



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 204 OF 2015

BETWEEN

IBRAHIM NDADEMA ADENYAPETITIONER

VERSUS

THE HONOURABLE ATTORNEY GENERAL

C/O MINISTRY OFFOREIGN AFFAIRS

AND INTERNATIONAL TRADE.....1ST RESPONDENT

AND

INTERNATIONAL LIVESTOCK

RESEARCH INSTITUTEINTERESTED PARTY

JUDGMENT

Introduction

1. In his petition dated 15th May 2015, the petitioner alleges violation of his constitutional rights under Articles 32, 33, 40 and 47 of the Constitution. The alleged violations arose in consequence of a decision by the respondent to demand that the petitioner goes to its office to sign a discharge voucher in respect of cheques issued in his favour by the interested party. The cheques are in respect of a claim arising out of workplace injuries sustained by the petitioner when he was employed by the interested party.
2. The petitioner has filed the present proceedings against the Attorney General (AG) on behalf of the Principal Secretary, Ministry of Foreign Affairs and International Trade, and has joined the International Livestock Research Institute (ILRI), the petitioner's former employer, as an interested party.

Background

3. The petitioner has, in his pleadings, given a lengthy background to the circumstances leading to the present petition. What is relevant for present purposes is that he was injured in the course of employment with the interested party, and was subsequently retired on medical grounds in 1987. He received some payment from the interested party, but over the years, had been pursuing a substantial claim against the interested party. In 2001, he filed a suit against the interested party, which was referred to the respondent Ministry for arbitration.
4. Finally, a settlement was reached in which he was to receive the sum of Kshs4,135,884.80 from the interested party. It is the manner of paying this amount to the petitioner that is at the centre of this petition. The petitioner is aggrieved by what he sees as the unconstitutional demand that the payment cheques are made to him directly, rather than to his Advocates. He alleges that the demand is unconstitutional and in violation of his rights under Articles 31, 32 (1) and (4), 40 (1) and 47 (1) of the Constitution. The petitioner's Advocates in this matter, the firm of Nelson Harun & Co. Advocates, were acting for the petitioner in the negotiations leading to the settlement.

The Petitioner's Case

5. The petitioner's case is contained in his petition and affidavit in support dated 15th May, 2015, a supplementary affidavit sworn on 9th July, 2015, and four sets of written submissions respectively dated 6th July, 2015, 23rd July, 2015, 14th September, 2015 and 9th November, 2015. His case was argued by his Learned Counsel Mr. Muturi.
6. The petitioner averred that he was employed by ILRI vide a letter of appointment dated 24th January, 1977. He suffered workplace injuries and contracted an occupational illness which necessitated his retirement on medical grounds in 1987. Upon his retirement, he was paid a paltry Kshs20,244.85. He therefore embarked on a journey in pursuit of justice and sought assistance from various quarters.
7. In 2001, through a letter dated 20th March, 2001, he was advised by the Ministry of Foreign Affairs to pursue his claim against ILRI through the court process, He therefore filed suit, and as noted above, the matter was referred to arbitration, the outcome of which was that a settlement was reached for the payment to him of Kshs.4,135,884.80 for workplace injuries.
8. He contends that upon the said agreement, in total breach of client-advocate confidentiality and in violation of his right to be represented by an advocate of his own choice and the right to receive legal advice from such an advocate of his choice, the AG instructed ILRI's advocates not to make the said payments to his advocates. The petitioner contends that he had given express written instructions to his advocate to receive the payments on his behalf, and the respondent was hound to honour such instructions.
9. He contends that the respondent directed ILRI's advocates to demand that the petitioner avails his bank account details in which the payments would be made. The petitioner's advocates, despite being offended by the conduct of State Counsels in the legal Department, Ministry of Foreign Affairs, nonetheless advised him to forward his bank account details to ILRI so as to enable it to make the payments directly to his account.
10. He deposes that despite availing his bank account details and the practice in government which requires that all payments in excess of Kshs.1 Million be paid by electronic transfer, the respondent abused his power and authority and directed ILRI to make out cheques in the petitioner's favour. It also demanded that he avails himself at the Ministry of Foreign Affairs boardroom to receive the cheques.
11. The petitioner further contends that the respondent, through a State Counsel and in complete

contempt of his right to associate with an advocate of his choice, commenced direct contact with him through letters and telephone calls. He terms the conduct of the State Counsel in contacting him directly while he had an advocate representing him as a violation of the Code of Conduct of State Counsel under the Office of the Attorney General Act.

