



**Okoti v Permanent Secretary, Ministry of Defence & 3 others
(Constitutional Petition 466 of 2019) [2025] KEHC 1857 (KLR)
(Constitutional and Human Rights) (21 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1857 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION 466 OF 2019**

EC MWITA, J

FEBRUARY 21, 2025

BETWEEN

OKIYA OMTATAH OKOITI PETITIONER

AND

PERMANENT SECRETARY, MINISTRY OF DEFENCE 1ST RESPONDENT

CABINET SECRETARY, NATIONAL TREASURY 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

KAY CONSTRUCTION COMPANY LTD 4TH RESPONDENT

JUDGMENT

Introduction

1. In 25th October 1990, the Ministry of Defence and Kay Construction Company Limited (the 4th respondent) entered into a contract for construction of Laikipia Airbase at a cost of Kshs. 229, 799, 889.60. The 4th respondent completed the works and handed over the project in November 1994.
2. The 4th respondent submitted a final invoice in the sum of Kshs. 93, 642, 605 for the outstanding amount for settlement. The Ministry of Defence paid Kshs. 18,600,000 in July 1998 and a further Kshs. 4,480,841.70 in October 1998 leaving a balance of Kshs. 70, 561,763.30 which the Ministry of Defence failed to settle.
3. The matter was referred to arbitration and in February 2011, an award was issued in favour of the 4th respondent for the sum of Kshs. 335,605,244.69 together with compound interest at 16% p.a from 21st April 2009 until the date of payment. On 17th April 2015 the award was recognized as a judgment of



the Court; a decree was issued on 26th May 2015 and a certificate of costs on 16th July 2015 for Kshs. 826,720,638.69. The Ministry of Defence still failed to settle the amount which as at 8th March 2017 stood at Kshs. 1, 427,137,645.09.

4. Contempt proceedings were commenced against the 1st respondent in Misc. Application No. 39 of 2014-Kay Constructions Company Ltd v The Attorney General to force the Ministry of Defence to settle the outstanding amount. Even then, parties went into negotiations and the government undertook to pay Kshs. 850,000,000 within one year and in default, the entire decretal sum would become due and payable in full.
5. Subsequently, the 1st respondent wrote through letters dated 19th September 2017 and 16th January 2018 to the Permanent Secretary, the National Treasury requesting for money to enable them comply with the terms of the consent to no avail.
6. The consent having not been complied with, on 24th October 2017, the Court found the 1st respondent guilty of contempt of court, but suspended implementation of the decision to allow the 1st respondent time to mitigate the sentence and arrange for payment.
7. On 7th May 2018, the 1st respondent wrote to the 2nd respondent requesting for funds without success. On 17th May 2018 the Permanent Secretary, National Treasury wrote to the 1st respondent instructing them to pay the money either from their already approved budget or to include the same in their next budget if there was no surplus in their already approved budget. There being no payment, on 20th November 2018, the 1st respondent was sentenced to six months imprisonment.

Petitioner's case

8. Following the above background, the petitioner filed this petition seeking several declarations and orders because failure to settle the outstanding amount resulted into unnecessary accrual of interest of daily interest of more than Kshs. 1,150,000 daily raising the judgment debt to Kshs. 1,819,062, 259 at the time of filing the petition, to the disadvantage of the people of this country.
9. The petitioner argued that in failing to pay the 4th respondent, the 1st respondent violated Articles 10, 40, 43, 73(1)(ii)(iv), 73 (2)(b)(d)(e), 201, 226 and 232 of *the Constitution* and section 68(1), 72, 79 and 92 of the *Public Finance Management Act*, 2012 (PFM Act). The petitioner also argued that the 2nd respondent violated Articles 201, 226, 225(3) and (5) of *the Constitution* and sections 12, 93, 97 and 202 (2) PFM Act.
10. The petitioner maintained that the petition raises questions of constitutional interpretation; sets out the 1st and 2nd respondents' actions he believes were unconstitutional and the constitutional provisions violated thus, it meets the threshold for a constitutional petition.
11. According to the petitioner, the decision in *Anarita Karimi v Republic* [1979] eKLR. Should be looked at taking into account the history of that case while bearing in mind *the Constitution*, 2010 and the Mutunga Rules which expand the scope of a litigant to approach the court alleging constitutional violations.
12. The petitioner took the position that the standards in *Anarita Karimi Njeru v Republic* [1979] eKLR have been overtaken by the jurisprudential developments. He relied on the decisions in *Peter M. Kariuki v Attorney General* [2014] eKLR and *John Kipng'eno Koech & 2 others v Nakuru County Assembly & 5 others* [2013] eKLR.
13. The petitioner asserted that the petition raised an issue of violation Article 201(d) of *the Constitution* and thus, this court has jurisdiction under Articles 23 and 165(3) of *the Constitution* to redress. The



petitioner maintained that the preliminary objection is incompetent and does not meet the threshold in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696.

14. The petitioner argued that where a ministry refuses to comply with a court order even after it has been cited for contempt, the only recourse available is to declare the minister in charge of the ministry unfit to continue holding office. The 1st and 2nd respondents should therefore be declared as such. The petitioner relied on Articles 10(1) (c), 73 and 232 (1) (a) of *the Constitution*; Abraham Kiapi: “Ministerial responsibility in East Africa” 4 *African Review* (1974) 565-582 and the decisions in *Econet Wireless Kenya Limited v Minister for Information and Communication of Kenya & another* [2005] eKLR and *Burchell v Burchell* (ECJ 010/2006) [2005] ZAECHC 35 (3 November 2005). Article 10 is on national values and principles of governance; Article 73 is on responsibilities of leadership while Article 232(1)(a) is on the values and principles of public service including -(a) high standards of professional ethics.
15. The petitioner relied on Article 225(3) of *the Constitution* and sections 92-98 of the *Public Finance Management Act*, 2012 for the position that owing to the fact that the Ministry of Defence is unable or unwilling to settle the debts owed to the 4th respondent, the 2nd respondent should have initiated the process of stopping transfer of funds to that ministry.
16. Article 225 is on financial control. Clause (3) states that legislation under clause (2) may authorize the Cabinet Secretary responsible for finance to stop transfer of funds to a state organ or any other public entity-(a) only for a serious material breaches of the measures established under that legislation. Under clause (4), the transfer cannot be for more than sixty days.
17. The petitioner contended that owing to the position that the 2nd respondent has a duty to stop the transfer of funds to the Ministry of Defence which it has not exercised, this court has an obligation to make such orders to ensure that public interest goals sought to be fulfilled by Article 225(3) of *the Constitution* and sections 92-98 of the PFM Act are complied with. He relied on the decisions in *Katiba Institute v President of the Republic of Kenya & 2 others*; *Judicial Service Commission & 3 others (Interested Parties)* [2021] KEHC 442(KLR).
18. The petitioner urged the court to make a declaration that the Ministry of Defence is guilty of serious and persistent material breaches of the provisions of sections 92-98 of the PFM Act as read with Article 225 (3) of *the Constitution* which warrant stopping transfer of funds to that ministry and a mandatory order directing the 2nd respondent to immediately initiate the process of stopping transfer to the Ministry of Defence or face contempt of court proceedings.
19. The petitioner argued that by virtue of Articles 3(1), 21(1), and 201(d) of *the Constitution*, this court is obligated to ensure that the limited State resources are utilized to protect, promote, and fulfil fundamental rights of citizens rather than waste the resources in settling interest that accrued unnecessarily due to deliberate delay in making payment. He urged that the court should issue orders stopping the transfer of funds to the Ministry of Defence with immediate effect to facilitate expeditious settlement of the decretal sum to forestall accrual of interest.
20. The petitioner once again relied on Articles 10(2) (c), 73(2) (d), 232 (1) (a) and 226(5) of *the Constitution*, section 201 (1) (a) of PFM Act, section 9 of the *Leadership and Integrity Act* as well as the decision in *Nicholas Rono v County Secretary County Government Bomet, Bomet County Assembly Service Board, County Government of Bomet & Joel Kipkorir Sigei* [2020] KEELRC 524 (KLR), for the argument that the 1st and 2nd respondents ought to be held personally liable to compensate the government for all losses it will suffer as interest on the decretal sum.
21. Based on those arguments, the petitioner sought the following reliefs:



- a. A declaration that the 1st respondent is unsuitable to hold a public office pursuant to the provisions of *the Constitution* as read together with those of *Leadership and Integrity Act*.
- b. A declaration that the 1st and 2nd respondents violated the provisions of *the Constitution* as well as the *Leadership and Integrity Act* and the *Public Finance Management Act* which violations occasioned the financial problems of the Ministry of Defence forming the subject of this suit.
- c. A declaration that the financial problems of the Ministry of Defence and the financial losses caused thereby to the people of Kenya as well as the 4th respondent were caused solely by the negligence and/or breaches of constitutional and statutory duties on the part of the 1st and 2nd respondents.
- d. A declaration that the 1st and 2nd respondents are liable, pursuant to article 226(5) of *the Constitution* as read together with the provisions of section 202 (2) of the PFM Act to the government in damages for the losses caused sustained on account of their negligence and/or breached of duties.
- e. A declaration that the Ministry of Defence's inability to settle its debts as and when they fall due (including but not limited to its inability to settle the decretal sum herein or to honour the commitments it made to court vide consent judgment filed on 6th July 2017) constitute a serious material breach or persistent material breach of PFM Act which ought to precipitate stoppage of transfer of funds to the Ministry of Defence, until the Ministry's financial problems are resolved.
- f. An order directing the 1st respondent to personally reimburse the government for all interests that have accrued on the judgment from the date of the consent judgment to the date of filing of this suit, which the people of Kenya will be forced to incur solely on account of his negligence and breach of duties.
- g. An order directing the 2nd respondent to personally reimburse the government for all interest that will accrue on the judgment debt from the date of filing of this suit to the date of complete settlement of the judgement debt owed to the 4th respondent.
- h. An order of mandatory injunction directed at the 2nd respondent requiring the said 2nd respondent to immediately stop the transfer of funds to the Ministry of Defence and thereafter proceed to resolve its financial problems pursuant to the provisions of *the Constitution* as well as the PFM Act, or in the alternative, an order directing the 2nd respondent to immediately settle the judgment debt aforesaid.
- i. Cost of this suit.
- j. Any other order that this honourable court deems fit to grant.

1st respondent's case

22. The 1st respondent opposed the petition through a replying affidavit and written submissions. The 1st respondent stated that the Ministry of Defence had not refused to comply with the decree. The 1st respondent pointed out that this court has no jurisdiction to adjudicate on this matter because the issues raised are contractual and best determined before the commercial courts. Further, that the petition does not meet the constitutional threshold and does raise a constitutional question for determination.



23. According to the 1st respondent, the 4th respondent had not exhausted the procedures and remedies available in law for executing a decree against the government. The 1st respondent maintained that every government department, including the Ministry of Defence, is given yearly budgetary allocations through Parliament as presented by the Cabinet Secretary for Finance for expenditure by the Ministries.
24. According to the 1st respondent, the Ministry of Defence had made several requests to the 2nd respondent to factor in the decretal sum in its budgetary allocations without success. The decretal amount could only be paid once it was factored in the financial year's budget or supplementary budget and approved by the Parliament. According to the 1st respondent, the delay in paying the decretal sum was not intentional. As soon as the National Treasury released Kshs. 350,000,000 for payment the money was immediately remitted to the 4th respondent. Any decretal amount can only be paid if approved by the Parliament on the expenditure of the Ministry responsible after it has been factored in the Ministry's budget.
25. The Ministry is only be accountable for what has been allocated to it and since there was no sufficient allocation from Parliament to settle the outstanding decretal amount, it would be unjust to allow the petition as prayed.
26. The 1st respondent stated that the Ministry of Defence and the 4th respondent had been holding negotiations with a view to reducing the decretal amount and capping the interest rate. Negotiations bore fruit and parties arrived at a mutual agreement and came up with a road map which contained the amount payable to the 4th respondent. Following that agreement, the Ministry of Defence paid Kshs. 350,000,000 after getting additional funds from the National Treasury in the year 19/20 supplementary budget.
27. The 1st respondent argued that the petitioner had not specifically pleaded violation of any constitutional rights and freedoms. Reliance was placed on the decision in *Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) v Habil Olaka – Executive Director (Secretary) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association) & Another* [2018] eKLR.
28. The 1st respondent took the view, that even though the petition alleged violation of the 4th respondent's Articles 40 and 43 rights, it was not demonstrated how those rights were violated. The 1st respondent relied on the decisions in *Anarita Karimi Njeru v Republic* (supra); *Harrikson v Attorney General of Trinidad and Tobago* [1980] A.L. 265 and *Peter Solomon Gichira v Attorney General & Another* [2020] eKLR that the petitioner is trying to convolute enforcement of a decree on behalf of the 4th respondent into a constitutional issue.
29. The 1st respondent maintained that the *Leadership and Integrity Act* and the *Public Finance Management Act* do not apply and cannot be the basis of a constitutional petition. Reliance was placed on sections 47 of the *Leadership and Integrity Act* and section 199 of the *Public Finance Management Act*.
30. According to the 1st respondent the argument that it had failed to comply sections 68(1), 72 and 79 of the PFM Act is not correct. The Act provides clearly that it is answerable to the National Assembly in case of a violation of section 68(1) of the Act which is not a function of the court moved through a constitutional petition.



31. It was the 1st respondent's case that the petitioner has no locus standi to bring this petition and relied on Michael Osundwa Sakwa v Chief Justice and President of the supreme Court of Kenya & Another [2016] eKLR and Khelef Khalifa El-Busaidy v Commissioner of Lands & 2 others [2002] eKLR.
32. The 1st respondent maintained that the Ministry of Defence was served with an application dated 19th August 2020 in Patrick Sagwa Kisia t/a Steg Consultants v Kay Construction Company Limited and a court order restraining it from releasing any part of the money payable to the 4th respondent out of the Decree or Orders issued in Misc. App. No. 39 of 2014 Kay Construction Company Ltd v Attorney General.
33. The 1st respondent relied on the decisions in Republic v Principal Secretary, Ministry of Defence ex parte George Kariuki Waithaka [2018] eKLR; Central Bank of Kenya & Another v Ratilal Automobiles Limited & Others (Civil Application No. Nai. 247 of 2006) and Wildlife Lodges Ltd v County Council of Narok and Another [2005] 2 EA 344 (HCK) that in view of the court order barring any further payments towards satisfying the decree, allowing this petition would amount to enforcing a decree that has been stayed by a court of competent jurisdiction.

2nd and 3rd Respondents' case

34. The 2nd and 3rd respondents only filed a preliminary objection that the Court lacks jurisdiction to entertain the petition. Submissions if any were not uploaded on the CTS.
35. According to the 2nd and 3rd respondents, this court has no jurisdiction over this matter since the issue raised is a commercial dispute. They relied on Dock Workers Union & 2 others v Attorney General & 2 others [2019] eKLR; Kenya Ports Authority & 4 others (Interested Parties) [2019] eKLR; Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR and Maggie Mwauki Mtalaki v Housing Finance Company of Kenya [2015] eKLR.

4th respondent's case

36. The 4th respondent filed a replying affidavit sworn by Hasmita Patel, a supplementary affidavit (which cannot however, be opened on the portal) and written submissions.
37. The 4th respondent reiterated the substance the contents of the petition regarding the contract with the Ministry of Defence; the outstanding amount, interest accrual and the constitutional violations, save that the arbitral award was for Kshs. 338,605,244.69.
38. The 4th respondent contended that the 1st and 2nd respondents infringed on its rights guaranteed under Articles 40 and 43 of *the Constitution* and the rights of other members of the public; that the 2nd respondent had contravened Article 225(3) of *the Constitution* as read with sections 92, 93, 94, 95, 97, 98 and 99 of the PFM Act and that the petition is of great public interest.
39. The 4th respondent maintained that the petition was premised on violation and continuing violation of *the Constitution* on public finance and that continued contempt of court by the 1st to 3rd respondents in relation to paying the decretal sum is subjecting the public to loss of resources contrary to the provisions of Article 201 of *the Constitution*.

Determination

40. I have considered the petition, responses and arguments by parties. I have also considered the decisions relied on. The issues for determination are whether there was violation of *the Constitution* and rights



and fundamental freedoms. If the answer is in the affirmative, whether the reliefs sought should be granted.

Violations

41. The gravamen of this petition is a contract entered into between the Ministry of Defence and the 4th respondent for construction of an airbase. The 4th respondent completed the works and handed over the project in November 1994. The 4th respondent submitted a final invoice to the Ministry of Defence for settlement. The Ministry paid some money in July 1998 and again in October 1998 leaving a balance outstanding.
42. Arbitral proceedings were initiated resulting into an arbitral award which was adopted as a judgment of the court and a decree issued. Execution proceedings followed and even contempt proceedings taken out all in an effort to force the Ministry of Defence to pay. The Ministry of Defence and the 4th respondent also entered into negotiations and part of the decretal sum was paid leaving substantial amount together with accrued interest outstanding.
43. The petitioner urged the court to declare that the Ministry of Defence is guilty of serious and persistent material breaches of the provisions of sections 92-98 of the PFM Act as read with Article 225 (3) of *the Constitution*. This infraction, he argued, warrants stopping transfer of funds to that ministry and direct the 2nd respondent to immediately initiate the process of stopping transfer funds or face contempt of court proceedings.
44. It was on that basis that the petition sought the declarations and orders against the 1st and 2nd respondents to hold them accountable for failure by the Ministry of Defence to pay the balance of the decretal amount together with the accrued interest as having violated *the Constitution* and the law. The petition was supported by the 4th respondent, the party owed money.
45. The 1st and 2nd respondents opposed the petition, arguing that the issues raised in the petition are not only commercial in nature which the Commercial Division has jurisdiction to determine, but also that this court has no jurisdiction. The 1st respondent further argued that the Ministry of Defence could only make payments if money was allocated for that purpose by the 2nd respondent and approved by Parliament, a request that has always been made without success.
46. The petitioner filed a constitutional petition claiming violation of *the Constitution* and rights and fundamental freedom. Although the 1st, 2nd and 3rd respondents argued that this Court has no jurisdiction, I do not think this is a noble argument.
47. Article 22(1) grants every person the right to institute proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or is threatened. In that premise, Article 23(1) read with Article 165(3) confers on the Court jurisdiction to determine an application for redress of denial, violation or infringement of a right or fundamental freedom and interpretation of *the Constitution*.
48. The petitioner came to this court in exercise of the right under Article 22 as read with Article 258(1) of *the Constitution* on the basis that the 1st respondent's action of delaying to pay the decretal sum led to accrual of interest thereby violating constitutional and statutory provisions. The 4th respondent supported the petition and added that its rights under Articles 40 and 43 had been violated and the violation was continuing. They wanted the court to find in their favour and grant the reliefs sought and redress the violations.



49. Whether or not there was violation, is first a question of fact. Once facts demonstrate an element of violation to the satisfaction of the court, then a question of law arises and the party claiming violation has to discharge the burden of proof that indeed, constitutional provisions and rights and fundamental freedoms had been violated.
50. I have carefully considered the facts of this petition, the responses thereto and arguments by parties. The critical issue arising is whether the facts disclose violations that this court should redress as prayed.
51. Whereas Article 23(1) grants this Court jurisdiction to redress violations, infringement and or threat to violate rights and fundamental freedoms in the Bill of Rights, Article 165(3)(b) confers on the Court jurisdiction to determine the question whether (b) a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or threatened and, (d) the question respecting interpretation of *the Constitution* and determine the question (ii) whether anything said to be done under the authority of *the Constitution* or of any law is inconsistent with, or in contravention of, *the Constitution*. Determination of violations or infringements must be done under Article 165(3)(b) and (d) first before Article 23(3) is invoked to redress the determined violations, infringements or threats to violate.
52. The facts in this petition point to a contract that was executed between the Ministry of Defence and the 4th respondent. Works were executed to completion and part of the contract sum was paid leaving a balance outstanding. Parties even went to arbitration and an award was made in favour of the 4th respondent and adopted as a judgment of the court. Delayed payment led to institution of contempt proceedings against the 1st respondent. Parties went into negotiation reached a consent and some more money was again paid, but not the whole decretal sum and accrued interest.
53. The petitioner argued that the delay to pay the decretal sum led to unnecessary accrual of interest and, as a result, the public was losing more money, which violated the principles in Articles 10, 73, 232(1) (a) and Article 225 and the PFM Act. For that reason, the court was urged to issue the declarations and orders sought in the petition, a position the 4th respondent supported.
54. The jurisdiction conferred by Article 165(3)(b) and (d) is two-fold. One; to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or threatened; two; (d) the question interpreting *the Constitution*, including (ii) whether anything said to be done under the authority of *the Constitution* or any law is inconsistent with, or in contravention of, *the Constitution*. That is; the remit of the court is to determine any violations of rights and fundamental freedoms in the Bill of Rights and interpret *the Constitution*, including whether a law is inconsistent with *the Constitution* and if whatever was done on the behest and authority of *the Constitution* or any law is inconsistent with, or in contravention of, *the Constitution*. In this respect, it is the acts that are said to have been done or not done in exercise of the authority granted by *the Constitution* or the law that the Court has to determine whether they were inconsistent with or contravened that Constitution.
55. A reading of the petition does not reveal a concise pleading allegation that the 1st and 2nd and respondents violated rights and fundamental freedoms in the Bill of Rights. The petitioner pleaded that the rights under Articles 40 and 43 were violated. The 4th respondent also argued in support of violation of its Articles 40 and 43 rights. These averments were made in a response to the petition thus, supporting the petition. article 40 is on property rights while article 43 is on social economic rights. It was not clear how these rights were violate taking into account the facts giving rise to this petition.
56. Further, the petition is not candid that the manner in which the 1st, 2nd, or 3rd respondents exercised authority conferred by *the Constitution* was inconsistent with, or in contravention of, *the Constitution*. The petitioner's case is that the Ministry of Defence did not pay the full decretal sum leading to



- unnecessary accrual of interest, which was a failure on its part. This could not be a violation of a right or fundamental freedom in the Bill of Rights given that being a decree, it can be executed against the Ministry and the law provides how to do so. Moreover, there is also averment in the pleadings that parties had entered into negotiation and, as a result, some money was paid, though not the whole amount, meaning action was being taken to settle the decretal amount, the slow pace notwithstanding.
57. The petitioner did not point out any law that provides for timelines within which a decree should be paid and which the 1st, 2nd or 3rd respondents were violating. Regarding accrual of interest, interest arises from a decree or order of the Court and applies to any party against whom judgment and decree is issued.
 58. The 1st respondent argued that the Ministry of Defence could only settle the decree if money was allocated for that purpose by the 2nd respondent and approved by Parliament. according to the 1st respondent, the Ministry of Defence had made several requests through its budgetary proposals without success. Failure to pay was, therefore, not for lack of trying.
 59. It is also important to note the 1st respondent's argument that they were served with a court order issued in an application dated 19th August 2020-Patrick Sagwa Kisia t/a Steg Consultants v Kay Construction Company Limited restraining the Ministry of Defence from releasing any part of the money payable to the 4th respondent out of the Decree or Orders issued in Misc. App. No. 39 of 2014 Kay Construction Company Ltd v Attorney General. They could not therefore act in violation of that court order. This position was not contested by the 4th respondent, the party to the application in which the order was issued. This uncontested fact further justified why the Ministry of Defence could not pay any money owed to the 4th respondent.
 60. The petitioner argued that 2nd respondent could stop transfer of funds to the Ministry of Defence because of the failure by the Ministry of Defence to make the payments. This is an interesting argument. Under Article 225(3) (a), transfer of funds to a Ministry can only be stopped for a "serious material breach" and only for sixty days and it is only the 2nd respondent who can do so. Failure to pay a decree cannot, in my view, be said to be a serious material breach as contemplated by [the Constitution](#) where the Ministry of Defence had not been put into funds for that purpose.
 61. Furthermore, section 168(1) is clear that accounting officer for national government, Parliamentary Service Commission and the Judiciary are accountable to National Assembly for ensuring that resources are used in a way that is careful and authorised and effective, efficient and transparent. This must apply where funds for paying the decretal amount had been provided for but were not utilised for that purpose.
 62. In this petition, although the petitioner argued that there was violation of constitutional provisions, it must be seen for what it is. The real issue here is about execution of the decree issued in favour of the 4th respondent as opposed to one of violation of rights and fundamental freedoms; violation of [the Constitution](#), or exercising authority in contravention of [the Constitution](#).
 63. Execution of the decree is an issue between the 4th respondent and the Ministry of Defence. If the 4th respondent believed that the Ministry of Defence had violated Articles 40 and 43 rights, it could move the appropriate court for execution as provided for in law, but not through this petition and not in the manner pleaded.
 64. I respectfully agree with the observation in *Grays Jepkemoi Kiplagat v Zakayo Chepkonga Cheruiyot* [2021] that for a constitutional petition to be sustainable, it must satisfy a basic threshold by clearly identifying the constitutional provisions that are alleged to have been violated or threatened with violation. There has to be particulars of alleged infringements in terms of the Court's mandate under



Article 165(3)(b) and or (d) of *the Constitution* to enable the other party respond to the allegations and for the Court to fairly determine the questions presented before it.

65. The Supreme Court reiterated this position in *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR stating (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...”
66. In *Godfrey Paul Okutoyi & others v Habil Olaka & Another* [018] eKLR, this Court observed:
- (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.”
67. 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.
68. In this case, the 4th respondent having obtained a decree, in its favour, it can only execute that decree as provided by law. Allegations that there was violation of constitutional principles of public finance must be seen from the context of the facts giving rise to this petition. I do not agree with the petitioner that this Court can bar transfer of funds to the Ministry of Defence for the reasons advanced in the petition.
69. In the circumstances of this case, I agree with the 1st to 3rd respondents, that the issue being contractual and there being a decree, it could not give rise to a constitutional petition in the manner pleaded. If there was violation of any statutory provision, the recourse lies elsewhere but not in this court exercising its constitutional jurisdiction. I therefore find and hold that the issues raised in this petition do not constitute constitutional questions to be determined in a constitutional petition in exercise of the Court’s jurisdiction donated by Article 23 as read with 165(3)(b) and (d) of *the Constitution*.

Conclusion

70. Having considered the pleadings, arguments and the decisions relied, the conclusion I come to, is that the issues raised in the petition having arisen from a contract, and judgment having been entered in favour of the 4th respondent against the Ministry of Defence and a decree issued, the issues raised do



not constitute a new cause of action that can be determined through a constitutional petition under Articles 22 and 23 (1) as read with Article 165(3)(b) and (d) of *the Constitution*. There is also no clearly discernible violation of either *the Constitution* or rights and fundamental freedoms.

71. There is also a Court order stopping payment of any money out of the decretal sum due to the 4th respondent by the Ministry of Defence the subject of this petition, which the 4th respondent has not controverted.

Disposal

72. The petition is declined and dismissed. I make no order on costs.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY 2025.

E C MWITA

JUDGE

