



REPUBLIC OF KENYA



**Abenga v General & another (Petition E183 of 2021) [2023] KEHC 920 (KLR)
(Constitutional and Human Rights) (17 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 920 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E183 OF 2021

M THANDE, J

FEBRUARY 17, 2023

BETWEEN

ELVIS BEGI NYACHIEO ABENGA PETITIONER

AND

HON. ATTORNEY GENERAL 1ST RESPONDENT

THE CABINET SECRETARY OF HEALTH 2ND RESPONDENT

RULING

1. The Petitioner filed his Petition dated 24.5.21 seeking the following orders:
 - A. A declaration does issue that the provision of free sanitary towels to all school going girls is part of realising the right to the highest attainable standard of health which is the duty of the respondents.
 - B. A declaration does issue that the State's providence of male condoms is sufficient evidence to show that resources are available and that the State has no defence under article 20 of the 2010 [Constitution](#).
 - C. This court does order the Respondents to provide sanitary towels to all school going children in public schools and public facilities.
 - D. A structural interdict compelling the State to continuously file and show sufficient progress of the practical realization of Prayer C.
 - E. This court makes any other orders that it deems fit in the best interest of justice and collective wellbeing of our children.
2. Together with the Petition, the petitioner filed an application of even date seeking orders that:



- a. Spent
 - b. The Government of Kenya do urgently produce a proper plan for provision of sanitary towels to public educational institutions, specifically primary and secondary girls' schools.
 - c. The Government of Kenya do urgently furnish the court with any policy or plan with regard to provision of sanitary towels and feminine hygiene products to public educational institutions.
3. It is the said Application that is the subject of this ruling. The grounds upon which the Application is premised, are that there is no provision of sanitary towels to public educational facilities in the Republic of Kenya; that needy female students in the above mentioned institutions stay away from school for lack of sanitary towels to manage their menstruation; that the State should provide these essential sanitary towels to public educational institutions; that the provision of sanitary towels to school going children is essential to upholding their inherent right to human dignity; that by providing male condoms in educational institutions and failing to provide the sanitary towels, is discriminatory against the girl child; and the orders sought herein are in the best interest of justice; that providing sanitary towels in every public institution will ensure that the health care and the education of the girl child is properly catered for.
4. The respondents filed grounds of opposition dated 4.10.21. The grounds are that:
- i. The petitioner has not demonstrated before the honourable court how the respondent have violated his constitutional rights.
 - ii. It is well settled law that the Petitioners ought to demonstrate how the Respondents conduct constitutes a violation and/or contravention of their fundamental rights and freedoms as established in the case of *Anarita Karimi Njeru vs R* (1976- 1980) KLR.
 - iii. No harm and/or prejudice has been demonstrated nor has the petitioner adduced any evidence of violation and/or contravention of the law to warrant the interference and involvement of this honourable court.
 - iv. The Petition is fundamentally defective and offends the provisions of sections 106 and 107 of the Evidence Act on the burden of proof as mere generalized assertions and allegations have been made without any supporting evidence.
 - v. The *Basic Education Amendment Act* (2016) places the responsibility of providing free, sufficient and quality sanitary towels on the Government to reduce the number of girls missing school during their menstrual cycle.
 - vi. This new legal provision makes it an obligation for the Government to provide the towels to every school-going girl who has reached puberty. It also compels the Government to provide a safe and environmentally sound mechanism for disposal of the sanitary towels.
 - vii. The Government is also committed to promoting gender equality and the empowerment of women and girls as is enshrined in the Constitution. This is the overall goal of the State Department of Gender Affairs in the Ministry of Public Service, Youth and Gender Affairs.
 - viii. The sanitary towels programme to girls in public schools was first launched in 2011 under the Ministry of Education which have been procuring and distributing the sanitary towels to girls from disadvantaged backgrounds.
 - ix. The programme had previously been targeting girls in schools located in 82 former districts chosen from marginalized and slum areas. Equally, a school's location as per the National



Poverty Index determined whether its pupils received the Government funded sanitary towels. In the new strategic initiative of the programme, it will now cater for all targeted girls in the entire country.

- x. The programme was transferred from the Ministry of Education to the Ministry of Public Service, Youth and Gender Affairs.
 - xi. The State department for Gender is responsible for logistics, monitoring and evaluation of the entire project.
 - xii. The Application and Petition therefore lack merit. They are frivolous, vexatious, incompetent and improperly before court and an abuse of the court process.
5. Parties filed their written submissions as directed by the court, which I have duly considered. I note that the respondents' submissions were on the Petition and not the Application. The issues that arise for determination are:
- i. Whether the petitioner has the *locus standi* to bring this Petition.
 - ii. Whether the prayer for production of documents as sought by the petitioner should be granted.

Whether the Petitioner has the locus standi to bring this Petition.

6. The petitioner submitted that as a member of the public he has the locus standi to institute a claim for violation of rights of the public and a class of persons, as he has in this case for girls. He also has the right to institute a claim as a father of a school going child. This submission was in response to the respondents challenge of the petitioner's locus in filing the Petition herein.
7. Locus standi is an age-old issue. In the past, parties were routinely sent away from the seat of justice for want of locus standi. With the promulgation of the Constitution of Kenya, 2010, however, access to court for the enforcement of the Bill of Rights and of the Constitution was broadened and *locus standi* was expanded. By dint of articles 22 and 258 of the Constitution, proceedings may be instituted by any person under these 2 areas, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest.
8. Article 22 which relates to enforcement of the Bill of Rights provides in part 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.
9. Article 258 which makes provision for enforcement of the Constitution is couched in very similar terms as follows:
- (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.



- (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.
10. Courts have often stated that no hindrance should be placed in the way of a party seeking access to the courts save where such access would amount to an abuse of court process. In the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR, the Court of Appeal had this to say about *locus standi* in the Constitution of Kenya, 2010 constitutional dispensation:

Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the petition was filed before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the arguments of lack of standing by counsel for the appellant. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the locus standi to file the petition. Apart from this, we agree with the superior court below that the standard guide for locus standi must remain the command in article 258 of the Constitution,

11. And in the case of relying on article 258 of the Constitution and the case *Jonathan Munene v Attorney General & 2 others; Kenya Judges Welfare Association (Interested Party)* [2021] eKLR, relied on by the petitioner, Makau, J stated:

The issue of *locus standi* is now well settled in our own jurisprudence which I note provides a broad approach that gives locus standi to any member of the public that is acting bona fide and has sufficient interest in instituting an action to redress a public wrong or injury. The broad approach not only ensures that courts fulfil their constitutional mandate, but also allows person with genuine grievances to access the seat of justice and enjoy the full measure of protection that they are entitled to under our liberal and progressive constitution.

12. The petitioner states that he seeks relief in the public interest and on behalf of all girls in the Republic of Kenya, particularly girls from disadvantaged background. In the premises, and flowing from the cited provisions of the Constitution and the cited authorities, it is evident that the petitioner has the necessary locus standi to institute the present Petition.

Whether the prayer for production of documents as sought by the Petitioner should be granted

13. The petitioner submitted that he seeks the production of a strategic plan if any, or policies in place for implementation of the legal mandate of the State to provide sanitary towels. His case is that the documents in question fall under secondary evidence within the context of section 68 of the *Evidence Act*. The petitioner further submitted that he is entitled by virtue of case law to apply for production of documents in the custody of the State and which are crucial to the determination of the Petition.



He further argued that because the respondents' grounds of opposition remain silent on the issue, the court should construe that silence as a lack of opposition to the production of the said documents.

14. The Petitioner relied on sections 68 and 69 of the Evidence Act as the basis for his case for production of the documents in question from the Respondents.
15. Section 68 of the Evidence Act makes provision for proof of documents by secondary evidence. Subsection (1) (a) provides as follows:
 1. Secondary evidence may be given of the existence, condition or contents of a document in the following cases—
 - a. when the original is shown or appears to be in the possession or power of—
 - i. the person against whom the document is sought to be proved; or
 - ii. a person out of reach of, or not subject to, the process of the court; or
 - iii. any person legally bound to produce it, and when, after the notice required by section 69 of this Act has been given, such person refuses or fails to produce it;
16. The law requires that notice be given to the party of whom production of documents referred to in section 68(1)(a), is required. Section 69 of the Evidence Act provides:

Secondary evidence of the contents of the documents referred to in section 68(1)(a) of this Act shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his advocate, such a notice to produce it as is required by law or such notice as the court considers reasonable in the circumstances of the case:

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases—

- i. when the document to be proved is itself a notice;
 - ii. when from the nature of the case, the adverse party must know that he will be required to produce it;
 - iii. when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;
 - iv. when the adverse party or his agent has the original in court;
 - v. when the adverse party or his agent has admitted the loss of the document;
 - vi. when the person in possession of the document is out of reach of, or not subject to, the process of the court;
 - vii. in any other case in which the court thinks fit to dispense with the requirement.
17. In the case of Elizabeth Chebii & another v Japhet Nyambegi, Ocs Langas Police Station & another; National Police Service Commission & another (Interested Parties) [2021] eKLR, Ogola, J. directed the State to produce documents which were in its possession. The learned Judge stated:

The documents requested are documents that are in the possession of the Respondents and the Interested Parties by their very nature. Further, from the proceedings, it is evident that



the Respondents and Interested Parties have been required to produce these documents and have failed to do so. (emphasis mine).

18. The notable difference between the cited case and the present case is that in that case, a notice to produce as contemplated under section 69 of the Act been issued, but not complied with. This is what informed the decision of the applicant therein to move to court. In the instant case, the petitioner has not demonstrated to the court by way of evidence, that he gave to the respondents or their advocates, notice to produce the documents, the production of which he seeks. Section 69 of the *Evidence Act* is explicit that without such notice the documents sought shall not be produced.
19. It is noted that the proviso to section 69 lists the circumstances in which the notice contemplated in that Section may be dispensed with. The Petitioner has not invoked the said proviso in seeking the production of documents without having given the required notice to the respondents.
20. Having considered the foregoing, I find and hold that the orders sought by the petitioner for production of documents cannot be granted. It follows that the Application dated 24.5.21 lacks merit and the same is hereby dismissed. Costs in the cause.

DATED AND DELIVERED IN NAIROBI THIS 17TH FEBRUARY 2023

M. THANDE

JUDGE

In the presence of: -

..... **for the Petitioner**

..... **for the Respondents**

..... **Court Assistant**

