



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**PETITION NO. 19 OF 2015**

**IN THE MATTER OF: THE CONTRAVENTION OF FUNDAMENTAL RIGHTS**

**AND FREEDOMS UNDER ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 24, 25, 28,**

**29, 31, 43, 47, 48, 49, 50, 238, 239, 243, 244 AND 245 OF THE**

**CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: CONTRAVENTION OF SECTION 3 OF THE PREVENTION OF  
TERRORISM ACT**

**BETWEEN**

**1. MUSLIMS FOR HUMAN RIGHTS (MUHURI)**

**2. HAKI AFRICA.....PETITIONERS**

**VERSUS**

**1. THE INSPECTOR-GENERAL OF POLICE**

**2. THE CABINET SECRETARY MINISTRY OF INTERIOR AND**

**COORDINATION OF NATIONAL GOVERNMENT**

**3. THE HON. ATTORNEY-GENERAL**

**4. GULF AFRICAN BANK LIMITED**

**5. NIC BANK LIMITED.....RESPONDENTS**

**RULING**

**INTRODUCTION**

1. This Ruling is divided into six parts:-

1. Terrorism defined
2. The Antecedents to the Petition and the Application
3. The Application
4. The Responses
5. Submissions
6. Conclusion
7. Final orders

## **WHAT IS TERRORISM?**

2. Terrorism is the calculated use of violence or threat of violence to inculcate fear; intended to coerce or intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological.

3. Kenya has fallen victim to its fair share of terrorist attacks in the past. In the last 20 years, there have been many terrorist related attacks in Kenya with the major ones being the bombing of the American Embassy in Nairobi (1998), bombing at Kikambala (2002), shooting at the Westgate Mall in Nairobi, the Nairobi and Mombasa bus explosions (2014), the Mpeketoni and Lamu attacks (2014) and most recently, the shooting at Garissa University College on 2<sup>nd</sup> April 2015 that left 148 people killed and approximately 79 injured. That attack was preceded with the massacre of quarry workers and bus travellers in Mandera. The proscribed terrorist group – Al Shabaab claimed responsibility for many of the attacks, including the Garissa Attack of 2<sup>nd</sup> April 2015.

## **THE ANTECEDENTS TO THE APPLICATION – THE GAZETTE NOTICE NO.2326 OF 2015**

4. On 7<sup>th</sup> April 2015, the Inspector-General of Police issued a Notice in the Kenya Gazette listing Al Shabaab as a terrorist organization under the Prevention of Terrorism Act. The same Notice contained a list of 85 entities and individuals suspected to be associated with Al Shabaab. Listed as number 45 and 46 respectively was **Haki Africa** (the second Applicant) and **Muslims for Human Rights (MUHURI)** (the First Applicant). On 8<sup>th</sup> April 2015, the National Treasury Principal Secretary Dr. Kamau Thugge announced at a press conference that the Government had frozen the bank accounts of people and institutions suspected to be funding terrorists pending investigations before action can be taken against them. The Petitioners soon found out on 8<sup>th</sup> April 2015 that they could not access their funds lying at Gulf African Bank Limited and NIC Bank Limited as their accounts had been frozen. The 5<sup>th</sup> Respondent in separate but similar letters dated the same day (“HKK2” and “HAA2”) informed the Petitioners that their respective accounts had been suspended indefinitely and referred them to the Bank Supervision Department of the Central Bank of Kenya for further information. This prompted the Petitioners to file this Petition.

## **THE APPLICATION**

5. The application before court is the Notice of Motion dated 13<sup>th</sup> April 2015. The Motion seeks the orders of the court to unfreeze the Petitioners' bank accounts with the Fourth and Fifth Respondents, as well as an injunction to restrain both Inspector-General of Police from recommending to the Cabinet Secretary in the Ministry of Interior and Coordination of National Government, and the Cabinet Secretary from declaring the Petitioners as specified entities. The Motion is supported by the affidavits of Hassan Abdi Abdille and Hussein Khalid Khamis for and on behalf of the First and Second Petitioners respectively. It is premised on the grounds that the Respondents are by their actions of publishing the Notice and freezing the Petitioners' accounts in breach of the Petitioners' rights under the Constitution

and the applicable law. The Petition claims that as a result the Petitioners have suffered public anger, ridicule and stigma; the lives of their officials and staff have been endangered; and they have been unable to continue with economic and social operations. The Petition seeks among other reliefs a declaration that the actions of the Respondents were unconstitutional, an order unfreezing their accounts and an injunction restraining the First and Second Respondents from proceeding any further or declaring them as specified entities.

6. The application was urged before this court on 30<sup>th</sup> April 2015, whereupon the court directed that the Motion as well as the Preliminary Objections be heard together.

### **RESPONSES TO THE APPLICATION**

7. The application is opposed. Mr. Muteti, counsel representing the Director of Public Prosecutions (DPP) who was joined as an Interested Party filed a Notice of Preliminary Objection dated 28<sup>th</sup> April 2015 challenging the Motion and Petition. The DPP pleads that the court has no jurisdiction to entertain the Application and the Petition because the Petition is premature. The Petitioners have only been listed as a requirement under Section 3(2) of the Prevention of Terrorism Act and have not been declared specified entities. The High Court cannot be moved to quash a notice requiring the entities to show cause to enable the Inspector-General of Police to advise the Cabinet Secretary as to whether they should be declared specified entities. And the Inspector-General of Police, not having made a decision yet, cannot be restrained from complying with the law unless section 3 of the Prevention of Terrorism Act is declared unconstitutional. The Petition in so far as it seeks to stop an on-going investigation is a non-starter and lacks any legal basis. Furthermore, the duty of the Police to detect and prevent commission of offences is Constitutional and cannot be subjugated to individual interest.

8. The DPP also urged that the freezing of the accounts having been done pursuant to the Central Bank of Kenya's directive in its capacity as a regulator can only be dealt with if the Central Bank of Kenya were enjoined as a party to the Petition and the Application, thus the failure to enjoin it renders the Application and Petition incompetent. The court was urged to strike out the same for non-joinder and mis-joinder of parties. The Application and Petition, it was stated, did not raise any matter within the purview of administrative law to avail the Petitioners any remedy since there is no failure on the part of the Inspector-General of Police discernible from the pleadings to justify the orders ought. The action taken to preserve the funds in the accounts is conservatory in the sense that the funds shall not be dissipated and may not be applied in the meantime to any acts that may offend the law and any aggrieved party shall not be without remedy in law.

### **RESPONSES BY THE ATTORNEY-GENERAL FOR FIRST, SECOND AND THIRD RESPONDENTS**

9. Ms. Mbiyu for the State filed appearance on behalf of the First, Second and Third Respondents and Grounds of Opposition and a Replying Affidavit sworn by **No. 234251** Leonard Bwire Inspector of Police, of the Anti Terrorism Police Unit Nairobi County and under the Office of the DPP, dated 28<sup>th</sup> April 2015 opposing the Petition and the Application. Inspector Bwire deponed that the Gazette Notice in question notified the entities set out therein of his intention to recommend to the Cabinet Secretary that an order be made declaring each of the entities named therein a specified entity. As a result of the notice, a number of individuals have been summoned and have already appeared before the investigators and others have been arrested and custodial orders sought. The evidence gathered so far and the evidence to be gathered by the First Respondent in accordance with the Constitutional mandate of the National Police Service cannot be assessed at this stage, nor can the court weigh its sufficiency at this point in time.