12. It is his case that disrespect to his advocate is disrespect to his decision to retain the services of the disrespected advocate and violates his freedom of association and conscience. It is also his contention that the respondent has violated his right to property as it has held the cheques issued by the interested party since September, 2014.
13. The petitioner has also alleged violation of his right to privacy. He alleges that this arises due to the demand by the respondent that he attends a cheque receiving ceremony at its premises, which he also alleges is unlawful and unreasonable administrative action for which he prays for damages.
14. He also alleges that the interested party has acquiesced in the violation of his rights contrary to Article 3 (1) and 10 of the Constitution, while the respondent has aided, abetted and encouraged the violation of his rights for 28 years and continues to disregard his legitimate expectation to be served by the respondent's state officers rather than being ruled by the said officers.
15. The petitioner also alleges a failure by the respondent to pursue the Kenya National Assurance Company Limited with respect to his retirement benefits under the staff endowment fund, or to pursue the interested party in respect thereof.
16. The petitioner therefore prays that the Court should allow his petition and grant him the following orders:
 - a. ***A mandatory injunction directing the respondent to forthwith and unconditionally release to the petitioner's advocates the settlement cheques in its custody and/or possession.***
 - b. ***In the alternative and without prejudice to prayer (a), if the said cheques are stale on account of time, mandatory injunction do issue directing the interested party to issue replacement cheques to the petitioner's advocates or in the further alternative, the interested party to effect an RTGS, Electronic Funds Transfer into the petitioner's bank account as per the details availed to the interested party and the respondent.***
 - c. ***A declaration that the actions of the respondent in the manner it has handled the petitioner's compensation from the interested part has violated the petitioner's constitutional rights as set out under Articles 31, 32 (1), 32 (4), 40 (1) and 47 (1) of the Constitution.***
 - d. ***A declaration that the actions of the respondent's office are illegal, unlawful, unreasonable and amount to abuse of power, office and are contrary to the constitutional dictates on leadership and integrity and a violation of public trust assigned to a State officer and the Code of Conduct of State Counsel.***
 - e. ***Damages.***
 - f. ***Costs of the suit.***

The Respondent's Case

17. In opposing the petition, the respondent relied on an affidavit sworn on 15th June, 2015, by Ms. Nilly Kanana, a State Counsel in the Ministry of Foreign Affairs and International Trade. It also filed written submissions which were highlighted by Learned State Counsel, Ms Kamande.
18. The respondent denies violating any of the petitioner's rights and takes the position that this petition is misplaced, ill-conceived, frivolous and an abuse of the court process and discloses no cause of action.

