



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO. 424 OF 2018**

**ST. PATRICK HILL SCHOOL LTD .....PETITIONER**

**VERSUS**

**NATIONAL HOSPITAL INSURANCE FUND.....RESPONDENT**

**JUDGMENT**

1. In its petition dated 28<sup>th</sup> November, 2018, the Petitioner, St. Patrick's Hill School Ltd introduces itself as a company incorporated under the Companies Act (Cap. 486) in the Republic of Kenya and that it controls a group of schools including a Preparatory School, Secondary School and IGCSE School all located in Kenya. The Respondent, the National Hospital Insurance Fund (NHIF) is a creature of Section 3 of the National Hospital Insurance Act, 1998 (NHIF Act) and its core function is to provide medical insurance to its contributors.
2. The genesis of this petition is a demand notice dated 25<sup>th</sup> October, 2018 in which the Respondent demanded payment of Kshs.1,052,950 from the Petitioner being accrued penalties for late payment of monthly contributions for the period of June, 2016 to August, 2018. According to the Petitioner, the said demand is unconstitutional on various grounds as hereunder.
3. Firstly, the Petitioner contends that the Respondent's demand is unlawful and violates Article 25 of the Constitution since the Respondent failed to give it prior and adequate notice for demands going as far back as June, 2016. In the Petitioner's view, its right to a fair hearing has been hampered as it has been denied an opportunity to be heard and no reasons have been given for the demand and neither has an opportunity been extended to it to respond to the demand.
4. Secondly, the Petitioner asserts that its right to equality and freedom from discrimination has been violated by the allegations levelled against it thereby harming its social standing in the community. The Petitioner states that the Respondent lacks the moral authority of making the demand after a lapse of such a lengthy period because equity does not aid the indolent. It is also the Petitioner's case that the Respondent's actions disregard its rights to equality before the law, equal protection of the law and equal benefit of the law.
5. Thirdly, the Petitioner avers that the Respondent's failure to inform it of the deadlines for monthly contributions and later alleging late payment is a violation of the rights bestowed upon it as a consumer by Article 46 of the Constitution.
6. Fourthly, the Petitioner alleges that the Respondent violated Article 47 of the Constitution by denying it administrative action that is expeditious, efficient, reasonable and procedurally fair.
7. Fifthly, the Petitioner accuses the Respondent for violating Article 50 of the Constitution by impeding and interfering with its right to a fair hearing.
8. The Petitioner also avers that the Respondent's actions violated various Acts of Parliament. According to the Petitioner, the Respondent violated the Fair Administrative Action Act, 2015 that required it to give the Petitioner prior and adequate notice, reasons for the demand and an opportunity to be heard and challenge the demand.
9. The Petitioner asserts that the Respondent's demand amounts to abuse of office as it is using the law as a tool of terror and persecution so as to unjustly enrich itself hence violating the Public Officers Ethics Act, 2003.
10. Finally, the Petitioner alleges violation of the Consumer Protection Act, 2012. It is the Petitioner's case that the Respondent denied it information in regard to the services being received hence violating the said Act.
11. Further, that the demand is outside the Petitioner's budgetary and economic provisions and would cause it serious economic and financial slavery and tyranny which would be contrary to the letter and spirit of the Constitution.

12. Consequently, the Petitioner asks for the following reliefs:-

- “ a) A declaration that the Petitioner’s Constitutional rights have been infringed and/or are threatened with infringement by the Respondent through the arbitrary and/or unlawful demands and notices.**
- b) A declaration that Section 18 of the NHIF Act is unconstitutional.**
- c) A declaration that the Respondent’s demands are null and void and that the Petitioner is not liable to pay the penalty of Kshs.1,052,950/-.**
- d) Such other or further reliefs and/or orders as this Court may deem just and appropriate to grant.**
- e) Costs of the Petition.”**

13. The Respondent opposed the petition through grounds of opposition dated 22<sup>nd</sup> March, 2019 as follows:-

- “ 1. THAT the Respondent’s Penalty Demand Notices dated 25<sup>th</sup> October 2018 and 8<sup>th</sup> November 2018, which demand notices form the basis of the Petition, were issued in proper and lawful exercise of the Respondent’s statutory powers conferred to it by the National Health Insurance Act (“the NHIF Act”).**
- 2. THAT the Respondent did not, by exercising those powers, infringe on any constitutional right of the Petitioner.**
- 3. THAT the Petitioner’s argument that, prior to the Respondent’s said demand notices, it had not been notified of late monthly contributions cannot stand as the deadline for remittance of monthly contributions is set out under the NHIF Act and the National Hospital Insurance Fund (Standard and Special Contributions) Regulations, which regulations are well published. No notification from the Respondent was necessary. The Petitioner cannot use its ignorance of the law as its defence.**
- 4. THAT the Petition does not disclose the injury caused or likely to be caused to the Petitioner by the Respondent’s actions.**
- 5. THAT the Petitioner’s delay in remitting contributions deducted from its employees’ salaries not only contravenes the NHIF Act and amounts to unjust enrichment but also flies in the face of the employees’ constitutional right to the highest attainable standard of health.**
- 6. THAT the impugned Section 18 of the NHIF Act does not contravene any provision of the Constitution.**
- 7. THAT in the event, justice and public interest will not be served by granting the Petitioner’s prayers.”**

14. When the matter came up for highlighting of submissions on 19<sup>th</sup> June, 2019, the advocates for the parties declined to highlight the written submissions indicating to the court that they would simply be relying on the filed submissions.

15. Through the submissions dated 14<sup>th</sup> June, 2019, counsel for the Petitioner identified the issues for the determination of this court as follows:-

- “i. Whether the Petitioner’s Constitutional rights have been infringed and/or are threatened with infringement by the Respondent through the arbitrary and/or unlawful demands and notices.**
- ii. Whether Section 18 of the NHIF Act is unconstitutional.**
- iii. Whether Section 18 of the NHIF Act has been subjected to the requisite public participation pre-condition before enforcement.**
- iv. Whether the Respondent’s demand is null and void and if the Petitioner is liable to pay the penalty of Kshs.1,052,950.**
- v. Does this demand derogate upon the doctrine of unjust enrichment?**
- vi. Does the Respondent possess the moral authority to make demands of the type made against the Petitioner?”**

16. Submitting on the question as to whether the Respondent’s actions have infringed or threatened to infringe the rights of the Petitioner, counsel stated that Article 25(c) of the Constitution succinctly provides that the right to a fair trial shall not be limited whereas Article 50(2) enumerates the ingredients of a fair trial.

17. Counsel then points to Article 47 of the Constitution as codifying every person’s right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Counsel refers to Section 4(3) of the Fair Administrative Action Act, 2015 as codifying the checklist for things to be done by an administrator in order to ensure compliance with Article 47 of the Constitution.

18. Counsel for the Petitioner refers to Section 4(4) of the Fair Administrative Action Act as requiring an administrator to accord a person against whom administrative action is to be taken the opportunity to attend the proceedings, be heard, cross-examine witnesses and request for adjournment where necessary. He wraps up by pointing at Section 12 of the said Act as clearly indicating that the provisions of the Act are in addition to and not in derogation from the general principles of common law and the rules of natural justice which entails procedural fairness.
19. Tying up the cited provisions with the facts of the case, counsel for the Petitioner submitted that by issuing the demand notice dated 25<sup>th</sup> October, 2018 and the final warning and reminder dated 13<sup>th</sup> November, 2018, the Respondent failed to give the Petitioner prior and adequate notice for the alleged penalties which went back to June, 2016. Further, that if there was any late payment, the Respondent should have notified the Petitioner as soon as possible rather than waiting for 27 months later to make demand for the alleged penalties.
20. According to the Petitioner's counsel, the Respondent denied it an opportunity to be heard and challenge the alleged penalties, hence its rights were prejudiced. In this regard, counsel asserts that the Respondent violated Articles 25, 47 and 70 of the Constitution, sections 4 and 6 of the Fair Administrative Action Act, the common law principles and the rules of natural justice. Further, that the Petitioner was denied an opportunity to be heard and make representations as well as cross-examine the Respondent on the information, materials and evidence relied upon by the Respondent when issuing the demand notice.
21. Counsel for the Petitioner also asserts that the Respondent violated Article 10 of the Constitution by failing to abide by the national values and principles of governance particularly the rule of law, equity, integrity, transparency and accountability in applying, interpreting or implementing the provisions of the NHIF Act.
22. Counsel for the Petitioner referred to the decision of the Court of Appeal in **Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] eKLR** in support of the principle that the right to a hearing is a well-protected right in the Constitution and is also the cornerstone of the rule of law.
23. The Petitioner's counsel submits that although the Respondent was a master of its procedures as provided by the NHIF Act, it was expected to achieve a degree of fairness in making its decisions. The decision of the Court of Appeal in the case of **Kenya Revenue Authority v Menginya Salim Murgani [2010] eKLR**, was cited in support of the assertion. The Petitioner's position is that prior to issuing the demand notice, the Respondent had never notified the Petitioner of any late payments and has to date not provided evidence of late payments. Counsel therefore terms the Respondent's actions illegitimate.
24. According to counsel for the Petitioner, the Respondent's actions did not only violate the Petitioner's rights to a fair trial and fair administrative action but also violated the rights enshrined under Articles 27 and 46 of the Constitution. Pointing out that Article 27 codifies every person's right to equality and freedom from discrimination, counsel submitted that by making the demands against the Petitioner, the Respondent has violated the Petitioner's rights under Article 27 on the basis of its social position in the community as there is no reasonable justification for the Respondent's demands and conduct against the Petitioner.
25. Counsel submits that the Respondent after making a distinction of the Petitioner as a group of schools with an essential social position in the community, made demands based on the allegations. The decision in the case of the **Attorney General v Kituo Cha Sheria & 7 others [2017] eKLR** is cited for the statement that a constitutional provision containing a fundamental human right is a permanent provision intended to cater for all times to come and therefore should be given a dynamic, progressive, liberal and flexible interpretation keeping in view the ideals of the people, their socio-economic, political and cultural values so as to extend the same to the possible maximum.
26. After highlighting the rights of a consumer as protected by Article 46 of the Constitution and the Consumer Protection Act, 2012, counsel submitted that under the NHIF Act, no provision, subsidiary legislation, rule, regulation or legal notice has been passed declaring the due date for remitting monthly contributions. It is the Petitioner's position that the Respondent has never notified it of the due date for monthly contributions hence violating its rights as a consumer.
27. As to whether Section 18 of the NHIF Act is unconstitutional, counsel for the Petitioner points out that Section 18(1) provides that any person who fails to pay a monthly contribution on or before the day on which payment is due is liable to pay a penalty equal to two times the amount of that contribution to the Respondent. Counsel states that the said Section 18(1) was introduced by the Statute Law (Miscellaneous Amendments) Act, 2014. His submission therefore, is that in accordance with the decisions in **Nairobi Petition No. 3 of 2016 Law Society of Kenya v The Attorney General** and **Josephat Musila Mutua & 9 others v Attorney General & 3 others [2018] eKLR** the amendment being a major one ought to have been subjected to public participation. He urges the Court to declare the provision unconstitutional on that ground.
28. The third issue is whether Section 18 of the NHIF Act was subjected to public participation. The Petitioner's counsel cited the principles of public participation as enunciated in the cases of **Nairobi Petition No. 532 of 2017 Okiya Omtatah Okoiti v Commissioner General, Kenya Revenue Authority & 2 others [2018] eKLR**; **JR Misc App. No. 374 of 2012, Republic v the Attorney General and another Ex-parte Hon. Francis Chachu Ganya; Poverty Alleviation Network & others v President of the Republic of South Africa & 19 others CCT 86/08 [2010] ZACC 5**; **Kiambu County Government & 3 others v Robert N. Gakuru & others [2017] eKLR**; **Doctors for Life International v Speaker of the National Assembly & others (CCT 12/05) [2006] ZACC 11**; and **Kenya Human Rights Commission v AG & another [2018] eKLR** and implores the court to find that Section 18 did not comply with the requirement for public participation and is therefore unconstitutional.
29. On the fourth issue as to whether the Petitioner is liable to pay the demanded penalties, counsel for the Petitioner cites Section 41 of the NHIF Act as providing the timeframe within which prosecution for offences committed under the Act should be commenced and asserts that the period for commencing prosecution having passed, the Respondent's demand is null and void. The decision in the case of **Mtana Lewa v Kahindi Ngala Mwagandi [2015] eKLR** is cited as stressing the necessity of complying with timeframes. Further, that the Respondent's delay in making the demand is against the maxim of equity that provides that equity does not aid the indolent.

