



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

Misc Civ Appli 7 of 2006

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS
OF THE INDIVIDUAL UNDER SETION 84 OF THE CONSTITUTION

AND

IN THE MATTER OF THE SUCCESSION ACT, CAP. 160 & SECTION 123(8) OF THE
CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) PRACTICE AND
PROCEDURE RULES, LEGAL NOTICE NO.133 OF 2001 SECTIONS 9 AD 11

RICHARD NDUATI KARIUKI APPLICANT/RESPONDENT

VERSUS

THE HON. LEONALD NDUATI KARIUKI 1ST RESPONDENT/APPLICANT

KARIUKI ENTERPRISES LTD 2ND RESPONDENT/APPLICANT

JUDGMENT

By an application dated 2nd March 2006 the applicants seeks to strike out or to dismiss an undated Originating Summons filed in court by the respondent to this application, on 6th January 2006. There are also two chamber applications dated 4th January 2006 and 15th February 2006, respectively filed by same respondent concerning the same matter. Both chamber application seek interim reliefs by way of stay and injunctions.

The application is supported by an affidavit sworn on 2nd March 2006 by Leonald Nduati Kariuki. In opposition the respondent has filed a replying affidavit sworn on 27th of March 2006.

The applicants have invoked Order 6 Rule 13(1)(b) and (d) of the Civil Procedure Rules which provide for striking out and has also invoked this court's inherent jurisdiction.

The dispute revolves around the estate of the late Peter Kariuki Mwangi and the first applicant and the respondent are sons of the late Mwangi while the 2nd applicant is a family company. In the Originating Summons and in this matter the respondent has in unprecedented and unique manner alleged that his fundamental rights and freedoms which are ordinarily under the Constitution owed by the State to all persons, have been violated by his step-brother the first applicant and the family company the second applicant. The applicant has sought various orders and declarations. The estate of Mwangi was the subject matter of a succession case namely Nairobi High Court Succession Cause No.209 of 1976 in the matter of the estate of Peter Kariuki Mwangi.

The respondent, Mr Richard Kariuki Mwangi has come to this court to have his constitutional rights in respect of the estate of his late father enforced. The respondent contends that the first applicant designed a programme deliberately meant to disinherit the respondent, in that he obtained temporary letters of administration in 1976 when the respondent was about 12 years old and he purported to settle the distribution in a fraudulent consent order in November, 2003 that is 27 years later. It is contended that the respondent's conduct goes against all common law principles and African customs and practices which advocate for fairness, Justice and Equality and that it violates all known constitutional principles and therefore the declarations and orders sought in the Originating Summons should be granted.

The learned Counsel for the respondent Mr Ondieki has relied on Professor Anderson Gavin book "CONSTITUTIONALISM IN AN AGE OF GLOBALIZATION" pages 9 and 10 where the author has observed:

"The Constitution is a living document. It is a house with many rooms, windows and doors. It is conservative enough to protect the past but flexible enough to advocate new issues and the future."

He has also relied on the author's statement under the topic CHANGING PARADIGMS IN CONSTITUTIONAL LAW at page 33 and 34:

"Constitutional thinking is premised on State conferred power to the neglect of private power but the law now appreciates the fact that even private individuals and corporate bodies enjoy rights and/or have a propensity to violate rights."

Reliance has also been placed on Professors Roederer Christopher and Daniel Moellerdont book: JURISPRUDENCE pgs 17 and 18:

"Constitutional Theory has set various models of interpreting constitutional tests ie Historical, textual, structural, doctrinal, ethical and prudential

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The Constitution formalizes the historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future:

Again, at page 45 on African Jurisprudence the professors have argued:

"Ordinarily the value content of law relates to the purpose or underlying basis of that law. Such judgment is based on the views and values of the people that make the law and those who the law regulates ..."

Finally on African customs, traditions and practices at pg 454 the professors have made a submission that:

"family property was managed by the head of the family for the benefit of all members of the extended family ... family and house property are generally exploited for the profit of more than one individual and may not be alienated without the consent of all right-holders."

