Ngotho & another v Permanent Secretary of Ministry of Education (As the Successor of the Ministry of Science, Education and Technology) & 2 others (Constitutional Petition 396 of 2018) [2025] KEHC 12531 (KLR) (Constitutional and Human Rights) (10 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12531 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION 396 OF 2018

AB MWAMUYE, J

SEPTEMBER 10, 2025

IN THE MATTER OF ARTICLES 2,3,10,19(1),19(2),20(1),20(2),20(4),21(1),22(2),23(1),28,35(1),(2),43(E), AND 47(1) OF THE CONSTITUTION

AND

IN THE MATTER OF VIOLATION OF THE RIGHT TO ACCESS TO INFORMATION, RIGHT TO DIGNITY, AND THE DENIAL TO FAIR ADMINISTRATIVE ACTION

AND

IN THE MATTER OF VIOLATION OF ARTICLES 5,9,18 AND 22 OF THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS

AND

IN THE MATTER OF ARTICLE (1) OF THE UNIVERSAL DECLARATION OF HUMAN RIGHT

AND

IN THE MATTER OF VIOLATION OF SECTION 4,4(2) AND 7(2) OF THE FAIR ADMINISTRATIVE ACTION

AND

IN THE MATTER OF VIOLATION OF ARTICLES 6&12 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL & CULTURAL RIGHT

BETWEEN

PAUL NGOTHO ..... 1ST PETITIONER

NGOTHO PROPERTY LIMITED ..... 2ND PETITIONER

AND

PERMANENT SECRETARY OF MINISTRY OF EDUCATION (AS THE SUCCESSOR OF THE MINISTRY OF SCIENCE, EDUCATION AND TECHNOLOGY) ..... 1ST RESPONDENT

HON ATTORNEY GENERAL ..... 2ND RESPONDENT

MS EDITH TOROME ..... 3RD RESPONDENT

JUDGMENT

INTRODUCTION AND BACKGROUND

1. The Petitioners, through a Petition and a Notice of Motion dated 12th November 2018, seek redress for alleged defamation, denial of access to information, and the violation of their right to fair administrative action. The 1st Petitioner, Paul Ngotho, a professional arbitrator, adjudicator, mediator and property valuer, was appointed by the Chartered Institute of Arbitrators (Kenya Branch) on 15th May 2015 to adjudicate a dispute between Alfatech Contractors Limited and the Ministry of Education, Science and Technology over the Gusii Institute of Technology construction project.

2. Following delivery of his adjudication decision on 22nd January 2016, the Petitioner became aware, in November 2017, that the 1st and 3rd Respondents had written and filed a letter dated 3rd November 2015 ("the Protest Letter") accusing him of professional misconduct. The Petitioners allege that the Protest Letter was never served on them, yet it formed part of a court record in Civil Case No. 7926 of 2016 in the Chief Magistrate's Court at Milimani.

3. The Petitioners contend that the unlawful filing and publication of defamatory statements infringed their right to dignity under Article 28, their right to access information under Article 35, and their right to fair administrative action under Article 47 of *the Constitution*. They thus seek the following orders:

The Petitioners' Case

4. Through their supporting affidavit, the Petitioners contend that the 1st Petitioner executed his adjudication duties with impartiality and professionalism, duly notifying all parties of the adjudication process, conducting a preliminary meeting on 1st July 2015, and issuing a final decision on 22nd January 2016.

5. The Petitioners claim that despite extending the opportunity to the 1st Respondent to participate in the proceedings, the latter failed to file any defence or submissions, nor did they attend the oral hearing. Nevertheless, the adjudication proceeded lawfully under the applicable rules.

6. The Petitioners aver that the 1st Respondent later authored and filed a protest letter dated 3rd November 2015, addressed to the Appointing Authority (CIArb), accusing the 1st Petitioner of professional misconduct. The said letter was never copied or served upon the Petitioners.

7. According to the Petitioners, the protest letter was subsequently filed in a separate court matter in Milimani Chief Magistrate's Court Civil Suit No. 7926 of 2016 without notice to them, thus violating their right to be heard and to access information concerning their reputation and professional conduct.

8. The Petitioners argue that the inclusion of Ngotho Property Consultants Ltd, a corporate entity incapable of being appointed as an Adjudicator, in the protest letter, was both inaccurate and malicious, as the adjudicator was appointed in his personal capacity as a member of CIArb.

9. It is the Petitioners' case that the Respondents' actions have gravely injured the Petitioners' professional standing, leading to reputational harm and psychological suffering. The 1st Petitioner in particular avers that he has lost work opportunities as a direct consequence of the defamatory letter.

10. The Petitioners assert that despite a formal demand issued on 29th January 2018 seeking the withdrawal of the letter and an apology, the Respondents took no remedial steps, thus aggravating the harm.

11. It is the Petitioners claim that they were unlawfully denied their constitutional right to access the protest letter under Article 35(2) and to challenge its contents through fair administrative processes as guaranteed under Article 47.

12. It is also the Petitioners' position that their right to dignity under Article 28 has been violated by the publication and filing of the offensive letter, and the continued inaction by the Respondents in withdrawing the same.

13. The Petitioners also draw this court's attention to various provisions of international human rights instruments including the African Charter on Human and Peoples' Rights and the Universal Declaration of Human Rights, to which Kenya is a party, and argue that the State has failed to protect their dignity, right to work, and right to mental well-being.

14. In light of these alleged violations, the Petitioners pray for declarations of constitutional violations, orders compelling withdrawal of the protest letter, an apology, and awards of general, specific and exemplary damages, among other reliefs.

The Respondents' Case

15. The Respondents opposed the Petition through a Replying Affidavit sworn by Dr. Margaret Mwakima and through Grounds of Opposition dated 30th September, 2019.

16. The Respondents contends that that the dispute referenced by the Petitioners had been resolved by way of final accounts signed by the contractor, Alfatech Contractors, on 5th March 2015, thereby extinguishing the subject matter of adjudication.

17. The Respondents assert that they were not privy to the adjudication process as no formal notice of dispute or appointment of the adjudicator was issued to the appropriate Ministry authority as specified in the Contract Agreement.

18. According to the Respondents, the appointment of the 1st Petitioner by CIArb at the request of one party to the dispute, Alfatech Contractors, was irregular and contrary to the Contract's general conditions under clause 1.31.1.

19. The Respondents claim that the 3rd Respondent wrote to the Chartered Institute of Arbitrators on 3rd November 2015, protesting the then ongoing adjudication process, but they never received a response to their letter.

20. The Respondents also deny ever attending a preliminary meeting on 1st July 2015 as claimed by the Petitioners, and argue that no evidence, such as signed minutes, has been tendered by the Petitioners to substantiate this assertion.

21. It is averred that the allegations leveled against the Respondents are founded on hearsay, as the Petitioners have not established or disclosed the manner in which they came into possession or acquired knowledge of the contents of the said letter.

22. It is further averred that, should the Petitioners have taken issue with the contents of the said letter addressed to the Chartered Institute of Arbitrators (Kenya Chapter) the appropriate course of action would have been to lodge a formal complaint with the said Institute, rather than instituting the present Petition.

23. The 3rd Respondent, a State Counsel deployed by the Office of the Attorney General to the Ministry of Education, is said to have acted within the scope of her lawful duties and thus enjoys protection under Section 8 and 17 of the Office of the Attorney General Act.

24. The Respondents maintain that the protest letter dated 3rd November 2015 was addressed to CIArb in good faith and contained genuine concerns about procedural irregularities and impartiality in the adjudication process.

25. They further maintain that the Petitioners have failed to demonstrate how the letter has violated any of their constitutional rights, nor have they adduced evidence to prove the existence or contents of the protest letter until a supplementary affidavit was filed much later.

26. The Respondents contend that the protest letter was not defamatory, and even if it were, the proper forum for redress would be in tort under civil law, not by way of constitutional petition.

27. They invoke the doctrine of constitutional avoidance, arguing that the Petition raises no constitutional issues and should be dismissed for being improperly instituted.

28. The Respondents also plead limitation of action under Section 4(2) of the *Limitation of Actions Act*, contending that any defamation claim is time-barred.

29. Additionally, they argue that the Petition is vague and lacks the requisite precision required in constitutional petitions as espoused in Anarita Karimi Njeru v Republic [1979] eKLR and in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR.

30. It is the Respondents' case that no proof has been tendered to demonstrate that the protest letter caused any psychological harm, loss of work, or denial of opportunities to the Petitioners and thus urge this Court to dismiss the petition with costs, for want of merit, jurisdiction, and proper cause of action.

31. The Petition was canvassed through written submissions. In compliance, only the Petitioners filed their submissions. The Respondents were given several opportunities to file their submissions, but they failed to do so.

The Petitioner's Submissions

32. The Petitioners, in their written submissions dated 28th November 2024, reiterate that the issues raised in this petition go beyond a mere defamation claim and are firmly rooted in constitutional violations. They contend that their rights under Articles 28, 35 and 47 of *the Constitution* have been violated by the Respondents' actions.

33. On the right to dignity under Article 28, the Petitioners submit that their professional standing and public reputation have been severely tarnished by the contents of the protest letter authored by the 3rd Respondent. They rely on the case of Reynolds v Times Newspapers Ltd [1999] 4 All ER 609 where Lord Nicholls emphasized the critical role of reputation in the enjoyment of one's dignity and public life.

34. The Petitioners assert that the 3rd Respondent, in particular, knew or ought to have known that Ngotho Property Consultants Ltd was incapable of acting as an adjudicator since only natural persons can be appointed as such under the CIArb guidelines. Therefore, imputing misconduct on the 2nd Petitioner was not only false but also malicious.

35. They further submitted that by filing the protest letter in court proceedings without serving them, the Respondents infringed their right to fair administrative action under Article 47, as they were denied an opportunity to respond or challenge the contents. In support of this proposition, reliance was placed on Republic v Fazul Mahamed & 3 Others Ex-Parte Okiya Omtatah Okoiti [2018] eKLR and Judicial Service Commission v Mbalu Mutava & Another [2015] eKLR.

36. The Petitioners contend that their right of access to information, as guaranteed under Article 35 of *the Constitution*, was violated by the authoring and filing of the protest letter without their knowledge or participation. They assert that, had they been made aware of the letter's existence in a timely manner, they would have had an opportunity to respond or take steps to mitigate the resultant reputational harm. In support of this contention, the Petitioners placed reliance on the decisions in Linus Simiyu Wamalwa v University of Nairobi & Another [2015] eKLR and Brummer v Minister for Social Development 2009 (II) BCLR 1075 (CC).

37. On the issue of international human rights obligations, the Petitioners submitted that Kenya has ratified instruments such as the African Charter on Human and Peoples' Rights and the International Covenant on Economic, Social and Cultural Rights, which obligate the State to protect dignity, mental health, and fair treatment.

38. On the issue of constitutional avoidance, the Petitioners submitted that where clear and gross violations of constitutional rights are evident, the Court must not shy away from rendering substantive justice. Additionally, it was argued that the Court has a constitutional obligation to the rights of individuals against state actors. Reliance is placed in Republic v Kenya Revenue Authority Ex-Parte Gibson Nyamweya and Jared Okello v Attorney General [2014] eKLR.

39. According to the Petitioners, the remedies sought are constitutional in nature which cannot be adequately provided through civil suits.

40. On the issue of the 3rd Respondent's immunity under the Office of the Attorney General Act, the Petitioners submitted that such immunity does not extend to actions done in bad faith or outside the bounds of statutory mandate. Reliance was placed on Republic v Anti-Counterfeit Agency Ex Parte Caroline Mangala t/a Hair Works Saloon [2019] eKLR, where it was held that bad faith and malice negate statutory immunity.

41. The Petitioners, therefore, submitted and prayed for appropriate reliefs as sought since the issues raised in the petition are based on serious constitutional violations and international human rights obligations. They thus urged the court to grant them the remedies sought, which include declarations of rights violations, fair administrative action, and compensation for harm caused.

Analysis and Determination

42. Having considered the pleadings, affidavits, annexures, and submissions, the Court identifies the following key issues for determination:

    i. Whether the Petition raises constitutional issues or is an ordinary civil dispute.

    ii. Whether the Petitioners have demonstrated violations of their constitutional rights.

1. Whether the Petition raises constitutional issues or is an ordinary civil dispute.

43. The Petition before this Court invites us to navigate the delicate frontier between private law disputes and constitutional adjudication. The Petitioners, aggrieved by a protest letter authored by the Respondents, contend that their constitutional rights to dignity, access to information, and fair administrative action were violated. They urge this Court to expunge the letter, order apologies, and grant damages. At its core, however, the dispute is about reputation, the right to be heard, and professional standing.

44. The Respondents on the other hand, opposed the Petition for offending the doctrine of constitutional avoidance by pointing out the cause of action is claim for defamation which can be fully and effectively litigated as a tortious claim as a common law claim in an ordinary civil suit. This inevitably raises the critical question: is this truly a constitutional matter, or is it, in substance, a private dispute camouflaged in constitutional clothing?

45. The doctrine of constitutional avoidance is central to answering this question. It is a doctrine rooted in judicial restraint, designed to preserve the constitutional jurisdiction of this Court for genuine constitutional controversies. Put differently, it prevents *the Constitution* from being invoked as a panacea for every legal grievance, thereby maintaining the proper boundaries between constitutional law and other branches of law.

46. Constitutional avoidance has been defined as a preference of deciding a case on any other basis other than one which involves a constitutional issue being resolved. As a principle, constitutional avoidance has been linked to the doctrine of justiciability.

47. In broad terms, justiciability governs the limitations on the constitutional arguments that the courts will entertain. It encompasses three main principles which are standing, ripeness and mootness.

48. The doctrine of avoidance was fortified in Sports and Recreation Commission v Sagittarius Wrestling Club and Anor [2001] (2) ZLR 501 (S){{^}} in which Ebrahim JA said the following: -

> "...Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights."

49. The Constitutional Court of Zimbabwe in Chawira & Ors v Minister of Justice Legal and Parliamentary Affairs & Ors CCZ 3/17 held: -

> "As we have already seen, in the normal run of things courts are generally loathe to determine a constitutional issue in the face of alternative remedies. In that event they would rather skirt and avoid the constitutional issue and resort to the available alternative remedies."

50. The court in S v Mhlungu [1995] (3) SA 867 (CC) 59 laid out constitutional avoidance as a general principle in the following terms:-

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

51. The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved.

52. In that regard, the Supreme Court stated in Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others [2014] KESC 53 (KLR) that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis.

53. In the South African case of S v Mhlungu (supra) Kentridge AJ, stated in the dissenting opinion respecting the principle of avoidance (at paragraph 59), that he would lay 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. And in Ashwander v Tennessee Valley Authority 297 U.S. 288, 347 (1936) the U.S. Supreme Court 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. 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 on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of rights. (See also Zantsi v Council of State, Ciskei & Ors 1995 (4) SA 615 (CC).

54. Expounding on the doctrine, the Court in Ibrahim Wakhanyanga & 2 others v Chief Magistrate's Court Kakamega & 2 others; Attorney General for Land Registrar Kakamega (Interested party) [2022] eKLR observed thus:

> "One of the instances in which a constitutional court loses jurisdiction is through the doctrine of constitutional avoidance. Thus, where there exist ample statutory avenues for resolution of a dispute, the constitutional court will defer to the statutory options and decline to entertain such a dispute. A party seeking relief in a matter that can be addressed through interpretation of statutes and rules made thereunder must seek relief through an ordinary suit as opposed to a constitutional petition. In that regard, the Court of Appeal stated in Sumayya Athmani Hassan v Paul Masinde Simidi & another [2019] eKLR as follows:
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> > ... where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on *the Constitution* without challenging the legislation in question. That principle has been reinforced by the Supreme Court in Communications Commission case (supra). In conclusion, we find that the alleged unlawful interdiction and termination of a contract of employment was not a constitutional issue and thus the petition did not disclose a cause of action anchored on *the Constitution*. Accordingly, the petition being incompetent, the court acted in excess of jurisdiction and erred in law in determining the petition. ...similarly, the same court stated in Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another [2016] eKLR thus:Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation...A corollary to the

foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done."

55. The doctrine of ripeness and constitutional avoidance gives credence to the concept that *the Constitution* does not operate in a vacuum or isolation. It has to be interpreted and applied in conjunction with applicable legislation together with other available legal remedies. Where there are alternative remedies the preferred route is to apply such remedies before resorting to *the Constitution*. The possibility of the elevation of any dispute to a constitutional issue is what is sought to be averted by the doctrines of ripeness and constitutional avoidance. It is borne out of a realisation that all legislative or common-law remedies are part of the legal system.

56. In summation, the doctrines of ripeness and constitutional avoidance counsel against the adjudication of constitutional issues where an alternative legal remedy exists that may afford the litigant the relief sought. Put differently, a constitutional question is not ripe for determination unless and until it becomes the sole available avenue through which the litigant may obtain an effective remedy. Both doctrines operate to defer the resolution of constitutional matters until it is absolutely necessary, and only where no other legal course remains capable of addressing the grievance in question. The exceptions to the application of the doctrine of constitutional avoidance are:

    i. where the constitutional violation is so clear and of direct relevance to the matter;

    ii. in the absence of an apparent alternative form of ordinary relief and;

    iii. where it is found that it would be a waste of effort to seek a non-constitutional resolution of the dispute.

57. A reading of the issues presented in this Petition leave no doubt that the Petitioners' grievance if any can effectively be addressed in a civil suit. The Petitioners could have pursued their grievance through defamation proceedings. Instead, they seek to constitutionalize what is essentially a reputational dispute.

58. The first step in applying constitutional avoidance is to interrogate the nature of the Petition. Here, the pleadings show that the Petitioners are primarily concerned with the reputational effect of the protest letter dated 3rd November 2015. They describe it as defamatory, false, and damaging to their professional standing. They complain of psychological suffering and seek apologies, damages, and withdrawal of the letter. These are classic remedies of the tort of defamation. Defamation is a tort governed by common law and statute. The proper forum is the civil division of the High Court. It is telling that the Petitioners have framed the reliefs sought in the language of civil liability.

59. Secondly, the Court is enjoined to consider whether alternative legal avenues exist for resolving the dispute at hand. Article 35 of *the Constitution*, which guarantees the right of access to information, is operationalised through the *Access to Information Act*, 2016, which establishes a statutory framework for making information requests and pursuing appeals. Similarly, Article 47 on the right to fair administrative action is implemented through the *Fair Administrative Action Act*, 2015, which provides for remedies including judicial review. These statutes offer adequate and effective mechanisms for addressing grievances related to denial of access to records or administrative unfairness. Where Parliament has prescribed a statutory procedure for the enforcement of constitutional rights, that procedure must ordinarily be followed unless it is shown to be inadequate or ineffective. The Petitioners, in this case, did not attempt to invoke or exhaust these statutory remedies.

60. In that regard, I agree with the finding in Motiga v Lugalia & 4 others [2025] KEHC 275 (KLR) where the court underscored that: -

> "71. It is manifest from the reading of this Petition the essential complaint is the alleged publication of the defamatory material against the Petitioner. In any case, even if the matter involves the need for supply of information under Article 35 of *the Constitution*, there is an elaborate procedure that is provided for under *Access to Information Act* prescribing how this is to be done and consequences of failure to facilitate the access to information when the conditions set out for supply of information have been met. In short, this Court will not necessarily have to turn to *the Constitution* to resolve the two main issues raised by the Petitioner in this Petition. That will require *the Constitution* to resolve. In other words, the resolution of the issues presented through this Petition will only require interpretation of the relevant statutes or principles of common law rather than *the Constitution* as the claim is founded on the tort of defamation and the issue of access to information is also adequately covered in the *Access to information Act*. I can thus comfortably conclude that this Petition does not raise any Constitutional question that would compel the Court to resort to *the Constitution* to resolve.
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> 72. This leads me into making the finding that the dispute that this Petition presents is not a Constitutional controversy since it can be determined without application of *the Constitution*. Its resolution squarely lies in the application of the tort law and the *Access to Information Act*."

61. The Court must also assess whether the Petition satisfies the threshold for a constitutional Petition. It is trite law that for a Constitutional Petitions to be meritable, it must pass the test that was set out in the case of Anarita Karimi Njeru v Republic (No.1) (1979) 1 KLR 154 and Mumo Matemu v Trusted Society of Human Rights Alliance, Civil Appeal No.290 of 2012 (2013) eKLR. In the case of David Mathu Kimingi v SMEC International PTY Limited (2021) eKLR on Constitutional Petitions held, the court held that: -

> " The main issue for determination in the application before me is whether the petition raises any issues on violation of *the Constitution* to meet the threshold of a constitutional petition. In the Petition while the Petitioner has cited Article 41 (1) of *the Constitution* as having been allegedly contravened, he has failed to specify the said provision and further give particulars of the said contravention within the body of the Petition. The petitioner further alleges violation of his constitutional right under Article 23(3) in the Orders he seeks in the Petition yet the same is not averred with specificity and particulars given on how the Respondent violated the said right. It is my considered opinion that the Petitioner has failed to satisfy the threshold of specificity as espoused in the celebrated cases of Anarita Karimi Njeru v Republic (No.1) (1979) 1 KLR 154 and Mumo Matemu v Trusted Society of Human Rights Alliance, Civil Appeal No.290 of 2012 (2013) eKLR."
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> In this case, the Petitioners allege violation of their right to dignity, access to information, and fair action but fail to establish how a protest letter, written in the context of an adjudication process, crosses the constitutional threshold.

62. The Petitioners' case risks reducing *the Constitution* into an omnibus platform for every grievance. Not every commercial or private dispute clothed in constitutional garb becomes a constitutional issue;

the Court must interrogate whether genuine constitutional questions arise. The present Petition, viewed objectively, is an attempt to convert a professional reputational dispute into a constitutional controversy.

63. Moreover, the principle of proportionality applies. Where alternative remedies are available and adequate, constitutional reliefs should not be the first resort. Constitutional jurisdiction should not be trivialised by disputes that can be addressed through statutory or common law remedies. The Petitioners have bypassed the defamation framework and attempted to elevate their grievance to constitutional level without justification. The position in The Speaker of the National Assembly v. Karume (2008) KLR (EP) 423 that where there is under *the Constitution* or Statute is a mechanism for redressing the same should be strictly followed resonates with view taken by Lenaola, J. (as he then was) in Uhuru Kenyatta v. The Nairobi Star Publications Limited, Nairobi HC Petition No. 187 of 2012 –

> " 16. ..... 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 v. S.K. Dutambala Cr. Appeal No. 37 of 1991 (Tanzania Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions."

64. The Petitioners argue that their dignity under Article 28 was violated. While dignity is sacrosanct, courts have been careful to separate reputational harm from constitutional injury. The right to dignity is not violated by every critical statement, however unpleasant; it is violated by conduct that amounts to humiliation, degradation, or denial of humanity. The protest letter falls within the realm of criticism of professional conduct, not a denial of human dignity.

65. This Court also considers the jurisprudential value of restraint. In S v Mhlungu (supra), the South African court observed that the doctrine of constitutional avoidance preserves *the Constitution* for cases where constitutional adjudication is indispensable. Similarly, in Kenya, avoidance ensures this Court does not overstep into areas adequately governed by civil law.

66. The broader policy rationale is to maintain judicial efficiency and prevent the over-constitutionalisation of disputes. If every complaint about reputation or information were converted into a constitutional petition, the High Court's constitutional docket would be overwhelmed, diluting attention from genuine constitutional grievances.

67. On the facts, therefore, the Petitioners' grievance is one of defamation, misrepresentation, and reputational harm. These are not novel constitutional questions but classic civil claims. *The Constitution* was not intended to be a substitute for the *Defamation Act*, the *Evidence Act*, or the *Civil Procedure Act*.

68. From the foregoing, this Court holds that the Petition is barred by the doctrine of constitutional avoidance. The Petitioners ought to have pursued their remedies in civil proceedings.

ii. Whether the Respondents violated the Petitioners' constitutional rights

69. Having concluded that the Petition is in substance a civil dispute, this Court nonetheless turns to examine whether the Petitioners have made out a case for violation of their rights under Articles 28, 35, and 47. These three provisions lie at the heart of Kenya's transformative constitutional framework. Article 28 guarantees dignity as an inherent right that must be respected and protected. Article 35 enshrines the right of every citizen to access information held by the State or by another person required

for the exercise of a right. Article 47 operationalises fair administrative action, demanding efficiency, lawfulness, reasonableness, and procedural fairness. The Petitioners insist that all three rights were violated by the filing and circulation of the protest letter.

70. However, constitutional rights, though broad and expansive, are not absolute shields from criticism, disagreement, or even reputational injury. Constitutional violations must be proved by cogent evidence and linked directly to the impugned act.

71. On the right to dignity, the 1st Petitioner contends that the protest letter demeaned his reputation as a professional. However, dignity under Article 28 is not triggered by every critical or negative statement. The protest letter, objectively viewed, was a professional protest lodged with an appointing authority; it cannot be equated with degrading treatment. On the evidence before the court, I would find that the Petitioners' right to dignity under Article 28 of *the Constitution* was intact and in no way violated by the acts of the Respondents herein, and equally significant, no evidence of loss, damage or injury was led to demonstrate any loss of dignity arising from the Respondents' alleged action

72. On the right to access information, this right is implemented through the *Access to Information Act*, 2016, which provides mechanisms for requesting and, if denied, appealing for information. The Petitioners did not show that they ever formally requested the protest letter or that their request was denied. A party cannot allege denial of the right to information without first making a request. The right is not self-executing. The Petitioners discovered the letter informally, but that discovery does not convert the Respondents' failure to serve them into a constitutional breach.

73. Moreover, the letter was not information held by the State for purposes of Article 35(1)(a) but an internal protest sent to the Chartered Institute of Arbitrators. Even if the Ministry could be said to hold it, the Petitioners never triggered the statutory process under the *Access to Information Act*. Litigants must first utilise the statutory mechanism unless it is shown to be ineffective. This failure undermines the Petitioners' reliance on Article 35.

74. On fair administrative action, the Petitioners assert that the failure to serve them with the protest letter amounted to procedural unfairness. Yet, Article 47 applies to administrative actions that affect legal rights or interests. The protest letter was not an administrative decision of the Ministry; it was a communication of concern addressed to a professional body. No legal right of the Petitioners was determined by the protest letter.

75. The Court must also weigh the Respondents' freedom of expression under Article 33. Public officials and state organs retain the right to express concerns and opinions, provided they act within the law. The protest letter was an expression of dissatisfaction, and cannot be censored on constitutional grounds absent proof of malice and falsehood established under defamation law.

76. Ultimately, the Petitioners' grievances are serious but misframed. *The Constitution* is not designed to be a catch-all for every wrong. Constitution is not a substitute for private law. Not every wrong must be vindicated under the Bill of Rights. On the facts, the Petitioners' complaints are better ventilated in civil proceedings.

77. This Court therefore finds that the Petitioners have failed to prove any violation of their rights under Articles 28, 35, or 47. Their claims, while not trivial, fall outside the protective ambit of the Bill of Rights.

78. Also, on the issue of remedies sought, there was no evidence of loss resulting from any defamation of the petitioners, if they were defamed. Damage and loss are, in any event, separate inquiries upon proof of liability and since the same has not been demonstrated in this case, the question of compensation for violation of rights in the Bill of Rights and for defamation does not arise. There being no proof

of liability there can be no basis or occasion for award of damages for the petitioners as prayed, or otherwise.

79. Accordingly, for the reasons set out above, this court finds the Petition to lack merit and is dismissed with no orders as to costs.

Orders accordingly.

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

.....

BAHATI MWAMUYE

JUDGE

In the presence of: -

Counsel for the Petitioners – Ms. Wangeci

Counsel for the Respondents – No appearance

Court Assistant – Ms. Lwambia