



Roy Transmotors Limited & another v County Government of Mombasa; Energy & Petroleum Regulatory Authority & 3 others (Interested Parties) (Petition E008 of 2023) [2024] KEHC 12121 (KLR) (19 September 2024) (Judgment)

Neutral citation: [2024] KEHC 12121 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

PETITION E008 OF 2023

OA SEWE, J

SEPTEMBER 19, 2024

**IN THE MATTER OF ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 20,
21, 22, 23(1) AND (3), 40, 47, 50 AND 258 OF THE CONSTITUTION**

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015

AND

IN THE MATTER OF THE ENERGY ACT NO. 1 OF 2019

AND

IN THE MATTER OF THE INTERGOVERNMENTAL RELATIONS ACT NO. 2 OF 2012

BETWEEN

ROY TRANSMOTORS LIMITED 1ST PETITIONER

**EAST AFRICAN PETROLEUM TRANSPORTERS ASSOCIATION 2ND
PETITIONER**

AND

COUNTY GOVERNMENT OF MOMBASA RESPONDENT

AND

ENERGY & PETROLEUM REGULATORY AUTHORITY INTERESTED PARTY

THE COUNCIL OF GOVERNORS INTERESTED PARTY

MINISTRY OF ENERGY & PETROLEUM INTERESTED PARTY

THE ATTORNEY GENERAL INTERESTED PARTY



JUDGMENT

1. This Petition was brought by the two petitioners, Roy Transmotors Limited and East African Petroleum Transporters Association. It seeks the following reliefs against the County Government of Mombasa (hereinafter, “the respondent”):
 - (a) A declaration that the decision of the respondent to order for the arrest and detention of the 1st petitioner’s Motor Vehicles Registration Numbers KCP 819F/ZD 4057 and KBV 520A/ZB 6702 and any other motor vehicle belonging to the 1st and 2nd petitioners’ members is against their constitutional rights.
 - (b) An order of certiorari to quash the decision of the respondent to arrest, clamp, detain, prosecute and deal with the 1st petitioner’s Motor Vehicles Registration Numbers KCP 819F/ZD 4057 and KBV 520A/ZB 6702 on account of alleged failure to take out a fire department clearance certificate guised as annual inspection levy from the respondent.
 - (c) An order restraining the respondent from effecting arrest, clamping, detaining, preventing or dealing with the 1st petitioner’s motor vehicles Registration Numbers KCP 819F/ZD 4057 and KBV 520A/ZB 6702 and any other motor vehicle belonging to the 1st petitioner on account of alleged failure to take out a fire clearance certificate now guised as annual inspection levy.
 - (d) An order for compensation against the respondent for loss of business occasioned to the 1st petitioner at the rate of Kshs. 230,000/= per day until release of the subject motor vehicles as well as parking fees at the rate of Kshs. 1,200/= per day until release of the motor vehicles.
 - (e) An order for injunction against the respondent restraining the respondent either by itself, its agents, employees, directors or any persons or officers acting under its directions from further holding, clamping, restraining movement, sanctioning, prosecuting and/or dealing in any way with motor vehicles Registration Numbers KCP 819F/ZD 4057 and KBV 520A/ZB 6702.
 - (f) An order that the 1st petitioner’s motor vehicles Registration Numbers KCP 819F/ZD 4057 and KBV 520A/ZB 6702 be released to the 1st petitioner unconditionally.
 - (g) A declaration that Section 3(1) of Schedule 15 Item 95 of the Mombasa County Finance Act 2023 is unconstitutional as it results in double taxation.
 - (h) Costs of the Petition.
2. At Section C of the Petition, the petitioners averred that the 1st petitioner is the owner of the subject motor vehicles, Registration Numbers KCP 819F/ZD 4057 and KBV 520A/ZB 6702. It further averred that its Counties of domicile and primary operations are Nairobi City County and the County of Kisumu. Accordingly, the 1st petitioner applied for and obtained a Clearance Certificate, Serial No. 5544 from the Fire Prevention Department of Kisumu County in respect of its motor vehicle Registration No. KCP 819F/ZD 4057; which Certificate was valid for the period up to 31st December 2023.
3. The 1st petitioner was therefore aggrieved that on the 7th February 2023, its motor vehicles Registration Numbers KCP 819F/ZD 4057 and KBV 520A/ZB 6702 were clamped in Mombasa. It averred that Motor vehicle KCP 819F/ZD 4057 was grounded by the roadside at Gapco Shimanzi area thereby exposing it to the risk of vandalism; while motor vehicle KBV 520A/ZB 6702 was grounded outside Vivo Energy along Kismayu road. The petitioner pointed out that the latter motor vehicle does not fall



- under the Fuel Tanker/LPG tanker/CBO tanker category as it is not used for purposes of transporting volatile or flammable products; hence no Certificate of Clearance from the Fire Department was necessary.
- 4 The petitioners further averred that, as a result of the respondent's action, the 1st petitioner was denied the use and enjoyment of its motor vehicles and thereby suffered loss of user at the rate of Kshs. 115,000/= per day per vehicle. In addition, it had to pay parking charges of Kshs. 600/= per vehicle per day to the respondent.
- 5 Being aggrieved by the respondent's conduct, the petitioners filed the instant Petition on 9th February 2023 seeking the reliefs set out at paragraph 1 herein above. At Section B of the Petition, the petitioners set out the provisions of *the Constitution* allegedly violated by the respondent, namely, Articles 2, 10, 20, 21, 22, 23, 40, 47, 50 and 259 of the Constitution. They also cited Sections 3, 4, 5, 6, 7, 8, 10 and 11 of the *Fair Administrative Action Act*, 2015.
- 6 Along with the Petition, the petitioners filed a Notice of Motion dated 9th February 2023 under a Certificate of Urgency for orders that:
- (a) The application be certified urgent and that service be dispensed with in the first instance;
 - (b) The Court be pleased to issue an order directing the respondent to release and/or remove the clamps on Motor Vehicles Registration Numbers KCP 819F/ZD 4057 and KBV 520A/ZB 6702. forthwith;
 - (c) The Court be pleased to issue an order of injunction restraining the respondent either by herself, her agents, employees, directors or any persons or officers acting under her directions from holding, clamping, restraining movement, sanctioning, prosecuting and/or dealing in any way with Motor Vehicles Registration Numbers KCP 819F/ZD 4057 and KBV 520A/ZB 6702 and any other motor vehicle pending the hearing and determination of the application herein.
 - (d) The Court be pleased to issue an order of injunction restraining the respondent either by itself, its agents, employees, directors or any persons or officers acting under its directions from holding, clamping, restraining movement, sanctioning, prosecuting and/or dealing in any way with Motor Vehicles Registration Numbers KCP 819F/ZD 4057 and KBV 520A/ZB 6702 and any other motor vehicle pending the hearing and determination of the Petition herein;
 - (e) That the OCPD Mombasa be directed to provide security and/or any other assistance to ensure compliance with the orders of the Court;
 - (f) That costs of the application be provided for.
- 7 Accordingly, interim orders were given on 15th February 2023 in terms of Prayer c above pending the inter partes hearing and determination of the application. The application was later heard and determined on 22nd September 2023, whereupon a temporary injunction was granted pending the hearing and determination of the Petition.
- 8 In support of the Petition, the 1st petitioner relied on the affidavit of its Administrative Manager, Ms. Nairuti Fridah Makena, sworn on 8th February 2023. The 1st petitioner averred that it is a limited liability company and a transporter within the East African region; and that it is the owner of motor vehicles Registration Numbers KCP 819F/ZD 4057 and KBV 520A/ZB 6702. The 1st petitioner also averred that its Counties of domicile and primary operations are Nairobi City County and the County of Kisumu and that for the year 2023, it applied for and obtained a Fire Clearance Certificate No. 5544



from the Fire Prevention Department of the County of Kisumu for Motor Vehicle Registration No. KCP 819F/ZD 4057. A copy of the certificate was annexed to the Supporting Affidavit as Annexure 'NFM-7'.

9. The 1st petitioner explained that KBV 520A/ZB 6702 does not fall under the Fuel Tanker/LPG Tanker/CBO Tanker category as it is not used for purposes of transporting volatile or flammable products. The 1st petitioner reiterated its averments in the Petition that the two motor vehicles were clamped by the respondent's officers on the ground that the 1st petitioner had not paid the Annual Inspection Levy. The 1st petitioner averred that the respondent had renamed the Fire Clearance Certificate, as previously known and provided for in the repealed Mombasa County Finance Act, 2022, to Annual Inspection Levy in the Mombasa County Finance Act, 2023.
10. The 1st petitioner further averred that, as a transporter, it is a member of the 2nd petitioner, through which members engaged the interested parties with a view of resolving trans-county operations. At paragraphs 11 to 14 of its Supporting Affidavit, the 1st petitioner explained that, in collaboration with the Commission on Revenue Allocation, the 2nd interested party formulated a policy to ensure that once an organization obtains a Fire Certificate from its County of business, such Certificate should apply across the other 46 Counties for vehicles in transit so as to curb double taxation. A copy of the 2nd interested party's letter to that effect, dated 9th February 2018, was annexed to the 1st petitioner's Supporting Affidavit as Annexure 'NFM-6'.
11. It was therefore the assertion of the 1st petitioner that the respondent acted wrongfully in clamping its two trucks/trailers on the 6th and 7th February 2023; and that as a direct result of the wrongful act, its constitutional right to the enjoyment and benefit of its property was infringed. The 1st petitioner also averred that it lost revenue to the tune of Kshs. 115,000/= per vehicle per day; and had to also pay parking fees to the respondent for the period in question. It accordingly prayed that the orders sought in the Petition be granted in the interest of justice. In addition to the Fire Certificate and the 2nd interested party's letter (Annexures NFM- 6 and NFM-7, the 1st petitioner relied on several other documents as annexed to the Supporting Affidavit.
12. On behalf of the 2nd petitioner, an additional Supporting Affidavit was sworn by Mohamed Abdulle, the Secretary General of the Association. The 2nd petitioner thereby confirmed that the 1st petitioner is a transporter within the East African region and is one of its members. The 2nd respondent also confirmed that the 1st petitioner is the registered owner of the subject motor vehicles. The 2nd petitioner further confirmed that the 1st petitioner's counties of domicile and primary operations are Nairobi City County and the County of Kisumu. It otherwise reiterated the averments of the 1st petitioner as regards what they consider to be the wrongful clamping of the 1st petitioner's motor vehicles and the impact thereof.
13. In response to the Petition, the respondent relied on the Replying Affidavit sworn by Hilmi Juma, its officer in charge of Revenue for purposes of Parking and Fire Clearance charges. The respondent thereby averred that its concern is to ensure compliance with fire safety in accordance with the functions and powers of County Governments as set out in Section 12 of Part 2 of the Fourth Schedule of the Constitution.
14. The respondent averred that, to provide the residents of the County of Mombasa with firefighting and other services, it must collect revenue and mobilize resources accordingly. It however denied having detained the 1st petitioner's motor vehicles. At paragraphs 8 and 19 of its Replying Affidavit, the respondent averred that it has the right to charge for firefighting services, granted that the 1st petitioner's trucks collect fuel products from Mombasa County; and therefore are not in transit while in Mombasa.



15. The respondent further averred that the petitioners have mixed issues of parking with the fire clearance certificates with a view of circumventing payment of fees and charges that are lawfully due to the respondent. It pointed out that the 1st petitioner's Annexure NFM-12 is proof, not of payment for Fire Clearance Certificate but for parking fees. It was therefore the contention of the respondent that the petitioners have utterly failed to prove their allegations in this Petition.
16. The Petition was urged by way of the Petitioners' written submissions dated 23rd February 2024. They proposed the following issues for determination:
 - (a) Whether the Petition meets the threshold for constitutional petitions;
 - (b) Whether the petitioners' constitutional rights under Article 40 have been infringed.
 - (c) Whether Section 3(1), Schedule 15, Item 95 of the Mombasa County Finance Act, 2023 should be declared unconstitutional.
17. The petitioners submitted that their Petition is in full compliance with the principle enunciated in *Anarita Karimi Njeru v Republic* 1979 KLR 154 by establishing a link between them as the aggrieved parties, the provisions of *the Constitution* alleged to have been contravened and the manifestation of the infringement. They further submitted that the thrust of Article 40 is to protect proprietary rights and prohibit the sort of acts complained of in this Petition.
18. The petitioners further submitted that there was no public participation by the relevant stakeholders before Section 3(1) Schedule 15 Item 95 of the Mombasa County Finance Act, 2023, was passed. They relied on *Okiya Omtatah Okiiti v Commissioner General, Kenya Revenue Authority & 2 others* 2018 eKLR to buttress their argument that all the affected stakeholders ought to have been involved before the enactment of the Finance Act 2023; and that since no such engagement was held, the impugned provision is unconstitutional and ought to be declared as such.
19. The respondent, on its part, considered the following issues pertinent:
 - (a) Whether the respondent has the mandate to charge for a fire certificate;
 - (b) Whether the 1st and 3rd interested parties' roles are similar to that of the respondent;
 - (c) Whether the petitioners have specifically proved their case.
20. The respondent made reference to the Fourth Schedule of *the Constitution* to demonstrate that one of its functions, at Section 12 thereof, is to provide firefighting services. It therefore submitted that it has the right to charge for such services to ensure efficient firefighting services within the County. The respondent further submitted that, because the 1st petitioner's trucks are filled with petroleum products in Mombasa, it is imperative that the charges be paid to enable it render services in the event of need.
21. The respondent also submitted that there is a distinction between its functions and the responsibilities of the 1st and 3rd interested party; and that whereas a Fire Clearance Certificate may be necessary for purposes of acquiring a petroleum road transportation licence, they do not offer fire fighting services as does the respondent. The respondent therefore urged the Court to ignore the letter dated 13th December 2022 (Annexure NFM-5 to the 1st petitioner's Supporting Affidavit).
22. On whether the petitioners have proved their case, the respondent relied on *Susan Mumbi v Kefala Grebedbin, Nairobi HCCC No. 332 of 1993*, for the principle that whoever alleges must prove. In the respondent's submission the petitioners have failed to prove their allegations to the requisite standard in that:



- (a) Whereas they alleged that the 1st petitioners motor vehicles Registration Numbers KCP 819F/ZD 4057 and KBV 520A/ZB 6702 were clamped for non-payment of Fire Clearance Certificate, no evidence was adduced to prove this allegation.
 - (b) The petitioners referred to a policy for revenue sharing at paragraph 11 of their Supporting Affidavit to the Petition but did not place that policy document before the Court.
 - (c) The petitioners alleged that their motor vehicles were detained by the respondent and yet the same were released pursuant to the orders of the Court dated 25th November 2022 in Mombasa High Court Petition No. E059 of 2022: Roy Transporters Ltd v County Government of Mombasa & others.
 - (d) The petitioners relied on photographic evidence without complying with the requirements of Section 106(4) of the *Evidence Act*.
 - (e) Allegations that the 1st petitioner lost business at the rate of Kshs 230,000/= per day, being in the nature of special damages were not specifically proved.
23. The respondent placed reliance on several authorities, including *Bangue Indosuez v D J Lowe and Company Ltd* 2006 2 KLR 208, *Moses Onchiri v Kenya Ports Authority & 4 others* 2017 eKLR and *Bethwell Allan Omondi Okal v Telkom (K) Ltd & 9 others* 2017 eKLR to buttress its submissions. The respondent thought it was cheeky for the petitioners to impugn the Mombasa County Finance Act, 2023, on the ground of lack of public participation in their written submissions without supportive pleadings in the Petition itself. Thus, the respondent prayed for the dismissal of the Petition with costs.
24. I have given due consideration to the Petition, its Supporting Affidavit, the Replying Affidavit filed by the respondent and the written submissions filed by counsel for the parties. There is no dispute that the petitioner is a limited liability company engaged in the business of transportation of petroleum products within the East African Region. There is further no dispute that the 1st petitioner is the owner of the subject motor vehicles, namely, Motor Vehicles Registration Numbers KCP 819F/ZD 4057 and KBV 520A/ZB 6702. The Registration Certificates in proof thereof were exhibited as annexures to the Supporting Affidavit of Nairuti Fridah Makena and marked Annexure ‘NFM-3’.
25. Whereas the petitioners allege that the respondent clamped the 1st petitioner’s motor vehicles Registration Numbers KCP 819F/ZD 4057 and KBV 520A/ZB 6702, the respondent vehemently denied those allegations. The respondent contended, both in its Replying Affidavit and written submissions that no evidence was placed before the Court by the plaintiffs in this respect.
26. In the light of the foregoing, the issues for determination in the matter are:
- (a) Whether the Petition has met the threshold for constitutional petitions.
 - (b) Whether the respondent clamped/detained the 1st petitioner’s motor vehicles as alleged and if so, whether the same amounts to a violation of the 1st petitioner’s constitutional rights.
 - (b) Whether, in the circumstances the 1st petitioner is entitled to the reliefs sought.

a Whether the Petition has met the threshold for constitutional petitions:

27. It is now settled that there is a basic threshold that constitutional petitions must adhere to. Hence, in the case of *Anarita Karimi Njeru v Republic* 1979 eKLR, it was held:

...if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that



he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

28. The principle was affirmed by the Court of Appeal in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* 2013 eKLR as hereunder:

(42) ...the principle in *Anarita Karimi Njeru* (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* (Cap 21) and section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of *Thorp v Holdsworth* (1876) 3 Ch. D. 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

29. The specificity rule enables the Court to easily determine from the pleadings whether constitutional issues arise therefrom. As was correctly pointed out by counsel for the petitioners, a Constitutional and Human Rights Court is supposed to exclusively deal with constitutional matters. And, for the avoidance of doubt, courts have delimited what a constitutional issue entails in numerous decisions. For instance, in *Fredricks & others v MEC for Education and Training, Eastern Cape & others* 2002 23 ILJ 81 (CC), the Constitutional Court of South Africa held:

The Constitution provides no definition of ‘constitutional matter’. What is a constitutional matter must be gleaned from a reading of *the Constitution* itself: ...constitutional matters must include disputes as to whether any law or conduct is inconsistent with *the Constitution*, as well as issues concerning the status, powers and functions of an organ of State...the interpretation, application and upholding of *the Constitution* are also constitutional issues. So too...is the question of the interpretation of any legislation or the development of the common law that promotes the spirit, purport and object of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of *the Constitution*, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction...”

30. With the foregoing in mind, I have perused and considered the averments in the Petition dated 9th February 2023 and note that the legal foundation thereof has been set out under Section B, where the petitioners made reference to Articles 2, 10, 20, 21, 22, 23, 40, 47 and 50 of the Constitution to demonstrate the supremacy of *the Constitution* and the central place given to



national values and principles of governance, which bind all state organs, state officers, public officers such as the respondent and its officers. They also pleaded Articles 21 and 22, which provides for the implementation of rights and fundamental freedoms. More importantly, the petitioners relied on Articles 40, 47 and 50 of the Constitution, which speak to the right to enjoy property, fair administrative action and fair hearing. The petitioners also furnished the factual basis of their Petition at Part C thereof, including the alleged violations.

31. Consequently, the contention that the Petition does not meet the requisite threshold appears to be ill-founded. Indeed, Rule 10(3) and (4) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, recognizes that:

(3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.

(4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.”

32. Accordingly, I fully endorse the expressions of Hon. Odunga, J. (as he then was) in *Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & Another* 2016 eKLR that:

On the issue whether this Court can determine the constitutional issues raised without compliance with the requirements stipulated in *Anarita Karimi Njeru vs. Attorney General* (supra), it is my view that the said decision must now be read in light of the provisions of Article 22(3)(b) and (d) of *the Constitution* under which the Chief Justice is enjoined to make rules providing for the court proceedings which satisfy the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation and that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. Whereas it is prudent that the applicant ought to set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed, to dismiss a petition merely because these requirements are not adhered to would in my view defeat the spirit of Article 22(3)(b) under which these proceedings may even be commenced on the basis of informal documentation...”

33. Indeed, in *Mumo Matemu v Trusted Society of Human Rights Alliance* 2013 eKLR, the Court of Appeal pointed out that:

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

34. In this respect, the Court of Appeal reiterated the viewpoint taken by a 3-judge bench of the High Court in *Trusted Society of Human Rights Alliance v Attorney General & 2 Others* 2012 eKLR in which it was held that:

We do not purport to overrule *Anarita Karimi Njeru* as we think it lays down an important rule of constitutional adjudication: a person claiming constitutional infringement must give sufficient notice of the violation to allow her adversary to adequately prepare her



case and to save the Court from embarrassment of adjudicating on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are so insubstantial and so attenuated that a Court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the respondents in a constitutional petition are fashioned in a way that gives proper notice to the respondents about the nature of the claims being made so that they can adequately prepare their case...”

35. Thus, it is my considered finding that the Petition is indeed compliant as to specificity.

b Whether the respondent clamped/detained the 1st petitioner’s motor vehicles as alleged and if so, whether the same amounts to a violation of the 1st petitioner’s constitutional rights:

36. The respondent having denied that it clamped or detained the 1st petitioner’s motor vehicles, the burden of proof was on the petitioners to prove their allegations to the requisite standard. 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...”

37. 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.”

38. 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:

66. The two superior courts below were of the unanimous view that a petitioner bears the burden to prove his/her claim of alleged threat or violation of rights and freedoms to the requisite standard of proof, which is on a balance of probabilities. We affirm this juridical standpoint bearing in mind that such claims are by nature civil causes. See *Deynes Muriithi & 4 others v Law Society of Kenya & another*, SC Application No 12 of 2015; 2016 eKLR.

67. In this case, the onus of proof was on the 1st appellant to adduce sufficient evidence to demonstrate that firstly, she owned or erected or lived in the alleged properties; and secondly, that state agents interfered or deprived her of the subject properties. This, as was aptly appreciated by the superior courts, is the import of section 107 of the *Evidence Act* on the burden of proof. The provision stipulates:



1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

In addition, section 109 of the *Evidence Act* elaborates on the onus of proof by stipulating that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

39. The petitioners relied on a single paragraph, namely, paragraph 21 of its Supporting Affidavit to prove their contention that the motor vehicles were “grounded” by the officers of the respondent outside Vivo Energy Kenya along Kismayu Road and at Gapco Shimanzi area, respectively.
40. In proof thereof, they relied on the photographs marked Annexures NFM-10. These are a set of ten images and not all of them are helpful to the Court. For instance, the 1st image is simply a front view picture of Motor Vehicle KCP 819F. There is no indication that it was clamped when the photograph was taken. The 3rd photograph is a close up view of the windscreen area of a truck. It gives no indication as to the exact motor vehicle photographed. The 4th, 6th and 7th photographs show a clamped wheel but do not necessarily help identify the motor vehicle concerned.
41. Therefore, the only photographs that encompass the clamping and the identity of the motor vehicle concerned are the 2nd, 5th and 8th photographs. They are all in respect of Motor Vehicle KBV 520A. There is not particular photograph to prove that Motor Vehicle KCP 819F/ZD 4057 was in fact clamped. This is significant given the respondent’s contention that the latter motor vehicle was the subject of a similar case in which the Court has issued release orders to the 1st petitioner on 25th November 2022 in Mombasa High Court Petition No. E059 of 2022: Roy Transporters Ltd v County Government of Mombasa & others.
42. Moreover, the photographs do not have a time stamp. This omission is critical. A time stamp would have enabled the Court ascertain when and at what time the photographs were taken vis-à-vis the time and date of the alleged violations.
43. It is therefore significant that Section 78A of the *Evidence Act* provides:
 - (1) In any legal proceedings, electronic messages and digital material shall be admissible as evidence.
 - (2) The court shall not deny admissibility of evidence under subsection (1) only on the ground that it is not in its original form.
 - (3) In estimating the weight, if any, to be attached to electronic and digital evidence, under subsection (1), regard shall be had to—
 - (a) the reliability of the manner in which the electronic and digital evidence was generated, stored or communicated;
 - (b) the reliability of the manner in which the integrity of the electronic and digital evidence was maintained;



- (c) the manner in which the originator of the electronic and digital evidence was identified; and
 - (d) any other relevant factor.
- (4) Electronic and digital evidence generated by a person in the ordinary course of business, or a copy or printout of or an extract from the electronic and digital evidence certified to be correct by a person in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organization or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.”
44. The respondent objected to the admissibility of the 1st petitioner’s photographs for non-compliance with Section 106B of the *Evidence Act*. The provision states as follows in Subsections (1) and (2):
- (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as “computer output”) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.
 - (2) The conditions mentioned in subsection (1), in respect of a computer output, are the following —
 - (a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;
 - (b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
 - (c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and
 - (d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.(
45. Section 106B(4) of the Evidence further states:
- (4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—
 - (a) identifying the electronic record containing the statement and describing the manner in which it was produced;
 - (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;



- (c) dealing with any matters to which conditions mentioned in subsection (2) relate; and
- (d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.”

46. Needless to mention that the object of Section 106B is for litigants to satisfy the court as to the reliability and validity of electronic evidence. Hence, in *Republic v Barisa Wayu Matriguda* 2011 eKLR the Court (Hon. Odero, J.) explained:

Whereas formerly the *evidence Act* did not specifically cover the question of the admissibility of such electronic evidence, following great advances in this field, the courts could not continue to ignore the great impact which modern technology plays in the world in all spheres up to and including the collection and storage of evidence. This led to the enactment of amendments to the *Evidence Act* which include S. 106A which provides that electronic records may be proved in court. The conditions upon which such electronic evidence would be admissible are legislated for by S. 106B of the same Act.”

47. The question to pose then is whether photographs, of the kind relied on by the petitioners, amount to electronic evidence. I note that the *Evidence Act* does not define what electronic record is for purposes of Section 106B of the Act. Nevertheless, in *Kenya Information and Communications Act* No. 2 of 1998 “electronic record is defined to mean:

...a record generated in digital form by an information system, which can be transmitted within an information system or from one information system to another and stored in an information system or other medium.”

48. In this instance, there is no evidence at all as to whether the photographs were generated digitally or whether they were transmitted from one information system to another. It can only be presumed that the photographs were photocopied from some original source, which is not good enough. In *Samwel Kazungu Kambi v Nelly Ilongo & 2 Others* 2017 eKLR such evidence was discredited by the Court thus:

22. The source of the photocopies of the photographs annexed to the affidavit sworn by the Petitioner in support of the Petition was not disclosed. The device used to capture the images was unknown. The person who took the photographs was not named. The person who processed the images was not named. The Petitioner was not an eyewitness to the incident and he could not therefore tell the court that the photographs were a true reflection of the incident he witnessed.”

49. In the circumstances, there is no basis upon which the Court can conclude that the photographs amount to electronic records; and even if the Court were to find that they are indeed electronic records, it is manifest that the petitioners did not bother to comply with the applicable law, namely Sections 78A and 106B of the *Evidence Act*, to pave way for the admissibility of such evidence.

50. The foregoing notwithstanding, it is manifest in more ways than one that the allegations of clamping were admitted in the body of the respondent’s affidavit as well as their written submissions. What was contested was whether the clamping was justified. For instance, at paragraph 15 the respondent averred:

That, the Advocate on record for the Respondent has advised which I verily believe to be true that the Petitioners have not proved to this Honourable Court that their motor vehicles



were clamped due to non-payment of a fire certificate, in the contrary the Petitioners have proved that their vehicles were clamped for failure to pay parking fees.” (Emphasis supplied)

51. It was therefore of paramount importance for the petitioners to demonstrate that the clamping of Motor Vehicle Registration No. KBV 520A/ZB 6702 was not for parking fees but for Fire Clearance Certificate. Having found that none of the photographs had any indication as to the clamping of Motor Vehicle KCP 819F/ZD 4057 and having found, in any event, that the photographs were not introduced in evidence in compliance with Section 106B of the *Evidence Act*, the inescapable conclusion is that the petitioners have not proved their allegations to the requisite standard and are therefore not entitled to the reliefs sought in this Petition.
52. In the result, the Petition dated 9th February 2023 is hereby dismissed with an order that each party shall bear own costs thereof.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 19TH DAY OF SEPTEMBER 2024

OLGA SEWE

JUDGE

