IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & MAKHANDIA, JJ.A)

CIVIL APPEAL NO. 45 OF 2012

BETWEEN

ROYAL MEDIA SERVICES LIMITED.....APPELLANT

AND

THE ATTORNEY GENERAL.....RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi – Milimani Commercial Courts (Majanja, J.) dated the 16th December, 2011

in

High Court Petition No. 421 of 2009)

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JUDGMENT OF THE COURT

Royal Media Services Ltd "*the appellant*" instituted in the High Court in Nairobi a constitutional petition dated 15th July 2009 against the Attorney General "*the respondent*" that culminated in the judgment by **Majanja J.** dated 16th December 2011 that is now the subject of the instant appeal.

The appellant was at the material time and is still in the radio and television broadcasting business and was at the time of instituting the petition owning and operating about nine radio and television stations. In the petition the appellant claimed that it had been contracted by the defunct Constitution of Kenya Review Commission "*the Commission*" to offer civic education to Kenyans of all walks of life through its eight radio stations between October and 16th November 2005, in connection with the referendum which was held on 21st November, 2005, to ratify the then proposed Constitution. Pursuant to the contracts the appellant offered the services contracted in the form of general information, reminders, mentions and other related services regarding the referendum to the general public countrywide in preparation for the referendum.

As a reminder and to reminisce, majority of Kenyans in that referendum eventually rejected the Government spearheaded "**yes campaign**" for the proposed new constitution by 58%.

Before that however, Kenyans through their elected representatives in the National Assembly legislated the Constitution of Kenya Review Commission Act "*the Act*" to facilitate the comprehensive review of the constitution. The Act was first enacted in 1997 but was subsequently amended culminating in the revised edition of 2001 that formed the background of the appellant's petition in the High Court. The Act established, as already stated, the Commission mandated to spearhead the conduct of civic education in order to stimulate public discussion and awareness of the proposed constitution. Relevantly, the Act also provided that the Commission would stand dissolved thirty days upon the referendum verdict becoming final. The rejection of the proposed constitution in the referendum was actualised and published on 25th December 2005. In essence then, the Commission stood dissolved thirty days thereafter, that is, on 25th December 2005.

In the course of its operations, the Commission allegedly entered into 32 contracts with the appellant that formed the subject of the petition. Those contracts were to cost the Commission Kshs 120,015,827/=. The appellant duly discharged its obligations under the contracts and demanded payment. However, out of the aforesaid contract sum, it only received a partial payment of Kshs 15,120,160/= before the Commission was dissolved by operation of the law. In essence, therefore, the appellant's claim against the Commission was for the balance of the contract sum of Kshs 104,895,667/= which it claimed the respondent had refused, failed and or neglected to pay with interest at 19% compounded daily and debited monthly as from 21st November 2005. The appellant took the view that in failing, neglecting and or refusing

to pay the balance aforesaid, the Commission had violated its constitutional rights under sections 75 and 82(2) of the repealed or retired constitution "*the constitution*" as it was arbitrary and contravened its constitutional right to property and protection from arbitrary deprivation of the same. It was the appellant's further contention that it was entitled to the protection of the right to the recovery of the debt due under contract and or restitution.

The appellant also alleged discrimination on the part of the respondent against it. This was on the footing that the Commission had paid other broadcasters who rendered identical or similar services on same terms as the appellant to the Commission during the same period. This, according to the appellant, amounted to a contravention of section 82(2) of the Constitution which outlawed discrimination against any person by a person acting by virtue of any written law or its functions as a public authority or body. As such, the appellant contended that it was entitled to redress within the meaning of section 84(2) of the Constitution.

It is however instructive to note that the appellant had initially filed **Constitutional Petition No. 481 of 2006** in respect of the same claim and following a hearing, judgment was reserved for 19th October 2007. However on the eve of the judgment, the Permanent Secretary in the Ministry of Justice and Constitutional Affairs, the parent ministry of the Commission, prevailed upon the appellant to discontinue the suit in favour of an out of court settlement. As it turned out, this was not to be.

On the basis of the foregoing, the appellant contended that the respondent admitted the debt but declined to settle it as it had suggested thereby forcing the appellant to file yet another petition in the High Court leading to this appeal.

