REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

PETITION NO. 6 OF 2009

IN THE MATTER OF SECTION 84(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF APPREHENDED CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOM GUARANTEED UNDER THE CONSTITUTION

BETWEEN

DILEEP MANIBHAI PATEL.....1ST PETITIONER

JEREMIAH ROBI WAWERU.....2ND PETITIONER

JAMES N. WAMBUGU.....3RD PETITIONER

RELIABLE CONCRETE WORKS LTD.....4TH PETITIONER

VERSUS

THE MUNICIPAL COUNCIL OF NAKURU.....1ST RESPONDENT

THE ATTORNEY-GENERAL.....2ND RESPONDENT

JUDGMENT

THE PETITION

1. By an Amended Petition dated and filed on 14.10.2010, **Dileep Manibhai Patel** *(1st Petitioner)*, **Jeremiah Robi Waweru** *(2nd Petitioner)*, **James N. Wambugu** *(3rd Petitioner)* and **Reliable Concrete Works Ltd,** *(4th Petitioner), (collectively the Petitioners)* claimed -

1. ***that Section 18 of the Rating Act which gives the rating authority the right to take rent from any building/land in respect of which rates are levied and apply such rent to offset the arears of rates, contravenes the provisions of Articles 40 and 50 of the Constitution of Kenya, 2010 to the extent that it grants the rating authority power to take property of the rate payer without compliance with the requirements of due process of law,***

2. ***that Section 19 of the Rating Act which states that the rates calculated under the Act shall be a charge against the land on which the rate was levied and that the charge may be registered against the title is a limitation on the right to property guaranteed under the Constitution without regard to due process of the law,***

3. ***that in the alternative and without prejudice to the court's findings in respect of the constitutionality of Sections 18 and 19 of the Rating Act, the notice issued by the Municipal Council of Nakuru via the Newspaper Advertisement dated 22nd July 2009 stating that -***

> ***(1) "the rates defaulters are warned of the consequences defaulting in payment that the council has powers under the law to sell the property by auction to cover all rates principal plus interest that may have accrued threon;***
>
> ***(2) the council has power to compel tenants to pay directly to the council until the rates and interest due are fully recovered and the council can cancel or withdraw any licences granted in the premises in which rates have not been paid, contravenes Articles 40 and 50 of the Constitution of Kenya 2010, and the due process of the law and that the same is unconstitutional, null and void.***
>
> ***(3) that to the extent Sections 18 and 19 of the Rating Act contravenes the right to due process entrenched under the Constitution, the same should be declared null and void.***

2. The Petitioners, by virtue of the foregoing sought declarations by the court -

(a) that Section 18 and 19 of the Rating Act, (Cap. 267, Laws of Kenya) is unconstitutional to the extent that it seeks to circumvent and/or limit the Petitioners' right to due process of the law which is guaranteed under Article 50 of the Constitution,

(b) that in the alternative and without prejudice to the finding of the court in respect of prayer (No. (a)) above, this court issues a declaration that the notice issued by Municipal Council of Nakuru, the First Respondent herein contained in the Daily Nation Newspaper dated 22 July 2009 is unconstitutional, null and void, to the extent that it contravenes, circumvents and limits the Petitioners' rights to property guaranteed under Section 40 of the Constitution and the right to due process guaranteed under Article 50 of the Constitution,

(c)that the First Respondent cannot sell any parcel of land belonging to the Petitioners by public auction or otherwise unless and until it complies with the provisions of the Constitution regarding the due process of the law,

(d) there be an order to restrain the First Respondent from engaging in the conduct contemplated in the notice aforesaid.

(e) that the court issues any other order as it may deem fit to protect the Petitioners from the First Respondent's unconstitutional conduct.

3. The Petition was supported by -

(a) the Affidavit of one James G. Mbugua who describes himself as one of the Petitioner;s but he is not listed as such (unless he is one and the same person, or the name is an alias for James N. Mbugua the third Petitioner) together with the cases attached thereto. The Affidavit is strangely indicated as sworn on 14th October 2010 but filed on 6th November 2009 with the original Petition dated 2nd October 2009,

(b) the Affidavit of Jeremiah Robi Waweru, the Second Petitioner sworn on 14th October 2010,

(c) the Affidavit of Mwangi Muchemi, a Director of Reliable Concrete Works Ltd, the Fourth Respondent, also sworn on 14th October 2010, and

(d) the Affidavit of Dileep Manbhai Patel the First Petitioner sworn and filed on 15th

October, 2010.

THE RESPONDENTS PLEADINGS

4. The Petition was opposed **first** by the Replying Affidavit of Abdirizak Sheikh Abdulahi then Town Clerk of the First Respondent sworn and filed on 19th January 2010, and **secondly,** the Further Affidavit of the said Abdirizah Sheikh Abdulahi sworn and filed on 26th October 2010, and in which the First Respondent strongly contended that no fundamental rights to property of the Petitioners have been breached or threatened with any infringement.

5. The Hon. the Attorney-General, the Second Respondent similarly opposed the Petition and in **Grounds of Opposition** dated and filed on 13th may 2010 says -

(a) that fundamental rights guaranteed by the Constitution are not absolute but are subject to some limitations under which this matter falls;

(b) that no constitutional violations have been proved by the Petitioners;

(c) that the impugned sections of the Rating Act give the payer ample time to settle the arrears of rates before proceedings to recover them from tenants;

(d) that in the absence of a mechanism to recover rates as provided in Section 18 of the Rating Act, then the local authorities will ground to a halt and will therefore not be able to render services to the rate payers;

(e) that the measures provided by Section 18 are unequitable but are not unconstitutional;

(f) that the entire Petition is an abuse of the process of the court,

(g) that the Petitioners cannot use fundamental rights guaranteed under the Constitution to escape their responsibilities as rate payers.

THE SUBMISSIONS

6. In addition to these primary pleadings, the Petition, the Affidavits in Support and in Opposition thereto, and the Grounds of Opposition by the Second Respondent, Counsel respectively for the Petitioners and the Respondents filed written submissions with annexed authorities or decided cases, and treatises in support of their respective cases and urging the court to uphold the Petitioners' contentions on one hand, and on the other, urging the court to make a finding that the Petition raises no constitutional issue, is an abuse of the court process and should be dismissed with costs.

THE PETITIONERS' CASE

7. The Petitioners' basic thesis is that Sections 18 and 19 of the Rating Act are contrary to the Constitution on the ground that those Sections contravene the right to due process entrenched under Articles 40 and 50 of the Constitution of Kenya, 2010.