10. It was further stated that the declarations sought cannot be issued since the Petitioners have not been declared as specified entities, the Petition is premature. There is no statutory duty for prior notice or information before an intention to declare entities is formed. The Petitioners were also said to have already acquiesced to the process by filling out questionnaires.

11. The court was said to lack jurisdiction in respect of a notice to declare, and the Petitioners were

faulted for seeking reliefs from the wrong parties. The Petitioners, it was stated, were seeking to pre-empt the statutory process already in place. In the instant scenario, any declaration or order made would be in vain, and the court should not issue orders in vain.

12. The Grounds of Opposition dated 29<sup>th</sup> April 2015 were in the same vein stating that the application is incompetent and premature and the prayers sought cannot lie. The jurisdiction of the court was challenged, adding that alternatively, the court can only hear any grievance from a specified entity by way of a review. In this case, the recommendation has not been made yet and the First Respondent had reasonable grounds to issue the Gazette Notice. The grant of any conservatory orders would be in breach and an anti-thesis to the rationale in the enactment of the Prevention of Terrorism Act 2012 (No. 30 of 2012) with specific reference to Section 35(1) and (2) as read together with Article 24 of the Constitution of Kenya, 2010 and the limitations provided therein.

13. A necessary party, namely the Central Bank of Kenya which is alleged to have acted in the freezing of bank accounts is not a party to the proceedings. Any order sought against the Cabinet Secretary would be premature in light of sections 3(3), (4) and 7 of the Prevention of Terrorism Act. The grant of conservatory orders would not be in the public interest as even the balance of convenience ought to be in favor of the Respondents, and the greater public interest overrides the private interests of the Petitioners.

### **THE FIFTH RESPONDENT'S RESPONSE**

14. For the Fifth Respondent, a Notice of Preliminary Objection dated 29<sup>th</sup> April 2015 was filed. It was pleaded that Regulation 25 of the Prevention of Terrorism Act prohibits legal proceedings against banks in relation to implementing freezing orders issued under the Act. In any event, the court does not have primary jurisdiction to hear or grant the prayers sought because Section 3(5) of the Prevention of Terrorism Act requires an aggrieved person upon being declared a specified entity to apply to the Inspector-General of Police for a revocation of the order. The Section confers to the Inspector-General of Police the jurisdiction to revoke the order declaring any person a specified entity under the Act. Section 3(7) of the Act limits the jurisdiction of the court to hearing applications for review from the decision of the Inspector-General of Police. In the alternative, the Petitioners were required to have made an application for de-listing as specified entities by filing an application with the Sanctions Committee pursuant to Rule 17 of the Prevention of Terrorism Regulations of 2013. Under Rule 16(2), the Sanctions Committee may give conservatory orders for necessities and basic expenses. The Sanctions Committee and the Inspector-General would approve or reject such application.

15. It is trite law counsel argued that where Parliament has by statute created procedure for the resolution of specific disputes, such statutory procedure must be strictly followed. The Petition and application are therefore void, as they invite the court to act *ultra vires* by usurping the jurisdiction reserved to the Financial Reporting Committee, the Inspector-General of Police, the Cabinet Secretary and the Sanctions Committee. In any event, it has not been alleged or demonstrated that the statutory framework for revoking the Gazette Notice or de-freezing of funds or releasing funds for basic necessities is unconstitutional or that the remedies are not sufficient.

### **THE SUBMISSIONS**

16. Mr. Muite, SC urged the Motion on behalf of the Petitioners stating that the Inspector-General of Police (IGP) had by issuing the Gazette Notice No. 2326 violated the Petitioners' rights and acted in contravention of section 3 of the Prevention of Terrorism Act (POTA). Section 3 of POTA states that the Inspector-General of Police (IGP) may recommend to the Cabinet Secretary persons or institutions to be declared specified entities. The POTA is specific that the IGP must have grounds, and those grounds must be reasonable, before making the recommendation. The IGP in this case however, proceeded to publish certain organizations – Al Qaida, Al Shabaab, ISIS, Boko Haram and Mombasa Republican Council in the Kenya Gazette Notice as persons/ bodies suspected to be terrorist groups, before or instead of making the statutory recommendation to the Cabinet Secretary. In the absence of the recommendation and final declaration of these groups as being terrorist groups, there was no ground for the organizations listed in the Notice to have been listed under section 3(1)(b) POTA as associates of suspected terrorist groups. It is

imperative that the suspected terrorist groups be declared as such before other groups may be named as associates.

17. In any event, it was argued, no grounds or evidence had been provided to link the Petitioners to the suspected terrorist groups. The freezing of accounts of the Petitioners without these grounds, was consequently, arbitrary and therefore illegal. The POTA did not permit the IGP to issue the Special Gazette Notice. In fact, the publication in the Gazette Notice did not have any statutory backing. The notice occasioned harm/ damage to the reputation of the Petitioners, even leading to the freezing of their respective bank accounts.

18. The court was urged to consider the history of the country in interpreting the Constitution citing the case of **Speaker of the Senate & Another vs. The Attorney General & Others, Supreme Court Advisory Opinion No. 2 of 2013 [2013] eKLR** where the historical background of the enactment of the new Constitution was explored.

19. Through counsel Mr. Otieno, the Petitioners also relied on the cases of **Republic vs. EACC ex parte Erastus Gatebe [2014] eKLR** on the principles of natural justice, **Joseph Mbalu Mutava vs. AG and Another [2014] eKLR** on the proposition that there should be no condemnation unless prior notice is given and fair opportunity for defence afforded and the case of **Mohamed Aktar Kana vs. AG, (Constitutional No. 544 of 2010) [2010] eKLR** in which the conduct of security agencies was examined. The Petitioners claimed that their respective rights to fair administrative action and right to property had been violated. They prayed for the unfreezing of their bank accounts and stay of proceedings pending the presentation of the evidence against them.

#### **ON BEHALF OF THE ATTORNEY-GENERAL**

20. Ms. Mbiyu for the Attorney General submitted that the rationale for enacting POTA must be appreciated from its preamble, and in the history of the country leading up to its enactment. The Gazette Notice required the Petitioners among others listed in it, to demonstrate why they should not be declared as specified entities, pursuant to section 3(2) POTA. This provision requires that the Inspector-General of Police to give opportunity to an entity before making recommendations to the Cabinet Secretary for their declaration as specified entities. It was in this spirit that the Inspector-General of Police published the notice in the terms that: *“In accordance with subsection 2 of section 3 of the Prevention of Terrorism Act (No. 30 of 2012), the Inspector-General of Police notifies the entities set out in the attached list to demonstrate within the next 24 hours why it should not be declared as a specified entity.”*

21. Following the notice, the Petitioners are said to have filled questionnaires and filed them with the Anti-Terrorism Police Unit as required in the Notice. The evidence of this questionnaire was promised to be availed at the hearing of the Petition. Counsel mentioned that the evidence of the investigation leading up to the publication of the Notice is broad based and cannot be presented in court. At the time, it was stated that the Inspector-General of Police had not yet made a recommendation with regard to the entities to the Cabinet Secretary and as such, there was no cause of action. On the other hand, the Inspector – General of Police’s notice to proposed specified entities did not require grounds to be adduced.

