CONSTITUTIONAL & STATUTORY INTERPRETATION

***Interpretation of constitutions under the Parliamentary Supremacy system.**

***Interpretations of constitutions under Constitutional Supremacy System.**

***Interpretation of statutes under Constitutional Supremacy System.**

***Section 12 of the Valuation for Rating Act in con?ict with Section 77(9) of the Constitution.**

IN THE HIGH COURT OF KENYA

AT NAKURU

CONSTITUTIONAL REFERENCE NO. 3 OF 2009

IN THE MATTER OF SECTION 84(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS & FREEDOMS UNDER SECTION 75 AND SECTION 77(2) OF THE CONSTITUTION

BETWEEN

RELIABLE CONCRETE WORKS LTD.....PETITIONER

AND

THE MINICIPAL COUNCIL OF NAKURU.....1ST RESPONDENT

THE MINISTER FOR LOCAL GOVERNMENT.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

This is a Constitutional petition brought by Reliable Concrete Works Ltd (the Petitioner) under **Sections 75, 77(9)** and **84(1)** of the **Constitution**. It seeks a declaration that the Valuation Court established by the Municipal Council of Nakuru (the Council) for purposes of determining objections to the increment of rates within the Council is not an independent and impartial tribunal within the meaning of **Section 77(9)** of the **Constitution** and is therefore unconstitutional; a declaration that **Section 12** of the **Valuation for Rating Act, Cap 266** of the **Laws of Kenya**, in so far as it authorizes the Council to appoint the Valuation Court, violates **Section 77(9)** of the **Constitution** and is therefore, to that extent, unconstitutional; a declaration that the Council's appointment and composition of the Valuation Court and its proceedings resulting in the Valuation Roll laid vide Gazette Notice No. 10214 of 19th October, 2007 "do not meet the constitutional and administrative law test of legality, rationality, proportionality and reasonableness and the same are null and void (to the extent that they adversely affect the Petitioner)" and any such order that this court may deem necessary to issue "to protect the Petitioner from the illegality and usury perpetrated by the 1st respondent."

The petition is strongly opposed by the Council. In addition to the replying affidavit sworn by the Council's Town Clerk, the Council's advocates have ?led a notice of preliminary objection in which they have raised some preliminary points of law including the competence of this petition that need to be addressed ?rst. Needless to say that if I accede to Mr. Ojienda for the Council's submissions on those issues I will be obliged to strike out this petition and that will be the end of the matter. If not I will of course decide it on its own merits.

Mr. Ojienda for the Council contended that the issues raised in this petition are fear, speculation, moot questions, phobia and anxiety all of which are unjustifiable and cannot therefore form the basis of a judicial determination; that the supervisory jurisdiction of this court can only

be invoked under **Section 65** of the **Constitution**; that the petition does not disclose any breach or likely breach of the Petitioner's fundamental rights and freedoms under **Sections 70 to 83** of the **Constitution** and that the petition is fatally defective, incompetent, inept and bad in law for fouling the provisions of the **Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006** (the Constitutional Rules).

Relying on the averments in the replying affidavit, Mr. Ojienda for the Council cited the cases of **Affordable Homes Africa Ltd Vs Ian Henderson & Others, Nairobi Milimani HCCC N0. 524 of 2004** and **Kabundu Holdings Ltd Vs Ali Ahmed [2005] eKLR** and submitted that this petition is incompetent for lack of the petitioner's board resolution to institute it. He also contended that this petition is not supported by an af?davit as required by **Rule 13** of the **Constitutional Rules** as the purported af?davit in support was sworn before the date of the petition. He took issue with the prayer for conservatory orders in this petition and contended that it should have been made by a separate Chamber Summons under **Rules 20** and **21** of the **Constitutional Rules**.

Mr. Ojienda further argued that this court has no jurisdiction under **Section 84(1)** of the **Constitution** to declare **Section 12** of the **Valuation for Rating Act** unconstitutional. He said this court's jurisdiction under **Section 84(1)** of the **Constitution** is circumscribed to deal with positive infringements or threatened infringements of fundamental rights and even then only when it is properly moved in accordance with the prescribed rules and procedure and not for the interpretation of law. He dismissed the Petitioner's contention that its property rights under **Section 75** and the right to a fair trial under **Section 77(9)** of the **Constitution** have been breached or are threatened with breach. He argued that as is clear from **Section 16(3)** of the **Valuation for Rating Act**, the Valuation Court does not determine any rights. It only tests the veracity of the ?gures on the roll and amends by way of addition, omission, increase or reduction of those ?gures based on valuations presented to it. He contended that the Petitioner has not demonstrated how its right under **Section 75** is threatened with breach. That failure, he said, offends the **Constitutional Rules** made under **Section 84(6)** and the authority in **Kenya Bus Service Ltd & Others Vs General Motors EA Ltd & Others Nairobi HC Misc. Case No. 413 of 2005** in which it was held that the constitutional mandate given to the High Court under **Section 84** of the **Constitution** is a serious one and should not be trivialized or abused. It was further held in that case that the party who invokes it should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which it is alleged to be infringed.

