

RECENT DEVELOPMENTS IN PUBLIC INTEREST LITIGATION IN KENYA

Public Interest Litigation (PIL) is relatively new in Kenya and its development has been hampered by the restrictive interpretation of standing taken by the Kenyan judiciary in a number of cases.

However, there have been two recent significant developments for PIL in Kenya:

Firstly, a recent case heard in the High Court of Kenya¹ creates a strong precedent in favour of a more relaxed approach to the issue of standing in public interest cases.

Secondly, the introduction of the new constitution which was approved by the Kenyan people in a referendum on 4 August 2010 (the “Consitution”) ensures that the decision of whether or not to gradually reinstate the traditional restrictive approach has now been permanently taken out of the hands of the judiciary.

The Constitution contains two articles which are of relevance to PIL. The first of these articles is Article 22 – Enforcement of the Bill of Rights. It provides as follows:

- 1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.
- 2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by –
 - (a) a person acting on behalf of another person who cannot act in their own name;
 - (b) a person acting as a member of, or in the interest of, a group or class of persons;
 - (c) a person acting in the public interest; or
 - (d) an association acting in the interest of one or more of its members

Article 258 is similar – clause (1) provides that:

Every person has the right to institute court proceedings claiming that the Constitution has been contravened or is threatened with contravention.”

¹ Priscilla Nayokabi Kanyua v Attorney General and the IIEC

Article 258 (2) is identical to Article 22(2) cited above.

The case of **Priscilla Nyokabi Kanyua v Attorney General and the IIEC** (the Kanyua case)² which was heard in the High Court in Nairobi in 2010 demonstrated an attitude amongst the judiciary which suggests that, even without the inclusion of articles 22 and 258 of the Constitution, it has been accepted that a more relaxed approach to standing is required in PIL cases. The **Kanyua** case was not the first case to introduce such an approach – however, the strong terms in which it was delivered and the fact that it was delivered shortly before the passing of the Constitution increase its significance.

The **Kanyua** case was itself related to the Constitution. Ms Priscilla Nyokabi Kanyua sought a declaration that prisoners should be permitted to vote in the referendum on the proposed draft constitution of Kenya, to be held on 4 August 2010. In delivering the judgement of the five-judge court, Justice Samuel N Mukunya gave detailed consideration to the question of standing.

He noted that “the issue of locus standi (standing) has shackled public law litigants for a long time”.

He identified the case of **Albert Ruturi, JK Wanywela & Kenya Bankers’ Association v The Minister of Finance & Attorney General and Central Bank of Kenya**³ (the Ruturi case) as being the case which ushered in “a new dawn of Public Law”. It was in that case that Justices Mbaluto and Kuloba stated as follows:

In constitutional questions, human rights cases, public interest litigation and class actions...any person or social action groups, acting in good faith, can approach the court seeking judicial redress for a legal injury caused or threatened to be caused to a defined class of persons represented or for a contravention of the Constitution, or injury to the nation. In such cases the court will not insist on such a public spirited individual or social action group espousing their cause, to show his or their standing to sue in the original Anglo-Saxon conception.”

² The full text of the case can be accessed online at http://kenyalaw.org/Downloads_FreeCases/75044.pdf

³ (2002) 1 KLR 61

Having cited this extract from the Ruturi case, Justice Mukunya went on to endorse the views of the academician Loots, stating:

Many people...whose fundamental rights are violated may not actually be in a position to approach the Court for relief, for instance, because they are unsophisticated and indigent, which in effect means that they are incapable of enforcing their fundamental rights, which then remain merely on paper...When large numbers of persons are affected in this way, there is merit in one person or organization being able to approach the court on behalf of all those persons whose rights are allegedly infringed.

Relying on these authorities, Justice Mukunya held that Ms Kanyua had standing to bring the case on the basis that she was an officer of Kituo cha Sheria, a human rights non-governmental organisation (despite the fact that she did not possess a signed letter from the inmates authorizing her to act as their representative.)⁴

This approach by the judiciary⁵ is to be strongly welcomed by human rights organisations throughout Kenya, including FIDA-Kenya. It will make it significantly easier for such organisations to plan and develop a comprehensive PIL strategy when they can be confident that their right to take the case in the first instance can not be successfully challenged by either the defendant or the judiciary.

This does not mean that the inclusion of articles 22 and 258 in the Constitution was unnecessary. Without these articles, there would have been a risk that another judge might choose to distinguish precedents such as **Ruturi** and **Kanyua** on their facts and revert to the 'old approach'.

Now, emboldened by the provisions of the new Constitution and the judgments in the Ruturi and Kanyua cases, Public Interest Litigation in Kenya has a very bright future.

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⁴ On the actual petition brought before the court – that prisoners should have a right to vote in the referendum on the constitution – it was held that there was no legitimate governmental objective to be served by denying prisoners the right to vote in a referendum provided that they were of sound mind, over 18 years of age and had not committed an electoral offence.

⁵ The case of *El-Busaidy V Commissioner Of Lands & 2 Others* (2006) 1KLR also strongly endorsed the Ruturi approach