

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 223 OF 2012

DUNCAN MURIUKI KAGUURU.....1ST PETITIONERS
DESTINATION AFRICA DMC LTD2ND PETITIONER

VERSUS

BAOBAB BEACH RESORT & SPA LIMITEDRESPONDENT

RULING

Introduction

1. This petition together with a Chamber Summons application seeking interim relief was filed under Certificate of Urgency on 29th June 2012. It alleges racial discrimination and defamation by the respondent against the petitioners. The petitioners seek various orders against the respondent, among them a declaration that the 1st petitioner's rights under Article 27 of the Constitution have been violated by the respondent, an injunction against publication of defamatory articles by the respondent, and general damages for violation of the rights protected under Article 27 and for defamation.
2. Pleadings in the matter were closed by 5th of February 2013 and the hearing of the matter by way of *viva voce* evidence scheduled for 7th May 2013. However, when the matter came up for hearing on that date, Mr. Inamdar, Counsel for the respondent, indicated that he had filed a Notice of Preliminary Objection on 30th of April 2013 which he wished to canvass first. Though the matter was scheduled for full hearing and the court was

ready to proceed, I nonetheless, in the interests of justice, allowed the respondent to argue its Preliminary Objection.

3. The respondent's Notice of Preliminary Objection dated 30th April 2013 is in the following terms:

1. *The fundamental rights and freedoms set out in the Bill of Rights (including Article 27 of the Constitution) can only be enforced by a private individual or a private limited company against the State or a State organ – and not by a private individual or a private limited company against another private individual or a private limited company.*
2. *By reason of the foregoing, the Petitioners' prayers for relief as set out in paragraphs (a) and (c) of the Petition constitute matters which are not capable of being entertained by way of a Constitutional Petition.*
3. *The Petitioners' claims for relief, as set out in the prayers at paragraphs (a) and (c) of the Petition, against the Respondent for the alleged "discrimination on the ground of race, colour, birth and/or ethnic or social origin" are matters for determination by the National Cohesion and Integration Commission under the National Cohesion and Integration Act No 12 of 2008 and not by way of a Constitutional Petition.*
4. *The Petitioners' claims for relief, as set out in the prayers at paragraphs (b) (d) and (e) of the Petition, against the Respondent constitute matters involving the tort of defamation and are only capable of being entertained by a civil suit and not by way of a Constitutional Petition.*
5. *The Petition (or, in the alternative, such of the prayers as are referred to in paragraphs 2 and 4 above) is/are an abuse of this Honourable Court's process and ought to be dismissed and/ or struck out with costs to the Respondent.*

Submissions by the Respondent

4. The respondent through its Counsel, Mr. Inamdar, raised two main arguments in support of its Preliminary Objection. First, it contends that this is not an appropriate matter for determination by this court because the fundamental rights and freedoms set out in the Bill of Rights can only be enforced by a private individual or company against the state, not against another individual or private company as such relations are governed by civil law. It points out that both the 2nd petitioner and the respondent are limited liability companies yet the prayers sought at prayer a) and c) of the petition seek redress for discrimination on racial or ethnic grounds. Secondly, the respondent argues that this is not the proper forum for determination of the matters raised in this petition as there is another forum and procedure provided by legislation for determination of matters such as this.

5. The respondent contends that the High Court has addressed itself to the issues such as are raised in this petition in the case of **Hon. Uhuru Kenyatta –vs- The Nairobi Star Limited High Court Petition No. 187 of 2012**; that the court dismissed the entire petition in that case on the basis of the holding in **Kenya Bus Services Limited** that the court will not deal with a constitutional issue if a remedy is available under some other provision; that the court in the **Hon. Uhuru Kenyatta –vs- The Nairobi Star Limited (supra)** case held that the matter could have been dealt with under specific legislative provisions established by the government under Article 27(6) of the Constitution, such legislation being the **National Cohesion and Integration (NCIC Act)**.

6. Mr. Inamdar submitted that in so far as discrimination is concerned, the petitioner has a remedy under the **NCIC Act**, that section 2 of the Act defines ethnic grounds and covers the matters raised in this petition; that the National Cohesion and Integration Commission (NCIC) had power under section **2, 3, and 25(2)** of the NCIC Act to deal with matters of racial and ethnic discrimination, and that the Act also provides for penalties under section 62 of the Act.
7. Mr. Inamdar also relied on the decision of the court in **Suleiman Said Shahbal -vs- IEBC & 3 Others High Court Constitutional Petition No. 162 of 2013** for the proposition that where there are specific provisions for dealing with a matter, in that case election petitions, those provisions should be followed; and this matter was therefore not properly before the court. He asked the court to strike out the entire petition.

Submissions by the Petitioners

8. Mr. Mwenda, Counsel for the petitioners, submitted that ground 1 of the Preliminary Objection was challenging the jurisdiction of the court; that the petitioners had come to court under the enforcement jurisdiction of the court provided for under Article 22(1) which gave the petitioners a right to come to the High Court with regard to violation or threatened violation of their rights, and the court had jurisdiction to deal with the matter.
9. To the respondent's contention, in reliance on the decision in **Hon. Uhuru Kenyatta -vs- The Nairobi Star Limited (supra)**, that a private person cannot bring a constitutional issue against another private individual in this jurisdiction, the petitioners took the position that the decision was granted *per incuriam* of Article 20(1) of the Constitution. Mr. Mwenda

submitted that Article 260 defined 'person' to include private persons and so the Bill of Rights is binding on private persons.

10. Mr. Mwenda contended that the case of **Hon. Uhuru Kenyatta -vs- The Nairobi Star Limited** was based on Article 21(1), on the implementation duty of state and state organs; that there is a difference between application of the Bill of Rights, which is to all persons, and implementation, which lies on the state; that this is clear from Article 27(4) and (5) which the petitioners have invoked; that Article 27(4) provides the prohibited grounds while Article 27(5) is binding on all persons by providing that a person shall not discriminate; and accordingly, the prescription against private individuals implies that a private individual can enforce the prescriptions against another individual.
11. With regard to ground 3 of the Preliminary Objection on procedure, Mr. Mwenda submitted that Article 22 provides a specialized jurisdiction to enforce the Bill of Rights, which he argued was in line with the court's decision in **Suleiman Said Shahbal -vs- IEBC & 3 Others (supra)**; that the rules of that specialized jurisdiction are the Gicheru Rules; and the petitioners were therefore properly before the court. He relied on the words of Madan J in the Court of Appeal decision in **D.T. Dobie & Company (Kenya) Limited -vs- Joseph Mbaria Muchina & Another, Civil Appeal No. 37 of 1979** which had been cited with approval in the case of **Rosa A. Munywoki & 17 Others -vs- Investments & Mortgages Bank Limited & Anr Civil Suit No. 223 of 2003 [2006] eKLR** in which the defendants sought to have the plaint struck out as it raised constitutional issues, that a suit should not be struck out if it can be saved.

12. According to Mr. Mwenda, the constitution requires that in exercising its jurisdiction, the court should not heed technicalities but should do substantive justice. He therefore asked the court, should it find that it has no jurisdiction to hear this matter, not to strike it out but to transfer it to the division with the jurisdiction to hear it.
13. Mr. Mwenda sought to distinguish the **Hon. Uhuru Kenyatta –vs- The Nairobi Star Limited (supra)** case with the case of **C.O.M –vs- The Standard Group Ltd and Another**, which was based on the right to dignity, involving a claim against a private entity where the respondents had published the HIV status of the petitioner. In that case, while observing that he was aware of the decisions in **Kenya Bus Services and 2 Others vs Attorney General & 2 Others HCCC No. 413 of 2005**, Lenaola J held that he was of the view that each matter must be considered on its unique circumstances.
14. According to Mr. Mwenda, the Learned Judge in the **C.O.M –vs-Standard** case relied on the Court of Appeal decision in **Rashid Odhiambo Aloggoh & 245 Others–vs- Haco Industries Ltd, Civil Appeal No.110 of 2001**, that parties should not be thrown out but that the court should find a way to do substantive justice. On the question whether the case comingles private law and public law claims, Mr. Mwenda argued that the court had found that defamation does raise constitutional issues of privacy and human dignity, and had awarded damages to the petitioner.
15. Mr. Mwenda also took the view that the respondent has a duty to show that under Article 24(2) (b) of the Constitution, there is a clear provision of the NCIC Act that denies this court jurisdiction on matters under Article 27(6). He asked the court to dismiss the Preliminary Objection with costs

to the petitioners, such costs to include thrown away costs for the hearing date as in the petitioners' view, the Preliminary Objection was intended to scuttle the hearing of the matter.

Submissions in Reply

16. In his rejoinder to the petitioners' submissions, Mr. Inamdar contended that the respondent was not challenging the jurisdiction of the court; that its argument was that where a legislative framework developed institutions and frameworks, matters such as this should be taken there.
17. On the submission by the petitioners that the remarks of Lenaola J in **Hon. Uhuru Kenyatta –vs- The Nairobi Star Limited (supra)** were *per incurium*, Mr. Inamdar pointed out that in the **C.O.M. –vs-Standard High Court Petition No. 192 of 2012** case, the court had noted that had the issues of jurisdiction been raised as a preliminary objection, it would have dealt with the matter but could not do so having fully heard the matter.
18. Mr Inamdar contended that the petitioners had interpreted the decision in the **Rosa Munywoki** case wrongly as the decision in that matter is that a civil court can properly hear constitutional issues, but a constitutional court cannot hear a civil matter where there is a procedure provided for it. He also distinguished the decision in the **Rashid Allogoh** case, arguing that the principles espoused in that case were upheld in **Hon. Uhuru Kenyatta –vs- The Nairobi Star Limited** and **C.O.M –vs- The Standard**.

Determination

19. The starting point in considering the Preliminary Objection by the respondent is to consider the reliefs that the petitioners are seeking from this court that are relevant to the issues now before me. In the petition dated 28th May 2012, the petitioners seek, among others, the following orders:

- a) *A declaration that the fundamental right to equality and freedom from discrimination on the ground of race, colour, birth and/or ethnic or social origin under Article 27 of the Constitution have violated in relation to the 1st Petitioner, his driver James Ole Nairuko, and his business associate Kores Solomon ole Musuni:*
- b) *An injunction against the continued publication of defamatory words against the Petitioners:*
- c) *An order for compensation by way of general damages for violation of the fundamental right to equality and freedom from discrimination on the ground of race, colour, birth and/or ethnic or social origin in relation to the 1st Petitioner, his driver, and his business associate:*
- d) *A further order for compensation by way of general damages, exemplary, aggravated, and/ or punitive damages for defamation against the 1st Petitioner.*

20. The respondent's Preliminary Objection groups the prayers sought in the petition as a) and c), which relate to violation of the right to equality before the law and freedom from discrimination and damages in respect thereof, and those sought in b) and d), which relate to defamation and losses resulting therefrom together. Put simply, the respondent's objection to this petition is that first, a private citizen cannot seek relief for violation of constitutional rights against another private citizen or entity, and second, that there are other procedures and institutions provided for the adjudication of matters of discrimination and defamation and consequently, the petitioners are wrongly before the court and should have filed their claims before those other forums.

21. The law is, I believe, settled with regard to what is a preliminary objection on a point of law. In the famous case of **Mukisa Biscuit Manufacturing Co Ltd -vs-West End Distributors Ltd [1969] EA 696**, the court stated that:

"So far as I am aware, a preliminary objection consists of a point of law which has been pleading or which arises by

clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are on objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.....”

22. The respondent’s objections, in my view, do fit within the parametres set by the **Mukisa Biscuit** case, and they call for determination of three main issues:

- i. Whether a private individual can bring a claim for violation of fundamental rights under the Constitution against another private individual or entity.*
- ii. Whether this Court is the Proper Forum For Determination of a Claim of Violation of the Non-Discrimination Provisions of Article 27.*
- iii. Whether this Court is the proper forum for determination of a claim in defamation.*

Whether a Private Individual can Bring a Claim for Violation of Fundamental Rights against Another Private Individual

23. The respondent has contended that the state is the guarantor of the human rights set out in the Constitution, and that a party cannot therefore bring a claim for violation of constitutional rights against another private individual or company as in the present case. The respondent has relied in this regard on the decision of Nyamu J in **Kenya Bus Services Limited and Two Others –vs-The Attorney General and 2 Others** and the decision of Lenaola J in **Hon. Uhuru Muigai Kenyatta –vs-The Nairobi Star Publications Limited**.

24. In my view, the decisions in **Kenya Bus Services Limited -vs- Attorney General and Hon. Uhuru Muigai Kenyatta –vs- The Nairobi Star Limited**

relied on by the respondent are distinguishable from the present petition. The **Kenya Bus Services –vs- Attorney General** decision was made in 2005, and predates the current Constitution which, as I shall show shortly, provides for both vertical and horizontal application of the Bill of Rights. With regard to the case of **Hon. Uhuru Muigai Kenyatta –vs- The Nairobi Star Limited**, it is true that Article 21 of the Constitution imposes an obligation on the State to observe, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. However, in my view, the provisions of this Article must be read together with the provisions of Article 2(1) and 20(1) of the Constitution.

25. Titled ‘Implementation of Rights and Fundamental Freedoms’, Article 21 is in the following terms:

21. (1) It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.

(2) The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43.

26. At Article 2(1), the Constitution provides that ‘***This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government***’ while Article 20(1) of the Constitution provides that ‘***The Bill of Rights applies to all law and binds all State organs and all persons.***’

27. I believe that the intention of the framers of the Constitution and the people of Kenya in enacting the Constitution with the very comprehensive Bill of Rights was that all persons, not just the state, would be bound not to violate the fundamental rights and freedoms of others, and in

appropriate cases, a private individual or entity could be held liable for violation of the fundamental rights of another individual.

28. To hold otherwise, in my view, would be to act contrary to the intention of the Constitution in making very clear and specific provisions that the Bill of rights would be binding on the state and **all persons**, while Article 260 defines a person as including ***'a company, association or other body of persons.'*** Further, Article 259 (1) (a) and (b) of the Constitution provide that the Constitution shall be interpreted in a manner that ***promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Right.***

29. In considering similar arguments to those advanced by the respondent in this case, I observed at paragraphs 45-46 of my decision in the case of **Abdalla Rhova Hiribae & 3 Others-vs-The Hon Attorney General & 6 Others High Court Civil Case No. 14 of 2010** as follows:

45. The 2nd respondent has argued that this Petition is defective for misjoinder of parties, contending that only the Attorney General should have been made a party as it is the state which protects and guarantees the fundamental rights and freedoms of the people under the Constitution. The 2nd respondent has relied on, among others, the decision in Charles Lekuyen Nabari and 9 Others –v- Attorney General and Anor (Supra) where the High Court stated that:

'These rights are vertical not horizontal and the correct party to join even in the case of the government is the Attorney General. No other individuals should be made a party thereon. In that case joining the 3rd-4th respondents (NEMA and County Council of Baringo) to this petition was a misjoinder of parties and is an abuse of the court process.'

46. *The 2nd respondent is correct that, at the time the decisions it has relied on were made, the constitution then in force limited the application of constitutional rights to the state, and an action for violation of a constitutional right could not be maintained against private individuals or entities; that there was only vertical, and not horizontal, application of the Bill of Rights. However, the Constitution of Kenya 2010 has changed the situation, and the Bill of Rights is binding on both state and non-state actors.*

30. After setting out the provisions of Article 2(1) and 20(1) of the Constitution which I have set out at paragraph 26 of this judgment, I concluded as follows:

47. *To my mind, the express constitutional provision that the Constitution in general and the Bill of Rights in particular applies to and binds all persons represents a radical departure from the position under the former constitution where only the state could be held liable for violation or infringement of constitutional rights. In my view, where the facts so demonstrate, an individual or corporate person such as the 2nd, 3rd, 4th, 6th and 7th respondents can be held to have violated another person's constitutional rights, and appropriate orders or declarations issued. Indeed, this court has so found in *Law Society of Kenya –v- Betty Sungura Nyabuto & Another* Petition No. 21 of 2010 and *B.A.O & Another –v-The Standard Group Limited & 2 Others* Petition No. 48 of 2011.*

31. This is the view that I still hold. While the state has the primary duty with regard to protection and promotion of fundamental rights and freedoms, which includes the duty to ensure that policies, systems and processes are in place for implementation and protection of fundamental rights, the Constitution also provides for claims to be made against individual persons

or corporate entities with respect to violation of these rights, and appropriate orders made against them.

Whether this Court is the Proper Forum For Determination of a Claim of Violation of the Non-Discrimination Provisions of Article 27

32. The respondent argues that though the High Court has jurisdiction to hear this matter, it should not entertain the petition as there is another forum, the National Cohesion and Integration Commission, which is set up under the provisions of Article 27(6) of the Constitution, to deal with matters such as this. Article 27(6) provides as follows:

'To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.'

33. The respondent asserts that Section 2, 3 and 25(2) of the NCIC Act provide the proper forum and processes for dealing with a matter such as this. The question then that I am called upon to address myself to is whether the NCIC, which was established under section 15 of the **National Cohesion and Integration Act**, Act No. 12 of 2008, is the proper forum set up under Article 27(6) for dealing with matters regarding discrimination on ethnic or on any other of the prohibited grounds under Article 27(4) of the Constitution as the respondent contends.

34. I have gone through the provisions of the NCIC Act. Section 2 of the Act contains the definitions and interpretation of terms used in the Act, while Section 3 of the Act deals with ethnic discrimination and what it is deemed to comprise under the Act.

35. The objects and functions of NCIC are set out in section 25 of the Act. Section 25(1) sets out the object for the establishment of the Commission by providing as follows:

(1) The object and purpose for which the Commission is established is to facilitate and promote equality of opportunity, good relations, harmony and peaceful co-existence between persons of the different ethnic and racial communities of Kenya, and to advise the Government on all aspects thereof.

36. Section 25(2) sets out a lengthy list of the functions of the Commission, running from (a) to (t). I think it is important, in the context of the issue before me, to set out some of the provisions of this section, which are as follows:

(2) Without prejudice to the generality of subsection (1), the Commission shall—

(a) promote the elimination of all forms of discrimination on the basis of ethnicity or race;

(b) discourage persons, institutions, political parties and associations from advocating or promoting discrimination or discriminatory practices on the ground of ethnicity or race;

(c) promote tolerance, understanding and acceptance of diversity in all aspects of national life and encourage full participation by all ethnic communities in the social, economic, cultural and political life of other communities;

(d) plan, supervise, co-ordinate and promote educational and training programmes to create public awareness, support and advancement of peace and harmony among ethnic communities and racial groups;

(e) promote respect for religious, cultural, linguistic and other forms of diversity in a plural society;

- (f) promote equal access and enjoyment by persons of all ethnic communities and racial groups to public or other services and facilities provided by the Government;*
- (g) promote arbitration, conciliation, mediation and similar forms of dispute resolution mechanisms in order to secure and enhance ethnic and racial harmony and peace;*
- (h) investigate complaints of ethnic or racial discrimination and make recommendations to the Attorney-General, the Human Rights Commission or any other relevant authority on the remedial measures to be taken where such complaints are valid;*
- (i) investigate on its own accord or on request from any institution, office, or person any issue affecting ethnic and racial relations;*
- (j) identify and analyze factors inhibiting the attainment of harmonious relations between ethnic communities, particularly barriers to the participation of any ethnic community in social, economic, commercial, financial, cultural and political endeavours, and recommend to the Government and any other relevant public or private body how these factors should be overcome;*

37. As is obvious from the functions of the Commission set out above, its primary function is to promote ethnic harmony, and its functions and powers are limited to what is provided for under the Act.

38. Article 27 of the Constitution guarantees to everyone the right to equal protection of the law and not to be discriminated against. A party who is subjected or alleges that he has been subjected to discrimination is in essence asserting a right that is protected by the Constitution. Article 165(3)(b) of the Constitution vests jurisdiction in the High Court to 'determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.' Article 22 of the Constitution grants to everyone the right to institute court

proceedings alleging violation or infringement of, or threat to a fundamental right under the Constitution. At Article 23 (3), the Constitution provides that:

'In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.

39. Given the above provisions juxtaposed against the powers and functions of the NCIC which are set out above, I take the view that it would be totally fallacious to hold that matters alleging discrimination on any of the prohibited grounds set out in Article 27(4) of the Constitution fall solely within the mandate of the NCIC. While the Commission has, among others, power to promote ethnic harmony and to investigate and promote conciliation and arbitration, it does not have power to grant the reliefs that the Constitution grants to anyone whose rights under the Constitution have been violated, and which it empowers the High Court to grant. Put differently, the NCIC and its establishing Act do not offer an adequate or appropriate remedy to a party whose constitutional rights under Article 27(4) and (5) of the Constitution have been violated.

40. In my view, the essence of an alternative remedy or process that the court in cases such as **Kenya Bus Services Limited -vs- Attorney General** and

Suleiman Said Shahbal -vs- The Independent Electoral and Boundaries Commission of Kenya had in contemplation is that it offers to the litigant an adequate remedy. As stated by the court in the case of **Minister of Home Affairs vs Bickle & Others (1985) L.R.C. Cost. 755**, cited with approval by Lenaola J in **Hon. Uhuru Kenyatta –vs- The Nairobi Star Limited**:

“It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so (Wahid Munwar Khan vs. The State AIR (1956) Hyd. 22).....Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights.” (Emphasis added)

41. I fully agree with the above sentiments, and in the circumstances, I find and hold that this petition is properly before me as there is no legislation or process that provides an alternative appropriate remedy as contemplated under Article 23 for violation of the rights guaranteed under Article 27(4) and (5) of the Constitution.

Whether this Court is the Proper Forum for Determination of a Claim in Defamation

42. The third issue that the objection before me raises is whether the claim for defamation can be properly determined before this court given that the tort of defamation falls for determination by way of a civil claim in the Civil Division of the High Court. I believe the answer to this issue lies in the

response to a related issue alluded to by Counsel for the petitioners in his submissions: what is a court to do when a matter before it comingles a constitutional issue and another issue for which there is a different forum and procedure provided by law? The decision of Lenaola J in **Hon. Uhuru Kenyatta –vs- The Nairobi Star Limited**, I believe, gives a pointer on how to address one’s mind to the matter. In that case, the court observed that principally, the petitioner’s complaint was that he was defamed, and concluded therefore that the petitioner’s remedy in that case lay in civil law.

43. In the present case, the principal issue before the court, and what gave rise to the subsequent articles published by the respondent that give rise to the claim in defamation, is the alleged act of discrimination by the respondent on the basis of race. I take the view that in the circumstances of this case, the issue of discrimination which is the basis of the petitioners’ claim merits consideration and adjudication by the court in exercise of its constitutional jurisdiction. I am fortified in this view by the words cited by Lenaola J in **Hon. Uhuru Kenyatta –vs- The Nairobi Star Limited** from the case of **NM & Others vs Smith and Others (Freedom of Expression Institute as Amicus Curiae) 200 (5) S.A. 250 (CC)**:

“It is important to recognise that even if a case does raise a constitutional matter, the assessment of whether the case should be heard by this Court rests instead on the additional requirements that access to this court must be in the interests of justice and not every matter will raise a constitutional issue worthy of attention.”

44. In my view, the principal issue in this petition, the allegation of violation of Article 27(4) and (5) of the Constitution, is a 'constitutional issue worthy of attention' by the court in exercise of its constitutional jurisdiction.
45. For the above reasons, the Preliminary Objection by the respondent is hereby dismissed with costs to the petitioners.
46. The parties are hereby invited to take a date for the hearing of the petition which had been scheduled for hearing on 7th May 2013.

Dated, Delivered and Signed at Nairobi this 12th day of June 2013


MUMBINGUGI
JUDGE

**Mr. Mwenda instructed by the firm of Nderitu & Partners Advocates for
the Petitioners**

**Mr. Inamdar instructed by the firm of Inamdar & Inamdar & Co.
Advocates for the Respondent**