19. The AG sets out the facts, from its perspective, leading to the present dispute: that a tripartite meeting was convened involving the petitioner's then advocates, M/s Khaminwa and Khaminwa, a representative from ILRI and officials from the Ministry with a view to resolving the dispute; that it was ascertained that ILRI had paid all the petitioner's medical bills through the personal accident insurance and his retirement benefits had also been settled by the National Social Security Fund; that the matter was held in abeyance until November, 2013 when the petitioner's new advocate, Mr. Nelson Harun, notified the Ministry that he had taken over from M/s Khaminwa and Khaminwa advocates and he reminded the Ministry that the claim was still outstanding.
20. According to the respondent, the dispute between the petitioner and the interested party has been settled. What remains is just the collection of the petitioner's cheques at the Ministry's office and the signing of a discharge voucher by the petitioner and ILRI so as to enable the Ministry to close the files on the matter.
21. The respondent deposes that the petitioner was requested to collect his settlement cheques from the Ministry in accordance with the existing Government Regulations and protocol guiding relations between the government, missions and international organizations based in Kenya, but his advocate, Mr. Harun, did not favour the way the government settles payments. As a result, the petitioner's Counsel wrote a complaint letter to the Law Society of Kenya accusing the Ministry's Legal Department of professional misconduct for failure to pay the settlement money to him as opposed to making the payments directly to the petitioner.
22. Ms. Kanana avers that the Ministry tendered an explanation to the Law Society of Kenya outlining the government's payment systems, emphasizing that the settlements are normally made directly to claimants and not to third parties, and where such claimants cannot be traced, payments are made to their estate through the Public Trustee.
23. According to the respondent, its only interest in matters such as this is purely to protect the interests of Kenyans working in either diplomatic missions or international organizations with status that gives such entities privileges and immunities. It terms its role in the present matter as purely that of an arbitrator between ILRI and the petitioner. Its position was that it had not refused to release the settlement cheques to the petitioner; and the petitioner was required to appear personally and/or with his lawyer to collect the cheques as they are drawn in his name, and to sign a discharge voucher witnessed by officials of ILRI and the Ministry.
24. With respect to the allegations of professional misconduct against Ministry officials, Ms. Kanana deposes that they are unfounded as the officials have no personal interest in the matter. In the respondent's view, nothing can be done by anyone if the petitioner willingly refuses to collect his payment.
25. It is also the respondent's contention that there is no law that bars the Ministry from channelling funds to the petitioner directly, and neither the petitioner nor his Counsel can dictate how the Government will settle claims. Further, it is her deposition that there is no restriction on who may accompany the petitioner when he goes to collect the cheques. The respondent prays that the petition should be dismissed with costs.

The Case of the Interested Party

26. ILRI opposed its joinder as a party to this petition. It filed an application in that regard dated 29th May, 2015 together with an affidavit in support sworn by its Legal Counsel, Ms. Linda Opati, which was argued in the course of hearing the petition. Its case was presented by its Counsel, Mr. Owiti.
27. ILRI's basic contention is that it enjoys immunity from every form of legal process unless it waives the immunity, which it has not done in this case. It is deposed on its behalf that it is an

autonomous, non-profit making international organization with juridical international personality and, pursuant to Article II (3) of the Host Country Agreement between it and the Government of Kenya, the government has agreed to apply to it, its staff, properties and assets, the provisions of the Convention on the Privileges and Immunities of the Specialised Agencies adopted by the United Nations General Assembly on 21st November, 1947 as well as those set forth in the Host Country Agreement.

28. Its case is further that any dispute or legal claim against it in Kenya, other than by the Kenyan Government, is to be referred to the Ministry of Foreign Affairs for negotiation and settlement. With respect to the petitioner's claim, it initiated negotiations through the Ministry for the settlement of the petitioner's claim, and the need for the involvement of the Ministry had all along been known to the petitioner, whose attempt to seek a remedy against it in HCCC No. 1236 of 2001 was stopped by the Court which referred the matter to the Ministry.

29. ILRI therefore argued that it is not a proper party to the present proceedings, and in any event, the prayers sought against it have been spent and are therefore superfluous as it has already issued replacement cheques and handed over the settlement amount of Kshs.4,135,884.80/= to the Ministry for onward transmission to the petitioner upon his signing the discharge voucher.

Determination

30. I have read and carefully considered the pleadings and submissions of the parties in this matter. The petitioner alleges violation of his constitutional rights in that the respondent has not paid the amount due to him from the interested party through his advocates, and has instead sought to do so directly to the petitioner.

31. The petitioner and the interested party have made detailed averments and depositions about the status of the interested party, and whether it is protected from legal process by diplomatic immunity. While I appreciate the labour that has gone into the pleadings and submissions, I do not believe that that is an issue that falls for determination in this matter, for one simple reason.

32. The negotiations between the petitioner and ILRI are complete, and a settlement reached. There is no dispute about the entitlement of the petitioner to the amount that has been agreed upon. ILRI has made payment to the petitioner through the Ministry. What is at issue is the mode of payment and/ or receipt of that amount. The petitioner, according to his depositions, wishes to have the amount paid through his advocates. The respondent takes the position that the payment should be made to the claimant directly, not to a third party.

33. Where is the claim, constitutional or otherwise, against ILRI that would justify this Court entering into a determination of the question whether ILRI does or does not have diplomatic immunity? While the petitioner has made averments regarding his pension and retirement benefits and entitlements under workmen's compensation law, those are not matters that are before the Court. There is no justification, as I see it, of expending valuable judicial time on an issue that is at best academic in the circumstances of this case.

34. In my view, the sole issue for determination in this matter is whether there has been a violation of the petitioner's rights by the respondent as alleged.

Violation of the Petitioner's Right

35. The petitioner has submitted that the respondents have disregarded his written instructions and his right to associate with his advocates as by law decreed and as by legal practice established, and as a result, the actions of the respondents violate his freedom of conscience and association.

36. It is also his submission that by demanding that he executes a discharge voucher at the Ministry without his advocate studying the contents of the said voucher, the respondent has violated his

- right to legal representation. The petitioner relied on the decision in **Delphis Bank Limited vs Channan Singh Chathe and 6 Others KLR (2005) 1** and submitted that the respondents have no right in law to impugn the advocate-client relationship between him and his advocates and further to disregard the hallowed principle of confidentiality in the said relationship.
37. The petitioner alleges violation of his rights under Articles 31, 32 (1) and (4), 40 (1) and 47 (1) of the Constitution. He also alleges violation of the Office of the Attorney General Act and the Code of Conduct of State Counsel.
38. The petitioner further submits that the respondent has failed to avail to the Court any evidence on the alleged guidelines on payment of claims that disregard the acknowledged practice and custom in law in the payment of claims where parties are represented by advocates.
39. In response, the AG submits that there is no cause of action or violation of constitutional rights demonstrated. The respondent has not refused to hand over the petitioner's cheques: all it requires is that he signs the discharge voucher in respect thereof in person. It denies that there has been a violation of the petitioner's rights under any of the provisions of the Constitution cited, noting that the petitioner, for his own reasons, wishes to circumvent the policies and procedures of the government in matters such as this. The respondent maintains that all the petitioner needs to do is collect his cheque and sign the discharge voucher from ILRI, and he may be accompanied by his lawyer.
40. With regard to the respondent's insistence on the petitioner signing the discharge voucher and the respondent not wiring the funds to the petitioner's account, the respondent maintains that this is a security measure as there have been cases where funds are wired to accounts only for the claimants to later claim that they did not get the funds.
41. This is a constitutional petition in which the petitioner alleges violation of his rights under Articles 31, 32 (1) and (4), 40 (1) and 47 of the Constitution. In accordance with the principles enunciated in the case of **Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272** and **Trusted Society of Human Rights Alliance vs Mumo Matemu and Another High Court Petition No. 229 of 2012**, the petitioner has an obligation to demonstrate, with a reasonable degree of precision, the constitutional provisions violated, and the manner of violation with respect to him.
42. Article 31 of the Constitution guarantees the right to privacy and provides that:

Every person has the right to privacy, which includes the right not to have-

- ***Their person, home or property searched;***
- ***Their possession seized;***
- ***Information relating to their family or private affairs unnecessarily required or revealed;***
or
- ***The privacy of their communications infringed.***

43. The right to privacy ensures the protection of an individual's autonomy among others. The New Zealand Supreme Court in **Brooker vs the Police (2007) NZSC 30** at para. 252 stated as follows:

“Privacy can be more or less extensive, involving a broad range of matters bearing on an individual's personal life. It creates a zone embodying a basic respect for persons...Recognising and asserting this personal and private domain is essential to sustain a civil and civilised society...It is closely allied to the fundamental value underlying and supporting all other rights, the dignity and worth of the human person.”

