



Munialo & another v Attorney General & 2 others; Mumias Sugar Company Limited & 15 others (Interested Parties) (Petition 569 of 2017) [2023] KEHC 19048 (KLR) (Constitutional and Human Rights) (26 May 2023) (Judgment)

Neutral citation: [2023] KEHC 19048 (KLR)

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

PETITION 569 OF 2017

M THANDE, J

MAY 26, 2023

BETWEEN

JACK MUNIALO 1ST PETITIONER

CHARLES ATIANG' ATYANG 2ND PETITIONER

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

THE CABINET SECRETARY MINISTRY OF AGRICULTURE, LIVESTOCK AND FISHERIES 2ND RESPONDENT

AGRICULTURE AND FOOD AUTHORITY 3RD RESPONDENT

AND

MUMIAS SUGAR COMPANY LIMITED INTERESTED PARTY

SOUTH NYANZA SUGAR COMPANY LIMITED INTERESTED PARTY

CHEMELIL SUGAR COMPANY LIMITED INTERESTED PARTY

MUHORONI SUGAR COMPANY LIMITED INTERESTED PARTY

NZOIA SUGAR COMPANY LIMITED INTERESTED PARTY

KENYA UNION OF SUGAR PLANTATION AND ALLIED WORKERS INTERESTED PARTY

COUNTY GOVERNMENT OF BUNGOMA INTERESTED PARTY

COUNTY GOVERNMENT OF BUSIA INTERESTED PARTY

COUNTY GOVERNMENT OF HOMABAY INTERESTED PARTY



COUNTY GOVERNMENT OF KAKAMEGA INTERESTED PARTY
COUNTY GOVERNMENT OF KERICHO INTERESTED PARTY
COUNTY GOVERNMENT OF KISUMU INTERESTED PARTY
COUNTY GOVERNMENT OF KWALE INTERESTED PARTY
COUNTY GOVERNMENT OF MIGORI INTERESTED PARTY
COUNTY GOVERNMENT OF NAROK INTERESTED PARTY
COUNTY GOVERNMENT OF SIAYA INTERESTED PARTY

JUDGMENT

1. By their Petition dated 13.11.17 and amended on 24.1.18, the Petitioners, who describe themselves as persons engaged in and derive their livelihood from sugarcane farming, seek the following reliefs:
 - a. A declaration that the 2nd respondent has no power under the Crops Act to revoke the Sugar Levy.
 - b. A declaration that the publication by the 2nd respondent of the Sugar (Imposition) (Revocation) Order 2016 Legal Notice No. 103 of 2016 is ultra vires null and void and of no effect.
 - c. An order directing and compelling the 2nd respondent to forthwith revoke The Sugar (Imposition of Levy) (Revocation) Order Legal Notice No. 103 of 2016.
 - d. An order directing and compelling the 2nd respondent to make available and release to the Sugar Development Fund at least Kshs. 1,866,000,000 moneys that the said Fund was deprived of by virtue of the publication of the Sugar (Imposition of Levy) (Revocation) Order Legal Notice No 103 of 2016.
 - dd) An order directing the 2nd Respondent to furnish an account of the sum Kshs. 1,866,000,000 and Kshs. 7,000,000,000/- and the said sums to be restituted to the Sugar Development Fund.
 - e. The costs of these proceedings to be borne by the 1st, 2nd and 3rd Respondents.
2. The Petition is triggered Legal Notice No. 103 of 2016 The Sugar (Imposition of Levy) (Revocation) Order (the impugned Legal Notice) published by the 2nd Respondent, which revoked the Sugar (Imposition of Levy) Order, 2002. It is the Petitioners' case as set out in their affidavits sworn on 13.11.17, that the impugned Legal Notice abolished the sugar levy and that the 2nd Respondent was not mandated or empowered by the Crops Act to abolish the sugar levy. Further that Section 32(5) (a) of the said Act directed that the levy payable in the case of tea pursuant to the Tea Act Chapter 343 Laws of Kenya (now repealed) and levy payable in the case of sugar pursuant to the Sugar Act No. 10 of 2001 (now repealed) were to continue to be payable until different rates were imposed by the 2nd Respondent. The Petitioners claimed that the 2nd Respondent purporting to act under the provisions of the Crops Act unlawfully and acting ultra vires published impugned Legal Notice. It is their case that before the publication of impugned Legal Notice, the 3rd Respondent had collected sugar levy amounting to Kshs. 1,866,000,000/= which had accumulated retained savings of approximately Kshs. 7,000,000,000/=. They stated that 2nd or 3rd Respondents, in breach of law, appropriated or liquidated the funds which were supposed to be held, managed and administered by the Sugar Development Fund



- as at 9.6.16. They therefore seek that the 2nd and 3rd Respondents do furnish accounts of the Sugar Development Fund as at 9.6.16.
3. The Petitioners contend that through its unlawful and ultra vires actions, the 2nd Respondent has denied them the funds raised in 2015 through the sugar levy. Further that by reason of impugned Legal Notice, the fund has been denied at least Kshs. 3,732,000,000/= for the years 2016 and 2017. These funds are now not available to build and maintain roads, bridges, culverts and drainage in sugar cane growing areas in Kenya, provision of funds for sugar research, rehabilitation and maintenance of sugar factories, and provision of funds for cane development. Further, the sugar levy is also not available to the 1st to 5th Interested Parties for grants and credit to help finance or provide farm inputs to sugar cane growers or to keep sugar cane mills running, for the general benefit of sugar cane farmers. The Petitioners' have thus been denied their constitutional rights to human dignity, equity, non-discrimination, good governance, integrity, transparency and sustainable development, which rights tea farmers enjoy and continue to enjoy. The Petitioners further contend that the sum of Kshs. 1,866,000,000/- and Kshs. 7,000,000,000/- belonging to the Sugar Development Fund has unlawfully and in breach of the Crops Act, been appropriated and liquidated by the 2nd Respondent being the line ministry superintending the affairs of the Sugar Development Fund. The said actions have violated Section 32 of the Crops Act and Articles 10(2)(b), (c) and (d) of the Constitution.
 4. The Respondents opposed the Petition vide a replying affidavit sworn on 19.3.18 by Alfred Busolo Tabu, the Interim Director-General of the 3rd Respondent. He deposed that in line with the objectives of the Crops Act as set out in Section 3 thereof the Commodities Fund is established under Section 9 which consists inter alia of all moneys paid as license fees, commission, export or import agency fees and fees that may accrue to or vest in the Authority in the course of the exercise of its functions under the Act; that the under Section 43 and paragraph 2(1) of the Third Schedule of the Act, the 3rd Respondent took over all the funds, assets and other property, both movable and immovable, which immediately before the date of commencement of the Crops Act were vested in the former institutions established under the repealed Acts listed in the Second Schedule; that Section 12 provides that the 2nd and 3rd Respondents shall establish institutional linkages to coordinate the provision inter alia of credit assistance including provision of equipment for land preparation, affordable farm inputs including quality seeds, market linkage and technical support including research and extension services; that the removal of the sugar levy was done with the approval of Parliament and in accordance with Section 32(2) of the Act; that paragraph 155 of the budget statement of the Fiscal year 2016/2017 read on 8.6.16 by the Cabinet Secretary for the National Treasury, proposed to remove ad volarem levy on tea and the sugar development levy, with a view to improve farmers' earnings.
 5. It was further deposed that prayer (d) cannot issue as the sugar development fund was abolished with the enactment of the Crops Act and in its place the Commodities Fund was established; that the Commodities Fund constitutes public funds pursuant to the provisions of the Public Finance Management Act and can only be managed in compliance with the provisions of that Act and of Article 206 of the Constitution; that the Commodities Fund is a general revolving fund for the various sectors in agriculture including the sugar, coffee, tea, cotton, sisal and pyrethrum; that Section 33 expressly states that the proceeds of any levy imposed under the Act shall form part of the general fund and property of the Authority and may be used by the Authority in the furtherance or exercise of any functions or power of the Authority; that through the Commodities Fund, the Respondents have undertaken projects in the sugar sector in excess of Kshs. 4,000,000,000/= and advanced loans to sugar millers, all of whom are at liberty to apply. Lastly that the Fourth Schedule of the Constitution of Kenya in Part 2 has devolved public road transport and county roads as functions of County Government. The Respondents urged that the Petition be dismissed with costs.