8. In his submissions, Mr. Githui, learned counsel for the Petitioners was candid enough to relate this Petition to two previous cases also decided by this court. In the CONSTITUTIONAL REFERENCE NO. 3 OF 2009, between RELIABLE CONCRETE WORKS LTD *(the Fourth Petitioner herein)* and THE MUNICIPAL COUNCIL OF NAKURU and THE ATTORNEY-GENERAL, in which the Petitioner contended inter alia that Section 12 of the Valuation for Rating Act, *(Cap. 266, Laws of Kenya)* was unconstitutional, in that it allowed the Minister for Local Government a person in charge of local authorities and therefore an interested party to appoint members of the Valuation Court provided for in that Section. The court found, not in my understanding, that Section was unconstitutional, but rather on the Roman law principle *"nemo debet esse judex in propria cause sua" (no one may be judge/arbiter in*

his/her cause) which principle the Roman Provinces or Europe including the British Isles adopted as their common law, and more so entrenched in the England by the four statutes of MAGNA CARTA *(the Great Charter)* commencing in 1215, and ending in 1225 a period when the English Monarchy ceded its absolute powers to the nobles, and the nobles to their liegemen, and eventually the common man – by the time of the Industrial Revolution. On that principle the court found that the valuation court *(whose members were appointees of the Minister)* could not be regarded as an independent arbiter or judge as envisaged by Section 75(2) of the repealed Constitution of Kenya *(2009 Edn)*, and declared the valuation court unconstitutional.

9. Mr. Githui also referred to a similar attempt in Judicial Review Application No. 49 of 2011, by one **TOM WAMBUA REUBEN & 96 OTHERS,** *(ex parte Applicants)*, against the MUNICIPAL COUNCIL OF NAKURU in which the Applicants sought orders of prohibition against the Respondent Council from causing the Draft Valuation Roll 2005, to be signed, endorsed or certified by the Council or publishing a notice to the effect that the roll has been signed or endorsed and/or certified. That application was for reasons given in the Ruling delivered on 30th June, 2009, dismissed.

10. Having failed in one, and succeeded in ther other, the Petitioners now seek to challenge the constitutionality of sections of the Rating Act, and notices to attach properties of rate payment defaulters. Counsel contended that Section 18 *(which provides for attachment of rent from a rate payer's tenant or lodger (where the rate payer defaults)*, to offset arrears of rent, and Section 19 which empowers a rating authority to register a charge on the property in priority to any encumbrance on the title are an assault on the constitution in that they take away due process entrenched in Section 75 of the repealed Constitution, and now Article 40 of the Constitution of Kenya 2010. Counsel submitted that the Constitution established an objective standard in accordance with principles justifiable in a democratic society, which can only be established by the court, applying the law as the benchmark and the court as the referee.

11. If the rights under the Constitution are to be limited or curtailed, that curtailment or limitation, counsel argued, must be subjected to due process. Counsel submitted that due process is both implicit and explicit. American jurisprudence has defined due process as follows -

> ***"Due process of law implies that the right of the person affected thereby to be present before a tribunal which pronounces judgment upon the question of life, liberty or property in its most comprehensive sense, to be heard by testimony or otherwise and to have the right of controverting, by proof, every material fact which bear on the question of right in the matter involved. If any question of fact or liability be prescribed against him this is not due process."***

Counsel also relied on the Indian Supreme Court case of **MANEKA GANDHI VS. THE UNION OF INDIA [1978] in INSC 1**6 where the court stated -

> ***"It is well established that even where there is no specific provision of a statute or rules made thereunder, for showing cause against an action, proposed to be taken against an individual, the duty to give reasonable opportunity to be heard will be implied from the nature of the function to be performed by the authority, which has the power to take punitive or damaging action."***

12. In the **LAW SOCIETY OF KENYA VS. THE ATTORNEY-GENERAL** *(Petition No. 185 of 2008)*, the court adopted the holding in the English case of **Schmidt & Another vs Secretary of State for Home Affairs [1969] ALL E.R 904 -**

> ***"that where a public officer has power to deprive a person of his liberty, the general principle is that it has not to be done without his being given an opportunity of being heard and making representation on his own behalf."***

13. Counsel for the Petitioners also relied on the American case of **Boddie vs. Connecticut [1971]**

40, US 371 referred to with approval in the case of **BAHAMAS ENTERTAINMENT LTD VS. KOLL & OTHERS [1996] 2 LRC 45,** where the Court stated -

> ***"without this guarantee that one may not be deprived of, neither liberty, nor property without due process of the law, the state monopoly over the techniques of resolution for binding conflict resolution, could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this court has through years of adjudication put flesh upon the due process principle."***

14. In the **Trinidad and Tabogo (West Indies)** case of **THAKUR PERSAD JOROO VS. ATTORNEY-GENERAL [2002] 5 LRC 268,** an appeal from the Court of Appeal of Tabago and Tridad *(the tiny Commonwealth Islands in the Western Atlantic Ocean)*, the Privy Council, in dismissing the appeal said -

> ***"the expression "due process" of law had two elements which were relevant first, protection against abuse of power, secondly, there was the requirement that when powers were exercised by the state against the individual they must be exercised lawfully and not arbitrarily. The Police had extensive powers in relation to the detention of property, but enshrined in the requirements of due process was a declaration of the fundamental guarantee afforded under the Constitution to each and every individual that the powers of the Police must be exercised lawfully and not arbitrarily ...".***

15. In summary, the Petitioners' thesis is that the concept of due process of the law provisions, fulfills the basic function of preventing the arbitrary exercise of executive power and places the exercise of that power under the control of the Judicature and that as the authorities state, the rights and liabilities of the citizen, whether criminal or civil be determined in accordance with the law of the land as a matter of both substantive and procedural law.

16. THE FIRST RESPONDENT'S SUBMISSIONS

Miss Mureithi learned counsel for the First Respondent agreed with the submission of counsel for the Petitioners that anything done by the Rating Authority must be justifiable in a democratic society. Counsel however submitted that this is exactly what Section 17 of the Rating Act provides for and sets out the manner of recovery of debt, the institution of suit, and issue of orders and decree. Counsel submitted that the notices provided for under Sections 18 and 19 of the Act, is crystalisation of what is envisaged in Section 17 of the Act, and that Sections 18 and 19 only apply where the rateable owner fails to pay the rates due, and that the notification in the Newspapers is part of due process envisaged under Sections 17 of the Act, that it was notification to pay rates and did not entail immediate dispossession of any rateable owner's property.

17. Counsel submitted that the constitutional due process has been entrenched in the Rating Act. In support of their submissions counsel relied on the case of **Otune & Another vs. Attorney-General [2002] 2 E.A. 508,** that in determining the constitutionality of a statute, the court has to look at the purpose of the statute and effect thereof; that the Notice had a list of rate defaulters, rates are used for funding public utilities, and that the purpose of Section 17-19 of the Rating Act is to ensure that rates are paid.

18. Finally, counsel for the First Respondent argued that if the court were to declare Sections 18 and 19 unconstitutional it would render Sections 17 ineffective for without the enforcement provisions of Section 18 and 19, the realisation of the rights under Section 17 would not be achieved. There was no constitutional issue raised by the Petition, and the same be dismissed with costs.

THE SECOND RESPONDENT'S SUBMISSIONS

19. Mr. E. N. Njuguna, Senior Principal Counsel for the Second Respondent urged the court to find that the issues raised by the Petitioners have been overtaken by events, there is a new Constitution, the old Local Government Act *(Cap. 265, Laws of Kenya)* has been repealed, there is the new Urban Areas and Cities Act 2011 *(No. 13 of 2011)* which repealed the Local Government Act. There are other laws on devolved Government all of which have a bearing on how municipalities would operate. Rates would, counsel submitted, remain, a way of raising revenue in one form or another, and Sections 18 and 19 of the Rating Act are a great help to rating authorities for even if they are inequitable, they are not unconstitutional.

20. Counsel further submitted that under the devolved system, a mechanism for valuation purposes and for payment of rates to fund public utilities would have to be established. He urged the court to dismiss the Petition as no fundamental or constitutional rights have been infringed. The notices given in the newspapers were merely information and not attachment of any of the Petitioners', or any other rateable owners, properties.

THE ISSUES AND ANALYSIS THEREOF

21. There is basically one issue raised by the above opposing views. It is whether Sections 18 and 19 of the Rating Act are inconsistent with Articles 40 and 50 of the Constitution of Kenya 2010 (the Constitution), for alleged lack of due process, and consequently whether the Petition raises a Constitutional issue for determination.

22. However before, I consider that issue, Counsel for the First Respondent raised in their submissions the issue of whether this Petition is *res judicata.* This principle is enshrined in Section 7 of the Civil Procedure Act *(Cap. 21, Laws of Kenya)*. The Section prohibits the Court from trying any suit or issue in which the matter directly and substantially in issue has been directly and substantially been in issue, in a former suit between the same parties or between the parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation 6 – of the said Section 7 provides -

> ***"Explanation 6 – where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others all persons interested in such right shall, for purposes of this section be deemed to claim under the person so litigating."***

23. Though Constitutional Reference No. 3 of 2009 in which the Fourth Petitioner was the sole Petitioner concerned the constitutionality of the Valuation Court established under Section 12 of the Valuation for Rating Act *(Cap. 266, Laws of Kenya)* and the membership of which was determined by the Minister for Local Government *(including local authorities – that is the rating authorities)* and therefore an interested party the issues raised in that Reference, were the same as in this Petition. The Petitioner was concerned **firstly** with the right to ownership and protection of property, under Section 75 of the former Constitution, and **secondly** the right to fair hearing before a court or other adjudicating authority prescribed by law *(under Section 77(9)* of the said Constitution. Those are the same issues raised in this Petition, the right to property *(Article 40)* and due process *(Article 50)* of the Constitution 2010. Though the first three Petitioners are new parties, it is quite clear by the presence of the Fourth Petitioner that, this Petition is largely influenced by the outcome in Constitutional Reference No. 3 of 2009. The issue therefore is whether the question of the right to property and due process under Sections 18 and 19 of the Rating Act ought not to have been raised under Constitutional Reference No. 3 of 2009.

24. Section 77(9) of the repealed Constitution provided as follows -

> ***"77(1) – (8)***
>
> 9. ***a court or other adjudicating authority prescribed by law for determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and***

impartial and where proceedings for such determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time."

25. I have no doubt in my mind that the Fourth Petitioner in this Petition, and the Petitioner in Constitutional Reference No. 3 of 2009, was litigating in good faith. Though it was the sole Petitioner in the said Reference, there is also no question that the right he was agitating for and obtained *(to be heard before an impartial court or tribunal)* was not merely for its own, but for the benefit of other rate payers. Although the first three Petitioners were not parties in that Reference, they are for purposes of the doctrine of res judicata deemed to have claimed under the Fourth Petitioner in this Petition.

26. I would respectfully agree with the submission of counsel for the first Respondent that the introduction of the first three Petitioners is nothing more than a red herring, and is no more than litigation in stages or instalments which amounts to no less than abuse of the court process. Indeed as this cout held in the case of **BENJOH AMALGAMATED LIMITED & ANOTHER VS. KENYA COMMERCIAL BANK LTD [2008] 1 E.A. 29 -**

"that a constitutional petition may be struck out in limine on the same grounds as a court would in a civil suit, that is to say, the matters are either res judicata, the matters are barred by limitation, or the Petition is scandalous, frivolous and vexatious or is otherwise an abuse of the court process."

27. I cannot of course say that the Petition herein is either frivolous and vexatious, but I am bound to say that, the matters raised herein concern the same issues raised in Constitutional Reference No. 3 of 2009, and this Petition should as a matter of strict interpretation be struck out on the grounds of res judicata. I will however not dismiss it on that ground. I will consider whether the Petition has any merit as it has purportedly been brought under the Rating Act, the enforcement law for rates once established under the Valuation for Rating Act, Cap. 266, Laws of Kenya. I will therefore advert to the issue raised in paragraph 21 above.

OF DUE PROCESS AND WHETHER THE PETITION RAISES A CONSTITUTIONAL ISSUE

28. There are two aspects brought out by the issue of due process. **Firstly,** it was the argument in paragraph 13 of the Supporting Affidavit of James N. Mbugua that Section 12 of the Valuation for Rating Act (Cap. 266, Laws of Kenya) having been declared unconstitutional, there was no court to which the Petitioners could challenge the level of increase of rates, and that therefore the imposition of rates under the Valuation for Rating Act and collection thereof under the Rating Act itself was unconstitutional for lack of due process. The **second** aspect of this issue was the direct challenge to Sections 18 and 19 of the Rating Act that they were inconsistent with and contrary to the Constitution for alleged lack of due process.

29. I will commence with the first issue. **Firstly,** the declaration of Section 12 of the Valuation for Rating Act as unconstitutional did not outlaw either the imposition of rates, or the Valuation for Rating purposes under the Valuation for Rating Act. **Secondly,** if the Petitioners' argument is that following the declaration of the valuation court as unconstitutional rate payers had no other avenue to ventilate their grievances, Section 17 of the Rating Act, does in my humble opinion, give rate payers adequate opportunity to raise any issue on rates. In any event even if Section 17 aforesaid did not exist, this court, under both the repealed and the current Constitution of Kenya had and retains original and unlimited jurisdiction in civil as well as criminal matters, in addition to its inherent jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court.

30. Consequently any argument that the Petitioners or rate payers have no avenue to ventilate their grievances because the Valuation court does not exist is not legitimate to the extent that it purports to give rate payers an excuse not to pay rates.

31. Having disposed of those preliminary points on *res judicata*, and alternative to access courts in

the absence of the Valuation for Rates Court, I now turn to Section 18 and 19 of the Rating Act.

32. To readily appreciate and answer the issue whether Sections 18 and 19 of the Rating Act are inconsistent with or contrary to the Constitution for alleged lack of due process, it is necessary to highligh both Sections and the relevant articles of the Constitution which the Sections of the Act are said to infringe. I will however commence with Articles 40 and 50 of the Constitution which are the relevant articles to this Petition.

33. Subject to Article 65 *(which restricts land ownership by non-citizens)*, Article 40(1) of the Constitution confers upon every person the right either individually or in association with others to acquire and own any property of any description and in any part of Kenya. Article 40(2) forbids Parliament from enacting any law that permits the state to arbitrarily deprive a person of property or any interest in, or right over any property of any description, or to limit or in any way restrict the enjoyment of any right under this Article on any of the grounds set out in Article 27, that is gender, race, pregnancy, marital status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. The Article provides for prompt payment in full of compensation to the person whose property is taken over or acquired, and allows any person who has an interest in, or right over that property, a right of access to court.

34. Article 50 provides for the right to fair hearing – that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, or if, appropriate another independent and impartial tribunal or body.

35. In addition to Articles 40 and 50, it is also necessary to bring into view Article 3(b) of the Constitution. This Article provides that sovereign power under the Constitution is delegated, among other institutions designated, to (i) the "national executive" and (ii) the "executive structures in the county governments".

36. In turn Chapter 12, entitled **"PUBLIC FINANCE"** sets out *inter alia*, the principles and framework of public finance and in Part 3 thereof, makes provision for revenue raising powers and the public debt. Article 209(1) empowers the national government by Act of Parliament, to impose -

(a) income tax,

(b) value-added tax,

(c) customs duties and other duties on import and export of goods and

(d) excise tax.

37. Article 209(2) empowers the County Government to impose -

(a) property rates,

(b) entertainment taxes, and

(c) any other tax that it is authorised to impose by Act of Parliament.

38. Under Article 209(4) both the national and county governments are empowered to impose charges for the services they provide.

39. The Petitioners' thesis is that Sections 18 and 19 of the Rating Act, *(Cap. 267, Laws of Kenya) (which confer upon the Rating authority)* the power to collect rates from a tenant of the rateable property owner *(such as the Petitioners), (S.18),* and creates an automatic charge upon the rateable property (S.19) are inconsistent with the provisions of Article 40 *(the right to property)* and Article 50 *(the right to fair hearing)* guaranteed under those provisions of the Constitution, and that by reason thereof those

provisions are unconstitutional, and the court should so find.

40. Two concomitant issues of interpretation arise from those contentions. **Firstly** what interpretation should be given to those provisions of the Constitution; and **secondly** what interpretation is to be accorded to the statute. I will commence with constitution.

41. In the case of **ATTORNEY-GENERAL VS UNITY DOW [1992] LRC (Const) 623 CA,** Purkrin JA of the Botswana Court of Appeal in a dissenting judgment identified *"three schools of thought"* on the subject of interpretation of the Constitution. These schools, the learned judge acknowledges, were identified by Madame Justice Bertha Wilson of the Supreme Court of Canada in a paper presented at a seminar at the University of Edinbough, May 1988 on Constitutional Protection of Human Rights – the Canadian Experience 1982 -

1. **the Framers' School of thought**
2. **the living tree metaphor**
3. **the Purposive interpretation**

The Framer's Intent School of Thought

42. This school of thought is fronted by some American Scholars who hold the view that the Constitution should be interpreted according to the intent of those who framed it. Adherents to this school hold that for a constitutional enterprise to be legitimate answers to constitutional problelms must come from the text of the Constitution itself. Consequently contemporary mores are irrelevant to the exercise and the only relevant values are those held by the framers at the time that the constitution was created.

43. While the Framers Intent principle may be extremely relevant in the interpretation of ordinary statutes, its applicability to the construction of a constitution has been debunked in the US itself, and in other countries with written constitutions. The greatest criticism has been that a group of draftsmen perhaps long deceased, should be allowed to constrain the progressive development of any nation. The U.S.A. experience provides an extreme example, for to apply the "Framers Intent" principle forever places American governmental thought into an 18th Century straight jacket, as it happened in the case of **DRED SCOTT VS. SANDFORD 19 How 393 (1857)** where Taney CJ concluded -

> ***"... that the Petitioners were not constituent members of the US of A, that they were not intended to be included as "citizens" in the Constitution, and could not therefore claim any rights and privileges that instrument (the Constitution of the United States) provides for and secures the citizens of the US. They were considered as subordinate and inferior class of beings, who had been subjugated by the dominant race."***

44. Contrary to that case, Holmes J in MISSOURI VS. HOLLAND 252, Us, 416, (1920) said:-

> ***"... the case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."***

45. In the Botswana case of **PETRUS VS. S [1984] BLR 14** Aguda J said -

> ***"... the Constitution … is a written instrument meant to serve not only the present generation, but also several generations yet unborn … but the function of the Constitution is to establish a framework and principles of government, broad and general in terms intended to apply to the varying conditions which development of our several communities require."***

46. **The "Living tree" Metaphor**

The metaphor was first used by Lord Sankey in the case of **Edward vs. The Attorney-General of**

Canada [1930] AC 124 PC. The issue in that case was whether women were *"persons"* and eligible as such to be appointed to the Canadian Senate. An appeal to the Privy Council was upheld, the Council concluding that women were indeed *"persons"*, Lord Sankey in his speech referred to the Canadian Constitution as a *"living tree capable of growth and expansion with its natural limits"*.

47. But Madame Justice Bertha Wilson (op cit) states the following:

> ***"The living tree metaphor is not without its critics. It provides, it is said by some, a cloak for the crudest and least warranted judicial activism. Even the most modest of trees, it is pointed out, occasionally needs pruning. Besides, how does one know at what point the Constitution ceases to be a living tree and becomes a noxious weed choking off legitimate governmental goals? Thus, if the American Framers' Intent approach risks being over conservative the Canadian living tree approach is open to the converse charge of being overly liberal and anti-democratic. As Canadian Judges, we are appointed and not elected officials. There would be something illegitimate about our forays into judicial review of legislation if all there was to them was a desire to substitute our personal values for those of our duly elected representatives. We cannot placidly assume that by some mysterious process we, the Judges have been given access to the true answers to fundamental, social and political dilemmas …. There is, therefore no plausible justification for us to substitute our personal values and our moral choices for those of the elected legislature. The metaphor of the living tree is a harmless one so long as it is used merely to suggest that a Constitution must adapt and grow to meet modern realities. It could, however, become dangerous and anti-democratic if it were used to justify the shaping of the Constitution according to personal views of individual judges."*** The nutrients for the living tree derive from the democratic process and not from judicial conviction.