The applicant has on the other hand exhibited a consent judgment/order NK3 duly endorsed on behalf of the respondent and the applicants and filed in court. Also exhibited is NK10, which is a sale Agreement executed by the respondent transferring his shares in the second applicant company to the other beneficiaries of the estate of the late Mwangi. The applicants contend, not without considerable merit, that Succession Cause No.209 of 1976 has resolved the issues now being raised in this matter and baptized surprisingly, constitutional. Thus, the exhibits and the evidence in the Succession Cause reflect an agreement by all the beneficiaries and shareholders of the second applicant company that the respondent and his mother now deceased would sell their shares in the company to other shareholders and cease to have any further input in the company. They argue that the outstanding issues in the cause were compromised by way of the consent order filed in court on 6th November, 2003. Similarly there was a supporting sale Agreement in respect of the shares. They submit that the consent order filed in court effectually and conclusively settled any contentious issues between the respondent and other beneficiaries of the estate.

For the above reasons the applicants have submitted that the issues raised in the present constitutional proceedings have been directly and substantially in issue in the said Succession Cause No.209 of 1976 and that prayer No 2 in the Amended Summons for Revocation Grant (Exhibit "NK2B") is for injunction couched in almost exact wording as in the present Originating Summons and the applications thereof. That application in the Succession Cause was compromised in the consent order. Arising from the above factual background the accuracy of which has not been challenged the applicants contend that the Originating Summons is barred by the principle of res judicata. Thus, the issues complained of are res judicata.

The issues raised in the Originating Summons include:

- (a) a declaration that his Constitutional right to his share of the estate of his late father in Wempa Farm has been, is being and is likely to be violated
- (b) A declaration that the applicants' right to protection of the law access to justice and pursuit of happiness had been, is being or is likely to be violated
- (c) A declaration that the applicant has been subjected to discrimination degrading and unfair treatment by the first applicant
- (d) A declaration that s 82(4) of the Succession Act is ultravires the spirit of the Constitution and null and void to the extent that it allows discrimination on account of devolution of property on death or other matters of personal law and irreconcilable with the principle of Constitutionalism
- (e) A declaration that Kenya is a signatory to the Universal Declaration of Human Rights and the International Covenant on Social, Economic and Cultural Rights and other Conventions that outlaw discrimination of any kind whatsoever
- (f) A declaration that the respondent has violated the fundamental Rights of the applicant
- (g) A declaration that the delay in adjudication of succession cause Number 209/1976 violates the Fundamental Rights of the applicant as envisaged under section 77(9) of the Constitution
- (h) An order for a Receiver Manager to manage the December 12th Hotel in Thika Town to stop further mismanagement
- (i) An order for a Receiver Manager to manage Pekat Company Ltd which was formerly PK Brothers Beer Distribution
- (j) A declaration that the 1700 Wempa Farm which is part of the estate of Peter Kariuki Mwangi should be distributed properly and equitably according to houses.

(k) A declaration that the first respondent to make full account to the applicant of the proceeds from the sale of Narashi Whole Sellers

(l) Any other declaration order or relief which the court may deem fit and in the circumstances.

The applicants have relied on this court's findings (Nyamu J) in the High Court Misc Civil Application No 1052 of 2004, **BOOTH IRRIGATION v MOMBASA WATER PRODUCTS LTD (BOOTH IRRIGATION (No.1)) where I held!**

“Although Constitutional Application should be heard on merit, I find that there is nothing which would prevent a challenger of the alleged contravention moving this court to demonstrate that the application does violate fundamental principles of law including public policy for example that the matter raised is res judicata. Res Judicata is also in turn based on the principle grounded on public policy that litigation must at some point come to end. Res Judicata is a fundamental principle of our law.”

