



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Petition 564 of 2004**

- (1). ALPHONSE MWANGEMI MUNGA**
- (2). PETER MUCHIRI MURIUNGI**
- (3). MICHAEL ONYANGO OCHIENG**
- (4). PETER N. MAKAU**
- (5). CHIVATSI KATAMA**
- (6). MARICOS NYAMWANGA OKONGO**
- (7). STEPHEN NZIOKI KASINA**
- (8). SHADRACK C. LEWA**
- (9). BENEDICT ORWARU**
- (10). NICHOLAS MOKI**
- (11). JAMES KINGELE (suing on their own behalf**

**and on behalf of 367 employees of**

**African Safari Club Limited.....APPLICANTS**

**- VERSUS -**

**AFRICAN SAFARI CLUB LIMITED ...RESPONDENT**

**JUDGMENT**

Alphonse Mwangemi Munga, Peter Muchiri Muriungi, Michael Onyango Ochieng, Peter N. Makau, Chivatsi Katama, Maricos Nyamwanga Okongo, Stephen Nzioki Kasina, Shadrack C. Lewa, Benedict Orwaru, Nicholas Moki and James Kingele were all employees of the Respondent, African Safari Club Ltd. upto 24.10.2003. They have brought this petition on their own behalf and that of 367 other employees who were employed by the respondent in various job categories upto about 24.10.2003 when their services were terminated. The petitioners have brought this petition under Section 84 (1) of the Constitution, alleging breach of their fundamental rights and freedoms under Section 70, 74, 75, 76 and 79 of the Constitution. As a result the petitioners seek the following orders and declarations:-

- (a) A declaration that the petitioners' right to life under Section 71 of the Constitution includes right to live in dignity, shelter and protection of their family and means of livelihood;
- (b) A declaration that the respondent has contravened the rights of the petitioners and other former employees of African Safari Club Ltd under Section 71 and 75 of the Constitution and are entitled to be paid their terminal dues and pensions plus interest totalling to over Kshs.57,000,000/= within the meaning of Section 75 of the Constitution;
- (c) A declaration that the rights of the petitioners and other former employees of the African Safari Club Ltd. to be paid full terminal dues and pension benefits are property rights within the meaning of Section 75 of the Constitution;
- (d) An order that the respondent do pay to the 367 petitioners Kshs.38,765,690/= being the balance of their terminal dues as of 16.10.2003 plus interest making a total of about Kshs.57,000,000/=;
- (e) An order that the respondent do pay the 367 applicants interest set out in (b) and (d) above at 12 % per cent per annum from the 6.10.2003 until payment in full;
- (f) An order that the respondent do give the petitioners their statutory certificates of service;
- (g) An order that the respondent do pay the 367 applicants general damages;
- (h) Any other further orders that the court deems fit to grant;
- (i) An order that the respondent do pay the costs of the petition.

The petition is supported by an affidavit sworn by Alphonse Mwangemi, dated 12.10.2006 and a further affidavit of the same deponent dated 30.11.2006 and skeleton submissions filed in court on 26.1.2007 and dated 25.1.2007.

The petition was opposed and Renato Bachmann, a Director of the respondent swore an affidavit dated 23.10.2006 in reply and the respondent also filed submissions on 22.1.2007.

Briefly the applicants' case is that they were employed in various categories with the respondent and their employment was governed by the provisions of the Employment Act Cap 226 Laws of Kenya and a Collective Bargaining Agreement (CBA) signed by the union officials of the petitioners and the respondent and it was duly registered with the Industrial Court and was therefore enforceable as a contract. That between April and mid 2003, the respondent failed to pay the petitioners' dues at the end of the month and by a letter dated 26.9.2003, the respondent informed the petitioners that their salaries for September 2003 would be delayed. They were not informed when the said salaries would be paid. A meeting was held between the Union and Ministry of Labour and Human Resources Department and the respondent but nothing was resolved. On 9.10.2003, when the meeting was to proceed, the petitioners reported to work but they were prohibited by police officers until a meeting was held between the union officials (KUDHEHA), the Ministry and the respondent when a return to work formula was agreed upon and they were advised to report to work on 11.10.2003. The terms of the return to work formula are at paragraph 10 of the supporting affidavit. Upon reporting to work on 11.10.2003 they were denied entry into the premises unless they met other terms like signing of an indemnity form, clearance certificates to which most declined and were locked out and similarly dismissed between 6<sup>th</sup> October and 24.10.2003. Due to the respondent's conduct, the petitioners declared a strike and at the same time, one Kali Woolf a Director of the respondent made abusive and derogatory remarks against the employees that "**One madman in Europe is better than 20 Kenyan professors.**" It is the petitioners contention that the respondents' conduct of terminating the petitioners contracts was unconstitutional, unfair, null and void for reasons that there was no basis for the dismissal as the petitioners have a right to withdraw labour and a strike is a right expressly provided by law. That despite the "**return to work formula**" they were locked out of their places of work, that they were not paid the salary arrears, allowances and salary in lieu of notice and yet some had received retirement notices. That they had not been reprimanded or

