



County Assembly of Laikipia v County Assemblies Sports Association Sued Through Imwatok & 2 others; County Assemblies Forum Through its Officials; Hon: Sabulei Philemon Kiplangat (Chairman) Hon: James Chege Mwaura (Secretary) Hon: Omar Mohamed Martin (Treasurer) & another (Interested Parties) (Constitutional Petition E005 of 2024) [2024] KEHC 12531 (KLR) (16 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12531 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CONSTITUTIONAL PETITION E005 OF 2024
AK NDUNG’U, J
OCTOBER 16, 2024**

BETWEEN

THE COUNTY ASSEMBLY OF LAIKIPIA PETITIONER

AND

PETER IMWATOK (CHAIRMAN) 1ST RESPONDENT

HON: BERNARD OMBOKO (SECRETARY GENERAL) 2ND RESPONDENT

HON: GAD OLIMA (TREASURER) 3RD RESPONDENT

AND

**COUNTY ASSEMBLIES FORUM THROUGH ITS OFFICIALS; HON:
SABULEI PHILEMON KIPLANGAT (CHAIRMAN) HON: JAMES
CHEGE MWAURA (SECRETARY) HON: OMAR MOHAMED MARTIN
(TREASURER) INTERESTED PARTY**

COUNTY ASSEMBLY OF BUNGOMA INTERESTED PARTY

RULING

1. The Petitioner instituted this suit by a petition dated 01/10/2024 and filed on the same date. The Petition discloses a dispute over hosting rights for County Assemblies sports association games and festival 2024 that is set out to take place on 18th -27th October, 2024. The Petitioner avers that vide a resolution contained in the minutes of the Respondent’s National Governing Council and National Executive Committee meeting held on 12th -14th July 2024, it was resolved that Laikipia County shall be the host of the aforesaid event. However, through a letter dated 13/09/2024, the Respondents



- invited all county assemblies for the said event to be held in Bungoma County. It is the Petitioner's contention that it was not invited to any forum where the decision for the Petitioner to host the festival was overturned.
2. Various reliefs are sought. Together with the petition was filed an application for conservatory orders pending disposal of the petition.
 3. The Respondent entered appearance on 08/10/2024 and also filed a notice of preliminary objection to the petition. The 2nd Interested Party also filed a preliminary objection to the petition. This ruling resolves the preliminary objections raised by the parties.
 4. The points raised by the Respondent's preliminary objection are;
 - i. That there is no constitutional petition before the court.
 - ii. Petitioner has failed to show how the Respondent has violated its constitutional rights.
 - iii. The Petitioner ought to have explored other fora to ventilate the alleged constitutional grievances and will urge the court to strike out the motion for violating the doctrine of constitutional avoidance.
 - iv. The petition does not set out with reasonable degree of precision the constitutional provisions infringed and the manner they are alleged to be infringed therefore violating the principles set out in *Anarita Karimi Njeru vs R (1976-1980) KLR 1272*.
 - v. The Petition is overtaken by event and caught up with mootness doctrine as it does not present a justifiable dispute and any resultant decision will be of no practical value.
 5. The 1st Interested Party formally raised a Preliminary objection in court opposing the petition and the application on the ground that the petition is fatally defective as it does not conform to the provision of Article 6(2), 189(3) and (4) of *the Constitution* as read with section 31, 33 to 35 of the *Intergovernmental Relations Act* 2012 (herein referred to as the Act)
 6. The 2nd Interested Party's preliminary objection is based on the following grounds;
 - i. The petition offends section 30, 31, 32, 33, 34, and 35 of the *Intergovernmental Relations Act*.
 - ii. The petition offends the spirit and letter of the law as espoused in the *Speaker of the National Assembly vs Hon. James Njenga Karume Civil Case No. 92/1992*.
 - iii. The court lacks immediate jurisdiction to hear and determine the entire suit.
 7. The preliminary objections were canvassed by way of written submissions. The Respondent submitted that it was upon the Petitioner to demonstrate that it has established the principles to consider while granting conservatory orders as were highlighted in the case of *Wilson Kaberia Nkunja v The Magistrate & Judges Vetting Board & Others Nrb HC Const. Petition No. 154 of 2016 [2016]eKLR* being a prima facie case with likelihood of success and in absence of conservatory orders, it is likely to suffer prejudice, that in absence of conservatory orders, the petition will be rendered nugatory and public interest must be considered.
 8. Further that the petition does not highlight a prima facie case worth issuance of conservatory orders on account that the resolution granting the Petitioner the hosting rights for the festival were unsigned and on the other hand, the resolution granting the 2nd Interested Party the hosting rights were signed.
 9. As to whether the petition meets the threshold for a constitutional petition, the Respondent submitted that the Petitioner has failed to identify the constitutional provisions that warrant this court



intervention and has failed to provide, in a very clear and elaborate manner, the evidence on how the Respondents have violated its Constitutional rights hence not abiding by the principles that were discussed in the Miscellaneous Criminal Application 4 of 1979, Anarita Karimi Njeru v Republic [1979] eKLR which were that a petitioner must identify the constitutional entitlement threatened, infringed or violated and to demonstrate with some level of precision on the manner of violation as to enable the respondent to mount a defence.

10. As to whether the petition violates the doctrine of constitutional avoidance, it was submitted that the prayers sought by the Petitioner in the petition are civil in nature with civil remedies and could have readily been redressed in a civil court. Therefore, the Petitioner ought to have filed a civil suit as opposed to bypassing the same and coming to the Constitutional Court. Reliance was placed on the case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR where the Apex court stated that the principal of constitutional avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis and the case of Uhuru Muigai Kenyatta v Nairobi Star Publications Limited [2013] eKLR, where it was held that Where there is a remedy in Civil Law, a party should pursue that remedy.
11. The Respondent urged the court to hold that the Petitioner's claim which is founded on its membership with the Respondent and the 1st Interested Party is a plain civil claim and that the Petition is not properly laid before this Court as a constitutional issue.
12. The 1st Interested Party challenged the jurisdiction of this court to hear and determine the petition on account that section 31 of the Act requires county governments to exhaust all reasonable measures to resolve dispute amicably including alternative dispute resolution before resulting to court. Further section 33(1) requires parties to resolve dispute through negotiation or through an intermediary whereas section 33(2) states that in case of failed negotiations, dispute must be declared and referred to relevant intergovernmental structures such as the summit.
13. Further, the Petitioner has failed to comply with section 34 which provides for the procedure after a formal declaration of the dispute and section 35 which states that judicial proceedings should only be initiated after all efforts of alternative dispute resolutions have failed. Reliance was placed on the case of Council of the County Governors v Energy Regulatory Commission & 7 Others [2023] KEHC and Albert Chaurembo Mumba & 7 Others v Maurice Munyao & 148 Others [2019] eKLR to emphasize that courts must exercise restraints where the statute provides for dispute resolution mechanisms.
14. It was their submissions that the Petitioner has not exhausted the available mechanisms thereby restraining this court from hearing the petition as the same will be contrary to the doctrine of exhaustion as discussed in the case of Council of the County Governors Case (supra). The 1st Interested party urged the court to be guided by the holding in the celebrated case of Owners of Motor Vessel Lillian "S" v Caltex Oil Kenya Limited [1989] KLR that jurisdiction is everything and without it a court cannot move even one step.
15. The 2nd Interested Party submitted that the dispute herein is between county government entities as provided under section 30(2)(b) of the Act and therefore subject to the dispute resolution mechanisms as provided under section 32 to 35 of the Act. That from the pleadings, there is no mention that the Petitioner invoked available dispute resolution mechanisms before going to court and failure to do so renders the suit herein a nullity. Reliance was placed on the case of Speaker of The National Assembly –Vs The Hon. James Njenga Karume (supra) where the court observed that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. That since the Petitioner has not exhausted the available mechanism prior to approaching this court, then this court does not have the jurisdiction to



handle this matter at this point and further reliance was placed on the case of Owners of Motor Vessel “Lilians Case (supra).

16. In rejoinder, the Petitioner submitted that by deciding to change the venue for CASA games, CASA was exercising a quasi-judicial function over the Petitioner and was therefore bound by the rules of natural justice as well as the constitutional requirement under Article 47 and that the high court exercises supervisory jurisdiction over subordinate courts and over any person, body or authority exercising judicial or quasi-judicial function.
17. It argued that the Interested Parties are not parties to the instant suit in that the wrong doings complained about by the Petitioner are against the Respondent and not the Interested Parties as they have merely been enjoined in the instant suit. That Rule 2 (Interpretations) of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules (The Mutunga Rules), 2013 defines an Interested Party as a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.
18. It was further submitted that the Petitioner does not bring the instant petition as a Government, of which it is not, but as a person within the general and wide spectrum meaning of a person under the Constitution and therefore, the argument that the Petitioner is an entity of the County Government of Laikipia is untenable for the reasons that the provisions of Section 31 (c) and 60 (1)(f) of the County Governments’ Act clearly demonstrates that county government entities are structures formed under the County Executives where the Governor has actual and/ or direct authority over such structures and the County Assemblies are not such structures, and that County Assemblies have got their own entities such as the County Assembly Services Board.
19. Further that the Petitioner is not either of the parties to the disputes provided for under Section 30 of the Act since the Petitioner is a County Assembly and not a County Government and any attempt to define the petitioner as a County Government would be to overstretch its mandate, purpose and functions by law established.
20. That Rule 1.1 and 2.1 of the Rules and Regulations of the County Assemblies Sports Association, 2019 demonstrates delegated power by CAF to CASA where CASA is expected to run its affairs with autonomy as CASA Constitution or CAF Constitution does not make CASA subject to oversight by CAF over the function of coordinating the participation of County Assemblies in Sports Activities and therefore, any dispute between a County Assembly and CASA in exercise of its function of coordinating the participation of County Assemblies in sports activities cannot be a dispute between a government and another or a dispute amongst county governments for the Intergovernmental Relations Act to come into play since CASA is not a government within the meaning of the Intergovernmental Relations Act.
21. That to argue that County Assembly of Bungoma, CASA and CAF are governments for purposes of the Intergovernmental Relations Act would be to overstretch the objectives of the said Act as well as to undermine the doctrine of separation of powers between the executives and legislatures of the counties. The Petitioner emphasized that county governments referred in the Act do not include County Assemblies for the reasons that the Act under Sections 7, 11, and 19 provides for Intergovernmental Relations Structures thus, the Council of county governors, technical committee, national and county government coordinating summit and none of the above structures recognizes the County Assemblies either as an intergovernmental relations structure or as part of either of the said intergovernmental Relations Structures.