Based on the above finding the applicants have contended that the succession cause just as the Originating Summons raise the same or substantially the same issues between the same parties and therefore the Originating Summons should be struck out as offending the principle of res judicata. The applicants, further argue that the previous succession matter was settled out of court and a consent order filed in court on 10th November, 2003 and that the respondent has never sought to set aside, discharge and/or in any way have the said consent order interfered with. For this reason also the Originating Summons ought to be struck out.

To support and reinforce the argument concerning the finality of a consent order the applicants have relied on the case of BOOTH IRRIGATION No.1 (Supra) where Nyamu J held:

“An equally cherished principle of our law is that a consent order or decree can only be set aside only on grounds of fraud or mistake or any other grounds which would vitiate a contract. This court cannot prevent a party from demonstrating at the preliminary stage that there has not been any challenge to the consent or that the matter is res judicata and therefore there cannot possibly be a contravention under s 84 of the Constitution and that the application does breach fundamental principles of law.”

The applicants have further relied on my own ruling in the *High Court Misc Civil Application No 1052 of 2004 BOOTH IRRIGATION v MOMBASA WATER PRODUCTS LTD (BOOTH IRRIGATION (No 2))* where I stated:

“I hold that res judicata does apply to constitutional matters and asking a constitutional court to deliberate and determine the issues surrounding the unchallenged consent order is with respect the height of absurdity when our fundamental principles give avenue of challenge in a civil court.”

Finally the applicants contend that fundamental rights and freedoms are owed guaranteed, secured and enforced by the state and both the applicants and the respondents are private citizens and cannot therefore be accountable under the Chapter 5 provisions as private citizens. On this point the applicants have cited the case of HCC Misc suit 413 of 2005, **KENYA BUS SERVICE LTD & 2 OTHERS v ATTORNEY GENERAL & OTHERS** where Nyamu J held:

“Moreover fundamental rights and freedoms are contained in the constitution and are principally available against the State because the Constitution's function is to define what constitutes Government and it regulates the relationship between the Government and the Governed. On the other hand the rights of individual interests are taken care of in the province of private law and are invariably redressed as such.”

In addition reliance has been placed in the KIRIBATI case of **TEITIWNNANG v ARIONG & OTHERS [1987] LRC const 517 also cited in the KENYA BUS SERVICES Ltd** case (supra) where Maxwell CJ

held:

“Dealing now with the question can a private individual maintain an action for declaration against another private individual or individuals for breach of the 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 of 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 group of individuals to another individual under the fundamental rights provisions of the Constitution.”

It has for the above reasons been strongly argued by the applicant that the respondent ought to have brought his claim if any under the relevant private law for example the law of succession and/or company law and that bringing a constitutional application against individual is an abuse of the process of the court.

The applicants have also submitted that the respondent has failed to set out and/or identify, with reasonable degree of precision, the provisions of the constitution he considers has been infringed in relation to him and the manner in which he believes the same has been infringed. On this point the respondent has said that the succession matter has taken more than 27 years to conclude and that this violates s 77(9) of the Constitution which provides for a hearing within a reasonable time.

However, it is quite clear from the reading of the subsection that it is the state which has a duty to set up an independent and impartial court or an adjudicating authority and also to ensure that the determination of the civil rights or obligations take place within a reasonable time. It is the State that has the responsibility both at domestic and international level to ensure that hearings take place within a reasonable time.

This duty is not owed by one individual to another as contended by the respondent, yet the state has not been joined. On the whole I concur with the applicant’s counsel Mr Rinkanya that the precise nature of the contravention or violation under the Constitution has not been set out by the respondent and in this regard I do endorse the holding in the case of *CYPRIAN KUBAI v STANLEY MWENDA HC Misc Application No.612 of 2002* where the court held”

“An applicant moving the court by virtue of section 60,65 and 84 of the Constitution must be precise and to the point not only in relation to section but also to the sub-section and where applicable the paragraph or sub-paragraph of the section out of 71 to 83, alleged to be contravened plus the relevant act of that contravention so that the respondent knows the nature and extent of the case he is to respond to and to enable the said respondent prepare accordingly and also the court to know the exact extent and nature of the case it is handling.”