In its defence to the petition, the Commission denied that it had entered into any contract with the appellant as alleged or at all. According to the Commission, only the Secretary to the Commission as the accounting officer could contract or bind it and that, as it were, the Secretary had denied ever contracting the appellant's services; that the chairperson of the Commission who had initiated and signed the alleged contracts had no power or authority to commit the Commission to the contracts. Further, that the Commission was independent of the executive and its liabilities were chargeable to the consolidated fund and payable only with the approval of the National Assembly. It further pleaded that the appellant was in the know that the Commission would stand dissolved upon the enactment of the bill with regard to the Constitution in accordance with the provisions of section 33 of the Act and that section 30 of the Act established a fund which was administered by the Secretary on behalf of the Commission; all expenses incurred in pursuance of the Act were to be paid out of that fund in accordance with the provisions of the Exchequer and Audit Act. The Commission further asserted that all contracts entered into by the Government were governed by the Government Contracts Act, and as such, in instituting the suit the appellant should have invoked the provisions of the said Act. It further opined that restitution as a remedy was not available to the appellant and the appellant could only be entitled to damages if, and only if, it proved that there was indeed breach of a valid contract. The respondent also contended that the appellant had not established the infringement of any property rights to warrant the invocation of the provisions of section 84 of the Constitution. In response to the claims of discrimination, the respondent took the position that the appellant, not being a natural person, could not claim discrimination on the basis of colour, creed, place of origin, political opinion or sex as provided for in section 82 of the Constitution. Winding up, the respondent asserted that the appellant's claim was purely contractual that called for determination by way of an ordinary civil suit as opposed to a constitutional petition.

The High Court, (**Majanja. J**) held, in dismissing the petition with costs that:

> ***"35. I have no doubt that the property referred to in section 75 of the Constitution is property of any kind which includes a debt. However, the debt in this case remains disputed and is not the kind contemplated by the Constitution in so far the right to have the same adjudicated upon is not impaired. In both Shah v The Attorney General of Uganda (supra) and Gairy v The Attorney General of Grenada (supra), the debt subject of the enforcement proceedings had been determined by a judgment of the court.***
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> ***36. Even if l were to find that debt due to the petitioner is property, l hold that mere refusal or failure to pay a debt does not amount compulsory (sic) acquisition of property as contemplated under section 75 of the Constitution. Deprivation, that is taking of possession or acquisition, would only arise if the state barred the petitioner's right to recover the debt. In this case the State has not impaired the petitioner's right to have its right to judgment in its favour determined by a court of law. This was indeed the position in Shah v The Attorney General of Uganda (supra) and Gairy v The Attorney General of Grenada (supra).***
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> ***37. I therefore conclude that there has been no infringement of the petitioner's rights under section 75 of the constitution.***
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> ***Freedom from Discrimination***
>
> ***38. The gravamen of the petitioner's claim in respect of discrimination is that it was treated in a discriminatory manner in that the other service providers were paid in full for their services and the decision was made in an arbitrary manner.***
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> ***39. Section 82(3) of the Constitution provides as follows:-***
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> ***In this section the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.***
>
> ***40. It is clear from a plain and obvious reading of section 82(3) of the constitution that discrimination as set out is limited to the classes described in the section. This is the import of the case of Shah Vershi Devshi & Company Ltd V Transport Licensing Board (supra). In my view, the petitioner has not been subjected to the discrimination prohibited by section 82 (3) of the constitution in the non-settlement of its claim.....***

Conclusion

44. My conclusion therefore is that the state has not infringed on the petitioner's rights guaranteed under section 75 and 82 of the constitution and as a consequence the petition must fail and it (sic) hereby dismissed......"