22. The court was said to lack jurisdiction, since no decision had yet been made against the Petitioners. There are specific procedures set out under section 3 of POTA which had not been exhausted, and this Petition was attempting to pre-empt the decision of the Cabinet Secretary. The court was informed that the investigations had been on-going, and while the Garissa Attack was the most recent terrorist attack, it was not the premise of the Gazette Notice. Ms. Mbiyu added that granting the orders unfreezing the Petitioners' bank accounts would be an anti-thesis to the rationale of the POTA. Section 35 of the POTA as read together with Article 24 of the Constitution of Kenya recognizes that there are certain limitations on the fundamental rights in so far as investigations relating to terror based crimes are concerned.

23. On a balance of convenience, and pending the investigation and compliance by all the entities and public interest, the conservatory orders should not be granted.

## **SUBMISSIONS FOR THE DPP**

24. Mr. Muteti for the DPP argued that section 3 of the POTA has a well laid out procedure on how these matters should be handled. The notice subject to these proceedings asks the Petitioners to show cause, and does not declare the Petitioners to be specified entities. The court cannot therefore venture into arbitrating a dispute which does not exist. It was urged that no damage had been occasioned by this form of government communication, and challenged the parties in court to demonstrate the prejudice suffered. The Gazette Notice was a mere notice of intention, and the court cannot quash an intention.

25. It was further submitted, that since the Act makes clear provisions for resolving disputes at this stage, the parties were obliged to follow the laid down channels. The case of **KRA vs Menginye** was cited in this regard. The Inspector-General of Police under section 3(2) of the POTA is a master of his own procedure. He is allowed discretion to choose how to fulfill the obligation of section 3(2) of the POTA in the best possible way. In his wisdom, the Inspector-General Police's decision to publish his intention in the Kenya Gazette cannot be faulted in the circumstances. This was the most efficient way to communicate his intention to all 85 bodies in order that they may be afforded an opportunity to be heard, which they did by reporting to the Anti-Terrorist Police Units in their vicinity and in the case of the Petitioners, filling in the questionnaire required of them.

26. The case of **JOHN HARUN MWAU VS. ATTORNEY-GENERAL [2015] eKLR** was cited and relied upon. That case concerned the question whether the court had the jurisdiction to question the discretion of the President to grant honours to persons holding designated public offices between December, 2008 and 2012 were entitled to national honours as a matter of right. The court agreed with the holding of the Canadian Supreme Court in **BLACKS VS. CHRITIEN [2001] 54 OR(3W) 215, 199 D.L.R. (4<sup>th</sup>) 228 (CA)** where the court said

**“the receipt of an honour lies entirely within the discretion of the conferring body. The conferring of the issue in this case, a British peerage is a discretionary favour bestowed by the Queen. It engages no liberty, no property, nor economic interests. It enjoys no procedural protection. It does not have a sufficient legal component to warrant the court’s intervention. Instead it involves “moral and political considerations” which is not within the province of the court to assess. In other words the discretion to confer or refuse to confer an honour is the kind of discretion which is not reviewable by the court.”**

27. The court said:-

**“I am in agreement with the above finding and I dare add that the best example of discretion is judicial discretion. It has been said time and time again that the exercise of discretion by a Judge is hardly challengeable unless it was exercised injudiciously. Even higher courts seldom overturn exercise of discretion by subordinate courts. In the same breath I do not see how this or any other court can order a President present or past to exercise his discretion to confer National hours in a particular way or to certain officers in certain offices. To do so would be akin to taking away discretion that is reposted only in the President. Such an action would be wholly irregular...”**

28. It was the submission of counsel for the Respondents that the Petitioners’ failure to enjoin the Central Bank of Kenya (CBK) and the Financial Reporting Centre was deliberate. The two institutions were essential to the determination of the source and grounds for the freezing orders, as well as whether and on what terms such orders may be lifted. The court, counsel submitted was being invited to make orders over parties who are not in court, when it is trite law that the court cannot issue orders in vain.

29. It was submitted that the actions of the Inspector-General of Police (IGP) were prompted by the history of the country. The court must balance the proportionality between the petitioners’ claims vis-à-vis the public interest. In support of this proposition counsel relied on the decision of J. B. Ojwang J (as he then was, now Judge of the Supreme Court), in the case of **LUCY NYAMBURA & ANNE WANGUI VS. THE TOWN CLERK MUNICIPAL COUNCIL OF MOMBASA & OTHERS** in

which the learned Judge stated at page 28:-

**“The Petitioners have not addressed the question of proportionality between their claim to certain rights and the claims of the public interest, and they have adduced no evidence demonstrating any violations of their guaranteed rights apart from raising analogies based on unrelated study entitled “Documenting Human Rights Violations of Sex Workers in Kenya 2008”. There is no basis for declaring that the Mombasa Municipal Council Bye-Law 258 (m) and (n) actually and potentially violates the rights and dignity of women, and there is no basis for declaring the same unconstitutional.”**

30. Reliance was also placed upon the 1963 decision of the US Supreme Court in the case of **KENNEDY VS. MENDOZA M. ARTINEX 372, US 144 (1963)** at page 40, on the proposition that the **Bill of Rights is not a Suicide Pact**. The court said *inter alia*:-

**“...the Constitution is silent about the permissibility of involuntary forfeiture of citizenship rights. While it confirms citizenship rights, plainly there are imperative obligations of citizenship, performance, which, Congress in the exercise of its powers may constitutionally exact. One of the most important of these is to serve the country in time of war and national emergency. The powers of Congress to require military service for the common defence are broad and far reaching, for while the Constitution protects against invasions of individual rights, it is not a suicide pact.”**

31. In this case counsel argued the court is being asked to speculate whether the IGP will recommend that the parties be declared specified entities, and that there is real no question before the court; that the court should not meddle in a matter which the law provides a procedure to be followed. Reliance was placed upon the case of **PAUL MWANGI MURUNGA VS. REPUBLIC** (Nakuru Criminal of Appeal No. 35 of 2006), where the Court of Appeal posited:-

**“In the United Kingdom and the United States of America for example “terrorism” is an extremely emotive issue and the Labour Government in the United Kingdom sought from Parliament the extension of the period of (detention). Parliament gave the prosecuting authorities 29 days and invariably that is complied with and if sufficient evidence to charge the accused is not available the Police will dutifully release the accused person. In the United States of America the current Government has sought to evade the issue by detaining terrorism subjects in Guantanamo Bay, far away from the meddlesome hands of the Supreme Court. There is no reason why the courts in Kenya should act differently.”**

32. The courts must walk a balancing act and always adhering to the Constitution and the rule of law. The Supreme Court in **RE: THE MATTER OF THE INTERIM INDEPENDENT ELECTORAL COMMISSION [2011] eKLR, SC**, said *inter alia*:-

**“[54] The Constitution’s detailed provisions for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the Executive Branch. The essence of the separation of powers, in this context, is that the totality of governance – power is shared out among different organs of government, and that these organs play mutually counter-availing roles. In this set-up it is to be recognized that none of the several governmental organs functions in splendid isolation.”**

33. Counsel therefore concluded that if the Petitioners were acting in good faith, then the FRC ought to have been enjoined. It is their letter directing the Defendants to freeze the Petitioners’ accounts which is sought to be reversed, that they are therefore necessary parties. The actions of the IGP and FRC in this instance are said to be justified by the security concerns for the country and in the public interest. Security and public interest are paramount when contrasted against the rights of an individual.

## **THE FIFTH RESPONDENT’S SUBMISSIONS**

34. Counsel for the Fifth Respondent Bank submitted that this court is the wrong forum, the procedure employed is wrong and the wrong parties have been enjoined. Counsel argued that Parliament has provided a procedure for resolution of disputes of this nature in the Prevention of Terrorism Act, and that the procedure so provided ought to be followed strictly. On this theme Mr. Ndegwa argued that in the Act, the agencies tasked by Parliament were more equipped to handle the issues herein than the court. Most agencies had the advantage of having special background in matters of security and could better assess what grounds would be reasonable to declare an organization a specified entity, for instance. Unless and until the procedure was declared unconstitutional, or that the remedies are insufficient, due process was to be followed. Counsel argued that the remedy for unfreezing of accounts was provided for under Rule 2 of Prevention of Terrorism Regulations 2012.

35. The Fifth Respondent is a Reporting Entity and takes directions for the freezing accounts under the Regulations from the Financial Reporting Centre established under Section 21 of the Proceeds of Crime and Anti-Money Laundering Act, 2009 (No. 9 of 2012). The bank is duty bound under Regulation 12 of the Prevention of Terrorism (Implementation of the United Nations Security Council Resolutions on Suppression of Terrorism) Regulations, 2013, as well as the Proceeds of Crime and Money-Laundering Act.

36. Counsel therefore concluded that the Applicants are fighting the wrong parties, and should perhaps have sought from the Financial Reporting Centre information whether there are any other reasons, for freezing of their accounts, other than the Gazette Notice which the Applicants have concluded as the cause or reason for the freezing of the accounts. Counsel asked that the case against the Fifth Respondent be struck out.

## **ANALYSIS**

37. The missile war-heads in the Applicants' arsenal are all targeted at the Gazette Notice No. 2326 of 4<sup>th</sup> April, 2015 by which the Inspector-General of Police notified the Applicants among eight five (85) entities **suspected to be** associated with Al-Shabaab,(an organization designated as a terrorist organization under the same Gazette Notice), and to show cause within twenty four hours why it should not be declared under Section 3 of the Prevention of Terrorism Act to be a specified entity. To appreciate the grievance of the Applicants I set out in full the provisions of Section 3 of the Prevention of Terrorism Act, 2012 –

### **Specified Entities**

**“3(1) Where the Inspector-General has reasonable grounds to believe that –**

**a. an entity has –**

**i. committed or prepared to commit**

**ii. attempted to commit, or**

**iii. participated in or facilitated the commission of, a terrorist act, or**

**b. an entity is acting –**

**i. on behalf of;**

**ii. at the direction of, or**

**iii. in association with; an entity referred to in paragraph (a) he may recommend to the Cabinet Secretary that an order be made under sub-section (3) in respect of that entity.**

**(2) Before making a recommendation under sun-section (1), the Inspector-General shall**

**afford the affected entity an opportunity to demonstrate why it should not be declared as a specified entity;**

**(3) Upon receipt of the recommendation under sub-section (1), the Cabinet Secretary may where he is satisfied that there are reasonable grounds to support a recommendation made under sub-section (1), declare by order published in the Gazette, the entity in respect of which the recommendation has been made to be a specified entity;**

**(4) (are procedures subject to Cabinet Secretary's declaration under sub-section (3) above, and are not a concern here)."**

38. The parties admit that the Petitioners have not been declared specified entities yet, and this admission falls ground one of the Notice of Motion. The Petitioners are mainly aggrieved because of the manner in which the Inspector-General of Police sought to inform them of his intention to recommend to the Cabinet Secretary that they be declared specified entities pursuant to Section 3(2) of the Prevention of Terrorism Act. The Applicants plead that the Inspector-General of Police chosen process – that is to say, the publication in the Kenya Gazette has been an affront to the Petitioners' right to fair hearing because it did not provide grounds for the inclusion of the Petitioners' names in the Gazette Notice. The Inspector-General of Police had listed the Applicants among persons and institutions which were under the investigative radar, that the notice was meant to prompt the Applicants to present themselves to the relevant authorities to defend themselves before a decision is made to recommend their declaration as specified entities.

39. Publication of the Gazette Notice is an administrative act. Article 47 of the Constitution confers upon every person –

**“(1) ...the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair;**

**(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action;**

**(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall –**

**(a) provide for review of administrative action by a court or, in appropriate cases, an independent and impartial tribunal; and**

**(b) promote efficient administration.”**

40. No legislation enacted pursuant to Article 47(3), was cited to the court by counsel for either the Applicants or the Respondents. On the question of what constitutes fair administrative action the Constitutional Court of South Africa in its decision in **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA & OTHERS VS. SOUTH AFRICA RUGBY FOOTBALL UNION & OTHERS (CCT/16/98) 2000(1) SA.1**, at paragraphs 135-136, with similar provisions on **“just administrative action”** in Section 33 of the South African Constitution stated:-

**“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see Section 33 as a mere codification of the common law principles, the right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive in determining not only the scope of Section 33, but also its content. The principal function of Section 33 is to regulate conduct of public administration, and, in particular, to ensure that where action taken by the administration affects or threatens**

**individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will of course be informed by the common law principles developed over decades.”**

41. In addition to Article 47 of the Constitution, I would also add here consideration of Article 24 of the Constitution which provides:-

**“24.(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –**

**a. the nature of the right or fundamental freedom;**

**b. the importance of the purpose of the limitation;**

**c. the nature and extent of the limitation;**

**d. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and**

**e. the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.**

**(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom –**

**(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;**

**(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and**

**(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.**

**(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.”**

42. Section 3(2) of the Prevention of Terrorism Act is clear, straightforward and is unambiguous and requires no more than the literal interpretation as to the procedure to be invoked before the Inspector-General of Police exercise his discretion to make recommendations to the Cabinet Secretary to declare an organization an “specified entity”. However the question before the court is whether the process and procedure in Section 3(2) is in conformity with Article 47, or whether that process is justified in terms of the limitation of rights and freedoms envisaged under Article 24 of the Constitution, and consistent and in conformity with Article 244(c) of the Constitution that the National Police Service shall comply with constitutional standards of human rights and fundamental freedoms.

