



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & MURGOR, JJ,A)

CIVIL APPEAL NO. 296 OF 2014

BETWEEN

BAOBAB BEACH RESORT AND SPA LIMITED.....APPELLANT

AND

1. DUNCAN MURIUKI KAGUURU

2. DESTINATION AFRICA DMC LIMITED.....RESPONDENTS

(Appeal from Ruling and Order of the High Court at Nairobi

(Constitutional & Human rights Division)

(Mumbi Ngugi, J.) delivered 12th June 2013)

in

Constitutional Petition No. 223 of 2012)

JUDGMENT OF THE COURT

Central to this appeal is the question whether the High Court Constitutional & Judicial Review Division has jurisdiction to determine the dispute on the basis that it was a matter that ought to be determined as a civil suit or under the National Cohesion and Integration Act (NCIA), but not by way of a constitutional petition.

The appeal arose from a ruling and order made on 12th June 2014, that dismissed a preliminary objection filed on 2nd May 2016 by *the appellant, Baobab Beach Resort and Spa Limited* that sought to have a constitutional petition filed by *the 1st respondent, Duncan Muriuki Kaguuru (Duncan)* and *the 2nd respondent Destination Africa DMC Limited (DMC)* dismissed with costs.

The preliminary objection was premised on the grounds that;

a. The fundamental rights and freedoms set out in the Bill of rights applied vertically and not horizontally;

b. The Respondents' prayers for relief as set out in paragraphs (a) and (c) of the petition constitute matters as incapable of being entertained by way of a constitutional petition;

c. The Respondents' claim for relief as set out in paragraphs (a) and (c) of the petition for alleged discrimination on the ground of race, colour, birth and/or ethnic or social origin are matters for determination by the National Cohesion & Integration Commission ("the NCIC") and not by way of a constitutional petition;

d. The Respondents claim for relief, set out in the prayers at paragraph (b), (d) and

(e) of the petition constitute matters involving the tort of defamation and are capable of being entertained by a civil suit and not by way of a constitutional petition; and

e. The petition is an abuse of the court process.

The background to the dispute between the appellant, which operates a hotel resort in Diani, Kwale County, and Duncan together with the 2nd respondent, which carries on the business of tour operators, is set out in a petition filed on 28th May 2012. In their petition, the respondents sought a declaration that their fundamental rights to equality and freedom from discrimination on grounds of race, colour, birth, and ethnic and social origin under **Article 27 of the Constitution** had been violated; an injunction restraining the appellant from further publication of defamatory words; compensation in general damages for the violation of their rights; exemplary, aggravative and punitive damages for defamation and compensation for loss of business.

It was Duncan's case that on 7th February 2012 at about 7.30 am whilst at the gate of the appellant's hotel, where he went to pick guests, he was denied entry into the hotel precincts by the security personnel due to the hotel management's policy to exclude small tour operators. Duncan complained that, the security personnel selectively and discriminatorily allowed other persons to enter the hotel on the grounds of race, colour, birth, ethnic and social origin.

Upon returning to the hotel two days later to drop off his guests, Duncan stated that he was further humiliated when he found that his complaint was considered by the appellant's senior management as a "nuisance at the gate". It was on this basis that Duncan claimed that he was discriminated against by the appellant on grounds of race, which violated his rights and freedom of movement contrary to the stipulations of **Article 27 of the Constitution**.

Duncan's further complained that following the incident, the appellant went on to defame him by falsely and maliciously publishing articles on the social and local print media insinuating that he was a charlatan, a fraudster and a malicious person, which exposed him to ridicule, embarrassment and distress, as well as harming his business.

After considering the parties pleadings and submissions, the trial court dismissed the Preliminary objection for reasons that, the Constitution made it clear that the Bill of Rights was applicable horizontally and that the Constitutional & Judicial Review Division of the High Court and not the NCIC was the proper forum for the determination of the claims of discrimination and defamation.

