



SNO (Suing on her Behalf and as Mother and Next of Kin of EAO - Minor) & another v Ampath Kenya (Petition E013 of 2025) [2025] KEHC 13157 (KLR) (24 September 2025) (Ruling)

Neutral citation: [2025] KEHC 13157 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

PETITION E013 OF 2025

RN NYAKUNDI, J

SEPTEMBER 24, 2025

IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE 22(1) OF THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 28, 35, 43(1)(A), 46 AND 539(2) OF THE CONSTITUTIONAL OF KENYA (2010)

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF SECTIONS 5(1) AND SECTION 5(2) OF THE HEALTH ACT NO. 21 OF 2017

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF SECTIONS 8 AND 16 OF THE CHILDRENS ACT NO. 29 OF 2022

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF SECTION 4 OF THE ACCESS TO INFORMATION ACT NO. 31 OF 2016

BETWEEN

SNO (SUING ON HER BEHALF AND AS MOTHER AND NEXT OF KIN OF EAO - MINOR) 1ST PETITIONER

COO 2ND PETITIONER

AND

AMPATH KENYA RESPONDENT



RULING

1. The petitioners filed a petition before this court dated 25th April, 2025 in which they sought orders as follows:
 - a. A declaration that the wrongful diagnosis and treatment of the petitioners as done by the Respondent amounted to a violation of the constitutional rights of the petitioners as guaranteed in Art. 46(1), 43(1)(a), 53(1) and (2), 35 and 28 of *the Constitution* of Kenya.
 - b. An order compelling the Respondent to provide an apology to the petitioners for the wrongful violation of their rights.
 - c. This Honorable court issue an order directing the respondent to put in place guidelines and measures to ensure accurate testing for HIV in line with the Kenya HIV testing services operational manual 2022 edition by the Ministry of Health and Kenya HIV Prevention and Treatment guidelines, 2022. Further in conducting in depth mandatory training of all medical personnel and health care providers and to enhance patient communication protocols.
 - d. This Honorable Court be pleased to order the Respondent to pay general and exemplary damages on an aggravated scale to the petitioners for the violation of their constitutional rights.
 - e. This Honorable court be pleased to order the Respondent to cover the medical costs incurred and to be incurred by the 1st petitioner.
 - f. This Honorable court be pleased to issue and order for costs of the suit.
 - g. This Honorable court be pleased to make such other orders as it shall deem just expedient for the ends of justice.
2. The Respondent in counter filed a Preliminary objection dated 4th August, 2025, which is before this court for determination. The respondent has raised grounds of objection as follows:
 - a. That the Respondent as sued as “AMPATH Kenya” is non-existent legal entity incapable of suing or being sued pursuant to Order 1 Rule 3, Order 1 Rule 8, Order 15 Rule 1,2,3 and 4 of the Civil Procedure Rules, 2010.
 - b. The petition offends the principles of legal capacity and is therefore incompetent ab initio.
 - c. Ampath Kenya does not exist as a legal entity hence has no representative legal capacity to be sued for and on behalf of others.
 - d. That the cause of action cannot be determined because of the locus standi of the Respondent since the suit has been improperly instituted.
 - e. That the cause of action cannot be determined because of the of the locus standi of the defendant.
 - f. The petition offends the principles of legal capacity and is therefore incompetent ab initio.
 - g. The suit is improperly instituted against a non-juristic person, rendering the proceedings null and void.
 - h. That the entire petition is statute barred under the *Limitation of Actions Act* since an action founded on tort may not be brought after the end of three years.



