



Sleeklady Cosmetics Limited v County Executive, Transport, Infrastructure and Public Works County Government of Mombasa & another (Petition 186 of 2018) [2023] KEHC 24714 (KLR) (29 September 2023) (Judgment)

Neutral citation: [2023] KEHC 24714 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION 186 OF 2018
MN MWANGI, J
SEPTEMBER 29, 2023
IN THE MATTER OF: ARTICLE 22 AND ARTICLE 258(1) & (2) OF
THE CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF: ALLEGED THREAT OF VIOLATION OF
ARTICLES 3 AND 10 OF THE
CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF: ALLEGED THREAT TO AND
CONTRAVENTION OF ARTICLES 11(2)(A),
19, 20, 21, 22, 23, 24, 27, 33, 40(5) AND 47 OF
THE CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF: PHYSICAL PLANNING ACT, CAP 286
LAWS OF KENYA

BETWEEN

SLEEKLADY COSMETICS LIMITED PETITIONER

AND

**COUNTY EXECUTIVE, TRANSPORT, INFRASTRUCTURE AND PUBLIC
WORKS COUNTY GOVERNMENT OF MOMBASA 1ST RESPONDENT**

COUNTY GOVERNMENT OF MOMBASA 2ND RESPONDENT



JUDGMENT

1. The petitioner Sleek Lady Cosmetics Limited, filed a petition dated 4th July, 2018, against the County Executive, Transport, Infrastructure and Public Works, County Government of Mombasa, and the County Government of Mombasa. The said petition was amended on 21st April, 2021, pursuant to a ruling delivered by the Court on 10th March, 2022, The petitioner seeks the following orders-
 1. An order declaring the impugned enforcement notice issued by the 1st respondent on behalf of the 2nd respondent unconstitutional for want of violations of constitutional provisions (sic);
 2. Upon grant of order 1 above, an order quashing the said enforcement notice;
 3. A permanent injunction restraining the respondents jointly and severally, either acting on their own and/or through its (sic) agents, employees, servants, Kenya Police Force and/or any other person acting and/or purporting to act under their instructions and/or orders from implementing the impugned enforcement notice subject matter herein;
 4. A permanent injunction restraining the respondents jointly and severally, either acting on their own and/or through its (sic) agents. employees, servants, National Police Service and/or any other person acting and/or purporting to act under their instructions and/or orders from implementing the impugned enforcement notice subject matter herein until the hearing and determination of this petition;
 5. In the alternative, this Honourable Court does issue such orders varying the terms of the impugned notice as it deems fit and just;
 6. A declaration that the 1st and 2nd respondents willfully, deliberately, and contemptuously disobeyed a clear, unequivocal order of this Honourable Court issued on 12th day of July, 2018;
 7. A declaration that the 1st and 2nd respondents are indebted to the petitioner for the sum Kenya Shillings Two Hundred and Twenty-Four Thousand Three Hundred and Thirty (Kshs. 224,330/=) being the cost of repainting and rebranding the shops along Digo road in Mombasa County;
 8. General damages;
 9. Costs of this petition; and
 10. Any other orders, writs and/or directions this Honourable Court deems fit and just to grant.
2. The petitioner's case is that the 1st respondent allegedly issued an enforcement notice pursuant to Section 38 of the Physical Planning Act, Cap 286 Laws of Kenya requiring all building owners within the 2nd respondent's jurisdiction to paint their buildings in white paint with olympic/oceanic blue border on the edge and windows above, without any sign written on the wall or canopy and thereafter, obtain clearance certificates from the respondents indicating their compliance with the impugned notice. The petitioner deposed that the respondents have threatened and have started prosecuting owners of buildings who have not complied with the impugned notice. The petitioner averred that the impugned notice is overly ambiguous and subject to abuse by enforcement officers of the 2nd respondent as evident from the endless prosecution of non-compliant building owners already in place. The petitioner further averred that the implementation of the impugned notice would deny the



petitioner and other building owners the right to use its long time Trademark and/or branding which would inevitably lead to loss of customers and business earnings.

