Law Society of Kenya v Attorney General; Central Organization of Trade Unions (K) (Interested Party) (Constitutional Petition 185 of 2008) [2009] KEHC 4250 (KLR) (Constitutional and Human Rights) (4 March 2009) (Judgment)

LAW SOCIETY OF KENYA v ATTORNEY-GENERAL & another [2009] eKLR

Neutral citation: [2009] KEHC 4250 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION 185 OF 2008

JB OJWANG, J

MARCH 4, 2009

IN THE MATTER OF SECTION 84 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF THE WORK INJURY BENEFITS ACT, 2007

IN THE MATTER OF CONTRAVENTION AND/OR APPREHENDED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

BETWEEN

LAW SOCIETY OF KENYA ..... PETITIONER

AND

ATTORNEY GENERAL ..... RESPONDENT

AND

CENTRAL ORGANIZATION OF TRADE UNIONS (K) ... INTERESTED PARTY

High Court declares various sections of the Work Injury Benefits Act to be inconsistent with the Constitution and thus null and void

The petition challenged the constitutionality of certain sections of the Work Injury Benefits Act and sought the annulment of the contested sections. The court found sections 4, 7(1) and (2), 10(4), 16, 21(1), 23(1), 25(1) and (3), 52(1) and (2) and 58(2) of the Work Injury Benefits Act to be in conflict with the provisions of the Constitution and thus they were declared null, and devoid of the status of law.

Reported by Kakai Toili

Constitutional Law *- fundamental rights and freedoms – enforcement of fundamental rights and freedoms - protection from discrimination - equality before the law - discrimination - section 52(2) of the Work Injury Benefits Act, 2007 (Act No 13 of2007) creating appellate locus for objector but not for affected party -*

constitutionality of - whether section 52(2) of the Act discriminatory and in conflict with section 82(1) of the Constitution.

***Constitutional Law** - fundamental rights and freedoms - enforcement of fundamental rights and freedoms - property rights - protection from deprivation of property under section 75(1) of the Constitution - section 58(2) of the Work Injury Benefits Act providing that claims prior to the commencement of the Act would be deemed to have been lodged under that Act - Act seeking to convert suits pending in court into claims under the Act - petitioner's argument that Act intended to deprive claimants of their property rights accruing before the coming into force of the said Act, by creating a no-fault principle, and the process of award being limited to an inquiry to be made by the Director of Occupational Safety and Health Services - whether section 58(2)of the Act contravened section 75(1) of the Constitution in so far as it attempted to take away the accrued rights of a claimant.*

***Constitutional Law** - fundamental rights and freedoms - enforcement of fundamental rights and freedoms - protection from discrimination - whether section 58(2) discriminatory and contravened section 82(1) of the Constitution inasmuch as it discriminates between one group of claimants and another group of claimants and thus unconstitutional.*

***Constitutional Law** - fundamental rights and freedoms - enforcement of fundamental rights and freedoms - property rights - right to property - protection from deprivation of property, under section 75(1) of the Constitution - whether section 7(1) of the Work Injury Benefits Act, 2007 (Act No 13 of2007) was unconstitutional for making it compulsory for employer to obtain and maintain for his employees an insurance policy with an insurer approved by the Minister in respect of any liability that the employer may incur under the Act to any of his employees.*

***Constitutional Law** - fundamental rights and freedoms - protection from discrimination, under section 82 of the Constitution - employee entitled, under section 25(3) of the Work Injury Benefits Act, 2007, to have a medical practitioner of his own choice present at the time of examination of the medical condition of the employee - employer not entitled to such right – whether section 25(3) was unconstitutional.*

***Constitutional Law** - Constitution of Kenya - supremacy of the Constitution - where an Act of Parliament was in conflict with the Constitution – what was the effect of an Act of Parliament being in conflict with the Constitution - Constitution of Kenya sections 3.*

***Civil Practice and Procedure** - parties to a suit - representative suit - locus standi - petitioner being the Law Society of Kenya(LSK), a statutory body that carries out public role and champions public interest - petitioner's public role and obligation to assist members of the public in understanding and benefiting from provisions of the law, and a role in helping Government with legislation and the application of law in the society - petitioner an employer - whether the LSK had locus standi to bring suit on its behalf as employer and on behalf of all employers generally in a petition challenging the constitutionality of the provisions of an Act of Parliament - locus standi.*

Brief facts

The petition challenged the constitutionality of certain sections of the Work Injury Benefits Act, 2007 (Act No 13 of 2007) and sought the annulment of the contested sections. The petitioner argued among other things, that section 7(1) of the Act had created a new obligation to obtain and maintain an insurance policy from an insurer approved by the Minister for Labour and Human Resource Development and that section 4 of the Act made it a criminal offence to fail to obtain and maintain such an insurance cover. The petitioner thus pleaded that the offending sections were unconstitutional and claimed that it had been deprived of its freedom to insure its employees with any licensed insurance company.

The petitioner further argued that the obligation imposed on the petitioner, to commit additional funds for obtaining and maintaining the insurance policy required by the Act, constituted a taking of the petitioner's property, contrary to section 75(1*)* of the Constitution; that the criminal offence created by the Act was not a legitimate exercise of the State's police power; that section 10(4) of the Act was patently unconstitutional because it created a new legal liability based on the misdeeds of the employee thus depriving the petitioner of its constitutional right to raise a defence if the material incident arose from the employee's criminal offence, or from unauthorized activity and it authorized unlawful acquisition of property.

The petitioner further contested the constitutional validity of section 16 of the Act on the basis that the section prevented an employee from instituting court action for recovery of damages in respect of injuries arising from accident and/or various diseases specified. The petition further stated that section 23(1) of the Act conferred upon the Director of Occupational Safety and Health Services the power to decide any claim or liability, an act which, it alleged amounted to usurpation, and violations of the terms of the Constitution in that the Director would be assuming judicial powers.

The other sections of the Act which the petitioner alleged to be violating the Constitution were; sections 52(1) and (2) and section 58(2). Consequently, the petitioner sought declarations that the sections contested in the petition were unconstitutional, null and void.

Issues

i. Whether section 58(2) of the Work Injury Benefits Act which provided that claims prior to the commencement of the Act would be deemed to have been lodged under that Act contravened section 75(1) of the Constitution in so far as it attempted to take away the accrued rights of a claimant.

ii. Whether section 58(2) of the Work Injury Benefits Act was discriminatory and contravened section 82(1) of the Constitution in as much as it discriminated between one group of claimants and another group of claimants and thus unconstitutional.

iii. Whether section 7(1) of the Work Injury Benefits Act was unconstitutional for making it compulsory for employers to obtain and maintain for their employees an insurance policy with an insurer approved by the Minister in respect of any liability that the employer may incur under the Act to any of his employees.

iv. Whether section 25(3) of the Work Injury Benefits Act was discriminatory and thus unconstitutional for providing that an employee was entitled at his own expense, to have a medical practitioner of his choice present at an examination by a designated medical practitioner but did not provide the same for an employer.

v. Whether the Law Society of Kenya had *locus standi* to bring suits on its behalf as employer and on behalf of all employers generally in a petition challenging the constitutionality of the provisions of an Act of Parliament.

vi. Whether section 52(2) of the Work Injury Benefits Act was discriminatory and in conflict with section 82(1) of the Constitution for creating appellate *locus* for the objector but not for affected party and thus unconstitutional.

