



**Federation of Kenya Employers v Cabinet Secretary, Ministry of Foreign Affairs and International Relations & 4 others; Law Society of Kenya (Interested Party) (Petition E085 of 2023) [2023] KEELRC 3067 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3067 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**PETITION E085 OF 2023**  
**B ONGAYA, J**  
**NOVEMBER 30, 2023**  
**IN THE MATTER OF ARTICLES 1,2,3,4,5,10,48,50,159, AND**  
**160, 165, 258, 259 OF THE CONSTITUTION OF KENYA**  
**IN THE MATTER OF THE ENFORCEMENT OF ARTICLES**  
**2,3,4,5,10,48,50,159,160 AND 165 OF THE CONSTITUTION OF**  
**KENYA**

**BETWEEN**

**FEDERATION OF KENYA EMPLOYERS ..... PETITIONER**

**AND**

**THE CABINET SECRETARY, MINISTRY OF FOREIGN AFFAIRS AND INTERNATIONAL RELATIONS ..... 1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**THE CHIEF JUSTICE REPUBLIC OF KENYA (STRUCK OUT AS A PARTY BY ORDER ON 26.07.2023) ..... 3<sup>RD</sup> RESPONDENT**

**JUSTICE AND ENVIRONMENT FOUNDATION ..... 4<sup>TH</sup> RESPONDENT**

**RONALD ONYANGO ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**LAW SOCIETY OF KENYA ..... INTERESTED PARTY**

*(Before Hon. Justice Byram Ongaya on Thursday 30th November, 2023)*



**Approval of the Data Commissioner when transferring sensitive personal data outside Kenya is a legal requirement even where the data subjects authorize and no complaint has been filed**

*The petitioner challenged the legality of the Scottish Court's orders, which barred James Finlay (Kenya) Limited from pursuing local legal remedies and implementing Kenyan court orders. The petitioner argued that these orders undermined Kenya's judicial authority, violating constitutional rights to access justice and a fair hearing. Additionally, the case addressed whether the 4th and 5th respondents had breached the Data Protection Act by transferring sensitive personal data outside Kenya without proper approval from the Data Commissioner. The court found that the High Court Practice and Procedure Rules were outdated and inadequate for enforcing foreign orders and protecting sensitive data. It ruled that significant updates to these rules were necessary. The court issued several declarations, including that foreign judgments must align with Kenyan law and that any data transfers must comply with the Data Protection Act.*

Reported by John Ribia

**Private International Law** – enforcement of foreign judgments – conditions - what were the constitutional, legal, and policy requirements for the enforcement of foreign judgments in Kenya – what were the constitutional, legal, and policy requirements for the enforcement of foreign judgments in Kenya - Judicature Act (cap 8) section 10

**Constitutional Law** – judicial authority – judicial authority over work injury claims – relevant court to address work injury claims - whether ad interim orders issued by a Scottish Court that effectively prohibited James Finlay (Kenya) Limited (JFKL) from prosecuting or instituting proceedings in Kenyan courts, undermined Kenya's judicial authority - whether the Scottish Court's orders, though described as temporary, compliance with the orders would exhaust all available legal avenues, effectively suspending Kenyan courts' jurisdiction over the matter - whether Scottish courts could assert jurisdiction over work injury claims especially when Kenyan law stipulated that such matters should be dealt with domestically under the Work Injury Benefits Act - whether the Scottish Court had the legal framework or expertise to apply the Work Injury Benefits Act scheme to claims related to workplace injuries that happened in Kenya – Constitution of Kenya articles 1(3), 2(1), 4(1), 22(1), 27, 31, 48, 50, 156, 159, 160, 161, and 258(1); Work Injury Benefits Act (cap 236) section 16; Foreign Judgments (Reciprocal Enforcement) Act (Cap 43).

**Data Protection Law** – transfer of data of Kenyans outside the country – procedure – approval of the Data Commissioner - whether the transfer of sensitive personal data of Kenyans that consented to a Scottish Court with without obtaining approval from Kenya's Data Commissioner was violation of the requirement of data controllers/processors to obtain approval from the Data Commissioner before transferring sensitive personal data outside Kenya - whether the legal requirement to obtain approval from the Data Commissioner before transferring sensitive personal data outside Kenya still remained where the data subjects approved the transfer of their information and where no complaint had been filed to the Data Commissioner - Data Protection Act, 2019 (cap 411C) section 2, and 48.

**Constitutional Law** – fundamental rights and freedoms – right to equal protection and benefit of the law - transfer of data of Kenyans outside the country without approval of the Data Commissioner - whether the transfer of employees' sensitive personal data from Kenya to Scotland, without proper legal authorization, violated the employees' right to equal protection and benefit of the law – Constitution of Kenya, 2010 article 27; Data Protection Act, 2019 (cap 411C) section 2, and 48.

**Statutes** – interpretation of statutes – conflicting legal provisions - procedure of transmitting evidence to foreign courts – requirements under the High Court Practice and Procedure Rules vis-à-vis the requirements of the Data Protection Act – section 48 of the Data Protection Act vis-à-vis Part 8 of the High Court Practice and Procedure Rules - whether the provisions of the Data Protection Act, particularly section 48, which regulated the transfer of sensitive personal data outside Kenya, conflicted with the procedural requirements established under Part 8 of the High Court Practice and Procedure Rules regarding the enforcement of foreign judgments and orders - whether



*the High Court Practice and Procedure Rules, specifically those related to the enforcement of foreign judgments and orders, required updating to align with the provisions of the Data Protection Act.*

### **Brief facts**

That petitioner has learnt that there were on-going legal proceedings between James Finlays Company and some of its workers over employment and work injuries related issues being carried out in Scotland. That there had been issued orders stopping and barring James Finlays Kenya from engaging in, participating in and or in any way pursuing any legal remedies within the court system established in Kenya. There had been proceedings in Kenyan courts between the parties in which the courts in Kenya had issued injunctions stopping evidence collection for the proceedings in Scotland in a manner that was inconsistent with the laws of Kenya.

Aggrieved the petitioner filed the instant petition. The petitioner was apprehensive that any suits filed in foreign jurisdictions automatically involved data transfers of sensitive personal information involving employees in Kenya and it was imperative that Kenyan law regulating such data transfers be adhered to. The petitioner contended that the proceedings in Scotland and the orders issued by Scottish courts undermined the judicial authority of Kenyan courts.

### **Issues**

- i. Whether *ad interim* orders issued by a Scottish Court that effectively prohibited James Finlay (Kenya) Limited (JFKL) from prosecuting or instituting proceedings in Kenyan courts, undermined Kenya's judicial authority.
  1. Whether the Scottish Court's orders, though described as temporary, would exhaust all available legal avenues, and effectively suspend Kenyan courts' jurisdiction over the matter.
- ii. What were the constitutional, legal, and policy requirements for the enforcement of foreign judgments in Kenya?
- iii. Whether Scottish courts could assert jurisdiction over work injury claims especially when Kenyan law stipulated that such matters should be dealt with domestically under the Work Injury Benefits Act.
- iv. Whether the Scottish court had the legal framework or expertise to apply the Work Injury Benefits Act scheme to claims related to workplace injuries that happened in Kenya.
- v. Whether the transfer of sensitive personal data of Kenyans that consented to a Scottish court without obtaining approval from Kenya's Data Commissioner was violation of section 48 of the Data Protection Act which required data controllers or processors to obtain approval from the Data Commissioner before transferring sensitive personal data outside Kenya.
- vi. Whether the legal requirement to obtain approval from the Data Commissioner before transferring sensitive personal data outside Kenya still remained where the data subjects approved the transfer of their information and where no complaint had been filed to the Data Commissioner.
- vii. Whether the transfer of employees' sensitive personal data from Kenya to Scotland, without proper legal authorization, violated the employees' right to equal protection and benefit of the law under article 27 of the Constitution.
- viii. Whether the 4<sup>th</sup> and 5<sup>th</sup> respondents' actions in recruiting individuals and filing suits in Scotland in a manner incompatible with Kenyan law rendered those foreign proceedings illegal and unenforceable in Kenya.
- ix. Whether allegations of professional misconduct by an advocate of the High Court of Kenya should first be addressed through the statutory mechanisms provided under the Advocates Act, including the Advocates Complaints Commission and Disciplinary Tribunal, before being brought before a court.
- x. Whether the provisions of the Data Protection Act, particularly section 48, which regulated the transfer of sensitive personal data outside Kenya, conflicted with the procedural requirements established under Part VII of the High Court Practice and Procedure Rules regarding the enforcement of foreign judgments and orders.



- xi. Whether the High Court Practice and Procedure Rules, specifically those related to the enforcement of foreign judgments and orders, required updating to align with the provisions of the Data Protection Act.

## **Held**

1. The petitioner had the *locus standi* to institute the proceedings. The petitioner had not stated that it was filing the petition on behalf of the Judiciary, or the Law Society of Kenya, or on behalf of any one single employer, or employee. The petition was a representative member-based organization that advocated for the rights of employers. Article 258 (1) of the Constitution provided that every person had the right to institute court proceedings claiming that the Constitution had been contravened or was threatened with contravention. The petitioner was entitled to file the petition upon that constitutional entitlement. The petitioner had satisfied article 258 (2)(b), (c) or (d) which in addition to 258(1), was a person acting as a member of, or in the interest of, a group or class of persons (in this case employers); was a person acting in the public interest (namely to safeguard the integrity of Kenya's legal or justice system); or, was an association acting in the interest of one or more of its members.
2. The petitioner enjoyed standing as of right to protect the Constitution and to safeguard interests of its employer-members. The petitioner in the instant matter was a party and was not acting for a party to proceedings like advocates were entitled to do under the Advocates Act.
3. The instant petition had set out the complaint and the provisions deemed to have been violated. It met the muster for a constitutional petition.
4. The Scottish court's orders undermined Kenya's judicial authority, restricted the Kenyan Judiciary's sovereign functions, and violated constitutional provisions, including the right to access justice and a fair hearing. The *ad interim* orders given by the Scottish court on August 22, 2022, effectively barred James Finlay (Kenya) Limited from prosecuting its case (ELRCPET/E133/2022) or instituting similar proceedings in Kenya. It also prohibited the implementation of Kenyan court orders issued on July 28, 2022, regarding the same matter.
5. The Scottish court's orders undermined the judicial authority of Kenyan courts, effectively suspending the Kenyan court's power to exercise its jurisdiction. Such orders violated articles 48 and 50 of the Constitution, which protected the right to access justice and a fair hearing. If the Scottish orders were labeled as temporary, their effect was permanent, as compliance would leave no further legal actions to be taken. For foreign orders to be enforced in Kenya, they must pass constitutional, legal, and policy tests. Any foreign judgment must be consistent with Kenya's Constitution, public policy, and laws.
6. Both the Scottish and Kenyan courts had jurisdiction over JFKL. Under the Civil Jurisdiction and Judgments Act 1982, the parties could have agreed to take a dispute to a particular court, but they had not done so. The employment contracts only stipulated that Kenyan law was to apply to any claims for workplace injury, not that such claims had to be raised in the Kenyan courts. As such, the Court of Session had jurisdiction to hear the claims.
7. In terms of Kenyan law, the group members' injuries were covered by the Work Injuries Benefits Act (WIBA) and therefore had to be dealt with under the WIBA scheme. The Court of Session had no experience of applying the WIBA scheme. In theory, the court could only award the same amount of compensation as would be awarded by the Director in Kenya. Those matters pointed towards Kenya being the appropriate forum.
8. The appropriate course of action was to pause the Scottish proceedings pending resolution of the claims under WIBA. The Scottish court could not say that the WIBA system was unable to provide the group members with substantial justice. If the claims were not determined in accordance with WIBA, or if there was excessive delay in their determination, the court may require to recall the pause. The claims should be progressed in Kenya under WIBA.
9. The 4<sup>th</sup> and 5<sup>th</sup> respondents were bound by section 48 of the Data Protection Act, which required data controllers or processors to obtain approval from the Data Commissioner before transferring



- sensitive personal data outside Kenya. Even though the employees may have consented to the transfer, the respondents were obligated to ensure the Data Commissioner was informed and satisfied with the security and protection measures in place. Although no complaint was filed with the Data Commissioner, the legal duty to obtain approval from the Commissioner remained. Subject to the provisions of section 48 of the Act, while the data subjects may have given consent, nevertheless, the section required the data subjects to be protected by the Data Commissioner in terms of section 48 of the Data Protection Act. There was a need for judicial and governmental assistance in the enforcement of foreign orders related to data.
10. One office to be involved in transferring data to a foreign jurisdiction where the assistance of the Kenya Government and the High Court was obtained would be the Data Commissioner per section 48 of the Data Protection Act, and, the provisions of the Act would have to be taken into account in updating the High Court (Practice and Procedure) Rules in the Judicature Act.
  11. On account of the doctrine of justiciability, the appropriate measure was for the merits of whether the 5<sup>th</sup> respondent had breached or not breached the Advocates Practice Rules, 1966 to be determined on merits, as of first instance, in accordance with the provisions of the Advocates Act. The availability of that elaborate statutory process and procedure operated as a bar to the court delving into the 5<sup>th</sup> respondent's alleged professional misconduct so as not to defeat the established statutory design that provided for adequate safeguards and reliefs to involved parties including the 5<sup>th</sup> respondent. The court had warned itself to decline determination of the issue for want of exhaustion of the statutory process and procedure and which had not been shown to be unavailable or incapable of being invoked in the instant claims and allegations. The Advocates Act provided for the Advocates Complaints Commission for the purpose of enquiring into complaints against any advocate, firm of advocates, or any member or employees thereof and the Commission may refer a complaint in breach of professional discipline to the Disciplinary Tribunal established under Part XI. The said Part XI had elaborate provisions for receiving and hearing complaints against an advocate of professional misconduct, which included disgraceful or dishonourable conduct incompatible with the status of an advocate.
  12. The dispute surrounding the instant proceedings pointed to significant challenges and gaps in the implementation of the Work Injury Benefits Act towards the expeditious, fair, just, and proportionate determination of the assessments for compensation and disputes under the Act. In that consideration the Cabinet Secretary for Labour and Social Protection and 2<sup>nd</sup> respondent were to take appropriate measures for legislative reforms towards removing the challenges and gaps in the no-fault regime envisaged under the Act. Such reforms would include focus on matters such as the expeditious, fair, just, and proportionate determination of the assessments for compensation and determination of disputes under the Act including instituting the relevant efficient and effective procedural safeguards; the defined role and guidelines for Designated Health Practitioners in assisting the Director of Occupational Safety and Health to undertake the assessments and make awards; comprehensive inclusion of specific work injuries with provisions for dealing with residual injuries not listed; periodic review of the formulae and measure of the awards to be made in given occupational injuries, diseases or deaths; step by step procedures for administering various aspects of the Act; and, prompt compliance or enforcement of the awards under the Act.

*Petition allowed.*

### **Orders**

- i. *The Cabinet Secretary for Labour and Social Protection and 2<sup>nd</sup> respondents were to take appropriate participatory measures for legislative reforms towards removing the significant challenges and gaps in the implementation of the no-fault design of the Work Injury Benefits Act towards the expeditious, fair, just, and proportionate determination of the assessments for compensation and determination of disputes under the Act including instituting the relevant efficient and effective procedural safeguards, the role and guidelines for Designated Health Practitioners in assisting the Director of Occupational Safety and*



- Health to undertake the initial and second assessments (in event of objections) and for expeditious making of awards across the Counties; comprehensive inclusion of specific work injuries with provisions for dealing with residual injuries not listed, and, prompt compliance or enforcement of the awards under the Act, and, a progress report be filed in Court within 12 months from the date of the instant judgment; and the petitioner were to serve the judgment within 7 days for that purpose.*
- ii. *Declaration issued that all persons had a right of access to justice and an absolute right to a fair hearing and no foreign court or order could be used to impede or stop the enjoyment of that right within the Republic of Kenya.*
  - iii. *Declaration issued that Kenyan courts had jurisdiction to try for any matter arising from causes of action that arose in Kenya in which parties were domiciled and operated in Kenya.*
  - iv. *Declaration issued that judgments and orders issued by courts in foreign countries were not enforceable in Kenya unless their enforcement was sought in the manner prescribed by law.*
  - v. *Declaration issued that no documentary evidence being sensitive personal data under the Data Protection Act could be presented from within Kenya to a foreign court unless the same had been collected in a manner established by the Data Protection Act and other relevant law.*
  - vi. *Declaration issued that judgments and orders issued by courts based in foreign countries and which judgments or orders were not compatible with the Kenyan Constitution could not be enforced or given effect to within the Republic of Kenya.*
  - vii. *Declaration issued that the act of the 4<sup>th</sup> and 5<sup>th</sup> respondents recruiting individuals and filing suits in foreign jurisdictions in a manner incompatible with Kenyan law was illegal and therefore null and void and orders emanating from any such proceedings could not be enforced in Kenya.*
  - viii. *Declaration issued that the Director of Occupational Health and Safety Services had the jurisdiction to deal with work injury claims arising from employment relationships within the Republic of Kenya under section 16 of the Work Injury Benefits Act at first instance and the Scottish courts had no jurisdiction at all, unless, by law, otherwise established.*
  - ix. *Declaration issued that any person dissatisfied with the decision of Director of Occupational Health and Services in exercise of the authority under the Work Injury Benefits Act would have redress in the Employment and Labour Relations Court of Kenya and not the Scottish courts or any other foreign jurisdiction, unless, by law otherwise established.*
  - x. *Declaration issued that any transfer of data from Kenya for use in a foreign jurisdiction could only be undertaken, inter alia, within the framework of section 48 of the Data Protection Act.*
  - xi. *Declaration issued that the act of the 4<sup>th</sup> and 5<sup>th</sup> respondents collecting and transmitting data outside the Republic of Kenya was incompatible with the provisions of section 48 of the Data Protection Act and constituted a violation of the right to equal protection and benefit of the law under article 27 of the Constitution.*
  - xii. *Declaration issued that the 4<sup>th</sup> and 5<sup>th</sup> respondents or their agents should forthwith stop, cease to aid, abet, assist or in any manner participate in the prosecution of the Scottish proceedings styled GP/22 in the Scottish courts or any other similar proceedings in Scotland without first observing the mandatory constitutional and statutory provisions applicable in furthering any prosecution of a suit in a foreign court as required under Kenyan law and with respect to employment relationships and causes of action accruing within the Republic of Kenya.*
  - xiii. *Declaration that the act of the 4<sup>th</sup> and 5<sup>th</sup> respondents collecting and transmitting evidence to foreign courts in a manner incompatible with Part 8 of the High Court Practice and Procedure Rules violated the right to equal protection and benefit of the law under article 27 of the Constitution.*
  - xiv. *Each was party to bear their costs of the suit.*