6. The 5th Interested Party supported the Petition vide an amended replying affidavit sworn on 20.2.18 by Ritah Mukhongo, its Legal Officer. She reiterated the averments in the Petition and deposed that the 2nd Respondent is bound by the Constitution to make the most desirable decision in the public interest, while protecting the rights of those who are likely to be directly or indirectly affected by his decision; that the 2nd Respondent's actions have unlawfully deprived the 5th Interested Party of the benefits that would have accrued to it from utilization of the amounts that would have been raised since the date of the revocation order, in accordance with the law; that the revocation order, is not only illegal and ultra vires, but altogether void and ought to be quashed for illegality. The 5th Interested Party urged that the Court gives an order that the Funds belonging to the Sugar Development Fund that have unlawfully and in breach of the Crops Act been appropriated and liquidated by the 2nd Respondent and the cash collected be restituted to the Sugar Development Fund.
7. The 10th Interested Party supported the Petition vide an affidavit sworn on 15.5.18 by Jeremiah Okello Namunyu, the County Chief Officer for Agriculture. He reiterated the averments in the Petition and deposed that a proper interpretation of Section 35(2) and (5) of the Crops Act shows that the law does not permit the Cabinet Secretary to revoke the Sugar Development Levy Fund but rather only alter the rate at which the levy may be imposed. Consequently, the decision of the Cabinet Secretary contained in the ' Legal Notice is ultra vires the provisions of the Crops Act and hence null and void; that pursuant to Section 32(2) of the Crops Act, the impugned Legal Notice came into effect after 9.8.16 by which time the sugar development levy had been collected by the 3rd Respondent at the rate of 4%, by virtue of the previous Sugar (Imposition of Levy) Order, 2007; that a report by the Agriculture and Food Authority- Sugar Directorate dated 4.4.16 posted an indicative amount of Kshs. 1,866,000,000/- as that which was likely to have been collected by the Authority and which the Court should compel the 2nd and 3rd Respondents to disclose how the same was appropriated; that in view of the fact agriculture is a devolved function of the County Governments, it is imperative that any decision by the National Government relating to or connected therewith be made with full concurrence, consultation and deliberate participation of the County Governments, a situation that did not happen prior to the publication of the impugned Legal Notice; that with the removal of the Sugar Development Levy Fund, the 10th Interested Party has lost an important source of funding and can no longer adequately and efficiently meet its constitutional and statutory functions including provision of research and extension services to sugar cane farmers in the County and the maintenance of sugar cane transportation road network, bridges and other sugar industry infrastructure located within the County. The 10th Interested Party urged that the Petition be allowed with costs to it.
8. The 12th Interested Party filed a statement of dated 13.3.18, in support of the Petition. The grounds are that the Petition raises fundamental questions of law touching on the constitutionality of the national legislation and the 2nd Respondent's actions affecting the sugar cane industry, which impacts directly on the livelihood of majority of the 12th Interested Party's population; that the publication by the 2nd Respondent of the impugned Legal Notice infringes on the objects of the Crops Act and specifically Section 32, as the National Assembly never contemplated the revocation of the said levy imposed on sugar importing; that the impugned Legal Notice operates contrary to the intention of Parliament and the object for enactment of the Act and infringes on Articles 2 and 10 of the Constitution of Kenya, 2010.
9. George Illah, the County Legal Officer of Homa Bay County, the 9th Interested Party swore a replying affidavit on 22.2.18 in opposition to the Petition. The 9th Interested Party's position is that the Crops Act which repealed the Sugar Act was enacted to accelerate the growth and development of agriculture, enhance productivity and incomes of farmers and rural population and also to consolidated statutes relating to crops; that pursuant to Article 119 of the Constitution, the Petitioners ought to have



petitioned Parliament to consider the section of the repealed Act and if possible, incorporate the same in the new Act.

