



**IN THE COURT OF APPEAL**

**AT NYERI**

**(SITTING AT NAKURU)**

**CORAM: VISRAM, KOOME & OTIENO - ODEK, JJ.A.)**

**CIVIL APPEAL NO. 192 OF 2009**

**BETWEEN**

**THE MUNICIPAL COUNCIL OF NAKURU ..... APPELLANT**

**AND**

**RELIABLE CONCRETE WORKS LIMITED ..... RESPONDENT**

*(An appeal from the Ruling of the High Court of Kenya at Nakuru*

*(Maraga, J.as he then was) dated 30<sup>th</sup> June 2009*

**in**

**H.C Petition No. 3 of 2009**

**JUDGMENT OF THE COURT**

1. This appeal relates to the constitutionality of the membership and composition of the Valuation Court appointed pursuant to **Section 12** of the **Valuation for Rating Act, Cap 266** of the **Laws of Kenya**.
2. The Respondent filed a Petition dated 26<sup>th</sup> March, 2009, before the High Court in Nakuru alleging apprehension of contravention of its fundamental rights and freedoms under **Sections 75** and **77 (9)** of the then **Constitution**. The petition was lodged in the respondent's capacity as a rate payer for the parcels of land comprised in titles **Nakuru Municipality Block 8/8** and **Nakuru Municipality Block 8/9**.
3. The background facts in support of the respondent's petition before the High Court is that its parcels of land are situated within the jurisdiction of the Municipal Council of Nakuru (*appellant herein*) and the said Municipal Council of Nakuru is the rating authority under the **Valuation for Rating Act (Cap 266, Laws of Kenya)** and the **Rating Act (Cap 267, Laws of Kenya)**. That on or around March, 2006, the Minister for Local Government by Gazette Notice No. 2245 approved the minutes of the Finance, Staff and General Purposes Committee of the Municipal Council of Nakuru which minutes set the time for valuation for the Municipal Council of Nakuru to be 31<sup>st</sup> December, 2004. That by Gazette Notice No. 2241, the said Minister approved the adoption by the appellant of a site value for purposes of levying rates. Subsequent to the Ministerial approval, a Valuation Roll was prepared and all rate payers were invited pursuant to **Section 10 (1)** of the Act

to lodge any objections to the valuation roll. The respondent lodged objections in respect to its two parcels of land. Under the provisions of **Section 12** of the **Valuation for Rating Act**, if there is objection to the valuation roll; a Valuation Court is established to hear the objection. In the instant case, subsequent to the lodgments of objections, the Minister for Local Government approved the appointment of the Chairperson and members of the Valuation Court.

4. Following the approvals by the Minister, the appellant as the rating authority exercised its powers under **Section 12** of the **Act** and appointed the Chairman and Members of the Valuation Court. **Section 12** provides as follows:

***“A local authority may, and, if the provisions of Section 11 have not prevailed, shall appoint a valuation court which shall consist of a magistrate having power to hold a subordinate court of the 1<sup>st</sup> class, or an advocate of not less than five years standing who shall be the chairman of the court and not less than two additional members appointed with the approval of the Minister who may or may not be members of the local authority”.***

5. The thrust of respondent’s petition is that **Section 12** of the **Valuation for Rating Act** is null and void because it violates **Section 77 (9)** of the then Constitution; that the valuation court is an adjudicating authority within the meaning of **Section 77 (9)** of the then **Constitution**; that **Section 77 (9)** of the **Constitution** requires an adjudicating authority to be independent and impartial; that the valuation court is not independent and impartial because **Section 12** of the **Act** grants authority to one party to a dispute (*a local authority*) to appoint members of the court and the clerk to that court is the executive officer of the municipal council; that **Section 24** of the **Act** allows one party to a dispute to meet the expenses of the court and to remunerate members of the court; that **Section 12** does not provide security of tenure for the members of the court and has no guarantee against external pressure. For these reasons, the respondent’s case is that the valuation court established under **Section 12** of the **Valuation for Rating Act** is not independent and impartial and contravenes **Section 77 (9)** of the **Constitution**. In its petition, the respondent prayed for orders declaring **Section 12** of the **Valuation for Rating Act** unconstitutional; and that the valuation roll prepared pursuant to the Gazette Notice No. 10214 and the proceedings of the valuation court be declared null and void as they do not meet the constitutional threshold.
6. **Section 77 (9)** of the then **Constitution** provides as follows:

***“A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time”.***

7. The appellant in response to the petition submitted that the petition was bad in law, speculative, misconceived and an abuse of the court process; that whereas the appellant had an interest in the valuation process, its role was provided by statute; that the law does not allow the appellant to dismiss, disqualify or manipulate members of the valuation court. The appellant contends that the valuation court is not an adjudicating authority within the meaning of **Section 77 (9)** of the **Constitution**; that the role of the valuation court under **Section 16** of the **Act** is to confirm or amend the draft valuation roll by way of increase or reduction, addition or omission as it may deem fit; that the mandate of the valuation court is to protect the ratable owners by verifying and scrutinizing the values returned by the valuer and not abrogate the right to private property or the right to fair trial; that the valuation court does not do valuation; that **Section 77 (a)** of the **Constitution** relates to a body determining the existence of a civil right or obligation and not the verification and appraisal of the precision of valuation or supplementary valuation roll. The appellant submitted that no right of the respondent had been breached, threatened or likely to be breached and the respondent is attempting to litigate spurious and fluid claims against the public interest.
8. The appellant submitted that the valuation court is independent and impartial for the following reasons:

- a. *the valuation court consists of a magistrate who is a judicial officer and person of integrity;*
  - b. *other members of the valuation court are persons of very high professional ideals and integrity;*
  - c. *that security of tenure is but one facet needed for impartiality and not the only one;*
  - d. *the fact that the valuation court members are remunerated by the appellant neither compromises the reasoning of the members nor renders the court partial;*
  - e. *that the role of the valuation court is clearly defined and it relies on expert evidence which cannot override parochial, monetary or other considerations.*
9. The appellant contends that public interest demands that a local authority should render services to the residents in its area of jurisdiction and collection of rates is a statutory source of revenue to enable services such as garbage collection, health, education and hygiene inspection to be conducted. The appellant further contends that the valuation court is a tribunal amenable to the supervisory jurisdiction of the High Court and if the respondent is aggrieved by any decision of the valuation court, the remedy is to seek judicial review orders and not to invoke a constitutional petition.
10. The trial court (Maraga, J.), upon hearing the parties in a ruling dated 30<sup>th</sup> June, 2009, declared **Section 12** of the **Valuation for Rating Act** unconstitutional; the Court expressed itself as follows:

***“I find and hold that Section 12 of the Valuation for Rating Act violates the independence and impartiality aspect of Section 77 (9) of the Constitution. It is, therefore, to that extent unconstitutional and I accordingly declare it void...I know that this decision does not only affect the Municipal Council of Nakuru but all the other local authorities in the county. But the law cannot be bent. It is my hope that the Minister for Local Government will immediately liaise with the Attorney General to amend Section 12 of the Valuation for Rating Act to conform to Section 77 (9) of the Constitution by setting up an independent machinery of establishing Valuation Courts”.***

11. Aggrieved by the ruling, the appellant has lodged the instant appeal citing thirteen grounds in its memorandum of appeal which we summarize as follows:
- i. *that the learned Judge erred in law when he held that Section 12 of the Valuation for Rating Act is in conflict with Section 77 (9) of the Constitution without according a whole, wide, liberal and purposive interpretation of the Constitution on the one hand and the Valuation for Rating Act on the other;*
  - ii. *the learned Judge erred in fact when he failed to consider the concept of independence and impartiality holistically as juxtaposed with the Valuation for Rating Act and the purpose of the Valuation Court;*
  - iii. *the learned Judge erred in law by making a ruling which has rendered all tribunals and or valuation courts in the country unconstitutional and illegal;*
  - iv. *the learned Judge erred in law when he failed to consider the Valuation for Rating Act with regard to its purpose and how it conforms with Sections 77 (9) and 75 of the Constitution;*
  - v. *the learned Judge misapprehended the law when he held that the valuation court would form a basis upon which rateable owners property would be sold which decision is unjustifiable in law; and*
  - vi. *The learned Judge erred in law when he granted orders for which he did not have jurisdiction by dint of Section 84 of the Constitution.*