warned during their tenure with the respondent. That there is no reason why the respondent could not pay the dues when the respondent operated many other hotels inter alia Coral Beach Hotel, Masai Safari Lodge, Chanzu Beach Hotel, Dolphin Beach Hotel and others. (See paragraph 16 of the affidavit) That as a result of the respondents actions several of their colleagues died due to lack of good health care. The names of the deceased are listed at paragraph 18 of the affidavit. That they filed Misc. High Court Case No. 212/04 (Mombasa) which was struck out on a technicality. Thereafter they filed this petition to urge contravention of their rights under the Constitution.

Mr. Kurauka counsel for the applicants submitted that it was illegal and against fair play to dismiss an employee without giving reasons and that the applicants should have been given a chance to defend themselves. That there is no good reason for failure to pay for services rendered by the petitioners because the respondent admits that they had monies to pay.

Counsel relied on the following cases in support of the petitioners' case:-

- (1). NJOYA & OTHERS – VS- ATTORNEY GENERAL (2004) KLR 261** where the court held that the constitutional provisions should be given a broad and liberal interpretation and not interpreted like an Act of Parliament.
- (2). RAMANOOP - VS – ATTORNEY GENERAL [2004] 1LRC.**
- (3). WANJUGUNA – VS – REPUBLIC [2004] KLR 520.**
- (4). RASHID ODHIAMBO ALOGGOH – VS – HACO INDUSTRIES AC 110/2001** where the court held that once one alleges breach of constitutional rights they should be heard.
- (5). MARETE – VS – ATTORNEY GENERAL [1987] KLR 690.**
- (6). ARONY AMOLLO - VS – ATTORNEY GENERAL MISC. APPLICATION NO. 494/2003.**
- (7). VINCENT LEMPAA – VS – KENYATTA UNIVERSITY H MISC. NO. 1118/2003.** In the above three matters the courts have awarded damages after proof of breach of fundamental rights.

Mr. Kurauka also urged this court to grant the orders sought which he submitted are also available against private companies like the respondent.

In opposing the application, the Director of the respondent deponed that the respondent was justified in summarily dismissing the petitioners for arbitrarily withdrawing their labour. As regards non-payment of salaries, it is the respondent's contention that it was due to business challenges that they could not pay and in addition, there was a massive fire damage to their hotels on 1.9.2003 when its 4 hotels were burnt down. That there was no intention to deny the petitioners their dues but the petitioners decided to use pressure by withdrawing their services. That the allegations of death of some of the petitioners are denied and that they are made in bad faith. Similarly the allegation of derogatory language by Mr. Woolf is denied. Mr. Mwakisha counsel for the respondent submitted that in the “**return to work formula**” arrived at on 9.10.2003, it was agreed that the petitioners dues would be paid as from 17<sup>th</sup> and 18<sup>th</sup> October 2003 but before the due date, the petitions rioted and were therefore dismissed in accordance with their individual contracts of employment

Counsel also submitted that since each of the 367 employees had individual contracts and their individual claims should be in ordinary law of contract. That there is need to adduce evidence which this court is not able to undertake. That the suit which had been filed in the High Court Case No. 212/2004, (Mombasa) was struck out so that the petitioners could move to the Industrial Court for the remedies that they seek..

Counsel also argued that this is not a public law litigation but the petition seeks to enforce private contracts. That it is also not public interest litigation to enable the applicants to come by way of

representative suit as they have done. That each petitioner has a contract which he seeks to enforce and Mr. Munga cannot purport to depone on behalf of 367 others as he cannot with certainty state what each individual is entitled to. That the court should look at the antecedents of the petitioners who abandoned due process even after a return to work formula and reject the claims.

In regard to the racial remark, it was submitted that this is a blank allegation because the petitioners were based in different hotels and can not have heard it at the same time and it amounts to hearsay. That in any event the petitioner did not specifically cite what category the allegation falls, under Section 82 of the Constitution to enable the respondents to respond.

After hearing both parties on the petition, the reply thereto, the submissions by counsel and authorities that have been cited, we are of the view that the issues that lend themselves for determination in this matter are:-

- (1). Whether the petitioners have the locus standi to bring this representative suit;
- (2). Whether the remedies sought are public or private law remedies and whether they can lie against the Respondent;
- (3). Whether any breach has been alleged and pleaded under Section 70 of the Constitution;
- (4). Whether the respondent's failure to pay salaries to the petitioners contravenes Section 71 of the Constitution;
- (5). Whether the respondent's failure to pay salaries amounts to torture, inhuman and degrading treatment and contravenes Section 74 of the Constitution;
- (6). Whether the Director's derogatory remarks contravened the petitioners' Constitutional rights;
- (7). Whether this petition raises any Constitutional issues;
- (8). Whether this court can grant the declarations and orders prayed for in the petition;
- (9). Who pays the costs of the petition.

The Respondent's Counsel raised issue whether the Petitioners had the capacity to bring a suit under S.84 of the Constitution on behalf of other parties each party having signed a contract of employment with the Respondent. Section 84 does not envisage one person bringing a common suit on behalf of others save where one is detained only then can another apply on their behalf. The section reads:

**“Section 84 (1) subject to subsection (6), if a person alleges that any of the provisions of S.80 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him, (on, 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.**

(2) .....

(3) .....7.”

The right to move the Constitutional Court under S. 84 for redress is of a personal (individual) nature and there is only one exception to that provision. There is no evidence that the other Petitioners who were not before the court were detained so that those before court could represent them.

Out of the 11 Petitioners before the court, only one presented his case. The petition as presented cannot be sustained as Section 84 of the Constitution does not envisage a common claim like that before us.

It is not in dispute that the petitioners' claim arises out of alleged breach of terms of employment, The petitioners were employed by the respondent in various capacities at different times. A sample of a standard form contract was exhibited at page 50 of the 1<sup>st</sup> petitioner's affidavit in support. It contains the names of the employee, the identity card number, the hotel at which one was employed, the occupation, the salary, house allowance and terms relating to termination of service and summary dismissals. Each employee was served with and issued with such a letter which forms the contract of employment and signed by the employee.

It is also admitted that there was a Collective Bargaining Agreement (CBA) signed between the respondent and Transport and Allied Workers Union (K), the union that represents the petitioners. It is also evident from the pleadings that there was some industrial unrest at the respondent's hotels in the period preceding 9.10.2003 when a return to work formula was arrived at between the parties, the terms which are found at paragraph 10 of Munga's affidavit; i.e. resumption of duty was to be on 11.10.2003; salaries were to be paid on or before 17<sup>th</sup> and 18<sup>th</sup> October 2003; the petitioners were not to withdraw their labour arbitrarily without following the laid down procedures; any delays in salary payment was to be communicated to the petitioners or their officials and victimization of the petitioners would be discussed at a meeting on 13.10.2003. Whereas the petitioners claim to have reported to work on 11<sup>th</sup> October 2003 and for no apparent reason were locked out, they contradict themselves at paragraph 11 (d) of the petition where they admitted having been locked out by the respondent because they rioted for their dues after "**return to work formula**". By the time they rioted for salaries the due date for payment of salary i.e. 17<sup>th</sup> and 18<sup>th</sup> of October had not reached. The respondents case is that the Petitioners rioted and that is why they were dismissed as they had flouted the terms of the return to work agreement. At page 56 of the annexures to Munga's affidavit, the Ministry of Labour and Human Resource Development filed their own report on the chronology of events on industrial unrest at the respondent's hotels. At paragraph 6 thereof, it is noted that all workers resumed work on 11.10.2003 after accepting to sign indemnity forms but the workers for Central Maintenance were not on duty having refused to sign the indemnity forms. The labour officer was unable to settle the dispute and advised the union to file a dispute with the Ministry of Labour to have the matter investigated and recommendations made. That report is dated 1.10.2003. Instead of the petitioners moving the Ministry of Labour as advised, they filed **H.C. 212/2004 (Mombasa). Peter M. Nzioka, Peter Mokau, Chivatsi Katana, Peterson Mwangi, Michael O. Ochieng, Maricos M. Okongo, Alphonse Mwangemi, Stephen Kasina, suing on the behalf and that of 351 others Versus African Safari Club Ltd.** The same parties herein. The respondent raised an objection to the case on account of jurisdiction and the court struck out the suit and held that the right forum for the dispute to be determined was the Industrial Court pursuant to the provisions of the Trade Disputes Act. In our considered view the dispute between the parties is an industrial dispute and we have the Employment Act and the Trade Disputes Act which provide the machinery for determining such disputes. Even the petitioners admit in their pleadings that their employment was governed by the Employment Act and Trade Disputes Act. The preamble to the Employment Act Cap 226 Laws of Kenya now repealed and replaced with a new employment Act No. 11/2007 reads as follows:-

**"An Act of Parliament to consolidate with amendments, the law relating to employment, and for matters incidental thereto and connected therewith."**

Again the Trade Disputes Act Cap 234 Laws of Kenya now repealed was enacted to deal specifically with trade disputes. The preamble thereto reads:-

**"An Act of Parliament to provide for the settlement of trade disputes generally and for the settlement of trade disputes in essential services; to provide for the establishment of Boards of Enquiry and a standing committee to control and regulate strikes and lockouts, to make provisions regarding the collection of union dues; and for matters incidental thereto."**

Section 14 of the Act then establishes the Industrial court to deal with industrial disputes. In this case, this court would need to establish the dues that each Petitioner would be entitled to, whether he owes the respondents any monies or leave due to him. It cannot be disposed of by way of affidavit evidence in a constitutional application. The court would also need to establish whether or not the dismissal of the

Petitioners was justified. The affidavit of one deponent would not suffice in the circumstances. And by its very nature, it should have been disposed of by way of adducing evidence before the industrial court as that is the procedure that the Petitioner opted for, having signed a Collective Bargaining Agreement (CBA) which is filed with the Industrial Court. We agree with and adopt the Court of Appeal's decision in **SPEAKER OF NATIONAL ASSEMBLY VS JAMES KARUME CA 92 [1992]** where the court said **"where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed....."** Though that case dealt with elections and Judicial Review, the principle would apply in the instant case because it was addressing the question of procedure generally. There is clear procedure under the Employment Act for enforcement of employment contracts, if the Petitioners opted to go to the ordinary courts or the Industrial Court if the Petitioners opted to proceed under the Trade Disputes Act.

We find that this dispute does not raise any constitutional question but a pure question of contract and should have been filed in the right forum, the Industrial Court.

Before us is a petition brought pursuant to Chapter V of the Constitution in which the Petitioners allege breach of their rights under their contracts of employment and we are of the view that the Petitioners are trying to enforce their individual private rights through this application which falls under public law.

Merriam Webster's Online Dictionary defines public law as such:-

**"(1) a legislative enactment affecting the public at large**

**(2) a branch of law concerned with regulating the relations of individuals with the government and the organization and conduct of the government itself.**

Business Dictionary defines Public Law as;

**"constitutional, statutory or judicial law developed by governments and applied equally to the general public"**

Law Encyclopaedia defines Public law as;

**"Public law refers to an act that applies to the public at large, as opposed to a private law that concerns private individual rights, duties and liabilities."**

Public law includes constitutional law, administrative law and criminal law.

In the instant case the Petitioners are trying to enforce their rights under contracts of service. Those are rights personal to themselves and have nothing to do with the public. Their claims fall within the private law realm. The remedies sought cannot avail.

The Respondent is a limited liability company duly incorporated in the Companies Act Cap 486 Laws of Kenya (See paragraph 2 of the Petition). The Respondent is a private entity, not a public body or a Governmental entity. It is trite law and this court has repeatedly held that fundamental rights are only enforceable against the Government which is the guarantor of individual rights and freedoms. In the case of **TEITWNNANG ARIONG & OTHERS 1987 LRC CONST. 577**, the court stated as follows:-

**"Dealing now with the question can a private individual maintain an action for declaration against another private individual or individuals for breach of fundamental rights, provisions of the Constitution? The rights and duties of individuals are regulated by private law. The Constitution on the other hand is an instrument of Government. It contains rules about the Government and the country. It follows therefore that the duties imposed by the constitution under the fundamental rights provisions are owed by the Government of the day to the governed. I am of the opinion that an individual or a group of individuals as in this case cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or a**

**group of individuals since no duty can be owed by an individual or a group of individuals to another individual under the fundamental rights provisions of the Constitution.”**

The above decision reflects the law in Kenya today and the courts were of the same view in **K.B.S. LTD. V ATTORNEY GENERAL HCC 413/2005, RICHARD NDUATI KARIUKI V HON LEONARD NDUATI KARIUKI HCC 7/2006 AND MANY OTHER CASES IN THE SAME POINT.** We find that the Respondent cannot guarantee the petitioners fundamental rights and the remedies sought against the Respondent cannot lie.

Despite the above finding, we have gone ahead and considered the various breaches alleged by the Petitioners under Sections 70, 74, 75, 76 and 79. There is now a host of authority to the effect that in constitutional applications such as this, the Petitioner needs to set out his case with precision citing the relevant sections, subsections or even sub paragraphs to enable the Respondent prepare for the challenge ahead of him. The courts have so held in the case of **ANARITA KARIMI NJERU V REP (1979) KLR 154; CYPRIAN KUBAI V STANLEY KINYONGA MWENDA NRB HMISC 612/02 AND OTHERS.** We note with concern that the Petitioners have not endeavoured to plead specifically as to the various breaches but have merely cited the sections or sought a remedy under the various sections. Those pleadings fall far too short of what is expected of such pleadings and the Respondents would not have been in position to prepare their defences.

**Section 70** of the Constitution lays down the protections available under the Bill of Rights (Chapter V of the Constitution) generally and in a summarized manner. It is a declaratory section and it limits the said rights and freedoms subjecting them to respect for the rights and freedoms of others and the public interest. The actual rights guaranteed are contained in Ss 71-83 and each section defines the rights and limitations (if applicable). The limitation and other provisions in each section have been provided to secure the rights of others and the public interest. No claim can succeed thereunder.

At prayer (a) of the petition, the Petitioners seek a declaration under **Section 71** of the Constitution, that they have rights to live in dignity, shelter and protection of one’s livelihood. That section was never cited and there are no pleadings in relation thereto. We have already alluded to the failure by the Petitioner to plead their case as required. The section was sneaked in as a prayer. There is no allegation or proof of any violation under that Section.

**Section 74** offers protection against torture, inhuman or degrading punishment or other treatment. Again we see no pleading in support of that Section. It is not enough to cite the section. It must be supported by pleadings in the petition and evidence in the supporting and further affidavits. Dismissal from employment cannot amount to torture or inhuman treatment or degrading treatment. In **SAMUEL RUKENYA MBURU V CASTLE BREWERIES, NAIROBI HCC 1119 OF 2003,** Justice Visram held that prohibition against torture, cruel or inhuman and degrading treatment implies that an “**action is barbarous, brutal or cruel.**” while degrading punishment is “**that which brings a person dishonour or contempt.**” We agree with that definition. The Petitioners have not shown that their dismissal was barbarous, brutal and cruel or that they were held in contempt. They admitted having rioted contrary to the agreement to return to work as a result of which the respondent made a decision to dismiss them. Besides they had signed contracts of service under which they can pursue redress. The claim under that section lacks any basis.

### **Section 75**

At para (b) and (c ) of the prayers, the Petitioners allege breach of their rights in that their terminal dues and pension, within the meaning of S. 75, were not paid. There is no pleading or evidence in support of this claim and in our view S. 75 of the Constitution which offers protection from deprivation of property does not apply because in any event we have found that the rights that the Petitioners are trying to enforce like payment of dues and salaries can only be determined in the ordinary civil courts or the Industrial Court. Besides it is not the Government that is denying the Petitioners their rights (See definition of Public Law above)

**Section 76** of the Constitution offers protection against arbitrary search and entry. There is nothing in the Petitioners' pleadings or affidavits to suggest that they were subjected to arbitrary search or entry and that claim must fail as it lacks any basis.

**Section 79** of the Constitution offers protection of freedom of expression. That section specifies the kind of freedoms one may not be hindered from enjoying. That section reads:-

**“79 (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions, without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information and freedom from interference with his correspondence.”**

The petitioners did not specifically plead or adduce any evidence to support the type of freedom that was interfered with. The Petitioners are alleged to have rioted yet there are provisions under the Trade Disputes Act on how workers can call a strike or lock out but not take the law into their own hands. We find that claim to be baseless.

Though **Section 82** was not specifically pleaded as having been breached, the petitioners in their affidavit in support of the petition, allege that one of the respondent's Directors, one Mr. Woolf made some derogatory remarks which had racial intonations, that Africans are inferior to Europeans. **Section 82** of the Constitution offers protection from discrimination and an Applicant invoking that section must state the grounds of the discrimination and categorize the nature of the discrimination. **Section 82 (3)** defines what 'discriminatory' means. To appreciate the section, we have set it out and it reads:

**“Section 82(1) subject to subsections (4) (5) and (8) no law shall make any provision that is discriminatory either of itself or in its effect.**

**(2) Subject to Subsections (6) (8) and 9, no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public officer or a public authority.**

**(3) In this Section the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex whereby persons of one such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.**

**(4) ..... (7)”**

As pointed out by counsel for the Respondent, the alleged remark by Mr. Woolf is hearsay because it was not disclosed to whom it was made. No affidavit was sworn in support thereof. The Petitioners worked in different hotels and it is not possible that they all heard the remark. That claim must fail for all the above reasons.

In our considered view this application is a total abuse of the court process because notwithstanding the court of appeal's decision in **RASHID ODHIAMBO ALOGGOH & 245 OTHERS – VS – HACO INDUSTRIES CA 110/01** where that court said that once one alleges violation or threatened violation of his fundamental rights the court should hear him, that does not give the licence to every litigant to come to court by way of a constitutional application even where there is no constitutional issue arising and where there are adequate remedies provided in other laws to cover such situations. This court has considered similar applications where the Petitioners seek to enforce service contracts by way of constitutional applications and have held them to be an abuse of Court process – eg

**(1) RASHID ODHIAMBO ALOGGOH & 245 OTHERS VS.**

**HACO INDUSTRIES LTD HMISC 1520/1999**

(2) **STEPHEN NDIBOI & 27 OTHERS VS. BROOKSIDE DAIRY LIMITED MISC. 764/05**

(3) **LAWRENCE NDUTTU & 156 OTHERS V KENYA BREWERIES CA 279/03**

In all the above cases the courts dismissed the applications for not raising any constitutional issues. The Constitution is the Supreme Law of the land but it has to be read together with other laws made by Parliament and should not be construed as to be disruptive of other laws in the administration of justice and in this case we adopt and endorse the decision in the case of **HARRIKISSON – VS- ATTORNEY GENERAL OF TRINIDAD AND TOBAGO [1980] AC 265**, where a teacher was transferred to another school without being given 3 month’s notice as required by the provisions of the Teachers Service Commission. He applied under Section 6 (1) of their Constitution for redress (similar to our Section 84) and the Privy Council in rejecting his appeal said thus at page 268 paragraph B – C.

**“The notion that whenever there is a failure by an organ of Government or a Public authority or public office to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed to individuals by Chapter 1 of the Constitution (our Chapter V) is fallacious. The right to apply to the High Court under Section 6 (our Section 84) of the Constitution for redress when any human right or fundamental freedoms is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. The mere allegation that a human right has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the section if it is apparent that the allegation is frivolous, vexatious or abuse of the process of court, as being made solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”**

In the instant case, we wish to emphasize the point that parties should make use of the normal procedures under the various laws to pursue their remedies instead of all of them moving to the Constitutional court and making constitutional issues of what is not. They have as a result lost valuable time to pursue contractual claims and / or to have the Industrial Court settle the trade dispute (if any) relating to the matter. The upshot of this petition is that it is an abuse of the court process and it is hereby dismissed.

In view of the authorities available touching on the substance of this decision, we see no reason why it should have been filed as a constitutional application and we therefore order that the costs be met by Kurauka & Co. Advocates.

**Dated and Delivered this 26<sup>th</sup> day of September 2008**

**J.G. NYAMU**

**JUDGE**

**R. P. V. WENDOH**

**JUDGE**