REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A.C. Mrima, J.)

CONSTITUTIONAL PETITION NO. E287 OF 2020

MUSTAFA TOBIKO OLE TAMPUL.....PETITIONER

-VERSUS-

HASSAN OLE NAADO & 17 OTHERS.....RESPONDENTS

RULING NO. 1

Introduction:

1. This ruling relates to the Notice of Preliminary Objection dated 28th September, 2020. It is filed by the 1st, 2nd, 3rd and 4th Respondents.

2. The objection is supported by the rest of the Respondents and is opposed by the Petitioner.

3. By directions of this Court, parties filed written submissions to the objection. Whereas the Petitioner appears in person, the 1st to 4th Respondents are represented by Messrs. J. Harrison Kinyanjui & Company Advocates while Prof. Hassan Nandwa appears for the other Respondents.

The Preliminary Objection:

4. The objection as raised, is as follows: -

> 1. *THAT this Honorable court has no jurisdiction to entertain the Petitioner's/Applicant's undated Notice of Motion and Petition, as NO proper Constitutional Petition has been lodged before this Honourable Court.*
>
> 2. *THAT by dint of Section 9(4) of the Fair Administrative Action Act, this Honourable Court is divested of jurisdiction as the Petitioner has not exhausted the dispute resolution mechanisms within the framework of the organization he directs his pleas against — The Supreme Council of Kenya Muslims, SUPKEM.*
>
> 3. *THAT there are no Constitutional issues founding any justiciable claims before the Court.*
>
> 4. *The undated Petition is bad in law.*
>
> 5. *The Petition has been drawn and filed by a stranger unknown in law and not a party before the Court or known to exist.*
>
> *By reason of the stated Preliminary objection, the Respondents seek that the undated Notice of Motion and the Petition of even date ought to be struck out and dismissed with costs to the said 1st, 2nd, 3rd, and 4th Respondents.*

5. In urging this Court to uphold the objection, Counsel for the 1st to 4th Respondents submitted that the Petition is incurably defective as it is neither signed by the Petitioner nor an Advocate. Counsel cited the decisions in *Nicholas Kiptoo Arap Korir Salat v. IEBC & 6 others (2013) eKLR and Raila Odinga v. I.E.B.C & others (2013) eKLR*, *John Ongeri Mariaria & 2 Others Vs. Paul Matundura Civil Application No. Nai. 301 of 2003 (20041 2 EA 163* and the provisions of Order VI Rule 14 of the Civil Procedure Rules for the position that the

defectivity in issue is not one of those which can be cured under Article 159(2)(d) of the Constitution.

6. It is strongly submitted that there is no Petition for adjudication.

7. The other limb of the objection relates to the exhaustion of dispute resolution mechanisms. It is submitted that the dispute relates to internal affairs of SUPKEM which is a duly registered Society. It is posited that SUPKEM has its own internal procedures of settling disputes, which the Petitioner has failed to subject the dispute into. As such, the jurisdiction of this Court is improperly invoked.

8. Several decisions were cited in support of the foregoing position. They are *Speaker of the National Assembly v James Njenga Karume [1992] eKLR, Geoffrey Muthinia Kabiru & 2 Others v Samuel Munga Henry & 1756 Others [2015] eKLR, Benard Murage v Fine serve Africa Limited & 3 others [2015] eKLR* and *Damian Delfonte v The Attorney General of Trinidad and Tobago CA 84 of 2004.*

9. The last limb of the objection is that the Petition does not raise any constitutional issues. Reliance was placed on *Anarita Karimi Njeru v Republic, Meme v Republic & another [2004] 1 KLR 637* and the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights alliance [20141 eKLR.*

10. In the end, the 1st to 4th Respondents prayed that the objection be sustained and the Petition be struck out with costs.

11. The objection is supported by the rest of the Respondents. Further to the foregoing grounds and submissions in support of the objection, the 5th to 18th Respondents also pointed out that the disputes within SUPKEM as raised by the Petitioner herein are already subject of two suits. They are Mombasa High Court Constitutional Petition No. 26 of 2020 and Milimani High Court Civil Case No. 262 of 2019.

12. The Petitioner opposed the objection. He asserted that the Respondents have been running down the affairs of SUPKEM and that he had filed criminal complaints against them. The complaints are still being investigated though. The Petitioner asserts that pending the outcome of the investigations, the Respondents ought to be restrained from in any way running the affairs of SUPKEM and instead an interim team be put in place.

13. The Petitioner views the objection as a ploy to delay the determination of the Petition. He prays that it be dismissed with costs.

The Issues for Determination:

14. A careful perusal of the record brings the following issues to the fore:-

(i) Whether the Preliminary Objection is sustainable in law.

(ii) Whether the Court is barred by the doctrine of exhaustion from entertaining the dispute.

(iii) Whether there are any constitutional issues raised.

15. I will deal with the issues as enumerated.

(a) Whether the Preliminary Objection is sustainable in law.

16. As the objection is raised by way of a preliminary objection, I will briefly look at the law guiding such objections. Recently, in Nairobi High Court Constitutional Petition No. E260 of 2021 ***Borniface Akusala & Another v. The Law Society of Kenya & 12 Others*** (unreported) I dealt with this aspect as follows: -

> *13. The validity of any preliminary objection is gauged against the requirement that it must raise pure points of law capable of disposing the dispute at once. It is, therefore, mandatory for a Court to ascertain that a preliminary objection is not caught up within the realm of factual issues that would necessitate the calling of evidence.*
>
> *14. The foregoing nature of preliminary objections was discussed in* ***Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors*** *Ltd, (1969) E.A. 696 page 700 when the Court observed as follows: -*
>
> ...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.*

15. In Civil Suit No. 85 of 1992, ***Oraro vs. Mbaja*** *[2005] 1 KLR 141****, Ojwang J****, as he then was, cited with approval the position in Mukisa Biscuit -vs- West End Distributors (supra) and stated as follows on the operation of preliminary objection: -*

…. 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.

16. In ***Omondi -vs- National Bank of Kenya Ltd & Others*** *{2001} KLR 579; [2001] 1 EA 177, it was observed that a Court in determining a preliminary objection can look at the pleadings and other relevant documents but must abide by the principle that the objection must raise pure points of law. It was held thus: -*

…*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.*

17. The question whether jurisdiction is a point of law was set out clearly by the Supreme Court in Petition No. 7 of 2013 ***Mary Wambui Munene v. Peter Gichuki Kingara and Six Others,*** *[2014] eKLR, when the Learned Judges stated that 'jurisdiction is a pure question of law' and should be resolved on priority basis.*

18. The Apex Court had earlier on in Constitutional Application No. 2 of 2011, ***In the Matter of Interim Independent Electoral Commission*** *(2011) eKLR observed as follows in regard to jurisdiction and its source: -*

… Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid down in judicial precedent.

17. The objection raises three main issues. They are the jurisdiction of the Court, the exhaustion doctrine and that no constitutional issues are raised in the Petition. Each of these issues is capable of terminating the Petition if allowed.

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

(a) Whether the Court is barred by the doctrine of <u>exhaustion from entertaining the dispute:</u>

19. In interrogating the doctrine of exhaustion and its applicability in ***Borniface Akusala & Another v. The Law Society of Kenya & 12 Others*** case (supra), the Court traced its origin as follows: -

25. 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.

26. Clause 3 is on traditional dispute resolution mechanisms.

20. 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.

21. 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.***

22. 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.

23. 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.*

24. 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).

25. Returning back to the case at hand, the Respondents only stated that the SUPKEM is a Society and that all disputes involving its affairs must be first dealt with as provided for under the SUPKEM Constitution.

26. The Constitution of SUPKEM is not part of the record in these proceedings. As a result, this Court is unable to interrogate whether there is a truly a defined procedure laid down under the SUPKEM Constitution as alleged, and if so, whether the exceptions to the doctrine of exhaustion apply.

27. That being the case, the limb fails and the issue answered in the negative. In other words, the Petition is, therefore, not barred by the doctrine of exhaustion.

(c) <u>Whether there are any constitutional issues raised.</u>

28. In Nairobi High Court Constitutional Petition No. E406 of 2020 ***Renita Choda vs. Kirit Kapur Rajput*** (2021) eKLR, this Court considered the above issue. This is what was stated: -

> *33. Long before the downing of the new constitutional dispensation under the Constitution of Kenya 2010, Courts have variously emphasized the need for clarity of pleadings. I echo the position.*
>
> *34. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (commonly referred to as '<u>the Mutunga Rules'</u>) 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.*
>
> *35. 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.

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

37. The Supreme Court in ***Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others*** *case (supra) 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.*

38. Both parties are in agreement with what a constitutional issue is. They both referred to ***Fredricks & Other vs. MEC for Education and Training, Eastern Cape & Others*** *case (supra) where the Court, rightly so, delimited what a constitutional issue entails and the jurisdiction of a Constitutional Court as follows: -*

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

39. In the United States of America, a constitutional issue refers to any political, legal, or social issue that in some way confronts the protections laid out in the US Constitution.

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

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

41. Whereas it is largely agreed that the Constitution of Kenya, 2010 is transformative and that the Bill of Rights has been hailed as one of the best in any Constitution in the world, as ***Lenaola, J*** *(as he then was) firmly stated in* ***Rapinder Kaur Atal vs. Manjit Singh Amrit case*** *(supra) '… Courts must interpret it with all liberation they can marshal…'*

42. Resulting from the above discussion and the definition of a constitutional issue, this Court is in agreement with the position in ***Turkana County Government & 20 Others vs. Attorney General & Others*** *case (supra) where a Multi-Judge bench affirmed the profound legal standing that claims of statutory violations cannot give rise to constitutional violations.*

43. A careful reading of the Petition and the application filed together with the Petition reveals that there is disharmony within SUPKEM. That state of affairs has so far resulted to the Petitioner requesting the Director of Criminal Investigations (hereinafter referred to as '***the DCI'***) and the Director of Public Prosecutions hereinafter referred to as '***the DPP'***) to carry out investigations. So far the investigations are on-going and already two Court cases have been filed being a Constitutional Petition and a Civil Case.

44. In this Petition, the Petitioner is not at ease at the manner in which the investigations are carried out. According to him, it seems like he is complaining of inordinate delays. It is on that basis that the Petitioner seeks for the prayers in the application and the Petition.

45. The Petition in this matter only contain the Articles of the Constitution on which it is anchored. They are Articles 19, 20, 21, 22,23, 27, 28, 32, 50, 159 and 165. It also has the descriptions of the parties. The Petition instead does not have any averments in the manner in which any violations arose, by whom and against whom. It is the application and the supporting affidavits which contained what may be described as '*the Petitioner's case'*.

46. The Petition, therefore, does not contain the facts relied upon, the constitutional provisions violated and 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. The Petition is, as presented, grossly contrary to Rule 10(1) and (2) of the Mutunga Rules.

47. With such a state of affairs, can the Petition be cured by dint of Rule 10(3) of the Mutunga Rules? This sub-rule has already been reproduced above. However, due to its centrality, I will reproduce it once more: -

> *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.

48. There is a specific requirement when a Court is to accept an oral application, a letter or any other informal documentation as a Petition. The requirement is that the denial, violation, infringement or threat to a right or fundamental freedom must be demonstrated. In this case, the Petitioner's main prayer is that the investigations are taking long and he now looks to this Court for reprieve.

49. The prayers sought in the application are as follows: -

1) Pending the ongoing investigations with the DCI, DPP the hearing and determination of the Petition herein, an order of injunction be issued restraining the Respondents whether by themselves or by their representatives, agents and or assigns from assuming the office in official capacity and conducting official business of Supkem in any manner whatsoever interfering with or otherwise dealing with the Council

2) Pending the ongoing investigations with the DCI, DPP, the hearing and determination of the Petition herein, an order of injunction be issued that, there be an immediate reconstitution of an Interim Office bearers in accordance of the Council's Constitution to conduct the Council's official business without interference from the Respondents.

3) The Respondents to hand over office and/or any of the Council's items, assets, documents and/or any other thing of value to the new interim office within 7 days of their assumption of the office.

4) Order that looted/stolen money, assets and any other thing of value from Supkem to be confiscated and returned to the Council's treasury in 7 days after the Criminal Court determines the Respondents' pro-rata involvement and culpability

5) The cost of this Petition be borne by the Respondents.

50. The application does not, therefore, demonstrate any denial, violation, infringement or threat to a right or fundamental freedom. Instead the prayers sought in the application are within the discretion of the investigative organs. In the event the DCI and/or DPP are of the conviction that such orders are necessary to aid them in their investigations, then they can easily seek them before the appropriate Court. Even if this Court is to grant the orders sought in the application, what will be the fate of '*the Petition?*'

51. This Court, hence, agrees with the Respondents that there are no constitutional issues raised in these proceedings and as such there is no competent Petition before Court for adjudication.

52. There was also the issue that the Petition was not signed by the Petitioner. I have perused the record and it seems that is not the position. The Petition is duly signed by the Petitioner.

Disposition:

53. Flowing from the foregoing findings and conclusions, the following orders of this Court do hereby issue: -

(a) The Preliminary Objection dated 28th September, 2020 is hereby allowed.

(b) The Petition and the Notice of Motion are hereby struck out.

(c) Costs to be borne by the Petitioner.

Orders accordingly.

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

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Mustafa Tobiko ole Tampul, the Petitioner in person.

Mr. Kinyanjui, Counsel for the 1st to 4th Respondents.

Prof. Hassan Nandwa, Counsel for the 5th to 18th Respondents.

Elizabeth Wanjohi – Court Assistant.