IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, OUKO, KIAGE, M'INOTI & J.MOHAMMED, JJA.)

CIVIL APPEAL NO. 9 OF 2013

BETWEEN

RANDU NZAI RUWA & 2 OTHERS ….....……APPELLANTS

AND

1. THE SECRETARY, THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

2. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSON

3. THE CLERK TO THE NATIONAL ASSEMBLY

4. THE REGISTRAR OF SOCIETIES

5. THE COMMISSION ON REVENUE ALLOCATION

6. THE MINISTER FOR TRANSPORT

7. THE MINISTER FOR ENERGY

8. THE MINISTER FOR ENVIRONMENT AND MINERAL RESOURCES

9. THE MINISTER FOR PLANNING

10. THE ATTORNEY GENERAL ….....RESPONDENTS

(*Being an appeal from a Ruling of the High Court of Kenya at Mombasa (Mwera, Muriithi, Nzioka, Tuiyot & Mwongo, JJ.) dated 20th December, 2012*

in

Constitutional Application No.6 of 2012)

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JUDGMENT OF OUKO, JA.

The appellants, pursuant to the various provisions of the Constitution of Kenya, the Universal Declaration of Human Rights and the United Nations

Declaration of the Rights of Indigenous People, took out an originating notice of motion alleging a plethora of violations of their constitutional rights and fundamental freedoms by the respondents. The appellants, who described themselves as former officials of the defunct Mombasa Republican Council (MRC) representing the interests of the residents and stakeholders in the six counties (Mombasa, Kwale, Kilifi, Tana River, Lamu and Taita Taveta) of the former Coast Province, complained, *interalia* that the succession of the defunct Interim Independent Boundaries Review Commission (IIBRC) by the Independent Electoral and Boundaries Commission (IEBC) violated the Constitution; and that the review of names, boundaries, constituencies and wards would disenfranchise the appellants as they did not participate in the process leading to their creation.

In view of these and other grievances the appellants sought several declaratory and injunctive reliefs. For example, they asked the court to declare that if the general elections were to be conducted on the basis of the new names and boundaries of constituencies and wards they would not to be free and fair; that the executive authority vested in the Coalition Government, was transitional in nature and did not grant it authority to divest the Republic of Kenya of its public land, property and/or assets; that all acts of disposal or divestiture of public land, property or assets during the term of the Coalition Government, i.e. between 28th February, 2008 until the first elections under the 2010 Constitution, were null and void; that the privatization of Government parastatals in the absence of consultations with the business community, stakeholders and residents of the counties within which such parastatals are found, was in contravention of the Constitution. As such they further prayed that the respondents be prohibited from initiating, proceeding with or concluding the privatization of the Port of Mombasa until the provisions of the Constitution were fully observed and residents fully involved. They prayed for an order of a mandatory injunction to compel the IEBC to facilitate and conduct a referendum on the question of self-determination of the indigenous residents in the coastal region.

Two months later, after filing the originating notice of motion, on 10th April 2012 the appellants filed a notice of motion under order **40 rules 1 and 2** of the Civil Procedure Rules, again seeking numerous reliefs, including an order of injunction to restrain the 1st and 2nd respondents from conducting elections in the aforementioned, and publishing any notice regarding all elective seats in the six counties, or receiving any nominations of candidates for all the elective positions in the six counties, until the hearing and determination of the originating notice of motion. The appellants, in addition sought to restrain the 6th, 7th 8th and 9th respondents from taking any steps to dispose of any public land, property and assets, from privatizing any Government parastatal in any of the six counties or disposing of, or exploring or leasing minerals, oil and other related assets until the hearing and determination of the main motion. Some of public properties and assets identified in the application are the Kenya Ports Authority, the Kenya Maritime Authority, and the Kenya Marine and Fisheries Authority.

The appellants, we reiterate explained that they brought the applications on behalf of the people living in the coastal region as former officials of the defunct MRC; and that the motions were brought by them in the capacity provided for under **Articles 22 (2) (a) (b) and (c)** of the Constitution. Before the originating notice of motion or the interlocutory motion could be heard, all the respondents, save for the 3rd respondent, who had been struck out as no cause of action was disclosed against him, took out two applications and a notice of preliminary objection, praying that both the originating notice of motion and the interlocutory motion be struck out principally because they were brought by persons who were members of and representing a prescribed organization, the MRC; that the originating notice of motion raised various causes of action which could not be heard in one application; that some of the issues raised in the originating notice of motion were *res judicata* while others were *sub- judice*; and that the motion was scandalous, frivolous, vexatious and amounted to an abuse of the court process. The appellants

opposed the two applications in their grounds of opposition insisting that the two applications for striking out as well as the notice of preliminary objection lacked merit.

A five–judge bench empanelled by the Chief Justice heard arguments on the applications for striking out of the two motions filed by the appellants and isolated the following six issues for determination;

> ***"1. Whether the Respondents? motions are irregular and incompetent.***
>
> ***2. Whether the Originating Motion raises issues that are sub judice and res judicata.***
>
> ***3. Whether the Applicants? motions are frivolous, vexatious and an abuse of process of the court.***
>
> ***4. Whether the Applicants? motions are incompetent on account of their multifarious breadth and nature of the causes of action underlying them.***
>
> ***5.Whether the Applicants have the capacity and legal standing to bring their Motions before the court.***
>
> ***6. Whether the protection of Constitutional rights is available only to individuals and not to groups on a collective basis."***

The appellants had argued that the applications to strike out their motions were irregular and incompetent for the reasons that they were instituted before the respondents had filed their replies to the originating notice of motion and the interlocutory motion, without which, and by dint of **order 2 rule 11 of Civil Procedure Rules** they (the respondents) were deemed to have admitted the validity of the claims. Citing **Rule 16** of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure **Rules, 2006,** the **Gicheru Rules)** the learned Judges held on this point that, central to the administration of justice under the Constitution, 2010 is the requirement that determination of disputes must be on substantive merits of the claims and not on procedural technicalities; that both sides of the dispute were in breach of the procedure set out in the **Gicheru Rules;** that while the respondents had failed to respond to the originating notice of motion within the stipulated period, the appellants had likewise filed an originating motion instead of a petition. The learned Judges in rejecting the appellants' objection stated that they would overlook those infractions for the sake of substantive consideration of the dispute.

On the question whether the issues raised in the originating notice of motion were *sub-judice* or *res judicata,* the learned Judges considered whether the decision of the High Court (a three-Judge bench) in Mombasa High Court Misc. Application No. 468 of 2010, **Randu Nzai & 2 others** v **The Internal Security Minister and others** on the issue of the proscription of MRC, was a bar to bringing the instant originating notice of motion and, secondly whether, the decision of the High Court in Mombasa High Court Misc. Application No.16 of 2011, **Randu Nzai and 2 others** v **Kenya Ports Authority and 5 others**, rendered the present originating notice of motion *res judicata*.

The court observed that when the applications for striking out the motions were filed, the ruling in Mombasa Misc. Application No. 468 of 2010 had not been rendered. In that decision, which was the subject of appeal to this Court in Civil Appeal No. 275 of 2012 and whose determination by the Court is also due to be rendered alongside this judgment, on the same day, the learned Judges held that the declaration of MRC as an organized criminal group was unconstitutional. The court also held, on MRC's agitation for secession of the former Coast Province, that MRC, as a political outfit, could not pursue the secession agenda without registration. They suggested, without invitation, that, for MRC to fully enjoy political rights, its members ought to consider its registration as a political party.

Turning to the appeal before us and in view of foregoing decision, the learned Judges in the instant appeal found that the originating notice of motion was neither *res judicata* nor *sub-judice*; that Mombasa High Court Misc. Application No.16 of 2011, which, like the present originating notice of motion, dealt with

privatization of the Port of Mombasa and other statutory bodies, was brought before the present originating notice of motion; and that, following the passage of the Transition to Devolved Government Act CAP 265A and upon concession by the appellants' advocates on the point, the grievance regarding transfer of public assets in the Coast region having been addressed the question of *sub judice* and *res judicata* was moot.

Regarding the question whether the originating notice of motion and the interlocutory motion were frivolous, vexatious and an abuse of the process of the court, the court found no substance in this ground and rejected it stating that the respondents had failed to demonstrate the same. I skip the next ground dealing with the question whether the motions were incompetent on account of their multifarious breadth and nature because the determination by the High Court on it, which in my view was sound, has not been challenged in this appeal.

The next, and perhaps the most substantive ground upon which the impugned decision of the High Court was based is with regard to the issue whether the appellants had capacity and legal standing to bring the motions, the answer to which was found by the learned Judges to be capable of disposing of the final ground seeking to answer the question whether the protection of constitutional rights was only available to individuals and not to groups on a collective basis. The main arguments by the respondents was that the appellants lacked *locus standi* to bring the originating notice of motion under the umbrella of MRC, an unregistered,illegal and unlawful society; that to entertain the motions filed by the appellants would be tentamount to offering legitimacy and recognition to an illegal and proscribed organization; that the appellants had acted in bad faith by bringing a multiplicity of suits over the same matter; that they continued to engage in unlawful activities including advocating that "*Pwani si Kenya*" after failing to seize the advice by the court below to register MRC as a political party; that by that advice the court in Mombasa High Court Misc. Application No. 486 of 2010 did not clothe MRC with legality; that the respondents had demonstrated that a grave and overwhelming injustice would be done if the appellants were permitted to proceed with their activities using the court process; and that the nation of Kenya and constitutionalism would suffer if the appellants were allowed to litigate.

The learned Judges considered the foregoing arguments and the appellant's submissions that the applications to strike out the motions were misconceived as the provisions of the Civil Procedure Rules permitting the striking out of pleadings were inapplicable to constitutional petitions or applications; that the **Gicheru Rules** made no provision for striking out of pleadings brought pursuant to the provisions of the Constitution; that the three appellants had capacity to bring the action because it was brought, not on behalf of MRC but on the appellants' own individual behalf and on behalf of all the residents of the counties comprised in the coast region; that unregistered groups and individuals under **Article 19** of the Constitution have the right to access courts; that, in addition, **Article 22** of the Constitution permits any person to bring proceedings if his or her constitutional rights and fundamental freedoms are violated or threatened with violation.

The court made the following observations on those submissions. That from the affidavit of Randu Nzai Ruwa it was clear that the appellants expressly deponed that they previously served as officials of the defunct MRC; that they brought the originating notice of motion in the interest of the residents and voters in the six coastal counties; that the appellants instituted the originating notice of motion pursuant to **Article 22 (2) (a), (b), (c) and (d)** of the Constitution; that to the affidavit in support of the originating notice of motion was annexed a letter signed by 21 individuals representing 21 constituencies in the region, giving authority to the appellants to act on their behalf on matters raised in the originating notice of motion; and that Randu Nzai Ruwa's affidavit in support of the interlocutory motion contained a 1737-page list of 32281 signatures of registered voters in the region who are in support of the motion. After making those observations the learned Judges concluded that the appellants, by dint of the definition of the word "*person*" in **Article 260**, qualified as "persons" within that definition. But for the purpose of **Article 22 (2)** they did not fit in any of the five (5) categories of persons who are authorized by the Constitution to institute court proceedings to challenge violation or threatened violation of a right or fundamental freedom in the Bill of Rights; that the appellants could not be constituted as a "group" or class" under **Article 258 (2) (b);** that a "group of persons" under **Articles 22 (2) (b) and 258 (2) (b)** could only bring an action as an organized body for a joint purpose; and that in terms of the provisions of

Article 22 (2) (c) the appellants could not be said to act in the "public interest."

They expressed the view that although, in the averments both in the originating notice of motion and interlocutory motion, the appellants had stated that the motions were brought in the interest of the people in the coastal region of Kenya, that assertion, was not supported by annextures to the affidavit.