## **Citations**

### **Cases**

#### **Kenya**



1. *Anarita Karimi Njeru v Republic* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR) - (Mentioned)
2. *Ingang'a & 6 others v James Finlay (Kenya) Limited* Petition 7 (E009) of 2021; [2023] KESC 22 (KLR) - (Explained)
3. *Ingang'a, Elly Okong'o & 6 others v James Finlay (Kenya) Limited* Petition ? of 2019; [2021] KEELRC 2309 (KLR) - (Mentioned)
4. *James Finlay Kenya Limited v Anganga & 1043 others; Hugh Campbell, QC (Interested Party)* Petition E133 of 2022; [2022] KEELRC 12963 (KLR) - (Mentioned)
5. *Law Society of Kenya v Commissioner of Lands* Civil Case 464 of 2000; [2001] eKLR - (Mentioned)
6. *Law Society of Kenya v Federation of Kenya Employers* Petition 505 of 2019; [2023] KEHC 17853 (KLR) - (Mentioned)
7. *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) - (Mentioned)
8. *Njau, Alfred & 5 others v City Council of Nairobi* Civil Appeal 74 of 1982; [1983] KECA 56 (KLR); (1982) KAR 220 - (Mentioned)
9. *Shollei v Judicial Service Commission & another* Petition 34 of 2014; [2022] KESC 5 (KLR) - (Followed)

### **United Kingdom**

*Hugh Hall Campbell, KC v James Finlay (Kenya) Limited* [2023] CSIH 39 GP1/22, P305/22 and P657/22 - (Mentioned)

### **Statutes**

#### **Kenya**

1. Advocates Act (cap 16) In general — (Cited)
2. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 28 — (Interpreted)
3. Constitution of Kenya articles 1(3); 2(1); 4(1); 22(1); 27; 31; 48; 50; 156; 159; 160; 161; 258(1) — (Interpreted)
4. Data Protection Act (cap 411C) sections 2, 48 — (Interpreted)
5. Employment Act (cap 226) In general — (Cited)
6. Foreign Judgments (Reciprocal Enforcement) Act (cap 43) In general — (Cited)
7. High Court Practice and Procedure Rules (cap 8C Sub Leg) part 8 — (Interpreted)
8. Judicature Act (cap 8) section 10 — (Interpreted)
9. Work Injury Benefits Act (cap 236) section 16 — (Interpreted)

### **United Kingdom**

Civil Jurisdiction and Judgments Act, 1982 In general — (Cited)

### **Advocates**

None mentioned

## **JUDGMENT**

1. The petitioner filed the petition dated May 3, 2023 through M/S Otieno Ogola & Company Advocates and Mr. Wills Evans Otieno Advocate acted in that behalf. The petitioner prayed for:
  - a. A declaratory order that all persons have an absolute right of access to justice and a fair hearing and no foreign court or order can be used to impede or stop the enjoyment of that right within the Republic of Kenya.
  - b. A declaratory order that Kenyan Courts have jurisdiction to try for any matter arising from causes of action that arise in Kenya in which parties are domiciled and operate in Kenya.



- c. A declaratory order that judgments and orders issued by courts in foreign countries are not enforceable in Kenya unless their enforcement is sought in the manner prescribed by law.
  - d. A declaratory order that no documentary evidence can be presented before a foreign court unless the same has been collected in a manner established by law.
  - e. A declaratory order that any judgments and orders issued by courts based in foreign countries that are not compatible with the Kenyan Constitution cannot be enforced or give effect to within the Republic of Kenya.
  - f. A declaratory order that the act of the 4<sup>th</sup> and 5<sup>th</sup> respondents recruiting individuals and filing suits in foreign jurisdictions in a manner incompatible with Kenyan law is illegal and therefore null and void and orders emanating from any such proceedings cannot be enforced in Kenya.
  - g. A declaratory order that the Director of Occupational Health and Safety Services has exclusive jurisdiction to deal with work injury claims arising from employment relationships within the Republic of Kenya under section 16 of the [Work Injury Benefits Act](#) at first instance and the Scottish courts have no jurisdiction at all.
  - h. A declaratory order that any person dissatisfied with the decision of Director of Occupational Health and Services will have redress in the Employment and Labour Relations Court and not the Scottish courts or any other foreign jurisdiction.
  - i. A declaratory order that any transfer of data from Kenya for use in a foreign jurisdiction can only be undertaken within the framework of section 48 of the [Data Protection Act](#).
  - j. An order that the act of the 4<sup>th</sup> and 5<sup>th</sup> respondents collecting and transmitting data outside the Republic of Kenya is incompatible with the provisions of section 48 [Data Protection Act](#) and constitutes a violation of the right to equal protection and benefit of the law under article 27.
  - k. A declaration that the 5<sup>th</sup> respondent working in conjunction with the 4<sup>th</sup> respondent to recruit workers in Kenya in collaboration with Scottish is acting in violation of rule 6 of the Advocates Practice Rules and the interested party should take up disciplinary action against the named person.
  - l. A declaratory order that the 4<sup>th</sup> and 5<sup>th</sup> respondents should with immediate effect stop, cease to aid, abet, assist or in any manner participate in the prosecution of the Scottish proceedings styled GP/22 in the Scottish Courts or any other similar proceedings in Scotland without first observing the mandatory constitutional and statutory provisions applicable in furthering any prosecution of a suit in a foreign court as required under Kenyan law.
  - m. An order that the act of the 4<sup>th</sup> and 5<sup>th</sup> respondents collecting and transmitting evidence to foreign courts in a manner incompatible with part 8 of the [High Court Practise and Procedure Rules](#) violates the right to equal protection and benefit of the law under article 27.
  - n. An order barring the 4<sup>th</sup> and 5<sup>th</sup> respondents from recruiting and soliciting individuals for purposes of filing cases in foreign jurisdictions for causes of action that arise in Kenya when there are sufficient mechanisms within the Republic of Kenya for dealing with any such grievances.
  - o. Any further relief or orders that this honourable court may deem just and fit to grant.
2. The petition describes the parties as follows:



- a. The petitioner is the most representative employers' organisation in Kenya. The role of the petitioner is to improve the business environment for Kenyan employers through advocacy, effective representation, social dialogue, and, provision of value-add services. In addition to representing Kenyan employers at local level, the petitioner also represents members at regional and international level including at East Africa Employers Organisation, Business Africa and International Organisation of Employers (IOE), and, International Labour Organization (ILO). Further, in taking policy position, KKE is guided with the need to ensure a balanced and trusted policy position that promotes Kenya's socio-economic development; accelerated job creation; enterprise development; fair labour practices; resilient and competitive employers; harmonious industrial relation; social justice; and, feasibility and affordability of the costs associated with implementation of the policy.
  - b. The 1<sup>st</sup> respondent is the Cabinet Secretary responsible for matters of international relations including amongst others, overseeing international relationship between the Kenyan State and foreign States within the general framework of laws and customs that govern international relations in the comity of nations.
  - c. The 2<sup>nd</sup> respondent is the Attorney General of the Republic of Kenya and per article 156 of the [\*Constitution of Kenya 2010\*](#) is the principal legal adviser to the Government of the Republic of Kenya; represents the National Government in Court or in any other legal proceedings to which the national government is a party; and, the officer of Government under duty to promote, protect and uphold the rule of law and defender of public interest.
  - d. The 3<sup>rd</sup> respondent had been the Chief Justice of the Republic of Kenya and is the head of Judiciary vested with amongst others the duty and responsibility of overseeing the administration of justice within the Republic. The 3<sup>rd</sup> respondent was struck out as a party to the proceedings by the order given on July 26, 2023.
  - e. The 4<sup>th</sup> respondent is a non-governmental organization operating within the Republic of Kenya and engages in acts of advocating for human rights, protection of the environment, empowering of individuals through access to information and opportunities. The 4<sup>th</sup> respondent also sources for and also recruits individuals within Kenya for purposes of instituting legal proceedings in foreign jurisdictions.
  - f. The 5<sup>th</sup> respondent is an Advocate of the High Court of Kenya and founder member of the 4<sup>th</sup> respondent who engages in acts of actively recruiting persons with supposed work injury claims to enlist and file cases in Scotland in matters that the course of action arose in Kenya and are subject to Kenyan law. The 5<sup>th</sup> respondent is subject to Kenya law and the regulatory processes and rules of the Interested party.
  - g. The interested party is the Law Society of Kenya and is joined in the proceedings on the strength of its statutory mandate to advise on the rule of law and oversee the practice of law by its members in a manner that conforms to the law and rules.
3. The petition was based upon the supporting affidavit of Jacqueline Mugo, Executive Director of the Petitioner, sworn on May 3, 2023 and exhibits thereto filed together with the petition. The petitioner's case is as follows:
    - a. That the petitioner is a representative member-based organization that advocates for the rights of employers, labour issues and the rule of law within the general rubric of employer-employee relations within the Republic of Kenya, the African continent and the global sphere generally.