3. It was stated by the petitioner that it has been in business under the Trademark Bestlady for over 15 years using the pink colour which has since become synonymous with its business as a means of ease of identification by its customers. That the business has branches in Mombasa, Nakuru, Nairobi, Bungoma, Eldoret, Kitale, Maua, Nyeri, Karatina, Kitui, Machakos, and Kericho, among others, and that they are all using the same pink colour. The petitioner contended that the use of different colours other than the pink colour will lead to loss of substantial clientele and diminished business earnings. The petitioner argued that most businesses will lose their commercial identities if the implementation of the impugned notice is not arrested since most business enterprises within the County of Mombasa use established Trademarks needing unique colors and by arbitrarily subjecting them to comply with the impugned notice means wanton loss of identity.
4. The petitioner further stated that it is customary for all businesses to have advertisement boards and signs for ease of identification thus denying business owners an opportunity to use their trading colours and advertisement signs is fatal to their businesses. The petitioner contended that failure to give compliance certificates to buildings that might not have complied with the impugned notice automatically renders several buildings unusable, which leads to deprivation of the right to accessible and adequate housing. The petitioner deposed that the County Chief Officer does not have authority to make such an order as there is no law upon which the respondents base their arbitrary notice, as neither the Physical Planning Act, Cap 286 Laws of Kenya and the County Government Act, 2012, contemplates having such notices as the impugned notice herein. The petitioner further deposed that the said order by the respondents flies in the face of Articles 11, 19(2) and 33 of *the Constitution* of Kenya.
5. It was stated by the petitioner that the impugned notice grossly violates social economic and cultural rights which is against the edicts of Article 43 of *the Constitution* of Kenya and the County Government Act, 2012, as it deprives the petitioner and other property owners within the 2nd respondent's jurisdiction their right to fair administrative action as provided for under Article 47 of *the Constitution*, and it limits the petitioner's proprietary rights as guaranteed under Article 40(5) of *the Constitution*. The petitioner contended that the impugned notice also violates the petitioner's right to privacy as guaranteed under Article 31 of *the Constitution* since allowing the respondents to implement the impugned notice will lead to endless arbitrary searches of private property and homes.
6. The petitioner deposed that on 12th July, 2018, this Court issued an order of temporary injunction against the respondents restraining them from implementing the impugned enforcement notice subject matter of the petition herein, which order was served on the respondents who acknowledged receipt but on 2nd September, 2019, when the injunctive order was still in force, the 1st respondent in blatant disregard of the said order instructed its agents to storm the petitioner's premises along Digo Road, Mombasa County and without notice painted and/or defaced the shops with an intent to implement the impugned Gazette Notice. It was stated by the petitioner that on several occasions, the respondents have visited its premises and defaced them, thereby occasioning the petitioner financial loss for the cost of repainting and rebranding the business premises amounting to Kshs.224,330.00.
7. The respondents opposed the petition herein vide a further affidavit sworn on 25th March, 2022, by Mangaro Onesmus Safari, learned Counsel for the respondents. The respondents averred that the prayers sought by the petitioner in the amended petition herein cannot be granted since despite the fact that the order issued on 12th July, 2018, is still in force, the petitioner deliberately failed to execute it and/or file contempt proceedings therefore the petitioner cannot come to this Court seeking declaratory orders on an existing order which is still in force.