The appellant was dissatisfied with the High Court's decision and appealed to this Court on grounds that the learned judge was wrong in finding that the Constitutional & Judicial Review Division of the High Court had the exclusive jurisdiction to hear and determine any Constitutional Petition alleging a violation or infringement of fundamental rights under the Constitution 2010; for wrongly concluding that a constitutional claim for breach of **Article 27 (4) and (5) of the Constitution** could be applied by one private citizen against a fellow private citizen, yet the remedy lay in either private law or under some other legal provision; for erroneously finding that fundamental rights and freedoms apply vertically and horizontally under the Bill of Rights; for adopting a narrow and sophistic application of **sections 2,3, and 25 of the National Cohesion and Integration Act No. 12 of 2008 (NCIA)** and for failing to appreciate the objectives and the powers of the NCIC; for concluding that **section 25** of the NCIA could not oust the

jurisdiction of the High Court and for holding that neither the NCIA nor the NCIC offered the primary, appropriate and effective remedy to a party whose rights have been violated; in failing to appreciate that the prayers for reliefs were limited to allegations of racial discrimination which were matters to be determined by the NCIC, and that the claim for defamation should be canvassed by way of civil suit.

The appellant filed written submissions that were highlighted by learned counsel **Mr. Inamdar**. Counsel submitted that the dispute involved allegations of racial discrimination against the appellant which arose from the denial of entry of the respondent into the appellant's private hotel, and therefore a claim by one private citizen against another; that under the Constitution, the Bill of Rights is not applicable horizontally between private citizens. Counsel argued that several High Court cases were supportive of the proposition that the Bill of Rights was not applicable horizontally- see **Kenya Bus Services Limited & Others vs The Attorney General & 2 Others [2005] eKLR**; **Uhuru Kenyatta vs Nairobi Star Publications Limited [2013] eKLR** and **Mwangi Stephen Mureithi vs Danial Arap Toroitich Moi [2011] eKLR**, whilst other cases and academic writings supported a contrary position. Counsel asserted that on account of the uncertainty in the law, this Court should finally settle the question of whether the Bill of Rights was applicable horizontally.

Counsel further argued that the preliminary objection was on the basis that the petition was before the wrong forum as the dispute centered on allegations of defamation and not racial discrimination and that the remedies available to the respondent were more appropriate and effectively dealt with under the civil law jurisdiction. Counsel cited the case of **Jemimah Wambui Ikere vs The Standard Group Limited & another [2013] eKLR** where a defamation case filed as constitutional petition was struck out as it ought to have been filed as a civil suit.

Mr. Nderitu, learned counsel for the respondents highlighted the written submission filed on 21st February 2017, and argued that the petition was concerned with allegations of racial discrimination by the appellant against the respondents followed by the appellant's defamatory actions, hence the need to raise the two causes of action in the same petition. Counsel further argued that the Constitution did not bar the horizontal application of the Bill of Rights; that in recognition of this, **Article 27 (5) of the Constitution** expressly stipulated that a person shall not discriminate directly or indirectly against another person; that the appellant though a private hotel is a person for this purpose, and that unlike in the case of a private dwelling, as a public facility it had a duty to allow entry to all persons engaged in the conduct legitimate business.

Concerning NCIC as a forum to determine racial violations, counsel asserted that as the petition centered on the allegations of discrimination, to which the allegation of defamation was ancillary, it was not an appropriate forum, as it did not have the capacity or powers to award damages.

In reply, Mr. Inamdar asserted that the issues in the preliminary objection turned on a pure point of law which was whether the Constitutional Court had jurisdiction to hear the petition on the claims for discrimination and defamation, given that the NCIC and civil law provided an alternative remedy.

We have considered the parties' pleadings and submissions and are of the view that the question whether the Constitutional & Judicial Review Division, which is simply the High Court had jurisdiction to determine the constitutional dispute turning on two main questions;- whether claims concerning violations of rights and fundamental freedoms can be made horizontally by one private citizen against another, and, whether the suit should have been brought as a constitutional petition or a civil suit or indeed whether it should have been heard and determined by the NCIC as the alternative remedy.

We are mindful that this appeal arises from a preliminary objection raised by the appellant. In the case of **Mukisa Biscuits Manufacturing Co Ltd vs West End Distributors (1969) EA 696**, Law, JA and Sir Charles Newbold P., outlined the elements comprising a preliminary objection. At page 700, Law, JA stated that:

“...a ‘preliminary objection’ consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of

the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Sir Charles Newbold P. added as follows at page 701:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

Therefore the preliminary objection raised in this case and touching on a pure point of law was concerned with the question of whether the Constitutional & Judicial Review Division had jurisdiction to determine the parties dispute.

