



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYAS AT ELDORET

CONSTITUTIONAL PETITION NO 16 OF 2019

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

ARTICLES 6, 10, 22, 23, 47, 174 AND 191

AND IN THE MATTER OF THE COUNTY GOVERNMENTS ACT SECTION 6, 8, 24 AND 25

AND

IN THE MATTER OF ALLEGED ENACTMENT OF THE COUNTY EQUITABLE DEVELOPMENT ACT CONTRARY TO ARTICLE 114 OF THE CONSTITUTION OF KENYA AND SECTION 24 OF THE COUNTY GOVERNMENT ACT APPLIED MUTATIS MUTANDIS TO COUNTY GOVERNMENTS

AND

IN THE NMATTER OF THE PUBLIC FINSNCE MANAGEMENT ACT PART IV – COUNTY GOVERNMENT RESPONSIBILITIES WITH RESPECT TO THE MANAGEMENT AND CONTROL OF FINANCE SECTIONS (102) OF THE ACT

CENTRE FOR HUMAN RIGHTS AND MEDIATION.....PETITIONER

VERSUS

COUNTY GOVERNMENT OF UASIN GISHU.....1ST RESPONDENT

UASIN GISHU COUNTY ASSEMBLY.....2ND RESPONDENT

COMMISSION ON REVENUE ALLOCATION.....1ST INTERESTED PARTY

ATTORNEY GENERAL.....2ND INTERESTED PARTY

RULING

1. **CENTRE FOR HUMAN RIGHTS AND MEDIATION** (the petitioner) seeks a declaration that the **UASIN GISHU EQUITABLE DEVELOPMENT ACT 2019** is unconstitutional and offends the principles of public finance, appropriation and separation of powers. It also seeks a declaration that any organ or body purportedly established by the Act is illegal. Further, that there was failure to the County Executive and residents of **UASIN GISHU** and failure by the **UASIN GISHU COUNTY ASSEMBLY** (2nd respondent) to provide reasonable opportunity for public participation renders the Act a nullity. That an order of mandamus do issue to examine and satisfy itself whether the impugned Act meets the minimum constitutional threshold in money bills. Also that an order of certiorari do issue to quash the acts of the county, the Act and any contemplates rules.

2. The 2nd respondent has filed a preliminary objection dated 17th July 2019, stating that the petitioner lacks the *locus standi* to present this petition on behalf of undisclosed persons, and the petition offends the provisions of Article 258 of the Constitution, and Rule 4 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedural Rules, 2013 (also referred to as the Mutunga Rules.

3. The petition is described as incurably defective, as it is premised on documents which were illegally obtained in contravention to article 50 (4) of the Constitution of Kenya.

4. The petition violates Rule 5 of the Mutunga Rules in that:

a) The 1st respondent has been wrongly joined, yet does not qualify to be a respondent by virtue of the definition of section 2 of the Mutunga Rules

b) The Commissioner of the Revenue Allocation and the Attorney General have been wrongly enjoined as interested parties, yet they do not meet the definition of an interested party in section 2 of the Mutunga Rules, by dint of the provisions of Articles 216 and 156 of the Constitution. That the parties have no identifiable stake or legal interest, or duty in the proceedings

c) That the joinder of the interested parties contravenes **Rule 7 of the Mutunga Rules**, as the joinder was done without leave of the court, and no application had been made for any such joinder.

5. **Mr. Yego** submits on behalf of the 2nd respondent that the issue of who becomes an interested party in a suit is a matter to be left for the court to determine, and a litigant cannot on its own volition add a party to a suit as an interested party, without leave of the court. Further, that there was no application made by any of the named interested party, to be enjoined to the suit, who in any event, by dint of **Article 156 of the Constitution**. Counsel explains that under **Article 156**, the Attorney General is under a duty to represent the national government, in suits where the national government is a party. He points out that in this suit, the national government is not a party, and the parties are the county government, and the Attorney General has no identifiable stake in the matter.

6. This court is urged to be guided by the decision in **Simon Wachira Kagiri v County Assembly of Nyeri**, where the court said that the county government was improperly enjoined in proceedings involving the county government.

7. It is also submitted that, the function of the Commission on Revenue Allocation is:

a) to make recommendations on equitable sharing of revenue between the national and county government (vertical allocation)

b) Allocation of revenue between the 47 counties (horizontal allocation)

That once the revenue has been shared, the Commission becomes *functus officio*, and does not engage in the sharing of the already allocated revenue to the county government within the devolved unit. It is contended that the role is executed by the county government, and the county assembly. That it is the County Assembly which is involved in the appropriation through approval of budgets, and the two named interested parties have no role to play, and they should be struck out.

8. With regard to the 1st respondent, it is submitted that under Rule 2 of the Mutunga Rules, which defines a person who is alleged to have denied, violated, infringed, or threatened to infringe or deny a fundamental right or freedom, yet in the present petition, there is not a single allegation made against the 1st respondent in such terms. That the impugned county legislation was enacted by the 2nd respondent, who is the only proper party in this petition, and the 1st respondent only exercises executive authority pursuant to Article 183 of the Constitution of Kenya. That in light of Rule 5 of the Mutunga Rules, the 1st respondent ought to be struck off from these proceedings.

9. The Petition is also faulted as offending Article 22 of the Constitution and Rule 10 (d) of the Mutunga Rules as it fails to demonstrate the nature of injury likely to be caused to the petitioner, or the person on whose behalf the petition is instituted. Further, that in the case of public interest, then one must demonstrate the injury likely to be cause to the class of persons or community- which is said to be lacking in the present case.

10. Counsel argued that Article 22 and 258 are not blank cheques for every person to rush to court in the name of a constitutional petition. That the purpose of rule 10 is to remove busy bodies who have no identifiable interest at stake, from clogging the justice system.

Reference is made to the case of Anarita Karimi Njeru which held that a person who has filed a constitutional petition must demonstrate that:

a) Provisions of the constitution have been violated

b) Prove the manner in which those provisions have been flouted (nature of the injury, and give specifics of the injury). That the petitioner cannot hide behind the veil of public interest, as it has not indicated that the petition is filed on behalf of any party or in the public interest, in the absence of which it must be assumed that the petitioner is acting on its own behalf.

11. That the petitioner lacks the *locus standi* to present this petition, and the petition violates rule 4 of the Mutunga Rules as it has not demonstrated the capacity in which the petition is presented. It is further argued that the petitioner has not demonstrated that they are likely to be adversely affected by the legislation, and Rule 2 requires one to disclose in whose name the petition is instituted, especially because one has to prove under which category the petition is filed.

12. This court is urged to take note that the 1st and 2nd respondents exercised sovereign power which belongs to the people of Kenya, in accordance with Article 1 (1) and 1 (2) of the Constitution, so no one can purport to represent public interest more than the 1st and 2nd respondents, especially 2nd respondent who exercises delegated sovereignty. That it is thus not open to any party to just free-wheel claiming public interest.

13. The petition is also faulted as being incurably defective as it is premised on illegally obtained documents, thus violating Article 50 (4) of the Constitution. It is submitted that the petition is purportedly presented upon receipt of documents procured under Article 35 of the Constitution- these documents were sought from the 1st respondent, and not the 2nd respondent, and no such request was from the 2nd respondent. The argument being advanced here is that it was improper for the petitioner to request for the documents from the 1st respondent

so as to use them against the 2nd respondent, so if the respondent challenges the legality of those documents, there will be no petition standing. It is on account of his that counsel argues that the 1st respondent has been conveniently roped into these proceedings yet it does not qualify as a party.

14. In opposing the preliminary objection, the petitioner contends that Parliament was alive to the kind of dilemma a petitioner would face, and therefore enacted Rule 5 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, (also referred to as the Mutunga Rules) to take care of such technical considerations like addition, joinder, and substitution of parties. Further, that Rule 7 thereto provides the courts with discretionary power to enjoin any interested party to the proceedings, as they are necessary for the interpretation of Articles 215-216 of the Constitution.

15. The presence of the Attorney General in these proceedings is justified on grounds that his functions are spelt out under Article 156 of the Constitution, and once the pleadings close, then no interested party can be enjoined. The presence of the 1st respondent in the proceedings is justified on grounds that the ultimate enforcement of the Act shall be undertaken by it, when so declared lawful.

16. **NICK OMITO (The Chief Executive Officer of the Petitioner)** has sworn a supplementary affidavit stating that the Petitioner is a public benefit organization whose objects include monitoring governance issues in the North Rift region, and monitoring human rights and development agenda of the County Governments, hence this petition is presented as a public interest litigation. Its main aim in so presenting this petition, is to protect the Constitution of Kenya 2010, the Public Finance Management Act, the County Government Act and such superior legislation sought to be mutilated by the County Assembly of Uasin Gishu.

17. He justifies pegging the petition on the impugned documents saying the same were supplied to him by the County Secretary Uasin Gishu County under the Freedom of Information clause provided by **Article 35 of the Constitution**. That in any case, most of those documents are available on-line, as it is now an obligation placed on public bodies to publish legislation before enacting

18. **Mr Angu**, on behalf of the Petitioner maintains that the Petition has met the threshold set under **Article 22** of the Constitution which is reproduced in the Mutunga Rules, and **Article 258 of the Constitution**. Further, that the Petition does not offend Rule 5 of the said rules, which sets out the procedure on joinder of parties, saying a petitioner may join a party when it is uncertain as to who will be liable.

19. Reference is also made to **Chapter 11 of the Constitution and the First Schedule of the Constitution** which creates county governments with three wings; namely the executive, the legislature, and the County Service Board. That where legislation is passed by a county government, it is forwarded to the Governor, and to the office of the County Secretary. That were the legislation to be enforced, it would affect the entire country because **chapter 12** of the Constitution addresses Finance in Kenya, and there are legislations which define the role of each player in the fiscal management process.

20. Counsel expounds on this, contending that the role of the legislature is legislation and control, yet in the impugned legislation, the Executive wants to convert itself inappropriately, on how finances are to be applied. That this is in total disregard of the Constitution, as well as the **Public Finance Management Act** which mandates the County Assembly of Uasin Gishu through the County Government Development Bill to create a structure within itself to appropriate 40% of the funds available within the county government, and further seeks to create a method on how this money shall be utilised equitably among the wards.

21. That under the Constitution and the Public Finance Management Act the executive prepares a 5-year plan which is fenced yearly by the Appropriation Budget, and ultimately the plans are forwarded to the County Assembly for approval, but before this happens, there must be public participation, and views must be obtained from all the wards. That this supervisory role of the County Assembly cannot be appropriated by the County Executive, and the Uasin Gishu County Assembly cannot be divorced from the executive, and their position is necessary for the due determination of the respective roles as set out in the Constitution.

22. That in any event, Rule 5 provides that a petition shall not be defeated for want of form, and in any case, parties are at liberty to amend a petition either through joinder or striking out. The court is urged to take note that mistakes may be made in pleadings, but that should not lead to a blanket condemnation without a hearing, as the pleadings are not cast in stone. The petitioner refers to the case of **LSK NRB BRANCH versus MALINDI LAW SOCIETY AND 6 others, to fortify the argument**

23. That in any event, where a party deviates from the national standards, or does not apply a process provided for, the party can proceed under **Article 216 Of the Constitution**. Emphasis is laid on the assertion that this is a public interest litigation, and the method of obtaining the documents cannot be faulted as the documents are not protected under any legislation, and in any case, the central communication office of a county government is the office of the County Secretary (which is the office that communicates to the whole world). That there are documents which were obtained from the public portal operated by the Uasin Gishu County government, and no one is barred from accessing the same. That no affidavit has been served alleging any breach of protocol, or invasion into the State secrets, and this court is urged to reject the argument that the documents were illegally obtained, as the same were regularly obtained.

24. Citing the case of **Institute of Accountability and 4 Others** where the court ruled that the CDF was unconstitutional, yet it was not even appropriating 1% of the budget, the court is urged to apply a purposive and liberal interpretation of the Constitution to find that the petition demonstrate public interest. it is also submitted that the petition discloses a cause of action, namely that the proposed county legislation seeks to mutilate the Constitution of Kenya, and the laid down fiscal legislation.

25. **Miss Chesoo**, on behalf of the 1st respondent submits that the question as to whether the petition is a public interest litigation can only be determined upon considering the evidence. That in any event, what is raised in the preliminary objection is not a point of law, because the issue as to how the documents were obtained is a matter of fact that requires adducing evidence and possibly cross examination of witnesses.

26. **Miss Chesoo** contends that the 1st respondent is a necessary party in these proceedings as it is the body mandated to implement the Uasin Gishu County Equitable Development Act. Further, that **Article 183 (1) (a) of the Constitution** notes that the function of the Executive

Committee (who form part of the 1st respondent), is to implement county legislation. That this is buttressed by **Article 176 (1) of the Constitution** which recognises the County Executive Committee, as part of the County government. On that basis, it will be extremely prejudicial and unjust to members of the public, if the 1st respondent is excluded from the proceedings, where the constitutionality of the Act it is mandated to implement is being determined.

27. That the Commissioner for Revenue Allocation and the Attorney General, as Interested Parties under **Art 216 of the Constitution** are properly included because the former is expressly mandated to give recommendations on issues finance and financial management of county governments, and national governments, and it qualify **under Rule 2** of the Mutunga Rules, as a body with an identifiable stake and legal interest in the implementation of the legislation. This is further fortified by Article 201 and Article 2 (4) of the Constitution

28. The following issues arise for determination:

A. Does the petitioner have the locus standi to present this petition

B. Is the petition defective on account of being premised on documents alleged to have been illegally obtained

C. Is there a misjoinder of parties

Misjoinder of parties

29. The argument raised here is that the **County Government of Uasin Gishu (1st respondent)** has been wrongly joined, yet it does not qualify to be a respondent by virtue the fact that there is no allegation attributed to it as to amount to having denied, violated, infringed, or threatened to infringe or deny a fundamental right or freedom. That the impugned county legislation was enacted by the 2nd respondent, who is the only proper party in this petition, and the 1st respondent only exercises executive authority pursuant to Article 183 of the Constitution of Kenya. **Article 176 (1)** provides that a county government consists of a county assembly and a county executive, whose authority by dint of Article 179 of the Constitution vests in the county executive committee. The County executive committee consists of the governor, and his deputy, and the member appointed by the county governor with the approval of the assembly, but are not members of the Assembly. This must not be confused with the designation reserved for the Governor as the county chief executive under **Article 179 (4) of the Constitution**.

30. **Article 183 of the Constitution** sets out the functions of the County Executive Committees to include inter alia:

a) Implement county legislation

b) Implement within the county, national legislation to the extent that the legislation so requires.

Surely I need not say more on the role of the 1st respondent in these proceedings. It is a necessary party, who even though not mentioned with regard to any violations of fundamental rights and freedoms, ultimately plays the most critical role of implementing the county legislations such as the contested **Uasin Gishu County Equitable Development Act**. **I concur with Miss Chesoo that** It would be unjust to members of the public, if the 1st respondent is excluded from the proceedings, where the constitutionality of the Act it is mandated to implement is being determined, and it will be prejudicial to order that the 1st respondent to be struck off from these proceedings.

31. As for the Commission on Revenue Allocation (1st Interested Party) and the Attorney General, it is submitted that these two parties have no identifiable stake or legal interest, or duty in the proceedings, and the joinder of the interested parties contravenes **Rule 7 of the Mutunga Rules**, as the joinder was done without leave of the court, and no application had been made for any such joinder. Rule 5 provides focuses on **Addition, joinder, substitution and striking out of parties** and provides that:

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

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

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

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

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

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

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

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

32. It is argued that the role of the Commission for Revenue Allocation is confined to making recommendations on equitable sharing of revenue between the national and county government (vertical allocation), and Allocation of revenue between the 47 counties (horizontal allocation). That once the revenue has been shared, the Commission becomes *functus officio*, and does not engage in the sharing of the already allocated revenue to the county government within the devolved unit. It is contended that the role is executed by the county government, and the county assembly and the 1st Interested Party should be struck out. **Article 216 Of the Constitution of Kenya provides that:**

(1) The principal function of the Commission on Revenue Allocation is to make recommendations concerning the basis for the equitable sharing of revenue raised by the national government-

a) Between the national and county governments, and

b) Among the county governments

(2) The Commission shall also make recommendations on other matters concerning the financing and the financial management by the county governments...

33. In light of this, then there is no way to sustain the argument that once the Commission is done with making recommendations on the vertical and horizontal sharing of revenue, it becomes *functus officio*. My understanding is that its role within the county governments remains preserved by virtue of **Article 216 (2)**.

The definition of an Interested Party under **rule 2 (b) of the Mutunga Rules** is:

“interested party” means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation;

34. I think that at the onset of a constitutional petition, nothing precludes the petitioner from joining an interested party, where it is doubtful whether it has been instituted in the name of the right petitioner and /or the determination of the court may affect the Interested Party. It is only once the matter comes to court and an interested party has not been joined, that the issue of obtaining leave from the court would arise. I find that the 1st Interested Party has an identifiable stake or legal interest, or duty in the proceedings.

35. As for the Attorney General who is listed as the 2nd Interested Party, his role is set out in **Article 156 (4) (b) of the Constitution** as the principal legal adviser to the government of Kenya, and his task basically is to represent the national government in court or in any other legal proceedings to which the national government is a party. The only exception is where he seeks to appear as a friend of the court in civil proceedings to which the government is not a party, then he shall seek leave of court to appear as a friend of the court. The petitioner has not demonstrated the role the Attorney General plays in the county legislation, particularly the **Uasin Gishu County Equitable Development Act**. I agree with **Mr Yego** that the 2nd Interested Party is unnecessarily enjoined in these proceedings, and is hereby struck. Out. However, the fact of misjoinder does not snuff out the life of this petition as there are other parties left standing, and in any event, **Rule 5 (b)** is categorical that petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.

Is the petition defective on account of being premised on documents alleged to have been illegally obtained

36. The argument raised here is that the petitioner obtained certain documents from the Secretary of the 1st respondent, only to turn around and now seek to use them against the 2nd respondent, and that this is illegal. Article 50 (4) of the Constitution provides that:

Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice.

37. It is not in dispute that the petitioner obtained some documents from the County Secretary, and some from the public portal run by the County Government of Uasin Gishu. The 2nd respondent is rather economical with what his grit is in this regard- is it the invasion of the right to privacy under **Article 31 of the Constitution**, or is it the negative impact on administration of justice. Whatever the case, it is not denied that the petitioner legally obtained the documents from the county secretary in the spirit of the right to information.

38. This must not be confused with the protection given by Article 31, and which was discussed in extensor in the case of **Prof. Tom Ojienda & Associates v Ethics and Anti- Corruption Commission & 5 Others [2016] eKLR**, or the more recent decision in **Philomena Mbete Mwilu and Anor v The DPP and 3 Others [2019] eKLR** which examined the manner in which the police/ the Anti-corruption agency accessed the bank accounts of the petitioners. The distinction is that those were private individual accounts, whereas these are documents readily available to the public on the internet and also availed under **Article 35** as relates to the right to access information. Any other details beyond this, would place the trial in an awkward position, and is best left to be determined through evidence at the hearing Does the petitioner have the locus standi to present this petition.

39. The petitioner is described as lacking the locus standi to present this petition on behalf of undisclosed persons, and therefore offends the provisions of Article 258 of the Constitution, and Rule 4 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms)

Practice and Procedural Rules, 2013 (also referred to as the Mutunga Rules. That having failed to demonstrate any no identifiable interest at stake, the petitioner is just clogging the justice system. Reference is made to the case of Anarita Karimi Njeru which held that a person who has filed a constitutional petition must demonstrate that a petitioner must show:

- a) Provisions of the constitution have been violated
- b) Prove the manner in which those provisions have been flouted (nature of the injury, and give specifics of the injury).

40. Although the Petitioner states that part of its mandate is to monitor issues on governance on behalf of the public, the argument advanced is that it cannot hide behind the veil of public interest,

as it has not indicated that the petition is filed on behalf of any party or in the public interest, in the absence of which it must be assumed that the petitioner is acting on its own behalf. It is further argued that the petitioner has not demonstrated that they are likely to be adversely affected by the legislation, and Rule 2 requires one to disclose in whose name the petition is instituted, especially because one has to prove under which category the petition is filed.

41. As regards contravention of rights or fundamental freedoms rule 4 provides as follows:

(1) Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.

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

- (i) a person acting on behalf of another person who cannot act in their own name;
- (ii) a person acting as a member of, or in the interest of, a group or class of persons;
- (iii) a person acting in the public interest; or
- (iv) an association acting in the interest of one or more of its members.

I must make it clear that a constitutional petition is litigation initiated to either challenge breach of constitutional provisions or violation or infringement of rights and fundamental freedoms granted or recognized by the Constitution. I echo the words of Mwita J in **GODFREY PAUL OKUTOYI (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya.) VERSUS HABIL OLAKA – the Executive Director (Secretary) of the Kenya Bankers and CENTRAL BANK OF KENYA** where he stated that these rights “...*must expressly or impliedly recognized and protected rights and fundamental freedoms under the Bill of Rights. They must be the sort of rights and fundamental freedoms that belong to each individual, that are not granted or grantable by the state, and belong to individuals by virtue of their being human. These are rights and fundamental freedoms enjoyed by each individual and not collectively.*”

42. In the case of **Anarita Karimi Njeru v Republic (No.1)-[1979] KLR 154** where the Court stated;

“...if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important(if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

43. 50. This principle was reiterated by the Court of Appeal in **Mumo Matemo v Trusted Society of Human Rights alliance [2014] eKLR**, where it stated that:

“...the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle”

44. A perusal of the petition and the supporting affidavit as well as the content of the pleadings, there isn't a semblance of a constitutional petition per se based on breach of known constitutional provisions, violation of and or infringement of rights and fundamental freedoms. What exists is a general pleading on breach of a statutory provision in the County Government's Act, and the Public Finance Management Act, which are capable of redress in a normal suit and not through a constitutional petition.

45. The Petitioner herein is a registered public benefit organization whose objective includes monitoring governance issues and development agenda in the North Rift region.

Which are the fundamental rights under the Bill of rights that have been violated? It states that there was lack of citizen participation, but a reading of the affidavit at paragraph 8 betrays whose interest the petitioner really represents-it is not so much a question of public participation,(which is simply being invoked so as to give it a constitutional twist, but a member of the Executive Committee who is aggrieved. This is why in its pleadings, the petitioner carefully avoiding specific reference to presenting the petition in the public interest.

46. I am minded of the words sounded out by Lord Diplock in the case of **Harrikissoon V Attorney General of Trinidad and Tobago [1980]AC 265** observing the tendency of litigants rushing to institute constitutional petitions alleging violation of fundamental freedoms where there was none stating;

“The notion that wherever there is a failure by an organ of government or a public officer to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed for individuals by...the constitution is fallacious. The right to apply to the High Court... for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action... the mere allegation that a human right of the applicant has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the Court...if it is apparent that the allegation is frivolous, vexatious or abuse of the process of Court as being made solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.” (emphasis)

47. In our local jurisprudence the case of **Benard Murage v Fine serve Africa Limited & 3 others [2015] eKLR** the Court stated;

“Not each and every violation of the law must be raised before the High Court as a constitutional issue.

Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.”

From the afore-going, I hold that it is this limb of the preliminary that is merited and the petition is dismissed with costs to the respondents

Delivered, Signed and Dated this 16th day of August 2019 at Eldoret.

H. A. OMONDI

JUDGE