



**Chege (Suing on Behalf of Nellie Muthoni Mathu) v Kamuru (Petition E041 of 2025)
[2025] KEHC 3137 (KLR) (Constitutional and Human Rights) (18 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3137 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E041 OF 2025
AB MWAMUYE, J
MARCH 18, 2025
IN THE MATTER OF BILL OF RIGHTS AND ARTICLES 19, 22, 23,
28, 29, 32, 39 AND 40 OF THE CONSTITUTION OF KENYA 2010
AND
IN THE MATTER OF DENIAL OF RIGHTS TO HUMANE TREATMENT
PROVIDED FOR BY ARTICLE 29 (VI) OF THE CONSTITUTION OF KENYA 2010
IN THE MATTER OF DENIAL OF FREEDOMS
OF PRIVACY, MOVEMENT AND ASSOCIATION**

BETWEEN

**GEORGE NGUGI CHEGE PETITIONER
SUING ON BEHALF OF NELLIE MUTHONI MATHU**

AND

MARYLYN MUTHONI KAMURU RESPONDENT

RULING

Introduction And Background

1. The Petitioner, George Ngugi Chege, vide a Petition and Notice of Motion, both dated 28th January, 2025 brought the present suit on behalf of his sister, Nellie Muthoni Mathu (hereinafter “The Subject Person”), alleging violations of constitutional rights by the Respondent, who is the daughter of The Subject Person. The Petitioner alleges infringement of several fundamental freedoms under the Bill of Rights and seeks remedies accordingly. The Petitioner contends that The Subject Person, who is of sound mind but physically confined to her residence, has been subjected to infringement of her rights by the Respondent.



2. The Petitioner, states that The Subject Person is being subjected to unconstitutional confinement by the Respondent. Specifically, the Petitioner alleges that the Respondent:
 - a. Confiscated The Subject Person’s mobile phone, title documents, identification documents and other personal documents;
 - b. Dismissed and replaced The Subject Person’s domestic staff with her own;
 - c. Restricted the movement of and access to The Subject Person’s home by other relatives and friends;
 - d. Purports to treat The Subject Person for dementia despite medical evidence suggesting otherwise;
 - e. Confiscated her car keys and confined her to her house.
3. The Petitioner avers that these acts amount to violations of Articles 29(b) & (f), 31(d), 36, 40, and 43 of *the Constitution*. The Petitioner further relies on Articles 19, 20, 22, 23, and 28 to anchor the prayer for enforcement of fundamental rights.
4. The Petitioner emphasizes that if the Court does not intervene urgently, The Subject Person will remain a “prisoner” in her own house and may suffer further harm to her health and well-being. Affidavits by Eunice Wambui Wachira, The Subject Person’s eldest sister, and that of Jane Njeri Mutiso, a longtime family friend bolster these claims. They each describe instances where they were denied access to The Subject Person’s home and voice concerns that the Respondent, while seeking guardianship through a Family Division case, is nonetheless isolating The Subject Person and administering medication for a questionable dementia diagnosis.
5. The Petitioner argues that the Family Division proceedings do not address the alleged constitutional violations of personal liberty, dignity, and property rights. Instead, those proceedings focus on a guardianship application and the question of The Subject Person’s mental capacity, matters which, from the Petitioner’s point of view, do not adequately cover the alleged ongoing infringement of constitutional rights.
6. Accordingly, the Petitioner avers that the constitutional forum is the correct platform to remedy these grievances because they are framed as breaches of the Bill of Rights, particularly freedom of movement, right to property, right to privacy, and freedom from cruel, inhuman, or degrading treatment.
7. He, therefore, seeks various remedies, including orders restraining the Respondent from interfering with The Subject Person’s freedom of movement and association, the return of her personal property, and an injunction preventing the Respondent from entering or controlling The Subject Person’s home without permission.
8. In response, the Respondent filed a Replying Affidavit sworn on 6th February, 2025, denying violating any constitutional rights as alleged by the Petitioner. She states that any actions taken, such as restricting access to her mother and limiting phone use, were recommended by doctors and motivated solely by her mother’s health needs. The Respondent further avers that her mother was involved in an accident in July, 2024 which left her with injuries and while undergoing medical treatment, she was diagnosed with dementia and thus her actions are aimed at protecting her mother who, requires a calm environment and consistent care. According to the Respondent, the confiscation of The Subject Person’s phone and appointing her new staff were necessary measures to ensure her mother is well taken care of and gets to recover quickly.