8. They further averred that special damages must be pleaded and proved but in this case, the petitioner's claim for special damages is not supported by any documentary evidence and in the absence of such evidence, the petitioner's claim cannot be evaluated.
9. The respondents argued that the petition herein involves a company therefore there is no suit in law properly before this Court since the petition was filed without authority from the petitioner's company and there is no resolution valid or otherwise from the petitioner's company approving the institution of the petition herein. It was contended that the said petition is invalid for want of authority from the petitioner company.
10. It was stated by the respondents that they issued the enforcement notice in issue and the 2nd respondent would prosecute the owners of the buildings who shall not comply with the said notice. They further stated that the petitioner herein is not the owner of the building and the charge preferred against Joseph Kabera Mungai in Criminal Case No. 4320 of 2018, has nothing to do with the enforcement of the said notice. It was stated that the relationship between Joseph Kabera Mungai and Peter Njoroge Karanja had not been disclosed by the petitioner.
11. The respondents contended that the notice in issue is not ambiguous and the petitioner had no existing Trademark over any colour that it purports to have. The respondents averred that the Trademark certificate exhibited by the petitioner in support of its case is for Bestlady cosmetic shop and has nothing to do with the petitioner. The respondents also contended that the said Trademark existed up to 22nd March, 2017, but it has never been renewed. It is the respondents' case that the 2nd respondent has the requisite power and authority to issue such enforcement notices.
12. The petition herein was canvassed by way of written submissions. The petitioner's submissions were filed on 25th April, 2022, by the law firm of Kariuki, Kiplangat & Lesaigor Associates Advocates, whereas the respondents' submissions were filed by the Office of the County Attorney, County Government of Mombasa.
13. Mr. Aluku, learned Counsel for the petitioner relied on the provisions of Article 10 of *the Constitution* of Kenya, 2010, and the case of IEBC v Maina Kiai & 5 others [2017] eKLR, where the Court held that there are directive and obligatory principles that are immediately and presently binding on all State Organs, State Officers, Public Officers and all persons whenever any of them apply, or interpret *the Constitution*; enact, apply or interpret any law; or make or implement public policy decisions. He submitted that the said principles are broad and all-inclusive in their reach, sweeping in their sway and peremptory in their command.
14. Counsel cited the case of Kenya Bankers Association & others v Minister of Finance [2002] 1 KLR 61, where the Court held that in relation to this type of public interest litigation, what gives locus standi is a minimal personal interest and such an interest gives a person standing, even though it is quite clear that he would not be more affected than any other member of the population. He further relied on the case of John Mining Temoi & another v Governor of County of Bungoma & 17 others [2014] eKLR, where the Court held that in a constitutional petition, Article 22(1) of *the Constitution* is clear that a Court should not be unreasonably restricted by procedural technicalities. He submitted that the deponent in the petitioner's supporting affidavit has demonstrated the nexus between himself and the petitioner at paragraph 2 of his supporting affidavit where he deposed that he is the Director of the petitioner therefore the burden of proving the contrary shifts to the respondents.
15. On whether the respondents had the authority to issue the impugned notice, it was submitted by Counsel that in as much as the respondents have the power and authority to issue notices, the exercise of such power and authority must be done within the ambit of *the Constitution*. Mr. Aluku contended



- that the impugned notice was purportedly issued pursuant to Section 38 of the Physical Planning Act but at paragraph 5 of the respondents' replying affidavit, they deposed that the notice was issued having regard to the provisions of regulations/rules 55 and 65 of the City Building by laws, 1968. Counsel submitted that the respondents misapprehended the laws since the conditions outlined in the said regulations are too remote a consequence of the impugned notice.
16. Mr. Aluku submitted that Article 183 of *the Constitution* as well as Section 36 of the County Government Act outline the functions of the 1st respondent as an agent of the 2nd respondent, and that the respondents are mandated to promote and not unnecessarily defeat the objects and principles of devolution outlined under Articles 174 and 175 as well as the national values and principles of governance under Article 10 of *the Constitution*. He stated that the respondents had no authority to issue the impugned notice and if they had, the same was issued ultra vires *the Constitution*, obtaining statutes and/or regulations.
 17. In submitting that the impugned notice is ambiguous, learned Counsel for the petitioner relied on the case of Kenya Bankers Association v Attorney General & another [2018] eKLR, where the Court held that lack of certainty in any law makes the said law null and void. He also relied on the case of Grayned v City of Rockford [1972] 408 US 104, where the US Supreme Court held that vagueness offends several important rules, because a vague law impermissibly delegates basic police matters to policemen, judges and juries for resolution on an adhoc and subjective basis with the attendant dangers of arbitrary and discriminatory application.
 18. Counsel cited the provisions of Article 46(1)(b) of *the Constitution* of Kenya which entitles consumers to the right to information, which information is imparted to the consumers by way of inter alia advertisement. He cited the case of Okeyo Omwansa George & another v Attorney General & another [2012] eKLR, where the Court held that advertising enables the consumers to have information regarding where, when, from whom and how to get legal service of an Advocate, and submitted that from the impugned notice, it is not clear whether the prohibition of any sign written on the wall or canopy amounts to a ban on advertising.
 19. It was submitted by Counsel that the nature of the petitioner's economic engagements is such as it must communicate through art and literature in order to realize and or maximize its business potential hence the petitioner must find a unique way of attracting its customers. He explained that the use of drawing is an artistic and literary expression, and as such, enacting the notice of compliance hence denying the petitioner its right, is a violation of Article 11 of *the Constitution* of Kenya. Mr. Aluku submitted that the petitioner has used the pink colour in its shop for over 15 years, and that the choice of pink colour is unique to the petitioner's business and implementation of the impugned notice would deny the petitioner a corporate brand marketing technique. Counsel contended that colour helps in establishing brand recognition and conveys trails about a company's personality or brand image.
 20. Counsel relied on the provisions of Article 259(1) of *the Constitution* and the case of Seventh Day Adventist Church (East Africa) Limited v Minister of Education & 3 others [2014] eKLR, where the Court held that in constitutional interpretation, the Court should always take a purposive approach as guided by *the Constitution* itself. In addition, Constitutional and human rights provisions must be interpreted broadly as well as liberally so as to give effect to its spirit. Mr. Aluku asserted that the impugned notice not only undermines Article 11 but also Article 27 of *the Constitution* in so far as the petitioner is not enjoying equal benefit and protection of the law.
 21. Mr. Aluku submitted that the impugned notice will lead to grave violations of Article 31 of *the Constitution* and submitted that the right to privacy has been found to extend to recognition of dignity and freedom of a person. In submitting that the impugned notice gives the respondents unfettered



- powers to arbitrarily enter into people's premises to ensure compliance, Mr. Aluku cited the case of Robert K. Ayisi v Kenya Revenue Authority & another [2018] eKLR.
22. Counsel also submitted that the impugned notice also violates the petitioner's intellectual property as provided for under Article 40(5) of *the Constitution*. He relied on the provisions of Section 5 of the *Trade Marks Act* and submitted that it protects marks where goodwill has been earned whilst Section 15 protects well known marks. Counsel relied on the book on Intellectual Property and Innovation Law in Kenya [2006] Nairobi, where Prof. Sihanya at p. 32 identifies functions of Trademarks, in that they serve to limit and/or avoid confusion among consumers, meeting consumer expectations, and that they are used for advertising.
 23. Mr. Aluku submitted that the impugned notice violates the petitioner's rights guaranteed under Article 43 of *the Constitution*. He stated that the obligation to fulfill socio-economic and cultural rights is imposed on the State and quasi-state agencies as was observed by Lenaola J in *Satrose Ayuma & 11 others v The Registered Trustees of the Kenya Railways Retirement Benefits Scheme & 3 others* [2013] eKLR. Counsel asserted that the effect of the impugned notice is that buildings which will not have complied with the said notice shall not be occupied for want of compliance, consequently interfering with livelihoods, capabilities and means of subsistence of its citizens.
 24. On whether the petitioner has made a claim for special damages, Counsel submitted that the petitioner has presented to this Court photographic images of the respondents and/or its agents defacing the petitioner's outlet and a newspaper extract of the Daily Nation carrying a story of customers walking out of the petitioner's outlet as a result of disturbances caused by the respondents. In addition, the petitioner provided documentary evidence of the losses it incurred in trying to mitigate the damage occasioned by the respondents in their contemptuous actions. Counsel stated that the petitioner prays for an award of special damages as pleaded at Kshs. 224,330.00.
 25. On the issue of general damages, Mr. Aluku submitted that having established that the respondents infringed on the petitioner's rights, and as a consequence of such infringement, they suffered injury to which the respondents are solely to blame, and that they incurred extraneous expenses including loss of business. The petitioner urged this Court to make an award of Kshs.4,000,000/= which will be appropriate in the circumstances.
 26. Mr. Mangaro, learned Counsel for the respondents submitted that the enforcement notice in issue was directed to specific building owners and/or owners of structures within the respondents' jurisdiction and not the petitioner herein. He argued that the proceedings herein were initiated by a company and it is established in law that any party deposing to, appearing and/or signing documents must prove and show beyond any reasonable doubt the nexus between the shareholder and/or Directors and the company itself, and that this can be done through a company resolution and/or minutes. Counsel contended that in the absence of a valid resolution of the company, there is no suit in law properly before this Court. To this end, Counsel relied on the case of *Leo Investment Limited v Trident Insurance Co. Limited* HCCC No. 893 of 2020.
 27. In submitting that the petitioner failed to comply with the procedure in instituting these proceedings, Mr. Mangaro relied on the case of *Mengich & Co. Advocates & another v Credit Co-operative Society Limited & others* ELC No. 65 of 2015. He also relied on the case of *Kenya Commercial Bank Ltd v Stage Coach Management Ltd* HCCS No. 45 of 2012 and the provisions of Order 4 Rule 1(4) of the Civil Procedure Rules, 2010 and submitted that the petitioner herein failed to comply with the provisions therein, and therefore it has no locus standi in bringing the current petition. He cited the case of *Ibacho Trading Co/ Ltd v Samuel Aencha Ondora* HCCC No. 25 of 2016 and submitted that



the petitioner having been confronted with the intention of raising an objection to these proceedings failed to ratify its case by producing the said authority in line with the law.

28. Mr. Mangaro argued that the petitioner does not own any property within the jurisdiction of the respondents, and that it is a mere tenant which has a contract with the landlord. Counsel contended that it was the duty of the landlord to move this Court if it was offended by the notice issued to him by the respondents. He submitted that the petitioner does not have locus standi to file the petition herein on behalf of the building owners and/or residents within the jurisdiction of the respondent, since the property owners had fully complied with the said notice and a certificate of compliance had been issued by the respondents, as per the compliance certificate dated 16th July, 2018, annexed to Tawfiq Balala's affidavit sworn on 19th July, 2018, directed to Bank of Baroda Building, where the petitioner operates its business.
29. Counsel pointed out that no suit had been filed by property owners within the respondents' jurisdiction, there are no affidavits of residents, property owners and/or traders within the jurisdiction of the respondents, that the petitioner purports to be affected by the notice herein, who have been joined in this petition.
30. Mr. Mangaro submitted that in respect to the Trademark annexed to the petition herein, the same had elapsed by the time the petition was being filed thus it was not legally in existent, and in any event, the said Trademark does not belong to the petitioner and it also does not specify the colours alleged to have been used by the petitioner herein.
31. Counsel submitted that the petitioner is seeking reliefs that could adequately be obtained by way of a plaint as the issues before this Court are not for public outcry but rather issues related to an individual entity, and as such, the petitioner is not entitled to any general damages.
32. In regard to the issue of special damages, Counsel submitted that special damages must be pleaded and proved in accordance with the law. He stated that special damages cannot be proved by an invoice, quotation or demand but can only be proved by way of receipts to satisfy the Court that such payments were effected. It was stated by Counsel that the petitioner had produced photographs showing that its customers were walking out of its business premises. He stated that any customer can get in and out of a business premises, and that the petitioner was required to show the exact loss it had suffered as a result of enforcement of the notice herein.

Analysis And Determination

33. I have carefully considered the pleadings, submissions and authorities cited by the parties herein. The issues that arise for determination are-
 - i. Whether the petitioner has the requisite locus standi to file the petition herein;
 - ii. Whether this petition raises constitutional issues; and
 - iii. Whether or not the petitioners have proved their case to the required standard.Whether the petitioner has the requisite locus standi to file the petition herein.
34. The petition herein was filed together with an application under Certificate of Urgency dated 4th July, 2018. In opposition to the said application, the respondents filed grounds of opposition dated 19th July, 2018 and a replying affidavit sworn on 19th July, 2018, by Tawfiq Balala who deposed that the petitioner's deponent had no capacity to institute the petition for want of authority of the Board of directors authorizing the filing of the petition herein. Subsequently, the Court in its ruling delivered



on 23rd July, 2020, held that it was satisfied that the petitioner had the requisite locus standi to file the petition herein. Having held so, the issue of whether the petitioner has the requisite locus standi or not does not arise.

Whether This Petition Raises Constitutional Issues.

35. The crux of the petitioner's case is that the 1st respondent issued an enforcement notice pursuant to Section 38 of the Physical Planning Act, Cap 286 Laws of Kenya requiring all building owners within the 2nd respondent's jurisdiction to paint their buildings in white paint with olympic/oceanic blue border on the edges and windows above, without any sign written on the wall or canopy and thereafter obtain clearance certificates from the respondents confirming their compliance with the impugned notice. The petitioner's contention is that implementation of the said notice threatens to infringe and/or violates its rights and that of the residents and building owners within the 2nd respondent's jurisdiction under Articles 11, 19(2), 31, 33, 40(5), 43 and 47 of the Constitution of Kenya.
36. The petitioner submitted that the notice issued was in gross violation of Article 11 of the Constitution in so far as it imposes a complete ban on advertisement, whereas the nature of the petitioner's economic engagements is such that it must communicate through art and literature in order to realize and maximize its business potential. On perusal of the said notice, it is evident that it has not commented or given any directions in regard to advertising within the 2nd respondent's jurisdiction. In addition, my understanding of Article 11 of the Constitution of Kenya is that it provides for protection, promotion and recognition of cultural practices and/or expressions, and intellectual property rights of the people of Kenya and not the right to advertise on walls of buildings or anywhere else for that matter.
37. The petitioner also deposed that the notice herein flies in the face of Articles 19(2) and 33 of the Constitution of Kenya, 2010, however, as held hereinabove, the notice in issue has not commented and/or given any directions in respect to advertising and marketing therefore it cannot be said to be in violation of Articles 19(2) and 33 of the Constitution of Kenya, 2010. This Court therefore finds that the notice in issue cannot be said to be a violation of the petitioner's right to advertise.
38. The petitioner submitted that implementation of the enforcement notice herein will lead to grave violations of Article 31 of the Constitution of Kenya, 2010 since it gives the respondents unfettered powers to arbitrarily enter into people's premises to ensure compliance. On perusal of the said notice, it is evident that it directs residential and commercial building owners to paint the exterior of their premises white with olympic/oceanic blue border on the edge and windows above without any sign written on the wall. In this Court's view, in order to confirm compliance, officers of the respondents do not need to enter into business premises arbitrarily or otherwise, therefore, it cannot be said that implementation of the said notice would lead to a violation of the petitioner's rights under Article 31 of the Constitution of Kenya. Even in the event that the respondent's officers arbitrarily enter into the petitioner's premises the same shall give rise to a tort of trespass, which is not a constitutional issue.
39. The petitioner argued that the notice issued by the respondents violates the petitioner's right to intellectual property guaranteed under Article 40(5) of the Constitution. In support of the said argument, the petitioner annexed a certificate of renewal of a Trademark for a period of 10 years from 22nd March, 2007. It is however evident from the said certificate that the said Trademark is in respect to the name Best Lady Cosmetic Shop Limited only. It is however worth noting that the petitioner in this petition is Sleek Lady Cosmetics Limited. Secondly, this petition was instituted in the year 2018, therefore, as correctly submitted by Counsel for the respondents, the Trademark relied on by the petitioner had expired by the time this suit was filed. Lastly, the colour pink which the petitioner contends is synonymous with its business and helps its customers identify it easily was not registered as a Trademark by either the petitioner or Best Lady Cosmetic Shop Limited. Consequently, I find that



the allegation that the respondents have infringed the petitioner's Trademark is not a constitutional issue.

40. The petitioner stated that the impugned notice grossly violates its social economic rights which is against the edicts of Article 43 of *the Constitution*, this is because the effect of the impugned notice is that buildings which will not have complied with the said notice shall not be occupied for want of compliance, consequently interfering with livelihoods, capabilities and means of subsistence of its citizens. I am of the considered view that this does not constitute a constitutional issue since interference with livelihoods, capabilities and means of subsistence will not be as a result of implementation of the notice given by the respondents, but will be as a result of failure to comply with the said notice. This Court finds that there is no real infringement, denial of rights or threat to violation of Article 43 of *the Constitution* of Kenya that calls for interpretation and enforcement of rights under the said Article. To this end, I hold the same view as the Court in *Japheth Ododa Origa v Vice Chancellor University of Nairobi & 2 others* [2018] eKLR where it was held that-

“I must also point out that it is not every disapproval of actions or decisions of public bodies that should lead to filing constitutional petitions alleging violation of fundamental rights and freedoms. There must be a real infringement, denial of rights or threat to violation that calls for interpretation of *the constitution* vis vis the rights infringed or threatened. It is not every disagreement that must find its way to the constitutional court.

In this regard, I agree with the observation by Lord Diplock in the case of *Harrikissoon V Attorney General of Trinidad and Tobago* [1980]AC 265 where he decried the tendency of people rushing to institute constitutional petitions alleging violation of fundamental freedoms where there was none, stating;

“The notion that wherever there is a failure by an organ of government or a public officer to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed for individuals by...*the constitution* is fallacious. The right to apply to the High Court... for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action... the mere allegation that a human right of the applicant has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the Court...if it is apparent that the allegation is frivolous, vexatious or abuse of the process of Court as being made solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.” (emphasis)

41. The issue of whether the respondent had the authority to issue the impugned notice, and whether the said notice is ambiguous, are not constitutional issues since they are issues that can aptly be determined by a Civil Court. To this end, I am guided by the holding in *Kiambu County Tenants Welfare Association v Attorney General & another* [2017] eKLR, where the Court held that a constitutional question is an issue whose resolution requires the interpretation of *the Constitution*. Additionally, it has been held that where there exists an alternative remedy, Courts ought to encourage parties to pursue



that remedy first before invoking the constitutional process. This was the position taken by the Court in *Benard Murage v Fine Serve Africa Limited & 3 others* [2015] eKLR where the Court stated thus -

“Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first;”

42. In light of the above analysis, this Court finds that the petition herein does not raise constitutional issues at all.

Whether Or Not The Petitioners Have Proved Their Case To The Required Standard.

43. In constitutional petitions, precision is vital because it enables the Court to decipher the issues brought before it for adjudication. It shows the link between the aggrieved party, the constitutional provisions at play and the possible infringement. This was the position taken by the Supreme Court in the case of *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR, where the Court stated as follows -

“Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Annarita Karimi Njeru v. Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement...”

44. The petitioner herein is alleging violation of its rights and the rights of other commercial and residential building owners guaranteed under Articles 11, 19(2), 31, 33, 40(5), 43 and 47 of *the Constitution* of Kenya. However, as held hereinabove, these issues do not amount to constitutional issues. Be that as it may, the petitioner contended that implementation of the enforcement notice herein violates their right to advertisement, right to privacy, right to intellectual property, and the right to social economic rights. It is however this Court’s finding that the petitioner failed to demonstrate, establish and/or lead any evidence in support of the said allegations.
45. On perusal of the pleadings herein, it is evident that other than the supporting affidavit by one Peter Njoroge Karanja, there is no affidavit by any other residential and/or commercial business owner including the petitioner’s landlord deposing to the effects of the enforcement notice issued. In addition, the respondents annexed to the affidavit sworn by Tawfiq Balala on 19th July, 2018, a Certificate of compliance dated 16th July, 2018, that had been issued to the Bank of Baroda building, which the respondent contends is the building where the petitioner operates its business, a fact which was not disputed by the petitioner.
46. It is noteworthy that the suit herein was filed after the expiry of the Trademark that the petitioner relies on in support of its intellectual property. On perusal of the said Trademark annexed to the petitioner’s supporting affidavit, it can easily be deduced that the Trademark was only in respect to the name



Bestlady Cosmetic Shop Limited and not the colour pink. Section 5 of the TradeMarks Act, Cap 506 Laws of Kenya provides that-

“No person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade mark, but nothing in this Act shall be deemed to affect rights of action against any person for passing off or the remedies in respect thereof.”

47. In view of the foregoing this Court finds that the petitioner herein had no right to institute the proceedings herein since at the time of filing the instant suit, it did not have a registered Trademark in respect to the colour pink and the fact that the petitioner has used the colour pink in all its branches across the country, which colour is synonymous with its business is not sufficient for it to seek protection from this Court.
48. This Court also finds that the petitioner has not demonstrated the effect the implementation of the notice in issue shall have to its business, as this could be done by way of affidavits sworn by its customers indicating that the only way they can identify the petitioner's shop is through the colour pink, thus if the petitioner's business premises is painted in any other colour, they would not be able to identify it and there is a risk that they will walk into any other shop selling similar items as the petitioner herein thus having a negative impact on the petitioner's business.
49. Accordingly, it is my finding that the alleged contraventions by the petitioner are unfounded and no contravention of constitutional rights and/or imminent threat to violation of the petitioner's, and/or the residential/commercial building owners within the 2nd respondent's jurisdiction rights has been proved. Therefore, I find that the petitioner has failed to discharge its burden of prove to the required standard hence it is not entitled to any general damages.
50. The petitioner deposed that on 12th July, 2018, this Court issued an order of temporary injunction against the respondents restraining them from implementing the impugned enforcement notice in issue, which order was served on the respondents who acknowledged receipt. That on 2nd September, 2019, when the injunctive order was still in force the 1st respondent in blatant disregard of the said order instructed its agents to storm the petitioner's premises along Digo Road, Mombasa County and without notice painted and/or defaced the shops with an intent to implement the impugned notice occasioning the petitioner financial loss for the cost of repainting and rebranding the business premises amounting to Kshs.224,330.00.
51. In support of the said allegation, the petitioner annexed photographs showing a vehicle belonging to Mombasa County Department of Transport, Infrastructure and Public Works, another photo of people painting pink metallic shutters and a photograph of white metallic shutters. The petitioner is seeking this Court to make a declaration that the 1st and 2nd respondents willfully, deliberately, and contemptuously disobeyed a clear, unequivocal order of the Court issued on 12th day of July, 2018.
52. As correctly submitted by the respondents' Counsel, there are laid down procedures that can and should be followed by the respondent in execution of the order issued by the Court on 12th July, 2018, which the petitioner has not followed, and in doing so, the Court dealing with the execution proceedings, shall be in a position to determine if indeed the respondent disobeyed its orders and thereafter, issue appropriate orders and/or reliefs. It is this Court's finding that the petitioner is attempting to prosecute contempt proceedings in a constitutional petition.
53. The petitioner herein is also seeking this Court to make a declaration that the 1st and 2nd respondents are indebted to the petitioner for the sum Kshs.224,330.00 being the cost of repainting and rebranding its shops along Digo Road in Mombasa County. In my view this is a prayer for special damages. It is



trite that special damages must not only be specifically pleaded but must also be strictly proved. In an attempt to prove these damages, the petitioner has annexed quotations for the cost of repainting the doors of the shops, instead of receipts. It is trite that a quotation is not sufficient to prove special damages as it does not show the actual amount of money spent in repainting the doors. He who alleges must prove. That is the purport of Section 107(1) of the Evidence Act, Chapter 80 of the Law of Kenya, which provides as follows-

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist...”

54. The burden of proof in a suit or proceedings lies with the person who would fail if no evidence at all was given on either side. In addition, the burden of proof as to any particular fact lies on the person who wishes the Court to believe its existence, unless it is provided by any law that the proof of that fact shall lie on a particular person. Lord Brandon in *Rhesa Shipping Co SA v Edmunds*[1955] 1 WLR 948 at 955 stated the following on the burden of proof-

“No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take.”

55. It is therefore my finding that the petition herein does not raise any constitutional issues and the petitioner has failed to prove its case to the required standard

56. The upshot is that the petition herein has no merits. It is dismissed. There shall be no orders as to costs.

**DELIVERED, DATED AND SIGNED AT NAIROBI ON THIS 29TH DAY OF SEPTEMBER, 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Kariuki for the petitioner

No appearance for the respondents