Dissatisfied with these findings, the appellant proffered this appeal impugning the judgment on 17 grounds which, in his written submissions and at the oral highlights of the same, **Dr. Kamau Kuria, SC,** condensed into 8. Urging the grounds globally, learned counsel drew our attention to the judge's observation in the judgment that there was no dispute that the appellant rendered the contracted services for which it was entitled to payment from the respondent. However, the appellant laments that despite the finding, the judge still went ahead to decline its petition. The appellant termed as contradictory the judge's finding that an ordinary civil suit would have sufficed to prove certain facts. He submitted further that the Commission had been established pursuant to section 6 (2) of its Act as a body corporate capable of suing and being sued. That, in terms of section 21(4), the chairperson was to preside over all the meetings of the Commission and was also the spokesperson of the Commission. That, however, the Secretary pursuant to section 21 was responsible for the day to day running of the Commission, though according to the appellant, the Act did not state that the functions of the Commission were to be performed solely by its Secretary or that only the Secretary could procure goods on behalf of the Commission. It was submitted further that since the Commission was an autonomous body, then the provisions of the Government Contracts Act did not apply to it. Further, that section 29 of the Act provided that expenses of the review process were to be charged to the consolidated fund without further appropriation. That according to section 30 of the Act, a Kenya Review Fund had been created and was to be administered by the Secretary, but the Government failed to provide the Commission with adequate funds or budget for civic education forcing the Commission to make all manner of excuses to justify its non-payment of the amount due to appellant.

According to the appellant, the issue for determination was whether the respondent could avail to itself the defence that there were procedural irregularities in procuring the contracts. But again, it argued, even if there were such defects, the respondent was still liable to pay for the services it had consumed on the footing of the doctrine of restitution. The appellant also contended that the judge erred in holding that the procedure under section 84 of the Constitution was not for debt collection. It was the view of the appellant that the current and the retired Constitutions provided for the procedure to enforce violation of constitutional rights, whether or not they involve debt collection and other claims. That rules 11 to 13 respectively of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006, "*Gicheru Rules*" provided the procedure for the enforcement of fundamental rights through a petition supported by an affidavit that should be lodged in the High Court. It relied on the authority of **Karume v The Speaker of the National Assembly** (2008)1 KLR 425 for the proposition that where the constitution or a statute provides for redress of a particular grievance, then that procedure ought to be followed. The appellant was of the view that whether or not an ordinary suit was necessary depended on the circumstances of the case. Counsel submitted that where sham defences or bare denials are mounted, courts should not allow a defendant to keep a plaintiff unnecessarily for too long, out of his dues and should enter judgment accordingly. Since according to the appellant there was no dispute that services were rendered, then the debt emanating therefrom ought to be paid since the word "*property*" as encapsulated in section 75 of the Constitution included a debt.

The appellant cited the case of **Craven Ellis v Cannons Ltd (1936)2KB 403** for its contention that a person is entitled to a reasonable remuneration in restitution or *quantum meruit* where work had been done or services rendered and in the case of the latter, where the amount payable is not stipulated in the contract. That the obligation to pay for the services was implied since the law applied to the respondent the same way as it applied to other ordinary litigants. The appellant was categorical that equity could not allow the respondent to invoke or hide behind the provisions of the Government Contracts Act or the Act to escape liability. It cited the case of **Chemelil Estates Ltd v Makongi (1967) EA 166** in which the court held that equity will not permit a party to take advantage of its own wrong doing and use a statute as an instrument of fraud. The appellant also cited the cases of **Gairy v The Attorney General of Trinidad & Tobago (2001)LRC 671** and **Ramanoop v AT of Trinidad & Tobago (2004) CLR** for the propositions that courts are mandated to do whatever it deemed appropriate for purposes of enforcing or securing the enforcement of fundamental human rights. On the authorities, it was submitted that the court had no limitations in granting remedies, which included enlarging old ones as well as inventing new ones, to secure and vindicate fundamental rights where they are breached.

In response through **Mr. Maurice Ogosso**, learned State Counsel, it was the case of the respondent that this Court ought to make a determination as to whether there was a valid contract between the parties upon which the appellant could found a claim. It contended that the appellant did not establish violation of its rights under sections 75 and 82 of the Constitution. According to it, the debt claimed by the appellant was disputed and could not form the kind of property as contemplated by section 75 of the Constitution. The respondent further submitted that there was need to establish whether, as a matter of fact, there had been arbitrary deprivation of property from the appellant, for the court to hold or find that the appellant's rights under section 75 of the Constitution had been violated. In the respondent's view such scenario would only arise if the Commission had barred the appellant its right to recover the said property, which was not the case here.

