Nyangugu v County Executive of Laikipia & another (Constitutional Petition E001 of 2022) [2023] KEHC 25910 (KLR) (29 November 2023) (Judgment)

Neutral citation: [2023] KEHC 25910 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CONSTITUTIONAL PETITION E001 OF 2022

AK NDUNG'U, J

NOVEMBER 29, 2023

BETWEEN

ANYONGE MICHAEL NYANGUGU ..... PETITIONER

AND

COUNTY EXECUTIVE OF LAIKIPIA ..... 1ST RESPONDENT

COUNTY ASSEMBLY OF LAIKIPIA ..... 2ND RESPONDENT

A public body in receipt of a petition must make the necessary steps to act on the petition

The petitioner's grouse was that the respondents failed to act on the County Environment Management and Coordination Bill which he presented to them for consideration and enactment. The court held that a purposive interpretation of article 37 of the Constitution would require that any public body in receipt of a petition must make the necessary step of acting on the petition, which acting included, but not limited to, responding formally to a petitioner on the action taken.

Reported by Kakai Toili

Constitutional Law *– fundamental rights and freedoms – right to present petitions to public authorities - whether it was mandatory for a public body in receipt of a petition to formally inform the petitioner on the action(s) taken concerning the petition – Constitution of Kenya, 2010, article 37.*

Jurisdiction *– jurisdiction of the High Court - jurisdiction to determine whether there was a gap of a county legislation on environmental issues - whether the High Court had the jurisdiction to determine whether there was a gap of a county legislation on environmental issues.*

Evidence Law *– burden of proof – burden of proof in constitutional petitions - what were the requirements for discharging the burden of proving violation or threat of violation of a constitutional right.*

Brief facts

The petitioner's case was that he presented to the 1st respondent (County Executive of Laikipia) the proposed County Environment Management and Coordination Bill (the Bill) and a brief on the policy issue for consideration and adoption by the county administration. He wrote to the 2nd respondent (County Assembly of Laikipia) seeking clarification on the progress of the Bill who responded that they were strangers to the

contents therein. He later on made a follow up but there was no response. Thereafter, the petitioner petitioned the 2nd respondent for the proposed Bill to be tabled before County Assembly for consideration. That was followed by submissions of a memorandum of object and reasons for the proposed legislation but there had been no official communication from the 2nd respondent.

The petitioner claimed that the continued absence of the proposed legislation in Laikipia County had generated a structural conflict between the two levels of Government. The petitioner thus sought for among other orders; a declaration that the respondents violated the applicants right to have Laikipia County environment protected for the benefit of present and future generations through legislative measures; and that the 2nd respondent violated his rights to present a petition under article 37 of the Constitution and section 15 of the County Government Act 2012.

Issues

i. Whether it was mandatory for a public body in receipt of a petition to formally inform the petitioner on the action(s) taken concerning the petition.

ii. Whether the High Court had the jurisdiction to determine whether there was a gap of a county legislation on environmental issues.

iii. What were the requirements for discharging the burden of proving violation or threat of violation of a constitutional right.

Held

1. Article 258(1) of the Constitution granted the petitioner the right to institute proceedings in relation to violation of his rights. Article 23(1) of the Constitution conferred the court with jurisdiction to determine whether a right conferred in the Constitution had been violated. The jurisdiction of the court flowed from article 165(3)(d) of the Constitution. To that extent, the issues raised by the petitioner fell under the purview of the jurisdiction of the court.
2. The burden of proving violation or threat of violation of a constitutional right was upon the petitioner. A petitioner must satisfy the evidential burden that a specific right existed and which right had been violated or restricted, besides pleading the same with reasonable particularity and precision. In addition, the petitioners must patently express the manner in which the respondents had violated their rights. The petitioner's grouse was that the respondents failed to act on the County Environment Management and Coordination Bill which he presented to them for consideration and enactment.
3. Article 37 of the Constitution conferred the right to demonstrate, picket and present petitions to public authorities. A purposive interpretation of article 37 would require that any public body in receipt of a petition as envisaged by the article must make the necessary step of acting on the petition, which acting included, but not limited to, responding formally to a petitioner on the action taken or reasons why the petition would not be acceded to. Otherwise, if the contrary was true, the right conferred under article 37 would not be realised.
4. The record did not show any communication from the 2nd respondent indicating whether the Bill was rejected, and if so, the reasons proffered thereto. Evidence available was of the very casual, contemptuous and dismissive letter by the Clerk to the County assembly dated November 26, 2019, whose content was that the Assembly was a stranger to the issues raised in the petitioner's letter dated November 22, 2019. The Constitution frowned upon such exercise of authority which was heavily laced with the big man syndrome which syndrome was cast to oblivion by the recognition in the Constitution that all sovereign power belonged to the people.
5. From the record, the foundation of the violations was the alleged failure by the respondents to enact the law. Other than mere recitals of the alleged violations, no evidence at all was laid before court in proof of the same.
6. It was not within the province of the court to decide if or not there existed a *lacuna*of a county legislation on environmental issues. That was power to be exercised by the people of Laikipia County