Mr. Ojienda further contended that the bill of rights in our Constitution is not a pious of platitudes but enforceable fundamental rights and freedoms of an individual. In enforcing them, the Constitution must always be given a wide, liberal and broad interpretation but always bearing in mind the rights of others and those of the general public. Life must be breathed into it for it to have effect on the values, needs and aspirations of the people of Kenya. But this can only be done when one has invoked the applicable provisions of the Constitution. He contended that when an allegation is made of violation of any of **Sections 70** to **83** of the **Constitution**, then the Constitutional Rules under **Section 84(6)** must be complied with.

This petition, he further contended, is befuddled as it has not been brought under **Section 67** of the **Constitution** and there is no warrant to invoke the court's supervisory jurisdiction under Section 65 of the Constitution. In his view a statute that is alleged to be unconstitutional should be subject to interpretation through a reference from the subordinate court under **Section 67** of the **Constitution** in accordance with **Rules 24** and **25** of the **Constitutional Rules**. Therefore the Petitioner should have raised its complaint before the Valuation Court under **Section 67** as was done in **Githunguri Vs Republic [1985] KLR 91** instead of coming directly to this court under **Section 84** which does not provide for interpretation. On these grounds he urged me to strike out this petition as being incompetent.

As would be expected, counsel for the Petitioner strongly opposed this preliminary objection. Basing himself on the averments in the af?davit in support of the petition sworn by Mwangi Mucemi, the project manager of the Petitioner, Mr. Githui for the Petitioner started by dismissing the advocates for the Council's preliminary point that this petition should have invoked the supervisory jurisdiction of this court under **Section 65** of the **Constitution** and **Rules 2** and **3** of the **Constitutional Rules** as narrow and restrictive and as based on a misapprehension of this petition. In his view, to hold that the presentation of this reference by a petition ousts the jurisdiction of this court would be elevating forms to a fetish which even the civil procedure law deprecates. In support of this contention, he relied on the Court of Appeal decision in **Mariba Vs Mariba & Another [2007] 1 EA 175**, in which it was stated that failure to commence proceedings for adverse possession by way of an originating summons is not fatal. Counsel said that authority is a clear demonstration that courts are unwilling to elevate procedural technicalities beyond substantive justice. He said that Section 72 of the **Interpretation and General Provisions Act, Cap 2** declares that proceedings in a court of law shall not be void on account of deviation from form unless the deviation affects the substance of the document or instrument prescribed by law. He submitted that as was stated in **Olum & Another Vs the Attorney General [2004] 2 EA 508**, the provisions of the Constitution, especially those touching on the fundamental rights should be broadly interpreted to give effect to the fundamental rights.

With respect I ?nd no merit in Mr. Ojienda's contention that this petition is incompetent for lack of the petitioner's board resolution to institute it for the simple reason that he has not shown how he knows that the Petitioner did not pass such resolution. I am not aware of any legal requirement that such a resolution should be ?led with a petition like this. The cases of **Affordable Homes Africa Ltd Vs Ian Henderson & Others, Nairobi Milimani HCCC No. 524 of 2004 and Kabundu Holdings Ltd Vs Ali Ahmed [2005] eKLR** that he relied on dealt with completely different scenarios. In the **Affordable Homes** case one of the directors had ?led a suit in the name of the company without a board resolution and the others challenged his right to do so while in the **Kabundu Holdings case** the claim by the director who sued in the name of the company that he had a power of attorney from that company was found to be suspect. None of those situations arises in this case. In the circumstances I overrule this point.

Mr. Ojienda's other contention that this petition is incompetent because the af?davit in support of it was sworn before the date of the petition has also no merit. In the case **Peter G.N. Nganga Vs Harrison Maina Kariuki & Another, Civil Appeal No. 294 of 2002 (CA Nrb)** that he cited, the Court of Appeal struck out the notice of motion therein because the af?davit in support of it was ?led 17 days after. That is not the case in this petition. Both the petition and the af?davit in support were ?led on the same day.

The irregularity here of swearing the affidavit in support of the petition before the date of the petition does not go into the substance of the matter and is taken care of by **Order 18 Rule 9** of the **Civil Procedure Rules**. I accordingly overrule that point also.

On jurisdiction Mr. Ojienda contended that this court has no jurisdiction to entertain this petition because it has been brought under a wrong

provision of the Constitution. As I have pointed out, his argument on this is that the declarations sought in this petition arise from the Petitioner's objection in the Valuation Court calling for a reference under **Section 67** of the **Constitution** and not a petition under **Section 84**. He is wrong.