48. **The Purposive Interpretation**

In recent years, the House of Lords *(and particularly Lord Diplock)* has emphasised the necessity of *"a purposive construction"* in relation to the written word. Thus a purposive construction has been applied in constitutional cases, the law of contract and even the law of intellectual property. Examples include the decisions in **ATTORNEY-GENERAL OF THE GAMBIA VS. MOMODOU JOBE [1984] 3WLR 174** at 183 and also **[1985]LRC** *(Const.)* 556). **SOCIETE UNITED DOCKS VS. GOVERNMENT OF MAURITIUS [1985] LRC *(Const)***, 801 at 844, **CATNIC COMPONENTS LTD VS. HILL & SMITH [1982] RPC 183 (HL)-**

> ***"Thus constitutional interpretation should be purposive. Rights should be interpreted in accordance with the general purpose of having rights, namely the protection of individuals and minorities against an overbearing collectivity."***

49. In this regard, Madame Justice Bertha Wilson in the case of **R. vs MORGENTALER [1988] 1 SCR 30,** expressed herself as follows -

> ***"The (Canadian Charter) is predicated on a particular conception of the place of the individual in society. An individual is not a totally independent entity disconnected from the society in which he or she lives. Neither, however, is the individual a mere cog in an impersonal machine in which his or her values, goals and aspirations are subordinated to those of the collectivity. The individual is a bit of both. The charter reflects this reality by leaving a wide range of activities and decisions open to legitimate government control while at the same time placing limits on proper scope of that control. Thus, the rights guaranteed in the charter erect around each individual, metaphorically speaking, an invisible fence over which the State will not be allowed to trespass. The role of the courts is to map out, piece by piece, the parameters of the fence."***

50. I will not end this narrative without reference to some decisions of that Nigerian Supreme

Court.

(1) Sir Udo Udoma of the Supreme Court of Nigeria said in **NAFUI RABUI VS. STATE [1981] 22 NCLR 293 at 316 said -**

> ***"I do not conceive it to be the duty of this court so to construe any of the provisions of the Constitution as to defeat the obvious ends the Constitution was designed to serve where another construction equally in accord and consistent with the words and sense of such provision will serve to enforce and protect such ends."***

(2) And in a later Nigerian case, **IFEZU VS. MBANDUGHA [1984] 1 SC, NLR, 5 SC 79, Bello JSC** put the matter thus -

> ***"The fundamental principle is that such interpretation as would serve the interests of the constitution and would best carry out its object and purpose should be preferred. To achieve this goal its relevant provisions must be read together and not disjointly... where the provisions of the constitution are capable of two meanings the court must choose the meaning that would give effect to the Constitution and promote its purpose."***

c. ***To these words, must be added the important voice of Lord Diplock in ATTORNEY-GENERAL OF THE GAMBIA VS JOBE [1985] LRC (Const.), 556 at 565*** thus -

> ***"A constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction.***

51. The framers of the Constitution of Kenya 2010, had the purposive approach of interpretation of the Constitution when they included that approach in Article 259 which says -

> ***"259(1) "This constitution shall be interpreted in a manner that -***
>
> ***(a) promotes its purposes, values and principles,***
>
> ***(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights,***
>
> ***(c) permits the development of the law, and***
>
> ***(d) contributes to good governance,***
>
> 2. **…**
> 3. ***Every provision of this constitution shall be construed according to the doctrine of interpretation that the law is always speaking...***

52. In a sense, Article 259 of the Constitution of Kenya encampasses all the three schools of thought identified by Madame Justice Bertha Wilson. This is more particularly so on the question of prisoners rights and the grant of bail irrespective of the nature of crime. Both the Framer's intent and living tree metaphors have for law enforcement agencies made the provisions a noxious weed against the prevention of crime.

53. However, this is not all so, as the following cases show. In the case of **NJOYA & 6 OTHERS VS. ATTORNEY-GENERAL & 3 OTHERS** (No. 2) [2004] **1 KLR 261,** the Court said -

> ***"the Constitution is not an Act of Parliament but the supreme law of the land. It is not to be interpreted in the same manner as an Act of Parliament. It is to be construed liberally to give effect to the values it embodies and the purposes for which the makers framed it."***

54. The Court of Appeal of Botswana considering the question of interpretation of the Constitution in the case of ATTORNEY-GENERAL VS. UNITY DOW on 3rd July 1972 said -

> ***"... the very nature of a constitutional construction requires that a broad and generous approach be adopted in the interpretation of its provisions that all the relevant provisions bearing on the subject for interpretation be considered together as a whole in order to effect the objective of the Constitution and that where rights and freedoms are conferred on persons by the Constitution derogations from such rights and freedoms should be narrowly or strictly construed."***

55. In **East Africa** the Constitutional Court of Uganda, in **LYOMOKI & OTHERS VS. ATTORNEY-GENERAL [2005] E. A. 127** outlined what the court will consider in interpreting an application for constitutional interpretation -

> ***(1) the onus is on the Petitioner to show a prima facie case for violation of their constitutional rights, thereafter, the burden shifts to the Respondent to justify that the limitations to the rights in the statute is justified by Article 43 of the Constitution,***
>
> ***(2) the purpose and effect of an impugned legislation are relevant in the determination of its constitutionality,***
>
> ***(3) the Constitution ought to be looked at as a whole with no one particular provision destroying another but each supporting the other. All the provisions on an issue should be considered so as to give effect to the purpose of the instrument,***
>
> ***(4) the constitution should be given a generous and purposive construction especially the part which protects the entrenched fundamental rights and freedoms,***
>
> ***(5) where human rights provisions conflict with other provisions human rights provisions take precedence and interpretation should favour enjoyment of human rights and freedoms.***

56. In the case of **RURANGA VS. ELECTORAL COMMISSION OF UGANDA [2008] 1 EA 387**, a five judge constitutional Court of Uganda said this on interpretation of the Constitution -

> ***"The principles of constitutional interpretation include words used in the Constitution must be given the widest possible interpretation according to their ordinary meaning; provisions of the constitution must be given liberal interpretation unfettered with technicalities. The fundamental rights provisions must be given liberal interpretation unfettered with technicalities, the fundamental rights provisions must be given dynamic progressive, liberal and flexible interpretation and purpose and effect."***

57. In the last comparative case on interpretation of the Constitution **NDYANABO VS. ATTORNEY-GENERAL [2001] 2 E.A. 485,** the Tanzania Court of Appeal stated -

> ***"In interpreting the Constitution the Court would be guided by the general principles that -***
>
> ***(i) the Constitution was a living instrument with a soul and consciousness of its own,***
>
> ***(ii) fundamental rights provisions had to be interpreted in a broad and liberal manner,***
>
> ***(iii) there was a rebuttable presumption that legislation was constitutional,***
>
> ***(iv) the onus of rebutting the presumption rested on those who challenged that legislation's status save that where those who supported a restriction on a fundamental right relied on drawback or exclusion clause, the onus was on them to justify the***

restriction.

58. Having set out the principles on interpretation of the Constitution, it is opportune at this stage to also set out the primary principles of interpretation of statutes, again beginning by way of a comparative jurisprudence over the last one and half centuries, in East Africa, and countries of the common law tradition.

59. In **OLUM & ANOTHER VS. ATTORNEY-GENERAL [2002] 2 E.A. 508,** the Court of Appeal of Uganda said inter alia -

> ***"In order to determine the constitutionality of a statute the court had to consider the purpose and effect of the impugned statute or section thereof. If the purpose was not to infringe a right guaranteed under the Constitution, the Court had to go further and examine the effect of its implementation. If either the purpose or the effect of its implementation infringed on a right guaranteed by the Constitution, the statute or section in question would be declared unconstitutional.***
>
> ***In interpreting the Constitution, the Constitutional principles of harmonization which was to the effect that all provisions of the constitution concerning an issue should be considered together would be applied."***

60. What has come down to lawyers as Lord Wednesleydale's *"golden rule"* of interpretation was first enunciated in the English case of **GREY VS. PEARSON 6 HLC 106** and stated as follows -

> ***"We are to take the whole statute together and construe it altogether, giving words their ordinary signification unless when so applied they produce an inconsistency … so as to justify the court in placing on them some other signification, which, though less proper, is one which the court thinks the words will bear."***

61. In the South African case of **DADOO LTD VS. KRUGERSDORP MUNICIPAL COUNCIL, 1920 AD 530** Solomon JA said at p. 464 -

> ***"Prima facie, the intention of the legislature is to be ascertained from the words which it has used. It is admissible for a court in construing a statute to have regard not only to the language of the legislature but also to its object and policy as gathered from comparison of its several parts as well as from the history of the law and from the circumstances applicable to its subject matter. If in consideration of its nature, a court is satisfied to accept the literal sense of the words would obviously defeat the intention of the legislature, it would be justified in not strictly adhering to that sense but in putting upon the words such other signification as they are capable of bearing."***

62. Again, in the South African case of **ATTORNEY-GENERAL *(of Transvaal)* vs. ADDITIONAL MAGISTRATE FOR JOHANNESBURG 1924,** AD, 421, at 436, Kotze JA relying on English law said -

> ***"a statute "says Cockburn CJ "should be construed that if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant" [The Queen vs. Bishop of Oxford, 4 QBD at 261]. To hold words occurring in a Section of an Act of Parliament as insensible, and as having been inserted through inadvertence or error, is only permissible as a last resort, it is, in the language of Erle CJ "the ultima ratio, when an absurdity would follow from giving effect to the words as they stand."***

63. In **DITCHER VS. DENISON IIMOORE PC, 325 at 357,** the Privy Council advised -

> ***"It is a good general rule in jurisprudence that one who reads a legal document whether public or private should not be prompt to ascribe – should not, without necessity or some***

sound reason impute to its language tautology or superfluity and should rather at the outset be inclined to suppose every word intended to have some effect or be of some use."

64. This comparative analysis of constitutional and statutory interpretation would be incompatible without reference to the canons of interpretation of daily and ordinary instruments of commerce, that is to say contracts, in all their variety.

65. In his book, **the Interpretation of Contracts** 2nd Edn. Lewison QC says in para. 6.02 p. 156,

"In order to arrive at the true interpretation of a document, a clause must not be considered in isolation, but must be considered in the context of the whole of the document."

66. In **CHAMBER COLLIERY LTD VS. TWYEROULD (1893) 1 Ch. 268**, Lord Watson said -

"I find nothing in this case to oust the application of the well known rule that a deed ought to be read as a whole, in order to ascertain the true meaning of its several clauses; and that the words of each clause should be so interpreted as to bring them into harmony with the provisions of the deed, if that interpretation does no violence to the meaning of which they are naturally susceptible."

67. The said author adds that the ***"expression of this principle of construction is no more than an enlargement of the general proposition that an individual word takes its meaning from the context in which it is found"***. So too an individual clause takes its meaning from the context of the document in which it is found. Thus in **BARTON VS. FITZ GERALD (1812) 15 East 530**, Lord Ellenborough C.J. said -

"It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected ex antecedentibus et conseguentibus, every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done."

68. Again taking example from construing of contracts, all parts of it must be given effect where possible and no part of it should be treated as inoperational or surplus, Lewison (op.cit) says at para. 603 -

"The construction of a document as a whole necessarily involves giving effect to each part of it in relation to all other parts of it. Accordingly, as a corollary of the principle that a document must be construed as a whole, effect must be given to each part of the document. This in turn means that in general each part of the document is taken to have been deliberately inserted, having regard to all the other parts of the document, with the result that there is a presumption against redundant words (usually called surplusage)."

69. In **RESTRAND MUSIC HALL CO. LTD (1865) 35 Bean 135,** Lord Romilly, MR said -

"The proper mode of construing any written instrument is, to give effect to every part of it, if possible, and not to strike out or nullify one clause in a deed, unless it is impossible to reconcile it with another and more clauses in the same deed."

70. This is because in *"a torrential"* style of drafting draftsmen frequently use many words either because it is traditional to do so or out of a sense of caution so that nothing which conceivably fell within the general concept which they have in mind should be left out. **UNION LIFE INSURANCE SOCIETY VS. BRITISH RAILWAYS BOARD** (1987) 283 E.G. 846 and Article 22 of the Constitution which employs such "torrential" style – a fundamental right or freedom has been denied, violated or infringed or threatened.

CONCLUSIONS ON ANALYSIS OF SUBMISSIONS

71. In Constitutional Petitions, like any other form of litigation, and irrespective of the number of parties, there are usually two rival obligations, and likewise, irrespective of their number, one

independent and impartial obligation or duty. **Firstly,** there is the obligation on the Petitioner to establish a prima facie case that the action of the Respondents infringes his rights, and the manner in which such rights have been infringed or likely to be infringed. **(Anarita Kirimi vs Republic, [1979] KLR 154).** The **second** obligation is upon the Respondent to show that no such right has been or is likely to be infringed, and if it has been or is threatened to show that the restriction or limitation is justifiable in a democratic society *(Article 24 of the Constitution of Kenya, 2010).* The **third** obligation or duty is upon the court as an independent and impartial arbiter or referee of the rival claims to show by reference to the principal guard posts of constitutional and statutory interpretation which of the two rival claims are legitimate and deserve to be declared and therefore enforced.

72. The Petitioners' case is not that Sections 18 and 19 of the Rating Act are superfluous or tautologous to some other provision of the Act. It is also not the Petitioners' case that those sections are insignificant. It is also not the Petitioners' case that the words used in those sections are either obscure or ambiguous so that they may be given a special meaning not leading to an absurdity. It is the Petitioners' case that Sections 18 and 19 of the Rating Act are inconsistent **firstly** with the right to property guaranteed under Article 40 of the Constitution and **secondly** the right to due process guaranteed under Article 50 of the Constitution. Article 40(1) says -

> ***"Subject to Article 65, every person has the right, either individually or in association with others to own property -***
>
> ***(a) of any description, and***
>
> ***(b) in any part of Kenya***
>
> ***(2) Parliament shall not enact any law that permits the State or any person -***
>
> ***(a) to arbitrarily deprive a person of property or of any interest in, or right over, any property of any description.***

And Article 50 provides -

> ***"Every person has the right to have any dispute that can be resolved by the application of law – decided in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal or body."***

73. The phrase *"any dispute that can be resolved by an application of law"* means merely any dispute that is justiciable. Under Article 260 of the Constitution *"property"* includes any vested or contingent right to or interest in or arising from -

> ***"land, or permanent fixtures on or improvements to land, and also money, choses in action."***

74. There is therefore no doubt that rates demanded by the First Respondent from the Petitioners is "property" in the form of money derived from ownership and improvements on land. The issue is therefore justiciable in terms of Article 50 of the Constitution.

75. Section 18 of the Rating Act permits a rating authority by notice to a tenant to demand payment of rent or lodging fees from the lodger, direct to the rating authority without formal proceedings in court, and that such notice shall operate to transfer to the rating authority the right to recover, receive and give a discharge for such rent. **Similarly** Section 19 of the Rating Act declares that the rate, due to be a charge on the property, and permits the Rating Authority to register a charge against the rateable property, and such charge shall stand in priority to other charges.

76. Rent or lodging fees due to a rateable owner from a tenant or lodger is certainly a right conferred upon the rateable owner or to the Petitioners in this case. Derogation from such right or

freedom to receive such rent or lodging fees must therefore be narrowly or strictly construed, and be shown to be justifiable in a democratic society.

77. Read alone these sections *(18 & 19)* of the Rating Act suggest that the rating authority is acting arbitrarily and without due process and therefore in breach of the Petitioners' rights to property that is, rent and fees payable directly to the rating authority instead of payment to the rateable owner who, in turn, would pay to the rating authority, the rates due or arrears and interest thereof. This would be a narrow an unreasonable reading of the statute. According to the canons of construction of both constitutional and statutory provisions, referred to in the above cited cases, all provisions bearing on the application of the powers conferred upon the rating authority by those sections must be considered together as a whole in order to effect the objective of the statute before the court can declare those sections inconsistent with the rights to property or inconsistent with the rights to due process **(Attorney-General vs. Unity Dow** *(supra).*

78. The Court must also consider the purpose and effect of the impugned legislation. All the provisions on the issue of rates should be considered so as to give effect to the purpose of the legislation **(LYOMOKI & OTHERS VS. ATTORNEY-GENERAL** *(of Uganda) (supra)* and **OLUM & ANOTHER VS. ATTORNEY-GENERAL of Uganda** *(supra).* We are to take the whole statute together giving words their ordinary signification **(Grey vs. Pearsons)** (supra). It is admissible for a court in construing a statute to have regard to the language of the legislature, but also to its object and policy gathered from comparison of its several parts as well as from the history of the law and from the circumstances applicable to its subject matter **(Dadoo Ltd vs. Krugersdorp Municipal Council** *(supra).* To hold words occurring in a section of an Act of Parliament as insensible and as having been inserted through inadvertence or error is only permissible as a last resort. It is, in the language Erle C. J., the *ultima ratio*, when an absurdity would follow from giving effect to the words as they stand **(A.G. (Transvaal) vs. Additional Magistrate for Johannesburg (supra).**

79. In this regard therefore Sections 18 and 19 of the Rating Act must be read and construed along with the preceding Sections 15, 16 and 17 of the Act. **Firstly** Section 15 declares that every rate levied by the rating authority shall become due on the first day of January in the financial year for which it is levied, and is payable on such day in the same financial year as shall be fixed by the rating authority, and of which the rating authority shall publish at least thirty days notice. **Secondly** Section 16 declares that once a rating authority has given notice under Section 15, it becomes the duty of the rate payer to pay the amount of such rate at the offices of the rating authority with such discount as the Minister may approve. **Thirdly** Sections 17, 18 and 19 of the Act are enforcement provisions for payment of rates by every owner of a rateable property. These provisions must however not be read in isolation but be construed as one reinforcing the other.

80. A reading or construction of Sections 18 and 19 in isolation of those preceding Sections would be contrary to the doctrine that an instrument, including an Act of Parliament be construed as a whole, both in terms of its antecedent and subsequent provisions (*antecedentibus et conseqeuntibus)*. It is a cardinal rule of construction of both public and private instruments that they should be given effect rather then destroyed. The Roman's whose language was Latin put it aptly when they said of the construction of contracts *ut res magis valeat quam pereat. [give effect to the matter rather than having it fail]*.

81. Every owner of a rateable property knows or is deemed to know that rates are due on the first day of January of every financial year (S. 15), and that it is his duty to pay rates (16). Section 17 (1) provides that -

> ***"If after the time for payment of any of any rate, any person fails to pay any such rate due from him and any interest on any such unpaid rate as provided in section 16, the rating authority may cause a written demand to be made upon such person to pay, within fourteen days after service thereof on him, the rate due by such person and interest thereon calculated in accordance with section 16 (3) which demand shall be in the appropriate form in the Second Schedule,***

(2) If any person who has had such demand served upon him makes default, the rating authority may take proceedings in a subordinate court of the first class to secure the payment of such rate and interest in the manner hereinafter prescribed."

82. Section 18 which authorises a rating authority to recover rates due to it directly from the tenant only requires a notice to be issued to the tenant *"**Stating the amount of such arrears, which may include interest calculated in accordance with Section 16 (3) and requiring all future payments or rent (whether the same have already accrued due or not) by the person paying the rent to be made directly to the rating authority until such arrears and interest have been duly paid."*** The notice further operates to transfer to the rating authority the right to recover, receive and give a discharge for such rent.

83. This Section makes no provision for notice to the rent payer of the rates owed by him, or of the intention to recover such rates from the rent payable to him by the tenants. It also does not afford him a chance to be heard or challenge the rates sought to be enforced. Therefore, it must be read together with Section 17 (1) and (2) of the Act which provide for enforcement of the rates, by way of suit before the subordinate court. It is only then that the rating authority may proceed to recover rates from the tenants or occupiers of the parcel of land, after issuing notice to them.

84. Section 19 of the Act creates an automatic charge against the property on which the rate was levied and authorises the rating authority to deliver a notification of the charge, in the prescribed form to the registrar who shall register it against the title to that land. This section read together with the provisions of Section 17 (6) which provides for enforcement of a decree granted by the subordinate court suggests that for a charge to be realized there must be a decree issued in favour of the rating authority. The said section provides-

(6) a decree granted by a subordinate court may be enforced by any mode of execution authorized by any rules made under the Civil Procedure Act and if the sum due under the decree is secured by a charge over the land by virtue of section 19, the decree-holder may apply to the High Court by originating summons to order the sale of such land in enforcement of such charge, and the High Court may make an order directing the sale of such land....."

85. Due process does not merely mean litigation before a court of law or other impartial body or tribunal, but also observance by the rating authority of the procedure laid down in the enabling statute. Due process would mean that Sections 18 and 19 of the Rating Act would not be invoked by the rating authority without first reference to or compliance with Sections 15, 16 and 17 of the Rating Act.

