REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A.C. Mrima J.)

CONSTITUTIONAL PETITION NO. E008 OF 2020

BETWEEN

1. ANN KIOKO

2. PEARLS & TREASURES TRUST

3. KENYA CHRISTIAN PROFESSIONAL FORUM.....PETITIONERS

VERSUS

1. KENYA MEDICAL PRACTITIONERS & DENTISTS COUNCIL

2. THE ATTORNEY GENERAL

3. DIRECTOR GENERAL OF HEALTH

4. THE CABINET SECRETARY, MINISTRY OF HEALTH

5. MARIE STOPES KENYA

6. KENYA PHARMACY

AND POISONS BOARD.....RESPONDENTS

AND

KENYA FILM CLASSIFICATION BOARD.....INTERESTED PARTY

RULING NO. 1

Introduction and Background:

1. This is a composite ruling in respect of three applications. They are the Notice of Motion dated 15th September, 2020, the Notice of Motion dated 16th November, 2020 and a Notice of Preliminary Objection dated 21st August, 2021.

2. Two applications were filed by the 5th Respondent herein, *Marie Stopes Kenya*. They are Notice of Motion dated 15th September, 2020 and the Notice of Preliminary Objection dated 21st August, 2021. The third application, a Notice of Motion dated 16th November, 2020 was filed by the Petitioners.

3. The 1st Petitioner, *Ann Kioko,* is the Campaigns Director of *Africa CitizensGo*, an organization that advocates for family values, promotion of life and religious beliefs. The 2nd Petitioner, *Pearls & Treasures Trust*, is a Trust Organization focused on helping girls and women who have undergone trauma, shock and health complications arising from abortion through intervention and counselling. The 3rd

Petitioner, *Kenya Christian Professional Forum,* is an organization of Christian professionals from different denominations who share common values on life, family, religion, education and governance.

4. The Petitioners' grievance was instigated by the decision of *Kenya Medical Practitioners & Dentists Council,* 1st Respondent herein, to lift the ban it had imposed on *Marie Stopes Kenya,* the 5th Respondent herein, from offering abortion related services.

5. The Petitioners lodged the instant Petition dated 7th July, 2020. It is supported by three Affidavits sworn by *Dr. Wahome Ngare, Ann Kioko* and *Noel Khasandi* respectively. The Petitioners were agitated by the fact that the 1st Respondent did not involve the 1st Petitioner in the decision to lift the ban despite being the complainant before the 1st Respondent that culminated in the imposition of the ban.

6. It is their case *inter alia* that the 1st Respondent ought not to have reversed its decision of 14th November, 2018, which among other orders directed the 5th Respondent to cease and desist from offering all forms of abortion related services within Kenya, without hearing all necessary parties.

7. The Petitioners are aggrieved that the lifting of the ban has resulted in unchecked abortion related services which have led to termination of lives of unborn children in violation of the right to life safeguarded under Articles 26 and 27 of the Constitution.

8. The Petitioners posited that the Respondents have violated and or threatened with violation, the inherent dignity of unborn children as well as the freedom from any form of violence, torture, cruelty, inhuman or degrading treatment safeguarded under Articles 28 and 29 of the Constitution.

9. As against the 1st, 3rd and 4th Respondents, the Petitioners contended that their failure to formulate a uniform practice for reviewing, documenting and intervention of abortions performed at various health facilities within Kenya has made abortion services available on demand in violation of unborn children's' right to life, to equal protection and benefit of the law and freedom from discrimination, inherent dignity and freedom from violence, torture, inhuman or degrading treatment guaranteed by the Constitution under Articles 26, 27 and 28 respectively.

10. The Petitioners further claimed that the Respondents' failure to put in place standards for the disposal of foetuses arising from medical abortions has exposed the lives of pregnant mothers to health hazards and left unborn children disposed inhumanely in violation of the right to dignity, non-discrimination secured under Articles 28, 29, 43, 53 and 56 of the Constitution respectively.

11. In addition, the Petitioners contended that the Respondents' failure to formulate and implement a program and or mechanism that ensure pharmacies, chemists and other medical facilities that sell drugs with Mifepristone, a combination of Mifepristone and Misoprostol and any other abortion inducing elements on prescription only has opened up prevalence of abortion on demand in violation of Articles 26, 27, 28, 43, 48, 53 and 56 of the Constitution.

12. In the main and based on the foregoing, the Petitioners sought the following reliefs: -

a) A declaration do hereby issue that the Kenya Medical Practitioner and Dentists Council letter dated 20th December 2018 and meeting of 1st March 2019 lifting the ban imposed on 14th November 2018 on Marie Stopes from offering abortion related services without affording the 1st Petitioner as the complainant and representative of unborn children an opportunity to be heard on such proposal the Respondent violated and threatens the continued violation of Articles 26, 27,28,29, 35,43, 47,48,50(1),53 and 56 of the Constitution of Kenya 2010.

b) A declaration do hereby issue that the 1st, 3rd and 4th Respondents' failure to formulate a uniform practice for reviewing, documenting and intervention in abortions performed at the various health facilities across the republic of Kenya violates Article 26,27,28,29,48,53 and 56 of the Constitution of Kenya 2010.

c) A declaration do herby issue that the 1st 3rd and 4th Respondents to put in place standards in terms of the medical facilities at which medica abortions can be conducted and the disposal of foetus remains violates Article 28, 29, 43, 48, 53 and 55 of the Constitution of Kenya 2010.

d) A declaration do herby issue that the 1st, 3rd and 4th Respondents' failure to formulate and implement programme an or mechanism that ensures pharmacies, chemists and other medical facility that sell drugs with Mifepristone, a combination of Mifepristone and Misoprostol and any other abortion inducing elements on prescription only has opened up prevalence of abortion on demand in violation of Article 26, 27, 28, 43, 48, 53 and 56 of the Constitution of Kenya 2010.

e) A permanent injunction do hereby issue against Marie Stopes and or its employees and or agents from offering abortion related services at its clinics and or facilities and or anywhere within the republic of Kenya until it demonstrates that it has filly complied with the conditions imposed on it by the Kenya medical Practitioners and Dentists Council's Ruling dated 10th November 2018 and forwarded under a cover letter dated 14th November 2018.

f) A conservatory Order of structural interdict or otherwise do herby issue that e 1st, 3rd and 4th Respondents should formulate and implement a programme and or mechanism that allows for the reviewing, documenting and intervention in medical cases of abortions and abortion related services offered in medical facilities within the Republic of Kenya.

g) A conservatory Order of structural interdict or otherwise do herby issue that a licensing requirement should be made t all

medical facilities within the Republic of Kenya where abortion and abortion related services can be offered and that where an abortion or abortion related service is offered then the same should be documented, including the opinion if any given to terminate pregnancy and assessment of the viability of pregnancy and returns of such documentation should be submitted to the Kenya Medical Practitioners and Dentists Council on a weekly and or monthly and or other periodic interval.

h) A conservatory Order of structural interdict or otherwise do hereby issue that any medical facility that performs abortion within the Republic of Kenya including Marie Stopes to be required to have a surgical theatre for emergency surgical intervention that are ready when the patient's condition deteriorates and access to nearby Intensive Care Unit facilities and keep comprehensive records of all instances of termination of pregnancy.

i) A conservatory Order of structural interdict or otherwise do hereby issue that any pharmacy, chemist or other medical facility that sells drugs with Mifepristone, a combination of Mifepristone and Misoprostol and any other abortion inducing elements to document sales on these drugs including the medical doctor's prescription notes presented by purchases and the returns of such documentation should be returned to the Kenya Pharmacy and Poisons Board and the Director General of Health on a weekly and or monthly and or any other period that the Court may prescribe.

j) An Order of Compensation by Marie Stopes Kenya by way of general and aggravated damages in respect of the girls and women who they have performed abortions on without providing counselling and examination of their health and in respect of the unborn children whose lives have been unknowingly terminated.

k) Costs of the Petition shall be borne by the Respondents.

13. In opposition to the Petition, the 5th Respondent filed a Notice of Preliminary Objection dated 21st August 2020. It sought to strike out the entire Petition on the following grounds: -

1. The Petitioners herein lack locus standi to bring the Petition against the 5th Respondent in that;

a. The petition does not set out the particulars of infringement of rights by the 5th Respondent as against the Petitioners as required by law and held in the seminal case of Anarita Karimi Njeru -vs- Republic (1979) KER154.

b. There is no link between the Petitioners and the 5th Respondent to enable them sustain the Petition as required in law to wit Supreme Court decision in Communications Commissions of Kenya & 5 Others -vs- Royal Media Services Limited & 5 Others postulates.

2. This Honourable Court lacks jurisdiction to hear and determine this case as the subject matter is the subject of appeal in the Court of Appeal at Nairobi vide Civil Appeal No. 594 of 2019.

3. The Petition herein is res-judicata as the entire substratum of the Petition has been determined by this Honourable Court vide Nairobi Constitutional Petitions No. 428 of 2018 and No. 266 of 2015.

4. This Petition is bad in law and an abuse of the court process in that the petitioners have not exhausted statutory remedies against the 5th Respondent prior to institution of the instant Petition.

14. Before the objection could be heard, the 5th Respondent filed the Notice of Motion dated 15th September 2020. The application is supported by the Affidavit sworn by *Dr. Hezron Mc' Obewa*.

15. The application sought the following orders: -

a. Spent

b. This Honourable Court be pleased to direct that the preliminarily Objection dated 21st August 2020 and filed in Court be heard on the same day together with this Application.

c. That Honourable Court be pleased to grant an order of Temporary injunction against the Petitioners, their agents, employees, servants undisclosed principal and any other persons acting on their behest from communicating to the public uncorroborated, inflammatory, defamatory, disparaging or any other form of communications with regard to the operations of the 5th Respondent including alleging that the 5th Respondent engages in unlawful abortion either by print, visual, audio visual through any media including their media platforms such as websites, telephone messages, social media, electronic media and mainstream media pending the hearing and determination of this application and Petition herein.

d. The Honourable Court be pleased to rule that the 5th Respondent is improperly enjoined in this instant Petition and consequently order its name to be struck out from this Petition.

e. The Honourable Court be please to strike out the entire Petition for being bad in law and an abuse of the Courts process.

f. That costs of this Application be awarded to the 5th Respondent.

16. The Petitioners also filed the Notice of Motion dated 16th November, 2020. It was supported by the Affidavit of *Noel Khasandi*. They sought the following orders: -

> *1. That leave be and is hereby issued for amendment of the Petition filed herein in terms of the draft Petition attached herein as well as the joinder of O.S as the 4th Petitioner in the current proceedings.*
>
> *2. That costs of the Application be in the Cause.*

17. On directions of this Court, parties filed written submissions on the three applications and made some highlights thereon. For record purposes, only two parties participated in the hearing of the three applications. They are the Petitioners and the 5th Respondent.

Issues for determination and analysis:

18. From the foregoing background to the applications and in consideration of the parties' cases as pleaded, the submissions filed and the decisions referred to, I hereby discern the following issues for determination: -

> *i. Whether the Preliminary Objection is sustainable in law.*
>
> *ii. Depending on (i) above, whether the objection and the Notice of Motion dated 15th September, 2020 are merited;*
>
> *iii. Depending on (ii) above, whether the Notice of Motion dated 16th November, 2020 is merited.*
>
> *iv. Disposition.*

19. I will now deal with the issues as under.

i. Whether the Preliminary Objection is sustainable in law:

20. The validity of a preliminary objection is considered on the basis that it conforms with the long-standing legal principle that it is raised on a platform of agreed set of facts, it raises pure points of law and is capable of wholly determining the matter.

21. To that end, my attention is drawn to the *locus classicus* decision in ***Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd*** (1969) E.A 696. At page 700, where the Court defined a preliminary objection and discussed its operation in the following eloquent manner: -

> ...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.
>
> *...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.*

22. The Supreme Court weighed in on the issue in ***Aviation & Allied Workers Union Kenya -vs- Kenya Airways Ltd & 3 Others*** [2015] eKLR and stated thus: -

> **….** *Thus a preliminary objection may only be raised on a 'pure question of law'. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.*

23. *Ojwang J*, as he then was, emphasized the finding in *Mukisa Biscuit -vs- West End Distributors* case (supra) in Civil Suit No. 85 of 1992, ***Oraro -vs- Mbaja*** **[**2005] 1 KLR 141 when he observed as follows: -

> **…..** I think the principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed….

24. In ***John Musakali -vs- Speaker County of Bungoma & 4 others*** (2015) eKLR the validity of a preliminary objection was considered in the following manner: -

> **….** The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of

law….

25. Finally, in ***Omondi -vs- National Bank of Kenya Ltd & Others*** {2001} KLR 579; [2001] 1 EA 177, guidance was given on what Courts ought to consider in determining the validity of preliminary objections. It was observed: -

> *…..In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters…What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion….*

26. I now return to the contents of the objection.

27. The objection in this matter has four limbs. It is contended that the Petitioners lack *locus standi* in this matter, that the Court lacks jurisdiction on the basis of the principles of *sub-judice* and *res judicata* and that the Petition is an abuse of the Court process.

28. In the event of any of the limbs succeeding, the entire proceedings will stand terminated. Therefore, in view of the manner in which the objection is tailored, it comes out that the objection rests purely on points of law and does not call for any evidence in its determination.

29. It is this Court's finding that the Preliminary Objection passes the propriety test and the objection is for consideration.

ii. Whether the objection and the Notice of Motion dated 15th September, 2020 are merited:

30. I will deal with this issue under the following five sub-issues namely: -

(a) The Petitioners' *locus standi.*

(b) Whether the current proceedings are *sub-judice* Nairobi Court of Appeal Civil Appeal No. 594 of 2019.

(c) Whether the current proceedings are *res judicata* as the substratum of the Petition has been determined by in Nairobi Constitutional Petitions No. 428 of 2018 and No. 266 of 2015.

(d) Whether the doctrine of exhaustion bars this Court from exercising jurisdiction over the Petition.

(e) Whether the Notice of Motion dated 15th September, 2020 is merited.

31. An analysis of each of the sub-issues follow.

The Petitioners' *locus standi*:

32. The 5th Respondent in raising the issue of *locus standi* intertwined it with the issue as to whether the Petition failed to meet the threshold required of constitutional Petitions. Those are two distinct aspects each of which can bring a Petition to an end, if proved. In this case, therefore, I will take it that the 5th Respondent raised both aspects.

33. On *locus standi*, it was argued that notwithstanding the provisions of Articles 22 and 23 of the Constitution, the Petitioners failed to demonstrate how their rights stand infringed by the allegations put forth. As such, it is argued, they all lack the right to institute these proceedings.

34. On whether there was a valid Petition for consideration, it was argued that the Petition failed to establish the facts relied upon, the constitutional provision relied upon, the nature of injury caused or likely to be caused and the relief sought as required under rule 10 of *Mutunga Rules (The Protection of Rights and Procedure Rules, 2013).*

35. In view of the foregoing, it was submitted that the Petitioners failed to demonstrate its complaint against the 5th Respondent, the provision violated and the manner of violation, a requirement of Constitutional Petitions as was established in *Anarita Karimi Njeru -vs- Republic* (1979) KLR and later by the Court of Appeal in *Mumo Matemu -vs- Trusted Society of Human Rights Alliance* as to give the Petitioner *locus* to institute the instant Petition. In the latter case support was found on the following finding;

> *….in this broader context, this court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process…*

36. It was submitted further that the Petitioners failed to establish a link between themselves and the 5th Respondent to enable them sustain the Petition as set out the Supreme Court decision in *Communications Commission of Kenya & 5 Others -vs- Royal Media Services Limited and 5 others.*

37. The Petitioners contended otherwise. They posited that the Petition is filed in public interest, that they all have sufficient *locus standi*

and that the Petition stands the requirements of the Constitution and the law. They also referred to several decisions in support of their position.

38. I will first look at the aspect of *locus standi*. The aspect of *locus standi* is, legally-speaking, a well beaten path. Courts have, by now, rendered themselves well enough on the subject.

39. The ***Black's Law Dictionary,*** 9th Edition defines *locus standi* at page 1026 as follows: -

> *The right to bring an action or to be heard in a given forum.*

40. The Court of Appeal in Mombasa Civil Appeal No. 75 of 2016, ***Juletabi African Adventure Limited & another -vs- Christopher Michael Lockley*** [2017] eKLR referred to its earlier decision in *Alfred Njau & 5 others -vs-City Council of Nairobi* [1983] eKLR where *locus standi* was described as follows: -

> ***…*** *The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding.…*

41. Articles 22 and 258 of the Constitution are the anchor provisions on *locus standi*. Article 22 provides the right of every person to institute proceedings whenever a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. Article 258 roots for every person's right to institute proceedings that the Constitution has been contravened or is threatened with contravention. In both instances, such proceedings may be instituted by the aggrieved party on its own interest, by a person acting on behalf of another person, on behalf of a class of people, in public interest or by an association acting on behalf of its member or members.

42. The Supreme Court in Advisory Opinion Reference 1 of 2017, ***Kenya National Commission on Human Rights -vs- Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)*** [2020] eKLR discussed the dynamics of *locus standi*. It referred to its earlier decisions in Reference No. 1 of 2013, ***in the Matter of the National Gender and Equality Commission*** and Constitutional Application Number 2 of 2011, ***Re The Matter of the Interim Independent Electoral Commission.*** Although the Court dealt with the factors to be considered regarding who may commence a suit before the Supreme Court in seeking an advisory opinion pursuant to Article 163(6) of the Constitution, I find that the principles therein remain largely applicable to the aspect of *locus standi* under Articles 22 and 258 of the Constitution. The Court stated as follows: -

> ***…*** *the Court must always consider whether the party seeking to move it, falls within the categories of parties decreed as having such standi by the Constitution.…*

43. The Court of Appeal in Nairobi Civil Appeal No. 290 of 2012 ***Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others*** (2013) eKLR discussed the matter as follows: -

> *27. …….. this Court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the Courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. …… We hold that in the absence of a showing of bad faith as claimed by the Appellant, without more, the first Respondent had the locus standi to file the Petition. Apart from this, we argue with the Superior Court below that the standard guide for locus standi must remain the command in Article 258 of the Constitution.....*
>
> *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 specific 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 Mutunga Rules" to inter alia, facilitate the application of the right of standing..... The rules reiterate that any person other than a person whose right or fundamental freedom under the Constitution is allegedly denied, violated in infringed or threatened has a right of standing and can institute proceedings as envisaged under Article 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 reasons 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 appropriate direction, order or writ in the High Court under Articles 22 and 258 of the Constitution.*

44. On the basis of the foregoing guidance, a look at the Petition reveals that indeed the Petitioners have the requisite *locus standi* in the matter. If anything, the Petition is brought in public interest and the Petitioners cannot be termed as busy-bodies. Further, there were earlier proceedings before the 1st Respondent herein, the Kenya Medical Practitioners & Dentists Council, where the 1st Petitioner participated. Some decisions were made. It is one of the Petitioners' claim that the said decisions were unilaterally set-aside by the 1st Respondent without their involvement, and as such, the Petitioners claim violation of their rights. I, hence, find it a tall order to lock out the Petitioners on the basis of *locus standi*.

45. It is the finding of this Court that the Petitioners have the requisite *locus standi* to institute the current proceedings.

46. I now turn to the proprietness of the Petition.

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

> *Form of petition.*
>
> *10. (1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.*
>
> *(2) The petition shall disclose the following—*
>
> *(a) the petitioner's name and address;*
>
> *(b) the facts relied upon;*
>
> *(c) the constitutional provision violated;*
>
> *(d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;*
>
> *(e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;*
>
> *(f) the petition shall be signed by the petitioner or the advocate of the petitioner; and*
>
> *(g) the relief sought by the petitioner.*

48. Rule 10(3) and (4) of the Mutunga Rules also have a bearing on the form of Petitions. They provide as follows: -

> *(3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.*
>
> *(4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.*

49. Rules 9 and 10 are on the place of filing and the Notice of institution of the Petition respectively.

50. The Supreme Court in ***Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR*** had the following on Constitutional Petitions: -

> *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.*

51. A perusal of the Petition in this case will no doubt reveal that the Petition fully complied with Rule 10(1) and (2) of the Mutunga Rules as well as the requirements in ***Communications Commission case*** (supra). I must, therefore, find and hold, which I hereby do, that the submission that the Petition is devoid of clarity and falls short of the constitutional and legal requirements cannot be maintained. The same is for rejection.

52. Having considered the twin sub-issues, I now turn to the next sub-issue.

Whether the current proceedings are *sub-judice* Nairobi Court of Appeal Civil Appeal No. 594 of 2019.

53. The 5th Respondent raised the bar of *sub-judice* in both its Preliminary Objection dated 21st August 2021 and Notice of Motion dated 15th September 2020.

54. In this discussion, I will not consider the issue as raised in the Preliminary Objection since the issue is factual and is in not agreed upon by the parties.

55. In the application, the 5th Respondent stated that the instant Petition was bad in law and an abuse of process since there is in progress Civil Suit No. 594 of 2018, wherein the issues and parties in contest are substantially similar to the ones in the instant Petition.

56. In the affidavit in support of the application, Mr. Mc'Ombewa deponed that the Petitioners also confirmed in their Petition that the issues raised in the instant is the subject matter of Petition No. 428 of 2018 which is currently before the Court of Appeal in Civil Appeal No. 594 of 2019.

57. In their written submissions, the 5th Respondent reiterated foregoing arguments.

58. In support of the claim that the Petition was sub-judice, the 2nd 3rd, 4th and 6th Respondents, in their submissions dated 24th November, 2020 argued that the instant Petition was *sub-judice* Petition No 428 of 2018.

59. To buttress their argument, the said Respondents referred to Section 6 of the Civil Procedure Act and the decision in Kampala High Court Civil Suit No. 450 of 1993, ***Nyanza Garage -vs- The Attorney General*** where it was observed;

> ***…*** *In the interests of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of parties because parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. secondly, multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits….*

60. The said Respondents further relied in ***Barclays Bank of Kenya Ltd -vs- Elizabeth Agidza & 2 Others*** where it was found that:

> ***…*** *if the controversy in the subsequent suit can be conveniently and properly adjudicated upon in previous suits, by virtue of the enactment of sections 1A and 1B of the Civil Procedure Act, section 6 will still apply. This is so because the overriding objective in Civil Procedure Act is for expeditious and proportionate resolution of civil disputes between parties.*

61. The Petitioners opposed the arguments on *sub-judice*. Counsel submitted that the principle of *sub-judice* ought to be cautiously looked at since under Articles 22 and 258 of the Constitution any party who has *locus standi* ought not to be locked out on the basis of a related matter. It was submitted that Courts can consolidate multiple suits and hear them together. The aspect of abuse of Court process does not arise.

62. The Petitioners further submitted that the use of the principle of *sub-judice* in this matter is aimed at gagging the Petitioners, an act which this Court ought to frown at.

63. The Petitioners called upon this Court to dismiss the contention on the doctrine of *sub-judice*.

64. In answer to this limb, I will run through how the Supreme Court in ***Advisory Opinion Reference No. 1 of 2017, Kenya National Commission on Human Rights -vs- Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR*** handled the issue of *sub-judice.*

65. The Supreme Court was approached by the Applicant, Kenya National Commission of Human Rights. It sought the Court's Advisory Opinion on the purposive interpretation of *Chapter 6* of the Constitution of Kenya specifically in the context of the affairs of political parties.

66. The Applicant contended that there was lack of clarity and/or guidance in High Court and the Court of Appeal decisions on the place of *chapter 6* of the Constitution, especially in respect of leadership and integrity qualifications of persons offering themselves to be elected or appointed to public service.

67. Before the matter could proceed, one of the Interested Parties filed a Preliminary Objection claiming that the application before the Court was *sub-judice* two other cases before the High Court namely; *Constitutional Petition No. 142 of 2017 and Constitutional Petition No. 68 of 2017*. It asserted that the application was an abuse of the Supreme Court's advisory opinion jurisdiction.

68. Upon considering the parties' arguments and counter-arguments, the Apex Court comprehensively addressed the often raised jurisdictional challenge of *sub-judice*. It first defined the term, outlined its purpose and then set the threshold for its operation. The Court observed as follows: -

> *[67] The term 'sub-judice' is defined in Black's Law Dictionary 9th Edition as: "Before the Court or Judge for determination." The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit****. A party that seeks to invoke the doctrine of sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.***

69. Upon setting the above foundation for the operation of the doctrine, the Learned Judges then pitched the issues emanating from the two High Court cases against the ones raised by application before them. They went ahead and observed as follows: -

> [68] In the above context, it cannot be denied that the issues and prayers sought by the Petitioner in the two Constitutional Petitions generally call for the interpretation and application of provisions of Chapter Six of the Constitution. The issues and orders in the two

> Constitutional Petitions substantially ascend from the criteria for the implementation of the provisions of Chapter Six of the Constitution. For the High Court to sufficiently pronounce itself in the two Constitutional Petitions, it has to interpret and apply the provisions of Chapter Six of the Constitution on leadership and integrity.
>
> [71] In so doing, (determining the two Constitutional Petitions) the High Court shall be compelled, to determine whether a Constitutional test is set up in Chapter Six of the Constitution, whether the set test (if any) is fit and proper, objective or subjective, the scope of application of the test, the implementing organs and bodies. These are substantially the same issues subject of the Advisory Opinion sought by the Applicant comprised at pages 13 to 19 of the Reference before this Court.

70. From the foregone, the Court was of the finding that the application before it was caught up by *sub-judice* doctrine. It refused to usurp the jurisdiction of the High Court in the following terms: -

> [72] We therefore find that this Reference, as framed, mainly raises issues of constitutional interpretation. These issues are also substantially in issue before the High Court in Constitutional Petition No. 68 of 2017 and Constitutional Petition No. 142 of 2017. In view of Article 165 of the Constitution, the High Court is the Court of first instance with regard to jurisdiction for interpretation and application of the Constitution and that Court has already been moved.
>
> ***[73] Guided therefore by these principles, and in exercise of our discretion, we decline to exercise our jurisdiction under Article 163(6) of the Constitution. This Reference is sub-judice and this Court will not usurp the High Court's jurisdiction under Article 165 (3).***

71. The Supreme Court, hence, declined jurisdiction because it was demonstrated that the issues before the Court were the same as those before the High Court.

72. From the foregoing, for the doctrine *sub-judice* to be in operation all its ingredients must be proved to exist.

73. I have carefully considered this issue. I do note that the 5th Respondent claimed that this dispute is *sub-judice* Civil Appeal No. 594 of 2019 in the application. However, in its submissions, the 5th Respondent submitted in respect of Constitutional Petition No. 428 of 2018. I will, therefore, consider both cases and ascertain whether either or both are *sub-judice* the instant Petition.

74. The doctrine of *sub-judice* rests on evidence. Evidence has to be presented to prove the similarity of all the suits. In this case, save from just mentioning the case numbers of the two cases, that is Petition No. 428 of 2018 and Civil Appeal No. 594 of 2019 and the claim that the parties and the dispute in the two case are substantially the same, the 5th Respondent has done no more.

75. The Respondents shouldered the burden to prove that the Petition is *sub-judice*. Absence such evidence, this Court is unable to establish the existence of the ingredients of the doctrine of *sub-judice* in this case.

76. As such, this Court finds no evidence to prove that the doctrine of *sub-judice* applies in this matter. The issue is answered in the negative.

Whether the current proceedings are *res judicata* as the substratum of the Petition has been determined by in Nairobi Constitutional Petitions No. 428 of 2018 and No. 266 of 2015:

77. The 2nd, 3rd. 4th and 6th Respondents in reference to the precedent set in ***Orina Kenyariri t/a Kenyariri Associates -vs- Salama Beach Hotel*** submitted that the doctrine of *res-judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectra of being vexed, haunted and hounded by issues and suits that have already been determined by a competent Court.

78. The said Respondents submitted that the Petition touches on abortion related services, which issues have been litigated in Petition No. 266 of 2015 that is currently on appeal in Civil Appeal No. 519 of 2019.

79. On its part, the 5th Respondent raised the bar of *res-judicata* both in the Preliminary Objection and in its Notice of Motion application. In the preliminary objection it stated that this Court does not have jurisdiction since the Petition is *res-judicata* the decision in Constitutional Petition No. 428 of 2018 and Petition No. 266 of 2015.

80. In the application, the 5th Respondent stated that the subject matter in the instant Petition has been competently determined by a Court of competent jurisdiction *vide* Nairobi Constitutional Petitions No. 266 of 2015 and as such the instant Petition is abuse of process.

81. The 5th Respondent relied in Petition No. 266 of 2015, ***John Florence Maritime Services Limited & Another -vs- Cabinet Secretary for Transport and infrastructure & 3 Others*** (2015) eKLR where it was observed as follows: -

> *On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept that proposition that constitution-based litigation cannot be subjected to the doctrine of res-judicata.*

82. The Petitioners in opposition argued that the doctrine of *res judicata* must be sparingly used and in the clearest of cases more so in constitutional Petitions. Counsel argued that the issues in the instant Petition have never been settled by any competent Court and as such, the doctrine is not applicable in this matter.

83. The doctrine of *res judicata* is not novel. It is a subject which Superior Courts have sufficiently expressed themselves on. The Supreme Court in ***Petition 14, 14A, 14B & 14C of 2014 (Consolidated) Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2014] eKLR*** delimited the operation of the doctrine of *res-judicata* in the following terms;

> *[317] The concept of res judicata operates to prevent causes of action, or issues from being relitigated once they have been determined on the merits. It encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings. In this case, the High Court relied on "issue estoppel", to bar the 1st, 2nd and 3rd respondents' claims. Issue estoppel prevents a party who previously litigated a claim (and lost), from taking a second bite at the cherry. This is a long-standing common law doctrine for bringing finality to the process of litigation; for avoiding multiplicities of proceedings; and for the protection of the integrity of the administration of justice? all in the cause of fairness in the settlement of disputes.*
>
> [318] This concept is incorporated in Section 7 of the Civil Procedure Act (Cap. 21, Laws of Kenya) which prohibits a Court from trying any issue which has been substantially in issue in an earlier suit. It thus provides:
>
> > No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.
>
> *[319] There are conditions to the application of the doctrine of res judicata: (i) the issue in the first suit must have been decided by a competent Court; (ii) the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; and (iii) the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title Karia and Another v. The Attorney General and Others, [2005] 1 EA 83, 89.*
>
> *[320] So, in the instant case, the argument concerning res judicata can only succeed when it is established that the issue brought before a Court is essentially the same as another one already satisfactorily decided, before a competent court.*
>
> *[333] We find that the petition at the High Court had sought to relitigate an issue already determined by the Public Procurement Administrative Review Tribunal. Instead of contesting the Tribunal's decision through the prescribed route of judicial review at the High Court, the 1st, 2nd and 3rd respondents instituted fresh proceedings, two years later, to challenge a decision on facts and issues finally determined. This strategy, we would observe, constitutes the very mischief that the common law doctrine of "issue estoppel" is meant to forestall.* ***Issue estoppel "prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route"*** *(Workers' Compensation Board v. Figliola [2011] 3 S.C.R. 422, 438 (paragraph 28)).*
>
> *[334] Whatever mode the 1st, 2nd and 3rd respondents adopted in couching their prayers, it is plain to us, they were challenging the decision of the Tribunal, in the High Court. It is a typical case that puts the Courts on guard, against litigants attempting to sidestep the doctrine of "issue estoppel", by appending new causes of action to their grievance, while pursuing the very same case they lost previously. In Omondi v. National Bank of Kenya Ltd. & Others, [2001] EA 177 the Court held that "parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit."*
>
> *[352] The Judicial Committee of the Privy Council, in Thomas v. The Attorney-General of Trinidad and Tobago, [1991] LRC (Const.) 1001 held that "when a plaintiff seeks to litigate the same issue a second time relying on fresh propositions in law he can only do so if he can demonstrate that special circumstances exist for displacing the normal rules." That court relied on a case decided by the Supreme Court of India, Daryao & Others v. The State of UP & Others, (1961) 1 SCR 574 to find that the existence of a constitutional remedy does not affect the application of the principle of res judicata. The Indian Court also rejected the notion that res judicata could not apply to petitions seeking redress with respect to an infringement of fundamental rights. Gajendragadkar J stated:*
>
> *But is the rule of res judicata merely a technical rule or is it based on high public policy? If the rule of res judicata itself embodies a principle of public policy which in turn is an essential part of the rule of law, then the objection that the rule cannot be invoked where fundamental rights are in question may lose much of its validity. Now the rule of res judicata…has no doubt some technical aspects…but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of res judicata they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Article 32.*
>
> *[353] Kenya's High Court recently pronounced itself on the issue of the applicability of res judicata in constitutional claims. In Okiya Omtatah Okoiti & Another v. Attorney General & 6 Others, High Court Const. and Human Rights Division, Petition No. 593 of 2013 [2014] eKLR, Lenaola J. (at paragraph 64) thus stated:*
>
> > *Whereas these principles have generally been applied liberally in civil suits, the same cannot be said of their application in constitutional matters. I say so because, in my view, the principle of res judicata can and should only be invoked in constitutional matters in the clearest of cases and where a party is relitigating the same matter before the Constitutional Court and where the Court is called upon to redetermine an issue between the same parties and on the same subject matter. While therefore the principle is a principle of law of wide application, therefore it must be sparingly invoked in rights-based litigation and the reason is obvious.*

[354] On the basis of such principles evolved in case law, it is plain to us that the 1st, 2nd and 3rd respondents were relitigating the denial to them of a BSD licence, and were asking the High Court to redetermine this issue.

[355] However, notwithstanding our findings based on the common law principles of estoppel and res- judicata, we remain keenly aware that the Constitution of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law. By clothing their grievance as a constitutional question, the 1st, 2nd and 3rd respondents were seeking the intervention of the High Court in the firm belief that, their fundamental right had been violated by a state organ. Indeed, this is what must have informed the Court of Appeal's view to the effect that the appellants (respondents herein) were entitled to approach the Court and have their grievance resolved on the basis of Articles 22 and 23 of the Constitution.

84. The Court of Appeal in ***John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR*** also discussed the doctrine of *res judicata* at length. The Court stated in part as follows: -

The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process under Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of res judicata. However, we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions.

We also resist the invitation by the appellants to hold that all constitutional petitions must be heard and disposed of on merit and that parties should not be barred from the citadel of justice on the basis of technicalities and rules of procedure which have no place in the new constitutional dispensation. The doctrine is not a technicality. It goes to the root of the jurisdiction of the court to entertain a dispute. If it is successfully ventilated, the doctrine will deny the court entertaining the dispute jurisdiction to take any further steps in the matter with the consequence that the suit will be struck out for being res judicata. That will close the chapter on the dispute. If the doctrine has such end result, how can it be said that it is a mere technicality" If a constitutional petition is bad in law from the onset, nothing stops the court from dealing with it peremptorily and having it immediately disposed of. There is no legal requirement that such litigation must be heard and determined on merit.

From our expose of the doctrine above, we are now able to formally answer the issues isolated for determination in this appeal earlier as follows: -

i) The doctrine of res judicata is applicable to constitutional litigation just as in other civil litigation as it is a doctrine of general application with a rider, however, that it should be invoked in constitutional litigation in rarest and in the clearest of cases.

ii) There is no legal requirement or factual basis for the submission that the doctrine must only be invoked and or ventilated through a formal application. It can be raised through pleadings as well as by way of preliminary objection.

iii) The ingredients of res judicata must be given a wider interpretation; the issue in dispute in the two cases must be the same or substantially the same as in the previous case, parties to the two suits should be the same or parties under whom they or any of them is claiming or litigating under the same title and lastly, the earlier claim must have been determined by a competent court.

85. I have keenly studied Petition No. 266 of 2015 on record. In the case, there were five Petitioners namely, Federation of Women Lawyers (FIDA Kenya), JMM through PKM (suing as a guardian and next friend of JMM) Ruth Mumbi Meshack and Victoria Otieno Awuor. There were three Respondents namely; The Attorney General, The Cabinet Secretary Ministry of Health and the Director of Medical services. There were seven interested Parties and 1 *Amicus Curiae*.

86. In the said Petition, the Petitioners agitated for the death of JMM that was occasioned by an unsafe abortion which she procured in the hands of a non-medical practitioner.

87. The Petitioners' case was precipitated by the Director of Medical Services Memo dated 24th February 2014 (Ref No. MOH/ADM/1/1/2 titled "***Training on safe abortions and use of Medabon (Mifepristone+Misoprostol) for Abortions"*** which directed all health workers– Public/Private/FBO) Faith-Based Organizations) not to participate in any training on abortions and THE use of Medabon.

88. In the said case, the Petitioners were aggrieved that the directions by the Director of Medical Services led to JMM's death due to the gap created in the reproductive health rights of all persons.

89. No evidence was presented before this Court regarding Constitutional Petition No. 428 of 2018.

90. From the synopsis of Petition No 266 of 2015, it is clear, first and foremost, that the parties therein were intrinsically different from the ones in the instant Petition.

91. Secondly, whereas the substratum of the said Petition and the instant Petition is on abortion, in Petition 266 of 2015, the clamour was on the constitutional right to reproductive health. In the instant case, the agitation is for closure *of Marie Stopes Kenya* for rampant unsafe abortions that lead to violation of the right to life.

92. Accordingly, the two Petitions are dissimilar. The Respondents have, therefore, not satisfied the elements that set into operation the bar of *re-judicata*. The contention hereby fails.

93. With the above finding, I will now consider the next sub-issue.

Whether the doctrine of exhaustion bars this Court <u>from exercising jurisdiction over the Petition:</u>

94. On this issue, it was submitted that *Section 45* of the *Health Act No. 21 of 2017* establishes a *Health Professionals Oversight Authority* mandated with the obligation to receive and facilitate the resolution of complaints from patients and aggrieved parties.

95. It was also argued that the Petitioners ignored remedies under *Section 20* of the Medical Practitioners and Dentists Act which provides for disciplinary proceedings in the event of a complaint of malpractice and suspension of licences and remedial measures.

96. In further discrediting the Petition, the 5th Respondent argued that it is a medical institution and as such, if the Petitioners had any complaint against it, the Health Act requires them to report to the 1st Respondent in the first instance.

97. To buttress necessity of exhausting statutory remedies, support was found in the Court of Appeal decision in Civil Appeal No. 191 of 2014, ***Bethwell Allan Omondi Okal -vs- Telkom (K) Ltd (Founder) & (Others*** (2017) eKLR where it was observed that: -

> ***….*** *The appellant might want to argue that he has a constitutional right of access to justice, and we agree that he does, but the High Court and this Court have pronounced themselves many times to the effect that a party must first exhaust other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the High Court by way of Constitutional Petitions….*

98. Reference was further made to the Court of Appeal in Civil Appeal No. 10 of 2015, ***Geoffrey Muthinja Kabiru & 2 Others -vs- Samuel Munga Henry & 1756 Others*** **(2015) eKLR** where the Learned Judges highlighted the importance of exhausting dispute resolution mechanisms that exist outside Court before invoking the Court's jurisdiction. It was urged that the Petition be struck out.

99. In rebutting the Respondent's arguments, *Mr. Kanjama*, Counsel for the Petitioners referred to the Supreme Court decision in **Petition 14, 14 A, 14 B & 14 C of 2014 (Consolidated) Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR** and submitted that the instant case is one where the available mechanisms were inadequate and as such the Constitutional Court has jurisdiction.

100. Counsel further submitted that the doctrine is not a bar to the jurisdiction of the High Court under Article 165(3)(b) & (d) of Constitution. It was his case that Article 20(3) of the Constitution calls for a progressive interpretation and one that favours the enforcement of rights.

101. He submitted that the avoidance principle ought to be restrictive and not an expansive one as it conflicts the foundation of the Bill of Rights. He stated that it also conflicts Article 159 of the Constitution on Judicial Authority which establishes the fundamental principles to apply the expedient determination of disputes.

102. Mr. Kanjama further submitted that Article 258 of the Constitution favours this Court's intervention since the avoidance doctrine does not apply.

103. The doctrine of exhaustion in Kenya traces its origin from *Article 159(2)(c*) of the Constitution which recognizes and entrenches the use of alternative mechanisms of dispute resolution in the following terms: -

> *159(2) In exercising judicial authority, the Courts and tribunals shall be guided by the following principles-*
>
> *(a)…*
>
> *(b)…*
>
> *(c) alternative forms of dispute resolution including resolution, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause 3.*

104. Clause 3 is on traditional dispute resolution mechanisms.

105. The doctrine of exhaustion was comprehensively dealt with by a 5-Judge Bench in *Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019* ***William Odhiambo Ramogi & 3 others v Attorney General & 4***

others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR**.** The Court stated as follows:

> *52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the Constitution and was aptly elucidated by the High Court in* ***R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR,*** *where the Court opined thus:*
>
> *42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in* ***Speaker of National Assembly v Karume [1992] KLR 21*** *in the following oft-repeated words:*
>
> > *Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.*
>
> *43. While this case was decided before the Constitution of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.*
>
> *This is* ***Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others [2015] eKLR,*** *where the Court of Appeal stated that:*
>
> *It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews…The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution*.

106. The Court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

> *59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA) (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:*
>
> > *What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.)*
>
> *60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.*
>
> *61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR.*
>
> *62. In the instant case, the Petitioners allege violation of their fundamental rights.* ***Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion . This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.***

107. The above decision was appealed against by the Respondents. The Court of Appeal in upholding the decision and in dismissing the appeal in Mombasa Civil Appeal No. 166 of 2018 ***Kenya Ports Authority v William Odhiambo Ramogi & 8 others [2019] eKLR*** held as follows: -

> *The jurisdiction of the High Court is derived from Article 165 (3) and (6) of the Constitution. Accordingly, the High Court has*

unlimited original jurisdiction in criminal and civil matters, including determination of a question of enforcement of the bill of rights and interpretation of the Constitution encompassing determination of any matter relating to the Constitutional relationship between the different levels of government.

At the High Court, we note that the learned Judges dealt with this matter under the question framed as follows: Is the court barred from considering the suit at present by virtue of Article 189 of the Constitution and sections 33 and 34 of Inter-Governmental Relations Act of 2012 (IGRA)? The parties have advanced similar arguments as before the learned Judges of the High Court. The High Court went further than just looking at the ruling by Ogola J. They also took into account the doctrine of exhaustion as enunciated in Republic vs. Independent Election and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR. They applied a dual pronged approach before concluding that the dispute was not an inter-governmental dispute under IGRA. First, they considered that the test for determining the matter as an inter-governmental dispute for purposes of application of IGRA was not simply to look at who the parties to the dispute were, but the nature of the claim in question and; secondly, they considered that the claimed Constitutional violations seeking to be enforced are not mere "bootstraps." We have keenly addressed our minds to the learned Judges' decision and are satisfied that they stayed within the expected contours and properly directed themselves. Once they determined that the dispute was not inter-governmental in nature, we do not think it is necessary to consider whether the petitioners had exhausted their legal avenue. Jurisdiction by the High Court under Article 165 (5) of the Constitution became automatic. And in our view, it could not be ousted or substituted.

108. Further, in Civil Appeal 158 of 2017, ***Fleur Investments Limited -vs- Commissioner of Domestic Taxes & another*** [2018] eKLR, the Learned Judges of the Court of Appeal relied on an earlier decision in *Speaker of National Assembly vs Njenga Karume (1990-1994) EA 546* to assume jurisdiction by bypassing the mechanism under Income Tax Tribunal. They observed as follows: -

23. For the reasons we have given earlier and others that will become apparent, there were definitely exceptional circumstances that existed in this case that were outside the ambit of the Income Tax Tribunal which called for intervention by way of judicial review. Whereas courts of Law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the Constitution and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.

109. The High Court has variously reiterated the position that it is only the High Court and Courts of equal status which can interpret the Constitution. (See ***Royal Media Services Ltd. -vs- Attorney General & 6 Others*** (2015) eKLR among others).

110. Returning back to the case at hand, and going by the contention that the Petitioners ought to have pursued *Section 20* of *the Medical Practitioners and Dentists Act* if it was aggrieved by the conduct of the 5th Respondent, I will reproduce the said provision, and as follows: -

20. Disciplinary proceedings

(1) If a medical practitioner or dentist registered or a person licensed under this Act is convicted of an offence under this Act or under the Penal Code (Cap. 63), whether the offence was committed before or after the coming into operation of this Act, or is, after inquiry by the Board, found to have been guilty of any infamous or disgraceful conduct in a professional respect, either before or after the coming into operation of this Act, the Board may, subject to subsection (9), remove his name from the register or cancel any licence granted to him.

(2) Upon any inquiry held by the Board under subsection (1) the person whose conduct is being inquired into shall be afforded an opportunity of being heard, either in person or by an advocate.

(3) For the purpose of proceedings at an inquiry held by the Board, the Board may administer oaths and may, subject to the provisions of rules made under section 23, enforce the attendance of persons as witnesses and the production of books and documents.

(4) Subject to the foregoing provisions of this section and to rules as to procedure made under section 23, the Board may regulate its own procedure in disciplinary proceedings.

(5) The power to direct the removal of the name of a person from the register or to cancel the licence of a person shall include a power exercisable in the same manner to direct that during such period as may be specified in the order the registration of a person's name in the register or the licence granted to him shall not have effect.

(6) A person aggrieved by a decision of the Board under the provisions of this section may appeal within thirty days to the High Court and in any such appeal the High Court may annual or vary the decision as it thinks fit.

(7) The provisions of this section, in so far as they relate to the cancellation or suspension of licences, shall be in addition to and not in derogation of the provisions of section 13 or 15.

(8) A person who fails when summoned by the Board to attend as a witness or to produce any books or documents which he is required to produce shall be guilty of an offence and liable to a fine of two thousand shillings or to imprisonment for one month.

(9) Notwithstanding the provisions of subsection (8) of section 4, the Board shall not remove the name of a person from the register, or cancel any licence granted to a person, under subsection (1) of this section unless at least ten members of the Board so

decide

111. I will, therefore, endeavour to ascertain whether any of the exceptions to the doctrine of exhaustion applies to this case.

112. *Section 3* of the Medical Practitioners and Dentists Act establishes the Kenya Medical Practitioners and Dentists Council (hereinafter referred to as '***the Council'***). *Section 4* thereof provides the functions of the Council as follows: -

> ***4. Functions of the Council***
>
> *(1) The functions of the Council shall be to—*
>
> *a) establish and maintain uniform norms and standards on the learning of medicine and dentistry in Kenya;*
>
> *b) approve and register medical and dental schools for training of medical and dental practitioners;*
>
> *c) prescribe the minimum educational entry requirements for persons wishing to be trained as medical and dental practitioners;*
>
> *d) maintain a record of medical and dental students;*
>
> *e) conduct internship qualifying examinations, preregistration examinations, and peer reviews as deemed appropriate by the Council;*
>
> *f) inspect and accredit new and existing institutions for medical and dental internship training in Kenya;*
>
> *g) license eligible medical and dental interns;*
>
> *h) determine and set a framework for professional practice of medical and dental practitioners;*
>
> *i) register eligible medical and dental practitioners;*
>
> ***j) regulate the conduct of registered medical and dental practitioners and take such disciplinary measures for any form of professional misconduct;***
>
> *k) register and license health institutions;*
>
> *l) carry out inspection of health institutions;*
>
> *m) regulate health institutions and take disciplinary action for any form of misconduct by a health institution;*
>
> *n) accredit continuous professional development providers;*
>
> *o) issue certificate of status to medical and dental practitioners and health institutions; and*
>
> *p) do all such other things necessary for the attainment of all or any part of its functions.*

113. Section 4(1)(j) of the Medical Practitioners and Dentists Act focuses on the disciplinary processes which the Council may take against registered medical and dental practitioners. However, in this case, the complaint is against the Council itself. As stated earlier, it is the Petitioners' contention that the Council infringed their rights to, *inter alia*, a fair administrative action and fair trial by unilaterally reversing a decision the Council had reached at after a full hearing involving witnesses and some of the parties in this matter.

114. In such a case, requiring the aggrieved party to subject itself to the same body it is accusing of the infringement is unreasonable. It is a cardinal rule of natural justice, and indeed the essence of Article 50(1) of the Constitution, that a dispute capable of resolution of the law ought to be decided in a fair and public hearing before a Court or any other independent and impartial tribunal or body. Indeed, no party ought to be a Judge of its own case.

115. As a result, Section 20 of the Medical Practitioners and Dentists Act is inapplicable in this case.

116. Apart from the foregoing, the Respondents further challenge this Court's jurisdiction based on the provisions of *Section 45* of the *Health Act No. 21 of 2017.*

117. The preamble of the Health Act is as follows: -

> *AN ACT of Parliament to establish a unified health system, to coordinate the inter-relationship between the national government and county government health systems, to provide for regulation of health care service and health care service providers, health products and health technologies and for connected purposes.*

118. *Section 2* defines various terms as used in the Health Act. Of importance to this discussion are the following: -

> *"**health**" refers to a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity;*
>
> *"**health care professional**" includes any person who has obtained health professional qualifications and licensed by the relevant regulatory body;*
>
> *"**health care provider**" means a person who provides health care services and includes a health care professional;"*
>
> *"**health care services**" means the prevention, promotion, management or alleviation of disease, illness, injury, and other physical and mental impairments in individuals, delivered by health care professionals through the health care system's routine health services, or its emergency health services;*
>
> *"**health facility**" means the whole or part of a public or private institution, building or place, whether for profit or not, that is operated or designed to provide in-patient or out-patient treatment, diagnostic or therapeutic interventions, nursing, rehabilitative, palliative, convalescent, preventative or other health service; "*
>
> *"**health system**" means an organization of people, institutions and resources, that deliver health care services to meet the health needs of the population, in accordance with established policies:*

119. From the foregoing, one of the purposes of the Health Act is to regulate health care service and health care service providers, health products and health technologies.

120. *Section 45* of the Health Act establishes the Kenya Health Professions Oversight Authority (hereinafter referred to as '***the Authority'***). The functions of the Authority are set out in *section 48*. It is mandated to: -

> *(a) maintain a duplicate register of all health professionals working within the national and county health system;*
>
> *(b) promote and regulate inter-professional liaison between statutory regulatory bodies;*
>
> *(c) coordinate joint inspections with all regulatory bodies;*
>
> ***(d) receive and facilitate the resolution of complaints from patients, aggrieved parties and regulatory bodies;***
>
> *(e) monitor the execution of respective mandates and functions of regulatory bodies recognised under an Act of Parliament;*
>
> *(f) arbitrate disputes between statutory regulatory bodies, including conflict or dispute resolution amongst Boards and Councils; and*
>
> *(g) ensure the necessary standards for health professionals are not compromised by the regulatory bodies.*

121. Section 45(d) of the Health Act comes to the fore. It provides that the Authority shall '*receive and facilitate the resolution of complaints from patients, aggrieved parties and regulatory bodies*'.

122. From the wording of, *inter alia*, the Preamble, Section 2 and Section 45(d) of the Health Act, the Authority can only resolve complaints from patients, aggrieved parties and regulatory bodies relating to the country's health system, the inter-relationship between the national government and county government health systems, the regulation of health care service and health care service providers, health products and health technologies. There is no iota of reference that the Authority can adjudicate on disputes against the Council. What the Authority can do is to resolve disputes by or against a regulatory authority, say for instance, the Council only relating to its mandate under the Health Act.

123. As said, at the core of the dispute is the Petitioners' contention that the ban that had been imposed on the 5th Respondent after a full hearing was unilaterally lifted, that is, without all the parties' participation. Such a dispute does not fall within the Health Act neither does the Authority have any mandate to deal with such a dispute.

124. The dispute is a pure constitutional issue of such a nature that it cannot be resolved by the Authority.

125. Section 45 of the Health Act, as well, is inapplicable in this matter.

126. As I come to the end, it is of essence to note that the Petition also raises complaints against the other Respondents relating to policy formulation on the issue of abortions. Such complaints cannot fall under the purview of the Council or the Authority. There is, as well, the nature of reliefs sought. One of them is a structural interdict. Such an order mostly calls for Court's supervision.

127. In sum, this Court finds that the Council and the Authority are not the appropriate fora for adjudication of the dispute for want of jurisdiction. The objection based on the exhaustion doctrine, therefore, fails and is hereby dismissed.

Whether the 5th Respondent's application is merited:

128. For ease of this discussion, I will, once again, reproduce the prayers sought in the application. The prayers are as follows: -

> *a. Spent*
>
> *b. This Honourable Court be pleased to direct that the preliminarily Objection dated 21st August 2020 and filed in Court be heard on the same day together with this Application.*
>
> *c. That Honourable Court be pleased to grant an order of Temporary injunction against the Petitioners, their agents, employees, servants undisclosed principal and any other persons acting on their behest from communicating to the public uncorroborated, inflammatory, defamatory, disparaging or any other form of communications with regard to the operations of the 5th Respondent including alleging that the 5th Respondent engages in unlawful abortion either by print, visual, audio visual through any media including their media platforms such as websites, telephone messages, social media, electronic media and mainstream media pending the hearing and determination of this application and Petition herein.*
>
> *d. The Honourable Court be pleased to rule that the 5th Respondent is improperly enjoined in this instant Petition and consequently order its name to be struck out from this Petition.*
>
> *e. The Honourable Court be please to strike out the entire Petition for being bad in law and an abuse of the Courts process.*
>
> *f. That costs of this Application be awarded to the 5th Respondent.*

129. The application has three limbs. They are the injunctive relief, joinder of the 5th Respondent and the striking out of the Petition as it is allegedly an abuse of the Court's process.

130. On the request for an injunctive relief, the grant of the equitable relief of temporary injunction is usually guided upon consideration of several factors. Such, were well captured by the Court of Appeal in Civil Appeal 201 of 2014 ***Director of Public Prosecutions -vs- Justus Mwendwa Kathenge & 2 others*** [2016] eKLR when the Court observed as follows: -

> ***….*** *Traditionally the basis of application of the equitable remedy of injunction has been section 63 of the Civil Procedure Act and Order 40 (previously 39) of the Civil Procedure Rules. Today Article 23 of the Constitution specifically identifies an order of injunction as one of the reliefs that a court can grant if it is satisfied that a person's right or fundamental freedom under the bill of rights has been denied, violated or infringed or is threatened. Needless to emphasize, the remedy of temporary injunction is a vital tool intended to preserve the property in a dispute until legal rights and conflicting claims are established, so as to prevent the ends of justice from being defeated. Order 40 recognizes that a temporary injunction will be sought where a property in dispute is in danger of being wasted, damaged, or alienated, or wrongfully sold in execution of a decree, or where a party threatens or intends to remove or dispose of the property in order to defeat any execution that may ultimately be passed. An injunction may also be applied for to restrain a party from committing a breach of contract or other injury. It is equally settled that a temporary injunction cannot be claimed as a matter of right, neither can it be denied arbitrarily by the court.*
>
> *Because of its importance and susceptibility to abuse certain guidelines have been developed while considering an application for temporary injunction. The three well- known tests enunciated in Giella v Cassman Brown (1973) EA 358 are to the effect that a party seeking a temporary injunction has to establish a prima facie case, whether the party seeking injunction will suffer irreparable damage if injunction is denied, and in case of doubt the issue in contention ought to be decided on the scale of a balance of convenience…..*

131. I have considered the plight of the 5th Respondents *vis-à-vis* principles captured by the Court of Appeal in *Director of Public Prosecutions v Justus Mwendwa Kathenge & 2 others* case (supra).

132. The 5th Petitioner is aggrieved by the conduct of the Petitioners in communicating to the public that the 5th Respondent engages in unlawful abortion. The issue as to whether the 5th Respondent stands guilty as accused is one of the core issues in these proceedings.

133. Even without much ado, it can only be fair to the 5th Respondent that such remarks are withheld until the matter is resolved. To that end, the request for an injunctive relief is merited.

134. I will now deal with the request to strike out the Petition.

135. At the risk of repetition, it is indeed settled that a Court must be slow and cautious in allowing an application to strike out pleadings or a party. In ***DT Dobie and Company (K) Ltd vs Joseph Mbaria Muchina& Another*** (1982) KLR 1 the Court of Appeal stated as follows: -

> ***…..*** *The power to strike out should be exercised only after the court has considered all the facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case…..*

136. In ***Elijah Sikona & George Pariken Narok on Behalf of Trusted Society of Human Rights Alliance -vs- Mara Conservancy & 5***

Others Civil Case No. 37 of 2013 [2014] eKLR, the foregoing was echoed in the following words: -

> *22. There are well established principles which guide the court in the exercise of its discretion under these rules. Striking out is a jurisdiction which must be exercised sparingly and in clear and obvious cases. Unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit determined in a full trial. The court ought to act cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court.*

137. The doctrine of *abuse of the Court's process* has also been discussed by Courts. *In* ***Meme -vs- Republic & Another*** (2004) eKLR the Court of Appeal discussed abuse of the Court process thus: -

An abuse of the court's process would, in general, arise where the court is being used for improper purpose, as a means of vexation and oppression, or for ulterior purposes, that is to say, court process is being misused.

138. In quashing a criminal prosecution on the basis of abuse of Court process, the Court in ***Peter George Anthony Costa v. Attorney General & Another*** Nairobi Petition No. 83/2010 expressed itself thus:-

> *The process of the Court must be used properly, honestly and in good faith, and must not be abused This means that the court will not allow its function as a court of law to be misused and will summarily prevent its machinery from being used as a means of vexation or of oppression in the process of litigation. It follows that where there is an abuse of the court process there is a breach of the petitioner's fundamental rights as the petitioner will not receive a fair trial. It is the duty of the court to stop such abuse of the justice system.*

139. A look at the pleadings and from the discussion on the doctrine of exhaustion, it, therefore, means that if the Petition is struck out then the Petitioners will not have any audience whatsoever. Further, the Petition raises serious issues which call for determination through a full trial. There is no iota of abuse of the Court process.

140. This Court hereby declines the invitation to strike out the Petition.

141. On whether the 5th Respondent ought to be struck out of the proceedings on the basis of misjoinder, suffice to note that the complaint that led to the Council deliberating and making an initial finding was against the 5th Respondent. It is still the 5th Respondent which obtained the order setting aside the ban. Even in the current Petition, the Petitioners seek various prayers against the 5th Respondent.

142. This is a constitutional Petition. *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (hereinafter referred to as '***the Mutunga Rules***') are *inter alia* aimed at facilitating access to justice for all persons as required under Article 48 of the Constitution and are to be applied with a view of advancing and realising the rights and fundamental freedoms enshrined in the Bill of Rights and the values and principles in the Constitution. The Mutunga Rules are also geared towards facilitating the just, expeditious, proportionate and affordable resolution of cases.

143. *Rule 2* of the Mutunga Rules define a "***Respondent***" to mean: -

> *a person who is alleged to have denied, violated or infringed, or threatened to deny, violate or infringe a right or fundamental freedom;*

144. There is also the Civil Procedure Rules, 2010 which provide for parties to a suit. *Order 1 Rule 3* of the Civil Procedure Rules sets out the parties who may be enjoined in a suit as Defendants. The provision states as follows: -

> *All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.*

145. In ***Zephir Holdings Ltd vs. Mimosa Plantations Ltd, Jeremiah Matagaro and Ezekiel Misango Mutisya*** (2014) eKLR the Court dealt with the issue of parties to a suit and held that: -

> *A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under Order 1 rule 1 and 2 respectively, or as a third party or as an interested party and* ***whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit.*** *And the court has a wide discretion to even order suo moto for a party to be impleaded whose presence may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. Accordingly, a suit cannot be defeated for mis-joinder or non-joinder of parties. (emphasis added)*

146. The joinder and misjoinder of parties is provided for in the Mutunga Rules as well as in the Civil Procedure Rules. *Rule 5* of the Mutunga Rules elaborately provide as follows: -

> ***Addition, joinder, substitution and striking out of parties.***
>
> *The following procedure shall apply with respect to addition, joinder, substitution and striking out of parties—*

(a) Where the petitioner is in doubt as to the persons from whom redress should be sought, the petitioner may join two or more respondents in order that the question as to which of the respondent is liable, and to what extent, may be determined as between all parties.

(b) A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.

(c) Where proceedings have been instituted in the name of the wrong person as petitioner, or where it is doubtful whether it has been instituted in the name of the right petitioner, the Court may at any stage of the proceedings, if satisfied that the proceedings have been instituted through a mistake made in good faith, and that it is necessary for the determination of the matter in dispute, order any other person to be substituted or added as petitioner upon such terms as it thinks fit.

(d) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—

(i) order that the name of any party improperly joined, be struck out; and

(ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.

(e) Where a respondent is added or substituted, the petition shall unless the court otherwise directs, be amended in such a manner as may be necessary, and amended copies of the petition shall be served on the new respondent and, if the court thinks, fit on the original respondents.

147. *Order 1 rule 9* of the Civil Procedure Rules talks about misjoinder of parties in the following manner: -

No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and obligations of the parties actually before it.

148. The 5th Respondent is at the core of these proceedings. The Petitioners are even seeking specific reliefs against it. For all purposes, I do not see how the 5th Respondent can be said to be wrongly enjoined in the Petition.

149. Respectfully, the prayer fails.

150. In sum, in disposing the Notice of Motion dated 15th September 2020, the injunctive relief is allowed whereas the prayer to strike out the 5th Respondent for misjoinder and the prayer for striking out of the Petition as it is an abuse of the Court's process hereby fail.

(iii) Whether the Notice of Motion dated 16th November, 2020 is merited:

151. The Notice of Motion dated 16th November, 2020 mainly seeks to amend the Petition. It is unopposed.

152. The draft Amended Petition annexed to the application does not seek to alter the substratum of the Petition. Accordingly, it only seeks to introduce a fourth Petitioner and amend the relief section by introducing new prayers to the Petition.

153. In making a finding on its merits, I will be guided by the Court of Appeal decision in Civil Appeal 261 of 2014 ***Governors Ballon Safaris Limited v Skyship Company Limited & another*** [2018] eKLR where the Court considered an application for the amendment of the Memorandum of Appeal and in allowing the application observed as follows: -

…. The power donated by rule 44(1) of the Court of Appeal Rules to amend any document is a discretionary power, which must be exercised judiciously, on the basis of reason rather than arbitrarily, and subject to the interests and dictates of justice. (See Kanawal Sarjit Singh Dhim v. Keshavji Jivraj Shah [2010] eKLR). A memorandum of appeal, such as the one that the applicant seeks to amend is a document that is amenable to amendment. (See Uhuru Highway Development Ltd v. Central Bank of Kenya [2002] 1 EA 314).

In exercising its discretion, the Court in Kanawal Sarjit Singh Dhim v. Keshavji Jivraj Shah (supra) took into account a number of considerations such as that the dispute involved a prime and valuable property in Nairobi, the judgment the subject of appeal had been obtained ex parte; the need to afford the applicant an opportunity to ventilate all the issues that he wished to raise on appeal; the fact that the intended amendment was not irrelevant to the appeal; and that the respondent stood to suffer no prejudice as he had the opportunity to oppose the appeal. And in Nathan Muhatia Pala t/a Muhatia Pala Auctioneers & Another v Joseph Nyaga Karingi [2013] eKLR, the Court also took into account the duty imposed by sections 3A and 3B of the Appellate Jurisdiction Act to ensure that justice is dispensed in consonance with the overriding objective so as to realize just, expeditious, proportionate and affordable resolution of disputes.

154. From the foregoing, the Petitioners application dated 16th November 2020 is merited.

Disposition:

155. In the end, the following final orders hereby issue: -

(a) The Notice of Preliminary Objection dated 21st August, 2020 is hereby dismissed.

(b) Save that a temporary injunction is hereby issued against the Petitioners, their agents, employees, and/or servants from in any manner whatsoever alleging that the 5th Respondent engages in unlawful abortion either by print, visual, audio visual through any media including their media platforms such as websites, telephone messages, social media, electronic media and mainstream media pending the hearing and determination of the Petition herein, the rest of the prayers in the Notice of Motion dated 15th September 2020 are disallowed.

(c) The Petitioners are hereby granted leave to amend the Petition. The Petitioners shall file and serve an Amended Petition within 7 days of this ruling.

(d) Once served, the Respondents and Interested Parties shall file and serve their respective responses to the Amended Petition within 14 days of service.

(e) The Petitioners shall thereafter file and serve any supplementary responses, if need be, together with written submissions within 14 days of service.

(f) The Respondents and Interested Parties shall file and serve written submissions within 14 days of service.

(g) Highlighting of submissions on a date to be issued by the Court.

(h) Costs in cause.

(i) The Petitioners shall extract and serve a copy of the orders in this ruling upon the rest of the parties together with the Amended Petition.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF SEPTEMBER, 2021

A. C. MRIMA

JUDGE

RULING NO. 1 VIRTUALLY DELIVERED IN THE PRESENCE OF:

MR. KANJAMA, COUNSEL FOR THE PETITIONERS.

MR. CHIGITI, SC, COUNSEL FOR THE 5TH RESPONDENT.

ELIZABETH WANJOHI – COURT ASSISTANT.