Motrex Limited & another v Director General Kenya National Highway Authority (KENHA) & 3 others; Director of Weights & Measures Ministry of Industrialization Trade & Enterprise Development (Interested Party) (Petition 40 of 2020) [2024] KEHC 1100 (KLR) (1 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1100 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

PETITION 40 OF 2020

OA SEWE, J

FEBRUARY 1, 2024

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER THE CONSTITUTION OF KENYA CONTRARY TO ARTICLES 1,2,3,10, 20,21,22,23,23,25(C),35,40,47,48,50(1), 258 & 260 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTIONS 2,3,4,7,9,11 & 12 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015, LAWS OF KENYA

AND

IN THE MATTER OF WEIGHTS AND MEASURES ACT, CAP 513 LAWS OF KENYA

AND

IN THE MATTER OF THE PRINCIPLE OF LEGITIMATE EXPECTATION

BETWEEN

MOTREX LIMITED ..... 1ST PETITIONER

MDALU MRABU MDALU ..... 2ND PETITIONER

AND

THE DIRECTOR GENERAL KENYA NATIONAL HIGHWAY AUTHORITY (KENHA) ..... 1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL ..... 2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 3RD RESPONDENT

THE SUBORDINATE PRINCIPAL MAGISTRATES' COURT KALOLENI ..... 4TH RESPONDENT

AND

THE DIRECTOR OF WEIGHTS & MEASURES MINISTRY OF INDUSTRIALIZATION TRADE & ENTERPRISE DEVELOPMENT ..... INTERESTED PARTY

JUDGMENT

1. The 1st petitioner is a limited liability company incorporated in Kenya. It is engaged in the business of transportation within the County of Mombasa and elsewhere in the Republic of Kenya. It filed this Petition jointly with the 2nd petitioner, who is its employee, in connection with an event that occurred on 6th June 2020. According to the Amended Petition filed on 26th May 2022, the 1st petitioner's motor vehicle Registration No. KBR 758Z/ZD9414 was impounded by Kenya National Highway Authority (KeNHA), the 1st respondent herein, for an alleged overload that was captured at the virtual weighbridge along Kaloleni-Mariakani Road on 3rd February 2020.

2. It was further averred that 2nd petitioner, who was then driving the motor vehicle, was served with a Notice To Attend Court on 12th June 2020 to answer the charges of driving the said motor vehicle on a public road with a greater load than permitted, contrary to Section 56(1) of the *Traffic Act*, Chapter 403 of the Laws of Kenya. Accordingly, the petitioners contended that the detention of the suit motor vehicle was not only unlawful but was also unwarranted in the circumstances; and that, as a consequence thereof, it suffered loss of business for 9 days at the rate of Kshs. 30,000/= per day. Thus, the petitioners complained that:

    (a) The 1st respondent made an administrative decision to arrest and charge the 2nd petitioner based on a ticket for the virtual weighbridge along the Kaloleni-Mariakani highway, contrary to the rules governing fair administrative action.

    (b) The 1st respondent acted maliciously by targeting the 1st petitioner's fleet of vehicles, thereby infringing on the petitioner's rights.

3. Consequently, the petitioners prayed for the following reliefs against the respondents:

    (a) That the Court be pleased to order the 1st respondent and the interested party to produce the Certificates of Verification for the static weighbridge at Mariakani for the years 2019, 2020 and 2021.

    (b) That the Court be pleased to order the 1st respondent and the interested party to produce the Certificates of Verification for the virtual weighbridge along Kaloleni-Mariakani for the years 2019, 2020 and 2021.

    (c) A declaration that the decision of the 1st respondent to order for the detention of the 1st petitioner's motor vehicle and the prosecution mounted by the Director of Public Prosecutions, the 3rd respondent, against the 2nd petitioner, in the circumstances, is illegal and unlawful.

    (d) That the Court do proceed to quash the said decision of the 1st respondent to arrest and detain the 1st petitioner's vehicle as well as the prosecution of the 2nd petitioner.

    (e) That the Court be pleased to order the 1st respondent to pay Kshs. 270,000/= being the amounts lost during the period of detention.

(f) That the Court be pleased to order that the 1st respondent did in fact act ultra vires, unfairly and unlawfully by detaining the subject motor vehicle and charging the 2nd petitioner based on readings of a measuring instrument not legally approved by the interested party.

(g) That the Court be pleased to order payment of damages by the 1st respondent to the petitioner for the violation of rights and loss of business.

(h) Costs of the Petition.

4. In the Supporting Affidavit sworn on behalf of the petitioners by Iqbal Ahmed Bayusuf, it was averred that the 1st petitioner is a transport company owning a fleet of motor vehicles, including the motor vehicle in issue, Motor Vehicle Registration No. KBR 758Z/ZD 9414. The petitioners reiterated their assertion that, on 6th June 2020 the 1st respondent served the 1st petitioner with an order to remove the subject motor vehicle from the road due to an offence which was allegedly committed on 1st February 2020. The motor vehicle was consequently detained; while the 2nd petitioner was charged and arraigned before the Principal Magistrate (the 4th respondent herein) in Kaloleni Traffic Case No. 31 of 2020: Republic v Mdalu Mrabu Mdalu.

5. Consequently, at paragraphs 14 and 15 of the Supporting Affidavit, the petitioners asserted that the charges against the 2nd petitioner in Kaloleni Traffic Case No. 31 of 2020 are unlawful and therefore ought to be declared as such. They further reiterated their assertion that the 1st petitioner suffered losses to the tune of Kshs. 30,000/= per day for nine days as a result of the unlawful detention of the subject motor vehicle, as the goods thereon belonged to a client. They accordingly prayed, in the interest of justice and equity, that the reliefs sought by them be granted by the Court.

6. In its Replying Affidavit filed herein on 10th February 2021, the 1st respondent, through its Roads Inspector, Eng. Michael Ngala, set out its mandate at paragraphs 4, 5 and 6. He likewise set out the nature and objective of its virtual weighbridges and asserted that, on the 27th November 2019, while the 1st petitioner's motor vehicle Registration No. KBR 758Z/ZD 9414 was being driven along the Kaloleni-Mariakani Road, it was weighed at the 1st respondent's virtual weigh station at Kaloleni and found to have been overloaded by 6,200 Kgs; having carried 48,200 Kgs instead of the legal permissible limit of 42,000 Kgs on the gross vehicle weight. Eng. Ngala further explained that the motor vehicle proceeded on its journey and continued its operations until 6th June 2020 when it was detained on account of the offence. The driver was accordingly served with a Notice To Attend Court for plea.

7. Thus, it was the assertion of the 1st respondent that an offence was in fact committed and therefore that the Petition is preemptive, and only meant to foil a legitimate process of charging accused persons before a court of law. It was further the contention of the 1st respondent that, contrary to the allegations contained in the Petition, the Magistrate's Court at Kaloleni issued an order for the release of the subject motor vehicle; which order was promptly complied with before the petitioner obtained stay of proceedings from this Court. In their view, the detention of the suit motor vehicle was well within the law and a Prohibition Order was duly issued on account of the said detention. They added that, being sanctioned in law, the detention of the suit vehicle cannot be said to amount to an unlawful or illegal detention or deprivation as alleged.

8. In the premises, the 1st respondent averred that, since the lower court has jurisdiction over the matter before it and has the mandate to determine the issues raised in this Petition conclusively, the Petition is preemptive and is an abuse of the court process; and should therefore be dismissed with costs.

9. On behalf of the 2nd and 4th respondents, a Reply to the Amended Petition was filed herein on 12th July 2022 by Mr. Makuto. The following Grounds were thereby proffered:

(a) That the Petition against the 2nd and 4th respondents is misconceived, vexatious and an abuse of the process of the Court;

(b) That the Petition as drawn fails the test of Anarita Karimi Case and ought to be dismissed with costs;

(c) That the petitioner does not state which of his fundamental right or freedom is under threat of violation or has been violated by the 2nd and 4th respondents;

(d) That the Amended Petition does not seek any order against the 2nd or 4th respondents;

(e) That there is no cause of action against the 2nd or 4th respondents.

10. On his part, the 3rd respondent relied on the Grounds of Opposition dated 19th June 2020, filed in opposition to both the interlocutory application and the Petition, namely:

(a) That the application is not grounded on facts that disclose bad faith, illegality, impartiality, breach of rules of natural justice or breach of *the Constitution* of Kenya or other extraneous considerations to demonstrate that the purpose of investigations and prosecution were meant to interfere with the right of the applicants/petitioners;

(b) That facts in issue can be canvassed and ventilated by the trial court, the 4th respondent;

(c) That wherefore the 3rd respondent prays that this application be dismissed.

11. The petitioner thereafter filed a Further Affidavit with the leave of the Court. The affidavit was sworn by Iqbal Ahmed Bayusuf on 25th May 2023 to refute some of the assertions made by the 1st respondent in the Replying Affidavit. Annexed to that affidavit is a certified copy of the ruling delivered in Kaloleni Traffic Case No. 31 of 2020: Republic v Mdalu Mrabu Mdalu and Willy Waweru Ngigi (as consolidated with Kaloleni Traffic Case No. 32 of 2020). The ruling confirms that the Traffic case against the 2nd petitioner herein was determined on 31st October 2022; whereupon the 2nd petitioner was acquitted under Section 210 of the Criminal Procedure Code.

12. The Petition was canvassed by way of written submissions; directions having been given in that regard on 27th May 2022. Accordingly, the petitioners relied on their written submissions dated 26th May 2023. They urged the Court to note that the subject motor vehicle had already offloaded goods that were the subject of the alleged overload of 1st February 2020; and had in fact taken several other trips along the Mombasa-Nairobi Highway without disturbance from the 1st respondent. They therefore complained that, in the circumstances, it was impossible to re-weigh the motor vehicle to confirm the alleged overload. The petitioners also submitted that, by detaining the subject motor vehicle for 9 days, thereby occasioning loss and damage to its business at the rate of Kshs. 30,000/= per day, the 1st respondent violated the 1st respondent's right to property as enshrined by Article 40 of the Constitution.

13. In addition, the petitioners submitted that, since the decision to arrest and charge the 2nd petitioner was an administrative decision based on a ticket for virtual weighbridge along the Kaloleni-Mariakani Highway, it was imperative for the 1st respondent to ensure compliance with Article 47 and the applicable provisions of the *Fair Administrative Action Act*. The petitioners argued that they were entitled to an administrative action that is expeditious, fair, lawful and reasonable; and that they ought to have been given written reasons for the 1st respondent's decision to arrest and charge the 2nd respondent. Reliance was placed, in this regard on President of the Republic of South Africa and Others v South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1; Judicial Service Commission v Mbalu Mutava & Another [2014] eKLR and Dry Associates Ltd v Capital

Markets Authority and Another [2012] eKLR to underscore the submission that administrative actions of public officers, state organs and other administrative bodies are now subject to the principle of constitutionality and constitutional discipline.

14. Hence, it was the submission of the petitioners that the Court has the jurisdiction to step in and grant appropriate relief under Article 23 of *the Constitution* and grant appropriate reliefs for the violations aforementioned. They argued, on the authority of Attorney General v Kituo Cha Sheria & 7 Others [2017] eKLR that rights have inherent value and utility and are therefore not grantable by the State. The petitioners also relied on Tinyefuze v Attorney General of Uganda [1997] UGCC3 as to the canons of constitutional interpretation and urged that their prayers be granted in terms of their Amended Petition.

15. The 1st respondent relied on its written submissions dated 25th September 2023, filed by their counsel, Ms. Rao. It proposed the following issues for determination:

    (a) Whether the Amended Petition meets the threshold of a constitutional petition;

    (b) Whether the Amended Petition is fatally defective, having been brought without a resolution of the company as required by law, and generally without lawful authority of the 1st petitioner which is a limited liability company;

    (c) Whether the petitioners have followed the right procedure to access information from the respondent, being a public entity;

    (d) Whether the remedies sought should be granted.

    (e) Whether the matter qualifies to be a public interest litigation.

16. The 1st respondent relied on Anarita Karimi Njeru v Republic [1979] eKLR and Mumo Matemu v Trusted Society of Human Rights Alliance [2013] eKLR to support their submission that the Amended Petition does not meet the requisite threshold; in that it merely quoted various provisions of *the Constitution* but failed to relate the said provisions to any acts or omissions by the respondents. They added that the petitioners only made wild and flailing accusations without availing the facts and particulars in support thereof. On that score, the 1st respondent submitted that the Amended Petition fails to meet the requisite threshold for a constitutional petition.

17. It was further the submission of the 1st respondent that the Amended Petition is fatally defective in so far as it was brought without a resolution of the Board of the 1st petitioner. In this respect, reliance was placed on the case of Salomon v Salomon [1897] AC 78 in which it was held:

> "The company is at law a different person altogether from the subscribers to the memorandum and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act."

18. In addition, counsel relied on Victor Mabachi & Another v Nurturn Bates Ltd [2013] eKLR where the Court held that a company:

> "...as a body corporate, is a persona jurisdica, with separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil."

19. Hence, it was the argument of the 1st respondent that, the 1st petitioner, being a juridical person in law, can only act or instruct counsel through resolutions of its board of directors; and that in the absence of such resolutions, any action purporting to have been taken for the said corporate entity is not binding upon it and is void ab initio. The cases of Leo Investments Ltd v Trident Insurance Company Ltd [2014] eKLR; Spire Bank Limited v Land Registrar & 2 Others [2019] eKLR; Kenya Commercial Bank Limited v Stage Coach Management Limited [2014] eKLR and Money Lenders Association of Uganda Limited & Another v Uganda Registration Services Bureau 2020 UG Comm C C153 were relied on in support of this argument. The 1st respondent further pointed out that the omission cannot be remedied at this late stage as the pleadings have already closed and final submissions invited.

20. While acknowledging that a Resolution of the Board of Directors of the 1st petitioner was attached to the Amended Petition authorizing the instructions to the current firm of lawyers, namely, M/s Omulama E.M. & Company Advocates, to act for the 1st petitioner, the respondents insisted that the same does not authorize the commencement of these proceedings by the law firm of M/s J.A. Abuodha & Company Advocates. The same arguments were advanced in respect of the initial Supporting Affidavit sworn by Iqbal Ahmed Bayusuf. It was therefore the assertion of the 1st respondent that the Petition dated 11th June 2020, which forms the basis of the Amended Petition, was filed without the authority of the 1st petitioner, Motrex Limited, and therefore must fail; given the explicit provisions of Rules 11 and 20 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules.

21. It was also the submission of the 1st respondent that no relationship of any kind was established between the 1st and 2nd petitioners; and therefore that, from the Amended Petition, it is not apparent the nature of the injury caused or likely to be caused to the 2nd petitioner by any of the respondents. Thus, the 1st respondent posited that the 2nd petitioner does not meet the criteria of a petitioner as defined in the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules.

22. In connection with Article 35 of the Constitution, the 1st respondent submitted that the prayers sought by the petitioners, namely, the production of Certificates of Verification for the static and virtual weighbridges at Kaloleni and Mariakani for the years 2019, 2020 and 2021, had been declined by the Court in a ruling delivered on 8th March 2022. The argument advanced in this regard by the 1st respondent was that the petitioners failed to comply with the prerequisites set out in Section 8 of the *Access to Information Act*, Chapter 7M of the Laws of Kenya. Thus, the 1st respondent urged the Court to note that, to date, the petitioners have not made an application or request for information to it as stipulated in the Act. It further submitted that the information sought has no nexus at all with the subject matter of the instant Petition.

23. Thus, counsel for the 1st respondent urged the Court to find that the petitioners are not entitled to the information sought, having failed to comply with the applicable procedure for procuring such information. Reliance was placed on Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others [2015] eKLR and Kawuki Mathias v Commissioner General, Uganda Revenue Authority

(High court Miscellaneous Cause No. 14 of 2014) UGCOMMC 67 for the proposition that, where a specific procedure has been provided for in legislation, the same should be exhausted by a litigant before filing an action in court.

24. On whether the petitioners are entitled to the reliefs sought by them, the 1st respondent reiterated its statutory mandate as spelt out in Section 3(1), 4(1) and 22(1)(c) of the *Kenya Roads Act*, 2007; pursuant to which it established different types of weighbridges in various parts of the country. It submitted therefore that the suit motor vehicle was weighed virtually in the normal discharge of that mandate; and on being found to have exceeded the prescribed limit, a Prohibition Order was issued as stipulated in Section 106(4) of the *Traffic Act*. The motor vehicle was subsequently removed from the road and its driver charged and arraigned before court. Therefore, in the 1st respondent's submission, the petitioners are not entitled to the reliefs sought as the actions complained of cannot be said to be ultra vires.

25. The 1st respondent made reference to the 1st petitioner's claim for Kshs. 270,000/=, alleged to be the amounts lost during the period of detention of the suit motor vehicle. Its contention however was that the amount was not specifically proved as not documents or any other form of proof was placed before the Court in support of the said claim. The 1st respondent further urged the Court to note that the said motor vehicle was released by consent of the parties upon the filing of this Petition; which consent was not conditional on any compensation. Thus, the postulation of the 1st respondent was that the petitioners expressly waived their right and are now estopped from claiming any loss or damage as a result of the detention.

26. The South African cases of Mvumvu v Minister for Transport [2011] ZACC and Residents of Industry House & 8 Others v Minister of Police & 9 Others [2021] ZACC were relied on for the proposition that the objective test for injury and assessment of damages for rights violations against state actors must take into account the public good. Reference was also made to Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR for the holding that the primary purpose of a constitutional remedy is not compensatory or punitive but to vindicate the rights violated and to prevent or deter any future infringements.

27. Lastly, the 1st respondent addressed the Court on costs and urged for a finding that the Petition be dismissed with costs. In this regard, counsel submitted that the petitioners set out on a time-wasting pursuit by filing this Petition to evade trial before the lower court. Accordingly, the 1st respondent relied on Brian Asin & 2 Others v Wafula W. Chebukati & 9 Others [2017] eKLR in which the following excerpt from the decision of the Indian Supreme Court in the case of Ashok Kumar Pandey vs. State of West Bengal AIR 2004 SC 28 was relied on:

> "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 attracting 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, Courts must be careful to see that a body 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 indult in the pastime of meddling with judicial process either by force of habit or from improper motives..."

28. On that score, the 1st respondent urged for the dismissal of the Petition with costs. The other respondents opted to rely on the 1st respondent's written submissions. Accordingly, the issues arising for determination are as follows:

(a) Whether the Petition as amended meets the threshold of a constitutional petition;

(b) Whether the Petition as amended is fatally defective for having been filed without a company resolution from the Board of the 1st petitioner;

(c) Whether Petitioners' rights to information, property and fair administrative action were violated by the respondents or any of them;

(d) Whether the remedies sought should be granted.

A. Whether the Petition herein has met the threshold of a Constitutional Petition:

29. The 1st, 2nd and 4th Respondents have contended that the Amended Petition herein does not meet the threshold of a constitutional petition as enunciated in the Anarita Karimi Njeru v Republic [1979] eKLR, in which it was held:

> " ...if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

30. The same position was reiterated by the Court of Appeal in the case of Mumo Matemu (supra) thus:

> " ... (42) It was the High Court's observation that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting." Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* (Cap 21) and section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:
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> > " The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially

as regards the amount of testimony required on either side at the hearing."

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

(44) We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference..."

31. Consequently, it is imperative for a petitioner to set out the constitutional provisions which he alleges to have been infringed and to demonstrate such violation in a precise manner. Further, the manner in which the alleged violations were committed and to what extent must be shown by way of evidence. With these factors in mind, I have perused the Amended Petition filed herein on 26th May 2022 and noted that the petitioners have explicitly alleged violations under Articles 35, 40(1) and 47 of the Constitution. They contend that the 2nd Petitioner was served with a Notice To Attend Court on the 6th June 2020 for an alleged offence of overloading that was said to have occurred on the 1st February 2020. They further complained that, not only was the 2nd petitioner required to attend court on the 12th June 2020, but also that the 1st petitioner's motor vehicle registration No. KBR 758Z/ZD 9414 was detained for no apparent reason while transporting goods belonging to another customer; which goods had nothing to do with the alleged offence of 3rd February 2020.

32. The petitioners also alleged that they were not accorded the right to fair administrative action in that they were not informed of the offence at the earliest opportunity to give them time to defend themselves. Moreover, they complained that their rights to information and property were infringed when the 1st respondents failed to address the overload immediately as well as in detaining their property for a total of nine (9) days; thereby occasioning them loss and damage. In particular, the 1st petitioner indicated that it had lost business to the tune of Kshs. 270,000/= at Kshs. 30,000/= per day. I am therefore satisfied that the Amended Petition sufficiently satisfies the threshold test for constitutional petitions. Indeed, in the Mumo Matemu case, the Court of Appeal pointed out that:

> "...precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point."

33. It was also submitted that the Amended Petition is not specific as to the alleged violations by the 2nd and 4th respondents; and therefore that the Amended Petition should be dismissed against them on that account. It is noteworthy however that that Rule 5 (b) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, provides:

> " A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute."

34. In this case the 2nd respondent has been sued in his capacity under Article 156 (4) (b) of the Constitution as the principal adviser and legal representative of the national government, while the 4th respondent heard the case Principal Magistrate Case at Kaloleni Traffic Case No. 31 of 2020 R v Mdalu Mrabu Mdalu & Another and gave a decision on the 31st October 2022. It is notable that one of the orders sought herein by the petitioners is a declaration that the prosecution of the 2nd illegal and unlawful and that the impugned proceedings be quashed.

35. Needless to say that the mandate to prosecute under Article 157 of the Constitution lies with the 3rd respondent; while the mandate to adjudicate the subject criminal matter is bestowed on the 4th respondent by dint of Article 169(1)(a) of the Constitution and Sections 5 and 6 of the Magistrates Courts Act, No. 26 of 2015. Looked at from that prism, it is plain that the 2nd and 4th Respondents are necessary parties to these proceedings.

B. On Whether the Petition is fatally defective for being filed without a company resolution:

36. The 1st respondent acknowledged that in their Amended Petition, the petitioners annexed a company resolution giving authority to the firm of M/s Omulama E. M & Company Advocates to represent them in the suit herein instead of the firm of J.A. Abuodha & Company Advocates. The 1st respondent contends that authority to act in respect of the firm of J.A. Abuodha & Company Advocates who initiated the suit herein, has not been presented before the court. Thus, the 1st respondent urged the Court to find that the Petition dated 11th June 2020, which forms the basis of the Amended Petition herein, was filed without the authority of the 1st petitioner; and therefore the Amended Petition is not properly before this court.

37. I have no hesitation in rejecting the respondents' submissions in this regard; chiefly because there is no requirement under the applicable law that that a board resolution be filed along with a Petition. Authorities abound in this regard, such as the case of Offshore Trading Company Limited v Attorney General & 2 others [2021] eKLR, in which it was held:

> " ...the matter pending before this Court is a Constitutional Petition in which Civil Procedure Rules are not applicable in regard to filing of Constitutional Petitions. The applicable law and procedure of filing Constitutional Petitions is provided for under "The Protection of Rights and Fundamental Freedoms, Practice and Procedure Rules, 2013, otherwise known as Chief Justice Mutunga Rules which provide the procedure for filing of Constitutional Petitions and which have no requirement that the Petitioner must exhibit a board resolution or swear a verifying Affidavit. In addition thereto *the Constitution* abhors Technical objections of this nature expressly at Articles 22, 3(b)(d) and 159 of *the Constitution*..."

38. Moreover, even where such a resolution is a requirement, the courts have consistently held that board resolution may be filed at any time before a suit is fixed for hearing. (See, for instance, the cases Mavuno Industries Limited & 2 Others v Keroche Industries Limited [2012] eKLR and Republic v Registrar General & 13 others [2005] eKLR. The Amended Petition was accompanied by authority act and for a

responsible officer to depose to the requisite affidavits. In the premises, the argument that the Amended Petition is defective is clearly untenable; and is therefore for dismissal.

C. Whether petitioners' rights to information, property and fair administrative action were violated:

39. The petitioners have alleged that their rights under Articles 35, 40(1) and 47 of the Constitution have been infringed. Pursuant to Article 35 of the Constitution, the petitioners prayed that the 1st respondent and the interested party be ordered to produce the certificates of verification for the static weighbridge at Mariakani for the years 2019, 2020 and 2021 and the virtual weighbridge along Kaloleni-Mariakani for the years 2019, 2020 and 2021.

40. In addition to their substantive prayers in the Petition, the petitioners filed an application dated 9th April 2020 for the following orders: -

    (a) The Certificate of verification for the static weighbridges at Mariakani, Eldoret-Webuye and Subukia-Kikuyu for the years 2019, 2020 and 2021.

    (b) The approval Certificates for the virtual weighbridges at Kaloleni, Eldoret-Webuye and Subukia-Kikuyu for the years 2019, 2020 and 2021.

    (c) The Certificates of Verification for the virtual weighbridges at Kaloleni, Eldoret-Webuye and Subukia-Kikuyu for the years 2019, 2020 and 2021.

    (d) The virtual tickets from the Kaloleni Virtual Weighbridge for Motor Vehicle Registration No. KCF 227M on 19th March 2021 at 11:32 am; Motor Vehicle Registration No. KCR 043Z on 19th March 2021 at 11: 39 am, Motor Vehicle Registration No. KBK 011E on 19th March 2021 at 11:39 am.

    (e) The static tickets from the Mariakani Weighbridge for the 19th March 2021 for Motor Vehicles Registration Nos. KCF 277M, KCR 043Z and KBK 011E for 19th March 2021;

41. The application was determined by Hon. Mativo, J. (as he then was) on the 8th March 2022. At paragraph 26 of his Ruling he made a finding that the petitioners had not complied with Section 8(1) of the *Access to Information Act* that requires a person or entity seeking information to first make an application to the public entity concerned. The provision states:

> " An application to access information shall be made in writing in English or Kiswahili and the applicant shall provide details and sufficient particulars for the public officer or any other official to understand what information is being requested."

42. Hence, at paragraph 27 of its ruling the Court came to the conclusion that the petitioners had failed to convince the court as to why they needed the documents, granted that Article 35 of the Constitution had not been pleaded in the Petition dated 11th June 2020.

43. In their Amended Petition, the Petitioners pleaded infringement of their rights under Article 35 of the Constitution and used this as the basis for the above prayers for the production of certificates of verification for the static weighbridge at Mariakani for the years 2019, 2020 and 2021 and the virtual weighbridge along Kaloleni-Mariakani for the years 2019, 2020 and 2021. Hence, the petitioners contend that the 1st respondent is yet to show proof of the static and virtual weighbridges at Kaloleni-Mariakani to validate the charges against the 2nd petitioner.

44. Having given this aspect of the Petition careful consideration, I entertain no doubt that, for purposes of enforcement of Article 35, the petitioners needed to demonstrate prior compliance with the provisions

of Section 8(1) of the *Access to Information Act*. As matters stand, the petitioners have not shown that they complied with that section or that their request was denied. I have seen Annexures 'IAB 6" and 'IAB 7" which are letters dated 9th March 2022 and 22nd March 2022, from the 1st petitioner and interested party, respectively. There is no request in the 1st petitioner's letter to be provided with the certificates of either the static or virtual weighbridges at Kaloleni-Mariakani. The 1st petitioner only questioned the validity of the virtual weighbridge weights; which query was appropriately responded to by the interested party.

45. Consequently, I am far from convinced that the petitioners complied with the requirement under Section 8(1) of the *Access to Information Act*, or that access was unjustly denied. It must also be recognised that the prosecution of the 2nd petitioner was a separate legal process and could not be the sole ground for the court to issue an order for the production of documents, noting that there are appropriate provisions and mechanisms for the production of such documents before the trial court. At any rate, the Traffic cases have since been finalized by the subordinate court in favour of the petitioners.

46. As to whether the 1st petitioner's rights under Article 40(1) of the Constitution were infringed, there is uncontroverted evidence on record that the 1st petitioner is the owner of Motor Vehicle Registration No. KBR 758Z/ZD 9414; and that, on the 6th June 2020 the motor vehicle was impounded in respect of an offence of overloading, alleged to have been committed on the 3rd February 2020. The 1st respondent explained that static and virtual weighbridges are metrological pieces of equipment duly approved by the Director of Weights and Measures; and that they are situated along major traffic corridors within the Country. It is not in controversy that the virtual weighbridge stations are unmanned; or that their main function is to weigh vehicles in motion and relay the data to a central data centre for processing and appropriate action, including law enforcement.

47. Thus, the 1st respondent confirmed that on the 3rd February 2020, the 1st petitioner's Motor Vehicle Registration No. KBR 758Z/ZD 9414 was driven along the Kaloleni-Mariakani virtual weighbridge and was found to have overloaded by 6,200 kgs; having carried goods measuring 48,200 kgs which was above the legally permissible limit of 42,000 kgs on the gross vehicle weight. Annexed to the Replying Affidavit was a copy of the virtual weighbridge ticket, marked Annexure EMN 5. It was thus the contention of the 1st respondent that the petitioners were not only guilty of overloading on the 3rd February 2020, but that there were also other such incidents as demonstrated by the Annexures marked EMN 7(a) to (d)'.

48. The 1st respondent admitted that the petitioners' offending motor vehicle was not intercepted on the 3rd February 2020; and therefore it proceeded with operations up until the 6th June 2020 when the 2nd Petitioner was arrested. The motor vehicle was detained and a prohibition order was issued in respect of it by the police officers seconded to the weighbridge station. The 1st respondent explained that the motor vehicle was detained under the provisions of Sections 106 and 107 of the *Traffic Act*. Reliance was also placed on Sections 55 and 56(1) of the same Act, which provide that no overloaded motor vehicle shall be allowed on the road.

49. The Prohibition Order dated 6th June 2020 was produced by the petitioners as Annexure IAB 3. Additionally, the 1st respondent also produced, as Annexure EMN 8, a Notice To Attend Court on 12th June 2020. There is therefore no dispute that the 1st respondent served the said Notice on the 2nd petitioner on the 6th June 2020 in respect of an offence that was alleged to have occurred on 3rd February 2020.

50. The mandate of the police to detain goods has not been denied. Nevertheless, the Kenya Roads (Kenya National Highways Authority) Regulations, 2013 [L.N. 86/2013.] made pursuant to the *Kenya Roads Act* No. 2 of 2007 is explicit, under Regulation 14, that an accused person be notified of the overloading offence. The Regulation provides: -

(1) Subject to regulation 13, the notification in the weighbridge report form shall form the basis for imposing fees where the vehicle is found to be overloaded in accordance with these Regulations.

(2) Upon issuance of the weighbridge report form, it shall be the duty of the driver to notify the registered owner of an overload offence and the registered owner shall be required to pay the overload fee.

(3) The registered owner of the motor vehicle pulling the trailer is in breach of regulation 10, the owner of the motor vehicle shall be liable for the overload offence and shall be required to pay overload fees.

(4) In order to secure payment of fees, an overloaded vehicle shall be detained free of charge by the Authority for the first three consecutive days, and subsequently, a fee of two thousand shillings shall be charged for each extra day until proof of payment is produced.

(5) Subject to the provisions of this regulation detained vehicles shall be held under the owner's responsibility and payment of fees prescribed in Part 1E of the Schedule shall be made either by cash or irrevocable bankers' cheque in United States dollars or its equivalent in Kenya Shillings.

51. From the above regulation, it is clear that notification of an overloading offence in the form of a weighing bridge report is a prerequisite. No such report was exhibited herein, and no proof was availed to show that such a report was ever served upon the petitioners to enable them defend themselves or pay any requisite fees due from them. What was exhibited by the 1st respondent was the Prohibition Order along with a Notice To Attend Court issued on the 6th June 2020. It is instructive that the two documents were in fact issued subsequently in respect an offence alleged to have been committed on 3rd February 2020. The 1st respondent has not shown any proof that they had served the petitioners with any of the virtual weighbridge tickets in respect of the goods detained on the 6th June 2020.

52. Clearly therefore, there was no justifiable cause for detainment of the suit motor vehicle and the goods thereon as of 6th June 2020, which goods were not the subject of the overload in issue. Indeed, the Prohibition Order exhibited herein shows that it ought to have been issued in the first instance on 1st February 2020, upon detection of the overload by the 1st respondent; for the heading reads:

> "Order to remove vehicle from road or public place, to offload excess weight, or to effect repairs"

53. Thus, the 1st petitioner is justified in its complaint that its motor vehicle was detained without justification; and that the detainment of the motor vehicle occasioned it loss and damage. It is my finding therefore that the 1st petitioner's right under Articles 40(1) of *the Constitution* was thereby infringed by the 1st respondent.

54. As to whether the petitioners' rights under Article 47 of the Constitution were violated, that Article states:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. (2) If a right or fundamental freedom of a person has been or

is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration."

55. Moreover, Section 4 of the *Fair Administrative Action Act*, which is the Act contemplated under Sub-Article (3) above, provides: -

(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision–

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to–

(a) attend proceedings, in person or in the company of an expert of his choice;

(b) be heard;

(c) cross-examine persons who give adverse evidence against him;and

(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

(6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of *the Constitution*, the administrator may act in accordance with that different procedure.

56. Hence, in Capital Markets Authority v Ciano & another (Civil Appeal 314 of 2018) [2023] KECA 581 (KLR) (26 May 2023) (Judgment), the Court of Appeal held: -

> 35. Article 47 of *the Constitution* codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Section 4 of the FAA Act echoes Article 47 and reiterates the entitlement of every person to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In all cases where a person's rights or fundamental freedoms is likely to be affected by an administrative decision, the administrator must give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations; notice of a right to a review or internal appeal against the decision where applicable; a statement of reasons; notice of the right to legal representation and right to cross-examine; as well as information, materials and evidence to be relied upon in making the decision or taking the administrative action. It is noteworthy that some of these elements are mandatory while some are only required where applicable.
>
> 36. Under section 4(3)(a) to (g) of the FAA Act, where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator is mandatorily required to give the person affected by the decision–(a)prior and adequate notice of the nature and reasons for the proposed administrative action; (b) an opportunity to be heard and to make representations in that regard; (c) notice of a right to a review or internal appeal against an administrative decision, where applicable; (d) a statement of reasons pursuant to section 6; (e) notice of the right to legal representation, where applicable;(f)notice of the right to cross-examine or where applicable; or (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.
>
> 37. Section 4 (4) of the FAA Act provides that the administrator shall accord the person against whom administrative action is taken an opportunity to– (a) attend proceedings, in person or in the company of an expert of his choice; (b) be heard; (c) cross- examine persons who give adverse evidence against him; and (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.
>
> 38. The appellant's appeal will stand or fall on the question whether it accorded the 1st respondent adequate notice as contemplated by Article 47 and Section 4 of the FAA Act. "Adequate notice" means that the affected person must be informed that an administrative action is being planned. The person must be given enough time to respond to the planned administrative action. The person also needs to be given enough information about the planned administrative action to be able to work out how to respond to the planned action. The person needs to know the nature of the action (what is being proposed) and the purpose (why the action is being proposed).

57. In this instance, it is also significant to note that, in the Petition, the 1st petitioner mentioned that it operates its transport business "...throughout the East African states..." Hence, it is instructive that, in Section 17 of the East African Community Load Control Act, 2016, it is stipulated that: -

> (1) When an authorized officer determines that a vehicle is carrying a load in excess of the legal load limit under this Act, he or she shall issue a weighing report setting out the overload particulars and the amount of overload fees payable.
>
> (2) Where an authorized officer, while a journey is being undertaken, determines that a vehicle is carrying a load in excess of the legal load limit, the authorized officer shall in consultation

with relevant implementing agencies, not allow the vehicle in question to continue its journey, unless the load is redistributed and the vehicle is, upon being reweighed, found to be within the legal load limit, or the vehicle is offloaded to lower its weight to the legal load limit and—

(a) any amounts due under subsection (1) have been paid to the national roads authority or its duly appointed agent; or

(b) a guarantee in the prescribed format is provided by the transporter that such amounts shall be paid.

(3) Where the fact of overloading is not disputed by the transporter, the transporter shall sign and acknowledge the weighing report in the prescribed manner and the transporter shall be liable for the overload fees which may be recovered as a summary debt by the national roads authority.

(4) Where the fact of overloading is disputed by the transporter, the authorized officer weighing the vehicle shall indicate such dispute in the weighing report, and a copy of the disputed report shall be issued to the transporter who may—

(a) pay the requisite overloading fees on a without prejudice basis to secure the release of the vehicle, make such necessary adjustment on the load as may be directed by the authorized officer and lodge an appeal against the fees as provided for by regulations made under this Act; or

(b) appeal against the fees, using regulations made under this Act, during which period the vehicle will remain detained at such designated place at the cost of the transporter.

(5) It shall be the duty of the driver to notify the owner and other relevant parties of an overload as indicated in the weighing report and such fees required to be paid for the overloading.

58. The above provision lays down an elaborate procedure in case of vehicle overloading. There is nothing before me to suggest that these processes were adhered to before the Prohibition Order and Notice to Attend Court were issued. It is therefore my finding that the petitioners' right to fair administrative action as contemplated under Article 47 of the Constitution was indeed infringed by the 1st respondent; for it is now trite that, where an alternative procedure has been provided for in statute, the same be strictly adhered to before the jurisdiction of the court can be invoked. Thus, in Speaker of National Assembly v Karume [1992] KLR 21 it was held that:

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

59. Likewise, in Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR, the Court of Appeal restated its position thus:

> "It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte

Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

60. As to whether the prosecution of the 2nd respondent was validly undertaken, it is my finding that it was perfectly lawful in the circumstances for the 2nd petitioner to be charged and arraigned before the 4th respondent as he was, pursuant to Section 56(1) of the *Traffic Act* for the offence of overloading, even though the offence was alleged to have occurred 4 months earlier. There is likewise, no gainsaying that prosecution is the mandate of the 3rd Respondent and is provided for under Article 157 of the Constitution. Accordingly, the assertion by the 2nd Petitioner that the decision to prosecute him had no legal basis and thus was malicious is utterly lacking in traction.

61. Moreover, the decision to charge and prosecute was not a final decision. It was subject to due process by way of a trial before an impartial court. Thus, in Halsbury's Laws of England Fourth Edition Vol. 1 page 90 para 74 the opinion is expressed, which I find apt, that:

> " The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice...Although, in general the rule applies only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be founded, the nature of an inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected shall be afforded an opportunity to put their case at that stage; and it may be unfair not to require the inquiry to be conducted in a judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice. As has already been indicated, the circumstances in which the rule will apply cannot be exhaustively defined, but they embrace a wide range of situations in which acts or decisions have civil consequences for individuals by directly affecting their legitimate interests or expectations. In a given context, the presumption in favour of importing the rule may be partly or wholly displaced where compliance with the rule would be inconsistent with a paramount need for taking urgent preventive or remedial action; or where disclosure of confidential but relevant information to an interested party would be materially prejudicial to the public interest or the interests of other persons or where it is impracticable to give prior notice or an opportunity to be heard; or where an adequate substitute for a prior hearing is available."

62. In the premises, since the decision to charge and prosecute the 2nd respondent was a preliminary one, it cannot be said that it is, ipso facto, unconstitutional. The 2nd petitioner's arrest and trial rights are under-guarded by an elaborate process anchored in Articles 49 and 50 of the Constitution. Indeed, in the case of Michael Sistu Kamau & 12 Others v Ethics and Anti-Corruption Commission & 4 Others [2016] eKLR, a three-judge bench of the High Court held that:

> " The trial courts are better placed to consider the evidence and decide whether or not to place an accused on their defence and even after placing the accused on their defence, the Court may well proceed to acquit the accused. Our criminal process also provides for a process of appeal where the accused is aggrieved by the decision in question. Apart from that there is also an avenue for compensation by way of a claim for malicious prosecution. In other words, unless the Petitioners demonstrate that the circumstances of the impugned process render it impossible for them to have a fair trial, the High Court ought not to interfere with the trial ... "

63. In the instant case, weighbridge tickets for overloading have been exhibited which the criminal court, no doubt, had the opportunity to examine against the evidence that was adduced before the court. Any assertion that the prosecution of the 2nd petitioner was based on readings of measuring instruments not approved by the interested party ought to have formed the subject of the proceedings before the subordinate court. And, as has been pointed out herein above, it so turned out that the 2nd petitioner was acquitted under Section 210 of the Criminal Procedure Code on the ground that no prima facie case had been made out against him.

64. In the foregoing circumstances, it is apposite to underscore the position taken in Paul Ng'ang'a Nyaga & 2 Others v Attorney General & 3 Others [2013] eKLR that:

> " there is a clear public interest in ensuring that crime is prosecuted and that a wrongdoer is convicted and punished. It also follows from this that it will generally be in public interest to prosecute a crime where there is sufficient evidence to justify the contrary e.g. unless there is some countervailing reason not to prosecute...If the petitioners or any other party for that matter, are charged with a penal offence, they have the right to be presumed innocent until proved guilty according to law in a public trial at which they have had all the guarantees necessary for their defence."

65. It is plain therefore that the allegations that the 2nd respondent's prosecution in the traffic matter was ultra vires is entirely baseless.

C. What reliefs if any, are appropriate in the circumstances?

66. Article 23(1) of the Constitution gives the Court the jurisdiction, in accordance with Article 165, to hear and determine petitions for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Accordingly, Sub-Article (3) is explicit that:

> In any proceedings brought under Article 22, a court may grant appropriate relief, including —
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> a. a declaration of rights;
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> b. an injunction;
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> c. a conservatory order;
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> d. a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
>
> e. an order for compensation; and
>
> f. an order of judicial review.

67. It is now trite that what amounts to appropriate relief depends on the nature and circumstances of the case. Hence, Law Society of Kenya vs. Attorney General & another; Mohamed Abdulahi Warsame & another (Interested Parties) [2019] eKLR Hon. Chacha, J. held that an appropriate relief should be an effective remedy for purposes of enforcing *the Constitution*, human rights and the rule of law. He

relied on Fose v Minister of Safety and Security [1997] (3) SA 786(CC)1997(7) BCLR 851 wherein it was held that:

> "(19) Appropriate relief will in essence be relief that is required to protect and enforce *the Constitution*. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in *the Constitution* are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights."

68. Similarly, in Hoffmann v South African Airways (CCT17/00) [2000] ZACC 17, it was held that:

> (45) The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, "we must carefully analyse the nature of the constitutional infringement, and strike effectively at its source". (see also Mvumvu v Minister for Transport (supra) and Residents of Industry House & 8 Others v Minister of Police & 9 Others, supra)

69. Having found that the petitioner's prayers for the production of documents were unwarranted for failure to comply with the applicable legal regime, in particular, Section 8 of the *Access to Information Act*, it follows that Prayers 1 and 2 of the Petition must fail and are accordingly declined. Similarly, no justification has been made for the quashing of the 3rd respondent's decision to prosecute the 2nd respondent; and for that reason, Prayers 4 and 6 are untenable.

70. The petitioners also prayed for damages to be assessed by the Court for violation and contravention of their fundamental rights. In this respect, it is to be appreciated that from a constitutional standpoint, an award of damages is not intended to serve a punitive end; but for vindication of a right. Thus, in Dendy v University of Witwatersrand, Johannesburg & Others [2006] 1 LRC 291, the Constitutional Court of South Africa held that:

> "...an award of damages was a secondary remedy to be made in only the most appropriate cases...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringed and to deter their future infringement. The test was not what would alleviate the hurt which the plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy." (see also Gitobu Imanyara & 2 others v Attorney General, supra)

71. On the question of damages, the Court of Appeal, in the case of Peter Ndegwa Kiai t/a Pema Wines & Spirits v Attorney General & 2 others (Civil Appeal 243 of 2017) [2021] KECA 328 (KLR) (17 December 2021) (Judgment), stated: -

> " 16. ...that an award of general damages in constitutional petitions is discretionary and will depend on the circumstances of each case, and can indeed be granted as compensation for proven loss.
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> 17. Special damages on the other hand are awarded for losses that are not presumed but have been specifically proved and that can be quantified, such as out-of-pocket expenses or earnings lost during the period between the injury and the hearing of the action. The attendant common law rules of proof are also applicable, in the absence of specific rules that regulate awards of compensation in constitutional petitions. It is trite under common law in this regard that special damages must be specifically pleaded and proven. This Court is guided by the reasons why special damages must be pleading and proved as set out in D.B. Casson and I.H. Dennis, Odgers: Principals of Pleading and Practice in Civil Actions in the High Court of Justice at pp. 170 to 171:
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> > " Special damage, on the other hand, is such a loss as the law will not presume to be the consequence of the defendant's act, but which depends in part, at least, on the special circumstances of the case. It must therefore always be explicitly claimed on the pleadings, and at the trial it must be proved by evidence both that the loss was incurred and that it was the direct result of the defendant's conduct. A mere expectation or apprehension of loss is not sufficient. And no damages can be recovered for a loss actually sustained, unless it is either the natural or probable consequences of the defendant's act, or such a consequence as he in fact contemplated or could reasonably have foreseen when he so acted. All other damage is held remote."
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> 18. Likewise, in the English case of Perestrello e Companhia Ltda vs United Paint Co. Ltd., [1969] 3 All E.R. 479 Lord Donovan held as follows at pp. 485-486.:
>
> > " Accordingly, if a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act, he must warn the defendant in the pleadings that the compensation claimed will extend to this damage, thus showing the defendant the case he has to meet and assisting him in computing a payment into court. The limits of this requirement are not dictated by any preconceived notions of what is general or special damage but by the circumstances of the particular case. "The question to be decided does not depend upon words, but is one of substance" (per Bowen L.J., in Ratcliffe v. Evans ([1892] 2 Q.B. 524 at 529)). The same principle gives rise to a plaintiff's undoubted obligation to plead and particularize any item of damage which represents out-of-pocket expenses, or loss of earnings, incurred prior to the

> trial, and which is capable of substantially exact calculation. Such damage is commonly referred to as . . . "special" in the sense that fairness to the defendant requires that it be pleaded. The obligation to particularize in this latter case arises not because the nature of the loss is necessarily unusual, but because a plaintiff who has the advantage of being able to base his claim upon a precise calculation must give the defendant access to the facts which make such calculation possible."

> 19. As regards the other types of damages that can be awarded in constitutional petitions, nominal damages typically consist of an insignificant allocation awarded upon proof that the defendant has violated the plaintiff's legal and constitutional rights. They are awarded for the purposes of declaring and vindicating legal and constitutional rights, and do not require proof of harm. Punitive damages are awarded in addition to compensatory or nominal damages, and proof of a highly culpable state of mind is necessary to support an award of punitive damages. Punitive damages primarily serve penal and deterrent functions in cases of gross constitutional violations, as well as vindicatory function."

72. In the light of the foregoing, I have looked at the Petition and noted that, at paragraph [e] of their prayers, the petitioners asked for special damages in the sum of Kshs. 270,000/=; being the total amount of loss of business incurred by the 1st petitioner by reason of the unlawful detention of the subject motor vehicle, calculated at Kshs. 30,000/= per day for the nine (9) days. However, this aspect was not specifically proved as would be expected. It is trite that, in addition to specifically pleading special damages, a litigant is under obligation to specifically prove the same.

73. Accordingly, it was not sufficient for the 1st petitioner to aver that the subject motor vehicle was detained for 9 days and therefore it is entitled to Kshs. 30,000/= per day for loss and damage incurred without demonstrating that such loss was, as a matter of fact, incurred. Hence, I find no basis for making an award in the sum of Kshs. 270,000/= sought as special damages by the 1st petitioner. Nevertheless, having found that the motor vehicle was detained without sufficient cause, it is my finding that the 1st petitioner is entitled to nominal damages; which I hereby assess at Kshs. 200,000/= only.

74. In view of the above, the Amended Petition dated 26th May 2022 is allowed to the extent only of the proven infringement of the 1st petitioner's right to property under Article 40 of the Constitution. Accordingly, the appropriate reliefs to award herein, and which I hereby award, are as hereunder:

    (a) That a declaration be and is hereby made that the decision of the 1st respondent in ordering for the detention of the 1st petitioner's motor vehicle amounted to arbitrary deprivation of property and an infringement of the 1st petitioner's right to property as envisaged under Article 40 of *the Constitution*.

    (b) That, for the infringement aforementioned, 1st respondent is hereby ordered to pay the 1st petitioner nominal damages in the sum of Kshs. 200,000/= together with interest thereon at court rates from the date hereof until full payment.

    (c) Since the Amended Petition is only partially successful, it is hereby ordered that each party shall bear own costs thereof.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 1ST DAY OF FEBRUARY 2024

OLGA SEWE

JUDGE