



Anjejo v CEO, National Hospital Insurance Fund & 3 others (Constitutional Petition E022 of 2021) [2023] KEHC 1762 (KLR) (28 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1762 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CONSTITUTIONAL PETITION E022 OF 2021**

JN KAMAU, J

FEBRUARY 28, 2023

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLES 10(2) (A), 22, 23, 26(1), 27(1) & 2, 29 (D), 35, 43 (1)(A) (2), 46(1)(C), 47, 73 (1) &(B), 232(1) (F) & 184 (1)(C) OF THE CONSTITUTION OF KENYA, 2010

AND

AS READ WITH ARTICLES 2(4), (5), (6), 159, 162, 258 & 259 OF THE CONSTITUTION OF KENYA 2010

AND

**IN THE MATTER OF UNITED NATIONS
UNIVERSAL DECLARATION OF HUMAN RIGHTS**

AND

**IN THE MATTER OF INTERNATIONAL COVENANT
FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

AND

IN THE MATTER OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

KENEDY OMOLO ANJEJO PETITIONER

AND

CEO, NATIONAL HOSPITAL INSURANCE FUND 1ST RESPONDENT



**NATIONAL HOSPITAL INSURANCE FUND MANAGEMENT
BOARD 2ND RESPONDENT
CABINET SECRETARY, MINISTRY OF HEALTH 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT**

JUDGMENT

Introduction

1. In his Petition dated and filed on 21st December 2021, the Petitioner herein sought the following orders:-
 - a. A declaration that the Respondents had jointly and severally violated and continued to violate the Petitioner's rights under *the Constitution* and in particular, Articles 21(2), 26, 27(4), 43 (1) & (2), 47 (1) and (2), 174 (c) & (h) and 232 (1) of *the Constitution* of Kenya, 2010 by their public announcement through newspaper coverage of a reduced dialysis benefit cover with a concomitant increase in the cancer treatment is (sic) contrary to the Petitioner's legitimate expectations to affordable and quality healthcare that was sustainable.
 - b. A declaration that the Respondent's Comprehensive Contract For The Provision of The Healthcare Services To Beneficiaries Of The National Hospital Insurance Fund 2022-2024 was unconstitutional and contrary to Articles 21(2), 27(4), 43(1), 47 (1) and (2), 174 (c) & (h) and 232 (1) of the Constitutional of Kenya 2010.
 - c. A conservation order restraining/prohibiting the Respondents either by themselves, their agents or any person/s working under or on their instructions from implementing the reduced dialysis capitation for compromised renal care patients under the Comprehensive Contract For The Provision of The Healthcare Services To Beneficiaries Of The National Hospital Insurance Fund 2022-2024 which constituted a threat to the life of the Petitioner as well as of over 5000 renal care patients in Kenya and their right to the highest attainable standard of health protected under Article 43 of *the Constitution*.
 - d. The Honourable Court do grant any prayer as modified from the above if it considers it just, fair, lawful and/or equitable determination of this Petition.
 - e. Costs of the suit.
2. The Petitioner's Written submissions were dated 2nd June 2022 and filed on 6th June 2022 while those of the 1st and 2nd Respondents were dated 14th March 2022 and filed on 14th June 2022. The 3rd and 4th Respondents did not file any submissions but indicated to court that they would be relying on the 1st and 2nd Respondents' Written Submissions. The Judgment herein is therefore based on the said Written Submissions which the parties relied upon in their entirety.

The Petitioner's Case

3. The Petition herein was supported by the Petitioner's Affidavit that he swore on 21st December 2021. He averred that he had brought this action in his personal capacity and on behalf of over five thousand (5000) patients who were currently undergoing the haemodialysis.



4. He averred that he was a haemodialysis patient who had end stage kidney disease caused by systematic hypertension and was on treatment twice weekly at Kisumu Specialists Hospital.
5. He stated that on or about the 26th September 2021, the 1st, 2nd and 3rd Respondents approved by resolution the reduction of the dialysis benefit package payments from Kshs 9,500/= to Kshs 6,500/= which amount was to cater for reception, registration, triaging, consultation, specialist's reviews, costs of temporary catheter, catheter insertion/removal, nursing and dialysis services, intra-care routine laboratory investigations, medications and maintenance drugs, counselling and follow up.
6. It was his contention that the 1st and 2nd Respondents' intended implementation of the reduced dialysis benefit package in the decreased matrix was in contravention of his rights under Article 47 (2) of *the Constitution* of Kenya, 2010 which entitled a person likely to be adversely affected by an administrative action to be accorded the opportunity to be heard and present his views and to be given written reasons for such action. He pointed out that the aforesaid action did not also meet the threshold of values and principles of public service under Articles 10, 73 and 232 (1) (d), (e), (f) of *the Constitution*.
7. He further contended that the publication of the resolution vide newspaper reports was a violation of Article 47(1) of *the Constitution* as the publication and import amounting to unfair administrative action for lack of participation, want of reasonableness and procedural fairness. He therefore asked this court to allow his Petition as prayed.

The Respondents' Case

8. The 1st and 2nd Respondents opposed the Petition herein vide Grounds of Opposition dated and filed on 3rd January 2022 and a Replying Affidavit that was sworn by the 2nd Respondent's Benefits Design and Claims Manager Dr Samson Kuhora, on 2nd March 2022. The same was filed on 3rd March 2022.
9. They averred that the 2nd Respondent was established in 1966 under *National Hospital Insurance Fund Act* Cap 255 (Laws of Kenya) and had a mandate to offer social medical insurance cover to all its beneficiaries countrywide through its various contracted and accredited Health Care Institutions.
10. It was their case that the Petitioner's Petition and application were an abuse of the court process and that the Petition as drawn was wanting both in form and substance and did not attempt to satisfy the parameters on Constitutional Petitions as set out in the locus classicus of Anarita Karimi Njeru case.
11. They contended that sometimes in the month of December 2017, the Government of Kenya committed to provide affordable healthcare under the flagship of Universal Health Care (UHC) as part of the big four (4) agenda. They pointed out that the UHC goal was that people resident in Kenya should have access to quality equitable health services without exposing them to financial hardships through strategic purchasing. They added that the financing of UHC needed to be through strategic purchasing of health services outlined in Health Benefit Package, which inputs had been previously considered in order to come up with Harmonized Health Benefit Packages.
12. It was their contention that the Government came up with a summary of the Harmonised UHC Benefit Package which was divided into curative health services, public health, preventive and promotive health services and Harmonised Health Benefit Package Negative List. They added that upon approval by the Ministry of Health, they undertook to implement the change of Benefit design.
13. It averred that that the change of the Benefit design was arrived at after conducting feasibility studies where they engaged different stakeholders through various taskforce and/or working groups along with healthcare providers and Kenya Renal Association meetings in an effort to align it benefits towards populations needs. They added that an actual costing of the services including the costs estimates/



actuarial analysis for the aforementioned benefits was also done by estimating the risk and utilisation over one (1) year period with scenarios of current membership and scale-up to hundred (100%) per cent coverage as per the Government of Kenya initiative of UHC which was then presented to the 3rd Respondent for approval.

14. They stated that there was no complaint that had been lodged by the said Association with respect to the intended impending reduction in the capitation of the dialysis benefit package and that the Petitioner had not adduced any evidence to show that he had been compelled to pay extra costs in respect of payment incurred from the treatment or dialysis, or he had presented and the other five thousand (5,000) other patient for treatment they were denied treatment. They denied that the Petitioner tried to engage them and averred that the only information he had sought was a request to furnish the Kenya Renal Association with the new change of Benefit design.
15. They further stated that there was no evidence that the Petitioner herein or the other five thousand (5,000) other patients had been compelled to pay any extra cost in respect of payment incurred from the treatment/dialysis from any of the firms it had contracted.
16. They asserted that they stood to suffer prejudice should the application and the Petition be allowed as they would be compelled to pay an extra Kshs 1,440,000,000/= for the five thousand (5000) renal patients annually which was completely unsustainable and would lead to redesigning of the whole benefit including the benefits for the other clients.
17. They were emphatic that the extra payment would neither translate to any extra benefit to the Petitioner or any of the five thousand (5000) renal patients covered nor diminish and/or reduce any benefit already accorded to them.
18. They thus urged this court to dismiss the said Petition with costs to them.

