



**Okoti v Independent Electoral and Boundaries Commission & 2 others (Petition 47 of 2017)  
[2022] KEHC 12111 (KLR) (Constitutional and Human Rights) (27 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12111 (KLR)

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

**PETITION 47 OF 2017**

**HI ONG'UDI, J**

**JULY 27, 2022**

**BETWEEN**

**OKIYA OMTATAH OKOITI ..... PETITIONER**

**AND**

**INDEPENDENT ELECETORAL AND BOUNDARIES COMMISSION .... 1<sup>ST</sup>  
RESPONDENT**

**DIRECTORATE OF IMMIGRATION AND REGISTRATION OF  
PERSONS ..... 2<sup>ND</sup> RESPONDENT**

**HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner filed a petition dated 13<sup>th</sup> February 2017 and supported by his affidavit sworn on even date. He seeks the following reliefs: -
  - i) A declaration that section 3 of the Election Laws (Amendment) Act No. 36 of 2016 is unconstitutional, null and void.
  - ii) A declaration that birth certificates are valid documents for purposes of registering as voters under the *Constitution* of Kenya and can be used as an alternative to National Identification Cards and valid passports.
  - iii) A Declaration That Expired Passports Are Valid Documents For Purposes Of Registering as voters under the *Constitution* of Kenya and can be used as an alternative to National Identification Cards, valid passports, and birth certificates.



- iv) A Declaration That the 14<sup>th</sup> February 2017 voter registration deadline set by the IEBC is contrary to section 5(1) (a) of the [Elections Act](#) 2011 and, therefore, null and void to the extent of the contradiction.
- v) A Declaration That a single database of citizens should be used to transact all affairs affecting citizens, and that the separate registrations for exams, ID, KRA PIN, voting, passports, etc., are unreasonable, constitute a wastage of public funds and, therefore, are unconstitutional.
- vi) An Order compelling the IEBC to register also using birth certificates and expired passports.
- vii) An Order compelling the IEBC to comply with Section 5(1) (a) of the [Elections Act](#) 2011.
- viii) An Order That the IEBC and the Directorate of Immigration and Registration of Persons publish accurate voter registration status reports indicating:
  - a. How many Kenyans are 18+ years of age and are eligible to vote national wide?
  - b. How many Kenyans are eligible to vote in each constituency or county?
  - c. How many have registered to vote per constituency or county?
  - d. How many eligible but unregistered persons per constituency or county have been issued IDs?
  - e. How many eligible but unregistered persons per constituency or county have not been issued IDs?
- ix) An Order compelling the respondents to, within a timeframe set by the Court, establish a single database of citizens to be used to transact all affairs affecting citizens.
- x) An Order That the costs of this suit be provided for.
- xi) Any other relief the court may deem just to grant.

### **The Petitioner's case**

2. A summary of his case is that, on 8<sup>th</sup> February 2017, angry residents of Teso South Constituency in Busia County where he hails from, held demonstrations outside the assistant sub-county commissioner's office, over delays in issuance of National Identification Cards (IDs) which they required to register as voters.
3. According to him, those in parts perceived to be pro-government are issued with IDs within two-three days while those from the opposition strongholds are denied the vital documents. The non-issuance is an excellent voter suppression weapon in those alleged pro-opposition parts of the country which is discriminatory and therefore, unconstitutional.
4. The IEBC was conducting the Mass Voter Registration II Campaign which was to end on 14<sup>th</sup> February 2017 and was targeting eligible persons who had not registered from November 19, 2012. It stated that there would be no extension of the Mass Voter Registration II campaign and the continuous registration of citizens as required by Article 82(1) (c) and 88(4) (a) of the [Constitution](#) which was a direct violation of section 5(1) (a) of the [Elections Act](#) 2011.
5. Only IDs and valid passports are considered valid documents for registration as a voter. The legal provision that allowed waiting cards to be used for registration was expunged pursuant to section 3 of the Election Laws (Amendment) Act, No. 36 of 2016. The same is unconstitutional, null and void



- for violating the enjoyment of rights under Article 38(3) (a) of the Constitution. He also noted that expired passports are not allowed for registration.
6. He noted that in as much as the IEBC had deployed more than 25,000 personnel across the country to carry out the exercise; the use of more than 8,000 BVR kits; and opened opportunities in universities, colleges, and huduma centers to ensure many eligible Kenyans are registered, there was no corresponding drive across the County to ensure that eligible Kenyan especially those youths who had turned 18 years of age were issued with IDs to enable them register as voters.
  7. He asserted that the requirement for an ID or a valid passport for registration as a voter, and for voting, is unreasonable and therefore, unconstitutional since these are not the only definers of citizenship, and they are issued at the whims of the executive. On the contrary, the birth certificate is the primary tool for identifying citizens in Kenya since it is issued at birth. It is ideal for registration of voters and unless one lies about their age, only those 18+ years old will qualify for registration using the birth certificate. It will prove both adulthood and citizenship and its use will not be compromised since the current national register of voter relies on both biometrics and pictures of individuals to identify voters.
  8. He claimed that the IEBC has been using vague status reports on the state of voter registration in the country, including by basing its projections on the number of IDs issued in an area and not the number of eligible voters. Accordingly, the size of persons holding IDs to make projections and not the size of adult population is fraudulent as it conceals the voter suppression machinations of the executive, and strips the IEBC of its autonomy and vests it in those who issue IDs.
  9. He stated that the IEBC and Directorate of Immigration and Registration of Persons ought to issue accurate voter status reports indicating how many Kenyans are 18+ years of age and are eligible to vote national wide; how many Kenyans are eligible to vote in each constituency or county; how many have registered to vote per constituency or county; how many eligible but unregistered persons per constituency or county have been issued with IDs; and, how many eligible but unregistered persons per constituency or county have not been issued with IDs.
  10. He states that it is only by basing its data on the population of adults in elective areas nationwide that the IEBC will deliver on its all-important mandate to ensure universal suffrage. Its decision to base its voter registration targets on the number of IDs issued per county, between 1999 and November 2016 and not on the actual adult population size of citizens, was wrong, unacceptable and captive to the skewed issuance of IDs.
  11. It is his case that, there is need to use a single database of citizens in all official transactions. The separate registrations for examinations, IDs, KRA PIN, voting, passports etc are unreasonable opportunities to disenfranchise citizens and conduits for corruption and wastage of public funds and therefore unconstitutional.
  12. Consequently, by reason of the aforesaid, the respondents violated Articles 3(1), 10(2) (a), 82(1) (c) and 88(4) (a), 38(3) (a) and 201(d) of the Constitution.