The respondent impugned the procedure through which the appellant approached the court. To the respondent, the appellant ought to have approached the court through an ordinary civil suit. This was especially so since the respondent maintained that the debt was disputed. It was further submitted that once the appellant successfully prosecuted the civil suit, obtained judgment and decree, the appellant would then use the judgment and decree as a basis for the enforcement proceedings under section 84 of the Constitution. For that proposition, the respondent also cited **Shah v The Attorney General of Ugan**da (supra) and **Gairy v The Attorney General of Grenada** (1970) EA 523. The respondent argued that even if the alleged debt formed part of the property contemplated by section 75 of the constitution, it was its view that the respondent had not made out a case of deprivation thereof. In any event, it argued that failure or refusal by the respondent or any other person to make good the debt cannot be equated to a deprivation or appropriation thereof.

The respondent also submitted that for discrimination to suffice against a party in accordance with section 82 of the retired Constitution, such party had to establish discrimination on the basis of the grounds then enumerated in the said provision which include race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex. That from the pleadings and its submissions, the appellant was unable to prove which of the discrimination grounds enumerated above, it hinged its claim since non-payment of the claim did not, in the respondent's view, amount to discrimination.

In response to the appellant's allegations that failure by the respondent to pay its claim while having paid other broadcasters was not only discriminatory but arbitrary in nature, the respondent supported the findings of the judge that even a purposive and broader interpretation of section 82 of the retired Constitution did not envisage additional modification so as to cater for other grounds such as arbitrariness as advanced by the appellant.

What then are the issues for determination in this appeal? We think that the issues should be whether the constitutional petition was the proper procedure to commence the appellant's claim in the High Court and whether indeed the appellant's fundamental rights were breached or violated.

Dealing with the first issue, we entirely agree with the appellant's submissions that it is settled law that where the constitution or a statute has prescribed a clear procedure for redress of any particular grievance, that procedure must be used and followed. That was the message of this Court in the case of **Karume v The Speaker of the National Assembly** (supra). The gravamen of the appellant's case was that its fundamental rights as guaranteed under the Constitution had been violated in terms of sections 75 and 82(2) thereof. The particulars being that, by the respondent refusing to pay or settle the balance of the contract sum due to the appellant for services rendered but paying other broadcasters who had executed similar services on the same terms as the appellant, the respondent had thereby discriminated against it. In other words, the refusal by the respondent to pay the appellant was arbitrary and discriminatory. Secondly, by the respondent's refusal to settle the claim, the appellant's right to the enjoyment of its property guaranteed by section 75 of the Constitution was infringed.

According to section 84 of the Constitution where a party sought redress for breach or violation of any of the rights enshrined therein, then such party had to petition the High Court for appropriate remedy. Read together with rules 11 and 12 of the Gicheru rules, the petition was to be supported by an affidavit. To the extent that the appellant felt that its claim was justifiable as an infringement of its fundamental rights under the constitution, we cannot fault it on the procedure adopted in lodging the claim.

However this was not the respondent's argument regarding the procedure adopted by the appellant regarding the prosecution of its claim. Nor did the judge fault the appellant for not following the Gicheru rules in filing and prosecuting its claim. The respondent's argument on procedure was simply that the claim being a contractual one, a constitutional petition was not the appropriate procedure for redress. That the claim was best handled as an ordinary civil suit. This position was informed by the fact that the debt was disputed, the legality of the contracts questioned, the ascertainment of the actual extent of services rendered and the amount payable. These matters could not be determined by the procedure adopted by the appellant by filing a constitutional petition instead of a simple civil suit. The constitutional procedure of proceeding by way of affidavit evidence was ill advised to ensure a just determination of the dispute. The dispute could only be determined justly through the ordinary procedure prescribed for resolution of civil disputes.

The judge agreed with the respondent's position when he held that;

> ***"29. In my view, the purpose of section 84 of the Constitution is to determine whether there has been an infringement or violation of rights secured by the Bill of Rights. It is not intended to be a substitute for the normal procedures for the determination of civil claims unless such determination is necessary and incidental to determination of the infringement, violation of or breach of fundamental rights and freedoms under the Constitution.....***
>
> ***My view is that the procedure provided under section 84 of the constitution is not a debt collection procedure....."***

The appellant having misinterpreted and or misunderstood the essence of the respondent's objection to the procedure and the judge's observation on the same, the appellant's submissions on this ground are clearly misplaced.