Legal Analysis

19. Having considered the Petition and respective parties' Written Submissions, it appeared to this court that the issues that had been placed before it for determination were:-
 - a. Whether or not the Petitioner's constitutional rights had been infringed upon;
 - b. If so, what reliefs was he entitled to; and
 - c. Who was to bear the costs of this Petition
20. The court therefore deemed it prudent to address the aforesaid issues under the following distinct and separate heads.

I. Competence Of The Petition

21. The 1st and 2nd Respondents placed reliance on the case of Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272 and argued that the Petitioner failed the requirement to show the manner in which the intended reduction in the capitation of renal care threatened his and the public's rights to the highest attainable standards of health under Article 43 of *the Constitution* as this could only be ascertained with reference to instances where the Petitioner or any other renal patient had been denied treatment by any of the service providers contracted by them.
22. They asserted that neither the body representing the Petitioner namely, Kenya Renal Association, had lodged any complaint in respect to the intended impending reduction nor had any of the service providers they had retained received the same.



23. They submitted that the Petitioner's allegations that the publication of the resolution through newspaper report was a violation of Article 47(1) and (2) of *the Constitution* amounting to unfair administrative action, reasonableness and procedural fairness was unfounded as prior to such publication there was a stakeholders feasibility study where they engaged different stakeholders through various taskforce along with healthcare providers and Kenya Renal Association in an effort to align its benefits towards the population needs.
24. They were emphatic that apart from citing omnibus provisions of *the Constitution*, the Petitioner never demonstrated the alleged complaints, the manner of alleged infringements or the jurisdictional basis of the action before the court. They pointed out that the failure to draft the Petition with precision had prejudiced them.
25. In that respect, they relied on several cases among them the case of Republic vs Commissioner of Police Exparte Nicholus Gitutu Karia & Rashid Odhiambo Aloggo and 254 Others vs Hacco Industries as cited in Kokebe Kevin Odhiambo & 12 Others vs Council of Legal Education & 4 Others [2016]eKLR and Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 Others [2014]eKLR where the common thread was that any applicant who alleged that his and/or her rights had been infringed upon was required not only to make allegations but also to state clearly with supporting facts and instances where such rights had been infringed failing which the application would be rendered fatally defective.
26. It was their contention that the Petition was wanting in form and substance and did not in any way show any semblance of a constitutional petition pleading breach of known constitutional provisions, violation of and/or infringement of rights and fundamental freedoms.
27. On his part, the Petitioner submitted that according to Articles 165 (3) (b) as read with Article 165 (5)(b) of *the Constitution* of Kenya 2010 only the High Court and courts of equal status possess and are endowed with the jurisdiction to hear and determine issues relating to violations of constitutional rights. He contended that the Constitutional Court has the primary obligation of interpreting *the Constitution* and may consequently grant redress to any aggrieved party.
28. He asserted that the thrust of his Petition gravitated on the question whether his rights to health as protected by *the Constitution* of Kenya 2010 was threatened or had been infringed and the court ought to find that the same was particularised in the grounds and manner of infringement in Part D and Paragraphs 32-44 therefore the same met the threshold set out in Anarita Karimi Njeru vs Republic (Supra) where the court held that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it was important 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.
29. It was his contention that even if there were shortcomings as had been posited by the 1st and 2nd Respondents, Article 159 of *the Constitution* provided that in exercising judicial authority, justice was to be administered without due regard to technicalities.
30. He submitted that his Petition had raised justiciable issues and in this regard, he relied on the case of Trusted Society of Human Rights Alliance vs A.G & Others High Court Petition No 229 of 2012 (eKLR citation not given) where it was held that constitutional petitions were to be fashioned in such a way that respondents were to be given proper notice about the nature of the claim being made so that they could adequately prepare their case.



