guaranteed in Article 29 of the Constitution.

(v) The court do make such orders and give such directions or reliefs that it may deem just.

(vi) The costs of the petition be borne by the respondents.

The Submissions

11. Ms Lubano, counsel for the petitioners, adopted the written submissions dated 23rd March 2012. She submitted that the civil suit was in essence a suit for defamation dressed in the nature of an action for the enforcement of fundamental rights and freedoms. In the circumstances, counsel contended, he ought to have filed a petition under **Article 22**.

12. The petitioners' complaint is that the order issued by Hon. Lady Justice Nyamweya was extremely wide as to prevent demonstrations of every nature. Counsel contended that the petitioners have denied all the allegations in the civil suit. The petitioners allege that Hon. Mwau's entire claim is based on false documents and fictitious events. To support this contention, they point to a meeting, which forms the basis of Hon. Mwau's case, at the British High Commission where certain youth were incited to demonstrate against Hon. Mwau. According to the petitioners' a note verbal from the British High Commission dated 9th February 2012 confirms that no such meeting was held as alleged or at all.

13. The petitioners aver that the civil suit was not brought in good faith as it sought to restrain them from commenting generally on any matters relating to narcotic drugs. They allege that the civil suit and the order issued violate the petitioners' rights and freedoms of assembly, expression and peaceful demonstration.

14. Ms Lubano submitted that the civil suit should be transferred from the Civil Division to the Constitutional and Human Rights Division for determination of the broad constitutional and human rights issues. Accordingly the petition and the civil suit should be heard together as they are based on the same facts and issues of law.

15. Counsel for the petitioners highlighted the fact that the civil suit, which seeks constitutional relief, is for all intents and purposes a suit for enforcement of fundamental rights and freedoms therefore Hon. Mwau ought to have filed a petition under **Article 22**. Ms Lubano submitted that **Rule 12** of the **Gicheru Rules** is mandatory as it provides that a petition “**shall**” be filed to enforce fundamental rights and freedoms.

16. According to counsel, no prejudice would be occasioned to parties by consolidation of both actions. Consolidation, counsel observed, would save judicial time. She maintained that Hon. Mwau will not be deprived of the right to a fair hearing and the court will determine whether the suit has merit.

17. In support of the case for consolidation, Ms Lubano relied on the case of **Intoil v Permanent Secretary, Ministry of Energy and Others [2009] 1 EA 157** where the court held that if several causes of action can conveniently be tried together, it will save the court and the parties time and costs. She also submitted that in the case of **Delphis Bank Kenya Limited v Mohamed Ashraf and Others Milimani HCCC No. 920 of 2001 (Unreported)** the court held that for a consolidation order to be issued the court must be satisfied that there are common questions of law and facts arising in the two suits and that the facts and law relied upon arise out of the same facts and transactions. Counsel submitted that this principle was satisfied in this case.

18. Ms Lubano submitted that **rule 23** of the **Gicheru Rules** is intended to avoid the duplication of proceedings. It provides that when a constitutional issue arises in the course of civil proceedings, the court may deal with the matter as a preliminary point. Counsel maintained that the application seeks that both matters be heard at the same time and there is no mischief. Moreover, counsel submitted that the wording of **rule 23** is discretionary. This case, she contended, is different as the petitioners’ grievance is that civil suit itself and the orders made therein constitute a breach of the petitioners’ fundamental rights and freedoms. It is therefore not a preliminary issue as contemplated by **rule 23**.

19. The petitioners aver that the court’s jurisdiction to enforce fundamental rights and freedoms should not be unreasonably restricted and the court should not fetter its jurisdiction by sending the petitioners away as this court has jurisdiction to set aside the order of another judge where such an order is issued in the manner infringes the petitioners’ fundamental rights and freedoms. Counsel relied on the case of **Kenya Bus Service v Attorney General Nairobi HC Misc. Application No. 163 of 2005 (Unreported)** where it was held that the court has power to prevent abuse of the process and the case of **Martha Karua v Radio Africa t/a Kiss FM and Others Nairobi HCCC No. 288 of 2004 (Unreported)** where the court emphasised that the right of direct access is a constitutional right. Counsel asserted that what the petitioners seek is intervention of the constitutional court to stop a blanket power of a High Court judge who has given what is in effect a “gagging order.”

20. Ms Lubano stated that the novelty of the case does not mean the application is defective and should not deter the court from granting the orders sought in the application. Even though the petitioners have the option of appeal and review, the procedure provided in **Article 22** is available to them where fundamental rights and freedoms are infringed. Counsel submitted that the petitioners have satisfied the test of consolidation as the civil suit is in substance a petition for the enforcement of fundamental rights and freedoms.

21. The petitioners’ case was supported by Ms Irari, counsel for the Attorney General, who submitted that the this petition and the civil case involved the same facts and issues and it was proper and in the interests of justice that the cases be consolidated and heard together.

22. The 1st respondent, represented by Mr Kibanga, opposed the application. He submitted that the alleged violation is the filing of a civil case and the filing of a case cannot amount to a violation of the right of any individual. To support this proposition counsel referred to the case of **Martha Karua v Radio Africa t/a Kiss FM and Others (Supra)**. Counsel submitted that the grievances must be addressed within the civil suit itself and the matter being a civil suit in the High Court, the judge hearing the matter has jurisdiction to determine all the issues.

23. Counsel submitted that the civil suit raises tortious issues and the fact that there are some reliefs of a constitutional nature does not change its character. Counsel suggested that the petition and the civil case did not exist independently as the petition was filed after the civil suit in order to create a basis for consolidation. He further submitted that *Martha Karua's* case dealt with a similar situation. In that case the plaintiff sued the defendants for defamation. The defendants sought to strike out the case through an application for the enforcement of fundamental rights and freedoms made within the suit. The application was dismissed and the matter ordered to proceed for trial.

24. Mr Kibanga submitted that this petition is an abuse of the court process and should be struck out. He cited the case of *Fleur Investment Limited v Permanent Secretary, Roads and Another Nairobi Petition No. 173 of 2011 (Unreported)* where the court struck out a suit for the enforcement of fundamental and freedoms where there were two existing suits in respect of the subject matter. He maintained that the order of Hon. Lady Justice Nyamweya cannot be set aside by filing a fresh petition as this court cannot sit on appeal or review of an order of a court of concurrent status. He urged the court to dismiss the application and the suit with costs.

25. Ms Mwangi for the 4th respondent opposed the application on the basis of the 4th respondent's affidavit sworn on 23rd March 2012. Ms Mwangi submitted that the petition has not disclosed any reasonable cause of action as the 2nd respondent has not infringed the petitioners' fundamental rights. She submitted that the petition is aimed at delaying the civil suit and the petitioners are in effect forum shopping by filing the petition. In her view, the judge dealing with the civil suit has jurisdiction to deal with all the matters.

26. Mr Ondieki, counsel for the 3rd respondent, adopted the written submissions dated 21st March 2012, and grounds of opposition dated 26th March 2012. Mr Ondieki submitted the High Court derives jurisdiction from **Article 23** as read with **Article 165** and whose jurisdiction is exercisable by a judge of the High Court. The current divisions are to ensure proper administration of matters and the Constitutional and Human Rights Division does not supervise the other divisions.

27. Counsel submitted that the judicial independence of a judge must also be respected by other judges and in the instant case what the petitioners seek for a judge of concurrent jurisdiction to interfere with the decision of another judge and this court should not allow this happen by transferring the matter to another division.

28. Mr Ondieki submitted that **rule 23** of *Gicheru Rules* was intended to stress the equality of arms between civil matters and petition instituted directly and that civil case and the constitutional case must be dealt with separately. **Rule 23** must be read with **Article 22** and **23** and therefore the constitutional issue must be raised in the civil case and determined separately. Counsel cited the *Martha Karua* case to support this proposition.

29. Mr Mwangi, counsel for the 4th respondent relied on the notice of the preliminary objection dated 26th March 2012. He submitted that under the *Civil Procedure Rules* this petition cannot be consolidated with the civil case. In his view, a matter commenced by way of plaint and on commenced by petition cannot be heard concurrently and the order would be impossible.

30. Counsel submitted that no attempt was made to challenge the legality of the order before Hon. Lady Justice Nyamweya and therefore what the petitioners seek this court to do is to supervise the jurisdiction of a concurrent court. Counsel drew the court's attention to **Articles 165(6)** and **(7)** which provides that the High Court has no supervisory jurisdiction over a superior court. Counsel also relied on the case of *Peter Ng'ang'a Muiruri v Credit Bank Limited & Others Nairobi Civil Appeal No. 203 of 2006 (Unreported)* where the Court of Appeal held that **section 84** of the former Constitution did not permit the High Court to intervene in concurrent proceedings of the High Court.

31. Mr Mwangi further submitted that if there are two suits relating to the same matter, the former suit prevails and nothing stops the petitioner from joining the earlier case and making the necessary

application in that suit. In his view, there are now parallel proceedings running which is against public policy and therefore the latter case should be struck out.

32. Mr Omwanza, counsel for Harun Mwau in the civil suit, opposed the application and asserted that his client, who is the plaintiff in the civil suit, did not wish to be dragged into the petition as he had filed his own case which should be determined on its own merits. He stated that his client has a cause of action and he is entitled to bring the case.

33. Counsel relied on the case of *Fleur Investment Ltd v Permanent Secretary, Ministry of Roads and Others (Supra)*. He submitted that this petition is an abuse of the process. The orders sought in the petition cannot be granted by this court as this court is being asked to impugn the orders of a judge of concurrent jurisdiction which is barred by **Article 165** of the Constitution. He urged the court to dismiss the application and strike out the petition.

Issues for Determination

34. I have heard the parties and considered the submissions and I consider that the following issues are necessary for determination;

(i) **Whether this court has jurisdiction to set aside and discharge the orders of Hon. Lady Justice Nyamweya issued on 9th January 2012.**

(ii) **It so, whether the court should consolidate this petition with the civil suit.**

Jurisdiction to enforce fundamental rights and freedoms

35. The right to enforce fundamental rights and freedoms under **Article 22** of the Constitution is a fundamental right. The right to proceed with a case for enforcement is independent and it is the obligation of that Court to ensure that the access is unhindered and devoid of obstacles that diminish the right sought to be enforced. (See *Rashid Allogoh & Others v Haco Industries Ltd Nairobi Civil Appeal No. 110 of 2001 (Unreported)* and *Maharaj v Attorney General of Trinidad & Tobago (No 2) [1979] AC 385*).

36. While **Article 22** of the Constitution provides an independent and direct access to the High Court for enforcement, it is not the exclusive means for enforcing fundamental rights and freedoms. Ms Lubano has argued that **Article 22** is exclusive and **rule 12** of the *Gicheru Rules* implies that in order to enforce fundamental rights, a petition shall be filed in accordance with that rule.

37. This reasoning cannot stand for several reasons. Firstly, the High Court under **Article 165(3)(b)** has jurisdiction to determine the question whether a right or fundamental freedom in the Bill of rights has been denied, violated, infringed or threatened. **Article 165(3)(d)** also grants the High Court jurisdiction respecting interpretation of the Constitution including a question whether any law is inconsistent with or in contravention of the Constitution and the question whether anything said to be done under the authority of the Constitution is consistent with or in contravention of the Constitution. The question whether anything said to be done or is consistent with the Constitution includes matters concerning the Bill of Rights which is part of the Constitution. This jurisdiction is not an independent jurisdiction, it is exercised in ordinary cases or disputes coming before the court and it need not be exercised through an **Article 22** application (see the case of *Peter Kaluma v Attorney General Nairobi Petition No. 79 of 2011 (Unreported)*).

38. Secondly, **Article 2(1)** of the Constitution is the supremacy clause and applies to the law and conduct and in any proceedings before the High Court, the court may be required to pronounce on fundamental rights and freedoms under the Constitution and where such a question arises then the court must decide and hold that the Constitution is the supreme law.

39. Furthermore, **Article 19(1)** provides, “*The Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies.*” **Article 20(1)** provides, “*the Bill*

of rights applies to all law and binds all State organs and all persons.” Article 21(1) imposes a fundamental duty on the State and every State organ, including the Judiciary, to, “observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.” The collective effect of these provisions is that the Constitution and Bill of Rights must permeate all proceedings before the court and the High Court, which is imbued with jurisdiction under **Article 165**, has the ability to deal with any matters of the Constitution and the Bill of Rights that arise in any proceedings before it. I must emphasise that there is only one High Court whose jurisdiction is exercisable by any High Court judge and whose jurisdiction is to give effect to the provisions of the Constitution and in particular the Bill of Rights in all cases and at all times (see *Peter Ng’ang’a Muiruri v Credit Bank Limited & Others (CA)* (Supra)).

40. The *Gicheru Rules* were promulgated under **section 84** of the former Constitution. They were intended to regulate the manner in which a party moved the court to enforce the provisions of the Bill of Rights. The procedure provided by **rule 12** is that a party invoking the direct access route to enforce fundamental rights and freedoms provided in **section 84** had to do so by way of a petition. The rules also recognised that an issue of interpretation of the Constitution could arise in any proceedings before the High Court arise therefore **rule 23** provided that the court could consider such issue a preliminary issue and deal with it.

41. The *Gicheru Rules* are preserved, subject to such alterations, adaptations, qualifications and exceptions as may be necessary to bring them in conformity with **Article 22**, by **section 19** of the **Sixth Schedule** to the Constitution until such time as the rules contemplated by **Article 22** are made by the Chief Justice.

42. I therefore conclude that the High Court, in the civil case and indeed in any civil case, has jurisdiction to hear and determine any matter concerning interpretation of the Constitution and enforcement of fundamental rights and freedoms under the Bill of Rights.

Whether Court can set aside the order in the Civil Suit

43. The petitioner’s case is a direct challenge to the order issued on 9th January 2012 in the civil case. Ms Lubano has argued forcefully that this court is not only entitled to set aside that order as it is a breach of the petitioners’ fundamental rights and freedoms but also the suit as well. She stated that this court can set aside the orders of another judge given in a separate suit on the basis on **Article 22**.

44. These proceedings constitute a collateral attack on an order of the High Court. They are an abuse of the court process and in addition to what I set out above, I adopt the sentiments of the court in *Fleur Investment Limited v Permanent Secretary Ministry of Roads and Others* (Supra) where the court observed, “[39] *Both pending cases and the present case are filed in the High Court. The High Court has jurisdiction under Article 165(3)(b) of the Constitution to enforce fundamental rights and freedoms in any case before it. This jurisdiction to enforce the provisions of the Bill of Rights is not exclusively exercisable under Article 22 but is part of the general jurisdiction the court exercises in deciding the case before it. The insistence that the pending cases proceed to their logical conclusion will not impair the determination of the petitioner’s grievances in respect of the breach of its rights and fundamental freedoms. Furthermore, I am satisfied that in the pending proceedings, the relief the petitioner seeks in these proceedings is available and has indeed been invoked in those proceedings.* [40] *I would also add that under rule 23 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2006, where a constitutional issue arises in matters before the High Court, the court seized of the matter may treat the matter as a preliminary point and shall hear and determine the same. This rule applies, a fortiori, to matters concerning enforcement of fundamental rights and freedoms.”*

45. The order in the civil suit was made on an interim basis as the court stated that, “*In the meantime prayers 4 to 7 of the application herein dated 27th December 2011 are granted pending the hearing of the application or until further orders. Inter parties hearing on 14th February 2012.*” The petitioners still

have the opportunity to contest the allegations against them.

46. The petitioners have filed their replying affidavits and a statement of defence in the civil suit. Paragraph 52 of their statement of defence dated 9th February 2012 states, ***“The Plaint and the proceedings brought herein by the plaintiff against them, including the interlocutory applications such as his Notice of Motion dated 27th December 2011 herein and the ex-parte orders obtained by him on 9th January 2012 against them are therefore in themselves an unlawful means and strategy by the plaintiff to curtail, preclude and prohibit their rights and fundamental freedoms under the Constitution of Kenya, to wit their freedoms of conscience, opinion, expression, media, association and assembly guaranteed by Articles 32, 33, 34, 36 and 37.”*** [Emphasis mine]

47. From the pleadings in the civil suit and this petition, I conclude that the issues for determination are the same. I also agree with Mr Kibanga and Mr Mwangi that this petition was filed as a direct response to the civil suit and the orders made therein. It is intended to litigate the same issues based on the same facts.

48. In considering the rule against filing a multiplicity of suits in respect of the same cause of action in a matter concerning enforcement of the Constitution, the court in the case of ***Retired Major Sharack Mutia Muia v Prof. Kivutha Kibwana & Others, Nairobi Petition No 281 of 2006 (Unreported)*** noted, ***“[26] Section 84 of the Constitution is a separate right, the right for a person whose rights are violated, infringed or threatened to move the High Court unhindered. The Court should exercise great circumspection in interfering with the gateway of enforcement lest the rights guaranteed under the Constitution become worth the paper they are written on. [27] This view is not inconsistent with the power of the Court to prevent abuse of its process or do justice. Allowing of abuse to take root in our system breeds impunity and the direct result is that the efficacy of Court orders is lessened thereby undermining the same rights that are to be enforced. [28] Under section 84, the Court is entitled to take into account the issue of subjudice and consider whether indeed, it affects the rights to be enforced. The Court is not powerless and cannot gloss over the abuse of its process merely because the matter before it is dressed as an enforcement of fundamental rights action. It must act when called upon to halt an abuse of its process in appropriate circumstances.”***

49. These are proceedings for the enforcement of fundamental rights and freedoms under the Constitution and I am aware that the provisions of **Article 22** require this court to adopt a wide and liberal attitude toward procedural impediments. I think that the most important consideration is whether, holding that the suit is an abuse if the court process impedes the petitioners’ right of access to this court to vindicate their rights. In ***Chokolingo v The Attorney General of Trinidad and Tobago [1981] 1 WLR 106***, Lord Diplock warned that, ***“It would be undesirable to stifle the grant of constitutional relief when a claim for relief is established and such relief is unavailable through the ordinary avenue of appeal. As it is a living, so must the Constitution be an effective, instrument.”***

50. The law governing civil procedure is replete with provisions that entitle a party to set aside an order made ex-parte, review orders where there is an error of law apparent on the face of the record or for sufficient reason. This jurisdiction is not exercised by commencing parallel proceedings but by making an application in the same case. To insist that the issues raised in this petition be dealt with in the civil suit will not impair the petitioners’ rights and the petitioners will be heard by a court competent to enforce their fundamental rights and freedoms.

51. Finally, I must deal with the contention that this court has jurisdiction to set aside the order of Hon. Lady Justice P. Nyamweya in the civil case. Counsel for the petitioner has referred to and relied upon certain dicta in the case of ***Labhsons Limited v Manula Hauliers Limited t/a Tausi Travellers Nairobi HCCC No. 204 of 2003 (Unreported), Kenya Bus Services Limited and Others v Attorney General and Others [2005] 1 EA 111***, the majority decision in ***Kinyanjui v Attorney General [2005] 2 KLR 485, Martha Karua v Radio Africa Ltd t/a Kiss FM Station (Supra)*** and ***Peter Ngang’a Muiruri v Credit Bank Limited and Others Nairobi HC Misc. Appl. No. 1382 of 2003 (OS)(Unreported)*** which suggest that the High Court exercising jurisdiction to enforce fundamental rights and freedoms under **section 84** of the former Constitution is entitled to set aside or otherwise intervene in concurrent proceedings of the High Court where such proceedings constitute a violation of the applicants fundamental rights and

freedoms.

52. In the case of *Peter Ng'ang'a Muiruri v Credit Bank Limited & Others* (Supra). The applicant, in the High Court, applied for declarations that his rights and fundamental freedoms had been infringed by a decision of the Court of Appeal. When the matter was placed before the Chief Justice for directions, the Chief Justice ruled that the issues raised did not merit constituting a "Constitutional Court." The applicant then took out a notice of motion seeking declarations that the orders of the Chief Justice denied him fundamental rights and freedoms. In the course of his decision, Justice Nyamu stated, "***When a challenge is directed at a Judge's order or ruling pursuant to section 84 of the Constitution a Judge of the High Court has jurisdiction by virtue to (sic) section 84(1) and (2) of the Constitution to hear the challenge The exercise of this Jurisdiction by any Judge of the High Court is not based on rank and it ought not to be a source of unpleasantness but a big credit to our systems of justice. The question is therefore no longer whether such a challenge can be entertained but rather to what extent can another court intervene. I see no inconsistency with the status and dignity of a Judge that his decision should be subject to a constitutional challenge.***"

53. The Court of Appeal firmly and emphatically shut down this line reasoning and emerging jurisprudence in the appeal from that decision. The Court clarified the jurisdiction of the High Court and in particular the place of the so called "Constitutional Court" in respect of constitutional matters. I think it is proper to set out what the court stated in order to emphasise this point. The Court stated, "***We want to set the law straight on the jurisdiction of what the learned Judge called "the Constitutional Court." There is no provision in the Constitution which establishes what Nyamu J. referred to as Constitutional Court. In Kenya we have a division of the High Court at Nairobi referred to as "Constitutional and Judicial Review" Division. It is not an independent Court but merely a division of the High Court. The wording of Section 67 of the Constitution which donates the power to the High Court to deal with questions of interpretation of sections of the Constitution or parts thereof does not talk about a Constitutional Court. Instead it talks about the High Court. With regard to protective provisions Section 84 of the Constitution does not in any of its sub-sections talk about the Constitutional Court. Instead it talks about an application being made to the High Court. In view of what we have stated above, it is quite clear that Nyamu J.'s remarks which we earlier reproduced were based on the mistaken belief that the Constitution had created a court called the Constitutional Court with supervisory powers over all other courts. The Hon. the Chief Justice must have been aware that no such Court is established under the Constitution and that, we think, would explain why he created a Constitutional Division and not a Constitutional Court. The creation of the Constitutional and Judicial Review Division was an administrative act with the sole object of managing the cause list. The Chief Justice would have no jurisdiction to create a constitutional court as opposed to creating a division of the High Court. Any single Judge of the High Court in this country has the jurisdiction and power to handle a constitutional question. The fact that a Constitutional Division was established did not by such establishment create a court superior to a single Judge of the High Court sitting alone. It would be a usurpation of power to push forward such an approach and whatever decision which emanates from a court regarding itself as a Constitutional Court with powers of review over decisions of Judges of concurrent or superior jurisdiction such decision is at best a nullity. Courts must exercise the jurisdiction and powers vested in them. As the late Nyarangi JA once remarked in the case of *The Owners of the Motor Vessel "Lillian" vs Caltex Oil Kenya Ltd* [1989]KLR 1 "Jurisdiction is everything. Without it, a court has no power to make one more step."***"

54. I hold that these sentiments of the Court of Appeal apply with equal force to the Constitution particularly the provisions of **Article 165** as read with **Article 22** which grant the High Court jurisdiction to deal with matters concerning the interpretation of the Constitution and the enforcement of fundamental rights and freedoms.

55. I also agree with the submissions by Mr Kibanga and Mr Ondieki that interfering with the orders made in the civil case in the manner suggested by the petitioners would amount to exercising supervisory jurisdiction over the High Court which is prohibited by **Article 165(6)**.

56. For the avoidance of doubt, I hold that I cannot interfere with or declare the orders given by

Honourable Lady Justice Nyamweya on 9th January 2012 in *Nairobi HCCC No. 586 of 2011* on the ground that the order is unjustified, unconstitutional and unlawful as prayed in the petition. Since the petitioners' cause of action is grounded a collateral attack of the order of the High Court, it follows that it cannot be sustained.

Conclusion and Disposition

57. Since I have found that this petition is an abuse of the court process, it cannot be consolidated with the civil suit. It must follow that the application dated 10th February 2012 lacks merit and it is hereby dismissed.

58. A suit that is in effect an abuse of the court process cannot continue to clog the court docket. I therefore strike out the petition but with no order as to costs.

DATED and DELIVERED at NAIROBI this 19th day of April 2012.

D.S. MAJANJA

JUDGE

Ms Lubano instructed by Anjarwalla & Khanna Advocates for the petitioners.

Mr Ondieki instructed by Ondieki and Ondieki Advocates for the 3rd respondent.

Mr Mwangi instructed by Mwangi Kigotho and Company Advocates for the 4th respondent.

Mr Kibanga instructed by Munga Kibanga and Company Advocates and Mr Omwanza instructed by Nchogu, Omwanza, Nyasimi Advocates for the 1st respondent.

Ms Irari, Litigation Counsel, instructed by the State Law Office for the 5th interested party.