



**Macharia & 7 others v Attorney General (Petition 69, 68, 70, 71, 72,
74, 75 & 76 of 2020 (Consolidated)) [2022] KEHC 15481 (KLR)
(Constitutional and Human Rights) (18 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15481 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 69, 68, 70, 71, 72, 74, 75 & 76 OF 2020 (CONSOLIDATED)
HI ONG'UDI, J
NOVEMBER 18, 2022**

BETWEEN

BEATRICE WANGUI MACHARIA & 7 OTHERS PETITIONER

AND

ATTORNEY GENERAL RESPONDENT

JUDGMENT

Introduction

1. On 13th October 2020 petitions No. 68 of 2020, (Agnes Ngoiri Nyarari vs. Attorney General), Pet. No. 72 of 2020 (Paul Njoroge Mwangi vs. Attorney General) and 75 of 2020 (Peter Nogaka Nyachoka vs. Attorney General) were withdrawn and the remaining matters i.e Petition Nos 69, 70, 71, 74 & 76 of 2020 proceeded to full hearing.
2. The petitioners in the instant petitions dated 26th February 2020 are seeking the following similar reliefs: -
 - a. A declaration that the Petitioner's rights under section 70, 71(1), 72(1), 75 (1) (2), 79(1), 81(1) and 82(1) (2) (3) (5) of the Repealed Constitution of Kenya 1963 were violated by the Government of Kenya.
 - b. A declaration that the Petitioner's rights under Article 31, 12 and 17 of the Universal Declaration of Human Rights, 1948 relating to the protection of private property under the law were violated by the Government of Kenya.
 - c. A declaration that the Petitioner's rights under Article 3, 12 and 17 of the Universal Declaration of Human Rights 1948, were violated.



- d. A declaration that the Petitioner's rights and legitimate expectation to fair Administrative action under Article 47 of the Constitution of Kenya have been breached by the Government of Kenya.
- e. Special Damages under Article 23(3) (e) of the Constitution of Kenya 2010 in respect of the value of the properties that were lost and destroyed as under paragraph 6 of the petitions at Kshs. 525,900/=, 965, 159/=, 230. 760/=, 987,000/=, 626,400/=,283,000/=,292,000/=and 186,202/= respectively plus interests thereon at Commercial Bank Rates from 1992 until payment in full.
- f. General damages under Article 23(3) (e) of the Constitution of Kenya 2010 in favour of the Petitioner as against the Government of Kenya being compensation for the Government's violation of the Petitioner's rights under Articles 28, 29, 38, 39, 40, 47, 48 and 64 of the Constitution of Kenya 2010 and Articles 3, 12 and 17 of the Universal Declaration of Human Rights 1948.
- g. Interest on all monetary awards, at Court rates from the date of judgment until payment in full.
- h. Costs of this petition and interests thereon at Court rates from the date of filing suit until payment in full.
- i. Any other or further relief that the Court may deem just in the circumstance.

The Petitioners' case

3. The petitioners' case as presented in the Petitions and supporting affidavits sworn by the petitioners on 26th February 2020 is that, they were victims of the politically motivated ethnic clashes that erupted in the year 1992 and 1997 throughout different parts of the country and more specifically in the Rift Valley and as a result they suffered loss as pleaded in their petitions.
4. They are registered members of Human Resettlement Disaster Care (HUREDICA) which was founded in the year 1992- 1993 by victims of the politically instigated tribal clashes while living in refugee camps, churches and other settlements in various parts of the expansive Rift Valley province.
5. The said society through its officials on 2nd August 2011 filed petition 170 of 2011 in the High Court Constitutional and Human Rights Division Court against the Attorney General and were granted leave to each file individual petitions seeking compensation for the infringement of their constitutional rights which is the basis of these petitions.
6. The petitioners' averments are that they were deprived of their Fundamental Rights and freedoms as provided for under sections 70, 71(1), 72(1), 75(1) (2), 79(1), 81(1) and 82(1) (2) (3) (5) of the repealed Constitution of Kenya. Further, the Government failed to carry out its obligations under Articles 3, 12 and 17 of the Universal Declaration of Human Rights 1948 to respect and protect the petitioners' private property as well as the petitioners' safety and security.
7. It is contended that the Government of Kenya also failed to observe its obligations enshrined under Articles 3, 5 and 14 of the African Charter on Human and Peoples Rights placing the responsibility on the Government of Kenya to protect and enact legislation that secures equal protection of its citizens before the law, secures dignity or security of the person and right to property.



The respondent's case

8. The Respondent did not file any replying affidavit, save the following grounds of opposition dated 4th November 2021: -
- i. That the petitioner has not demonstrated before the Honourable court how the respondent has violated her constitutional rights.
 - ii. The petition is time barred and the claim is unlawful detention offends the express provisions of Law i.e. Section 3 of the [Public Authorities Limitation Act](#) therefore an abuse of the court process and ought to be dismissed.
 - iii. It would be difficult for the respondent to obtain relevant public records in opposition of the petition after a period of 33 years since those records are not held by the respondent indefinitely by public entities but are disposed of after sometime as guided by the applicable Acts of Parliament and Regulations.
 - iv. The petition is prejudicial to the Respondent since it will be difficult to procure and trace witnesses 33 years after the occurrence of the alleged events.
 - v. The petitioner has not disclosed why it took her so long to bring this petition to court and therefore is guilty of laches.
 - vi. The orders sought by the petitioner are not tenable against the respondents because the petitioner has not identified the perpetrators or the names of the perpetrators involved in the alleged acts complained of.
 - vii. The exact dates of the occurrence of the acts complained of are not disclosed in the petition or supporting affidavit and it is difficult to ascertain if indeed they occurred.
 - viii. The petitioner has not disclosed if she reported the acts complained of in any police station or post and hence it is difficult to ascertain the veracity of her allegations.
 - ix. The petitioner has not disclosed how the government instigated or supported the alleged tribal clashes and hence her allegations remain unsupported.
 - x. The petitioner has failed to disclose the exact role played by the unnamed administration police officers or national government administrative officers in the tribal clashes and this render her allegations unproved.
 - xi. The petition offends the provisions of sections 106 and 107 of the [Evidence Act](#) on the burden of proof as mere generalized assertions and allegations have been made without any such supporting evidence and hence the petition is fundamentally defective.

Petition No. 69/2020 Beatrice Wangui Macharia vs. Attorney General.

9. The petitioner testified as PW1 and called one witness Francis Ndunge Gachau who testified as PW1. They adopted their witness statements (EXB 1a & b) and testified that they hailed from Ol-Moran location within Laikipia County and were victims of the ethnic clashes of 1997. PW2 was the area councilor. It's their evidence that as a result of the clashes their properties, and homes were destroyed. They fled to the Catholic Church parish at Ol-Moran, for shelter. The area administration and police



never assisted them against the attackers, who targeted the Kikuyus. The said attackers burnt down PW1's house and looted, among other things her livestock, personal items, farm tools and equipment, furniture and utensils. She immediately reported the incident to OL- Moran Police Post but did not get any help. The area administration watched as the attackers attacked Kikuyus and destroyed their property.

10. As a result, PW1 suffered loss of the following properties; 2 houses, 1 store, 1 kitchen, 1 chicken house, Furniture i.e. 3 book shelves, 1 wardrobe, 2 cupboards and 4 beds; households i.e. 25 sufuria; 4 dozen spoons, plates and cups, jugs, trays, bowls, thermos and 3 basins; beddings; farm tools i.e. 4 pangas, 15 hoes, 1 mortar and a wheelbarrow; farm animals i.e. goats and sheep, 9 cows and 101 chicken; farm produce i.e. 68 bags of maize, 6 1/2 bags of beans, 1 bag of black beans, 1/2 a bag of sorghum, 1 bag of peas and 1 1/2 bags of soya beans.

Petition No. 70 of 2020 – Dorcas Nyambura Gikuhi vs. Attorney General.

11. The petitioner testified as PW1 and called one witness Grace Gakenia Maina (PW2). They too adopted their witness statements (EXB 2 a & b). They testified that they hailed from Laikipia West sub county, Ol Moran Survey sub-location Ol Moran location. It's their testimony that they were badly affected by the ethnic clashes of 1992. Their evidence is similar to that of the witnesses in Pet No. 69 of 2020. They averred that the provincial administration, and the administration police never assisted them, despite their reports.
12. She lost the following properties; 1 house; 1 store; 1 kitchen; furniture i.e. 1 wall unit, sofa sets and 4 beds; households i.e. 8 sufurias, 2 dozens of plates, 3 dozens of cups and 4 Jerricans; Farm tools i.e. 3 pangas, 4 jembes, and 3 hoes; farm animal i.e. 25 goats, 5 cows and 3 donkeys; and farm produce i.e. 22 bags of maize, 5 bags of beans and 1 bag of peas.

Petition No. 71 of 2020 – Pauline Njeri Mwangi vs. Attorney General

13. The petitioner testified as PW1 and called one witness Johnson Wakibaru (PW2). They too adopted their witness statements – EXB 3(a) & (b). She stated that her father Mwangi Njoroge who died on 13th November 2006 in Nakuru was a victim of the ethnic clashes of 1992 & 1998. They lived in Molo South – Kamwaura. They were attacked and driven out of their farm and their property destroyed. Despite the reports, the administration did nothing. Her late father suffered loss and damage where he lost property worth Kshs.987,000/=. She therefore claimed for compensation from the government. PW2 corroborated PW1's evidence.

Petition No. 74 of 2020 - Paul Kiragu Mwangi vs. Attorney General

14. The petitioner testified as PW1. He called two witnesses namely: Esther Wanjiru Mwangi (PW2) & Mary Waithera Njoroge (PW3). They all adopted their witnesses statements (EXB 4 (a) (b) & (c). PW 1 lived in Kiukasa Molo South which neighbours Thigio village, Karirikani location Molo where PW2 & PW3 live. They claim to have been victims of the 1992 ethnic clashes.
15. They were attacked by Kalenjin warriors and deprived of their properties. They were unable to feed their livestock (goats, sheep & cows) as a result of the poor conditions they were living in after the clashes. The administration never came to their aid during the attacks. PW1 says he suffered loss and damage where he lost property worth Kshs.283,000/= and prays for compensation. PW2 & PW3 supported his claim. They sought refuge in Molo Town.



Petition No. 76 of 2020 – Joseph Mwangi Kamau vs. Attorney General

16. The petitioner testified as PW1. He called two witnesses namely; Joseph Kiptanui Kosgei (PW2) and Samuel Kamau Kamara (PW3). PW1 lives in Kamuyu Burnt Forest while PW2 & PW3 live in Umoja Sub location of Lanet Location Nakuru town. It is PW1's evidence that he was a victim of the 1992 & 1998 tribal clashes in the Rift Valley. They were attacked by people calling themselves Kalenjin warriors. As a result of the clashes they lost their properties, houses which were burnt down. The administration and the police never came to their aid.
17. He stated that as he ran from the group of men calling themselves the Kalenjin Warriors, he was pierced with arrows on his right hand and got cuts on his left hand. His neighbors took him to the hospital in burnt Forest and since that day he relocated to Burnt Forest. As a result of the government and its officials failing to uphold and protect his constitutional rights or right to own property anywhere in the country he suffered loss and damage where he lost the following properties; 1 house; 1 store; 1 kitchen; 1 latrine; furniture i.e. 1 sideboard, 1 wardrobe, 2 cupboards, 4 beds, 1 set of sofa sets, 2 chair tables and 6 stools; Households i.e. pressure lamp, 2 ordinary lamps, 3 iron boxes, 1 dozen of sufurias, 3 dozens of plates and cups, 4 sets of spoons and 2 dozens of cups; clothing i.e. 3 boxes of clothes and 4 pair of shoes; beddings i.e. 8 blankets, 7 bed sheets, 6 bed covers, and 4 mattresses; farm tools i.e. 3 pangas, 4 jembes, 2 fork jembes, sprinkler, horse pipe, weighing balance, metallic water tank and 1 bicycle; farm animal i.e. 5 sheep, 2 cows and 10 chicken; farm produce i.e. 30 bags of maize, 3 bags of beans.

Submissions

18. The petitioners filed joint submissions dated 18th March 2022 by the firm of AGN Kamau. Counsel raised three issues for determination namely: -
 - i. Whether the grounds of opposition by the respondent are merited
 - ii. Whether the petitioners' fundamental rights and freedoms under the various sections of the repealed Constitution of Kenya were violated by the respondent
 - iii. Whether the petitioners were entitled to the remedies they are seeking
19. On the first issue, and while relying on the cases of Kennedy Otieno Odiyo & 12 others v Kenya Electricity Generating Company Limited [2010] eKLR; Mohammed & Another vs Haidara [1972] E.A 166; and Mustano Rocco v Aniello Sterelli [2019] eKLR counsel submitted that the respondent did not follow the grounds of opposition with a replying affidavit hence an admission of the petitioners' facts as per their replying affidavits.
20. He submitted that the petitioners have explained in their respective petitions that they first filed a suit against the respondent through their officials on 2nd August 2011 in High Court Constitutional Petition No. 170 of 2011, upon hearing the petition the court granted them leave to file individual petitions seeking compensation for the infringement of their constitutional rights vide a judgment delivered on 18th August 2015 by Hon. Justice Lenaola.
21. They then embarked on the process of marshaling individual documentations and evidence in preparation of their individual petitions and consequently filed them in the year 2020. Before filing the petitions and due to financial hardships, they filed an application on 27th February 2019 seeking to be exempted from paying court filing fees whose ruling was delivered on 11th September 2019. They managed to file petitions on 28th February 2020 after much struggle and managing to obtain some finances. They relied on Florence Wakiuru Muchiri & another vs. Attorney General [2017] eKLR;



- Joan Akinyi Kaba Sellah and 2 others vs Attorney General, Petition No. 41 of 2014 and submitted that they have not been indolent in filing the petitions and it is fair and just that the same be heard.
22. Counsel submitted that the petitioners have individually indicated in their replying affidavits and sworn statements how their rights were infringed and who the perpetrators were at the time contrary to the respondent's allegations.
 23. On the second issue and on breach of section 70 of the repealed constitution, they submitted that the Government of Kenya through the reign of the former president the late Daniel Moi and his administration failed to protect them during the 1992-1997 clashes which were instigated by the government to displace them from their respective regions as per their petitions. To wit, each petitioner has stated that he/ she was individually attacked and his/ her house burnt down, livestock and property destroyed; they reported the attack to the area police who failed , refused and neglected to assist and failed to take any steps to stop the attacks and the destruction of their property; as a result of the government's failure to protect them individually they lost their properties thereby occasioning them loss and damage;
 24. By failing to offer protection for the right to liberty, security of person and protection of the law, the government was in breach of their rights. Further the state did not take measures to protect them resulting in them suffering physical injuries, psychological integrity and their dignity as Kenyans which resulted in violation of their right to freedom and security of person.
 25. On section 71(1) of the repealed Constitution, they submitted that that the state's failure to assure and ensure their security during the 1992-1997 clashes threated their safety and life. To wit; the police and the administration's failure to take action to stop the violent acts of the attackers amounted to lack of protection by the State which impacted their life negatively; their lives were adversely affected as a result of the attacks and violence leading to loss of livelihood and the psychological trauma, they suffered during the clashes to date.
 26. On section 71(1) of the repealed Constitution and Articles 31, 12 and 17 of the Universal Declaration of Human Rights, 1948, relying on Charles Muriithi & 2 others vs Attorney General Petition No. 113 of 2009, counsel submitted that their right to property was violated when they were forcibly displaced from their homes as a result of the clashes; their properties on the land were burnt down or destroyed whilst livestock was stolen which occasioned them great loss; and they were left in a helpless situation and were unable to rebuild and recover.
 27. On section 79(1) of the repealed Constitution, he submitted that the petitioners were attacked and forcibly displaced from their respective homes/ regions for mere perception that one was a Kikuyu and therefore perceived as a supporter of the opposition which was a threat to the re-election of the former President Moi into government; they were each denied their rights and freedoms to choose which political party to support through intimidation and harassment as portrayed in their statements and petitions.
 28. On section 81(1) of the repealed Constitution, he submitted that the attempt by the state to displace them from their respective homes/ regions just because they were perceived as supporters of the opposition to the then President Daniel Arap Moi was an infringement of their right to move and reside in any part of Kenya; the violence meted by the state between 1992 to 1997 restricted their movement within the Country; and the said rights were violated through the administration who failed to protect them by failing to prevent and / or stop the forcible displacement since the petitioners and other Kikuyus were perceived as intruders/ strangers.



29. On section 82, and while relying on section 82(3) of the repealed Constitution, Article 6 & 7, of the Universal Declaration of Human Rights 1948, counsel submitted that as evidenced in their individual affidavits and contrary to the said section, the petitioners suffered discrimination and the State failed to protect them and others.
30. On the third issue, it was submitted that the petitioners have individually satisfied the evidential burden that a specific right existed and which right was violated by the State beside pleading the same with reasonable particularity and precision. Counsel relied on section 107 of the *Evidence Act* and the cases of Stephen Nyarangi Ouma & Another v George Magoha & 7 others [2014] eKLR and argued that consequently they are entitled to general damages and compensation of their respective special damages as indicated in each of their petitions. Counsel further relied on Allio Somo Abdi on behalf of the subject Mohamed Adan Abdow & 2 others v Minister of State for Provincial Administration and Internal Security & 3 others [2019] eKLR where the court awarded Kshs. 7,000,000/- and Moses Tengeya Omweno v The Commissioner of Police & Another CA Civil Appeal No. 243 of 2011 [2018] eKLR where the Court of Appeal substituted an award of Kshs.2,000,000/= with Kshs.5,000,000/=. He urged the court to award Kshs.7,000,000/= to each of the petitioners and costs of the petition.

The Respondent's submissions

31. The respondent filed submissions dated 30th March 2022 through M/s P. A. Chibole Senior State Counsel, raising three issues for determination: -
 - i. Whether the respondent's conduct constitutes a violation and contravention of *the Constitution* of Kenya 2010
 - ii. Whether the petition is time barred
 - iii. Whether the Honorable Court should issue the orders sought in the petition
32. On infringement of the petitioners' rights by the respondent, and relying on the cases of Anarita Karimi Njeru vs R (1976-1980) KLR and Mumo Matemo v Trusted Society of Human Rights Alliance & amp; 5 others [2013] eKLR, she submitted that the petitioners have failed to demonstrate how they were tortured and the nature of the injuries sustained. That there is no support to the allegations made.
33. It is the respondent's case that the petitioners offend the provisions of the *Evidence Act* as they did not produce any photographs to show that their properties were actually burnt down and/ or destroyed as alleged. The petitioners relied on the list of properties prepared by Huredica Welfare Organization in 1992. It is not signed by any person and was not produced in court by the maker as required in law and the court has been left to guess on who actually prepared the document and when in the year 1992.
34. Relying on sections 107 and 108 of the *Evidence Act*, she submitted that it is incumbent upon the petitioners to prove on a balance of probabilities that the allegations they have brought before this court are true as stated in the case of Constitutional Petition No. 128 of 2006, LT Col. Peter Ngari Kagume & others vs Attorney General. No such burden of proof was discharged by the petitioners. It is not enough to allege and fail to produce any documentary evidence that they reported the situation in any police station. No occurrence book extract has been tendered as evidence in court therefore it's not possible to know the exact dates of the occurrences of the acts complained of if at all it did occur. She relied on Constitution Petition No. 128 of 2006, Lt. Col. Peter Ngari Kagume & Others vs Attorney General, in support.
35. Counsel submitted that the petitioners have not identified the perpetrators or the names of the perpetrators involved in the alleged acts complained of save for the late Mr. William Ole Ntimama who



cannot be called to testify in court. The police only act within their powers as provided under sections 24 and 35 of the [National Police Service Act](#).

36. On whether the petition is time barred, she submitted that the acts complained of occurred 28 years ago and the court has to consider whether the delay in filing a petition alleging violation of constitutional rights is unreasonable and prejudicial to a respondent's defence. There was no explanation for the delay when the alleged acts occurred and 2011 when the petitioners filed Constitutional Petition No. 170 of 2011, Patrick Chege Kinuthia & 2 others v the Hon. Attorney General. Also, no explanation has been preferred for the delay from 2015 when the judgment in the said constitutional petition was delivered and it would be difficult for the respondent to obtain relevant public records in opposition to the petition. She relied on High Court Petition No. 306 of 2012 Ochieng Kenneth K'Ogutu vs Kenyatta University and 2 others and High Court Petition No. 424 of 2013 Joseph Migere Onoo vs The Attorney General.
37. On whether the petitioners are entitled to the orders sought, she submitted that they have failed to prove their cases on merit. The same should thus be dismissed with costs.

Analysis and determination

38. Having carefully considered the parties' pleadings, oral evidence, submissions and the law I find the following issues to arise for determination: -
- i. The effect of failing to file a Replying Affidavit to the petitions
 - ii. Whether the petition is time barred
 - iii. Whether the petitioners' rights under sections 70, 71(1), 72(1), 75(1) (2), 79(1), 81(1) and 82(1) (2) (3) (5) of the repealed Constitution were violated
 - iv. Whether the reliefs sought in the petitions should be granted

Issue No. (i) The effect of failing to file a replying affidavit

39. Rule 15 of [the Constitution](#) of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules) on reply to a petition provides as follows: -
15. The Attorney-General or any other State organ shall within fourteen days of
 - (1) service of a petition respond by way of a replying affidavit and if any document is relied upon, it shall be annexed to the replying affidavit.
 - (2) A respondent not in category of sub rule (1) shall within seven days file a memorandum of appearance and either a-
 - (i) replying affidavit; or
 - (ii) statement setting out the grounds relied upon to oppose the petition.
 - (b) after filing either of the documents referred to in sub rule (2) (a), a respondent may respond by way of a replying affidavit or provide other written document as a respond to the petition within fourteen days.
 - (3) The respondent may file a cross-petition which shall disclose the matter set out in rule 10(2).



40. The Attorney – General has been sued as the respondent. Going by the provisions of Rule 15(1) of the Mutunga Rules, he ought to have filed a replying affidavit to the petition.
41. What then is the impact of filing grounds of opposition instead of replying affidavit? In the case of Kennedy Otieno Odiyo & 12 Others v. Kenya Electricity Generating Company Limited [2010] eKLR it was held as follows: -

“The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition address only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the application in its supporting affidavit. Thus what was deponed to was not entered nor rebutted by the Respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant’s supporting affidavit, means that the respondents have no claim against the applicant.

42. In *Mustano Rocco v Aniello Sterelli* [2019] eKLR, Chepkwony J, stated as follows: -

“8. With regard to the foregoing authorities, I find the Respondent only filed grounds of opposition there being no replying affidavit to the application, the facts deponed to in the supporting affidavit are therefore considered unrebutted and I take them to be true. However, where the averments made in the affidavit fall short of the legal threshold expected in a matter, this Court may still decline to grant the orders sought and this must be so even in cases where the application is not opposed.”

43. In *Phillip Tirop Kitur v Attorney General* [2018] eKLR, Mativo J, stated thus: -

“11. Before addressing the above issues, I find it necessary to address the issue of the Respondent’s failure to file a Replying affidavit to this Petition and failure to call witnesses. The Petitioners counsel citing *Harun Thungu Wakaba vs A.G.*[1] argued that in absence of a replying affidavit, hence the Petitioners averments remain uncontested. The Respondents’ counsel did not specifically address this issue.

12. It is common ground that the only evidence on record is the evidence tendered by the petitioner. Failure to file a Replying Affidavit or adduce evidence on the part of the Respondent means that the evidence adduced by the Petitioner is uncontroverted and therefore unchallenged.[2] In *Interchemie EA Limited vs. Nakuru Veterinary Centre Limited*[3] it was held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted.”

Also see;

- i. *Peter O. Nyakundi & 68 others v Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & another* [2016] eKLR.
- ii. In *Daniel Kibet Mutai & 9 others v Attorney General* [2019] eKLR. In particular paragraphs 34, 41 – 44.



44. Based on the above court decision and the provisions of the Mutunga Rules, it is clear that the facts of the petitioners' cases were admitted by failure to file a replying affidavit. The petitioners' case was therefore admitted, by the respondent.

Whether the petition is time barred

45. The respondent raised this issue and stated that the petitioners have not explained the delay in filing the Petitions herein and that it is prejudicial to them as they are unable to get other documents they intend to rely on. The petitioners did not give any explanation to this in the petitions or affidavits. The explanation has instead been given by counsel in the submissions which is already captured elsewhere in this Judgment.

46. The general rule is that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights as observed in *Dominic Arony Amolo vs Attorney General, Nairobi High Court Misc. Civil Case No. 1184 of 2003 (OS) [2010] eKLR*

“I therefore, think and I so hold that Section 3 of *the Constitution* excludes the operation of Cap 22 with regards to claims under fundamental rights and further that fundamental rights provisions cannot be interpreted to be subject to the legal heads of legal wrongs or causes of actions enunciated under the Limitation Act, Cap 22.”

47. In the case of *Kiluwa Limited & another vs. Commission of Lands & 3 others [2015] eKLR* it was stated:

“...there is no statutory period prescribed for commencement of the petitions either under Article 22 or 258 of *the constitution*. The grant of these reliefs or remedies are consequently not subject to any statute or period of limitation either under the *Limitation of Actions Act* (Cap 22 laws of Kenya) or the *Law Reform Act*... I therefore reject argument by Counsel for the 3rd and 4th respondents subjecting the reliefs in judicial review granted in a constitutional petition to any period of limitation.”

48. However, this court is required to determine whether there was inordinate delay as observed by the Court of Appeal decision in *James Kanyiiita Nderitu v Attorney General & another [2019] eKLR*. The court stated;

33. In the instant matter, the appellant asserts that the delay of over 26 years was explained. We remind ourselves as was aptly stated in *David Gitau Njau & 10 Others vs. the AG Petition No. 340 of 2012* that there is no limitation period imposed by *the constitution* in seeking redress for violation of fundamental rights and freedoms. In this matter, we have examined the record of appeal and more particularly the affidavit in support of the petition. We are unable to discern any specific paragraph which explains the delay in filing the petition. All the appellant submitted on this issue is rehashing the background facts from the date of his arrest to the date when the High Court quashed his conviction. In his written submission, it is urged that by the time the appellant was lodging the petition in 2011, it was shortly after the promulgation of the new 2010 Constitution that ushered in a new regime in the protection and enforcement of the Bill of Rights.



34. Promulgation of the 2010 Constitution is not an act that extends or revives old causes of action. Promulgation neither founds a cause of action nor is it an absolute excuse for each and every delay in instituting proceedings for causes of action which arose and were known to exist. Delay in filing a petition or any cause of action must be explained independently of the promulgation of the 2010 Constitution.

Also see:

- i. Florence Wakiuru Muchiri & another vs Attorney general [2017] eKLR.
- ii. Humphrey Mutegi Burini & 9 others v Chief of the Kenya Defence Forces & another [2017] eKLR.

49. In as much as I note that there has been delay in filing the petitions herein, I also note in line with the cited authorities and agree with Justice Lenaola that these are special cases, where there have been historical injustices. The petitioners filed this petition in 2020 but this was after they had been given a green light by Lenaola J, (as he then was) in 2015 to each file a constitutional petition. The delay in filing these petitions has been explained. In my view, it would be unfair to dismiss the petitions on the grounds of time limitation.

Whether the petitioners' rights under sections 70, 71(1), 72(1), 75(1) (2), 79(1), 81(1) and 82(1) (2) (3) (5) of the repealed Constitution were violated

50. I will deliberately cite what each of these provisions provides:

70. Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely—

- (a) life, liberty, security of the person and the protection of the law;
- (b) freedom of conscience, of expression and of assembly and association; and
- (c) protection for the privacy of his home and other property and from deprivation of property without compensation, the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

71 (1) No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted.



72(1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases, that is to say—

- (a) in execution of the sentence or order of a court, whether established for Kenya or some other country, in respect of a criminal offence of which he has been convicted;
- (b) in execution of the order of the High Court or any Court of Appeal exercising jurisdiction in Kenya punishing him for contempt of any such court or of another court or tribunal;
- (c) in execution of the order of a court made to secure the fulfilment of any obligation imposed on him by law;
- (d) for the purpose of bringing him before a court in execution of the order of a court;
- (e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law of Kenya;
- (f) in the case of a person who has not attained the age of eighteen years, for the purpose of his education or welfare;
- (g) for the purpose of preventing the spread of an infectious or contagious disease;
- (h) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community;
- (I) for the purpose of preventing the unlawful entry of that person into Kenya, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Kenya or for the purpose of restricting that person while he is being conveyed through Kenya in the course of his extradition or removal as a convicted prisoner from one country to another; or
- (j) to such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within Kenya or prohibiting him from being within such an area, or to such extent as may be reasonably justifiable for the taking of proceedings against that person relating to the making of any such order, or to such extent as may be reasonably justifiable for restraining that person during any visit that he is permitted to make to any part of Kenya in which, in consequence of any such order, his presence would otherwise be unlawful.

75(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say—



- (a) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of any property in such manner as to promote the public benefit; and
 - (b) the necessity therefore is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and
 - (c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.
- (2) Every person having an interest or right in or over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court for—
- (a) the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled; and
 - (b) the purpose of obtaining prompt payment of that compensation: Provided that if Parliament so provides in relation to any matter referred to in paragraph (a) of this subsection the right of access shall be by way of appeal (exercisable as of right at the instance of the person having the right or interest in the property) from a tribunal or authority, other than the High Court, having jurisdiction under any law to determine that matter.
- 79(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.
- 81(1) No citizen of Kenya shall be deprived of his freedom of movement, that is to say, the right to move freely throughout Kenya, the right to reside in any part of Kenya, the right to enter Kenya, the right to leave Kenya and immunity from expulsion from Kenya.
- 82(1) Subject to subsections (4), (5) and (8) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.
- (2) Subject to subsections (6), (8) and (9) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.
- (3) In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connexion, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.
- (5) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) of this section to the extent that it makes provision with respect to standards or



qualifications (not being standards or qualifications specifically relating to race, tribe, place of origin or residence or other local connexion, political opinion, colour or creed) to be required of any person who is appointed to any office in the public service, in a disciplined force, in the East African Community, in the service of a local government authority or in a body corporate established by any law for public purposes.

51. The petitioners have alleged that their constitutional rights under the above-mentioned sections of the repealed Constitution were violated by the government officers represented by the respondent. They have further submitted that they have mentioned the names of the perpetrators in their individual replying affidavits and sworn statements. That the state failed in its obligations by failing to protect them during the alleged incidences. The respondent on the other hand has submitted that the petitioners offend sections 107 and 109 of the *Evidence Act* in terms of availing evidence. That besides not mentioning the names of the perpetrators they provided no evidence to prove their claims. That the document from HUREDICA was not produced by the maker and they did not state how the respondent violated their constitutional rights.

52. Section 107 and 109 of the *Evidence Act* Cap 80 Laws of Kenya provides as follows: -

107. Burden of proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

53. In the case of *Christian Juma Wabwire v Attorney General* [2019] eKLR the court held:

23. Section 107 of the Evidence Act provides, that he who alleges must prove. The petitioner failed to call evidence to prove his allegation. In the case of *Lt. Col Peter Ngari Kaguma and others vs AG*, Constitutional Application No. 128 of 2006 it was held:

“... it is incumbent upon the petitioners to avail tangible evidence of violation of their rights and freedoms. The allegations of violations could be true but the court is enjoined by law to go by the evidence on record. The petitioners’ allegations ought to have been supported by further tangible evidence such as medical records, witnesses..... the court is deal to speculation and imaginations and must be guided by evidence of probative value. When the court is faced by a scenario where one side alleges and the rival side disputes and denies, the one alleging assumes the burden to prove the allegation... However, mere allegation of incarceration without providing evidence of the same does not at all assist the court. It was incumbent upon the petitioners to provide evidence of long incarceration beyond the allowed period and not to be presumptuous that the court knows what happened...”



54. The burden of proof on a Petitioner in a constitutional Petition was addressed by the Supreme Court in *Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others* [2014] eKLR as follows: -

Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru 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.

55. In the case of *Peter Ngari Kagume & 7 Others v Attorney General* [2009] eKLR it was stated;

Turning to the alleged violation as aforementioned, it is incumbent upon the petitioners to avail tangible evidence of violation of their rights and freedoms. I have gone through the petitioners' affidavits which have horrifying allegations. The Respondent has denied all those allegations. The allegations of violations could be true but the court is enjoined by law to go by the evidence on record. The petitioners' allegations ought to have been supported by further tangible evidence such as medical records, witnesses or rather oral evidence capable of being subjected to cross examination to test its veracity. The Petitioners did not provide such evidence except the averments of what transpired to them. It is most probable that in the prevailing circumstances then, the petitioners were subjected to physical beating, torture, detention without trial among other violations but the court is deaf to speculation and imaginations and must be guided by evidence of probative value. When the court is faced by a scenario where one side alleges and the rival side disputes and denies, the one alleging assumes the burden to prove the allegation. I have gone through the entire court record and there is absolutely nothing to support the allegations made by the petitioners.

56. What is evident is that the petitioners have the burden of proving the alleged constitutional violations. A look at the petitions, affidavits in support thereof, and the witness statements, and their evidence reveals that the petitioners have at large narrated the occurrences of the post-election violence in 1992 and 1997. They have even mentioned names of some of the alleged perpetrators. They have however failed to; adduce evidence of the said meetings held to instigate the Kalenjin tribes against the Kikuyu Tribe; produce any Occurrence Book (O.B) to demonstrate that they reported the matters to the police station; produce medical reports to show the injuries sustained or that as a result of the post-election violence they suffered psychological trauma; and produce photographs to show the then destroyed houses and property. How does the court establish the existence of all these properties they claim compensation for?

57. They have not sued the perpetrators whom they claim to know as, respondents in this case, to enable them respond to the allegations. There is no evidence from the alleged shelters or refugee camps to demonstrate that they indeed sought refuge therein. They have not demonstrated how they suffered discrimination or how the State failed to protect them. There is no evidence of loss of lives as a result of the alleged post-election violence. I agree with the respondent that the list of properties prepared by HUREDICA was not signed nor produced in court by the makers hence its authenticity is questionable. In my view therefore the petitioners have not discharged their burden of proof as to how the said provisions of the repealed Constitution were violated, by the respondent.



Whether the reliefs sought should be granted

58. Having determined above that the petitioners have not discharged their burden of proof as to the constitutional violations alleged, it follows that they are not entitled the prayers sought in the petitions. The petitioners are in their respective petitions seeking special damages of the properties lost/ looted and / or destroyed. A special damage claim, must not only be specifically pleaded but also proved. In *Farah Awad Gullet v CMC Motors Group Limited* [2018] eKLR where the order dismissing the Appellant’s special damages claim was affirmed by the Learned Judges of Appeal – R. N. Nambuye, F. Sichale, and S. Ole Kantai, the Court stated: -

“Considering the above holding in the light of the now crystalized principle of law that special damages must not only be specifically pleaded but also proved, we agree with the trial Judge’s holding that it was not sufficient for the appellant to merely state the loss that he had allegedly suffered, and throw the resulting figure to the Court, and then ask the Court to allow it. He was obligated in law first of all to prove that there existed a trade usage in the Lolgorian area, of hiring out tractors for ploughing activities at the rate claimed, and secondly, to call witnesses to demonstrate the existence of such a trade practice in the said area. (See *Harilal & Co. and another (supra)*.”

59. The decision of the Court of Appeal in *Hahn V. Singh* , Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal – Kneller, Nyarangi JJA, and Chesoni Ag. J.A – held:

“Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural of probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the acts themselves.”

60. In *Rukia Abdi Many & another v Officer Commanding Police Station Habaswein & another* [2020] eKLR the court stated;

“38. Starting with the first issue, it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit. See *National Social Security Fund Board of Trustees vs Sifa International Limited* (2016) eKLR, *Macharia & Waiguru vs Muranga Municipal Council & Another* (2014) eKLR and *Provincial Insurance Co. EA Ltd vs Mordekai Mwanga Nandwa*, KSM CACA 179 of 1995 (UR). In the latter case this Court was emphatic that;

“... It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead. It is equally clear that no general damages may be awarded for breach of contract”

61. The petitioners pleaded special damages but did not prove the same. In a nutshell the petition has not been proved to the required standard.

62. The award of costs is discretionary. The petitioners will not be condemned to pay costs since they were exercising their constitutional right of access to justice.

63. The upshot is that all the petitions are dismissed with no order as to 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

