



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI  
MISC CIVIL SUIT NO 413 OF 2005**

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS &  
FREEDOMS UNDER SECTION 84 OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**KENYA BUS SERVICE LTD ..... PLAINTIFF NO1/RESPONDENT**

**BUSTRACK LIMITED ..... PLAINTIFF NO 2**

**MSAFIRI PASSENGER SERVICES LTD ..... PLAINTIFF NO 3**

**AND**

**ATTORNEY GENERAL ..... DEFENDANT NO 1**

**MINISTER FOR TRANSPORT ..... DEFENDANT NO 2**

**AND**

**GENERAL MOTORS EAST AFRICA LTD AND 220 OTHERS .....INTERESTED  
PARTIES**

**RULING**

By an application dated 24th March 2005 brought by way of a Notice of Motion expressed to be grounded on s 84(1) and 2 of the Constitution of Kenya and Rule 10(a) of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules 2001, the three plaintiffs namely, Kenya Bus Service Ltd, Bustrack Ltd and Msafiri Passenger Services Ltd claim that their Constitutional rights have been violated by the two defendants namely the Attorney General and the Minister for Transport. The main ground relied on is that the plaintiff/applicants in the Notice of Motion have expended unbudgeted funds to comply with an unlawful law and hence the applicant has been denied the fundamental right to protection of law guaranteed by s 70(c) of the Constitution and the further fundamental right not to have their properties as guaranteed under s 76 of the Constitution entered into. The applicants in the motion further contend that as a result of the enforced compliance with the Traffic Regulations, the applicant cash flows have been severely curtailed and they have been unable to service accounts with their creditors – hence their joining the 221 creditors including the 1st, 2nd and 3rd interested parties (now applicants in the applications, to set aside, dated 7th April 2005 18th April 2005 and 29th May 2005 respectively).

They further contend that compliance with the illegal road transport Rules and Regulations introduced by

the defendants the applicants stand real danger of being wound-up and hence losing the protection of their property as guaranteed under s 70(a) of the Constitution. They have also claimed that the winding up proceedings and/or attachment of their assets and other property as a result of circumstances set out above will breach their fundamental rights:

**(i) the due protection of their property under s 70©**

**(ii) not to be subjected to the entry to their properties granted under s 76(1) of the Constitution**

**(iii) right to due process under s 77(9) of the Constitution**

The court considers it important to set out the challenged order. On 24th March 2005 his Lordship Mr Justice Osiemo made the following order:

“Application by way of Notice of Motion dated 24th March 2005 under certificate certified urgent Prayers 2 and 3 granted”

Prayers 2 and 3 read as under:- 2. “An order that the matter be placed before the Honourable Chief Justice for directions as to composition of the court and other directions including the hearing date”

3. “Pursuant to section 84(1) and (2) of the Constitution of Kenya and Rule 10(6) of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual Practice and Procedure Rules 2001 further proceedings and procedures set out in paragraph 14(a) to 14(o) of the affidavit of EDWIN MUSIMBA MUKABANAH be stayed pending the determination of the Originating Summons filed herewith.”

Thus without any battle what appears to be final orders were granted ex-parte until the determination of the Originating Summons against 221 Interested parties many of whom I understand have not yet been served to date, special interest being taken on the Interested parties which had obtained judgments as creditors or those who were poised to execute the decrees or those about to petition for winding up.

The respondent has contended that the two applications are not properly brought under O 36 of the Civil Procedure Rules but as will be apparent hereinafter when there is no specific provision such application can be brought under the inherent powers of the court and indeed that power has been cited in the applications. Rules under s 84(6) do not provide for the setting aside but it must be appreciated that they also do not provide for interim relief but the power to grant conservatory orders is in s 84(2). I find that the applications are properly brought the Originating Summons being a pending proceeding.

The respondent has also contended that the court has no jurisdiction to set aside an order made pursuant to application brought under s 84 of the Constitution but where there are final orders in the proceedings at the Milimani Court, the general policy of the law would support successful pleas of res judicata, abuse of court process, oppressive proceedings, non disclosure of material facts and the giving final orders at the ex-parte stage without any reasons and without any time limitation all these categories of irregularities bring the matter within the court’s inherent power do set aside any ex-parte orders falling in those categories.

Contrary to what the respondents contend the applicants seek neither a review nor an appeal against the ex-parte order. I find that the automatic stay cannot be available where the court lacks jurisdiction and even in other cases where the bringing of the application offends the fundamental principles of law any such stay can be set aside by the court upon application and it would be unreasonable, unfair and oppressive for an aggrieved party to be burdened with an automatic stay until the determination of the Originating Summons upon which the order was obtained. It would be unreasonable and unjust to paralyse proceedings where the application is patently untenable or lacks substance.

I find no misapprehension of law on the part of the applicants. On the contrary I endorse fully the

skeleton arguments by the Interested parties on each point.

Going by the nature of the interim relief sought it was improper not to provide for an Interim hearing on merit. An interim and ex-parte order was prejudicial and continues to be prejudicial to the interests of the applicants and a reasonable life span for the ex-parte order ought to have been given as is the practice under the Civil Procedure Rules and the intended interested parties allowed to contest it inter parties before the hearing of the Originating Summons unless the court was satisfied that the Originating Summons was going to be rendered nugatory. There is nothing provided for under O 36 which requires directions to be taken before an application for conservatory orders is heard inter parties. The basis upon which conservatory orders/or interim relief are granted are requirements of balancing the interests of the parties and the need to preserve the subject matter of the claim.

On the whole I find the contentions of the respondents, a serious violation of s 70 of the Constitution and the irony of it is that the justification for the claim against the Interested Parties is based on the same section. What a contradiction. Fundamental rights cannot be enjoyed in isolation and by a selected few while they trample on others or tread upon their rights. The enjoyment of fundamental rights and freedoms contemplates mutuality and an atmosphere of respect for law and order including the rights of others and the upholding of the public interest. Rights and freedoms can only thrive alongside those of others and the society at large because the alternative would be anarchy. The function of the court when faced with the task of establishing or determining the rights on the one hand and determining the limitation and restrictions on the other hand is to do a balancing act. In this balancing act are principles values, objectives to be attained, a sense of proportionality and public interest and public policy considerations just to mention a few. All these must be put on the scales with the fundamental rights on the left and the limitations on the right.

In HCC Misc 1052 of 2004 BOOTH IRRIGATION v MOMBASA WATER PRODUCTS LTD this court I held inter-alia:

**(i) Res judicata does apply to Constitutional matters (ii) An unchallenged court order cannot be the basis of a Constitutional application (to prevent execution)**

**(iii) Non disclosure of material facts is sufficient to warrant the dismissal of a Constitutional application**

**(iv) A Constitutional court has inherent powers to prevent abuse of its process**

**(v) A Constitutional application brought in violation of fundamental principles of law is incompetent and should be dismissed.**

In the earlier ruling of BOOTH IRRIGATION I the court held inter alia

**(i) fundamental principles of law such as estoppel, res judicata laches, waiver, compromise etc apply because the Constitution assumes their existence on grounds of public policy – justice, freedom and fair play**

**(ii) violation of a fundamental principle of law can defeat the articulation of applications under s 84 of the Constitution**

**(iii) Objection to the challenge of an application under s 84 dismissed for possible breach of a fundamental principle**

**(iv) Application under s 84 subsequently dismissed in BOOTH IRRIGATION**

**II.**

In HCCC 204/2003 MILIMANI – LABHSONS LTD v MANULA HAULERS T/A TAUSI TRAVELLERS

this court held inter alia that the right to apply to the High Court under s 84 in itself a fundamental right and it cannot be stifled, clogged or fettered except where the application violates fundamental principles of law.

It is therefore abundantly clear that the local jurisprudence on this has so far manifested itself to the effect that violations of fundamental principles of law is a major consideration by the court firstly to prevent the abuse of the process under s 84 and also to filter out applications that are patently frivolous vexatious, or legally oppressive and untenable. The Constitutional mandate given to the High Court under section 84 of the Constitution is a serious one. The courts cannot countenance the process being trivialized or abused and applications falling under this category can in my view be challenged and dismissed or struck out. Judgments of competent courts cannot be challenged in a constitutional court except on grounds of lack of due process or anything that borders on unconstitutionality

#### Automatic Stay

Concerning the point as to whether there is an automatic stay once a Constitutional application is filed it is clear to the court that the Notice of Motion which resulted in the granting of the ex parte order by Hon Mr Justice Osiemo was brought under Rule 10(a) of the constitution of Kenya (Protection of Fundamental rights and Freedoms of the Individual) Practice and Procedure Rules 2001 yet there are no pending proceedings the Originating Summons having been brought under s 84(1) and (2) of the Constitution.

There was no pending proceeding in that the only pending proceedings are the one suit brought against the plaintiffs by the 3rd interested party and the Notice of Motion was not brought under those proceedings namely HCCC 684 of 2004 where the third interested party has a judgment of approximately 7 million which is alleged to be owed and HCC No 163 of 2005 *Kenya Bus Ltd v General Motors EA Ltd* where the 1st plaintiff had filed suit against the 1st interested party seeking injunctive relief. The 2nd Interested Party claims to be owed over 177 million and the respondents apprehend the bringing of winding up proceedings under the Companies Act.

The Notice of Motion upon which the ex-parte order was granted was not based on any proceedings and rule 10(b) does not apply. Rule 11 (a) should have been invoked and not 10(a). It follows that a chamber summons under O 36 rule 12 should have been filed seeking interim orders. Order 36 rule 12 is mandatory and I find that the Notice of Motion upon which the interim order was granted is incompetent.

There was therefore no automatic stay and the ex-parte orders had no basis in law.

There cannot therefore be an automatic stay under Rule 10(b). What is stayed under Rule 10(b) are further proceedings where a Constitutional question has arisen in the proceedings being stayed. On the contrary a direct application does not attract an automatic stay. The ex-parte order was therefore literally based on thin air and without the backing of the rules made under s 84(6) of the Constitution.

(i) By and large Chapter 5 fundamental rights and freedoms are not absolute. What is granted are rights subject to permissible restrictions such as the rights of others and of society and the public interest. Thus s 70 clearly provides that restrictions or limitations are contained in s 71 to s 83. In particular the enjoyment of those rights and freedoms by any individual should not prejudice the rights and freedoms of others or the public interest. S 70 reads:

**“S 70 Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion political opinions colour creed or sex but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely –**

**a) life, liberty, security of the person and the protection of the law**

**b) freedom of conscience, of expression and of assembly and association; and**

**c) protection for the privacy of his home and other property and from deprivation of property without compensation the provisions of this chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of those rights and freedoms by an individual does not prejudice the rights and freedoms of others or the public interest.”**

They are not absolute as is clear from the provisions of s 70 of the Constitution. They can only be enjoyed in an orderly society. Where they infringe on the rights of others they cannot be enforced by a Constitutional court because the rights of others, the society and the public interest are in the terms of the Constitution also rights and freedoms to be secured and enforced by the court hence the need for a balancing act as illustrated earlier. The Constitution does not say that these other rights and freedoms are lesser rights etc. Where they are likely to prejudice the rights of others the courts cannot enforce them unless the court has a way of securing and enforcing them without disregarding the rights of others.

In this case it is quite evident that the grant of the ex-parte orders paralysed or stopped completely both accrued rights such as the rights to execute decrees of competent courts and the order was so wide as to purport to stop any future right of the interested parties to enforce their rights by instituting any future litigation against the applicants.

The creditors are entitled to have the courts adjudicate on the civil obligations under s 77(9) of the Constitution.

Stopping interested parties from using the due process of law to enforce their rights is itself a clear violation of the provisions to secure protection of law under s 77 of the Constitution. Decisions or determinations by way of judgments, decrees or orders are clearly recognized by s 77(9) of the Constitution and failure to recognize court judgments of competent courts is both unconstitutional and an improper invocation of jurisdiction.

The courts must exercise jurisdiction in conformity with the Constitution – see s 3 of the Judicature Act. In addition execution of decrees is provided for as a permissible limitation or restriction on the right not to be deprived of property under s 75 of the Constitution. Thus s 75 (6) 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**

**“(ii) in the execution of judgments or orders of a court in proceedings for determination of civil rights or obligations”. There cannot therefore be a cause of action based on a lawful exercise of the right of execution by Interested parties. It is unthinkable to imagine how the plaintiffs can allege and prove any contravention under s 84 in the circumstances.**

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.

It is a serious contradiction to suggest that creditors who are enforcing their rights under the private law should be stopped from so doing because there are allegations of violations of the Constitution by the State or Government. There is no legal nexus between the applicant Interested Parties and the respondent in terms of any contravention of the Constitution or ordinary law and none has been pleaded under s 84 is clearly inapplicable.

I therefore entirely accept as good Constitutional law the holding by Maxwell CJ in the Kiribati case of **TEITIWNANG v ARIONG & OTHERS [1987] LRC Const 517 at page 599 where he held as follows:**

**“Dealing now with the question can a private individual maintain an action for declaration against another private individual on individual or individuals for breach of the fundamental rights provisions of the Constitution. The rights and duties of individuals and between 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 is my view 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 or individual under the fundamental rights provisions of the Constitution, no action for a declaration that there has been a breach of duty under the provision can be or be maintained in the case before me, and I so hold.”**

In India where almost similar fundamental rights and freedoms provisions are in existence (except the right to property is no longer a fundamental right) the courts have held the same as per the above quotation. The definition of a “person” under s 123 of the Constitution includes a body of persons corporate or unincorporate.

Turning to the instant case there is even an additional reason for holding that no valid order can be made under the Chapter 5 provisions and which is – no allegations of violations by the so called Interested parties have been made against them but the allegations of violations are directed against the Attorney General and the Minister for Transport and therefore no such order can be made against the Interested parties pursuant to s 84 (1) and 2 of the Constitution or at all. Without threatened or real violation or contraventions alleged proof thereof there cannot be any Constitutional redress against the interested parties even on the basis of the Originating summons and without a hearing because there will be nothing to hear under s 84.

In addition, although there is no direct local authority on the point, the holding No 3 in the Trinidad and Tobago Constitution in the case of *Re APPLICATION BY BAHADUR* [1986] LRC (Const) 297 at page 298 represents our position as well:

**“The Constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action.**

**Where infringements of rights can found a claim under substantive law, the proper course is to bring the claim under that law and not under the Constitution”. (see *HARRIKISSON v ATTORNEY GENERAL OF TRINIDAD AND TOBAGO* 1979 3 WLR 62 applied.**

I am of the view that the only exception to the Rule or principle stated above is where companies or corporations principally created under a statute can Constitutionally be said to be State agents or under the instrumentality of the State, and which is not the case here. The origin of the principle of the instrumentality of the State can perhaps be traced to the Imperial days of *SOLOMON v SOLOMON* and the modern political reality of the State delegating by Statute its functions to large corporations to perform what would in yester years have been the function of the state eg managing Railways, Telecommunications and Energy based Corporations. Applying this principle none of the Interested Parties or indeed the others is associated with the State under this principle. The *SOLOMON v SOLOMON* days – Chartered Companies were directly given Charters by the Queen or King and were State Agents. It is not the case here.

It follows therefore if the plaintiffs had any claim whatsoever against the 1st and 2nd Interested parties or any of the other parties they should have rightly been brought under the private law eg under Company law provisions or Bankruptcy Act provisions.

Invoking s 84 of the Constitution in my view is an abuse of the court process and the claim against the Interested parties has no substance.

A Constitutional court cannot interfere with HCCC No 163 of 2005 *Kenya Bus Ltd v General Motors EA* or any orders in the suit the court in Milimani being a competent court. Moreover any final orders, judgments or decrees in the suit would clearly give rise to a plea of *res judicata* in the Constitutional application herein.

## JURISDICTION

Although it has been argued that this court has no jurisdiction in my opinion there are several reasons for finding that this court has jurisdiction:

1. As regards the order given by Justice Osiemo on 24th March 2005 during the High Court vacation it is trite law that an *ex-parte* order can be set aside by the Judge who gave it or by any other Judge. The Civil Procedure Rules provide for this and this has been the position for many years now. In this case Hon Mr Justice Osiemo did personally order that the application to set aside be referred to the Constitutional Division when he was requested to deal with the application himself. In the recent case of *STEPHEN KIMOTHO & OTHERS v ATTORNEY GENERAL H C M C 833 of 2004* this court held that our Constitution does assume the existence of a supportive Civil Procedure regime in so far as the same is not inconsistent with the Constitution. I find nothing inconsistent with the Constitution in the act or principle of setting aside of *ex-parte* orders for good reasons. If an order obtained in a Constitution application is incompetent or improperly obtained there cannot be any valid reason why the court would not have jurisdiction to set it aside. Setting aside would be properly justified on grounds of doing justice and fair play and good administration of justice and therefore in furtherance of public policy.

2. Where there is no specific provision to set aside the courts power or jurisdiction would spring from the inherent powers of the court. Whereas ordinary jurisdiction stems from the Acts of Parliament or Statutes, the inherent powers stem from the character or the nature of the court itself – it is regarded as sufficiently empowered to do justice in all situations.

Sir Isaac J H JACOB writing in his work entitled *THE REFORM OF CIVIL PROCEDURE LAW AND OTHER ESSAYS IN CIVIL PROCEDURE* (1982) Version has described the inherent powers in clear terms at page 224:

**“The answer is that the jurisdiction to exercise these powers was derived, not from statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called “inherent”. This description has been criticized as being “metaphysical” but I think nevertheless that it is apt to describe the quality of this jurisdiction. For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court, it is its very lifeblood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law. The Judicial basis of this jurisdiction is therefore the authority of the Judiciary to uphold, to protect and to fulfil the Judicial function of administering justice according to law in a regular, orderly and effective manner.”**

The need to administer justice in accordance with the Constitution occupies an even higher level due to the supremacy of the Constitution and the need to prevent the abuse of the Constitutional provisions and procedure does occupy the apex of the Judicial hierarchy of values. I therefore hold that the court does have inherent powers to prevent abuse of its process in declaring, securing and enforcing Constitutional rights and freedoms. It has the same power to set aside *ex-parte* orders which by their very nature are provisional see *WEA RECORDS LIMITED v VISIONS CHANNEL 4 LIMITED & OTHERS (1983) 2 ALLER 589* cited by the 2nd interested party’s Counsel Nani Njoroge Mungai and which this court applied in *R v LAND REGISTRAR KAJIADO & 2 OTHERS Exparte JOHN KIGUNDA HC Misc 1183 of 2004* (unreported). As indicated in the citations of authorities elsewhere in this ruling this court has invoked this power to deal with non disclosure of material facts such as the existence of court cases which have a bearing on the case at hand or where the process is used not to advance the cause of justice but to

subvert it or use for an ulterior purpose.

4. Under s 70 to 84 of the Constitution the court cannot exercise jurisdiction to deny other persons or the rest of the society their rights and freedoms in order to secure instead those of an individual. Any such exercise would be a nullity and without jurisdiction. Chapter 5 rights and freedoms are subject to the right of others society and public interest.

Under section 84 the court had with great respect no jurisdiction to give the order of 25th March 2002 against the applicants and the other interested parties which the respondents purported to enjoin. A court would not have jurisdiction to give an order which violates the Constitution.

I agree with the learned counsel for the 1st interested party Mr Ochieng Oduol in his citation of OWNERS OF MOTOR VESSEL “LILLIANS” v CALTEX K LTD ...where the court observed

**“Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing.”**

### ABUSES OF COURT PROCESS

I find that the seeking and obtaining of an ex-parte order against parties (interested parties) that have nothing to do with the alleged violation and/or imminent violation of the respondents Constitutional right is an abuse of the court process.

Similarly failure to give reasons for such a novel order which I must confess I have not come across in living memory constitutes extreme arbitrariness and which this court, even with extreme deference to the court which granted it finds it quite agonising to deal with. An order without reasons must be a nullity to say the least - see the case of *OMEGA ENTERPRISES KENYA LTD v KTDC CA 59 of 1993 CA* (unreported). The application similarly lacks good faith in that it has principally been brought in total disregard of the relevant commercial laws such as Company Laws which could have been beneficially invoked to obtain relief deserved. To illustrate this point the court understands that one of the respondents had obtained an ex-parte injunction in the pending Milimani matter and as a result of the ex-parte order in the Constitutional application the Interested party is completely paralysed and cannot make any move or take any step to enforce its rights in law in that suit. This state of affairs fly in the face of s 70 and any such order is in my view void for contravening s 70 of the Constitution and the court did not have jurisdiction to give it in the first place since the jurisdiction of the court ought to be exercised firstly in conformity with the Constitution – see section 3 of the Judicature Act.

As aptly put by Nani Mungai the ex-parte order has stayed not illegal actions by the creditors but legal proceedings before competent courts that the creditors of the respondents are in law entitled to take and were taking including the execution of lawfully obtained decrees – which as observed above, clearly constitute acceptable restrictions or permissible limitations on the rights claimed. In our judicial history unless I am seriously mistaken the order given has no precedence and no equal. The closest example as so skillfully argued by Nani Mungai is the United States of America Bankruptcy Code (popularly known as CHAPTER 11 PROTECTION (nothing to do with (NINE ELEVEN OF COURSE) and even in America such protection has been specifically provided for by an Act of Congress. Across the Atlantic the other example is the ENGLISH INSOLVENCY ACT of 1986 whose provisions include inter alia A PROVISION not allowing the directors of the company seeking protection to continue in full control of the company and which makes provision for an Administrator to be appointed to oversee the company seeking protection and assist in putting together the rescue package and where there is strict supervision by the Administrator, creditors and the court.

In our context it is the rights of the general body of creditors which are dormant in the winding up process. There is no proof that the redress against creditors as provided for in the Companies Act is less beneficial to any protection under the Constitution if any such protection exists under Chapter 5. As a result I find that the respondents have no cause of action against the Interested Parties and further find that if there is any relief due to the respondents in law it is as against the defendants.

## NO CAUSE OF ACTION AGAINST INTERESTED PARTIES

The respondents have no cause of action against the Interested parties at all because there is no contravention shown even on a prima facie basis under s 84 of the constitution. For a contravention to exist the requirements set out in the following cases must be met and have not been met:

(i) In *MATIBA v ATTORNEY GENERAL H C Misc Appl 666 of 1990* the court held

**“An applicant in an application under s 84(1) of the constitution is obliged to state his complaint the provision of the Constitution he considers has been infringed in relation to him and the manner in which he believes they have been infringed. Those allegations are the ones which if pleaded with particularity invoke the jurisdiction of this court under the section. It is not enough to allege infringement without particularizing the details and the manner of infringement.”**

(ii) In *AMERICAN CONSTITUTIONAL LAW* 2nd Edition by Lawrence Tribe at pg 67 the author puts the same position this way:

**“a litigant must now demonstrate regardless of the actual existence of claimed injury or its subjective importance an individualized harm imparting specifically upon him and of a tangible concrete nature.”**

(iii) In *ANARITA KARIMI NJERU v R (No 1) 1979 KLR 154* Trevelyan and Hancox J) held:

**“We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains the provision said to be infringed and the manner in which they are alleged to be infringed.”**

(iv) Finally in *CYPRIAN KUBAI v STANLEY KANYONGA MWENDA – NAIROBI – HC MISC 612 o 2002* unreported KHAMONI J struck out an application and went on to make a finding as follows:

**“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 the section, but also to the subsection and where applicable the paragraph or subparagraph of the section out of 71 to 83, allegedly contravened plus relevant act of that contravention so that the respondent knows the nature and extent of the case to respond to enable the respondent prepare accordingly and also to know the exact extent and nature of the case it is handling...”**

## CONCLUSION

Before reaching the final verdict it is significant to point out that this court is not oblivious of the strategic role which the respondents have in the Public Transport Sector especially in the Capital City. However any rescue measures are in the field of policy – by the Executive arm of Government and/or in the Legislature should a change in the law be required. As a court of law our role is confined to interpreting and applying the law.

For all the above reasons either singly or collectively I hereby set aside the order dated 24th March 2005 as against Interested parties number 1, 2 and 3 with costs to them.

However as regards the other Interested parties it is the view of the court that extra ordinary wrongs or irregularities call for extra ordinary remedies and for this reason I hereby forthwith expunge the Interested Parties from the record pursuant to Order 1 rule 10(2) of the Civil Procedure Rules for having been improperly joined and for lack of a cause of action or contravention. The court further invokes s 84 (2) of the Constitution in setting aside the ex-parte Order against them as of right with no order as to costs. The reason for this is that it is this court’s view that the Chapter 5 fundamental rights and freedoms have to be

contrasted with the rights and freedoms of the Interested Parties and which constitute and are described as limitations or restrictions and which are in my view Constitutionally fundamental and of equal importance.

The only differences between the rights and the restrictions are that the restrictions can be challenged on grounds of reasonableness, democratic practices, proportionality and the society's values and morals including economic and social conditions etc whereas rights are to the spiritual, God given, and inalienable and to the non-believers changeless and the eighth wonder of the World!

I must conclude by saying the ex-parte order could not have been spared in any event for the reason that if I may borrow one expression from Lord Denning on his famous streams of justice and put it in my own words, the order would have hindered the smooth flow of the streams of justice for all by blocking the 221 persons while the rivers of Constitutional Justice or any justice at all should flow pure for all to drink from them. While the rights and freedoms of the Interested Parties are quite evident or apparent in the circumstances of this case the rights and freedoms of the respondents are not there and nothing tilts in their favour. The Notice of Motion is also struck out as incompetent.

In the alternative and in the event that I am wrong in my view of the law and the powers of this court I do invoke the inherent jurisdiction of the court in order to prevent abuse of its process and to preserve its authority and dignity by setting aside the ex-parte order as against this category of Interested parties and in abundant caution the ex-parte order is hereby set aside on this ground as well with no order as to costs.

It is so ordered.

This 10th day of June 2005.

**J G Nyamu**

**JUDGE**