Beginning with the question of whether violations of rights and fundamental freedoms are applicable horizontally, the appellant has argued that following the enactment of the Constitution 2010, several decisions of the High Court have resulted in uncertainty on the issue. Counsel cited the cases of *Kenya Bus Services Limited vs The Attorney General (supra)* and *Uhuru Muigai Kenyatta vs Nairobi Star Publications Limited (supra)* as being responsible for this uncertainty.

In addressing the issue of horizontal application of the Bill of Rights, the trial court (Mumbi Ngugi, J) stated thus;

“I believe that the intention of the framers of the Constitution and the people of Kenya in enacting the Constitution with the very comprehensive Bill of Rights was that all persons, not just the state, would be bound not to violate the fundamental rights and freedoms of others, and in appropriate cases, a private individual or entity could be held liable for violation of the fundamental rights of another individual”.

The court was of the view that to hold otherwise would be to act contrary to the intention of the Constitution in making very clear and specific provisions that the Bill of Rights would be binding on the state and all persons, and concluded that;

“While the state has a primary duty with regard to the protection and promotion of fundamental rights and freedoms, which include the duty to ensure that policies, systems and processes are in place for implementation and protection of fundamental rights, the Constitution also provides for claims to be made against individual persons or corporate entities with respect to violation of these rights, and appropriate orders made against them”.

Whether the Bill of Rights can be applied horizontally against private persons is a matter that will require a consideration of the relevant provisions of the Constitution. **Article 22 (1)** provides;

“Every person has the right to institute court proceedings claiming that a right or a fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”

For the purposes of the instant case, the concerned provisions under the Bill of Rights are **Article 27 (4)** and **(5)** of *the Constitution* which provide that;

“(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth”.

“(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified in clause (4)”.

When **Articles 22 (1)** and **27 (4) and (5)** are read in conjunction with **Article 260** which defines a “*person*” as, a company, association or other body of persons whether incorporated or unincorporated, there can be no question that these provisions must be construed to mean that since a person cannot discriminate against another person, and where such discrimination occurs, such person can enforce the provisions of the Bill of Rights against such other person. Numerous authorities support this position.

For instance, the issue was initially considered by Supreme Court and the law on horizontal application of the provisions of the Constitution set out in the case of **Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others, [2012] eKLR** which stated;

“At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods.”

This was followed by a decision of the Constitutional Division of the High Court where the horizontal application of the Bill of Rights was considered in the case of **Rose Wangui Mambo and 2 Others vs Limuru Country Club and 17 others [2014] eKLR**, in which the court asserted thus;

“To accede to the Respondents’ proposition that private entities are insulated from the constitutional duty to respect and uphold fundamental rights, to hold that private entities are completely shrouded by their private cloak from the Court’s scrutiny is, we believe, to reverse the intention of the framers of the Constitution. It is to strip individual Kenyans of the very constitutional protection that the Constitution of Kenya 2010 meant jealously to guard and leave them exposed and vulnerable in private dealings. This would effectively render the constitutional protections of little or no practical value to the very persons designed to enjoy its protections and would, in our view, to abdication of this Court’s primary responsibility conferred upon it by the people of Kenya.”

This position was upheld in the case of **BA and another vs Standard Group Limited and 2 Others [2016] eKLR** where this Court also stated;

“One of the key differences between the Bill of Rights in the current Constitution and the Bill of Rights in the repealed Constitution is that the repealed Bill of Rights prohibited discrimination by persons acting in an official capacity and not by any person generally as is the case in the current Bill of Rights. The current Bill of Rights application is both horizontal and vertical whereas the former was to a large extent vertical...”

A review of these and other authorities makes it cognitively clear that, unlike the retired constitution, the provisions of the current Constitution are to be generally applied both vertically and horizontally. More particularly, in so far as the Bill of Rights was enacted to provide guarantees against the violation of the constitutional rights of persons, its application is required to be invoked, either directly or indirectly against another person, whether a person, company, association or other body of persons whether incorporated or unincorporated or against any public entity so as to give full effect to the aspirations of the Kenyan people, and the provisions of the Constitution, so as to safeguard against actions by persons who indiscriminately choose to trample upon the rights of others.

However, if we understand the appellant’s complaint correctly, the controversy seems to be that there is no consensus amongst courts on the manner of horizontal application of the Bill of Right against private persons and further; that this Court should ascertain when and in what circumstances the provisions of the Constitution should be invoked horizontally against private citizens.

According to the appellant, this uncertainty was to manifest itself in case of **Kenya Bus Services Limited and 2 Others vs The Attorney General and 2 Others (supra)**, wherein the case of **Uhuru Muigai Kenyatta vs Nairobi Star Publications Limited (supra)** , Lenaola J stated thus;

“The law on this subject is quite clear in my view. As Nyamu, J stated in Kenya Bus services Ltd and 2 others vs the attorney General and 2 Others (2005) eKLR (page 44 Volume 2)... fundamental right(s) are contained in the Constitution and are principally against the State because the Constitution’s functions is to define what constitutes Government and it regulated the relationship between the Government and the governed. On the other hand the rights of individual interests are taken care of in the province of private law and are invariable addressed as such”.

And recently in the case of **Satrose Ayuma & 11 others vs Registered Trustees of Kenya Railway Staff Retirement benefits Scheme [2013] eKLR**, the High Court stated that though the issue whether the Bill of Rights applies horizontally or vertically is beyond peradventure, the real issue was whether and to what extent the Bill of Rights should apply to private relationship, and that ***“...the court will be reluctant to apply the Constitution directly to horizontal relationships where specific legislation exists to regulate the private relations in question. In other cases, the mechanisms provided for enforcement are simply inadequate to effectuate the constitutional guarantee even though there exists private law regulating a matter within the scope of the application of the constitutional right or fundamental freedoms. In such cases the court may proceed to apply the provisions of the constitutional directly.”***

Also highlighted by the appellant was the case of **Ngugi vs Nairobi Hospital and 3 Others (supra)**, where Majanja J, was construed to have questioned ***“...whether and to what extent the Bill of Rights is to apply to private relationships...”***

Whilst on the other side of the spectrum this position can be contrasted with the case of **Mwangi Stephen Mureithi vs Daniel Toroitich Arap Moi [2011] eKLR** where Gacheche J stated;

“The rigid position that the human rights applies vertically is being overtaken by the emerging trends in the development of human rights law and litigation. We can no longer afford to bury our heads in the sand for we must appreciate the reality, which is that private individuals and bodies such as clubs and companies wield great power over the individual citizenry, who would as of necessity be protected from such non-State bodies who may for instance discriminate unfairly, or cause other Constitutional breaches. The emerging jurisprudence in Kenya seems now to lean towards the South African stand, and that there are instances when the non- State actors can be and have been held liable for breach of fundamental rights...”

We will begin by observing that, so far as the case of **Kenya Bus Services Limited and 2 Others vs The Attorney General and 2 Others (supra)**, is concerned, the decision was rendered in 2005 under the regime of the repealed constitution where claims under the Bill of Rights were restricted to being made vertically against the State. With the promulgation of the Constitution 2010 a distinct shift has been made from the position held in that decision, such that claims under the Bill of Rights can now be made both vertically and horizontally.

Furthermore, whether a claim should invoke the provisions of the Constitution or be commenced as a civil suit under some other legislation is a matter that requires to be determined on the basis of its own particular set of facts.— See **Jemimah Wambui Ikere (supra)**. Needless to say, the starting point would be to ascertain whether the dispute is one of a constitutional or civil nature. In the case of **Gabriel Mutava & 2 Others vs Managing Director Kenya Ports Authority & Another [2016] eKLR** this Court emphasized that;

“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.”

We are in entire agreement with the sentiments expressed by this Court and would add that if a civil or criminal matter can be decided on the basis of existing legislation or an alternative remedy without invoking the constitutional provisions as the foundation of the suit, then such alternative course of action should in such cases be adopted instead.

But this notwithstanding, the respondents' petition is stated to be grounded on an allegation of violation of their fundamental rights and freedom on the basis of race, and a further claim for defamation or vice versa. **Articles 27 (4) and (5)** expressly provides that "...person shall not discriminate directly or indirectly against another person...", and since there is no alternative remedy for redress of such a violation, it follows that the respondents were entitled to bring a constitutional claim for racial discrimination against the appellant. Hence the learned judge's finding and with which we agree, the complaint of racial discrimination was a "*constitutional issue worthy of consideration*".

Turning to whether the respondent should have filed a civil claim or a claim for racial discrimination with the NCIC, the appellant has argued that since the principal complaint was founded on defamation and damages in relation thereto, rather than for racial discrimination, the matter would be better dealt with as a claim under tort in the civil jurisdiction as in the case of ***Uhuru Muigai Kenyatta vs Nairobi Star Publications Limited (supra)*** where a defamation suit filed as a constitutional petition was struck out, and not as a constitutional petition; further that the claims for alleged racial discrimination are matters that ought to have been determined by the NCIC.

Before addressing the issue, it is important to appreciate that the Constitutional & Judicial Review Division is not a stand-alone court but a division of the High Court. In the Court of Appeal case of ***Peter Nganga Muiruri vs Credit Bank Limited & Another, Civil Appeal No. 203 of 2006*** the court expressed itself thus:

"There is no provision in the Constitution, which establishes what, is referred to as Constitution Court. In Kenya we have a division of the High Court at Nairobi referred to as "Constitutional and Judicial Review" Division which is not an independent court but merely a division of the High Court. The wording of Article 165 of the Constitution which donates the power to the High Court to deal with questions of interpretation of Articles of the Constitution or parts thereof does not talk about a Constitution Court but talks about the High Court... with regard to the protective provisions of the Constitution, it does not in any of its Articles talk about the Constitutional Court but instead talks about an application being made to the High Court..."

And in the case of ***Rachael Muaka vs Kahawa Sukari Ltd & Another [2010] eKLR*** it was stated that: -

"The High Court of Kenya is only one court with unlimited original jurisdiction in civil and criminal matters, and such jurisdiction and powers as may be conferred on it by the Constitution or any other law. The divisions in High Court are purely administrative and do not erode the Constitutional jurisdiction conferred on the court. This court is therefore empowered to handle, hear and determine this matter."

Bearing this in mind, in determining whether the Constitutional & Judicial Review Division was the proper forum for the determination of the petition, the learned judge had this to say;

"...the principal issue before the court, and what gave rise to the subsequent articles published by the respondent that give (sic) rise to the claim in defamation, is the alleged act of discrimination by the respondent on the basis of race. I take the view that in the circumstances of this case, the issue of discrimination which is the basis of the petitioners' claim merit consideration and adjudication."

There is no question that the petition discloses two causes of action, one being an allegation of racial discrimination, and the other for defamation or vice versa. As stated above, whether or not the petition is one of a constitutional or civil jurisdiction, orientation is a matter of fact to be determined by the court below. Therefore, to avoid preempting that decision, what we can say at this point is that, the conflation

of both causes of action into one petition, does not preclude the Constitutional & Judicial Review court, a division of the High Court, from hearing it. Prudence demands that, instead of the respondents resorting a multiplicity of suits, both causes of action are better heard and determined together in one suit in the High Court.

On the related issue of whether the respondent ought to have filed the suit before the NCIC. The learned judge's response to this was that it would be "...*totally fallacious to hold the view that matters alleging discrimination on any of the grounds prohibited by Article 27 (4) of the Constitution would fall solely within the mandate of the NCIC...*". The court was not convinced that the NCIC mandate was sufficient to usurp the jurisdiction of the High Court.

The NCIC's mandate is established under the Act, and is to address inter-ethnic conflicts following the 2007 post-election violence and to facilitate and promote equal opportunity, good relations, harmony and peaceful co-existence between persons of the different ethnic and racial communities in Kenya and to advise the Government of all aspects thereof.

The Constitution mandated Parliament to enact legislation to address discrimination on ethnic and racial grounds, and pursuant to **Article 27 (6)**, the NCIA was enacted. The preamble to the NCIA describes it as "*an Act of Parliament to encourage National cohesion and integration by outlawing discrimination on ethnic grounds; to provide for the establishment, powers and functions of the NCIC*".

Under **section 3** of the NCIA ethnic discrimination is defined as where a person discriminates against another person if;

"(a) on ethnic grounds treats that other person less favourably than he treats or would treat other persons

(b)..."

The objects and powers of the NCIC are clearly set out in **section 25** of the NCIA, and include powers to investigate complaints of ethnic or racial discrimination and to make recommendations on the remedial measures to be taken to the Attorney General, the Human Rights Commission and other relevant authorities where such complaints are valid, as well as powers to institute its own investigation or on request from any institution, office, or person any issue affecting ethnic or race relations and to make recommendations on penalties to be imposed on any person for any breach of the provisions of the Constitution or of any law dealing with ethnicity.

On the other hand, under **Article 165 (3) of the Constitution** sets out the jurisdiction of the High Court as follows;

"Subject to Clause (5) the High Court shall have;

a. Unlimited original jurisdiction in Criminal and Civil matters.

b. Jurisdiction to determine the question whether a right or fundamental freedom in Bill of Rights has been denied, violated, infringed or threatened.

c. ..."

In addition, **Article 23 (1)** specifies that the High Court has jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

In the case of **Albert Chaurembo Mumbo & 7 others vs Maurice M. Munyao & 148 others [2016] eKLR** this Court observed;

“...under Article 3 of the Constitution, every person has an obligation to respect, uphold and defend the Constitution while Article 10 (1) provides that national values and principles of governance bind all public officers whenever they interpret the Constitution or make public policy decisions. The CEO of RBA and the Appeals Tribunal are public officers and or state organs and are bound to implement the Constitution. We are of the considered view that the jurisdiction of the High Court and or the Employment and Labour Relations Court to hear and determine the present dispute between the parties cannot be premised on the contention that the respondents’ claim raises issues of violation of the constitutional right to property and consequently the CEO and Appeals Tribunal have no jurisdiction to consider constitutional violation of rights. It is our view that violation of constitutional rights can be raised in any forum that is competent to hear and determine a dispute between parties and such forum is bound by the Constitution in its interpretation and application of constitutional provisions and individual rights.” (emphasis ours)

Similarly, NCIC is charged under **Article 27** of the Constitution with the responsibility of investigating and determining complaints of discrimination on racial and ethnic grounds, which mandate it is compelled to carry out in accordance with the provisions of the Constitution. On this basis, we consider that the NCIC has the jurisdiction and the proficiencies necessary to interpret and decide upon cases concerning racial and ethnic violations, and as such, qualifies as yet another forum where individuals may seek appropriate reliefs in the event of violation of such rights.

But this notwithstanding, it cannot be gainsaid that the Constitution, as the supreme law, has nevertheless bestowed the High Court with a superior jurisdiction to determine constitutional, as well as civil and criminal disputes, together with supervisory, interpretive and enforcement powers. In the face of this dictate and contrary to the appellant’s assertions, the NCIC cannot be said to have the sole and exclusive jurisdiction over matters of racial discrimination. Essentially, there is no provision in the Constitution that ousts the High Court from determining such matters, not least **section 25** of the NCA which merely provides the NCIC with investigative powers over complaints of ethnic or racial discrimination, and the ability to make recommendations to the Attorney General, the Human Rights Commission and other relevant authorities on remedial measures and penalties to be imposed for breaches of the provisions of the Constitution or of any law dealing with ethnicity. We would add that the NCA does not provide it with powers or abilities to grant reliefs, particularly those sought by the respondents in the instant case.

As the NCIC has no powers to hear civil suits, unlike the High Court, and given that the petition herein comprises two combined issues, one being a claim of a civil nature, we find that the circumstances of the case would in any event militate against an NCIC intervention.

That said, we find that the High Court was right in reaching the conclusion that the petition was properly before it, and that the respondents were entitled to, and had the freedom to select the High Court Constitutional & Judicial Review Division as the forum to file their petition and pursue appropriate reliefs.

We have said enough. The appeal is without merit, and is dismissed with costs to the respondents.

It is so ordered.

Dated and delivered at Nairobi this 10th day of November, 2017.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR