



**Onguti v Nyaanga & 5 others (Petition 279 of 2018)
[2022] KEHC 13177 (KLR) (Civ) (30 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13177 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

PETITION 279 OF 2018

AC MRIMA, J

SEPTEMBER 30, 2022

BETWEEN

EDWIN MOTARI ONGUTI PETITIONER

AND

GEOFFREY MOGENDI NYAANGA 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT

LAW SOCIETY OF KENYA 3RD RESPONDENT

FRED OKENGO MATIANG'I 4TH RESPONDENT

**MINISTRY OF INTERNAL SECURITY AND CO-ORDINATION OF NATIONAL
GOVERNMENT 5TH RESPONDENT**

ATTORNEY GENERAL 6TH RESPONDENT

JUDGMENT

1. The Petitioner herein, Edwin Motari Onguti, instituted these proceedings on December 10, 2018. He sought inter alia compensation for alleged infringement of his rights and fundamental freedoms.
2. The cause of action is in regard to effecting service of Court documents in relation to a Succession Cause; when it is alleged that his rights were violated.
3. The Petition is opposed.

The Petitioner's case:-

4. The Amended Petition is dated December 10, 2018, filed together with an undated Supporting Affidavit.



5. In further support to the Petition, written submission dated February 25, 2019 were filed by the Petitioner.
6. The Petition was heard by way of reliance on the pleadings, affidavit evidence and written submissions.
7. Mainly, the Petitioner sought orders as following reliefs: -
 - i. That Orders be so issued for the arresting officer from Syokimau Administration Police who arrested the Petitioner Edwin Motari to appear in court and file a report on the circumstances and the conditions the Petitioner was before arrest and the people who were with the Petitioner before the arrest.
 - ii. That Orders be so issued for Corporal Joram Karanja attached to Mlolongo Police Station arraign one Edwin Motari Onguti for plea taking in the Chief High Court Milimani (sic) before Hon. Kimaru who I have Application No. 313 of 2018 on the allegation of Creating Disturbance contrary to section 95 (1) (b) of the Penal Code as per documents issued for release of suspect being Section 52 (2) of the National Police Service Act, No. 11A of 2011.
 - iii. Damages for malicious incarceration at Mlolongo Police Station at the helm of my career of becoming an advocate.
 - iv. Damages for character assassination on incarceration of a Lawyer and former MCA aspirant Bosamaro Ward in year 2017 elections Nyamira County, who has people looking up to him for leadership and clientele.
 - v. Such other Order(s) this honourable court shall deem just.
8. On the 18th October, 2021, parties highlighted their cases. Of interest, the Petitioner stated that it was the 1st Respondent who had instituted a case that led to the Petitioner's arrest and eventual acquittal, because it was all malicious.
9. The Petitioner in his Petition stated that sometimes on 5th June, 2018 he attempted to effect service of Summons for Revocation of Grant - in Succession Cause 102 of 2004 (In the Estate of Nelson Onguti Okindo) filed in Vihiga - to Maureen Kerubo Onguti, her biological sibling and presumed wife to Geoffrey Mogendi Nyaanga in Syokimau.
10. That in his attempt to effect service, he was denied entry into the home of Maureen Kerubo Onguti and the Petitioner proceeded to shout 'con woman' and 'fraudster'.
11. As a result of the said words, that the 1st Respondent, who is an Advocate of the High Court, allegedly attacked and injured the Petitioner his agents, servants and representatives.
12. In the Petition, the Petitioner presented the following issues for determination:
 - a. Whether the petitioner was attacked on the 15th June and robbed at 10.30 am while serving court documents in Succession Cause 102 of 2004 that is pending in Vihiga having been fraudulently lodged and thereafter incarcerated at Mlolongo Police station for 48 Hours without being arraigned in court.
 - b. Who is responsible for the attack of the Petitioner in Syokimau on the 15.06.2018 at the gate where one Maureen Kerubo Onguti the wife of the 1st Respondent.
 - c. Did one Geoffrey Nyaanga Mogendi threaten the Petitioner curtailing his movement within the Republic of Kenya on the allegation that he has money to hire his agents or representative to attack Edwin Motari.



- d. Who is liable for the loss of the Ksh 27,000 OPPO phone valued at Ksh 27,000 and spectacles on a private road under the watch of Administration Police from Syokimau, who thereafter arrested the petitioner and booked him at Mlolongo Police Station.
13. It was the Petitioner's averment that the educated wife of the 1st Respondent had been benefiting secretly from Pension at the expense of other siblings still schooling for a decade, with the knowledge of the 1st Respondent who is an Advocate of the High Court.
14. The Petitioner further averred that the 1st Respondent proceeded to instruct persons with Motor bikes to chase the Petitioner away, robbing him of his valuables; spectacles, Oppo mobile phone and Kshs. 27,000. That he reported the matter to the police vide OB No. 53/08/2018. That all these happenings were done in full glare of the public and outside the front gate of the Respondent's home in Syokimau.
15. The Petitioner contended that he was arrested by Administration Police officers and booked at Mlolongo Police Station. That he spent the night in custody and in the early morning he was released on free bond.
16. The Petitioner pleaded that he failed to report to the police station as required since he was schedule to sit for Advocates Training Programme examinations from the 16th July 2018. That, this was his first attempt after differing five times before due to lack of school fees, as a result of alleged fraud against him in the Succession Cause.
17. The Petitioner submitted to the jurisdiction of this Court and affirmed that the subject matter was not before any other Court.
18. In his written submissions, the Petitioner presented the following set of issues for determination: -
- i. Whether the petitioner was attacked on the 16th June, 2018, robbed at 10. 30 am while serving court documents in Succession Cause 102 of 2004 that is pending in Vihiga having been fraudulently lodged.
 - ii. Who is responsible for the attack of the Petitioner in Syokimau on the 16.06.2018 at the gate where one Maureen Kerubo Onguti the presumed wife of 1st Respondent.
 - iii. Was the plaintiff arrested and incarcerated at Mlolongo Police station for 48 hours.
 - iv. Was the arrest and detention wrongful or unlawful?
 - v. Was the plaintiff subjected to inhuman and degrading treatment, during the said arrest and incarceration?
 - vi. Was the plaintiff charged and arraigned in any Magistrate's Court with the offence of causing disturbance, or any or at all?
 - vii. In what capacity did the said Police officers arrest the plaintiff, and with whose authority?
 - viii. Did the plaintiff suffer injuries as alleged, or at all?
 - ix. Did the plaintiff suffer loss and damage as alleged, or at all?
 - x. Is the plaintiff entitled to the reliefs sought?
19. The Petitioner's cause of action rests on the allegation that the 1st Respondent conspired to defraud the Petitioner of his benefits from the estate of his late father.



20. The Petitioner reiterated his claim as discussed herein above, his school challenges, loss of property, physical attacks on him and his arrest and denial to communication with third parties. He averred that his arrest was wrongful and unlawful and without any reasonable and justifiable cause and completely deprived him of his fundamental rights and freedom enshrined in *the Constitution*.
21. Further, that neither the Boda Boda operators that assaulted him, nor the 1st Respondent who instructed them, were arrested and charged. He asserted that he spent forty-eight hours in police custody and later released on free bond, but he was never arraigned before any Court.
22. The Petitioner claimed that while sitting for his examinations, he had to constantly wash his face since he lacked eye lenses to help him see properly.
23. In claiming damages and compensation as a result of the alleged malicious arrest and incarceration, the Petitioner cited the cases of *Mbowa vs East Mengo District Administration* [1972] EA 352, *Dr. Willy Kaberuka vs Attorney General Kampala* and *Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another* in support.
24. The Petitioner submitted that a successful malicious prosecution claim must satisfy the ingredients as follows: (a). That the prosecution was instituted by the defendant or by someone for whose acts he is responsible. (b) That the prosecution was instituted without reasonable and probable cause. (c). That the prosecution was actuated by malice. (d). That the prosecution was terminated in the plaintiff's favour.
25. For claim of false imprisonment, the Petitioner submitted its meaning by reference to Black's Law Dictionary, 7th Edition, page 459. He pointed out that he had properly made his claim for compensation thorough his amended Petition. He further relied on *Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another*; Nairobi High Court Civil Case No. 661 of 2007 *Jacob Juma & Another vs. The Commissioner of Police & Another*; *Charles Mutero Mwangi and 2 Others Civil suit 696 of 2000*; *Zablon Mwaluma Kadon -Vs National Cereals & Produce Board (2005) eKLR*; and *Josephat Mureu Gibiguta -Vs- Howse & Mc George Ltd eKLR H.C. At Nairobi Civil Case No. 2646 of 1993*.
26. In his claim for exemplary damages, the Petitioner averred that the assessment of damages is a discretionary relief, and sought the Court to award exemplary and aggravated damages, in his favour, on the grounds that he is a Lawyer who has been victim of circumstances despite the tremendous effort he has made in upholding human rights and the rule of law.
27. He cited the Supreme Court of Canada in *Vancouver (City) Vs. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28; *Mwangi Stephen Muriithi Vs. Hon Daniel Arap Moi Nairobi High Court Petition No. 625 of 2006*; *Wachira Weheire Vs. Ag High Court Civil Case No. 1184 of 2003*; *Dominic Arony Amolo Vs. A. G Misc. Application No. 494/03*; *Harun Thungu Wakaba & Others Vs. Ag Nairobi High Court Civil Case No. 1411 of 2004*; *Miguna Miguna Vs. Ag. Petition No. 16 of 2010*; *Dr. Willy Kaberuka vs. Attorney General Kampala HCCS No. 160 of 1993*; and *Thomas Mboya Oluoch & Another vs. Lucy Muthoni Stephen & Another*.
28. The Petitioner prayed that the 1st Respondent be found liable for: Spectacles broken worth Kshs 35,000; Cash amounting to Kshs 27,000; An OPP phone values at Kshs 27,000; Loss of opportunity of using spectacles while sitting for my Advocate Training Program June ,2017 at a value of Kshs 1,000,000 that was slated to start a weeks' time from date of robbery. As against the 6th Respondent, the Petitioner is seeking an award of Kshs 10,000,000.00 for malicious incarceration and undignified treatment at the Police for 48 Hours without being through a trial process.



29. The Petitioner prayed that the Amended Petition be allowed as prayed.

The Responses:

The 1st Respondent's case:

30. The 1st Respondent filed a Replying Affidavit he swore on 16th November, 2020, written submissions and a List and Bundle of Authorities in opposition to the Petition.
31. In the Affidavit, the 1st Respondent dealt with the issues raised in detail and further urged the Court to dismiss the Petition through the submissions.
32. The 1st Respondent averred that the Petitioner had on several occasions resulted to physical confrontational against him and his family. One such incident happened in Milimani Law Court where the Petitioner caused disruptions and was consequently charged for causing disturbance in Criminal Case 1143 of 2019.
33. The 1st Respondent in his submissions formulate the following issues for determination: -
- a. Whether the current petition as drawn meets the legal threshold for a constitutional petition?
 - b. Whether the current petition discloses any reasonable cause of action against the 1st Respondent?
 - c. Whether the Petitioner is entitled to the orders sought in the current petition?
34. On the first issue, the 1st Respondent contended that the Petition had not satisfied the legal threshold to constitute a proper constitutional Petition. That the law requires the Petitioner to specifically state the constitutional provisions that were allegedly infringed, provide clear particulars of the alleged infringement and vividly describe how the Respondent(s) infringed on the said rights. He relied on *Anarita Karimi Njeru v Republic No.1 (1979) I KLR, 54* and *Mumo Matemo v Trusted Society of Human Rights Alliance Civil APP.290/2012 (2013) eKLR* for the position.
35. To the 1st Respondent, the Petition is just a mere allegation and/or complaint that do not amount to any constitutional violations or infringement of rights. That, the Petition is scantily detailed of the particulars of the alleged infringement of right and is unclear on how the 1st Respondent violated the rights of the Petitioner.
36. As a result, it was pleaded that the Petition failed to form a constitutional petition and as such it ought to be struck out.
37. Moreover, the 1st Respondent points out that the Supporting Affidavit to the Petition is undated. As such it contravenes Section 5 of the Oaths and Statutory Declaration Act.
38. The 1st Respondent further submitted that the Supporting Affidavit ought to be struck out and so should the Petition in totality. He relied on the case of *Charles Muturi Mwangi vs Invesco Assurance Co. Ltd (2014) eKLR*.
39. On the attached annexures to the Supporting Affidavit, it was posited that the same were not properly stamped and sealed by a Commissioner for Oaths, the jurat and identification are not in the proper format - contrary to Rules 9 and 10 respectively of the Oaths and Statutory Declarations Rules - which requirements are mandatory. He sought for the annexures to be struck out, relying on *Francis A. Mbalanya vs. Cecilia N. Waema [2017] eKLR*, and *Solomon Omwega Omache & Another v Zachary O Ayieko & 2 others [2016] eKLR*, cases.



40. From the foregoing, the 1st Respondent submitted that the Petition was incurably defective and can neither be saved by the ‘Oxygen Principles’ under civil litigation nor the provisions of Article 159(2) (d) of *the Constitution*. That resultantly, the entire Petition ought to be dismissed or struck out.
41. On the second issue, the 1st Respondent asserted that there were no ties between him and the non-existent constitutional violations against the Petitioner, or reliefs sought against him as the 1st Respondent. It was pointed out that the Petition was mainly seeking relief against the alleged malicious incarceration/prosecution by the police.
42. Therefore, the 1st Respondent maintained that the Petition was scandalous, vexatious and did not disclose any reasonable action against the 1st Respondent; hence that the same should be dismissed. He cited County Council of Nandi vs. Ezekiel Kibet Rutto & 6 Others [2013] eKLR, and DT Dobie & Company vs. Muchina [1982] KLR1 cases in support of his submission.
43. On the third issue, the 1st Respondent submitted that despite no relief being sought against him, nonetheless, he is opposed to the prayers being granted in the instant Petition. His reasons include: that the Petitioner has approached this Court with unclean hands in non-adherence to the maxim of equity - that he who comes to court must come with clean hands. The 1st Respondent pointed out that the Petitioner failed to disclose that he had instituted other suits elsewhere against the 1st Respondent which were frivolous, as so is the instant Petition. Reliance was placed upon John Njue Nyaga v Nicholas Njiru Nyaga & Another (2013) eKLR.
44. While directing the Court to the annexures to his Replying Affidavit, the 1st Respondent submitted that the Petitioner is applying pressure in an effort to extort monies from him.
45. To that end, the 1st Respondent submitted that the Petitioner was not entitled to the prayers sought in the instant Petition and that the instant Petition did not disclose any reasonable action against the 1st Respondent and as such the same ought to be dismissed with costs to the 1st Respondent.

The 4th, 5th and 6th Respondents’ case:

46. In opposing the Petition, the 4th, 5th and 6th Respondents filed Grounds of Opposition dated 25th February 2019 together with a Replying Affidavit sworn by one No. 233979 Joachim Kanganga, the Officer Commanding Station, Mlolongo Police Station, on 9th April, 2021.
47. The following grounds were tendered in opposition to the Petition:
 - a. THAT the Petitioner has not demonstrated which law has been breached by any of the Respondents that would warrant the intervention of this court.
 - b. THAT the Petition does not disclose any constitutional violations by Respondents.
 - c. THAT the Petitioner is abusing the due process of this honourable court as there exists a matter before Hon Kimaru Application No 313 of 2018 on the allegation of creating disturbance / sec 95(1) (b) of the penal which allegations that the petitioner is raising in this petition
 - d. THAT the Petition is malicious in that it is being used by the Petitioner to defeat the cause of justice by unconstitutionally seeking to discontinue a criminal trial without any lawful basis
 - e. THAT this court is asked to determined issues that are already pending before Vihiga law courts in Succession Cause 102 of 2004.
 - f. THAT by adversely mentioning names of officers who are not parties to the instant petition (Geoffrey Nyaaga Mogendi), the Petitioner is engaging in a fishing expedition since the named



officers are strangers to those allegations and they do not have an opportunity to defend themselves and/or rebut the said allegations.

- g. THAT the orders sought by the Petitioner in the main petition are blanket in nature and are couched in casual generalities hence ambiguous and unmerited and the same are without any legal basis.
 - h. THAT the instant Application and the Petition lacks merit, the same are an abuse of the due process of the court and should be dismissed with costs.
48. The 4th, 5th, and 6th Respondent presented the following issues for consideration: -
- a. Fact and Issues not pleaded.
 - b. Whether the Petition raises any constitutional issues to warrant this court's intervention.
 - c. Whether the Petition is merited.
49. On the first issue, the 4th, 5th and 6th Respondents contends that the Petitioner in his submissions introduced fresh facts and issues not raised in his pleadings. The Respondents maintained that it is trite law, that the Petitioner is bound by his pleadings; and as such, the Petitioner's evidence in submissions must be consistent with his pleadings.
50. A comparison of the Amended Petition and Petitioner's submissions was brought to the fore. Points of divergent were highlighted - where allegations were shown to be inconsistent with the pleadings, and also new fresh facts introduced were illustrated. The 4th, 5th and 6th Respondents further submitted that an issue cannot be raised by way of submissions. Reliance is placed on the Indian Supreme Court Case of Arikala Nasara Reddy Vs. Ventaka Ram Neddy Reddygari & Another Civil Appeal No. 5710 – 5711 of 2012 [2014] 2SCR which was approved in the Supreme Court in the Case of Raila Amolo Odinga & Another –vs- Independent Electoral & Boundaries Commission and 2 Others [2017] eKLR.
51. On the second issue, the 4th, 5th and 6th Respondents submitted that the Petition totally failed to specifically and particularly: set out the provisions in *the Constitution* that are alleged to have been violated, and demonstrate how the Respondents have allegedly infringed his rights, respectively. That, on that point by itself, the Petition is bad in law and ought to be dismissed. Reliance is on the case of Anita Karimi Njeru vs Republic (supra).
52. The 4th, 5th and 6th Respondents further submitted that the Petitioner admitted to having been arrested after a complaint against him was made to the police by the 1st Respondent; creating disturbance contrary to Section 95 of the Penal Code Cap 63. To that end, the Respondents maintained that they acted on justifiable cause. That the Petitioner has failed to demonstrate with evidence that his arrest was done out of malice, in bad faith, or that it constituted an abuse of process/police powers.
53. Referring to Section 24 of the *National Police Service Act*, Act No. 11A of 2011, the Respondents asserted that it would be an injustice for the Kenyan police to be condemned for acting on a complaint and performing its duty, unless proved that the arrest was arbitrary and without cause. The case of Abdiwahab Ibrahim Ali & another v Inspector General of the National Police Service & 3 others [2017] eKLR was cited.
54. Further, the 4th, 5th and 6th Respondents submitted that Petitioner's evidence is coupled with serious inconsistencies and discrepancies which discredits the legitimacy of his allegations/claims. The same is illustrated from the Petitioner's Supporting Affidavit and submissions.



55. He who alleges must prove, this is also the 4th, 5th and 6th Respondent's submissions. Further, that all the alleged constitutional infringements must be set out by the Petitioner; and demonstrate existence of constitutional grievance, which ought to form the basis of a constitutional question to be answered by the Court. That, however, in the instant case the Petitioner failed on all those aspects. Resultantly, the petition ought to be dismissed.
56. For the third issue, the 4th, 5th and 6th Respondent's submitted on whether the Petitioner is entitled to the relief sought. The Respondents asserted that the orders sought by the Petitioner in his submissions were inconsistent with the orders pleaded in his Petition. Accordingly, that the Petitioner is bound by his pleadings and on that point, the court should disregard those orders sought in Petitioner's submissions, citing the case of *Abdiwahab Ibrahim Ali (Supra)*.
57. It is the position of the Respondents that for special damages relief, it is trite law that special damages must be specifically pleaded and proved. That the Petitioner has not specifically sought orders of special damages in his Petition, and as such the orders for special damages in his submissions should fail.
58. The Respondents averred that the Petition also constitutes an attempt to seek orders that have an adverse effect in a different matter, before a different trial Court of the same status. Additionally, that it would be unjust for Court to issue orders condemning persons, not party to the suit against, unheard. That the orders sought in the Petition are bad in law and misconceived. They relied on the case of *Henry Kigera Thuo & 2 others v Jackson Maina Mwangi 3 others [2013] eKLR*.
59. It was submitted that the Petitioner has not proven his case against the 4th, 5th and 6th Respondents. That it is openly seen that the Petitioner is simply using the Courts to settle personal scores with the 1st Respondent.
60. The Respondents urged this Court to dismiss the Petition.

Issues for Determination:

61. Having carefully considered the record, this Court finds the following issues arising for determination:
 - a. Whether the Petition is drafted with precision so as to properly invoke the jurisdiction of this Court.
 - b. If the answer to (a) above is in the affirmative, a look at the principles in constitutional interpretation.
 - c. Whether the Respondents' variously violated the Petitioner's rights and fundamental freedoms.

Analysis and Determinations:

a. Whether the Petition is drafted with precision so as to properly invoke the jurisdiction of this Court:

62. It has been contended that the jurisdiction of this Court is not properly invoked in that the Petition is not drafted with precision to as to bring forth substantive constitutional issues for determination.
63. The settled legal position is that jurisdiction goes to the root of a dispute and any dispute resolution purportedly done without jurisdiction is a nullity ab-initio. Any challenge on the jurisdiction of a Court must be addressed as a matter of priority.



64. The various facets of the doctrine of jurisdiction have been the subject of many decisions. Jurisdiction of a Court or tribunal can be impugned on many fronts including the successful raising of the lack of precision on the pleadings.

65. In recent times, in Nairobi High Court Constitutional Petition No. E008 of 2022, Okiya Omtatah Okoiti v Attorney General & another [2022] eKLR, this Court briefly discussed the operational dimensions of the doctrine of jurisdiction. This Court rendered itself thus: -

22. The Court of Appeal in Nakuru Civil Appeal No. 119 of 2017 Public Service Commission & 2 Others vs. Eric Cheruiyot & 16 Others consolidated with Civil Appeal No. 139 of 2017 County Government of Embu & Another vs. Eric Cheruiyot & 15 Others (unreported) in a decision rendered on 8th February, 2022 spoke to the doctrine of jurisdiction in general as follows: -

36. Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in “Words and Phrases Legally Defined”, Volume 3 at Page 113 defines court jurisdiction as follows:

By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

37. The locus classicus on jurisdiction is the celebrated case of Owners of the Motor Vessel “Lillian S’ v. Caltex Oil (Kenya) Ltd [1989] KLR 1. Nyarangi, JA. relying, inter alia, on the above cited treatise by John Beecroft Saunders held as follows:

...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

38. A decision made by a court of law without proper jurisdiction amounts to a nullity ab initio, and such a decision is amenable to setting aside ex debito justitiae.

39. The Supreme Court in the Matter of Interim Independent Electoral Commission [2011] eKLR, Constitutional Application No. 2 of 2011 held that jurisdiction of courts in Kenya is regulated by *the Constitution*, statute, and principles laid out in



judicial precedent. The Supreme Court at paragraph 30 of its decision held in part as follows:

...a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of Legislation is clear and there is no ambiguity.

40. In Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited & 2 others [2012] eKLR, Application No. 2 of 2011, the Supreme Court reiterated its holding on a court's jurisdiction. In the matter of the Interim Independent Electoral Commission (supra) at paragraph 68 of its ruling, the Supreme Court held as follows:

(68). A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.

66. Due to the unique nature of Constitutional Petitions, Courts, since the pre-2010 constitutional era, have variously emphasized the need for clarity of pleadings. I echo the position. *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (commonly referred to as 'the Mutunga Rules') also provide for the contents of Petitions.
67. Rule 10 thereof provides seven key contents of a Petition as follows:

Form of petition.

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

(2) The petition shall disclose the following—

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

68. Rule 10(3) and (4) of the Mutunga Rules also has a bearing on the form of Petitions. It provides as follows: -

- (3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.



- (4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.
69. Rules 9 and 10 are on the place of filing and the Notice of institution of the Petition respectively.
70. The Supreme Court in *Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others* [2014] eKLR had the following to say in the manner in which constitutional Petitions ought to be presented before Court for adjudication: -

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

71. But what is a constitutional issue? In *Fredricks & Other vs. MEC for Education and Training, Eastern Cape & Others* (2002) 23 ILJ 81 (CC), the South Africa Constitutional Court, rightly so, delimited what a constitutional issue entails and the jurisdiction of a Constitutional Court as follows: -

The Constitution provides no definition of ‘constitutional matter’. What is a constitutional matter must be gleaned from a reading of *the Constitution* itself: if regard is had to the provisions of... Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with *the Constitution*, as well as issues concerning the status, powers and functions of an organ of State.... the interpretation, application and upholding of *the Constitution* are also constitutional issues. So too is the question of the interpretation of any legislation or the development of the common law promotes the spirit, purport and object of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of *the Constitution*, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly on extensive jurisdiction...

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

... When determining whether an argument raises a constitutional issue, the Court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the Court to consider constitutional rights and values...



74. Whereas it is largely agreed that *the Constitution* of Kenya, 2010 is transformative and that the Bill of Rights has been hailed as one of the best in any Constitution in the world, as Lenaola, J (as he then was) firmly stated in *Rapinder Kaur Atal vs. Manjit Singh Amrit* case (supra) ‘... Courts must interpret it with all liberation they can marshal...’
75. This Court has perused the Amended Petition. The pleading misses out key parts. In particular, the constitutional provisions alleged violated are not provided, the legal foundation of the Petition is missing, the nature of injury suffered is not disclosed and the manner in which the Respondents are alleged to have infringed upon the rights and fundamental freedom of the Petitioner are not clearly set out.
76. It is this Court’s position that the Petition failed to fully comply with Rule 10 of the Mutunga Rules as well as the requirements in Communications Commission case (supra). In such instances, the Respondents are hard-pressed to properly respond to such a pleading. That infirmity goes to the essence of a fair trial as encompassed in Article 50(1) of *the Constitution*.
77. In the premise, the fairest order is to acknowledge that the Petition suffered a false start. The Petition cannot be allowed to be prosecuted as it is since it fails to properly invoke the jurisdiction of this Court.
78. As the first issue is answered in the negative, this Court finds no legal basis to deal with the other issues herein since it is called upon to down its tools.

Disposition:

79. As I come to the end of this judgement, I must profusely apologize for the late delivery of this decision. The delay was mainly occasioned by the number of election-related matters which were filed in the Constitutional and Human Rights Division from December 2021. From their nature and given that the country was heading to a General election, the said matters had priority over the rest, hence, the delay.
80. Drawing from the foregoing, the upshot is that the Petition is hereby struck out with costs.
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:

Edwin Motari Onguti, the Petitioner in person.

Mr. Mbaabu, Counsel for the 1st Respondent.

Mr. Muiruri, Counsel for the 3rd Respondent.

Miss Mwasao, Counsel for the 4th, 5th and 6th Respondents.

Kirong/Benard – Court Assistants.

