



REPUBLIC OF KENYA



**Kabundu & 2 others v County Government of Mombasa & 10 others;
Mombasa Law Society (Interested Party) (Petition E009 of 2024)
[2024] KEHC 11630 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11630 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

PETITION E009 OF 2024

OA SEWE, J

SEPTEMBER 20, 2024

**IN THE MATTER OF CONTRAVENTION OF ARTICLE 19, 20, 21, 27, 40(1)
& (3), 50(2) (N), 199(1), 210(1) OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF MOMBASA COUNTY REVENUE ADMINISTRATION
ACT 2013 (ACT NO. 3 OF 2014) IN THE MATTER OF THE
MOMBASA COUNTY RATING ACT 2014 (ACT NO. 4 OF 2014)**

AND

**IN THE MATTER OF THE MOMBASA COUNTY WARDS
DEVELOPMENT FUNDS BILL 2014 (BILLS NO. 1 OF 2014)**

AND

**IN THE MATTER OF MOMBASA COUNTY
ASSEMBLY SERVICE BILL, 2014 (BILLS NO. 7 OF 2014)**

AND

**IN THE MATTER OF THE MOMBASA COUNTY
PORT AUTHORITY BILL, 2014 (BILLS NO. 9 OF 2014)**

AND

**IN THE MATTER OF MOMBASA COUNTY PUBLIC
NUISANCE BILL 2014 (BILLS NO. 10 OF 2014)**

AND

**IN THE MATTER OF MOMBASA COUNTY
PUBLIC WORKS BILL 2014 (BILLS NO. 12 OF 2014)**

AND

**IN THE MATTER OF MOMBASA COUNTY CARRIAGE
OF FOOD BILL 2014 (BILLS NO. 15 OF 2014)**



AND

**IN THE MATTER OF THE MOMBASA COUNTY FERRIES
AND HARBORS BILL 2014 (BILLS NO. 16 OF 2014)**

AND

**IN THE MATTER OF THE MOMBASA COUNTY
PORT HEALTH BILL 2014 (BILLS NO. 17 OF 2014)**

AND

**IN THE MATTER OF MOMBASA COUNTY WHOLESALE MARKET
CONTROL AND LICENSING BILL, 2014 (BILLS NO. 18 OF 2014)**

AND

**IN THE MATTER OF MOMBASA COUNTY QUALITY IN
LEARNING AND TEACHING BILL 2015 (BILLS NO. 2 OF 2015)**

AND

**IN THE MATTER OF MOMBASA COUNTY TRADE
REVOLVING BILL 2015 (BILLS NO. 10 OF 2015)**

AND

**IN THE MATTER OF MOMBASA COUNTY TRADE, MARKET'S
CONTROL AND LICENSING BILL, 2015 (BILLS NO. 12 OF 2015)**

AND

**IN THE MATTER OF MOMBASA COUNTY WATER AND
SEWERAGE SERVICES ACT 2016 (ACT NO. 2 OF 2016)**

AND

**IN THE MATTER OF MOMBASA COUNTY OUTDOOR
ADVERTISING ACT 2016 (ACT NO. 3 OF 2016)**

AND

**IN THE MATTER OF MOMBASA COUNTY CONSOLIDATED
REVOLVING FUND ACT 2016 (ACT NO. 5 OF 2016)**

AND

**IN THE MATTER OF MOMBASA COUNTY
CORPORATION ACT 2016 (ACT NO. 6 OF 2016)**

AND

IN THE MATTER OF MOMBASA COUNTY CHILD CARE ACT 2016 (ACT NO. 7 OF 2016)

AND

IN THE MATTER OF MOMBASA COUNTY ROADS ACT, 2016 (ACT NO. 8 OF 2016)

BETWEEN

PATRICK KABUNDU 1ST PETITIONER



JOHN KIREMA MUKARIA 2ND PETITIONER
KEFA ONYANGO MITO 3RD PETITIONER

AND

THE COUNTY GOVERNMENT OF MOMBASA 1ST RESPONDENT
THE CLERK, MOMBASA COUNTY ASSEMBLY 2ND RESPONDENT
NATIONAL POLICE SERVICES 3RD RESPONDENT
THE EXECUTIVE INCHARGE OF HEALTH MINISTRY 4TH RESPONDENT
THE EXECUTIVE INCHARGE OF TOURISM, CULTURE AND TRADE
MINISTRY 5TH RESPONDENT
THE EXECUTIVE INCHARGE OF TRANSPORT, ROADS AND PUBLIC
WORKS MINISTRY 6TH RESPONDENT
THE EXECUTIVE INCHARGE OF HOUSING AND LANDS
MINISTRY 7TH RESPONDENT
THE EXECUTIVE INCHARGE OF FINANCE MINISTRY 8TH RESPONDENT
THE EXECUTIVE INCHARGE OF WATER AND SEWERAGE SERVICES
MINISTRY 9TH RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS 10TH RESPONDENT
THE ATTORNEY GENERAL 11TH RESPONDENT

AND

MOMBASA LAW SOCIETY INTERESTED PARTY

JUDGMENT

1. The three petitioners are citizens of Kenya and residents of the County of Mombasa. They described themselves as human rights activists. They filed this Petition in that capacity. They averred that, between 2013 and 2016, the Mombasa County Assembly tabled various Bills which were ultimately enacted into law as the Mombasa County Acts; but which Acts were only published in the County Gazette without further gazettelement in the Kenya Gazette, as required under Article 199(1) of *the Constitution* as read with Section 25 (1) of the County Government Act 2012.
2. The legislations in issue were listed at paragraph I of the Petition as hereunder:
 - (a) Mombasa County Revenue Administration Act, 2013 (*Act No. 3 of 2014*)
 - (b) Mombasa County *Rating Act*, 2014 (*Act No. 4 of 2014*)
 - (c) Mombasa County Wards Development Funds Bill, 2014 (Bill No. 1 of 2014)
 - (d) Mombasa County Assembly Service Bill, 2014 (Bill No. 7 of 2014)
 - (e) Mombasa County Port Authority Bill, 2014 (Bill No. 9 of 2014)



- (f) Mombasa County Public Nuisance Bill, 2014 (Bill No. 10 of 2014)
- (g) Mombasa County Corporations Bill, 2014 (Bill No.11 of 2014)
- (h) Mombasa County Public Works Bill, 2014 (Bill No. 12 of 2014)
- (i) Mombasa County Carriage of Food Bill, 2014 (Bill No. 15 of 2014)
- (j) Mombasa County Ferries and Harbors Bill, 2014 (Bill No. 16 of 2014)
- (k) Mombasa County Port Health Bill, 2014 (Bill No. 17 of 2014)
- (l) Mombasa County Wholesale Market Control and Licensing Bill, 2014 (Bills No. 18 of 2014)
- (m) Mombasa County Quality in Learning and Teaching Bill, 2015 (Bill No. 2 of 2015)
- (n) Mombasa County Trade Revolving Bill, 2015 (Bill No. 10 of 2015)
- (o) Mombasa County Trade, Markets Control and Licensing Bill, 2015 (Bill No. 12 of 2015)
- (p) Mombasa County Water and Sewerage Services Act, 2016 ([*Act No. 2 of 2016*](#))
- (q) Mombasa County Outdoor Advertising Act, 2016 ([*Act No. 3 of 2016*](#))
- (r) Mombasa County Port *Health Act*, 2016 ([*Act No. 4 of 2016*](#))
- (s) Mombasa County Consolidated Revolving Fund Act 2016 ([*Act No. 5 of 2016*](#))
- (t) Mombasa County Corporation Act, 2016 ([*Act No. 6 of 2016*](#))
- (u) Mombasa County Child Care Act, 2016 ([*Act No. 7 of 2016*](#))
- (v) Mombasa County Roads Act, 2016 ([*Act No. 8 of 2016*](#))

3. The Petitioners averred that, by reason of the failure by the respondents to adhere to the proper legislative procedure requiring that County laws be published in the Kenya Gazette, their rights under Articles 2(4), 3, 50(2) (n), 199(1) & (2) and 210 of the Constitution and Sections 5, 24, 25 and 34 of the County Government Act, 2012 were violated. They accordingly prayed for the following reliefs:

- (a) An order of prohibition to stay the implementation and or execution of the ungazetted Acts pending the regularization. The ungazetted Acts were listed as hereunder:
 - (i) Mombasa County Revenue Administration Act 2013 ([*Act No. 3 of 2014*](#)),
 - (ii) Mombasa County *Rating Act* 2014 ([*Act No. 4 of 2014*](#)),
 - (iii) Mombasa County Water and Sewerage Services Act 2016 ([*Act No. 2 of 2016*](#)),
 - (iv) Mombasa County Outdoor Advertising Act 2016 ([*Act No. 3 of 2016*](#)),
 - (v) Mombasa County Port *Health Act*, 2016 ([*Act No. 4 of 2016*](#)),
 - (vi) Mombasa County Consolidated Revolving Fund Act 2016 ([*Act No. 5 of 2016*](#)),
 - (vii) Mombasa County Corporation Act 2016 ([*Act No. 6 of 2016*](#)),
 - [viii] Mombasa County Child Care Act 2016 ([*Act No. 7 of 2016*](#)) and
 - (ix) Mombasa County Roads Act, 2016 ([*Act No. 8 of 2016*](#))
- (b) Declarations that the following Acts and Bills are unconstitutional:



- (i) Mombasa County Revenue Administration Act, 2013 ([*Act No. 3 of 2014*](#))
 - (ii) Mombasa County [*Rating Act*](#), 2014 ([*Act No. 4 of 2014*](#))
 - (iii) Mombasa County Wards Development Funds Bill, 2014 (Bill No. 1 of 2014)
 - (iv) Mombasa County Assembly Service Bill, 2014 (Bill No. 7 of 2014)
 - (v) Mombasa County Port Authority Bill, 2014 (Bill No. 9 of 2014)
 - (vi) Mombasa County Public Nuisance Bill, 2014 (Bill No. 10 of 2014)
 - (vii) Mombasa County Public Works Bill, 2014 (Bill No. 12 of 2014)
 - [viii] Mombasa County Carriage of Food Bill, 2014 (Bill No. 15 of 2014)
 - (ix) Mombasa County Ferries and Harbors Bill, 2014 (Bill No. 16 of 2014)
 - (x) Mombasa County Wholesale Market Control and Licensing Bill, 2014 (Bills No. 18 of 2014)
 - (xi) Mombasa County Quality in Learning and Teaching Bill, 2015 (Bill No. 2 of 2015)
 - (xii) Mombasa County Trade Revolving Bill, 2015 (Bill No. 10 of 2015)
 - [xiii] Mombasa County Trade, Markets Control and Licensing Bill, 2015 (Bill No. 12 of 2015)
 - (xiv) Mombasa County Water and Sewerage Services Act, 2016 ([*Act No. 2 of 2016*](#))
 - (xv) Mombasa County Outdoor Advertising Act, 2016 ([*Act No. 3 of 2016*](#))
 - (xvi) Mombasa County Port [*Health Act*](#), 2016 ([*Act No. 4 of 2016*](#))
 - [xvii] Mombasa County Consolidated Revolving Fund Act 2016 ([*Act No. 5 of 2016*](#))
 - [xviii] Mombasa County Corporation Act, 2016 ([*Act No. 6 of 2016*](#))
 - (xix) Mombasa County Child Care Act, 2016 ([*Act No. 7 of 2016*](#))
 - (xx) Mombasa County Roads Act, 2016 ([*Act No. 8 of 2016*](#))
- (c) An order of Certiorari to quash the following Bills and Acts:
- (i) Mombasa County Revenue Administration Act, 2013 ([*Act No. 3 of 2014*](#))
 - (ii) Mombasa County [*Rating Act*](#), 2014 ([*Act No. 4 of 2014*](#))
 - (iii) Mombasa County Wards Development Funds Bill, 2014 (Bill No. 1 of 2014)
 - (iv) Mombasa County Assembly Service Bill, 2014 (Bill No. 7 of 2014)
 - (v) Mombasa County Port Authority Bill, 2014 (Bill No. 9 of 2014)
 - (vi) Mombasa County Public Nuisance Bill, 2014 (Bill No. 10 of 2014)
 - (vii) Mombasa County Public Works Bill, 2014 (Bill No. 12 of 2014)
 - [viii] Mombasa County Carriage of Food Bill, 2014 (Bill No. 15 of 2014)
 - (ix) Mombasa County Ferries and Harbors Bill, 2014 (Bill No. 16 of 2014)



- (x) Mombasa County Wholesale Market Control and Licensing Bill, 2014 (Bills No. 18 of 2014)
 - (xi) Mombasa County Quality in Learning and Teaching Bill, 2015 (Bill No. 2 of 2015)
 - (xii) Mombasa County Trade Revolving Bill, 2015 (Bill No. 10 of 2015)
 - [xiii] Mombasa County Trade, Markets Control and Licensing Bill, 2015 (Bill No. 12 of 2015)
 - (xiv) Mombasa County Water and Sewerage Services Act, 2016 ([*Act No. 2 of 2016*](#))
 - (xv) Mombasa County Outdoor Advertising Act, 2016 ([*Act No. 3 of 2016*](#))
 - (xvi) Mombasa County Port [*Health Act*](#), 2016 ([*Act No. 4 of 2016*](#))
 - SUBPARA [xvii]
 - Mombasa County Consolidated Revolving Fund Act 2016 ([*Act No. 5 of 2016*](#))
 - SUBPARA [xviii]
 - Mombasa County Corporation Act, 2016 ([*Act No. 6 of 2016*](#))
 - (xix) Mombasa County Child Care Act, 2016 ([*Act No. 7 of 2016*](#))
 - (xx) Mombasa County Roads Act, 2016 ([*Act No. 8 of 2016*](#))
 - (d) An order to direct the 2nd respondent to address the Petition filed by the 1st petitioner dated 1st April 2020 in light of Articles 118 and 119 of Constitution of Kenya, Section 15, 87, 88, 89 and 91 of the County Government Act, 2012 and Mombasa County Assembly Standing Orders.
 - (e) Any other relief that the Court may deem fit to grant.
4. Along with the Petition, the petitioners filed a Notice of Motion dated 11th March 2024 under various provisions of [*the Constitution*](#) and the applicable procedural rules seeking orders that:
- (a) Pending the hearing and determination of the application, an interim order of Prohibition be issued staying the implementation, execution and/or prosecution of cases, civil or criminal, under the ungazetted Acts listed hereunder by all the persons responsible, including but not limited to the County Government of Mombasa through the County Executive, the Office of the County Attorney, the Office of the Director Public Prosecutions, the Office of the Attorney General, the Office of the Inspector General of Police and/or their representatives:
 - (i) Mombasa County Revenue Administration Act, 2013 ([*Act No. 3 of 2014*](#))
 - (ii) Mombasa County [*Rating Act*](#), 2014 ([*Act No. 4 of 2014*](#))
 - (c) Mombasa County Wards Development Funds Bill, 2014 (Bill No. 1 of 2014)
 - (iii) Mombasa County Assembly Service Bill, 2014 (Bill No. 7 of 2014)
 - (iv) Mombasa County Port Authority Bill, 2014 (Bill No. 9 of 2014)
 - (v) Mombasa County Public Nuisance Bill, 2014 (Bill No. 10 of 2014)
 - (vi) Mombasa County Public Works Bill, 2014 (Bill No. 12 of 2014)
 - (vii) Mombasa County Carriage of Food Bill, 2014 (Bill No. 15 of 2014)



- [viii] Mombasa County Ferries and Harbors Bill, 2014 (Bill No. 16 of 2014)
 - (ix) Mombasa County Wholesale Market Control and Licensing Bill, 2014 (Bills No. 18 of 2014)
 - (x) Mombasa County Quality in Learning and Teaching Bill, 2015 (Bill No. 2 of 2015)
 - (xi) Mombasa County Trade Revolving Bill, 2015 (Bill No. 10 of 2015)
 - (xii) Mombasa County Trade, Markets Control and Licensing Bill, 2015 (Bill No. 12 of 2015)
 - [xiii] Mombasa County Water and Sewerage Services Act, 2016 ([*Act No. 2 of 2016*](#))
 - (xiv) Mombasa County Outdoor Advertising Act, 2016 ([*Act No. 3 of 2016*](#))
 - (xv) Mombasa County Port [*Health Act*](#), 2016 ([*Act No. 4 of 2016*](#))
 - (xvi) Mombasa County Consolidated Revolving Fund Act 2016 ([*Act No. 5 of 2016*](#))
 - [xvii] Mombasa County Corporation Act, 2016 ([*Act No. 6 of 2016*](#))
 - [xviii] Mombasa County Child Care Act, 2016 ([*Act No. 7 of 2016*](#))
 - (ix) Mombasa County Roads Act, 2016 ([*Act No. 8 of 2016*](#))
- (b) Pending the hearing and determination of the Petition, an interim order of Prohibition be issued staying the implementation, execution and/or prosecution of cases, civil or criminal, under the ungazetted Acts listed hereunder by all the persons responsible, including but not limited to the County Government of Mombasa through the County Executive, the Office of the County Attorney, the Office of the Director Public Prosecutions, the Office of the Attorney General, the Office of the Inspector General of Police and/or their representatives:
- (i) Mombasa County Revenue Administration Act, 2013 ([*Act No. 3 of 2014*](#))
 - (ii) Mombasa County [*Rating Act*](#), 2014 ([*Act No. 4 of 2014*](#))
 - (iii) Mombasa County Wards Development Funds Bill, 2014 (Bill No. 1 of 2014)
 - (iv) Mombasa County Assembly Service Bill, 2014 (Bill No. 7 of 2014)
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 - (xi) Mombasa County Quality in Learning and Teaching Bill, 2015 (Bill No. 2 of 2015)
 - (xii) Mombasa County Trade Revolving Bill, 2015 (Bill No. 10 of 2015)



- [xiii] Mombasa County Trade, Markets Control and Licensing Bill, 2015 (Bill No. 12 of 2015)
 - (xiv) Mombasa County Water and Sewerage Services Act, 2016 ([Act No. 2 of 2016](#))
 - (xv) Mombasa County Outdoor Advertising Act, 2016 ([Act No. 3 of 2016](#))
 - (xvi) Mombasa County Port [Health Act](#), 2016 ([Act No. 4 of 2016](#))
 - [xvii] Mombasa County Consolidated Revolving Fund Act 2016 ([Act No. 5 of 2016](#))
 - [xviii] Mombasa County Corporation Act, 2016 ([Act No. 6 of 2016](#))
 - (xix) Mombasa County Child Care Act, 2016 ([Act No. 7 of 2016](#))
 - (xx) Mombasa County Roads Act, 2016 ([Act No. 8 of 2016](#))
- (c) That any other order that the Court deems it be issued.
- (d) That the Costs of the application be provided for.
5. In a Supplementary Affidavit sworn by the 2nd petitioner, Mr. John Kirema Mukaria, he deposed that, although the 1st respondent, through the County Executive Member in charge of Public Service published a public notice inviting public participation on some of the Bills, the said notice was not published by the Director of the Department of Public Participation as envisaged by Sections 7, 8 and 10 of the Mombasa County Public Participation Act, 2017. He averred that this is one example to show the 1st and 2nd respondents' tendency of ignoring the set legal procedures for enacting laws and urged the Court to grant the orders sought by them. He annexed a copy of the publication as well as a copy of the Mombasa County Public Participation Act.
 6. In response to the Petition, the 1st, 3rd and 9th Respondents filed a Replying Affidavit sworn by the 1st respondent's County Attorney, Mr. Jimmy Waliaula. He made reference to Articles 199(1) of the Constitution which states that County legislation does not take effect unless published in the Gazette. He also cited Article 260 of the Constitution as to the definition of a Gazette and averred that, currently, the County of Mombasa does not have a County Gazette of its own. The 1st respondent explained that, naming of the Gazette Supplements by the Government Printer as "Mombasa County Gazette Supplement" was only intended to differentiate laws emanating from Mombasa County as published by the Government Printer in the Gazette.
 7. The 1st respondent further averred that, contrary to the petitioners' assertions, the County of Mombasa has, since inception, published its legislation in the Kenya Gazette without exception. He deposed that upon obtaining the Governor's assent, the legislation would be sent to the Government Printer for publication and that it was upon the Government Printer to design and print the cover page. Annexed to the Replying Affidavit was a copy of the Mombasa County Waste Management (Amendment) (No. 2) Bill as assented to and published by the Government Printer, to demonstrate that the design and wordings attributed to the cover page was the sole responsibility of the Government Printer.
 8. The 1st respondent explained that the reference to County Gazette Supplement caused confusion, not only in the case of Mombasa County, but all the 47 counties; and that it has since been corrected by the Government Printer by simply referring to the applicable Kenya Gazette Supplement as Mombasa County Acts. The 1st respondent annexed a copy of the Mombasa County Liquor Licensing Act, 2014 which was corrected in the manner aforementioned. The County Attorney pointed out that the correction was made *suo motu* by the Government Printer following litigation initiated against other



- counties. He adverted to the case of *James Gacheru Kariuki & 3 others v Attorney General and 11 others* [2017] eKLR as a good example of the relevant litigation.
9. The Respondents in the rebuttal indicated that all the 47 counties publish their legislation in the Kenya Gazette as a County Gazette Supplement with the name of the said County being used as a differential factor. They averred therefore that it was imperative for the Government Printer, as the printer of the Kenya Gazette, to be enjoined to this Petition to explain why the Gazette appeared as the Mombasa County Gazette Supplement as opposed to the Kenya Gazette Supplement.
 10. As for the Bills that are yet to be passed into law, the respondents deposed that the same ought to be ignored as the court cannot pronounce itself on legislation that is yet to become law for the purposes of Article 199(1) of the Constitution.
 11. On the 4th April 2024 when the application came up for directions, the 1st petitioner proposed that the Petition be prioritized instead with a view of expediting its hearing and determination. Accordingly, leave was granted to the petitioners to withdraw the Notice of Motion and directions given for the Petition to be canvassed by way of written submissions. In the 1st petitioner's written submissions dated 15th July 2024 he reiterated the facts in support of the Petition and proposed the following issues for determination:
 - (a) Whether the impugned Bills and Acts are constitutional.
 - (b) Whether he is entitled to his constitutional rights under Articles 118 and 119 of *the Constitution*.
 - (c) Who is to bear the costs of the Petition?
 12. The 1st petitioner traced the background of each of the Bills and Acts and fashioned his submissions accordingly. He highlighted his assertion that the impugned legislations were published in the Mombasa County Gazette only; and therefore are inconsistent with Article 199(1) of *the Constitution*. The 1st petitioner relied on *James Gacheru Kariuki & 3 others v Attorney General & 11 others* [2017] eKLR and *Republic v County Government of Mombasa & others, Ex Parte Patrick Kabundu & others* [2020] eKLR, among others, in support of this argument. The 1st petitioner also relied on *Doctors for Life International v Speaker of the National Assembly & others CCT 12/05* [2006] for the proposition that *the Constitution* imposes certain obligations on the exercise of legislative authority.
 13. On the second limb of the Petition, the 1st petitioner submitted that he is entitled to constitutional rights under Articles 118 and 119 of *the Constitution*. He submitted that Section 89 of the County Government Act and the County Assembly Standing Orders require that such petitions be responded to expeditiously. He relied on Article 47 of the Constitution and the case of *Onyango Oloo v Attorney General* [1987] eKLR on the principles of natural justice. Lastly, the 1st petitioner addressed the Court on Articles 20(4) and 259(1) with regard to the rules of constitutional interpretation and urged the Court to find in his favour.
 14. The 2nd and 3rd petitioners relied on their written submissions dated 9th May 2024. The proposed the following issues for determination:
 - (a) Whether the subject legislations of the Mombasa County are unconstitutional;
 - (b) Whether the subject legislations have violated and/or threatened the constitutional rights of the 2nd and 3rd petitioners as well as those of the other residents of Mombasa County.
 15. With reference to Article 199(1) of the Constitution and Section 25 of the *County Governments Act*, No. 17 of 2012, the 2nd and 3rd petitioners submitted that any county legislation that has been published



in the County Gazette only and not in the Kenya Gazette is unconstitutional. They likewise relied on the case of *James Gacheru Kariuki & 3 others v Attorney General & 11 others* (supra) and *Republic v County Government of Mombasa; Clerk County Assembly of Mombasa & 6 others (Interested Parties) Ex Parte Patrick Kabundu & 2 others* [2020] eKLR in which the above provisions were discussed and submitted that definitive orders were made in the latter case to the effect that action be taken by the 1st respondent to regularize the publication of the County Legislation in the Kenya Gazette within a specified period from the date of the judgment.

16. Thus, the 2nd and 3rd petitioners submitted that the continued application of the subject legislations by the respondents infringes the fundamental rights and freedoms of the residents of Mombasa County, including the right to fair trial under Article 50(2) of the Constitution and the right to lawful taxation under Article 210(1) of the Constitution. They therefore urged the Court to find that the various pieces of legislation that are yet to be gazetted are unconstitutional and therefore ought to be declared as such.
17. There was no indication that the respondents filed any submissions as there is none either on the court file or in the e-filing portal. Accordingly, the key issue for determination is whether the impugned Bills and Acts are indeed unconstitutional. The second issue touches on the question of alleged violation of the petitioners' right to a response under Article 118 and 119 of the Constitution.
18. It is instructive to mention at the outset that, in exercising its interpretive function, the Court must bear in mind the precepts set out at Article 259 of the Constitution. The provision states:
 - (1) This Constitution shall be interpreted in a manner that—
 - (a) promotes its purposes, values and principles;
 - (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
 - (c) permits the development of the law; and
 - (d) contributes to good governance.
 - (2) ...
 - (3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking and, therefore, among other things—
 - (a) a function or power conferred by this Constitution on an office may be performed or exercised as occasion requires, by the person holding the office;
 - (b) any reference in this Constitution to a State or other public office or officer, or a person holding such an office, includes a reference to the person acting in or otherwise performing the functions of the office at any particular time;
 - (c) a reference in this Constitution to an office, State organ or locality named in this Constitution shall be read with any formal alteration necessary to make it applicable in the circumstances; and
 - (d) a reference in this Constitution to an office, body or organisation is, if the office, body or organisation has ceased to exist, a reference to its successor or to the equivalent office, body or organisation.



19. Hence, in *Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General* [2011] eKLR, held:

“...In interpreting *the Constitution*, this court is bound by the provisions of Section 259 which requires that *the Constitution* be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law and the human rights and fundamental freedoms in the bill of rights, permits the development of the law and contributes to good governance. ...

...In interpreting *the Constitution*, the letter and the spirit of the supreme law must be respected. Various provisions of *the Constitution* must be read together in order to get a proper interpretation. In the Ugandan case of *TINYEFUZA v ATTORNEY GENERAL, CONSTITUTIONAL APPEAL NO. 1 OF 1997*, the court held as follows:

“The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution.”

20. Accordingly, the burden of proof was on petitioners to demonstrate to the requisite standard the inconsistencies alleged by them. This point was made by the Supreme Court in *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others (Petition 5, 3 & 4 of 2013 (Consolidated))* [2013] KESC 6 (KLR) (16 April 2013) (Judgment), as follows:

“...a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden...”

21. Likewise, in *Leonard Otieno v Airtel Kenya Limited* [2018] eKLR it was emphasized that:

65. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize *the constitution* and inevitably result in ill considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.”

22. The Supreme Court reiterated the position in *Wamwere & 5 Others v Attorney General* (Petition 26, 34 & 35 of 2019 (Consolidated)) [2023] KESC 3 (KLR) (Constitutional and Human Rights) (27 January 2023) (Judgment) and held:

“A petitioner bore the burden to prove his/her claim of alleged threat or violation of rights and freedoms to the requisite standard of proof, which was on a balance of probabilities. Such claims were by nature civil causes. The onus of proof was on the 1st appellant to adduce sufficient evidence to demonstrate that she owned or erected or live in the alleged properties; and that State agents interfered or deprived her of the subject properties. That was the import of section 107 of the *Evidence Act* on the burden of proof.”

23. Article 199(1) of *the Constitution* requires that for a County legislation to take effect, it must be gazetted. A "Gazette" for purposes of *the Constitution* is defined in Article 260 to mean the Kenya Gazette published by authority of the national government, or a supplement to the Kenya Gazette.



24. The legislative procedure of the County Governments is provided for under Sections 21-25 of the County Government Act. Section 25 (1) requires that a Bill be passed by the County Assembly and assented to by the Governor before gazettelement in the County Gazette and Kenya Gazette. The petitioners complained about several Bills that, apparently are yet to be assented to by the County Governor. They are:
- (a) Mombasa County Wards Development Funds Bill 2014 (Bills No. 1 of 2014),
 - (b) Mombasa County Assembly Service Bill, 2014 (Bills No. 7 of 2014),
 - (c) Mombasa County Port Authority Bill 2014 (Bills No. 9 of 2014),
 - (d) Mombasa County Public Nuisance Bill 2014 (Bills No. 10 of 2014),
 - (e) Mombasa County Public Works Bill 2014 (Bill No. 12 of 2014),
 - (f) Mombasa County Carriage of Food Bill 2014 (Bill No. 15 of 2014),
 - (g) Mombasa County Ferries and Harbors Bill 2014 (Bill No. 16 of 2014),
 - (h) Mombasa County Wholesale Market Control and Licensing Bill, 2014 (Bills No. 18 of 2014),
 - (i) Mombasa County Quality in Learning and Teaching Bill 2015 (Bills No. 2 of 2015),
 - (j) Mombasa County Trade Revolving Bill 2015 (Bills No. 10 of 2015) and
 - (k) Mombasa County Trade, Markets Control and Licensing Bill, 2015 (Bills No. 12 of 2015).
25. No evidence whatsoever has been presented by the petitioners to demonstrate that the Bills aforementioned have been passed by the County Assembly and assented to by the Governor. It is therefore my finding that, in respect of the aforementioned Bills, the Petition is premature on account of the doctrine of ripeness. Such are the issues that are barred from consideration on account of the principle of avoidance.
26. The doctrine was well-discussed by the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR (29th September 2014) (Judgment) thus:
- “(256) The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v. Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:
- “I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”
- (257) Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936)).



(258) From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents' claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright-infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court..."

27. In the case of *K K B v S C M & 5 others (Constitutional Petition E014 of 2020)* [2022] KEHC 289 (KLR) (22 April 2022) (Ruling), Hon. Mativo, J. (as he then was) also expressed himself on the doctrine as hereunder:

"In summation, the doctrines of ripeness and constitutional avoidance shun to deal with a constitutional issue where there exists another legal course which can give the litigant the relief he seeks. In other words, a constitutional issue is not ripe for determination until the determination of the constitutional issue is the only course that can give the litigant the remedy he seeks. Both constitutional avoidance and ripeness avert the determination of the constitutional issues until it becomes very necessary to the extent that it is the only course available to assist the litigant's cause..."

28. Further in the case of *Faraj & 3 others v Police & 2 others (Constitutional Petition 165 of 2020)* [2022] KEHC 287 (KLR) (27 April 2022) (Judgment) it was held:

"27. The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved. In that regard, the Supreme Court stated in *Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others* (at para 256) that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis.

...

29. The doctrine of ripeness and constitutional avoidance gives credence to the concept that *the Constitution* does not operate in a vacuum or isolation. It has to be interpreted and applied in conjunction with applicable legislation together with other available legal remedies. Where there are alternative remedies the preferred route is to apply such remedies before resorting to *the Constitution*. The possibility of the elevation of any dispute to a constitutional issue is what is sought to be averted by the doctrines of ripeness and constitutional avoidance. It is borne out of a realisation that all legislative or common-law remedies are part of the legal system..."

29. As for the Acts, there appears to be no dispute that they were published as County legislation in what was labelled Mombasa County Gazette Supplement. The impugned Acts are:

- (a) Mombasa County Revenue Administration Act 2013 (*Act No. 3 of 2014*),
- (b) Mombasa County *Rating Act* 2014 (*Act No. 4 of 2014*),
- (c) Mombasa County Water and Sewage Services Act 2016 (*Act No. 2 of 2016*),
- (d) Mombasa County Outdoor Advertising Act 2016 (*Act No. 3 of 2016*),



- (e) Mombasa County Port *Health Act*, 2016 (*Act No. 4 of 2016*),
 - (f) Mombasa County Consolidated Revolving Fund Act 2016 (*Act No. 5 of 2016*),
 - (g) Mombasa County Corporation Act 2016 (*Act No. 6 of 2016*),
 - (h) Mombasa County Child Care Act 2016 (*Act No. 7 of 2016*), and
 - (i) Mombasa County Roads Act, 2016 (*Act No. 8 of 2016*)
30. They were gazetted in a special issue of the Mombasa County Gazette Supplement. As already shown above, Article 199(1) mandates that for a County legislation to take effect, it must be published in the Kenya Gazette or as a supplement of the Gazette. Article 199 (2) states that a National or County legislation may prescribe additional requirements in respect of the publication of the county legislation.
31. It is noteworthy that Section 25 of the County Government Act before it was amended by the County Governments (Amendment) *Act, No. 11 of 2020* provided:
- (1) A legislation passed by the county assembly and assented to by the governor shall be published in the county Gazette and Kenya Gazette within seven days after assent.
 - (2) Subject to subsection (3), the county assembly legislation shall come into force on the fourteenth day after its publication in the county Gazette and Kenya Gazette, whichever comes earlier, unless the legislation stipulates a different date on or time at which it shall come into force.
 - (3) A county assembly legislation that confers a direct benefit whether financial or in kind on members of the county assembly shall come into force after the next general election of members of the county assembly.
 - (4) Subsection (3) does not apply to an interest that members of county assembly have as members of the public.
32. The provision as amended now reads:
- Subject to subsection (3), the county assembly legislation shall come into force on the fourteenth day after its publication in the Kenya Gazette unless the legislation stipulates a different date on, or time at which, it shall come into force.
33. The Court is therefore cognizant that in James Gacheru Kariuki (*supra*) the High Court dealt with a similar question at length. It considered, *inter alia*, questions on Article 199 of the Constitution and Section 25 of the County Government Act and held:
- ...What therefore is a County Gazette, if at all and is there any relationship between a County Gazette and the Kenya Gazette?
31. The term ‘County Gazette’ is not defined nor provided for in *the Constitution* which only provides for a Gazette, which has been defined as the Kenya Gazette published by the authority of the National Government or a supplement to the Kenya Gazette. However, the *County Governments Act* defines a ‘County Gazette’ as a Gazette published by the authority of the County Government or a supplement of such a Gazette. This shows that there is a clear distinction between a ‘County Gazette’ and a ‘Kenya Gazette’ and the difference as can be



seen above is; whereas the ‘Kenya Gazette’ is published under the authority of the National Government, the ‘County Gazette’ is published under the authority of a County Government.

32. In essence, while the concept of a ‘County Gazette’ was introduced by the *County Governments Act, the Constitution* explicitly requires County legislation to be published in the Kenya Gazette for them to take effect...”
34. The Court went on to hold that:
- “38. ...a County Gazette is neither a Kenya Gazette nor a supplement to the Kenya Gazette and as such, County legislation only gains legitimacy upon its publication in the Kenya Gazette or a supplement to the Kenya Gazette. Further, as already elaborated upon, the definition of a County Gazette completely departs from the meaning of the term ‘Gazette’ as used in Article 199 and defined in Article 260 of *the Constitution*. A County Gazette and which is a creation of the *County Governments Act* and not *the Constitution* cannot in any event supersede in its publication, the Kenya Gazette.
39. I therefore agree with the Petitioners that to the extent that Section 25(2) of the *County Governments Act* envisions that a County legislation may come into effect without necessarily being published in the Kenya Gazette by use of the phrase, ‘whichever comes earlier’, then it is a complete derogation from the pre-requisite of *the Constitution* and hence invalid to the extent of that inconsistency...”
35. The court made a finding that Section 25(2) of the County Government Act was inconsistent with *the Constitution* to the extent that it provided that County legislation was to be published in either the County Gazette or Kenya Gazette “whichever came first”, contrary to Article 199 that requires that the Acts be published in the Kenya Gazette. The finding in James Gacheru Kariuki (supra) was affirmed by the Court of Appeal in *County Government of Kiambu v Kariuki & 3 others (Civil Appeal 137 of 2017)* [2021] KECA 351 (KLR) (17 December 2021) (Judgment), wherein it was stated:
32. Section 25 (2) reinforces the position that County legislation ought to be published in both the Kenya Gazette and the County Gazette and that such publication may be done concurrently. The same Section further provides that the legislation shall come into force on the fourteenth day after its publication in the County Gazette and Kenya Gazette, whichever comes first. It is on this wording ‘whichever comes first’ that the Respondents presuppose the possibility of County Legislation coming into force upon its publication in the County Gazette only where it precedes publication in the Kenya Gazette. It is plain to us that a County Gazette is a creation of the County Government Act and not *the Constitution* and cannot by any craft of interpretation supersede its publication in the Kenya Gazette. We are thus in agreement with the learned Judge that *the Constitution* explicitly requires County Legislation to be published in the Kenya Gazette for the same to take effect.
33. We note with approval that the learned judge’s findings that a County Gazette is neither a Kenya Gazette nor a supplement to the Kenya Gazette, as it departs from the definition of a County Gazette used in article 199 and defined in article 260. Indeed, pursuant to Article 199 of *the Constitution*, section 25 of the *County Governments Act* was enacted to provide additional requirements with regards to publication of County Legislation. We agree with the learned judge that any additional requirements contemplated under article 199 should



not derogate from the mandatory duty necessitating publication of County Legislation in the Kenya Gazette or its supplement, and no legislation can waive the need for such publication.

34. Our understanding of the provisions of section 25 is that County legislation ought to be published in both the Kenya Gazette and the County Gazette and such publication may be done one after the other. We note the observation made by the learned trial judge that section 25 further does provides that the legislation shall come into force on the fourteenth day after its publication in the County Gazette and Kenya Gazette, whichever comes earlier. It is now this wording ‘whichever comes earlier’ that is the issue as it presupposes the possibility of County Legislation coming into force upon its publication in the County Gazette only where it precedes publication in the Kenya Gazette.
35. We find that the judge held and rightly so held that section 25 was a complete derogation from the prerequisite of *the Constitution* and was invalid to the extent of the words ‘whichever comes first’ as it envisions that County Legislation may come into effect without being necessarily being published in the Kenya Gazette. Indeed, the correct position is that County Legislation ought to be published in the Kenya Gazette for it to gain legitimacy...”
36. The respondents blamed the Government Printer for the anomaly and demonstrated that, at least in one instance, action has been taken, in line with James Gacheru Kariuki (supra) to correct the heading on the cover page of the publications. The respondents attached as annexure JW-3 the Mombasa County Liquor Licensing Act, 2014 which had been initially published in the Mombasa County Gazette Supplement but which has since been published in the Kenya Gazette Supplement as required by the law.
37. This court having considered that the impugned Acts herein were published before the finding in James Gacheru Kariuki (supra), the amendment of the County Government Act and the fact that the Government Printer is taking action to correct the publication of the County Legislation from the County Gazette to the Kenya Gazette, there is no justification for a declaration of unconstitutionality. I agree entirely with the position taken in James Gacheru Kariuki (supra) that:
52. ...devolution being a new entrant into our Constitution, the implementation of its various visions therein is bound to be faced with several hitches. Some perceived challenges include what is now before me being the desire to fully operationalize the working of Counties by putting in place relevant legal safeguards in terms of legislation in a bid to ensure that Counties effectively perform the duties assigned to them under the Fourth Schedule of *the Constitution*. I therefore opine that it is in the interests of justice and for the public good, that the operations of Kiambu County are not brought to a stand still for reasons of reliance on an ungazetted law...”
38. Similarly, this court also directs that the County Government of Mombasa and the Attorney General should take immediate steps to ensure that all Mombasa County legislations that were misdescribed by the Government Printer be duly and properly gazetted in the Kenya *Gazette* within a period of 90 days from the date hereof in compliance with Article 199(1) of the Constitution.
39. The Petitioners have sought a prayer that the 2nd Respondent be directed to address a different Petition filed on the 1st April 2020 on the questions of Articles 118 and 119 of the Constitution, Sections 15, 87, 88,89 and 91 of the County Government Act, 2012 and Mombasa County Assembly Standing Orders 184. This prayer not only lacks of specificity but also appears to have no relevance to the instant Petition and could have been resolved by alternative means of redress.
40. In view of the above, the orders that commend themselves to the Court in respect of the Petition dated 11th March 2023, and which I hereby grant are as follows:



- (a) The prayer for an order of prohibition to stay the implementation and or execution of the ungazetted Acts pending the regularization of the ungazetted Acts listed below:
- (i) Mombasa County Revenue Administration Act 2013 ([*Act No. 3 of 2014*](#)),
 - (ii) Mombasa County [*Rating Act*](#) 2014 ([*Act No. 4 of 2014*](#)),
 - (iii) Mombasa County Water and Sewerage Services Act 2016 ([*Act No. 2 of 2016*](#)),
 - (iv) Mombasa County Outdoor Advertising Act 2016 ([*Act No. 3 of 2016*](#)),
 - (v) Mombasa County Port [*Health Act*](#), 2016 ([*Act No. 4 of 2016*](#)),
 - (vi) Mombasa County Consolidated Revolving Fund Act 2016 ([*Act No. 5 of 2016*](#)),
 - (vii) Mombasa County Corporation Act 2016 ([*Act No. 6 of 2016*](#)),
 - [viii] Mombasa County Child Care Act 2016 ([*Act No. 7 of 2016*](#)) and
 - (ix) Mombasa County Roads Act, 2016 ([*Act No. 8 of 2016*](#)) is hereby declined.
- (b) The prayer for a declaration that the following Acts and Bills are unconstitutional:
- (i) Mombasa County Revenue Administration Act, 2013 ([*Act No. 3 of 2014*](#))
 - (ii) Mombasa County [*Rating Act*](#), 2014 ([*Act No. 4 of 2014*](#))
 - (iii) Mombasa County Wards Development Funds Bill, 2014 (Bill No. 1 of 2014)
 - (iv) Mombasa County Assembly Service Bill, 2014 (Bill No. 7 of 2014)
 - (v) Mombasa County Port Authority Bill, 2014 (Bill No. 9 of 2014)
 - (vi) Mombasa County Public Nuisance Bill, 2014 (Bill No. 10 of 2014)
 - (vii) Mombasa County Public Works Bill, 2014 (Bill No. 12 of 2014)
 - [viii] Mombasa County Carriage of Food Bill, 2014 (Bill No. 15 of 2014)
 - (ix) Mombasa County Ferries and Harbors Bill, 2014 (Bill No. 16 of 2014)
 - (x) Mombasa County Wholesale Market Control and Licensing Bill, 2014 (Bills No. 18 of 2014)
 - (xi) Mombasa County Quality in Learning and Teaching Bill, 2015 (Bill No. 2 of 2015)
 - (xii) Mombasa County Trade Revolving Bill, 2015 (Bill No. 10 of 2015)
 - [xiii] Mombasa County Trade, Markets Control and Licensing Bill, 2015 (Bill No. 12 of 2015)
 - (xiv) Mombasa County Water and Sewerage Services Act, 2016 ([*Act No. 2 of 2016*](#))
 - (xv) Mombasa County Outdoor Advertising Act, 2016 ([*Act No. 3 of 2016*](#))
 - (xvi) Mombasa County Port [*Health Act*](#), 2016 ([*Act No. 4 of 2016*](#))
 - [xvii] Mombasa County Consolidated Revolving Fund Act 2016 ([*Act No. 5 of 2016*](#))
 - [xviii] Mombasa County Corporation Act, 2016 ([*Act No. 6 of 2016*](#))



- (xix) Mombasa County Child Care Act, 2016 ([Act No. 7 of 2016](#))
 - (xx) Mombasa County Roads Act, 2016 ([Act No. 8 of 2016](#)) is hereby declined.
- (c) The prayer for an order of Certiorari to quash the following Bills and Acts:
- (i) Mombasa County Revenue Administration Act, 2013 ([Act No. 3 of 2014](#))
 - (ii) Mombasa County [Rating Act](#), 2014 ([Act No. 4 of 2014](#))
 - (iii) Mombasa County Wards Development Funds Bill, 2014 (Bill No. 1 of 2014)
 - (iv) Mombasa County Assembly Service Bill, 2014 (Bill No. 7 of 2014)
 - (v) Mombasa County Port Authority Bill, 2014 (Bill No. 9 of 2014)
 - (vi) Mombasa County Public Nuisance Bill, 2014 (Bill No. 10 of 2014)
 - (vii) Mombasa County Public Works Bill, 2014 (Bill No. 12 of 2014)
 - [viii] Mombasa County Carriage of Food Bill, 2014 (Bill No. 15 of 2014)
 - (ix) Mombasa County Ferries and Harbors Bill, 2014 (Bill No. 16 of 2014)
 - (x) Mombasa County Wholesale Market Control and Licensing Bill, 2014 (Bills No. 18 of 2014)
 - (xi) Mombasa County Quality in Learning and Teaching Bill, 2015 (Bill No. 2 of 2015)
 - (xii) Mombasa County Trade Revolving Bill, 2015 (Bill No. 10 of 2015)
 - [xiii] Mombasa County Trade, Markets Control and Licensing Bill, 2015 (Bill No. 12 of 2015)
 - (xiv) Mombasa County Water and Sewerage Services Act, 2016 ([Act No. 2 of 2016](#))
 - (xv) Mombasa County Outdoor Advertising Act, 2016 ([Act No. 3 of 2016](#))
 - (xvi) Mombasa County Port [Health Act](#), 2016 ([Act No. 4 of 2016](#))
 - [xvii] Mombasa County Consolidated Revolving Fund Act 2016 ([Act No. 5 of 2016](#))
 - [xviii] Mombasa County Corporation Act, 2016 ([Act No. 6 of 2016](#))
 - (xix) Mombasa County Child Care Act, 2016 ([Act No. 7 of 2016](#))
 - (xx) Mombasa County Roads Act, 2016 ([Act No. 8 of 2016](#)) is hereby declined.
- (d) The prayer for an order to direct the 2nd respondent to address the Petition filed by the 1st petitioner dated 1st April 2020 in light of Articles 118 and 119 of Constitution of Kenya, Section 15, 87, 88, 89 and 91 of the County Government Act, 2012 and Mombasa County Assembly Standing Orders is also hereby declined.
- (e) An order be and is hereby made for the 1st respondent and the Attorney General to ensure the regularization of the gazettelement of the impugned legislations within 90 days from the date hereof, failing which the same shall stand quashed.
- (f) Each party to bear own costs of the Petition.

Orders accordingly.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20TH DAY OF
SEPTEMBER 2024**

OLGA SEWE

JUDGE