86. Contrary to the Petitioners' contention that Sections 18 and 19 do not provide for due process and are therefore inconsistent with the right to fair hearing guaranteed under Article 50 of the Constitution, the object and effect of Section 18 and 19 is to enforce the collection of rates once Section 15, 16 and 17 of the Act have been complied with by the Rating Authority. Section 17 takes pride among the enforcement provisions because it provides for conclusive determination following a hearing inter partes of what is collectable by way of recovery under Section 18 of the Act and the actuality of the sums which will be subject to a charge under Section 19. It empowers the rating authority to sue and obtain an order or decree against any defaulting rate payer for the payment of rates.

87. For purposes of clarity as this is an enormously important issue not just to rate payers, but also to many tenants and lodgers *(who are the majority in any city or town)*, it is necessary to restate that Sections 17, 18 and 19 of the Rating Act are enforcement provisions for payment of rates. In my humble reading and understanding of those sections, once the rating authority has complied with the provisions of Sections 15, 16 and 17 (1) and (2) of the Act, it is at liberty to proceed by any and all the three ways. **Firstly,** it may enforce a decree under Section 17 of the Act by any of the mode of execution authorised by any rules made under the Civil Procedure Act; **secondly,** it may proceed to attach rents and fees due from tenants and lodgers of rateable premises, *(under Section 18),* with prior notices to those tenants and lodgers. **Thirdly**, any rate payable or due under Section 16 is a charge upon the land on which the rate is levied and the rating authority may apply and have the claim of rates registered against the rate payer's

title. The rate payer is not prohibited from discharging the charge. That too is a protection for the rate payer.

88. The first two methods of enforcement, objected to by the Petitioners are no more than methods for collection of overdue rates. This is no more punitive than an agency notice under Section 96(2) of the Income Tax Act, (Cap. 470, Laws of Kenya) served by the Kenya Revenue Authority (KRA) upon a bank attaching an account of a tax payer.

89. I do not, with great respect to learned counsel for the Petitioners and to the Petitioners find that these provisions, more than those under the national Government tax regime can be said to be any more contrary to or inconsistent with either Article 40 *(the right to property)* or Article 50 *(the right to due process)* of the Constitution.

90. As already observed, there is of course no doubt that *"rent"* paid by a tenant, or fees *"paid by a lodger are "property"* within the definition set under Article 260 0f the Constitution. For the Petitioners to assert that taking away of such *"rent"* or *"fees"* is inconsistent with the constitution, they must show either that taxation is inconsistent with some provision of the Constitution, or that the purpose of taking away is either arbitrary, is not for a public purpose, or is not in the public interest. This, the Petitioners failed to do.

91. The purpose of the Act is declared in the short title, as an Act of Parliament for the imposition of rates on land and buildings in Kenya. Section 3 thereof provides that the purpose of the rates levied by the rating authority is for meeting all liabilities falling to be discharged out of the general rate fund, the County fund or the township rate fund as the case may be.

92. Further Article 209 of the Constitution clearly empowers a County under which the functions of the former local authorities fall to impose rates. Indeed as observed by Shields J. in the case of **MARETE VS. ATTORNEY-GENERAL KLR 690 -**

> ***"the Constitution of this Republic is not a toothless bulldog, nor is it a collection of pious platitudes. It has teeth and in particular those (teeth) found in Section 84."***

93. The Marete case was concerned with the enforcement of fundamental rights and freedoms under Section 84 of the repealed Constitution. The equivalent provision is now Article 23 of the Constitution of Kenya 2010.

94. It is the obligation of every rateable property owner to pay rates in relation to ownership of rateable property. It is also the duty and obligation of every person liable to pay tax, to pay that respective tax. That is the price of modern civilization, and in particular of living in planned urban areas, townships, and cities. It is the price of collective benefits of the provision of clean water, public lighting, roads, and ancillary facilities and maintenance thereof.

95. If I may be permitted again to paraphrase what Madame Justice Bertha Wilson said in the case of **R. v. Morgentaler** *(supra)*, in relation to the Kenya Constitution. The Bill of Rights set out in Chapter Four of the Constitution grants every individual, natural, or juridical *(like the 4th Petitioner)*, a particular place in society. An individual is not a totally independent entity *"disconnected"* from the society in which he, she or it lives and operates. Nor is the individual a mere cog in an impersonal mechanism which his or her or its values, goals and aspirations are subordinated to the collectivity. The individual is a bit of both. The Constitution of Kenya reflects this reality by leaving a large range of activities and decisions open to legitimate governmental control. Thus the rights guaranteed in the Constitution erect around each individual metaphorically speaking, an invisible fence over which the State will not be allowed to trespass. The role of the courts is to map out, piece by piece, the parameters of the fence.

96. This approach allows a judge to combine a purposive and a contextual interpretation of both the Constitution and statute in order to determine the ambit and extent of any individual freedom or right

under debate.

97. In my view, a purposive construction of the Constitution *(as clearly envisaged under Article 259(1)(a) of the Constitution)* is the correct method of interpretation. It provides the court with *"a metewand whereby excesses of personal judicial conviction may be kept in check."*

98. In exercise **firstly** of the unlimited original jurisdiction in criminal and civil matters, and **secondly** the original jurisdiction to determine any question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened, conferred upon this court under Article 165(3)(a) & (b) of the Constitution, the question I ask myself as a Judge is not merely what the framers of the Constitution may have had in mind at the date of drafting, nor of what I as an individual judge believe the protection afforded under the Constitution should be. The question I ask myself is, within the context of the Constitution and the impugned statute, taking into account the principles and framework of public finance, raising of revenue, and public debt, and other social values, what is the purpose of the right to be protected?

99. Therefore applying the purposive construction to the Articles 40 and 50 of the Constitution, and attempting to *"map out piece by piece the parameters of the fence"* I am of the view that the Constitution, and in particular Articles 40 and 50 thereof do not preclude the legislature from passing a statute which provides for payment of rates by owners of rateable properties. Consequently I am also of the view that Sections 18 and 19 of the Rating Act *(Cap. 267 Laws of Kenya),* are not inconsistent with either Article 40 or Article 50 of the Constitution. The Petition does not therefore raise any constitutional issue.

100. Arising from the above holding, there is no basis for holding or declaring in the alternative, that the notices issued by the Municipal Council of Nakuru, the first Respondent herein and contained in the Daily Nation Newspaper dated 22nd July 2009 is unconstitutional, null and void. The notices were merely information that rates are over due, and intended action if default in payment persists. The said notice does neither contravene, circumvent nor limit the Petitioners' rights to property guaranteed under Article 40 of the Constitution, nor the right to due process guaranteed under Article 50 of the Constitution.

101. The notice in the Newspaper aforesaid were no more than a prelude to the rating authority's exercise of its powers under Rating Act, and in particular Sections 15, 17, 18 and 19 thereof.

102. In the premises, and for all those reasons, the Petition herein first filed on and Amended on 14th October, 2010, is hereby dismissed with costs to the Respondents.

103. There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 8th day of May, 2014

M. J. ANYARA EMUKULE

JUDGE