44. In his book, **The Value of Privacy (Polity, 2005) p. 72**, **B. Rossler** explains the right to privacy in the following terms:

“The concept of right to privacy demarcates for the individual realms or dimensions that

he needs in order to be able to enjoy individual freedom exacted and legally safeguarded in modern societies. Such realms or dimensions of privacy substantialize the liberties that are secured because the mere securing of freedom does not in itself necessarily entail that the conditions are secured for us to be able to enjoy these liberties as we really want to."

45. Rossler continues to state as follows: *"protecting privacy is necessary if an individual is to lead an autonomous, independent life, enjoy mental happiness, develop a variety of diverse interpersonal relationships, formulate unique ideas, opinions, beliefs and ways of living and participate in a democratic, pluralistic society. The importance of privacy to the individual and society certainly justifies the conclusion that it is a fundamental social value, and should be vigorously protected in law. Each intrusion upon private life is demeaning not only to the dignity and spirit of the individual, but also to the integrity of the society of which the individual is part"*.

46. As I understand the petitioner's case, his being required to attend the respondent's offices to collect his cheques for what he describes as a cheque collection ceremony amounts to a violation of his right to privacy. Regrettably, however, there is little in his contentions that brings his case even remotely close to what would lead the Court to conclude that there was a violation of his right to privacy. As the cases and text above demonstrate, a party must show that the right has been curtailed in some manner or a limit has been imposed. I therefore find that there has been no violation of the petitioner's right to privacy.

Violation of Article 32

47. Article 32 provides that:

1. *Every person has the right to freedom of conscience, religion, thought, belief and opinion.*
2. ...
3. ...
4. *A person shall not be compelled to act, or engage in any act, that is contrary to the person's belief or religion.*

48. Freedom of conscience entails the protection of a person's free will. In **S. P. Mittal Etc. vs Union Of India And Others, 1983 AIR, 1 1983 SCR (1) 729**, it was noted that:

"... Freedom of conscience is not to be separated from the right to profess, practice and propagate religion. They go together and together they form part of the Right to Freedom of Religion."

49. The meaning of religion was addressed by Dickson CJC in **R vs Big M Drug Mart Ltd., [1985] 1 S.C.R. 295** where he observed as follows:

"A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon Section 15 of the Charter (an equivalent of our Article 32). Freedom must surely be founded in respect for the inherent dignity and inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination."

50. Freedom of religion thus entails the right to hold and manifest beliefs in relation to ones chosen religion, while freedom of conscience relates to the right to freely make decisions without any impediments.

51. Given the provisions of the Constitution and the elucidation of the right in the decisions set out above, one is constrained to ask: in what manner has the petitioner's right to freedom of conscience and religion been violated by the respondents? His averment at paragraph 22 is that:

“ The Petitioner further avers that the treatment of the Petitioner by the Respondent and in particular treating the Petitioner's instructions on payment of his claim and seizing the Petitioner's cheques while equally being a violation of the Petitioner's right to privacy violates the Petitioner's right to freedom of conscience, thought, belief and opinion. The petitioner seeks damages.”

52. I can find in these averments no violation or threat of violation of the petitioner's rights under Article 32.

Violation of Article 40

53. Article 40 (1) contains the constitutional guarantee of the right to property and provides that:

Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-

- a. ***Of any description; and***
- b. ***In any part of Kenya***

54. The right to own property has been accorded universal recognition, with the courts recognizing the importance of the right. In the case of **R vs Chief Immigration Officer (1976) 3 AER 843** Lord Denning stated as following regarding the guarantee of the right in the Universal Declaration of Human Rights:

“... Among the important rights which individuals traditionally have enjoyed is the right to own property. This right is recognised in the Universal Declaration of Human Rights (1948). Article 17(1) which states that everyone has the right to own property and Article 17(2) guarantees that "no one shall be deprived of his property" The contention of the State counsel negates this right. An intention to provide for arbitrary infringement of human rights cannot be attributed to the legislature unless such intention is unequivocally manifest. When Parliament is enacting a statute, the court will assume that it had regard to the Universal Declaration of Human Rights and intended to make the enactment accord with the Declaration and will interpret it accordingly...” (Emphasis added)