Annextures "RNR I (a)" and "RNR 1 (b)",according to the learned Judges told a different story, because in them it was clear that the appellants were still advancing the interest of MRC; and that the statement in the affidavit was inconsistent with the clear intention manifested by their actions. They were also not persuaded by the deposition of Randu Nzai Ruwa that the appellants had lodged a formal application with the Registrar of Societies for registration of MRC as a political party but the application was peremptorily rejected. In their opinion there was no evidence of payment or refusal to register to demonstrate that the application was indeed submitted as claimed or as required by **Rule 2 (d)** of the Societies (Amendment) Rules, 2003; that only one person out of the 21 individuals listed in the letter as giving the appellants authority to sue, is listed as an official of MRC; that other than Randu Nzai Ruwa, the authority of the other two appellants is doubtful and questionable. In any event, the learned Judges added,

> ***"There is no doubt that the appellants were or presented themselves to be acting on behalf of MRC. The applicants admit that they are members of MRC. There is no doubt that MRC is indicated to be a membership association. It behooves us, therefore, to identify and understand the organization called MRC. What is MRC and what does it stand for-…?***
>
> ***We have perused the draft MRC Constitution of 2010 and Forms A and B which were intended for its registration … We however highlight the following final clauses in the MRC Constitution.***
>
> ***15. DISSOLUTION***
>
> ***The Council shall not be dissolved until the Coast Region becomes an autonomous State.***
>
> ***16. GOALS OF THE COUNCIL***
>
> ***1. To repeal the 8th October 1963 agreement Number Cmnd 2161***
>
> ***2. The Kenya Government to remove their administration***
>
> ***3. To grant our independence"***

After citing the provisions of sections 2, 4 and 9 of the Societies Act, the learned Judges concluded their consideration of the last issue raised by the respondents stating that;

> ***"MRC, not being registered, or not pursuing the process of registration or exemption from registration, lacks legal capacity. As such, it has brought the motions before us prematurely and without the legal capacity to do so… we hold that neither the applicants as individuals acting on behalf of MRC, nor the MRC as an unregistered, amorphous body espousing an unconstitutional agenda, has either the locus standi or the legal competency to bring the originating motion or the interlocutory motion or to be entitled to pursue the reliefs sought."***

Those are the findings that aggrieved the appellants. Their appeal is premised on 36 grounds but condensed and argued as 6 grounds, and which I have further summarized, adopting the approach employed in the written submissions by the appellants.

Their first challenge is that the learned Judges engaged in the determination of matters not placed before them. While the motions were sought to be struck out on specific ground, that the appellants lacked *locus standi*, the learned Judges based their decision to strike out the motions on the ground that MRC was not a registered organization; that the learned Judges ignored the merit of the originating notice of motion and concentrated on the status of the appellants; that while *locus standi* is relevant even in constitutional

matters, personal qualities of a party before the court ought not to be of any relevance or consequence; that a court of law must never view the identity of a person whose fundamental rights have been violated as more important than the violation itself; and that by the impugned ruling the learned Judges sadly declared that the appellants, citizens of Kenya had no right of access to justice.

The appellants argue that **Article 22** aforesaid which is in the most plain and clear language was misinterpreted; that **Article 22** grants a right to any person, without any distinction, to institute court proceedings to challenge violation of rights and fundamental freedoms; that **Article24** does not provide for the striking out of constitutional petitions and that the determination of the dispute in the manner it was decided was an attempt to usurp the role, office and decision-making prerogative of the Registrar of Societies.

On behalf of the 1st and 2nd respondents, it was submitted that the learned Judges properly struck out the originating notice of motion on account of the appellants lacking capacity to move the court; that even in the absence of an express provision donating to the court the power to strike out the motion, the court retained inherent jurisdiction to do so if it is brought in abuse of its process; that it was evident that the appellants sought to enforce the Bill of Rights in their capacity as members of MRC on behalf of coastal people, yet MRC was illegal; and that the appellants failed to utilize the opportunity extended to them by the court below to register MRC as a political party. The 4th to 10th respondents took the que from the 1st and 2nd respondents and reiterated the foregoing arguments.

In my assessment of the arguments, the two broad and related points for determination is whether the appellants had *locus standi* to bring the originating notice of motion and the interlocutory motion and secondly, whether the court below properly exercised its discretion in striking out the two motions. Because the first issue is the most fundamental in this appeal I will first dispose of with the latter question and reserve the determination of the former to the end.

Under **rule 12** of **the Gicheru Rules,** where contravention of any fundamental rights and freedoms of an individual was alleged an application to the High Court would be made by way of a petition. We have noted earlier that the appellants, instead resorted to an originating notice of motion, and that the learned Judges found nothing turning on this irregularity, relying on the provisions of

Articles 22(3) (b) (d) &**159(2) (d)** of the Constitution. It is, however clarified that originating notice of motion procedure was preserved for applications under Part I of the **Gicheru Rules,** dealing with the supervisory jurisdiction of the High Court. An application invoking the supervisory jurisdiction was to be brought by a petition and not by originating notice of motion. No prejudice was suffered by the infraction.

I have, however cited the **Gicheru Rules,** only because of the appellants' submission that those rules did not provide for striking out of constitutional petitions or applications. A close reading of those rules does not support this submission. First, the rules provided for timelines for the taking of various steps.

For instance under **Rule 15** a petition alleging violation of a right was required to be served on the Attorney General (in a criminal case) and on the respondent (in a civil case) within seven days of filing. There is a further timeline under **Rule 27** requiring the subordinate court to refer the questions for determination to the High Court within 21 days from the date of framing those questions. Although the rules do not expressly state so, where these timelines are not complied with the remedy of striking out would be resorted to.

By the provisions of **Rules 24** and **26,** in proceedings in a subordinate court where contravention of a right is raised, the court is only enjoined to refer the question to the High Court, if in the court's opinion the question raised is not frivolous or vexatious. The consequence of the converse, that is, where the question raised is frivolous or vexatious, is the striking out of the application. In my view therefore there is no authority for holding that the court cannot strike out a constitutional petition or application. The courts generally retain an inherent power to strike out pleadings of whatever nature if those pleadings are in contravention of the Constitution or any law or where they are brought in abuse of the court process.

Under **order 2 Rule 15** of the Civil Procedure Rules the court before striking out pleadings considers whether they disclose reasonable cause of action, or defence, whether it is scandalous, frivolous or vexatious; whether it may prejudice, embarrass or is likely to delay the fair trial of the action, or whether it is

otherwise an abuse of the process of the court. There were no similar provisions in the **Gicheru Rules** which were the applicable rules under the Constitution of Kenya, 2010 before new rules were made. Those principles, in my view can apply to any application for striking out of constitutional petitions or applications in the same manner they are available in ordinary suits and applications. Under the Constitution the Chief Justice has made rules pursuant to **Article 22 (3),** that is, the Constitution of Kenya (Protection of Rights and Fundamental freedoms) Practice and Procedure Rules, 2013 (**the Mutunga Rules**). It is instructive that **Rule 5 (b)** declares that a petition cannot be defeated by reason only of misjoinder or non-joinder of parties and that "**the court may in every proceeding deal with the matter in dispute.**" In addition **Rule 3 (8)** provides that the court is to make "such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court." I come to the conclusion on this ground that a constitutional petition or application is amenable to the power of court to strike out.

It is, however broadly accepted that the summary procedure of striking out pleadings, apart from being discretionary is also draconian. Because it is a draconian remedy it may only be resorted to in plain cases of a frivolous, scandalous and vexatious pleadings or where the pleadings amount to an abuse of the court process. An appellate court will not interfere with the exercise of a discretionary power if used judicially. See **The Co-operative Merchant Bank Ltd v George Fredrick Wekesa,** Civil Appeal No. 54 of 1999. Where the striking out involves a petition or originating motion alleging violation of constitutional rights and fundamental freedoms there is need for even greater caution, so as to avoid impeding the course of and access to justice since courts are the custodians of the Constitution and defenders of rights.