In our view the judge cannot be faulted for holding that a constitutional petition procedure adopted by the appellant in ventilating its claim was ill suited for the kind of claim it had laid before the trial court namely debt collection. We had occasion in the past to bemoan the current trend of filing constitutional petitions and references on matters or claims that have no iota or scintilla of any constitutional bearing. This trend of constitutionalising virtually everything, which is actually, in our view an abuse of the court process, needs to nibbed in the bud and frowned upon. We stated thus in the case of **Gabriel Mutava & 2 Others v Managing Director Kenya Ports Authority & Another [2016] eKLR**:

> "Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation. Indeed, in the case of **Harrikissoon v Attorney General [1980] AC 265**, the Privy Council held that:-
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> **'….The notion that whenever there is a failure by an organ of the Government or public authority or public officer to comply with the law necessarily entails the contravention of some fundamental freedom guaranteed to an individual by Chapter 6 of the Constitution is fallacious. The right to apply to the High Court under Section 6 of the Constitution for redress when any human right or fundamental freedom is, or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for normal proceedings for invoking judicial controls of administrative action…..'**

Again in the case of Re Application by **Bahadur [1986] LRC (Const) 297**, a case also from **Trinidad & Tobago**, the above Court held emphatically that:-

> **'……The Constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action and that where infringements of rights can found a claim under substantive law, the proper course would be to bring**

the claim under that law and not under the Constitution.'

In the South African case of **SA Naptosa & Others v Minister of Education Western Cape & others [2001] BLLR 338 at 395**, the Western Cape High Court observed:-

> **'…If an employer adopts a labour practice which is thought to be unfair, an aggrieved employee would in the first instance be obliged to seek remedy under the Labour Relations Act. If he or she finds no remedy under the act, the Act might come under scrutiny for not giving adequate protection to a constitutional right…'**

Back home and in a string of cases, this Court has severally held that where a fundamental right is regulated by legislation, such legislation, and not the underlying constitutional right, becomes the primary means for giving effect to the constitutional rights. In the case of **Daniel N. Mugendi v Kenyatta University & 3 Others [2013] eKLR**, this Court observed:-

> '……**Citing the case of** Alphonse Mwangemi Munga & Others vs African Safari Club Ltd [2008] eKLR, **the learned judge was persuaded that the Constitution had to be read together with other laws made by Parliament. It should not be so construed as to be disruptive of other laws in the administration of justice and that accordingly parties should make use of the normal procedures under the various laws to pursue their remedies instead of all of them moving to the constitutional court and making constitutional issues of what is not. With all the foregoing, the learned judge concluded that the claim placed before her by the appellant was based on employment - a matter that should have instead been taken to the Industrial Court which had constitutional and statutory jurisdiction over such matters and not the High Court in the form of a constitutional reference.**
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> **Having heard counsel submit on this issue of jurisdiction and also having gone over the nature of the pleadings as placed before the High Court as well as the manner in which that court found and determined the reference, we do not discern any fault on the part of the learned judge. We say so because the drafting, tenor and substance of the reference before her was essentially on breach of terms of employment. All this shines through the quotations (above) from the petition as regards the orders, and prayers stated. The appellant was hired by the 1st respondent as Deputy Vice Chancellor according to the Kenyatta University Act. In alleged breach of that employment contract, the 1st respondent allegedly sent him on compulsory leave, suspended him from duty and stopped his emoluments before finally firing him. So the appellant had gone before the High Court for declarations/orders that the compulsory leave was void, terminating his employment should be halted and he should be paid compensation. To my mind, this petition was essentially an employment claim that should have gone to the Industrial Court in accordance with** Article 162 (2) (a) **above, and the learned judge rightly declined jurisdiction over it**….'

Then there is the case of **Speaker of the National Assembly v James Njenga Karume [1992] eKLR**, where this Court again emphasized:-

> **'…In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.**…'

Of course, violations of constitutional rights may nonetheless be different, and more serious than the violations of statutory or contractual rights. There is no clear demarcation however, where one violation begins and ends, and when one violation should attract desperate remedies. In employment matters, such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except to the extent that the terms are contrary to the law; or have been superseded by statute. Certainly invoking the constitutional route in the circumstances of this case was misguided. The Constitution should not be turned into a thoroughfare for resolution of every kind of common grievance.

A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done. In the case of **Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others, Petition No. 14, 14A, B & C of 2014,** the Supreme Court delivered itself thus on the issue:-

> **'[256] The appellants in this case are seeking to invoke the** "principle of avoidance", **also known as** "constitutional avoidance"**. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided** on another basis**. In South Africa, in** S v. Mhlungu, 1995 (3) SA 867 (CC) **the Constitutional Court, Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:**
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> *"I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."*
>
> **[257]Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of** (**Ashwander v. Tennessee Valley Authority**, 297 U.S. 288, 347 (1936))."

We reiterate that this was not a proper case where the infringement of constitutional rights should have been involved. It was a simple case of breach of contract whose remedy lay elsewhere.

In his submissions the appellant has spoken of implied admissions of the claim on the basis of the legal opinion to the relevant ministry rendered by the respondent as well as the luring of the appellant into discontinuing its earlier petition as a basis of its claim that this was a fit

case for summary judgment. It placed reliance on the following cases; **Magunga v Pepco Distributers Limited (1987)2KAR 69**, doctrine of equity recognised in **Chemelil Estates Ltd v Makong**i (supra) that prevents a party as an engine to perpetrate a fraud against another and the concepts of restitution or *quantum meruit* as encapsulated in the case of **Graven Ellis vs Cannons Ltd (1936)2 KB 403**. If we may ask, where is the place of all the foregoing in a constitutional petition considering what is required to be pleaded in constitutional petitions?. The requirement is that constitutional petitions should be pleaded with reasonable precision and particularity. This court considered the requirement in the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR** and stated as follows:

> ***".....We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of, hearings, submissions and judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point..."***

See also **Anarita Karimi Njeru v The Republic (1976-1980) L R 1272**. In our view, it is precisely for the foregoing reasons that appellant's claim was best canvassed by way of an ordinary civil suit as correctly observed by the trial judge.

We now turn to consider whether the appellant's fundamental rights protected under section 75 of the Constitution were violated. That section provided *inter alia:*

> ***"75. Protection from deprivation of property.***
>
> ***(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied—***
>
> ***(a) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit; and***
>
> ***(b) the necessity therefor is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and***
>
> ***(c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.***
>
> ***(2) Every person having an interest or right in or over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court for—***
>
> ***(a) the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled; and***
>
> ***(b) the purpose of obtaining prompt payment of that compensation; Provided that if Parliament so provides in relation to a matter referred to in paragraph (a) the right of access shall be by way of appeal (exercisable as of right at the instance of the person having the right or interest in the property) from a tribunal or authority, other than the High Court, having jurisdiction under any law to determine that matter.***
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> ***(3) The Chief Justice may make rules with respect to the practice and procedure of the High Court or any other tribunal or authority in relation to the jurisdiction conferred on the High Court by subsection (2) or exercisable by the other tribunal or authority for the purposes of that subsection (including rules with respect to the time within which applications or appeals to the High Court or applications to the other tribunal or authority may be brought).***
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> *(4) and (5) (Deleted by 13 of 1977, s. 3.)*
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> ***(6) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) or (2)— (a) to the extent that the law in question makes provision for the taking of possession or acquisition of property—***
>
> ***(i) in satisfaction of any tax, duty, rate, cess or other impost;***
>
> ***(ii) by way of penalty for breach of the law, whether under civil process or after conviction of a criminal offence under the law of Kenya;***
>
> ***(iii) as an incident of a lease, tenancy, mortgage, charge, bill of sale, pledge or contract;***
>
> ***(iv) in the execution of judgments or orders of a court in proceedings for the determination of civil rights or obligations;***

(v) in circumstances where it is reasonably necessary so to do because the property is in a dangerous state or injurious to the health of human beings, animals or plants;

(vi) in consequence of any law with respect to the limitation of actions; or

(vii) for so long only as may be necessary for the purposes of an examination, investigation, trial or inquiry or, in the case of land, for the purposes of the carrying out thereon of work of soil conservation or the conservation of other natural resources or work relating to agricultural development or improvement (being work relating to the development or improvement that the owner or occupier of the land has been required, and has without reasonable excuse refused or failed, to carry out), and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society; or

(b) to the extent that the law in question makes provision for the taking of possession or acquisition of—

(i) enemy property;

(ii) property of a deceased person, a person of unsound mind or a person who has not attained the age of eighteen years, for the purpose of its administration for the benefit of the persons entitled to the beneficial interest therein;

(iii) property of a person adjudged bankrupt or a body corporate in liquidation, for the purpose of its administration for the benefit of the creditors of the bankrupt or body corporate and, subject thereto, for the benefit of other persons entitled to the beneficial interest in the property; or

(iv) property subject to a trust, for the purpose of vesting the property in persons appointed as trustees under the instrument creating the trust or by a court or, by order of a court, for the purpose of giving effect to the trust.

(7) Nothing contained in or done under the authority of an Act of Parliament shall be held to be inconsistent with or in contravention of this section to the extent that the Act in question makes provision for the compulsory taking possession of property or the compulsory acquisition of any interest in or right over property where that property, interest or right is vested in a body corporate, established by law for public purposes, in which no moneys have been invested other than moneys provided by Parliament."

As can readily be seen from the above content, the section was intended to protect the right to property. The first part of the section prohibits the compulsory acquisition of property of whatever description without satisfaction of conditions 75(1) (a), (b) and (c) above. In sum, these conditions speak to the acquisition or taking possession of the property which must be in the interest of the public, followed by prompt payment of compensation. The right to approach the High Court in the event of compulsory acquisition is reserved and cannot be taken away by statute. On the other hand section 75 (6) of the Constitution provides instances where acquisition of property contemplated by section 75(1) of the Constitution is not deemed to be inconsistent with the aforesaid section of the Constitution. These are acts of execution of a judgment and decree of the court, assuming the property is in satisfaction of tax, the law authorizing the taking over of enemy property or the property of the bankrupt.

The appellant's contention was that after discharging its obligations as contracted by the respondent, it demanded payment forthwith of the contract sum of Kshs 120,015,827/= out of which it was only paid Kshs 15,120,160/= leaving a balance of Kshs 104,895,667/= which remains unsatisfied to date. This is the amount, simply put, that the appellant claimed in its petition that it was arbitrarily deprived by the respondent thus breaching its right to property. In the alternative, it argued that the respondent was still liable to pay the amount on the footing of the doctrine of restitution and or *quantum meruit*. After all, the respondent had not denied that the appellant provided the services contracted and had only been partially paid. Indeed the judge held that the services had been rendered. The word property under the section is undisputed by both parties that it encompasses a debt or monies owed. The judge also came to the same conclusion and from where we sit, that was a proper interpretation. In countering the appellant's assertion, the respondent took the position that much as the appellant's claim was actionable, however it was not the type of claim contemplated under section 75 of the Constitution. In failing to find for the appellant, the judge delivered himself thus:

"..... Even if I were to find that debt due to the petitioner is property, I hold that the mere refusal or failure by the State to pay a debt does not amount (to) compulsory acquisition of property as contemplated under section 75 of the Constitution. Deprivation, that is the taking of possession or acquisition, would only arise if the State barred the petitioner's right to recover the debt. In this case the State has not impaired the petitioner's right to a judgment in its favour determined by a court of law....." *(sic).*

We do not see anything wrong with the judge's summation above. In our view, failure or refusal to make good a debt cannot be equated to a deprivation of property or appropriation thereof. In other words, non payment of a debt due does not amount to deprivation of property as argued by the appellant. Nor can it be equated to compulsory acquisition of property as again submitted by the appellant. Such deprivation would only be justified, if, for instance, the respondent arbitrarily barred the appellant from claiming or pursuing the claim. As it were, at the time of filing the petition the debt was still alive and the appellant was entitled to invoke the relevant legally tenable procedure to secure a determination on account of the law provided for that purpose. The respondent had not failed to provide a forum or remedy for such determination or that it had impaired or placed roadblocks to the appellant's right to seek redress under the ordinary and usual legal process. Further, as correctly submitted by the respondent, for a debt such as one owed to the appellant to be property contemplated under section 75 of the Constitution, the same had to be either undisputed or be in the nature of a judgment and or decree following legal adjudication by a court of competent jurisdiction. The claim had to form part of enforcement proceedings. This was the position enunciated by the two cases cited by both parties in this appeal; **Shah v The Attorney General of Uganda** (supra) and **Gairy v The Attorney General of Grenada** (supra).

On the whole we are of the firm view that the appellant did not prove the infringement of its right to property. Consequently we are in agreement with the judge's finding that there was no infringement of the appellant's right to property under section 75 of the Constitution.

As for discrimination, the appellant anchored its claim on the basis that it was treated arbitrarily and in a discriminatory manner when other broadcasters contracted with it at the same time for the self same work and on similar terms were paid in full but for the appellant whose balance remains unpaid to date. The discrimination alleged was based on the provisions of section 82(2) of the Constitution which provides as follows:

> ***"In this section the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description".***

A plain reading of this section leads us to conclude, just like the trial judge and as already observed above, that the discrimination contemplated has to be based on race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex. From the record, it is plain that the appellant was unable to demonstrate against which of the above discrimination grounds its allegations were based. In any event and as already stated, non-settlement of the alleged debt does not amount to discrimination and cannot be hinged on any of the above discriminatory grounds. See again the case of **Shah Devshi & Company Ltd. V Transport Licensing Board** (supra). In a nutshell the appellant being a corporate and not a natural person did not bring itself within the contemplation of any of the specified criteria under section 82 (2)of the Constitution. The judge cannot therefore be faulted for so holding.

As a parting shot, **Dr. Kamau Kuria** urged us to adopt a broad and purposive interpretation of the said provisions of the Constitution, with particular regard to the question of equality before the law and arbitrariness. For this submission, the appellant sought refuge in the Supreme Court of India decision in **Sinti Maneka Gandhi v Union of India and another, Writ Petition No. 231 of 1997**. Counsel pushed us to conclude that the appellant's fundamental rights protected as to deprivation of property, discrimination and arbitrariness were violated. Further, that if we were to find that the prayers sought in the petition are inadequate or not grantable, we should be able to rise to occasion and fashion out appropriate remedies. He supported this submission by referring to the cases of **Gairy v The Attorney General of Grenada** and **Tobago and Ramanoop v The Attorney General of Trinidad and Tobago** (all supra). We have not lost sight of the fact that the appellant made the same submissions before the High Court that were considered and rejected in the following terms;

> ***" .....42. Counsel for the petitioner asked me to find that the freedom from discrimination under section 82 of the constitution encapsulates the prohibition against arbitrariness and capricious abuse of public power. He cited the case of Maneka v Union of India (supra) in respect of similar provisions under the Constitution of India.*** **Article 14 of the Constitution of India states;** *"The State shall not deny person equality before the law or the equal protection of the laws within the territory of India...."* ***It is clear that unlike our section 82, the Indian Constitution has an equality clause that enabled the court to adopt the broad interpretation of equality to include a prohibition against arbitrariness and capricious abuse.***
>
> ***43. What l am called upon to do is to expound (sic) the provisions of section 82 and even if l am minded to adopt a broad and purposive interpretation, the words of section 82 do not permit a broader interpretation as suggested by counsel for the petitioner...".***

On our part, we go further and add that the words do not permit the fashioning of other remedies. We therefore have no hesitation whatsoever in holding that the judge cannot be faulted in his reasoning. That is to say, any purposive and broader interpretation of the impugned constitutional provisions do not envisage additional modifications so as to cater for other grounds such as the ones urged by the appellants before us.

The upshot of all we have been saying is that this appeal lacks merit and is accordingly dismissed.

We make no orders as costs.

Dated and delivered at Nairobi this 26th day of October, 2018.

P. N. WAKI

……

JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

ASIKE MAKHANDIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR