



**Ndung'u v Shop & Deliver Limited; Betting Control and Licensing Board  
(Interested Party) (Petition E344 of 2020) [2025] KEHC 2154 (KLR)  
(Constitutional and Human Rights) (14 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2154 (KLR)

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

**PETITION E344 OF 2020**

**EC MWITA, J**

**FEBRUARY 14, 2025**

**BETWEEN**

**MARK NDUMIA NDUNG'U ..... PETITIONER**

**AND**

**SHOP & DELIVER LIMITED ..... RESPONDENT**

**AND**

**BETTING CONTROL AND LICENSING BOARD ..... INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. The petitioner registered for online betting services with the respondent and opened an account using his cell phone number. On realising that he had a betting problem, he called the respondent's customer care on 17<sup>th</sup> July 2020 and requested that his account be closed. The customer care advised the petitioner to let the account remain dormant for some time and it would be closed. The petitioner however insisted on having the account closed and customer care asked him to send a snapshot of his identity card on email so that they can begin the process of closing the account, which the petitioner did.
2. The account was not closed immediately and on 21<sup>st</sup> July, the petitioner sent a reminder by email and another reminder on 6<sup>th</sup> August 2020 which was followed up with a phone call to customer care. The petitioner sent another reminder on 18<sup>th</sup> August 2020 and on the same day received an email from the respondent informing him that it was following up on the deactivation of the account and it would be resolved as soon as possible.



3. On 24<sup>th</sup> August 2020 the petitioner sent a complaint letter to the interest party requesting it to inquire into the respondent's conduct. Having received no response, the petitioner sent a reminder which also elicited no response.

### **The petition**

4. The petitioner was aggrieved by the respondent's inaction and filed this petition claiming that the respondent had violated his rights and fundamental freedoms. He averred that his request to close the account was not effected despite reminders followed by a demand letter on 14<sup>th</sup> September 2020. He asserted that although he received an email on 15<sup>th</sup> September 2020 from the respondent informing him that the account had been closed, this was not true as he still had access to the account. Although he again received an email on 25<sup>th</sup> September 2020 attaching a letter from the respondent reiterating that the account had been closed, he could still access limited functionalities.
5. The petitioner asserted that between 21<sup>st</sup> July 2020 and 6<sup>th</sup> August 2020, he continued placing bets which he could not have done had his account been closed when he requested that it be closed. As a result, he lost Kshs. 110, 362.
6. It was the petitioner's case that the respondent took advantage over him and made a benefit out of his vulnerability by failing, refusing and or delaying to close his account on request. The petitioner stated that the respondent is aware that its services are potentially addictive and as such, upon request to close his account, it should have effect the request without delay.
7. The petitioner asserted that the respondent's services are defective and not of reasonable quality for not establishing a platform that would have enabled him close his account without intervention from the respondent. And if intervention is necessary, then the services are defective to the extent that the respondent failed, refused and or delayed to close the account.
8. The petitioner maintained that his betting account with 22bet was closed within 10 hours upon request and the respondent should have acted in a similar manner. The petitioner complained that opening an account with the respondent takes a few minutes yet it takes months to close it.
9. The petitioner asserted that while the respondent has duty of care to its customers, it has an even greater duty of care to consumers who exhibit addictive tendencies and should assist by closing such accounts promptly on request. According to the petitioner, World Health Organization (WHO) recognises gambling as a disease. This means the respondent's activities have a direct bearing on the health of consumers who end up with gambling problem and should safeguard such consumer's right to health and safety by closing their accounts promptly on request.
10. The petitioner stated that before requesting his account to be closed, he was struggling to quitting gambling. The respondent's conduct made it difficult for him to quit the habit thus, infringed on his rights under Article 46 of *the Constitution*. The respondent also infringes on the rights of other consumers especially those with gambling habits and impacts on their health, well-being, safety and economic interest.
11. The petitioner asserted, therefore, that the respondent violated his rights under Article 46 (1) (a), (c) of *the Constitution* and section 13(2) (a), (e) and (f) of the *Consumer Protection Act*, 2012. He sought declarations that his rights were violated and constitutional compensation.



## Respondent's response

12. The respondent opposed the petition through a replying affidavit sworn on 16<sup>th</sup> November 2020 by Chris Mwirigi Kaumbuthu and a supplementary affidavit sworn on 12<sup>th</sup> April 2024 by Eric Githinji Maina.
13. The respondent admitted that the petitioner had been its online customer and used to place bets on various occasions. There was nothing on his account activity to show that he had a gambling problem to warrant suspension or closure of his account.
14. The respondent stated that from 26<sup>th</sup> June 2020 when the account was opened to 17<sup>th</sup> July 2020 when the petitioner requested for its closure, the petitioner had only deposited Kshs. 36,065 into the account. The petitioner enjoyed the respondent's services for only 21 days before requesting that the account be closed. The respondent asserted that during the time the petitioner was a customer, the petitioner won Kshs. 118,941.48 having placed stakes amounting Kshs. 92,794.
15. According to the respondent, before one can register for its services, he has to read mandatory requirements, understand and agree to the terms and conditions. Its homepage website has a "Responsible Gaming Policy" which automatically appears on all platforms when one is accessing the services through any device. The policy offers responsible gaming tips and addresses the different categories and actions to take if any of the customers needs assistance.
16. The respondent admitted that the petitioner contacted its customer care service on 17<sup>th</sup> July 2020 seeking to close his account because he wanted to take a long break from betting. He was advised to leave the account dormant which would shut itself after a period of inactivity. The petitioner insisted that the option of inactivity would not work and sought an alternative. He was asked to send a copy of his national identity card for manual deactivation process to commence and he would be informed after deactivation had been effected.
17. According to the respondent, the petitioner did not indicate that he had a gambling problem when customer care asked for the reason for closing the account. The respondent denied the petitioner's allegation that the frequency of his bets and the amounts staked per bet had substantially increased and that he was placing bets during working hours. There were no significant amounts that would attract any suspicion to warrant intervention based on the total number of bets placed between 26<sup>th</sup> June 2020 and 17<sup>th</sup> July 2020.
18. The respondent contended that despite the petitioner being informed of the option to let the account remain dormant, he continued to place bets on his account.
19. The respondent stated that the petitioner also wrote to 22bet on 3<sup>rd</sup> September 2020 requesting that the account be closed. It asserted that if the petitioner believed that he had made a decision to stop betting all together due to a gambling problem, he should have made the two requests on the same day, 17<sup>th</sup> July 2020.
20. The respondent maintained that between 21<sup>st</sup> July 2020 to 6<sup>th</sup> August 2020, the petitioner willfully continued to make deposits into his accounts and placing bets despite advice to let account remain dormant and not to engage in any activity. The respondent asserted the petitioner's reminder of 18<sup>th</sup> August 2020 was responded to and he was informed that steps were being taken to deactivate the account. It was the respondent's position that certain protocols, including investigations in cases of accounts to be closed have to be observed before deactivation of a customer's account hence the duration it took to conclude deactivation.



21. The delay in closing the account was also caused by a system upgrade and its employees working in shifts or from home during the Covid-19 pandemic. On 15<sup>th</sup> September 2020, it sent an email to the petitioner confirming that the account had been closed. Upon closing an account, a former customer may still be able to access limited functions but cannot place bets. This fact was communicated to the petitioner in the letter dated 25<sup>th</sup> September. The petitioner was also informed that his data would be retained in compliance with the requirements of the Data Protection Act.
22. The respondent contended that while the petitioner claimed to have continued placing bets between 21<sup>st</sup> July 2020 and 6<sup>th</sup> August 2020 due to the accessibility of the account. He stopped placing bets on 6<sup>th</sup> August 2020 without any intervention, a demonstration that he was not at any risk and that placing of bets was being done in bad faith and targeted towards filing this petition. The respondent took the position that the petitioner had not demonstrated adverse betting habits or proof of spending problem.
23. The respondent stated that being cognizant of the abuses of betting by those that do not observe responsible betting, it had put in place several safeguards which appear on the Betika Responsible Gaming Policy. The respondent further stated that the petitioner was capable of reading and understanding the policy on its homepage website.
24. The respondent denied the petitioner's allegation that it took advantage of him, asserting that it had no penalties or conditions that would compel the petitioner or any other customer to continue betting. The respondent does not benefit from funds that remain in a customer's account and the petitioner had the option of deleting its mobile application from his phone if he was serious about quitting betting.
25. The respondent contended that the petitioner did not demonstrate that he underwent medical procedures to conclude that he had a betting problem given the short period of 21 days he had been a customer which was insufficient to develop or discover a gambling disorder.
26. The respondent also denied that it infringed on the petitioner's constitutional rights and maintained that it was under no duty to either take reasonable steps to offer assistance or to deny one from betting. According to the respondent, the issues raised in the petition are of contractual nature and do not warrant a constitutional petition. The respondent asserted that it complied with the requirement of Article 46 of *the Constitution*; observed the requirements of disclosure and transparency and discharged its duty of care to its customers as required by the regulator.

### **Interested party's response**

27. The interested party also opposed the petition through a replying affidavit sworn by Peter K. Mbugi. The interested party stated that the respondent applied for and was registered under section 5 of the *Betting, Lotteries and Gaming Act*, (Cap 131) for an off-the-course bookmakers' license to trade as Betika. It was issued with a license after complying with the regulatory requirements.
28. The interested party contended that from the pleadings, the petitioner voluntarily registered as a punter with the respondent on 26<sup>th</sup> June 2020. The petitioner's claim that he had a gambling problem was not based on any evidence such as a medical report. And from the respondent's response, it is not true that the petitioner was losing a lot of money having won a total of Kshs. 118,941.48 after placing stakes amounting to Kshs. 92, 794.
29. The interested party stated that there are steps to be followed and adhered to by a betting company before an account is closed. Further, the respondent has a responsibility to conduct due diligence on



accounts where requests for closure have been made so as to ascertain that the customers were not engaging in illegal activities.

30. The interested party took the view, that, the petitioner was expected to have read and understood the terms and conditions before registering with the respondent for betting. The interested party admitted receiving a letter of complaint against the respondent from the petitioner and it sent an inquiry to the respondent with a copy to the petitioner. The respondent was asked to provide a response with a brief background information surrounding the issue and to confirm whether the petitioner's account was still active and the steps being taken to close it down.
31. The respondent responded and explained the account registration process by a customer, the term and conditions and its responsible gaming policy and its applicability to the instant case. From its assessment, the respondent had acted reasonably and in a timely manner in closing the petitioner's account. As such there was no violation of Article 46(1) (c) of *the Constitution*. The interested party also argued that section 13(2) (a), (e) & (f) of the *Consumer Protection Act*, 2012 did not apply in this case.
32. The interested party contended that in the event that the *Consumer Protection Act* is applicable, the petitioner ought to have exhausted the alternative dispute resolution mechanisms outlined in Part IX of the Act, hence the petition is premature.

### Oral evidence

33. Parties led oral evidence in this petition. The petitioner testified as PW1 and reiterated the contents of his petition and the supporting affidavit. He told the court that he registered a betting account with the respondent in July 2020. Soon after, he realised that he was had been affected by betting. On 17<sup>th</sup> July 2020, he requested the respondent to close his account but this was not done. He made phone calls and emails to that effect and the account was eventually closed sometime in November 2020.
34. The petitioner testified that the reason the respondent gave for not closing the account immediately was not adequate and that the respondent's conduct was wanting. The petitioner told the court that after closing his account, the platform still sent promotional messages to his account meant to entice him back to betting.
35. In cross examination, the petitioner told the court that he used the respondent's services from July 2020 and he requested deregistration on 17<sup>th</sup> July 2020. He admitted that he received confirmation of deregistration of his account on 15<sup>th</sup> September 2020, a day after he had written a demand letter to the respondent.
36. The petitioner further admitted that the petition was filed on 23<sup>rd</sup> October 2020 a month after confirmation of deregistration of his account. He stated that he wrote to the Interested party on 24<sup>th</sup> August 2020 and 18<sup>th</sup> September 2024 but did not receive a response. He admitted that he did not give reasons why he wanted the account closed in the letter dated 24<sup>th</sup> August 2020. He also admitted that he was informed of the procedure to follow which, however, he did not follow.
37. The petitioner again admitted that in both of his letters of 18<sup>th</sup> September 2024 and 24<sup>th</sup> August 2024, he did not indicate that he had been affected by betting. He confirmed that he received promotional messages from other parties other than the respondent and that he had not unsubscribed as at that time.
38. The petitioner told the court that between July 2020 and August 2020, he placed deposit of about Kshs. 100,000 but could not remember how much he had won.



39. Although he told the court that he went through counselling sessions because of the issues of betting, he admitted that the receipts from Amani Counselling Centre were not in his name and were issued between 13<sup>th</sup> August 2020 and 9<sup>th</sup> October 2020, during the Covid 19 period.
40. The petitioner admitted that he voluntarily registered for betting and that he went for therapy to complement his efforts relating to closure of the account. This helped him identify what the problem was but even with the efforts for this therapy, he continued placing bets.
41. DW1 Erick Githinji Maina (Mr. Maina), the principal engineer with the respondent and a software engineer, adopted his affidavit and that sworn by Chris Kaumbuthu and annexures thereto as the respondent's evidence before court.
42. In cross examination, he stated that he was authorised to swear the affidavit on behalf of the respondent but had no written authority. He admitted that he had also not produced any document to show that he was the respondent's employee. He stated that in 2020, he was serving as a lead Engineer. He was however not involved in the issues relating to this matter in 2020 and had no authority from Kaumbuthu to rely on his affidavit. He also did not know Kaumbuthu's signature.
43. The witness told court that at the time the request to close the account was made, the system was being upgraded to offer efficient service to customers. The upgrade period affected time and required more resource but he did not remember how long it took. He also did not know when the terms and conditions came into effect; when they were uploaded on the respondent's platform and could not access that information as the lead engineer.
44. In re-examination, Mr. Maina confirmed that he had worked with the respondent since 2017; had interacted with Mr. Kaumbuthu's signature before and could tell when he saw the signature.

#### **Petitioner's submissions**

45. The petitioner relied on Article 46 of *the Constitution* to argue that the respondent's services were not of a reasonable quality because it took the respondent 60 days to act on his request; the respondent failed to take urgent and decisive steps to either suspend his account or put restrictions to prevent him from placing bets as it embarked on reviewing the account. The respondent's advice to leave the account dormant failed to give effect to his interest and his freedom to contract.
46. The petitioner submitted that being able to access his account when the respondent claimed to have closed it, showed the unjustifiable deficiencies in the respondent's services. He further submitted that the respondent continued to bombard him with promotional messages to lure him into betting even though it claimed to have closed his account.
47. The petitioner argued that he was not given any information as to why his account was not being closed and failure to act on his request violated Article 46(1) (b) of *the Constitution*. The respondent's indolence aggravated his problem in the sense that he continued spending his valuable time and money on betting making him suffer health wise which necessitated counselling. The action also violated section 3(2) of the *Consumer Protection Act*.
48. The petitioner took the view, that the respondent had a constitutional and statutory duty to act upon his request to close the account and relied on section 3(4) of the *Consumer Protection Act*. The petitioner relies on *CIS v Directors, Crawford International School & 3 others* [2020] eKLR for the argument that the respondent's conduct falls under the category of unconscionable, unfair, unreasonable and unjust conduct.



49. The petitioner again relied on section 4(1) (c) of the Betting Lotteries and Gaming Act for the argument that the interested party has the power to inquire into complaints against licensees or permit holders such as the respondent. It is expected to safeguard consumer rights of individuals by ensuring that they are treated fairly and are not taken advantage of.
50. The petitioner faulted the interested party for failing to prepare a report regarding the complaint indicating how the issue was resolved and whether the respondent had been found at fault or not. He relied on the decision in 888 UK limited; Bonne Terre Limited t/a Sky Betting and Gaming (SBG) and FSB Technology (UK) Limited.
51. The petitioner argued that he had discharged the burden of proof that his consumer rights under *the Constitution* and the *Consumer Protection Act* were grossly violated. He relied on Muinde & another v Insurance Regulatory Authority & 2 others; KBU 400 A & 2 others (Interested Parties) [2022] KEHC 568 (KLR).
52. The petitioner argued that he is entitled to general damages of Kshs. 8,000,000 and exemplary damages of Kshs. 20,000,000. He relied on section 84(3) of the *Consumer Protection Act* and the decisions in David Gitau Thairu v County Government of Machakos & 2 others [2020] eKLR and Godfrey Julius Ndumba Mbogori & Another v Nairobi City County [2018] eKLR.
53. The petitioner maintained that the evidence contained in the replying affidavit by Chris Kaumbuthu is inadmissible as it falls short of the admissibility test in sections 33, 70 and 71 of the *Evidence Act*. He urged the court to find that the evidence cannot be relied on Reliance was placed on Republic v John Ng'ang'a Njeri [2018] eKLR.

#### **Respondents' submissions**

54. The respondent submitted that the issues raised in the petition arose from a contract between private parties and form a subject matter of litigation in a civil suit. It relied on Hakizimana Abdoul Abdulkarim v Arrow Motors (EA) Ltd & Another [2017] eKLR.
55. The respondent denied that the petitioner had a betting problem. The respondent cited Salmond and Heuston on the Law of Torts, 9<sup>th</sup> Edition; Halsbury's Laws of England 3<sup>rd</sup> Ed. Vol. 36 (para. 689) and the decisions in Donoghue v Stevenson [1932] UKHL 100 and Breweries Limited v Godfrey Odoyo [2010] eKLR for the position that the petitioner's case falls below the threshold set by the courts in proving claims on negligence.
56. The respondent again relied on the decision in Grant v Australian Knitting Mills Ltd [1936] A.C. 85, 103 to argue that in law, it has no obligation towards problematic or pathological gamblers. The Betting, Lotteries and Gambling Act and the Regulations do not place any obligation on it to conduct individual assessment on each customer to determine the wisdom of their decisions to place bets. The respondent relied on the decisions in Calvert Hill v William Hill Credit Limited [2009] 2 WLR 1065 and Reynolds v Katoomba RSL All Services Club Ltd [2001] NSWCA 234 on the duty of care in gambling.
57. The respondent again relied on the decisions in Reynolds v Katoomba RSL All Services Club Ltd [2001] NSWCA 234 and Preston v Star City Pty Limited [2005] NSWSC 1223 for the proposition that the only foreseeable circumstance that would warrant this court to impose liability on it for engaging a self-diagnosed compulsive gambler would be if it had offered inducement to the petitioner.



58. The respondent argued that it was not responsible for the petitioner's financial loss. The claim would only be valid if the petitioner had written to the interested party requesting to be excluded from the entire betting industry. Reliance was placed on *Calvery v William Hill* [2009] 2 WLR 1065.
59. The respondent relies on section 84(1) of the *Consumer Protection Act* and several other decisions and urged the court to dismiss the petition since this is a matter that should have been filed in the Civil court.

### **Interested Party's submissions**

60. The interested party relied on the decision in *National Bank of Kenya Ltd Pipe Plastic Samkolit (k) Ltd & another* [2011] eKLR to argue that the petitioner was acting as a free agent and cannot claim compensation for any loss occasioned to him as a result of his own actions.
61. the interested party asserted that the respondent acted responsibly and in a timely manner in closing the petitioner's account. Similarly, the interested party undertook its statutory obligations under section 4 of its establishing Act.
62. The interested party argued that during the period when the complaint was being addressed, the petitioner continued to voluntarily place bets thus, invoked the doctrine of *volenti non fit injuria*.
63. The interested party submitted that the respondent's gaming policy has pronounced itself on the issue of self-seclusion as a preventive measure to assist gamblers who struggle to control gambling expenditure, including the petitioner. This proves that the respondent undertook its duty of care towards the petitioner. The interested party urged the court to dismiss the petition.

### **Determination**

64. I have considered the petition, responses, respective parties' arguments and the decisions relied on. The issues for determination are whether this is a constitutional petition; if the answer to this issue is in the affirmative, whether the petitioner's rights were violated; should he be compensated and what is the quantum.
65. The gravamen of this petition arose from the petitioner's registration with the respondent's betting platform in July 2020. The petitioner used that platform to place bets for some time but on 17<sup>th</sup> July 2020, he requested the respondent to close the account. The account was not, however, closed immediately despite reminders through phone calls and emails.
66. The delay to close the account aggrieved that petitioner who filed this petition arguing that his rights had been violated as he continued placing bets during the time he was waiting for the closure of the account. The petitioner argued that placing of bets affected him and as a result, he had to seek counselling.
67. The respondent admitted that the petitioner had registered to use its betting services and indeed placed some bets. He then made a request for closure of his account and was advised what to do as they worked on the issue. Eventually the account was closed in August 2020 and the petitioner was notified of this fact. The respondent denied violating the petitioner's rights and fundamental freedoms and argued that the matters raised in the petition arose from a contractual arrangement and cannot form the basis of a constitutional petition. They were better handled by a civil court.
68. The interested party agreed with the respondent, stating that the respondent acted properly in dealing with the request to close the account; that the issue was contractual and that there was no violation of constitutional rights and fundamental freedoms.



69. The petitioner filed a constitutional petition claiming violation of his rights and fundamental freedom. Article 22(1) grants every person the right to institute proceedings claiming that a right or fundamental freedoms in the Bill of Rights has been denied, violated, infringed, or is threatened. When so moved, Article 23(1) read with Article 165(3) of *the Constitution* confers on the Court jurisdiction to determine an application for redress of denial, violation or infringement of a right or fundamental freedom.
70. The petitioner came to this court in exercise of this right on the basis that the respondent's action of delaying to close his account violated his rights and fundamental freedoms. He wanted the court to find that there was violation of his rights and fundamental freedom and redress the violation. Whether or not there was violation, is first a question of fact. Once facts show an element of violation to the satisfaction of the court, it then becomes a question of law so that the party claiming violation has to discharge the burden of proof that indeed, his rights and fundamental freedoms were violated.
71. The respondent and interested party argued that this is not a constitutional petition as the facts giving rise to the petition arose from a contractual relationship which can only be determined through a civil suit.
72. It has long been held that there must be precision in constitutional litigation to enable parties respond to the issues at hand and for the court to make the correct determination on the issues placed before it. In *Phillips & others v National Director of Public Prosecutions* [2005] ZACC 15; 2006(1) SA 505(CC), the Constitutional Court of South Africa stated;
- The constitutional challenge should be explicit, with due notice to all affected. This requirement ensures that all interested parties have an opportunity to make representations; that the relevant evidence, if necessary, be led.
73. In *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR, the Supreme Court stated (at para 349) that "...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....plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement..."
74. These decisions emphasis the point that a party claiming violation of rights and fundamental freedoms should plead with precision, the constitutional rights violated and the manner of violation so that the respondent is put on notice over the petitioner's claim and respond appropriately.
75. The claim in this petition arose from a contract between the petitioner and the respondent. The respondent was registered under section 5 of the *Betting, Lotteries and Gaming Act*, to trade as Betika. It was on that basis that the petitioner registered with the respondent for betting. Having so registered, the petitioner entered into a contract with the respondent to act in accordance with the rules governing placing of bet. The relationship between the petitioner and the respondent was to be guided by the law governing that business.
76. The petitioner's grievance was that despite requesting the respondent to close his account, the respondent did not act immediately to actualize the request. The petitioner did not indicate to the court that there was a timeline within which the respondent had to act on the request to close the account and identify the section of the law setting the timeline. If there is such a law and the respondent failed to act within the time allowed by law, that would be a breach of the law which would have its own consequences.



77. The petitioner filed this petition claiming violation of his rights and fundamental freedoms. This was so, notwithstanding the fact that the relationship between the parties was contractual and statute based so that closing of an account was not a constitutional issue but an issue arising from a contract regulated by statute. The petitioner did not demonstrate to this court which constitutional provision governed the issue of opening accounts, placing of bets and closing the accounts to upgrade the issue from statute to one of violation of constitutional rights and fundamental freedoms.
78. In this petition, the petitioner merely cited constitutional provisions to make the issue appear to have the semblance of a constitutional dispute when no constitutional provision was cited regarding how long it should take the respondent to act on a request to close an account. If it was clear to the petitioner that the respondent had violated the law, it was for him to file a suit and show that indeed the law had been violated but not to file a constitutional petition alleging violation of constitutional rights and fundamental freedoms. This would have been so, since the relationship between the parties was regulated by statute and not *the Constitution*.
79. I agree with the position taken by the court in *Grays Jepkemoi Kiplagat v Zakayo Chepkonga Cheruiyot* [2021] that for a constitutional petition to be sustainable, it must, at a minimum, satisfy a basic threshold. It must with some reasonable degree of precision identify the constitutional provisions that are alleged to have been violated or threatened with violation but not merely cite constitutional provisions. There has to be particulars of alleged infringements to enable a respondent respond to those allegations.
80. Similarly, in *Godfrey Paul Okutoyi & others v Habil Olaka & Another* [018] eKLR, this court stated:
- (65) It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a court of law in the manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a Constitutional petition. A party should only file a constitutional petition for redress of a breach of *the Constitution* or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure.
- See also *Bernard Murage v Fine Serve Africa Ltd & others* [2015] eKLR that “Not each and every violation of the Law must be raised before the High Court as a constitutional issue. Where there exist an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued.”
81. The Court of Appeal had occasion to weigh in on this issue in *Gabriel Mutava & 2 others v Managing Director, Kenya Ports Authority* [2016] eKLR where it stated;
- Constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. Constitutional litigation is not a panacea for all manner of litigation; we reiterate that the first port of call should always be suitable statutory underpinned forums for the resolution of such disputes.
82. In this case, the petitioner having registered with the respondent for betting on his own free will, agreed to be bound by rules and regulations governing that business. Throughout this petition, the petitioner did not point out any law, rule or regulation that the respondent violated to enable the court determine



whether such infraction could translate into a constitutional violation given that this was an issue governed by statute thus, contractual.

83. In the circumstances of this case, I agree with the respondent that the issue being contractual, could not give rise to a constitutional petition in the manner the petitioner pleaded. If there was violation of any statutory provision, the petitioner would have been entitled to pursue such violation(s) through a normal suit. I therefore find and hold that the issue raised in this petition does not constitute a constitutional issue to be determined in a constitutional petition.
84. Having determined that the issue raised herein could not sustain a constitutional petition, I do not find it necessary to address the rest of the issues, namely; whether the petitioner's constitutional rights and fundamental freedoms were violated and whether he is entitled to compensation.

### **Conclusion**

85. Having considered the pleadings, arguments and the decisions relied on by parties, the conclusion I come to, is that this is not a constitutional petition. The issues raised in the petition having arisen from a contractual relationship, could only give rise to a civil suit if the petitioner thought there was violation of the statute governing that relationship. They could not be the foundation of a constitutional petition.

### **Disposal**

86. The petition is declined and dismissed. I make no order as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF FEBRUARY 2025**

**E C MWITA**

**JUDGE**