through their elected representatives in the County Assembly. Through the petition, the petitioner had attempted to tout the strength of his proposed bill. The court only intervened in legislation, be it national or local, only when there were procedural flaws or the enacted law was unconstitutional. Legislation making was a preserve of Parliament at the national level and county assemblies at the county level. Good laws were a pillar of society in all spheres of peoples' social and economic activities.

7. The Constitution obligated the State and all State organs to ensure adequate public consultation on all public policies, legislation or any decision that was likely to impact on the people of Kenya. Failure to factor in the mandatory requirement of public participation exposed the legislative instrument or policy framework to constitutional challenges of legitimacy, hence making it actionable for unconstitutionality in a court of law. The requirement for public participation should not obfuscate the doctrine of separation of powers which was the bedrock of a democratic society.
8. The mandate to legislate was exclusive and neither the Executive nor the Judiciary should interfere. The court, however, had the mandate to oversee the legality of the law-making process and the constitutionality of the enactment. The petitioner had mixed up issues of the respondents' failure to act on the Bill with issues pertaining to the need and merits of the proposed law. The court could only come to his aid in regard to any flouting of procedure by the respondents or where a law inconsistent with the constitution was passed but must eschew any attempt to suggest to, leave alone order, the respondents on what legislation to pass or not to pass.
9. The respondents failed to respond with reasons to the petitioner why his Bill was rejected. Although the petitioner had pleaded violations of the Constitution, he had not demonstrated to the required standard how his individual rights and fundamental freedoms were violated, infringed or threatened by the respondents. He had not adduced any evidence to demonstrate the alleged violations. He was however entitled to a fair administrative action which included to have written reasons why the Bill was rejected.

Petition partly allowed.

Orders

i. *The respondents were obligated to receive the Bill and subject it to usual consideration and make a decision on it which decision should be communicated to the petitioner. The petitioner shall, to achieve that, be at liberty to re-submit the Bill for that purpose.*
ii. *Each party to bear its own costs.*

Citations

Cases

Kenya

1. *Anarita Karimi Njeru v Republic* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR) — (Applied)
2. *Matiba v Attorney General General* [1990] KLR 666 — (Followed)
3. *Matemu, Mumo v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) — (Followed)
4. *Otieno, Leonard v Airtel Kenya Limited* Petition 218 of 2017 ; [2018] eKLR) — (Applied)
5. *Republic v National Employment Authority & 3 others ex parte Middle East Consultancy Services Limited* (Judicial Review Application 171 of 2018 ; [2018] eKLR) — (Followed)
6. *Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae)* Advisory Opinion Reference 2 of 2013; [2013] KESC 7 (KLR)- (Followed)
7. *Trusted Society of Human Rights v Attorney-General and others* Petition 229 of 2012; [2012] KEHC 2480 (KLR) ; [2012] 2 KLR 518) — (Followed)
8. *Wamwere & 5 others v Attorney General* Petition (Application) 26 of 2019 & Petition 34 & 35 of 2019 (Consolidated); [2023] KESC 26 (KLR) — (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 10(2)(d); 23(1); 37 ; 42 ; 93(2); 94(1); 165(3)(d);174; 175 ; 183(1)(2) ; 185(2); 185(2)(4) ; 186(1); 187(2);189(1)(b)(2);258(1) — (Interpreted)
2. County Governments Act (cap 265) sections 8(2) ; 15 — Interpreted
3. Environmental Management and Coordination Act (cap 387) section 3 — (Interpreted)
4. Petition to County Assemblies (Procedure) Act (cap 274) section 5(2) — (Interpreted)