Surely the respondent having signed a consent letter and also a sale agreement in respect of the transfer of his shares in the family company is now clearly estopped from relitigating the same issues under the guise of a constitutional grievance. All the rights of the beneficiaries were adjudicated upon in the succession cause including any impact of the delay on the right of any individual beneficiary. If the effect of the 27 years delay was not raised in the succession cause it is also deemed to have been raised and is covered by the principle of estoppel. A constitutional court cannot be the seat of relitigation of private rights. Even a succession court while adjudicating rights, is in a way, a constitutional court because in performing its duties it has to do so in conformity with the Constitution see s 3 of the Judicature Act.

It does not also assist the respondent’s case in that he did not sufficiently disclose the existence of the consent order, and the distribution of the estate and the sale of his shares to the other beneficiaries. All these constitute material nondisclosure and under the BOOTH (2) case this too disentitles the applicant to any remedy as well.

Under Kenya's current constitutional law an applicant seeking relief under Chapter 5 fundamental rights and freedoms must access the court by invoking the rules made under s 84(6) of the Constitution and since it is not in dispute by the party that the succession cause was still alive the respondent ought to have invoked Rule 10(a) of the Rules made by the Chief Justice at the time of filing of the matter. The application ought to have been instituted by way of a Notice of Motion in the Cause instead of bringing an Originating Summons. There is now a line of authorities to the effect that failure to properly invoke the rules is fatal and I find myself in total agreement with the cases. For this reason also, the Originating Summons is incompetent and it ought to be struck out.

It is apparent from the above that the Originating Summons and any other related applications are all incurably incompetent. However because of the critical thinking demonstrated by Counsel for the respondent by raising the question whether individuals have the propensity of violating fundamental rights and freedoms I consider it important to go an extra mile!

CHALLENGE

The challenge to this court by the applicants is whether the fundamental rights and freedoms are vertical – guaranteed, secured and enforced by the State or by State agents who carry out public duties and functions. The structure of Chapter 5 is such that only a vertical application was contemplated and not horizontal application. Thus, the whole thrust of Chapter 5 rights and freedoms is against public authorities.

Although this application has been rejected by the court on grounds of violating fundamental principles of law such as *res judicata*, undermining the principle of consent judgments and orders violating the rules made under s 84(6) of the constitution and therefore constituting abuse of the court process, the application does challenge the court to adjudicate on whether only public authorities can violate fundamental rights and freedoms.

The court does accept that challenge by stating that in practice public authorities are not the only ones who may offend the rights and freedoms falling under Chapter 5 of the Constitution or any other rights falling within the spirit of the Chapter or under the umbrella of human rights law. The rights constituting this category include the right to respect for private and family life, the right to freedom of expression, the right to freedom of association (including trade union membership) the prohibition of discrimination, the right to education currently recognized by the Government by introduction of free primary education and the right to a clean environment. All these rights are in my view capable of being violated by non governmental bodies and agencies. However the Constitution as drafted only recognizes vertical application perhaps for practical reasons and for historical reasons concerning the nature of State power. Thus, the Constitution had its origins in a desire to protect people from the misuse of power by the State rather than from the actions of private individuals.

In cases where an individual is capable of violating fundamental rights and freedoms (in the current case there is no such violation at all on the facts as set out above) I believe, courts, have a duty to invoke the common law to enforce the private rights of an individual in such a way that the private causes of action are expanded to incorporate appropriate remedy against the private individual or agency violating or contravening such rights. Of course the ideal would be for appropriate constitutional and legislative changes to be made by Parliament in recognition of the wider State responsibilities imposed by some of the International Instruments. The pressure to invoking the prevailing common law in a manner that is compatible in remedying any violations by the individuals of those rights that are capable of being violated by individuals shall in my view escalate but it is for the policy makers and Parliament to appreciate that they have a duty to extend the protection horizontally. The challenge to the courts is whether they can where appropriate expand causes of action under the common law to cater for the horizontal need without attracting the description of judicial activism! In my view the State has a responsibility to provide for the above situations under the domestic law by virtue of the State responsibilities imposed by the International Instruments including the International Covenant on Civil and Political Rights (The ICCPR) and the International Covenant on Social Economic and Cultural Rights (The ICECR). Even in the event of any such domestic provision in the future the responsibility shall

remain in the State.

On the facts of this particular case I find myself insufficiently inspired even to consider any horizontal application because the application itself does violate cherished fundamental principles of law. Thus, final court orders are as constitutional as anything can be so long as they do not violate any provisions of the Constitution and a party should not be allowed at all to trivialize the constitutional jurisdiction by challenging court orders obtained in other regular proceedings or courts properly constituted which is what the applicant has endeavoured to do. Further more the court declines to accept the invitation to pronounce on hypothetical situations or to interfere with the vindication of private rights and remedies which have been properly and adequately provided for under any other written law e.g. under the Succession Act. The Constitution cannot undermine or supplement all the other laws which are neither in conflict with its provisions or its spirit. It remains to be seen whether the challenged bodies will rise to the challenge and make horizontal provisions as observed above. For now, I have not been given sufficient and proper basis to braze the trail given the facts as outlined above.

In this obiter the court wishes to recognize that the learned counsel for the respondent has exercised considerable critical thinking in his quest to have extended constitutional application to non-state actors.

Although as indicated above I have ruled out the horizontal application to private individuals who must content themselves in my view with the expansion of the causes of actions under the common law, and/or any other legislative provisions for the actors performing public functions the changing paradigms of constitutional law, demand a more expansive interpretation to provisions that limit constitutional application to the State so as to reach them. The reason for this was well captured by J. Balkan, *The Corporation: The Pathological Pursuit of Profit and Power* (New York, Free Press 2004):

“The diffusion of political authority in the context of the global economy has led to concerns about the ability of constitutionalism to operate as a check on political power if it speaks only to the state. Moreover, there is growing awareness – perhaps fuelled by recent examples of corporate corruption and wrong doing – that private power as much as public power has the capacity to oppress.”

It is arguable that in appropriate cases State agency could be extended to the actors who perform public functions. However in the matter before me it is an individual and a family company who have nothing to do with public power and are distant from public functions.

Although as held above on the facts the applicant is not be entitled to a horizontal application or enforcement the principle behind the bringing of such a suit cannot in the view of the court just be wished away in view of the changing circumstances both at domestic and international levels. It is therefore important to expand on this obiter.

BUSINESS CORPORATIONS AND FUNDAMENTAL RIGHTS AND FREEDOMS

At international level, I agree with the applicants counsel that business corporations especially multinationals are increasingly been considered to have some responsibility for observance of fundamental rights and freedoms as a matter of ethical responsibility to respect fundamental human rights and at the domestic scene they may have legal obligations in the field of human rights where the domestic law has made provision. States do have international legal obligations to ensure adequate protection in their domestic law against human rights violations committed by business corporations. A good illustration of this is under the emerging environmental legislation which demand in some cases corporations protect the environment. There is nothing to stop a state from legislating to require that corporations protect individual rights and to provide for redress in the event of violations. There is also scope for growth of the common law in this area in terms of the recognition of rights, new causes of action including remedies as observed above.

UNIVERSALITY OF HUMAN RIGHTS

The International instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (The ICCPR) and International Covenant on Economic Social and Cultural Rights (The ICESCR) give recognition that human rights belong to an individual as a human being, hence the inherent dignity and the fact that those rights are equal and inalienable of all human beings. The rights are inherent to man. They are universal and inalienable and hence their ethical base, since they are intrinsic to the human condition. They are not dependent on the states or the geographical location. They are owed to all persons.

For the above reasons human rights are owed by the States to all individuals within their jurisdiction and in certain situations to groups of individuals.

It is a general principle in international human rights law that human beings cannot be deprived of the substance of their rights hence reference to their individuality. It is only the exercise of some of the rights that can be limited in certain circumstances.

STATE RESPONSIBILITY FOR HUMAN RIGHTS VIOLATION

Many Constitutions of the world provide for state responsibility for not complying with the legal obligations as regards human rights.

It is now recognized, that under international law, States incur responsibility or liability for not complying with their legal obligations to respect and ensure, that is, to guarantee, the effective enjoyment of the human rights recognized either by International instruments binding on the State concerned or any other source of law.

Thus, in the Inter-American Court of Human Rights in the case of *I.A. COURT, H.R. v ELASQUEZ RODRIGUEZ* Judgment of July 29, 1998 Series C, No.4, p.51 para 16, in explaining the meaning of Article 1(1) of the American Convention on Human Rights held:

“an impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the legal, source concerned.”

The extent of the responsibility includes ministerial civil servants, judges, police officers, prisons official customs officials, teachers, Government controlled business and other similar groups. The State obligation is to prevent, investigate, punish and whenever possible restore rights that have been violated and/or to provide compensation eg see Article 6 of ICCPR on the right to life and General Comment No. 6 of the United Nations Compilation of General comments pp 114-116.

THIRD PARTY – STATE RESPONSIBILITY

Under the International human rights law states may be responsible for not having taken reasonable action to prevent private individual or groups from carrying out acts that violate human rights, or to provide adequate protection against such violations under domestic law for example see the European Court of Human Rights Case of *A v THE UNITED KINGDOM* Judgment of 23rd September 1998, Reports 1998 – VI, at p.2692 which dealt with the right to respect for ones private and family life in Article 8 of the European Convention on Human Rights. Its aim is:

“essentially that of protecting, the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference; in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life ... These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.”

It follows for example that State parties to the European Convention will have to provide under domestic

law, practical and effective protection, where fundamental values and essential aspects of private life are at stake such as for instance, in order to protect persons against sexual abuse etc.

The significance of this development in terms of state responsibility was well brought out by the European Court of Human Rights in the Turkish case of *MAHMUT KAYA v TURKEY* of 28th March 2000 – courts Website: <http://hudoc/echricoe.int/hudoc>.

Thus as regards the duty to secure for everyone within its jurisdiction the right to life, the European Court has held that it “involves a primary duty to put in place effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prosecution, suppression and punishment of such provisions, and further that this duty- see ‘MAHMUT KAYA case:

“also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose life is at risk from criminal acts of another individual.”

SCOPE OF STATES INTERNATIONAL LEGAL OBLIGATIONS EXTENDED TO PRIVATE LIFE .

It is clear to this court that the states legal obligations could be extended by Treaties binding on a State to take positive measures even in the private sphere. It is clear from the rulings touching on the European Convention that there is a clear recognition by the court of the extension of State responsibility from the public sphere into the private life in certain situations. This extension if adopted elsewhere has the positive effect of allowing for a more adequate and effective protection against various forms of human rights violations such as physical and mental abuse of children women and the mentally ill to give a few illustrations. Even in these situations a State will however only incur international responsibility for a human right violation if it has failed to provide the alleged victim with an adequate and effective remedy through the workings of its own court’s or administrative authorities and an aggrieved person has to exhaust the domestic remedies before moving on to the international arena.

OUR SITUATION

Turning to this case, it has not been shown to the court any threatened violation or any actual violation of a right by the first applicant or the company or any violation of any known family values under the relevant customary law or why this could not be articulated in the succession court. While still on the aspect, I must add that Africa is the continent of the Family with very strong extended family values and attachments and perhaps the greatest challenge in the future is for the Region to come up with a Convention on the family which is now under attack from all quarters in order to safeguard and protect the family and its values. I believe, we on this continent have a duty and responsibility to evolve a jurisprudence that gives scope to the development of the family and related matters and that we should not blindly apply the family values from elsewhere and which have led to the erosion of the values we had for centuries held dear nearly everywhere on this continent. The humanist approach to issues that was characteristics of most of our societies should be revisited, looked at afresh, reactivated and restated.

CONCLUSION

Even in situations where individuals can be said to be capable of violating human rights the way out or the ideal is to provide for state responsibility at the International plane so as to cause the state in turn to regulate the position by appropriate domestic laws. It is expected that the responsibility shall continue to be vested in the State and not on individual say by a Treaty or Protocol. As regards individuals any horizontal recognition and enforcement shall in turn depend on the development of the common law or domestic legislation. As regards State Corporations with public duties they could be held liable as State agents. As regards international business they have an ethical duty to respect and enforce human rights. In a real and concrete situation, a constitutional court did rule on the interplay of responsibility of State and individuals in the case *PETER K. WAWERU v THE ATTORNEY GENERAL Misc Civil Application No.118 of 2004*.

I have no doubt that whereas the current constitutional application have a vertical effect to the extent described above any future constitutional dispensation could reasonably prescribe some horizontal application by providing that all laws including common law must as much as it is practically possible be compatible with the fundamental rights and freedoms that is something along the lines of the European Convention on Human Rights and the accompanying Human Rights Acts. The United Kingdom which is obviously in a special position because of the absence of a written Constitution and which has anchored the protection of human rights on Human Rights Act 1998 has interpreted the principle of compatibility with the Human Rights, Convention as per the following response by the Lord Chancellor during the debate before the Act was passed:

“We believe that it is right as a matter of principle for the courts have the duty of acting compatibly with the Convention not only in cases involving other public authorities but also in developing the common law in deciding the cases between individuals. Why should they not? In preparing this Bill we have taken the view that it is the other course, that of excluding the Convention considerations altogether from cases between individuals, which would have to be justified. We do not think that that would be justifiable nor do we think it would be practicable.”

Barring any future Constitutional changes we have to maintain constant faith and loyalty to the Constitution as framed. Indeed, of all constitutional interpretation prescriptions I have come across I derive great faith and confidence in the warning given by Justice McIntyre in the Canadian case of REFERENCE re PUBLIC SERVICE EMPLOYEE RELATIONS ACT (1987) 38 DLR (4th) 161 in these illuminating words:

“While a liberal and not an overly legalistic approach should be taken to constitutional interpretation, the charter should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time. The interpretation of the Charter, as of all constitutional documents, is constrained by the language, structure and history of the constitutional text, by constitutional tradition, and by the history, traditions and underlying philosophies of our society.”

I have no hesitation in stating that our constitutional provisions on fundamental rights and freedoms are largely vertical and it would not be proper in my view to stretch the meaning contrary to what is very clear structure but I must add that it does not stop the courts when confronted with suitable cases, from developing the common law in a manner that is compatible with the fundamental rights and freedoms Chapter. Where of course the International Instruments give a wider responsibility to the State that touch on third party – or horizontal application and a State (including Kenya) does not comply enforcement of the default is the responsibility of the monitoring body of the particular Instrument or Convention and in the case of the two 1966 Human Rights Covenants it is the Human Rights Committee. In this regard the Committee has come up with a wealth of rich jurisprudence in the field of International human rights law.

Again at the domestic level in Kenya the principle of compatibility touched on elsewhere in this judgment is in my view, well captured by section 3 of the Judicature Act and the courts would have no excuse in failing to develop the common law that conforms to the Constitution and where it is silent in conformity with the International Instruments.

For the above reasons while saluting the learned counsel for a brave attempt to allocate responsibility to an individual or a private limited liability company, there is nothing in the Kenyan Constitution to back any such liability hence the reason for the above analysis of the jurisprudential development of the law both at International and domestic level and an observation on the way forward.

It is therefore clearly evident that suit against the defendants is legally misconceived and the Originating Summons and the accompanying applications are forthwith, struck out with costs to the applicant.

DATED and delivered at Nairobi this 14th day of July 2006.

J.G. NYAMU

JUDGE