



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO 305 OF 2019

NATIONAL TRADITIONAL HEALTH PRACTITIONERS ASSOCIATION.....PETITIONER

VERSUS

CABINET SECRETARY- MINISTRY OF HEALTH.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

PHARMACY AND POISONS BOARD.....3RD RESPONDENT

JUDGMENT

THE PETITION

1. The Petitioner through an Amended Petition dated 14th August 2019 seeking the following orders:-

a. An order of prohibition be issued directed to the 3rd Respondent, their agents, servants, restraining the arrest, harassment, mapping charging and/or causing to be charged, the Petitioners members.

b. An order of certiorari be issued quashing and removing into this Honourable Court the criminal proceedings against one SAMUEL KAMU KABUGUA in the Criminal Case No. PCR 451 of 2019.

c. A Declaration that the Petitioner's members have the rights under Articles 27, 28, 40, 43 of the Constitution to the due recognition, respect and practice of traditional medicine within the Republic of Kenya without the need to be registered and/or obtaining a licence from the 3rd Respondent herein.

d. A Declaration that Sections 2, 3B (1) and (2) of the Health Laws Amendment Act 2019 that effectively incorporated amendments to sections 2 and 3 of the Pharmacy and Poisons Act Cap 244 Laws of Kenya is unconstitutional to the extent of being discriminatory to the Petitioners' members and therefore offends the provisions of Article 27 of the Constitution.

e. The Honourable Court do make such other orders, issues such writs and give such directions as it may consider appropriate for the purpose of securing the enforcement of the Petitioners rights and freedoms.

f. Costs

PETITIONER'S CASE

2. The Petitioner's case as encompassed in their Amended Petition and the Supporting Affidavit of Dr. Stephen A. Mugambi Mwithimbu dated 14th August 2019, is that the 3rd Respondent has since 2019 been mapping members of the Petitioner with the intention of inspecting their premises and thereafter arresting and charging them in a Court of law.

3. The Petitioner argues that the 3rd Respondent has violated their rights under **Article 27 of the Constitution** through the deliberate and systematic failure to recognise, respect and uphold the practice of traditional and alternative medicine in Kenya. Furthermore, the Petitioner contends that the 3rd Respondent discriminated against and continues to discriminate against the members of the Petitioner by arbitrarily arresting and or causing the said members to be arrested and charges for acting contrary to the provisions of the **Pharmacy and Poisons Act Cap 244**.

4. The Petitioner asserts that the discriminatory and arbitrary arrest of its members has led to untold physical, mental stress as well as economic losses, social alienation and embarrassment likely to erode their human dignity under **Article 28 of the Constitution**.
5. The Petitioner additionally complains that the 1st and 3rd Respondents have violated **Article 40 of the Constitution** by failing to support, promote and protect the intellectual property rights of the Petitioner's members and promulgate the regulations pursuant to **Part X of the Health Act and the Protection of Traditional Knowledge and Cultural Expressions Act 2016**. Moreover, it is urged 1st and 3rd Respondent have infringed upon the Petitioner's rights under **Article 43 of the Constitution** through their failure to promote, support and protect the practice of traditional medicine as a viable alternative to conventional medicine.
6. It is further contended that the 1st and 3rd Respondents have violated **Article 47 of the Constitution** by failing to accord the members of the Petitioner the right to present their case before the Board.
7. Furthermore, the Petitioner complains that the 3rd Respondent acted in disregard of the national values and principles under **Article 10** by initiating an Amendment under the **Health Laws (Amendment) Bill 2018** to include traditional and alternative medicine as part of the definition of a "health product" under **Section 2 of the Pharmacy and Poisons Act Cap 244 Laws of Kenya**. The Petitioner claims that they were not included in the participatory meetings as stakeholders. Moreover, the 3rd Respondent failed to recognise the existence of the **Health Act 2017 Part X** and the **Protection of Traditional Knowledge and Cultural Expressions Act 2016**.

THE 1ST AND 2ND RESPONDENTS' RESPONSE

8. The 1st and 2nd Respondents filed Ground of Opposition dated 25th November 2019 opposing the Petition on grounds that the Petitioner has failed to demonstrate how the 1st and 2nd Respondents conduct constitutes a violation and/or contravention of their fundamental rights and freedoms. It is further asserted that traditional/ herbal and complementary products are registered by the 3rd Respondent and as such the arrest and charge preferred against the Petitioner's member was done by the 3rd Respondent.
9. It is further averred that there is a general presumption that every **Act of Parliament** is constitutional.

THE 3RD RESPONDENT'S RESPONSE

10. The 3rd Respondent filed a Response to the Petition dated 21st February 2020 asserting that although the Petitioner is a registered and licensed association under the Ministry of Sports Culture and Heritage, the said license and/or registration is only with reference to the practice of its members and not to the products. Traditional medicine like all other conventional medicine is regulated by the 3rd Respondent.
11. It is further alleged that if at all the Petitioner has the mandate to register its members as practitioners of traditional medicine, that mandate is only in reference to the practice of traditional medicines and not either manufacture, distribute or sell medicine or medicinal substances.
12. In regards to the arrest and charge of Samuel Kamau Kabugua, the 3rd Respondent avers that the fact that the accused might be a registered member of the Petitioner and that he might have complied with the sanitary requirements under the Public Health Act does not in any way negate the requirement for him to submit his products for registration purposes with the 3rd Respondent.
13. On the allegation of discrimination, it is asserted that the Mapping out Exercise was nationwide and not limited to the Petitioner's members. It covered every person and business across the country undertaking activities that are regulated by the 3rd Respondent.

PETITIONER'S SUBMISSIONS

14. The Petitioner by way of written submissions dated 24th February 2020, identifies 3 issues for determination:

a) Whether Section 2, 3 and 3B of the Health Laws Amendment Act 2019 are inconsistent with the Constitution

b) Whether the enactment of the Health Laws Amendment Act 2019 was in violation of the provisions of Article 10 and Article 118 of the Constitution especially on the principle of public participation, which is a condition precedent to the enactment of a statute.

c) Whether the 3rd Respondent's failure to accord the Petitioner's members an opportunity to be heard and a fair and just decision made as envisioned under Article 47 of the Constitution as read together with the Fair Administrative Actions Act contributed to the violation of their rights under Article 47 of the Constitution.

15. On the first issue, it is submitted that **Sections 3 and 3B (1) of the Health Laws Amendment Act** violate the spirit and objects of the Constitution under **Articles 27, 28, 40, 43 and 69** thereof as the provisions have the effect of imposing a legal regime that is contradictory to the legal regime that was anticipated in the **Health Act**. The Health Act recognises the role and places emphasis on self-regulation where the Cabinet Secretary in the Ministry responsible will formulate regulations for the effective operation of the practice. The Petitioner relies on **Olum and another v Attorney-General [2002]** on determining the constitutional validity of a statute by examining its purpose or effect. Further reliance is placed on the case of **Centre for Reproductive Rights Education and Awareness & another v John Harun Mwau & 6 others [2012] eKLR**.

16. On the second issue, it is submitted that the enactment of the **Health Laws Amendment Act in 2019** was a legislative process and for that reason, the National Assembly was bound by the principle of public participation. It is alleged that there was no public participation in the enactment of the Amendment Act therefore the process violated one of the key national values and principles of governance. It is pointed out that the 3rd Respondent has not alluded to the issue of public participation in its formal response to the Petition. Reliance is placed on a number of cases including **Robert N. Gakuru & others v Kiambu County Government**; and **Land Access Movement of South Africa Association for Rural Development and others v Chairperson of the National Council of Provinces and others [2016] ZAACC22**.

17. On the third issue, the Petitioner relies on the cases of **Judicial Service Commission v Mbalu Mutava & another [2014] eKLR** and **Dry Associates Ltd v Capital Markets Authority and another [2012] eKLR** to support its contention that the 3rd Respondent violated the Petitioner's right to fair administrative action contrary to Article 47 of the Constitution. This is premised on the allegation that the Petitioner's member was not afforded a fair hearing before being arrested and questioned, and that the reasoning behind the 3rd Respondent's decision was not communicated to the Petitioner. The Petitioner alleges that this was a case of abuse of power by a public officer and or body.

1ST AND 2ND RESPONDENTS SUBMISSIONS

18. The 1st and 2nd Respondents filed Submissions dated 4th April 2020 raising three issues for determination:-

- a. **Whether the 1st and 2nd Respondent's conduct constitutes a violation and contravention of the Constitution of Kenya.**
- b. **Whether the Petitioner has been discriminated upon by the Respondents; and**
- c. **Whether the Honourable Court should issue the orders sought in the Petition**

19. On the first issue, it is submitted that the 1st and 2nd Respondents' conduct as set out in the Petition do not constitute a violation and/or contravention of the Petitioner's rights and freedoms. It is submitted that the Petitioner has failed the test laid out in **Anarita Karimi Njeri v R (1976-1980) KLR 1272**.

20. It is further contended that every law enjoys a presumption of validity and it is the duty of the Petitioner to demonstrate its unconstitutionality. This is buttressed by the decision in **Were Samwel & 14 others v Attorney General & 2 others [2017] eKLR**.

21. On the second issue, it is submitted that other than pleading that their constitutional rights have been violated, the Petitioner has not demonstrated with a certain degree of precision, the manner in which the rules are discriminatory. The Respondents argue that when it comes to professional requirements, discrimination cannot ensue as each profession has its own standards. In reliance on the cases of **Mohamed Abuduba Dida v Debate Media Limited & another [2017] eKLR** and **Rachel Adhiambo Ogola & another v Council of Legal Education & another [2017] eKLR** the Respondents submit that not ever differentiation amounts to discrimination and that discrimination has not been demonstrated by the Petitioners.

22. Finally, the Petitioner submits that this Court should not interfere with the Petitioner's trial as the trial court is better placed to consider the evidence and decide whether to put the Petitioner of their defence or acquit them.

THE 3RD RESPONDENTS SUBMISSIONS

23. The 3rd Respondents through their submissions dated 5th June 2020 submit that the issues for determination are:-

- a) **Whether the Petitioner has the legal standing to institute and prosecute this Petition on its own behalf or on behalf of its members.**
- b) **Whether the Amended Petition discloses, with precision, the rights and freedoms of the Petitioner or those of its members that have been violated or threatened by the 3rd Respondent and how they have been violated.**
- c) **Whether the mapping out exercise by the 3rd Respondent and the arrest and prosecution of Samuel Kamau Kabugua was arbitrary, irregular and discriminatory.**
- d) **Whether Section 2, 3B (1) and (2) of the Health Laws (Amendment) Act are unconstitutional to the extent of offending Article 27 of the Constitution.**
- e) **Whether there exists any conflict between Part X of the Health Act No 21 of 2017 and the Pharmacy and Poisons Act Cap 244.**

24. On the first issue, the 3rd Respondent submits that the Petitioner attached a Certificate of Registration and a Constitution to demonstrate its registration status under Section 10 of the Societies Act. The Respondent argues that this is confirmation that the Petitioner does not have legal standing to file this Petition as it is well settled in law that unincorporated bodies or associations such as the Petitioner have no legal personality and cannot, therefore, institute proceedings in their own name. This Respondent is guided by the holding in **Kipsiwo Community Self-Help Group v Attorney General and 6 others [2013] eKLR**.

25. On the second issue, the 3rd Respondent submits that the Petitioner has not demonstrated to the required standard how the rights and fundamental freedoms of its alleged members have been violated, infringed or are threatened to enable the Court to give redress within the ambit of **Article 23 (1)**. This is supported by the decisions in **Anarita Karimi Njeru v Republic [1979] eKLR; Ben Kipeno & 6 others v Attorney General & another [2007] eKLR; and Husus Mugiri v Music Copy Right Society of Kenya & another [2018] eKLR**. Particularly on the alleged violation of **Article 47 of the Constitution**, it is submitted that the Petitioner does not disclose any administrative action taken by the 1st and 3rd Respondent which the Petitioner's members are aggrieved.

26. On the third issue, the 3rd Respondent asserts that it is not accurate for the Petitioner to claim that the Mapping Exercise which led to the arrest of one Samuel Kamau Kabugua was arbitrary and irregular as it was not limited to members of the Petitioner but covered every person and business across the country. It is submitted that there is no evidence to support the contention that the 3rd Respondent has unfairly differentiated the Petitioner's members from other members of the general public and on what basis the Petitioner's members have been treated differently. The cases of **John Harun Mwau v Independent Electoral and Boundaries Commission & another [2013] eKLR; and Mohamed Mire v Attorney General & another [2016] eKLR** support this.

27. The 3rd Respondent argues that the exercise was conducted within its mandate as provided under **Section 2 of the Act** as amended by the **Health Law (Amendment) Act 2019**. Therefore, the arrest of the Petitioner's member was not arbitrary. The 3rd Respondent relies on the cases **Douglas Maina Mwangi v Director of Public Prosecutions & another [2013] eKLR; Diamind Hasham Lalji & another v Attorney General & 4 others [2018] eKLR; and Lalchand Fulchand Shah v Investment & Mortgages Bank Limited & 5 others [2018] eKLR** to buttress the argument that the High Court ought not to interfere with the prosecutorial powers of the DPP unless cogent reasons are given for doing so.

28. On the fourth issue, it is asserted that the provisions of the **Health Laws (Amendment) Act, 2019** was enacted following the proper procedure or legislative enactment and therefore is valid and has the force of law as it is. The Respondent relies on the principle of presumption of constitutionality as envisaged in the case of **Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another Petition Nos. 628 & 630 of 2014 [2015] eKLR; and Aids Law Project v Attorney General & 3 others Petition Number 97 of 2010 [2015] eKLR**.

29. The 3rd Respondent further submits that the burden of proof lies on the Petitioner to demonstrate that there was no public participation or involvement of the Petitioner prior to the enactment of the impugned **Health Laws (Amendment) Act**. This is supported by the holding in **Law Society of Kenya v Attorney General & 2 others [2013] eKLR**. The Respondent contends that the Petitioner has not demonstrated the conflict between the impugned provisions and **Article 27** or any other provision of the Constitution that would render the same unconstitutional.

30. On the final issue, it is submitted that there is no contradiction between the two statutes as one regulates the manufacturing, importation, distribution and sale of pharmaceutical products including medicine; and the other provides for the regulation of the practice of traditional and alternative medicine. The Respondent submits that the **Amendment Act** introduced certain new provisions to align it with the **Part X of the Health Act, 2019**.

ANALYSIS AND DETERMINATION

31. I have carefully considered the pleadings in this Petition; rival submission and from the aforesaid the following issues arise for determination:-

a) Whether the Petition has the legal standing to institute and prosecute this Petition on its own behalf or on behalf of its members.

b) Whether Section 2, 3 and 3B of the Health Laws (Amendment) Act 2019 are inconsistent with the Constitution and discriminatory under Article 27 of the Constitution.

c) Whether the 3rd Respondent's failure to accord the Petitioner's members an opportunity to be heard and a fair and just decision made as envisioned under Article 47 of the Constitution as read together with the Fair Administrative Actions Act contributed to the violation of the Petitioner's right under Article 47 of the Constitution.

d) Whether the Respondents conduct constitutes a violation and contravention of the constitution of Kenya 2010.

A. WHETHER THE PETITION HAS THE LEGAL STANDING TO INSTITUTE AND PROSECUTE THIS PETITION ON ITS OWN BEHALF OR ON BEHALF OF ITS MEMBERS.

32. The 3rd Respondent submit that the Petitioner has no capacity of instituting the current constitutional Petition in its name as the National Traditional Health Practitioners Association. The Amended Petition describes the Petitioner as duly registered and licensed Association whose current registration number with the State Department of Culture is HL/4195/12/2017.

33. The 3rd Respondent further contended that the law under which the Petitioner is registered is not disclosed in the Amended Petition or Supporting Affidavit and therefore its capacity in law is not established. Further to the foregoing, it is averred that the Petitioner has not produced any document in the Amended Petition to show that it is registered with the State Department of Culture or who constitutes its membership. In view whereof it is the 3rd Respondent's case that there is no proof before the Court that the Petitioner is a legal entity, and as such the Petitioner being a non-entity lacks requisite locus standi to file and prosecute the current constitutional Petition.

34. The 3rd Respondent aver that if the Court were to look past the Amended Petition and consider the documents produced by the Petitioner prior to the amendment of the Petition, it will notice that the Petitioner attached a Certificate of Registration and a Constitution to demonstrate its registration status. **Article 1(3)** of the Petitioner's Constitution describes the Petitioner as an Association duly registered under **Section 10 of the Act**. This is further urged is a confirmation that the Petitioner does not have a legal standing to file this Petition and the same should be dismissed on that basis.

35. The 3rd Respondent supporting its contention on this issue proceed to contend that it is settled law that unincorporated bodies or associations, such as the Petitioner in this case, have no legal personality, and cannot, therefore, institute proceedings in their own name. Reliance is placed in holding of the Environment and Land Court decision in the case of **Kipsiwo Community Self Help Group v Attorney General and 6 others [2013] eKLR** where a Constitutional Petition was instituted by a self-help group in the Environment & Land Court. A preliminary Objection was field raising the issue that the Petition had not been filed by a person or entity capable of filing such suit or Petition. The Court while striking out the Petition stated at paragraphs 37 and 38 that:

“37. It would seem therefore, from a reading of Article 22 and the definition provided in Article 260, that a company, association or other body of persons whether incorporated or unincorporated, may institute proceedings asserting a violation of a right in the Bill of Rights.

38. I think the issue is not really whether unincorporated entities may commence action but the manner in which unincorporated entities may commence proceedings. A number of individuals may come together and form an identifiable group. They can bring action as the group, but it does not mean, that the group now vested with legal capacity to sue and to be sued. In such instance, the members of the group have to bring action in their own names, as members of the Group, or a few can bring action on behalf of the other members of the group, in the nature of a representative action. Unincorporated entities have no legal capacity and cannot therefore sue in their own names. They can however sue through an entity with legal capacity. Just because the Constitution allows unincorporated bodies to sue, does not vest such bodies with legal capacity, and such bodies do not become persons in law, and cannot be the litigants or sue in their won standing. They still have to use the agency of a person recognized in law as having capacity to sue and to be sued.”

36. In addition reliance is placed in a decision in **Kituo Cha Sheria v. John Ndirangu Kariuki & Another [2013] eKLR** that:-

“It is trite that artificial legal person can being legal proceedings. The capacity to sue and be sued in their own names is however limited. Incorporated companies and statutory corporation are clothed with that legal power... As a general rule, unincorporated legal persons including societies, clubs and business-names can only bring proceedings through their registered or elected officials or in their proprietor's names.”

37. The 3rd Respondent therefore concludes that in the instant Petition there is no iota of evidence that the Petitioner is an Association that actually exists or that it even has membership to make it an associate. Further, it is averred that it is impossible to determine under which Act of Parliament, the Petitioner is incorporated or registered as the case maybe, if at all. It is also urged that however, if the documents attached in the Original Petition is anything to go by, then it is clear that the Petitioner is an unincorporated entity without capacity to sue or to be sued in its own name. It is further pleaded that the Petition has a diverse membership countrywide that are divided into individual practitioners, local corporate institutions, foreign practitioners, foreign corporate institutions, and associate members. The Association has a governance structure composed of a general assembly which is the highest decision making organ, national executive council which is responsible for the implementation of the decisions of the Assembly in the realization of the goals and objectives of the association, the branches, working committees, and the national secretariat.

38. The **Constitution of Kenya 2010** is elaborate on who has the right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of rights has been denied, violated or infringed or is threatened.

39. **Article 22(1) (2) of the Constitution** on enforcement of the Bill of Rights provides:-

“22. (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.”

40. **Article 260 of the Constitution** states that in this Constitution, unless the context requires otherwise a **“person”** includes a company, association or other body of persons whether incorporated or unincorporated.

41. **Article 260** clearly defines who a **“person”** is in dealing with Constitutional matters. **Article 22 and 258** clearly provides every person has a right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of rights has been denied, violated or infringed or is threatened or claiming that the constitution has been controverted or is threatened with contravention. The person as per

Constitution includes incorporated and even unincorporated body of persons. It therefore follows unincorporated entities have legal capacity to institute and prosecute Petitions. In view whereof I am not persuaded by the authorities relied upon by the 3rd Respondent as the same are not in my view in accordance with **Article 22 and 260 of the Constitution**.

42. I find that the Petitioner a duly registered and licenced Association, an umbrella body of all traditional and alternative Health Practitioners in Kenya and with current registration with state Department of Culture No. HL/4195/12/2017 has legal standing and capacity to institute and prosecute the Petition on its own behalf or on behalf of its members.

B. WHETHER SECTION 2, 3 AND 3B OF THE HEALTH LAWS (AMENDMENT) ACT 2019 ARE INCONSISTENT WITH THE CONSTITUTION AND DISCRIMINATORY UNDER ARTICLE 27 OF THE CONSTITUTION.

43. The Petitioner urges that **Sections 2, 3, and 3B(1) of the Health Laws (Amendment) Act 2019** as prevailing are inconsistent with the provisions of **Article 27, 28, 40 and 43 of the Constitution**.

44. It is trite that in determining the question on constitutional validity of a statute or provision thereof, the Court needs to consider fully the laid down principles:-

a) That there is a general but rebutted presumption that a statute or statutory provision is constitutional and the burden is on the person alleging unconstitutionality to prove that the statute or its provision is constitutionally invalid.

*b) A further key principle of determining constitutional validity of a statute is by examining its purpose or effect. The purpose of enacting a legislation or the effect of implementing the legislation so enacted may lead to nullification of the statute or its provision if found to be inconsistent with the constitution, In **Olum and another v Attorney General [2002] EA**, it was stated that;*

“To determine the constitutionality of a section of a statute or Act of Parliament, the Court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the Constitution, the Court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the Constitution, the impugned statute or section thereof shall be declared unconstitutional.”

45. It is urged by the 3rd Respondent that this Court is being asked to declare **Section 2, 3 B (1) & (2) of the Health Laws (Amendment) Act** unconstitutional to the extent that these provisions offend **Article 27 of the Constitution**.

46. The Petitioner alleges the manner in which the Respondents initiated an amendment to the Pharmacy and Poisons Act through the **Health Laws (Amendment) Bill, 2018** disregarded the National Values and principles under **Article 10 of the Constitution** since they were not involved in the process.

47. It is 3rd Respondent’s contention that the principle of constitutionality of legislation is the presumption that, whenever the legislator enacts a statute, it always intends to act in accordance with the Constitution and therefore Courts should not hold legislation unconstitutional unless the unconstitutionality is clear.

48. To buttress the above the 3rd Respondent referred to the case of **B. R. Enterprises vs. State of LL.P (1999) 9 SCC 700**, the Supreme Court of India observed;

“First attempt should be made by the Courts to uphold the charged provisions and not to invalidate it merely because one of the possible interpretation leads to such a result, howsoever attractive it may be. Thus, where there are two possible interpretations, one invalidating the law and the other upholding, the latter should be adopted. For this, the courts have bene endeavouring, sometimes to give restrictive or expansive meaning keeping in view the nature of the legislation. Cumulatively, it is to sub serve the object of the legislation. This also keeps the Courts within their tracks and checks. Yet inspite of this, if the impugned legislation cannot be saved, the courts shall not hesitate to strike it down. Here the courts have to play a cautious role of weeding out the wild from the crop, of course, without infringing the constitution. The principle of reading down, however, will not be available where the plain and literal meaning from a bare reading of any impugned of any impugned provision clearly shows that it confers arbitrary or unbridled power.”

49. Further reliance is placed in the case of **Fletcher VS. Peck, 10 U.S. (6 Cranch) 87, 128 (1810)**, the US Supreme Court (Marchall CJ) observed thus;

“First attempt should be made by the Courts to uphold the charged provisions and not to invalidate it merely because one of the possible interpretation leads to such a result, howsoever attractive it may be. Thus, where there are two possible interpretations, one invalidating the law and the other upholding, the latter should be adopted. For this, the courts have been endeavouring, sometimes to give restrictive or expansive meaning keeping in view the nature of the legislation. Cumulatively, it is to sub serve the object of the legislation. Old golden rule is of respecting the wisdom of the legislature, that they are aware of the law and would never have intended for an invalid legislation. This also keeps the courts within their track and checks. Yet inspite of this, if the impugned legislation cannot be saved, the courts shall not hesitate to strike it down. Here the Courts have to play a cautious role of weeding out the wild from the crop, of course, without infringing the Constitution. The principle of reading down, however, will not be available where the plain and literal meaning from a bare reading of any impugned of any impugned provision clearly shows that it confers arbitrary or unbridled power.”

50. The above-mentioned authorities support the 3rd Respondent’s position that the principle of presumption of constitutionality of

legislation is a very fundamental legal principle which cannot be loosely challenged without sufficient proof as the Petitioners purport to be doing. The provisions of the Health Laws (Amendment) Act, 2019 having been enacted following a proper procedure for legislative enactment is valid and has the force of law as it is. The claims that these provision are unconstitutional without giving cogent reasons cannot be upheld.

51. Reliance is further placed in the case of *Bihar vs. Bihar Distillery Ltd (1997) 2 SCC 453 at para 17; the Supreme Court of India observed;*

“The approach of the Court, while examining the challenge to the constitutionality of enactment, is to start with the presumption of constitutionality. The Court should try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain it. The Court should not approach the enactment with a view to pick holders or to search for defects of drafting, much less in exactitude of language employed. Indeed, any such defects of drafting should be ironed out as part of the attempt to sustain the validity/constitutionality of the enactment. After all, an Act made by the legislature represents the will of the people and that cannot be lightly interfered with. The unconstitutionality must be plainly and clearly established before an enactment is declared as void. The same approach holds good while ascertaining the intent and purpose of an enactment or its scope and application. Now, the result of the impugned judgment is that the Amending Act has become an exercise in futility – purposeless piece of legislation. And this result has been arrived at by pointing out some drafting errors and some imperfection in the language employed. ...To call the entire exercise a mere waste is, to say the least, most unwarranted besides being uncharitable. The court must recognise the fundamental nature and importance of legislative process and accord due regard and deference to it...

52. Further in the case of *Coalition for Reform and Democracy (CORD) & another Vs. Republic of Kenya & Another Petition Nos.628 & 630 of 2014 [2015] eKLR, the Court stated that;*

*“In support of this contention, reliance was placed on *Kizito Mark Nganywa vs. Minister of State for Internal Security and Provincial Administration & Another (supra)*, and *Susan Wambui Kaguru & Others vs. Attorney General & Another (Supra)*. In the *Kizito Case*, *Ibrahim, J (as he then was)* referred to his own decision made on 6th October 2010 in *Mombasa High Court Petition No. 669 of 2009 – Bishop Joseph Kimani & Others vs. Attorney General & Others* in which he pronounced himself as follows: “It is a very serious legal and constitutional step to suspend the operations of statutes and statutory provisions. The Courts must wade with care, prudence and judicious wisdom... It is my view the principle of presumption of Constitutionality of Legislation in (sic) imperative for any state that believes in democracy, the separation of powers and the Rule of Law in general. Further the courts to be able to suspend legislation during peace times where there is no national disaster or war, would in my view be interfering with the independence and supremacy of Parliament in its constitutional duty of legislating law. I think that I shall hold the said views and that legislation should only be impugned in any manner only where it has been proven to be unconstitutional, null and void. Conservancy orders to suspend operation and supremacy of Parliament in its Constitutional duty of legislating law. I think that I shall hold the said views and that legislation should only be impugned in any manner only where it has been proven to be unconstitutional, null and void. Conservancy orders to suspend operation of statutes, statutory provision or even Regulations should be wholly avoided except where the national interest demand and the situation is certain... I am still of the view that “there is no place for conservatory or interim order in Petitions, which seek to nullify or declare legislation/statutes unconstitutional, null and void.” It is even more premature at this stage where the application has not been heard or is not being heard to seek such conservatory orders. The applications must be heard first.*

53. Similarly, in *Hamdarddawakhana Vs. Union of India Air (1960) 554*, the Supreme Court of India stated:

“In examining the Constitutionality of a statute it must be assumed that the legislature understand and appreciates the need of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representative assemble in a legislature enact laws which they consider to be reasonable for the purpose of which they are enacted. Presumption is, therefore, in favour of the Constitutionality of an enactment.”

54. It is as stated herein above that it is trite law that the burden of proof rest on whoever alleges that an Act of Parliament is unconstitutional to prove so. It is generally presumed that the process of the enactment of an Act of Parliament was constitutional unless the contrary is proven. This was the holding in *Council of County Governors vs. Attorney General & Another [2017 eKLR]* where it was stated that:-

“There is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on every person who alleges otherwise. (The court should start by assuming that the Act in question is constitutional)” (Emphasis added)

55. In interpreting the Constitution the Court would be guided by the general principles that there is a rebuttable presumption that legislation is constitutional hence the onus of rebutting the presumption rests on those who challenge that legislation’s status save that, where those who support a restriction on a fundamental right rely on a claw back or exclusion clause, the onus is on them to justify the restriction.

56. Further in U.S. Supreme Court observed in the case of *US v. Butler 297 U.S. 1 (1936)* that:

“When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty: to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This Court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and having done that, its duty ends.”

57. On the doctrine of constitutionality of legislation on the wider Constitutional doctrine of separation of powers cannot be overlooked. The principle of separation of powers is a fundamental principle that must be observed in any engagement among the various organs of the state. The Petitioner in paragraphs 30 – 41 have gone to a great extent to try to persuade this Court to simply ignore this fundamental principle and consider the Petition as presented. The only effect of this is inviting the Court to apply judicial craftsmanship to clothe itself with jurisdiction that it lacks, something that the Courts greatly frown upon. The Constitution only obligates the Honourable Court to interpret the law and that if any substance thereof is deemed in the opinion of any party to be an error then only Parliament is competent to address such a concern unless any such concern touches on the constitutionality or otherwise of the legislation in issue which is not the case at hand.

58. In the case of *Aids Law Project vs Attorney General & 3 others Petition Number 97 of 2010 [2015] eKLR*, the Court stated that;

“Therefore where a statutory provision offends the constitution, the court is duty bound to declare it unconstitutional; and it is incumbent upon any person claiming unconstitutionality of a statutory provision to identify clearly the constitutional provision contravened as well as the offending statutory provision.”

59. It is noted in this Petition that the Petitioner concern is that the impugned provision of the *Health Laws (Amendment) Act, 2019* impose a separate regime other than that which was envisioned by the Health Act. I find even if this were true, it would not make these provisions unconstitutional. The Petitioner also claims, that these provisions also violate the spirit and objects of the Constitution under *Articles 27, 28, 40, 43 and 69* without justifying these allegations. I find that even if this was correct that would not make the provisions unconstitutional. It is noted that the Petitioner claim also, that these provision violated the constitution under *Articles 27, 28, 40 and 69* without proof and justification.

60. From the aforesaid I find that the Petitioner has failed to demonstrate to this Court the conflict existing between the impugned provisions and *Article 27* or any other provision of the Constitution that would result in rendering the same unconstitutional. I therefore find and hold that he allegation of unconstitutionality of *Section 2, 3 B (1) and (2) of the health Laws (Amendment) Act 2019* are without basis and unfounded.

C. WHETHER THE 3RD RESPONDENT’S FAILURE TO ACCORD THE PETITIONER’S MEMBERS AN OPPORTUNITY TO BE HEARD AND A FAIR AND JUST DECISION MADE AS ENVISIONED UNDER ARTICLE 47 OF THE CONSTITUTION AS READ TOGETHER WITH THE FAIR ADMINISTRATIVE ACTIONS ACT CONTRIBUTED TO THE VIOLATION OF THE PETITIONERS RIGHT UNDER ARTICLE 47 OF THE CONSTITUTION.

61. The Petitioner contended that the 3rd Respondent failure to accord the Petitioner’s membership a fair hearing is a violation of the Petitioner’s rights under *Article 47(1) of the Constitution*. It is Petitioner’s averments that *Article 47(1) of the Constitution* is in mandatory terms that every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Looking at *Article 47(2) of the Constitution* it is clear that it is more forceful that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for that action.

62. In the instant Petition it is Petitioner’s case that the Petitioner’s management approached the 3rd Respondent’s offices with a view of finding out why its members were under investigation and/or interrogations while all along the Petitioner together with the 3rd Respondent were engaged in a taskforce seeking to formulate regulations on how to guide the Traditional Health Practitioners pursuant to *Chapter 10 of the Health Act 2017*.

63. The Petitioner further stated that the 3rd Respondent’s failure to even communicate the reasoning informing their decision caused a lot of anxiety to the membership since they did not understand how the 3rd Respondent has decided to enforce an Act which they were not consulted in it’s enactment while at the same time the 3rd Respondent is member of a joint taskforce on formulating regulations aforementioned. The Petition further contended that by virtue of *Article 260 of the Constitution* is a “person” which include a company association or other body of person whether incorporated or not. In that regard

64. As regards interpretation of *Article 260*, I find that the Petitioner is a person for purposes of *Article 47 of the Constitution* in that its rights as an entity would be adversely affected by Respondent’s action or omission in respect of impugned decision and would be entitled to an administrative action that is not only procedurally fair and lawful but also reasonable. The Petitioner is also entitled to hearing before any adverse action would be taken against the Petitioner.

65. The 3rd Respondent on the violation of *Article 47 of the Constitution* averred that the Petitioner alleges that the right of its members have been violated, claiming its members were not accorded the right to be heard. It is 3rd Respondents assertion that the Petitioner has not told this Court what administrative decision the 3rd Respondent mode without according its member the right to be heard.

66. Looking at the Amended Petition under “*the Constitutional and statutory foundation of the Petition*” No.5 it is pleaded thus:-

“The Petitioners fundamental rights and freedoms under Article 47 of the Constitution have been violated and/or are likely to be violated by the 1st and 3rd Respondent’s failure to accord the members thereof the right to present their case before the Board and to have the Board recognize the validity and efficacy of traditional medicine as an alternative to conventional medicine. The member’s right to fair administrative action as captured under Article 47 of the Constitution and the Fair Administrative Actions Act will therefore be compromised as a result of the blatant and arbitrary arrests. “

67. From the contents of the Amended Petition it turns out that the Petitioner has failed to demonstrate, with certainty and precession, the exact administrative action that was taken by the 3rd Respondent which is being complained of. It is noted that the Petitioner only stated in the Amended Petition that the Petitioner’s rights under *Article 47 of the Constitution* were violated and are likely to be threatened.

68. I have carefully perused and considered the above paragraph as it appears in the Amended Petition and I find that the same does not disclose any administrative action taken by the 1st and 3rd Respondents, which the Petitioner's members are complaining of and with which they are aggrieved. There is no explanation how the 1st and 3rd Respondents have failed to accord the Petitioner a hearing or whether such hearing was requested by the Petitioner and declined and whether any decision was made by the Respondents before which the Petitioner should have been heard. I find from the Amended Petition as drawn there is no cause of action that I can find to have arisen in respect of the provisions under **Article 47 of the Constitution**. I find in order for Petitioner to succeed under **Article 47 of the Constitution**, the Petitioner ought to have outlined the specific administrative actions taken by the 1st and 3rd Respondents, that did not meet the constitutional threshold of being expeditious, efficient, lawful, reasonable and procedurally fair.

69. To buttress the aforesaid reliance is placed in the case of High Court at **Garissa County Government v National Land Commission & 3 others [2016] eKLR** where it was stated with regards to the right to fair administrative action under **Article 47 of the Constitution** that:

“Several things are notable from the above provisions. Firstly, the action in question has to fall under the definition of “administrative action.” Secondly, only when an action has been defined as “administrative action” can the Court then probe it to determine if it is indeed “expeditious, efficient, lawful, reasonable and procedurally fair.” Consequently, if the action in question does not constitute “administrative action,” any remedies or recourse that would flow from invoking Article 47 will not cogently ensure.” (Emphasis added)

70. Now I turn to consider what is said to be **“Administrative Action.”** Under **Section 2 of the Fair Administrative Action Act, 2015** it is provided that **“Administrative Action”** includes:-

“i. The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

ii. any act, omission or decisions of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.” (Emphases added).

71. From the contents of the Amended Petition herein, I find that the Petitioner has not outlined, the specific powers, functions or duties that were exercised by the 1st and 3rd Respondent's or the acts; omissions or decision of the 1st and 3rd Respondents which are being complained of. Further there is no evidence provided by the Petitioner of any decision made by 3rd Respondent to the effect that it does not recognise the validity of efficacy of the Traditional Medicine as an alternative to conventional medicine.

72. The Amended petition as drawn and filed does not claim that by implementing the **Health Laws (Amendment) Act 2019**, or by Nationwide Mapping out Exercise in collaboration with the Ministry of Interim and Co-ordination of National Government and other Government Agencies, the 3rd Respondent did not follow the correct procedure as laid down by the law. I find therefore the Petitioner has failed to demonstrate with precision the nature of the rights and / or freedoms of its members which have been violated and/or threatened and/or likely to be violated by the 1st and 3rd Respondents and how they have been violated or threatened.

73. In view of the aforesaid, the Petitioner has not shown that there exists an alternative statutory dispute mechanism under the Pharmacy and Poisons Act which the 3rd Respondent is required to pursue before taking the Petitioner to Court. In the absence of such a mechanism, and considering that the Petitioner's member was arrested on charges of committing an offence, the proper route of action was for him to be brought before the Criminal Court. There is no sense in this court interfering with the jurisdiction of the lower Court and any objections in that sense should be brought to the Court hearing the Criminal Case and a fair decision could be reached.

D. WHETHER THE RESPONDENTS CONDUCT CONSTITUTES A VIOLATION AND CONTRAVENTION OF THE CONSTITUTION OF KENYA 2010.

74. The Petitioner contended that the Respondents violated the principle of Public participation in enactment of the **Public Health Laws, (Amended) Act, 2009**.

75. Public participation is one of the national values and principles in our Constitution which must be observed by all persons; state organs and public officers in the exercise of their responsibilities. **Article 10(1) of the Constitution** states that the national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution; (b) enacts, applies or interprets any law; or makes or implements public policy decisions. And according to **Article 10(2)**, the national values and principles of governance include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and **“participation of the people.”**

76. There is no doubt that the enactment of the **Health Laws (Amendment) Act in 2019** was a legislative process and for that reasons the National Assembly was bound by the national value and principle of public participation as well as the principles of governance including transparency and accountability. Furthermore, **Article 118 of the Constitution** is clear that Parliament should conduct its business in an open manner, and its sittings and those of its committees should be open to the public and it should facilitate public participation and peoples' involvements in its legislative and other business including those of its committees.

77. The Petitioner herein did not pleaded there was no public participation but in its submissions submitted that the legislation process, that midwived the impugned statute did not take into account Public Participation and, therefore, urged that the process violated one of the key national values and principle of governance. The 3rd Respondent has not alluded to the issue of public participation at all in its formal response to the Petition. The 3rd Respondent's Counsel has only tabled before this Court a list of the mapping exercise that had been conducted by officers of the Respondent. The 3rd Respondent therefore not been demonstrated nor responded to this on Court the process of consultations with the relevant stakeholders in the industry which includes the Petitioner members, was not performed as it is not pleaded

hence it cannot be construed that this critical process was *never adhered to in the enactment of the statute. Article 259(1) of the Constitution behoves the court when interpreting the Constitution to do so in a manner that promotes its values and purposes. One of the values and principles of our constitution is Public Participation.*

78. The parties to a suit are also bound by their own pleadings and cannot argue any issues outside their own pleadings.

79. The burden of showing that there has been no public participation is on the Petitioner. In the case of *Law Society vs. Attorney General & 2 others (2013) eKLR*, the Court held that:-

“52. The burden of showing that there has been no public participation or that the level of public participation within the process does not meet the constitutional standards is on the Petitioner...”

80. Similarly in *Judicial Service Commission vs. Attorney General & another Interested Party; Jacqueline Akinyi Okeyo Manani [2019] eKLR*;

“The burden of proof there was public participation lies with the Respondents to demonstrate there was public participation.”

81. In addition in the case of *Law Society of Kenya v Attorney General & 2 others [2019] eKLR*;

“[...] It was an error for the learned judge to require the appellant to prove the negative, for once it states there was no public participation, the burden shifted to the respondents to show that there was. Much weight has been placed on public participation because it is the only way to ensure that the Legislature will make laws that are beneficial to the mwananchi, not those that adversely affect them.

Additionally, the onus is on the Parliament to take the initiative to make appropriate consultations with the affected people. It is therefore a misdirection for the learned judge to hold that the appellant had the responsibility to prove that the consultations did not happen. [...]”

82. I find that once a Petitioner attacks the legislation process on grounds that the law making process did not meet the constitutional standard of Public Participation, the Respondent(s) are under a legal obligation to demonstrate that the legislative process did meet the constitutional standards of public Participation, because it is the constitutional duty of Parliament to ensure that there is Public Participation. The Attorney General as the 2nd Respondent, has the legal burden to disprove this contention. This is so because it is a constitutional requirement that the National Assembly conducts its affairs in compliance with the Constitution.

83. The Constitutional text is clear in *Article 118(1)* under the sub-title **“Public Participation”** where it states in plain language that Parliament should conduct its business in an open manner, and its sittings and those of its committees should be open to the public and it should **“facilitate Public Participation and involvement in the legislative and other business of Parliament and its committees.”**

84. Reliance is placed in support of the above proposition in the case of South African case of *Matetiele Municipality & Others vs. The President of South Africa & Others (2) (CCT 73/05 A [2006] ZACC 12; 2007 (1) BCLR 47 (CC)*, the Constitutional Court stated that;

The representative and participative elements of our democracy should not be seen as being in tension with each other... What our constitutional scheme requires is “the achievement of a balanced relationship between representative and participatory elements in our democracy.” The Public involvement provisions of the Constitution address this symbolic relationship, and they lie at the heart of the legislative function. The Constitution contemplates that the people will have a voice in the legislative organs of the State not only through elected representatives but also through participation in the law-making process.”

85. In the instant Amended Petition, it is clear that the Petitioner has not pleaded on the absence of Public Participation, in legislation but has proceeded to submit on the purported issue on whether there was public participation in legislation of the impugned Act. A party is always bound by its own pleadings and cannot through unsupported submissions by pleadings, create an issue from nowhere and seek Court’s determination. I find in absence of pleadings in support of the issue whether there was public participation, there is nothing before me for consideration. The issue urged upon and advanced before this Court is in my view, a non-starter and an abuse of the Court process. The same is accordingly struck out as an issue and the same dismissed.

86. The consensus on the issue regarding public participation in recent decisions as regards the burden of proof on public participation is now settled, in that where a complaint is raised, that public participation was not conducted or a stakeholder was not involved, the burden of proof shifts to the Respondents. The burden cannot be shifted back to the accuser to prove that they did not take part in the consultations. Therefore, in such situations the Respondents, are under an obligation to prove that the same had taken place with the acquiescence of the Petitioner.

87. The Petitioner contended that *Articles 27, 28, 40 and 43 & 69* have been violated. The Respondents urge that the Petitioner is in violation or infringement of *Anita Karimi Njeru vs. Republic (1979) eKLR* decision in that the pleadings are not set out with a reasonable degree of precision and is bad in law.

88. Similarly in *Robert Amos Oketch vs. Andrew Hamilton & 8 Others [2017] eKLR*, the court held:-

“First, this being a constitutional petition, the petitioner is required to show with precision that it meets the test set in the case of Anita Karimi Njeru v. Republic (supra). In that case, the court stated that ... a party who wishes the court to find in his

favour must plead with a reasonable degree of precision the rights he claims to have been violated the constitutional provisions allegedly violated and the jurisdictional basis for it.

....

Applying the above principles to this case, I have considered the petitioner's pleadings, the evidence as well as submission by his counsel and in my respectful view this is not a proper constitutional petition challenging violation of fundamental freedoms. I say so because, although the petitioner had pleaded provisions of the constitution, he has not demonstrated to the required standard how his rights and fundamental freedoms have been violated infringed or are threatened to come within the ambit of Article 23(1) of the constitution for redress".

89. In the instant Petition, I find that the Petitioner has not properly and with required precision demonstrated how its rights and the right of its members have been infringed upon by the Respondents herein. The Petition merely quoted the provisions of the constitution but has not explained in detail how those rights have been violated or infringed or threatened. This is clear that the pleadings are not set out with reasonable degree of precision and accordingly are bad in law.

90. A party in a Petition cannot leave the details hanging and expect the Court to speculate on its behalf and to proceed to fill the gaps in the pleadings. The Court faced with such situation is left with no alternative or any option but to dismiss such a Petition.

91. **The upshot is that the Petition herein is dismissed with costs.**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF SEPTEMBER, 2021.

.....

J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA