



REPUBLIC OF KENYA



Makindu Motors Limited v Office of the Deputy President & 10 others (Petition E389 of 2020) [2025] KEHC 1641 (KLR) (Constitutional and Human Rights) (20 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1641 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E389 OF 2020

LN MUGAMBI, J

FEBRUARY 20, 2025

BETWEEN

MAKINDU MOTORS LIMITED PETITIONER

AND

OFFICE OF THE DEPUTY PRESIDENT 1ST RESPONDENT

**MINISTRY OF INTERIOR AND CO-ORDINATION OF THE NATIONAL
GOVERNMENT OF KENYA 2ND RESPONDENT**

INSPECTOR GENERAL OF THE POLICE 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

ALLAN KIPROTICH CHESANG 5TH RESPONDENT

JOY WANGARI KAMAU 6TH RESPONDENT

AUGUSTINE MATATA 7TH RESPONDENT

JONAH OCHIENG OSORE 8TH RESPONDENT

TEDDY AWITI 9TH RESPONDENT

KEVIN MUTUNDURA 10TH RESPONDENT

JAMES WILLIAM MAKOKHA 11TH RESPONDENT



JUDGMENT

Introduction

1. The Petitioner is a company that deals in supplies, construction and motor vehicle and motor cycle importation and sales.
2. It filed the Petition dated 26th November 2020 supported by the affidavit sworn of its Director, Stephen Ngei Musyoka.
3. This Petition stems from a Tender to supply laptops allegedly awarded to the Petitioner by the 1st Respondent's officers but which turned out to be scam through which the Petitioner lost colossal amounts of money hence the institution of this Petition for violation of its constitutional rights.
4. The Petitioner thus prays for the following reliefs against the Respondents:
 - i. A declaration that the offices of the 1st, 2nd and 3rd Respondents are institutions bound by the Constitution and that they are under a duty to respect, uphold and defend the Constitution in terms of Article 2(1),3(1), 129(2), 232(a), 238(b) and 244 (a) of the Constitution.
 - ii. A declaration that the loss incurred by the Petitioner to the tune of Ksh.317,618,000 million was as a result of the 1st, 2nd and 3rd Respondents violations of the Petitioner's rights as guaranteed by the Constitution in Articles 2(1), 3(1), 129(2),232(a), 238(b) and 244(a)(b) of the Constitution.
 - iii. Compensation of Ksh.317, 681,000 million plus interest at court rates.
 - iv. Any other orders that the Court may deem fit and expedient to grant.
 - v. Costs of the Petition.

Petitioner's Case

5. On 18th May 2018, the Petitioner vide an email communication was informed that it had been shortlisted by the 1st Respondent for its Tender as one of the participants for the year 2018/2019.
6. He depones that in June 2018, the Petitioner was informed that it had been awarded the tender to supply 2800 laptops being HP Pavilion i5 w/intel C15 7200u @ 2.5 ghz 8gb DDR4 ,1TB HD. As such, it was issued with a Local Purchase Order (L.P.O).
7. It is noted that the Petitioner's agents in this process engaged the purported procurement officer, the 6th Respondent and the Deputy Director, the 8th Respondent. The two are alleged to have been at all time accompanied by the 1st Respondent's officers in uniform and escorted by armed policemen.
8. He depones that being that the model required by the 1st Respondent was 7th Generation and out of the market, the Petitioner enquired whether it could replace the laptops with the 8th Generation models. The request was approved through an email dated 27th June 2018.
9. With the green light, the Petitioner proceeded to source for these laptops both locally and internationally through its agent, All in One Technology Limited. He states that once the Petitioner had sourced the laptops, he delivered the same as per the L.P.O.



10. He states that the total cost for sourcing and delivering the laptops was Ksh.182, 119, 092. Accordingly, the Petitioner forwarded the Ksh.317, 681, 000 invoice to the 1st Respondent on 2nd August 2018.
11. Soon after, the Petitioner had delivered the laptops, he avers that they were allegedly informed that the 1st Respondent had sold the laptops at a throwaway price in the streets of Nairobi. In a bid to unearth whether this was true, the Petitioner through its agent bought some of these laptops. He depones that the Petitioner through the serial numbers of the laptops was able to confirm that indeed these were the laptops that it had sourced and delivered to the 1st Respondent.
12. The Petitioner in quest of an explanation for the same reached out to the 5th, 6th and 7th Respondents' who had dealt with in the process to no avail. He informs that the Petitioner reported the matter to the Parliament Police Station.
13. Through investigations, the police traced back 651 of the sourced laptops at the 5th Respondent's house and 10 others in his vehicle. As a consequence, the 5th, 6th, 7th, 8th, 9th, 10th and 11th Respondents were arrested and charged under Criminal Case No.1816 of 2018 for the offense of obtaining money by false pretenses.
14. In view of the foregoing, he contends that, the 1st Respondent through its employees connived and colluded with the 5th to 11th Respondents to mislead and defraud the Petitioner of a sum of Ksh.317,681,000. This is pegged on the fact that the 1st, 2nd and 3rd Respondents allowed these Respondents to access highly secured offices at the Harambee Annex to deceive the Petitioner that it was a legitimate tender business. Moreover, the communication received from the 1st Respondent vide its email, letters, stamps and logos is alleged to have been official.
15. The Petitioner is aggrieved that as a result of the Respondents concerted effort, it has incurred a colossal loss. He informs that the money used to source the laptops was procured as a bank loan which the Petitioner now owes.
16. For this reason, the Petitioner contends that the Respondents ought to be jointly held liable for this loss. Furthermore, he avers that the 1st, 2nd and 3rd Respondents in the context of this case abused their powers as provided under *the Constitution*.

Respondents' Case

17. The 5th, 6th, 8th, 9th, 10th and 11th Respondents' responses and submissions are not in the Court file or Court Online Platform (CTS).

1st Respondent's Case

18. In reply, the 1st Respondent through its Assistant Director Supply Chain Management, Lawrence Nganga Mbugua filed its Replying Affidavit sworn on 18th March 2022.
19. He depones that the 1st Respondent neither issued nor awarded any tender for procurement of laptops in the year 2018/2019. He adds that the 1st Respondent did not receive or accept the Petitioner's interest for such a Tender. He stresses that the Petitioner has not adduced any evidence to support the claim of an existing Tender, specifically an advertisement that was issued to that effect at the material time.
20. He informs that on 1st March 2018, the Head of Public Service vide a Circular Ref. No. OP/CAB.39/1A centralized the procurement of all ICT equipment and Services with the Ministry of Information Communication and Technology. This was equally reported in the Media. He avers thus that it is clear that there were neither grounds nor funds to procure the purported laptops.



21. He as well informs that the 1st Respondent's official email is dp@deputyresident.go.ke which is information available to the public on the tender website. He points out that the email used in the Petitioner's case noreply@deputyresident.go.ke has never existed with the 1st Respondent.
22. It is further asserted that when the 1st Respondent discovered the 8th Respondent's involvement in this fraudulent scheme, it dismissed him from service. Furthermore, Criminal Case Number 1816 of 2018 was instigated against him and the other Respondents.
23. He asserts that the Petitioner's claim is baseless as its assertion of an existing Tender without an advertisement as required in the *Public Procurement and Asset Disposal Act* is a display of negligence and dishonesty on its part. Additionally, he avers that the Petitioner ought to have been vigilant and conducted its due diligence.
24. It is asserted thus that the Petition does not disclose any legal and justifiable claim against the 1st Respondent. Moreover, that it is pre-mature and an abuse of the Court process and so should be dismissed.

7th Respondent's Case

25. The 7th Respondent filed his Replying Affidavit sworn on 26th May 2022.
26. He depones that the Petitioner has not demonstrated how he violated its constitutional rights. He adds that he was not privy to the alleged contract that was entered into by the Petitioner as averred in the Petition.
27. He avers further that the criminal matter against him in Criminal Case No.1816 of 2019 is yet to be heard and determined. Considering this, the instant Petition is deemed to be premature.
28. The 7th Respondent as well avers that the Petition is an abuse of the Court process as the Petitioner's claim and sought remedy can be sought through the civil court.