31. Article 22(1) of *the Constitution* of Kenya, 2010 provides that every person has a right to institute proceedings claiming that a right or fundamental freedom in the Bill of Rights had been denied, violated or infringed or was threatened.
32. The threshold of a constitutional petition was clearly formulated in the case of Anarita Karimi Njeru vs Republic (Supra) that was relied upon by both parties herein. It should be noted the aforesaid case has been relied upon from time and time again to demonstrate the said threshold.
33. A petitioner was required to set out the constitutional provisions which he or she believed to have been violated or threatened and the manner in which the respondent had violated the same. It was not enough for the petitioner to cite the provisions without demonstrating how they were infringed upon.
34. Upon perusal and consideration of Part D and Paragraphs 32-44 and of the Petition, it was clear to this court that the Petitioner has laid out the actions by the Respondents which he believed were wrong and unconstitutional as well as the provisions of *the Constitution* of Kenya which he believed were violated.
35. He set out the constitutional and legal foundations of the Petition by setting out the provisions of *the Constitution* of Kenya and international legal instruments enshrining health as a fundamental right which were to the effect that the State had an obligation to provide its citizens the highest attainable standard of health care.
36. In Part D Paragraphs 32- 34 of his Petition, he stated that the reduction of the dialysis benefit coverage without seeking his views and those of five thousand (5000) other patients or without according them an opportunity to be heard was outside the scope of Articles 10,47,174 and 232 of *the Constitution* of Kenya. He blamed the Petitioners for having violated the said provisions.
37. This court was therefore persuaded to find and hold that the Petitioners had set out his case in such a manner that the Respondents were aware of what they were to respond to in line with the case of Anarita Karimi Njeru vs Republic (Supra).
38. It is trite law that courts should as much as possible try to sustain rather than strike out pleadings on technicalities. Striking out of pleadings is a draconian step and must be applied as a last resort. Pleadings that can be saved by amendments ought to be saved.
39. Notably, Article 159(2)(d) of *the Constitution* of Kenya mandates courts to administer justice without undue regard to procedural technicalities. This is further re-emphasised in the case of petitions filed pursuant to the provisions of Article 22 of *the Constitution* of Kenya. *The Constitution* of Kenya envisages proceedings and their commencement being informal provided that the same clearly set out the nature of the claim with certainty for ease of response by the respondent.
40. Indeed, Article 22(3)(b) of *the Constitution* of Kenya envisages that formalities in stipulates as follows:-

“The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation.”
41. It was for the aforesaid reasons that the Respondents submissions that Petitioner’s pleadings were wanting in form failed to find favour with this court. The question of whether or not the Petition was merited was a different question altogether.



II. Constitutional Rights

42. The Petitioner reiterated the averments in his Petition and pointed out that public's right to the highest attainable standard of health was provided for by Article 43 of *the Constitution* of Kenya. He explained that the National Hospital Insurance Fund (NHIF) was the largest insurance provider in Kenya and played a critical role in advancing universal health coverage, a fact that both the 1st and 2nd Respondents acknowledged.
43. He asserted that the right to health as the enjoyment of a variety of facilities, goods, services and conditions was necessary for the realisation of the highest attainable standard of health.
44. He invoked Article 43(1)(a) of *the Constitution* of Kenya, Article 25 of the Universal Declaration of Human Rights, Article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Article 16 of the African Charter on Human and People's Rights (ACHPR) which also recognise the right to health a right which encompassed proper treatment at hospital availability of necessary equipment, facilities and medication.
45. He argued that 1st and 2nd Respondents' bid to implement the proposed Comprehensive Contract for the Provision of Healthcare Services to Beneficiaries of the NHIF 2022-2024 which provided for a reduction of dialysis cover would disrupt and destabilise the life-saving treatment that dialysis provided and would result in many renal patients including him being unable to meet the costs of the life-saving dialysis treatment and risk of being pushed into poverty as they would be forced to use all their life savings, sell assets or borrow to seek treatment thereby destroying their futures and those of their children.
46. He was apprehensive that there was a real and threatened loss of lives through compromised dialysis services or no dialysis at all through health system bottlenecks inimical towards accessing quality primary health care. He submitted that when people paid most of the cost for health services out of their own pockets, the poor were often unable to obtain many of the services they needed and the rich were also exposed to financial hardship in the event of severe or long-term illness.
47. He further argued that he faced threatened physical and mental anguish occasioned by the anxiety of not being able to access the life saving dialysis treatment and being subjected to discrimination whereby there was a cost reduction in dialysis treatment on the one hand with a concomitant increase in cancer care on the other hand thereby perpetrating discrimination in access to health services.
48. He relied on the case of *P.A.O & 2 Others vs Attorney General* [2012] eKLR where the court held that the right to health, life and human dignity were inextricably bound.
49. He asserted that Article 2(6) of *the Constitution* of Kenya enjoins the government to honour treaties already ratified. He was emphatic that the 1st and 2nd Respondents' decision ignored Articles 10 & 19 of *the Constitution* of Kenya that emphasised the centrality of the Bill of Rights as part of Kenya's democratic state and the framework for social, economic and cultural policies for the preservation of the dignity of individuals, the promotion of social justice and the realisation of the potential of all human beings.
50. It was his case that the Respondents' actions contravened Article 47 of *the Constitution* of Kenya as read with Section 4 of the Fair Administrative Action No 4 of 2015 by undertaking an administrative action which was unlawful, unreasonable and procedurally unfair as no information was disseminated or consultations done yet the Respondents were well aware that their actions were likely to primarily and adversely affect the fundamental rights and freedoms of the Petitioner as well as of other renal care patients.



51. It was his submission that the information would have enabled him and other renal care patients know and understand the reasons for the reduction in the dialysis capitation to enable them present considered views and make representations which he submitted was a violation of the provisions of Article 35 of *the Constitution* of Kenya which expressly grants every citizen the right of access to information held by the State and by another person and required for the exercise or protection of any right or fundamental freedom.
52. He argued that Annexure DS-3 contained minutes of Western Region HCPs Re-contracting Engagement Meeting held on 15th October 2022 where it was clear that the deliberations were with health care providers who were being persuaded to sign new contracts in line with the UHC Policy in the absence of and/or participation of renal care patients.
53. He cited Article 10, 174 (c) & (d) and 232 (1) of *the Constitution* and placed reliance on the case of Kaps Parking Limited & Another vs County Government of Nairobi & Another [2021] eKLR where it was held that a public participation programme must show intentional inclusivity and diversity and that any clear intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition.
54. On their part, the 1st and 2nd Respondents were emphatic that the decision of reduction of the capitation of renal patients followed the procedural safeguards embedded in *the Constitution* as a feasibility study was organised where different stakeholders were engaged through various task force and working groups alongside the Healthcare providers.
55. They submitted that where one alleged violation/infringement of a right, he had the obligation to adduce tangible admissible evidence so that the court would then scrutinise for purposes of making a just decision. To buttress their point, they invoked Section 107, 108 and 109 of the Evidence Act and placed reliance on the case of Harrison Njuguna vs Inspector General National Police Service & 2 Others [2021] eKLR where the court held that he who alleges must prove.
56. They were emphatic that it was not enough that the Petitioner submitted and narrated the sequence of the events but that documentary evidence was necessary to corroborate his averments. They urged the court to consider the case of Vivo Energy Limited (Initial Party Kenya Shell Limited) vs George Karunji [2014] eKLR where it was held that pleadings and documents on record are all allegations until they are proved and that oral and documentary evidence should be adduced in a hearing to prove the issue.
57. They further relied on the case of Yunes Maniafu Mukolwe vs Moses Makokha & 3 Others [2016] eKLR where the court therein cited the case of Stephen Wasike Wakho & Another vs Security Express Limited [2006] eKLR where the court held that a party seeking justice must place before the court all material facts which considered in light of law would enable the court arrive at the decision as to whether the relief sought is available.
58. They argued that the Petitioners' allegations of abrogation, breach, infringement or violations of fundamental human rights and freedoms had not been pleaded with reasonable precision or proved in evidence and having failed to prove any violations of any right, it was evident that the prayers in his Petition should not take off.
59. They further cited the cases of Kiambu County Tenants Welfare Association vs Attorney General & Another [2017] eKLR and Christian Juma Wabwire vs Attorney General [2019] eKLR where the common thread was that for a person to prove violation of their rights under the various provisions of the Bill of Rights, they must not only state the provision of *the Constitution* allegedly infringed but also indicate the manner of infringement, the nature and extent of that infringement and the injury suffered.



