



**Lekulai & 90 others v Attorney General & 3 others (Constitutional Petition E297 of 2020)
[2023] KEHC 26467 (KLR) (Constitutional and Human Rights) (15 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26467 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E297 OF 2020**

AC MRIMA, J

DECEMBER 15, 2023

BETWEEN

JOHN LEOKO LEKULAI 1ST PETITIONER
RAPHAEL LESALERIN 2ND PETITIONER
ELIJA NABORI 3RD PETITIONER
GRACE NABORI 4TH PETITIONER
HELLEN NABORI 5TH PETITIONER
ELIAS PARTENEN 6TH PETITIONER
LEMUSUMBA TADAYO 7TH PETITIONER
EDWARD TAMAR 8TH PETITIONER
GILBERT LOKOSEK 9TH PETITIONER
CARO LESAAYA 10TH PETITIONER
SALOME SIKAMEY 11TH PETITIONER
NOONGICHU LOLTANGULE 12TH PETITIONER
SUSAN LERIAKO 13TH PETITIONER
CHRISTINE LENASO 14TH PETITIONER
CALVIN KOYIAL 15TH PETITIONER
ROSIAN SANINGO 16TH PETITIONER
TITUS LESARRA 17TH PETITIONER
LOSOKOL LENGALIMA 18TH PETITIONER



THOMAS KAPNANGA	19 TH PETITIONER
GEOFFREY LOTARA NKITENG	20 TH PETITIONER
WESTON OLESUNGUNA	21 ST PETITIONER
TOREN SEIN LEDA	22 ND PETITIONER
ROSIA LEMAITANO	23 RD PETITIONER
NOLKARAPITA LEMAITANO	24 TH PETITIONER
NOLBIKICHO LEPARIYO	25 TH PETITIONER
NOLKARAPITA LEMAITANO	26 TH PETITIONER
NICKSON LEPARIYO	27 TH PETITIONER
JOSEPH LEMESERI	28 TH PETITIONER
FROLRENCE LESIITA	29 TH PETITIONER
MERCY PARPIRIS	30 TH PETITIONER
JAMLICK LEPARKITORE	31 ST PETITIONER
MIRIAM PARKITORE	32 ND PETITIONER
LORNA LEMAITANO	33 RD PETITIONER
NOONGUTA KATEUYA	34 TH PETITIONER
THOMAS PRSARE	35 TH PETITIONER
ROBERT LEARAM	36 TH PETITIONER
JENNIFFER PARKITORE	37 TH PETITIONER
NOLKARAPITA LEMAITANO	38 TH PETITIONER
NAISEKU LENASO	39 TH PETITIONER
LINEX LENAICI	40 TH PETITIONER
LOTOME LECHUTA	41 ST PETITIONER
NATANA LEMESIRI	42 ND PETITIONER
JANET LEKATENYA	43 RD PETITIONER
DANIEL NAKURE	44 TH PETITIONER
MIRIAM LEKUREITO	45 TH PETITIONER
CALVIN KOIYALA	46 TH PETITIONER
LOKOSOL LENGALAINA	47 TH PETITIONER
PAUL LEKIRONGOZI	48 TH PETITIONER
BENNEDICT LOKORIO	49 TH PETITIONER
JULIUS LUNGUCHAILE	50 TH PETITIONER



PATRICK LEMEIGURAN	51 ST PETITIONER
JOSEPHAT LEKORPMO	52 ND PETITIONER
FRANKILINE MARAMPA	53 RD PETITIONER
HILLARY LEKETAI	54 TH PETITIONER
PRISCILLA NAKURE	55 TH PETITIONER
SABINA LEPARIYO	56 TH PETITIONER
JONATHAN LESARIS	57 TH PETITIONER
JENNIFER KUROITO	58 TH PETITIONER
FATUMA KIKENYI	59 TH PETITIONER
JOSPHINE LEKODEI	60 TH PETITIONER
HARRISON LEBARIYON	61 ST PETITIONER
PETER MARIGE	62 ND PETITIONER
HENRY LEWATACHUM	63 RD PETITIONER
HENRY LEWATACHUM	64 TH PETITIONER
JAVASON NTAWUO	65 TH PETITIONER
MOSES KIPIRICH	66 TH PETITIONER
DANSON MPAKANY	67 TH PETITIONER
JACKSON LEPERIN	68 TH PETITIONER
BENSON PARSALAACH	69 TH PETITIONER
RISPER NTAAI LEWATACHUM	70 TH PETITIONER
PHILIP MUTELIA	71 ST PETITIONER
MOSES SAIPA LEWATACHUM	72 ND PETITIONER
MOCHONGOI LELEBOO	73 RD PETITIONER
WYCLIFF PASRSALAACH	74 TH PETITIONER
COLLINS AKUTA	75 TH PETITIONER
AGNES LAUNONI	76 TH PETITIONER
SOPPY WESTON JAKQUILINE KURUI	77 TH PETITIONER
MARRY SUKUTA	78 TH PETITIONER
LESUMAN LEMPAKANY	79 TH PETITIONER
LESUMAN LEMPAKANY	80 TH PETITIONER
BOAZ PARSLAACH	81 ST PETITIONER
JULIA NTOIYE LENONGONOP	82 ND PETITIONER



SAILAS LEWERI	83 RD PETITIONER
LEITANAH LEMPANKANY	84 TH PETITIONER
WILSON SAMPICHA	85 TH PETITIONER
NATAANA LENARIACH	86 TH PETITIONER
NONGERA LEMERIA	87 TH PETITIONER
NONGOSEURIA LENAISIAKU	88 TH PETITIONER
JOHNSON LOMODONI	89 TH PETITIONER
NOLMOGI LEKUPARET	90 TH PETITIONER
JOEL LECHINGEI	91 ST PETITIONER

AND

ATTORNEY GENERAL	1 ST RESPONDENT
MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT	2 ND RESPONDENT
MINISTRY OF EDUCATION	3 RD RESPONDENT
MINISTRY OF DEVOLUTION	4 TH RESPONDENT

JUDGMENT

Background:

1. The Petitioners are members of the Ilchamus Community, a Maa speaking sub-tribe of Maasai living mainly in South East of Lake Baringo within Baringo County.
2. They are an indigenous, minority community of about 40,000 people.
3. The Petitioners contended that they had suffered many ills, not only in the hands of bandits, but also from the State owing to historical inaction to protect their constitutional rights.
4. The Petitioners are aggrieved by the discrimination and historical injustice visited at them due to their small numerical strength.
5. The Petitioners decry failure by the State to accord them the benefit due to them in the 2010 Constitution on the rights of minorities and the marginalized.

The Petition:

6. Through the Petition dated 24th September 2020, supported by the Affidavit of John Lekoko Lekulai deposed to on a similar date, the Petitioners approached this Court to claim violation of their constitutional entitlements by the Respondents.
7. The Petitioners pleaded that for many years they have suffered systematic discrimination, insecurity, loss of property and most recently floods that have displaced the entire community.



8. They averred that, the Pokot, their neighboring community have conducted raids and banditry on them since the year 2005, often with devastating consequences and the Government has not done much to help despite their pleas.
9. The Petitioners contended that the Government has always responded symptomatically without going to the root of the heinous attacks, a discriminatory approach due to their insignificant numerical strength in Kenyan politics.
10. Further to the foregoing, the Petitioners posited that despite litigating and getting orders for compensation by Government for the suffering occasioned to their livestock by the poisonous prosopis jusiflora (Mathenge weed) the Orders were blatantly disobeyed by the relevant Ministry and the Attorney General.
11. The Petitioners further asserted that they have suffered discrimination and despite affirmations from Court in Nairobi Petition No. 466 of 2006 and Nairobi Misc. No. 305 of 2004, the Government has utterly ignored and disregarded their plight.
12. Speaking to the current state of affairs in the Community, the Petitioners pleaded that Lake Baringo flooded and displaced many people, destroyed property and rendered many destitute.
13. It was their case that the floods submerged a total of 18 schools in the region and the Petitioners faced disaster without help from Government.
14. The Petitioner averred that the inaction by Government could render their community extinct.
15. The Petitioner pleaded that the Government could not simply tell them to relocate to safer grounds yet they already are contending with poverty caused by banditry.
16. It was their case that their property had been swept away by floods and had no means of livelihood and the Government could not expect them to move on their own.
17. They posited that the announcement by Ministry of Education to reopen school without addressing the fact that most schools in their community were submerged was contrary to their children's right to education.
18. The Petitioners claimed that the Government of Kenya owes all its citizens a duty to protect their lives in the face of a disaster but they had been forgotten and discriminated upon.
19. The Petitioner isolated the particulars of neglect by stating that about 4000 people are living in deplorable conditions without food and basic amenities after being displaced by the floods.
20. They further pleaded that about 18 Primary and Secondary schools had been swept away by the flood without receiving any aid from Government.
21. It was their case that the flood had cut short their basic means of livelihood and their children were suffering.
22. The Petitioners claimed that the foregoing state of affairs was the Government's violation of their constitutional entitlement under Articles 10(2)(b), 27 and 56 of *the Constitution*.
23. It was their case that the abandonment by Government was contrary to their right to dignity, freedom and security of the person and non-equality and discrimination guaranteed under Articles 27, 28 and 29 of *the Constitution*.



24. With respect to flooding of Schools, the Petitioners pleaded that the Government's inaction was a direct violation of their children's right to education under Article 43 of *the Constitution*.
25. On the foregoing factual and legal foundation, the Petitioners prayed for the following reliefs: -
- a. A declaration resonating the intention of Articles 10 and 56 on the Objects and the spirit of *the Constitution* of Kenya 2010 that the Government of Kenya has violated the rights of the Petitioners as a marginalized community.
 - b. A declaration that the failure of the Government to Kenya to respond to disaster facing the petitioners and perennial disobedience of Court orders on their favour amounts to discrimination and a violation of their right against discrimination as encapsulated under Article 27 of *the Constitution* of Kenya 2010.
 - c. An order directed to the Ministry of Interior and Coordination of National Government to provide an elaborate plan to mitigate the disaster facing the Petitioners.
 - d. An order compelling the Government of Kenya to institute affirmative action programmes in accordance with Article 56 to mitigate the suffering of the Petitioners.
 - e. An order directed to the Ministry of Education to provide an elaborate plan to ensure learning continues in all the affected schools in the region affected by the floods.
 - f. An order that a Commission of Experts experienced in public administration, law and social justice and representatives of the Ilchamus Community be appointed under terms and references to be set out by this Honourable Court inter-alia to;
 - i. Assess and quantify the loss occasioned on the petitioners owing to the constant discrimination and neglect of a marginalized community by the Government of Kenya.
 - ii. Assess and quantify the socio-economic impact of the act and omission of the Government on the Petitioner.
 - iii. Assess and make recommendations on affirmative action measures to be taken by the Government resonating with the intention of Article 56 of *the Constitution* of Kenya 2010 to ensure the Petitioners as a marginalized community are protected.
 - iv. Assess injury to the Petitioners and commensurate award for the harm suffered because of violation of constitutional rights and prepare a report to be tabled before to this Honourable Court for further orders.
 - v. Complete its task within 600 days.
 - g. An order for resettlement of the IDPs resulting from floods and a compensation of the victims of the attacks and violations of *the Constitution* based on the findings of the commission in (f) above.
 - h. Exemplary damages.
 - i. That this Honourable Court be pleased to make any further orders as it may deem just and fit to grant in the public interest and in justice.
 - j. Costs of this Petition be provided for.



The Submissions:

26. The Petitioners urged their case further through written submissions and supplementary written submissions dated 26th April 2021 and 8th July 2022 respectively.
27. It was their case that their suffering was not instigated by a natural disaster but was a response to a manmade disaster created by Government due to its failure to serve its people.
28. The Petitioners submitted that there had been a selective inaction by the Government of Kenya on diverse issues touching on the lives of the Ilchamus Community because they are a minority.
29. It was their submission that despite exhausting all avenues of bringing to the attention of the State their plight, including floods, insecurity, hunger, loss of lives and property and displacement, nothing had been done to alleviate the situation.
30. The Petitioners relied on the decision in *Peter K. Waweru -vs- Republic (2006) eKLR* to demonstrate unequal protection and benefit of the law. In the case, discrimination was defined as follows;

Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subject to restrictions to which persons of another description are not made subject to are accorded privileges or advantages which are not accorded to persons of another such description.

31. In reference to Article 260 of *the Constitution* that delimits what a minority community is, the Petitioners submitted that they had been exposed to inhuman treatment and their right to human dignity violated on the basis of their small numerical strength.
32. It was their case that based on the continued discrimination, they were entitled to affirmative action in accordance with Article 56 of *the Constitution* in order to mitigate their suffering.
33. In making the claim for entitlement to compensation as a result of the suffering caused by floods, the Petitioner's submitted that it is a necessary remedy to uplift the life of the Petitioner and to restore their humanitarian conditions.
34. In the supplementary submissions, the Petitioners stated that the Respondent's claim that the Petitioner were pursuing ignored Court orders was wrong. It was their case that the Petition refers to previous cases involving the Ilchamus Community only to show a pattern of discrimination by the Government against matters concerning this community.
35. In rebutting the claim that the Petition was raising issues that comprise Acts of God, the Petitioner submitted that the Petition does not seek any prayer that focuses on fighting nature, but merely seeks redress for the victims of nature who have been side-lined in the response mechanism of the government.
36. To demonstrate the fact that the flooding was not an Act of God, the Petitioners relied on the definition of an act of God as was set out in the case of *Crystal Charlotte Beach Resort v Registrar of lands, Bondo & C5 others (2022) eKLR* where it was observed that;

“An act of God” is an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.



37. It was their case that the disaster complained about could not be cited as an Act of God, since the swelling of Lake Baringo was a fact that was foreseeable from long. It was urged that this Court ought to take judicial notice of the fact that climate change is not a novel idea and its aftermath on the people is well within the knowledge of the Government.
38. The Petitioners claimed the Petitioner had not been overtaken by events because the effects of the displacements that happened have not been redressed by the Government and that many people are still living in IDP camps.
39. The Petitioner reiterated that the flooding had disproportionately affected one minority community that had suffered historical discrimination.
40. The Petitioners found support on the claim of affirmative action in the decision in *Petition E002 of 2022 Centre for Minority Rights Development (CEMIRIDE) & 2 others v Attorney General & 2 others; Independent Electoral and Boundaries Commission (Interested Party) [2022] eKLR*, where it was observed: -
 195. Article 56 of *the Constitution* places a duty on the State to put in place affirmative action programmes designed to uplift the standards of living of the said persons. This is not a favour but a constitutional debt owed by those upon whom sovereign power has been delegated to those who have delegated that power including the minorities and marginalised groups.
41. In the end, the Petitioners beseeched the Court to allow the Petition and grant the orders to protect the rights of an indigenous community that is at great risk.

The Respondents' case:

42. The Attorney General, The Ministry of Interior and Coordination of National Government, Ministry of Education and The Ministry of Devolution, challenged the Petition through Grounds of Opposition dated 7th March 2022. It was couched in the following terms;
 1. That the application lacks merit.
 2. That the application is scandalous, vexatious and amounts to an abuse of the court process.
 3. That the petition as drafted does not raise any constitutional issues.
 4. That the court lacks jurisdiction to determine most of the issues raised in the petition as some of the alleged violations have been determined in other courts and/or acts of God and the court is barred by the doctrine of separation of powers.
 5. That the Petitioners have not pleaded with specificity and precision how their constitutional rights have been violated.
 6. The Respondents pray that the Petition be dismissed with cost

The submissions:

43. In their written submissions dated 7th March 2022, the Respondents stated that the substratum of the Petitions had been overtaken by events.
44. It was their case that the orders sought from the Government to mitigate the disaster of flooding had abated. The Respondent submitted that there was no longer any need for intervention since the heavy rains had stopped.



45. The Respondents further urged Court to take judicial notice that flooding is an Act of God and that it does not happen throughout the year.
46. The Respondents claimed further that the Petitioners did not adduce any evidence to show that flooding continued after September 2020
47. As regards the contest on this Court's jurisdiction, the Respondents submitted that the Petitioners should have filed contempt applications in the respective courts where there was disobedience of Court orders.
48. It further was the Respondents' case that this Court has no capacity to give orders for formation of a Commission comprising of experts experienced in public administration, law and social justice to quantify the loss occasioned on the Petitioners since, pursuant to Section 3(1) of the Commission of Inquiry Act, such mandate solely vests with the President and is discretionary.
49. The Respondents submitted that this Court ought to uphold the doctrine of separation of powers by declining to grant the said order.
50. It was the Respondents' further submission that the call to compel the Respondents to perform their duties including disaster mitigation, security and obedience of Court orders does not hold since the Respondent enjoys discretion in the manner of performance of a duty as no order can issue directing Respondents to perform the duty in a particular manner.
51. In conclusion, the Respondent submitted that they had not discriminated the Petitioners in any way and they (the Petitioners) still enjoy equal rights as other Kenyans.
52. They stated that the Petition does not meet the threshold for the grant of the orders sought and ought to be dismissed with costs.

Analysis:

53. Having carefully considered the Petition, the response thereto, the parties' submissions and the decisions referred to, this Court discerns the following issues for determination: -
 - i. Whether this Court's jurisdiction is ousted on the basis of the Petition's failure to raise any constitutional issue.
 - ii. In the event issue (i) is answered in the negative, whether the alleged various constitutional violations are proved.
 - iii. Reliefs, if any.
54. The Court will deal with the issues sequentially.

(a) Whether this Court's jurisdiction is ousted on the basis of the Petition's failure to raise any constitutional issue:

55. Any challenge on jurisdiction must be addressed at the onset. This Court has in the recent past, in Petition No. E282 of 2020 David Ndii and & 4 Others -vs- The Attorney General & Others, discussed the legal concept of jurisdiction at length. This is what the Court stated: -
 24. Jurisdiction is defined in Halsbury's Laws of England (4th Ed.) Vol. 9 as "...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.". Black's Law Dictionary, 9th Edition, defines jurisdiction as the Court's power to entertain, hear and determine a dispute before it.



25. In Words and Phrases Legally Defined Vol. 3, John Beecroft Saunders defines jurisdiction as follows: -

By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognisance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

26. That, jurisdiction is so central in judicial proceedings, is a well settled principle in law. A Court acting without jurisdiction is acting in vain. All it engages in is nullity. Nyarangi, JA, in Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited [1989] KLR 1 expressed himself as follows on the issue of jurisdiction:

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...

27. Indeed, so determinative is the issue of jurisdiction such that it can be raised at any stage of the proceedings. The Court of Appeal in Jamal Salim v Yusuf Abdulahi Abdi & another Civil Appeal No. 103 of 2016 [2018] eKLR stated as follows: -

Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in Adero & Another vs. Ulinzi Sacco Society Limited [2002] 1 KLR 577, as follows;

- 1)
- 2) The jurisdiction either exists or does not ab initio ...
- 3) Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.
- 4) Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.

28. On the centrality of jurisdiction, the Court of Appeal in Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR stated that: -

So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren *cui-de-sac*. Courts, like nature, must not sit in vain.



29. On the source of a Court's jurisdiction, the Supreme Court of Kenya in Constitutional Application No. 2 of 2011 In the Matter of Interim Independent Electoral Commission (2011) eKLR held that: -
30. Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid down in judicial precedent
31. Later, in Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & Others (2012) eKLR Supreme Court stated as follows: -

A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

32. And, in Orange Democratic Movement v Yusuf Ali Mohamed & 5 others [2018] eKLR, the Court of Appeal further stated: -

(44) a party cannot through its pleadings confer jurisdiction to a court when none exists. In this context, a party cannot through draftsmanship and legal craftsmanship couch and convert an election petition into a constitutional petition and confer jurisdiction upon the High Court. Jurisdiction is conferred by law not through pleading and legal draftsmanship. It is both the substance of the claim and relief sought that determines the jurisdictional competence of a court...

56. The Respondents contended that the Petition does not raise any constitutional issue.
57. Long before the downing of the new constitutional dispensation under *the Constitution* of Kenya 2010, Courts have variously emphasized the need for clarity of pleadings. I echo the position.
58. *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (commonly referred to as 'the Mutunga Rules') also provide for the contents of Petitions. Rule 10 thereof provides seven key contents of a Petition as follows: -

Form of petition.

10.

- (1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.
- (2) The petition shall disclose the following—



- (a) the petitioner's name and address;
- (b) the facts relied upon;
- (c) the constitutional provision violated;
- (d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
- (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
- (f) the petition shall be signed by the petitioner or the advocate of the petitioner; and
- (g) the relief sought by the Petitioner.

59. Rule 10(3) and (4) of the Mutunga Rules also have a bearing on the form of petitions. They provide as follows: -

- (3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.
- (4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.

60. Rules 9 and 10 are on the place of filing and the Notice of institution of the Petition respectively.

61. The Supreme Court in *Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others* [2014] eKLR had the following on the manner in which Constitutional Petitions ought to be presented, thus: -

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 *Anarita Karimi Njeru vs. 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 principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

62. A constitutional issue was defined in *Fredricks & Other vs. MEC for Education and Training, Eastern Cape & Others* (2002) 23 ILJ 81 (CC) as follows: -

The Constitution provides no definition of 'constitutional matter'. What is a constitutional matter must be gleaned from a reading of *the Constitution* itself: if regard is had to the provisions of... Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with *the Constitution*, as well as issues concerning the status, powers and functions of an organ of State.... the interpretation, application and



upholding of *the Constitution* are also constitutional issues. So too is the question of the interpretation of any legislation or the development of the common law promotes the spirit, purport and object of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of *the Constitution*, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly on extensive jurisdiction...

63. In the United States of America, a constitutional issue refers to any political, legal, or social issue that in some way confronts the protections laid out in the US Constitution.
64. Taking cue from the foregoing, and broadly speaking, a constitutional issue is, therefore, one which confronts the various protections laid out in a Constitution. Such protections may be in respect to the Bill of Rights or any other part of *the Constitution*. In any case, the issue must demonstrate the link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened or threatened and the manifestation of contravention or infringement. In the words of Langa, J in Minister of Safety & Security vs. Luiters, (2007) 28 ILJ 133 (CC): -

... When determining whether an argument raises a constitutional issue, the Court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the Court to consider constitutional rights and values...
65. Whereas it is largely agreed that *the Constitution* of Kenya, 2010 is transformative and that the Bill of Rights has been hailed as one of the best in any Constitution in the world, as Lenaola, J (as he then was) firmly stated in Rapinder Kaur Atal vs. Manjit Singh Amrit case (supra) ‘... Courts must interpret it with all liberation they can marshal...’
66. Resulting from the above discussion and the definition of a constitutional issue, this Court agrees with the position in Turkana County Government & 20 Others vs. Attorney General & Others case (supra) where a Multi-Judge bench affirmed the profound legal standing that claims of statutory violations cannot give rise to constitutional violations.
67. This Court has perused the Petition. It has six parts being the Jurisdiction, the Description of the parties, the Facts of the Petition, the Constitutional violations and their particulars and the reliefs sought. Therefore, by way of pleading, the Petitioners have attempted to establish a link between themselves, as the aggrieved parties, the provisions of *the Constitution* alleged to have been contravened and the manifestation of contravention or infringement.
68. In other words, the Petitioners seeks the intervention of this Court on the basis that the Respondents have and/or are confronting their rights and fundamental freedoms guaranteed under the Bill of Rights in *the Constitution*. In such a scenario, the issues transcend the borders of ordinary issues into the realm of and crystallize into constitutional issues.
69. In this case, even by taking the caution in Hakizimana Abdoul Abdulkarim -vs- Arrow Motors (EA) Ltd & Anor case (supra), into account, still the Petition, no doubt, reveal that it has fully complied with Rule 10(1) and (2) of the Mutunga Rules as well as the requirements in Communications Commission case (supra).
70. The Petition raises pure and serious constitutional issues for consideration by this Court. This Court is duty bound under Article 165(3) of *the Constitution* to determine any question as to whether a right or fundamental freedom in a Bill of Rights has been infringed, denied, violated or threatened.



71. This Court, hence, finds that the contention that the Petition is devoid of raising any constitutional issue cannot be maintained. The same is for rejection.
72. Having found the first issue in the negative, the Court will deal with the rest of the second issue.

(b) Whether the alleged various constitutional violations are proved:

73. The fact the Ilchamus community is a minority and marginalized one was settled in Nairobi Misc. Civil Application No. 305 of 2004 and Nairobi Constitutional Petition No. 466 of 2004.
74. Being of such status, the said community through the Petitioners herein decried that the Government has continually treated them against the protection of their rights and fundamental freedoms as enshrined in *the Constitution*. In this Petition, the Petitioners complained of the manner in which the Government did not take any steps to avert the effects of floods which in turn destroyed their properties and schools thereby exposing them into effects which contravened their rights and fundamental freedoms guaranteed under Articles 27, 28, 43 and 56 of *the Constitution*.
75. Responding to the issue of the floods, the Respondents contended that the floods were an Act of God since it was not reasonably possible to foresee and contemplate floods of such magnitude which had never hit the Petitioners' places before. The Petitioners, however, were of the opposite view holding that the problem of flooding has been a perennial one in their area of occupation.
76. The starting point in this discussion should, therefore, be the ascertainment as to whether the issue of flooding within the areas occupied by the Petitioners' community has been a perennial one. Such is a factual issue and calls for proof.
77. The matter before Court is a constitutional Petition. Like other disputes, the conduct of constitutional Petitions is generally governed by *the Constitution* and the law.
78. Article 159(2)(d) of *the Constitution* call upon Courts and Tribunals to administer justice without undue regard to procedural technicalities. Speaking of the essence of Article 159(2)(d) of *the Constitution*, the Supreme Court of Kenya in *Law Society of Kenya v. The Centre for Human Rights & Democracy & 12 Others*, Petition No. 14 of 2013 held that: -

Article 159(2) (d) of *the Constitution* is not a panacea for all procedural shortfalls.
79. And, in *Patricia Cherotich Sawe v Independent Electoral & Boundaries Commission (IEBC) & 4 others* [2015] eKLR the Supreme Court further held that: -

Not all procedural deficiencies can be remedied by Article 159....
80. The practice and procedure in constitutional Petitions is further provided for under the Mutunga Rules.
81. Rule 20(1) of the Mutunga Rules is on the manner in which constitutional Petitions ought to be heard. Petitions may be heard by way of affidavits or written submissions or oral evidence. Rule 20(3) of the Mutunga Rules provides that a Court may upon application or on its own motion direct that the Petition or part thereof be heard by oral evidence. Rule 20(4) and (5) of the Mutunga Rules provide for the summoning and examination of witnesses.
82. The conduct of constitutional Petitions is also guided by various laws. For instance, the *Evidence Act* applies to matters generally relating to evidence. The *Evidence Act* is clear on its application to constitutional Petitions and affidavits in Section 2 thereof. The provision provides as follows: -



1. This Act shall apply to all judicial proceedings in or before any Court other than a Kadhi's Court, but not to proceedings before an arbitrator.
 2. Subject to the provisions of any other Act or of any rules of Court, this Act shall apply to affidavits presented to any Court.
83. Sections 107(1), (2) and 109 of the [Evidence Act](#) are on the burden of proof. They state as follows: -
- 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.
 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.
- and
109. Proof of particular fact
- 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.
84. The Petition in this matter was heard by way of reliance on the pleadings and affidavit evidence further to the written submissions. Apart from the averments contained in the Petition, affidavit and submissions, which were denied by the Respondents, the Petitioners did not adduce any other evidence on the aspect of the alleged devastating flooding having been a perennial issue.
85. Based on such state of affairs, this Court hereby finds that the allegation that such floods as described in the Petition have been perennially affecting the Petitioners is not factually proved. As such, this Court finds and hold that the floods in issue were a distinct occurrence.
85. Being a distinct act, the Respondents should not be blamed unless there is evidence that the Respondents were aware of such floods and took no action to avert the resultant effects. Unfortunately, such evidence is also lacking in this Petition.
87. In coming up with the above finding, this Court takes judicial notice of the fact that our country is a developing economy and at times the Government has to take gradual interventions towards attaining some of the aspirations of Kenyans as encapsulated in [the Constitution](#). A case at hand is the current flooding hitting the country. Despite the Weatherman having warned of such heavy rains, and the Government having put necessary interventions in place, still the resultant rains were so heavy such that massive destruction of property and life were visited on the country.
88. Therefore, this Court affirms its finding that the Petitioners did not table evidence to support their contention that the rains in issue were not of the magnitude as attested to by the Respondents. With such a finding, then the alleged violations of the rights and fundamental freedoms by the Petitioners cannot stand. Likewise, the reliefs sought do not hold.
89. Consequently, the Petition is not proved and is hereby dismissed with no orders as to costs since it is a public interest litigation.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 15TH DAY OF DECEMBER, 2023.



A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

N/A for the Petitioners.

N/A for the Respondents.

Chemosop/Duke – Court Assistants.

