



Consumer Federation of Kenya v Toyota Motors Corporation & 4 others (Petition 455 of 2018) [2022] KEHC 15459 (KLR) (Constitutional and Human Rights) (18 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15459 (KLR)

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

PETITION 455 OF 2018

HI ONG'UDI, J

NOVEMBER 18, 2022

BETWEEN

CONSUMER FEDERATION OF KENYA PETITIONER

AND

TOYOTA MOTORS CORPORATION 1ST RESPONDENT

TOYOTA KENYA LTD 2ND RESPONDENT

TSUSHO CAPITAL LTD 3RD RESPONDENT

KENYA BUREAU OF STANDARDS 4TH RESPONDENT

ARVINDER SINGH REEL 5TH RESPONDENT

JUDGMENT

1. The petition dated December 14, 2018 was filed under articles 10, 22, 23, 35, 46, 156, 165, 231, 232 and 258 of Constitution. Accordingly, the petitioner seeks the following orders:
 - i. A declaration order that the actions of the respondents contravene the provisions of the Constitution under Articles 10, 22, 23, 35, 41, 43, 46, 156, 165, 232 and 258 and thus contravened the rights and freedoms of the petitioner and members of the public.
 - ii. A mandatory injunction to produce an independent assessment of the chassis of the said KCG 516G to determine that the modified 28-seater could not carry the weight of the body of a 33-seater without causing tyre bursts, brake failures among other defects.
 - iii. A prohibitory injunction proscribing the 4th respondent from such risky modifications of the chassis and enforce the new standards in line with the 1st respondent standards.



- iv. An order of compensation to the petitioner's members for any losses incurred by the 1st respondent over the breach of law.
- v. An order of structural interdict for this honourable court to supervise compliance with its orders.
- vi. Any other relief the court deems fit to grant.
- vii. Costs of this application be borne by the respondent.

The Petitioner's case

2. This petition is supported by Stephen Mutoro, the petitioner's chairman affidavit in support of even date and grounds on the face of the petition. The petition was further supported by the witness statements of Paul Njuguna Wainaina and Catherine Nyambura Njuguna dated December 13, 2018. Similarly the further supplementary affidavit dated November 9, 2021 is in support.
3. For context, the background of this case as captured in Paul Njuguna Wainaina and Catherine Nyambura Njuguna sworn joint witness statement is that they purchased a Hino 300 bus registration number KCG516G on February 11, 2016 from the 2nd respondent's Hino Division for commercial use.
4. The agreed purchase price of Ksh.4,800,000/= for the vehicle was paid by a deposit of Ksh.2,000,000/= and the balance paid using a finance facility from the 3rd respondent as recommended by the 2nd respondent. The monthly installments of the finance facility were to be Ksh.76,702/= and to be paid as from April 3, 2016.
5. They deposed that the body of the motor vehicle was completed by Skyline Holdings. They started operating the vehicle soon thereafter along the Kasarani, Nairobi Route. That barely weeks later, the vehicle started having mechanical problems and almost caused a fatal accident due to brakes failure. They noted that this happened despite their continual maintenance of the vehicle as per the required standards.
6. It is deposed that the 2nd respondent (Hino Division) recalled the vehicle a number of times and undertook major repairs on the braking and gear box system. Likewise the wheels which were also faulty were replaced. They deposed that at all times they engaged the 2nd respondent in good faith and had a legitimate expectation that it would be honest in its dealings and offer them value for their investment. On their part they dutifully met their contractual obligations to the 3rd respondent until the motor vehicle started having mechanical problems since they struggled financially to raise the monthly installments.
7. Aggrieved they contacted the 2nd respondent on October 2017 over the matter. In the meeting held with the 2nd respondent's manager (Hino Division) it was agreed (gentleman's agreement) that the 2nd respondent would overhaul the body of the vehicle and provide a substitute vehicle to ensure that they continue their payments to the 3rd respondent in that period. This agreement was not honoured because the 3rd respondent came and repossessed the vehicle from the 2nd respondent's garage on 16th October 2017 without notifying them.
8. From the grounds in the petition it is shown that the 2nd respondent failed to make a formal disclosure to the members of the public that they were modifying the 28 seater Hino 300 bus into a 33 seater bus which in essence made the weight of the motor vehicle heavier than the chassis. This was not supposed to be done by the 2nd respondent but the 1st respondent since it is not a licensed manufacturer of chassis.



9. It was further noted that the 2nd respondent had failed to disclose that the said motor vehicle fell within the scope of the vehicles that were recalled for manufacturer defects. As such the petition was premised on the assertion that the 2nd respondent failed to provide sufficient information to the public hence acting in contravention of article 35 and 46(1)(b) of the Constitution.
10. Stephen Mutoro's affidavit reiterated the stated facts. He added that on November 13, 2018 the petitioner's members, Paul Njuguna Wainaina and Catherine Nyambura Njuguna who were joint owners of the said Motor Vehicle wrote to the 2nd respondent through its agent Hino Motors who sent a reply on November 16, 2018. In the response, Gerald J. Muli, the General Manager invited the petitioner for a meeting which was held on November 20, 2018. It is deposed that the 2nd respondent agreed it would inform the petitioner on the way forward with regards to compensation for the members.
11. He deposed that the 2nd respondent at the meeting concealed material information on the record of service of the motor vehicle and the job cards signed by the petitioner's members. He deposed that in view of the grounds and averments made herein the 2nd respondent could not pass responsibility of a defective motor vehicle to its members and neither could the 2nd respondent ascertain the alleged improper use of the said motor vehicle on the part of the petitioner's members.
12. With reference to the 3rd respondent, he deposed that the 2nd respondent conspired with the 3rd respondent to have the said motor vehicle repossessed from the 2nd respondent's garage 2 days ahead of the agreed 14 days default without notifying the petitioner's members. Furthermore, that the 3rd respondent failed to drop lending rates from 22% to 14% even after the Banking (Amendment) Act became law in 2016 which affected its members. To this end, the petitioner deposed that it was just that the affected petitioner's members be refunded their Kshs.2,000,000/= deposit and compensation of Kshs.5,000,000 in lost revenue with effect from October 5, 2017. Moreover they demanded that the 2nd respondent clear the 3rd respondent claims and further compensate the petitioner's members a further Ksh.1,100,000/= for consequential losses.
13. In the supplementary affidavit it was deposed that the 2nd respondent is a subsidiary of the 1st respondent. Additionally, that the HINO buses had major mechanical problems causing the 1st respondent to place an international recall of these buses in a number of jurisdictions.

The Respondents' case

The 1st Respondent's Case

14. The record reflects that the 1st respondent did not participate in these proceedings.

The 2nd and 5th Respondents' Case

15. The 2nd and 5th respondents' in response to the petition filed a replying affidavit dated May 9, 2019 and a further affidavit dated May 12, 2022 all sworn by the 5th respondent. He averred that the petitioner was not vested with the requisite locus standi to institute the instant suit. Likewise, that the petition did not disclose a prima facie constitutional issue. He additionally averred that his personal joinder in the suit was misconceived and in bad faith as the 2nd respondent is a company with legal capacity to sue and be sued.
16. He deposed that there was a pending product liability suit that raises similar issues before the Commercial and Admiralty Division of the High Court being HCCC No.231 of 2017 – Martin Mwangi Njoki & 10 others v Toyota Kenya Limited & 4 others. It was deposed further that the 1st



respondent is a separate and independent legal entity which is incorporated and domiciled in Japan. He made known as such that the 1st respondent is not a shareholder of the 2nd respondent and neither is the 2nd respondent a subsidiary of the 1st respondent or vice versa.

17. Denying the petitioner's allegations that they had not disclosed the defective nature of the buses, he informed that the typical process of purchasing a bus involves a number of steps that involve the customer's selection of the various vehicle parts of the desired vehicle and the desired vehicle body builder to assemble the chosen parts.
18. Once the body builder completes his work, the vehicle is returned to the 2nd respondent for registration. He noted that while the body builder is working on the vehicle a customer is at liberty to visit the shop and inspect the work. Once registration is done the customer inspects the vehicle again before delivery is done. Where satisfied with the product the customer then pays for the vehicle either in cash or through a financier. In view of this he deposed that the decision regarding the body and number of seats to be mounted on the chassis rests on the customer not the 2nd respondent as alleged.
19. He deposed that there had not been a global recall of the Hino motor vehicles and even so those recalled were not on sale on the Kenya market. He further deposed that the 3rd respondent is an independent separate legal entity from the 2nd respondent and was not its shareholder or subsidiary. He deposed that the 3rd respondent was one of the many financiers who offer asset financing services to its customers. He noted that the choice of a financier rested on the customers, and was therefore the petitioner's members who chose the 3rd respondent.
20. He deposed that upon delivery of the said vehicle to the customer who was Catherine Nyambura Njuguna, she warranted and confirmed that she had received the vehicle in good order and condition. He deposed that Hino motor vehicles are sold with a 2 year or 100000km warranty subject to proper and sufficient maintenance at every 5000km at an authorized Hino dealership which is the customer's responsibility. He deposed that as per their records the vehicle was serviced up until 27,260km after which the owner stopped servicing it as required thus negating the warranty. Similarly he noted that the owner defaulted on the terms of the financing agreement with the 3rd respondent which he said this Court cannot rewrite.
21. He deposed that while the petitioner met their representatives on November 20, 2018 for the matter to be settled amicably, the meeting yielded no fruits. This is since Stephen Mutoro made unreasonable and unwarranted demands including hefty sums of compensation. To this end he averred that the petition lacked merit and ought to be dismissed.
22. In the further affidavit in response to the petitioner's supplementary affidavit, he deposed that the petitioner had not annexed the precise webpages of the links listed in the supplementary affidavit. More so that he had been unable to access a number of the links provided in the affidavit and unclear what he was supposed to be looking at or referring to in the few links that he was able to access. He averred that it was the petitioner's obligation, to produce the webpages of the links and to draw specific attention to the contents of the said webpages so as to enable the respondents respond to the specific allegations.
23. He moreover deposed that the annexures to the supplementary affidavit were of no probative value, as the same were incomplete, incoherent and inconclusive. This is because neither were accompanied by the attendant certificate of electronic record, required for information downloaded from the internet. As such they maintained that the petition lacked merit.



The 3rd Respondent's case

24. In response to the petition the 3rd respondent filed its replying affidavit dated May 9, 2019 sworn by Joseph Nyandemu, the Senior Manager – Operations & Collections. He averred that the 3rd respondent offers financing facilities to customers who wish to purchase vehicles. He made known that the 3rd respondent is an independent company and not a subsidiary or shareholder of the 2nd respondent. Similarly, that the 3rd respondent is not a bank hence not regulated by Central Bank. As such he divulged that the 3rd respondent operates on the principles stipulated in the contractual agreements it enters into with its clients.
25. He deposed that the agreement referred to the Master Instalment Sale Agreement. It's terms to the customer revolve around payment of the deposit, payment of the agreed installments, informs that the title of the vehicle remains vested in the 3rd respondent until instalments are paid in full, informs upon default of one instalment the whole amount becomes due and the 3rd respondent can repossess the car, insurance of the car, instalation of a tracking device by the 3rd respondent and exclusion of the 3rd respondent from liability of any kind for any warranties other than those derived from the manufacturer. Where the customer agrees with these terms the vehicle is released to them for their intended use.
26. He deposed with reference to the subject vehicle, that none of its other customers who had purchased the same vehicle submitted complaints about it. In this matter he informed that the 3rd respondent had not been made aware of the alleged mechanical problems as deposed by the petitioner until they received correspondence from petitioner's advocates on instigation of this suit.
27. He averred that its customer was Catherine Nyambura Njuguna and Paul Njuguna Wainaina was the guarantor. She purchased the HINO Bus FC 300, registration number KCG 516G. and obtained financing from the 2nd respondent who was financed by the 3rd respondent. In view of this the 3rd respondent paid the purchase price of the vehicle to the 2nd respondent in full and then sold the same to the customer in the Master Instalment Sale Agreement.
28. Pursuant to the terms of the Agreement the customer took possession of the vehicle confirming that the said vehicle was in good condition. The customer then continued with her business making the monthly installments which he deposed were irregular underpayments. Aggrieved by this, the 3rd respondent issued a demand letter on July 11, 2016 to the customer demanding payment of the sums due which were two installments. The customer failed to honour the letter and continued being in default. As a consequence, the 3rd respondent issued repossession orders on October 13, 2017 and the vehicle was accordingly repossessed.
29. He deposed that even after repossessing the vehicle the 3rd respondent granted the customer and guarantor a grace period to redeem the vehicle to no avail. This is notwithstanding a promise by the customer to pay Ksh.500,000/= to have the vehicle released to her. The 3rd respondent stored then vehicle at the Leakey's Garage awaiting sale after valuation. He informed that as at February 2019 the outstanding amounts owing from the customer were Ksh.3,096,657/=.
30. Owing to the averments above, the 3rd respondent deposed that the petitioner's case against them was misconceived and without any basis. Furthermore, that the agreements which are in essence private credit agreements between itself, the customer and guarantor cannot form basis for a public interest litigation matter. Likewise that it would not be in the interest of justice to allow the petitioner's to avoid making payments while stopping the respondent from selling the vehicle.



The 4th Respondent's case

31. The 4th respondent in opposition to the petition filed grounds of opposition dated March 1, 2021 on the basis that:
- i. The 4th respondent denies that there was a global recall of Hino 300 buses and that it abdicated its duties under the Standards Act (cap 496 of the Laws of Kenya) and articles 35 and 46 of Constitution by failing to disclose the same to the public; and so puts the petitioner to strict proof thereof.
 - ii. The issues in the petition arise from contractual obligations between parties and form a subject matter for litigation in and ordinary civil suit.
 - iii. The 4th respondent was not privy to:
 - iv. the agreement between the petitioner's members (Paul Njuguna Wainana and Catherine Nyambura Njuguna) and the 2nd respondent on the purchase of the 28-seater Hino 300 bus chassis; and
 - v. the agreement between the petitioner's members or the 2nd Respondent and Skyline Holdings Ltd to undertake bodybuilding and fabrication of the said bus.
 - vi. If the alleged modifications were made to Motor Vehicle Reg. no. KCG 516G Hino 300 bus chassis (chassis conversion) the same were carried out in accordance with the specifications given by or agreed between Paul Njuguna Wainana and Catherine Nyambura Njuguna, the Petitioner's members and Skyline Holdings Ltd (Bodybuilders) and not according to specifications given by the 4th respondent.
 - vii. The 4th respondent has been wrongly enjoined as a party in these proceedings since it is not mandated by law to conduct motor vehicle inspections and certification to ascertain vehicles' roadworthiness and compliance with road transport regulations.
 - viii. The National Transport and Safety Authority (NTSA) is responsible for ensuring that all commercial passenger service vehicles (PSVs) undergo pre-registration inspection and certification to ascertain roadworthiness including inspection to determine correct load capacity that is whether the load capacity of the Hino Bus 300 was greater than the load specified by the manufacturer of the chassis of the vehicle thus, defective and a danger to the petitioner's members', passengers and other road users, pursuant to section 4(2) (b) and (h) of the NTSA Act, 2012, sections 6, 17, 17 A and 56 of the Traffic Act and Part IX of the Traffic Rules on seating and passenger capacity etc.
 - ix. The petition as drawn does not disclose a cause of action against the 4th respondent therefore, the orders sought cannot issue against it.
 - x. The petition filed herein is otherwise incompetent, misconceived, without merit and an abuse of the process of this honourable Court as the petitioner's rights and fundamental freedoms have not been breached in any manner as alleged or at all and the same ought to be dismissed with costs.

Submissions

32. The petitioner through its advocates Sikuta & Associates Advocates filed written submissions and a list of authorities dated December 5, 2019. Counsel noted the issues for determination to be:



- i. Whether proper service of documents was effected on the 1st respondent.
 - ii. Whether the actions and omissions of the respondents is a breach of the petitioner and petitioner members constitutional rights under articles 2(5), 10, 35 and 46 of the .
33. Counsel on the first issue answered in the affirmative. This is because the petitioner had effected service on the 1st respondent in accordance with Order 5 Rule 3 and Rule 10 of the [Civil Procedure Rules](#) and section 1010 and 1011 of the [Companies Act](#), No.17 of 2015 in relation to service on corporations.
 34. This answer was based on the fact that the petitioner deposed that the 2nd respondent is the authorized sole distributor and service provider of Toyota, Yamaha and Hino products in Kenya. Moreover that the 2nd respondent was established in 1997 as a subsidiary of Toyota Tshusho Corporation (TTC). To buttress this argument Counsel relied on the case of [Export Trading LTD v United Kingdom Mutual Steamship Assurance Association \(Bermuda\)](#) (2006) eKLR where it was held that service on a business or work against a person who does not reside in Kenya can be done through a manager or an agent who carries on such business or work for such person.
 35. Moving onto the second point, Counsel submitted with reference to article 10 of the [Constitution](#) that the respondents who are bound by this provision violated it. This is because the 1st respondent failed to reign on its subsidiary the 2nd respondent to effect the international recall of the HINO buses and tracks. As such the 2nd respondent deceptively marketed the Hino buses that should have been recalled failing to protect consumers in line with the [Consumer Protection Act](#) and [Competition Act](#).
 36. Further that the 3rd respondent's action of repossessing the vehicle without notifying them contravened article 46 of [Constitution](#) and the [Consumer protection Act](#). All this Counsel submitted was done while the 5th respondent who is in charge of the daily operations of the 2nd respondent watched as the petitioner's rights were violated.
 37. In support reliance was placed on the case of [Coast Water Services Board v Mrs. Alome Achayo & 5 others](#) (2015) eKLR where it was held that in considering these questions, note is taken of the constitutional position that even private persons or private entities may breach and are liable for breach of the constitutional, provisions like national values and principles of governance under article 10 of the [Constitution](#). Similar reliance was placed on the cases of [Mohammed Sheria & 2 others v Simon Kipkorir Sang & 5 others](#) (2018) eKLR and [George Bala v Attorney General](#) (2017) eKLR.
 38. On article 46 of the [Constitution](#) Counsel urged the court to reject the narrow, literal reading of the various provisions of the [Constitution](#), violated against the petitioner's members and opt for a construction that promotes a wider access to protection of consumer rights. With regards to the dispute herein Counsel submitted that article 46(3) of the [Constitution](#) applies to goods and services offered by public entities and private persons.
 39. As such this provision and the [Consumer Protection Act](#) dictates that consumers have a right to goods and service of reasonable quality, to the information necessary for them to gain full benefit from goods and services, to protection of their health, safety and economic interests and to compensation for loss or injury arising from defects in goods or services.
 40. To buttress this point reliance was placed on the case of [Mark Ndumia Ndung'u v Nairobi Bottlers Ltd & another](#) (2018) eKLR where the court held that article 46(1) of the [Constitution](#) discloses the obligations on public and private manufacturers as to provision of goods and services of reasonable quality, provision of any information necessary for the consumer to gain full benefit of the goods and services and obligation to protect the consumer's health, safety and economic rights. Similar reliance was placed on the case of [James Kuria v Attorney General & 3 others](#) (2018) eKLR.



41. On Article 35 of Constitution Counsel noted that there is a close nexus between consumers' rights to be afforded quality goods and services and their right to information. Counsel submitted that the petitioner's members were entitled to the information on the quality of the vehicle which defects endangered the lives of the passengers and occasioned suffering and losses to the petitioner's members. In closing Counsel stated that the petitioner had made out a case that the respondents had violated the petitioner's members rights.

The 2nd and 5th Respondents' Submissions

42. The 2nd and 5th respondents' through Oraro and Company Advocates filed written submissions dated May 25, 2021. The issues identified for determination were:
- i. Whether the petition meets the test for a constitutional petition;
 - ii. Whether the 5th respondent is properly enjoined in this suit;
 - iii. Whether service was effected upon the 1st respondent;
 - iv. Whether the alleged actions and/or omissions of the respondent were in breach of the petitioner's members rights under article 46 (1) of the Constitution; and
 - v. Whether the petitioner's is entitled to the prayers sought.
43. Counsel relying on the case of Anarita Karimi Njeru v Republic (1979) eKLR as upheld in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR on the first point submitted that the petitioner had failed to disclose with precision, the nature of and the manner in which the petitioner's members' rights were violated by the 2nd respondent. Additional dependence was placed on the case of David Gathu Thuo v Attorney General & another [2021] eKLR.
44. Additionally Counsel submitted that what amounts to a constitutional matter was addressed in the case of CNM v WGM (2018) eKLR as that which forces the court to consider constitutional rights or values. In Counsel's opinion the present petition, forces this Court to look at the contractual arrangements between the parties so as to determine whether the rights and liabilities arising from these arrangements were fully discharged. A matter that is beyond the purview of this Court.
45. Counsel noted that the Court of Appeal in the case of Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another (2016) eKLR had warned against this by stating that a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Additional reliance to buttress this point was placed on the cases of Turkana County Government & 20 others v Attorney General & 4 others [2016] eKLR, Damian Belfonte v The Attorney General of Trinidad and Tobago C.A 84 of 2004, Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others (2014)eKLR, Jorum Kabiru Mwangi & 2 others v Co-operative Bank of Kenya, Kawangware Branch [2016] eKLR, Wycliffe Ouma Omondi v Nine One One Group Limited & 2 others(2020) eKLR, Grays Jepkemoi Kiplagat v Zakayo Chepkoga Cheruiyot [2021] eKLR.
46. On the second issue, Counsel submitted that the 5th respondent was not properly enjoined in this suit and so should be struck off. This is because the 2nd respondent is a separate legal entity with the capacity to incur liability for its own actions yet the petitioner in this suit has proceeded to assign personal liability to the 5th respondent a natural person. Counsel argued that such joinder was in violation of the fundamental principle of separate legal personality enjoyed by companies.



47. To buttress this point he cited the case of *Valentine Opiyo & another v Masinde Adhiambo TIA El/yams Entreprises* (2014) eKLR where it was observed that the agreement was clear that the 1st appellant was acting on behalf of a limited liability company hence it cannot be said that he assumed liability on his own. Additional reliance was placed on the case of *Githunguri Dairy Farmers Cooperative Society v Ernie Campbell & Co. Ltd & Another* (2018) eKLR.
48. Counsel furthermore noted that the petitioner had not made any direct or specific allegations against the 5th respondent or made out a case why the veil of incorporation should be lifted so as to hold the 5th respondent personally liable for the alleged actions of the 2nd respondent.
49. Turning to the next issue, it was submitted that this Court was not properly seized of this matter as service has not been properly effected upon the 1st respondent. This is because the 1st respondent is foreign company located in Japan yet despite having this knowledge, the petitioner opted to effect service on the 2nd respondent.
50. Counsel relying on the 2nd and 5th respondent's affidavit noted that the 2nd respondent was not an agent of the 1st respondent for the purposes of rendering service and in fact the two are separate legal entities. Counsel as such argued that the petitioner in purporting that the 2nd respondent was an agent of the 1st respondent by virtue of distribution of its products in Kenya was controverting the meaning of the term agency, by turning it on its head and assigning to it a much deeper meaning, encompassing distributors who are independent contractors as appreciated in the case of *Okero v Republic* (1981) eKLR.
51. Additional reliance was placed on the cases of *Development Bank of Kenya Limited v Riva Oils Co. Limited & 3 others* [2015] eKLR, *Peeraj General Trading & Contracting Company Limited, Kenya & another v Mumias Sugar Company Limited* [2016] eKLR and *Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd* HCCC.No. 391 of 2000.
52. Counsel further submitted that the petitioner was in contravention of Order 5 Rule 8 as read with Rule 10 of the *Civil Procedure Rules*, as it had not effected personal service upon the 1st respondent nor its authorized agent. To buttress this point Counsel relied on the case of *Roberta Macclendon Fonville v James Otis Kelly Ill & 3 others* (2002) eKLR where it was observed that failure to issue a Notice of summons for service on a defendant outside the jurisdiction of the court in accordance with the official procedure set out in Order 2 Rule 27 is a fundamental omission and not merely an irregularity which divests the court of any jurisdiction over them. Additional reliance was placed on the case of *Law Society of Kenya v Martin Day & 3 others* (2015) eKLR.
53. On the fourth issue, Counsel submitted that the 2nd respondent did not contravene the petitioner's members' rights under article 46 (1) of the *Constitution*. This is because the said vehicle was of merchantable quality when sold to the customer who verified this fact upon its delivery. Further, the customer went on to accept the vehicle as sold, with no complaints until the vehicle was repossessed by the 3rd respondent.
54. In addition to this, Counsel noted that the respondents deposed that all Hino FC 300 buses were sold with a 2 year or 100,000 km warranty, subject to proper and sufficient maintenance schedules at authorized Hino dealers. He noted as such that it is the practice and usage of merchants and traders to examine the goods supplied as against the specifications of the contract and to reject and return those goods to the supplier or manufacturer, or otherwise give notice to the supplier of the defects as held in *Spin Knit Limited v Subsahara Supplies Limited* (2012) eKLR.



55. In light of these averments Counsel submitted that the institution of this suit is a sham meant to deprive the 3rd respondent of their right to realize their security. This is because the alleged complaints concerning the merchantability of the vehicle was only raised by the petitioner's members after they had failed to make their payments towards the facility advanced. Moreover, that the allegations are based on unproven and untested propositions with no evidence to buttress their claims. In view of this Counsel relied on section 107 as read with 108 of the Evidence Act.
56. On the final issue Counsel submitted that the petitioner having failed to discharge its burden of proof, the prayers sought by it did not warrant implementation by Court.

The 3rd Respondent's submissions

57. The firm of George Gilbert Advocates on behalf of the 3rd respondent filed written submissions and a list of authorities dated March 26, 2021. The issues identified for determination are:
- i. Whether the 1st respondent was properly served.
 - ii. Whether the petition raises a constitutional question.
 - iii. Whether the petition satisfies the test of a constitutional petition.
 - iv. Whether the alleged violations were proved.
 - v. Whether the prayers are capable of implementation the Court.
58. On the first issue, Counsel submitted that Order 5 Rule 10 provides that for a business not resident in the country, service is to be done on any Manager or the Agent. Section 1010 (2) of the Companies Act provides that service on a registered foreign company is done on the local representative of the company in Kenya. Where the foreign company has no local representative or local representative refuses service or service cannot be effected service is done by leaving or sending it by post to, any place of business of the company in Kenya. Both statutes state that service is done on the Agent.
59. Counsel in this regard noted that the 2nd and 5th respondents in their replying affidavit had indicated that they were not an agent of the 1st respondent. As such the burden to prove otherwise was upon the petitioner who did not adduce evidence to that effect and neither demonstrated that it served any place of business of the 1st respondent in Kenya.
60. He submitted that to assume jurisdiction over a foreign entity, a party must first seek leave before such service is made. He argued that the petitioner never sought leave to effect the said service and so without such leave, the Court lacks jurisdiction over such foreign entities as held in the case of Barakat Exploration Inc v Taipan Resources Inc [2014] eKLR. Similar reliance was placed on the case of WK, MW K (Both suing as the Administrators of the Estate of Dr. WK) & another v British Airways Travel Insurance & another [2017] eKLR.
61. On the second issue, Counsel submitted in the negative. He argued that the dispute was a contractual matter involving sale of what is alleged to be a defective motor vehicle and a contractual relationship based on the Masters Installment Sale Agreement for its finance. He noted therefore that the same was governed by the Sales of Goods Act. In support reliance was placed on the case of James Watenga Kamau v CMC Motors Group Limited (2020) eKLR where the court held that "a contract of sale" includes an agreement to sell as well as a sale. In a contract for sale there is an actual sale of goods.
62. In view of this Counsel submitted that the instant suit invokes the doctrine of constitutional avoidance. This is because the petitioner failed to take action in a commercial court while masking a product



liability case which is contractual as a constitutional petition. In support reliance was placed on the case of *CNM v WMG* [2018]eKLR where it was noted that a constitutional suit is one that forces the court to consider constitutional rights or values.

63. Additional reliance was placed on the case of *Sumayya Athmani Hassan v Paul Masinde Simidi & another* (2019)eKLR, *Communication Commission of Kenya & others v Royal Media Services Limited & 5 others* [2014] eKLR, *Grays Jepkemoi Kiplagat v Zakayo Chepkoga Cheruiyot* (2021] eKLR, and *Ernest C.O. Muga v Attorney General* [2018] eKLR.
64. Turning to the next issue, Counsel submitted that the petition fails to satisfy the test of a constitutional petition as envisaged in *Anarita Karimi Njeru v Republic* No.I (1979) I KLR, 54 and echoed in the case of *Mumo Matemo v Trusted Society of Human Rights Alliance* Civil APP.290/2012 (2013) eKLR. This is because the petitioner failed to demonstrate with precision, which of the respondents violated the customer's rights and the manner of violation. According to Counsel the petitioner merely cited constitutional provisions without stating how the rights had been violated.
65. Moving on to the next issue, Counsel submitted that the only allegation leveled against the 3rd respondent was that the 3rd respondent failed to reduce the lending rates from 22% to 14% after the Banking (Amendment) Act became law on September 24th 2016. In this regard it was noted that the 3rd respondent does not carry on any banking business as defined in the *Banking Act* and so its lending rates are not subject to the *Banking Act*. Moreover, he noted that no action of the 3rd respondent had been stated to have violated any rights of the petitioner or the *Constitution*. Similarly it was stressed that there was no specific prayer sought capable of being granted against the 3rd respondent. Further that no case had been made against the 3rd respondent and neither had any violations been demonstrated against it.
66. On the next issue, Counsel submitted that the petitioner alleged that the 2nd respondent was modifying the 28 seater Hino 300 buses into a 33 seater bus hence making the weight of the motor vehicle heavier than the chassis. As a result the alleged modifications caused break failures, clutch malfunction and frequent tyre bursts. According to him these allegations are purely scientific in nature. He contended that no expert witnesses had testified in court and neither was there an expert report on this matter.
67. In support Counsel relied on the case of *Gragan (K) Limited v General Motors (K) Limited & another* (2016] eKLR where the court stated that in the absence of technical expertise, the court was not in a position to make a finding of a technical nature in favour of the petitioner. Additional reliance was placed on the cases of *James Watenga Kamau v CMC Motors Group Limited* (2020) eKLR, and *Stephen Kinini Wang'ondru v the Ark Limited* NYR HCCA No. 2 of 2014 [2016] eKLR.
68. On the final issue, Counsel in view of the foregoing contended that the prayers as framed were incapable of being awarded and implemented. This is because the allegations were not proved including the sought for compensation on the losses incurred.

The 4th Respondent's submissions

69. The 4th respondent through its advocates Kihara and Wyne Advocates filed written submissions and a list of authorities dated May 20, 2021. Counsel identified the issues for determination as:
 - i. Whether petitioner has locus to institute petition
 - ii. Whether petition discloses prima facie constitutional issue
 - iii. Whether petition is sub judice.



70. On the first issue, Counsel submitted that owing to the nature of the dispute which is contractual in nature the petitioner lacked locus standi to institute the instant suit in this court. Taking this into consideration Counsel argued that the petition ought to have been instituted as a contractual dispute between the parties privy to the contract. He noted that in view of this the petitioner was not a party to the contract/s that the petition is founded on. The contract was noted to be as between the petitioner's witnesses and the 2nd respondent. As a result Counsel noted that the petitioner held no sufficient interest to institute the instant suit.
71. In support reliance was placed on the case of *Law Society of Kenya v Commissioner of Lands & others*. Nakuru High Court Civil Case No 464 of 2000 where it was held that locus standi signifies a right to be heard. A person must have sufficiency of interest to sustain his standing to sue in court of law. Similar reliance was placed on the case of *Alfred Njau & others v City Council of Nairobi* (1982) KAR 229.
72. On the second issue, Counsel while relying on the case of *CNM v W M G alias H N* Constitutional Petition No 586 of 2017 submitted that a constitutional question is an issue whose resolution requires the interpretation of the *Constitution* rather than that of a Statute. Similar reliance was placed on the case of *Fredericks and others v MEC for Education and Training Eastern Cape and others* 2002 (2) BCLR 113 (CC). In view of this Counsel submitted that the instant petition does not raise any constitutional questions, rather, contractual issues that can be litigated between the petitioner and 2nd respondent in the Commercial & Admiralty Division of the High Court.
73. On the final issue, Counsel submitted that there was pending product liability suit HCCC No. 231 of 2017 Martin Mwangi Njoki & 10 others v Toyota Kenya Limited & 4 others before the Commercial and Admiralty Division that raises the same issues as raised by the petitioner. That the 2nd and 3rd respondents are parties therein hence invoking the doctrine of sub judice under section 6 of *Civil Procedure Act*.

Analysis and Determination

74. I have carefully considered the pleadings, submissions, authorities and the law and in my view the matters raised consist of preliminary and substantive issues. I note that one of the preliminary issues that was raised, is whether this matter is sub judice as stated by the 2nd, 4th and 5th respondents and whether it was conclusively determined by this court in its ruling dated May 14, 2020 and as such this court will not consider it.
75. That said, this court must essentially determine the preliminary matters first. This is because they deal with the justiciability of the matter which either allows or bars this court from making a determination on the substantive issues raised. The issues raised are as follows:

The Preliminary issues

- i. Whether the petitioner has locus standi to file this suit; and
- ii. The competency of the instant petition.

Substantive issues

- iii. Whether the 1st respondent was served;
- iv. Whether the 4th and 5th respondents are proper parties to this suit;
- v. Whether the petitioner's constitutional rights were violated by the respondents; and



vi. Whether the petitioner is entitled to the orders sought.

- Whether the petitioner has locus standi to file this suit

76. The *locus standi* of the petitioner was challenged by the 2nd, 4th and 5th respondents. They contended that since the petition arose from a contractual relationship between the 2nd and 3rd respondents and the petitioner's members, the petitioner lacked sufficient capacity to file the petition on their behalf. The petitioner did not respond to this averment.
77. The law on locus standi for constitutional petitions is envisaged under article 22 and 258 of the Constitution. The Articles read as follows:
1. Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
 2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by--
 - a. a person acting on behalf of another person who cannot act in their own name;
 - b. a person acting as a member of, or in the interest of, a group or class of persons;
 - c. a person acting in the public interest; or
 - d. an association acting in the interest of one or more of its members.
78. Speaking to the law on *locus standi* the Court of Appeal in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR held as follows:

“(28) It still remains to reiterate that the landscape of locus standi has been fundamentally transformed by the enactment of the Constitution in 2010 by the people themselves. In our view, the hitherto stringent *locus standi* requirements of consent of the Attorney General or demonstration of some special interest by a private citizen seeking to enforce a public right have been buried in the annals of history. Today, by dint of articles 22 and 258 of the Constitution, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest. Pursuant to article 22 (3) aforesaid, the Chief Justice has made rules contained in Legal Notice No 117 of 28th June 2013 – the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013– which, in view of its long title, we take the liberty to baptize, the “Mutunga Rules”, to inter alia, facilitate the application of the right of standing. Like article 48, the overriding objective of those rules is to facilitate access to justice for all persons. The rules also reiterate that any person other than a person whose right or fundamental freedom under the Constitution is allegedly denied, violated or infringed or threatened has a right of standing and can institute proceedings as envisaged under articles 22 (2) and 258 of the Constitution.

(29) It may therefore now be taken as well established that where a legal wrong or injury is caused or threatened to a person or to a determinate class of persons



by reason of violation of any constitutional or legal right, or any burden is imposed in contravention of any constitutional or legal provision, or without authority of law, and such person or determinate class of persons is, by reason of poverty, helplessness, disability or socio-economic disadvantage, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under articles 22 and 258 of the Constitution.”

79. It goes without saying that the scope of locus standi is wide in constitutional petitions. The petitioner has throughout the suit asserted that the respondents’ actions with regard to the subject vehicle that was purchased by its members infringed upon its members constitutional rights. The Constitution makes known that in addition to an aggrieved party filing a suit, another party is also allowed to file a suit on behalf of the class of persons listed under article 22(2) of the Constitution.
80. An analysis of the facts of this case makes it plain that the petitioner’s two members purchased the said vehicle from the 2nd respondent. The nature of such an arrangement is generally as between the parties privy to such an arrangement. The petitioner does not demonstrate why the said two members were not in a position to act in their own names. As per the witness statement adduced by the petitioner both parties are adults with legal capacity to institute a matter. This is also discernable from the fact that it is the petitioner’s members in their personal capacity who engaged the 2nd and 3rd respondents in the purchase and finance for the subject vehicle.
81. It is my considered view that although Constitution has widened the scope of locus standi, the same does not make it automatic for any party to institute a suit on behalf of another party without satisfying the provisions of article 22(2) of Constitution. It is incumbent on a party suing on behalf of a competent party in a personal matter to demonstrate sufficient cause why it has locus standi to institute the suit.
82. It is my further finding that the petitioner did not have the requisite locus standi to institute this suit. This is because the genesis of this suit stems from a consensual relationship between the petitioner’s members and the 2nd and 3rd respondents. Secondly, while the petitioner submitted that the petition was made on behalf of its members the reasons why they could not pursue the matter in their own capacity were not cited nor proved.

The Competency of the instant petition

a. Whether the petition invokes the principle of constitutional avoidance

83. This matter was similarly raised by the respondents who while relying on numerous authorities, argued that the instant suit revolves around a contractual agreement hence does not raise a constitutional question which would force this court to consider constitutional values.
84. This doctrine of constitutional avoidance was expounded on by the Supreme Court in the case of Communications Commission of Kenya (supra) as follows:

“(256) The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:



“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

(257) Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Ashwander v Tennessee Valley Authority*, 297 US 288, 347 (1936)).”

85. Likewise the court in the case of *C O D & another v Nairobi City Water & Sewerage Co. Ltd* [2015] eKLR with regard to this principle noted as follows:

“

“11. Similarly, in *Papinder Kaur Atwal v Manjit Singh Amrit* Nairobi Petition No 236 of 2011 where after considering several authorities on the issue, Justice Lenaola remarked as follows:

“All the authorities above would point to the fact that the Constitution is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes..... I must add the following; Our Bill of Rights is robust. It has been hailed as one of the best in any Constitution in the World. Our Courts must interpret it [with] all the liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violation thereof.”

The Supreme Court of India has also held that ordinary remedies available under common law and statutes must be pursued in the ordinary manner or as provided under statute. For instance, in *Re Application by Babadur* [1986] LRC (Const) the court expressed itself as follows at page 307;

““The courts have said time and again that where infringements of rights are alleged which can be founded in a claim under substantive law, the proper course is to bring the claim under such law and not under the Constitution...”’

86. What is clear from the above examination is that this doctrine necessitates that this court should avoid making determinations on issues that have their foundations in an existing statutory law which is a sufficient and adequate mechanism to deal with the specific issue. The doctrine is to the effect that where a dispute is one which can be determined under another area of law other than under the Constitution, then it is best that it be so determined and pure constitutional issues left to be determined as such.

87. The petitioner asserted that the respondents violated its members constitutional rights due to the manner in which they handled the dispute with regard to the subject vehicle. While this is the narrative, the facts of the case point to a premise of a contractual relationship. This relationship was forged when the petitioner’s members purchased the subject vehicle from the 2nd respondent and financed the purchase using a financial facility granted by the 3rd respondent. The obvious question to answer would therefore be whether the petitioner and 2nd and 3rd respondents performed their obligations under their agreement for the sale of the subject vehicle.



88. Embracing the opine in the cited authorities it would be reasonable to infer that at the core of this petition lies a question that forces this court to interrogate the agreements between the parties so as to ascertain whether the said vehicle which is the product was delivered in accordance with the terms set therein before determining whether the alleged rights were violated. In this regard there already exists an alternative mechanism under the civil court that deals with breach of contractual relationships.
89. In my view, the petition does not raise a constitutional claim or constitutional question as the petitioner's members' grievance is well covered under civil law. Taking this into consideration, I find that the instant petition invokes the doctrine of constitutional avoidance. The essence of this doctrine is that not all claims that cite constitutional provisions necessarily amount to constitutional claims to qualify filing of a constitutional petition. The instant petition does not qualify as such.

b) Whether the petition has met the constitutional threshold

90. The 2nd, 3rd and 5th respondents argued that the instant suit had failed the constitutional test set out in the case of *Anarita Karimi Njeru* (*supra*) since the petitioner failed to disclose with precision, the nature of and the manner in which the petitioner's members' rights were violated by the respondents. This was contested by the petitioner which stated that it had pleaded its case in line with the set threshold.
91. As a starting point for the petitioner to prove its case against the respondents the petition is required to satisfy the threshold set for constitutional petitions. This means that a party that alleges violation of his or her rights must plead with reasonable precision the manner in which the rights have been violated. This means a demonstration of the allegations using evidence. This test was similarly appreciated by the court in the case of *Husus Mugiri v Music Copy Right Society of Kenya & another* [2018] eKLR where it noted that:
- “ 18. In order for a petition to qualify to be a constitutional petition that seeks to enforce or protect fundamental rights and freedoms under the bill of rights, it must meet the test set in *Anarita Karimi Njeru v Republic* [1979] eKLR. That is, the applicant must specify which specific provisions of the Constitution that declare the rights, the specific rights and freedoms that have been or are threatened to be infringed or violated and the manner in which the respondent has infringed the subject rights. This position has been reiterated time and again.”
92. Likewise, the court in the case of *Meme v Republic* [2004] eKLR, restated the position in the *Anarita Karimi Case* (*supra*) stated as follows:-
- “Where a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important that he should set out with reasonable degree of precision that of which he complains, the provisions said to have been infringed and the manner in which they are alleged to have been infringed and that the applicant's instant application had not fully complied with the basic test of constitutional references, as it was founded on generalized complaints without any focus on fact, law or Constitution, hence it had nothing to do with the constitutional rights of the appellants”.
93. My interpretation of the above provision is that for a constitutional petition to be sustainable a party must by way of evidence demonstrate how its rights have been violated. It therefore follows that the mere citing of constitutional provisions is not enough.



94. A brief perusal of the materials before this court reveals a number of things. The petitioner has brought the case against the respondents and made solid allegations pegged on constitutional provisions. Accordingly, following a perusal of the petitioner's pleadings I observe that the affidavit in support contains a witness statement as an annexure. No other documentary evidence to buttress and demonstrate the alleged averments that the respondents violated its members' rights is supplied.
95. To expound, the petitioner informs the court on the existence of a vehicle that was purchased and paid for but no documents to that effect are annexed. The petitioner also alleges that the chassis of the subject vehicle was not built to accommodate the body of a 33 seater bus. This forms a technical allegation that was not supported by any documentary evidence to assist this Court make an informed decision in its determination. The petitioner also noted that they were not informed on the quality of the vehicle by the 2nd respondent in addition to what they were informed at the point of purchase. No correspondence to the 2nd respondent seeking further information or attempt to acquire the sought information was shown. In a nutshell the trend of making allegations without demonstration of the same is consistent throughout the petitioner's case.
96. It is apparent in light of this that the petitioner seeks to have this court make a determination on its case on a hypothesis premise. Unquestionably were such evidence adduced the same would have granted this court an opportunity to interrogate it and given this court a leeway to make a determination on the questions of violation of the parties' rights.
97. From the foregoing analysis it is my humble view that the petitioner's petition does not meet the threshold of a constitutional petition. It is not lost on this court that this is a court of evidence and not theories. the law requires that a party who seeks a pronouncement in its favour must first discharge its burden of proof by adducing the necessary evidence to demonstrate the manner of violation. I find myself in agreement with the holding in the case of Edward Akong'o Oyugi & 2 others v Attorney General [2019] eKLR where it was stated that:

“72. Section 107 (1) of the Evidence Act [36] provides that "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.

Sub-section (2) provides that "when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person." Additionally, I have severally stated that all cases are decided on the legal burden of proof being discharged (or not).

“No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take.”

73. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular



case. This fact was succinctly put forth by Rajah JA in *Britestone Pte Ltd v Smith & Associates Far East Ltd*[38] :-

“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

74. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Court decisions cannot be made in a factual vacuum. To attempt to do so would trivialize the Constitution and inevitably result in improper use of judicial authority and discretion. It will be a recipe for ill-considered opinions. The presentation of clear evidence in support of such prejudice is a prerequisite to a favourable determination on the issue under consideration. Court decisions cannot be based upon the unsupported hypotheses.”

98. To this end and for the reasons set out above, the instant petition is not competent and is defective as filed. Taking this into consideration this court cannot proceed to make a determination on the raised substantive issues. This is since pronouncements of this court are customarily pegged on the justiciability of the matter placed before it, which the instant suit is lacking in.

99. Having come to the stated conclusion, it is my humble finding that the petition dated December 14, 2018 lacks merit and is hereby dismissed with costs.

Orders accordingly

DELIVERED, VIRTUALLY, DATED AND SIGNED THIS 18TH DAY OF NOVEMBER .2022 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG’UDI

JUDGE OF THE HIGH COURT