30. It is the submission of the Petitioner's counsel that it is unfair, unjust and cruel for the Respondent to bring such claims after a long period when the Petitioner has undergone changes in respect of its employees and may not have information to challenge the Respondent's claim. Further, that the Petitioner should not be held liable to pay the claim when it is the Respondent who defaulted in carrying out its duties. Sections 8, 9, 10 and 11 of the Public Officer Ethics Act, 2003 are cited as highlighting the attributes of an efficient, honest, courteous, respectful, and professional and law-abiding officer and that a public officer should not use his office to enrich himself or others. The Petitioner concludes that the Respondent has failed the test of a professional public officer as set in the Public Officer Ethics Act, 2003.

31. On the fifth issue as to whether the Respondent's demand violates the doctrine that frowns on unjust enrichment, it is submitted for the Petitioner that the alleged penalties shall only serve to benefit and enrich the Respondent. The Court of Appeal decision in **Kenya Commercial Bank Limited and another v Samuel Kamau Macharia & 2 others [2008] eKLR** is cited as outlining the ingredients of the principle of unjust enrichment. Counsel therefore contends that paying the claim will unjustly enrich the Respondent yet the basis of the same is unconstitutional and unjust.

32. The sixth and final issue identified by the Petitioner is whether the Respondent possesses the moral authority to make the demand against the Petitioner. Relying on newspaper cuttings annexed to the affidavit sworn by Eliah Karwitha Kangethe in support of the petition, counsel asserts that the Respondent has recently been involved in multi-billion graft scandals resulting in the misuse and mismanagement of contributors' funds. For that reason, counsel argues that the Respondent has no moral authority to demand the penalties from the Petitioner.

33. Urging the court to reject the Respondent's grounds of opposition, counsel for the Petitioner submits that the same do not address the unconstitutionality of Section 18 of the NHIF Act. The court is therefore urged to dismiss the Respondent's defence and grant the reliefs sought in the petition.

34. Through the submissions dated 22<sup>nd</sup> March, 2019 the Respondent identified the following issues for determination of the court:-

**“a. Whether the Petitioner owes the Respondent the Penalty Amount;**

**b. Whether the demand notices issued by the Respondent to the Petitioner are lawful;**

**c. Whether the Respondent is in breach of any constitutional rights of the Petitioner;**

**d. Whether Section 18 of the NHIF Act is unconstitutional; and**

**e. Who should pay the costs of the Application.”**

35. On whether the Petitioner owes the Respondent the demanded penalties, counsel for the Respondent submits that Section 15(4) of the NHIF Act provides that contributions should be made on the first day of each month or on such later date as the Board may prescribe. He asserted that Section 18 imposes a penalty being two times the amount of the contribution for failure to comply.

36. According to the Respondent's counsel the law is clear that:-

a. The Petitioner has an obligation to remit all deductions by the first day of each calendar month, unless the Respondent has published a different payment deadline;

b. The Respondent has published a different cut-off date, which date is 9<sup>th</sup> of every month following the month of deduction of contributions;

c. If any payment is remitted later than that date, a penalty under Section 18 automatically becomes payable; and

d. The demanded penalty is the amount owed to the Respondent by the Petitioner.

37. On the second issue as to whether the demand issued to the Petitioner is unlawful, counsel for the Respondent once again points to Section 18 as providing the legal basis for the demand. Section 42(2) of the NHIF Act is identified as the law authorising the Respondent to recover all the debts due to it.

38. It is the Respondent's position that it exercised its discretion reasonably. The decision in the case of **Republic v Non-Governmental Organizations Coordination Board and another ex-parte Transgender Education and Advocacy & 3 others [2014] eKLR** is cited as disclosing the circumstances in which the court can interfere with exercise of discretion by a public body. It is submitted that those circumstances do not exist in this case.

39. The third issue identified by the Respondent is whether the Respondent is in breach of any constitutional rights of the Petitioner. The Respondent's assertion is that the Petitioner has not demonstrated that the Respondent has infringed on its rights and neither has it established any harm suffered as a result of the alleged infringement. According to the Respondent, all the Petitioner has done is to make outrageous and unsubstantiated allegations against the Respondent without raising any constitutional issues.

40. The Respondent claims that the Petitioner is actually trying to avoid meeting its statutory obligations. The decisions in the cases of **Kiambu County Tenants Welfare Association v Attorney General & another [2017] eKLR** and **Cecil James Oyugi v Public Procurement Administrative Review Board & another [2017] eKLR** are cited for the proposition that he who alleges a constitutional

violation must not only state the provision(s) violated but must also state the manner of the infringement, the nature and extent of the infringement and the nature and extent of any injury suffered. It is the Respondent's case that the Petitioner has failed to meet these tests.

41. On the fourth issue as to whether Section 18 of the NHIF Act is unconstitutional, the Respondent states it is not. It is the Respondent's view that a reading of the said section clearly discloses Parliament's intention of imposing a penalty for late remittance of contributions to the Respondent.

42. It is the Respondent's contention that the Petitioner has not established that the provision meets the parameters for declaring it unconstitutional as per the tests set down in the case of **Kenya Human Rights Commission v Attorney General & another [2018] eKLR**. The Respondent urges the court that in deciding whether Section 18 is unconstitutional or not it should take into account the presumption that the section is constitutional, unless the Petitioner proves otherwise.

43. Counsel urged that in determining the constitutionality of a statutory provision, the court should consider the purpose, object and effect of the impugned provision. The Respondent's case is that the object, purpose and effect of the impugned section is not only clear but is also in conformity with the Constitution. Counsel submitted that the provision is intended to deter late remittance of contributions and this is necessary because late remittance of deductions by employers inconveniences contributing employees who are unable to access insurance benefits in spite of their contributions having been deducted by the employer.

44. According to the Respondent's counsel, late remittance of contributions actually violates Article 43(1)(a) of the Constitution which guarantees the right to the highest attainable standard of health. Thus, the effect of the section ensures that the constitutional rights of the contributing employees are protected.

45. In conclusion, counsel for the Respondent cited the decision in the case of **Jacob Nyandega Osoro v Chief Justice of Kenya & another [2018] eKLR** and stressed the principle of statutory construction which requires that a statute or statutory provision (including rules and regulations) should be construed in a manner that brings it in harmony with the Constitution and should only be declared inconsistent or invalid where the court is unable to reconcile them with the Constitution.

46. The fifth and final issue is the question of costs. Counsel for the Respondent points out that Rule 26(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 grants this court the discretion to award costs only limited by sub-rule 2 which requires the court to take appropriate measures to ensure that every person has access to the court to determine their rights and fundamental freedoms.

47. The case of **Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR** is cited as setting out the general rules applicable to the award of costs, one of them being that costs must follow the event unless the court has good reason to order otherwise.

48. Asserting that the petition is a blatant abuse of the court process, the Respondent's counsel relying on the decision in the case of **Consumers Federation of Kenya (Cofek) v Nakumatt Holdings Limited & 4 others [2018] eKLR** urged this court to dismiss the petition with costs.

