REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc Civ Appil 1759 of 2004

ABRAHAM KAISHA KANZIKA alias MOSES SAVALA KEYA Trading as

KAPCO MACHINERY SERVICES & MILANO INVESTMENTS LIMITED ..... PLAINTIFF

VERSUS

GOVERNOR CENTRAL BANK OF KENYA ..... 1ST DEFENDANT

ATTORNEY GENERAL ..... 2ND DEFENDANT

PERMANENT SECRETARY TO TREASURY ..... 3RD DEFENDANT

RULING

This is an application by way of a chamber summons dated 25th August, 2006 to strike out an application dated 28th December, 2005 brought by the plaintiff/applicant under s 75 of the Constitution. The amended Originating Summons seeks various declarations the substance of which is that the plaintiff applicant had allegedly made certain payments to the third defendant through the first defendant for the purchase of treasury bills. The applicant/plaintiff's claims that the proceeds of his investment should have been paid to him on the 18th day of July 1988 in respect of issue number 735 of the treasury bills and on 14th August 1988 in respect of the issue number 739 of the Treasury bills. He, the plaintiff contends that the proceeds of all the bills were not paid to him upon their maturity. That Treasury bill certificates amount to shs 21.5 million.

In respect of the claim it is not disputed that the plaintiff applicant has filed this suit seventeen years after the cause of action in respect of the Treasury bills had accrued. However the plaintiff/applicant's contends that the proceedings brought under s 75 do not constitute an action capable of being barred under either the Public Authorities Act or the Limitation of Actions Act because the cause of action is not an action but a constitutional right. He further strongly contends that the fact that an alternative remedy was in existence (that suing the Government for breach of contract) is not bar to constitutional relief as stipulated in s 84(1) of the Constitution.

He further states that the Governor of the Central Bank is capable of being sued under s 13 of the Central Bank Act Cap 491 although under s 30 of the Act the Bank is a body corporate with perpetual succession and a common seal with power to acquire and own property and dispose of property, to contract and to sue and to be sued in its own name.

On the above points the plaintiff/applicant has relied on the following authorities:

1. *RASHID ODHIAMBO v HACO INDUSTRIES CA 2001 NO.110*

2. *DURITY v ATTORNEY GENERAL OF TRINIDAD AND TOBAGO 2003 ILRC* page 210

3. *DOMINIC ARONY v HON ATTORNEY GENERAL OF KENYA H.C. Misc 494 of 2003* unreported

He further relies on the filed written submissions.

On the other hand the First Defendant in his written skeleton arguments contends:

1) the alleged K.1-7 and K 8-14 Treasury bills were issued by the third Defendant and that the first Defendant has been wrongly sued in view of the provisions of s 30 of the Central Bank Act Cap 491

2) that the Originating Summons does not raise any constitutional issue the issue of the Treasury bills being entirely contractual

3) that the claims are barred by the Limitation of Act that is s 75(6)(a)(vi) of the Constitution

4) that the general principles of law are recognized by the Constitution including the defence of limitation.

The 1st Defendant has relied on the following authorities:

1. The Limitation of Actions Act Cap 22 of the Laws of Kenya

2. *WANYOIKE v THE ATTORNEY GENERAL HCC NO 574 OF* 2001 (unreported)

3. *BOOTH IRRIGATION v MOMBASA WATER PRODUCTS Ltd H.C. Misc C.A. 464 of 2004 (unreported*

4. *EPCO BUILDERS LTD v ADAMS MARTON & ANOR* Misc AP 274 of 2004 (unreported) – but now reversed on appeal.

Counsel for the Attorney General and the Permanent Secretary 2nd and 3rd Defendants respectively, Mrs Owino has adopted the arguments of the First Defendant Counsel.

I have considered the arguments and the authorities cited.

As regards the interpretation of the Constitution in a two bench decision (Nyamu J and Emukule J) in the recent ruling in *Hon Martha Karua v Africa Radio H.C. Misc Civil Application No. 1759 of 2004* unreported the Court did adopt the reasoning in the Canadian case of

IN REFERENCE RE PUBLIC SERVICE EMPLOYEE RELATIONS ACT LABOUR RELATIONS ACT AND POLICE OFFICERS COLLECTIVE BARGAIING ACT (1987) DLR 4TH 16 1 WHERE Justice McIntyre warned:

"**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 traditions and by the history, traditions and underlying philosophies of our society."**

Textually there is no reason for constitutional vindication of Commercial or contractual matters unless

there is compulsory acquisition or "a taking away" as the American would call it.

I think the parties and the courts have a responsibility not to trivialize constitutional jurisdiction. This is a claim that was well provided for under the general law of the land and in particular contract law but the applicant now wants to go behind that law ostensibly to escape from the applicable or available defences on limitation.

This Court will not allow it.

Thus, while I agree that the claim in respect of the Chapter 5 fundamental rights and freedoms are not actions as such capable of being time barred, except where expressed in the Constitution this principle is not available to the applicant for the following reasons:

(1) There is no compulsory acquisition of the Treasury bills pleaded or proved. Any cause of action under s 75 of the Constitution on the bills is therefore misconceived and incompetent. The wording of s 75 clearly indicates that it regulates compulsory acquisition of property, interest and right. The wording or the language of s 75 clearly takes the claim out of the section. The court must bow to the text of the provisions. The Court is textually constrained.

(2) Section 75 6 (vi) unlike the other fundamental right provisions does recognize the general principle of limitation of actions and I find that the action on the bills was contractual and therefore an action capable of being barred under the law of limitation.

The subsection reads:

"**Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) or (2) to the extent that the law in question makes provision for the taking of possession or acquisition of property in consequence of any law with respect to the limitation of actions."**

Since it is not denied that the claim arises from a contractual relationship it is barred by virtue of this specific provision in the Constitution. Even if there was no specific provision in the Constitution I would like to reiterate the reasoning I adopted in the cited case of *BOOTH IRRIGATION v MOMBASA WATER PRODUCTS LTD Misc Civil Application No. 464 OF 2004* where I held that our Constitution does recognize the existence of the general principles of law. Even where there is no specified period of limitation it is proper for the court to consider the period of delay since the accrual of the claim and the reasons for the delay. An applicant must satisfactorily explain the delay. In this case a delay of 17 years is inordinate and it has not been explained. The prosecution of the claimant took 6 years and although he gives this as the reason for the delay he has not explained the balance of eleven years.

In my view failure by a Constitutional Court to recognize general principles of law including, limitation expressed in the Constitution would lead to legal anarchy or crisis. It would also trivialize the constitutional jurisdiction in that applicants would in some cases ignore the enforcement of their rights under the general principles of law in order to convert their subsequent grievance into a "constitutional issue" after the expiry of the prescribed limitation periods. The contention that the applicant was acquitted in respect of related fraud charges and the magistrate did remark that there was consideration does not in the view of the court elevate the matter to a constitutional one. The judgment by a criminal court is not conclusive in this court see s 45 to 47 of the Evidence Act .

On the facts of this case although the existence of an alternative remedy is no bar to the enforcement of a right under s 84(1) of the Constitution there is no such alternative in that the so called constitutional right is in reality a contractual right if any and is already time barred and there is no constitutional issue capable of being articulated under s 84(1) because there is no constitutional claim nor a compulsory acquisition at all. Our Constitution has not and was not intended to create commercial or contractual rights, instead it secures and guarantees existing constitutional rights.

In this regard I would like to adopt the holdings in Tanzanian case of *NDYANABO v ATTORNEY GENERAL [2001] 2 EA 485* at page 498 by Samatta C.J.

"**Fundamental rights are not illimitable. To treat them as being absolute is to invite anarchy in society. Those rights can be limited but the limitations must not be arbitrary, unreasonable and disproportionate to any claim of state interest: see PUMBUN'S case (supra). Under the Constitution an individuals fundamental right may have to yield to the common weal of society ..."**

In other words in our society there must be a balance between individual liberty ad social control.

On the same page the learned Chief Justice went on to observe:

"**Personal freedoms and rights must necessarily have limits, for, as learned judge also rightly remarked in his eloquent speech on the spirit of Liberty cited by Khanna J in his judgment in *HIS HOLINESS KESAVANADA BHARATI SRIPADANA GALAVARU v STATE OF KERALA & ANOR 1973 Supra SCR 1***

'**A society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few ...'":**

(3) The final reason why this claim must fail is that under s 70 the individual right is subject to public interest. Public interest includes observation of laws including the Limitation of Actions Act and the Public Authorities Limitation Act and the general principles of law except where there are inconsistent with a particular provision in the Constitution.

Moreover I would also disallow this claim on the principle of legal certainty. The applicant/plaintiff sat on his commercial or contractual rights (if any) for 17 years and his new attempt to seek constitutional relief violates the principle of legal certainty. It would be unjust to revive the matter after such a long period and deny the state defences which would have been available to it. In this regard, I wish to adopt Lord Brightman's illuminating holding in the case of *YEW BON TEW v KENDE RAM BAS MARA [1983] AC 553* at 563 where he delivered himself as follows:

"**When a period of limitation has expired a potential defendant should be able to assume that he is no longer at risk from a stale claim. He should be able to part with his papers, if they exist and discard any proofs of witnesses which have been taken, discharge his solicitors for if he has been retained and order his affairs on the basis that his potential liability has gone."**

The Bills were issued pursuant to an Act of Parliament and according to the applicant they were issued under the Internal Loans Act Cap 420 (LOK). Their enforcement and recovery are already regulated by statute and the applicant has not explained why he did not enforce the bill under the relevant statutes. Failure to do so does in my view violate the rule of law which is one of the pillars of the Constitution. Our Constitution must therefore recognize the applicable statute. The words of Lord Diplock in the case of *BLACK-CLAWSON INTERNATIONAL LTD v PAPIERWERKE WALDHOF – ASCHAFFENBERG AG* 1975 AC 591 at 638 are pertinent:

"**The acceptance of the rule of law as a constitutional principle requires that a citizen before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it. Where those consequences are regulated by statute the source of that knowledge is what the statute says. In construing it the court must give effect to what the words of the statute would reasonably understood to mean by those whose conduct it regulates."**

Again the Court cannot overstretch this by providing for situations which were never contemplated by the framers of the Constitution because as in this case they were properly regulated by contract or commercial law. For this reason I decline to apply the living tree principle to the matter before me. Any growth that does not derive its food from the roots of the tree is a stranger to the tree.

Where as in the case of the Kenya Constitution a Chapter is devoted to fundamental rights and freedoms (ie chapter 5) a court is constrained by the framework, text and language and while recognizing that International Conventions to which Kenya is a signatory have widened or expanded civil, political, social and economic rights, where there is no domestication, expansion can only come in handy where there is ambiguity in the interpretation of the Constitution in which event, it would be prudent and even necessary for the court to interpret the provision in a manner compatible with the relevant Convention otherwise the constitutional restrictions must prevail.

Where the rights have been defined the State has four levels of duties namely to respect, protect, promote and fulfil the rights.

Most constitutions provide for allocation of governmental power – this is the root and the trunk of the living tree. Contractual and commercial transactions belong to other different but smaller living trees. They cannot be naturally grafted into the living tree ie Constitution. The court can only graft in what is not constrained by the language, structure and history of the constitutional text, by constitutional traditions, by history and by the underlying philosophies of our society. This court has declined to overshoot or graftin, as invited to by the applicant. The claim is misconceived.

For the above reasons the Amended Originating Summons is struck out with costs to the Defendants.

DATED and delivered at Nairobi this 19th day of October, 2006.

J.G. NYAMU

JUDGE