



**Cheruiyot v Cabinet Secretary, Ministry of Roads and Transport
& 4 others (Petition E483 of 2023) [2025] KEHC 6111 (KLR)
(Constitutional and Human Rights) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6111 (KLR)

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

PETITION E483 OF 2023

LN MUGAMBI, J

MAY 15, 2025

BETWEEN

KIPKOECH EVANS CHERUIYOT PETITIONER

AND

**CABINET SECRETARY, MINISTRY OF ROADS AND
TRANSPORT 1ST RESPONDENT**

INSTITUTION OF SURVEYORS OF KENYA 2ND RESPONDENT

PRESIDENT, INSTITUTION OF SURVEYORS OF KENYA .. 3RD RESPONDENT

ABRAHAM SAMOEI 4TH RESPONDENT

ATTORNEY GENERAL 5TH RESPONDENT

JUDGMENT

Introduction

1. The petition dated 27th November 2023 is supported by the petitioner’s affidavit in support of similar date and a further supplementary affidavit dated 23rd July 2024.
2. The petitioner challenges the 4th respondent’s nomination and appointment as a member to the Board of Kenya Urban Roads Authority [KURA] on the basis that it violates Article 10 of the *Constitution* and Section 11 [1] [g] [iv] & [2] of the *Kenya Roads Act*, thus unlawful.
3. Accordingly, the petitioner seeks the following reliefs against the respondents:



- a. A declaration that the appointment of the 4th respondent to the Board of Kenya Urban Roads Authority is null and void for violating the provisions of Article 10 of the [Constitution](#).
- b. A declaration that the appointment of the 4th respondent to the Board of Kenya Urban Roads Authority is null and void for violating the constitutional principle of rule of law by contravening Section 11 [1] [g][iv] & [2] of the [Kenya Roads Act 2007](#).
- c. An Order be issued quashing the appointment of the 4th respondent, Mr. Abraham Samoei to the Kenya Urban Roads Authority board.
- d. An order be issued that within sixty [60] days from the date of this Judgement, the 1st respondent shall appoint a member of the Institution of Surveyors Kenya [ISK] to the Kenya Urban Roads Authority board and in strict compliance with the law and the observations of this Court.
- e. Any other order as deemed fit.
- f. Costs of the suit herein.

Petitioners' Case

4. The petitioner stated that he is a member of the 2nd respondent.
5. By Gazette Notice No.16167 dated 24th November 2023, the 1st respondent appointed the 4th respondent to be a member of the KURA Board. This was to be for a period of 3 years commencing on 24th November 2023.
6. According to the petitioner, this appointment was in contravention of Section 11[1] [g] [iv] the [Kenya Roads Act](#) which provides that the 1st respondent is to make this appointment from among three persons who are to be nominated and approved at the 2nd respondent's Annual General Meeting [AGM].
7. The petitioner asserts that no such nomination and approval was made in any AGM, the last being on 4th August 2023 prior to the 4th respondent's appointment.
8. Furthermore, it is asserted that the 4th respondent's name was not forwarded to the 1st respondent by the 3rd respondent as required by law. Likewise, it is argued that the 4th respondent lacks the requisite qualifications to be appointed as such. This is because he is not a surveyor as required by the Act, but a valuer.
9. Consequently, the petitioner asserts that by appointing the 4th respondent contrary to the law, the respondents violated Articles 10[1][b]; [2][a] & [b], 27[1] of the [Constitution](#). In addition, failure to undertake a competitive process is said to be in breach of Section 11[2] of the Roads Act. It is contended moreover that appointment of an unqualified person to the post is a threat to the lives and safety of the Kenyan public hence a threat to Article 26 of the [Constitution](#).
10. The petitioner informs that an attempt at an Alternative Dispute Resolution between the parties was unsuccessful. This meeting was held at the Bonds Restaurant, Upper Hill on 21st December 2023. The petitioner alleges that in the meeting attended by the 3rd and 4th respondent among other, it was resolved that the matter was beyond them.

1st Respondent's Case

11. This party's response and submissions are not in the Court file or Court Online Platform [CTS].



2nd and 3rd Respondent's Case

12. In response to the petition, the 2nd and 3rd respondents filed their grounds of opposition dated 8th April 2024 on the premise that:
- i. The petition has failed to satisfy the threshold of what constitutes a constitutional petition as per the principle established in the case of *Anarita Karimi Njeru v The Republic* [1979] eKLR which principle was later restated by the Court of Appeal in the case of *Mumo Matemo v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR as the petitioner did not specifically identify the constitutional provisions that are alleged to have been violated or threatened to be violated and the manner of the violation and/or threatened violation.
 - ii. There are no discernable constitutional issues in the petition to warrant its admission and adjudication before this Court.
 - iii. The nomination of the 4th respondent for Appointment to be a Member of the Kenya Urban Roads Authority by the Council of the 2nd respondent, was in accordance with Rule 8 of the Constitution and by-laws of the Institution of Surveyors of Kenya [ISK], which provides that the Council may, from time to time, elect fellows or full members to represent the Institution in any representative statutory or other bodies.
 - iv. The petitioner has not exhausted the internal dispute resolution mechanism provided under Article 29 of the Constitution of the Institute of Surveyors of Kenya which provides an elaborate dispute mechanism for dispute resolution between members of the Institution before invoking the jurisdiction of this Court.
 - v. The doctrine of avoidance as fortified in the Supreme Court stated in *Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others* [2014] eKLR states that the principle of avoidance means that when a party has an appropriate forum before which to seek redress, it is incumbent upon them to raise their concerns before the said forum as opposed to invoking the constitutional jurisdiction of the Court at the outset.
 - vi. The petition discloses no reasonable cause of action as against the 2nd and 3rd respondent herein.
 - vii. The petition is incompetent, misconceived, misplaced and is an abuse of the Court and ought to be dismissed.
13. In addition, these respondents on 24th April 2024 filed a Notice of Preliminary Objection and a replying affidavit by the 3rd respondent sworn on the same day.
14. The 2nd and 3rd respondents in the Notice of Preliminary Objection oppose this petition on the premise that:
- i. Under Article 29 of the 2nd respondent's Constitution and also under Section 4 and 6 of the *Arbitration Act* this Court has no jurisdiction to hear this matter.
 - ii. Article 29 of the 2nd Respondent's Constitution provides as follows:
 - a. Any disputes arising among the members shall, in the first instance:
 - i. If it arises between members as such, be dealt with by the Professional Practice and Disciplinary Committee
 - ii. If it arises within an organ, be dealt with within such organ



- iii If it arises among the Committees or between them and the Secretariat, be dealt with by the Council
 - iv If it arises between the Council and any of the other organs, be dealt with by the General Assembly.
 - b. Any dispute which cannot be internally resolved as indicated in sub-Article [a] shall be submitted to arbitration.
 - c The Institution shall seek the services of the Institute of Arbitrators [Kenya] or any other similar body to identify and appoint suitable arbitrators to resolve the dispute.
15. In their reply, he depones that vide a letter dated 10th March 2022, the 1st respondent requested the 2nd respondent to nominate 3 candidates for appointment to the KURA Board in line with Section 11[i] [g] and [2] of the *Kenya Roads Act*.
 16. He asserts that while Section 11[2] of the *Act* provides that the three persons be nominated and approved by the 2nd respondent at its AGM, the Section does not specify a detailed procedure for the nominations and appointment appreciating that each organization is distinct and with its own unique methods of appointment. As such, he claims that there cannot be a single standard method of appointment.
 17. He informs that the 2nd respondent's Constitution under Rule 8 grants the Council the mandate to elect and appoint nominees to any representative statutory body or other body. He enlightens that customarily such nominees are selected at the 2nd respondent's Council meetings. He claims that calling for an AGM for each nomination is neither feasible or economical.
 18. He depones that the Executive Committee on 8th September 2022 met and discussed the Board nominations to the Boards of KURA and Kenya Rural Roads Authority [KERRA]. The Council approved the names that had been submitted to the 1st respondent by the 2nd respondent. The list of nominees also included the petitioner. It is stated that the 4th respondent's appointment was based on the 1st respondent's discretion.
 19. He avers that the petitioner's claim that the 4th respondent is unqualified is misleading. He informs that the 2nd respondent under Article 10 of its Constitution is categorized into 8 chapters being: Valuation Surveyors, Land Surveyors, Geospatial Information Management Surveyors, Engineering Surveyors, Property Management, Building Surveyors, Land Administration Management Surveyors and Estate Agency Surveyors. categorized into 8 chapters being: Valuation Surveyors, Land Surveyors, Geospatial Information Management Surveyors, Engineering Surveyors, Property Management, Building Surveyors, Land Administration Management Surveyors and Estate Agency Surveyors.
 20. He avers that the definition of a surveyor under Article 1 of their Constitution affirms that the 4th respondent is qualified as he is involved in the practice of assessing the value and management of property, selling and letting property, which is within the purview of surveying. He also notes that the 4th respondent is a licensed practitioner who has been in this field for 12 years and thus possesses the necessary academic qualifications and technical expertise.
 21. On this premise, he contends that the 4th respondent's appointment met the test set out under the 2nd respondent's Constitution and so no fundamental rights were violated as claimed to justify invoking of this Court's jurisdiction.
 22. Furthermore, he makes known that the 2nd respondent's Constitution under Article 29 provides an internal dispute resolution mechanism which the petitioner being a member is aware of but failed to



utilize and exhaust. On this basis, he avers that the petition ought to be struck out. Similarly, he states that the petition is incompetent, misconceived and an abuse of the Court process.

4th Respondent's Case

23. The 4th respondent in response to the petition filed his replying affidavit sworn on 7th February 2024.
24. He depones that he is a registered and licensed valuer engaged in valuation of land and buildings. He as well is a registered and licensed estate agent engaged in property management, sales and letting. He states that he has been in this industry for the last 18 years.
25. In addition, he depones that he was the former 2nd respondent's president having been elected in 2018. He served the term up until 2023. Prior to this, he had been the Chairman of the Valuation Chapter from 2016 to 2018. He is currently the Managing Director of Ascendas Kenya, the Chairman of Regent Management and the Director at Sterling Real Estate.
26. He contends that the petitioner has deliberately misled the Court as to who a surveyor is. He states that the correct definition of a surveyor is provided under Article 1 of the 2nd respondent's Constitution. In line with this definition, he informs that he is in the practice of assessing the value and management of property, selling and letting property, which is within the scope of which a surveyor is, thus duly qualified. He adds that he had no undue influence over his appointment as the same was an independent discretionary decision made by the 1st respondent.
27. He reasons that the petitioner filed this petition with a malicious intent aimed at settling personal scores for not being appointed to the position. He depones that during his leadership he upheld the principles of transparency and nominated several persons to various statutory boards. These names were captured in the 2nd respondent's Annual Report and members during the AGM meetings requested to highlight any issue with any of the nominees. Throughout this time, he alleges that the petitioner never raised the issue that these persons had not been approved during the 2nd respondent's AGM.
28. It is asserted that the petitioner in filing this suit disregarded the elaborate and mandatory dispute mechanism set out under Article 29 of the 2nd respondent's Constitution.
29. He contends that the petitioner's rights in this matter were not violated so as to warrant this Court's intervention. Additionally, he points out that the petitioner has not outlined any particular right that has been violated. The petition is thus adjudged to be frivolous and an abuse of the Court process.

5th Respondent's Case

30. The 5th respondent filed its grounds of opposition dated 11th April 2024 on the premise that:
 - i. This petition does not meet the test of a constitutional petition laid down in the case of *Anarita Karimi Njeru v Republic* [No.1] [1979] KLR 154 and emphasized us the case of *Mumo Matemu v Trusted Society of Human Rights alliance* [2014] eKLR, and on that ground alone, we urge that this petition should fail. That apart from citing omnibus provisions of the *Constitution*, the petition has provided neither particulars of the alleged complaints, nor the manner of alleged infringements
 - ii. The petitioner has not exhausted the dispute resolution mechanism provided under Article 29 of the Constitution of the Institute of Surveyors of Kenya which provides an elaborate mechanism for dispute resolution between members of the Institution.



- iii. Pursuant to the constitutional avoidance principle as posed by the Court in the case of *Kiriro Wa Ngugi & 19 Others v Attorney General & 2 Others* [2020] eKLR, where the Court defined the constitutional avoidance doctrine in terms that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion. The Court further stated that the doctrine interrogates whether there are other ways of resolving a dispute outside a constitutional petition.
- iv. The appointment of the 4th respondent was done pursuant to Section 11[1][g] & [2] of the *Kenya Roads Act* of 2007 which do not state that the person to be appointed has to be a surveyor but it states that the person shall be appointed based on their knowledge or experience in surveying.
- v. The 4th respondent is a member of the Institute of Surveyors of Kenya which fact the petitioner has exhibited by attaching the Gazette Notice No. 3080 dated 10th March 2023.
- vi. The respondents reiterate the impugned actions were done pursuant the statutory provisions as expressed in the impugned Gazette Notice No. 16167 of 24th November 2023 and cannot therefore be said to be unconstitutional.

Petitioner's Submissions

31. The petitioner's through Wandeto Wachira Advocates filed submissions dated 23rd July 2024. The issues for discussion were set out as: whether the petition has met the Constitutional threshold of a constitutional petition as per the Anarita Karimi Njeru case and whether the preliminary objection by the 2nd and 3rd respondent's is merited.
32. Counsel affirmed that the petitioner had pleaded in a precise manner, the constitutional provisions deemed to have been violated as set out in *Anarita Karimi Njeru* [*supra*] and echoed in *Godfrey Paul Okutoyi v Habil Olaka & another* [2018] eKLR. Counsel noted that this suit primarily questions whether by the 1st respondent in appointing the 4th respondent to be a member of the KURA Board, was in utter disregard the procedure and substance of the law as provided in the *Kenya Roads Act* and the *Constitution*.
33. Reliance was placed in *Bernard Ambasa v Institute of Human Resources Management & 3 others* [2021] eKLR where it was held that:

“The *Constitution* provides no definition of ‘constitutional matter’. What is a constitutional matter must be gleaned from a reading of the *Constitution* itself: if regard is had to the provisions of..... Constitution, constitutional inconsistent with the *Constitution*, as well as issues concerning the status, powers and functions of an organ of State...the interpretation, application and upholding of the *Constitution* are also constitutional issues? So too... is the question of the interpretation of any legislation or the development of the common law promotes the spirit, purport and object of the Bill of Rights.”
34. Counsel on the next issue stated that the essence of a preliminary objection was appreciated in *Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd* [1969] EA 696 as follows:

“A preliminary objection consists of a point of law, which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit... 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop”.

35. Like dependence was placed in *Hassan Ali Jobo & Another v Suleiman Said Shabbal & 2 Others* [2014] eKLR, *John Musakali v. Speaker County of Bungoma & 4 Others* [2015] eKLR, *Oraro v Mbaja* [2005] KLR 141 and *Quick Enterprises Ltd v. Kenya Railways Corporation*, Kisumu High Court Civil Case No.22 of 1999.
36. Counsel in light of this guidance submitted that the 2nd and 3rd respondent’s preliminary objection was not a proper ground. This is since, the parties tried to resolve this issue as detailed in the petitioner’s supplementary affidavit however the matter was not resolved. On this premise, Counsel asserted that the petitioner had rightfully invoked this Court’s jurisdiction.
37. Counsel further argued that the provisions of the *Arbitration Act* cannot oust this Court’s jurisdiction where a matter concerns infringement of the *Constitution* and a valid grievance. Counsel hence stressed that the jurisdiction of the Courts to consider valid grievances from parties cannot be ousted. Counsel stated that the rationale behind this precept is that statutory provisions ousting the Court’s jurisdiction must be construed restrictively as stated in *Night Rose Cosmetics [1972] Ltd v Nairobi County Government & 2 others* [2018] eKLR.
38. Counsel equally submitted that the Court can conduct review of appointments to state or public office on grounds of procedural soundness as well as the legality of the appointment decision to determine if it meets the constitutional threshold. Consequently, Counsel submitted that the 4th respondent’s nomination and appointment process was riddled with procedural infirmities that are inconsistent with Section 11[2] of the *Roads Act* and Article 10 of the *Constitution*.
39. Particularly, Counsel submitted that the 2nd and 3rd respondents had not adduced any evidence to show that the nominees had been nominated and approved by the 2nd respondent at its AGM. Moreover, that it was not shown that the three required names were actually submitted to the 1st respondent.
40. Counsel stressed that just because these respondents had relied on a past unlawful practice, did not mean that the future practice should also be unlawful. Accordingly, Counsel argued that the respondent’s reliance on the 2nd respondent’s Constitution to justify the process was ultra vires and unconstitutional.
41. Dependence was placed in *Marson Intergrated Limited v Minister for Public Works & another* [2012] eKLR where the appointment of the interested party in the matter was nullified, as the appointing Minister violated Article 10 of the *Constitution* on the national values and principles.
42. In view of the foregoing, Counsel urged the Court to grant the appropriate remedy in line with Article 23 of the *Constitution*. Reliance was placed in *Bitange Ndemo v Director of Public Prosecutions & 4 others* [2016] eKLR where it was held that:

“A declaration is a formal statement by the court pronouncing upon the existence or non-existence of a legal constitutional state of affairs. It declares what the legal position is and what are the rights of the parties. It does not contain an order which can be enforced against the respondents, as it only declares what is the legal position. It is not a coercive remedy and can be carefully couched or tailored so as not to interfere with the activities of public



authorities more than is necessary to ensure that those public authorities comply with the law.”

2nd and 3rd Respondent’s Submissions

43. Mwangambo and Okonjo Advocates for these respondents filed submissions dated 20th November 2024 and identified the issues for discussion as: whether the petition meets the threshold of a constitutional petition, and if so, whether this Court has the requisite jurisdiction to entertain, hear, and determine the issues raised in the petition, whether the doctrine of constitutional avoidance has been satisfied and whether the appointment of the 4th respondent was procedural.
44. Counsel in the first issue stated that the petitioner had cited Articles 22, 23, 27, 165 and 258 of the *Constitution* but failed to demonstrate how these rights had been violated. In addition, it was argued that the petitioner had also not set out how these respondents had violated these provisions. Considering this, Counsel argued that the petitioner had failed to meet the requisite degree of specificity required in constitutional petitions hence the petition is untenable. In light of this inference Counsel submitted that this Court does not have jurisdiction to entertain this matter.
45. Reliance was placed in the *Mumo Matemu case* [supra] where the Court of Appeal held that:

“ However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. The respondent has cited the case of *Thorp v Holdsworth* [1876] 3 Ch D.637 at 639 and submits that the petitioner has not pleaded with reasonable precision the provisions of the *Constitution* which he alleges were violated and has not set out the particulars of how the violation were done.”
46. On the third issue, Counsel submitted that Article 29 of the 2nd respondent’s Constitution provides an elaborate dispute resolution mechanism which the petitioner disregarded. It is alleged that this provision makes clear that this mechanism is the first port of call. Counsel asserted therefore that the petitioner in failing to exhaust this mechanism as guided by the Court of Appeal in *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* [2015] eKLR had invoked this Court’s jurisdiction improperly.
47. On the final issue, Counsel recapping these 3rd respondent’s averments submitted that the process did not contravene any constitutional provisions. Counsel further stated that the petition was founded on falsehoods aimed at suiting the petitioner’s narrative so as to gain the orders sought.

4th Respondent’s Submissions

48. The 4th respondent through V.K. Nduhiu and Company Advocates filed submissions dated 29th November 2024. The issues for determination were outlined as: whether the assertions contained in the petition should be considered as constitutional violations; whether the Court should entertain the hearing and determination of the petition; whether the nomination and/or appointment of the 4th respondent constituted a violation of the petitioner’s rights.
49. In like manner, Counsel submitted that the petition is defective as fails to meet the parameters set out in the *Anarita Karimi Njeru case* [supra] and affirmed by the Court of Appeal in *Mumo Matemu* [supra]. Similarly, the petitioner was accused of failing to particularize how the 4th respondent had violated his rights.
50. Counsel stated that while this Court has original jurisdiction to hear and determine issues of a constitutional nature, this is based on the clarity and precision of the provisions alleged to have been



violated. Counsel emphasized that the mere mention of the Articles in the Bill of rights does not in any manner justify or qualify to compel this Court to determine this matter. Reliance was placed in *Owners of the Motor Vehicle M.V. Lillians v Caltex Oil [Kenya] Limited* [1989] KLR 1.

51. Turning to the third issue, Counsel submitted that the doctrine of constitutional avoidance urges the Courts be very reluctant or avoid any dispute that has an alternative remedy in form of alternative dispute resolution or internal mechanism of sorting such disputes. Counsel underscored that in the dispute mechanism is clearly provided for under Article 29 of the Constitution yet the petitioner failed to exhaust the same.

52. Reliance was placed in *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] KECA 208 [KLR] where the Court held that:

“Where there is a law prescribed by either a constitution or an Act of Parliament governing a procedure for the redress of any particular grievance, that procedure should be strictly followed”.

53. Analogous reliance was placed in *Rafiki Enterprises Limited v Kingsway Tyres and Automart Limited* Nai Civil Application No.375 of 1996 [UR], *Gatanga General Stores and 12 others v Samuel Mbugua Gitbure* Nairobi Civil Application Number Nai 101 of 1987 [UR] and *Kimani Wanyoike v Electoral Commission* Civil Appeal No. 213 of 1995 [UR].

54. Counsel was certain in the next issue that the 4th respondent’s appointment was in line with Section 11[2] of the *Kenya Roads Act*. Counsel submitted that the 4th respondent’s nomination had complied with the dictates of Article 10 of the *Constitution* since it complied with the principles of transparency, accountability and fairness.

55. Counsel additionally urged the Court to take into consideration the nomination procedures of every professional body as well as the best practices in nominating of persons to serve in various boards of statutory bodies. Counsel advocated for a liberal and purposive interpretation of this Section. Reliance was placed in *Independent Electoral & Boundaries Commission v Maina Kiai, Khelef Khalifa, Tirop Kitur, Attorney-General, Katiba Institute & Coalition for Reforms & Democracy* [2017] KECA 477 [KLR] where it was held that:

“Opposing the appeal, the 1st, 2nd and 3rd respondents, who were represented by Mr. Otieno, Prof. Sihanya and Mr. Oginga, learned counsel, submitted that in interpreting the *Constitution*, the courts must pay due regard to its values and adopt an interpretation that is both substantive and purposive, while bearing in mind the mischief that the *Constitution* sought to cure. While accepting that there were provisions of the *Constitution* best suited for literal interpretation.”

5th Respondent’s Submissions

56. On 25th November 2024, the 5th respondent’s Principal State Counsel, Stephen Terell filed submissions for this party and highlighted the issues for discussion as: whether the petition meets the threshold of a constitutional petition and whether the petitioner’s rights have been violated.

57. Counsel submitted in the first issue that the petitioner had not set out the alleged violations with precision. According to Counsel, the petitioner had just cited omnibus provisions of the *Constitution* with no particulars of the alleged complaints and how they were infringed. On the whole, Counsel submitted that the petition does not meet the threshold established in the *Anarita Karimi Njeru* [*supra*] and emphasized in *Mumo Matemu* [*supra*].



58. Reliance was placed in *Matiba v Attorney General* H C Misc Appl 666 of 1990 where it was emphasized that:
- “An applicant in an application under s 84[1] of the Constitution is obliged to state his complaint the provision of the Constitution he considers has been infringed in relation to him and the manner in which he believes they have been infringed. Those allegations are the ones which if pleaded with particularity invoke the jurisdiction of this court under the section. It is not enough to allege infringement without particularizing the details and the manner of infringement.”
59. Like dependence was placed in *Kenya Bus Services Ltd & 2 others v Attorney General & 2 others* [2005] eKLR and *Cyprian Kubai v Stanley Kanyonga Mwenda* – Nairobi – HC MISC 612 of 2002.
60. On the second issue, Counsel submitted that the petitioner had not exhausted the available dispute mechanism under Article 29 of the 2nd respondent’s Constitution. Counsel submitted that this failure invokes the doctrine of constitutional avoidance as this case can be resolved in another fashion without the need of resorting to the Constitution as held in *Kiriro Wa Ngugi & 19 others v Attorney General & 2 others* [2020] eKLR. On this premise, Counsel submitted that the petition was not yet ripe for determination by this Court.
61. Equivalent reliance was placed in *Apollo Mboya v The Attorney General and National Employment Authority* Nairobi Constitutional Petition Number E335 of 2023[unreported].
62. To this end, Counsel submitted that the 4th respondent’s appointment was constitutional as the petitioner had not discharged his burden of prove otherwise. Similarly, that the petitioner had not demonstrated how the respondents had violated the Constitution.

Analysis and Determination

63. In light of the parties’ arguments, it is my considered view that the issues that arise for determination in this matter are as follows:
- i. Whether this Court has jurisdiction to entertain this matter in view of the doctrine of constitutional avoidance and the doctrine of exhaustion of remedies.
 - ii. Whether the petition meets the threshold required in pleading of a constitutional petition.
 - iii. Whether the nomination and appointment of 4th respondent to the KURA Board was done lawfully in accordance with the relevant law and the applicable constitutional principles.
 - iv. Whether the petitioner is entitled to the relief sought.

Whether this Court has jurisdiction to entertain this matter in view of the doctrine of constitutional avoidance and the doctrine of exhaustion of remedies.

64. Whenever a jurisdictional question is raised, it is the duty of the Court make an inquiry into the matter and satisfy itself if it has jurisdiction or not and this is by examining the Constitution, the Statutes or principles that have been established through judicial precedents. This point was underscored by the



Supreme Court *in the Matter of the Interim Independent Electoral Commission* [2011] KESC 1 [KLR] where it observed that:

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent.”

65. The jurisdiction of the High Court to interpret the Constitution is specified in Article 165 3 [d][i]-[iv] which states as follows:

“ 163 Subject to clause [5], the High Court shall have:

- [3]
- d. Jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of-
 - i. the question whether any law is inconsistent with or in contravention of this Constitution
 - ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to constitutional relationship between levels of government; and
 - iv. a question relating to conflict of laws under Article 191; and
 - v. any other jurisdiction conferred by legislation.

66. The jurisdiction of the Court is however not exercised in vacuum and as was expressed in *Benson Ambuti Ambega & 2 Others v Kibos Distillers Limited* [2020] eKLR; the Court stated:

“... a Court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination, if there would be other appropriate legislatively mandated institutions and mechanism...”

67. The Court thus has to give deference to other dispute resolution mechanisms such as where a statute or a regulatory regime has provided other alternative means of accessing a remedy instead of directly approaching the Court and this finds Constitutional support in Article 159 of the Constitution which requires that in exercising judicial authority, courts and tribunals shall be guided principles set out therein part of which includes the ‘alternative forms of dispute resolution...’

68. Expounding on the doctrine of exhaustion of remedies, the Court in *John Githui v Trustees, Nakuru Golf Club* [2019] KEHC 5523 [KLR] held:

“25. There is no doubt that the doctrine of exhaustion of local remedies is one of esteemed juridical ancestry in Kenya. In *Republic v IEBC Ex Parte NASA-Kenya & 6 Others* [2017] eKLR, the Court – a three-judge bench -- described our jurisprudential policy on the doctrine of exhaustion which the



Respondents raised in a bid to preliminarily swat away the Applicants' suit in the following words:

“This doctrine [of exhaustion] is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in *Speaker of National Assembly v Karume* [1992] KLR 21 in the following oft-repeated words:-

“Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

While this case was decided before the Constitution of Kenya, 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution...”

69. The application of this doctrine is however not absolute, there are exceptions as was observed in *Krystalline Salt Limited v Kenya Revenue Authority* [2019] KEHC 6939 [KLR] in which the Court opined thus:

“What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/ or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile.

...this court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy.”

70. In the instant case, the 3rd, 4th and 5th Respondent urged this Court to find that the Petitioner is breach of the doctrine of exhaustion of remedies because he chose to file this Petition directly yet the 2nd Respondent's Constitution has an elaborate dispute resolution mechanism provided for in Article 29 of the Institute of Surveyors of Kenya.
71. The matter before this Court is whether or not the 1st Respondent's appointment of the 4th Respondent to Board of Kenya Roads Authority was done in accordance with the Constitution and the law. I do not think the wrangling between members of the 2nd Respondent to be settled in accordance with 2nd respondent constitution. The appointment of the 4th Respondent is not governed by the Constitution of the 2nd Respondent but statutory provisions, which supersede the provisions that may be contained in the Constitution of the 2nd Respondent.
72. The issue before the Court thus is beyond the provisions in the Constitution of the 2nd Respondent and thus the argument that the Petitioner ought to have this dispute determined by the Dispute resolution



mechanism in the 2nd Respondent Constitution is untenable because once the appointment by the 1st Respondent is done, that places it beyond the scope of the 2nd Respondent's Constitution.

73. The other issue raised in the preliminary objection is that the matter brought by the Petitioner offends the doctrine of Constitutional avoidance, in that it does not raise Constitutional questions. The Court must decline to determine disputes disguised as constitutional matters but which may be resolved without the need to invoke Constitution. It has been held that Courts will not normally consider a constitutional question unless the existence of a remedy depends on the Constitution and where a remedy is available under some legislative provision or on some other basis, whether legal or factual, the Court will usually turn down the invitation to invoke the Constitution.

74. The Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 Others [2014] eKLR explained the concept as follows:

“[256] The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v. Mhlungu*, 1995 [3] SA 867 [CC] the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

[257] Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of [*Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 [1936]].”

75. In C O D & another v Nairobi City Water & Sewerage Co. Ltd [2015] KEHC 7762 [KLR] the Court held:

“14. where there exist sufficient and adequate mechanisms or forums to deal with a specific issue or dispute by other designated constitutional organs or under a statute, the jurisdiction of the High Court under Article 165[3] [b] of the Constitution should not be invoked until such mechanisms have been exhausted. To my mind therefore, not every litigant ought to come to court by way of a constitutional petition even where there are no constitutional issue arising and where there are adequate remedies provided in other laws to determine such situations.

15. The Constitution cannot be used as a general substitute for the normal procedures...”

76. The appointment of the 4th Respondent to the Board Kenya Roads Authority is being assailed for lack of transparency in the manner it was arrived at and disregarding the laid down statutory provisions. Transparency in the process leading to appointment of the 4th Respondent to Kenya Roads Board is a fundamental constituting principle that applies all public appointments under the National values and principles of governance in Article 10 which the Constitution states are binding on all State Organs, State Officers, Public officers and all persons. Indeed, Article 10 [1] [b] provides that the values and



principles of governance shall apply whenever one enacts, applies or interprets any law. Article 10 [2] [c] lists integrity, transparency and accountability as part of the values and principles of governance every person must observe in applying, enacting or interpreting any law. All the Respondents were all bound by the said provision and this Court cannot determine this matter which relates to a public appointment without examining if the principles of transparency and accountability in the process of recommendation and appointment were adhered to. The issues raised in the Petition cannot be decided without recourse to the Constitution hence are Constitutional questions. The doctrine of the Constitution avoidance cannot thus be raised to frustrate the instant Petition. This ground of attack must thus inevitably fail.

Whether the petition meets the threshold required in pleading of a constitutional petition.

77. It was argued by the respondents that the Petition falls short of meeting the threshold of a Constitutional Petition in that the Petition does not clearly outline the rights that were violated, the manner of infringement or the causal nexus between the alleged violations and the Respondent's conduct.
78. The Petitioner argued that the Petition has satisfied the requirements for a Constitution Petition citing specifications under Rule 10 [2] of the Constitution of Kenya [Protection of Rights and Fundamental Freedoms] Practice and Procedure Rules, 2013 and confirming that the Petition was fully concordant.
79. A constitutional petition must satisfy the elements of specificity and precision in identification of constitutional provisions that are alleged to have been violated and also supplying the information on the manner in which the alleged violations were executed. The Court in Munene v Director of Public Prosecutions & 3 others [2023] KEHC 25900 [KLR] observed as follows:
- “27. The jurisdiction of the High Court in dealing with Constitutional Petitions is properly invoked once a Petition that complies with the constitutional and legal requirements is lodged. The Court must, therefore, decline any invitation by a Petitioner to deal with an alleged Petition which falls short of the laid down parameters on Constitutional Petitions.”
80. The locus classicus case on specificity and precision of Constitutional Petitions is the case of Anarita Karimi Njeru v Republic [1979] KLR which was affirmed by the Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2015] KESC 15 [KLR] as follows:
- “[349] Although Article 22[1] of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v. Republic, [1979] KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement...”



81. The core of this principle was elaborated by Court of Appeal in *Mumo Matemu v Trusted Society of Human Right Alliance* [2014] eKLR as follows:

“...The principle in *Anarita Karimi Njeru* [*supra*] that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of *Thorp v Holdsworth* [1876] 3 Ch. D. 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of the *Constitution* in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the *Constitution*, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the *Constitution* and the rule of law, without any particulars.”

82. The Court went further to state that:

“We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru* [*supra*]. In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting,” without requiring remedy by the 1st respondent...”

83. Similarly, in *Kenya Pharmaceutical Association & another v Nairobi City County and the 46 other County Governments & another* [2017]eKLR the Court opined as follows:

“33. The core issue here is to understand the function of and purpose of good pleadings. In this regard, I recall the words of the Australian Court where Vickery J said this of the principles of good pleading:-

“In a mathematical proof, elegance is the minimum number of steps to achieve the solution with greatest clarity. In dance or the martial arts, elegance is minimum motion with maximum effect. In filmmaking, elegance is a simple message with complex meaning. The most challenging games have the fewest rules, as do the most



dynamic societies and organizations. An elegant solution is quite often a single tiny idea that changes everything.

... Elegance is the simplicity found on the far side of complexity.

While elegance in a pleading is not a precondition to its legitimacy, it is an aspiration which, if achieved, can only but advance the interests of justice. A poorly drawn pleading, on the other hand, which does not tell a coherent story in a well-ordered structure, will fail to achieve the central purpose of the exercise, namely communication of the essence of case which is sought to be advanced.

Pleading should not be dismissed as a lost art. It has an important part to play in civil litigation conducted within the adversarial system. Crafting a good pleading calls for precision in drafting, diligence in the identification of the material facts marshalled in support of each allegation, an understanding of the legal principles which are necessary to formulate complete causes of action and the judgment and courage to shed what is unnecessary.

Although a primary function of a pleading is to tell the defending party what claim it has to meet, an equally important function is to inform the court or tribunal of fact precisely what issues are before it for determination.

34. The function of a pleading in civil proceedings is to alert the other party to the case they need to meet [and hence satisfy basic requirements of procedural fairness] and further, to define the precise issues for determination so that the court may conduct a fair trial; The cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action [or defence]. The expression “material facts” is not synonymous with providing all the circumstances. Material facts are only those relied on to establish the essential elements of the cause of action; a pleading should not be so prolix that the opposite party is unable to ascertain with precision the causes of action and the material facts that are alleged against it.”

84. The question that this Court must now answer is whether this Petition has served the purpose of articulating in a precise and clear manner the violation that the Petitioner alleges and the manner in which it occurred to avoid embarrassing the respondents in defending themselves against the claims of violation.

85. The Petition is hinged on violation of the *Constitution* and identifies Articles 10 [2] [a] and 10 [1] [b] and also Section 11 [1] [g] [iv] and 11 [2] of the *Kenya Roads Act* as the foundation of the Petition. The Petitioner then proceeds to explain the factual background under pinning the petition in paragraphs 3 to 8 how the violation of the law and the Constitutional principles were effected when the Respondent ignored the laid down procedure in the appointing the 4th Respondent to the Board of Kenya Urban Roads in violation of the principle of the rule of law and transparency.

86. It is my humble view that the manner the Petition is pleaded is explicit and satisfies the threshold of pleading a Constitutional Petition. The Respondents were provided with full information on the nature of the Petitioner’s complaint and were not embarrassed in responding to the Petition as framed, it has provided sufficient factual details of the grievance.



Whether the nomination and appointment of 4th respondent to the KURA Board was done lawfully in accordance with the relevant law and the applicable constitutional principles.

87. The petitioner assails the respondents' failure to adhere to Section 11 [2] of the *Kenya Roads Act* in the nomination and appointment of the 4th respondent. This section states as follows:

Board of the Authority

1. The Urban Roads Authority shall be managed by a Board which shall consist of the following members—
 - a. a non-executive Chairperson who shall be appointed by the President from amongst the members appointed under paragraph [g];
 - b. the Principal Secretary of the Ministry responsible for roads or his representative;
 - c. the Principal Secretary of the Ministry responsible for finance or his representative;
 - d. the Principal Secretary of the Ministry responsible for Local Government or his representative;
 - e. the Director-General who shall be an ex officio member;
 - f. a member of an association for the time being recognised by the Government as representing the interests of local authorities;
 - g. five other persons, not being public officers, who shall be appointed by the Cabinet Secretary, by virtue of their knowledge or experience in—
 - i industry;
 - ii urban planning;
 - iii highway engineering;
 - iv surveying; and
 - v urban public transport operations.
2. The persons referred to in subsection [1][g] above shall be appointed by the Cabinet Secretary from among persons nominated by the organisations set out in Part C of the Second Schedule, each of which shall nominate and approve three candidates at its annual general meeting.
3. The Third Schedule shall apply with respect to the conduct of the business and affairs of the Board.



88. The overriding words in Section 11 [2] is that the nominations of the persons by organizations set out in part C, of the second Schedule shall comply with the following requirement,
- “each shall nominate and approve three candidates at its annual general meeting.’
89. The Statute uses the mandatory word ‘shall’ meaning the organizations have no discretion to exercise.
90. What does this mean, it would mean upon seeking the recommendation or nominees from the organisations, the 1st respondent has a legal duty to ascertain that these organization have complied or satisfied this legal requirement by for instance seeking to see the minutes of the General Meetings containing the resolution that approved the three names forwarded for appointment. Equally, the 2nd and 3rd Respondent must demonstrate that they complied with this legal condition by ensuring that the General Meeting approves the nominees for forwarding to the 1st Respondent for appointment.
91. In the instant case, the Petitioner was categorical that there was no resolution that was sought before from the 2nd Respondent in a General Meeting before the names that resorted in the appointment of the 4th Respondent was done by the 1st respondent. He annexed the copy of the notice of the AGM [annexure EK 3] for the meeting that took place on 4th August, 2023 to confirm the absence of that particular agenda and insisted that not even a Special AGM was ever convened to approve the said name or names.
92. Eric Nyadime, in the replying affidavit on behalf of the 2nd and 3rd respondent sworn on 24th April, 2024 merely narrated how on 10th March, 2022 the 1st Respondent requested the Institution of Surveyors of Kenya [2nd Respondent] to nominate three candidates for the appointment of member of Kenya Urban Roads Authority and on 8th September, 2022; the Executive Committee of the 2nd Respondent met and discussed the Board nominations to both Kenya Rural Roads Authority [KERRA] and Kenya Urban Roads Authority [KURA] as an issue that had to be fast tracked. That the Council did meet and endorsed names and having sent the letter with the four nominees, the responsibility of the 2nd respondent ended.
93. He went on to say that the 2nd respondent’s Constitution under Rule 8 grants the Council the mandate to elect and appoint nominees to any representative statutory body or other body and that customarily such nominees are selected at the 2nd respondent’s Council meetings. He claimed that calling for an AGM for each nomination is neither feasible or economical.
94. One thing is clear from the above deposition of Mr. Eric Nyadimo, the 3rd Respondent who also swore the affidavit on behalf of 2nd respondent. There was no AGM that approved the names of the nominees sent to the 1st Respondent as required by Section 11 [2] of *Kenya Board Act*. He seeks refuge in the 2nd respondent’s Constitution but that is subordinate to the Statute and all the 2nd Respondent is required to do is to amend the same to conform to the Act as it cannot override the clear provisions of the Statute. Moreover, he says that it is not possible to call a general meeting whenever such an appointment is required, but that is an excuse that cannot to circumvent the law. In making laws, Parliament intends that they will serve a particular object or need and the court cannot question the wisdom of legislation or its policy object in the case where a challenge to its constitutionality of the same and the fact of unconstitutionality of the particular is established. Mere inconveniencies presented by a provision of the law should not give anybody an excuse to disregards its binding effect for if this were so, people would just be finding excuses for not complying with the law.



95. Moreover, even the fact that there was need to fast track the appointment holds no water. In *Republic v Fazul Mahamed & 3 others Ex-Parte Okiya Omtatab Okoiti* [2018] KEHC 9435 [KLR] the Court observed that;

“7. Public bodies, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. It follows that for the impugned decision to be allowed to stand, it must be demonstrated that the decision is grounded on law. As such, the Respondents' actions must conform to the doctrine of legality... Guidance can be obtained from the South African case of *AAA Investments [Pty] Ltd v Micro Finance Regulatory Council and another* where the court held as follows:-

“ [t]he doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised . . . Public power . . . can be validly exercised only if it is clearly sourced in law”[20]

8. Courts are similarly constrained by the doctrine of legality, i.e. to exercise only those powers bestowed upon them by the law.[21] The concomitant obligation to uphold the Rule of Law and, with it, the doctrine of legality, is self-evident. In this regard, the Respondent's are constrained by that doctrine to enforce the law by ensuring that its decisions conform to the relevant provisions of the law governing its exercise of power. The Respondent's have a statutory and a moral duty to uphold the law and to comply with the law governing their operations...”

96. A power that is abused is power that has not been lawfully exercised. Evidently, the 2nd and 3rd Respondents did not comply with the law, in one, recommending the 4th Respondent to be appointed to the Board of Kenya Urban Road Authority without seeking the approval of the names in the AGM of 2nd respondent and two, the 1st respondent who had an obligation to ascertain the appointment met the requisite threshold before making the appointment abdicated his responsibly by not verifying that the minutes of AGM of the 2nd respondent were forwarded with names confirming it had been approved in fulfilment of conditions set out in Section 11 [2] of the *Kenya Roads Act*.

97. The failure to comply with the law is an infringement of the rule of law principle under 10 [2] [a] of the *Constitution*. The lack of involvement of the annual general meeting to participate in the nomination approval names to be forwarded for nomination was meant, in my view to ensure the principle of public participation and transparency was also incorporated in the process and failure to do so was offensive to the *Constitution* itself.

98. I am satisfied that the Petition has been proved to the required standard by the evidence on record and thus find that the appointment of the 4th Respondent, Mr. Abraham Samoei to the Board of the Kenya Urban Roads Authority is unconstitutional, illegal, null and void.

99. Consequently, I grant the following reliefs:



- a. A declaration that the appointment of the 4th respondent to the Board of Kenya Urban Roads Authority is unconstitutional, null and void for violating the principles under Article 10 of the Constitution and also contravening Section 11 [2] of the Kenya Roads Act, 2007.
- b. An order is hereby issued quashing the appointment of the 4th Respondent, Mr. Abraham Samoei to the Board of Kenya Urban Roads Authority vide Gazette Notice number 16167, dated 24th November, 2023.
- c. I make no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF MAY, 2025.

L N MUGAMBI

JUDGE

