Olili v President of the Supreme Court of Kenya & another; Law Society of Kenya (Interested Party) (Constitutional Petition E027 of 2022) [2024] KEHC 7182 (KLR) (16 May 2024) (Judgment)

Neutral citation: [2024] KEHC 7182 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CONSTITUTIONAL PETITION E027 OF 2022

HK CHEMITEI, SM MOHOCHI & TA ODERA, JJ

MAY 16, 2024

BETWEEN

SHARON M OLILI ..... PETITIONER

AND

THE PRESIDENT OF THE SUPREME COURT OF KENYA ... 1ST RESPONDENT

PRESIDENT OF THE REPUBLIC OF KENYA ..... 2ND RESPONDENT

AND

THE LAW SOCIETY OF KENYA ..... INTERESTED PARTY

Setting timelines for establishment of courts across Kenya by the High Court is unrealistic as the Judiciary does not fund itself

The petitioner sought to compel the 1st respondent to immediately establish a High Court in every county and Magistrates' Court in every constituency/sub-constituency within 18 months. The court held that the President (the 2nd respondent) ought not to be sued in his name or office. The Attorney General was the correct party to be sued whenever the President allegedly contravened any constitutional provisions. The court further held that setting timelines with regards to establishment of courts across Kenya would be unrealistic as the Judiciary did not fund itself. The court also held that it was not constitutionally mandated to issue an order compelling the 2nd respondent to fund the Judiciary.

Reported by Kakai Toili

Constitutional Law *- Judiciary – courts - establishment of courts – timelines for establishment of courts across Kenya - whether the High Court had the jurisdiction to set timelines for the Judiciary with regards to establishment of courts across Kenya - whether the High Court could issue orders compelling the President to fund the Judiciary – Constitution of Kenya, article 173.*

Civil Practice & Procedure *– suits against the President – protection from legal proceedings against the President - whether the President could be sued in his name whenever he allegedly contravened any constitutional provisions – Constitution of Kenya, article 143(2).*

Constitutional Law *- concept of non-justiciability – nature of the concept of non-justiciability - what were the doctrines which were comprised in the concept of non-justiciability of disputes before courts - Constitution of Kenya, article 159.*

Constitutional Law *– fundamental rights and freedoms – right to equality and freedom from discrimination - whether different treatment would amount to discrimination if the criterion for differentiation was reasonable and objective*

Brief facts

The petitioner sought for among other orders; a declaration that the omission and or refusal by the respondents to establish a High Court in every county and Magistrates' Court in every constituency/sub-county was unconstitutional and in violation of the rights and freedoms of the petitioner and other citizens. The petitioner stated that the National Executive, the executive structures in the county governments, Parliament and the legislative assemblies in the county governments as State organs had taken positive steps in ensuring reasonable access to their services in all parts of Kenya by setting up shops in all counties/sub counties and wards in pursuit of ensuring that all people could easily access their services thus removing the burden that would have been shouldered by the people when moving from one area to another in pursuit of these services.

The petitioner further stated that the Judiciary had failed to ensure reasonable access to its services in all parts of Kenya as the President of the Supreme Court of Kenya (the 1st respondent) had failed to establish High Courts in all the 47 counties for example Lamu, Mandera, Isiolo, Turkana, Samburu and Elgeyo Marakwet Counties did not have a High Court. The petitioner further averred that the respondent had also failed to establish Magistrate's Courts in all constituencies/sub-counties.

Issues

i. Whether the High Court could set timelines for the Judiciary with regards to establishment of courts across Kenya.
ii. Whether the President could be sued in his name whenever he allegedly contravened any constitutional provisions.
iii. What were the doctrines which were comprised in the concept of non-justiciability of disputes before courts?
iv. Whether the High Court could issue orders compelling the President to fund the Judiciary.
v. Whether different treatment would amount to discrimination if the criterion for differentiation was reasonable and objective.

Held

1. A literal reading of article 143(2) of the Constitution showed that the President was immune from civil proceedings in respect of anything done or not done in exercise of his power under the Constitution while in office. The President of the Republic of Kenya (the 2nd respondent) ought not to be sued in his name or office. The Attorney General was the correct party to be sued whenever the President allegedly contravened any constitutional provisions.
2. The court took judicial notice that there was an occupant of the office in question and that was the President of Republic of Kenya. He was the one who had been sued as the 2nd respondent in the petition. The petitioner had gone afoul of express provisions of article 143(2) of the Constitution, which addressed itself to the office and the occupier of the office. The 2nd respondent was improperly enjoined and the petition against the 2nd respondent was therefore wrong itself.
3. In a constitutional petition, a party was not supposed to merely cite constitutional provisions. S/he must with some reasonable degree of precision identify the constitutional provisions that were alleged to have been violated or threatened to be violated and the manner of the violation and/or threatened

violation and state some particulars of alleged infringement to enable the respondent to be able to respond to each allegation accordingly.

4. The petitioner cited articles 1(1), 2(1) ,3(1) ,6(1),10(1), 19, 20(1), 22(1), 23(1), 24, 27, 39(3), 48, 43, 50(1), 131(2)(e) and 174 purportedly infringed but only set out the manner in which articles 6(1), 10(1), 27, 39(3), 48, 43, 131(2) (e), and 174 were alleged to be infringed. The court therefore declined to accept the argument that the petition was imprecisely drafted.

5. He who alleged must prove. In the circumstances, the case relied on by the petitioner may not aid her case as she had not demonstrated that delay in establishing the courts was deliberate.

6. Under the framework outlined in article 173 of the Constitution, the Chief Registrar would be required in every financial year to prepare estimates of expenditure for the following year, and submit them to the National Assembly for approval and upon approval by the National Assembly, the expenditure of the Judiciary shall be a charge on the consolidated fund and the funds shall be paid directly into the Judiciary. Setting timelines with regards to establishment of courts across Kenya would be unrealistic as the Judiciary did not fund itself. The petitioner had not demonstrated that the Judiciary had sufficient resources to establish the courts but refused or failed to do so.

7. Following the promulgation of the Constitution of Kenya, 2010, there had been significant improvement in the promotion and protection of access to justice. Access to justice in Kenya was to be attained progressively.

8. The concept of non-justiciability of disputes before courts was a sound one in law and it had its basis in article 159 of the Constitution which routed for alternative dispute resolution mechanisms. The concept of non-justiciability was comprised of three doctrines;
    1. the political question doctrine;
    2. the constitutional-avoidance doctrine; and,
    3. the ripeness doctrine.

9. Article 173 of the Constitution made express provisions regarding the Judiciary fund. The funds were to be allocated to the Judiciary upon approval by the National Assembly, and it was the work of the Parliament to enact legislation to provide for the regulation of the fund.

10. The petitioner had asked the court to issue orders compelling the 2nd respondent to fund the Judiciary. The court was not constitutionally mandated to issue such an order. The order sought if granted would interfere with constitutional mandate of the National Assembly as regards to approval of expenditures. The avenue the applicant would seek compliance with the statute would be by way of judicial review orders of *mandamus* to compel Parliament to comply with the statutory duty imposed on it to allocate and appropriate funds but not through a petition.

11. The court was not constitutionally mandated to direct the 1st respondent on how to perform her functions. The concept of non-justiciability was therefore applicable in the petitions in regards to prayers (b) and (c) which sought a declaration that the omission and or refusal by the respondents to establish a High Court in every county and Magistrates' Court in every constituency/sub-county was unconstitutional; and an order compelling the 1st respondent to immediately establish a High Court in every county and Magistrates' Court in every constituency/sub-constituency within 18 months.

12. The Constitution prohibited all forms of discrimination. A party alleging discrimination was duty bound to prove it. The petitioner had not demonstrated how she and other citizens had been discriminated. Different treatment would not amount to discrimination if the criterion for differentiation was reasonable and objective. Establishment of courts was to be done progressively and therefore there was no intention on the part of the Judiciary to discriminate against the petitioner and other citizens who resided in the areas where the High Courts and Magistrates' Courts were yet to be established.

Petition dismissed.

Orders

Each party to bear their own costs.

Citations

Cases

1. Anarita Karimi Njeru v Republic (Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR)) — Mentioned
2. Anthony Miano & others v Attorney General & others (Petition E343 of 2020; [2021] KEHC 12687 (KLR)) — Explained
3. Apollo Mboya v Attorney General, National Assembly & Senate (Petition 472 of 2017; [2018] KEHC 6933 (KLR)) — Mentioned
4. Attorney-General & 2 others v Ndii & 79 others; Dixon & 7 others (Amicus Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated); [2022] KESC 8 (KLR)) — Mentioned
5. Attorney General v Kituo Cha Sheria, Abebe Dadi Tullu & 6 others (Civil Appeal 108 of 2014; [2017] KECA 773 (KLR)) — Mentioned
6. Christian Juma Wabwire v Attorney General (Petition 50 of 2013; [2019] KEHC 1049 (KLR))
7. Dry Associates Limited v Capital Markets Authority & Another Interested Party Crown Berger (K) Ltd (Petition 328 of 2011; [2012] KEHC 5568 (KLR)) — Explained
8. Independent Electoral and Boundaries Commission (IEBC) v New Vision Kenya (NVK Mageuzi) & 4 others (Petition 25 of 2014; [2015] KESC 21 (KLR)) — Applied
9. Jacqueline Okeyo Manani, Ben Sihanya, Anna Cherono Konuche, Ekaterina Handa Muok, Mercy Wanjiku Kareithi & Everlyne Musangi Ngalaka v Attorney General & Law Society of Kenya (Petition 36 of 2018; [2018] KEHC 9395 (KLR)) — Mentioned
10. John Harun Mwau v Independent Electoral And Boundaries Commission & Attorney General (Petition 26 of 2013; [2013] KEHC 6762 (KLR)) — Explained
11. Kenya Bus Service Ltd & another v Minister for transport & 2 others (Civil Suit 504 of 2008; [2012] KEHC 2402 (KLR)) — Mentioned
12. Kenya Ports Authority v William Odhiambo Ramogi, Asha Mashaka Omar, Gerald Lewa Kiti, Attorney General, Cabinet Secretary, Ministry of Transport & Infrastructure, Kenya Railways Corporation, Muslims for Human Rights, Maina Kiai & County Government of Mombasa (Civil Appeal 166 of 2018; [2019] KECA 305 (KLR)) — Explained
13. Kiriro Wa Ngugi & 19 others v Attorney General, Cabinet Secretary, Foreign Affairs & Kenya International Boundaries Office (Petition 254 of 2019; [2020] KEHC 8819 (KLR)) — Explained
14. Law Society of Kenya Nairobi Branch v Malindi Law Society , Attorney General, Chief Justice and President of The Supreme Court, National Assembly, Law Society of Kenya, National Land Commission & Parliamentary Service Commission (Civil Appeal 287 of 2016; [2017] KECA 231 (KLR)) — Explained
15. Matindi & 3 others v President of the Republic of Kenya & 4 others; Controller of Budget & 50 others (Interested Parties) (Petition E080, E084 & E150 of 2023 (Consolidated); [2023] KEHC 19534 (KLR)) — Applied
16. Mohammed Abduba Dida v Debate Media Limited & Media Council of Kenya (Petition 324 of 2017; [2017] KEHC 8963 (KLR)) — Applied
17. Mumo Matemu v Trusted Society of Human Rights Alliance, Attorney General, Minister of Justice & Constitutional Affairs, Director of Public Prosecutions, Kenyan Section of the International Commission of Jurists & Kenya Human Rights Commission (Civil Appeal 290 of 2012; [2013] KECA 445 (KLR)) — Mentioned
18. Okiya Omtatah Okoiti v Cabinet Secretary, National Treasury, Commissioner General, Kenya Revenue Authority, National Assembly & Attorney General (Petition 253 of 2018; [2018] KEHC 9439 (KLR)) — Explained

19. Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others (Election Petition 6 of 2013; [2013] KEHC 5939 (KLR)) — Explained
20. Peter K. Waweru v Republic (Miscellaneous Civil Application 118 of 2004; [2006] KEHC 3202 (KLR)) — Mentioned
21. PETER NGARI KAGUME & 7 Others v ATTORNEY GENERAL (Constitutional Application 128 of 2006; [2008] KEHC 677 (KLR)) — Explained
22. Rai & 3 others v Rai & 4 others (Petition 4 of 2012; [2014] KESC 31 (KLR)) — Explained
23. Wanjiru Gikonyo, Paul Kemunche Masese & Edwin Mutemi Kiama v National Assembly of Kenya, Senate of the Republic of Kenya, Cabinet Secretary of the National Treasury, Attorney General & Affirmative Action Social Development Fund Board (Petition 453 of 2015; [2016] KEHC 5536 (KLR)) — Explained
24. William Odhiambo Ramogi, Asha Mashaka Omar & Gerald Lewa Kiti, Attorney General, Cabinet Secretary, Ministry of Transport and Infrastracture, Kenya Ports Authority, Kenya Railways Corporation, Muslims for Human Rights, Maina Kiai & County Government of Mombasa (Constitutional Petition 159 of 2018; [2018] KEHC 9718 (KLR)) — Mentioned
25. William Odhiambo Ramogi, Asha Mashaka Omar & Gerald Lewa Kiti, Attorney General, Cabinet Secretary, Ministry of Transport and Infrastracture, Kenya Ports Authority, Kenya Railways Corporation, Muslims for Human Rights, Maina Kiai & County Government of Mombasa (Constitutional Petition 159 of 2018; [2018] KEHC 9718 (KLR)) — Explained
26. Government of the Republic of South Africa v Grootboom Case (CCT 11/00 [2000] ZACC 19;) — Explained
27. Levben Products v Alexander Films ((SA) (PTY) Ltd 1957 (4) SA 225 (SR)) — Explained

Statutes

1. Civil Procedure Act (cap 21) — section 27 — Cited
2. Constitution — article 1, 2, 3, 6(1) ; (3), 10, 19, 20, 21, 22, 23, 24, 27, 39, 43, 48, 131(2)(e), 143(2), 159, 160(5), 165(3); (b); (d), 173, 174, 258, 259 — Cited
3. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules (2013) — rule 5(b) — Cited
4. High Court (Organization And Administration) Act (cap 8C) — section 12(1) — Cited

Texts

1. Frietz W. Scharpf (1966), Judicial Review and the Political Question: A functional analysis (Yale Law Journal)
2. Garner, BA., (Ed) (2009), Black's Law Dictionary (St Paul, Minnesota: Thomson Reuters 10th Edn)
3. Wechsler, H., (Ed) (1959), Towards Neutral Principles of Constitutional Law (Harvard Law Review Vol 73 No 1 pp 1-35)

Advocates

None mentioned

JUDGMENT

1. This is a unanimous judgment of a bench presided over by Justice H Chemitei, Justice Mohochi SM and lady Justice Teresa Odera.

2. The petitioner presented a petition dated December 13, 2022.

3. The petition is brought under articles 1, 2, 3, 6(1) & (3), 10, 19, 20, 21, 22, 23, 24, 27, 39, 48, 159, 165(3) (b) &(d), 258 & 259 of the *Constitution* 2010.

4. The petitioner seeks the following reliefs from the court: -

   a. A declaration that the omission and or refusal by the respondents to establish a High Court in every county and magistrates' court in every constituency/sub-county is unconstitutional and in violation of the rights and freedoms of the petitioner and other citizens enshrined in articles 27,39(3) and 48 of the *Constitution* of Kenya, 2010.

   b. A declaration that the omission and or refusal by the respondents to establish a High Court in every county and magistrates' court in every constituency/sub-county is unconstitutional and in violation of articles 6(3) and 10 of the *Constitution* of Kenya, 2010.

   c. An order compelling the 1st respondent to immediately establish a High Court in every County and magistrates' court in every constituency/sub-constituency within 18 months.

   d. An order compelling the 2nd respondent to immediately fund the judiciary and in any event within 12 months so as to comply with order (c) above.

   e. The respondents to individually file reports of compliance with order (c) and (d) above within 24 months.

   f. An order that all existing courts in Kenya be preserved unless with the consent of the interested party.

   g. The petitioner be paid costs of this petition.

5. The petition is based on the grounds set out therein. In a nutshell, the petitioner states the national executive, the executive structures in the county governments, Parliament and the legislative assemblies in the county governments as state organs have taken positive steps in ensuring reasonable access to their services in all parts of the Republic by setting up shops in all counties/sub counties and wards in pursuit of ensuring that all people can easily access their services thus removing the burden that would have been shouldered by the people when moving from one area to another in pursuit of these services.

6. That a closer look at things shows that every sub-county has a sub-county administrator from the county government and a deputy-county commissioner. However, the judiciary which is vested with judicial authority that is derived from the people and exercises it through the courts and tribunals established by or under the *Constitution* has failed to ensure reasonable access to its services in all parts of the republic as the 1st respondent has failed to establish High Courts in all the forty-seven counties eg Lamu, Mandera, Isiolo, Turkana, Samburu and Elgeyo Marakwet Counties do not have a High Court.

7. That therefore anyone who resides in the above counties and wants to access the services of the High Court is forced to travel to the nearest county that has a High Court. While doing this, they are forced to incur additional expenses in terms of money and time compared to those living in counties that have a High Court.

8. The petitioner avers that the respondent has also failed to establish magistrate's courts in all constituencies/Sub Counties eg Merti, Garbatula, Kuresoi South, Kuresoi North, Bahati, Turkana North, Loima, Turkana South, Tiaty, Mogotio, Turkana East, Kipkelion West, Kipkelion East, Bureti, Kipkelion East,Njoro, Rongai,West Rongai, Subukia & Gilgil do not have magistrates courts.

9. The petitioner contends that equally, the residents of the said constituencies/Sub-Counties also incur additional expenses compared to the residents who are in constituencies/sub-counties that have magistrates' courts, which is a sad state of affairs considering the *Constitution* is more than twelve (12) years old.

Constitutional Provisions Denied, Violated Infringed and/or Threatened

10. The petitioner averred that the respondents in violation of article 6(3) have failed to establish High Court and Magistrates Courts throughout all forty-seven counties and all constituencies/Sub constituencies respectively.

11. That the 1st respondent in utter disregard of article 10 of the *Constitution* proceeded to establish High Courts and magistrates' courts in counties and constituencies/sub-counties of her choice. That there was no public participation in the counties and constituencies/sub-counties that are denied the services of these courts.

12. The respondents failure to establish High Courts in every county and magistrates' courts in every constituency/sub-county, have limited and violated the right of the citizens in the affected counties and constituencies/sub-counties to access justice. This is because the citizens who live in these areas are forced to move to areas where such courts are in orders to access justice, and in their pursuit of justice they are met with additional costs in terms of money and time yet they have an equal right as those who have these courts in the counties and constituencies/sub-counties they reside in.

13. That the existence of backlog of cases is a violation of the right to access justice since justice delayed is justice denied, and that this problem is further amplified when a High Court or a Magistrates' Court is forced to take up matters from nearby counties or constituencies/Sub-counties respectively just because of the neglect/omission of the respondents that had led to these courts issuing hearing dates as far as twelve (12) months away and mention dates as far as six (6) away.

14. The petitioner averred that by being denied the full and equal enjoyment of the right to access justice yet other citizens are enjoying this right, means that they are being treated differently with no legally justifiable reason.

15. It was the petitioner's further averment that the respondents have violated article 39 of the *Constitution*by forcing the decisions of citizens, including the petitioner, when it comes to deciding where to reside *vis-à-vis* the accessibility of courts. Moreover, some people do not have the luxury of moving certain counties and/or constituencies/sub-counties to easily and affordably access the High Court and/or magistrates' courts because of their economic status.

16. The petitioner contended that the respondents infringed her rights and those of other advocates under article 43 of *the Constitution*. That their neglect/omissions to establish the aforesaid courts have contributed to the increase of the already many challenges advocates face in pursuit of satisfaction of their socio-economic rights.

17. It was pleaded that the 2nd respondent violated article 131(2)(e) of the *Constitution* by failing to properly fund the judiciary and its refusal to do so has taken away institutional and functional independence of the judiciary thus reducing it to a flower girl and praise singer.

18. The 1st and 2nd respondents opposed the petition through grounds of opposition dated June 19, 2023 on grounds that: -

    i. The petitioners have not proved the violation of their rights and or the violation of any other person's rights

    ii. The petition as drawn does not meet the threshold of constitutional petitions as set forth in *Anarita Karimi Njeru v Attorney General* [1979] KLR 154.

    iii. The petitioners have not satisfied the grounds for granting the orders sought.

iv. The rights alleged to have been violated can only be attained in a progressive manner.

v. the *Constitution* as it is does not provide for mandatory devolution of functions reserved for the National Government to the Counties.

vi. The orders sought are a violation of article 160(1) and 160(5) of the *Constitution* as far as the independence of the Judiciary is concerned.

vii. The petitioners have not proved the 2nd respondent is responsible for the allocation of funds to the judiciary.

viii. The petition offends the provisions of article 143(2) of the *Constitution*.

19. The interested party swore a replying affidavit on February 13, 2023 in support of the application and the petition through Wangari Mwangi who describes herself as an Advocate of the High Court of Kenya. The said affidavit largely adopts the averments contained in the petition.

20. The petitioner swore a further affidavit on June 16, 2023 deposing that the 1st respondent has proceeded vide gazette Notice No 5470 dated April 19, 2023 to establish Lamu Environment and Land Court Sub-Registry and vide gazette Notice No 5471 dated April 19, 2023 proceeded to establish Lamu High Court Sub-Registry, and on May 20, 2023 vide gazette Notice No 7030, established Employment and Labour Relations Court at Kakamega Law Courts.

21. That the 1st respondent further proceeded vide gazette notice No 7031 dated May 20, 2023 to establish employment labour relations court divisions in Nairobi ie (a) the claims and labour relations division (b) the judicial review and labour rights division; & (c) the appeals Division.

22. That this goes to show that the 1st respondent recognizes the duty to protect the right to access to justice and has not performed that duty to the required constitutional standards for the past 12 years since the promulgation of the 2010 constitution.

23. The petitioner averred that the 1st respondent seems to be acting whimsically despite being in charge of an entire arm of government, albeit the fact that the 1st respondent should have enacted an actionable strategic plan with laid down enforcement plans and funding within at least 5 years of promulgation of the *Constitution* 2010.

24. That on the other hand, the budget estimate for the judiciary in the financial year 2023/24 is KES 23.2 Billion, reflecting an increase from the previous allocation of Ksh 18.9 billion in 2022/2023. She contended that while this is an increase in the amount it is a drop in the ocean as it 0.6% of the total budget compared to 60.1% that the 2nd respondent receives for the executive.

25. She averred that the establishment of courts that are easily accessible ensures expeditious disposal of cases which cultivates trust in the citizenry to approach courts in instances of even minor disputes which upholds the rights to fair hearing and access to justice.

26. That access to justice is one of the ways the government can ensure protection of individual citizen rights as enshrined in the 2010 constitution.

27. She posited that the rule of law can only be politically ideal when the government through the 2nd respondent promotes tenets to access of justice which is the cornerstone of building any democracy.

28. The petitioner in her submissions indicated that she filed a supplementary affidavit dated February 20, 2023 on February 22, 2023 the same was not on Record.

29. The petition was canvassed through written submissions.

Petitioner's Submissions

30. The petitioner filed her submissions and supplementary submissions on May 12, 2023 and July 24, 2023 respectively.

31. The petitioner framed 5 issues for determination. Namely;

    a. Whether the 2nd respondent is properly enjoined in the petition.

    b. Whether the access to justice is a progressive right.

    c. Whether the petition is justifiable.

    d. Whether the respondents have violated the provisions of the *Constitution* by failing to establish a High Court in every County and Magistrates' courts in every sub-county/constituency.

    e. Whether the prayers sought should issue.

32. On the first issue, the petitioner submitted that the 2nd respondent has been properly sued for failing as the Head of the State and Government to ensure reasonable access to the services of the judiciary.

33. The petitioner also argued that the 2nd respondent has not been sued in his name and that the presidency as an office is not immune to article 165 of the *Constitution* of Kenya.

34. The petitioner referred this court to rule 5(b) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*,2013 and the case of *Matindi & 3 others v The National Assembly of Kenya & 4 others; Controller of Budget & 50 others (Interested Parties)* (Petition E080, E084 & E150 of 2023 (Consolidated)) [2023] KEHC 19534 (KLR) (Constitutional and Human Rights) (3 July 2023) (Judgment) (with dissent - HI Ong'udi, J) for the proposition that the misjoinder of the President was not fatal.

35. In regards to the second issue, the petitioner argued that respondents have not produced any evidence to support the assertion that available judiciary allocation does not allow the 1st respondent to establish courts as they allege. The petitioner also contended that the *Constitution* does not associate the principle of progressivity with regard to access to justice under article 48 of the *Constitution* 2010. She argued that by calling for progressive approach to access to justice under article 48, the respondents are seeking to limit a right guaranteed under article 48 and no such limitation can be allowed because the respondents have not secured the enactment of a law to impose the proposed limitation.

36. They referred this court to the decision of the Constitutional Court of South Africa in the case of *R v Grootboom* CCT 11/00 on the question of progressive realization of rights.

37. Regarding the third issue, the petitioner submitted that the issue of non-justiciability is inapplicable herein. She cited the case of *William Odhiambo Ramogi & 2 others v Attorney General & 6 others* case [2018] eKLR, where the learned judges dealt with the exceptions to the doctrine of non-justiciability.

38. The petitioner then submitted that article 23 of the *Constitution* grants this honourable court the jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. She stated that as this is a petition for a threatened violation of the *constitution*, the respondents cannot argue that the petition is not justiciable.

39. With respect to the fourth issue, the petitioner submitted that the 1st respondent has failed to establish High Courts in all the 47 counties and magistrates court in all sub-counties/constituencies while the

2nd respondent has failed to ensure that the budget allocation for the judiciary is sufficient to ensure these courts are established as required.

40. She argued that the acts and omissions by the respondents are in violation of article 6(3) of the *Constitution*.

41. The petitioner contended that the natures of services offered by the judiciary are sensitive and more of need than want. She argued that if disputes are to be resolved in accordance with the law, then their societal systems will crumble. That for systems to work and have longevity, they rely on confidence, and the people ought to be confident that the system is not only effective but efficient.

42. She contended that a resident of Mandera town will not have confidence in the judicial system when he or she is forced to travel to High Court in Garissa which is 713 kilometers away.

43. The petitioner argued that it therefore follows that a resident of Mandera County cannot be said to have reasonable equitable access to the services of the judiciary as required under article 6(3) and section 12(1) of the *High Court (Organization and Administration) Act*, 2015.

44. The petitioner submitted that the respondents have failed to ensure that the services offered by the judiciary are reasonably and equitable accessible. The petitioner relied on *Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others* [2017] eKLR where the court addressed the issue of accessibility of courts to all residents of Kenya.

45. The petitioner further referred this court to article 10 of the *Constitution* and the case of *Okiya Omtatah Okoiti v Commissioner General, Kenya Revenue Authority & 2 others* [2018] eKLR where the court held *inter alia* that all State Organs, State Officers, Public Officers and all persons whenever any of them applies or interprets the *Constitution*, enacts, applies or interprets any law or makes or implements public policy decisions must adhere to article 10 of the *Constitution*, and submitted that the respondents by failing to establish a High Courts in all the counties and magistrates' court in all constituencies/sub-counties deviated from these national values and principles.

46. The petitioner argued that respondents have not demonstrated whether there was participation of people before they made the decisions to establish High Courts and Magistrates Courts in some counties over other counties and in some constituencies/sub-counties over others.

47. She contended that the respondents did not lead any evidence demonstrating that the residents of counties where they have not established High Courts participated in the making of such a decision/ omission and the same goes for residents of constituencies/sub-counties that do not have magistrates' courts. In buttressing her submissions, the petitioner relied on the case of *Okiya Omtatah Okoiti v Commissioner General, Kenya Revenue Authority & 2 others*(*supra*) where the court addressed the essence of participation of the people.

48. The petitioner contended that the respondents having not demonstrated the criteria used to determine which residents deserved the services of the courts over other residents, discriminated against the residents of counties they have not established High Courts and residents of constituencies/sub-counties that do not have magistrates' court.

49. The petitioner submitted that as an advocate her right to enter, remain in and reside anywhere in Kenya has been limited by failure to establish High Court in some counties and magistrates courts in some constituencies and sub-counties since if she was to set up a law firm in such areas, her clients would be reluctant to employ her services and those of the judiciary since they will incur more costs just to access the same services which are readily available in other counties and constituencies/sub constituencies.

50. The petitioner argued that the right to access justice includes the right to easily approach a court in order to access remedies and relief from courts. In buttressing this proposition, reliance was placed on article 48 of the *Constitution* and the cases of *Apollo Mboya v Attorney General & 2 others* [2018] eKLR & *Kenya Bus Service Ltd & another v Minister for Transport & 2 others* [2012] eKLR.

51. The petitioner submitted that there is therefore need to facilitate access to justice in a timely and affordable manner. She contended that failure to establish courts in aforementioned areas limit access to justice to residents of those areas.

52. The petitioner also argued that existence of backlog of cases is a violation of the right to access justice since justice delayed is justice denied and that this problem is amplified when High court and Magistrates court are forced to take up matters from nearby counties or constituencies/sub-counties respectively just because of neglect/omission of the respondents.

53. In regards to the last issue, the petitioner submitted that she is entitled to the orders sought as of right since she is only seeking the enforcement of a constitution that is more than 12 years old. That moreover, the enforcement of her constitutional rights and freedoms is not an option. To support her submissions, the petitioner relied on the case of *Attorney General v Kituo cha Sheria & 7 others* [2017] eKLR where the Court of Appeal addressed the issue of respecting constitutional rights as follows: -

> "The clear message flowing from the constitutional text is that rights have inherent value and utility and their recognition, protection and preservation is not an emanation of state largesse because they are not granted, nor are they grantable, by the State. They attach to persons, all persons, by virtue of their being human and respecting rights is not a favour done by the state or those in authority. They merely follow a constitutional command to obey."

54. The petitioner also aligned herself with the sentiments of Mahomed CJ, THAT;

> "..Unlike Parliament or the executive, the court does not have the power of the purse or the army or the police to execute its will. The superior courts and the Constitutional Court do not have a single soldier. They would be impotent to protect the *Constitution*if the agencies of the state which control the mighty physical and financial resources of the state refused to command those resources to enforce the orders of the courts. The courts could be reduced to paper tigers with a ferocious capacity to roar and to snarl but no teeth to bite and no sinews to execute what may then become a piece of sterile scholarship. Its ultimate power must therefore rest on the esteem with which the Judiciary is held within the psyche and soul of a nation. That esteem must substantially depend on its independence and integrity." ("*The Role of the Judiciary in a Constitutional State* - Address at the First Orientation Course for New Judges" [1998] 115 SALJ 111 at 112).

55. The Petition urged this court to grant the reliefs sought.

Respondents' Submissions

56. With respect to whether the 2nd respondent has been improperly enjoined in this petition, the respondents submitted in the affirmative. In bolstering their submissions, this court was referred to the provisions of article 143 of the *Constitution* and the case of *Attorney-General & 2 others v Ndii & 79 others; Prof Rosalind Dixon & 7 others* (Amicus Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with dissent).

57. On whether the court can compel the 2nd respondent to fund the 1st respondent, the respondents submitted that having improperly enjoined the 2nd respondent in this suit, this court cannot issue any orders as against the 2nd respondents and secondly, the 2nd respondent has no powers under the *Constitution*to fund the 1st respondent and that even if the 2nd respondent had the constitutional mandate to allocate funds, this court would be crossing the boundaries in delving into such issues assigned to another arm of government as it would not be justiciable.

58. The respondents argued that article 173 of the *Constitution*of Kenya is clear as to the funding of the judiciary.

59. The respondents invited this court to *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others* [2016] eKLR which expounded on the concept of non-justiciability, and submitted that based on separation of powers doctrine, budgetary concerns fall within the realm of policy and rightly belong to the other relevant arms of government.

60. On whether the respondents violated the rights and freedoms of the petitioner as well as those of other citizens and in particular articles 27, 39(3) and 48 of *the constitution*, the respondent submitted that though the petitioner have alleged that they have been discriminated upon under article 27 of *the Constitution*, she has not proved the said discrimination.

61. The respondents contend that discrimination must be proved and is different from differentiation.

62. The respondents further argued that the petitioner has not proved that she comes from the said counties and constituencies that have not benefited from the establishment of High Court courts and Magistrates' courts respectively.

63. The respondents further submitted that the petitioner has not stated that the residents of the aforesaid counties that are yet to benefit from the establishment of the High Courts and magistrates' courts have been denied access to justice rather what they have established is that their access to justice is different from those of counties that have high courts and constituencies that have magistrate's courts.

64. The respondents contended that differentiation is not discrimination and is not unconstitutional either. In buttressing their submissions, reliance was placed on the case of *Mohammed Abduba Dida v Debate Media Limited & another* [2017] eKLR for the proposition that differentiation is permissible if it does not constitute unfair discrimination.

65. The respondents argued that the petitioner has not demonstrated with precision how the people in the counties have been denied reasonable access to courts just because they come from different counties. That the courts should consider this in view of the fact that courts can be accessed online.

66. The respondents submitted that the petitioner has not cited any case to demonstrate that she has undergone a struggle in accessing the court services and that she tried to reach out to the Chief Justice to demonstrate the need of the aforesaid courts yet she is an Advocate with ease access to the Chief Justice.

67. The respondents argued that establishment of courts is a function under the different acts of parliament that have already been subjected to public participation and an administrative function that demands no public participation.

68. With respect to whether access to justice is a progressive right, the respondents submitted that the chief justice as demonstrated vide various gazette notices has been gazetting various courts throughout the country in a progressive manner and with regard to the resources available and the number of cases available. To support their submissions, the Respondents referred this court to the case of *Independent*

Electoral and Boundaries Commission (IEBC) v New Vision Kenya (NVK Mageuzi) & 4 others [2015] eKLR on the concept of progressive realization of a right.

69. On whether the consolidated petition was drawn with sufficient precision, the respondents submitted that a party who alleges violation of his or her rights must plead with reasonable precision the manner in which the rights have been violated. In support of this proposition reliance was placed on the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR.

70. The respondents then submitted that the petitioner has cited various articles of the *Constitution* allegedly infringed without sufficiently demonstrating how her rights and those of other citizens have been violated.

71. The respondents urged this court to dismiss the petition.

Interested Party's Submissions

72. The interested party submitted that the issue for determination falls under article 48 of the *Constitution* on the right of access to justice. The interested party referred this court to the case of *Dry Associates Limited v Capital Markets Authority & another Interested Party Crown Berger (K) Ltd* [2012] eKLR where the court succinctly discussed the components of access to justice.

73. The interested party submitted that failure of the respondents to provide adequate courts is an issue of equality and freedom from discrimination. To support his submissions, interested party relied on article 27 of the *Constitution* and the cases of *Jacqueline Okeyo Manani & 5 others v Attorney General & another* [2018] eKLR and *Peter K Waweru v Republic* [2006] eKLR.

74. The interested party urged this court to allow the petition.

Issues for Determination

75. From the pleadings filed, responses thereto, respective parties' submissions and the authorities, the following issues crystalize for determination:

    a. Whether the 2nd respondent has been improperly joined by petitioner in this petition.

    b. Whether the petition meets the threshold set out in Anarita Karimi Njeru's case.

    c. Whether right to access to justice is to be progressively achieved.

    d. Whether the doctrine of non-justiciability is applicable in this Petition.

    e. Whether the petitioner has established a violation of the constitutional rights by the respondents.

    f. Whether the petitioner is entitled to the orders sought.

    g. Who should bear the costs of this petition?

76. I will deal with the issues in seriatim.

Whether the 2nd respondent has been improperly joined by petitioner in this Petition

77. The respondent submitted that the 2nd respondent has been improperly enjoined in this matter whereas the petitioner holds the view that the Presidency as an office is not immune to article 165 of the *Constitution* of Kenya. It was her position that the 2nd respondent has properly been sued for failing as

the Head of the state and Government to ensure reasonable access to the services of the Judiciary. She also contended that the 2nd respondent has not been sued in his name.

78. The relevant provision to this matter is article 143 (2) which states:

> " (2) Civil proceedings shall not be instituted in any court against the President or the person performing the functions of that office during their tenure of office in respect of anything done or not done in the exercise of their powers under this Constitution".

79. A literal reading of the provision shows that the President is immune from civil proceedings in respect of anything done or not done in exercise of his power under the *Constitution* while in office.

80. The Supreme Court in *Attorney General & 2others v Ndii & 79 others*; (*supra*) elaborately discussed the issue whether civil proceedings could be instituted against the President or person performing the functions of the office of the President during their tenure of office in respect of anything done or not done contrary to the *Constitution*. It held as follows: -

> " The superior courts below fell in error in their interpretation and application of article 143(2) of the *Constitution* by holding that civil proceedings could be instituted against the President or a person performing the functions of the office of President during their tenure of office in respect of anything done or not done contrary to *the Constitution*. Civil proceedings could not be instituted against the President or a person performing the functions of the office of President during their tenure of office in respect of anything done or not done contrary to *the Constitution*. Such proceedings could be instituted against the President vide the Attorney General".

81. The above decision is binding on this court. I have not been referred to and neither could I find any other decision of the said court that departs from that finding.

82. In the most recent case of *Eliud Karanja Matindi and Others v President Republic of Kenya* [2023] KEHC 19534 (KLR) (The 50 CAS's case) the High Court did revisit this issue. The 3 Judge bench also cited *Attorney General & 2others vs Ndii & 79 others*(*supra*) and held as follows;

> " Having considered the submissions of the parties on this issue as set out above, we are guided by article 143 of the *Constitution* and the decision of the Supreme Court in *Attorney-General & 2 others v Ndii & 79 others; Prof Rosalind Dixon & 7 others (Amicus Curiae)* (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) (with dissent) more commonly known as 'the *BBI* case', where at the following paragraphs the court stated as follows:
>
> " (282) Consequently, this leads to the inescapable conclusion that the immunity of the President is unlike that of the other state actors. The President not only enjoys functional immunity like all public officials who perform state duties, which protects them from civil liability for official functions, they further enjoy sovereign immunity as the Head of State and the single representation of the sovereignty of the Republic. Indeed, it is only sovereign immunity that can immunize anyone against both proceedings and criminal liability...
>
> (288) With respect to legal accountability, the protection of the President from legal proceedings under article 143(2) does not mean that a President's actions or omissions cannot be challenged in court. Anybody or party aggrieved by the President's actions or failures can initiate

proceedings against the Attorney General who by virtue of being the legal representative of the government in legal proceedings also represents the President, who is the Head of Government. The immunity on the other hand offers protection that shields the President from civil suits being filed against them in their personal capacity. As rightly conceded by the President in his written submissions before this court... (emphasis ours) As such, pursuant to article 156(4) of *the Constitution*, the exercise of public power by the President can be challenged in a court of law by suing the Attorney General through an action of judicial review or constitutional petition wherein the court may issue appropriate remedies... (emphasis ours)

Pursuant to article 143 of *the Constitution*, and based on the law as set out above, we find that the 1st respondent was improperly joined into the consolidated petition.

We further find that the misjoinder is not fatal to the consolidated petition but take the opportunity to urge the petitioners and future litigants to avoid this practice in light of the unequivocal pronouncement by the Supreme Court on this issue."

83. The law is thus well settled that the 2nd respondent ought not to be sued in his name or office. The Attorney General is the correct party to be sued whenever the President allegedly contravenes any Constitutional provisions.

84. The argument by the petitioner that the President has not been sued in his own name is neither here nor there. This court takes Judicial Notice that there an occupant of the office in question and that is the President of Republic of Kenya. He is the one who has been sued as the Second Respondent in this petition. Clearly, the petitioner has gone afoul of very express provisions of the said article, which addresses itself to the office and the occupier of the office.

85. It is thus my finding that the 2nd respondent was improperly enjoined and petition against the 2nd respondent was therefore wrong itself.

Whether the petition meets the threshold set out in Anarita Karimi Njeru's Case

86. The court in *Anarita Karimi Njeru vs The Republic* (*supra*) held that a Constitutional petition should set out with a degree of precision the petitioner's co-plaint, the provisions infringed and the manner in which they are alleged to be infringed.

87. This principle was later reaffirmed by the Court of Appeal in the case of *Mumo Matemo v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR when the court at paragraph 87(3) of the judgment stated as follows: -

> "It is our finding that the petition before the High Court was not pleaded with precision as required in constitutional petitions. Having reviewed the petition and supporting affidavit we have concluded, that they did not provide adequate particulars of the claims relating to the alleged violations of the *Constitution* of Kenya and the Ethics and Anti-Corruption Commission Act, 2011, accordingly the petition did not meet the standard enunciated in the Anarita Karimi Njeru case."

88. It is thus well settled law that in a constitutional petition therefore, a party is not supposed to merely cite constitutional provisions. He/she must with some reasonable degree of precision identify the constitutional provisions that are alleged to have been violated or threatened to be violated and the manner of the violation and/or threatened violation and state some particulars of alleged infringement to enable the respondent to be able to respond to each allegation accordingly.

89. I have perused the petition and I do note that the petitioner did indeed cite articles 1(1), 2(1) ,3(1) ,6(1),10(1), 19, 20(1), 22(1), 23(1), 24, 27, 39(3), 48, 43, 50(1), 131(2)(e)& 174 purportedly infringed but only set out the manner in which articles 6(1), 10(1), 27, 39(3), 48, 43, 131(2) (e), and 174 are alleged to be infringed, as set at paragraphs 41, 43 43, 52, 53, 54, 55, 56, 59 & 61 thereof.

90. I therefore decline to accept the argument that the petition was imprecisely drafted.

Whether right to access to justice is to be progressively achieved

91. The respondent submitted that access to justice is a progressive right and dependable on resources available and number of cases available. It was their case that the judiciary relies upon funding as approved by the National Assembly and therefore issuing timelines for compliance without orders as to the source of funds would be unrealistic.

92. The petitioner on her part argued that the *Constitution* does not associate the principle of progressivity with regard to access to justice as that will amount to limiting a right guaranteed under article 48 of the *Constitution*.

93. The respondents in buttressing their case relied on the case of *Independent Electoral and Boundaries Commission (IEBC) v New Vision Kenya (NVK Mageuzi) & 4 others* (*supra*)where court in regards to concept of progressive realization stated:

> " On the concept of progressive realization of a right, this Court did express its perception in the Matter of the Principle of Gender Representation in the National Assembly and the Senate, (supra) as follows [Paragraph 49]:
>
> "The concept of 'progressive realization' is not a legal term; it emanates from the word 'progress,' defined in the Concise Oxford English Dictionary as 'a gradual movement or development towards a destination.' Progressive realization, therefore, connotes a phased-out attainment of an identified goal. The expression gained currency with the adoption of the Universal Declaration of Human Rights in 1948 – and this landmark international instrument stepped up the growth of the 'human rights movement,' worldwide. The legal milestones in this development were later marked by other instruments: such as the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Such instruments introduced a set of expressions that has become part of the standard language of international human rights jurisprudence. Such language entails no technicality, but is simply concerned to prescribe the extent of a State's obligation in the realization of rights embodied in the human rights Conventions"
>
> We would affirm the Court of Appeal's directions, and only add an insight from our decision in In the Matter of the Principle of Gender Representation [para 53]:
>
> " We believe that the expression 'progressive realization' is neither a stand-alone nor a technical phrase. It simply refers to the gradual or phased-out attainment of a goal – a human rights goal which by its very nature, cannot be achieved on its own, unless first, a certain set of supportive measures are taken by the State. The Exact shape of such measures will vary, depending on the nature of the right in question, as well as the prevailing social, economic, cultural and political environment. Such supportive measures may involve legislative, policy or programme initiatives including affirmative action."

94. The petitioner on her part referred this court to the oft-quoted case South African case of *Government of the Republic of South Africa v Grootboom Case* CCT 11/00 where it was held that;

> " Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'tre, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources"

95. It is trite law that he who alleges must prove. In the circumstances, I opine that the case relied on by the petition may not aid her case as she has not demonstrated that delay in establishing the aforesaid courts was deliberate.

96. Article 173 of the *Constitution* provides as follows: -

> 173.
>
> (1) There is established a fund to be known as the Judiciary Fund which shall be administered by the Chief Registrar of the Judiciary. (2) The Fund shall be used for administrative expenses of the Judiciary and such other purposes as may be necessary for the discharge of the functions of the Judiciary. (3) Each financial year, the Chief Registrar shall prepare estimates of expenditure for the following year, and submit them to the National Assembly for approval. (4) On approval of the estimates by the National Assembly, the expenditure of the Judiciary shall be a charge on the Consolidated Fund and the funds shall be paid directly into the Judiciary Fund. (5) Parliament shall enact legislation to provide for the regulation of the Fund.

97. It is clear thus that under the framework outlined in article 173, the Chief Registrar will be required in every financial year to prepare estimates of expenditure for the following year, and submit them to the National Assembly for approval and upon approval by the National Assembly, the expenditure of the Judiciary shall be a charge on the Consolidated Fund and the funds shall be paid directly into the Judiciary.

98. I am in agreement with the respondents position that setting timelines with regards to establishment of courts across the country would be unrealistic as the Judiciary do not fund itself. The petitioner has not demonstrated that the judiciary had sufficient resources to establish the aforesaid courts but refused or failed to do so.

99. Following the promulgation of the *Constitution* 2010, there has been significant improvement in the promotion and protection of access to justice. When Willy Mutunga became Kenya's Chief Justice in 2011, he and his team developed the Judiciary Transformation Framework which was an initiative

aimed at turning Kenya's Judiciary into an independent, efficient and transparent system. In the Judiciary Transformation Framework 2012-2016, several pillars towards improvements of the court functions were identified. One of the Pillars is people focused delivery of justice which was aimed at among other things to achieve access to and expeditious delivery of justice. Some of the strategies which was proposed to be implemented towards attainment of the same, was building more courts to reduce the distance to courts and increasing the number of mobile courts and developing a strategy to ensure that they work.

100. Subsequently, in compliance with the above strategy, new courts have been established. According to Sustaining Judiciary Transformation (SJT) A service Delivery Agenda 2017-2021, the Court of Appeal was devolved to Kisumu, Nyeri and Malindi. sub-registries in Nakuru, Eldoret, Kisii, Mombasa, Bungoma, Busia and Meru were also established, where circuit courts were in operation. The High Court had also witnessed establishment of new stations. Between the year 2012 and 2016, the High Court expanded from 16 Counties to 36 Counties with an establishment of 38 High Court stations and 2 High Court sub –registries. 19 new High Court stations were opened. As at the beginning of 2017, there were 120 Magistrates courts in the country and additional 59 functional mobile courts across the country, mostly in far-flung areas.

101. According to strategic plan 2019- 2023, The Judiciary completed the construction of one Court of Appeal building and 23 High Court stations while the construction of 14 Magistrates' Court stations were still ongoing. It established 71 courts across the country including three Court of Appeal sub-registries, 19 High Courts, nine ELCs, eight Magistrates Courts, and 32 Kadhis' Courts. Sub-registries for four High Courts and nine for the ELRC were also established. Further, four ELRC circuits were established while three mobile Magistrate Courts upgraded to full-fledged Magistrates' Court stations. During the Plan period, 20 out of the 60 Tribunals were transited to the Judiciary.

102. In line with the Judiciary vision of Social transformation through access to justice, the Court of Appeal in Nakuru was launched on September 28, 2022.

103. During the 1st Phase of the operationalization of the Court in the FY 2021/2022 small claims courts were rolled out in 12 counties ie Nairobi, Kajiado, Kiambu, Uasin Gishu, Machakos, Makueni, Nyeri, Nakuru, Kakamega, Mombasa, Kisumu and Meru.

104. In 2023, the Chief Justice Launched High Court in Kibera, and, High Court and Environment and Land Court in Nyandarua.

105. Further it is factual as pointed out by both parties that The Chief Justice has been gazetting various courts through the country.

106. The judiciary has also embraced alternative disputes mechanisms through Court annexed Mediation(CAM) and Alternative Justice system policy(AJS). This has improved access to Justice in Kenya. CAM for example was first implemented in Kenya in April 2016 at the commercial and Family Division in Nairobi. It has also been lodged in courts outside Nairobi eg in Eldoret, Garissa, Kakamega, Kisii, Kisumu, Machakos, Mombasa, Nakuru & Nyeri, and it continues to expand in the Country.

107. The above therefore may not be exhaustive lists of the established courts since the promulgation of the new constitution but it demonstrates that access to justice in Kenya is to be attained progressively.

Whether the doctrine of non-justiciability is applicable in this Petition

108. The court in *Anthony Miano & others v Attorney General & others* [2021] eKLR stated that the concept of non-justiciability of disputes before Courts is a sound one in law and that it has its basis in article 159 of the *Constitution* which routes for alternative dispute resolution mechanisms. The concept of

non-justiciability is comprised of three doctrines: Firstly, the Political Question Doctrine; secondly, the Constitutional-Avoidance Doctrine; and, thirdly, the Ripeness Doctrine.

109. The three doctrines making up the concept of non-justiciability were discussed in length by a 3-Judge Bench of the High Court in Nairobi Constitutional Petition No 254 of 2019, *Kiriro wa Ngugi & 19 Others v Attorney General & 2 others* [2020) eKLR. The court stated as follows: -

> 96. The *Black's Law Dictionary*, 9th Edition, Thomson Reuters Publishers at page 943-944 defines justiciability as follows:
>
> "proper to be examined in courts of justice" or "a question as may properly come before a tribunal for decision"
>
> 97. A court must satisfy itself that the case before it is not caught up by the bar of non-justiciability. The concept of non-justiciability is comprised of three doctrines: Firstly, the Political Question Doctrine; secondly, the Constitutional-Avoidance Doctrine; and, thirdly, the Ripeness Doctrine. The doctrines are crosscutting and closely intertwined. We shall however endeavour to as far as possible delimit the operation of each doctrine in isolation.

98. We shall commence with the political question doctrine. *Black's Law Dictionary*, 10th Edition, Thomson Reuters Publishers, at page 1346 defines it as:

> The judicial principle that a court should refuse to decide an issue involving the discretionary power by the executive or legislative branch of government. [underlining added]

99. The political question doctrine focuses on the limitations upon adjudication by courts of matters generally within the area of responsibility of other arms of Government. Such matters mostly deal with foreign relations and national security. [See generally Ariel L. Bendor; Are there any limits to justiciability? The jurisprudential and constitutional controversy in light of Israeli and American experience?]

100. According to the political question doctrine, certain sets of issues categorized as political questions, even though they may include legal issues, are considered to be external to the Judiciary as an arm of Government. Such issues are handed over to other branches of Government for adjudication. The political question doctrine therefore focuses on limiting of adjudication of disputes by courts in favour of the legislative and the executive interventions. It is underpinned by the concept of separation of powers. All that the Courts are doing in such situations is assigning discretion on the issue to another branch of Government. [See generally Frietz W Scharpf; *Judicial Review and the Political Question: A functional analysis* and Herbert Weschler; *Towards Neutral Principles of Constitutional law*.]

101. Courts have dealt with application of the doctrine. In *William Odhiambo Ramogi & 2 others v Attorney General & 6 Others*, Mombasa High Court Petition No.159 of 2018 [2018] eKLR, the five-judge bench observed as follows:

> (79) It was held in *Council of Civil Service Unions vs Minister for the Civil Service* [1985] AC 374 at 418 that a challenge is referred to as being non-justiciable because its nature and subject matter is such as not to be amenable to the judicial process. The "justiciability" doctrine is rooted in both constitutional and prudential considerations and evince respect for the separation of powers, including a properly limited role of the courts in a democratic society. One justiciability concept is the "political question" doctrine

—according to which courts should not adjudicate certain controversies because their resolution is more proper within the political branches.

(80) In *Baker v Carr* 369 US 186 [1962] the United States Supreme Court outlined six matters that could present political questions as follows:

> (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due to coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

(81) In the Kenyan context, the political question doctrine was discussed by the Court of Appeal in Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others (supra) where the court held as follows:

> 98. In considering the issue, we are alive to the provisions of article 159(2)(c) of the *Constitution*which enjoins courts to promote alternative dispute resolutions mechanism inter alia through reconciliation, mediation or arbitration. We emphasize that these alternative dispute resolution mechanisms must be adopted and effectuated prior to judgment by the trial court. With this in mind, the role of the legislature is to make laws and policy and that of the executive is to implement those laws and policies. The role of the judiciary is to interpret the policies and laws as enacted and approved by the legislature and executive. Generally, courts have no role to play in policy formulation; formulation of government policy is a function best suited for the executive and legislature. In Marbury v Madison– 5 US. 137 it was stated that:
>
> The province of the court is solely, to decide on the rights of individuals and not to enquire how the executive or executive officers perform duties in which they have discretion.
>
> 100. In Ndora Stephen v Minister for Education & 2 others, Nairobi High Court Petition No 464 of 2012, Mumbi Ngugi, J correctly observed that the formulation of policy and implementation thereof were within the province of executive. Questions which are in their nature exclusively political should never be adjudicated upon by courts. In the instant case, the trial court directed that State policies and programs on the provision of shelter and access to housing for marginalized groups be presented to the trial court. What would the trial court do with such policies if tabled? Would the court interfere or evaluate the soundness of the policy? A court should not act in vain and issue orders and directions that it cannot implement. In making orders and directions in relation to article 43(1) of the *Constitution*, the provisions of article 20(5)(c) of the *Constitution*must be borne in mind. Article 20(5)(c) stipulates that the court may not interfere with a decision by a State organ concerning the allocation of available resources solely on the basis that it would have reached a different conclusion. We opine that it is advisable for courts to

practice self-restraint and discipline in adjudicating government or executive policy issues. This precautionary principle should be exercised before delving and wading into the political arena which is not the province of the courts.

(82) It is evident from the case law that the two main criteria that will influence the justiciability of an issue or otherwise are firstly, whether there is a clear constitutional commitment and mandate to a particular government organ to make a decision on the issue, and secondly, even where such a constitutional mandate exists, whether the nature of the issue and dispute is such that it is more effectively resolved by conventional political methods of majoritarian decision-making rather than by a deliberative constitutional judgment. This will include situations where a court lacks the capacity to develop clear and coherent principles to govern litigants' conduct.

102. In the *William Odhiambo Ramogi & 2 others v Attorney General & 6 others* case [*supra*], the learned judges also dealt with the exceptions to the doctrine as follows:

(89) .....that there are constitutionally permissible situations where this court may interfere in the policy decisions of the Government, and particularly if a policy decision is in actual or threatened violation of the fundamental rights guaranteed under *the Constitution*, or in violation of other provisions of *the Constitution*. The necessity of vindicating constitutionally secured personal liberties and fundamental freedoms is the principal justification for the anti-majoritarian power that judicial review confers upon the courts, and we are therefore reluctant to find that a claim of fundamental rights, such as the one presented by the petitioners is non-justiciable, even though it may concern the political process, or the internal workings of other government branches.

110. The above decision went on appeal in *Kenya Ports Authority v William Odhiambo Ramogi & 8 others* Mombasa Civil Appeal No 166 of 2018 [2019] eKLR. While approving the reasoning of the High Court on applicability of non-justiciability concept on intergovernmental disputes, the Court of Appeal held:

> First, they [High Court] considered that the test for determining the matter as an inter-governmental dispute for purposes of application of IGRA was not simply to look at who the parties to the dispute were, but the nature of the claim in question and; secondly, they considered that the claimed constitutional violations seeking to be enforced are not mere "bootstraps." We have keenly addressed our minds to the learned Judges' decision and are satisfied that they stayed within the expected contours and properly directed themselves.

111. In the instant case, the respondents submitted that that even if the 2nd respondent had the constitutional mandate to allocate funds, this court would be crossing the boundaries in delving into such issues assigned to another arm of government as it would not be justiciable whereas the Petitioner argued that article 23 of the *Constitution* grants this honourable court the jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

112. The aforesaid article 173 makes express provisions regarding the Judiciary fund. It is clear that the funds are to be allocated to the Judiciary upon approval by the National Assembly, and it is the work of the Parliament to enact legislation to provide for the regulation of the Fund.

113. The petitioner has asked this court to issue orders compelling the 2nd respondent to fund the Judiciary. It is my considered view that this court is not constitutionally mandated to issue such an order. The order sought if granted will interfere with constitutional mandate of the National Assembly as regards to approval of expenditures.

114. Further it is my humble view, that the avenue the applicant would seek compliance with the statute would be by way of Judicial Review orders of mandamus to compel Parliament to comply with the statutory duty imposed on it to allocate and appropriate funds but not through a petition.

115. This court also is not constitutionally mandated to direct the 1st respondent on how to perform her functions. The concept of non justiciability is therefore applicable in this petitions in regards to prayers (b) and (c).

Whether the petitioner has established a violation of the constitutional rights by the respondents

116. The petitioner averred that failure to establish High Court in every County and magistrates' court in every constituency/sub-county is unconstitutional and in violation of her and other citizens' rights and freedoms enshrined in articles 27, 39(3) and 48 of the *Constitution* of Kenya, 2010.

117. Article 27 of the *Constitution* embodies the principle of equality and non-discrimination thus:

> "(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law...
>
> (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth."

118. In the case of *Jacqueline Okeyo Manani & 5 others v Attorney General & another* (*supra*) it was stated; -

> "26. *Black's Law Dictionary*, 9th Edition defines "discrimination" as (1)" the effect of a law or established practice that confers privileges on a certain class because of race, age sex, nationality, religion or hardship" (2) "Differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured".

119. It is true that the *Constitution* prohibits all forms of discrimination. A party alleging discrimination is duty bound to prove it. In the case of *John Harun Mwau v Independent Electoral and Boundaries Commission & Another* [2013] eKLR, the court stated referring to article 27 of the *Constitution*;

> "[i]t must be clear that a person alleging a violation of article 27 of the *Constitution* must establish that because of the distinction made between the claimant and others the claimant has been denied equal protection or benefit of the law. It does not necessarily mean that different treatment or inequality will per se amount to discrimination and a violation of the *constitution*."

120. In the instant case, the petitioner has not demonstrated how she and other citizens have been discriminated. Different treatment would not amount to discrimination if the criterion for differentiation was reasonable and objective. In the instant case, I have pointed out that establishment of courts is to be done progressively and therefore there was no intention on the part of the judiciary to discriminate against the Petitioner and other citizens who reside in the aforesaid areas where the High courts and magistrates' courts are yet to be established.

121. Regarding the Freedom of movement and residence, the petitioner submitted that the same has been infringed as her movement to areas where the aforesaid courts have not been established has been restricted. She contended that clients would be reluctant to employ her services since they will incur more costs to access Justice.

122. For clarity the above article provides as follows: -

39. (1) Every person has the right to freedom of movement.

(2) Every person has the right to leave Kenya.

(3) Every citizen has the right to enter, remain in and reside anywhere in Kenya.

123. The above reasons advanced by the petitioner in my view are unfounded and speculative. It was incumbent upon the petitioner to avail tangible evidence in support of her case but she chose not to. I'm duly guided by the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance* (supra) where it referred to the case of *Christian Juma Wabwire v Attorney General* [2019] eKLR, the Judge relied on the decision in *Lt Col Peter Ngari Kagume and 7 others v AG*, Constitutional Application No 128 of 2006 where the Learned Judge held as follows: -

> "I am alive to the fact, that the petitioner in his petition alluded to various constitutional violations, but without having availed tangible evidence of violation of his rights and freedoms, I find the allegation by mere words without any other evidence, the court cannot find that the petitioner has proved violations of his rights and freedoms...
>
> The courts of law are deaf to speculations and irregularities as it must always base its decision on evidence. I therefore find and hold that the petitioner failed to discharge the burden of proof to the required standard of proof. I find that the petitioner did not give evidence of probative value to enable this court decide the petition in his favour and grant the orders sought."

124. Regarding rights to access to justice, the petitioner asserted that failure to establish courts in aforementioned areas limit access to justice to residents of those areas and that existence of backlog of cases.

125. The petitioner also argued that existence of backlog of cases is a violation of the right to access justice and that this problem is amplified when High court and Magistrates court are forced to take up matters from nearby counties or constituencies/sub-counties respectively just because of neglect/omission of the respondents. The respondents on their part submitted that petitioner has not cited any case to demonstrate that she has undergone a struggle in accessing the court services. On this issue I will also align myself with the court reasoning in Christian Juma Wabwire's case (supra) and hold that the petitioner has failed to present tangible evidence of her infringement and of other citizens residing in areas in issue of rights to access justice.

Whether the prayers sought should issue

126. As already discussed there was no concrete evidence presented by the petitioner to enable this court grant orders (a) and (b) of the petition.

127. Doctrine on non-justiciability bars this court from issuing prayers (c) and (d) of the petition.

128. Further in regards to prayer (d), I have already held that the 2nd respondent was improperly enjoined in this matter. No orders shall therefore issue against him.

129. Prayer no (e) is untenable for reason that rights to access to justice is to be attained progressively.

130. There was no evidence led in support of prayer (f).

131. The upshot is that the petitioner is not entitled to the orders sought.

132. The petition is devoid of merit and should be dismissed in its entirety.

Who should bear the costs of this Petition

133. By virtue of section 27 of the *Civil Procedure Act*, it is trite law that the issue of costs is a discretionary award that is awarded to a successful party. Section 27 provides: -

> "(1)Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."

134. In the case of *Party of Independent Candidate of Kenya & another vs Mutula Kilonzo & 2 others* [2013] eKLR which cited with approval the words of Murray CJ in *Levben Products v Alexander Films* (SA) (PTY) Ltd 1957 (4) SA 225 (SR) at 227 that it stated:

> "It is clear from authorities that the fundamental principle underling the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion ...But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so."

135. In *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR the court held:

> "It emerges that an award of costs would normally be guided by the principle that costs follow the event: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion; by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is judiciously exercised discretion of the court, accommodating the special circumstances of the case, while being guided by the ends of justice. The claims of public

interest will be a relevant discretion, as will also be the motivation and the conduct of the parties, prior to, during and subsequent to the actual process of litigation."

Although there is eminent good sense in the basic rule of costs, that costs follow the event – it is not an invariable rule and, indeed the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law constitute an unchanging consequence of legal proceedings."

136. Consequently, this court's finding is that the petition was on matters which could not be said to have been farfetched, frivolous, hopeless or out to annoy the respondents so as to incur unnecessary costs of litigation. I hereby order each party to bear their own costs.

137. Orders Accordingly.

DATED, SIGNED AND DELIVERED AT NAKURU ON THIS 16TH DAY OF MAY, 2024.

.....

S.M. MOHOCHI

JUDGE

on behalf of the bench

In the presence of;

Hon Lady Justice Teresa Odera

C/A Schola