I turn to consider what is, no doubt, the kernel of this appeal; whether the appellants had the ***locus standi*** to bring the originating motion alleging constitutional violation. I reiterate that the learned Judges struck out the originating and interlocutory notices of motion merely because in their view, the appellants;

> ***"..presented themselves to be acting on behalf of MRC. …. MRC not being registered, or not pursuing the process of registration or exemption from registration lacks legal capacity …. Neither the appellants as individuals acting on behalf of MRC, nor MRC as an unregistered, armophous body espousing an unconstitutional agenda has neither the locus standin or the legal competency to bring the motions."***(my emphasis).

The learned Judges, from the foregoing maintained that the action was brought by the appellants on behalf of MRC. At the time this decision was reached by the learned Judges, three of them, (**Mwera** (as he then was), **Kasango** and **Tuiyott**,

JJ) had found in Mombasa H.C.C. Misc. Appl. No. 468 of 2010 that the proscription of MRC was without any reason or justification as there was no evidence that it was linked to any criminal activities. The Judges acknowledged

that;

> ***"80. On our part, we have looked at the evidence presented by the parties before us and have come to the conclusion that MRC is a political movement."***

Earlier in the same decision the learned Judges were emphatic regarding the right to access to justice stating that:-

> ***"35. In our view, a party seeking to enforce the Bill of Rights should be able to approach a court with the confidence that she/he will not be turned away without a hearing unless the approach itself defiles***

(sic) ***the law."***

When the three appellants in this appeal instituted H.C. Misc. No. 468 of 2010 as officials and on behalf members of or a group of persons professing allegiance to MRC, and challenging its proscription they were entertained because "***a party seeking to enforce the Bill of Rights should be able to approach a court with confidence that she/he will not be turned away without a hearing …",*** to quote the learned Judges. A few weeks later the door to the fountain of justice was slammed on their faces by the impugned decision.

While **Article 48** of the Constitution recognizes the importance of access to justice as an essential instrument for the protection of human rights, it must, at the same time be borne in mind that ***"…the rights and fundamental freedoms in the Bill of Rights…belong to each individual and are not granted by the State".*** See

Article 19 (3) (a). Taken together with **Articles 22, and 258** these Articles are a

stark departure from the narrow scope of **Section 84** of the former Constitution in so far as the concept of *locus standi* is concerned. The former Constitution and the cases decided during its reign provided and held in no uncertain terms that only a party aggrieved and whose interests were directly affected could institute proceedings for protection, under the Bill of Rights. In the case of **Alfred Njau & 5 others** v **City Council of Nairobi** (1982 – 88) 1 KAR 229, this Court explained the thinking behind the concept as follows;

> ***"The requirement of sufficient interest is an important safeguard to prevent, as Mr. Opiacha, appearing for the respondent Council put it, people running to the courts to challenge the actions of local authorities all over the country. Its purposes is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left whether they could safely proceed with administrative action while judicial review proceedings were actually pending, even though misconceived. If the requirement were not there the courts would be flooded and public bodies harassed by irresponsible applications."***

This conservative requirement had the effect of limiting access to justice as it treated litigants, other than those directly affected, as mere or meddlesome busy bodies, ignoring the fact that every judicial system has a built-in mechanism to protect its process from abuse by busy bodies, cranks and other mischief makers. Today, decisions like **Maathai v Kenya Times Media Trust (1989) KLR 267**and **El Bussaidy v Commissioner of Land and others**(2002) IKLR 508 have no relevance except for the history they represent.

The appellants were clear and specific in their depositions. They described themselves as **"former officials of MRC before it was banned**" and averred that they were bringing the original notice of motion ***"in the interest of the residents, voters and stake-holders in all the counties within the coast province …that we, the petitioners do bring originating motion……. in the capacity provided under section*** *(sic)* ***22(2) (a) (b) & (c) of the Constitution."***

The following Articles of the Constitution are cited to make the point that historical common law restrictions on the standing have been overhauled by the Constitution of Kenya, 2010.

> ***"22(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.***
>
> ***(a) a person acting on behalf of another person who cannot act in their own name;***
>
> ***(b) a person acting as a member of, or in the interest of, a group or class of persons;***

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members." (my emphasis***)***

Article 258; on the other hand stipulates that;

"258(1) <u>Every person</u> has the right to institute court proceedings, <u>claiming that</u> <u>this Constitution</u> has been contravened, or is threatened with contravention.

(2) <u>In addition to a person acting in their own interest</u>, court proceedings under clause (1) may be instituted by-

a) a person acting on behalf of another person who cannot act in their own name;

b) a person acting as a member of, or in the interest of, a group or class of persons;

c) a person acting in the public interest; or

d) an association acting in the interest of one or more of its members."

A "**person**" is defined in Article 260 to include a company, association or other body of persons whether incorporated or unincorporated.

These provisions have been the subject of judicial interpretation in many recent decisions. For instance the Supreme Court in **<u>Mumo Matemo</u> v <u>Trusted</u> <u>Society of Human Rights Alliance & 4 others</u>**SC Civil Appl. No. 29 of 2014 held as follows in respect of a body that had been de-registered by the time "it lodged" the appeal to the Supreme Court and the question, among others, was whether it had *locus standi* to do so.

"Although section 12(2) & 3 of the Act*(N.G.O)* ***provides for the legal status of the 1st respondent, when read together with Articles 22, 258 and 260 of the Constitution, and in the public interest, it is to be inferred that the <u>1st</u> <u>respondent did not lose its locus standi, even if it</u> <u>were to be assumed to have lacked registered status</u>. The three Articles give an enlarged view of locus standi to the effect that every***

"person" including persons acting in the public interest, can move a court of law contesting infringements of any provision in the Bill of

Rights or the Constitution."(my emphasis)

Each of the first two Articles starts with the phrase ***"Every person has the right to institute court proceedings."*** They also provide that that person may either bring the proceedings as an individual in his/her own interest. He/she can, in addition bring proceedings in many other capacities, on behalf of persons who cannot act in their own name, or as a member of or in the interest of a group or class of persons, or, like in the above cited Supreme Court case of **<u>Mumo Matemo</u>** (supra), acting in the public interest or, finally an association acting in the interest of one or more of its members can also institute court proceedings for the enforcement of the Bill of Rights. The above decision arose from the judgment of this Court in Civil Appeal No. 290 of 2012, **<u>Mumo Matemo</u>** v **<u>Trusted Society of Human Rights Alliance and another</u>**, in which the Court, like the Supreme Court emphasized that;

"27 Moreover we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broad context, this Court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hardles on access to courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. We hold that in the absence of a showing of bad faith as

claimed by the appellant, without more, the 1st respondent had the locus standi to file the petition. Apart from this, we agree with the superior court below that the standard guide for locus standi must remain the command in Article 258 of the Constitution …

28. It still remains to reiterate that the landscape of locus standi has been fundamentally transformed by the enactment of the Constitution in 2010 by the people themselves. In our view the hitherto stringent locus standi requirements of consent of the Attorney General or demonstration of some special interest by a private citizen seeking to enforce a public right have been buried in the annals of history. Today by dint of Articles 22 and 258 of the Constitution, any person can institute proceedings under the Bill of Rights, …."

The Court further held that a legal wrong or injury to a person or to a determinate class of persons, the person or a member of the determinate class of persons, or even a member of the public can maintain an application under

Articles 22. Pursuant to **Article 22(3),** as I have said, the Chief Justice has made the **Mutunga Rules** which, *inter alia* provide for the application of the right of standing. Specifically **Rule 4** confirms that a person as an individual acting in his/her own interest, who alleges a denial, violation or infringement of any right or fundamental freedom under the Constitution may apply to the High Court for protection. Although the Mutunga Rules had not been made when the appellants filed their applications, I have made reference to them to demonstrate that the intention of the framers of the Constitution from which those rules are derived, was to allow any person who genuinely believed that there was a violation of fundamental freedoms and constitutional rights to approach the court for redress.