Parties' Submissions

Petitioner's Submissions

29. The Petitioner through M. Mutinda and Associate Advocates filed submissions dated 23rd August 2020. Counsel outlined the issues for discussion as: whether the Petitioner was negligent; whether the 1st, 2nd and 3rd Respondents violated the Petitioner's constitutional rights violated Article 10, 27, 244 of *the Constitution* and whether the Petitioner is entitled to the relief sought.
30. On the first issue, Counsel submitted that the Petitioner was not negligent in dealing the alleged 1st Respondent's officers. Relying in Article 73(1) of *the Constitution*, Counsel submitted that the process and business having been conducted in the 1st Respondent's offices, could not have doubted. For this reason, the 1st Respondent is accused of failing to promote public trust in its offices.
31. Turning to the second issue, Counsel answered in the affirmative. Referring to Article 10 of *the Constitution*, Counsel submitted that the 1st Respondent failed to demonstrate good governance in dealing with the Petitioner as its officers were not transparent in the plan to defraud. The Respondents were further accused of having failed to uphold the highest standards of professionalism while promoting transparency and accountability.
32. Equally, being that the 1st Respondent's officers were accompanied by police men in these transactions, Counsel argued that the police aided in the act of corruption instead of fighting against it. Considering



this, Counsel submitted that the 1st, 2nd and 3rd Respondents in addition to violating the Petitioner's rights failed to uphold the edicts of *the Constitution*.

33. Reliance was placed in *Katiba Institute v Presidents Delivery Unit & 3 others* [2017] eKLR where it was held that:

“The clear message flowing from the constitutional text is that rights have inherent value and utility and their recognition, protection and preservation is not an emanation of state largesse because they are not granted, nor are they grantable, by the State. They attach to persons, all persons, by virtue of their being human and respecting rights is not a favour done by the state or those in authority. They merely follow a constitutional command to obey.”

34. Like dependence was placed in *Thomas Bazaar v Inspector General of Police & 6 others* [2017] eKLR.

35. Owing to the stated case, Counsel submitted that the Petitioner was entitled to the relief sought as well as the costs of the suit. Reliance was placed in *Katiba Institute (supra)* where it was held that:

“I am guided by what the Court stated in the case of *Tinyefuze v Attorney General of Uganda* [1997] UGCC3 that; “If a Petitioner succeeds in establishing breach of a fundamental right, he is entitled to the relief in exercise of constitutional jurisdiction as a matter of course.”

1st, 2nd, 3rd and 4th Respondents' Submissions

36. State Counsel, Ruth Wamuyu filed submissions dated 6th June 2022 for these Respondents. To commence with, Counsel submitted that the Petitioner had not proved the existence of a valid Tender as alleged.

37. Counsel stressed that it is trite law under Section 107 and 109 of the *Evidence Act* that he who alleges a fact must prove its existence which the Petitioner had failed to prove. Particularly Counsel submitted that the Petitioner had not proved the advertisement of the alleged Tender, the procurement contract entered into and where it got the authority to supply the alleged laptops.

38. Furthermore, Counsel stressed that the Petitioner as all interested participants in a public procurement process are subject to the dictates of the *Public Procurement and Asset Disposal Act*, 2015 which binds the 1st Respondent in its procurement processes. Considering this, Counsel argued that the laptops were supplied privately to a private person who was not the 1st Respondent contrary to the provisions of Section 96 and 98 of the Act.

39. Likewise, Counsel submitted that the Petitioner under Section 72 of the Act is equally obliged to ensure that the procurement process is done in accordance with the law. For this reason, Counsel stressed that ignorance of the law cannot act as a defence for the Petitioner

40. Reliance was placed in *Pakater Investment Company Limited Vs Municipal Council Of Malindi* [2016] eKLR where the Court stated:

“I do agree with the findings of the trial court that the proper procedure to procure the goods was not followed. Although it is not the work of a supplier to find out the internal workings of a public organization or a company as established in the *Turquand's* case, at least the ordinary processes have to be followed. A supplier cannot expect to receive a phone call from an assistant supply officer to supply goods and jump into the process of supplying. One has to be pre-qualified... The appellant cannot hide in the contention that it was not its duty



to find out whether the process was followed. There is the basic business procedures which call for minimum due diligence.”

41. In light of this, Counsel submitted that no legal remedy can flow from unlawful acts. Reliance was placed in *Royal Media Services V Independent Electoral & Boundaries Commission & 3 Others* [2019]eKLR; *Standard Chartered Bank Limited Vs. Intercom Services Limited & 4 Others* (Civil Appeal No. 37 of 2003) and *Scott Vs. Brown, Denning & McNab Company (3)* [1892] 2QB 724.
42. In closing, Counsel submitted that the Petition does not disclose any legal or justifiable claim against the 1st Respondent. By the same token that it is premature, baseless and an abuse of the Court process and so should be dismissed.

7th Respondent’s Submissions

43. The 7th Respondent in the submissions dated 26th May 2022 filed by Maosa and Company Advocates submitted that the Petition does not disclose any liability on his part with regards to the Petitioner’s claim.
44. That notwithstanding Counsel submitted that since the Petitioner’s claim is criminal in nature it should be directed to the relevant investigative agencies.
45. Counsel further submitted that the Petition was incompetent was for a number of reasons. First no goods were supplied to the 7th Respondent and there is no exiting contract between the two so as to claim violation of a right. Additionally that the Petitioner failed to institute this matter as civil cause. It was also stated that the Petitioner in prayer C fails to issue the definite sum. Counsel also points out that the Authority to Sign in the Petition has not been executed as required by law.
46. In view of the foregoing Counsel submitted that the Petition ought to be struck out as there is no valid orders that can be issued against the 7th Respondent in the context of this case.

Analysis and Determination

47. In my view, this Petition raises only three major issues for determination:
 - i. Whether the petition meets the requisite threshold of a Constitutional Petition.
 - ii. Whether the 1st 2nd and 3rd Respondents violated the Petitioners Constitutional Rights.
 - iii. Whether the Petitioner is entitled to the relief sought.

Whether the petition meets the requisite threshold of a Constitutional Petition

48. It is now an accepted principle in constitutional adjudication that a constitutional Petition must be drawn with reasonable precision clearly identifying the provisions of *the constitution* alleged to have been violated coupled an indication of the manner in which the alleged violation occurred.
49. Vagueness that embarrasses the adverse party has no room in constitutional litigation as it blurs a fair trial. Sufficient details of the complaint must be provided so that the opposite party can answer the allegations of violation made against it. This principle was pithily pronounced in *Anarita Karimi Njeru* (1979) KLR as follows:

“... 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...”

50. The Supreme Court echoed the aforesaid principle in the *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (2014) eKLR by stating thus:

“(349) Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v. Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement...”

51. I have carefully studied this Petition. The Petitioner details the legal foundations of the Petition by listing the various provisions of *the Constitution* between paragraphs 9- 23 of *the Constitution* by briefly what they stating what they entail. The provisions include Articles 2 (1), 2 (4), 3, 10, 23, 27, 47, 73 (1), 129, 232 (a), 238 (b), 244 (a), (b) and 165 of *the Constitution*.
52. The Petitioner sets out the facts relied by describing how the 1st, 2nd and 3rd Respondents are connected to the Petitioner’s tribulations; not by directly infringing on the Petitioner’s rights under the Bill of Rights, but in breaching Articles 232 (a) that deals with values and principles of public service delivery, 238 (b) on the National Security and adherence to the rule of law, Article 244 (a) and (b) which deals with the objects and functions of the National Police Services and Article 129 (2) which deals with the exercise of Executive Authority hence contends liability attaches to the 1st, 2nd and 3rd Respondents for the failure to enforce the said provisions thereby connived with the employees and/or agents namely 5th, 6th, 7th, 8th, 9th, 10th and 11th Respondent to mislead and defraud the Petitioner to lose a total sum of Kshs. 317, 618,000/-. That because the 1st, 2nd and 3rd Respondent allowed the 6th-11th Respondent access to highly secured offices specifically No. B3005 on 3rd Floor, Harambee Annex with the sole intention of hoodwinking the Petitioner they were undertaking genuine government business and by providing security while collecting goods and ostensibly delivering them to 1st Respondent. The Petitioner blamed the 2nd Respondent for allowing 3rd Respondent to allow its officers to be part of a conspiracy scheme to fleece him and for also for 1st Respondent allowing its emails, letters, stamps and logos to be used by 5th -10th Respondents to execute fraudulent acts.
53. The manner in which the Petition is pleaded gives a fair disclosure of the Petitioner’s complaint and I would thus find it suffices as a Constitutional Petition.

Whether the 1st 2nd and 3rd Respondents violated the Petitioners constitutional rights.

54. The next significant phase of my inquiry is question whether the Petitioner has proved the allegations put forth in this Petition against the Respondents and in this regard I shall equally be guided by the principles enunciated in various authorities. In *Leonard Otieno v Airtel Kenya Limited* [2018] eKLR the Court observed as follows:

“ 52. Constitutional analysis under the Bill of Rights takes place in two stages. First, the applicant is required to demonstrate that his or her ability to exercise a



fundamental right has been infringed. If the court finds that the law, measure, conduct or omission in question infringes the exercise of the fundamental right or a right guaranteed in the Bill of Rights, the analysis may move to its second stage. In this second stage, the party looking to uphold the restriction or conduct will be required to demonstrate that the infringement or conduct is justifiable in a modern democratic State and satisfies the Article 24 analysis test.”

55. The Court went on to observe that:

“

“62. Section 107 (1) of the *Evidence Act* provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Sub-section (2) provides that “when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

I have severally stated that all cases are decided on the legal burden of proof being discharged (or not). Lord Brandon once remarked:

“No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take.”

Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britstone Pte Ltd vs Smith & Associates Far East Ltd*:

“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize *the constitution* and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.”

56. Another authority is the case of *Alice Wanjiru Ruhiru v Messiac Assembly of Yahweh* [2021] eKLR where the Court observed as follows:

“

“22. I also refer to *The Halsbury’s Laws of England*, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to



an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

(16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”

57. The Petitioner faults the 1st, 2nd and 3rd Respondent for conniving with the 5th to 11th Respondents to facilitate a fraudulent scheme through which he was conned to supply 2800 laptops in a non-existent procurement deal at the Office of the 1st Respondent in which he lost total of Kshs. 317,681,000/-.

58. To start with, the Constitution provides for the procurement of public goods and services under Article 227 as follows:

1. When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost- effective.
2. An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—
 - a. categories of preference in the allocation of contracts;
 - b. the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;
 - c. sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and
 - d. sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices.

59. What I consider relevant to gather in Article 227 of the Constitution for purposes of this case is that the Constitution sets the standard that the procurement of goods must be transparent meaning that the process must not be opaque or obscure. The Petitioner informed this Court that it was emailed and told it had been pre-qualified in a tender for supply of laptops in the 1st respondent’s office. It does not tell the Court or demonstrate how such decision was reached as in the process leading to such identification. Did it ever participate in any prequalification process? In fact, the petitioner does not exhibit any written application for the job to the office of the 1st Respondent.

60. There is no demonstration of any public notice having been issued in reference to the tender by the 1st respondent’s office. At least, none was exhibited by the Petitioner as a consequence of which it can say it acted upon such information.

61. Further, even assuming that it was a direct procurement under Section 65 of the Public Procurement and Disposal Act, it would have been mandatory for there to have been a tender document to form the basis for tender preparation by the tenderer and subsequent negotiations with the adhoc committee



appointed by the accounting officer with the ultimate end being a written contract executed between tenderer and the Accounting Officer of the 1st Respondent.

Procedure for direct procurement

1. An accounting officer of a procuring entity shall adhere to the following procedures with respect to direct procurement—
 - (a) issue a tender document which shall be the basis of tender preparation by tenderer and subsequent negotiations.
 - (b) appoint an ad hoc evaluation committee pursuant to section 46 to negotiate with a person for the supply of goods, works or non- consultancy services being provided;
 - (c) ensure appropriate approvals under this Act have been granted;
 - (d) ensure the resulting contract is in writing and signed by both parties.
62. Clearly, there was no such binding contract executed between the Petitioner and the 1st respondent nor was any evidence to demonstrate that the Accounting Officer had either directly or indirectly represented to the Petitioner that he could deal with the 5th to 10th Respondent.
63. Additionally, the Petitioner did not demonstrate that there was previous conduct or history of dealing as such with the 1st Respondent officers which in fact resulted in a binding contract notwithstanding the lack of express approval or adherence to the laid down procedures by the 1st Respondent's principal.
64. Clearly, this Petition lacks plausible basis for determining the liability of the 1st Respondent on the basis of objective manifestations which flow from the principal to the agent.
65. Instead, the Petitioner seeks to rely on remote actions of suspected fraudsters who duped him through posturing and display of pomposity just because set up the fraud was executed in a Government Office in which some of the conspirators were government employees to seek compensation from the 1st to 3rd Respondent. This in my view cannot succeed. It is a basic tenet in any business deal to carry out some form of due diligence before committing one's resources in a transaction. One cannot shift responsibility to others if there is failure on their part to undertake such preliminary steps before committing. Had the Petitioner bothered to carry out even the most mundane form of due diligence, it would have saved him this agony. It cannot now seek to transfer that responsibility on others that had nothing to do with the fraud.
66. As was held in *Royal Media Services V Independent Electoral & Boundaries Commission & 3 Others* [2019]eKLR:

“...It is the duty of the Contractor as it is of the procuring entity to observe the provisions of Statute and the Regulations thereunder. Section 27 imposes an unequivocal responsibility on any contractor, supplier or consultant intending to supply goods or services to a public entity to comply with all the provisions of the Act and the Regulations. This duty, in my view, extends to the Contractor making due enquiries as to whether the procuring entity has complied with its side of the law and declining to enter into a contract which is procured in apparent disregard of the law. For that reason a contractor or supplier cannot find refuge in the argument that compliance was an internal matter of the public entity when s[he] has not done enough to enquire about compliance or s[he] is herself or himself guilty of infringement.



46. The law on direct procurement is clearly expressed in both the substantive and subsidiary provisions of the PPD Act, 2005. RMS knew that IEBC was a public entity. RMS was expected to know the law on public procurement because as the old adage goes, ignorance of the law is no defence. It would be apparent to RMS that the meeting of 11th December 2012 were not negotiations required by the statute. It would further be apparent to RMS that it was offering services when the contract required by Section 75(c) had not been concluded. These two aspects of the transaction were not matters internal to IEBC only. Negotiations and entering of a formal contract were matters that required the participation of RMS. RMS knew or ought to have known that certain facets of direct procurement were being overlooked. Non-compliance could easily be seen. For this reason this Court is unwilling to hold that RMS should be excused from the flawed process...”
67. The Petitioners tribulations though sad cannot be apportioned to the 1st, 2nd and 3rd respondent who had absolutely nothing to do with it.
68. The losses to the Petitioner were incurred due to criminal actions of persons well known to the Petitioner and whom it was very able to identify.
69. The Petitioner claims that the State had an obligation to protect him from the actions of the 5th to 11th Respondent that cost it huge losses. It is indeed true that Article 21 (1) it places the responsibility on the state to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. This Article embodies positive and negative obligations of the State in observance of human rights. Positive obligations requiring the State to take specific measures that will guarantee observance of human rights by others hence the words protect, promote and fulfil and negative obligations that require the State itself not to do anything that may be considered injurious to human rights hence respect and observe. The State thus has for instance an obligation to pass legislation and putting in place structures that protect its citizens but that does not relieve the citizens from evaluating risks or taking precautions when carrying out their affairs.
70. Upon careful assessment of facts relied on in this Petition, I am not persuaded that the State slackened in its constitutional responsibility to protect the Petitioner. It immediately took disciplinary action against its officer that was implicated. According to the affidavit of the 1st Respondent sworn by Lawrence Nganga Mbugua on 18th March, 2022; when it came to the knowledge that the 8th Respondent who occupied Harambee House Annex Office No. B3-005 was involved in fraud, the 1st Respondent took disciplinary action and dismissed him from service.
71. Further, all those that were involved were arrested and are now facing prosecution in Milimani Criminal Case Number 1816 of 2018 for the fraudulent acts.
72. The Petitioner is still at liberty to pursue the suspected fraudsters, not by way of a Constitutional Petition, but by ordinary civil case to recoup his losses. The claim for recovery of losses against the 5th to 11th Respondents lies not invoking *the Constitution* but the relevant substantive civil law. The doctrine of Constitutional avoidance applies to the instant Petition as against 5th to 11th Respondent as the claim against them does not qualify to be a constitutional controversy.
73. The upshot is that this Petition lacks merit and is hereby dismissed.
74. Each Party shall bear its own costs.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH FEBRUARY, 2025.

L N MUGAMBI

JUDGE