Held

1. The applicant had a public role and obligation to assist members of the public in understanding and benefiting from the provisions of the law and a similar role in helping Government with legislation and the application of law in the society. The applicant was itself an employer, and hence had a relationship with its employees which would readily call for resolution within the scope of employer liability. In these circumstances, the applicant had *locus standi* to institute the petition.
2. Compulsory insurance of employees as was provided for in Act, was an encumbrance upon the employer's property rights. The effect,was to qualify the property rights of the employer which were protected under section 75(1) of the Constitution. Such legislation ran into conflict with the terms of the Constitution, rendering it null.
3. Sections 10(4), 16, 23(1) and 52(1) of the Act lacked professional draftsmanship, and, as they stood, offended against the employer's guaranteed rights to due process of the law.
4. Section 7(1) of the statute was a nulity since it made open-ended power donations to those wielding executive power who were bound to distort it.
5. There was discriminatory arrangements as exhibited in section 21(1) of the Act in respect of medical examination for a complainant since the employer was not granted as much of a representation as the employee. running counter to the terms of section 82 of the Constitution. Similarly, section 52(2) of

the Act created appellate *locus* for the objector, in respect of the determinations of the Director of Occupational Safety and Health Services, hence unconstitutional.

6. The Work Injury Benefits Act, 2007 (Act No 13 of 2007) failed to meet the professional standards of draftsmanship and scrutiny, and ended up in the statute book as an enactment that was inconsistent with certain provisions of the Constitution. The Work Injury Benefits Act, 2007 (Act No 13 of 2007) was inconsistent with the provisions of the Constitution in the following sections: 4; 7 (1) and (2);10(4); 16; 21(1); 23(1) 25(1) and (3); 52(1) and (2); *58(2)* hence null and void.

Petition allowed.

Citations

East Africa

1. *East African Community v Republic* [1970] EA 457
2. *Ngui, MargaretMagiri vRepublic* Criminal Application No 39 of 1985
3. *Republic v El Mann* [1969] EA 357
4. *Okunda v Republic* [1970] EA 453

United Kingdom

1. *Don John Francis Douglas Liyanage v The Queen* [1967] AC 259
2. *Schmidt & Another v Secretary of State for Home Affairs* [1969] 2 Ch D 149; [1969] 2 WLR 337; [1969] All ER 904

United States of America

1. *Kent v Dulles,* 357 US 116 (1958)
2. *The South Buffalo Railway Company v Earl Ives* (1911) 201 NY 271.

India

1. *Maneka Gandhi v Union of India &* another [1978] INSC 16
2. *Zeigler v South & North Ala R R Company*, 58 Ala 594 (1877)

Statutes

1. Constitution of Kenya sections 3, 60, 75(1);77(1)(9)(10); 80(1); 82(1) 84
2. Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006 (Constitution of Kenya Sub Leg) rules 12
3. Work Injury Benefits Act, 2007 (Act No 13 of 2007) section 5, 7(1)(2) (4); 10(4);16; 21(1)(3); 23(1); 25(1) (3); 52(1);53(2); 58(2)
4. Law Society of Kenya Act (cap 18) section 4(c)(d)(e)
5. Employment Act, 2007 (Act No 11 of 2007)
6. Labour Relations Act, 2007 (Act No 14 of 2007)
7. Labour Institutions Act, 2007 (Act No 12 of 2007)
8. Occupational Health and Safety Act, 2007 (Act No 15 of 2007)

JUDGMENT

I. Background Facts Relating to the Petition

1. The petitioner herein filed a petition on 14th April, 2008 by virtue of s 84 of the *Constitution* of Kenya, and Rule 12 of the *Constitution* of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006 (*LN No 6 of 2006*).

2. The petitioner contests the constitutional validity of certain sections of a newly-enacted statute, the *Work Injury Benefits Act*, 2007 (*Act No 13 of 2007)*, and seeks annulment of the same by virtue of the High Court's jurisdiction based on the terms of s 3 of the *Constitution*.

3. The petitioner's *locus standi* arises from s 4(c) of the *Law Society of Kenya Act* (Cap 18, Laws of Kenya) which sets it up to "assist the Government and the Courts in all matters affecting legislation." The petitioner also derives *locus standi* from the terms of s 4(d) of the *Law Society of Kenya Act* which obligates it to represent members of the legal profession in Kenya, regarding the conditions of practice of law, or any matter related thereto. The petition, in addition, drives its foundation from s 4(e) of the *Law Society of Kenya Act*, which gives the petitioner the mandate to "protect and assist the public in Kenya, in all matters related to law." The petitioner, besides, is an employer within the meaning of s 4 of the *Work Injury Benefits Act*, and it come before this Court in that capacity.

4. In a supporting affidavit by Betty S Nyabuto, the Secretary of the petitioner, it is stated that the Minister for Labour and Human Resource Development, on 11th January, 2008 published *Legal Notice No 7 of 2007* in the *Kenya Gazette* designating 20th December, 2007 as the date when the new statute would be deemed to have come into operation. From that moment, the petitioner started receiving "numerous complaints from its members, employees and employers regarding various provisions of the *Work Injury Benefits Act*, 2007"' and the petitioner has been aggrieved by several of the provisions of the Act - hence the petition.

5. The respondent had questioned the petitioner's *locus standi* in this matter; but after I heard counsel on the point, and took into account relevant authority, I made a ruling on 22nd May, 2008 as follows:

> " Is it the case that the applicant lacks locus standi to maintain the petition and the instant application? That cannot be so, in my opinion. The language of the *Law Society of Kenya Act* is clear enough: the applicant has a public role and obligation to assist members of the public in understanding and benefiting from the provisions of the law; and a similar role in helping Government with legislation and the application of law in the society. It is also clear that the applicant is itself an employer, and hence has a relationship with its employees which would readily call for resolution within the scope of employer-liability. I hold, in these circumstances, that the applicant has locus standi to maintain both the petition, and the instant application."

II The petitioner's gravamen

[a] It is pleaded that s 7(1*)* of the *Work Injury Benefits Act*, 2007 has created a new obligation - to "obtain and maintain an insurance policy" from an insurer approved by the Minister for Labour and Human Resource Development, in respect of such liability as an employer may incur towards employees; and s 4 of the Act makes it a criminal offence to fail to obtain and maintain such an insurance cover.

[b] The petition pleads that two sections of the Act (s 4 and s 7(1)) are unconstitutional, and should be declared to be a nullity, on the following grounds:

(i) the petitioner has been deprived of its freedom which is conferred by s 80(1) of the *Constitution* - to insure its employees with any licensed insurance company;

(ii) the obligation imposed on the petitioner, to commit additional funds for obtaining and maintaining the insurance police required by the Act,

constitutes a taking of the petitioner's property, contrary to s 75(1) of the *Constitution*;

(iii) the criminal offence created by the Act is "not a legitimate exercise of the State's police power."

[c] The petitioner contests the constitutional validity of s 10(4) of the new statute, on the ground that it creates liability on the part of the petitioner as an employer, notwithstanding that the employee at the material time was carrying out an activity in direct contravention of the law and/or without the express or implied authority of the employer: it is pleaded that s 10(4) of the new Act is "patently unconstitutional" because -

(i) it creates a new legal liability based on the misdeeds of the employee;

(ii) it purports to deprive the petitioner of its constitutional right to raise the defence that the material incident arose from the employee's criminal offence, or from unauthorized activity;

(iii) it violates the employer's entitlement to fair trial in accordance with s 77(1) of the *Constitution*; and it authorizes unlawful acquisition of property, contrary to s 75(1) of the *Constitution*.