I come to the conclusions on this ground that the strict common law rule of standing which insists that a person or group of people will only have the requisite *locus standi* if they can show that they have a personal and sufficient interest in the matter, a greater interest than that of the rest of the public, has now been evolved and broadened under the Constitution. The Constitution today gives standing to any member of the public who is not a mere busy-body or a meddlesome interloper, and who acts in good faith to institute proceedings challenging any violations under the Bill of Rights.

The appellants deponed that;

"…together with the 2nd and 3rd Petitioners herein, I did serve as an official of the now defunct "Mombasa Republican Council", which association prior to its being gazette as being a „banned? organization, did have extensive membership within the residents and voters of Mombasa City, Mombasa County, and all the Constituencies within the Counties situated within the Coast Province at large And it is in the interest of the residents and voters, and stakeholders in all the Counties situated within the Coast Province that we the Petitioners do bring this Originating Motion as provided for under section 22 (2) (b), (c) and (d) of the Constitution of Kenya." (my emphasis)

I come to the conclusion that the learned Judges ignored the appellants' unequivocal plea that they were no longer members of MRC and instead used its proposed constitution to deny the appellant's access to justice. They also failed to appreciate that under the Constitution the appellants did not have to be members of a registered group to access the court; and that even as individuals they had the right to complain to the court about what they perceived to be a violation or threatened violation of their and other people's rights and fundamental freedoms. They ought to have been heard on the merit of their grievance. The exercise of discretion and the trial court's inherent jurisdiction was improper.

I have deliberately avoided to consider the status of the appellants *vis á vis* MRC for the reasons that such a determination may embarrass the fair consideration of the issues in dispute at the trial. In the circumstances, and as Musinga, Kiage, M'Inoti and J. Mohammed JJA agree the order of the court is that this appeal is allowed and the ruling and order of the High Court of 20th December, 2012 are set aside. We make no orders

as to costs.

Dated and delivered at Nairobi this 8th day of July, 2016

W. OUKO

……

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF MUSINGA, J.A.

I have had the benefit of reading in draft the judgment of my brother, Ouko JA. I am in full agreement with his decision and the orders he has proposed.

Dated and delivered at Nairobi this 8th day of July, 2016.

D.MUSINGA

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JUDGE OF APPEAL

JUDGMENT OF KIAGE, JA.

I am in full concord with my learned brother, Ouko JA, whose judgment I have had the advantage of reading in draft.

To shut a pleader out of the seat of judgment on account of some prior categorization of him as undeserving to bring before court his complaints, regarding violation of constitutional rights no less, appears to me to be entirely out of step, indeed discordant with and anachronistic to our current constitutional dispensation.

It seems to me, respectfully, that the High Court drew a line and shut out the appellants from being heard on the merits of their not-insubstantial burdens, pains and travails without at all hearing them. That move by that court was a drastic, draconian and dramatic negation of the entire access to justice project in the circumstances of this case, and I would not endorse it.

I agree that the appeal is for granting in the terms proposed by Ouko JA.

Dated at Nairobi this 8th day of July, 2016.

P. O. KIAGE

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JUDGE OF APPEAL

JUDGMENT OF M'INOTI, J A.

I have had the advantage of reading in draft the judgement of my brother, ***W. Ouko, JA.*** I agree with his decision and the orders that he has proposed.

Dated and delivered at Nairobi this 8th day of JULY, 2016

K. M'INOTI

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JUDGE OF APPEAL

JUDGMENT OF J. MOHAMMED, J.A.:

I have had the advantage of reading in draft the Judgment of my brother, ***Ouko, J.A***. I concur with his decision and the orders that he has proposed.

Dated and delivered at Nairobi this 8th day of July, 2016.

J. MOHAMMED

……

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR