



**Omtatah v Head of Public Service & 2 others (Constitutional Petition E301 of 2021)
[2024] KEHC 198 (KLR) (Constitutional and Human Rights) (19 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 198 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION E301 OF 2021

LN MUGAMBI, J

JANUARY 19, 2024

**IN THE MATTER OF: ARTICLES 3(1), 22(1) & 2(C), 23, 48, 50(1), 159
AND 258(1) & (2)(C) OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION AND
VIOLATION OF ARTICLES 1(1); 2(1), (2) & (3); 3(1), 10, 19, 20, 21, 24,
73, 94(5), 201, 227, 232(1)(D) AND 259(1) & 3 OF THE CONSTITUTION**

AND

**IN THE MATTER OF: THE ALLEGED VIOLATION OF RIGHTS AND
FUNDAMENTAL FREEDOMS UNDER ARTICLE 47(1) OF THE CONSTITUTION**

AND

**IN THE MATTER OF: THE ALLEGED VIOLATION OF SECTIONS 2, 4, 5, 7, 44, 52, 53
AND 60 OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2015; SECTION
3, 4 AND 5 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015; SECTIONS 4, 5, 6,
7 AND 8 OF THE STATUTORY INSTRUMENTS ACT, 2013 ; AND PARAGRAPH 3.5
OF MWONGOZO (THE CODE OF GOVERNANCE FOR STATE CORPORATIONS).**

AND

**IN THE MATTER OF: THE CONSTITUTION AND LEGAL VALIDITY OF ENACTING
WITHOUT PUBLIC PARTICIPATION AND APPROVAL BY PARLIAMENT OF THE
POLICY CENTRALISING LEASING OF MOTOR VEHICLES BY STATE CORPORATIONS**

**IN THE MATTER OF: THE CONSTITUTIONAL AND LEGAL VALIDITY
OF THE POLICY REQUIRING STATE CORPORATIONS TO LEASE
MOTOR VEHICLES THROUGH THE NATIONAL TREASURY**

**IN THE MATTER OF: THE DOCTRINES OF
LEGITIMATE EXPECTATION, AND VOID AB INITIO**



BETWEEN

OKIYA OMTATAH PETITIONER

AND

HEAD OF PUBLIC SERVICE 1ST RESPONDENT

THE NATIONAL TREASURY & PLANNING 2ND RESPONDENT

THE HON ATTORNEY GENERAL 3RD RESPONDENT

Circulars are not statutory instruments

Reported by John Ribia

Statutes – statutory instruments – circulars - whether circulars that guided the application for the prevailing policy and laws were statutory instruments – Statutory Instruments Act (cap 2A) sections 2, 5, 6, 8, 9 10 and 11; Public Procurement and Asset Disposal Act (cap 412C) sections 7, 44, 50, 55, and 60(1); Public Finance Management Act (cap 412A) section 11 and 128.

Constitutional Law – national values and principles – public participation – matters that should be subjected to public participation - circulars - whether there was a legal requirement for circulars guiding the application for the prevailing policy and laws to be subjected to public participation – Constitution of Kenya 2010, article 10.

Public Procurement Law – consortium procurement – circular guiding application of consortium procurement - whether a circular that applied and gave directions on existing laws and policies on consortium procurement, contravened statutory provisions and usurped the roles of respective accounting officers - Public Procurement and Asset Disposal Act (cap 412C) sections 7, 44, 50, 55, and 60(1); Public Finance Management Act (cap 412A) section 11 and 128; National Government Coordination Act (cap 127) section 7 and 8.

Brief facts

The petition challenged Government Circular OP/CAB.23/1A dated June 26, 2021, issued by the Head of Public Service. The circular directed the centralization of government motor vehicle leasing through the National Treasury. The petitioner, citing violations of the Constitution and statutory provisions, argued that the circular usurped procurement roles of accounting officers, lacked public participation, and contravened the Statutory Instruments Act. The respondents defended the circular as an administrative directive within existing laws, aimed at achieving efficiency and cost-effectiveness.

Issues

- i. Whether a circular that applied and gave directions on existing laws and policies on consortium procurement, contravened statutory provisions and usurped the roles of respective accounting officers.
- ii. Whether circulars that guided the application of the prevailing policy and laws were statutory instruments.
- iii. Whether it was a legal requirement that circulars guiding the application for the prevailing policy and laws had to be subjected to public participation.

Held

1. Article 3(1) of the Constitution provided that every person had an obligation to respect and uphold the Constitution. Further, article 258 (1) stated that that every person had the right to institute court proceedings, claiming that the Constitution had been contravened, or was threatened with contravention. The Constitution therefore allowed anyone to bring a claim alleging violation of its provisions whether or not they were directly affected by the violation or not. The petition fell squarely within the ambit of public interest litigation.



2. If the purpose of the circular was merely elaboratory or explanatory and was based on what already existed, then it was not a statutory instrument. It was purely an administrative tool issued for purposes of guiding implementation of existing policies.
3. The mandate of Head of Public Service drew from the executive functions of the President. It was an office created under article 132(4)(a) of the Constitution.
4. The circular in question was giving directions concerning centralized leasing of government vehicles. Under section 50 of the Public Procurement and Asset Disposal Act, 2015; procurement entities could enter into consortium buying. Central leasing was already incorporated in the Procurement and Asset Disposal Act and was described as consortium buying, a scheme where procurement entities could come together and procure jointly to benefit from economies of scale. All that the circular did was to give guidance concerning that particular procurement item, but the rules did not change. It was not against the existing legal provisions nor was it usurpation of the roles of respective accounting officers. It did not contravene the existing statutory provisions. The circular was executive in nature and meant to guide the application of the prevailing policy. It could not be considered a statutory instrument within the meaning of section 2 of the Statutory Instruments Act.
5. The circular in question was an amplification of what was already in law and policy (consortium procurement). The circular was not a statutory instrument within the scope of section 2 of the Statutory Instruments Act. It did not require public participation.

Petition dismissed, each party was to bear its costs.

Citations

Cases

Kenya

1. *Anarita Karimi Njeru v Republic* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR); [1979] KLR 154; (1986-1990) KLR 1272 - (Explained)
2. *Asin, Brian & 2 others v Wafula W Chebukati & 9 others* Petition 429 of 2017; [2017] KEHC 9388 (KLR) - (Explained)
3. *British American Tobacco Kenya PLC v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tabacco Kenya Limited (Affected Party)* Petition 5 of 2017; [2019] KESC 15 (KLR) - (Mentioned)
4. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14,14A,14B & 14C of 2014; [2015] KESC 15 (KLR) - (Mentioned)
5. *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance(NASA) Kenya & 6 others* Civil Appeal 224 of 2017; [2017] KECA 436 (KLR) - (Explained)
6. *Judicial Service Commission v Mbalu Mutava & another* Civil Appeal 52 of 2014; [2015] KECA 741 (KLR) - (Explained)
7. *Kaps Parking Limited & another v County Government of Nairobi & another* Petition 104 of 2020; [2021] KEHC 5819 (KLR) - (Explained)
8. *Kenya Anti-Corruption Commission v Deepak Chamanlal Kamani & 4 others* Civil Appeal 152 of 2009; [2014] KECA 719 (KLR) - (Explained)
9. *Kenya Human Rights Commission v Attorney General & Law Society of Kenya* Constitutional Petition 87 of 2017; [2018] KEHC 9656 (KLR) - (Explained)
10. *Keroche Industries Limited v Kenya Revenue Authority & 5 others* Miscellaneous Civil Application 743 of 2006; [2007] eKLR - (Mentioned)
11. *Peter Ngari Karume & 7 others v Attorney General* Constitutional Application No 128 Of 2006; [2009] eKLR - (Explained)
12. *Okeyo, Erick v County Government of Kisumu & 2 others* Petition 1 'A' of 2014; [2014] KEHC 5380 (KLR) - (Explained)



13. *Okiya, Omtatab Okoiti v Cabinet Secretary, National Treasury & 3 others* Petition 253 of 2018; [2018] KEHC 9439 (KLR) - (Mentioned)
14. *Ramogi, William Odhiambo & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* Constitutional Petition 159 of 2018; [2020] KEHC 10266 (KLR) - (Explained)
15. *Republic v Attorney General; Law Society of Kenya (Interested Party); Ex-parte: Francis Andrew Moriasi* Judicial Review Miscellaneous Application 364 of 2018; [2019] KEHC 7013 (KLR) - (Explained)
16. *Republic v Independent Electoral and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 6 others* Judicial Review 378 of 2017; [2017] KEHC 4663 (KLR) - (Explained)
17. *Republic v Public Procurement Administrative Review Board ex-parte Magic General Contractors Limited & 2 others* Miscellaneous Application 129 of 2017; [2018] KEHC 8858 (KLR) - (Mentioned)
18. *Wabwire, Christian Juma v Attorney General* Petition 50 of 2013; [2019] KEHC 1049 (KLR) - (Explained)

India

Ashok Kumar Pandey v State of West Bengal 2004 SC 280 - (Explained)

Texts

Garner, BA., (Ed) (2019), *Black's Law Dictionary* St Paul Minnesota: Thomson Reuters 11th Edn

Statutes

Kenya

1. Constitution of Kenya articles 1(1); 2(1) (2), (3); 3(1); 10; 22; 24; 27; 40; 43; 46; 47; 73; 93; 94; 109(1); 114; 118; 124; 131(1); 132(3)(b); 4(a); 201; 209; 221; 225(1); 227; 232; 258; 259(1)(3)- (Interpreted)
2. Evidence Act (cap 80) section 107 - (Interpreted)
3. Fair Administrative Action Act (cap 7L) sections 3, 4 - (Interpreted)
4. National Government Coordination Act (cap 127) sections 7, 8 - (Interpreted)
5. Public Finance Management Act (cap 412A) sections 11, 128 - (Interpreted)
6. Public Procurement And Asset Disposal Act (cap 412C) sections 7(1),(3); 44; 50; 55; 60(1) - (Interpreted)
7. Statutory Instruments Act (cap 2A) - (Interpreted) sections 2, 5(1)(2)(3); 6; 8; 9; 10; 11

Advocates

Ms Wamuyu for the respondents.

JUDGMENT

The Petitioner's Case

1. The petitioner contends that since 2019, the Government of Kenya has been piloting a motor vehicle leasing programme in which existing procurement procedures and systems for participating State Corporations were observed. However, through Government Circular OP/CAB 23/1A dated June 26, 2021 which did not exempt State Corporations, the 1st respondent announced that the motor vehicle leasing programme would with immediate effect be applied across the entire spectrum of Government. It directed ministries, departments and agencies with running leasing programmes to immediately register them with the National Treasury to be managed centrally.
2. According to the petitioner, the circular has enabled the National Treasury/Ministry of Finance to usurp the responsibilities of specific procurement offices in the Ministries as mandated by the Constitution and the law.
3. The petitioner alleges that the respondents enacted policy require that:



- a. All State Corporations, which are semi-autonomous entities, to surrender their procurement mandate to the National Treasury as regards the leasing of motor vehicles;
 - b. All ministries to surrender their procurement mandate to the National Treasury as regards the leasing of motor vehicles yet they have their own internal procurement systems
4. He contends that the policy change violates the { Public Procurement and Asset Disposal Act, No 33 of 2015 which requires the accounting officer of a procuring entity to be responsible for procurement. The states impugned policy was effected without advance information, consultation or public participation, and violates both article 227 of the Constitution and the Public Procurement and Asset Disposal Act, 2015.
5. In his petition dated July 29, 2021, the petitioner prays for the following reliefs:
- i. A declaration that:
 - a. Because it was enacted in violation of the Constitution, the Statutory Instruments Act, 2013, the Fair Administrative Action Act, 2015, and the Public Procurement and Asset Disposal Act, 2015, the policy centralizing in the National Treasury and procurement of leased motor vehicles by public bodies is invalid, null and void ab initio;
 - b. Because it was enacted without public participation, the policy centralizing in the National Treasury the procurement of leased motor vehicles by public bodies is invalid, null and void ab initio;
 - c. The policy centralizing in the National Treasury the procurement of leased motor vehicles by public bodies is invalid, null and void ab initio for violating the article 227 of the Constitution and provisions of the Public Procurement and Asset Disposal Act, 2015;
 - d. The centralization in the National Treasury in the procurement of motor vehicles leased by all public bodies is unreasonable and, therefore unconstitutional, null and void;
 - e. The Head of Public Service has no capacity in law to unilaterally centralise in the National Treasury the procurement of leased motor vehicles leased by all public bodies is unreasonable and, therefore unconstitutional, null and void ab initio;
 - f. The 1st respondent should pay the petitioner's costs of the suit
 - ii. An Order:
 - a. Quashing the Government Circular OP/CAB 23/1A, dated June 26, 2021;
 - b. Compelling the 1st respondent to pay the petitioner's costs of this suit.
 - iii. Any other relief that the court may deem just to grant.
6. The petitioner posited that the Constitution of Kenya, 2010 is not a preserve of the governing elite because public participation is a constitutional imperative and democracy is premised on the idea that all members of the public are equally entitled to have a say in decisions affecting them. In paragraph F of the petition, the petitioner outlined the nature of the violations:
- a. That by enacting the impugned policy without public participation, the 1st respondent violated articles 1(1), 2(1)(2) & (3), 3(1), 10, 24, 27, 40, 43, 46, 47, 73, 93, 94, 109(1), 114, 118,



124, 201, 209 and 259(1) & (3) of the Constitution, thereby undermining constitutionalism in general and the rule of law in particular;

- b. The Head of Public Service undermined the rule of law by violating clear provisions of the Fair Administrative Action Act, 2015; the Statutory Instruments Act, 2013; and the Public Procurement and Asset Disposal Act, 2015;
- c. the Constitution is threatened with violation because it will be impossible to run a system that is fair, equitable, transparent, competitive and cost-effective where the procurement is centralized in one huge bureaucracy;
- d. Article 227(2) of the Constitution was violated to the extent that the Head of Public Service violated express provisions of the Public Procurement and Asset Disposal Act, 2015, which is the legislation operationalized the article.

The Respondents' Case

7. The 1st respondent's replying affidavit is dated September 27, 2021 and was deponed by Kenedy Kihara, who was the Principal Administrative Secretary and Assistant Secretary to the Cabinet in the 1st respondent's office. He began by stating that the Government of Kenya is a key purchaser of motor vehicles for purposes of facilitating delivery of service to the public and that it is not in contest that since independence Ministries, Departments and Agencies have purchased various vehicle models to facilitate their execution of mandate. He deponed that as a result of the foregoing the Government has ended up with the untenable situation where different models of motor vehicles are purchased from different vendors and consequently, the inventory behavior and associated costs do not exhibit standard patterns making it difficult to model and optimize the supply chains using classical inventory models. That the maintenance of these different vehicle models has proven to be problematic to the extent that it has entailed different standards with varying operational costs and levels of complexities and further that some of the service providers are monopolistic in their conduct of business causing no assurance of value for money in the repairs and maintenance.
8. The 1st respondent posited that policy it was intended to address the foregoing concerns to ensure to prudent and efficient use of public funds, by considering a singular framework on the purchase of motor vehicles and its utilization, that it communicated the decision on Motor Vehicle Leasing programme. That the said programme was central in monitoring framework on the utilization and attendance fuel consumption as to warrant prudence and efficiency in the Government's operations. He listed the benefits of the programme in paragraph 15 of his affidavit and stated that the Constitution under article 201 of the Constitution provides for prudent and responsible use of public resources of which onus is upon the Government to assure compliance through policies and interventions that will enable the achievement of the objective.
9. The 3rd respondent opposed the petition on the following grounds listed in their grounds of opposition dated September 16, 2021:
 - a. That the petition is premises on an erroneous legal premise viz that circular Ref No OP/CAB.23/1A is a statutory instrument when it clearly isn't;
 - b. The petition is premised on an erroneous factual premise viz. that circular Ref No OP/CAB.23/1A is a directive of the Head of Public Service whereas the same clearly indicates that the circular was a communication of an executive decision of the National Government;
 - c. The petition is on an erroneous legal and factual premise viz. that the circular constitutes subsidiary legislation when it is neither factually nor legally subsidiary legislation;



- d. The petitioner has admitted in paragraphs 11 to 15 of this petition to both the cost-effectiveness and merits of the government programme of leasing motor vehicles thereby affirming the utilitarian merits of the same as required under the provisions of article 227 of the Constitution in consonance with the public finance principle set out under article 201(d) that public money shall be used in a prudent and responsible way;
- e. That contrary to the petitioner's allegations the National Treasury is expressly recognized under section 7(1) of the Public Procurement and Asset Disposal Act as being responsible for public procurement and asset disposal policy formulation;
- f. That further, section 7(3) of the Public Procurement and Asset Disposal Act provides that the National Treasury may prescribe institutional framework to provide for the procurement, administration and management of common user items for the national government;
- g. That motor vehicles fall within the definition of common-user under the Public Procurement and Asset Disposal Act;
- h. That contrary to the petitioner's allegations consortium buying which the petitioner terms as centralizing of procurement is expressly permitted under the Public Procurement and Asset Disposal Act;
- i. That the petition is premised on a misapprehension of the character and content of the circular in issue by the petitioner;
- j. That the circular in issue is executive in character with administrative objectives providing guidelines in implementation of government policy;
- k. That the National Treasury is established under section 11 of the Public Finance Management Act as read together with the provisions of article 225(1) of the Constitution with a clear constitutional and statutory mandate inter alia controlling expenditure control and establishing mechanisms to ensure implementation of the same;
- l. The petition is bad in law in that it is premised on the petitioner's personal preferences over those of a constitutional mandated repository of government functions; and
- m. The petition is inimical to public good and is actuated by motives other than the vindication of public interest.

Submissions

10. The petition was canvassed by way of written submissions with the parties highlighting their respective submissions on the June 27, 2023.
11. The petitioner highlighted his submissions dated March 5, 2022. He started by affirming that the instant petition was a public interest litigation contrary to the assertions by the 3rd respondent grounds of opposition that it was premised on the petitioner's personal preferences over those of a constitutional repository of a government function. He proceeded to describe public interest litigation as a tool that crusaders of constitutionalism, good governance and probity in public affairs management have to hold Government and its agencies transparent and accountable under the law. He



relied on the provisions of articles 22 and 258 of the Constitution and the case of Kenya Anti-corruption Commission v Deepak Chamanlal Kamni & 4 others [2014] eKLR where the court held that:

“...a matter of public interest must be a matter in which the whole society has a stake, anything affecting the legal rights or liability of the public at large.”

12. He placed further reliance on the case of Thakur Babadur Singh & another v Government of Andhra Pradesh delivered on September 23, 1998 and the Ontario Law Reform Commission’s 1989 Report on The Law of Standing. He submitted that he had brought the Petition in good faith pursuant to articles 3(1), 22 and 258 of the Constitution to respect, uphold and defend the Bill of Rights and the Constitution in general and thus the petition meets the test of *bona fide* public interest litigation. He continued to submit further that article 1(1) of the Constitution vested sovereign power to the People of Kenya, which power should be exercised only in accordance with the Constitution.
13. The second issue that the petitioner submitted on was the failure by the 1st respondent to conduct public participation on the impugned circular. He stated that the said circular dated June 26, 2021 contravened articles 10 of the Constitution for want of public participation. That in the case of Independent Electoral Boundaries Commission (iebc) v National Super Alliance (nasa) & 6 others, Civil Appeal No 224 Of 2017 [2017] eKLR, the Court of Appeal held that:

“In our view, analysis of the jurisprudence from the Supreme court leads us to clear conclusion that article 10(2) of the Constitution is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in article 10(2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles....”
14. While further relying on the case of Mombasa High Court Constitutional Petition No 159 of 2018 consolidated with Constitutional Petition No 201 of 2019 William Odhiambo Ramogi & others v Attorney General & 4 Others; Muslim For Human Rights & 2 others [2020] EKLK, the petitioner submitted that the 1st respondent holds a state office while the 2nd respondent is a public entity charged with the mandate of performing public duties, hence constitutionally bound to undertake public participation in decision making process.
15. The petitioner contends that he is aggrieved with the manner in which the impugned circular was developed by the 1st respondent and its subsequent implementation by the 2nd respondent. That the respondents failed to conduct public participation before developing the circular and that there was need for meaningful and adequate participation and consultation before the circular could validly be issued and implemented. That all decisions by public entities ought to be subjected to public participation as discussed in the case of William Odhiambo Ramogi (supra) where the court dealt with the manner in which a state corporation ought to exercise statutory power.
16. That the circular was meant for implementation and this would affect the motor vehicle lessors to the Government who have a valid and ongoing motor vehicle lease with the Government because the circular would be implemented across the spectrum. That tax payers and the general public are also affected by the circular. He relied on the case of Kaps Parking Limited & another v The County Government of Nairobi & another [2021] eKLR where the court discussed the manner in which public participation must be carried out and proceeded to outline the parameters of the what must be factored by a public entity.
17. He also placed reliance on the case of Kenya Human Rights Commission v Attorney General & another [2018] eKLR;



18. While submitting on his third issue, that the circular also contravened other provisions of the Constitution, the petitioner stated that save for article 10 of the Constitution, the circular also contravenes articles 47, 118, 124, 201, 221 and 232. He relied on the Court of Appeal case of Judicial Service Commission v Mbalu Mutava & another [2015] eKLR held that:

“ Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights...The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of *ultra vires* from which administrative law under the common law was developed.”

19. He submitted that the 1st respondent violated the express provisions of article 47 of the Constitution aforementioned to the extent that it came up with the impugned circular without involving the stakeholders, the general public and/allowing any form of public participation when they knew they were duty bound to do that. That the circular did not pass the procedural fairness test. That further the impugned circular was made in bad faith and in contravention of the constitutional precepts of transparency, competitiveness, cost-effectiveness hence violating article 227 of the Constitution, prejudicing the legitimate expectations of millions of Kenyans for respect if the Rule of Law in discharging public functions. He relied on the case of Republic v Independent Electoral and Boundaries Commission (iebc) ex parte National Super Alliance (nasa) Kenya & 6 others (2017) eKLR, where the court held that:

“ Accordingly, article 227 cannot be read as a stand-alone provision while disregarding article 10 of the Constitution. Moreover, the said article 227 empowered Parliament to prescribe a framework within which policies relating to procurement and asset disposal are to be implemented...”

20. He submitted that the respondents decided to go against the express provisions of the laws especially the spirit of articles 2 and 3 of the Constitution and it is only just that the court quashes the impugned Circular in order to uphold, defend and protect the Constitution.

21. He submitted further the impugned Circular contravenes the Statutory Instruments Act, 2013, the Fair Administrative Actions Act 2015; and the Public Procurement and Asset Disposal Act, 2015. That sections 5, 10 and 11 of the Statutory Instruments Act, sections 3 and 4 of the Fair Administrative Actions Act and sections 44, 55 and 60(1) of the Public Procurement Assets Disposal Act, 2015 have been contravened. He relied on the following cases:

- a. British American Tobacco Ltd v Cabinet Secretary For The Ministry of Health & 5 others, [2017] eKLR;
- b. Republic v Public Procurement Administrative Review Board & another ex parte Athi Water Service Board & another [2017] EKLR.

22. The fifth issue the petitioner submitted on was that the impugned circular offends the principles of legitimate expectation and legal certainty. He stated that together with the general public, he had a legitimate expectation that in carrying out their duties, the respondents would adhere to the law as required by the Constitution but they failed. He relied on the following cases:

- a. Keroche Industries Limited v Kenya Revenue Authority & 5 others [2007] eKLR;



- b. [*Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others*](#) [2014] eKLR.
23. The petitioner’s final issue was on costs, and he stated that the 1st respondent should be condemned to meet costs of these proceedings because despite having the knowledge of the fact that he was/is bound by the law to respect, protect and uphold the [*Constitution*](#) in discharging his mandate, he chose the path of impunity to create a circular that was meant to affect all ministries and state departments, stakeholders in the lease industry of motor vehicle with the Government and the general public, without involving all the stakeholders in the public participation before coming up with the impugned Circular. He relied on the case of [*Erick Okeyo v County Government Of Kisumu & 2 others*](#) [2014] EKLK where it was held that:
- “On the issue of costs, I consider that the 1st and 3rd respondents were engaged in a blatant illegal enterprise that was going to deny the county and its residents enormous resources. It is for this reason that I order that they jointly and severally pay the costs of the Petitioner who has brought this matter to the attention of the public.”
24. He contended that the said petition was filed in the public interest against state agencies and/bodies acting *ultra vires* the clear provisions of the law thereby, leaving the Petitioner with no option but to file the instant petition.
25. The petitioner also urged this court to grant any other relief that it may deem fit to grant and to adopt the decision of the court in the case of [*Okiya Omtatab Okoiti v Commissioner General, Kenya Revenue Authority & 2 others*](#) [2018] eKLR by Mativo J.
26. Ms Wamuyu highlighted the respondents’ submissions dated May 10, 2023. She submitted on the following issues for determination:
- a. Whether the Government Circular OP/CAB 23/1A dated June 26, 2021 is a statutory instrument;
 - b. Whether the Head of Public Service violated the [*Constitution*](#) by issuing the circular;
 - c. Whether the National Treasury acted *ultra vires* in making the directive to centralize leasing of motor vehicles;
 - d. Whether procurement and lease financing by the National Government is unlawful;
 - e. Whether the petition has met the threshold of public interest.
27. On the first issue, she submitted that section 2 of the [*Statutory Instruments Act*](#) defined the meaning of any instrument and that these instruments require approval from the National Assembly prior to the enactment of section 5(1)(2) and (3), 6, 8, 9 and 11 of the Act. That the Circular is not a statutory instrument according to the description of the Act because not all government directives are statutory instruments as not all directives are legislative in nature. She relied on the case of [*Republic v Attorney General; Law Society of Kenya \(Interested Party\); ex parte Francis Andrew MoriasI*](#) [2019] EKLK;
- “...There is no reference in the Circular dated March 1, 2018 to any statutory provision empowering the said Guidelines, or to indicate that the same were being made in exercise of any legislative powers...”
28. That the petition is premised on an erroneous legal and factual premise viz. that the circular constitutes subsidiary legislation when it is neither factually nor legally subsidiary legislation. That public



participation is compulsory during enactment of a statutory instrument and the Petitioner has failed to demonstrate how the circular merits to be a statutory instrument.

29. On the second issue, Ms Wamuyu submitted that the Head of Public Service acted in accordance with the Constitution in issuing the circular and that his role flows from the President's functions under article 132(3)(b) of the Constitution. That the roles of the National Government's departments and ministries are amplified in the provisions of the National Government Coordination Act, 2013 more specifically sections 7 and 8.
30. While submitting on the third issue, Ms Wamuyu relied on article 131(1) of the Constitution that the Cabinet can assist the President to perform his functions and it could thus include centralizing the motor vehicle leasing program. That section 4 of the State Corporations Act provides that the President shall assign ministerial responsibility for any state corporation and matters relating thereto to the Vice President and the several Ministers as the President may determine. She quoted section 7 of the Public and Asset Disposal Act No 33 of 2015 and stated that the role of the National Treasury is well provided therein. That the role of lease financing is unique as it has been categorically and specifically addressed separately under section 128 of the Public Finance Management Act regulations which provided that the accounting officer may not enter into lease financing without approval of the relevant national treasury. She reiterated to this court that centralizing the motor vehicle leasing program was decision on policy change and the same was within the power of the National Treasury.
31. On the fourth issue, Ms Wamuyu submitted that due to the adverse modes of purchasing motor vehicles, the government has been unable to realize the value and economies of scale, thus incapable of assuring efficiency in purchasing and utilization of the motor vehicle. She stated that since 2019 the government has been running a pilot motor vehicle leasing programme for National Government Ministries and State Departments in which State Corporations are free to independently procure the vehicle in line article 227(1) of the Constitution as read together with the Public Procurement and Asset Disposal Act, 2015. She posited that the Government adopted the centralize leasing programme to achieve value for money and that the allegation of usurping the role of accounting officers by the Petitioner is unfounded and baseless and only aims at trivializing the role of Government in safeguarding Public Resources. That the attainment of the objectives can only be realized if the Government aggregates common user requirements that makes economic sense for service providers and investors to deploy their resources that shall guarantee favorable returns on their investments.
32. On whether the petition has met the threshold of public interest litigation, Ms Wamuyu submitted that the petition is not a public interest litigation, as it has not met the threshold of a public interest litigation. That further, the petition does not meet the principles in the case of Anarita Karimi [1979] KLR 154. That the Petitioner has not demonstrated who he is acting for and how their rights have been denied, violated, infringed or threatened by the Respondents. That in the case of Christian Juma Wabwire v Attorney General [2019] EKLK the Judge relied on the decision in Lt Col Peter Ngari Karume & 7 others v AG Constitutional Application No 128 Of 2006 where it was held that:

“...it is incumbent upon the petitioners to avail tangible evidence of violation of their rights and freedoms. The allegations of violations could be true but the court is enjoined by law to go by the evidence on record. The petitioners' allegations ought to have been supported by further tangible evidence such as medical records, witnesses...the court is dead to speculation and imaginations and must be guided by evidence of probative value. When the court is faced by a scenario where one side alleges and the rival side disputes and denies, the one alleging assumes the burden to prove the allegation...”



33. That it is trite in the law of evidence that he who alleges a fact must prove its existence and the petitioner has not sufficiently demonstrated who will suffer as a result of centralizing leasing of motor vehicles and how they will be affected contrary to section 107 of the *Evidence Act*. She submitted that the petition has not met the threshold of public interest litigation. She urged this court to dismiss the petition.

Analysis and Determination

34. The issues that arise for determination in this petition are:
- a. Whether the present petition meets the threshold of a public interest litigation claim;
 - b. Whether the impugned circular is a statutory instrument;
 - c. Whether there was a need for public participation with regards to Government Circular OP/CAB.23/1A;
 - d. Whether the petition succeeds;
 - e. Who should bear the costs of the instant petition?

A. Whether the Petition Meets the Threshold of a Public Interest Litigation Claim

35. The respondents claim that the petitioner seeks to propagate his personal interests in litigating the petition rather than the interest of the general public as he claims. The petitioner in his rebuttal stated that the Petition affected him, the general public and tax payers generally. *Black's Law Dictionary*, 11th edition defines public interest litigation as

“Public Interest Litigation means a legal action initiated in a court of law for the enforcement of public interest or general interest in which public or class or class of community have pecuniary interest or some interest by which their legal right or liabilities are affected.”

36. The Supreme Court of India in the case of *Asbok Kumar Pandey v State of West Bengal* 2004 SC 280 held that: -

“Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, court must be careful to see that a body of persons or member of public, who approaches the court is acting bona fides and not for personal gain or private motive or political motivation or other oblique consideration. The court must not allow its process to be abused for oblique considerations. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs.”



37. In Kenya the court in the case of *Brian Asin & 2 others v Wafula W Chebukati & 9 others* [2017] EKLK stated that:

“The Public Interest Litigation was designed to serve the purpose of protecting rights of the public at large through vigilant action by public spirited persons and swift justice. But the profound need of this tool has been plagued with misuses by persons who file Public Interest Litigations just for the publicity and those with vested political interests. The courts therefore, need to keep a check on the cases being filed and ensure the bona fide interest of the petitioners and the nature of the cause of action, in order to avoid unnecessary litigations. Vexatious and mischievous litigation must be identified and struck down so that the objectives of Public Interest Litigation aren’t violated. the *Constitution* envisages the judiciary as “a bastion of rights and justice.

61. Public interest litigation is a highly effective weapon in the armory of law for reaching social justice to the common man. It is a unique phenomenon in the Constitutional Jurisprudence that has no parallel in the world and has acquired a big significance in the modern legal concerns.

The question is whether the proceedings before me are frivolous or vexatious bearing in mind that it is the duty of the court to see whether the petitioner who approaches the court has a bona fide intention and not a motive for personal gain, private profit or political or other oblique considerations.”

38. Article 3(1) of the *Constitution* provides that every person has an obligation to respect and uphold the *Constitution*. Further, article 258 (1) of the states that every person has the right to institute court proceedings, claiming that the *Constitution* has been contravened, or is threatened with contravention. the *Constitution* therefore allows anyone to bring a claim alleging violation of its provisions whether or not they are directly affected by the violation or not.
39. The respondents standpoint that the petitioner was not coming to court on behalf of a specific interest group is immaterial. The Petitioner need not have come to court on behalf of any specific interest group to petition the court about a violation of the *Constitution* or threatened violation. The petition claims violation of constitutional provisions and specific Acts of Parliament due to lack of public participation prior to issuing the circular containing the policy on centralized motor vehicle leasing. The prayers are not intended for the personal benefit of the petitioner. It is my considered view that the petition falls squarely within the ambit of public interest litigation.

B. Whether the Impugned Circular Fell Within the ambit of the *Statutory Instruments Act*?

40. The respondents contention was that the Circulars in issue was not a statutory instrument within the meaning of section 2 of the *Statutory Instruments Act*. That the circular is executive in nature anchored on constitutional and statutory provisions that empower the President to direct and coordinate the functions of ministries and government departments. That the circular was thus made for administrative purpose and was in no way or form a legislative in nature as to fall within what is contemplated under section 2 of the statutory instruments. Section 2 of the *Statutory Instruments Act*, 2013 defines ‘statutory instruments’ as:

“Any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament



under which that statutory instrument or subsidiary legislation is expressly authorized to be issued.”

41. The court in the case of *Republic v Attorney General; Law Society of Kenya (Interested Party); Ex-parte: Francis Andrew Moriasi* [2019] eKLR made an attempt to elaborate on the scope of section 2 of the statutory instruments:

“From the definition given above of statutory instruments, and the powers granted to the respondent, it is therefore the case that not all the guidelines, orders, or directions given by the respondent are legislative in character and therefore statutory instruments. There may be guidelines and directions that are purely executive in character, in the sense that their objectives are solely administrative in guiding implementation of standards in laws and policies... It is thus my finding that the said circular was not made in exercise of the legislative powers granted to the respondent, and that its purpose was clearly stated to be explanatory. It is therefore not a statutory instrument as envisaged by the *Statutory Instruments Act*, and was therefore not subject to the procedure set out in the said Act as regards enactment of statutory instruments, including the requirements of consultation and publication.”

42. This means that if the purpose of the circular is merely elaboratory and is based on what already exists, then it is a statutory instrument. It is purely an administrative tool issued for purposes of guiding implementation of existing policies.

43. The circular in issue in this petition is Government Circular OP/CAB.23/1A dated June 26, 2021. The Circular was issued by the Head of Public Service who according to the website (<https://www.headofpublicservice.go.ke>) performs the following functions:

- a. He is the Administrative Head of the Executive Office of the President;
- b. Act as Co-ordinator and convener of the Principal Secretaries Committees, support the Executive Office of the President in facilitating the organization and efficient execution of Government Business;
- c. Promotes ethics, good governance, efficiency, and effectiveness in the provision of public services through the deployment of right skills, values, and leadership in the Kenyan Public Service;
- d. Transmits Executive Directives/Orders and Presidential Proclamations to Ministries, State Organs, State Departments, and State Agencies for their information, implementation or other action;
- e. Custodian of the Kenya Public Seal and other instruments of the State for national posterity; and
- f. Perform any other function ancillary to the above as may be assigned by the President.

44. The Head of Public Service mandate draws from the executive functions of the President. It is an office created under article 132(4)(a) of the *Constitution*.

The functions of the President are specified in article 132. Part of those functions is what is contained in article 132(3) which states:

132 (3) The President shall-

- a)



- b) direct and coordinate the functions of ministries and government departments;
45. The circular in question was giving directions concerning centralized leasing of government vehicles.
46. Under section 50 of the *Public Procurement and Asset Disposal Act*, 2015; procurement entities can enter into what is referred to as consortium buying. It provides:
- “A procuring entity or procuring entities with common interest may enter into consortium buying for purposes of procuring jointly in order to benefit from economies of scale”
47. Article 131(2)(a) obligates the President to respect, uphold and safeguard the *Constitution* and this extends to any person exercising delegated powers of the president within the frame of the *Constitution*. The question is, was the Head of Public Service circular in violation of the *Constitution* or Statutory law as alleged by the petitioner?
48. The petitioner did not attach a copy of the said circular to the petition. However, in paragraph 18 of the Petition, he quoted an excerpt from the said circular which reads:
- “The purpose of the Circular, therefore, is to inform you of change in official government motor vehicles leasing programme and urge you to comply. Each Ministry is required to ensure that the contents of this circular reach the state corporations/agencies under purview and ensure compliance.”
49. Central leasing is already incorporated in the *Procurement and Asset Disposal Act, 2015* and is described as consortium buying, a scheme where procurement entities can come together and procure jointly to benefit from economies of scale. All that which the circular did was to give guidance concerning that particular procurement item, but the rules did not change. It was not against the existing legal provisions nor was it usurpation of the roles of respective accounting officers. It did not contravene the existing statutory provisions. In my view, the circular was executive in nature and meant to guide the application of the prevailing policy. It could thus not be considered a statutory instrument within the meaning of section 2 of the *Statutory Instruments Act*.

C. Whether Public Participation Was Required

50. Article 10(2)(a) of the *Constitution* lists public participation as one of the national values and principles of governance. This requirement is also incorporated in article 232(1)(d) which provides that the people should be involved in the process of policy making. The respondents are also held accountable for any administrative actions by virtue of article 232(1)(e).
51. It is the considered view of this court that the circular in question was an amplification of what was already in law and policy (consortium procurement). The circular was not a statutory instrument within the scope of section 2 of the *Statutory Instruments Act* in the circumstances. It did not require public participation.
52. In light of the foregoing, the petition is hereby dismissed.
53. As the petition was brought in the public interest, each party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT MILIMANI THIS 19 TH DAY OF JANUARY, 2024.

L.N MUGAMBI

JUDGE

