



Law Society of Kenya & another v Mutayi & 4 others (Constitutional Petition E303 of 2024) [2025] KEHC 12891 (KLR) (Constitutional and Human Rights) (10 September 2025) (Ruling)

Neutral citation: [2025] KEHC 12891 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E303 OF 2024**

AB MWAMUYE, J

SEPTEMBER 10, 2025

IN THE MATTER OF: ARTICLES 1, 2, 3, 10, 19, 20 (1), (2) & (3), 21(1), 22(1) AND (2) (B) AND (C), 23 (1) AND (3), 24 (1) AND (2), 25 (A), 27 (1) AND (2), 28, 29 (C), (D) AND (F), 37, 47, 48, 49, 51 (1), 159(2), 165 (3)(B) AND (D), 238 (2)(B), 244, 258, 259 OF THE CONSTITUTION OF KENYA, 2010.

AND

IN THE MATTER OF: THE ALLEGED CONTRAVENTION AND VIOLATION OF ARTICLES 2, 25, 27, 28, 29, 37, 47, 48, 49, 51 AND 244 OF THE CONSTITUTION OF KENYA.

AND

IN THE MATTER OF: THE CONSTITUTIONAL AND LEGAL VALIDITY OF THE USE OF EXCESSIVE FORCE AGAINST PEACEFUL AND UNARMED CITIZENS EXERCISING THEIR ARTICLE 37 RIGHTS.

AND

IN THE MATTER OF: THE DENIAL VIOLATION AND INFRINGEMENT OF THE PETITIONER'S AND KENYANS' RIGHT TO PEACEABLY, AND UNARMED, ASSEMBLE, DEMONSTRATE, PICKET AND PRESENT PETITIONS TO PUBLIC AUTHORITIES.

AND

IN THE MATTER OF: USE OF EXCESSIVE FORCE TO CAUSE INJURY TO ADVOCATES OF THE HIGH COURT OF KENYA REPRESENTING ARRESTED PERSONS.

AND

IN THE MATTER OF: SECTIONS 2, 49(4), (5) AND (13), 56 (3), AND 95 OF THE NATIONAL POLICE SERVICE ACT.

AND

IN THE MATTER OF: THE FIREARMS ACT, CHAPTER 114



BETWEEN

LAW SOCIETY OF KENYA 1ST PETITIONER

IRENE OITO 2ND PETITIONER

AND

MOSES MUTAYI 1ST RESPONDENT

ADMSON BUNGEI 2ND RESPONDENT

INSEPECTOR GENERAL OF POLICE 3RD RESPONDENT

NATIONAL POLICE SERVICE 4TH RESPONDENT

ATTORNEY-GENERAL 5TH RESPONDENT

RULING

In respect of the Applicant’s Notice of Motion dated 9th July 2025

Introduction

1. This Ruling is in respect of the Respondents’ Notice of Motion dated 9th July 2025, seeking orders to strike out affidavits filed by the 2nd Petitioners and other witnesses in the matter. The affidavits under challenge are those sworn by Joan Mumbua Kiliku on 14th May 2025, Gloria Wangui Kimani on 14th May 2025, and Irene Okoth Otto (undated) all filed in support of the Petitioners’ case.
2. The Respondents contend that these affidavits were improperly introduced and should be expunged from the record. The application is supported by an affidavit of Elizabeth Marube, and is opposed by the Petitioners.
3. The petition was filed on 25th June 2024 by the Law Society of Kenya challenging an alleged incident on 18th June 2024 at Nairobi Central Police Station where police officers, including the 1st Respondent, are said to have denied a group of advocates access to their clients in custody and forcibly dispersed the advocates by lobbing teargas at them. The Petition alleges that this conduct by the police violated various constitutional rights of the advocates and by extension the public, including rights guaranteed under Articles 25(a), 28, 29(c),(d),(f), 37, 47, 48 and others of *the Constitution*. The Petition was supported by a founding affidavit sworn by one Florence Muturi, which, inter alia, outlined the general circumstances of the alleged incident.
4. A Notice of Preliminary Objection dated 11th July 2024 and a Replying Affidavit sworn on 30th September 2024 by Elizabeth Marube, an Assistant Superintendent of Police attached to the legal department. In her replying affidavit, Ms. Marube averred that the Petition as originally drawn lacked crucial particulars for instance, it did not name the specific advocates said to be affected, describe the nature or degree of any injury suffered, or detail the status of the alleged breach of fundamental rights. The Respondents contended that the omission of such details rendered the Petition vague and deficient.



5. The Preliminary Objection was heard and by a ruling delivered on 13th March 2025, this Court dismissed the objection. On that date, the Court expressly granted the Petitioners leave to file further affidavits in response to the Respondents' Replying Affidavit, if need be.
6. In exercise of the said leave, the Petitioners filed three affidavits; those now impugned by Joan Mumbua Kiliku, Gloria Wangui Kimani, and Irene Okoth Otto. These affidavits were filed in May 2025, within the timeline contemplated by the Court's directions. The deponents are individuals who were allegedly present during the material incident on 18th June 2024 and who attest to personal knowledge of the facts surrounding the occurrence.
7. The Respondents took exception to the content and manner of these additional affidavits. They maintain that the Petitioners have gone beyond merely responding to the existing Replying Affidavit and have instead introduced "new persons and new issues" that were not apparent in the original Petition.
8. The Respondents' position is that by filing multiple affidavits raising fresh factual matters, the Petitioners have in effect remade or amended their Petition without leave of the Court, contrary to the established procedures. They argue that this development fundamentally alters the character of the Petition and has caused them prejudice by raising matters on which they had no opportunity to reply.
9. On 30th June 2025, the Respondents sought and obtained the Court's leave to lodge the present application challenging the admissibility of the three affidavits. The Notice of Motion dated 9th July 2025 was thereafter filed, seeking orders that the affidavits of Joan Mumbua, Gloria Wangui Kimani and Irene Otto be struck out. The application is premised on the grounds set out on its face and elaborated in the supporting affidavit of Ms. Elizabeth Marube.
10. The Petitioners oppose the application. They argue that the affidavits in question were filed with the knowledge and permission of the Court and in good faith to clarify the factual background of the Petition, not to ambush the Respondents. The Petitioners contend that no new cause of action or new parties have been introduced. The affidavits merely provide particulars of the very incident already pleaded and thus fall squarely within the existing scope of the Petition. Any additional details, they say, were necessitated by the Respondents' own assertion in the Replying Affidavit that the Petition lacked specificity regarding the identities of the affected advocates and the extent of the harm caused.
11. The Petitioners maintain that the Respondents have not suffered any cognizable prejudice, and note that if the Respondents needed to rebut the new affidavits, they could have sought leave to file a further affidavit or could seek to cross-examine the deponents, rather than move to strike out the evidence.

Analysis And Determination

12. Having carefully considered the application before me, the respective responses thereto, and the submissions of the parties, the sole issue for determination whether the affidavits sworn by Joan Mumbua Kiliku, Gloria Wangui Kimani, and Irene Okoth Otto each filed in May 2025 ought to be struck out on the grounds that they are inadmissible or were filed in contravention of procedural requirements.
13. It is not in dispute that, on 13th March 2025, this Court granted the Petitioners leave to file further evidence pursuant to Rule 21(2) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (the Mutunga Rules). Rule 21(2) provides in express terms that, "a party who wishes to file further information at any stage of the proceedings may do so only with the leave of the Court."



14. However, the parties diverge on the scope and intended effect of that leave. The Respondents contend that the leave was limited to the filing of a single affidavit in rebuttal of new issues raised in their response, whereas the Petitioners proceeded on the understanding that they had leave to supplement their factual case generally. The Court’s order of 13th March 2025 stated that the Petitioners may “file an affidavit in response to the Respondents’ affidavit, if need be.” The Petitioners subsequently filed three affidavits, sworn by Joan Mumbua Kiliku, Gloria Wangui Kimani, and Irene Okoth Otto, each of which addressed different aspects of the events of 18th June 2024.
15. The Respondents assert that the Petitioners are effectively attempting to recast their case by introducing new factual contentions through these affidavits, without formally amending the Petition. It is true that the affidavits introduce material particulars including names of individuals, the nature of injuries sustained, and efforts made to seek redress which were absent from the Petition filed on 25th June 2024. The Mutunga Rules underscore the need for front-loading of material: Rule 10(2) requires a petition to set out the facts and nature of the alleged injury, and Rule 11(2) obligates petitioners to annex relevant documents at the point of filing. The initial Petition did not meet this threshold. For instance, it omitted key details such as the fact that the 2nd Petitioner, Ms. Irene Okoth Otto, was injured by police officers, sought medical treatment, and allegedly faced obstruction in lodging a formal complaint.
16. The record of the Court’s proceedings on 13th March 2025 indicates that the leave was granted while noting the compliance status of the Respondents. The language employed suggests the Court was cognizant of the issues raised in the Respondents’ reply, including the alleged evidentiary deficiencies. The Court further noted that the leave was granted “in recognition of the need for a comprehensive presentation of facts.” It is therefore the Court’s considered view that the leave extended to the Petitioners was not confined to a narrow rebuttal but was intended to allow the Petitioners to address evidentiary gaps and respond substantively to the factual issues raised by the Respondents.
17. Upon examination of the impugned affidavits, it is apparent that they relate exclusively to the events of 18th June 2024 and their aftermath the same incident that underpins the Petition. None of the affidavits introduces an unrelated event or purports to found a new cause of action distinct from that which is already pleaded. In this respect, the affidavits can reasonably be viewed as supplemental to the original case rather than transformative of it.
18. The Respondents’ grievance, however, is more nuanced. They argue not that the affidavits speak to a wholly unrelated event, but that they introduce fresh factual allegations that were not previously pleaded. This is not without basis. Prior to the filing of the affidavits, the Petition merely alleged that police officers used tear gas against advocates, thereby infringing their constitutional rights. It did not specify any injuries, name any affected individuals, or allege that attempts to seek accountability were rebuffed. The affidavits have introduced those particulars, thereby refining and strengthening the Petitioners’ case.
19. The legal question that arises is whether such factual developments amount to the introduction of new issues, or whether they are properly characterized as evidentiary particulars of issues already pleaded. This distinction is critical. As a matter of legal principle, an unpleaded fact that materially alters the nature of a claim may constitute a new issue, which cannot be introduced without amending the pleadings. Conversely, facts that merely provide evidentiary support for already pleaded allegations are permissible, provided they do not prejudice the opposing party. The Supreme Court in *Raila Odinga & 5 Others v IEBC & 3 Others KESC* underscored that parties are not permitted to introduce new claims or issues “through the backdoor” once pleadings have closed. The Court emphasized the importance



- of fairness and procedural clarity, particularly in cases where the opposing party would be taken by surprise.
20. Similarly, in *Stanley Khainga v Kenya Medical Practitioners & Dentists Board* [2019] eKLR, the Court held that supplementary affidavits that go beyond the scope of the initial petition by introducing new allegations or shifting the character of the claim are impermissible. The Court reiterated that parties are bound by their pleadings and must not expand the issues for determination through evidentiary side channels.
 21. In the present case, the question is whether the affidavits of Ms. Irene Okoth Otto and the other deponents introduce new causes of action, or whether they serve merely to provide supporting particulars. It is the Court's finding that the initial Petition, though broadly worded, did raise allegations of constitutional violations arising from police conduct on 18th June 2024. The facts now adduced, while detailed, are directly connected to that incident and serve to illustrate the manner in which the Petitioners allege their rights were violated. They do not depart from the pleaded case but rather substantiate it.
 22. It is also material that the affidavits do not alter the reliefs sought, introduce new respondents, or extend the scope of the dispute beyond that already before the Court. The Petitioners' core grievance that police used excessive force against advocates on the material day remains unchanged. The affidavits merely provide context and detail.
 23. Accordingly, this Court is inclined to treat the impugned affidavits as evidentiary particulars admissible under the leave previously granted.
 24. This Court must now consider whether, notwithstanding their relevance, the affidavits ought to be struck out for being procedurally irregular or prejudicial to the Respondents.
 25. Having considered the arguments, the Court is not persuaded that striking out the affidavits would be a proportionate or just outcome in the circumstances. Several factors inform this conclusion:
 - i. The Petitioners acted on the bona fide understanding reasonably derived from this Court's order that they were permitted to file additional evidence. While they may have exceeded the Respondents' expectations, they did not act in defiance of a clear limitation.
 - ii. Any prejudice suffered by the Respondents can be remedied through procedural accommodations. The matter is at a pre-trial stage. The Respondents may, if they so wish, file a further affidavit in response to the new material. The Petitioners have not opposed such a step. The perceived "ambush" can thus be addressed without recourse to striking out.
 - iii. Article 159(2)(d) of *the Constitution* and Rule 3 of the Mutunga Rules mandate the Court to administer justice without undue regard to procedural technicalities. While this principle does not excuse all lapses, it does counsel restraint where the breach is not fundamental and can be mitigated without injustice.
 - iv. Striking out evidence, like striking out pleadings, is a draconian remedy. As observed in *Kivanga Estates Ltd v National Bank of Kenya* [2017] eKLR, it should be employed only where absolutely necessary. Removing these affidavits would leave the Petitioners' case bereft of factual support, potentially rendering it incapable of being adjudicated on its merits.
 - v. The affidavits aid the Court in understanding whether the constitutional rights allegedly infringed such as those under Article 29 on the security of the person were violated in actual, concrete terms. Without such evidence, the Petition may appear speculative or hypothetical.



26. In light of the foregoing, this Court finds that the affidavits sworn by Joan Mumbua Kiliku, Gloria Wangui Kimani, and Irene Okoth Otto were filed pursuant to leave granted by this Court, are relevant to the matters in controversy, and do not introduce a new cause of action. Any procedural irregularity in their filing does not warrant the extreme sanction of striking them out. The Respondents have not demonstrated prejudice that cannot be addressed through further procedural directions. Accordingly, the application to strike out the said affidavits is without merit and is hereby dismissed.

ORDER

- a. The Notice of Motion dated 9th July 2025 is hereby dismissed.
- b. The costs of the application shall abide the outcome of the main Petition.

Orders accordingly.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 10th DAY OF SEPTEMBER, 2025.

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BAHATI MWAMUYE

JUDGE

In the presence of :

Counsel for the Petitioner: Mr. Eric Muriuki

Counsel for the Respondents: Mr. Weche h/b Mr. Kaumba