### **1st respondent's case**

13. The 1<sup>st</sup> respondent filed a replying affidavit by Praxedes Tororey sworn on 16<sup>th</sup> February 2017 and answer to the petition dated 20<sup>th</sup> March 2017 (Not in the file or the CTs). She deposed that pursuant to article 88 (4) (a) of the Constitution, the commission had been continuously registering voters from the period immediately following the last general elections and had in that regard actively engaged in sensitizing all eligible voters to register as by law established.



14. It rolled out a mass voter registration exercise between the period 15<sup>th</sup> February 2016 to 15<sup>th</sup> March 2016 in a campaign dubbed as Mass Voter Registration I and another one dubbed Mass Voter registration II wherein it had projected to achieve a target of lower limit of 4 million new voters' and upper limit of 6 million new voters in a bid to encourage as many qualified persons as possible to register as voters.
15. She averred that the registration was a complex process which entailed the actual manual data collection from about 24, 599 registration centres across the 290 constituencies in Kenya and subsequently uploading, analyzing, cleaning up and verifying the data for purposes of creation of a register of voters for use in the general elections.
16. She deposed that the voter registration exercise was an intricate process which required extensive logistical and fiscal preparation and with far reaching financial implications which must be properly provided for before it was rolled out. In that regard, the commission was spending almost Kshs. 70 million on a daily basis for the Mass Voter Registration exercise. These sums must be allocated through a well deliberated and thought out Parliamentary approval process. All these factors must be taken into account before embarking on such an extension of the process.
17. She deposed that where the law vests the exercise of any function in an institution, the Court is divested of the jurisdiction to take over such function unless it is found not to have been discharged in accordance with the law. Thus this Court's Order effectively extending the voters registration deadline was an interference with the mandate of the commission contrary to the court of appeal holding in *Shaban Mohamud Hassan & 2 others v Shaban Mohamud Hassan & 3 others* (2013) eKLR.
18. She deposed that if the orders sought were to be granted, they would interfere with the fiscal and logistical measures put in place by the Commission to ensure that there was an accurate, verifiable and accountable election. The entire remaining electoral process would be thrown into a spin leading to possible alteration of fixed timelines.

#### **The 2nd and 3rd respondents' case**

19. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed a replying affidavit dated 24<sup>th</sup> April 2017 to the petition. The same could not be traced in the file nor CTs

#### **The Interested party's case**

20. Pursuant to the court order issued on 16<sup>th</sup> February 2017, the proposed interested party (Bado Mapambano Trust) was enjoined in this suit. There is however no documentation in respect of the said interested party in the file nor CTs.

#### **The Petitioner's submissions**

21. The petitioner filed submissions dated 30<sup>th</sup> August 2021 raising the following issues: -
  - i) Whether the petitioner has locus standi to institute this case
  - ii) Whether the court has jurisdiction to hear and determine this case
  - iii) Whether the respondents violated the *Constitution*
  - iv) Whether section 3 of the Elections Laws (Amendment) Act No. 36 of 2016 is unconstitutional, null and void.



- v) Whether birth certificates are valid documents for purposes of registering as voters under the Constitution of Kenya and can be used as an alternative to National Identification Cards and valid passports.
  - vi) Whether the IEBC should register voters using birth certificates and expired passports.
  - vii) Whether the 14<sup>th</sup> February 2017 voter registration deadline set by the IEBC violated section 5(1) (a) of the Elections Act 2011 and was, therefore null and void to the extent of the contradiction.
  - viii) Whether the respondents should establish a single database of citizens to be used to transact all affairs affecting citizens.
  - ix) Whether the respondents should pay the cost of these proceedings.
  - x) Whether the court should grant any other relief it may deem just.
22. On whether the petitioner has locus standi to institute this case, and relying on Articles 3, 10, 22 and 258 of the Constitution and the cases of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others 9 2013) eKLR and Sollo Nzuki v Salaries and Remuneration Commission & 2 others [2019] eKLR he submitted that he had the locus to file a constitutional matter in the public interest.
  23. On whether the court has jurisdiction to hear and determine this case, he argued that pursuant to Articles 23 and 165(3) (b) of the Constitution and the cases of Judicial Service Commission v Gladys Shollei and another [2014] eKLR and Petition 45 of 2019; Muema Mativo v Director of Criminal Investigation & 2 others; HFC Limited (Interested Party) [2021] eKLR, this court has jurisdiction to hear and determine this case. Further that he had framed his issues with reasonable precision to what extent the respondents had violated the Constitution as required by the Anarita Karimi Case.
  24. Regarding the respondents violation of the Constitution, he argued that Articles 10 and 21(1) of the Constitution, do not permit the state to be a passive actor but require an activist sense in ensuring fundamental rights are promoted and fulfilled. This includes registration as voters of persons who have attained the age of 18 and above but for whatever reasons have not been issued with a national ID.
  25. He submitted that the IEBC violated Article 38(3) (a) of the Constitution by allowing the executive to use the skewed issuance of IDs to suppress voter registration. Further that the IEBC's use of persons holding IDs to make projections and not the size of adult population which is eligible to vote was fraudulent as it concealed the voter suppression machinations of the executive and strips it of its autonomy vesting it in those who issue IDs.
  26. According to him, the IEBC violated Articles 82(1) (c) and 88 (4) (a) by terminating the continuous registration of voters on 14<sup>th</sup> February 2017. It further violated Article 201(d) of the Constitution by running multiple database of citizens consequently, violating Articles 3(1) and (2) of the Constitution.
  27. On whether section 3 of the Election Laws (Amendment) Act No. 36 of 2016 is unconstitutional, null and void, he submitted that the amendment is meant to violate the enjoyment of rights under Article 38(3) (a) of the Constitution of Kenya 2010. Relying on Olum and another v attorney General [2002] EA; The Queen v Bid M. Drug Mart Ltd, 1986 LRC (Const.) 332; and Center for Rights education and Awareness & another v John Harun Mwau & 6 others [2012] eKLR he argued that in determining the constitutional validity of a state/ section of the statute is by examining its purpose and effect.
  28. According to him, the object and purpose of section 3 of the Impugned Act, was to bar eligible voters from registering as voters. Section 5 (3A) and (B) of the Election Act was well intentioned to ensure



that Kenyan citizens who had reached the age of 18 and had waiting cards were eligible to register as voters in compliance with Article 38(3) (a) and (b) of the *Constitution* which has been curtailed by section 3 of the impugned Act. Further, pursuant to Article 24 of the *Constitution*, the limitation to be registered as a voter by section 3 of the impugned Act was not justified; the same limited fundamental rights and freedoms hence unconstitutional, and this court should restore the original text of section 5 (3A) and (B) of the *elections Act* No. 24 of 2011.

29. On whether birth certificates should be used to register voters, he submitted that persons who have attained the age of 18 years and above should be registered by the IEBC as voters using their birth certificates as an alternative before they are issued with IDs or passports for whatever reasons. He relied on Article 83 (3) and the case of *Republic v Independent Electoral and Boundaries Commission Ex parte Mohamed Ibrahim Abdi & 4 others* [2017] eKLR.
30. On whether the IEBC should register voters using expired passports, he argued that this court should order IEBC to register voters using expired passports for the reasons that the voter registration process may kick off and end when one has not been issued with a new passport. The mere expiry of one's passport does not rip them of their Kenyan citizenship which is a basic element for obliging a state to protect its citizens and let them enjoy certain constitutional rights related to the juridical fact of citizenship i.e. the active and passive right.
31. Regarding the 14<sup>th</sup> February 2017 voter registration deadline set by the IEBC and whether it violated section 5(1) (a) of the *Elections Act* 2011 and, therefore null and void to the extent of the contradiction, he argued that this court granted interim orders which extended the deadline and allowed many people to register to vote and since such exercises are held periodically, and the issue is not moot.
32. He submitted that at the time the petition was filed, the IEBC was conducting Mass Voter Registration II campaign which was to end on February 14, 2017 and was targeting eligible persons (Kenyan Citizens) who had not registered from November 19, 2012 to date. The IEBC had also clearly stated that there would be no extension of the Mass Voter Registration II campaign and the continuous registration of citizens as voters as required by Article 82(1) (c) and 88(4) (a) of the *Constitution*, would also come to an end on February 14, 2017. According to him, that decision was and is still unreasonable and a direct violation of Section 5(1) (a) of the *Elections Act* 2011. That whereas the law requires the registration to terminate two months before the date of the Election, the IEBC's directive issued was five months away from the general elections making it a nullity.
33. He dismissed the argument that continuous voter registration at the county headquarters was not viable in view of Article 6(3) of the *Constitution*. The least it could do was to have its personnel stationed at the ward level which is the smallest electoral unit, for purposes of ensuring grassroots access to its services, including continuous voter registration. The other option was to deploy modern technologies to allow Kenyan citizens to register online as voters.
34. On whether the respondents should establish a single data base of citizens to be used to transact all affairs of state affecting citizens, he argued that there is need to use a single database of citizens in all official transactions. This would ensure that the true number of registered voters is known and this will ensure an accurate register of voters which is the first step in realizing the accurate elections required under Articles 81 (e) (v) and 86(a) of *Constitution*. Having a single database of citizens will ensure a credible Principal Voter Registration mechanism which will see to it that even those who become of age are automatically registered as voters even before they obtain an ID card or a passport.
35. On whether the respondents should pay costs, he submitted that he is entitled to costs given the fact that he has spent a lot of personal resources prosecuting this case in public interest. He also submitted that in the event that he is unsuccessful, each party should bear their own costs. He relied



on *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* [2018] eKLR and *Biowatch Case* cited as CCT 80/2008 or 2009 ZACC 14 at paragraph 21.

36. On whether the court should grant any other relief it deems just, and relied on Article 23 (3) of the *Constitution* and the cases of *Attorney General v Kituo Cha Sheria & 7 others* [2017] eKLR; *Minister of Health & others vs Treatment Action Campaign & others* (2002) 5 LRC 216 at page 249; *Fose v Minister of Safety and Security* [1997](3) SA 786 (CC) 1997 (7) BCLR 851 and *Hoffman v South African Airways* (CCT17/00)[2000]ZACC 17. He thus urged this court to be guided by the said decisions and provisions of the law and evidence on record and award appropriate relief that it may deem just to grant herein to advance the cause of justice and the rule of law.

### The 1st respondent's submissions

37. The 1<sup>st</sup> respondent filed submissions dated 1<sup>st</sup> February 2022 by G & A advocates raising the following issues for determination:-
- i. Whether the test in *Anarita Karimi Njeru* has been met?
  - ii. Whether there was a violation of the timelines for voter registration pursuant to the *Elections Act*?
  - iii. Whether the issuance of IDs in Teso Constituency, Busia County amounted to voter suppression and whether it was discriminatory and unconstitutional?
  - iv. Whether section 3 of the Elections Laws (Amendment) Act, 2016 is unconstitutional as it does not permit the use of waiting cards and expired passports hence violates Article 38(3) of the *Constitution* of Kenya?
  - v. Whether a single database should be used to transact all affairs affecting citizens?
38. On the first issue, he relied on *Anarita Karimi Njeru v The Republic* (1976-1980) KR 1272; *Mumo Matemu v Trusted Society of Human Rights Alliance ; Sothers* [2013] eKLR; *Dr. Rev. Timothy Njoya vs The Hon. Attorney general and Kenya Review authority* HC Constitutional and Human Rights Division Petition No. 479 of 2013; and, *David Gathu Thuo v Attorney General & another* [2021] eKLR. He then submitted that the petitioner had not met the test set out in the *Anarita Karimi case* as he had not pleaded his case with reasonable precision nor demonstrated the manner in which the rights he listed were violated.
39. On the second issue, he submitted that there was no violation of the timelines for voter registration as set out in the *Constitution* and the *Elections Act* and added that in any event this issue was moot because the same was conclusively dispensed with by the Court in its ruling dated 16<sup>th</sup> February 2017. He cited *Daniel Kaminja & 3 others (Suing as Westland Environmental Caretaker Group) v County Government of Nairobi* [2019] eKLR and *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others* [2016] eKLR, to support this submission.
40. Counsel further submitted that what was to terminate on 14<sup>th</sup> February 2017 was Mass Voter registration and not the continuous registration of citizens as voters as contemplated under Article 88(4) (a) of the *Constitution* which continued to be carried out and only closed sixty days to the elections as required by section 5 of the *Elections Act*. Therefore, relying on section 3 of the *Evidence Act*, he argued that this was not a fact in issue as highlighted in *Isaac Aluoch Polo Aluochier v National Alliance and 542 others* [2016] eKLR.
41. Regarding Mass Voter registration, and while reiterating the contents of their replying affidavit, Counsel relied on Article 88(4) of the *Constitution* and section 4 of the *Independent Electoral and*



- Boundaries Commission Act*. He thus submitted that there was no legal requirement for the 1<sup>st</sup> respondent to conduct Mass Voter registration. The decision was a deliberate and proactive endeavor to encourage as many qualified citizens to register as voters. He urged the Court to find that the deadline for the Mass Voter registration was not in contravention of section 5(1) (a) of the *Elections Act*.
42. On the third issue, counsel submitted that the 1<sup>st</sup> respondent’s mandate did not extend to the issuance of identification cards and therefore there was no nexus between its functions and the allegations. The same was the mandate of the 2<sup>nd</sup> respondent pursuant to *Kenya Citizen and Immigration Act*, No. 12 of 2011 and section 4 of the *Registration of Persons Act*, Cap 107 laws of Kenya.
43. On the fourth issue, he argued that section 5(3) of the *Election Act* limits the documents to be used for voter registration to IDs and the Kenyan passport which obligates it to solely rely on the aforementioned documents for purposes of identification of eligible voters for voter registration. Further that Article 38(3) (a) of the *Constitution*, is not one of the non-derogable rights. He urged that the petitioner has failed to demonstrate how the limitation to only register as a voter using an ID or a Kenyan passport violated that right bearing in mind Article 24 of the *Constitution*. On the contrary the said limitation sought to enhance the principles under Article 86 of the *Constitution* for accuracy, verifiability and transparency.
44. Relying on Article 24 of the *Constitution* and the cases of *Jacqueline Okuta & another v Attorney General & another* [2017] eKLR and *Kenya National Commission on Human Rights & another v Attorney General & 3others* [2017] eKLR he submitted that the limitation is proportional and reasonable in an open and democratic society as its objective is to ensure that elections are verifiable and accurate.
45. Regarding use of waiting cards, birth certificates and expired passports, he submitted that waiting cards would compromise the accuracy of the register should the persons already registered fail to be issued with the IDs; the expired passports would put the accuracy, verifiability and transparency of the elections into question; and birth certificates are not proof of citizenship and cannot therefore be the most accurate document for the purposes of registration of a voter.
46. On the fifth issue, counsel submitted that the question of consolidation of data basis is not one of the functions allocated to it under the law. Nonetheless the process has commenced where parliament passed into law the Statute Law (Miscellaneous) Amendment Act No. 1 of 2018 by which it amended, inter alia, the *Registration of Persons Act* to include the National Integrated Identity Management System (NIIMS).The enactment of the NIIMS was declared unconstitutional in *Republic v Joe Mucheru, Cabinet Secretary Ministry of Information Communication and Technology & 2 others exparte Katiba Institute & Another; Immaculate Kasait, Data Commissioner (Interested Party)* [2021]eKLR. The basis for declaring the NIIMS unconstitutional was due to violation of *Data Protection Act*. Hence this prayer has been overtaken by events.

### **The 2nd and 3rd respondents’ submissions**

47. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed submissions dated 14<sup>th</sup> February 2022 by Mr. Marwa raising the following issues: -
- i) Whether the respondents have violated the petitioner’s constitutional rights;
  - ii) Whether the issuance of IDs in Teso Constituency, Busia County amounted to voter suppression and whether it was discriminatory and unconstitutional;



- iii) Whether section 3 of the election Law (Amendment) Act, 2016 is unconstitutional as it does not permit the use of waiting cards and expired passports hence violated article 38 (3) of the Constitution of Kenya.
- iv) Whether a single database should be used to transact all affairs affecting citizens.
48. Urging this court to dismiss the prayer on violation of rights, counsel argued that the petitioner had not adduced evidence demonstrating how his rights were violated, how the constitutional provisions cited were violated by the respondents and the harm he suffered. He relied on Dr. Rev. Timothy Njoya v Hon. Attorney General and Kenya Review Authority HC Constitutional and Human Rights Division Petition No. 479 of 2013. He also argued that the right to vote under Article 38 of the Constitution is not absolute and can be limited by legislation. That the petitioner had failed to meet the threshold for the alleged violation occasioned to him and the purported voters of Teso.
49. On the second issue, he submitted that the petitioner has not adduced evidence to support the case of selective issuance of IDs. That pursuant to section 9 (1) of the Registration of Persons Act, there is a prescribed period upon which an applicant has to wait before he or she can be issued with an ID card. It cannot be said that the statutory period for waiting for the ID is discriminatory. Further, that there is no comparable statistics from other constituencies in Kenya demonstrating that other regions were issued with IDs within a shorter period. They relied on Section 107(1) of the Evidence Act and the cases of Samuel Nduati & 3 others vs, Cabinet Secretary Ministry of Health 79 others [2018] eKLR; Titus Barasa Makhanu v Police Constable Simon Kinuthia Gitau No. 83653 & 3 others [2016] eKLR; Jacqueline Okeyo Manani & 5 others v Attorney General & another [2018] eKLR; EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae) in support.
50. On the third issue, he submitted that section 3 of the Elections Laws did not violate the provisions of Article 38 of the Constitution. He relied on New Vision Kenya (NVK Mageuzi) & 3 others v Independent Electoral and Boundaries Commission & 8 others [2016] eKLR for this argument.
51. As to whether a legislation or part thereof is in conflict with the Constitution, counsel relied on Hambardda Wakhana v Union of India Air [1960] 554 that laid down the principles to be followed. Tanzania in Ndyanabo v Attorney General [2001] EA 495 set principles for the presumption of constitutionality of statutes. Further that in determining constitutionality the court must be guided by the object and purpose of the impugned statute, which object and purpose can only be discerned from the legislation itself.
52. Counsel submitted that the waiting card is proof of one having applied for an ID card and not proof of citizenship. It doesn't contain all that is captured in section 9(2) of the Registration of Persons Act hence the I.D is the ideal document for purposes of identification during voting. The waiting card is incapable of identifying an electorate. The petitioner has failed to demonstrate how section 3 of the Election Laws (Amendment) Act is unconstitutional and how the said provisions have occasioned harm to him.
53. On the fourth issue, it was submitted that an expired passport lacks legal validity. Pursuant to section 26 of the Kenya Citizenship and Immigration Act, 2011, a passport has a timeline upon which it is operational and upon the expiry of the indicated period, the said document ceases to be a passport and lacks legal protection.
54. Regarding the use of birth certificates, counsel argued that the birth certificate is not proof of citizenship and cannot therefore be used in isolation to register one as a voter for the purposes of an election. He referred to Hashmukh Devani v Cabinet Secretary Ministry of Interior and Coordination of National Government & 3 others [2016] eKLR.



## Analysis and determination

55. Having carefully considered the parties' pleadings, submissions, cited authorities and the law I find the following issues to arise for determination: -
- i. Whether the threshold in Anarita Karimi has been met.
  - ii. Whether the issuance of IDs in Teso Constituency, Busia County amounted to voter suppression and whether it was discriminatory and unconstitutional.
  - iii. Whether the 14<sup>th</sup> February 2017 voter registration deadline set by the IEBC violated section 5(1) (a) of the [Elections Act](#) 2011 and was, therefore null and void to the extent of the contradiction.
  - iv. Whether section 3 of the Election Laws (Amendment) Act, 2016 is unconstitutional as it does not permit the use of waiting cards and expired passports hence violated article 38 (3) of the [Constitution](#) of Kenya.
  - v. Whether birth certificates are valid documents for purposes of registering as voters under the [Constitution](#) of Kenya and can be used as an alternative to National Identification Cards and valid passports
  - vi. Whether a single database should be used to transact all affairs affecting citizens.

### **i. Whether the threshold in Anarita Karimi has been met.**

56. Before delving into this issue, I note that the petitioner has in his submissions raised issues on locus standi and this court's jurisdiction as falling for determination by this Court. The same have not been raised nor challenged by the respondents. I therefore do not find the need to address them.
57. Regarding the issue at hand, the petitioner argued that he has framed his issues with reasonable precision and shown the extent to which the respondents violated the [Constitution](#) as required by the [Anarita Karimi case](#). The 1<sup>st</sup> respondent, submitted that the petitioner had not met the test set out in the Anarita Karimi case as he had not pleaded his case with reasonable precision nor demonstrated the manner in which the rights he listed were violated. The 2<sup>nd</sup> & 3<sup>rd</sup> respondents also argued that the petitioner had not adduced evidence demonstrating how his rights were violated, how the constitutional provisions cited were violated by the respondents and the harm he suffered.
58. It is trite that when it comes to matters concerning the violation of human rights certain standards in the pleadings must be met. This is well expounded in the [Anarita Karimi Njeru case](#) (supra) where the court stated that: -

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

The case of [Memo Matemu vs Trusted Society of Human Rights Alliance](#) [2013] eKLR also reaffirmed the position in [Anarita Karimi Njeru](#) (supra).

59. Rule 10(2) of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules](#), 2013 provides for the form of a petition as follows: -
- (2) The petition shall disclose the following: -



- (a) the petitioner's name and address;
- (b) the facts relied upon;
- (c) the constitutional provisions 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

60. In *Timothy Njoya v Attorney General & another* [2014] eKLR Lenaola J (as he then was) held: -

I agree with the above reasoning, and with respect, the Petitioner cannot come to court to seek facts and information he intends to use to prove the very case that he is arguing before the Court. He must also plead his case with some degree of precision and set out the manner in which the Constitution has been violated, by whom and even state the Article of the Constitution that has been violated and the manner in which it has been violated - See *Anna Rita Karimi Njeru v Republic* (1976-1980) 1 KLR 14 and *Trusted Society of Human Rights v Mumo Matemu and Another* Petition No. 279 of 2012.

Also see

- (i) *Humphrey Mutegi Burini & 9 others v Chief of the Kenya Defence Forces & another* [2017] eKLR,
- ii. *Japheth Ododa Origa v Vice Chancellor University of Nairobi & 2 others* [2018] eKLR

61. The provisions of the law cited in the above cases show that it is important that the petitioner not only points out to this court the constitutional provisions violated but the manner in which they were violated and the harm suffered. A review of the petition as pleaded demonstrates that the petitioner, as rightly stated by the respondents has only stated the constitutional provisions but not demonstrated the manner of infringement or the harm suffered. In my view, the petition as drafted does not meet the threshold in the *Anarita Karimi Njeru* (case) in respect of what petitions should entail.

**ii. Whether the issuance of IDs in Teso Constituency, Busia County amounted to voter suppression and whether it was discriminatory and unconstitutional.**

- 62. The petitioner argued that the areas that were pro government were issued with IDs within two- three days and that those against government were denied vital documents. That the same amounted to voter suppression, was discriminatory and unconstitutional.
- 63. The 1<sup>st</sup> respondent responded stating that its mandate did not extend to the issuance of IDs and therefore there was no nexus between its functions and the allegations by the petitioner.
- 64. The 2<sup>nd</sup> & 3<sup>rd</sup> Respondents argued that the petitioner has not adduced evidence to support the case of selective issuance of IDs. That there is a prescribed period upon which an applicant has to wait before he or she can be issued with an ID, and the said period cannot be said to be discriminatory. Further,



there were no comparable statistics produced to show that in other constituencies in Kenya IDs were issued within a shorter period.