[d] The petitioner contests the constitutional validity of s 16 of the Work Inj ury Benefits Act; on the basis that this section "prevents an employee from instituting Court action for recovery of damages in respect of injuries arising from accident and/or various diseases specified in the Act." This point is said to be demonstrated in practice, by the petitioner receiving "numerous complaints from its members, employees and employers regarding various provisions of the ....Act." Specifically 1 the petitioner has realized that -

(i) court actions which were pending for hearing and/or delivery of judgment have been adjourned generally;

(ii) the petitioner's members whose legal practices wholly or substantially deal with personal injury claims, have been adversely affected;

(iii) judgments hitherto delivered cannot be executed, notwithstanding that such judgments do confer vested rights upon the judgment-creditors.

[e] The petitioner states that s 23(1) of the *Work Injury Benefits Act* confers upon the Director of Occupational Safety and Health Services the power to decide any claim or liability "upon making an inquiry"; and contends that the effect of that provision amounts to usurpations, and violations of the terms of the *Constitution*-

(i) the said Director of Occupational Safety assumes judicial powers;

(ii) the said Director exercises the power after making inquiries which he or she considers appropriate;

(iii) the said Director may demand "further particulars" and a party who fails to provide such "further particulars", commits a criminal offence.

[f] It is pleaded that s 25 (1) of the *Work Injury Benefits Act*, which empowers the Director to appoint a medical practitioner to examine 20 the employee, but does not pennit

tire employerto designate a medical practitioner during tire examination process, is unconstitutional for the reasons that -

(i) by s 60 of the *Constitution*, the judicial power is vested in the Judicature, and not in the Director;

(ii) the Director is not "independent and impartial" as envisaged by s. 77(9) of the *Constitution*;

(iii) the process before the Director is an inquiry in violation of entitlements to a public hearing conferred by s 77(10) of tire Constitution;

(iv) a state of inequality is created as between tire employee and the 30 employer;

(v) want of due process exists, notwithstanding that the property rights of the employer are to be taken;

(vi) the process seeks to divest accrued property rights without any compensation, contrary to s 75(1) of tire Constitution;

(vii) die Director is neither a Court nor an adjudicating authority as required by s 77(9) of the *Constitution*.

[g] It is pleaded that s 52(1) of the *Work Injury Benefits Act* empowers the Director to decide an appeal against his or her decision; die Director is empowered to vary or uphold his earlier decision, and without according the affected party any opportunity to be heard, in relation to die appeal; in tills respect, the process does not constitute a fair hearing and is in breach of s 77(9) of the*Constitution*; insofar as die Director is allowed to hear and determine the appeal and/or objection, in an administrative manner, the process is in breach of s 77(10) of the *Constitution*; and the appeal process violates s 75(1) of the *Constitution* to the extent that it purports to affect vested property rights, without due process.

[h] The petitioner pleads that s 52(2) of the *Work Injury Benefits Act*, 2007 is discriminatory, and so runs into conflict with s 82(1) of the *Constitution*. By the said s 52(2) of the new statute, an objector is entitled to lodge an appeal in the Industrial Court against the decision of the Director of Occupational Safety; but the affected person is not permitted to make such appeal; this, it is contended, creates discrimination against the employer.

[i] It is pleaded that s 58(2) of the *Work Injury Benefits Act* seeks to take away the right to legal process, in respect of matters covered by the new statute; for that section provides that any claim prior to the commencement of the said statute, shall be deemed to have been lodged under that statute; the said provision "seeks to convert suits pending in Court [into] claims under the Act": and this contravenes s 75(1) of the *Constitution* to the extent that it purports to take away property rights, without due process. It is pleaded, besides, that s 58(2) of the new statute contravenes section 82(1) of the *Constitution* inasmuch as it discriminates between one group of claimants and another group of claimants.

6. The foregoing are the grounds on which the petitioner omes before this Court seeking -

(i) a declaration that s 7(1) and (2) of the *Work Injury Benefits Act* is "unconstitutional, null and void";

(ii) a declaration that s 10(4) of the said Act is "unconstitutional, null and void";

(iii) a declaration that s 16 of the said Act is "unconstitutional, null and void to the extent that it prevents access to justice";

(iv) a declaration that s 23(1) of the said Act is "unconstitutional, null and void to the extent that it permits the determination of liability and consequent award without due process of law";

(v) a declaration that s 25(1) and (3) of the said Act is "unconstitutional, null and void to the extent that it does not permit equality of treatment to persons in similar circumstances";

(vi) a declaration that s 52(1) of the said Act is "unconstitutional, null and void to the extent that it allows [the] determination of an objection and/ or appeal without due process";

(vii) a declaration that s 52(2) of the said Act is "unconstitutional, null and void to the extent that it does not confer equal [rights] of appeal [upon] the person adversely affected by the decision";

(viii) a declaration that s 58(2*9* of the said Act is "unconstitutional, null and void to the extent that it seeks to extinguish access to Court";

(ix) an order that pending [the] determination of this petition, suits pending in Court and/or claims in respect of matters covered by the said Act do proceed in the appropriate juridical forums.

III. Orders on suits involving subject-matter of new statute, and currently pending in courts

7. This last matter in the pleadings came up for an early hearing and interlocutory orders. Betty S Nyabuto, the Secretary of the Law Society of Kenya, had sworn a supporting affidavit annexed to the petitioner's chamber summons of 14th April, 2008 averring that -

> " (i) Subordinate Courts have consistently maintained that in view of section 58(2) of the *Work Injury Benefits Act*, 2007 .... [those Courts] would not hear any matter covered by the Act"; and
>
> (ii) Subordinate Courts have stood over generally any suit relating to matters covered by the Act."

8. After hearing counsel for the applicant/ petitioner, for the respondent, and for the Interested Party, I made a ruling which will still prove relevant, as the main cause is determined. That ruling reads, in part, as follows:

> "It is not contested that there are many workmen's compensation cases pending before Magistrates' Courts throughout the country. Such cases had been brought on the basis of either the now-repealed Workmen's Compensation Act(Cap 236, Laws of Kenya), or the common law, or both. The suitors in such cases would have been exercising their rights sounding in fundamental rights, as secured under Chapter V of the *Constitution* of Kenya, and so they had legitimate expectations that the judicial process would handle and conclude their cases. The enactment of the *Work Injury Benefits Act*, 2007, so far as it goes, would be a normal exercise of the legislative power of the Kenyan Parliament, in accordance with the terms of s 30 of the *Constitution* of Kenya. There is, however, room for conflict between

the *Constitution*'s empowerment to Parliament, on the one hand, and the *Constitution*'s safeguards for the citizen's rights, on the other: and whenever such a conflict occurs, then ordinarily, it is the High Court's mandate to make a sensible interpretation, and to declare the correct understanding of the *Constitution*. The relevant questions on this point turn on the content of the *Work Injury Benefits Act*, 2007, and the manner in which it touches on on-going proceedings before the Courts of law. These are substantive questions to be resolved during the hearing of the petition itself. But at this stage, a prima facie position is to be taken that those fundamental rights of the citizen which are safeguarded by the *Constitution*, and which are already the subject of litigation in [the] Courts, must have an opportunity for resolution in the normal manner."

9. The foregoing reasoning led to certain orders, which were made in the ruling on 22nd May, 2008; and the relevant paragraph thus reads:

> "On the foregoing grounds, I will order that, pending the hearing and determination of the main cause, all pending litigation which had been commenced on the basis of either the Workmen's Compensation Act ... or of the common law, or of a combination of both regimes of law, shall continue to be prosecuted and, in a proper case, finalized on the basis of the operative law prior to the entry into force of the *Work Injury Benefits Act*, 2007...."