9. The Respondent insists she has lawfully acted as her mother’s primary caregiver and co-administrator of her late father’s estate, while also pursuing formal guardianship in the Family Division of the High Court.
10. In support of her case, the Respondent filed a Notice of Preliminary Objection dated 6th February, 2025 to strike out the Petition and Notice of Motion. In the Notice of Preliminary Objection, the Respondent contends that:
 - a. the enforcement of the Bill of Rights is typically against the State, not private individuals,
 - b. that no genuine constitutional issue has been disclosed in the petition, and that through the doctrine of Constitutional avoidance, and/or
 - c. the case is more appropriately dealt with under existing statutory or common law processes, specifically, the pending guardianship proceedings in the High Court, Family Division, Milimani Law Courts.
11. The Preliminary objection was argued orally. The learned counsel for the Petitioner argued against it by stating that the Applicant is not looking to take care of the subject and is asking the court to enable the subject to take care of herself. He further argued that this matter does not relate to the guardianship proceedings and those are defended the way they are defended and they are being dealt with, but so long as the subject is not able to access the outside world including her lawyers then she is being kept in a virtual prison and that is purely a constitutional issue. On the other hand, the learned counsel for the Respondent argued in support of the Preliminary objection. He averred that how could the Petitioner be have all the information regarding The Subject Person in his affidavit if he does not have access to her. He further argued that the doctrine of constitutional avoidance should apply here since there is a pending suit in the High Court family division, urging the Court to dismiss the Petition and Notice of Motion.
12. It is the Respondent’s position that the Family Division is the best-suited forum to address questions regarding the well-being, capacity, and property management of her mother. Consequently, any alleged infringements, if any, should be resolved under the relevant statutory provisions rather than by invoking *the Constitution* directly.
13. Having considered the pleadings, affidavit evidence, submissions by counsels, and authorities filed, the Court identifies the following issues for determination:
 - a. Whether the Petition discloses a prima facie constitutional cause of action particularly on the question of whether the Bill of Rights in these circumstances extends to purely private disputes.
 - b. Whether the doctrine of constitutional avoidance applies and which forum is best suited to hear this matter.
 - c. Who should bear the Costs.

Analysis And Determination

14. As has been severally held, jurisdiction is everything, without which, a court of law downs its tools in respect of a matter before it the moment it holds the opinion that it is without it. (see Owners of Motor Vessel “Lillian S” vs Caltex Oil (k) Ltd (1989) KLR 1 Per Nyarangi JA. See also the Court of Appeal decision in Owners and Masters of Motor Vessel “Joey” VS Owners and Masters of the Motor Tugs



“Barbara” and “Steve B.” [2008]1 EA 367 where, echoing the decision in the case of Owners of Motor Vessel “Lillian S”, the Court of Appeal held, inter alia:

“The question of jurisdiction is threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step.....”

15. Further, jurisdiction cannot be conferred by parties to a dispute. It is *the Constitution* or other written laws that confer jurisdiction on courts. Jurisdiction cannot be decided by an erroneous decision. See Carmella Wathugu Karigaca vs Mary Nyokabi Karigaca CA 30 of 199.
16. Jurisdiction of this court is provided for in Article 165(3) of *the Constitution*. This court has jurisdiction to, among others, determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; hear any question respecting the interpretation of *the Constitution*, including the determination of the question 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*.

Further Article 23(1) of *the Constitution* states; -

“The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.”

17. Article 165(3) thus, authorizes this court to decide all matters brought before it other than those reserved for other courts as contemplated in article 162 (2). That is, matters reserved for the exclusive Jurisdiction of the Employment and Labour Relations Court and Environment and Land Court, or restricted by article 165(5) and (6) of *the Constitution*.
18. From the sweep of the constitutional authorization given to the High Court, the court has wide jurisdiction to hear and determine various matters that may be brought before it. Whether or not this court has jurisdiction to hear and determine this Petition must, therefore, be viewed through the prism of article 165(3)(b) and (d). The question here is whether the petition raises a prima facie cause of action and whether the doctrine of constitutional avoidance raised denies or restricts this court’s jurisdiction. From the aforementioned Articles, it is clear, the jurisdiction of this Court has been confined to interpretation of any constitutional question as well as redress for violations of constitutional rights.

Prima Facie Cause of Action and Horizontal Application of the Bill of Rights

19. Article 22(1) of *the Constitution* of Kenya provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, or infringed, or is threatened. Article 22(2) states that: -
 - (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
 - (a) a person acting on behalf of another person who cannot act in their own name;
 - (b) a person acting as a member of, or in the interest of, a group or class of persons;



- (c) a person acting in the public interest; or
- (d) an association acting in the interest of one or more of its members.

20. In the instant case, the Petitioner has brought this suit on behalf of his sister, The Subject Person, alleging that she is of sound mind but physically confined to her residence, thereby she has been subjected to infringement of her rights by the Respondent, who is her daughter. The petitioner contends that such an act is enshrined in the constitution under Article 22 and I agree with the Petitioner in that regard.

21. Whereas in older constitutional dispensations, certain rights primarily bound the State, the 2010 Constitution contemplates the possibility of private persons violating constitutional rights in specific contexts (horizontal application). Courts, for instance, have held that “a private entity or individual may be amenable to constitutional claims if it is established that the nature of the right and duty in question apply horizontally.” (See *Satrose Ayuma & 11 Others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 Others* [2013] eKLR)

22. The Respondent argues the enforcement of rights under the Bill of Rights must be against the State. However, Article 20(1) of the Constitution clearly provides:

“The Bill of Rights applies to all law and binds all State organs and all persons.”

23. In the case of *Mwangi Stephen Mureithi v Daniel Toroitich Arap Moi*, Petition Number 625 of 2009 [2011] eKLR Gacheche J., observed that: -

“...the rigid position that human rights apply vertically is being overtaken by the emerging trends in the development of human rights litigation...We can no longer afford to bury our heads in the sand for we must appreciate the realities which is that private individuals and bodies such as clubs and companies wield great power over individual citizenry who should as of necessity, be protected from such non-state bodies who may for instance discriminate unfairly or cause other constitutional breaches...The major challenge to horizontal application of human rights is the fact that it (is) a novel area and courts bear great responsibility of examining individual cases so as to decide each case on its own merits as a horizontal application does not and should not cut across the board...I find that fundamental rights are applicable both vertically and horizontally save that horizontal application would not apply as a rule but it would only be an exception which would obviously demand that the court do treat (it) on a case by case basis by examining the circumstances of each case before it is legitimized.”

24. In *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] KECA 445 (KLR), the court stated that: -

“It still remains to reiterate that the landscape of locus standi has been fundamentally transformed by the enactment of the Constitution in 2010 by the people themselves. In our view, the hitherto stringent locus standi requirements of consent of the Attorney General or demonstration of some special interest by a private citizen seeking to enforce a public right have been buried in the annals of history. Today, by dint of Articles 22 and 258 of the Constitution, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest. Pursuant to Article 22 (3) aforesaid, the Chief Justice has made rules contained in Legal Notice No. 117 of 28th June 2013 –



The Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013—which, in view of its long title, we take the liberty to baptize, the “Mutunga Rules”, to inter alia, facilitate the application of the right of standing. Like Article 48, the overriding objective of those rules is to facilitate access to justice for all persons. The rules also reiterate that any person other than a person whose right or fundamental freedom under the Constitution is allegedly denied, violated or infringed or threatened has a right of standing and can institute proceedings as envisaged under Articles 22 (2) and 258 of the Constitution.

(29) It may therefore now be taken as well established that where a legal wrong or injury is caused or threatened to a person or to a determinate class of persons by reason of violation of any constitutional or legal right, or any burden is imposed in contravention of any constitutional or legal provision, or without authority of law, and such person or determinate class of persons is, by reason of poverty, helplessness, disability or socio-economic disadvantage, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Articles 22 and 258 of the Constitution.

25. Therefore, it is settled law that private individuals, including family members, can indeed be held accountable for constitutional rights violations under certain circumstances.
26. Nonetheless, a Petitioner must establish with reasonable precision how one’s actions amount to an infringement of the Bill of Rights. In this case, the Petitioner lists Articles 28, 29, 31, 36, 39, 40, and 43, alleging they have been infringed by the Respondent. The Respondent, on her part, indicates that certain sub-Articles of Article 29, namely (b) relating to detention without trial, and (f) relating to torture or inhuman treatment are almost always directed at State actors or persons exercising State-like authority. The question of whether they can apply to purely private persons depends on the circumstances though not impossible, it requires a factual nexus which must be clearly set out.
27. In the present case, the Petitioner argues that The Subject Person has been confined at her home to the exclusion of others. In their Supporting affidavits, the Petitioner and others have stated that they were allowed to visit The Subject Person under the supervision of the staff. Further in the affidavit sworn by Eunice Wambui, she stated that she has on several occasions been visiting The Subject Person since she came back to Kenya thereby confirming that The Subject Person has not been denied to have visitors, friends or other relatives from visiting her.
28. While it is correct that the Bill of Rights can, in certain contexts, bind private individuals, Article 20(1) and (2), a party seeking to enforce those rights against a private individual bears the burden to show that the specific constitutional provisions invoked do indeed apply horizontally. In this case, the Petitioner’s references to Articles 29(b) & (f) are insufficiently grounded because those provisions have not been well specified by the petitioner as The Subject Person, has had other visitors at her place and the Respondent has been issuing out her car to take her outside. Furthermore, the subject herein, The Subject Person, has not filed any documents in support of the petition proving the said facts to be true nor has she been presented to court by the petitioner to confirm the said allegations.

Doctrine of Constitutional Avoidance and Pending Family Division Proceedings

29. The doctrine of constitutional avoidance provides that where disputes can be resolved under common law or statutory remedies, constitutional jurisdiction should not be invoked prematurely. This principle prevents the over-constitutionalizing of disputes that are otherwise resolvable through ordinary civil remedies. In essence, the doctrine preserves judicial resources and avoids encroaching on



matters better resolved by other established appropriate remedies. In *Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others*, the Supreme Court stated that: “The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis.”

30. In *Uhuru Muigai Kenyatta vs. Nairobi Star Publications Limited* [2013] eKLR, Lenaola, J held that:

“Where there is a remedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in *Haco Industries* (supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in *AG vs S.K. Dutambala Cr. Appeal No. 37 of 1991* (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions.”

31. Similarly, in *John Harun Mwau vs. Peter Gastrow & 3 Others* [2014] eKLR, it was observed that *the Constitution* only ought to be invoked when there is no other recourse for disposing of the matter and in which the Court expressed itself in the following terms:

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights...It is an established practice that where a matter can be disposed of without recourse to *the Constitution, the Constitution* should not be invoked at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so.”

32. In the instant case, there is an ongoing guardianship matter in the High Court before the Family Division, in which The Subject Person’s capacity, welfare, and property management are directly in issue. That matter has already been referred to mediation, with parties being represented by their own advocates. Those proceedings clearly provide a suitable forum for investigating and resolving all allegations about whether The Subject Person is (a) properly cared for, (b) mentally and physically well, and (c) consenting or objecting to certain decisions made on her behalf.

33. If there is an available, sufficient, and effective statutory or specialized court mechanism, particularly one already seized of the dispute, the Court is guided to allow that forum to make a determination. *The Constitution* is not to be invoked merely because a party believes their rights are infringed, it must be shown that the specialized forum cannot adequately address the issues or that a direct constitutional question must be adjudicated.

34. Looking at the nature of the dispute, a Constitutional Petition may not be the best forum to hear and determine the dispute. A Constitutional Petition is predicated on a linear floor that has a beginning and an end. It cannot sit for a long period of time where issues arise and are canvassed within an existing suit. A Petition determines itself and extinguishes itself, a final order is given and it is extinguished. A family division matter is able to sit longer and is able to canvass the issues in dispute better. It also applies statutory questions better such as the *Mental Health Act*, which a Constitutional Petition is not well suited to do.

35. A careful analysis of the pleadings leads this Court to conclude that, fundamentally, the Petition concerns disagreements over guardianship and management of an elderly parent’s affairs. These issues lie squarely within the jurisdiction of the Family Division Court, and therefore they can be adequately addressed by the said court.



36. A Preliminary Objection, as famously stated in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, should be based on a pure point of law argued on the assumption that all facts pleaded by the other side are correct. It should not rely on ascertainment of contested facts. While discussing what constitutes a Preliminary objection, the court said: -

“...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.”

In the words of Sir Charles Nwebold P at page 701, B: “...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

37. In my view, a preliminary objection can be raised on any of the following grounds:

- a. Lack of jurisdiction over the subject matter of the action or the person of the defendant, improper venue or improper form or service of a writ of summons or a complaint;
- b. Failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter;
- c. Insufficient specificity in a pleading;
- d. Legal insufficiency of a pleading (demurrer);
- e. Lack of capacity to sue, non-joinder of a necessary party or mis-joinder of a cause of action; and
- f. Pendency of a prior action or agreement for alternative dispute resolution.

38. Considering the ratio decidendi in the above-cited case, this court concludes, without much hesitation, that the issues raised do fall squarely within the scope of a “preliminary objection”; as the Preliminary Objection filed by the Respondent raises threshold questions of law: a. Whether the Bill of Rights predominantly applies to the State or State-like actors, or if it may also apply to private persons in this context. b. Whether the Petition discloses a coherent constitutional question or cause of action. c. Whether the matter is more appropriately dealt with by the High Court Family Division, thereby invoking the doctrine of constitutional avoidance.

39. It is not disputed that there is a pending guardianship suit in the High Court, Family Division, Milimani Law Courts. It is also evident that the Petitioner’s grievances revolve around alleged deprivations of property and liberty that strongly overlap with the guardianship questions, explicitly, whether The Subject Person is mentally fit, whether the Respondent is validly acting on her behalf, and how best to manage The Subject Person’s interests. Those are precisely the matters typically adjudicated under the *Mental Health Act* and the guardianship framework, not necessarily in a constitutional petition.

40. The High Court, sitting in the Constitutional and Human Rights Division, retains the mandate to adjudicate legitimate constitutional grievances. However, in light of the principle of constitutional avoidance, the specific nature of these claims, and the existence of the pending guardianship suit, it is manifest that the Family Division is best placed to address and resolve the real controversy.



41. If indeed there are breaches of The Subject Person’s welfare or property rights, the Family Court seized of the guardianship matter can protect and enforce her interests, whether by orders of guardianship, directions on visitation, or protective orders regulating access to her. There is no need to fragment the litigation by running a parallel constitutional petition in this Division.
42. On account of the reasons set out above, the Court is persuaded that the Petition offends the doctrine of constitutional avoidance. The Petitioner ought to pursue remedies under the already existing suit in the Family Division or a new matter; where all parties can comprehensively ventilate their positions regarding The Subject Person’s health, care, property, and related matters and thereby this Court finds that the preliminary objection raised has merit.
43. Ultimately, while any person is entitled to a remedy for breach of rights, *the Constitution* contemplates that the remedy must be sought in the right forum and in the correct manner. The High Court in Family Division is better suited in this particular instance to address the care, management, and property issues surrounding The Subject Person’s affair. It therefore follows that the Preliminary Objection has succeeded.
44. This Court has power to order a transfer of a matter to another High Court. However, in this case, I have considered the nature of the Petition and the Application herein and I am satisfied that a transfer may not be proper as the Family Division matter can better receive the matters herein either vide an Application of whatever nature in the existing matter or through fresh process before that Division, as opposed to their blanket transfer.
45. The Petition herein and the matters at issue involve deeply emotive and personal matters by persons with close ties. In the circumstances, it is proper that each party bear its own costs.
46. In the result, this Court makes the following orders:
 - i. The Respondent’s Preliminary Objection dated 6th February, 2025 is upheld;
 - ii. The Petitioner’s Petition and Notice of Motion dated 28th January, 2025 are struck out with liberty to pursue appropriate remedies within the existing Family Division proceedings or fresh ones;
 - iii. In the circumstances of the matter, it is just that each party shall bear its own costs.

It is so ordered, and file closed accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF MARCH 2025.

BAHATI MWAMUYE

JUDGE

In the presence of: -

Counsel for the Petitioner – Ms. Maina h/b Mr. Mbigi

Counsel for the Respondent – Mr. Nelson Havi

Court Assistant – Ms. Neema