49. The Petitioner alleges that the constitutional violations perpetuated upon it by the Respondent stems from an unconstitutional provision of the NHIF Act. The starting point is to discover whether Section 18 of the NHIF Act is unconstitutional. The Section provides that:-

“18. Penalty for late payment of standard contributions

(1) Subject to the provisions of this section and without prejudice to any other penalty imposed under this Act, if any contribution which any person is liable to pay under this Act in respect of any month, is not paid on or before the day on which payment is due, a penalty equal to —

(a) in the case of micro and small enterprises, twenty-five percent of the amount of that contribution; and

(b) in any other case, two times the amount of that contribution,

shall be payable by that person for each month or part thereof during which the contribution remains unpaid, and any such penalty shall be recoverable as a sum due to the Fund, and when recovered, shall be paid into the Fund.

(2) If an employer fails to pay a standard contribution in respect of any person employed by him—

(a) that employer shall be liable to pay the penalty prescribed in subsection (1);

(b) that employee shall not be liable to any penalty under this section for so long as he is employed by that employer.

(3) Where a contributor is outside Kenya on the day when a standard contribution becomes payable by him, that contribution shall, for the purposes of this section, be deemed to become payable on the day of his return to Kenya.

(4) In this section, the expressions “micro enterprise” and “small enterprise” have the meanings assigned thereto respectively in the Micro and Small Enterprises Act, 2012.”

50. A reading of the said section discloses that the intention of Parliament is to penalise late contributions. As correctly submitted by the Respondent, Section 15(4) provides the deadline by stating that:-

**“A person to whom this section applies shall pay the contribution to the Board on the first day of each month or on such later date as the Board in consultation with the Minister, may prescribe.”**

51. The Respondent disclosed that the date for making contributions has since been fixed as the 9<sup>th</sup> day of the month following the month in which the contributions are applicable.

52. It is not enough for a Petitioner to allege that a statutory provision is unconstitutional. The manner in which the provision is said to be unconstitutional must not only be stated but must also be established. In **Kenya Human Rights Commission v Attorney General & another [2018] eKLR**, it was held that:-

**“47. There is a general but rebuttable presumption that a statute or statutory provision is constitutional and the burden is on the person alleging unconstitutionality to prove that the statute or its provision is constitutionally invalid. This is because it is assumed that the legislature as peoples’ representative understands the problems people they represent face and, therefore enact legislations intended to solve those problems. In *Ndynabo v Attorney General of Tanzania* [2001] EA 495 it was held that an Act of Parliament is constitutional, and that the burden is on the person who contends otherwise to prove the contrary.”**

53. A perusal of the Petitioner’s pleadings and submissions outrightly discloses that the Petitioner does not fault Section 18 on the ground that its purpose and effect countermands the letter and spirit of the Constitution. The Petitioner’s position is that the enactment was done without the input of the public as required by Articles 10 and 118 of the Constitution. That public participation, as declared by G. V. Odunga, J in the **Robert N. Gakuru** case, is indeed of immense significance considering the primacy it has been given in the supreme law of this country is no longer a question for debate. What the Petitioner was required to do was to take the next step of proving that the enactment did not indeed undergo public participation. Evidence in respect of the enactment of a statute, a provision of a statute, regulations or rules can only be found in the process through which the enactment was taken. The Petitioner did not lay before the court any evidence to show that there was a misstep in the process leading to the enactment of Section 18. The Petitioner has simply made an allegation that the provision was enacted without the input of the public. This court cannot in reliance of such unproved assertions declare a provision of the law unconstitutional.

54. It is also noted that although the Petitioner was challenging the constitutionality of a section of the NHIF Act, it did not name the Attorney General a party to the petition. The Respondent is neither the Attorney General nor Parliament and has no constitutional or statutory role in the making of laws. It has no duty or capacity to respond to any allegation that the law which creates it and with which it is charged with implementing is unconstitutional. In the circumstances, the Petitioner’s claim of unconstitutionality of Section 18 also fails because it did not bring its claim against the correct party.

55. Having found that Section 18 of the NHIF Act is constitutional, it follows that the Respondent’s claim against the Petitioner is legally sound. Whether the claim is merited, is in my view, an issue for another forum. This is well explained by the Respondent’s parting shot in its demand dated 25<sup>th</sup> October, 2018 that:-

**“Further note that should you fail to remit the stated sum in the manner above prescribed, NHIF shall institute legal proceedings against yourselves for recovery of the same without further reference to you.”**

56. That statement alone answers the question as to whether the Petitioner’s rights have been violated or are threatened with infringement. In the first place, the petition is premature in that the Respondent has simply made a demand and promised to follow it by taking other legal steps if the demand is not acceded to. Secondly, a person threatened with court action cannot say that such action violates rights or threatens infringement of fundamental rights and freedoms. Courts are creatures of the Constitution and being sued cannot be said to be a breach of the Constitution.

57. As stated in **Kiambu County Tenants Welfare Association v Attorney General & another [2017] eKLR**, he who alleges violation of constitutional rights and fundamental freedoms has a duty to state the violated provisions, the manner of violation and any injury sustained from the alleged infringement. This is what John M. Mativo, J stated in the said judgment:-

**“Courts have over the years established that for a party to prove violation of their rights under the various provisions of the Bill of Rights they must not only state the provisions of the Constitution allegedly infringed in relation to them, but also the manner of the infringement and the nature and extent of that infringement and the nature and extent of the injury suffered (if any).”**

58. A similar statement was made by G. V. Odunga, J in **Cecil James Oyugi v Public Procurement Administrative Review Board & Another [2017] eKLR** when he stated that:-

**“This Court, where it is alleged that there is a threatened violation of the Constitution, which is what I understood the Petitioner to be saying, must rely on concrete grounds and is not expected to rely on mere conjectures. In other words the Petitioner must place before the court facts which show that there is a probability as opposed to mere possibility of such contravention.”**

59. My understanding of the statements of my learned brothers is that success in a constitutional petition is evidence-based. Where no evidence is adduced, the journey comes to a stuttering halt. Mere allegations will not bear any fruits. The Petitioner's petition is made up of a litany of allegations, which are not backed by any iota of evidence.

60. In conclusion, I therefore find that the Petitioner's petition is indeed without merit. It has not established that the Respondent has acted outside its statutory remit. The petition is therefore dismissed in its entirety.

61. On the question of costs, I find the words of W. A. Okwany, J in **Consumers Federation of Kenya (COFEK) v Nakumatt Holdings Limited & 4 others [2018] eKLR** quite illuminating when she states that:-

**“19. Courts have been reluctant to award costs in constitutional petitions seeking to enforce constitutional rights in cognizance of the fact that costs may be a barrier to potential litigants in Public Interest Litigation in tandem with the spirit of the Constitution which allows any person to approach the court either on his behalf or on behalf of another person citing violation or threat of a constitutional right. This is further in recognition of the fact that in public litigation, a litigant is usually advancing public interest as opposed to personal gain. Courts have held the view that an order for costs would hinder the promotion of constitutional justice as parties who are not well-endowed financially would be shy to approach the seat of justice for fear of being condemned in costs should they be unsuccessful in their cases thus preventing a matter of public importance from being heard....**

**22. The above position does not however mean that courts do not award costs in all constitutional petitions. There are instances where courts have held an award of costs would be justified such as where the litigation is frivolous or vexatious or where the conduct of the litigant attracts censure by the court.”**

62. Although the institution of this petition was ill-advised from the beginning, it cannot be said that the same was frivolous or vexatious. The Petitioner has not done anything to warrant censure by the court. For that reason, I will not make orders as to costs meaning that each party will bear own costs of the litigation.

**Dated, Signed and Delivered at Nairobi this 24<sup>th</sup> day of October, 2019**

**W. Korir,**

**Judge of the High Court of Kenya**