



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 78 OF 2020**

**CONSOLIDATED WITH PETITION NO. 79 OF 2020, 80 OF 2020 AND 81 OF 2020**

LAW SOCIETY OF KENYA.....1<sup>ST</sup>PETITIONER  
DR JOSEPH MITHIKA MWENDWA MZALENDO.....2<sup>ND</sup>PETITIONER  
DR CYPRIAN THIANKOLOU.....3<sup>RD</sup>PETITIONER  
JAMES KOUNA.....4<sup>TH</sup>PETITIONER  
ELVIS BEGI NYACHIO ABENGA.....5<sup>TH</sup>PETITIONER  
HER VOICE KENYA.....6<sup>TH</sup>PETITIONER  
AIDS HEALTHCARE FUNDATION KENYA.....7<sup>TH</sup>PETITIONER  
BUYER AWARENESS KENYA.....8<sup>TH</sup>PETITIONER

**AND**

CABINET SECRETARY FOR HEALTH.....1<sup>ST</sup> RESPONDENT  
CABINET SECRETARY TRANSPORT, INFRASTRUCTURE  
HOUSING, URBAN DEVELOPMENT AND  
PUBLIC WORKS.....2<sup>ND</sup> RESPONDENT  
CABINET SECRETARY FOR INTERIOR AND  
COORDINATION OF NATIONAL GOVERNMENT.....3<sup>RD</sup> RESPONDENT  
CABINET SECRETARY FOR FOREIGN AFFAIRS.....4<sup>TH</sup> RESPONDENT  
KENYA AIRPORTS AUTHORITY.....5<sup>TH</sup> RESPONDENT  
KENYA CIVIL AVIATION AUTHORITY.....6<sup>TH</sup> RESPONDENT  
DIRECTOR OF IMMIGRATION.....7<sup>TH</sup> RESPONDENT  
ATTORNEY GENERAL.....8<sup>TH</sup> RESPONDENT  
KENYA AIRWAYS.....9<sup>TH</sup> RESPONDENT

**RULING**

1. The Petitioners/Applicants through an application dated 28<sup>th</sup> February 2020 were on 28<sup>th</sup> February 2020 granted ex-parte orders after the Court heard the Petitioners/Applicants Counsel ex-parte and after being satisfied with the matter, that the 1<sup>st</sup> Respondent conduct posed a threat to Constitutional right to life and upon court finding, that unless ex parte conservatory orders are issued, the Kenyan population will continue to be exposed to deadly disease of coronavirus. The court noted by declining to grant the orders, the Respondents will continue to allow more flights into the country putting Kenyan at grave danger, that may result in deaths of several Kenyans as Corona Virus has no known vaccine or treatment.

2. The Court upon considering the Counsel submissions and grounds in support found it proper and appropriate to grant temporary ex parte orders in terms as per extracted order of this Court: thus:-

***i. That Petition No.78/2020 and 79 of 2020 be and are hereby consolidated.***

***ii. That the lead file shall be Pet 78 of 2020.***

***iii. That pending the hearing and determination of the Application, a Conservatory order be and is hereby issued suspending the Respondent's decision to allow resumption of non-essential flights from China to Kenya.***

***iv. That pending hearing and determination of the Application, a Conservatory Order be and is hereby issued in the form of structural interdict compelling the 1<sup>st</sup> Respondent to prepare and present to the Court for scrutiny, a contingency plan on prevention, surveillance, control and response systems to coronavirus (COVID-19) outbreak in Kenya.***

***v. That Conservatory Orders be and are hereby issued to prevent the Respondents from letting into the country by air, sea and land any persons from China and or any other World Health Organization (WHO)-designated hot-spot country that is adversely affected by Coronavirus (COVID-19) outbreak, pending the hearing and determination of this Application.***

***vi. That Conservatory Orders be and are hereby issued to prevent the Respondents from letting into the country by air, sea and land any persons from China and or any other World Health Organisation (WHO)-designed hot-spot country that is adversely affected by Coronavirus (COVID-19) outbreak, pending the hearing and determination of this Petition.***

***vii. That an Order compelling be and is hereby issued to the Respondents to forthwith trace, account, re-examine, confine and quarantine in a KDF facility and or a specially guarded medical facility, all the 239 passengers that they let into the country 239 aboard a Chinese flight CZ 6043, which landed at Jomo Kenyatta International Airport (JKIA) on 26<sup>th</sup> February, 2020 at 7:29 am, until they are duly certified to be free from Coronavirus (COVID-19), pending the hearing and determination of this matter.***

***viii. That Order 5 and 6 above shall remain in force for 10 days from today.***

***ix. That the Petition be served upon all the Respondents and Interested Parties on or before 2<sup>nd</sup> March, 2020.***

***x. That Respondents and Interested Party to file their Response within 1 day from the date of service.***

***xi. That Mention on 3<sup>rd</sup> March 2020 for directions and further Orders.***

3. The Respondent filed a Replying Affidavit by Dr. Patrick Amoth sworn on 5<sup>th</sup> March 2020 attaching Report by National Emergency Response Committee on Coronavirus issued at State House Nairobi on 28<sup>th</sup> February 2020. It was averred that the actions outlined therein were evidence of some of interventions to prevent the incidence and spread of the Virus in Kenya.

4. The Respondents further filed a Replying Affidavit sworn by Benjamin Murkomen on 5<sup>th</sup> March 2020; a Port Health Officer at Jomo Kenyatta International Airport.

5. The Respondent on 18<sup>th</sup> March 2020 field a Report on measures put in place by the government to deal with the Coronavirus (COVID-19) threat in Kenya dated on the even date and duly signed by Dr. Patrick Amoth in compliance with the Court's Order.

6. The counsel for 1<sup>st</sup> – 5<sup>th</sup> Respondents and 7<sup>th</sup> – 8<sup>th</sup> Respondents through a Notice of Motion dated 8<sup>th</sup> April 2020, brought pursuant to Rule 25 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 seek the following orders:-

**a) The application herein be certified as urgent and service thereof be dispensed with in the first instance.**

**b) Pending the hearing and determination of this application inter-partes, this Honourable Court be pleased to stay the implementation of the orders issued on 28<sup>th</sup> February, 2020 only to extent that the same was in the form of a structural interdict compelling the 1<sup>st</sup> Respondent to prepare and present to the court for scrutiny, a contingency plan on prevention, surveillance, control and response system to coronavirus (COVID -19) outbreak in Kenya**

c) That this Honourable Court be pleased to set aside, vary or discharge the ex-parte orders issued on 28<sup>th</sup> February, 2020 only to the extent that the same was in the form of a structural interdict compelling the 1<sup>st</sup> Respondent to prepare and present to the court for scrutiny, a contingency plan on prevention, surveillance, control and response system to corona virus (COVID -19) outbreak in Kenya.

7. The Notice of Motion is premised on the grounds on the face of the application and to be specific as follows: -

1) This Honourable Court has jurisdiction to stay, set aside, vary or discharge the ex-parte orders issued on 28<sup>th</sup> February, 2020 (the impugned orders).

2) The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> Respondents are dissatisfied with the impugned orders and as provided under rule 25 of the Constitution of Kenya (Protection of rights and fundamental freedoms) practice and procedure rules, 2013 have elected to apply for their setting aside, variation or discharge of the same.

3) This Honourable Court gave a mandatory injunction at an interlocutory stage, ex-parte and has therefore rendered the hearing of the main petition otiose.

4) The Petitioners are now seeking to enforce the very same orders that they were seeking as final orders which orders were issued even before the Petition was served upon the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup>, and 8<sup>th</sup> Respondents.

5) The impugned orders should be set aside and/or discharged, ex-delbito justitiae.

6) This Honourable Court neither gave any reasons for its decision nor gave a rational explication as to how it arrived at the orders and therefore, the same were issued arbitrarily.

7) The impugned orders which constitute a mandatory injunction against the Respondents herein were issued contrary to the principles of issuance of injunctions and the same were therefore issued capriciously and injudiciously.

8) The impugned orders have occasioned the Respondent's great prejudice and have literally denied the Respondents right to a fair hearing and condemned the Respondents without any hearing.

9) The impugned orders issued by this Honourable Court on 28<sup>th</sup> February, 2020 are akin to a final judgment at an interlocutory stage and ex-parte.

10) The honourable court in issuing the impugned orders acted without jurisdiction for the reason that structural interdicts can only be issued as a final order and/or judgment.

8. The Petitioners/Applicants filed supplementary affidavit sworn by Mercy Wambua on 16<sup>th</sup> April 2020.

#### **ANALYSIS AND DETERMINATION**

9. I have considered the Petitioners /Applicants application, the Respondents application, the Replying Affidavits, the Counsel rival submissions and from the above the following issues arises for consideration:-

a) ***Whether the court had jurisdiction to grant the structural interdict; when it did?***

b) ***Do the 1<sup>st</sup> Respondent have an obligation to prepare a contingency plan in the terms directed by the Court?***

#### **A. WHETHER THE COURT HAD JURISDICTION TO GRANT THE STRUCTURAL INTERDICT; WHEN IT DID?**

10. The Respondents urge that the impugned orders are in the nature of a mandatory injunction and were granted illegally, contrary to the principles of issuance of injunctions and the same were therefore issued capriciously and injudiciously. It is further contended that their continued existence and/or enforcement is against the rule of law and administration of justice.

11. The Respondents further state that this honourable Court has the requisite jurisdiction and inherent power to stay and/or set aside, vary or discharge the impugned ex parte interlocutory orders.

12. The Respondents in support the aforesaid purported rely on the case of *K. G. Patel & Sons Ltd vs. John Kabukuru Gituro [2016] eKLR* where Justice John Mativo with regard to inherent power of Court stated:-

*“In my view, the court is not powerless to grant relief when the end of justice and equity so demand, because the powers vested in the court are of a wide scope and ambit. See Mamraj vs. Sabri Devi, AIR 199 P & H 96. The inherent power, as observed by the Supreme Court of India in Raj Bahadur Ras Raja vs Seth Hiralal AIR (1962) AC 527 “has not been conferred on the court; it is a power inherent in the court by virtue of its duty to do justice between the parties before it.” Lord Cairns in Roger Vs Comptoir D’Escompts De Paris (1871) L.R. 3 P. C. 465 a 475 stated as follows:-*

**“One of the first and highest duties of all, Courts is to take care that the act of the Court does no injury to any of the suitors and when the expression ‘Act of the Court’ is used it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole from the lowest court which entertains jurisdiction over the matters up to the highest court which finally disposes of the case.”**

13. I find that in considering the question whether inherent powers should be exercised for the ends of justice, the court is under duty to take into account relevant consideration; the existing circumstances, the injustice caused to the applicant, remedy that may be available to the aggrieved party, inconvenience and unnecessary expenses likely to be bundled on the parties. The court is always required to take care that the act of the court does no injury to any of the litigants and in doing so the main concern is to do substantial justice in the administration of justice.

14. The Petitioners view is that this Court has jurisdiction and properly granted the structural interdict under **Article 23 of the Constitution**. **Article 23(3) of the Constitution** provides:-

**“In any proceedings brought under Article 22, a Court may grant appropriate relief, including...”**

15. This Court on 28<sup>th</sup> February 2020, while issuing the structural interdict it rendered a ruling in which it stated partly:-

**The Court is satisfied that this matter is involving Constitutional right to life, amongst other reasons (i)....**

**I find unless the conservatory orders sought are granted, the Kenyans will continue to be exposed to deadly disease, coronavirus. That the Respondents will on the other hand continue to allow more flights from China thus putting Kenyans at grave danger that may result into deaths of several Kenyans as Coronavirus has no known vaccine or treatment.”**

16. The court in its ruling specifically and contrary to Respondents assertion, that the Court neither gave any reason for its decision nor gave a rationale explanation as to how it arrived at its orders is unjustified and without basis as the Court considered the application, gave reasons and explanation for its decision.

17. The Attorney-General has a duty to promote, protect and uphold the rule of law and defend public interest and seeks that the court do lift the structural interdict. The Respondents in seeking the lifting of the Structural interdict seek to invoke this court’s inherent powers but choose to say nothing about this court’s constitutional duty to grant **“appropriate relief”** in the circumstances of a matter as provided under **Article 23 of the Constitution of Kenya 2010**; to preserve fundamental rights and freedoms. This clearly goes against the Attorney-Generals mandate under **Article 156 (6) of the Constitution of Kenya 2010** which provides: -

**“156. The Attorney-General**

**(6) The Attorney-General shall promote, protect and uphold the rule of law and defend the public interest.”**

18. The Respondents contend that the Honourable Court in issuing the impugned orders it acted without jurisdiction for the reason that structural interdicts can only be issued as a final order or judgment.

19. The Respondents assert the Court did not exercise its discretion judiciously in issuing the impugned orders. The Respondents in support of this preposition relies in the Court of Appeal decision in the case of **Barclays Bank of Kenya Ltd vs. Banking, Insurance & Finance Union (Kenya) (2019) eKLR** while citing with approval the locus classicus case of **Giella vs Cassman Brown & Company Ltd (1973) EA 358** which was restated by the same Court in **Nguruman Limited vs Jan Bonde Nielsen & 2 Others [2014] eKLR** as follows:-

**“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;**

**a) Establish his case only at a prima facie level,**

**b) Demonstrate irreparable injury before a temporary injunction is granted, and**

**c) Allay any doubts as to (b) by showing that the balance of convenience is in his favour.”**

20. It is further urged the impugned interlocutory orders are in the nature of a mandatory injunction and were granted illegally contrary to the principles of issuance of injunctions and the same were therefore issued capriciously and injudiciously.

21. The Respondents referred to the case of **Barclays Bank of Kenya Ltd vs. Banking, Insurance & Finance Union (Kenya) [2019] eKLR** where it was stated as follows regarding mandatory injunctions at page 6 thereof:-

First, on mandatory injunction, this Court stated times without number, that at the interlocutory stage a mandatory injunction will only be granted in clear cases or where special circumstances exist. The rationale as stated by Meggery, J. in the case of *Shepherd Homes Ltd vs. Shandahu (1971)1. Ch. D.*, is that:

**“...a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory**

stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually wrong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation.” (emphasis mine)

22. The Court of Appeal in the above cited case while relying on the case of **Localball International Finance Ltd. Vs. Agroexport and Others** [1986] 1 ALL ER 901 at pg.901 stated thus:

“ A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of insurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.” (Emphasis mine)

23. **Articles 23(3) of the Constitution of Kenya 2010**, is clear that it entitles the court to grant any “appropriate relief” in any proceedings brought under **Article 22 of the Constitution**. In the case of **EWA and 2 others v. Director of Immigration and Registration of Persons & another** (2018) eKLR it defines “appropriate relief” as a relief that is required to protect and enforce the Constitution “... a declaration of rights, an interdict, mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced” The same position was held in the case of **Fose v. Minister of Safety and Security (CCT 14/96) 1997, ZACC 6, 1997**.

24. “Appropriate relief” will be in essence be relief that is required to protect and enforce the Constitution depending on the circumstances of each case. The relief may be a declaration of rights, on interdict, a mandamus or such other relief as may be required to ensure that the right as enshrined in the constitution are protected.

25. Further it is clear from the authorities relied upon by the Respondents that mandatory injunctions, at interlocutory stage will only be granted in clear cases or where special circumstances exist. In the instant case the Petitioner’s case is strong and clear and brought under special circumstances regarding protecting Kenyans due to the threat of COVID-19 pandemic and due to special circumstances in existence, the court considered the same and gave reasons for granting the ex-parte orders as provided in the case of **Barclays Bank of Kenya Ltd vs. Banking, Insurance & Finance Union (Kenya) [2019] eKLR** and **Localball International Finance Ltd. Vs. Agroexport and Others** [1986] 1 ALL ER 901 at pg.901.

26. The Respondents contend that the “a structural Interdict” can only be issued as a final order or judgment and not at interlocutory stage. The Respondent in support of the said proposition, seek support from the Court of Appeal decision, in the case of **Kenya Airports Authority v. Mitu-Bell Welfare Society & 2 Others** [2016] eKLR under paragraph 101 of the Judgment where the Court stated:-

“Post-Judgment supervision of implementation of judgment is a recent development in comparative jurisprudence. Such post-judgment supervision is at times referred to as supervisory orders or structural interdicts and they arise out of the situations created by a new and transformative constitutional order. India, Canada and South Africa are some of the states of the states that embrace post-judgment supervisory orders” [Emphasis added]

27. It is Respondents contention from the reading of paragraph 101 of the **Kenya Airports Authority v. Mita-Bell Welfare Society & 2 Others** (supra) that the “structural interdict” can only be issued at a final order in a judgment that finally determines a dispute between parties. They contend therefore this Courts erred and failed to act judiciously by issuing a “structural interdict” at an interlocutory stage and ex parte.

28. **Article 23 of the Constitution of Kenya 2010** entitles the Court to grant any “appropriate relief” in any proceedings brought under **Article 22 of the Constitution**. The “appropriate relief” as stated herein above is a relief; required to protect and enforce the constitution and includes a declaration of rights, an interdict, a mandamus or such relief as may be required to ensure that the rights enshrined in the constitution are protected and enforced. The submissions by the Respondents that structural interdict can only be issued as a final order in the judgment that finally determines a dispute between the parties contradicts **Article 23 of the Constitution** which clearly provides “**in any proceedings brought under Article 22, a Court may grant “appropriate relief”**, without limits as to timing. **Article 22 of the Constitution** entitles persons, like the Law Society of Kenya, to “institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed and is threatened. I find that a threat to a right or fundamental freedom, invokes this court’s jurisdiction to issue conservatory orders.

29. In the Supreme Court decision in the case of **Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others** (2014) eKLR at page 86 the Supreme Court captured the pre-emptive role of the conservatory orders:-

“Conservatory Orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory Orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes.

30. I now turn to the authorities relied upon by the Respondents, thus the case of **Simeon Kitheka & 18 Others vs. County Government of Machakos & 2 Others** (2018) eKLR; **John Harun Mwau vs. Linus Gitahi & 13 Others** (2016) eKLR as well as **Kenya Airports Authority v. Mitu Bell Welfare-Society & 2 Others** (supra) and **Localball International Finance Ltd. Vs. Agroexport and Others** (supra). I find none of these authorities addresses a situation as addressed herein by the Respondents, who challenges the Court’s jurisdiction to grant a

“structural interdict or other conservatory orders” at an interlocutory stage in the face of a public health emergency of International concern, which has now become a pandemic. The Respondents have in my view not put forward a single authority in support of their claim that “a structural interdict” can only be issued as a final order or judgment, even in a situation where a structural interdict is the “most appropriate relief”.

31. **Article 20 (3)(b) of the Constitution** provides that in applying a provision of the Bill of Rights, a Court shall adopt the interpretation that most favours the enforcement of a right or fundamental freedom. I find upholding the Respondents’ contention as regards averments that a “structural interdict” can only be issued as a final order or judgment would bleed **Article 23(3) of the Constitution** of all meaning.

32. The Respondents reading of paragraph 101 of *Kenya Airports Authority v. Mitu-Bell Welfare Society & 2 Others (supra)*, that “structural interdict can only be issued as a final order or judgment”, clearly is not supported by the holding and is a misstatement of the holding in my view. The case mainly referred to the “*comparative jurisprudence*” on “*supervisory order*” without setting any rule as to their timing in the cause of litigation. On Competitive jurisprudence on post-judgment supervision, it was stated thus :-

**“Post-judgment supervision of implementation of judgment is a recent development in comparative jurisprudence. Such post-judgment supervision is at times referred to as supervisory orders or structural interdicts and they arise out of the situation created by a new and transformative constitutional order. India, Canada and South Africa are some of the states that embrace post-judgment supervisory orders.”** (Emphasis mine)

33. In view of the Court’s holding as quoted herein above, I find the Court of Appeal decision has no timing and as such the Respondents’ averment on timing of “*structural interdict*” has no basis.

34. The Court of Appeal decision in *Mitu-Bell case* at paragraph 112 states:-

**“if properly crafted to avoid vagueness, a supervisory order can be made pursuant to the provisions of Article 23(3) of the Constitution of Kenya, 2010.”**

35. In this case the Courts Order was clearly crafted and was most appropriate relief, in the face of the Respondents failure to prepare for any COVID-19 cases in Kenya. I find paragraph 101 of *Mitu-Bell case* supports the Petitioners.

36. In the case of *County Government of Kitui vs. Ethics & Anti-Corruption Commission (2019) eKLR* at paragraph 100, Odunga J, recently clarified the meaning of “structural interdict” as an appropriate relief under **Article 23 of the Constitution**:-

**“One of the remedies which is now recognized in jurisdictions with similar constitutional provisions as our Article 23 is what is called structural interdict. In essence, structural interdicts (also known as supervised interdicts) require the violator to rectify the breach of fundamental rights under court supervision. Five elements common to structural interdicts have been isolated in this respect. First the court issues a declaration identifying how the government has infringed an individual or group’s constitutional rights or otherwise failed to comply with its constitutional obligations. Second, the Court mandates government compliance with constitutional responsibilities. Third, the government is ordered to prepare and submit a comprehensive report, usually under oath, to the court on a pre-set date. This report, which should explicate the government’s action plan for remedying the challenged violations, gives the responsible state agency the opportunity to choose the means of compliance with the constitutional rights in question, rather than the court itself developing or dictating a solution. The submitted plan is typically expected to be tied to a period within which it is to be implemented or a series of deadlines by which identified milestones have to be reached. Fourth, once the required report is presented, the court evaluates whether the proposed plan in fact remedies the conditional infringement and whether it brings the government into compliance with its constitutional obligations. As a consequence, through the exercise of supervisory jurisdiction, a dynamic dialogue between the judiciary and the other branches of government in the intricacies of implementation may be initiated. This stage of structural interdict may involve multiple government presentations at several ‘check in’ hearings, depending on how the litigants respond to the proposed plan and, more significantly, whether the court finds the plan to be constitutionally sound. Structural interdicts thus provide an important opportunity for litigants to return to court and follow up on declaratory or mandatory orders.**

**The chance to assess a specific plan, complete with deadlines, is especially valuable in cases involving the rights of ‘poorest of the poor,’ who must make the most of rare and costly opportunities to litigate. After court approval, a final order (integrating the government plan and any court ordered amendments) is issued. Following this fifth step, the government’s failure to adhere to its plan (or any associated requirements) essentially amount(s) to contempt of court”.**

37. From the Provisions of **Article 20(3)(a) and (b) of the Constitution** this Court is bound to adopt the interpretation that most favours enforcement of rights claimed and to develop the law on structural interdict. The structural interdict as an appropriate relief can be available at interlocutory stage. The nature of the obligation has been reiterated by the Court of Appeal in *CKC and another (suing through the mother and next friend JNN v. ANC (2019) eKLR* where the Court stated :-

**“Addressing the courts directly, the Constitution demands that in applying a provision of the Bill of rights, they must develop the law to the extent that it does not give effect to a right or fundamental freedom and adopt the interpretation that most favours the enforcement of a right and fundamental freedom. The courts must also promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and object of the Bill of rights. As regards implementation of rights and fundamental freedoms, Article 21 makes it the obligation of all State organs and all public officers to address the needs of vulnerable groups within society, including women and children and members of particular ethnic, religious or cultural communities. Next, Article 22 gives all persons a broad and unrestricted right of access to the courts for the purposes of enforcement of rights and fundamental freedoms.”**

38. Upon considering the party's rival submissions, the authorities and submissions and provisions of **Article 23(3) of the Constitution**, I find the Court has jurisdiction to grant a **"structural interdict"** including at the interlocutory stage, as was the case herein, if that is the **"appropriate relief."**

39. In the Respondents application it is urged the impugned orders prejudiced the Respondents and denied the Respondents the right to a fair hearing and were considered without any hearing.

40. The court upon hearing the Petitioners ex parte granted interim orders on 28<sup>th</sup> February 2020. The extracted court's order was duly served upon the Respondents on 2<sup>nd</sup> March 2020 as per affidavit of service filed on 3<sup>rd</sup> March 2020. On 3<sup>rd</sup> March 2020 the parties including the Respondents appeared before this Court. The Respondents did not object to the court's orders but sought 3 days to put in the **"structural interdict report"**.

41. The matter was subsequently mentioned on 6<sup>th</sup> March 2020, when the Respondents had filed their response together with Report on steps that the government had taken. The matter was subsequently mentioned on 17/3/2020; 19<sup>th</sup> March 2020; 26<sup>th</sup> March 2020; and 2<sup>nd</sup> April 2020 during which periods the Respondents participated without raising any objections or filing an application to set aside the ex parte orders.

42. From the conduct of the Respondents and in view of the fact that an ex parte had been given, it is clear that no prejudice was suffered by the Respondents nor were they denied rights to fair hearing. I find the application filed on 8<sup>th</sup> April 2020 was an afterthought as the Respondents filed their Replying Affidavit on 6<sup>th</sup> March 2020 and on 18<sup>th</sup> March 2020 filed Report on the measures put in place by the government to deal with Coronavirus (COVID-19) threat in Kenya. The application to set aside and/or review or vacate the ex parte orders of 28<sup>th</sup> February 2020 was filed after expiry of 40 days which is dated 8<sup>th</sup> April 2020 rising the issue as regard the structural interdict. The delay is unexplained and without any basis.

#### **B. DO THE 1<sup>ST</sup> RESPONDENT HAVE AN OBLIGATION TO PREPARE A CONTINGENCY PLAN IN THE TERMS DIRECTED BY THE COURT?**

43. The Petitioners aver that under **Article 2(6) of the Constitution of Kenya 2010**, any treaty or convention ratified by Kenya forms part of the laws of Kenya and to that extend Kenya is a state party to the Constitution of the World Health Organisation (WHO) whose objective is the attainment by all people of the highest possible level of health. Under Articles 2, the WHO has the following functions relevant to the present Petition, to act as the directing and co-ordinating authority on international health work; to stimulate and advance work to eradicate epidemic, endemic and other diseases, to public conventions, agreements and regulations and to make recommendations with respect to International Health matters.

44. On regulations, Article 21(a) and 22 the WHO Constitution empowers the world Health Assembly to adopt regulations, designed to prevent the International spread of disease. Once adopted by the Health Assembly, the regulations enter into force for all WHO members states that do not affirmatively opt out of them within a specified time period. Having been adopted by the fifty eight World Health Assembly on 23<sup>rd</sup> May 2005, the International Health Regulations (2005) entered into force on 15<sup>th</sup> June 2007.

45. The purpose and scope of the H/R (2005) are "to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade.

46. On issue of public health contingency planning under international law, **Article 5 of the 2005 Regulations** requires each state party, to develop, strengthen and monitor as soon as possible, but not later than five years from the entry into force of the Regulations for that state party (not later than 16<sup>th</sup> June 2012). The capacity to detect, assess, notify and report events in accordance with Annex 1 of the Regulations. Annex 1 of the Regulations requires the following specific actions.

**"Each State Party shall assess, within two years following the entry into force of these Regulations for that State Party, the ability of existing national structures and resources to meet the minimum requirements described in this Annex. As a result of such assessment, States Parties shall develop and implement plans of action to ensure that these core capacities are present and functioning throughout their territories as set out in paragraph 1 of article 5 and paragraph 1 of Article 13.**

**Public health response: The capacities: to establish, operate and maintain a national public health emergency response plan, including the creation of multidisciplinary/multisectoral teams to respond to events that may constitute a public health emergency of international concern.** (Emphasis mine)

47. The above obligation is reiterated in Article 13 on public health responses, which requires a state to:-

**"1. ...develop, strengthen and maintain, as soon as possible but no later than five years from the entry into force of these Regulations for that State Party, the capacity to respond promptly and effectively to public health risks and public health emergencies of international concern as set out in Annex 1. WHO shall publish, in consultation with member States, guidelines to support States Parties in the development of public health response capacities.**

**2. ....report to WHO on the basis of a justified need and an implementation plan and, in so doing, obtain an extension of two years in which to fulfil the obligation in paragraph 1 of this Article. In exceptional circumstances and supported by a new implementation plans, the State Party may require a further extension not exceeding two years from the Director-General, who shall make the decision, taking into account the technical advice of the Review Committee. After the period mentioned in paragraph 1 of this Article, the State Party that has obtained an extension shall report annually to WHO on progress made**

towards the full implementation. (Emphasis mine)

48. **Article 22(1)** requires “**competent authorities**” like the Respondents to have effective contingency arrangement to deal with an unexpected public health event.

49. The Petitioners contention is that the 1<sup>st</sup> Respondent has failed in the time-bound obligation to prepare a public health contingency plan under **Article 5 and 13 of WHO Constitution**, which is mandatory obligation under the International Health Regulations, 2007.

50. The Petitioners averments is therefore that the court order of 28<sup>th</sup> February 2020 in which it issued “a structural interdict compelling the 1<sup>st</sup> Respondent to prepare and present to the court for scrutiny a contingency plan on prevention, surveillance, control and responsive systems in coronavirus (COVID-19) outbreak in Kenya” is yet to be complied with.

51. The Respondents in response filed on 18<sup>th</sup> March 2020 a report entitled “The Report on measures put in place by the government to deal with the Coronavirus (COVID-19) threat in Kenya by Dr. Patrick Amoth....”

52. Petitioners aver that the Report filed on 18<sup>th</sup> March 2020 is not a contingency plan as it does not comply with the WHO Guidelines on contingency planning as “identification and regular monitoring of risks, vulnerabilities and capacities (to) inform the planning and implementation of measures to mitigate the risks and preparedness to respond.”

53. The Guidelines indicate the rationale for contingency planning in protecting public health as follows:

**“The goal of the WHO Health Emergencies Programme is to help countries and to coordinate international action to prevent, prepare for, detect, rapidly respond to, and recover from outbreaks and emergencies in order to reduce the mortality and morbidity of affected populations.... Understanding the risk that threatens people’s health, planning to mitigate the impact, and preparing to respond can significantly save lives and preserve health and well-being. Thus all WHO offices need to undertake, along with governments, other UN agencies and partners, or alone if needed, regular strategic risks analysis and monitoring, and related contingency planning.”** (Emphasis added)

54. The contingency planning Guidelines outline the following steps:

**“Risk analysis**

**a. Identify and monitor priority hazards threatening health**

**b. Make assumptions and potential scenarios**

***The purpose of this assessment is to identify and rank the risks and their geographical locations, and define those hazards and scenarios for which contingency planning is required.***

**c. Risk mitigation**

***Identify risk mitigation measures to reduce health consequences***

***Ensure direct implementation***

***To ascertain which measures are already in place, and which can be taken, to prevent or mitigate the impact of the risks, once the risks to health have been identified.***

**d. Preparedness actions**

***Identify preparedness measures to ensure readiness to respond***

***Plan impregnation according to level of needs and/or imminence of risks***

***Once mitigation strategies are in place, potential response needs have to be determined; to identify and plan for any preparedness actions and for the response itself. Specific timelines for preparedness actions are important to ensure that most of the response elements are in place at the time of the event/emergency.***

**e. Contingency plan**

***Introduce a contingency or preliminary response plan based on scenarios***

***Set preliminary response specific objectives, activities, targets and indicators.***

***With the response needs identified above, a preliminary response plan is developed with the objectives of:***

*Fostering common understanding among all partners of the anticipated scope of the emergency, the possible health and health related needs, and the nature and scope of the planned operational response;*

*Clearly explaining the response strategy to address the needs of the affected population in the first weeks of an emergency;*

*Reflecting specific challenges / gaps in the potential response in order to communicate anticipated funding requirements;*

*Supporting the timely drafting of resource mobilization document, e.g. a flash appeal, in the event of an emergency.*

*This preliminary response plan sets out the initial response strategy and operational plan for meeting critical humanitarian needs during the first three to four weeks of an emergency. The plan should therefore use the same format as a response plan and state the preliminary response objectives, activities, targets and indicators.*

**f. Develop action plan**

*The ultimate and most important planning step is to determine the means and resources by which the state will implement its mitigation and preparedness actions according to the agreed schedule. A standard logical framework format can be used to develop the details, timing and budget requirements of the different elements of each plan.*

**g. Testing and monitoring**

*Test plan to ensure validity and functionality and address identified weaknesses.*

*Monitor progress of achievements and adequacy with evolution of risks.*

*Regular review is a crucial element in assessing an office's readiness to respond. In order to be effective and reliable, the contingency plan needs to be constantly improved through testing to ensure that emergency management capabilities are consistent with the plans, procedures and policy."*

55. The Petitioners contend the report dated 18<sup>th</sup> March 2020 does not include any risk analysis assumption or potential scenarios and it has no attempt to identify and rank the risks and their geographic locations or to define the hazards and scenario for which contingency planning is required.

56. The report of 18<sup>th</sup> March 2020 arose out of an ex-parte Courts' order on interim basis. The court's order was served on 2<sup>nd</sup> March 2020 and Respondents filed a report on 18<sup>th</sup> March 2020 within a period of 16 days from the date of service. It is this report the Petitioners are urging, that it is lacking in specific and as such is not a contingency plan. The Report was to be prepared and presented to the Court for scrutiny and satisfy itself with the compliance with the Court's Order. The Report as urged was lacking in specifics but looking at it and being an interim Report as of 18<sup>th</sup> March 2020 and being not a final report, it is clear that the National Government has through the Ministry of Health put in place a contingency plan on prevention, surveillance, control and responsive systems to Coronavirus (COVID-19) outbreak. The report has a detailed plan on maintaining a heightened surveillance system at all points of entry, health facilities and communities across the Country. It has established mandatory screening at all points of entry to minimize the risk of importation of virus from any of the affected countries. It further states that each air, sea and land point of entry has a designated isolation facility to separate suspected cases for further monitoring. That the Department of Immigration continues to record all incoming passengers, while retaining contact and physical address. That further self-quarantine was intruded as preventive strategy by the embassy of China in Kenya. In collaboration with the Government of Kenya on 13<sup>th</sup> February 2020 the report further makes it clear that all level 4 and 5 hospital as well as private hospitals have received express directive to establish isolation wards; that 615 health workers in both public and private health facilities and points of entry have been sensitized on how to deal with suspected cases.

57. The Report further as regards Diagnostic capacity, states that the government has in place the necessary capacity for in-country testing of COVID-19. On governance the government, has adopted a whole government and multi-agency approach, at two levels; Ministries, departments and agencies have been put on board to deal with the threat of COVID -19. Further emergency operations centre have been activated and are closely monitoring the evaluation of the outbreak across the world. On Personal Protection Equipment it is stated the country has adequate PPE sets and more are being mobilized. On flights from China the government had previously requested all Kenyans based in China undertaking non-essential business to return. The government further averred it has suspended China Southern direct flights to Kenya until further notice; further putting a requirement for all incoming passengers from China, as well as Italy, Iran, South Korea, Japan, Singapore, USA and many other countries, which had confirmed over 20 cases of the coronavirus, subject themselves at their own costs to quarantine at a government designated quarantine facility for a period of 14 days or as otherwise prescribed.

58. The report clearly indicate that the ministry has continued to provide prompt and regular updates to the members of public regarding coronavirus. It is therefore clear that the Report of 18<sup>th</sup> March 2020 was and is not a final Report from the National Government but an Interim Report that was ordered to be prepared and filed.

59. That on 17<sup>th</sup> March 2020 the Head of Public Service Communicated administrative guidelines to prevent the spread of Coronavirus disease.

60. In view of the above I am satisfied that the Respondents complied with the court's order of 28<sup>th</sup> February 2020 and did prepare an Interim Contingency plan and did not as urged by the Petitioners violate the right to health under the Constitution and International Law. This Court is alive to the fact that the Report of 18<sup>th</sup> March 2020 was not the final report on the contingency plan. The Report in question

was an interim report in pursuance of interim orders of the court pending hearing and determination of the application inter partes and the Petition.

61. The upshot is that the application by the Respondents is without merits and the interim contingency plan ordered by the court was to be prepared and presented to the Court for scrutiny. I therefore from my findings make the following orders:-

*a) Respondents' Application dated 8<sup>th</sup> April 2020 is without merits and is dismissed.*

*b) The prayer for stay the implementation of the orders issued on 28<sup>th</sup> February 2020 only to the extent that the same was in the form of a structural interdict compelling the 1<sup>st</sup> Respondent to prepare and present to the Court for security a contingency plan on prevention, surveillance, control and response system to coronavirus (COVID-19) outbreak in Kenya is declined.*

*c) The prayer to set aside; vary or discharge the exparte orders issued on 28<sup>th</sup> February 2020 only to the extent that the same was in form of structural interdict compelling the 1<sup>st</sup> Respondent to prepare and present to, the court for scrutiny, a contingency plan on prevention surveillance, control and response system to coronavirus (COVID-19) outbreak in Kenya is declined.*

*d) The Court has jurisdiction to grant a structural interdict including at interlocutory stage if that is the "appropriate relief". In pursuance of Article 23(3) of the Constitution of Kenya, 2010.*

*e) The Report filed on 18<sup>th</sup> March 2020 by the Petitioners following interim orders by the court on contingency plan is sufficient at the interim stage.*

*f) No orders as to costs.*

**Dated, Signed and Delivered at Nairobi on this 3<sup>rd</sup> day of August, 2020.**

.....

**J. A. MAKAU**

**JUDGE**