- b. That the petitioner has learnt from numerous media reports and has further confirmed at the Court's registry as well as that of the Court of Appeal, that there are on-going legal proceedings between James Finlays Company and some of its current and former workers over employment and work injuries related issues being carried out in the United Kingdom and specifically Scotland.
- c. That the proceedings in Scotland between James Finlays Kenya and some of its current and former employees are styled as cause GP1/22.
- d. That the petitioner in its investigations established that in the proceedings in Scotland, there have been issued orders stopping and barring James Finlays Kenya from engaging in, participating in and or in any way pursuing any legal remedies within the court system established in Kenya.
- e. That the petitioner was also able to establish that there had been proceedings in Kenya courts between the parties in which the courts in Kenya had issued injunctions stopping evidence collection for the proceedings in Scotland in a manner that was inconsistent with the laws of Kenya.
- f. That the petitioner established that the proceedings in Scotland have been initiated upon the instigation of the 4<sup>th</sup> respondent who has been actively recruiting persons in Kenya on its website to join and lodge proceedings in Scotland.
- g. The petitioner is apprehensive that any suits filed in foreign jurisdiction automatically involve data transfers of sensitive personal information involving employees in Kenya and it is imperative that Kenya law regulating such data transfers be adhered to.
- h. The petitioner being a representative body of employers in Kenya is concerned about the emerging trend of labour suits being filed outside jurisdiction to undermine the ability of Kenyan courts and administrative structures to resolve any such disputes in the manner provided under Kenyan law. Such a move will have drastic effect in resolving labour disputes and undermine the right of employees to access to justice and fair hearing as provided in the [Constitution](#).
- i. The petitioner seeks the Court's interpretation of article 159 of the [Constitution](#) which provides that judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under the [Constitution](#) and whether the practice of parties seeking recourse in foreign courts where the course of action and all parties reside in Kenya, the grievance is governed by Kenyan law and a foreign court bars parties from participating in proceedings in Kenya, is consistent with the provisions of the [Constitution](#).
- j. The petitioner seeks the court's interpretation of article 160 of the [Constitution](#) which provides that in the exercise of judicial authority, the judiciary as constituted by article 161 shall be subject only to the [Constitution](#) and the law and shall not be subjected to the control or direction of any person or authority and whether a foreign court order can be enforced within the Republic of Kenya in a manner incompatible with the [Constitution](#).
- k. The petitioner's case is that the act of the 4<sup>th</sup> and 5<sup>th</sup> respondents in recruiting persons to institute proceedings in a foreign jurisdiction for courses of action that arise in Kenya and are subject to Kenyan law is a treat to the sovereignty of the Kenyan State, undermines the right to due process of the law in Kenya and challenges the judicial authority of the Kenyan Courts. The institution of injury claims as instigated by the 4<sup>th</sup> and 5<sup>th</sup> respondents in circumstances



that violate the [Work Injury Benefit Act, 2007](#) (WIBA) will violate constitutional rights and fundamental freedoms guaranteed under article 50(1) of the [Constitution](#) which gives all persons the right to have disputes involving it determined by application of the law through fair and lawful procedure. Further, the rights and fundamental freedoms guaranteed under article 27(1) and (5) of the [Constitution](#) stand to be infringed as the complained act divests affected employers the benefit of having claims determined in line with the [Work Injury Benefits Act, 2007](#).

- l. The petition if not allowed, the petitioners' members will suffer irreparable harm because the 4<sup>th</sup> and 5<sup>th</sup> respondents will continue with the impugned acts of recruiting and registering workers- to institute proceedings against Kenyan employers in foreign jurisdictions for courses of action that arise in Kenya and are subject to Kenyan law.
4. The 5<sup>th</sup> respondent filed his replying affidavit sworn on October 9, 2023 through KTK Advocates and Mr Donald B Kipkorir acted in that behalf. The 5<sup>th</sup> respondent stated and urged as follows:
- a. The respondent states that he is an Advocate of the High Court of Kenya and a solicitor of the Senior courts of England and Wales. He is the managing partner of Ronald K Onyango Advocates LLP a Kenyan based law firm based in Nakuru. That he resides in Manchester UK and operates between Manchester, UK and Nakuru-Kenya.
  - b. The petitioner admits that there are ongoing proceedings in Scotland styled as cause GP1/22 by current and former employees of James Finlay Kenya Limited against it, on injuries sustained whilst working with James Finlay Kenya Limited which was first lodged in court in September 2021, and that the court in Scotland established that the petitioners had a *prima facie* case against the respondents.
  - c. That James Finlay Kenya Limited in November, 2021 appealed to the Inner House of the Court of Session (The Supreme Court of Scotland) against the aforementioned decision, and the appellate court upheld the earlier decision by the Outer House (first instance judge) of the Court of Session.
  - d. That in March 2023 the Scottish court heard “proof” namely a trial in the group proceedings. Judgment is awaited from Lord Weir. The trial was limited to questions of (first) jurisdiction; and (second) forum non conveniens.
  - e. The respondent apprehends that the suit herein is made for and on behalf of James Finlay Kenya Limited despite that it is not a named party, and is an application by proxy. Further, that counsel for the petitioner (Mr. Otieno) was an expert witness for James Finlay Kenya Limited in the Scottish trial although he did not ultimately give evidence in person.
  - f. That there is an ongoing legal proceeding in the Employment and Labour Relations Court between James Finlay Kenya Limited and some of its current and former workers being ELRC Petition No. E133 of 2022 James Finaly Kenya Limited v Alice Bosibori Anganga and 1043 others and Hugh Hall Campbell as an interested party.
  - g. That James Finlay Kenya Limited were issued an anti-suit injunction by the ELRC court under the said ELRC Petition No. 133 of 2022, which stopped the 1,044 current and former employees from proceeding further with the Scottish matter which the Scottish judge endorsed the orders from the Kenyan courts and set aside cases being presented by the 1,044 petitioners.
  - h. That the current and former employees of James Finlay Kenya Limited did not seek to stop proceedings undertaken in Kenya, but instead they sued James Finlay Kenya in the Scottish



court for breach of an undertaking where they undertook not to intimidate any current or former employees who intends or has already joined the class action suit in Scotland or interfere with the Scottish proceedings in any way.

- i. That the order in Scotland was not an order to stop the proceedings in Kenya but an order asking James Finlay Kenya Limited to stay the Kenyan proceedings pending conclusion of the Scottish case so as not to frustrate the already ongoing Scottish proceedings.
  - j. The 5<sup>th</sup> respondent stated that he has never recruited anyone as Ronald Onyango, however, the firm of Ronald K Onyango Advocates LLP which has several partners is involved in representing current and former tea workers of James Finlay Kenya Limited in an already ongoing proceedings in Scotland styled as cause GP1/22, and that the process of registration of clients which is being referred to as recruitment is not illegal since the purpose of the exercise is for a class action, compensation suit, in Scotland, and not in Kenya courts.
  - k. That the lead firm representing the tea workers, was issued with a letter of no objection on the class action suit from the Law Society of Kenya to publicise and advertise group proceedings against James Finlay Kenya Limited
  - l. Instituting the suit in Scotland is not a violation of the [Constitution of Kenya](#) and does not in any way undermine the Kenya's sovereignty or any laws as alleged.
  - m. This is not the first case where employees domiciled in Kenya have sued their employers in a foreign jurisdiction where the parent employer company is domiciled. Such cases include Kakuzi Plc a subsidiary of Camelia Plc and Unilever Tea, where former employees sued in the UK and were compensated. It is stated that this is not the first time action is being taken outside Kenya in relation to plantation and agricultural activities in Kenya, and, the respondent states it had not been able to identify any action of such an intervention by the petitioner.
  - n. That the effect of the orders sought against the respondent is that he would not be able to discharge his duties to the clients in representing them in the group action. The impact is serious and interferes with the rights of the clients to legal representation, choice of advocates, and, access to justice.
  - o. That the reliefs sought in the petition are incapable of being granted as they violate the established international law and norms on independence of the judicial process of each country. That they violate internationally established law on enforcement proceedings that allow national courts to test, affirm or reject foreign judgments and orders.
5. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents have not filed papers to oppose or support the petition. They did not file submissions. Mukele Moni & Company Advocates filed a notice of appointment dated July 26, 2023 to act for the interested party.
  6. Final submissions were filed for the parties. The court has considered all the material on record. The court returns as follows.
  7. To answer the 1<sup>st</sup> issue, the court returns that the petitioner has the requisite standing. It is submitted for 5<sup>th</sup> respondent that the petitioner has no locus standi to institute proceedings on behalf of the Judiciary, the Law Society of Kenya, the employers, and the employees. In [Law Society of Kenya v Commissioner of Lands](#) HCCC No of 2000 at Nairobi it was held thus, "*locus standi* signifies a right to be heard. A person must have sufficiency of interest to sustain his standing to sue in Court of law." Again, in [Alfred Njau and others v City Council of Nairobi](#) (1982) KAR 220 the Court held, "The term *Locus standi* means a right to appear in Court and conversely to say that a person has no *locus standi* means



that he has no right to appear or be heard in such and such proceedings.” It was submitted for 5<sup>th</sup> respondent that the petitioner did not have instructions to act for the Law Society of Kenya or the Judiciary. The matter in Scotland styled GP1/22 is a civil matter with no public law implications. The petitioner cannot therefore claim that the [Constitution of Kenya](#) has been infringed in relation to the independence of the Judiciary simply because any orders were given against a party in that matter in Scotland. The grant of the stay orders in that matter does not warrant filing of the petition on behalf of the Judiciary. Further, it is the Law Society of Kenya that regulates the legal practice in Kenya per the statutory provisions and the society did not instruct the petitioner to file the instant petition. The employees of James Finlay Kenya Limited filed the suit in Scotland to seek compensation from their employer which is a company registered and insured in Scotland and by doing so the [Constitution of Kenya](#) was not thereby violated to entitle the petitioner to file the instant petition on behalf of the Judiciary or the Law Society of Kenya. Authority to so plead has not been exhibited at all. The petitioner is being used as a proxy by the James Finlay Kenya Limited and in [Law Society of Kenya v Federation of Kenya Employers](#), Petition No 505 of 2019 at Nairobi it was held that the petitioner is not authorised to offer legal services. The 5<sup>th</sup> respondent submitted that the petitioner did not have standing to file the instant petition on behalf of an employer.

8. For the petitioner there appears no express submissions on the issue of standing. However, the petitioner has by affidavit stated that the petitioner is a representative member-based organization that advocates for the rights of employers, labour issues and the rule of law within the general rubric of employer-employee relations within the Republic of Kenya, the African continent and the global sphere generally. The 5<sup>th</sup> respondent has not denied or rebutted the declared special mandate of the petitioner. It is in that capacity that the petitioner has filed the petition. The petitioner has not stated that it is filing the petition on behalf of the Judiciary or the Law Society of Kenya. It has not even stated that it is filing the petition on behalf of any one single employer or employee. It has stated that it is a representative member-based organization that advocates for the rights of employers. Article 258(1 of the [Constitution](#) provides that every person has the right to institute court proceedings claiming that the [Constitution](#) has been contravened or is threatened with contravention. The petitioner is entitled to file the petition upon that constitutional entitlement. Further, by the undisputed description of the petitioner, the court considers that the petitioner has satisfied article 258(2)(b)(c) or (d) which in addition to 25(1), is a person acting as a member of, or in the interest of, a group or class of persons (in this case employers); is a person acting in the public interest (namely to safeguard the integrity of Kenya’s legal or justice system); or, is an association acting in the interest of one or more of its members. Thus, the petitioner enjoys standing as of right to protect the [Constitution](#) and to safeguard interests of its employer-members. While making that finding, the court returns that the petitioner in the instant matter is a party and is not acting for a party to proceedings like Advocates are entitled to do under the [Advocates Act](#).
9. The 2<sup>nd</sup> issue is whether the petition meets the threshold in pleading constitutional violations. The 5<sup>th</sup> respondent has cited [Anarita Karimi Njeru v Republic](#) [1976]eKLR thus, “We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the [Constitution](#), it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.” It was submitted that the same principle was upheld in [Mumo Matemo v Trusted Society of Human Rights Alliance](#) (2013) eKLR. It was submitted for the 5<sup>th</sup> respondent that the petitioner has not demonstrated how the 5<sup>th</sup> respondent has limited the petitioner’s rights to access justice under article 48 of the [Constitution](#) or the right of the petitioner to a fair trial under article 50 of the [Constitution](#). That the 5<sup>th</sup> respondent is an Advocate for the former and current employees of the James Finlay Kenya Limited who lodged a suit in Scotland and has not



violated any person's right to access justice or a fair hearing. Further the court in Scotland gave an order to stay the proceedings in Kenya as an interim measure to James Finlay Kenya Limited or anyone acting in its behalf until the matter is concluded in Scotland to avoid a scenario where two courts of competent jurisdiction have contradicting decisions on a matter between similar parties emanating from the same subject matter. The court in Scotland did not order James Finlay Kenya Limited from accessing justice in a fair and impartial trial. It the court which made the order and not the 5<sup>th</sup> respondent. He was merely an agent of former and current employees of James Finlay Kenya Limited in that suit seeking compensation. The petitioner has therefore failed to show the nexus between the 5<sup>th</sup> respondent and the alleged violation of the rights under articles 48 and 50.

10. As submitted for the respondent, to determine whether the petitioner has met the threshold for proper pleadings in constitutional petitions, the answer lies in the pleadings. The threshold is about allegations in the pleadings. It is another issue whether they are established at all. What allegations did the petitioner make against the 5<sup>th</sup> respondent? The allegations are made against the 4<sup>th</sup> and 5<sup>th</sup> respondents jointly and they are as follows. They are undermining the due process of law in Kenya including sponsoring directly and indirectly through proxies and associates proceedings in foreign jurisdiction that usurp the practice of law in Kenya; they are publicly recruiting members of the public to pursue litigation in Scotland on matters whose cause of action arose in Kenya and are subject of the laws to laws of Kenya; they are collecting and sending out personal and sensitive data of Kenyan citizens without complying with the applicable laws of Kenya including High Court Practice and Procedure Rules, the data protection Act and if unchecked, those actions by the 4<sup>th</sup> and 5<sup>th</sup> respondents shall undermine the due process of law. The proceedings in Scotland and the actions by the 4<sup>th</sup> and 5<sup>th</sup> respondents are in violation of the Employment Act, 2007 on terms and conditions of employment; the Work Injury Benefit Act, 2007 on assessment of work injury, diseases, or deaths benefits and determination of related disputes, and, and the rights in articles 50, 27(1) and (5) and, 48 of the Constitution of Kenya 2010 have thereby violated. The Court returns that looking at the petitioner's pleadings, the test in Anarita Karimi Njeru v Republic [1976] eKLR has been passed, namely setting out the complaint and the provisions of the Constitution that are alleged to have been violated.
11. The 3<sup>rd</sup> issue is whether the orders made by the Court in Scotland violated the sovereignty of the Judiciary in Kenya. This particular issue was framed for the 5<sup>th</sup> respondent. The Court has perused the petition and the supporting affidavit as well as the replying affidavit. There is exhibited an order dated August 24, 2022 given by the Outer House, Court of Sessions in Petition No. P657/22, Hugh Hall Campbell QC as petitioner (suing for the employees) and James Finlay (Kenya) Limited as the respondent. Order 3 was worded thus, "3. interdicts as interim the respondent or anyone acting on its behalf:
  - a. from continuing to prosecute the proceedings at its instance in the Employment and Labour Relations Court of Kenya at Nairobi City under case number ELRCPET/E133/2022;
  - b. from seeking to raise any further proceedings other than those referred to in (a) above, in Kenya or elsewhere out-with the jurisdiction of this Court, which have the effect or intended effect of interfering in any way with the conduct of the Group Proceedings in Scotland, in which the respondent is the defender, with reference number GP1/22;
  - c. from seeking to implement the orders of the Court in Kenya pronounced on 28 July 2022 in any way, and in particular by posting copies of the list of Respondents to Kenyan Proceedings on notice boards or, if effected, by continuing to permit them to be posted."
12. Order 4 thereof was worded thus "4. Grants orders ad interim in terms of section 46 of the Court of Sessions Act 1988:



- a. Ordering the respondent to apply to the Court in Kenya as soon as practicably possible in the proceedings referred to in paragraph (3)(a) above (i) to recall or otherwise negate the effect of all orders which were granted on 28 July 2022, such as to permit the continuation of the Scottish Group Proceedings stayed; those applications to be at their sole expense; and,
  - b. Ordering the respondent as soon as practicably possible to publish a notice in English together with a translation to Swahili and publish on its notice boards at all locations where it had previously displayed the names of employees who were engaged in the group proceedings in purported implement of the court orders in the Kenyan proceedings; orders that the notice should inform group members of the terms of the orders granted in 3(a) and 3(b) of this interlocutor and that it should include the following: “Contrary to previous notices placed on this notice board, no person is required to provide their email address to JFK’s Advocates.”
13. It is submitted for the 5<sup>th</sup> respondent that the petitioner’s case is that the order in that Scottish court as made against its member, James Finlay (Kenya) Limited undermines the authority of the Kenya Judiciary as it bars the Kenya Judiciary from exercising its judicial authority. Further, the said ELRCPET No. E133 of 2022 before the Court in Kenya on the same issues of sovereignty is pending and is a live matter. Further, the ad interim orders by the Scottish Court were directed at James Finlay Kenya Limited and who should be able to ventilate the issues in the Scottish Court and their objections in Scottish Court have failed to get the order of August 12, 2022 recalled. It was further submitted thus, “The decision to stay a matter in one court is not meant to limit the power of that court but to facilitate amicable resolution of the dispute, in question and not to raise more avenues of conflict by having two Courts of competent jurisdiction having different decisions.” Further, the said ad interim order by Lord Braid were directed at James Finlay Kenya Limited to desist from prosecuting their petition in Kenya and not directed at the Kenyan Court from hearing that petition. Further, the Scottish Court made the orders not attempting to exercise its powers within the Kenyan territory and jurisdiction, but rather, it was exercising its powers over the proceedings before it. It is submitted that if the orders were breached, they would be enforced by the Scottish court, James Finlay Kenya Limited being a resident of Scotland. In giving the ad interim orders, the Scottish Court followed due process and can be adopted in the High Court of Kenya for enforcement as per the Court of Appeal in *Elly Okong’o Ingang’a & 6 others v James Finlay (Kenya) Limited* [2021] eKLR that the Kenyan Court whose assistance is sought would examine the case from the foreign Court and ascertain whether proper judicial process has been followed in obtaining such order, whether that process is consistent with Kenyan laws and policy, and whether the experts (to undertake inspection in that case) were duly qualified.
14. For the petitioner, the Court of Appeal decision in *Elly Okong’o Ingang’a & 6 others v James Finlay (Kenya) Limited* [2021] eKLR was cited thus, the Scottish Court has not been established pursuant to the *Constitution of Kenya* and the Scottish Court is not one of the courts established by the *Constitution*. Consequently, Kenya’s judiciary in the exercise of its sovereign and constitutional functions cannot be restricted, instructed or directed in any manner by an order of the courts of another sovereign state. It was submitted that the orders by the Scottish Court purported to bar James Finlay (Kenya) Limited, a member of the petitioner, from participating in, engaging in any legal proceedings whose cause of action arose in Kenya in effect, the Scottish Court purported to bar or suspend the application of the *Constitution of Kenya*. In particular, the orders by the Scottish Court undermined Article 1 of the *Constitution* on the exercise of the sovereign power of the people, article 48 on access to justice, article 50 on the right to a fair hearing, article 22(1) and 258(1) which guarantee every person the right to institute court proceedings. The orders further undermined Kenya’s judicial authority as guaranteed in articles 159 and 160 of the *Constitution* including jurisdiction of the High Court to hear and determine any question on the interpretation of the *Constitution* as James



Finlay (Kenya) Limited had instituted in ELRCPET.E133 of 2022. It was submitted that the Judiciary exercises delegated sovereign power of the people under article 1(3)(c) of the [Constitution of Kenya 2010](#) and the court has the constitutional responsibility to secure and guarantee the sovereignty of the people of Kenya and the supremacy of the [Constitution of Kenya 2010](#) per articles 1 and 2 thereof, and, to safeguard and protect the integrity, authority and independence of Kenya's judiciary in line with articles 159 and 160 of the [Constitution](#). It was further submitted for the petitioner thus, "On the other hand, the orders of the Scottish court, though issued in respect of ongoing judicial proceedings in Scotland, cannot be considered as being of an interlocutory nature because, if enforced, they would have the effect of terminating and preventing further judicial proceedings in Kenya with finality. As such, their effect is that of a definitive judgment and they should be treated as judgments within the meaning of the [Foreign Judgments \(Reciprocal Enforcement\) Act](#), and their enforcement subject to the Act."

15. The Court has considered the submissions. The court upholds the submissions made for the petitioner.
16. First, what was the scope of the ad interim orders given on August 22, 2022 by the Scottish Court? The order was that James Finlay (Kenya) Limited would not prosecute ELRCPET/ E133/2022 and would not institute and prosecute similar proceedings in Kenya or elsewhere and would not implement orders given on July 28, 2022 in ELRCPET/E133/2022. The Court finds that in essence, the order was made to suspend the authority of the Court in Kenya and summarily set aside or declared vestigial the orders given by the Court in Kenya on July 28, 2022. The order then proceeded to order the respondent (James Finlay (Kenya) Limited) to issue notices and post them within Kenyan territory and to word the notices in a particular manner. Article 48 provides that the state shall ensure access to justice for all persons and fees, if any, shall be reasonable and shall not impede access to justice. The Court was the provided forum for James Finlay (Kenya) Limited to access justice in terms of article 48 and at a reasonable cost for the kind of the cause of action such as had been initiated in ELRCPET/E133/2022. Article 50(1) on fair hearing provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. Article 25 of the [Constitution](#) provides that despite any other provision in the [Constitution](#) amongst the other listed fundamental freedoms and rights that shall not be limited is the right to fair trial (as provided for in article 50 of the [Constitution](#)). The court returns that the terms of the purported ad interim order while they were final or permanent in effect as submitted for the petitioner, they as well purported to, even if purported to be temporarily, to suspend access to justice by the respondent therein and contrary to the express provisions of article 25. For avoidance of any doubt, article 50 applies even to civil suits as to constitutional petitions. The court has been guided by the Supreme Court holding in [Gladys Boss shollei –versus- Judicial Service Commission & another](#) Petition No 34 of 2014 [2022]KESC5(KLR)(17 February 2022) (Judgment) (Koome CJ & P, Mwilu DCJ, & V-P, Ibrahim, NS Ndungu, & W Ouko, SCJJ), inter alia,

- “19. Article 50(1) of the [Constitution](#) referred to the right to a fair hearing for all persons, while article 50(2) accorded all accused persons the right to a fair trial. Article 25(c) of the [Constitution](#) listed the right to a fair trial as a non-derogable fundamental right and freedom that could not be limited. Often the terms fair hearing and fair trial were used interchangeably, sometimes to define the same concept, and other times to connote a minor difference.

Although the right to a fair trial was encompassed in the right to a fair hearing in the [Constitution](#), a literal construction of article 50(1) and 50(2) of the [Constitution](#) could be misconstrued in some quarters to mean that article 50(1) dealt with the right to fair hearing in any disputes including those of



a civil, criminal or quasi criminal nature whereas article 50(2) was limited to accused persons thereby arguing that the protection of such right only related to criminal matters. That was not an acceptable interpretation or construction within the parameters of articles 19 and 20 of the Constitution on the Bill of Rights, which called for an expansive and inclusive construction to give a right its full effect.”

17. Second, the ad interim orders were in impact permanent and if and after the respondent therein, James Finlay (Kenya) Limited implemented them, there would be nothing left to be done of them as the actions of compliance would be completed, with nothing left of the terms of the orders. Whether they were temporary or in fact final, the unconstitutional effect aside as found, they would require assistance of the Kenyan Courts to be adopted for implementation, if they passed the constitutionality, legality and policy tests as was held by the Court of Appeal in Elly Okong’o Ingang’a & 6 Others v James Finlay (Kenya) Limited [2021] eKLR. The Court of Appeal decision was appealed to the Supreme Court and it was upheld. The Supreme Court held that the foreign interim orders just like judgments would require assistance by the Kenyan Judiciary to be enforced in Kenya. The Supreme Court in in Elly Okong’o Ingang’a & 6 others v James Finlay (Kenya) Limited Petition No. 7 (E009) of 2021 eKLR held as follows:

- “(57) Under the Constitution, it is in the courts and tribunals established in Kenya through article 159, that the people of Kenya vested judicial authority. This is what informs our considered view that, of the three arms of government, the Judiciary is the better suited authority to scrutinize the decisions of a foreign court. It is also at the juncture of such scrutiny that the Courts of an enforcing country examine a decision by the foreign court or tribunal to determine if the same adheres to the Constitution and laws of the country. It is here that the Country’s public policy becomes crucial, as decisions that go against the enforcing country’s public policy considerations would not gain recognition.
- (62) Turning back to the dispute before the Court, these principles of territoriality and sovereignty are reflected in various articles of the Constitution of Kenya . Pursuant to article 2(1), the Constitution of Kenya is the supreme law of the land and binds all persons and all State organs at both levels of government. Pursuant to article 2(4) of the Constitution, any law that is inconsistent with the Constitution is void, and any act or omission in contravention of the Constitution is invalid. It goes without saying, that any foreign decision that is not consistent with the Constitution is void and would not be recognised.
- (63) Article 1 of the Constitution of Kenya lays out the expression of sovereignty of the people of Kenya as follows: “Sovereignty of the people (1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution. (2) The people may exercise their sovereign power either directly or through their democratically elected representatives. (3) Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution— (a) Parliament and the legislative assemblies in the county governments; (b) the national executive and the executive structures in the county governments; and (c) the Judiciary and independent tribunals. (4) The sovereign power of the people is exercised at— (a) the national level; and (b) the county level.”



- (64) Article 4(1) declares Kenya to be a sovereign republic. The people of Kenya exercise this sovereign power themselves and through the delegated state organs such as the Judicial arm of government. Article 159(1) provides that judicial authority of the courts ‘is derived from the people and vests in, and SC Petition No 7(E009) of 2021 30 shall be exercised by, the courts and tribunals established by or under this Constitution.’ While article 160(1) provides that ‘in the exercise of judicial authority, the Judiciary, as constituted by article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.’
- (66) We have no difficulty finding that decisions by foreign courts and tribunals are not automatically recognized or enforceable in Kenya. They must be examined by the courts in Kenya for them to gain recognition and to be enforced. Consequently, it is also our finding that Kenya as a sovereign state cannot automatically allow citizens, individuals or officers of a foreign state to carry out upon its own territory the decisions of a foreign court, without authorization from the Kenyan Government upon recognition of the decision of the foreign court or tribunal. Such an action would violate the principle of sovereignty enshrined in our Constitution. It is therefore our finding that the Appellants’ experts/examiners cannot enter the country to execute the locus inspection orders without authorization.
- (67) It is for the aforementioned reasons that one of the avenues Kenya has for the recognition and enforcement of decisions from foreign courts and tribunals is the *Foreign Judgments (Reciprocal Enforcement) Act*, cap 43 Laws of Kenya. This is our first port of call. This preamble of the statute provides that the Act serves ‘to make new provision in Kenya for the enforcement of judgments given in countries outside Kenya which accord reciprocal treatment to judgments given in Kenya and for other purposes in connection therewith’.
- (86) For us this is a demonstration that the trial court was correct in its supposition that the procedural provisions are a demonstration that judicial assistance is a prerequisite in enforcing interlocutory orders. In tandem with this, there is a procedure to be followed when a foreign court or tribunal issues orders geared towards discovery of evidence.”

18. Thirdly, Rika J in the orders given on August 25, 2022 in *James Finlay Kenya Limited v Alice Bosibori Anganga & 1043 others* Petition No. ELRC E133 of 2022 it was ordered, “2. The orders issued by the Scotland Court cannot be enforced in this court. As they are in breach of our Constitution, in particular with respect to our sovereignty.”
19. Fourthly, the proceedings by the Scottish Court impugned in the instant petition went to appeal and judgment delivered on 07.11.2023 by the First Division, Inner House, Court of Sessions in *Hugh Hall Campbell, KC v James Finlay (Kenya) Limited* [2023] CSIH 39 GP1/22, P305/22 and P657/22. The summary of the findings was as follows:

### **Jurisdiction**

20. Both the Scottish and Kenyan courts had jurisdiction over JFKL. Under the *Civil Jurisdiction and Judgments Act 1982*, the parties could have agreed to take a dispute to a particular court, but they had not done so. The employment contracts only stipulated that Kenyan law was to apply to any claims



for workplace injury, not that such claims had to be raised in the Kenyan courts. As such, the Court of Session had jurisdiction to hear the claims.

### **Forum non conveniens**

21. In terms of Kenyan law, the group members' injuries were covered by WIBA and therefore had to be dealt with under the WIBA scheme. This finding created a jurisdictional dilemma. The Court of Session had no experience of applying the scheme. In theory, the court could only award the same amount of compensation as would be awarded by the Director in Kenya. These matters pointed towards Kenya being the appropriate forum.

### **Final Order**

22. The appropriate course of action was to pause the Scottish proceedings pending resolution of the claims under WIBA. The court could not say that the WIBA system was unable to provide the group members with substantial justice. If the claims are not determined in accordance with WIBA, or if there is excessive delay in their determination, the court may require to recall the pause. For now, the claims should be progressed in Kenya under WIBA.
23. The Court stated, in conclusion thus, “[70] The court will recall the interlocutor of the Lord Ordinary dated July 11, 2023 in so far as it repels the defenders' second plea-in-law (on forum non conveniens). It will allow the reclaiming motion and sist the group proceedings (GP1/22) pending resolution of the group members' claims in Kenya under the WIBA scheme. It will not determine the plea of forum non conveniens at present.”
24. To answer the 3<sup>rd</sup> issue, the court returns that the orders made by the court in Scotland violated the sovereignty of the Judiciary in Kenya as found and as well amounted to curtailment of fundamental rights and freedoms as already found.
25. The 4<sup>th</sup> issue is whether the 5<sup>th</sup> and 4<sup>th</sup> respondents have breached the Data Protection Act 2019 in the manner they have collected the data about the particulars of the current and former employees of James Finlay (Kenya) Limited. It is submitted that personal medical information has been or will be obtained to show the injuries in question and health records and medical reports amount to “sensitive personal data” which under section 2 of the Act means, “data revealing the natural person's race, health status, ethnic social origin, conscience, belief, genetic data, biometric data, property details, matrimonial status, family details including names of the person's children, parents, spouse or spouses, sex or the sexual orientation of the data subject.” It is submitted for the petitioner that section 48 of the Act obligates the 4<sup>th</sup> and 5<sup>th</sup> respondents to ensure that sensitive personal data is not transferred outside Kenya without first providing the Data Protection Commissioner with sufficient proof of the safeguards in place to ensure the security and protection of the data it transferred. It is submitted that the 4<sup>th</sup> and 5<sup>th</sup> respondents have collected and transferred data out of the Kenyan jurisdiction without complying with section 48 of the Act and thereby violated the rights of the data subjects to privacy guaranteed under article 31 of the Constitution. For the 5<sup>th</sup> respondent, it is admitted that section 48 of the Act provides that a data controller or a data processor may transfer personal data to another country only after approval of the Data Protection Commissioner. Under section 2 of the Act, “data processor” means a natural or legal person, public authority, agency, or other body which processes personal data on behalf of the data controller. Section 2 states “data controller” means a natural or legal person, public authority, agency or other body which alone or jointly with others determines the purpose and means of processing of personal data. The 4<sup>th</sup> and 5<sup>th</sup> respondents do not deny that they have taken out of Kenya the personal data of the employees, former and current, of the James Finlay (Kenya) Limited for use in the group proceedings filed in the Scottish Court. The 5<sup>th</sup> respondent



submits that the same was done with the consent of the employees in the group suit. Further, the data subjects, the employees have not lodged a complaint with the Data Commissioner as per section 56 of the Act. Section 48 of the Act states as follows:

48. Conditions for transfer out of Kenya

A data controller or data processor may transfer personal data to another country only where

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- (a) the data controller or data processor has given proof to the Data Commissioner on the appropriate safeguards with respect to the security and protection of the personal data;
- (b) the data controller or data processor has given proof to the Data Commissioner of the appropriate safeguards with respect to the security and protection of personal data, and the appropriate safeguards including jurisdictions with commensurate data protection laws;
- (c) the transfer is necessary—
  - (i) for the performance of a contract between the data subject and the data controller or data processor or implementation of pre-contractual measures taken at the data subject's request;
  - (ii) for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and another person;
  - (iii) for any matter of public interest;
  - (iv) for the establishment, exercise or defence of a legal claim;
  - (v) in order to protect the vital interests of the data subject or of other persons, where the data subject is physically or legally incapable of giving consent; or
  - (vi) for the purpose of compelling legitimate interests pursued by the data controller or data processor which are not overridden by the interests, rights and freedoms of the data subjects.

The court finds that the 4<sup>th</sup> and 5<sup>th</sup> respondents were bound by the provisions of section 48 of the Act. While the data subjects may have given consent, nevertheless, the section required the data subjects to be protected by the Data Commissioner in terms of section 48 of the Act. The court returns for the submissions made for the petitioner. While no complaint may have been made to the Data Commissioner by the data subjects, the employees in the group proceedings in Scotland, it is that the Data Commissioner is informed, satisfied in terms of section 48 and, an approval obtained accordingly. The finding is more so because, as found by the trial court, the Court of Appeal and the ultimately the Supreme Court in *Elly Okong'o Ingang'a & 6 others v James Finlay (Kenya) Limited* Petition



No 7 (E009) of 2021 eKLR found that the interlocutory discovery processes as had been made by the Scottish Court in the dispute therein, would require the assistance of the Government of Kenya and more so, the Judiciary to be enforced in Kenyan territory. The Supreme Court stated thus, “[99] Even now, the procedural steps to be undertaken as set out under Part VII – Evidence for Foreign Tribunal of the [High Court Practice and Procedure Rules](#) made pursuant to section 10 of the [Judicature Act](#), are not clear. It is not explicitly clear whether the letter of request is to be sent to the Attorney General, the Minister (now Cabinet Secretary) or directly to the Registrar of the High Court. However, for procedural propriety, we direct the appellants to pursue having the Court in Scotland channel a commission rogatoire or letter of request to the Registrar of the High Court in Kenya for assistance. This would then activate or trigger the High Court in Kenya to implement the Rules as contained in order 28 of the [Civil Procedure Rules, 2010](#) in executing the request.” And further, “[101] We have taken keen note that the laws currently in place regarding this issue, require updating in order to be brought in line with the [Constitution](#). There is also need to harmonize these laws with the other existing laws such as the [Civil Procedure Act, Rules, 2010](#) any other relevant laws. The [High Court \(Practice and Procedure\) Rules](#) in the [Judicature Act](#) are stuck in time warp! We are surprised that the law in this regard is yet to be updated. These procedures in their current state remain a hindrance to Kenyans realizing their right to access to justice as guaranteed by article 48 of the [Constitution](#).” The Court considers that one office to be involved in transferring data to a foreign jurisdiction where the assistance of the Kenya Government and the High Court is obtained would be the Data Commissioner per section 48 of the Data Protection Act, and, the provisions of the Act would have to be taken into account in updating the [High Court \(Practice and Procedure\) Rules](#) in the [Judicature Act](#).

26. The 5<sup>th</sup> issue is whether the 5<sup>th</sup> respondent has breached rule 6 of the Advocates Practice Rules. It is submitted for the petitioner that the rule bars Advocates from recruiting or joining in the recruitment of persons for the purpose of participating in a suit. The petitioner has exhibited the online platforms, websites and social media platforms by the 4<sup>th</sup> and 5<sup>th</sup> respondents advertising the ongoing group proceedings in Scotland and inviting workers who have been injured and not compensated or those who were sexually harassed or with back injuries to register. For the 5<sup>th</sup> respondent it is submitted that even if the rule has been violated, but which is denied, the statutory procedure is to deal with the matter under the [Advocates Act](#) per the provisions regulating the professional conduct of Advocates and disciplinary matters. As submitted for the 5<sup>th</sup> respondent, the kind of alleged and impugned 5<sup>th</sup> respondent’s conduct is provided for in rule 2 of the rules and rule 6 of the rules deals with situations where an advocate is to take up representation of a client where the client is already being represented by another advocate. The Court considers that on account of the doctrine of justiciability, the appropriate measure is for the merits of whether the 5<sup>th</sup> respondent has breached or not breached the Advocates Practice Rules, 1966 to be determined on merits, as of first instance, in accordance with the provisions of the [Advocates Act](#). The availability of that elaborate statutory process and procedure operates as a bar to the Court delving into the 5<sup>th</sup> respondent’s alleged professional misconduct so as not to defeat the established statutory design that provides for adequate safeguards and reliefs to involved parties including the 5<sup>th</sup> respondent. In the circumstances the Court has warned itself to decline determination of the issue for want of exhaustion of the statutory process and procedure and which has not been shown to be unavailable or incapable of being invoked and continued in the instant claims and allegations. In particular, the Act provides in Part X for the Advocates Complaints Commission for the purpose of enquiring into complaints against any advocate, firm of advocates, or any member or employees thereof and the Commission may refer a complaint in breach of professional discipline to the Disciplinary Tribunal established under Part XI. The said Part XI has elaborate provisions for receiving and hearing complaints against an advocate of professional misconduct, which includes disgraceful or dishonourable conduct incompatible with the status of an advocate.



27. The dispute surrounding the present proceedings point to significant challenges and gaps in the implementation of the [Work Injury Benefits Act](#) towards the expeditious, fair, just, and proportionate determination of the assessments for compensation and disputes under the Act. In that consideration the Cabinet Secretary for Labour and Social Protection and 2<sup>nd</sup> respondent shall take appropriate measures for legislative reforms towards removing the challenges and gaps in the no-fault regime envisaged under the Act. The Court considers that such reforms would include focus on matters such as the expeditious, fair, just, and proportionate determination of the assessments for compensation and determination of disputes under the Act including instituting the relevant efficient and effective procedural safeguards; the defined role and guidelines for Designated Health Practitioners in assisting the Director of Occupational Safety and Health to undertake the assessments and make awards; comprehensive inclusion of specific work injuries with provisions for dealing with residual injuries not listed; periodic review of the formulae and measure of the awards to be made in given occupational injuries, diseases or deaths; step by step procedures for administering various aspects of the Act; and, prompt compliance or enforcement of the awards under the Act.
28. The petitioner has succeeded but the court has considered the nature of the dispute and the public interest involved and returns that each party to bear own costs of the petition.

In conclusion and in view of the findings, judgment is hereby entered for the petitioner for:

- a. The Cabinet Secretary for Labour and Social Protection and 2<sup>nd</sup> respondents to take appropriate participatory measures for legislative reforms towards removing the significant challenges and gaps in the implementation of the no-fault design of the [Work Injury Benefits Act](#) towards the expeditious, fair, just, and proportionate determination of the assessments for compensation and determination of disputes under the Act including instituting the relevant efficient and effective procedural safeguards, the role and guidelines for Designated Health Practitioners in assisting the Director of Occupational Safety and Health to undertake the initial and second assessments (in event of objections) and for expeditious making of awards across the Counties; comprehensive inclusion of specific work injuries with provisions for dealing with residual injuries not listed, and, prompt compliance or enforcement of the awards under the Act, and, a progress report be filed in Court within 12 months from today; and the petitioner to serve the judgment within 7 days for that purpose.
- b. The declaration that all persons have a right of access to justice and an absolute right to a fair hearing and no foreign court or order can be used to impede or stop the enjoyment of that right within the Republic of Kenya.
- c. The declaration that Kenyan Courts have jurisdiction to try for any matter arising from causes of action that arise in Kenya in which parties are domiciled and operate in Kenya.
- d. The declaration that judgments and orders issued by courts in foreign countries are not enforceable in Kenya unless their enforcement is sought in the manner prescribed by law.
- e. The declaration that no documentary evidence being sensitive personal data under the [Data Protection Act](#) can be presented from within Kenya to a foreign court unless the same has been collected in a manner established by the [Data Protection Act](#) and other relevant law.
- f. The declaration that judgments and orders issued by courts based in foreign countries and which judgments or orders are not compatible with the Kenyan Constitution cannot be enforced or given effect to within the Republic of Kenya.



- g. The declaration that the act of the 4<sup>th</sup> and 5<sup>th</sup> respondents recruiting individuals and filing suits in foreign jurisdictions in a manner incompatible with Kenyan law is illegal and therefore null and void and orders emanating from any such proceedings cannot be enforced in Kenya.
- h. The declaration that the Director of Occupational Health and Safety Services has the jurisdiction to deal with work injury claims arising from employment relationships within the Republic of Kenya under section 16 of the [Work Injury Benefits Act](#) at first instance and the Scottish courts have no jurisdiction at all, unless, by law, otherwise established.
- i. The declaration that any person dissatisfied with the decision of Director of Occupational Health and Services in exercise of the authority under the [Work Injury Benefits Act](#) will have redress in the Employment and Labour Relations Court of Kenya and not the Scottish courts or any other foreign jurisdiction, unless, by law otherwise established.
- j. The declaration that any transfer of data from Kenya for use in a foreign jurisdiction can only be undertaken, *inter alia*, within the framework of section 48 of the [Data Protection Act](#).
- k. The declaration that the act of the 4<sup>th</sup> and 5<sup>th</sup> respondents collecting and transmitting data outside the Republic of Kenya is incompatible with the provisions of section 48 of the [Data Protection Act](#) and constitutes a violation of the right to equal protection and benefit of the law under article 27.
- l. The declaration that the 4<sup>th</sup> and 5<sup>th</sup> respondents or their agents should forthwith stop, cease to aid, abet, assist or in any manner participate in the prosecution of the Scottish proceedings styled GP/22 in the Scottish Courts or any other similar proceedings in Scotland without first observing the mandatory constitutional and statutory provisions applicable in furthering any prosecution of a suit in a foreign court as required under Kenyan law and with respect to employment relationships and causes of action accruing within the Republic of Kenya.
- m. The declaration that the act of the 4<sup>th</sup> and 5<sup>th</sup> respondents collecting and transmitting evidence to foreign courts in a manner incompatible with Part 8 of the High Court Practise and Procedure Rules violates the right to equal protection and benefit of the law under article 27.
- n. Each party to bear own costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 30<sup>TH</sup> NOVEMBER, 2023.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