43. It was argued that Section 3(2) of the Prevention of Terrorism Act does not expressly require the Inspector-General of Police either to provide reasons for his suspicions or investigations. The Inspector-General of Police could have conveyed summons to the Petitioners/Applicants and other persons listed in any number of ways to present themselves to him or his representatives on the ground in order to defend themselves. That he chose to summon the Petitioners in a Special Gazette Notice had not been shown to cause any particular prejudice to the Petitioners/Applicants or infringed their constitutional rights. It was also argued that depending on the decision finally taken by the Inspector-General of Police, and the Cabinet

Secretary, the Applicants would have another opportunity under Section 3(6) of the Prevention of Terrorism Act to redeem themselves. It was similarly pleaded that until then, the proceedings in this court with regard to the question whether there are or were sufficient grounds for their suspicion or investigation on them are premature, and that on this ground alone the application should also be dismissed.

44. With respect I do not agree. The Petitioners/Applicants are not inanimate things or mere names. They are represented by living men and women who have emotions and feelings or if you prefer minds and souls. It is those emotions and minds which are subjects of protection under Article 29 of the Constitution, concerning freedom and security of the person. Every person has the right to freedom and security of the person, which includes the right **not to be** –

(a)...-(c)

c. subjected to torture in any manner, whether physical or psychological;

45. Section 3(1)(b) provides that where the Inspector-General of Police has reasonable grounds to believe that an entity is acting (i) on behalf of; (ii) at the direction of, or (iii) in association with an entity which in terms of Section 3(1) has (i) committed or prepared to commit (ii) attempted to commit, or (iii) participated in or facilitated the commission of a **terrorist act**, that is an act which **inter alia** (i) involves the use of violence against a person, (ii) endangers the life of a person other than the person committing the action, (iii) **prejudices national security** or public safety, and which is carried out with the aim of –

i. intimidating or causing fear amongst members of the public or a section of the public; or

iii. intimidating or compelling the Government or international organization to do, or refrain from any act; or

iii. destabilizing the religious, political, constitutional economic or social institutions of a country, or an international organization;

46. It is a frightful and terrifying feeling to wake up and read in the print and electronic media that an organization of which you are the principal or chief officer is suspected of being associated with, and acting either on behalf of, or at the direction of, or in association with an entity which has either, committed or prepared to commit or attempted to commit, or participate or facilitated the commission of a terrorist act or acts. It is equally terrifying to find that the funds entrusted to you on behalf of the organization have been preserved into frozen accounts suspected of being terrorist property –

a. proceeds from the commission of a terrorist act, money or other property which has been, is being, or is intended to be used to commit a crime,

b. money or other property which has been, is being, or is intended to be used by a terrorist group; or

c. being property of a terrorist group.

47. There is, and there can be no debate, and it is a matter of which this court takes judicial notice on the grounds of their notoriety, the callousness and viciousness of the actions of the designated entities, Al Qaida, Al Shabaab, ISIS, Boko Haram, are terrorist organizations. This is however very far from saying that the Applicants have been or have **acted on behalf of, at the direction of, or in association** with any of the designated entities. For such a conclusion to be reached the Inspector-General of Police needs to comply with the requirements of Section 3(2) of the Prevention of Terrorism Act and show reasonable grounds that the Applicants have been acting in breach of the Prevention of Terrorism Act, and in respect of the frozen accounts that the proceeds thereof are proceeds from the commission of terrorist acts, or are moneys intended to be used to commit terrorist acts, or to be used by a terrorist group or is property of a terrorist group. This is part of what is called fair administrative action.

48. The First Respondent is not just an investigating body. It is an independent constitutional body charged with the maintenance of security and protection of the citizens of Kenya, the governors and the governed. The First Respondent in conducting its investigations is bound to comply with basic requirements of natural justice. The principles of natural justice concern procedural fairness and ensure that a fair decision is reached by an objective decision-maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are – **firstly**, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision maker, **secondly**, that no one ought to be a judge in his/her own cause, and this is the requirement that the deciding authority must be unbiased when recording or making the decision, and **thirdly**, that an administrative decision must be based upon logical proof or evidentiary material (per Odunga J. in **REPUBLIC VS. ETHICS AND ANTI-CORRUPTION COMMISSION & 2 OTHERS, ex parte Erastus Gatebe [2014]eKLR**).

49. In the Supreme Court of Canada decision in **BAKER VS. CANADA (MINISTER FOR CITIZENSHIP & IMMIGRATION) 2S.C.R. 817 (1)** the court said:-

**“The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions.”**

50. The Supreme Court of Canada emphasized however that the procedural fairness is flexible, and entirely dependent on the context. In order to determine the degree of fairness owed in a given case, the court set out five factors to be considered:-

- (1) the nature of the decision made and the process followed in making it;
- (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
- (3) the importance of the decision to the affected person;
- (4) the presence of any legitimate expectation, and
- (5) the choice of procedure made by the decision maker.

51. Where, as in this case the choice of procedure, made by the Inspector-General of Police, has clearly traumatized the Applicants. It will be difficult to conclude that the evidence obtained under circumstances which must meet the test of having been given freely or voluntarily, and could constitutionally be excluded as having been obtained contrary to Article 50(2) (1) (4) of the Constitution. In **ONYANGO OLOO VS. ATTORNEY-GENERAL C [1986-1980] E.A. 456**, the Court of Appeal expressed itself thus –

**“The rules of natural justice apply to administrative action in so far as it affects the rights of the appellant and the appellant’s legitimate expectation to benefit from the remission by a release. The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard. There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice....A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at ... In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be**

punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings.... It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated ....Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or an internal disciplinary character. It is a road, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair... Denial of the right to be heard renders any decision made null and void *ab initio*."

52. In the case of **MINISTER OF HEALTH & OTHERS VS. TREATMENT ACTION CAMPAIGN & OTHERS** {2005} 5LRC 216, 248 PARAGRAPHH 99 THE South African constitutional Court defined the constitutional duty of the court in the following terms:-

**' The primary duty of the court is to the Constitution and the Law which they must apply impartially and without fear, favour or prejudice. The Constitution requires the state to respect, protect, promote, and fulfill the rights in the bill of Rights where state policy is challenged as inconsistent with the constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.'**

53. Similarly, the case of **DOCTORS FOR LIFE INTERNATIONAL VS. SPEAKER OF THE NATIONAL ASSEMBLY & OTHERS** (supra), at paragraph 70, the court said this on the question of balance:-

**"What courts should strive to achieve is the appropriate balance between their role as the ultimate guardian of the Constitution and the rule of law including any obligation that Parliament is required to fulfill in respect of the passage of laws on the one hand and the respect which they are required to accord to other branches of Government as required by the principle of separation of powers on the other hand."**

54. Whereas it is correct that Section 3(2) of the Prevention of Terrorism Act does not lay down the manner which an entity may be informed of the suspicion of acting in terms of Section 3(1) (b) of the Act, Article 29(d) of the Constitution guarantees every person protection and equality before the law, and Article 29 the right not to be subjected to torture in any manner, whether physical or psychological. Article 244(c) of the Constitution requires the National Police Service of which the Inspector-General of Police is its Chief Executive Officer, to comply with constitutional standards of human rights and fundamental freedoms. In summoning the Applicants representatives by way of Gazette Notice without a prior notice to appear before him within twenty-four hours, the Inspector-General of Police subjected representative of the Applicants to psychological torture which is prohibited by Article 29(d) and deprived those representatives of their dignity and equality before the law as guaranteed by Article 27 of the Constitution.

## JURISDICTION

55. Before I deal with the question relating to the core of the application, I will dispose of the Preliminary Objections raised by both the Director of Public Prosecutions as an Interested Party and by the Attorney-General as Fourth Respondent, and by counsel for the Fifth Respondent claiming that the petition and the Application thereunder (for conservatory orders are premature). This claim was premised upon the

proposition that the Prevention of Terrorism Act has an elaborate procedure for ventilating grievances and that it was trite law that where an act of Parliament provides a procedure for determination of disputes, that procedure ought to be exhausted before a party approaches the court for determination of the dispute or matter in issue. It was their submission that the court had no jurisdiction to determine the Petition much less grant any orders under the Notice of Motion.

56. The court was referred to comparative jurisprudence from South Africa, the Commonwealth of Pennsylvania in the USA, South Africa and the United Kingdom.

57. In the first South African case **ANDREW LIONEL PHILIPS & 15 OTHERS VS. NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS CCT 55/2004** – which concerned the nature of a restraint order under Section 26 of the Prevention of Organized Crime 1998 (N0. 112 of 1998) and the circumstances under which it may be varied or rescinded by the court that granted the order. Contrary to the contention by the Director of Public Prosecutions, that the Application raised no constitutional issue the court found that the Application raised a constitutional issue of importance which relates to the nature and ambit of the powers of superior courts in particular their inherent powers.

58. In the second South African case, **PRINCE VS. PRESIDENT, CAPE LAW SOCIETY & OTHERS (2001) 2SA 388 ©, 2001(2) BCLR 133**, Ngcobo J said:-

**“It is impossible for a party to rely on a constitutional complaint that was not decided.”**

In **PRINCE VS. PRESIDENT, CAPE LAW SOCIETY & OTHERS 2001(2) BCLR 133, (CC)** Ngcobo J stated:-

**“Parties who challenge the constitutionality of a provision in a statute must raise the constitutionality of the provision being challenged at the time they institute pleadings. In addition, a party must place before the court information relevant to the determination of the impugned provisions.**

**Similarly a party seeking to justify a limitation of a constitutional right must place before the court information relevant to the issue of justification. I would emphasize that all this information be placed before the court of first instance.**

**The placing of the information is necessary to warn the other party of the case it will have to meet so as to allow it an opportunity to present factual material and legal argument to meet the case. It is not sufficient for a party to raise the constitutionality of a statute only in the heads of argument [skeletal argument], without laying of a proper foundation for such a challenge in the papers or pleadings.**

**The other party must be left in no doubt as to the nature of the case it has to meet and the relief that is sought. Nor can parties hope to supplement and make their case on appeal.”**

59. In **NAPTOSA & OTHERS VS. MINISTER FOR EDUCATION, WESTERN CAPE & OTHERS (2001) 21SA 112 ©, 2011 (4) BLR 388C** Cape High Court was concerned with the appropriateness or otherwise of granting relief directly under Section 23 of the Constitution of South Africa without a **complaint** that the Labour Relations Act was constitutionally deficient in the remedy it provides. The High Court held that it could not –

**Conceive that it is permissible for an applicant, save by attacking the constitutionality of the Labour Relations Act to go beyond the regulatory framework which it establishes.**

60. On the question whether Section 23 of the South African Constitution (equivalent to Article 35 of the Constitution of Kenya), on the right to information a full Bench of the Eastern Cape High Court held:-

**“... it was inevitable... that the constitutional right of access to information in terms of**

**Section 23 must apply... to both civil and criminal litigation by the State.”**

61. Counsel for the Fifth Respondent also relied upon the two decisions of the Supreme Court of Pennsylvania on the application of statutory remedy over common law. In **NANCY A. WHITE**, on behalf of Herself and all others similarly situated – **APPELLEE VS. CONESTOGA TITLE INSURANCE COMPANY**, Applicant (No. 30 EAP 2010 (decided on August 20, 2012) the court said:-

**“In all cases where a remedy is provided or a duty is enjoined or anything is directed to be done by any statute, the directions of the statute shall be strictly pursued, and no penalty shall be inflicted, or anything done agreeably to the common law, in such cases, further than shall be necessary for carrying such statute into effect;**

**This statute says in unambiguous language that if the legislature provides a specific exclusive constitutionally adequate method for the disposition of a particular kind of dispute, no action may be brought in any “side” of common pleas to adjudicate the dispute by any kind of common law form of action (other) than the exclusive statutory method, unless the statute provides for it, or unless there is some irreparable harm that will follow if the statutory procedure is followed;**

**It is equally clear that if the method for disposing of the dispute is not exclusive, some appropriate form of common law action in the court of common pleas may be available and the court of common pleas may have jurisdiction.”**

62. The same conclusion was reached in **UNITED STATES DISTRICT COURT FOR WESTERN DISTRICT OF PENNSYLVANIA**, a class action between **ALLEN HIVELY, KENNETH KNAUFF, and RANDALL SHAW VS. ALLIS CHALMERS ENERGY INC.** Civil Action No. 130106! Judge Nora Barry Fischer.

63. In **MARTIN AND SUZANNE MATTEO & 2 OTHERS VS. HILLCORP ENERGY COMPANY VS. COMMONWEALTH OF PENNSYLVANIA OFFICE OF THE ATTORNEY-GENERAL, ATTORNEY-GENERAL & ANOTHER (Dochel No. 266 of 2014)**, the court declined to exercise jurisdiction over the case **“because”** the matter is not ripe for review as the issues presented are inadequately developed and the Petitioners will suffer no hardship if review is delayed. Petitioners have unjustifiably failed to exhaust all statutorily prescribed administrative remedies before seeking review, and petitioners would suffer no **“direct and immediate”** impact as a result of the Department’s eventual ruling on the Application rendering the invocation of original equitable jurisdiction for pre-enforcement review improper.”

64. Counsel further referred to the decision in **SPEAKER OF THE NATIONAL ASSEMBLY VS. KARUME [1992] KLR 22** where it was held that:-

**“Where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”**

65. Similar conclusions were reached in **NAROK COUNTY COUNCIL VS. TRANSMARA COUNTY COUNCIL & KENYA ASSOCIATION OF TOUR OPERATORS [2000] eKLR** and in **KONES VS. REPUBLIC ex parte KIMANI WANYOIKE & 4 OTHERS [2006] 2KLR** which followed the Karume case.

66. In **REPUBLIC VS. CABINET SECRETARY FOR TRANSPORT & INFRASTRUCTURE & 6 OTHERS [2015] eKLR**, it was held that Article 159 (d) does not confer jurisdiction upon the court, where no jurisdiction exists. Same conclusions were reached in **ABDALLAHI MANGI MOHAMED VS. LAZARUS BEJA & 5 OTHERS [2012] eKLR**, and **MWATHETHE ADAMSON KADENGE VS. TWAHIR ABDULKAIM MOHAMED & OTHERS [2013] eKLR**.

67. In the English case of **REGINA VS. BIRMINGHAM CITY COUNCIL ex parte Ferror Limited [1993] 1 ALL ER 560**, the court held –

**“Where there was an alternative remedy especially where Parliament had prescribed statutory appeal procedure, it was only exceptionally that judicial review would be granted. In determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in particular case and to ask itself what, in the context of the statutory provisions, was the real issue to be determined and whether the statutory appeal was suitable to determine it.”**

### **COMMENT ON JURISDICTION**

68. For inexplicable reasons neither counsel for the Office of Director Public Prosecutions (an Interested Party) nor for the Attorney-General (the Third Respondent), nor indeed counsel for the Fifth Respondent (who made submissions on the comparative decisions in the U.S.A., South Africa, and Kenya that, where a statute provides a procedure for determination of disputes that procedure should be strictly followed,) none of the said counsel made reference to the provisions of the Constitution of Kenya, or addressed the court on the justification of the limitation of rights and fundamental freedoms under the Prevention of Terrorism Act, and therefore the conformity thereof with the relevant provisions of the Constitution.

69. I accept the proposition that where the statute provides an adequate remedy, the remedies under the common law have no application, except as aids in the interpretation of such statute. That is what is acknowledged in the South African Case of **PRESIDENT OF SOUTH AFRICA VS. SOUTH AFRICA RUGBY FOOTBALL UNION & OTHERS** (infra).

70. Under the common law, a preliminary objection used to be what was called a demurrer. In the words of Sir Charles Newbold P. in the celebrated **MUKISA BISCUIT MANUFACTURING COMPANY LIMITED VS. WEST-END DISTRIBUTORS LIMITED [1966] EA 696 at page 700:-**

**“... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”**

71. Though it was not cited in support of their case on the consequences of the court finding that it has no jurisdiction, the Court of Appeal decision in the **OWNERS OF THE MOTOR VESSEL “LILIAN S” VS. CALTEX OIL KENYA LIMITED [1989] KLR** has firmly established the jurisprudence that where the court finds that it has no jurisdiction, it cannot take any one step further. It downs its tools.

72. The question here is whether the Preliminary Objection raised by the Interested Party, the Fourth and Fifth Respondents dispose of the Petition herein? With respect it does not, this is a highly contested matter, no facts as pleaded (except the publication of the Gazette Notice) are agreed upon by the Petitioners/Applicants. Under the tests in **Mukisa case**, the Preliminary Objection must fail.

73. There is however a much more fundamental ground why the Preliminary Objection must fail. It is the Constitution of Kenya 2010. The two Preliminary Objections remind this court of the story of encounter of the risen Christ, and two followers one of whom, named Cleopas asked Jesus –

**“Are you the only stranger (visitor) in Jerusalem who does not know the things that have been happening there these last few days?” “What things? He asked. The things that happened to Jesus of Nazareth,” they answered, “this man was a prophet and was considered by God and by all the people to be powerful in everything he said and did. Our chief priests and rulers handed him over to be sentenced to death and was crucified. And we had hoped he would be the one who was going to set Israel free!”**

74. It seems to me that the Interested Party, the Fourth Respondent and Fifth Respondents have fallen into slumber, and appear not to believe that after nearly twenty years of gestation, and a cost of nearly Kshs. 15 – 20 billion, the people of Kenya gave birth on 4<sup>th</sup> August, 2010, to a new **Covenant** called the Constitution of Kenya 2010. Its preamble is instructive –

**“We, the people of Kenya**

**Acknowledging,**

**Honouring,**

**Proud of**

**Respectful**

**Committed**

**Recognizing, the aspirations of all Kenyans for a Government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.**

**Exercising our sovereign and inalienable right to determine the form of governance of our country and having participated fully in the making of this Constitution,**

**ADOPT, ENACT and give this CONSTITUTION to ourselves and to our future generations.**

**GOD BLESS KENYA.”**

75. Among the many provisions of this Covenant, are the provisions of the Bill of Rights set out in Chapter Four of the Constitution (Articles 9-59). The Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies (Article 19(1) and the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and realization of the potential of all human beings (19(2).

76. Under Article 19(3) the rights and fundamental freedoms in the Bill of Rights –

**(a) belong to each individual and are not granted by the State;**

**(b) do not exclude other rights and fundamental freedoms, not in the Bill of Rights, but recognized or conferred by law except to the extent that they are inconsistent with this Chapter; and**

**(c) are subject only to the limitations contemplated in this Constitution.**

77. Article 24(1) on the limitation of rights and fundamental freedoms provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

**(a) the nature of the right or fundamental freedom;**

**(b) the importance of the purpose of the limitation;**

**(c) the nature and extent of the limitation;**

**(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any**

**individual does not prejudice the rights and fundamental freedoms of others;**

**[the bill of rights is not a suicide pact]**

**(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose;**

78. In Sub-article 2(c), Article 24, provides that the limitation of any right or fundamental freedom shall not derogate from its core or essential content. In addition, Article 25 specifies that certain rights cannot be limited, namely –

- a. freedom from torture, and cruel inhuman or degrading treatment or punishment,
- b. freedom from slavery or servitude; and
- c. the right to fair trial.

79. Finally on the question of enforcement of rights and fundamental freedoms, Article 22 and 258 of the Constitution give unqualified right to every person to institute court proceedings, claiming that a right or fundamental freedom in the Bill of Rights has been **denied, violated** or infringed, or is threatened and Article 258, that the Constitution has been contravened or threatened with contravention. In addition to a person acting in their own interest, court proceedings may be instituted by inter alia, an association acting in the interest of, a group or class of persons.

80. Express jurisdiction is granted to this court, in accordance with Article 165, to hear and determine applications for redress of a denial, violation, or infringement (contravention) of, or threat to, a right or fundamental freedom in the Bill of Rights.

81. On the question of jurisdiction therefore, there are not one, nor two but many unanswered questions **firstly**, from the point of view of Section 3(1) (2) of the Prevention of Terrorism Act itself, and **secondly**, THE Bill of Rights provisions. From the point of view of the Prevention of Terrorism Act itself, there are unanswered procedural questions as to reasonable grounds for associating the Petitioners/Applicants with the designated entities when the grounds for such designation are unknown. In particular, it is unknown, (the Gazette Notice does not say so), whether the Inspector-General of Police made any recommendations to the Cabinet Secretary whether or not declare the five organizations named in the Gazette as specified entities. In the absence of any such recommendations being made, the grounds upon which the Petitioners/Applicants can be named as associates of the specified entities or terrorist groups remain nebulous.

82. There are unanswered questions as to the right to fair administrative action guaranteed by Article 47 of the Constitution. There are questions as to the right to the presumption of innocence and the requirement to be informed in sufficient detail of the charges against an accused, and the right to adequate time and facilities to answer such charges or, as in the case at hand, such suspicions. The rights and freedoms subsist and are inherent at all times, both before, during investigations and at trial and are not divided in time and scope.

83. These are all legitimate questions for exploration and determination in the Petition. The Petitioners/Applicants have a complex and arguable Petition. Jurisdiction of this court cannot be taken away by the procedural aspects of the Prevention of Terrorism Act. A contrary reading would put the provisions of the Prevention of Terrorism Act in conflict with supremacy provisions of the Constitution, and this court would not advert to that route as it is unnecessary. The objection on grounds of jurisdiction equally fails.

#### **OF JOINDER AND MISJOINDER**

84. On the question of misjoinder and/or non-joinder, the Petition cannot be struck out on those grounds,

the remedy for misjoinder is either to strike out the party wrongly joined or dismiss the claim against the party misjoined. The court will not make orders against persons who are not parties to an action.

### OF COMPLIANCE WITH THE GAZETTE NOTICE

85. The defence that representatives of the Petitioners/Applicants have filled questionnaires required by the First Respondent is not a ground for striking out the Petition or the Application. It merely shows that those representatives are discharging a duty of every law abiding citizen to assist the law enforcement agencies in their arduous and onerous task of detecting and preventing crime of any nature, more so terrorist acts. It is not a defence to a Petition alleging a violation, infringement or threat of violation or infringement of a right or fundamental freedom.

### OF PUBLIC VS. INDIVIDUAL FREEDOM

86. On the argument that the public interest outweighs the public interest, and that the balance of convenience leans to the public interest, there is no greater public interest than adherence to the Constitution, and the rule of law; however inconvenient and cumbersome this may at times appear. National security as an important aspect of the public interest and protection of rights and fundamental freedoms of the individual are not mutually exclusive. The Constitution enjoins those seeking to limit the rights and fundamental freedoms, to show whether there are no other less restrictive ways of limiting those rights than the methods employed in the Gazette Notice. The claim that there is no statutory duty on the part of the Inspector-General of Police to give any person notice of his intention to designate any organization to be a specified entity would of course run contra to the provisions of fair hearing, and due process including the right not to incriminate oneself. These again, are legitimate areas of inquiry by the courts in the Petition.

87. No doubt the agencies tasked by Parliament are more equipped than the courts in matters of security, the citizen no matter how heinous his act or suspected act may be, cannot be turned away or shut out from the temples of justice, the courts, because Parliament has tasked some agencies with matters of security. In our law, even matters of security are jus

Sociable ~~~~~ when they concern the liberty and freedom of the ordinary citizen of Kenya.

88. Indeed the Bill of Rights is not a suicide pact. If it were, Article 24 of the Constitution on the limitation of rights would not be part of the Constitution, nor indeed would there be Article 244 thereof that the National Police Service would **“comply with constitutional standards of human rights and fundamental freedoms”**, and would train staff to the highest possible standards of competence and integrity and to **respect human rights and fundamental freedoms and dignity**; and **“foster and promote relationships with the broader society.”**

89. The courts in Kenya, as in the Supreme Court in the U.S.A. will, under the Constitution, be meddlesome when it comes to the rights of citizens and permanent residents of Kenya. As an integral part of the Government, the courts play a counter-availing role to protect the rights of the people, and will not sit in **“splendid isolation”**.

90. In the circumstances, I make the following findings:-

- (1) The Petitioners have an arguable Petition;
- (2) The court has the jurisdiction and constitutional mandate to determine the Petition and the Application herein.

91. However, before I make my final orders it is both meet and fair to determine the position of the Fourth and Fifth Respondents. The freezing of the Applicants’ accounts with these Respondents was done pursuant to a decision of the Financial Reporting Committee (FRC), and the Central Bank of Kenya

(CBK), bodies to which the said Respondents owe a statutory duty. Neither the FRC nor the CBK are parties to the Petition and therefore the application herein. No effort was made to join them to this Petition in terms of Rule 20 (4) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

92. This would have been necessary in light of Rule 11(3) of the Prevention of Terrorism Regulation 2013 which provides that a designation or sanctions list circulated by the Cabinet Secretary [to the Treasury] or the Committee shall be deemed to authorize a Reporting Institution to freeze the funds of the entity until further notice. In this instance, the Gazette Notice does not constitute a circular warranting the order to freeze accounts of the Applicants.

93. The Central Bank of Kenya and the Financial Reporting Centre having been identified as source or origin of the freeze order, would be necessary parties to determine the legality or propriety of the Circular to freeze the Applicants' Accounts with the Fourth and Fifth Respondents. Having not been joined as parties to the Petition and therefore the Application, I decline to grant any orders in terms of paragraph (b) of the Notice of Motion. Instead, the Petition as against the Fourth and Fifth Respondents is hereby struck out with costs.

94. Having disposed of the case against the Fourth and Fifth Respondents, and in light of the findings above, in relation to the First, Second and Third Respondents, I make the following orders:-

(1) There shall issue a conservatory order in terms of paragraph (c) of the Notice of Motion dated and filed on 13<sup>th</sup> April, 2015, by way of an injunction restraining the First Respondent from recommending to the Cabinet Secretary Interior and Coordination of National Government to declare the First and Second Petitioners as specified entity until the hearing and determination of the Petition herein.

(2) There shall issue a conservatory order in terms of paragraph (d) of the Notice of Motion dated and filed on 13<sup>th</sup> April, 2015 restraining the Second Respondent from declaring the First and Second Petitioners as specified entities.

(3) That the costs of the Application and the Petition shall be in the cause.

95. Finally, I wish to express my appreciation to all counsel for the Petitioners/Applicants led by Mr. Paul Muite, SC, Mr. Alex Muteti, of the Office of the Director of Public Prosecutions, Ms. Mbiu of the Office of the Attorney-General, Mr. Ndegwa for the Fourth and Fifth Respondents, and Mr. Nyoike Waikwa of the Katiba Institute, as an amicus curiae.

**Dated, Signed and Delivered in Mombasa this 11<sup>th</sup> day of June, 2015**

**M. J. ANYARA EMUKULE**

**JUDGE**

In the presence of:

Miss Warrancha for 1<sup>st</sup> Petitioner

Mr. Salim holding brief Muite for 2<sup>nd</sup> Petitioner

Miss Lutta for 1<sup>st</sup> – 3<sup>rd</sup> Respondents

No Appearance for 4<sup>th</sup> Respondent

Mr. Ndegwa for 5<sup>th</sup> Respondent

Mr. Muteti for Interested Party DPP

Mr. Jeffa for National commission for Human Rights

Mr. Jeffa holding brief Waikwa for Katiba Institute amicus curiae