60. They submitted that the gap in the evidence that was adduced had denied the Petitioner the opportunity of demonstrating that his rights were indeed violated as had been detailed in the Petition.
61. They contended that the Petitioner would not suffer any prejudice if the orders he had sought were not granted as they had not failed to cater for the cost of the treatment if any incurred by himself and other patients and that he had not shown any evidence where he had presented himself for treatment and the same was declined.
62. They pointed out that an order of prohibition was discretionary and was only tenable where a public body or official acted in excess of their powers. They asserted that they had not acted out of their powers and/or ultra vires as the intended reduction of the dialysis benefit package payments was reached after consultation with all the relevant bodies and stakeholders and the actions were within their functions.
63. They also relied on the case of Republic vs The Chief Magistrate, Milimani & 2 Others Ex P Tusker Mattresses Ltd & 3 Others HC Misc. Civil Application No 179 of 2012 (eKLR citation not given) where it was held that in order to succeed in an application for judicial review, the applicant had to show that the decision or act complained of was tainted with illegality, and procedural impropriety.
64. *The Constitution* of Kenya has guaranteed to everyone, among other social economic rights, the right to health. Article 43 of *the Constitution* of Kenya provides that:
1. Every person has the right –
 - a. To the highest attainable standard of health, which includes the right to health care services, including reproductive health care;
 2. A person shall not be denied emergency medical treatment.
65. This provision reflects the right guaranteed in international instruments to which Kenya is a party, chief among them Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which provides as follows:
1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
 - ... d. The creation of conditions which would assure to all medical service and medical attention in the event of sickness.”
66. It is important to point out that the right to health is intrinsically connected with the right to life as the Petitioner correctly submitted and that violation of the right to health would therefore impact negatively on the right to life. It must, however, be appreciated that the right to health can only be achieved progressively and that its realisation is subject to the availability of resources.
67. Article 21(2) of *the Constitution* of Kenya provides that:-
- 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.”
68. *The Constitution* of Kenya further provides the manner in which the court should approach the question of the state’s obligation in meeting its obligations under Article 43 of *the Constitution* of Kenya.



69. Going further, Article 20 (5) of *the Constitution* of Kenya stipulates as follows:

“In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles-

- a. It is the responsibility of the State to show that the resources are not available;
- b. In allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and
- c. The court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.”