IV. Respondent's Pleadings In Opposition

10. To the petitioner's pleadings and affidavit, there were replying affidavits from the respondent, and the Interested Party.

11. The Principal Litigation Counsel, Antony Oteng'o Ombwayo, the respondent's deponent, made depositions on the background to the statute in question, stating that the Attorney-General's Task Force appointed on 16th May, 2001 had been mandated to "make recommendations on proposal for reform or amendment of labour laws, to ensure that they are consistent with the conventions and recommendations of the International Labour Organization to which Kenya is a party." The deponent averred that the Attorney-General, in appointing the said Task Force, had sought to address "the existence of a need to review [the] labour laws in Kenya due to several legal and socio-economic factors", and such factors included

    (i) existing labour laws were mostly enacted in colonial times, and were not in keeping with the requirements of independent statehood;

    (ii) contemporary social and economic developments exemplified by structural adjustments and economic liberalization and privatization, had triggered crises in labour relations calling for a new set of labour laws;

    (iii) owing to modern production methods in the economy, "greater responsibilities are being placed on both employers and employees to make work places safer", and there should be new laws carrying this principle;

    (iv) in 1995, at the World Summit for Social Development in Copenhagen, the international community "adopted specific commitments and a programme of action relating to basic workers' rights, the prohibition of forced labour and child labour, freedom of association, the right to organize and bargain collectively, equal remuneration for work of equal value, and elimination of discrimination in employment." Such commitments were renewed at the 1996 World Trade Organization Ministerial Conference, where an undertaking was made "to observe internationally-recognized core labour standards." And in 1998 the International

Labour Organization adopted a declaration of fundamental principles and rights at work, which safeguard and promote respect for basic workers' rights. Against that background, Kenya is "duty-bound to domesticate the principles set out in the [said] Declaration within the labour laws";

(v) Kenya, as a beneficiary of America's African Growth and Opportunity Act (AGOA), is "expected to enact [legislation] which [upholds] the rule of law."

12. The deponent averred that the said Task Force, in the conduct of its work, had benefited from financial and expert resource-contribution from both the International Labour Organization and the United States Department of Labour, as well as from the contributions of local experts.

13. It was averred further that the outcome of the labours of the said Task Force, would represent the ideal, in the making of the requisite labour laws, as membership was tripartisan as called for by the international labour organizations, involving Government, employers and employees - jointly referred to as "Social Partners" or "Stakeholders".

14. The deponent averred that, out of a properly representative Task Force initative, several labour-related bills were formulated - the Work Injury Benefits Bill, the Labour Institutions Bill, the Employment Bill, and the Labour Relations Bill - and the same were duly published in the *Kenya Gazette,* then introduced in Parliament on 11th October, 2007 at 2.30pm, were duly enacted, and were assented to by the President on 22nd October, 2007; and subsequently, by *Gazette Notices* Nos 6, 7 and 8 dated 8th January, 2008 the Minister for Labour and Human Resource Development appointed 20th December, 2007 as the commencement date for the several enactments; but Legal Notices Nos 7 and 8 aforesaid were subsequently revoked, and substituted by Legal Notices Nos 60 and 61 published in the *Kenya Gazette* Supplement No 37 of 27th May, 2008, changing the said commencement date to 2nd June, 2008.

15. The deponent states his belief that "the impugned sections of the *Work Injury Benefits Act* are not unconstitutional because they do not violate individual rights enshrined in Chapter V of the *Constitution* of Kenya." The deponent deposes that "the [labour] laws [in question] are balanced and beneficial to both the employer and employees", insofar as these laws -

(i) promote "development that is consistent with the fundamental principles and rights at work";

(ii) cultivate "good, transparent and accountable governance, to facilitate the [expeditious] and efficient resolution of disputes and minimize the risk of competition";

(iii) foster "accessibility of the labour laws to the social partners including the men and women who are covered by them";

(iv) promote "freedom of association and the effective recognition of the right to collective bargaining";

(v) eliminate "all forms of forced or compulsory labour";

(vi) ensure the "effective abolition of child labour";

(vii) ensure the "elimination of discrimination in respect of employment and occupation."

V. Interested Party's Pleadings In Opposition

16. The Secretary-General of the Central Organization of Trade Unions (K) [the Interested Party] swore a replying affidavit on 5th June, 2008, making certain depositions. He deponed, firstly, on a contestable point, though without indicating his source of counsel, that: "the entire provisions of the *Work Injury*

Benefits Act apply to both employers and .... Workers/ employees in our membership so that any breach thereof and /or misinterpretation of the said law is bound to prejudice the workers' rights." It is also not clear that the deponent spoke of his own perception, knowledge and belief as he should, on the whole, have done; for he set's out the collective position of the Interested Party, as follows:

(i) s 7(1) of the *Work Injury Benefits Act*, 2007

> " The section ... does not take away the employer's right to choose an appropriate insurer .."
>
> - "This section is therefore not unconstitutional as the employer has the liberty to seek the Minister's approval of the already-existing medical and insurance policies
>
> - "The imposition of the fine for failure to comply is meant to enforce compliance, and therefore cannot be said to be an illegitimate exercise of the State's police power."

(ii) s 10(4) of the said Act

> " [That section] takes into account the requirement of a no-fault system that enables an employee to be compensated in case of injury while in employment. This is not a new legal liability based on the misdeeds of the employee, as the repealed .... Workmen's Compensation Act, section 5 provided for similar application of the law."
>
> "The petitioner 's constitutional right to raise a defence [in relation to] a criminal offence and/or unauthorized activity has not been taken away as alleged ." "The constitutional requirement [for] a fair hearing has not ... [been] taken away by this section ..."

(iii) Section 16 of the said Act

> " This section does not take away an employer's right to choose which cause of action he will [proceed with] and in which forum."

(iv) Section 23(1) of the said Act

> " This section does not donate judicial power to the Director of Occupational Safety and Health Services as to do so would be ultra vires the *Constitution*."

(v) Section 25 (1) of the said Act

> " [This section] gives the employer the leeway to have the employee examined by a doctor of his choice ..."

(vi) Section 53(2) of the said Act

> " [This section] does not discriminate [between] the objector and the employee ....; it confers equal rights upon the two ..."

(vii) Section 58(2) of the said Act

> "[This section] may be unconstitutional insofar as its commencement date is concerned save that the respondent has by Gazette Notice No 60[07] 27th May, 2008 [altered] the commencement dated to 2nd June, 2008."

17 The foregoing are, in my opinion, not proper matter for deposition by a lay deponent, as he merely arrogates the role of counsel in submissions. Indeed, the deponent has gone further to make the ultimate statement which could have emanated from counsel: "That, in the ... premises, the aforementioned sections of the Act are not unconstitutional if given the right interpretation." Greater weight shall, on those points, be attached to the submissions of counsel for the Interested Party.

VI. Inconsistencies between statute and constitution: Submissions for petitioner

1. The *Work Injury Benefits Act*: A Background

18. Learned counsel for the petitioner, Mr Ngatia began by giving the background to the *Work Injury Benefits Act*, 2007. By Gazette Notice No 3204 of 16th May, 2001 the Attorney had appointed a committee of 17 persons to examine and review all the labour laws and to make recommendations for appropriate legislation to replace or amend any of the existing labour law statutes; and the committee then submitted to him a report in April, 2004 which report is the basis of the *Work Injury Benefits Act*, 2007. By Kenya Gazette Notice No 7 of 8th January, 2008, the Minister for Labour and Human Resource Development appointed 20th December, 2007 as the date on which the new Act would be deemed to have come into operation; but this date was later changed to 2nd June, 2008 in Kenya Gazette Notice No 60 of 23rd May, 2008.

2. S 7(1) of the *Work Injury Benefits Act*, 2007 -

> "Every employer shall obtain and maintain an insurance policy with an insurer approved by the Minister in respect of any liability that the employer may incur under this Act to any of his employees."

19. Counsel contended that, by the compulsory insurance policy in the employment sector, the property of the employer was being taken and conferred upon the employee - whereas it was the State's responsibility to operate a national insurance cover, and indeed this had been considered by the Attorney-General's Task Force aforementioned, but dropped off.

20. In support of this argument, learned counsel relied on the United States case, The south Buffalo Railway Company v Earl Ives (1911) 201 NY 271. This persuasive authority points to the inherent character of property rights, and the solemn and clear-cut demarcations of these rights, reinforced by constitutional principles, which take them out of the executive's or the legislature's competence to casually take. The relevant paragraph reads as follows:

> "The right of property rests not upon philosophical or scientific speculations nor upon the commendable impulses of benevolence or charity, nor yet upon the dictates of natural justice. The right has its foundation in the fundamental law. That can be changed by the people, but not by legislature ... If such economic and sociologic arguments are here advanced in support of this statute can be allowed to subvert the fundamental idea of property, then there is no private right entirely safe, because there is no limitation upon the

absolute discretion of legislatures, and the guarantees of the *Constitution* are a mere waste of words"

21. In the end, the Court declared void a statute that sought to impose a new liability on employers, in memorable words:

> " All that it is necessary to affirm in the case before us is that in our view of the *Constitution* of our state, the liability sought to be imposed upon the employers enumerated in the statute before us is a taking of property without due process of law, and the statute is therefore void."

22. Learned counsel in the instant case submitted that Kenya's s 75 of the *Constitution*, too, gave clear protection for property rights; and so the taking of property cannot be allowed, save in the named circumstances: in the interests of defence, public safety, public order, public morality, public health, town and country planning - and even in such cases, prompt compensation becomes payable.

23. The objection was raised that, not only was the employer being compelled to undertake a new scheme of insurance to benefit the employee, but a skewed mode of identifying the insurer was also imposed, contrary to principles set out in the *Constitution*: Parliament has determined that the Minister is to elect the particular insurance company to cover every employer. No justification underlay the controlling role of the Minister, and the Minister's control in this regard, it was contended, ran counter to s 80(1) of the *Constitution* which safeguarded the freedom of association. Counsel, in this regard, contended that: "a law that purports to confer upon the Minister an unbridled discretion regarding a constitutional right is unconstitutional."

24. Counsel called in aid, in this regard, an American case, Kent v Dulles, 357 US 116(1958), in which the court held unregulated ministerial powers, detracting from constitutional rights, to be contrary to law. This is to be appreciated from the following passage in the judgment:

> " We, therefore, hesitate to impute to Congress, when in 1952 it made a passport necessary for foreign travel and left its issuance to the discretion of the Secretary of State, a purpose to give him unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose."

25. Counsel relied on this principle to underline the point that it will be unconstitutional for the Minister, acting by virtue of the *Work Injury Benefits Act*, 2007 to qualify the rights of association of employers, guaranteed by s 80(1) of the *Constitution*.

3. S 7(4) of the *Work Injury Benefits Act*, 2007

26 Learned counsel raised objections to this section of the new statute, for creating a criminal offence for failure to obtain and maintain an insurance cover by the employer; and in view of the perception that the requirement for such insurance is a violation of the employer's property rights, it was further urged that the attached criminal sanction is "not a legitimate exercise of the State's police functions."

4. S 10(4) of the *Work Injury Benefits Act*, 2007

27. Objection was raised to this provision because it holds the employer liable for employees' acts done against authority, and even where such employees' acts are criminal. S 10(42 of the new statute provides:

> " For the purposes of this Act, an occupational accident or disease resulting in serious disablement or death of an employee is deemed to have arisen out of and in the course of

employment if the accident was due to an act done by the employee for the purpose of, in the interest, of or in connection with, the business of the employer despite the fact that the employee was, at the time of the accident acting -

(a) in contravention of any law or any instructions by or on behalf of his employer; or

(b) without any instructions from his employer."

28. The effect, it was urged, was that in respect of the employer, liability was deemed to have occurred; even if the employee was coimnitting a crime, the employer is to be held liable; there is no possible defence that the employer can raise; and there is no due process of law.

29. Such a scenario, counsel urged, is objectionable; and he invoked a persuasive authority to demonstrate the point: South Buffalo Railway Company v Earl Ives (1911) 201 NY, 271.

30. The following is a choice passage from that decision:

> " If the legislature can say to an employer, 'you must compensate your employee for an injury not caused by you or your fault', why can it not go further and say to a man of wealth, 'you have more property than you need and your neighbour is so poor that he can barely subsist; in the interest of natural justice you must divide with your neighbour so that he and his dependants shall not become a charge upon the State?' The argument that the risk to an employee should be borne by the employer because it is inherent in the employment, may be economically sound, but it is at war with the legal principle that no employer can be compelled to assume a risk which is inseparable from the work of the employee, and which may exist in spite of a degree of care by the employer far greater than may be exacted by the most drastic law. If it is competent to impose upon an employer who has omitted no legal duty and has committed no wrong, a liability based solely upon a legislative fiat that his business is inherently dangerous, it is equally competent to visit upon him a special tax for the support of hospitals and other charitable institutions, upon the theory that they are devoted largely to the alleviation of ills primarily due to his business. In its final and simple analysis that is taking the property of A and giving it to B, and that cannot be done under our Constitutions."

31. Counsel submitted that the *Work Injury Benefits Act* posed precisely the kind of difficulty addressed in the South Buffalo Railway Company case: the Attorney- General's Task Force, in this case, was attempting to replace common law actions with a no-fault principle which went much further, and removed the employer's constitutional rights to property, and even the employer's rights to due process.

32. Mr Ngatia questioned the new statute's "deeming" of liability against the employers in all circumstances; to so deem liability is to be oblivious of the cause of the accident; this denied the employer an opportunity to adduce rebutting evidence; and this was a denial of the due process of law. Counsel stated the petitioner's case as being that, a legal duty on the part of the employer to compensate the employees "can only arise from contract, or from being adjudged to be at fault"; and Parliament "has no power to change innocence to guilt by [the] use of deeming provisions". The deeming provisions, counsel noted, applies to the whole statute; and so if it is found that s 10(4) of the Employment Benefits Act is unconstitutional, then the entire Act should be found unconstitutional, as the said s 10(4) would be unseverable from the Act.

5. Sections 16 and 23(1) of the *Work Injury Benefits Act*, 2007

33. The said s 16 thus provides:

> "No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employee's employer and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death".

And s 23(1) of the Act provides:

> "After having received notice of an accident or having learnt that an employee has been injured in an accident the Director shall make such inquiries as are necessary to decide upon any claim or liability in accordance with this Act".

34. The effect of the two provisions, Mr Ngatia urged, is that the common law action has been abolished, and replaced with the processes set out in the Act; that the legal right vested in an employee to file an action in law has been extinguished; and that the adjudicative role vested in the Judicature by the *Constitution* has been abolished and, in its place, the Director of Occupational Safety and Health Services has been appointed to determine "the claim of liability".

35. Learned counsel submitted that the judicial power cannot be so transferred, or shared with the Executive Branch; in his words: "The only organ of State which can determine the claim of liability is the Judicature, and it is a violation of the *Constitution* to transfer that power to the Director". Counsel noted the fact that the role entrusted to the Director even though he is to resolve questions of legal character, is to make "inquiries"; already, s 10(4) has deemed the employer liable, the Director is required to do no more than make inquiries. The effect, counsel urged, is to violate the constitutional guarantee of fair hearing; the employer is "condemned without being heard in his defence"; and "a taking of property is sanctioned".

36. Counsel urged that the intent of the provisions of the *Constitution* relating to the Judicature, is to make the Judiciary the organ of State responsible for dispute settlement in matters touching on private rights. In aid of this point, counsel referred to a Judicial Committee of the Privy Council case from what is now Sri Lanka, Don John Francis Douglas Liyanage v The Queen [1967] A C 259, in which the following passage appears:

> "These provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature."

37. Mr Ngatia urged that the *Work Injury Benefits Act*, 2007 by the provisions of ss 16 and 23 (1) was caught in an illegality the attempt to preempt the play of due process of the law; and due process in this regard, was defined as in a persuasive authority, Zeigler v South & North Ala R R Company, 58 Ala 594 (1877):

> "Due process of law undoubtedly means, in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights .... They were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the principles of private rights and distributive justice".

38. Of due process of law, that American Court had further stated: "Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be presumed against him, this is not due process of law."

6. Section 21 (1) and (3) of the *Work Injury Benefits Act*, 2007

39 Section 21 (1) of the Act thus provides:

> " An employee who claims compensation or to whom compensation has been paid or is payable, shall when required by the Director or the employer as the case may be after reasonable notice, submit himself at the time and place mentioned in the notice to an examination by the medical practitioner designated by the Director or the employer with the approval of the Director."

And sub-section (3) aforesaid stipulates:

> " An employee shall be entitled as his own expense, to have a medical practitioner of his choice present at an examination by a designated medical practitioner."

40. Mr Ngatia urged that s 21 (1) and (3) of the *Work Injury Benefits Act*, 2007 entails discrimination between employer and employee. Whereas the employee is entitled to the presence of his medical practitioner, as a matter of right, the employer has no such right: yet the medical examination process is a significant event, being the basis for determining the extent of injury or incapacity to the employee, which leads to the financial award.

7. S 52 (1) of the *Work Injury Benefits Act*, 2007

41. Section 52 (1j aforesaid thus provides:

> " The Director shall within fourteen days after the receipt of an objection in the prescribed form, give a written answer to the objection, varying or upholding his decision and giving reasons for the decision objected to, and shall within the same period send a copy of the statement to any other person affected by the decision."

42. Counsel submitted that upon receipt of the objection, the Director is under no obligation to seek the views of any party. By statute, what is required is that the Director is to "give a written answer", which may vary or uphold his earlier decision. The petitioner's gravamen, in this regard, is that "the objection is heard without according to other person(s) an opportunity to be heard contrary to the constitutional entitlement empowering a party to be heard by an adjudicating authority" and so, " a clearly adjudicative process is relegated to administrative fiat, [and] persons who have clear vested rights are not heard at all." This principle of legality, Mr Ngatia submitted, is not answered to by saying that "the decision made by the Director is communicated to the affected person"; for if such a decision would be enhancing the award, then it would be a taking of property without due process of law.

43. The forgoing point was buttressed by persuasive case-authority: Maneka Gandhi v Union of India [1978] INSC16:

> " It is well established that even where there is no specific provision in a statute or rules made thereunder for showing cause against action proposed to be taken against an individual, which affects the rights of that individual, the duty to give reasonable opportunity to be heard will be implied from the nature of the function to be performed by the authority which has the power to take punitive or damaging action."

44. That the foregoing is a trite constitutional and general-law principle, is clear from authorities coming from other jurisdictions; and learned counsel placed before the Court Schmidt & Another v Secretary of State for Home Affairs [1969] 2 Ch 149; [1969] 2 WLR 337; [1969] All ER 904: "Where a public officer has power to deprive a person of his liberty or his property, the general principle is that it has not to be done without his being given an opportunity of being heard and of making representations on his own behalf. The same rule also prevails in other Commonwealth countries like Canada, Australia and New Zealand."

8. S 52(2) of the *Work Injury Benefits Act*, 2007

45. Section 52(2) of the Act provides:

> " An objector may, within thirty days of the Director's reply being received by him, appeal to the Industrial Court against such a decision."

46. The petitioner raised the objection that the foregoing provision creates an appellate locus in the Industrial Court for the objector, but not for an affected party, the employer in this case. Since it is an established principle in the functioning of tribunals that the opportunity to appeal must be created by statute, it follows that under s 52(2) of the *Work Injury Benefits Act*, only the objector may lodge an appeal: and it is contended that such a provision is discriminatory, in relation to two persons who are placed in similar circumstances.

9. S 58(2) of the *Work Injury Benefits Act*, 2007

47. The issue here is the deeming of prior suits to have been lodged under the *Work Injury Benefits Act*. 2007. Many work-injury cases had been lodged in the normal manner, under existing laws whose legality was not in issue, prior to the enactment of the new statute. In such cases, pleadings had closed, but hearing was yet to coimnence; or in other cases, the hearing of the suits was already in progress; and in still other cases, the hearing had been concluded and lawful decisions rendered by the Courts, but execution of judgment had not yet taken place. The petitioner contends that it is "a scientific impossibility to [transform such suits into] claims under the Act, considering that the Act has abolished [the] common law, introduced a no-fault principle, and the process of award is limited to an inquiry to be made by the Director".

48. Besides, learned counsel urged, in relation to matters in which judgment had already been delivered, "a decree confers a property right which is now taken away to be a claim under the impugned Act"

10. Costs of the Petition

49. The claim in the petition entails that the respondent, the principal legal adviser to the Government, failed to take due professional action to see to it that the impugned statute was not enacted in its current form; and therefore, the incidental costs of the action should fall upon the respondent .

VII. AModem Statute; in The Public Interest; Petition is Misconceived: Submissions for the Respondent

50. The burden of the submissions made by the Principal Litigation Counsel. Mr Ombwayo. on behalf of tire Attorney-General, is not so much a focused analysis and disproof of the constitutional arguments of the petitioner, but rather, a plea of the meritorious intentions, and about the substantial works which the State mounted, in the background to the drafting of the *Work Injury Benefits Act*. 2007.

51. Counsel closely followed the content of Iris replying affidavit, which has already beenreviewed in this judgment. My task now is to re-evaluate Mr Ombwayo's submissions, and to set out all such elements as may claim to present a fundamental argument.

52. It is contended that the legislative drafting exercise was justified by objective "legal and socio-economic factors"; that the new law was necessitated by "technological innovations and automation in the last decades of [the] 20th century" that there were international labour trends justifying the enactment of a statute such as die *Work Injury Benefits Act*. 2007; that there were international trade concerns necessitating

54. such legislation; that much local and international expertise made its contribution to the shape of the new legislation; that the right drafting partnerships were present, during the formulation process for the new statute; that the drafting Task Force was at the task for a prolonged period, May, 2001 to April, 2004 (some three years); that the law-drafting task began in April, 2004 and ended in October, 2007 (more than three years); that the bill was placed before Parliament on 11th October, 2007 and passed by the National Assembly that very day; that twelve days later, on 22nd October, 2007 the President assented to the said Bill, bringing to life the *Work Injury Benefits Act*, 2007.

55. This is essentially a historical profile which, indeed, would stand in support of the broad argument by counsel for the petitioner: that a bill generated by a rather considerable number of Task Force members, may have escaped the scrutiny of Parliament, at a time when - the Court should take judicial notice - its members were barely two months away from dissolution and from general elections, and so they had no opportunity to subject it to the requisite committee deliberations; they received the bill at 2.30 pm, and they passed it into legislation that very afternoon.

56. For contentions of merit in the respondent's submissions, the following points are noteworthy: counsel for the respondent is of the "belief that the impugned sections of the *Work Injury Benefits Act* are not unconstitutional because they do not violate individual rights enshrined in Chapter V of the *Constitution* of Kenya"; "contrary to the allegations of the petitioner, the laws are balanced and beneficial to both the employer and employees"; "the petitioner lacks the standing to bring this petition on behalf of employees whom [it] claims their rights are being violated when [it] clearly states [it] is an employer"; "the petitioner has not demonstrated that any of the sections envisaged under section 84 of the *Constitution* has been violated by the respondent"; "the petitioner has not demonstrated that the employers [it] represents in this matter are either disabled or detained"; "the Court must not allow its process to be abused by those bent [on delaying] legitimate administrative action"; "the petition by Law Society of Kenya is meant to foist reliefs upon individuals which reliefs they have not sought in a Court of law"; "the statutory restrictions excluding the jurisdiction of civil Courts by creating special jurisdiction and taking away the jurisdiction of the Courts are not unreasonable or [contrary] to rules of natural justice"; "the impugned sections of the *Work Injury Benefits Act* do not take away the rights of employers but provide for a balance between .... employers' rights against ... employees' rights as rights cannot be enjoyed in abstract"; "the petitioner has not demonstrated that [it] is being or likely to be discriminated [against] due to race, tribe, place of origin or residence, or other local

connection, political opinion, colour, creed or sex"; "valuable rights have already accrued to employees and other persons under the provisions of the impugned Act, hence it will not be just to disturb"; "there has been undue delay in challenging the provisions [of the *Work Injury Benefits Act*]"; "the petitioner has not demonstrated that an individual member has suffered loss or is likely to suffer loss"; "the petition is misconceived [and] based on [a] misinterpretation of the law." Although the foregoing is an odd assortment of contentions made in challenge to the petition, learned counsel laid before the Court a substantial list of case authorities, but without addressing them individually or demonstrating how they made a case competing with the specific points in the petitioner's gravamen. For this reason, the sixteen cases in the respondent's list of authorities have not been of assistance in determining the relevant questions.

VIII. The Act does not prejudice the employer, it is not unconstitutional: submissions for the interested party

57. The interested party, speaking through learned counsel Mrs Guserwa, contested the petitioner on grounds quite similar to those relied on by the respondent. Counsel extolled the package of labour-related statutes emanating from the respondent which were placed before the National Assembly one October afternoon in 2007, and enacted on the spot — namely, the *Employment Act*, 2007 (*Act No 11 of 2007)*; the *Labour Relations Act*, 2007 (*Act No 14 of 2007)*; the *Labour Institutions Act*, 2007 (*Act No 12 of 2007)*; the *Work Injury Benefits Act*, 2007 (*Act No 13 of 2007)*; and the Occupational Health and Safety Act, 2007 (*Act No 15 of 2007)*.

58. Counsel laid emphasis on the fact that a public Task Force had been working on the several draft Bills for some four years, and that important stakeholders had also participated at the formative stage of those Bills. Of the petitioner's objection to s 7(1) of the *Work Injury Benefits Act*, which is about the employer maintaining an insurance policy with an insurance company of the Minister's choice, learned counsel's contention is as follows:

> " The section, in my humble opinion, does not take away the employer's right to choose an appropriate insurer save for the Minister's approval ...."

59. Counsel, on that supposition, proceeds to make an argument challenging the petitioner's position:

> " This section is therefore not unconstitutional as the employer has the liberty to seek the Minister's approval of the already existing medical and insurance policies in respect of the employees in existing schemes."

60. With regard to the penalty-threat to which the employer has been subjected by the *Work Injury Benefits Act*, learned counsel for the interested party states:

> " The imposition of the fine for failure to comply is meant to enforce compliance, and therefore cannot be said to be an illegitimate exercise of the States' police power."

61. As regards s 10 (4) of the Act which institutes a no-fault system of compensation to injured employees, learned counsel urges that there is nothing new about it, as it had also been in place under s 5 of the repealed Workmen's Compensation Act.

62. In respect of some of the petitioner's contentions, all the interested party does is to deny that such contentions are valid — for instance, in respect of ss 10 (4), 16, 23 (1) 25 (1) and 53 (2) of the *Work Injury Benefits Act*, 2007. Learned counsel Mrs Guserwa was essentially satisfied with the interested party's replying affidavit of 5th June, 2008 and apart from this and her written skeleton submissions,

she had little to add. Counsel took it in favour of the respondent that the respondent had established a law review Task Force which made recommendations on an entire set of statutes; in her words: "they must have considered certain things before coming up with the amendment."

63. However, as regards s 58 (2) of the *Work Injury Benefits Act*, 2007 Mrs Guserwa was in agreement with the petitioner, that the application of the Act should have no retroactive application, covering matters that were already before the Courts prior to entry into force of the enactment. Learned counsel said she was of "the humble opinion that the entire Act was not unenforceable", and that the new statute had "sections that only required proper interpretation"; and in the end, counsel urged that the petition "be allowed in part."

IX. Are the several provisions of The *Work Injury Benefits Act* inconsistent with the *Constitution*?

1. The Framework for a Decision

64. The petitioner's pleadings and the responses thereto, as well as the representations of counsel, provide the basis of merits for resolving the question before the Court. Whereas the petitioner has made specific challenges to the design of the *Work Injury Benefits Act*, 2007 the respondent, apart from challenging the competence and bona fides of the petitioner, has focused his case on the potential benefits of the new statute, of a general nature; and the interested party's position, too, has been founded on broad policy considerations. The approaches adopted by both the respondent and the interested party, which includes an emphasis on the background statutory review work which preceded the enactment of the *Work Injury Benefits Act*, have not shed light on any specific attention which, in the travauxpreparatories, may have been devoted to harmonizing that Act with the terms of the *Constitution*. Therefore, in this analysis, attention will given be to each grievance of the petitioner, on its own merits.

65. The locus-point raised by counsel for the respondent is clearly inappropriate, as this Court already had ruled, upon an application at which all the parties were represented, that "the applicant has locus standi to maintain both the petition and the instant application".

2. Conflict between the *Constitution* and any other Law: The Judicial Role

66. By s 30 of the *Constitution* of Kenya,

> " The legislative power of the Republic shall vest in the Parliament of Kenya, which shall consist of the President and the National Assembly".

67. There is, therefore, no question at all that Parliament could, by its assigned constitutional powers, enact such statute law as it may deem proper. However, the High Court, by virtue of its interpretative competence under the *Constitution*, can declare an enactment of Parliament void, if such enactment is found to be in conflict with the *Constitution* itself: and this, therefore, places an obligation on Parliament at the time of legislating, to receive correct and responsible advice from the Attorney-General, that the instrument brought forward to be legislated, is not contrary to the *Constitution*. Section 3 of the *Constitution* thus stipulates:

> " This Constitution is the *Constitution* of the Republic of Kenya and shall have the force of law throughout Kenya and.... if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

68. The mandate to declare nullity of such conflicting law is reserved to this Court, and therefore it is lawful in every respect, where this Court finds any other category of law to run into conflict with the

Constitution, to declare such other law null; this is clear from the terms of s 123 (8) of the *Constitution* itself:

> " No provisions of this Constitution that a person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has exercised those functions in accordance with this Constitution or any other law."

69. That is the position, as is well expressed in case law: Okunda v Republic [1970] EA 453; East African Community v Republic [1970] E A 457; Republic v El Mann [1969] E A 357; Margaret Magiri Ngui v Republic, Nairobi High Ct Crim Appl No 39 of 1985. It is on that basis that the case made by the petitioner herein is to be resolved.

3. Does the *Work Injury Benefits Act*, 2007 entail a Violation of Property Rights?

70. The evidence before the Court is that, prior to the enactment of the *Work Injury Benefits Act*, 2007 litigation relating to work-injuries had gone on as at all other times in the past; and a number of the suits had progressed up to decree stage; some of them were still being heard; and others had reached the pleading stage. All such matters were being dealt with under completely different regimes of law which cannot be reconciled with the administrative mode, resting on unregulated discretions of a Director of Occupational Safety and Health Services, of the *Work Injury Benefits Act*, 2007. It is apparent that claims thus commenced, cannot be transformed into claims under the *Work Injury Benefits Act*, 2007, even though s. 58 (2) of that Act provides:

> " Any claim in respect of an accident or disease occurring before the commencement of this Act shall be deemed to have been lodged under this Act."

71. The effect is that, for those existing claims which have not yet reached decree stage, the claimants will, in effect, have been non-suited; they will have been denied due process of law. But this denial will amount in some cases to a confiscation, in those cases where a decree of the Court has been issued and has conferred certain benefits upon the claimant. Learned counsel for the petitioner had equated such accrued rights with property rights, which are protected under s 75 (1) of the *Constitution*. Such constitutional rights are clearly, as the petitioner contends, being taken by virtue of ordinary statute, but without compliance with the terms of the *Constitution*. It is clear to this Court, that s 58 (2) of the *Work injury Benefits Act*, 2007 is contrary to the terms of the *Constitution*.

72. Learned counsel has urged that there is a similar violation of property rights manifested in other provisions of the *Work Injury Benefits Act*, 2007.

73. It was urged that s 7(1) of the Act, by imposing upon the employer the burden of insuring the employee against all adversities, including adversities occasioned by the employee's criminal activities, is taking the employer's property rights and deploying the same to establish something akin to a national social insurance system. The merit of that contention was indeed considered by the Attorney-General's Task Forces which proposed the scheme of new labour legislation, but it was dropped, purely out of convenience; and that fact by itself, suggests that compulsory insurance of employees as provided for in the *Work Injury Benefits Act*, was glibly cast as an encumbrance upon the employer's property rights. The effect, it is apparent to me, is to qualify the property rights of the employerwhich are protected under s 75 (1) of the *Constitution*; and such legislation thus runs into conflict with the terms of the *Constitution*, which renders null the provisions in s 7 (1) of the *Work Injury Benefits Act*, 2007.

4. An Overweening Director of Occupational Safety and Health Services:

74. Is this Consistent with the *Constitution*?

75. Counsel for the petitioner raised a constitutional principle, as a basis for dealing with the grievance herein: does the *Constitution* allow Parliament to name an exceptionally-empowered Director, whose exercise of discretion will qualify the constitutional and legal entitlement of the employer?

76. Sections 16 and 23 (1) of the *Work Injury Benefits Act*, 2007 granted unlimited powers to the said Director, in "making inquiries" in relation to a work-related accident, and inmaking awards. The new statute requires that the complaint be reported to the said Director, and he alone then proceeds to determine the question, and to resolve "the claim of liability". Obviously the relevant matter is litigious in nature, and is therefore a judicial question; but the new statute reserves it to the said Director. The Director proceeds on the formdation of s 10 (4) of the said Act, which already has deemed the employer liable; and so his role is conclusive. Counsel urged that the "deeming" provision, in respect of liability, would itself deny the employer the right to a fair hearing; and then on the foundation of that deeming, the Director then assumes exclusive rights of "inquiry", and of making an award. I am in agreement with learned counsel that the said sections of the *Work Injury Benefits Act*, ie ss 10 (4), 16, 23 (1) and 52 (1) lack professional draftsmanship, and, as they stand, offend against the employer's guaranteed rights to due process of the law.

5. Must the Employer insure with Minister-approved Insurance Companies?

77. Questions of Freedom of Association Under constitutional principles, the petitioner sees not only an overweening Director of Occupational Safety and Health Services, but also a Minister, who controls choice of companies with which insurance is to be effected. Even though learned counsel for the interested party did not see this as a practical problem, the petitioner has raised the question of guaranteed rights of association under s 80 (1) of the *Constitution*. This Court, firstly, finds validity in the grievance thus raised in respect of s 7(1) of the *Work Injury Benefits Act*, 2007; and secondly, takes judicial notice that the tendency for those wielding executive power is to distort such open-ended power-donations, for purposes inimical to the enjoyment of constitutional rights by the citizen; and on that account, nullity is to be attributed to s. 7(1) of the said statute.

6. Discriminatory Arrangements in respect of Medical Examination for a Complainant?

78. Counsel has shown that although an important question, in relation to claims under the *Work Injury Benefits Act*, 2007 is the medical condition of the complainant, the employer is not granted as much of a representation as the employee, at that forum; and such a reading emerges plainly from s 21 (1) of the Act. Discrimination of this kind runs counter to the terms of s 82 of the *Constitution*; and therefore nullity is to be attributed to the relevant provisions of statute.

79. A similar kind of discrimination has been associated with s 52 (2) of the *Work Injury Benefits Act*, 2007; it creates appellate locus for the objector, in respect of the determinations of the Director of Occupational Safety and Health Services, but not for the affected party; and for the same reason of the relevant constitutional safeguard, the said s 52 (2) of the Act is liable to nullification.

7. Findings, Orders, and Declarations

80. On the basis of this assessment of the merits of the pleadings, the written and oral submissions, and the persuasive authorities noted, I find that the *Work Injury Benefits Act*, 2007 (*Act No 13 of 2007)* failed to meet the professional standards of draftsmanship and scrutiny, and ended up in the statute book as

an enactment that is inconsistent with certain provisions of the *Constitution*. The particular sections of the said Act which stand in contradiction to the *Constitution* are set out below, in the declaration which pronounces them to be null.

81. The petitioner asked that the entire statute be nullified, but the Court has no basis for so ordering, as the pleadings and the submissions were focused on particular provisions. Since, however, it is clear that the impugned statute has shortcomings of drafting, if it is to function as an integral law, then the Attorney-General, undoubtedly, will appreciate the need for a comprehensive drafting scrutiny and reformulation.

82. It is declared that the *Work Injury Benefits Act*, 2007 (*Act No 13 of 2007)* is inconsistent with the provisions of the *Constitution* in the following sections of the said Act:

(i) Section 4;

(ii) Section 7 (1) and (2);

(iii) Section 10 (4);

(iv) Section 16;

(v) Section 21 (1);

(vi) Section 23 (1);

(vii) Section 25 (1) and (3);

(viii) Section 52 (1) and (2);

(ix) Section 58 (2) The said provisions of the *Work Injury Benefits Act*, 2007 (*Act No 13 of 2007)* which are in conflict with the provisions of the *Constitution*, are hereby declared null, and devoid of the status of law.

83. The respondent shall pay the petitioner's costs in this cause.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH, 2009.

J. B. OJWANG

JUDGE.

Coram: Ojwang, J.

Court clerk: Huka

For the Petitioner: Mr. Ngatia

For the Respondent: Mr. Ombwayo

For the Interested Party: Mrs. Guserwa