65. Sections 107 and 109 of the [Evidence Act](#) Cap 80 Laws of Kenya provides as follows: -

107. Burden of proof

- (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.

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.

See also

(i) [Christian Juma Wabwire v Attorney General](#) [2019] eKLR

(ii) [Samuel Nduati & 3 others vs Cabinet Secretary Ministry of Health & 9 others](#) [2018] eKLR

66. The position in law under the [Evidence Act](#) is that he who alleges a fact must prove it. The burden only shifts once that has been done. In this case the petitioner had the duty to demonstrate to this court the selective discrimination and how the issuance of IDs in Teso constituency Busia amounted to voter suppression.

67. The Court in the case of [Peter K. Waweru v Republic](#) [2006] eKLR while referring to the [Black's Law dictionary](#) 11<sup>th</sup> Edition on the meaning of discrimination stated;

“Discrimination” In constitutional law the effect of a statute or established practice which confers particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges granted and between them and those not favoured no reasonable distinction can be found.

Unfair treatment or denial of normal privileges to persons because of their race, age, sex, nationality or religion. A failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

68. In [Reuben Njuguna Gachukia & another v Inspector General of the National Police Service & 4 others](#) [2019] eKLR, while declining to find that the petitioner’s right under Article 27 of the [Constitution](#) was trampled upon, Okwany J, cited with approval the case of [John Harun Mwau v Independent Electoral and Boundaries Commission & Another](#) [2013] eKLR, where the court made reference to Article 27 of the [Constitution](#), thus;

“[i]t must be clear that a person alleging a violation of Article 27 of the [Constitution](#) must establish that because of the distinction made between the claimant and others the claimant has been denied equal protection or benefit of the law. It does not necessarily mean that different treatment or inequality will per se amount to discrimination and a violation of the [Constitution](#).”

Also see



- (i) *Mbona v Shepstone and Wylie* [2015] ZACC11,
- (ii) *James Nyasora Nyarangi & 3 others v Attorney General* [2008] eKLR

69. Based on the law and decided cases it is evident that for the petitioner to succeed on the issue of discrimination, he must prove unfavourable bias and the said bias must be based on the grounds set out in the *Constitution*. A point to note is that discrimination does not act in isolation; to prove it, a comparison must have been made. In the case herein, the petitioner has not adduced any evidence to show the selective issuance of IDs.
70. I agree with the 2<sup>nd</sup> and 3<sup>rd</sup> respondents that there is no comparable statistics from other constituencies in Kenya demonstrating that in other regions the IDs were issued within a shorter period. It has not been stated which are the pro government favoured areas. I also agree with the 1<sup>st</sup> respondent that it is not their mandate to issue IDs. The 1<sup>st</sup> respondent deals with elections and not issuance of IDs.

**ii. Whether the 14<sup>th</sup> February 2017 voter registration deadline set by the IEBC violated section 5(1) (a) of the *Elections Act* 2011 and was, therefore null and void to the extent of the contradiction**

71. The petitioner argued that the 1<sup>st</sup> respondent violated Articles 82(1) (c) and 88 (4) (a) by terminating the continuous registration of voters on 14<sup>th</sup> February 2017. That it further violated Articles 201(d) of the *Constitution* by running multiple databases of citizens hence consequently violating Articles 3(1) and (2) of the *Constitution*. He further argued that although this court granted interim orders which extended the deadline, the said exercise is held periodically, and so the issue is not moot. According to him, the decision was and is still unreasonable and a direct violation of section 5(1) (a) of the *Elections Act* 2011.
72. The 1<sup>st</sup> respondent refuted having violated the timelines set for voter registration as set out in the *Constitution* and *Elections Act* and argued that this issue was moot having been dealt with in this court's ruling of 16<sup>th</sup> February 2017. Counsel submitted that what was to terminate on 14<sup>th</sup> February 2017 was the Mass Voter registration but the continuous voter registration would proceed until two months before the general elections. That the issue was not a fact in issue. It was further argued that the 1<sup>st</sup> respondent was not obligated to conduct Mass Voter registration.
73. Article 82(1) (c) of the *Constitution* provides that Parliament shall enact legislation to provide for the continuous registration of citizens as voters. Article 8(4) (a) of the *Constitution* provides the continuous registration of citizens as voters, as one of the functions of the 1<sup>st</sup> respondent. This is also echoed in section 4(a) of the *Independent Electoral and Boundaries Commission Act*, 2011.
74. Section 5(1) (a) of the *Elections Act* 2011 alluded to by the petitioner provides as follows
- 5. Registration of voters
    - (1) Registration of voters and revision of the register of voters under this Act shall be carried out at all times except—
      - (a) in the case of a general election or an election under Article 138(5) of the *Constitution*, between the date of commencement of the sixty-day period immediately before the election and the date of such election: Provided that this applies to the first general election under this Act
75. I have had a chance to read Mwita Chacha J's ruling dated 16<sup>th</sup> February 2017, together with the arguments raised by the parties. Mwita Chacha J noted that the court was aware of the 1<sup>st</sup> respondent's mandate and would only interfere in exercise of its jurisdiction under Article 165(3) if there was



evidence that the 1<sup>st</sup> respondent had acted unlawfully or irrationally. The court also found from the evidence that the voter registration would not be closed anytime soon. It was only the “Mass Voter” registration which was to come to an end. After hearing the parties and taking into account all the circumstances the Court extended the “Mass Voter” registration from 14<sup>th</sup> February 20/7/2017 to 19<sup>th</sup> February 2017 at 6.00p.m. That being the position there is nothing else for this Court to extend.

76. In the case of *Daniel Kaminja & 3 others (Suing as Westland Environmental Caretaker Group) v County Government of Nairobi* [2019] eKLR the court stated: -

26. A case or issue is considered moot and academic when it ceases to present a justiciable controversy by virtue of supervening events, so that an adjudication of the case or a declaration on the issue would be of no practical value or use. In such instance, there is no actual substantial relief which a petitioner or applicant would be entitled to, and which would be negated by the dismissal of the case. Courts generally decline jurisdiction over such cases or dismiss them on grounds of mootness, save when, among others, a compelling constitutional issue raised requires the formulation of controlling principles to guide the bench, the bar and the public; or when the case is capable of repetition yet evading judicial review.[17]

27. The legal doctrine known as ‘mootness’ is well developed in constitutional law jurisprudence. Accordingly, a case is a moot one if it.

[18] “...seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has actually been asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical effect upon a then existing controversy.”

28. Furthermore, a case will be moot-

[19] “...if the parties are not adverse, if the controversy is hypothetical, or if the judgment of the court for some other reason cannot operate to grant any actual relief, and the court is without power to grant a decision.”

77. It is clear from the Constitutional provisions and the IEBC Act that the mandate of the 1<sup>st</sup> respondent is for continuous registration of voters and in light of section 5(1) (a) of the *Elections Act*, 2011 up to two months before the general elections. There is no provision obligating it to conduct Mass Voter registration. As rightly stated by Chacha J in the ruling, of 16<sup>th</sup> February 2017, this was an initiative to get as many voters as possible to register. Furthermore, in its submissions, the 1<sup>st</sup> respondent submitted that what was to terminate was the Mass Voter registration and not the continuous voter register which at the time was ongoing and was to terminate two months before the general elections. This was also noted in the ruling. I therefore find that the issue on Mass Voter registration is moot.

**ii. Whether section 3 of the Election Law (Amendment) Act 2016 is unconstitutional as it does not permit the use of waiting cards and expired passports hence violating Article 38(3) of the Constitution.**

78. The petitioner submitted that the said section 3 of the Election Law (Amendment) Act 2016 is unconstitutional. That the object and purpose of the said section on the impugned Act was to bar eligible voters from registering as voters. According to him section 5 (3A) and (B) of the *Election Act* was well intentioned to ensure that the Kenyan citizens who had reached the age of 18 and had waiting cards were eligible to register as voters. Further that the limitation imposed by that section of the law is not justified and therefore the original position should be restored. He also urged that birth certificates and expired passports be used to register voters.



79. The 1<sup>st</sup> respondent argued that section 5(3) of the *Elections Act* limits the documentation to be used for voter registration to IDs and the Kenyan passport which obligates it to solely rely on the aforementioned documents for purposes of identification of eligible voters for voter registration. That Article 38(3) (a) of the *Constitution* can be limited and the petitioner failed to demonstrate how the limitation to only register as a voter using an ID or Kenya passport violated that right. It submitted that waiting cards would compromise the accuracy of the register should the people already registered fail to be issued with IDs; the expired passports would put the accuracy, verifiability and transparency of elections into question.
80. The 2<sup>nd</sup> & 3<sup>rd</sup> respondents also submitted that section 3 of the Elections Laws did not violate the provisions of Article 38 of the *Constitution*. The waiting card is proof of one having applied for an ID and not proof of citizenship. That the expired passports lack legal validity, and so can't be relied on.
81. The Court of Appeal in Nairobi Civil Appeal 261 of 2018 *Haki Na Sheria Initiative v Inspector General of Police & 3 others* [2020] eKLR held as follows: -

“ 32. . As we embark on determining whether the impugned sections of the Act pass constitutional muster, we take cognisance of the fact that there is a general, although rebuttable presumption, that a provision of law is constitutional, and that it falls on the party alleging otherwise to prove its claim. This was the precedent set in *Ndyanabo vs Attorney General* [2001] 2 EA 495 where the Court of Appeal of Tanzania held as follows:

In interpreting the *Constitution*, the court would be guided by the general principles that ... there was a rebuttable presumption that legislation was constitutional, and...the onus of rebutting the presumption rested on those who challenged the legislation's status save that, where those who supported a restriction on a fundamental right relied on claw back or exclusion clause, the onus was on them to justify the restriction.”

82. In *Kenya Human Rights Commission v Attorney General & Another* [2018] eKLR the court stated;
- “47. There is a general but rebuttable presumption that a statute or statutory provision is constitutional and the burden is on the person alleging unconstitutionality to prove that the statute or its provision is constitutionally invalid. This is because it is assumed that the legislature as peoples' representative understands the problems people they represent face and, therefore enact legislations intended to solve those problems. In *Ndyanabo v Attorney General of Tanzania* [2001] EA 495 it was held that an Act of Parliament is constitutional, and that the burden is on the person who contends otherwise to prove the contrary.”
83. In *Zachary Olum and another v Attorney General* (Constitutional Petition 6 of 1999) [2000] UGCC 3 (06 June 2000) the court opined that;

“To determine the constitutionality of a section of a statute or Act of Parliament, court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the *Constitution*, the court has to go further and examine the effect of its implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the *Constitution*, the impugned statute or section thereof shall be declared unconstitutional.”



84. It was therefore incumbent upon the petitioner to prove the unconstitutionality of section 3 of the Election Law (Amendment) Act 2016. The said section provides as follows: -
3. Section 5 of the *Elections Act*, 2011 is amended by—
    - (a) deleting subsection (3A); and
    - (b) deleting subsection (3B).
85. Section 5 (3A) and (B) of the *Election Act* of the *Election Act*, 2011 read;
- (3A) Despite subsection (3), a citizen who has attained the age of eighteen years and has registered for an identification card and is in the possession of an acknowledgement of registration certificate shall, upon application, be registered as a voter using the acknowledgement registration certificate, but may only vote using an identification card.
  - (3B) For purposes of this section, an acknowledgement of registration certificate means a certificate issued by registration officer under the *Registration of Persons act* to a person who has applied for an identification card, pending the issuance of the card.
86. The petitioner argued that the section 3 is unconstitutional as it does not allow the use of waiting cards for registration of voters. Article 83(1) provides for the pre-conditions for qualifying as a voter. It provides; A person qualifies for registration as a voter at the elections or referenda if the person-
- (a) is an adult citizen;
  - (b) is not declared to be of unsound mind; and
  - (c) has not been convicted of an election offence during the preceding five years.
87. Section 5(3) of the *Elections Act*, 2011 provides;
- (3) Any citizen of Kenya who has attained the age of eighteen years as evidenced by either a national identity card or a Kenyan passport and whose name is not in the register of voters shall be registered as a voter upon application, in the prescribed manner, to the Commission.
  - (3A) Deleted by Act No. 36 of 2016, s. 3.
  - (3B) Deleted by Act No. 36 of 2016, s. 3.
88. Section 10 of the *Elections Act*, 2011 provides: -
10. Eligibility to vote
    - (1) A person whose name and biometric data are entered in a register of voters in a particular polling station, and who produces an identification document shall be eligible to vote in that polling station.
    - (2) The identification document produced in subsection (1) shall be the identification document used at the time of registration as a voter.
    - (3) Nothing in this section shall entitle a person who is prohibited from voting by any written law to vote or relieve that person from any penalties to which the person may be liable for voting. [Act
89. Section 2 of the *Elections Act* defines “identification document” to mean a Kenyan national identification card or a Kenyan passport. It is on the premise that only the National ID card and



the Kenyan passport are allowed for one to register as a voter that the petitioner has challenged the constitutionality of section 3 of the Elections Laws (Amendment), Act, 2016. That the same violated Article 38(3) of the Constitution.

90. Article 38(3) of the Constitution provides that every adult citizen has the right, without unreasonable restrictions- to be registered as a voter; to vote by secret ballot in any election or referendum and to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office. This right is not one of the non-derogable rights envisaged under Article 25 of the Constitution and therefore can be limited with justification. Article 38(3) of the Constitution itself, connotes that there are instances where the right to be registered as a voter can be restricted. In my mind the reasonable circumstances where such a right can be limited is instances where one does not have an ID or a valid Kenyan passport.
91. The waiting card is not sufficient to prove adulthood or citizenship. It is a mere application for an identity card, and not proof of one's entitlement to an ID. In *Republic v Principal Registrar of Persons, Ministry of Immigration & Attorney General Ex parte Viridi Gurveen* [2017] eKLR, Odunga], stated: -
34. The applicant seems to be of the view that once she applied for a national Identity Card and was issued with a waiting card, she was automatically entitled to be issued with a Kenyan National ID Card. With due respect to the applicant, a waiting card is just evidence that an application for a national Identity Card has been made and it does not automatically qualify as a confirmation that the Identity Card will actually be issued though where there is unexplained unreasonable delay in issuing the same the Court may intervene appropriately.
92. As regards expired passports, Garner, B.A, & Black, H.C. [2009]. Black's law dictionary. 11<sup>th</sup> ed. St. Paul, MN: West defines expire to mean to be no longer legally effective; to become null at a time fixed beforehand.
93. The above documents cannot therefore be used for registration by one as a voter. One is not conclusive proof of citizenship and adulthood and the other lacks legal validity.

**ii. Whether birth certificates are valid documents for purposes of registering as voters under the Constitution of Kenya and whether they can be used as an alternative to National Identification Cards and valid passports**

94. The petitioner submitted that persons who have attained the age of 18 years and above should be registered by the IEBC as voters using their birth certificates as an alternative before they are issued with the IDs or passports for whatever reasons. He based his argument on Article 83(3) of the Constitution.
95. The 1<sup>st</sup> respondent submitted that birth certificates are not proof of citizenship and cannot therefore be the most accurate document for purposes of registration of a voter. The 2<sup>nd</sup> & 3<sup>rd</sup> respondents submitted that the document is not proof of citizenship and cannot therefore be used in isolation to register one as a voter for the purposes of an election.
96. Faced with this issue, the Supreme Court of Ghana in the case of National Democratic Congress v Attorney General and Another (J19 of 2020) [2020] GHASC 25 held:

We find no merit whatsoever in the 2<sup>nd</sup> Defendants' contention. It flies in the face of article 42 of the Constitution and the decisions of this court in Abu Ramadan (No 1), supra and Abu Ramadan (No 2) supra. A birth certificate is not a form of identification. It does not establish the identity of the bearer. Nor does it link the holder with the information on the certificate. Quite obviously, it provides no evidence of citizenship. It therefore does not satisfy the requirements of the article 42 of the Constitution. In fact, as a form of identification, it is



worse than the NHS card which was held to be unconstitutional as evidence of identification of a person who applies for registration as a voter in Abu Ramadan (No 1), supra and Abu Ramadan (No. 2) supra.

97. My finding is that a birth certificate cannot be used to register one as a voter as explained by the respondents. It does not have all the necessary details.

**ii. Whether a single database should be used to transact all affairs affecting citizens**

98. The petitioner submitted that there is need to use a single database of citizens in all official transactions as this will ensure that the true number of registered voters is known it will ensure an accurate register of voters. Having a single database of citizens will ensure a credible principal voter registration mechanism. It will further guarantee that even those who become of age are automatically registered as voters even before they obtain an ID or a passport.

99. The 1<sup>st</sup> respondent averred that the question of consolidation of data basis is not one of the functions allocated to it under the law. It noted that the process commenced when parliament passed into law the Statute Law (Miscellaneous) Amendment Act No. 1 of 2018 by which it amended the Registration of Persons Act to include the National Integrated Identity Management System (NIIMs). The enactment of NIIMs was declared unconstitutional hence the prayer is overtaken by events.

100. I agree with the 1<sup>st</sup> respondent that going by the decision in Republic v Joe Mucheru, Cabinet Secretary Ministry of Information Communication and Technology & 2 others Ex parte Katiba Institute & Another; Immaculate Kasait, Data Commissioner (Interested Party) [2021] eKLR the issue of a single database has been overtaken by events. Secondly, it is not the mandate of the respondents to consolidate databases or enact laws for the consolidation of the same.

101. Regarding the issue of costs, Rule 26 (1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, provides that the award of the costs is at the discretion of the Court. Sub Rule (2) provides that in exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms.

102. Having considered all the material before me and upon doing the above analysis I find that the petitioner has failed to prove a case for issuance of any of the reliefs sought.

The upshot is that the petition lacks merit and is dismissed.

103. The petitioner really tried to represent public interest. I therefore order each party to bear its own costs.  
Orders accordingly.

**DELIVERED, VIRTUALLY, DATED AND SIGNED THIS 27TH DAY OF JULY 2022 IN OPEN COURT AT MILIMANI, NAIROBI.**

**H. I. ONG'UDI**

**JUDGE OF THE HIGH COURT**