70. It was thus undisputed that the State had the primary obligation to ensure that the Petitioner and other citizens enjoyed the highest attainable standard of health. The State had a duty to make the necessary budgetary allocation and to take the necessary legislative and policy measures to ensure that their right to health was realised.
71. In the instant case, the Petitioner claimed that 1st and 2nd Respondents’ bid to implement the proposed reduction of dialysis cover would disrupt and destabilise the life-saving treatment that dialysis provided which would result in many renal patients including him going completely out of pocket and thus be unable to meet the costs of the life-saving dialysis treatment and in the process destroy their future and that of their children.
72. Under the *National Hospital Insurance Fund Act*, the NHIF has a mandate to offer social medical insurance cover to all its beneficiaries countrywide through its various contracted and accredited Health Care Institutions. Provision of affordable health care under UHC was a policy issue.
73. The said legislation and policy is the responsibility of the government in line with the provisions of Article 21(2) of *the Constitution* of Kenya which mandates the State to take legislative measures to achieve the progressive realisation of the rights (emphasis court). The implication of this is that whereas Article 43 of *the Constitution* of Kenya mandates the government to ensure the right to the highest standard of attainable health, this right is to be realised progressively as it has financial implications.
74. Article 20 (5) (b) of *the Constitution* of Kenya imposed a duty on the state to channel its resources in respect of social economic rights while giving priority to ensuring the widest possible enjoyment of the right and having regard to prevailing circumstances, including the vulnerability of particular groups or individuals.
75. The 1st and 2nd Respondents explained that the Government came up with a summary of the Harmonised UHC Benefit Package which was divided into curative health services, public health, preventive and promotive health services and Harmonised Health Benefit Package Negative List. The same was done so as to align according to the needs of Kenyans. The current membership was taken into account. Actual costing of the services and costs estimates/actuarial analysis for the aforementioned benefits was also done by estimating the risk and utilisation over a period of one (1) year with a view to attaining to hundred (100%) per cent coverage. According to the Petitioner, this led to the reduction of the dialysis benefit package payments from Kshs 9,500/= to Kshs 6,500/=.



76. While it was the responsibility of the government to allocate the resources to ensure that all citizens attain the highest standard of health, there was no dispute that the court was not suited to decide matters of resource allocation as it did not have the requisite information to enable it make a determination as to the best use of scarce resources in the health sector vis a vis other equally critical sectors.
77. There was danger in making an order that the resources be used for a particular patient, as this could deny those resources to other patients to whom they might more advantageously be devoted. The sad but inescapable truth about our circumstances in Kenya as in other developing countries, is that there are countless persons facing similar dire medical situations as the Petitioner and the five thousand (5000) other renal and diabetic patients. Undoubtedly, there are other illnesses such as cancer that have created a huge disease burden on citizens competing with the medical needs of the Petitioner and other renal patients.
78. In the mind of this court, the word “attainable” recognises the availability and/or scarcity of financial resources. Access of health care of the highest standard is therefore dependent on the resources available.
79. Courts must therefore be slow to interfere with rational decisions taken in good faith by State organs and medical authorities whose responsibility it is to deal with such matters.
80. The court would be acting ultra vires *the Constitution* of Kenya to direct the 1st and 2nd Respondents and the State to provide dialysis cover at a certain amount of cost when it cannot determine the availability of resources or the impact the diversion of resources to meet the Petitioner’s individual demands would have.
81. It rendered itself as such while appreciating the dearth of information supplied by the parties, particularly the 1st and 2nd Respondents, in relation to its policies and budgets for health vis a vis other sectors but bearing in mind also the limitations of the court in making a determination on what was appropriate expenditure in the various sectors for which the State was responsible.
82. The court acknowledged that the Petitioner and other renal patients were in a difficult and no doubt life-threatening situation and that the State could and perhaps do a lot better than it had done with regard to the provision of health care and ensuring access to citizens thus realising its obligation with regard to the right to health.
83. Indeed, the ideal situation would be one in which the Petitioner and the many other patients with renal failure accessed medical dialysis at a frequency that suited their health needs and at a cost that they could afford without being subjected to long queues and waiting times. It would also be ideal if the 1st and 2nd Respondents had the capacity to cover all the medical expenses for its contributors. But we do not live in an ideal world, and the court must allow the policy makers to make appropriate decisions.
84. If this court were to grant the Petitioner the prayers that he sought, this would be tantamount to the court interfering with policy making decisions when it was prohibited from interfering with policy matters relating to the realisation of the right to health as that is the mandate of the State.
85. Notably, Article 20(5)(c) of *the Constitution* of Kenya prohibits the court, tribunal or other authority to interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.



86. Issuing conservatory orders to restrain the Respondents from hurriedly implementing the cost reduction of dialysis coverage as the Petitioner had submitted was tantamount to interfering with the role of the State in formulating policy.
87. Given that the Petitioner and the five thousand (5000) other renal patients did not demonstrate that they had failed to access dialysis treatment as and when they wanted it despite the limited resources that had been allocated in renal illness, this court was not satisfied that based on the material that was placed before it, that the measures that were taken by the Respondents to ensure access to haemodialysis by the Petitioner and other renal patients were unreasonable.
88. Topping up financial resources to access medical treatment by any person, if at all, was not a violation of *the Constitution* of Kenya. This is because the right to health care is to be realised progressively. Indeed in the Newspaper Article titled “NHIF to cut benefits in cost saving plan” annexed in the Replying Affidavit, the 1st Defendant stated that although patients were paying Kshs 6, 000/= annually, they were receiving benefits of Kshs 1,000,000/= per year which was a burden to NHIF. This court would have taken a different view if *the Constitution* of Kenya had expressly mandated the government to provide free health care to all. Sadly, this was not the case.
89. This court was therefore unable to find a violation of the rights of the Petitioner under Articles 10(a), 322, 23, 26(1), 27(1) & (2), 29 (d), 35, 43(1) (a) and (2), 46 (1) (c), 47, 73(1)(a) and (b), 174 (c) and 232 (1)(f) of *the Constitution* of Kenya. It was the considered view of this court that the Petition herein was premature and based on speculation as no violation had been suffered by the Petitioner or any of the five thousand (5000) other renal patients and if they had, they had not demonstrated the same.
90. Going further, although the Petitioner had asserted that he and five thousand (5000) other renal patients ought to have been invited to give their input was not tenable, the 1st and 2nd Respondents averred that there was a stakeholder feasibility study where they engaged different stakeholders through various taskforce along with healthcare providers and Kenya Renal Association in an effort to align its benefits towards the population needs. They argued that it was strictly under their statutory mandate.
91. It was not possible, tenable and realistic to have had each and every person suffering from renal disease in Kenya to have given his or her input. It was sufficient that the Kenya Renal Association and other stakeholders participated in the deliberations of the proposals for the 1st and 2nd Respondents to have complied with the requirement of public participation as mandated by Article 10(2)(a) of *the Constitution* of Kenya.
92. This court was satisfied that there was public participation as the 1st and 2nd Respondents had annexed Reports and call logs in their Replying Affidavit showing engagement between the NHIF and different stakeholders. In the meeting of 15th October 2021, there were four hundred and eighty one (481) attendees during a virtual meeting. It was expected that by the time the Business Daily published the Article titled “Uproar over NHIF Plan to cut cash for dialysis” on 28th October 2021, some sort of consensus had been arrived at the meetings as none of the participants in the Stakeholder meetings sought court intervention.
93. Having considered all the affidavit evidence that was presented before this court, this court was not persuaded to find that the Petitioner’s rights under Article 35 (1)(a) and (b) of *the Constitution* of Kenya were violated. He did not furnish the court with any documentation to show that he had demanded to be given certain information held by the 1st and 2nd Respondents and the same was denied and/or that the 1st and 2nd Respondents held information that was required for the exercise or protection of any of his and/or the five thousand (5000) other renal patients’ right or fundamental freedom.



94. Having found that the Petitioner did not demonstrate that his fundamental rights had been violated, infringed and/or contravened and/or that the same were threatened, public interest did not tilt in his favour as he had contended. He was thus not entitled to any reliefs.

III. Reliefs

95. The 1st and 2nd Respondents did not submit on the issue of costs. This court had due regard to the case of Consumers Federation of Kenya (COFEK) vs Nakumatt Holdings Limited & 4 others [2018] eKLR where the court stated that courts have been reluctant to award costs in constitutional petitions as costs may be a barrier to potential litigants in public interest litigation but that there were instances where courts have held an award of costs would be justified such as where the litigation was frivolous or vexatious or where the conduct of the litigant attracted censure by the court. In this case, the Petitioner had not done anything to warrant such censure by the court.

Disposition

96. For the foregoing reasons, the upshot of this court's decision was that the Petitioner's Petition dated and filed on 21st December 2021 was not merited and the same be and is hereby dismissed. Each party will bear its own costs.
97. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF FEBRUARY 2023

J. KAMAU

JUDGE

