



**Muema v OCS, Langata Police Station & 4 others (Constitutional Petition EO89 of 2021)
[2022] KEHC 13194 (KLR) (Constitutional and Human Rights) (30 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13194 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION EO89 OF 2021**

AC MRIMA, J

SEPTEMBER 30, 2022

BETWEEN

KENNEDY MUEMA PETITIONER

AND

OCS, LANGATA POLICE STATION 1ST RESPONDENT

OCS, AKILA POLICE STATION 2ND RESPONDENT

CHARLES NDETO 3RD RESPONDENT

LILLIAN MUMBUA MUNYWOKI 4TH RESPONDENT

ATTORNEY GENERAL OF KENYA 5TH RESPONDENT

JUDGMENT

Introduction:

1. The petitioner herein, KM, and the 4th respondent herein, LMM, were married on 16th June, 2017 and had since then lived together in the premises known as House No xx, Elaganze Gardens Estate located in South C in Nairobi City County within the Republic of Kenya (hereinafter referred to as ‘the suit property’).
2. The spouses lived in the suit property until the occurrence of the subject events in this petition.
3. Resulting from the said events, the petitioner moved to court alleging infringement of his rights and fundamental freedoms and sought various reliefs against the respondents.
4. The petition was only, but vehemently opposed by the 4th respondent.



The Petition:

5. The petition is dated January 22, 2021. The petition was supported by an evenly dated supporting affidavit and an undated supplementary affidavit both sworn by the petitioner.
6. The petition was further supported by written submissions dated July 2, 2021.
7. It was the petitioner's case that he was the legal owner of the suit property.
8. He deposed that sometime around the January 6, 2021 the respondents, save for the 5th respondent, illegally trespassed into the suit property and forcefully removed the main door in order to gain access. As a result, the petitioner further deposed that the suit property was vandalized.
9. The petitioner's contention was that the illegal entry into the suit property took place in his absence and without any notice to him. He further contended that the said respondents lacked any court order authorizing their impugned actions thereby amounting to trespass, invasion of privacy and damage to private property. As a result, the petitioner alleged to have been psychologically disturbed.
10. Further, that the petitioner averred that he was denied access to the suit property and also to his personal and business belongings which remain therein. Resultantly, the petitioner alleges to have been forced to be homeless and destitute and had to find alternative accommodation despite owning the suit property.
11. The petitioner, however, conceded that there was a civil suit between himself and the 4th respondent, being Civil Suit Number E6442 of 2020, where the court had issued some orders. However, the petitioner posited that the orders never included any breaking and entering authorization.
12. It is further posited that the petitioner's counsel intimated to the 3rd respondent herein the need to abide by and obtain court orders prior to any intended entry into the suit property, but the respondents heeded not to the intimation.
13. To that end, the petitioner posited that the respondents' actions were illegal and unlawful, thus in violation of his right to equal protection in law, infringement of his liberty, violation to his right to acquire and own property, contravention of fair administrative action and infringement of his freedom of movement.
14. The petitioner also deposed to divorce proceedings between him and the 4th respondent including instances where the 4th respondent left the suit property without the petitioner's knowledge.
15. It was also deposed that the petitioner was on a business trip at the time of the illegal entry into the suit property, which property he had left locked. He further contended that after the respondents gained forceful entry into the suit property, the 4th respondent did not reside in it but left to unknown destination.
16. The petitioner maintained that on his return, and in compliance with a court order, he opted to provide the 4th respondent with an alternative accommodation at kshs 10,000/=, an offer which the 4th respondent declined and insisted on returning to the suit property despite the 4th respondent having obtained a court order restraining the petitioner from nearing her.
17. The petitioner stated that he acquired the suit property long before marriage and thus it does not form part of matrimonial property. He further deposed that the 4th respondent owns a separate house in Woodley Estate and, therefore, her claims of destitution and homelessness are misleading to the court. Thus, that the 4th respondent is in court with unclean hands while bearing malice and misrepresentation.



18. Flowing from the above and in the main, the petition sought for orders that: -
- i. There be a declaration that the petitioner's fundamental rights and freedoms under articles 20(1) (2, 22, 23, 27, 40, 47 & 50 of the *Constitution of Kenya*, 2010 at all material times had been and were repeatedly contravened and grossly violated by the respondents.
 - ii. A declaration that the petitioner is entitled to the payment of damages as compensation for gross violations and contraventions of their fundamental rights and freedoms under the aforementioned provisions of the Constitution of Kenya, 2010.
 - iii. General damages, exemplary damages under article 23(3) of the *Constitution of Kenya* 2010, for the unconstitutional conduct of the government of Kenya, and its agents and/ or servants.
 - iv. A declaration that the 1st to 4th respondents be held personally liable for violation of the petitioner's fundamental rights and freedoms under the aforementioned provisions of the Constitution of Kenya 2010.
 - v. A declaration that the 1st to 4th respondents be held personally liable for damages for illegally trespassing onto the petitioner's private property and causing damage to private property belonging to the petitioner herein.
 - vi. Any further orders, writs, directions as this honourable court may consider appropriate.
 - vii. Costs of the petition.
 - viii. Interest
19. In his written submissions, the petitioner presented three issues for determination. They are whether the petition met the precision threshold, whether the petitioner's rights and fundamental freedoms were infringed and, therefore, entitled to the orders sought and who should pay the costs of the petition.
20. Submitting on the first issue, the petitioner argued that the instant petition qualifies as a competent constitutional petition since it referred to articles 20(1), (2), 22, 23, 27, 40, 47 and 50 of the *Constitution*. That, the petitioner also illustrated the locus to institute the petition and that the petitioner had demonstrated violation and infringements of his rights and freedoms. Reliance was placed on the case of *Anarita Karimi Njeru v The Republic* (1979) KLR.
21. On the second issue, the petitioner asserted that his rights and fundamental freedoms were violated and infringed upon as guaranteed under articles 20 (1), (2), 22, 23 – on Bills of Rights; article 27 - Equality and Freedom from Discrimination; article 40 – on Protection of Right to Property; article 47 – on Fair Administrative Action; and article 50 – on Fair Hearing of the *Constitution*.
22. The petitioner asserted that he had been discriminated against in light of deprivation of his property in disregard to article 40 of the *Constitution*. That, his right to fair administrative action and the right to fair hearing were infringed upon by the respondents - when they broke/trespassed into his premises and the destruction of his property; that all actions of the respondents are extra-judicial.
23. The petitioner posited that he deserved to be compensated under article 23(3)(e) of the *Constitution* for the violations and infringement against him. Also, that an additional award ought to be granted so as to serve as deterrence in disregarding one's rights and fundamental freedoms. He relied on Kajiado High Court Constitutional Petition No 14 of 2017 (formerly Nairobi High Court petition No 533 of 2016) *Mohamed Feisal & 19 others v Henry Kandie, Chief Inspector of Police, OCS Ongata Rongai*



Police Station & 7 others, where the court cited with approval the words of Lord Nicholls at paragraph 18 and 19 in the Case of Siewchand Ramanoop v The AG of T&T, PC Appeal No 13 of 2004.

24. For the quantum of the compensation, the petitioner cited Daniel Waweru Njoroge & 17 Others v Attorney General [2015] eKLR, where the court held that:

On quantum of damages the court has to bear in mind the following cardinal principles in the assessment of damages namely: -

- i. Damages should not be inordinately too high or too low.
 - ii. Should be commensurate to the injury suffered.
 - iii. Should not be aimed at enriching the victim but should be aimed at trying to restore the victim to the position he was in before the damage was suffered.
 - iv. Awards in past decisions are mere guides and each case depends on its own facts.
25. On the third issue, the petitioner submitted that it is trite law for costs to follow the events. In that regard, the respondents should bear the cost of the suit. He also cited section 27 of the Civil Procedure Act and also relied on Peter Muriuki Ngure v Equity Bank (K) Ltd [2018] eKLR.
26. The petitioner submitted that his petition ought to be allowed as prayed.

The 4th Respondent's case:

27. As stated above, the petition was opposed by only the 4th respondent herein whom I will also alternatively refer to as 'L'.
28. Opposing the petition, the 4th respondent filed a replying affidavit she swore on April 26, 2021. L also filed written submissions dated September 24, 2021.
29. L pleaded that she travelled out of the country with the consent of the petitioner in seeking In-Vitro Fertilization (IVF) technology. She attached as evidence, a copy of text message between them on the issue.
30. That the 4th respondent was away from October 30, 2020 to November 6, 2020. On her return she was unable to access the matrimonial home, as the door locks were changed by the petitioner, while she was away.
31. According to the 4th respondent, while she was away, the petitioner engaged a moving company to take away her belongings from their matrimonial home. That, this has led the 4th respondent being deprived of her personal belongings as the same were not availed to her when she returned.
32. L posited that since her business failed due to Covid-19 effects, the petitioner has been the one supporting her financially. As such, she deposed that she lacked means to meet her financial needs without the support of her estranged husband, the petitioner.
33. It was pleaded that since the petitioner was non-supportive, L moved to court through MCCC/E6422/2020 LMM v KM and Nellions Moving and Relocations Ltd (hereinafter referred to as 'the Civil suit') in seeking re-entry to their matrimonial home or she be given alternative suitable accommodation by the petitioner herein and for return of her personal effects. That, in being granted the orders, order 5 authorised Officer Commanding Station (OCS), Akila police station to ensure compliance of the order granted by court.
34. L further that the court in the civil suit issued the following orders: -



1. That pending the hearing and determination of this suit, a temporary injunction be and is hereby issued restraining the 1st respondent herein either by himself, his servants or agents from abusing the applicant physically, economically, emotionally, verbally or psychologically and/or insulting, ridiculing, and issues threats of whatever nature by any means to the applicant.
 2. That pending the hearing and determination of this suit, the 1st respondent be and is hereby compelled to forthwith allow the applicant to gain re-entry into their shared residence at Eleganze Gardens Estate, house number xx, South C or in the alternative the 1st respondent to provide the applicant with an alternative and conducive accommodation consistent with the applicant's standards of living and to release the applicant's personal property currently in their shared residence.
 3. That pending the hearing and determination of this suit, the 1st respondent, his agents or duly authorized representatives be and is hereby barred from interfering, tampering, entering or being in close proximity with the applicant, her place of residence and her work.
 4. That the 2nd respondent, Nellions Moving and Relocations Ltd be and is hereby ordered to immediately release to the applicant all her personal belongings to be delivered at their home in Eleganze Gardens South C or to the alternative accommodation that the 1st respondent will provide and for the 1st respondent to pay for all expenses relating to the return and delivery of her belongings.
 5. that the Officer Commanding Station, Akila police station be and is hereby ordered to ensure compliance of the above orders.
35. The 4th respondent contended that it was the petitioner who ignored the court orders and instead moved to this court with unclean hands.
 36. The 4th respondent claimed that she was a victim of all the allegations brought by the petitioner in the instant petition. She affirmed how her re-entry into the suit property complied to court orders, denies trespassing on the suit property and also denies destroying any properties. She alleged that it is the petitioner who has destroyed the property in an effort to make the suit property inhabitable for her so that she may move out.
 37. The 4th respondent posited that the petitioner is not homeless as he alleges, but in his own admission in the divorce proceedings, he has another home in Great Wall Gardens, Athi River - where he currently resided.
 38. Further, in opposing the petition, the 4th respondent in her submissions formulated three issues for determination. The issues are whether the 4th respondent infringed the petitioner's rights, whether the petitioner is entitled to the orders sought and who should pay the costs of the suit.
 39. Submitting on the first issue, the 4th respondent denied infringing on any of the petitioner's rights. She submitted that she resulted to going to court, where she got favourable orders, after the petitioner denied her entry into the suit property. Compliance was enforced by the 2nd respondent, and thus their actions and her re-entry was legally sanctioned.
 40. As for allegations of violations of article 20(1), (2), 22 and 23 of the *Constitution* by the petitioner, the 4th respondent contended that the same had not been proved by the respondent. That, the said articles do not grant rights capable of violation, but give life to the Bill of Rights. That, therefore, no rights can be violated thereunder.



41. On infringement of article 27 of the Constitution, the 4th respondent stated that the petitioner alleged that their actions resulted in discrimination against him. However, that he failed to prove any discrimination. The 4th respondent submitted that it was trite law for an act to amount to discrimination, it ought to base on differential treatment on a ground as provided by article 27 of the Constitution. Reliance is placed on the case of Reuben Njuguna Gachukia & another v Inspector General of the National Police Service & 4 others [2019] eKLR.
42. For article 40 of the Constitution, the 4th respondent contended that whereas the petitioner claimed trespass, property damage and being rendered homeless by the respondents which violated his rights under the Constitution, L maintained that her re-entry into the matrimonial home was legally sanctioned by the court order and was done without damage, trespass or breaking into the suit property. The 4th respondent in her submissions reiterated that the petitioner is culpable of the very things he is alleging against her.
43. It was further contended that the petitioner had merely alleged violation of his rights without tendering any evidence illustrating how acquisition or ownership was violated. section 107 and 109 of the Evidence Act and the case of Phelista Mukamu Makau v Elizabeth Kanini Mulumbi [2015] eKLR where the court referred to the court's ruling in Janet Kaphiphe Ouma & Another v. Marie Stopes International (Kenya) HCCC No 68 of 2007 were relied upon in disputing the petitioner's contention.
44. It was the 4th respondent's submissions that the petitioner's rights under article 40 of the Constitution were not infringed upon by the respondents. Further, the 4th respondent submitted that the suit property is matrimonial property; for the petitioner and the 4th respondent. Section 6(1) of the Matrimonial Property Act, 2013 was cited.
45. The 4th respondent conceded that the title to the suit property was in the petitioner's name, but contended that the same is their matrimonial home in accordance to Matrimonial Property Act, 2003. Also, reliance was placed on article 45(3) of the Constitution. It was submitted that as a result the 4th respondent has every right to the suit property as the petitioner does.
46. Regarding alleged violation of article 47 of the Constitution, the 4th respondent contended that she is not a public officer and thus not possible to have violated the said article. She identifies as a private individual.
47. On article 50 of the Constitution being violated, the 4th respondent submitted that the petitioner herein, was and is being accorded a fair hearing in the civil suit which matter is still pending in court. It was also averred that the petitioner was an active participant in that case and as such, the petitioner had failed to provide evidence of such violations.
48. On the second issue, the 4th respondent submitted that since the petitioner has failed to demonstrate/ prove any violation of his rights by the 4th respondent, the instant petition ought to fail.
49. On the third issue, as to costs, the 4th respondent contended that the petitioner should bear the costs for his failure to establish his case in this petition.

Issues for Determination:

50. After examining the pleadings, affidavits and submissions on record, this court formulated the following as issues for determination: -
 - i. Whether the petition attained the precision threshold.



ii. In the event issue (i) is answered in the affirmative, whether the petitioner's rights and fundamental freedoms were infringed, if so, whether the petitioner is entitled to the orders sought.

iii. Costs.

51. This court will deal with each of the issues in seriatim.

Analysis and Determination:

a. Whether the petition attained the precision threshold:

52. As a matter of principle, constitutional petitions must be pleaded with some measure of precision and specificity as what provision of the Constitution has been violated and in what manner.

53. The foregoing requirement finds credibility in the fact that a respondent needs to know the violation one is accused of and manner of violation so as to be in a position to respond. That goes to the heart of fair trial.

54. The foregoing was fittingly captured in in Miscellaneous Criminal Application 4 of 1979, *Anarita Karimi Njeru v Republic* [1979] KLR where the court observed as follows: -

... 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...

55. In Constitutional petition No E265 of 2021, *Kenya Medical Practitioners, Pharmacists and Dentists' Union v University of Nairobi & another* [2021] eKLR, the court discussed the need for precision in approval to the precedent in Anarita Karimi decision and observed as follows: -

87. The foregoing finding (Anarita Karimi Njeru) received endorsement from the Court of Appeal in Nairobi Civil Appeal No 290 of 2012, *Mumo Matemu v Trusted Society of Human Rights Alliance* when the Learned Judges remarked on the importance of compliance with procedure under article 159 of the *Constitution*, the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* and need for precision in framing issues in constitutional petitions. It was observed thus: -

(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.

88. The Learned Judges further bolstered the foregoing finding by making reference to the decision of Jessel, MR in *Thorp v Holdsworth* (1876) 3 Ch D 637 at 639 where he made the following findings: -



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

89. In making a finding that the High Court was right in its assessment that the petition before it had not been drafted with the necessary precision, the Learned Appellate judges reaffirmed the Anarita Karimi Njeru principles and made the following findings: -

(43) The petition before the High Court referred to articles 1, 2, 3, 4, 10, 19, 20 and 73 of the *Constitution* in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars.

(44) We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting,” without requiring remedy by the 1st respondent.

56. The apex court has, as well, discussed the issue. That was in *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others* [2014] eKLR where the court stated as follows: -

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

57. Further, in *Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 others* [2018] eKLR the Supreme Court emphasized the need for precision as follows: -

(48) Consequently, it is our determination that where a party in an election petition invokes this court’s jurisdiction under article 163(4)(a) of the *Constitution*, it is not enough for one to generally allege that the Court of Appeal erred in its decision(s) and that its reasoning and conclusions took a constitutional trajectory. The constitutional trajectory stated by this



honourable court is not illusionary. It is tangible and should be discernable from a party's pleadings. A party is under a constitutional forensic duty to clearly set out the particulars of the constitutional transgressions that in his/her opinion the Court of Appeal committed in their interpretation and/or application. Those grounds must be pleaded with precision and the constitutional principle and/or provision alleged to have been violated clearly set out.

58. Having laid out the foundation for lodging constitutional petitions, this court will now interrogate how the instant petition squares with the established principles.
59. The petition has 5 parts. They are the description of the parties, the locus of the petitioner, the petitioner's case against the respondents, the grounds on which the petition is founded and the remedies sought.
60. The petitioner variously elaborates the constitutional provisions violated and the manner of violation.
61. Without much ado, this court finds that the petition is clear on what is alleged to have been violated and the manner of the violations. The constitutional provisions alleged violated are also apparent in the petition.
62. Resulting therefrom, it is this court's finding that the petition passes the precision test.
63. With such a finding, a consideration of the second issue follows.

b. Whether the petitioner's rights and fundamental freedoms were infringed, if so, whether the petitioner is entitled to the orders sought:

64. Further to drafting a petition to the required precision threshold, a party is still under a duty to prove the averments in the petition.
65. The practice and procedure in constitutional petitions is further provided for under The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) *Practice and Procedure Rules*, 2013 (hereinafter referred to as 'the Mutunga Rules').
66. Rule 20(1) of the Mutunga Rules is on the manner in which constitutional petitions ought to be heard. Such petitions may be heard by way of affidavits or written submissions or oral evidence. Rule 20(3) of the Mutunga Rules provide 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.
67. 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.
68. 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.



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.

69. The burden of proof on a petitioner in a constitutional petition was addressed by the Supreme Court in *Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others* case (supra).

70. This court has carefully considered the petition and the averments therein. It has as well perused the affidavits. The petition was heard by way of reliance on affidavit evidence and written submissions.

71. There is no doubt that the court in the civil suit issued orders. The orders are captured above. The orders granted the 4th respondent access into the suit property. There was a further order directed to the police. The order stated as follows: -

That the Officer Commanding Station, Akila police station be and is hereby ordered to ensure compliance of the above orders.

72. This court is aware that it is not called upon to interpret the orders in the civil suit. Any party wishing to contest the said orders including whether they were properly executed cannot run to this court, but to the court that issued the said orders.

73. Given that the acts complained of by the petitioner were undertaken on the basis of a court order, then unless it is proved that there were no such orders or that the orders were executed contrary to the directions of the court, the allegations of infringement of the petitioner's rights and fundamental freedoms does not arise.

74. Further, in this matter, the petitioner alleged that his rights and fundamental freedoms under articles 20(1), (2), 22 and 23 of the *Constitution* were infringed. Surprisingly, the said provisions of the Constitution cannot be alleged to have been infringed. Those are general provisions relating to the Bill of Rights.

75. There was also the allegation that articles 27, 40, 47 and 50 of the *Constitution* were infringed.

76. article 27 provides for the right to equality and freedom from discrimination. The petitioner did not demonstrate how complying with a court order infringed that right. Compliance of a court order upholds the rule of law and is in line with article 10(2)(a) of the *Constitution*.

77. Article 40 of the Constitution is on protection of the right to property. Again, the petitioner did not prove how complying with a court order ran contra the property rights. Further, the property rights are subject to many other rights including those in article 45(3) of the *Constitution* and the law.

78. Article 47 of the Constitution is on fair administrative action. Section 2 of the *Fair Administrative Action Act*, No 4 of 2015 defines an 'administrative action' as follows: -

"administrative action" includes—

- (i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
- (ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

79. The actions complained of in the petition were precipitated by orders of a court. From the reading of article 47 of the Constitution and the provisions of the *Fair Administrative Action Act*, court orders



do not fall under the category of administrative actions. Therefore, the invocation of article 47 of the Constitution in the circumstances of this matter is misplaced.

80. Article 50 of the Constitution is on fair hearing. There is no iota of evidence on how this provision was infringed or at all. The contention, therefore, fails.
81. The upshot is, hence, that none of the alleged violations of the Constitution are proved and the petitioner is not entitled to any of the prayers sought. As such, the issue is answered in the negative.

c. Costs:

82. The standing rule on costs is that costs follow the event. There are, however, exceptions to the rule depending on the discretion of a court. In exercising the discretion, the court would ordinarily take into account the nature of the petition, the conduct of the parties, the extent of effort applied into the matter, the timing of the withdrawal, financial resources the respondents applied in defending the petition, whether the petition is a *SLAPP* or a public interest litigation, among many other considerations. (See: *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another* [2016] eKLR.
83. In this case, the petitioner was well aware of the existence of the court order. Whereas he was opposed to the manner the orders were allegedly executed, he did not return to the court that issued the orders and raised his complaints. That was the appropriate court to decide on whether its orders were properly executed or not. Once the court expressed itself on the issue and still the petitioner remained unsatisfied, then the petitioner would rightly exercise his other options in the matter. Instead, the petitioner coined his complaints in the language of the Bill of Rights so as to gain entry into this court. He in fact put the cart before the horse. That amounts to an abuse of the court process.
84. As a result, the petitioner ought to shoulder the costs of the suit.

Disposition:

85. Flowing from the above discussion, it is clear that the petition is unsuccessful.
86. The upshot is that the following final orders do hereby issue: -
- a. The petition dated January 22, 2021 is hereby dismissed.
 - b. The petitioner shall bear the costs of the petition.
- Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 30TH DAY OF SEPTEMBER, 2022.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Haggai holding brief for Mr. Lusiola, Learned Counsel for the petitioner.

Miss. Muthama, Learned Counsel for the 4th respondent.

No appearance for the 1st, 2nd, 3rd and 5th respondents.

Kirong/Benard – court Assistants.