10. In their submissions dated 9.3.18, the Petitioners submitted that in publishing the impugned Legal Notice, the Cabinet Secretary went beyond his remit because he did not impose a levy but purported to abolish the sugar levy. Further that nothing has been filed by the Respondents to show that the approval of Parliament was sought and obtained. They argued that the power granted to the Cabinet Secretary by section 32(1) of the Crops Act is expressly qualified by Section 32(5) whose effect was to preserve the levies payable in the case of tea and sugar which were in place immediately before the commencement of the Crops Act. Those levies would continue to be payable until the Cabinet Secretary specifically imposed different rates. Thus the 2nd Respondent unconstitutionally, unlawfully and acting ultra vires abolished an existing sugar levy by revoking Legal Notice No. 383 of 2002.
11. Additionally, the Petitioners submitted that the sugar levy has been in existence since 1992 and its legality is originally drawn from the Agriculture Act and then the Sugar Act. Further that today the legality of the sugar levy is traced to Section 32 and more specifically Section 32(5) of the Crops Act and that for a period of over 26 years the sugar levy and the Sugar Development Fund have defined the lives and well-being of the sugar industry and players therein who include the farmers, the mills and the consumers. Relying on the provisions of Section 32(1), (2) and (5) (a) of the Crops Act, they submitted that their complaint toward the 2nd Respondent is well founded. Further that the 3rd Respondent, the organ created by statute to administer and manage the sugar levy and the Sugar Fund, had collected the levy and that none of the Respondents responded to paragraphs 15 and 21A of the amended Petition. They further posed the question as to what happened to the Kshs. 1,866,000,000/= and Kshs. 7,000,000,000/= and urged that prayers (a), (b), (c), (d) and (dd) of the amended Petition be granted.
12. In their submission dated 26.9.18, the Respondents contended that the publication of the impugned Legal Notice was informed by the budget statement of the fiscal year 2016/2017 read by the Cabinet Secretary of the National Treasury at paragraph 155 at pg. 31. The publication was thus not ultra vires as the 2nd Respondent had the mandate, power, authority and approval of the National Assembly. On whether an order can issue compelling the 2nd Respondent to make available and release to the Sugar Development Fund at least Kshs. 1,866,000,000/= the Respondents submitted that contrary to the position taken by the Petitioners and Interested Parties, the sugar cane industry has continued to receive both technical and financial support from the 2nd and 3rd Respondents post the publication of the impugned Legal Notice. They submitted that the Petitioners, the Interested Parties and residents within the sugar belt have benefitted from projects valued in excess of Kshs. 4 billion. This has been in research and development of 21 new high yielding sugar cane varieties; acquisition of bridges and roads; installation of cane testing units in different counties including Kakamega; Kisumu, Bungoma, Narok, Homa Bay and Kwale. In addition to the technical support through the commodities fund, sugar millers have been advanced loans in the range of Kshs. 1.2 billion.
13. The Respondents further submitted that prayers (d) and (dd) cannot issue as the commodities fund constitutes public funds and the management of the funds therein can only be managed in accordance with Article 206 of the Constitution and the Public Finance Management Act. Further, that the funds which they seek for the monies to be put on is non- existence by operation of the law with the enactment of the Crops Act and as such it would be contrary to the constitutional principles of public finance in respect to the responsibility of financial management and fiscal reporting enshrined in Article 201(e) of the Constitution.
14. The 1st Interested Party supported the petitioners' case but did not file any documents. Although the 2nd Interested Party indicated that it had filed submissions on 10.2.22, the same were not in the



court file and could not be traced the Case Tracking System. In its submissions dated 10.8.18, the 10th Interested reiterated the averments in its affidavit and urged the Court to allow the petition. The 5th Interested Party filed submissions dated 19.3.18 in which the contents of its amended replying affidavit were reiterated, namely that the 2nd Respondent acted ultra vires in publishing the impugned Legal Notice. It contended that Section 32(1) of the Crops Act empowers the Cabinet Secretary with approval of Parliament to impose upon or alter a levy on a scheduled crop or product such as sugar, but not to abolish the sugar levy, as he did, and without approval from Parliament. It was further submitted that the 2nd and 3rd Respondents unlawfully and in breach of specific and clear provisions of an act of parliament appropriated and liquidated the funds supposed to be held, managed and administered by the Sugar Development Fund, a state corporation. The 12th Interested Party did not file submissions but relied on its grounds and submissions by the Petitioners and the 10th Interested Party.

15. The gravamen of the Petitioner's Petition is that the impugned Legal Notice published by the 2nd Respondent abolished the Sugar Levy. Their contention is that Section 32(1) pursuant to which the Legal Notice was published, does not confer upon the 2nd Respondent powers to revoke the Sugar Levy. According to the Petitioners therefore, the 2nd Respondent acted unconstitutionally, unlawfully and ultra vires.
16. The Sugar Act (now repealed) at Section 19 established the Sugar Development Fund which was to consist inter alia of the Sugar Development Levy. Section 18(1) provided that The Minister may, in consultation with the Board, by order in the Gazette, impose a levy on domestic and imported sugar to be known as the Sugar Development Levy.
17. The Crops Act which was enacted in 2013 and repealed various statutes relating to crops, including the Sugar Act. Section 32 of the Crops Act provides for General power to impose levies as follows:
 1. The Cabinet Secretary may, with the approval of Parliament, by a notice in the Gazette, impose a levy to be levied on a scheduled crop or crop product.
 2. The Cabinet Secretary may, upon the advice of the Authority, at any time by notice, alter the rate of the levy imposed under subsection (1) and such altered rate shall come into force on such date, not being less than two months from the date of the notice, as may be specified in the notice.
 3. ...
18. The impugned Legal Notice revoked Legal Notice No. 385 of 2002, which is reproduced below:

The Sugar (Imposition of Levy) Order, 2002

1. This Order may be cited as the Sugar (Imposition of Levy) Order, 2002 and shall be deemed to have come into operation on the 1st April, 2002.
2. There is hereby imposed a levy, described in Section 18 of the Sugar Development Levy at the rate of seven per centum of the ex-factory price for locally produced sugar and of the landed entry point price for imported sugar.
3. The levy on the locally produced sugar shall be remitted to the Board by the sugar mills as its agents whereas the levy for imported sugar shall be collected directly by the Board or by its authorized agents, who shall be notified in the Gazette.



4. The amount of the levy collected by any authorized agent referred to in paragraph 3 shall be remitted to the Board not later than the tenth day of the month following the month during which the levy was collected.
5. The Kenya Sugar Authority (Imposition of Levy) (Amendment) Order, 1998 and the Kenya Sugar Authority (Imposition of Levy) (Amendment) Order, 2000 are revoked.

Made on the 16th December, 2002.

19. AS can be seen, the Order in the revoked Legal Notice imposed a levy on local and imported sugar at 7%. The Order also revoked the Kenya Sugar Authority (Imposition of Levy) (Amendment) Order, 1998 and the Kenya Sugar Authority (Imposition of Levy) (Amendment) Order, 2000. There is nothing in the revoked Order that even remotely suggests that the sugar levy was established thereunder, so its revocation would result in abolition of the sugar levy as alleged by the Petitioners. Contrary to the Petitioners' contention therefore, the impugned Legal Notice, did not, did not abolish the sugar levy. The effect of impugned Legal Notice is that whatever was contained in the revoked Order, ceased to have effect.
20. Section 32(5) of the Crops Act provides as follows in relation to the sugar levy:
 4. For the avoidance of doubt-
 - a. The levies payable in case of tea and sugar immediately before the commencement of this Act shall continue to be the payable rates until the Cabinet Secretary specifically imposes different rates;
 - b. The rate of any other levy shall be specified in the notice under subsection (1) and shall not exceed four per cent of the value of the crop on which the levy is payable.
21. It can be readily seen that the sugar levy payable before the commencement of the Act was to remain payable until the 2nd Respondent specifically imposed different rates. The question that then begs is, what sugar levy rate was payable and under which imposition of levy order was it payable? The Order that was revoked by the impugned Legal Notice is the The Sugar (Imposition of Levy) Order, 2002. Is this the Order that was in force immediately before the commencement of the Crops Act? Not at all. There were subsequent orders namely, Legal Notice No. 98 of 2009 referred to by the Petitioners, and The Sugar (Imposition of Levy) Order, 2007 which was published vide Legal Notice No. 90 of 2007. The 2009 order reduced the levy from 7% set by the 2007 Order, to 4%. It would thus follow that the levy contained in the revoked 2002 Order was clearly not what was payable immediately before the coming into effect of the Act. What can be deduced from the foregoing is that the impugned Legal Notice which revoked The Sugar (Imposition of Levy) Order, 2002, did not and could not have abolished the sugar levy as alleged. Had this been the case, there would not have been any need for the subsequent imposition of levy orders in the aforementioned legal notices. Indeed it would not have been possible for such orders to be published, had the sugar levy been abolished.
22. In view of the foregoing, I find and hold that the contention by the Petitioners that the 2nd Respondent's action of publishing the impugned abolished the sugar levy and was unconstitutional, unlawful and ultra vires, is without merit.
23. The Petitioners seek an order compelling the 2nd Respondent to release to the Sugar Development Fund at least Kshs. 1,866,000,000/= being moneys that the said Fund was deprived of, by virtue of the publication of the impugned Legal Notice. They also seek that the 2nd Respondent be directed to



furnish an account of the sum Kshs. 1,866,000,000/= and Kshs. 7,000,000,000/= and the said sums to be restituted to the Sugar Development Fund.

24. The Sugar Development Fund was established under Section 19 of the Sugar Act (now repealed) which provided:
1. There is established a Fund to be known as the Sugar Development Fund which shall be administered by the Board.
 2. The Fund shall consist of—
 - a. the Sugar Development levy;
 - b. any funds provided by bilateral or multilateral donors for the purposes of the Fund;
 - c. any moneys provided by Parliament for the purposes of the Fund;
 - d. moneys from any other source approved by the Board.
25. The long title of the Crops Act, 2013 indicates that it is an Act of Parliament to consolidate and repeal various statutes relating to crops; to provide for the growth and development of agricultural crops and for connected purposes. Among the statutes repealed is the Sugar Act. With the repeal, the institutions created under the repealed statutes ceased to exist. In light of this, it was necessary for provision to be made concerning the assets vested in the institutions established under the repealed Acts. Paragraph 2(1) and (2) of the Third Schedule of the Crops Act provides as hereunder:
3. On the appointed day, all the funds, assets and other property, both movable and immovable, which immediately before such day were vested in the former institutions shall, by virtue of this paragraph, vest in the Authority.
 4. On the appointed day, all rights, powers and liabilities, which immediately before such day were vested in, imposed on or enforceable against a former institution shall, by virtue of this paragraph, be vested in, imposed on or enforceable against the Authority.
26. The Sugar Development Fund being one of the institutions established under the Sugar Act (now repealed), ceased to exist upon the coming into force of the Crops Act. Accordingly, all the assets of the Sugar Development Fund became vested in the 3rd Respondent.
27. Section 9 of the Crops Act establishes the Commodities Fund as follows:
1. There is established a Fund to be known as the Commodities Fund.
 2. The Fund shall consist of-
 - a. monies paid as license fees, commission, export or import agency fees and fees that may accrue to or vest in the Authority in the course of exercise of its functions under the Act;
 - b. funds from any other lawful source approved by the Trustees; and
 - c. funds appropriated by Parliament for this purpose.
 3. The Fund shall be managed by a Board of Trustees to be appointed by the Authority with the approval of the National Assembly.
28. The prayers sought by the Petitioner that the 2nd Respondent make available, release and restitute to the Sugar Development Fund the sums quoted cannot issue for the very simple reason that by operation of



law, the Sugar Development Fund ceased to exist upon the coming into force of the Crops Act, which repealed the Sugar Act. Further all assets of the Sugar Development Fund became vested in the 3rd Respondent. In the end I find that the Petitioners have placed no evidence of violation of the cited or any other provisions the Crops Act.

29. Additionally and more fundamental is that the Petition does not meet the threshold of a constitutional petition. It is well settled that a constitutional petition is required to be pleaded with reasonable precision, and a party who alleges violation of rights must clearly state the nature of injury, the rights violated and the manner in which they have been violated. This principle was enunciated in the oft cited case of Anarita Karimi Njeru v Republic [1979] eKLR in which Trevelyan and Hancox, JJs stated:

We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

30. The Court of Appeal upheld this principle in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR where it observed as follows:

The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements.

31. It is quite evident from the foregoing that for this amended Petition to be sustainable as a constitutional petition, the Petitioners were required to cite the constitutional provisions that were alleged to have been violated or threatened by the Respondents and also to demonstrate the manner in which the said provisions were violated or are threatened with violation. From the facts and evidence placed before Court, the amended Petition herein fails in this regard.
32. As regards costs, it is trite that costs always follow the event. Rule 26(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, provides that the award of the costs is at the discretion of the Court. Sub Rule (2) provides that in exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms. In determining whether or not to award costs therefore, this Court must be mindful not to hinder the advancement of constitutional justice. This Petition was brought to Court by the Petitioners in the public interest. Accordingly, an award of costs will discourage other public-spirited persons from approaching the Court to determine their rights and fundamental freedoms.



33. In the end and in view of the foregoing, I find that the Petition dated 13.11.17 and amended on 24.1.18 lacks merit and the same is hereby dismissed with no order as to costs.

DATED AND DELIVERED IN NAIROBI THIS 26TH DAY OF MAY, 2023

M. THANDE

JUDGE