12. At the hearing of this appeal, learned counsel Messrs Collins Odundo teaming up with Aim Yoni

- of Odhiambo & Odhiambo Advocates appeared for the appellant while learned counsel Messrs John Githui appeared for the respondent.
13. Mr. Odundo for the appellant submitted that the core of this appeal is the constitutionality of the valuation court whose members are appointed and constituted as provided in **Section 12** of the **Valuation for Rating Act**. Counsel submitted that the trial court erred in declaring valuation courts in the country unconstitutional; that the Judge erred in holding that a local authority is an interested party for purposes of valuation; the trial court erred in failing to look into the purpose and intention of the **Valuation for Rating Act**. It was submitted that a valuation court is not an adjudicating authority as per **Section 77** of the then Constitution; that **Section 77 (9)** was geared towards adjudicating authorities established to deal with civil rights and obligations; that **Section 12** of the **Valuation for Rating Act** is not aimed at establishing civil rights; that the learned Judge erred in misapprehending the role of the valuation court; that rates are fixed depending on the valuation roll and the valuation court does not prepare the valuation roll; that the trial court failed to consider that the appellant as a local authority does not prepare the valuation roll which is prepared by an independent valuer; that the valuation court only deals with the figures proposed as rates; that the local authority is not an interested party in the valuation process and if any objection to the proposed rates is made, the objection is raised against the independent valuer and not the local authority. Counsel submitted that the contention that the valuation court was not independent and impartial amounts to stretching the concept of independence too far; that any person, including the local authority may raise an objection before the valuation court; that the valuation court only verifies the correctness of the figures given by the valuer; that the valuation court does not adjudicate any civil rights and obligations as stated in **Section 77 (9)** of the then **Constitution**.
  14. Learned Counsel Mr. Aim Yoni for the appellant submitted on the finding by the learned Judge that the valuation court was unconstitutional due to absence of independence and impartiality; the trial court erred in declaring that **Section 12** of the **Valuation for Rating Act** and the valuation court unconstitutional when no anticipated or real violation of rights under **Section 75** and **77 (9)** of the **Constitution** were demonstrated. Counsel submitted that the Minister properly constituted and appointed the valuation court and **Section 12** gives discretion to the local authority to appoint members of the valuation court; that the criteria for appointment of the members is statutorily provided for and the appointees are reputable persons of integrity; that independence of the valuation court is guaranteed through the qualifications that must be possessed by the individual members; that remuneration of members is not the sole criteria that determines independence and impartiality, and payment of remuneration does not compromise the independence of the members of the valuation court. It was submitted that the High Court gave a narrow and restricted reading and interpretation of **Section 77 (9)** of the **Constitution**; that a local authority is a public institution and is subject to administrative law; that local authorities collect rates to take care of the welfare of its residents. The appellant urged that we allow the appeal with costs.
  15. Learned Counsel for the respondent opposed the appeal submitting that the procedure for appointment of the Chairman and members of the valuation court under **Section 12** of the **Valuation for Rating Act** is unconstitutional; that the valuation court as appointed is not independent and impartial and this violates **Section 77 (9)** of the former Constitution.
  16. It was submitted that the respondent in this case, as a rate payer, petitioned the High Court as it was apprehensive that the valuation court appointed under **Section 12** was not independent and impartial; that one party to the dispute (*the appellant*) had appointed members of the valuation court and remunerates them; that this state of affairs made the respondent apprehensive that its right to protection of property under **Section 75** of the **Constitution** would be violated. It was submitted that the appellant's assertion that the valuation court was not an adjudicating authority is fallacious. Counsel emphasized that the valuation court is an adjudicating authority because it determines rates to be levied on property and collection of rates is a limitation on property rights; it was submitted that the decisions of the valuation court impose an obligation on the property owner to pay rate and if the rate is not paid it is recoverable as a civil debt; that a valuation court hears disputes and makes a determination which affect property rights of the parties.
  17. Counsel for the respondent submitted that the valuation court as appointed and constituted under **Section 12** of the **Act** is unconstitutional for lack of independence and impartiality; that independence and impartiality are terms of art; that since **Section 12** permits one litigant to appoint members of the court, the impartiality and independence of the court is compromised; that

such members are likely to pay homage to the appointing authority and there is appearance of partiality; that there is a legitimate doubt on independence and impartiality of the valuation court. The appellant in rejoinder submitted that the respondent neither tendered, proved nor established facts that demonstrate the basis for reasonable apprehension that the valuation court was biased or impartial.

18. We have considered the grounds of appeal and submission by counsel in the matter. This being a first appeal, we are under duty to re-evaluate and re-appraise the evidence on record and arrive at our own independent conclusions. We identify the following issues for our consideration and determination.

- i. ***Is the Valuation Court established under Section 12 of the Valuation for Rating Act an adjudicating authority in terms of Section 77 (9) of the former Constitution?***
- ii. ***Does the valuation court affect civil rights and obligations or violate the private property rights protected and guaranteed under Section 75 of the former Constitution?***
- iii. ***Is the appointment and establishment of the valuation court as provided for in Section 12 of the Valuation for Rating Act independent and impartial and do the procedure for appointment and establishment of the court violate Section 77 (9) of the former Constitution?***
- iv. ***Did the learned Judge err in declaring Section 12 of the Valuation for Rating Act unconstitutional?***

19. Before we consider the issues as identified above, we note from the respondent's submissions that the appellant is continuing to collect rates in respect of its rateable property despite the existence of the ruling delivered by the High Court which declared **Section 12** of the **Valuation for Rating Act** and the valuation court to be unconstitutional. We observe that **Section 18** of the **Valuation for Rating Act** provides for the coming into force and validity of the valuation roll. We note that **Section 28** of the **Act** provides that no appeal shall operate as a stay of execution of the decision of the court appealed from. In the instant case, the valuation court never made any decision that has been appealed against. Further, the appellant contend that the trial court erred by failure to holistically interpret the Constitution. The guiding principles for interpretation of the Constitution have been settled by the Supreme Court in a plethora of its decisions. For instance, ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, Sup. Ct. Appl. No. 2 of 2012 [para.83]***: it is stated that the Constitution should be interpreted holistically, taking into account its declared principles.

#### **Is the Valuation Court an adjudicating authority under Section 77 (9) of the Constitution?**

20. **Section 77 (9)** of the former Constitution provides that a court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial. The thrust of the appellant's submission is that the valuation court is not an adjudicating authority within the meaning of **Section 77 (9)** of the then constitution as it does not determine civil rights and obligations but verifies the site value and figures proposed by an independent valuer. The appellant contends that the learned Judge erred in making a finding that the valuation court is an adjudicating authority.

21. The preamble to the **Valuation for Rating Act** stipulates that the purpose of the **Act** is to empower local government authorities to value land for purposes of rates. The valuation court is established as a forum through which objections to the valuation roll by rate payers is to be considered and determined. Drawing an inference from this function, the trial court held that the valuation court is an adjudicating authority within the meaning of **Section 77 (9)** of the former **Constitution**. The trial court further held that the valuation court being the forum through which disputes of rate payers is resolved, it is a forum for determination of the existence or extent of a civil right or obligation within the meaning of **Section 77 (9)** of the former **Constitution**.

22. We now consider the issue whether the valuation court is an adjudicating authority and if the procedure before the valuation court leads to determination of civil rights and obligations. Counsel for the appellant conceded that the valuation court is a tribunal whose decision is amendable to the supervisory jurisdiction of the High Court. We agree with this submission and add that the proceedings before the valuation court are quasi-judicial in nature.

23. The Supreme Court in the case of *Communications Commission of Kenya & 5 Others – v- Royal Media Services Limited & 5 Others, Petition No. 14 of 2014 as consolidated with Petition No. 14A of 2014, Petition No. 14B of 2014 and Petition No. 14C of 2014* expressed itself as follows on the issue as to whether a body is quasi-judicial in nature:

*“Although there are differences of substance and of form, between judicial and administrative forums, traditionally, when a non-judicial tribunal acts in a quasi-judicial capacity, its determinations are entitled to the same effect as a duly-rendered judicial determination. Although the Public Procurement Administrative Review Tribunal is not a Court of law, the administrative proceeding ... that took place before it was judicial in nature”.*

24. Guided by the dicta enunciated by the Supreme Court as stated above, we are of the considered view that although the valuation court is not a Court of Law as established under **Section 60** or **65** of the former Constitution, the proceedings that take place before it is judicial in nature. The valuation court is meant to hear and determine objections and disputes in relation to the valuation roll. The procedure before the valuation court allows parties to present their case on the basis of the evidence; the sittings are in public; **Section 16 (3)** of the **Act** allows persons who lodge objections to appear and be heard either in person, by advocate or by accredited representative; **Section 15 (7)** of the **Act** allows the valuation court to call and examine witnesses on oath; **Section 19** of the **Act** allows a party to appeal the decision of the valuation court to the High Court if the Court was appointed under **Section 12** of the **Act**; **Section 20** of the **Act** stipulates that if during the consideration of an objection, any question of law arises as to the principle upon which any valuation has been or should be made, at the request of any party to the hearing; the question can be reserved for decision by the High Court as case stated. All these procedures lead us to conclude that the valuation court is an adjudicating authority exercising quasi-judicial powers. The valuation court is a body prescribed and established by law (*i.e.* **Section 12 of the Valuation for Rating Act**) in tandem with the stipulation in **Section 77 (9)** of the former Constitution. We find that the trial court did not err in arriving at the conclusion that the valuation court is an adjudicating authority within the meaning of **Section 77 (9)** of the former Constitution.

### **Valuation Court and Protection of Private Property Rights**

25. The respondent’s apprehension is that imposition of rates on its property pursuant to a decision of a null and void valuation court is a violation of its constitutional right to protection of private property under **Section 75** of the former Constitution. It is our understanding that the respondent is not challenging the constitutionality of levying and collecting rates in relation to rateable property. **Section 3** of the **Rating Act (Cap 267 of the Laws of Kenya)** authorizes a local authority to levy rates. We note that whereas **Section 75** guarantees protection of private property, there are exceptions to this. Of relevance is **Section 75 (6) (a) (i)** and **(iv)** which provides that nothing done under the authority of any law shall be held to be inconsistent with **Section 75** to the extent that the law in question makes provision for taking possession or acquisition of property in satisfaction of any rate or other impost; further nothing done in execution of a judgment or order of a court in proceedings for the determination of civil rights or obligations is inconsistent with **Section 75**. Guided by these exceptions, we hold that imposition and recovery of rates on rateable property is not a violation of the fundamental right to protection of private property guaranteed under **Section 75** of the **Constitution**.

26. The appellant submitted that the learned Judge erred in finding that the valuation court in

the exercise of its functions determines civil rights and obligations; it was submitted that the valuation court does not determine issues of rights and obligations but only scrutinizes the values returned with a view to increasing, reducing, adding or omitting from the proposed valuation roll. The decisions and determinations of the valuation court have a legal impact; the determination of the rate payable in respect of a rateable property is a determination *in rem* which attaches to and is recoverable *in rem* against the rateable property. Under the Rating Act, unpaid rates are recoverable as a civil debt; the effect is that a civil liability and obligation to pay the rate is imposed on the property owner. The decision and determination of the valuation court is a determination of a civil obligation that attaches *in rem* to the rateable property; the civil obligation is vested upon the owner of the rateable property. This analysis is fortified by the provisions of **Section 19** of the **Rating Act, (Cap 267 of the Laws of Kenya)** which provides that any rate together with interest thereon shall be a charge on the land on which the rate was levied and where the title to such property is registered under any law the rating authority may deliver a notification of such charge to the registrar who shall register it against the title to that land. We add that all proceedings that are not criminal in nature are civil proceedings and since the valuation court does not have a criminal jurisdiction, *ipso facto* its proceedings and determinations are civil in nature. The provisions of **Section 17** of the **Rating Act** on recovery and enforcement of payment of rates show that imposition, collection and recovery of rates is a civil process. **Section 17 (3)** of the **Rating Act** requires a plaint to be filed for recovery of unpaid rates and **Section 17 (6)** and **(7)** provides that the **Civil Procedure Act (Cap 75)** regulate procedure to enforce a decree for recovery any unpaid rates.

### **Independence and Impartiality of the Valuation Court**

27. The trial court held that the valuation court as established under **Section 12** of the **Valuation for Rating Act** is neither independent nor impartial and concluded that **Section 12** of the **Valuation for Rating Act** is in violation of **Section 77 (9)** of the then **Constitution**. At the risk of repetition, **Section 12** of the **Valuation for Rating Act** provides as follows:

***“A local authority may, and, if the provisions of Section 11 have not prevailed, shall appoint a valuation court which shall consist of a magistrate having power to hold a subordinate court of the 1<sup>st</sup> class, or an advocate of not less than five years standing who shall be the chairman of the court and not less than two additional members appointed with the approval of the Minister who may or may not be members of the local authority”.***

28. In declaring **Section 12** unconstitutional, the trial court expressed itself as follows:

***“Section 77 (9) of the Constitution also requires such tribunals to be fair in their adjudications....Generally speaking, fairness requires at least adherence to the principles of natural justice. Natural justice has two major principles – audi alterem partem (hear the other side) and nemo iudex in sua causa (no one should be judge in his or her own case). It is of fundamental importance that justice should not only be done, but that it should also be manifestly seen to be done (See R – v- Sussex Justices Ex Parte MacCarthy, 1923 AllER 233).For justice to be done and seen to be done in this case, the valuation court should not only be independent of the parties to the dispute but should be seen to have that independence. In my view, it cannot have that independence nor can it be seen to have it when the Council is authorized to appoint its members”.***

29. The trial court endorsed the decision in **Findlay – v- UK, (1997) 24 EHRR** as cited with approval in **Runa Begum – v- Tower Hamlets LBC, (2002) 2 All ER 668 at 682 para. 28** where it is stated:

***“In order to establish whether a tribunal can be considered independent, regard must be had to the manner of appointment of its members, their terms of office, existence of guarantees against outside pressure and whether the body presents an appearance of independence. As to the impartiality there are two aspects in these requirements. First, the***

***tribunal must be subjectively free from personal prejudice and bias. Secondly, it must also be impartial from objective point of view that it must offer sufficient guarantee to exclude any legitimate doubt in this respect”.***

30. We are of the view that the valuation court cannot attain independence from external control without other policy and legislative interventions. Independence cannot be realized in a vacuum. **Section 77 (9)** of the then **Constitution** requires an adjudicating authority to be independent and impartial. **Section 12** of the **Valuation for Rating Act** prescribes how the valuation court is to be constituted. The aim of establishing an independent and impartial adjudicating authority is to prevent external forces from being intrusive and distorting the operations of the adjudicating authority. **Section 14** of the **Valuation for Rating Act** stipulates that the payment of any fees and allowances to the Chairman or any member of the valuation court shall not, by reason only of such payment be construed to mean that the Chairman or such member is an officer of the local authority or to have a pecuniary interest in any matter. The requirement that a magistrate having power to hold a subordinate court of the 1<sup>st</sup> class and an advocate of not less than five years standing be members of the valuation court is a policy and legislative intervention aimed at prima facie ensuring legal and professional competence as well as independence of the valuation court.

31. The Supreme Court in ***Re the matter of the Interim Independent Electoral Commission (IEBC); Sup. Ct. Advisory Opinion No. 2 of 2011; [2011] eKLR***, at (paragraphs 59 and 60) had occasion to comment on the concept of independence. It stated as follows:

***“It is a matter of which we take judicial notice that the real purpose of the “independence clause”, with regard to Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government... The several independent Commissions and offices are intended to serve as “people’s watchdogs’ and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the ‘independence clause”. “For due operation in the matrix, “independence “does not mean “detachment”, “isolation” or “disengagement” from other players in public governance. Indeed, for practical purposes, an independent Commission will often find it necessary to co-ordinate and harmonize its activities with those of other institutions of government, or other Commissions, so as to maximize results, in the public interest...”[emphasis supplied]. Therefore, “independence” is a shield against influence or interference from external forces.... However, such a body cannot disengage from other players in public governance”.***

32. In ***Communications Commission of Kenya & 5 others – v- Royal Media Services Limited & 5 Others, Petition No. 14 of 2014 as consolidated with Petition No. 14A of 2014, Petition No. 14B of 2014 and Petition No. 14C of 2014***; the Supreme Court considered how the shield of independence is to be attained. The Court observed that:

***“The main safeguard is the Constitution and the law. Once the law, more so the Constitution, decrees that such a body shall operate independently, then any attempt by other forces to interfere must be resisted on the basis of what the law says. Operationally however, it may be necessary to put other safeguards in place, in order to attain “independence” in reality. Such safeguards could range from the manner in which members of the said body are appointed, to the operational procedures of the body, and even the composition of the body. However, none of these “other safeguards” can singly guarantee “independence”. It takes a combination of these, and the fortitude of the men and women who occupy office in the said body, to attain independence”.***

33. In determining whether the composition and appointment of the members of the valuation court as provided for in **Section 12** of the **Valuation for Rating Act** is unconstitutional, we adopt

the dicta by the Supreme Court that whereas the safeguard to independence could range from the manner in which members of the said body are appointed, to the operational procedures of the body, and even the composition of the body; none of these safeguards can singly guarantee “independence”. We concur that it takes a combination of these, and the fortitude of the men and women who occupy office in the valuation court to attain independence.

34. Of significance in our view is that the respondent tendered no evidence of bias or possibility of bias or impartiality on the part of the individual members or the entire valuation court. In *Kenya Pipeline Company Limited – v- Kenya Oil Company Limited & Another, (2012) eKLR*, it was stated that there has to be a firm foundation for a claim of bias; there has to be an actual basis inconsistent with impartiality; the party alleging bias has the onus of proving it. In *Newfoundland Telephone Company Limited – v- The Board of Commissioners of Public Utilities, [1992] 1 RCS at 623*, it was held that the test to ensure fairness is whether a reasonably informed bystander would perceive bias on the part of the adjudicator and there must be reasonable apprehension of bias with regard to the decision. In the case of *President of the Republic of South Africa – v- South African Rugby Football Union, (1998 (4) SA 147, 177*, it was held that the question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case - that is a mind open to persuasion by the evidence and submissions of counsel; the reasonableness of the apprehension must be assessed; there must be reasonable grounds on the part of a litigant for apprehending that the judicial officer for whatever reasons was not or will not be impartial.

35. In the instant case, guided by the above cited cases we are of the considered view that mere apprehension and speculation of bias or impartiality is not enough; facts that give rise to reasonable apprehension of lack of independence, bias or impartiality should be tendered in evidence. In this case there is no iota of evidence on record tendered by the respondent to demonstrate the basis of apprehension that the individual members of the valuation court as appointed and gazetted by the Minister shall not be impartial. In this case, the respondent never appeared before the valuation court but opted to file a petition at the High Court. We are not saying that by filing the petition the respondent was wrong; far from it as **Section 84 (1)** of the former Constitution permits the same. All we are saying is that there must be a reasonable factual basis for the apprehension that the valuation court would lack independence, be biased and be partial. We concur with the decision in *Homepark Caterers Limited – v – The Attorney General & 3 Others, (2007) eKLR*, where a factual basis was considered necessary in arriving at the conclusion that the judge would be impartial and biased.

36. We take cognizance that **Section 19** of the *Valuation for Rating Act* provides a procedure for an appeal to be lodged against the decision of the valuation court. Further, the valuation court is amenable to the supervisory jurisdiction of the High Court under **Sections 60** and **123 (8)** of the former Constitution. In the case of *Speaker of National Assembly – v- Njenga Karume, [2008] 1 KLR425*, this Court stated that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should strictly be followed. In *Alphonse Mwangemi Munga & 10 others – v- African Safari Club, [2008] eKLR* it was stated that the Constitution does not give the license to every litigant to come to court by way of a constitutional application even when there is no constitutional issue arising and where there are adequate remedies provided in other laws to cover such situations.

37. The Supreme Court observed in *Communications Commission of Kenya & 5 Others – v- Royal Media Services Limited & 5 Others, (supra)* that a Constitution does not envisage a vacuum in the flow of matters of legal consequences. We are of the view that **Section 77 (9)** of the former Constitution was not meant to operate in a vacuum or to establish a legal lacuna in the procedure for dealing with objections to the valuation roll. We take judicial notice that the valuation court as established in **Section 12** of the *Valuation for Rating Act* is the only body with the power to hear and determine objections by any rate payer arising from the valuation roll. The learned judge by declaring the valuation court and **Section 12** of the *Valuation for Rating Act* to

be unconstitutional created a vacuum and legal lacuna in the framework for handling objections relating to rateable property. It is our view that in public interest, there ought not be an institutional lacuna or vacuum in dealing with objections arising from the valuation roll. It is our considered view that **Section 77 (9)** of the **Constitution** was not envisaged to operate in a manner that creates legal vacuity in the management of public affairs. The contest to the constitutionality of the valuation court is based on the perceived lack of independence in its composition and manner of appointment and remuneration. It is our view that the manner of appointment and remuneration of members of the valuation court should not *per se* be a ground for determining absence of independence and impartiality. We concur with the recommendation by the trial court that Parliament can take legislative measures, by way of amending or repealing existing legislation, or enacting new legislation to ensure that appointment and membership to the valuation court is made independent of the local authority. Such amendments can target the existing procedures for appointment of members of the valuation court if they are considered not independent enough; or even the body itself in terms of its composition. Such legislative interventions should not engender a vacuum in considering and determining objections to the valuation roll.

38. In ***Communications Commission of Kenya & 5 Others – v- Royal Media Services Limited & 5 Others***, (*supra at paras. 203 and 204*), the petitioners alleged that composition of the Communications Authority (CAK) violates the Constitution and negates the independence clause because the Chairman of the Board was appointed by the President and the Board further comprises of four Principal Secretaries and seven persons appointed by the Cabinet Secretary. On this issue, the Supreme Court at paragraph 204 expressed itself as follows:

***“In our considered view, such court challenges will continue until a balance that aligns the legislation to the Constitution is found. In the meantime, there is no legal vacuum... and the constitutionality of the CCK and its independence to consider and issue licences under Article 34(3) of the Constitution continues”.***

39. Guided by the above quoted Supreme Court dicta and noting that there should be no legal vacuum in the institutional framework for handling objections to the valuation roll, we find that **Section 12** of the **Valuation for Rating Act** and the Valuation Court are not unconstitutional. It is our view that the trial court erred in failing to appreciate that the manner of appointment and remuneration of members of the valuation court should not *per se* be a ground for determining absence of independence and impartiality; the Judge erred in failing to appreciate that combination of these and the fortitude and fecundity of the men and women who are members of the valuation court are factors to be considered. In addition, the trial court erred in not taking into account that the Constitution neither operates in a vacuum nor creates a vacuum and it is a matter of public interest that there ought not be an institutional lacuna or vacuity in the legal framework for dealing with public affairs; and in the instant case, there should be no vacuum in the legal framework for handling objections arising from the valuation roll. The trial court further erred in failing to take into account that the respondent did not tender a reasonable factual basis for its apprehension that the valuation court would lack independence, be biased and be partial. For these reasons, we hereby set aside the Ruling dated and delivered on 30<sup>th</sup> June, 2009, and also set aside all consequential orders arising therefrom. We award costs of this appeal, and of the proceedings in the High Court to the appellant.

***Dated and delivered at Nakuru this 23<sup>rd</sup> day of October, 2014.***

***ALNASHIR VISRAM***

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***JUDGE OF APPEAL***

***MARTHA KOOME***

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**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**