55. At the core of the petitioner's case is that the holding of the cheques by the respondent amounts to an infringement of his right to property. However, it is to be noted that there has been communication between the parties in which the petitioner has been requested to collect his cheques. In its letter dated 22nd July, 2014, M/s Sisule Munyi Kilonzo and Associates wrote to M/s Nelson Harun and Co. Advocates informing them of the proposed payments to be made to the petitioner. The letter stated that:

“If our client's proposal is acceptable to yours, kindly let us have Mr. Adenya's Bank Account details to enable our client effect payment. Please note that we have instructions that the Ministry of Foreign Affairs, having been involved in the settlement of the claim, have requested our client that the amount be paid directly to Mr. Adenya or through the Ministry, hence the request for Mr. Adenya's bank details.”

56. In a letter dated 1st September, 2014, M/s Sisule Munyi Kilonzo and Associates again wrote to M/s Nelson Harun and Co. as follows:

“On the mode of payment, we are instructed that the settlement cheques will be drawn in the name of your client and will be handed over to him directly at the Ministry of Foreign

Affairs and International Trade upon his signing of the Discharge Voucher then, and at which occasion you will be at liberty to attend in your capacity as your client's advocate.

...

“Our client is aware that you have in the past protested against this mode of payment. However, please note that the Ministry has been the arbitrator in the concluded negotiations. as such, the matter cannot be officially concluded until the Ministry has witnessed your client signing off that he accepts and has actually received the negotiated payment cheques. Only then can the Ministry officially close its file on the matter.

In view of the above therefore, and in view of the fact that your client has agreed to settlement as indicated in your letter under reply, we are proceeding to request our client to immediately prepare and avail the settlement cheques at the Ministry for your client's collection subject to signing as indicated above at a time convenient to the Ministry and to both our client and yours, which time we shall communicate.”

57. In a subsequent letter by M/s Sisule Munyi and Associates, dated 9th September, 2014, the said firm reiterated its position with regard to the aforementioned mode of payment.

58. On 15th September, 2014, the petitioner wrote to ILRI giving it his bank account details for the purpose of payments as he had been requested. Subsequently however, in a letter dated 17th September, 2014, the Ministry of Foreign Affairs and International Trade invited the petitioner to go and collect the cheques. The said letter stated as follows:

“You are requested to come to the Ministry and collect your final settlement from ILRI who have deposited the cheques with the Ministry in accordance with procedures governing the relations between the Government and international organizations based in Kenya.

On collection of the cheques you will be expected to sign a discharge vouchers between yourself and ILRI and witnessed by an official of this Ministry.”

59. On 26th May, 2015, ILRI drew replacement cheques to be collected by the petitioner as the cheques which it had issued earlier had become stale.

60. It is thus evident that there is no intention on the part of the respondent to deprive the petitioner of his property. A settlement having been agreed with the interested party, and the petitioner requested to collect the cheques in respect of the settlement, how has the respondent violated the petitioner's right to property? Again, I must answer this question in the negative: there has been no violation of the petitioner's right to property disclosed in the material before me.

Violation of Article 47

61. The petitioner has also alleged violation of Article 47, which guarantees to everyone the right to ***“administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”*** It also requires that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, he or she should be given written reasons for the administrative action.

62. Fair administrative action entails the making of sound decisions by bodies in line with the law and any such powers conferred to such bodies. According to section 2 of the Fair Administrative Actions Act, No. 4 of 2015, "administrative action" is defined to include-

i. ***The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or***

- ii. ***Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.***

63. In the circumstances of this case, and given the fact that I have been unable to find a violation of the petitioner's rights under any of the Articles cited, I cannot find a violation of Article 47. The correspondence contained in the material presented before me shows that the petitioner was informed that he could collect his cheques, and the reasons why he should collect them personally. Even had I found a violation of the other rights alleged to have been infringed, I would have been unable to find that the respondent was in breach of Article 47 in the circumstances of this case.

Disposition

64. In making my final disposition of this matter, I ask one question that has vexed the Court from its commencement: what, really, is this petition about? In the course of the proceedings, I enquired from Counsel for the petitioner what the constitutional issue in this petition was. His response was that the petition is about him, about his fees. The petition and the submissions on behalf of the petitioner also carry palpable anger by the petitioner's advocate about what he sees as disrespect to him personally by a junior Counsel, who has the temerity to correspond with his client directly.

65. However, no matter how affronted a person may be by the conduct of another, and disrespect from anyone is to be deprecated that does not turn a matter into a constitutional issue. Similarly, this Court cannot enter into an examination of the question whether the State Counsel in the respondent's office has been in breach of the professional Code of Conduct binding on her: that too, is not a constitutional issue, and there are clear mechanisms provided in law, among them the provisions of the Leadership and Integrity Act and the disciplinary process of the Law Society, for dealing with such matters.

66. There is a danger, which this and other Courts have sounded a caution about a number of times, that if every issue is labeled a constitutional issue and litigated as such under the constitutional jurisdiction of the High Court, then the importance of that jurisdiction will be diminished and lose its value. Before lodging a matter alleging violation of constitutional rights, parties must bear in mind the words of the Privy Council in the case of *Kemrajh Harrikissoon vs Attorney General of Trinidad and Tobago*, (1979) 3WLR 63 in which it stated as follows:

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

67. In this case, and with the greatest respect to Counsel for the petitioner, one would have to do some serious legal gymnastics to find a violation of the petitioner's rights under the provisions of the Constitution relied on.

68. Having reached that conclusion, what I should do is proceed to dismiss the petition.

69. However, and in exercise of the jurisdiction vested in the Court under Article 23(3) of the

Constitution to grant appropriate relief, it is my view that this matter can be resolved by the parties stepping back and, in a spirit of taking into consideration the interests of the petitioner, adopting a commonsense approach to the matter. I say this bearing in mind that having come this far in seeking a resolution of the matter, all the parties, the petitioner's Counsel particularly, are interested in justice for the petitioner.

70. In giving the directions that I shall shortly give in this matter, I do so bearing in mind that the petitioner is entitled to legal representation, and that such representation necessarily entails receipt of payments due to the client. I am however, also mindful of the need to put an end to this matter, and of the need to do so in a manner that takes into account the respondent's responsibility in ensuring that the dispute that it arbitrated between the petitioner and the interested party is brought to a close, and hence the need to follow its discharge processes.

71. I note that at some point in 2014, as is evident from the annexures referred to at paragraph 20 of the affidavit of Ms. Linda Opati, ILRI had drawn seven cheques. Five, numbers 376001, 376002, 376003, 376004 and 376005 were drawn in favour of the petitioner and were for the amount of Kshs.827,176.95 each. Two cheques were drawn in favour of the petitioner's advocates, being cheque numbers 376006 and 376007 for Kshs.413,588.50 each. All the cheques were dated 10th September 2014.

72. In order to bring the petitioner's long wait for a settlement on the issue to a close, my directions are as follows:

- i. ***The interested party shall within Fourteen (14) days hereof replace the cheques as drawn in September 2014 in favour of the petitioner and his Advocates respectively;***
- ii. ***The petitioner, in the company of his Advocate, shall call upon the respondent on a date to be agreed to collect the said cheques and execute the requisite discharge voucher(s) in settlement of his claim against the interested party;***
- iii. ***Each party shall bear its own costs of the petition.***

73. Orders accordingly.

Dated, Delivered and Signed at Nairobi this 11th day of May 2016

MUMBI NGUGI

JUDGE

Mr. Muturi instructed by the firm of Nelson Harun Muturi & Co. Advocates for the petitioner.

Ms. Kamande instructed by the State Law Office for the respondent.

Mr. Ochieng Owiti instructed by the firm of Sisule Munyi Kilonzo & Co. Associates Advocates for the interested party.