Texts

Klare, KE., (Prof) (1998), *Legal Culture and Transformative Constitutionalism* Routledge Taylor & Francis Group; South African Journal on Human Rights Vol 14

Advocates

None mentioned

JUDGMENT

1. The petitioner's case is set out in the Amended Petition dated and filed on August 17, 2022. He avers that he presented to the 1st respondent the proposed *County Environment Management and Coordination Bill* (hereby referred as the Bill) and a brief on the policy issue for consideration and adoption by the county administration on November 1, 2019. On November 25, 2019, he wrote to the 2nd respondent seeking clarification on the progress of the Bill who responded vide a letter dated November 26, 2019 that they were strangers to the contents therein. He made a follow up vide a letter dated September 17, 2020 but there was no response.

2. Thereafter, on October 27, 2020the petitioner petitioned the 2nd respondent for the proposed *Bill* to be tabled before County Assembly for consideration. This was followed by submissions of a memorandum of object and reasons for the proposed legislation on March 17, 2021 but there has since been no official communication from the 2nd respondent in accordance with Standing Orders No. 202 of the County Assembly.

3. He claimed that the continued absence of the proposed legislation in Laikipia County has generated a structural conflict between the two levels of government leading to poor resource use, inequity in access, exclusion and ineffective resource management in relation to the protection and conservation of the environment under the Fourth Schedule of the *Constitution*. That if the Bill is not enacted, the natural resources of Laikipia County remains vulnerable to further environmental degradation and rights under article 42 of the *Constitution* are likely to be violated.

4. It is the petitioner's case that by the refusal to enact the *Bill*, the respondents have violated the constitution in that;

    i. The respondents are in violation of the objects and principles of devolution of governments under article 174 and 175 of the *Constitution*.

    ii. The respondents are in violation of article 10 of the *Constitution* on national values and principles of governance on sustainable development.

    iii. That his rights under article 37 of the *Constitution* to petition public authorities were violated by failing to act in accordance with section 6(2) of the Laikipia County Petition to County Assembly (Procedure) Act 2014 and standing order 202 of the County Assembly.

    iv. The respondents disregarded the due process under article 183(2) and 185(4) of the *Constitution*.

v. The respondents violated article 42 of the *Constitution* by denying the petitioner his right to have Laikipia County environment protected for benefit of present and future generations through legislative measures.

vi. The respondents violated article 189(2) of the *Constitution* by failing to enact the *Bill* in accordance with Standing Orders 110.

vii. In disregarding the provisions of the *Bill*, the respondents violated article 185(2), 186(1) and 187(2) of the *Constitution* as provided for under the Fourth Schedule to give effect to the functions and exercise of powers assigned to county governments in relation to the protection and conservation of the environment at decentralized level of the government.

5. For the alleged violations, the reliefs sought are as follows;

i. A declaration that the respondents violated the applicants right to have Laikipia County environment protected for the benefit of present and future generations through legislative measures under article 42 of the *Constitution*.

ii. A declaration that the 2nd respondent violated the petitioner's rights to present petition under article 37 of the *Constitution* and section 15 of the *County Government Act* 2012.

iii. A declaration that the respondents violated national values and principles of governance on sustainable development as stipulated under article 10 of the *Constitution*.

iv. A declaration that the respondents violated article 189(2) of the *Constitution*.

v. A declaration that article 174 and 175 of the *Constitution* on principles of devolution were violated.

vi. A declaration that article 183(2) of the *Constitution* was violated.

vii. A declaration that article 185(4) of the *Constitution* was violated.

viii. An injunction that the 2nd respondent tables the provision of the *Bill* for enactment in order to give effect to the functions and exercise of powers assigned to county governments in relation to protection and conservation of the environment.

ix. General damages.

x. Cost of the petition.

xi. Such further orders the court may deem fit.

6. In opposing the petition, the 2nd respondent filed a replying affidavit dated 15/02/2023 sworn by Jasper M. Muturi, the Clerk of the 2nd respondent. The 1st respondent did not file a response.

7. The 2nd respondent deponed that upon receipt of the petitioner's Petition on the proposed Bill, he forwarded the same to the Speaker of the County Assembly of Laikipia for reporting in the County Assembly in accordance with section 5(1) of the *Petition to County Assemblies (Procedure) Act* 2020. That in accordance to section 5(2) of the said *Act*, the petition was presented to the Committee concerned with Environment and Natural Resources as per Standing Order No 202 of County Assembly of Laikipia for consideration.

8. After consideration and deliberation, the committee arrived at a decision that the national environmental laws being *Environmental Management and Coordination Act* No 8 of 1999 and its subsidiary legislation are sufficient for the County Executive Committee to effectively performs its

functions and mandate in regard to environmental management in Laikipia County and there was no need to legislate further since there is no vacuum.

9. That the Assembly held that the petitioner's *Bill* had failed to meet the required threshold and he notified the petitioner vide a letter of the resolution of the Assembly in accordance with Standing Order No 202(2) and 202(3) of the Laikipia County Assembly Standing Orders. That the petitioner has failed to demonstrate how his rights have been threatened or violated. Furthermore, the petitioner did not state how the alleged continued absence of the proposed legislation threatened the provisions said to be infringed and the manner in which they are alleged to be infringed.

10. The 2nd respondent further averred that the issue of formulation and passing of Bills is an internal matter to the Assembly which the court ought not to interfere with. That the Petition offends the doctrine of separation of power as it invites the court to direct the County Assembly how to run its affairs and the court has no jurisdiction to supervise constitutional bodies carrying out their mandate within the confines of the *Constitution*. That it is general, speculative and did not disclose a real dispute capable of resolution by this court.

11. In rejoinder, the petitioner filed an affidavit dated February 21, 2023. He deponed that the 2nd respondent lied by stating that he notified the petitioner of the decision of the County Assembly for the said letter was not attached to the replying affidavit and was not published in the County gazette in accordance with section 7(c) of Laikipia County Petition to County Assembly (Procedure) Act 2014. That the respondents had the mandate to exercise legislative authority but failed to do so, therefore, the petition is not an abuse of the court process as claimed by the 2nd respondent. That the orders sought are not an infringement to separation of powers as the High Court has the jurisdiction to determine applications for legal redress in accordance with article 23 of the *Constitution*.

12. Further, that formulation and passing of Bills is not an internal matter as section 3 of the Laikipia County Petition to County Assembly (Procedure) Act 2014 provides for a legal framework for petitioning to the 2nd respondent so as to promote public participation.

13. The petition was canvassed by way of written submissions. The petitioner stated that he was invited by the 2nd respondent on March 17, 2021 to a consultative meeting with the relevant sectoral committee on environment and natural resources where he presented a memorandum of objects and reasons for the *Bill* to the committee for tabling but no action was taken. That the respondents had a Constitutional mandate to prepare proposed legislation for consideration but they failed to do so.

14. He submitted that the admission by the 2nd respondent that they are relying on national environmental laws shows that there is absence of a county legislation and that the decision on whether there was need to enact the Bill or not was to be by democratic way of voting by members of the County Assembly but the Bill was shut down before it was tabled for debate. That the allegation that the 2nd respondent notified the petitioner the decision of the Assembly was not substantiated with any evidence.

15. On violation of the *Constitution*, he stated that article 10(2)(d) of national values and principles of governance on sustainable development was violated by the respondents by shelving the Bill that was meant to ensure proper management and rational utilization of environmental resources on a sustainable yield basis for the improvement of the quality of human life in the county. That the decision to shelve the *Bill* was in violation of article 42 of the *Constitution* of the petitioner's right to have the environment and natural resources of Laikipia County protected. He repeated that the respondents violated article 37, article 174, 175 and article 189 of the *Constitution*. That there is absence of a legal and institutional framework for the management of the environment in Laikipia County since the

powers assigned to the County in relation to the protection and conservation of the environment are still centralized at the national level.

16. He further submitted that the High court has jurisdiction under article 23 and section 3 of the *Environment and Management and Coordination Act* 1999 to intervene and make determination if a right under article 42 to clean and healthy environment had been violated, infringed, denied or likely to be denied and give such orders as it may deem appropriate. Therefore, this court has the power to order the respondents to enact the *Bill* into law as their Constitutional mandate.

17. The 2nd respondent's counsel on his part submitted that the petitioner did not substantiate his claim on violation of his Constitutional rights by any evidence as no material was placed before the court to show that residents of Laikipia have been disentitled their fundamental right to a clean and healthy environment. Reliance was placed on the case of *Anarita Karimi Njeru v Republic* (1979) eKLR. It is urged that the national legislation being *Environmental Management and Coordination Act* has proven sufficient for years in respect to environmental management in Laikipia County.

18. Further, section 8(2) of the *County Government Act*, 2012 allows county governments to use national legislation in absence of a county legislation. That in line with article 183(1) and (2) of the *Constitution*, the committee has never found a need for a new legislation and there is no lacuna that the petitioner demonstrated in his petition that exists so the petitioner did not prove the need for a new legislation.

19. That the claim for violation of article 37 of the *Constitution* is misguided as the petitioner was not barred from presenting a petition to the 2nd respondent. In fact, the *Bill* was considered and forwarded to the relevant committee who rejected the *Bill* and the letter adduced by the petitioner dated November 26, 2019 speaks volumes that indeed the 2nd respondent did acknowledge receipt and took the proposal into consideration.

20. On alleged violation of article 10, 174, 175, 183(2), 185(2)(4), 186(1), 187(2) and 189(2) of the *Constitution*, counsel submitted that the petitioner did not give details how his rights under the said articles were violated and failure to enact the proposed *Bill* did not in any way violate the said articles. Further, that the respondents' reliance on *EMCA Act* is in line with their functions, national values, principle of governance and principles of devolved government. That reliance on national legislation by the respondent falls within the parameters of the *Constitution* as provided under article 189(1)(b) and 186(4) of the *Constitution*.

21. Counsel further submitted that the petition is based on mere apprehension of violations of right hence the petitioner is barred under the rule of ripeness since there is only a threatened harm. Reliance was placed on the case of *R v National Employment Authority & 3 others ex parte Middle East Consultancy Services Limited* (2018) eKLR where the court held that the doctrine of ripeness deals with situations or problems that have already ripened or crystallised and not with prospective or hypothetical ones. That the orders sought by the petitioner that the respondent tables the *Bill* amount to encroachment of doctrine of separation of power and the effect of such order would amount to compelling the 2nd respondent to approve the *Bill* which will be an intrusion to legislative power of the 2nd respondent and this court is devoid of power to usurp the constitutional mandate of the 2nd respondent.

22. I have considered the petition, the response and the rival submissions by the parties.

23. article 258(1) of the *Constitution* grants the petitioner the right to institute proceedings in relation to violation of his rights. This article provides thus;

> " Every person has the right to institute court proceedings, claiming that this *Constitution* has been violated, or is threatened with contravention".

24. article 23(1) of the *Constitution* confers this court with jurisdiction to determine whether a right conferred in the *Constitution* has been violated. The article provides;

> " The High Court has jurisdiction, in accordance with article 165, to hear and determine applications for redress of a denial, violation or infringements of, or threat to, a right or fundamental freedom in the Bill of Rights."

25. Thus, the jurisdiction of this court flows from article 165(3)(d) of the *Constitution* which is framed as follows;

> " Subject to clause (5), the High Court shall have –
>
> (d) Jurisdiction to hear any question respecting the interpretation of this *Constitution* including the determination of –
>
> (i) the question whether any law is inconsistent with or in contravention of this *Constitution*;
>
> (ii) the question whether anything said to be done under the authority of this *Constitution* or of any law is inconsistent with, or in contravention of, this *Constitution*;
>
> (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
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> (iv) a question relating to conflict of laws under article 191."

26. To that extent, the issues raised by the petitioner fall under the purview of the jurisdiction of the court. It is opportune, however, to put the petition herein in proper perspective to avoid a laborious and unnecessary long winding route that would lead this court away from the real issue in controversy. As I understand it, the petitioner's grouse is that the respondents failed to act on The *County Environment Management and Coordination Bill* which he presented to them for consideration and enactment.

27. The petitioner's pleading quickly metamorphosed into a labyrinth of alleged multiple constitutional violations which include rights to a healthy environment among others which I will address along the way.

28. The law is settled that the burden of proving violation or threat of violation of a constitutional right is upon the petitioner as was established in *Anarita Karimi Njeru v Republic* [1979] eKLR where it was held that a petitioner must satisfy the evidential burden that a specific right exists and which right has been violated or restricted, besides pleading the same with reasonable particularity and precision. This was reiterated by the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR. In addition, it is also settled that the petitioners must patently express the

manner in which the respondents have violated their rights as was stated in *Matiba v Attorney General* [1990] KLR 666.

29. As to what constitute evidential burden, the Supreme Court in *Wamwere & 5 others v Attorney General* (Petition 26, 34 & 35 of 2019 (Consolidated)) [2023] KESC 3 (KLR) held that;

> "In this case, the onus of proof was on the 1st appellant to adduce sufficient evidence to demonstrate that firstly, she owned or erected or lived in the alleged properties; and secondly, that state agents interfered or deprived her of the subject properties. This, as was aptly appreciated by the superior courts, is the import of section 107 of the Evidence Act on the burden of proof. The provision stipulates:
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> 107.
>
> 1. 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.
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> 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
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> In addition, section 109 of the Evidence Act elaborates on the onus of proof by stipulating that:
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> > The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
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> Unfortunately, aside from bare allegations, the 1st appellant did not adduce even an iota of evidence to back her claims. We particularly agree with the observation by the High Court that this limb of the 1st appellant's claim was pursued in a context of an "evidential vacuum". ...It is also imperative to take note of the fact that even in situations where a respondent does not file or tender evidence to counter the petitioner's case, the petitioner still bears the burden of establishing his/her allegations on a balance of probabilities. As to whether such standard is met will depend on whether a court based on the evidence is satisfied that it is more probable that the allegation(s) in issue occurred....All in all, the 1st appellant's evidence or lack of it, for that matter, could not be the basis of a finding that it was more probable than not that her right not to be deprived of property was infringed. To put it differently, in the words of Lord Denning J in *Miller v Minister of Pensions* [1947] 2 All ER 372 –
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> > "Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, ... the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

30. Mativo J *Leonard Otieno v Airtel Kenya Limited* [2018] further expounded that;

> "It is fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the proposition he asserts to prove his claim. Decisions on violation of Constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the constitution, an inevitable result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not,

a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses."

31. It therefore follows that the question this court should determine is whether the petitioner's rights were violated and whether he has proffered any proof to allegations of such violation.

32. On the claim on violation of article 37 of the *Constitution*, the article confers the right to demonstrate, picket and present petition to public authority. His claim under this head was that the respondents failed to take action on the definite object of his petition. The 2nd respondent stated that the *Bill* was indeed considered by the concerned committee on the environment and was rejected since the national law in place was deemed sufficient.

33. The petitioner in his petition claimed that the Bill was shelved without any reason and that despite his follow up through numerous letters, there has been no official communication from the 2nd respondent. In his submissions however, he stated that he was invited by the 2nd respondent on March 17, 2021 to a consultative meeting with the relevant sectoral committee on environment and natural resources which was chaired by Hon. Simon Kanyotu where he presented a memorandum of objects and reasons for the Bill to the committee for tabling.

34. This means therefore that he indeed presented the *Bill* to the relevant committee and a meeting was held where he presented his memorandum and object of the *Bill*. On the material before court, the petitioner did present his Petition to the respondents and the same was received. A purposive interpretation of article 37 would require that any public body in receipt of a petition as envisaged by the article must make the necessary step of acting on the petition, which acting includes, but not limited to, responding formally to a petitioner on the action taken or reasons why the petition would not be acceded to. Otherwise, if the contrary be true, the right conferred under this article would not be realised. I note that the record does not show any communication from the 2nd respondent indicating whether the Bill was rejected, and if so, the reasons proffered thereto. Evidence available is of the very casual, contemptuous and dismissive letter by the Clerk to the County assembly dated November 26, 2019 whose content is that the Assembly was a stranger to the issues raised in the petitioner's letter dated November 22, 2019. The *Constitution* frowns upon such exercise of authority which is heavily laced with the big man syndrome which syndrome was cast to oblivion by the recognition in the Constitution that all sovereign power belongs to the people.

35. Moving on to other alleged constitutional violations, it is clear from the record that the foundation of the violations is the alleged failure by the respondents to enact the law. I have carefully considered the affidavit evidence on record and I reach the conclusion that other than mere recitals of the alleged violations, no evidence at all is laid before court in proof of the same. For instance, the alleged violations of article 10(2)(d) and 42 of the *Constitution* are intertwined. On this there is no iota of evidence to demonstrate any of the alleged violations and the petition lacks in specifics of how the failure to enact the Bill affected the petitioners livelihood or the livelihood of the people of Laikipia due to lack of a County Legislation on Environment. He did not give instances when and how these articles were violated. How people have suffered or how the environment have been degraded to affect the livelihood of the residents of Laikipia County.

36. The respondent stated that there is no lacuna when it comes to environmental laws in Laikipia County since the County is governed by the national law being *Environmental Management and Coordination Act* No 8 of 1999 (EMCA) in line with section 8(2) of *County Government Act*, 2012. The respondent further averred that the County has been implementing provisions of *EMCA* in accordance with

article 183(1) and the Fourth Schedule of the *Constitution*. And in carrying out their duties, there has been no need to formulate County legislation in accordance with article 183(2) of the *Constitution*.

37. Section 8(2) of the *County Government Act* states that;

> "If a county assembly fails to enact any particular legislation required to give further effect to any provision of this *Act*, a corresponding national legislation, if any, shall with necessary modifications apply to the matter in question until the county assembly enacts the required legislation."

38. article 183(1)(b) of the *Constitution* further mandates County Governments to implement, within the county, national legislation to the extent that the legislation so requires

39. The question whether there is a lacuna for lack of a County legislation on environmental issues has been explained away by the 2nd respondent in that a national law exists that governs management of environment and natural resources. I hasten to add that it is not within the province of this court to decide if or not there exists a lacuna. This is power to be exercised by the people of Laikipia County through their elected representatives in the County Assembly. It is apparent that through this petition, the petitioner has attempted to tout the strength of his proposed bill. Suffice it to note that this court only intervenes in legislation, be it national or local, only when there are procedural flaws or the enacted law is unconstitutional. Which takes me to the issue of separation of powers which this petition brings to the fore.

40. For emphasis, legislation making is a preserve of Parliament at the national level and County Assemblies at the County level. Good laws are without a doubt a pillar of society in all spheres of peoples' social and economic activities. The Law Reform Commission in its Guide to the legislative process in Kenya puts it thus'

> "Good quality legislation is one of the most fundamental tenets of any modern and civilized democratic society. The process of developing such legislation is as critical as the product. It is important for legislative bodies, policy makers,draftspersons and members of the public to not only sufficiently understand, but also have the opportunity to participate meaningfully in the legislative process and to have the capacity to analyze and ensure strict adherence to established standards and procedures"

41. The *Constitution* obligates the State and all State organs to ensure adequate public consultation on all public policies, legislation or any decision that is likely to impact on the people of Kenya. Failure to factor in the mandatory requirement of public participation exposes the legislative instrument or policy framework to constitutional challenges of legitimacy, hence making it actionable for unconstitutionality in a court of law. Be thus as it may, the requirement for public participation should not obfuscate the doctrine of separation of powers which is the bedrock of a democratic society.

42. The doctrine of separation of powers was appreciated by the High Court in *Trusted Society of Human Rights v The Attorney-General and others*, High Court Petition No 229 of 2012; [2012] eKLR, at paragraphs 63-64 where it held as follows:

> "Although the Kenyan Constitution contains no explicit clause on separation of powers, the Montesquieuian influence is palpable throughout the foundational document, the Constitution, regarding the necessity of separating the Governmental functions. The Constitution consciously delegates the sovereign power under it to the three branches of

Government and expects that each will carry out those functions assigned to it without interference from the other two."

43. As seen above the mandate to legislate is by law vested on Parliament at the national level and the County Assemblies at the County level. This mandate is exclusive and neither the Executive nor the Judiciary should interfere. The court, however, as earlier noted, has the mandate to oversee the legality of the law-making process and the constitutionality of the enactment. The Supreme Court in Advisory Refence No.2 of 2013 put it succinctly while quoting Karle in his article, "*Legal Culture and Transformative Constitutionalism*" published in South African Journal of Human Rights, Vol 14 (1998) as follows;

> "(53) The history of political change in South Africa will remain highly relevant for those African countries, like Kenya, seeking to evolve democratic constitutional systems out of a past of skewed and repressive governance. And by the settled technique of the comparative method in law, we draw from that country's achievements in constitutional precedent. We in this Court, conceive of today's constitutional principles as incorporating the transformative ideals of the *Constitution* of 2010: we bear the responsibility for casting the devolution concept, and its instruments in the shape of county government, in the legitimate course intended by the people. It devolves upon this court to signal directions of compliance by State organs, with the principles, values and prescriptions of the Constitution; and as regards the functional machinery of governance which expresses those values, such as devolution and its scheme of financing, this court bears the legitimate charge of showing the proper course.
>
> (54) The context and terms of the new *Constitution*, this court believes, vests in us the mandate when called upon, to consider and pronounce ourselves upon the legality and propriety of all constitutional processes and functions of State organs. The effect, as we perceive it, is that the Supreme Court's jurisdiction includes resolving any question touching on the mode of discharge of the legislative mandate."
>
> "[61] It emerges that Kenya's legislative bodies bear an obligation to discharge their mandate in accordance with the terms of the *Constitution*, and they cannot plead any internal rule or indeed, any statutory scheme, as a reprieve from that obligation. This Court recognizes the fact that the *Constitution* vests the legislative authority of the Republic in Parliament. Such authority is derived from the people. This position is embodied in article 94(1) thereof. The said article also imposes upon Parliament the duty to protect the *Constitution* and to promote the democratic governance of the Republic. article 93(2) provides that the national Assembly and the Senate shall perform their respective functions in accordance with the Constitution. It is therefore clear that while the legislative authority lies with Parliament, the same is to be exercised subject to the dictates of the *Constitution*. While Parliament is within its general legislative mandate to establish procedures of how it conducts its business, it has always to abide by the prescriptions of the *Constitution*. It cannot operate besides or outside the four corners of the *Constitution*. This court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The court cannot supervise the workings of Parliament.

The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another.

(62) However, where a question arises as to the interpretation of the *Constitution*, this court, being the apex judicial organ in the land, cannot invoke institutional comity to avoid its constitutional duty. We are persuaded by the reasoning in the cases we have referred to from other jurisdictions to the effect that Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the *Constitution* decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court to assert the authority and supremacy of the *Constitution*. It would be different if the procedure in question were not constitutionally mandated. This court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the *Constitution*. Where however, as in this case, one of the Houses is alleging that the other has violated the *Constitution*, and moves the court to make a determination by way of an Advisory Opinion, it would be remiss of the court to look the other way."

44. What is clear in this petition is that the petitioner has mixed up issues of the respondents' failure to Act on the bill with issues pertaining to the need and merits of the proposed law. As clearly stated above, this court can only come to his aid in regard to any flouting of procedure by the respondents or where a law inconsistent with the constitution is passed but must eschew any attempt to suggest to, leave alone order, the respondents on what legislation to pass or not to pass.

45. I have already made a finding that the respondents failed to respond with reasons to the petitioner why his bill was rejected. It is therefore my considered view that although the petitioner has pleaded violations of the *Constitution*, he has not demonstrated to the required standard how his individual rights and fundamental freedoms were violated, infringed or threatened by the respondents. He has not adduced any evidence to demonstrate the alleged violations. He is however entitled to a fair administrative action which includes to have written reasons why the Bill was rejected.

46. With the result that the petition succeeds to the extent that the respondents are obligated to receive the *Bill* and subject it to usual consideration and make a decision on it which decision should be communicated to the petitioner. The petitioner shall, to achieve that, be at liberty to re-submit the *Bill* for that purpose.

47. This being a public-spirited litigation, I direct that each party bears its own costs.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 29TH DAY OF NOVEMBER 2023

A.K. NDUNG'U

JUDGE