



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**PETITION 359 OF 2007**

**IN THE MATTER OF: S. 84(1) CONSTITUTION OF KENYA**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS & FREEDOMS UNDER S.77(4) & (9), CONSTITUTION OF KENYA**

**IN THE MATTER OF: THE ANTI-CORRUPTION & ECONOMIC RIMES ACT, 2003**

**BETWEEN**

**MIDLAND FINANCE & SECURITIES LIMITED.....1<sup>ST</sup> PETITIONER**

**GLOVETE INC ..... 2<sup>ND</sup> PETITIONER**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**KENYA ANTI CORRUPTION COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

The Petition is based on the protective provisions of the Constitution, namely Chapter 5 provisions. In particular the heart of the Petition is deprivation of property contrary to S 75 of the Constitution.

The State has taken a preliminary objection based on S 70 of the Constitution because the commencement of the section reads:

**“Whereas every person in Kenya”**

The argument is that since all the other protective provisions namely 71 to 83, are subject to the provisions of S 70, then the Petitioners who are corporate or limited liability companies without any residence or presence in Kenya cannot validly bring a petition under the protective provision relied on. The State calls the petitioners “aliens”

After giving the objection considerable attention I overrule the objection for the following reasons:-

1) In a judgment read last Friday **R v PRINCIPAL IMMIGRATION OFFICER Ex parte DEEPAK KAMANI & ANOTHER** a Constitutional Court of three Judges, has given S 70 an expanded or wider

interpretation on the points raised concerning the territorial jurisdiction of this court and the position of “public interest” as a legitimate aim or objective in terms of limiting fundamental rights. In the KAMANI case two Kenyan citizens whose passports had been revoked and who were not physically present in Kenya successfully prosecuted a Petition and had their passports restored;

- 2) The subject matter of the dispute is an international contract or Agreement with an arbitral clause. The State is prima facie a party to the contract and the other parties are foreigners;
- 3) The choice of law clause in the contract has chosen another country’s law – as the applicable law;
- 4) The principle of party autonomy has been severally upheld by this Court in past decisions and is a major factor in these proceedings;
- 5) The Agreement expressly excludes the application of Public law of Kenya and therefore the issue of the Courts jurisdiction looms large;
- 6) S 75 gives protection to property and a “person” under the Constitution is as defined in S 123 of the Constitution. If contract was entered into in Kenya the contractual rights or interests, where the State is a party are in the first place located within the territorial jurisdiction of this Court;

The cumulative effect of the above factors suggests that prima facie the subject matter is covered by Chapter 5 protective provisions;

The subject matter of the Petition includes International Commercial Arbitration, Constitutional Law, Public policy and International law and for this reason Section 70 must be given a broad and purposeful interpretation to include all persons except where any protective provision is restricted to citizens. I would also like to point out that fundamental rights and freedoms have acquired a universal dimension and the existence of international instruments testifies to this fact. For this reason where a provision is ambiguous, a broad and purposive interpretation would be apt in order to take care of this oneness or universality;

7. As held in the KAMANI case above S 70 defines the rights but the substantive rights are as set out in each section 71-83 and the permissible limitations are as per the provisions of each section. The legitimate aims and objectives are also as per each provision. The element of public interest is as specified in each provision.

8. In my view whenever bound by international human rights law, States have a strict legal obligation to guarantee the effective protection of human rights to all persons within their jurisdiction.

Persons are within jurisdiction when they are either physically present or the subject matter of the claim was entered into within the territory or is located within Kenya. As in KAMANI Kenya citizens for example outside Kenya can enforce their right to return to Kenya. Likewise non citizens may enforce some of the provisions because of the location of the subject matter within Kenya or because some of the provisions are not limited to citizens but can be invoked by all persons.

In the result the objection is overruled and costs shall be in the cause. Petition to be heard on 9<sup>th</sup> July 2007 at 10.30 am as previously ordered.

DATED and delivered at Nairobi this 29<sup>th</sup> day of June, 2007.

**J.G. NYAMU**

**JUDGE**