- i. The claim arises from an alleged tort of medical negligence, specifically wrongful HIV misdiagnosis, said to have occurred on 11th April, 2014.
 - j. That under section 4(2) of the Limitations of Actions Act, an action founded on tort must be brought within three (3) years from the date on which the cause of action arose.
 - k. The current petition having been filed over 11 years after the cause of action arose is hopelessly out of time and statute barred, and no leave of the court extending time has been granted.
 - l. The suit is therefore incurably defective and an abuse of the court process, and should be dismissed with costs.
 - m. That the petition is bad in law since the Petitioners should have either filed a normal claim in court.
 - n. That Art. 43 right to health do not automatically entitle a petitioner to compensatory damages. That such damages must be pursued through a civil suit.
3. In response to the Preliminary objection, the petitioners filed grounds of opposition in which they stated as follows:
- a. The Preliminary Objection that this Honorable Court lacks jurisdiction and that the petition is bad in law is misconceived, unfounded and contrary to Article 22(1) and 23(1) of *the Constitution* of Kenya which grants this court original jurisdiction to enforce the Bill of Rights.
 - b. The contention that the Petition is a negligence claim is misplaced and misconceived, as the Petition raises weighty constitutional violations of Articles 28, 35, 43(1)(a), 46, and 53(2) of *the Constitution*, including violations of dignity, health, consumer rights, access to information, and the best interests of a child which fall squarely within the jurisdiction of this Honorable Court as provided under Article 165(3)(b) of *the Constitution*.
 - c. A preliminary objection can only be raised on a pure point of law, as settled in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696*. The issues raised by the Respondent, including the nature of the petition and the claim that it is bad in law, requires ascertainment of facts and evidence presented, and therefore cannot properly be disposed of by way of a preliminary objection.
 - d. The Respondent's contention that compensation cannot be awarded in constitutional petitions is contrary to Article 23(3)(e) of *the Constitution* and established precedent, which affirm that damages are an appropriate remedy for violation of constitutional rights and wherein the courts awarded compensation for violation of health rights.
 - e. The objection on limitation of time is untenable, as no limitation period applies to enforcement of the Bill of Rights. The Court of Appeal in *Wachira Weheire v Attorney General (2010) KEHC 4127 (KLR)* affirmed that constitutional violations, particularly continuing violations, are not barred by limitation statutes.
 - f. The contention that the petition is statute time barred is equally flawed as it does not fall within the Limitations of Actions Act (Cap 22 Laws of Kenya) since it is not a negligence claim but a constitutional petition.
 - g. A constitutional petition is not statute-barred as the constitutional violations listed within the petition are continuing in nature, particularly with the Petitioners ongoing health



complications, psychological suffering, and the stigma endured and that they continue to endure.

- h. The Respondent is properly enjoined in this Petition, being a public-private partnership engaged in provision of health services in collaboration with Moi Teaching and Referral Hospital and the Government of Kenya and is therefore bound by Article 20(1) and (2) of *the Constitution* to respect, uphold, and promote fundamental rights and freedoms.
 - i. The Respondent has previously been a party to multiple proceedings before Kenyan Courts that have been determined.
 - j. The Preliminary Objection offends Article 48 of *the Constitution* on access to justice and Article 159(2)(d), which requires courts to administer justice without undue regard to technicalities. The Petition outlines the reason the Respondents were joined to the petition as they were attending the Respondent facility for testing and administration of antiretroviral treatment which is evidenced by the appointment cards attached in the supporting affidavits to the Petition.
 - k. The Preliminary Objection is an abuse of the court process, intended to delay and defeat substantive hearing of the Petition, and should therefore be dismissed with costs.
4. The petitioners equally filed their written submission which can be summarized as hereunder:

Petitioners' written submissions

5. The petitioners submitted that the preliminary objection is fatally defective, misconceived, and contrary to law and established jurisprudence. They identified four key issues for determination: whether the preliminary objection meets the required threshold; whether the court has jurisdiction to hear and determine the petition; whether the petition is time-barred; and whether the Respondent has locus standi to be included as a party to the suit.
6. On the first issue of whether the preliminary objection meets the required threshold, the petitioners argue that the Respondent's objections fail to qualify as proper preliminary objections. In support of this argument, the petitioners relied on the case of Justus Wekesa and others vs Abubakar Bibi Mansor Haji, ELC Case No 117 of 2019, which discussed the landmark case of Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd (1969) EA 696. That the Mukisa case defined a preliminary objection as a pure point of law which, if argued successfully, may dispose of a suit without requiring examination of facts. The court in Justus Wekesa stressed that where ascertainment of facts is required, a preliminary objection is not the proper procedure.
7. The petitioners submitted that the Respondent's objections concerning the nature of the petition and whether compensatory damages should be awarded require the court to interrogate the facts and evidence presented in the petition as a whole. These are not pure points of law but factual and legal issues that can only be determined upon full hearing of the petition, and therefore fall outside the scope of a valid preliminary objection.
8. The petitioners contend that they rightfully invoked the jurisdiction of the court under Article 22 of *the Constitution*, raising substantial violations of constitutional rights. They argue that the petition raises weighty constitutional violations including the right to the highest attainable standard of health, dignity, consumer rights, access to information, and the best interests of the child, which are quintessential constitutional questions requiring adjudication through a constitutional petition. In support of this position, the petitioners relied on the case of Anarita Karimi Njeru v Republic (1979) eKLR, where the court required precision in constitutional pleadings. The petitioners argue



that their petition clearly sets out the rights violated, the manner of violation, and the reliefs sought, thus satisfying this test.

9. The petitioners further emphasize that they continue to suffer ongoing physical, psychological, and emotional harm from the wrongful HIV diagnosis and treatment, and that part of the reliefs sought include systemic remedies such as orders directing the Respondent to put in place guidelines and measures to ensure accurate testing for HIV in line with the Kenya Testing Services Operational Manual 2022 Edition and the Kenya HIV Prevention and Treatment Guidelines 2022, as well as conducting mandatory training of all medical personnel and enhancing patient communication protocols. This matter, they argue, goes beyond a medical negligence claim and implicates public interest litigation.
10. On the issue of compensation, the Respondent had contended that compensation cannot be awarded in a constitutional claim on health rights. The petitioners submit that this argument is contrary to *the Constitution* and precedent. They relied on Article 23(3) of *the Constitution*, which empowers the court, when enforcing the Bill of Rights, to grant appropriate relief including declarations, injunctions, conservatory orders, and under Article 23(3)(e), an order for compensation. The petitioners argued they have sought an order for general and exemplary damages on an aggravated scale for the violation of their constitutional rights, which is within the law.
11. The petitioners acknowledge that the Respondent relied on precedent stating that violations of Article 43 do not automatically entitle a petitioner to compensatory damages. However, they argue this has not been the case in several constitutional violation cases concerning the right to health. In support of this argument, the petitioners relied on the case of *L A W & 2 others v Marura Maternity & Nursing Home & 5 others* [2022] KEHC 17132 (KLR), where the High Court awarded damages for violation of health rights. They also cited *J O O (also known as J M) v Attorney General & 6 others* [2018] eKLR, where the court similarly awarded damages for violations of health rights.
12. The petitioners further relied on the case of *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR, where the Court of Appeal affirmed that damages are an appropriate remedy for violation of constitutional rights, distinct from tortious damages, and may be compensatory, exemplary, or even punitive as long as it is appropriate and just according to the facts and circumstances of a particular case. The petitioners emphasize that they do not seek tortious damages but remedies for violation of their fundamental rights, and such relief is firmly anchored in *the Constitution* and binding precedent.
13. On the second issue of whether the court has jurisdiction to hear and determine the petition, the petitioners submit that the Respondent's contention that the court lacks jurisdiction is unfounded. They rely on Article 22(1) of *the Constitution*, which grants every person the right to institute proceedings where a right or fundamental freedom has been denied, violated, infringed, or is threatened. They also cite Article 23(1) of *the Constitution*, which vests original jurisdiction in the High Court to hear and determine such proceedings, and Article 165(3)(b) of *the Constitution*, which empowers the High Court to determine whether a right has been violated.
14. In support of their jurisdictional arguments, the petitioners relied on the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR, where the Court of Appeal emphasized that constitutional petitions must be heard on their merits where they disclose violations of fundamental rights. They also cited *Trusted Society of Human Rights Alliance v AG & 2 Others* [2012] eKLR, where the court held that where a matter involves questions of fundamental rights, courts are obligated to hear the petition regardless of the private law elements it may bear.
15. On the third issue of whether the petition is time-barred, the petitioners argue that the Respondent's contention is misconceived. They submit that it is trite law that enforcement of constitutional rights



is not subject to statutes of limitation. In support of this argument, the petitioners relied on the case of *Wachira Weheire v Attorney General* (2010) KEHC 4127 (KLR), where the Court of Appeal held that constitutional violations are not subject to statutory limitation, particularly where the violations are continuing in nature.

16. The petitioners further argue that the contention that the petition is statute-barred is equally flawed as it does not fall within the Limitations of Actions Act (Cap 22 Laws of Kenya) since it is not a negligence claim but a constitutional petition. They emphasize that they continue to suffer stigma, physical complications, and psychological harm arising from the Respondent's actions, and that the petition and supporting affidavits clearly outline the steps taken since they realized the misdiagnosis, including reaching out to the Respondent and the delay tactics used by the Respondent that led to the delay in filing the constitutional petition.
17. On the fourth issue of whether the Respondent has locus standi to be included as a party to the suit, the petitioners argue that the petition demonstrates that AMPATH Kenya is a public-private partnership entity delivering health services in collaboration with Moi Teaching & Referral Hospital and the Government of Kenya, and is therefore bound by Article 20(1) and (2) of *the Constitution* to respect, uphold, and promote fundamental rights and freedoms.
18. The petitioners point out that AMPATH Kenya has been involved in several cases before the courts in Kenya that have addressed the issue of locus of the Respondent, and that the Respondent has been involved in several cases that proceeded to the determination of the issues. In support of this position, they relied on the case of *Ochiel v Ampathplus (Employment and Labour Relations Claim (2018) [2022] KEELRC 1691 (KLR) (18 May 2022)*, where the court stated that noting the partnership with other entities being within the knowledge of the Respondent, they ought to have taken out a third-party notice to the party they think should be the Respondent rather than evading liability altogether. They also cited *Suke v Ampath Centre (2024) KEHC 6192 (KLR)*, where the court entertained a claim against the Respondent and delivered a judgment on the same.
19. The petitioners argue that the petition has clearly outlined why AMPATH Kenya was joined as they were attending AMPATH Kenya for testing and administration of antiretroviral treatment, which is evidenced in the supporting affidavits. They submit that AMPATH Kenya is therefore the only party directly responsible for the constitutional violations occasioned to the petitioners, and is therefore properly joined in these proceedings and cannot escape liability under the guise of non-registration or misjoinder.
20. The petitioners invoke Article 48 of *the Constitution*, which guarantees every person the right to access to justice, arguing that preliminary objections such as this undermine that guarantee by shutting the door of justice before the merits of the case are analyzed. They also cite Article 159(2)(d), which directs that justice shall be administered without undue regard to technicalities. The petitioners submit that the court should consider the mischief of the Respondent in continuously raising a preliminary objection on this basis despite several determinations by similar courts on their locus.
21. In conclusion, the petitioners submit that the preliminary objections as raised fail to meet the threshold of a proper objection, offend established jurisprudence, and if upheld, would unjustly lock the petitioners out of court without hearing on the merits of the case. They urge the court to dismiss the preliminary objection with costs and direct that the petition proceeds to hearing on its merits.



Respondent's written submissions

22. Learned Counsel Mr. Cheptinga started by submitting that it is only entities with juristic personality that can sue and be sued. On this he cited the locus classicus in *Salomon v. Salomon & Co. Ltd* (1897) AC 22.
23. Learned Counsel cited numerous decisions in support of the objection regarding the issue of the respondent as an entity to sue or be sued.
24. On the issue of the petition being statute time barred, Learned Counsel submitted that the entire petition is statute barred under the *Limitation of Actions Act* since an action founded on tort may not be brought after the end of three years. That the claim arises from an alleged tort of medical negligence, specifically wrongful HIV misdiagnosis, said to have occurred on 11th April, 2024. Mr. Cheptinga submitted that under section 4(2) of the *Limitation of Actions Act*, an action founded on tort must be brought within three (3) years from the date on which the cause of action arose.
25. On this issue he concluded that the current petition having been filed over 11 years after the cause of action arose, is hopeless out of time and statute barred, and no leave of the court extending time has been granted. Therefore, the suit is incurably defective and an abuse of the court process, and should be dismissed with costs.
26. According to the Respondent, the petition is bad in law since the petitioners have either filed a normal claim in court. This is because a medical negligence claim requires prove of standard deviation in care that was given as well as direct prove that the omission or commissions occasioning by the defendant who is not a legal person in this case is the one who directly caused any current medical complaints. That there is no corporate veil that can even be lifted in this case. Counsel maintained that Article 43 rights to health do not automatically entitle the petitioner to compensatory damages. That such damages must be pursued through a civil suit. On this counsel cited the decision in *Kurji v. Mwangombe* MBS Civil Appeal E114 of 2021.
27. On the question of proof of negligence, learned counsel submitted that the onus is on a plaintiff to prove negligence on a preponderance of probabilities. That if at the conclusion of the case the evidence is evenly balanced, he cannot claim a verdict; for he will have discharged the onus resting upon him. He urged the court to uphold the preliminary objection.

Analysis and determination

28. Having perused the petition together with the Preliminary Objection together with the Grounds of Objection, there are three interrelated issues that distill themselves for determination by this court. The first concerns whether AMPATH Kenya, an entity operating without formal legal registration, can be held to account in as separate legal entity capable of suing or being sued. This question is not merely technical; it goes to whether organizations providing critical health services can shield themselves from liability by claiming they lack legal personality, even while actively delivering those services and holding themselves out to the public.
29. The second issue addresses the temporal dimension of justice. When the alleged misdiagnosis occurred in 2014 but the petition was filed in 2025, more than eleven years later, the court must answer the parties on whether statutory limitation periods apply to constitutional petitions, and if so, whether there are circumstances that would excuse or explain such a delay.
30. The third question concerns the appropriate legal framework for seeking redress. The respondent argues this matter should have been framed as a medical negligence claim under ordinary tort law, while



the petitioners contend that the violations of their constitutional rights to health, dignity, and the best interests of the child properly situate this matter within the constitutional jurisdiction of the High Court.

31. The legal requirement that preliminary objections must raise pure points of law is well-settled in our jurisprudence. This foundational principle finds its authoritative statement in the East African Court of Appeal's decision in *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696*, which has served as the definitive reference point on this matter across the region for over five decades. In that landmark decision, Law JA articulated the test with clarity:

“So far as I'm aware, 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. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

And by Sir Charles Newbold JA, thus:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. 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 had 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 issue. The improper practice should stop.”

32. These pronouncements establish three essential requirements that must all be satisfied: first, the objection must raise a pure point of law; second, it must assume the correctness of all facts pleaded by the opposing party; and third, it must not require any factual determination or exercise of judicial discretion. The absence of even one of these elements renders the preliminary objection improper.
33. The respondent's preliminary objection centers on one main point: that AMPATH Kenya, as named in this suit, does not exist as a legal entity that can sue or be sued. Learned Counsel Mr. Cheptinga relied on the locus classicus case of *Salomon v. Salomon & Co. Ltd (1897) AC 22*, which established that only entities with legal personality can participate in legal proceedings. He argues that since AMPATH Kenya lacks such legal status, the entire suit is flawed and should be struck out.
34. The petitioners on the other hand have made efforts to show that AMPATH Kenya is not some imaginary entity. It is a working public-private partnership that operates alongside Moi Teaching and Referral Hospital and the Government of Kenya. It provides real medical services to real patients, including the petitioners in this case. The petitioners attended AMPATH facilities, received treatment there, and have the medical records to prove it.
35. The petitioners cited the case of *Ochiel v Ampathplus (Employment and Labour Relations Claim 40 of 2018) [2022] KEELRC 1691 (KLR)* which dealt with exactly this same objection. AMPATH argued, just as it does now, that it could not be sued because it was not a legal entity. Justice J.W. Keli rejected this argument. The court found that AMPATH had hired employees, issued employment contracts through its Chief of Party, and acted in every way like an employer. Therefore, it could be treated as one for legal purposes.



36. The court in that case made an important observation:

“The submissions on the partnership with other entities being within the knowledge of the Respondent ought to have been addressed by the Respondent by taking out third party notice to the party it thinks should be the defendant rather than evading liability altogether.”

37. The fundamental question that emerges from this preliminary objection is whether AMPATH Kenya, as sued, constitutes a legal entity capable of being held accountable in law. The petitioners themselves have described the Respondent as follows: “Ampath Kenya is a healthcare facility and a collaborative partnership involving Moi University, Moi Teaching and Referral Hospital, a consortium of international universities led by Indiana University, and the Kenyan government. Their mission is to enhance holistic and sustainable health in Kenya by providing comprehensive healthcare services, training medical professional, and conducting research.”

38. This description by the petitioners themselves reveals the crux of the legal problem. AMPATH Kenya is described as a “collaborative partnership” involving multiple distinct legal entities. The critical question becomes: where does this partnership draw its legitimacy from as a separate legal entity? Do they have registrable instruments that confer upon them independent legal personality? The evidence before me suggests they do not.

39. While I acknowledge that AMPATH Kenya operates as a functioning entity providing medical services, it has not come out clear where they draw their legitimacy from and whether they are established as a separate legal entity. The fact that AMPATH Kenya operates through a collaborative partnership model does not automatically confer upon it the status of a legal entity capable of being sued. As a partnership involving multiple organizations, questions arise as to its independent legal standing, whether it maintains separate accounts, and whether it has the requisite legal instruments to establish it as a juristic person distinct from its constituent partners.

40. The case of *Ochiel v Ampathplus* (supra), while dealing with employment matters, does not resolve the fundamental question of legal personality in the context of constitutional proceedings. Employment relationships may create different legal dynamics that do not necessarily translate to constitutional liability. The respondent in this matter appears to be a collaborative arrangement rather than a properly constituted legal entity with the capacity to be held liable for constitutional violations.

41. I find that the petitioners have failed to demonstrate that AMPATH Kenya, as sued, constitutes a legal entity with the capacity to be a party to these proceedings. The suit is therefore improperly constituted against a non-juristic person, rendering the proceedings incompetent ab initio.

42. It is worth noting, though not determinative in this case, that the doctrine of exhaustion of local remedies may also have applied to these circumstances. On exhaustion, the sentiments of the Court of Appeal in *Nyaoga V Chairman Kisii County Assembly & 3 Others* [2023] KECA 1540 (KLR) are a worthy highlighting;

“The doctrine of exhaustion of remedies was created by courts in order to promote an efficient justice system and autonomous administrative state. It is a principle that requires parties to exhaust all available local administrative remedies before seeking redress in a court of law on a constitutional issue. An aggrieved party must first pursue all avenues of relief found within the administrative agency responsible for the issue at hand. The reason for this is to allow administrative agencies to address, and to potentially resolve the issue before escalating the same to the courts”



43. It is in the case of *Maurice Ooko Otieno v Mater Misericordia Hospital* [2004] eKLR, where it was held as follows in relation to party suing a non-existent legal entity;

“In *Janto Construction Company Ltd v Enock Sikolia & 2 others* [2020] eKLR the court held; A claimant has a duty of ascertaining the legal status of a party intended to be sued. The reason being that it is only those entities which are either natural or legal persons which can Successfully sue or be sued. Instituting legal proceedings against a non-legal entity renders the suit a non-starter-In this case had the Plaintiff ascertained the status of the 2nd Defendant it would have found out that indeed Citizen TV is not a legal entity. As a result of the foregone, the suit against the 2nd Defendant cannot stand. It is hereby struck out accordingly.”

In *Maurice Ooko Otieno v Mater Misericordia Hospital* [2004] eKLR the court held that; The law requires that a suit be brought against a legal entity. The respondent failed to establish that the West FM Media he sued as the defendant was a legal entity capable of being sued. In the event that the appellant herein failed to enter appearance or appeal the judgment and decree, the same would have been rendered unenforceable. The judgment should have ended at the juncture that the trial magistrate acknowledged that the appellant was non-suited as the appellant lacked locus standi to defend itself against the allegations. The admission of DWI that he was an employee of West Media Limited does not suffice to consider the appellant as properly suited as the same was not vide any pleadings. Further, the respondent had several opportunities to cure the defect in his pleadings as he amended the same and failed to do so. Allowing the said decision to stand amid the glaring contradiction would be a bad precedent. The same would amount to issuing a court order in vain as it would be unenforceable. The trial court having reached a conclusion of fact that the defendant was wrongly sued, should have dismissed the suit as it was incurably incompetent. In the premises, I find that the trial court erred in issuing judgment against a party it had already determined was wrongly sued”

44. The Court of Appeal in the case of *Speaker of National Assembly v Njenga Karume* [2008] eKLR stated as follows:

“...where there was an alternative remedy and especially where parliament has provided a statutory procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully to the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it...” Emphasis ours. (See also: *Narok County Council v Trans Mara County Council & Another* [2000] eKLR).”

45. Finally, in *Albert Chaurembo Mumba &7 others v Maurice Munyao & 148 others* (2019) eKLR the court stated as follows:

“In pursuit of sound legal principles, it is our disposition that the disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of the superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to the relevant



persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute”

46. The petitioners appear to have chosen the constitutional petition route possibly to circumvent the limitation periods that would apply to a medical negligence claim under tort law. While constitutional petitions are generally not subject to limitation periods, this should not be used as a mechanism to avoid proper legal procedures where alternative remedies exist. The constitutional jurisdiction of the High Court, while broad, should not become a refuge for claims that could and should be pursued through ordinary civil procedures, particularly where the substantive issues relate to alleged medical negligence rather than systemic constitutional violations.
47. However, given my finding on the primary issue of legal personality, it is unnecessary to make a definitive determination on this point.
48. For the foregoing reasons, I find that the preliminary objection succeeds on the ground that AMPATH Kenya, as sued, does not constitute a legal entity capable of suing or being sued. The petition is accordingly struck out as being incompetent ab initio.
49. It is so ordered.

DATED AND SIGNED AT ELDORET THIS 24TH DAY OF SEPTEMBER, 2025

.....

R. NYAKUNDI
JUDGE