Section 67(1) of the **Constitution** requires that: -

> **"(1) Where a question as to the interpretation of this Constitution arises in proceedings in a subordinate court and the court is of the opinion that the question involves a substantial question of law, the court may, and shall if a party to the proceedings so requests, refer the question to the High Court.**

Except where the reference relates to an interlocutory matter**, subsection (3)** of that Section directs that the reference shall be heard by uneven number of not less than three judges. Mr. Ojienda is not saying that this court has no jurisdiction because this petition should have been heard by at least three judges. His contention is that this court has no jurisdiction to entertain this petition because it has been brought under a wrong provision. In his view invoking Section 84 in such a petition amounts to tri?ing with the court's jurisdiction, an act that he says was condemned in **Republic Vs Commissioner of Police, Ex-parte Nicholas Gituhu Karia Nairobi HC Misc. Appl. No. 534 of 2003**.

A reading of **Section 84** of the **Constitution** does not support Mr. Ojienda's contention. **Subsection (1)** of that Section states:-

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

Nowhere does the section state that the court's jurisdiction there under is not available to anyone with a remedy under any other section. To the contrary as is clear from this subsection "if a person alleges that any of the provisions of **Sections 70** to **83** (inclusive) has been, is being or is likely to be contravened in relation to him...then, without prejudice to any other action with respect to the same matter which is lawfully available, that person...may apply to the High Court for redress." As a matter of fact **subsection (3)** of that Section repeats the provisions of **Section 67**. It states: -

> **"If in proceedings in a subordinate court a question arises as to the contravention of any of the provisions of section 70 to 83 (inclusive), the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous and vexatious."**

I have no major quarrel with the decision in **Republic Vs Commissioner of Police, Ex-parte Nicholas Gituhu Karia, Nairobi HC Misc. Application No. 53 of 2003** cited by Mr. Ojienda that "although...section 84 of the constitution gives the High Court original jurisdiction to make such orders, issue writs and give such directions it may consider appropriate, the court can only do so when properly moved in accordance with the prescribed rules and procedure" as long as the rules of procedure are not raised to a fetish and end up defeating the court's jurisdiction where it exists to do justice to the parties. In that case the court struck out as incompetent the Notice of Motion application which sought under the then **Rule 10(a)** and **(b)** of the **Constitutional Rules** to invoke the court's constitutional and judicial review jurisdictions to determine contentious matters of fact which required a plenary trial. That is not the case here. There is no contentious factual issue here. The declaration sought in this petition that the constituting of the Valuation Court by the Council is unconstitutional is by way of enforcement of the Petitioner's constitutional right to property under **Section 75** of the **Constitution** and is purely on a point of law. That issue, in my view, falls within this coult's jurisdiction under **Section 84(1)** of the **Constitution**.

Rules 11 and 12 of the **Constitutional Rules** under which this petition has been brought require a party to make an application directly to the High Court by way of a petition "Where contravention of any fundamental rights and freedoms of an individual under **Sections 70** to **83** (inclusive) of the **Constitution** is alleged or apprehended..." That is what the Petitioner has done.

This petition is therefore not in any way tri?ing with this court's jurisdiction under Section 84 of the Constitution as Mr. Ojienda contended and I accordingly also overrule the issue of jurisdiction.

For these reasons I ?nd that this petition is competent and that this court has jurisdiction under **Section 84** of the **Constitution** to make the declaration sought if merited. I now wish to consider the petition on its merits.

On the merits of the petition Mr. Githui, counsel for the Petitioner, recapitulated the averments in the af?davit in support of the petition that in March 2006 the Minister for Local Govemment (the Minister) approved under **Section 6** of the **Valuation for Rating Act** the Council's proposal for the time of its valuation to be 31st December, 2004 and by Gazette Notice No. 2241 the Minister approved the Council's site value for purposes of levying rates. Pursuant to that approval, a Valuation Roll was prepared and laid and all ratepayers including the Petitioner were invited to lodge objections, if any, to the increments proposed by the Council. Like other ratepayers, the Petitioner lodged its objections after which the Minister approved the appointment by the Council of the members of the Valuation Court.

He said the Petitioner contends that the Council being a party to the disputes on the rates payable, it is unconstitutional for it to be allowed to appoint members of the Valuation Court whom it pays and controls to determine the disputes. For that reason, the Petitioner contends, the Valuation Court does not meet the constitutional threshold of an independent and impartial court as required by **Section 77(9)** of the **Constitution**. In the circumstances the Petitioner fears that the Valuation Court will be partial thus violating the Petitioner's constitutional rights to property.

Mr. Githui also contended that the whole valuation process is null and void for fouling **Section 3** of the **Valuation for Rating Act** which

requires the valuation for purposes of rating to be done after every 5 years but in this case it was done after 15 years without any extension. He said the Gazette Notice under which the Minister purported to extend time is subsidiary legislation which cannot supersede the provisions of the parent Act.

Turning to the substantive issue in this petition of the unconstitutionality of **Section 12** of the **Valuation for Rating Act**, Mr. Githui submitted that as was stated in the Canadian case of **The Queen Vs Bid M Dru Mart [1986] LRC 332** cited with approval and applied by the unanimous decision of the Supreme Court of Uganda in **Ssemogerere & Others Vs The Attorney General (3) [2004] 2 EA 276** and **Olum & Another Vs the Attorney General [2004] 2 EA 508**, to establish whether a section of a statute is unconstitutional, both its purpose and effect must be looked at. He said in this case it is clear that the purpose and effect of Section 12 of the Valuation for Rating Act is to establish the Valuation Court to determine disputes between local authorities and ratepayers on rates payable in respect of their properties. That court is an adjudicating authority within the meaning of **Section 77(9)** of the **Constitution** which demands that any adjudicating authority must be independent and impartial.

Counsel further contended that **Rules 2** and **3** of the Constitutional Rules apply to matters not provided for under **Sections 67** and **84** of the **Constitution**. He submitted that in this case, upon lodging its objection in the Valuation Roll, the Petitioner felt that the constitution and composition of the Valuation Court contravened **Section 77(9)** of the **Constitution** and was therefore unlikely to be fair and impartial in the matter. That, in counsel's view, fell squarely within the purview of **Section 84(1)** of the **Constitution** and **Rules 11** and **12** of the **Constitutional Rules** under which this petition is brought. He said like the one the Council has raised in this petition was dismissed in the case of T**he Law Society of Kenya Vs the Attorney General & Another, Petition No. 185 of 2008** which cited with approval the American case of **Zeigler Vs South & North Ala. R.R. Co. 594 91877)**. He said that case is also an authority for the proposition that due process of law means that in any legal proceedings, parties have an equal chance of presenting their respective cases to a tribunal which is objectively and subjectively above reproach. The Petitioner, in the premises, prays for a declaration that to the extent that **Section 12** of the **Valuation for Rating Act** authorizes the Council to appoint and control members of that Valuation Court which is to determine disputes between the Council and the ratepayers including the Petitioner on the rates payable, is unconstitutional and therefore null and void. He urged me to allow the petition.

For his part Mr. Ojienda for the Council cannot see how the Petitioner's right under **Section 77(9)** can be breached in view of the high thresholds provided under the **Valuation for Rating Act** for the protection of the ratepayers' fundamental rights to property. In support of this contention he cited as examples **Sections 5, 6**, **8** and **9** which provide for collecting information and making the roll before the rateable owners come to the picture and **Section 16** which he said does not only require the valuer to justify the value he has returned but also provides for a fair hearing in which the objectors are accorded the opportunity of calling witnesses and even submitting their own valuations. The Petitioner having not appeared before the Valuation Court, he submitted that it cannot be heard to complain that its rights will be breached for this court to declare the valuation process unconstitutional.

Besides this Mr. Ojienda asserted that by its composition the independence and impartiality of the Valuation Court cannot be questioned. One of the members, who is usually the chairman, is a magistrate who is an employee of the Judicial Service Commission and the others are professionals whose integrity cannot be compromised. With that he rested his submissions and urged me to dismiss this petition as being unmeritorious.

It is clear from these submissions that this petition raises weighty constitutional issues. If I grant it and declare **Section 12** of the **Valuation for Rating Act** unconstitutional, that will deal a devastating blow not only to the valuation for rating process in the Municipal Council of Nakuru but also to those of all the other local authorities in the country. With that caution in mind I have carefully considered the pleadings in this petition and the able rival submissions presented by counsel for both the Petitioner and the Council. It is unfortunate that I do not have the bene?t of the Honourable the Attorney General's views on the matter as he has not entered appearance or ?led any pleadings though his of?ce was served with the petition.

As I have repeatedly pointed out, the gravamen of this petition is a prayer for a declaration that by authorizing the Council to appoint the Valuation Court to adjudicate on the disputes to which the Council itself is a party, **Section 12** of the **Valuation** for **Rating Act** runs counter to the requirements of **Section 77(9)** of the **Constitution** and is, to that extent, unconstitutional. This calls for the construction or interpretation of both these Sections. I would like to start with that of **Section 77(9)** of the **Constitution**.

Where an act, decision, provision or enactment is said to be unconstitutional, the starting point, in my view, is to examine and interpret the constitutional provision it is said to be in con?ict with. Once the meaning and the spirit of the constitutional provision is ascertained, that act, decision, provision or enactment is then gauged against it to determine whether or not that act, decision, provision or enactment is indeed in con?ict with it. If it is, it is then declared unconstitutional and therefore null and void. Before I examine the Sections I would like to set out the principles that govern the interpretation of constitutions and determine the nature and import of the right that **Section 77(9)** of the **Constitution** gives individuals.

I am not one with the late Justice Mwendwa, CJ in the holding in the case of **Republic V El Mann [1969] EA 357** that the principles which govern the construction of statutes apply equally to the construction of constitutional provisions. From the authorities cited in that case, it appears to me that the late Justice Mwendwa's view was based on the British parliamentary sovereignty system.

In the British constitutional system of parliamentary sovereignty, parliament is the highest and most supreme institution in the land. Law is what parliament says it is. Under its orthodox constitutional system, the British do not have any concept of an entrenched constitution or entrenched bill of rights. All laws including statutes of a constitutional nature are equal and operate on the same level which means that they can be enacted and repealed by parliament at will. Any ordinary Act of parliament can amend or repeal even an Act of a constitutional nature. There is no Act which is unrepealable or repealable only in some special way.

In this British system the courts, in interpreting the constitution and the statues, are not supposed to question what parliament has done. They cannot invalidate any Act of parliament as being unconstitutional. Their business is simply to examine the words of the enactment and ascertain the intention of the sovereign parliament and thereafter enforce it however absurd the consequences may be. In South Africa before the new constitutional dispensation and at a time when this British system reigned supreme, Justice Galgut had, in the case of **Segale Versus**

the Government of the Republic of Bophuthatswana (1990) (1) S.A. at 434 occasion to warn the courts not to invent their own fancy ambiguities in order to defeat the intention of the legislature. He emphasized that:

> **"The task of the courts is to ascertain from the words of the statute in the context thereof what the intention of the legislature is. If the wording of the statute is clear and unambiguous they state what the intention is. It is not for the court to invent fancy ambiguities and usurp the function of the legislature."**

It is on the basis of this British constitutional system of parliamentary sovereignty that the English common law evolved an approach to the interpretation of ordinary statutes on the same principles as those of a constitutional nature. The cardinal purpose in the construction of statutes under this system, as I have said, is to ?nd out the intention of parliament by examining the words the enactment. If the words of the statute are themselves precise and unambiguous in expressing the intention of parliament, then no more can be necessary than to expound those words in their ordinary and natural sense and enforce the constitutional or the statutory provision as it is. It is not permissible in the construction of the constitution or statute to imply a provision in the constitution or statute which is inconsistent with the words expressly used. It is said that the words themselves alone do in such a case best declare the intention of the lawgiver. That is why the passage in **CRAIES ON STATUTE LAW (6th Edn.),** which appears at p. 66 has always been cited as the tool for interpretation of the British Constitution and statutes. In that book the principle is expressed thus: -

> **"The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. 'The tribunal that has to construe an Act of legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to inquire what is the subject-matter with respect to which they are used and the object in view."**

In **Orders Construction of Deeds and Statutes (4th Edn) at p.186** this point is succinctly put in the following words: -

> **"If the language of a statute is clear, it must be enforced though the result may seem harsh or unfair and inconvenient. It is, again, only when there are alternative methods of construction that notions of injustice and inconvenience may be allowed scope."**

It is only when the words of a statute are ambiguous or obscure that the courts have room for maneuver and even then the most important thing is to look for the intention of parliament. Our constitutional system like those of the United States of America, Canada, Botswana and now South Africa to mention but just a few, is the constitutional supremacy system in which the highest institution in the land is the will of the people expressed through the constitution. The constitution is the supreme law of the land which provides a framework and sets the limits for governmental power and guarantees the fundamental rights and freedoms of an individual. It acts as a controlling instrument against which all other laws must be tested for consistency against the values the people have set for themselves.

The supreme constitution therefore serves different and more important objectives than those served by ordinary legislation. A statute de?nes present rights and obligations. It is easily enacted and easily repealed. A constitution, by contrast, is drafted with an eye in the future. It is intended to be a durable instrument which does not admit of amendments as ordinary legislations do. It is meant to withstand the test of time and, as such, amendments are limited. Section 47(2) of the Kenyan Constitution, for instance, states that its amendments require a vote of sixty ?ve per cent of all the members of Parliament excluding ex-of?cio members. Article 259 of the 1995 Ugandan Constitution provides that certain Articles of that Constitution shall be amended only if the amendments are supported in the second and third reading in Parliament by not less than two thirds of all the members of Parliament, and approved by the people in a referendum. Under Article 260, amendments of certain Articles may be carried out not only when supported on the second and third readings in Parliament by not less two-thirds of all members of Parliament, but also when rati?ed by at least two-thirds of the members of the District Council in each of at least two-thirds of all the Districts in Uganda.

While interpreting the meaning of the word "unreasonable" in the Canadian Charter of Rights and Freedoms in the case of **Hunder Versus Southam Inc, (1984) 11 DLR (4th) 641 (SCC) 649** the Canadian court clari?ed that:

> **"The task of expounding a constitution is crucially different from that of construing a statute. A statute de?nes present rights and obligations, it is easily enacted and easily repealed. A constitution, by contract, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when jopined by a bill or charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions can not easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions bear these conditions in mind."**

See also the Botswana case of **Unity Dow Vs Attorney General of Botswana [1992] LRC 623** in which Agnda, J. A. said at page 665 that "The constitution is the supreme Law of the land, and it is meant to serve not only this generation but also generations yet un-born."

As an instrument that guarantees the fundamental rights and freedoms of the individual, a supreme constitution is meant to cater not only for the present generations but also for posterity. As such it is a living and durable document which must be allowed to develop in line with the developments and aspirations of the people taking into account new social and political realities.

In the constitutional supremacy system law is what parliament says it is subject to the constitution. What parliament enacts as law can only be law if it is consistent with the constitution. Supremacy elevates the constitutional document to a status higher than ordinary statutes. The constitution trumps any other law that is inconsistent with it. A special legal instrument of this kind requires a holistic and ?exible interpretation, so that it can be adapted over a period of time to changing conditions. For this reason the system of constitutional supremacy demands that a constitution be interpreted in a manner different from the one followed in the interpretation of ordinary statutes. It must be

interpreted as a higher law or norm against which all other laws must be assessed for consistency.

Even in this system, the words and phrases used in the constitution have to be considered and where they are clear and unambiguous they must be given their primary, plain, ordinary and natural meaning. The language used must be construed in its natural and ordinary meaning. The sense must be that which the words used ordinarily bear. At the end of the day, however, the overall objective in the interpretation of supreme constitutions is to determine the values in the constitutional provision and not the intention of parliament.

The interpretation of such constitution will therefore be directed at ascertaining the fundamental values inherent in the constitution whilst the interpretation of the particular legislation will be directed at ascertaining whether it con?rms to the fundamental values or principles of the constitution. Statutory interpretation is therefore to be seen not as a search for the intention of the legislature but an enforcement of the constitutional values. Such approach would involve inter alia setting out the broader historical and social context of the enactment, paying attention to the language used, establishing and giving concrete effect to the values of the constitution and harmonizing the statute concerned with those values.

While interpreting constitutions of other countries, the British courts have given effect to this principle. In 1979, in what has become a leading authority on constitutional interpretation throughout the commonwealth, the Privy Council, in the case of **Minister of Home Affairs versus Fisher [1980] A. C. 319 (PC),** declared that a constitution was "sui generis, calling for principles of interpretation of its own, suitable to its character... without necessary acceptance of all the presumptions that are relevant to legislation of private law." In that case the Privy Council was interpreting the constitution of Bermuda in relation to the meaning of the word "child" in a statute of that country. In con?rming the decision of the Court of Appeal of Bermuda that "child" as used in section 11 of the Statute of Bermuda in question included illegitimate child, the Privy Council held that a constitutional instrument should not necessarily be construed in the manner and according to the rules which applied to Acts of Parliament.

In Botswana, the court of Appeal emphasized the difference at the interpretation level between the British and American type of constitutions in the case of **State Versus Petrus & Another (1985) LRC (const) at 669** where it stated that:

> **"It was once thought that there should be no difference in approach to constitutional construction than any other statutory interpretation. Given the British system of government and the British judicial set-up, that was understandable, it being remembered that whatever statutes that might have the look of constitutional enactment in Britain, such statues are nevertheless mere statutes like any others and can be amended or repealed at the will of parliament. But the position where there is a written constitution is different."**

In the case of **Unity Dow Vs Attorney General of Botswana [1992] LRC 623**, Amissah, J.P. of the Court of Appeal of Botswana said: -

> **"By nature and de?nition even when using ordinary prescriptions of statutory construction, it is impossible to consider a Constitution of this nature on the same footing of a legislation which was itself established by the Constitution."**

It is not in doubt that **Section 77(9)** is in **Chapter V** of our Constitution which provides for the protection of the fundamental rights and freedoms of an individual. As counsel for both parties have correctly pointed out, constitutional provisions, especially those touching on fundamental human rights like the one in this case ought to be construed broadly and liberally in favour of those on whom the rights have been conferred by the Constitution unfettered by technicalities. This, as I have already pointed out, is because while the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed may give rise to a new and fuller import to its meaning. A constitutional provision containing a fundamental right is a permanent provision intended to cater for that right for all time to come and, therefore, while interpreting such a provision, the approach of the court should be dynamic, progressive and liberal, keeping in view the people's economic, political and cultural values so as to extend the bene?t of the same to the maximum extent possible. In other words, the role of the court should be to expand the scope of such a provision and not to restrict it.

The liberal interpretation of the constitutional provisions especially those that touch on the fundamental rights and freedoms is not a preserve of only our jurisdiction. It is a world wide approach. This is how Lord Diplock rendered himself on this point in the case of **Attorney v Momodou Jube [1984] AC 689 at p. 700** which was an appeal to the Privy Council from the Court of Appeal of Gambia:-

> **"A constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled is to be given generous and purposeful construction.**
>
> **The interpretation should be generous rather than a legalistic one, aimed at ful?lling the purpose of the guarantee and securing for individuals the full bene?t of the charger's protection. See Republic v Big M Drug Mart Ltd (other intervening) [1986] 29 LRC (Const) 332 (Supreme Court of Canada per Dickson J)".**

In **Unity Dow Vs Attorney-General of Botswana [1992] LRC 623** it was stated that a generous construction means that: -

> **"...you must interpret the provisions of the Constitution in such a way as not to whittle down any of the rights and freedoms unless by very clear and unambiguous provisions such interpretation is compelling".**

With these principles of interpreting Supreme Constitutions in mind, I would now like to consider the provisions of **Section 77(9)** of our **Constitution** and determine the exact right or bene?t it confers on an individual and whether or not **Section 12** of the **Valuation for Rating Act** whittles down that right or bene?t. The Section states that: -

> **"A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or**

obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time."

Five aspects of this provision need to be understood and made clear. They are: (1) "A court or other adjudicating authority; (2) prescribed [and being] established by law; (3) for the determination of the existence or extent of a civil right or obligation; . . . (4) shall be independent and impartial; and (5) where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time."

If I may start with the second of these aspects, there is no issue of the Valuation Court not being established by law. In compliance with **Section 77(9)** of the **Constitution, Section 12** of the **Valuation for Rating Act** establishes the valuation court. It provides that:-

"(1) A local authority may, and, if the provisions of section 11 have not prevailed, shall, appoint a valuation court, which shall consist of a magistrate having power to hold a subordinate court of the ?rst class, or an advocate of not less than ?ve years' standing, who shall be chairman of the court, and not less than two additional members appointed with the approval of the Minister, who may or may not be members of the local authority.

As to the ?rst aspect which is to determine if the Valuation Court is "A court or other adjudicating authority", we need to look at the object or purpose for which the Valuation Court is established and in this determination, I have no problem with the consideration of the British principles of interpretation or construction in the interpretation of our ordinary statutes as long as in the end what is sought to be determined is not the intention of parliament but the values contained in the constitution.

One of the cardinal methods of construction of statutes employed by courts in the interpretation of statutes is by reading the whole statute and ascertaining the object of the enactment. As stated in the above quoted passage from **CRAIES ON STATUTE LAW (6th Edn.),** "in order to understand [the words of a statute] it is natural to inquire what is the subject-matter with respect to which they are used and the object in view."

Although the purpose for which the Valuation Court is established is not expressly stated under the Valuation for Rating Act, the same may, however, be deciphered from the object of the entire Act.

The object of the Valuation for Rating Act is set out in its preamble. It is "To empower the local government authorities to value land for the purpose of rates." If the object of the entire Valuation for Rating Act is to empower the local authorities to value land for rating purposes, then the Valuation Court is established as a forum through which disputes between the ratepayers and the local authorities can be resolved. This is quite clear from a reading of **Section 12** of the **Act**. It therefore follows from this reasoning that the Valuation Court is an "adjudicating authority" within the meaning **of Section 77(9)** of the **Constitution.** This also disposes of the third aspect of **Section 77(9)** of the **Constitution** in that if it is a forum through which disputes between the ratepayers and the local authorities concerned can be resolved, it also follows that the Valuation Court is also established for the "determination of the existence or extent of a civil right or obligation" of an individual, within the meaning of that Section. That leaves me with the issues of the independence and impartiality of the Valuation Court and the fair hearing before that court. I will deal with these two together.

On the aspects of independence and impartiality, Mr. Ojienda submitted that by setting the threshold of the appointment of professionals (a magistrate who is an employee of the Judicial Service Commission or an advocate of not less than ?ve years standing as the chairman of the Valuation Court and two other members approved by the Minister), as well as the manner in which the Valuation Court is required by **Section 16** of the **Valuation for Rating Act** to conduct its proceedings, any apprehensions of the Valuation Court's impartiality are dispelled.

I cannot accept this contention. Though not expressly raised by counsel for the parties, I am alive to the fact that with the increase in social and economic regulation by governments and the need for more specialized bodies to implement government policy there has been a vast increase in the number of administrative tribunals. The Valuation Court is one of such bodies.

The need for specialization and expertise to consider local circumstances as well as the need for the adoption of expeditious, informal, and inexpensive procedures compels the establishment of such bodies by legislation. **Section 77(9)** of the **Constitution** recognizes this need.

I know that the independence of the judiciary has two distinct meanings; independence from the legislative and executive branches of government (separation of powers) and the requirement that judges should decide cases impartially. The ?rst requirement can have no application to tribunals. Administrative tribunals are frequently part of the executive (or at least not part of the judiciary) and the separation of powers as a means of independence does not 'structurally' apply to them. That notwithstanding, however, by constitutionalising the requirements of independence and impartiality, Section 77 (9) of the Constitution puts this aspect of that section beyond debate. The basic idea on which this provision is based is that there can be no justice without impartiality. The independence and impartiality of these tribunals is central to the adjudicating function. The administrative tribunals must therefore be absolutely independent and impartial. The purpose of insisting on this is therefore to afford the individuals involved in adjudicative proceedings before such tribunals the protection which separation of powers normally provides to them.

There is no dispute in this case that the object of this **Section 12(1)** of the **Valuation for Rating Act** is to authorize and it authorizes the Council to appoint the Valuation Court. It is also common ground that the disputes on rates that the Valuation Court is called upon to decide are disputes between the Council on the one hand and the ratepayers including the Petitioner in this case on the other. It is clear from **Subsection (1)** of this **Section** that the Council can appoint its own members to the Valuation Court. The issue then is whether or not that is in con?ict with **Section 77(9)** of the Constitution.

As Mr. Githui for the Petitioner correctly pointed out and as I have myself already stated, in determining the constitutionality of Section 12

of the **Valuation for Rating Act**, its purpose and effect must be looked at. This is how the Canadian court stated this criterion of both effect and purpose of an enactment in determining it constitutionality in case of **The Queen Vs Big M Drug Mart [1986] LRC 332** quoted with approval and applied in the Ugandan cases of **Ssemogerere and Others Vs The Attorney General (3) [2004] 2 EA 276** and **Olum and Another Vs the Attorney General [2002] 2 EA 508:-**

> **"Both [the] effect and purpose are relevant in determining constitutionality; either unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislations are animated by an object the legislature intends to achieve. This object is realized through the impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact are clearly linked if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus its validity."**

I respectively endorse this dictum as setting out the correct approach to the interpretation of the section under consideration.

I have already pointed out the purposes of **Section 12(1)** of the **Valuation for Rating Act**. It is the establishment of a tribunal or adjudicating body to resolve disputes between the Council on the one hand and the rateable owners of properties in the Council's jurisdiction on the other on disputes of the rates payable. That being the case and if "object and its ultimate impact are clearly linked if not indivisible" as stated in the above case, the next question to be answered is: what will be the effect or impact of the Valuation Court's decision?

To me it is obvious. It is the imposition of an obligation on the rateable owners to pay a certain sum of money as rates with of course the attendant consequences of legal action, including, as we all know, the selling of the rateable property in event of default in the payment of the amount demanded. It therefore goes without saying that the Valuation Court's decision will affect the rateable owners' constitutional rights to property which is protected by **Section 75** of the **Constitution**.

Section 77(9) of the **Constitution** also requires such tribunals to be fair in their adjudications. Fairness entails more than simply going through the motions. A fair public hearing by an 'adjudicating forum' which applies the law in order to resolve a dispute must not only be procedurally fair but also produce a fair outcome. Generally speaking, fairness requires at least adherence to the principles of natural justice. Natural justice has two major principles — ***audi alteram partem*** (hear the other side) and ***nemo judex in sua causa*** (no one should be judge in his or her own case). These principles are well-established in administrative law.

It is of fundamental importance that justice should not only be done, but that it should also be manifestly seen to be done. See **R.Vs Sussex Justices, Ex-parte MacCarthy[1923] All E.R. 233**.

For justice to be done and seen to be done in this case, the Valuation Court should not only be independent of the parties to the dispute but should be seen to have that independence. In my view, it can not have that independence nor can it be seen to have it when the Council is authorized to appoint its members. In the English decision in the case of **Findlay Vs UK [1997] 24 EHRR 221 at 244-245 (par. 73)** (cited with approval in **Runa Begum Vs Tower Hamlets LBC [2002] 2 All ER 668 at 682 par.28)** the concept of an independent and impartial tribunal with regard to the appointment of its members was stated thus:-

> **"In order to establish whether a tribunal can be considered independent, regard must be had to the manner of appointment of its members, their terms of of?ce, existence of guarantees against outside pressure and whether the body presents an appearance of independence. As to the question of impartiality there are two aspects in these requirements. First, the tribunal must be subjectively free from personal prejudice and bias. Secondly, it must also be impartial from an objective point of view that it must offer suf?cient guarantee to exclude any legitimate doubt in this respect."**

I would endorse this decision as the correct statement of the law in this regard.

As I have pointed out objections to valuations for rating are essentially determinations of rights and obligations of the rating authorities on the one hand and the ratepayers on the other. By authorizing the rating authority, in this case the Municipal Council of Nakuru, to appoint members of the Valuation Court who, as I have said, may include its own members, to determine rate disputes to which it is a party, I ?nd and hold that **Section 12** of the **Valuation for Rating Act** violates the independence and impartiality aspect of **Section 77(9)** of the **Constitution**. It is therefore to that extent unconstitutional and I accordingly declare it null and void. That being my view, I need not go into the other issues raised in these applications.

For these reasons I allow this petition and grant the petitioner the declaration that by authorizing the local authorities to appoint valuation courts to resolve disputes on rates to which the local authorities are parties, **Section 12(1)** of the **Valuation for Rating Act** undermines the ratepayers' rights under **Sections 75** and **77(9)** of the **Constitution** and is therefore unconstitutional and null and void. Consequently the Valuation Court appointed by the Municipal Council of Nakuru to determine rate disputes between the council and the applicants is illegal and is hereby prohibited from carrying on any further proceedings.

As I pointed out at the beginning of the ruling I know that this decision does not only affect the Municipal Council of Nakuru but all the other local authorities in the country. But the law cannot be bent. It is high time the local authorities were required to strictly comply with the law. It is my hope that the Minister for Local Government will immediately liaise with the Attorney General to amend **Section 12** of the **Valuation for Rating Act** to conform with **Section 77(9**) of the **Constitution** by setting up an independent machinery of establishing valuation courts. The Applicants shall have the costs of these applications but I do not certify for two counsel.

DATED and delivered this 30th day of June, 2009.

D.K. MARAGA

JUDGE