



**Kiragu v Chuka University (Constitutional Petition  
E001 of 2023) [2024] KEHC 2241 (KLR) (6 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2241 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
CONSTITUTIONAL PETITION E001 OF 2023**

**LW GITARI, J**

**MARCH 6, 2024**

**BETWEEN**

**JOSEPH KIAMA KIRAGU ..... PETITIONER**

**AND**

**CHUKA UNIVERSITY ..... RESPONDENT**

**RULING**

1. The Petitioner instituted these proceedings vide the Petition dated 18<sup>th</sup> January, 2023. In the Petition, the Petitioner is substantively seeking several declaratory orders to apparently enforce his constitutional rights to privacy and dignity which he claims have been infringed by the Respondent through the use of the Petitioner's image without his permission.
2. In response to the said petition, the Respondent raised a notice of preliminary objection dated 11<sup>th</sup> April, 2023 seeking the dismissal of the suit with costs based on the following grounds:
  1. The Petition does not meet the threshold of Constitutional Petition set out by the High Court in the case of *Anarita Karimi Njeru v Republic* affirmed by the Court of Appeal in *Mumo Matemo v Trusted Society of Human Rights Alliance & 5 others* in that it has not been pleaded with reasonable precision by enumerating the article violated and particulars set out on how the said articles are alleged to have been violated.
  2. The Honourable Court lacks jurisdiction to entertain, hear and determine the Petition as pleaded for the reasons that:
    - i. The nature of the dispute in issue can be litigated in other legally constituted forums.
    - ii. The Petition is ill founded for being filed as a Constitutional petition instead of a normal suit.



3. This suit has been brought to this honourable court in clear disregard of the law, is an abuse of the due process of court and cannot be heard or ventilated by this court.
  4. The suit herein is otherwise bad in law and fundamentally defective and ought to be dismissed with costs to the Respondent.
3. Parties were then directed to file and serve their written submissions to the Preliminary Objection. Both parties complied and filed written submissions on 15<sup>th</sup> May, 2023.

The respondent relies on the case of *Anarita Karimi Njeru v Republic* 1979 eKLR where the court held that-

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

That based on this holding for petition to meet the constitutional threshold to be entertained by the Constitutional Court it must meet with a reasonable degree of precision the three tier test, that is stating that which one complains of, the provision said to be infringed, the manner in which they are alleged to be infringed.

That although the petitioner has enumerated Articles 28, 31 and 40 of the *Constitution* as the articles that have been infringed, no particulars are pleaded with reasonable clarity on how they have been violated and the extent of the violation. That the petitioner has not demonstrated how the respondent who is not the State has failed to support or infringed such right under Article 40(5) of the *Constitution* of Kenya when the said right is the responsibility of the State.

4. The respondent further relies on the case of *Mumo Matemo v Trusted Society of Human Rights Alliance & 5 Others* [2014] eKLR where the Court of Appeal held that-

“.....However the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. The respondent has cited the case of *Thorp v Holdsworth* [1876] 3 Ch D.637 at 639 and submits that the petitioner has not pleaded with reasonable precision the provisions of the *Constitution* which he alleges were violated and has not set out the particulars of how the violation were done.”

Additionally the respondent submits that constitutional litigation is not open for every claim which may properly be dealt with under the alternative existing mechanism for redress in Civil or Criminal Law. To this end he relies on the court of Appeal decision in *Gabriel Mutava & 2 Others v Managing Director Kenya Ports Authority and Another* (2016) eKLR & *National Assembly v James Njenga Karume* [1992] eKLR where the Court of Appeal stated that where there is a clear procedure for redress of any grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed.

Reliance was also on *Leonard Otieno v Airtel Kenya Limited* [2018] eKLR. He submits that the principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done.



5. While referring to [Civil Procedure Act](#) and [Data Protection Act](#), the respondent submits that there are statutes which provide remedies for the claims such as that of the Petitioner. It is further argued that our jurisprudential policy is to encourage parties to exhaust and honor alternative forums of dispute resolution where they are provided by statute. It is the contention by the respondent that there exists other mechanisms provided by Statute to regulate claims such as that of the petitioner and he should not be allowed to avoid such procedure.
6. For the Petitioner, it is submitted that the respondent's Preliminary Objection does not satisfy the requirement of a Preliminary Objection as stipulated in the case of *Mukisha Biscuits Manufacturing Limited v West End Distributors* [1969] E.A as it does not raise pure points of law. He further submits that the petitioner has provided ground on how his rights have been violated. That the court is being invited to examine the evidence on record and assess whether the petitioner's rights were violated and thus cannot summarily dismiss the suit. He relies on the case of Independent [Electoral and Boundaries Commission v Jane Chebererugor & 2 Others](#) 2015 eKLR. Where the Supreme Court stated-

“It is distinctly improper for a party to resort to a preliminary Objection as a sword of winning a case, otherwise destined to be resolved judicially and on the merits.”

The petitioner further relies on [Joel Kenduryo v District Criminal Investigations Officer Nandi & 4 Others](#) [2019] eKLR.

7. I have considered the grounds that the preliminary objection is based on and the respective submissions by the parties, the main issues that arise for determination by this Court are:
  - a. Whether the Petition meets the threshold of a Constitutional Petition; and if so,
  - b. Whether this Court has jurisdiction to entertain this matter; and if so,
  - c. Whether there were alternative dispute resolutions mechanisms that the Petitioner should use;
  - d. Who should bear the costs?

## Analysis

### a. Whether the Petition meets the threshold of a Constitutional Petition

8. It was the Respondent's submission that the Petition in question does not meet the threshold of a constitutional petition as the Petitioner has enumerated Articles 28, 31, and 40 as the constitutional provisions that the Respondent has allegedly infringed but has allegedly not pleaded any particulars with reasonable clarity on how those provisions have been violated and the extent of the violation. To buttress this submission, the Respondent has placed reliance on the holdings in the cases of [Anarita Karimi Njeru v Republic](#) [1979] eKLR and [Mumo Matemo v Trusted Society of Human Rights Alliance & 5 Others](#) [2014] eKLR which both highlight the threshold that a petition should meet in order for a constitutional court to entertain the same.
9. On the part of the Petitioner it was argued that the Petitioner's contention that the instant Petition does not meet the threshold of a constitutional petition as held in the case of *Anarita Karimi Njeru* (supra) invites this court to assess whether the contents of petition are sufficient to warrant a constitutional remedy which warrants the hearing of the parties hence going against the requirement that was established in the case of *Mukhisa Biscuits Manufacturing Ltd v. West End Distributors* [1969] that preliminary objections should only raise points of law.



10. In addition, it was the Petitioner’s submission that the instant Petition contains sufficient grounds to support the Petitioner’s claim that his constitutional rights have been violated by the Respondent. Further, that paragraph 4 of the Petition specifically provides the specific constitutional rights that the Respondent is alleged to have violated and that paragraphs 5, 6, and 7 of the Petition goes on to expound on how those rights have been violated by the Respondent. That the Petitioner also expounds on the said violations in his affidavit dated 18<sup>th</sup> January, 2023 which also attaches his evidence in support of the Petition for consideration of this Court.
11. The Petitioner thus submits that the instant petition invites this Court to examine the evidence on record and determine whether the constitutional rights of the Petitioner were infringed by the Respondent and that as such, summarily dismissing the suit at this stage would be denying him justice as the core issues will not have been addressed. The Petitioner relied on the cases of *Independent Electoral and Boundaries Commission v. Jane Cheperemger & 2 Others* [2015] eKLR, *Joel Kendwiyo v. District Criminal Investigations Officer Nandi & 4 Others* [2019] eKLR, and *Patric Baya Martha v. Cabinet Secretary Industry and Enterprises Development & 2 Others* [2021] stating that in all these cases, the courts upheld the position that preliminary objections should not be used as a sword to win a case and deny the Petitioner an opportunity to be heard on merit.
12. I have perused the Petitioner’s petition that is dated 18<sup>th</sup> January, 2023 and was filed before this Court on 15<sup>th</sup> March, 2023. The petition is premised on Articles 1, 2(1), 165(3)(b), 258, and 259(1)(b), but substantively it focuses on the rights as guaranteed under Articles 28, 31(c), and 40(5) of the *Constitution* of Kenya. The Petitioner alleges that that his right to privacy, right under article 31 and right to publicity have been infringed by the Respondent who has been using the Petitioner’s identity, image and likeness for their financial and commercial gain and for exploitative purposes without his consent. The Petitioner thus seeks, inter alia, for a declaratory order to be made by this Court that the Petitioner has suffered damages, both emotionally and financially, due to the aforesaid actions of the Respondent.
13. The Respondent in this case is yet to respond to the Petition and deny or affirm the facts as pleaded therein. Instead, the Respondent opted to raise the present preliminary objection which is the subject of this ruling.
14. In the case of *Hassan Ali Joho & Another v Suleiman Said Shabbal & 2 Others* [2014] eKLR, the Supreme Court of Kenya held that a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit.
15. Rule 4(1) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (the “Mutunga Rules”)* provides that:

“Where any right or fundamental freedom provided for in the *Constitution* is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.”
16. Rule 10 of the Mutunga Rules governs that the form that a constitution should take. Rule 10(2) of the same Rules specifically provide as follows:

“(2) The petition shall disclose the following—

  - (a) the petitioner’s name and address;
  - (b) the facts relied upon;



- (c) the constitutional provision violated;
- (d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
- (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
- (f) the petition shall be signed by the petitioner or the advocate of the petitioner; and
- (g) the relief sought by the petitioner.”

17. In light of the above requirement and having perused the instant petition that is before this Court, it is my view that the instant petition as presented has complied with Rules 10 of the Mutunga Rules. As such, the issue raised on the preliminary objection as to whether the petition meets the threshold of a constitutional petition is not only unmerited but is also all short of meeting the threshold of a pure point of law that is likely to dispose of the Petition. A point of law does not require the court to interrogate the petition for merits. It must be a pure point of law and a Preliminary Objection cannot be raised if certain facts have to be ascertained.

**b. Whether this Court has jurisdiction to entertain, hear, and determine this matter**

18. The dictum of Nyarangi, JA in the case of the *Owners of Motor Vessel (Lillian S v Caltex Oil (Kenya Ltd)* [1989] KLR 1) has been cited severally by the courts. The court in that case held that jurisdiction is everything and where a court of law holds that it has no jurisdiction, it should down tools.

19. It follows that jurisdiction is central in any litigation and without it, a court of law cannot validly take any other step. In this case, the Respondent, while recollecting their earlier argument that present Petition falls short of the substantive test of a constitutional threshold, submitted that this Court is not clothed with the jurisdiction to hear a Petition that falls short of a constitutional petition in its nature.

20. On the part of the Petitioner, it was submitted that this honourable court us espoused with the mandate and jurisdiction to deal with constitutional matters as per the provisions of Article 165(3)(b) of the *Constitution*. The said Article provides that this Court has jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Article 165 (3) (b) of the *Constitution* provides:

- “b) subject to clauses (4) and (5), the High court shall have jurisdiction to determine whether a right or fundamental Freedom in the bill of rights has been denied, violated, infringed or threatened.

21. Having found that the Petition as presented meets the threshold of a constitutional petition under the Mutunga Rules and by dint of the Article 165(3)(b) of the *Constitution*, there is no doubt that this Court is properly clothed with the jurisdiction to entertain, hear, and determine the Petitioner’s petition.



**c. - Whether there were alternative dispute resolutions mechanisms that the Petitioner should use**

22. the *Constitution* of Kenya recognizes and entrenches the use of alternative mechanisms of dispute resolution in the following terms: -.

“159(2) In exercising judicial authority, the Courts and tribunals shall be guided by the following principles-

- (a) .....
- (b) .....
- (c) alternative forms of dispute resolution including resolution, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause 3.”

23. On this issue, it was the Respondent relied on the cases of *Gabriel Mutava & 2 Others v Managing Director Kenya Ports Authority* [2016] eKLR and *Leonard Otieno v. Airtel Kenya Limited* [2018] eKLR in submitting that there are other mechanisms provided in statutes to regulate claims such as that of the Petitioner but he failed to exhaust those alternative dispute resolution mechanisms before instituting the present proceedings.

24. The Petitioner on the other hand, relied on the case of *Rashid Abhiambo Aloggoh & 24 Others v Haco Industries Limited*, Civil Appeal No. 110 of 2001, and the case of *Fred Munialo v Matheu Wamalwa Wafula & 2 Others* [2020] eKLR and submitted that there is no principle of law that deters the Petitioner from filing instant Petition just because there are possibly other avenues that would have helped him achieve justice. In addition, the Petitioner claims that the Respondent blatantly ignored resolution of the dispute through alternative dispute resolution mechanisms and as such, should not be allowed to resort to the same at this stage.

25. It was further the Petitioner’s position that the instant petition has not called for the interpretation of any statutory provisions but rather, the petition raises issues concerning alleged infringement of his constitutional rights. It was thus the Petitioner’s submission that this Court is the best forum to address the issues raised by the Petitioner.

26. The High Court has variously reiterated the position that it is only the High Court and Courts of equal status which can interpret the *Constitution*. (See: *Royal Media Services Ltd v Attorney General & 6 Others* [2015] eKLR among others).

27. In the case at hand, the Respondent has been defined in the petition as an educational institution under the *Universities Act* 2016 situate in Chuka County. As stated herein before, the Respondent has not yet responded to the instant petition and as such, this Court is unable to interrogate whether there is a defined procedure laid down by the Respondent in its constitution that the Petitioner ought to have otherwise taken as an alternative for the resolution of the dispute herein. Furthermore challenge of applauding for want of form should not be entertained to deny a party justice. The court should determine the matter on merits.

**d. Who should bear the costs?**

28. On the issue of costs, it is trite the costs follow the event. As such, and in view of the reasons given above, the costs of the preliminary objection should be awarded to the Petitioner.



**Conclusion**

29. From the foregoing analysis, I opine that the notice of preliminary objection dated 11<sup>th</sup> April, 2023 and subsequently filed in this Court on 14<sup>th</sup> April, 2023 is dismissed with costs for want of merit.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 6<sup>TH</sup> DAY OF MARCH 2024.**

**L.W. GITARI**

**JUDGE**