22. The Petitioner further argued that section 19 creates a council of County Governors which clearly demonstrates that the intention was to loop in the County Executives and not County Assemblies and that in the Act, the term county assembly or speaker of county assembly does not feature anywhere and given the separation of power between the County Executive and the County Assembly, it cannot be said that the council of County Governors is actually holding brief for the county speakers and/ or assemblies and if that were to be the case, nothing would have been easier than for the said Act to expressly say so and the foregoing is the reason why there is County Assemblies Forum an independent forum for County Assemblies which has not been incorporated within the Act as an Intergovernmental Relations Structure in that regard. Therefore, the dispute before the Honourable Court is outside the ambit of the *Intergovernmental Relations Act*.
23. It was submitted that both the CASA rules and regulations of 2019 and the CAF constitution do not provide for any mode of alternative dispute resolution in the event a dispute arises as to who shall be the host of the CASA games leaving an aggrieved party with no option but to explore redress from the court.
24. On whether there is a constitutional petition before the court, the Petitioner submitted that the approach by the Respondent is contrary to Article 159 (2)(d) of *the Constitution* and Rule 3(2) of the Mutunga Rules, 2013 and therefore untenable. Furthermore, the petition describes the Petitioner's grievance citing the rights violated and the argument by the Respondent that the petition lacks exactitude remains a mystery.
25. It was further submitted that the doctrine of constitutional avoidance does not apply in the instant petition since Articles 22 and 258 of *the Constitution* guarantee any person the right to approach the Court and complain that a certain right under the bill of rights has been or is under a threat of being violated and *the Constitution* does not limit the above right and the same is only limited if there is an alternative for the same provided for elsewhere so that the principle of exhaustion of all avenues provided for dispute resolution before approaching the Court can kick in. Therefore, if there is no other dispute resolution framework provided for elsewhere, an aggrieved party is left at liberty to approach the Court.
26. I have considered the parties' submissions on the preliminary objections raised. For determination is whether the objections meet the legal threshold set in law and whether the same are meritorious.
27. I find it important to, at the earliest, address an issue raised by the Petitioner in their submissions to the effect that the Interested Parties are not party to the suit. This is necessary, since, having raised preliminary objections on their part, the determination of their locus standi becomes central to the resolution of the objections before the court.
28. The supreme court in the case of *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Others [2014] eKLR (Petition No. 12 of 2013)* defined an interested party as;

“... an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.
29. It is therefore strange for the Petitioner to state that the interested parties are not party to the suit. Notably, it is the Petitioner who enjoined them to the said suit, a clear acknowledgement that the Interested Parties have a definite stake in the outcome of the proceedings herein. From whatever prism one looks at



it, the Interested Parties would be affected by the decision of the court either way. The question whether they are proper parties in this suit answers in the affirmative.

30. On whether the Preliminary objections raised meet the legal threshold and have merit, I have carefully read and considered the points raised.

31. What constitutes a preliminary objection was well settled in the *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 in the following words: -

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

32. Further Sir Charles Nebbold, JA stated that: -

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

33. It is evident that a Preliminary Objection, raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or the court is called upon to exercise judicial discretion.

34. In the case of *Oraro v Mbaja* [2005] 1KLR 141, the Court held that:-

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence.”

35. The point of law taken by the 1st and 2nd Interested Parties is that this court has no jurisdiction to entertain the suit since the dispute is between county government entities and therefore, subject to the procedure outlined under section 30 to section 35 of the *Intergovernmental Relations Act*. The Petitioner’s position on the other hand is that it does not bring the instant petition as a Government, of which it is not, but as a person within the general and wide spectrum meaning of a person under *the Constitution* and therefore, the argument that the Petitioner is an entity of the County Government of Laikipia is untenable for the reasons that the provisions of Section 31 (c) and 60 (1)(f) of County Government Act does not mention county assemblies as entities of county government. Further that the Petitioner is not either of the parties to the disputes provided for under Section 30 of the Act since the Petitioner is a County Assembly and not a County Government.

36. That any dispute between a County Assembly and the 1st Interested party in exercise of its function of coordinating the participation of County Assemblies in sports activities cannot be a dispute between a government and another or a dispute amongst county governments for the *Intergovernmental Relations Act* to come into play since CASA is not a government within the meaning of the *Intergovernmental Relations Act*. That to argue that County Assembly of Bungoma, CASA and CAF



are governments for purposes of the *Intergovernmental Relations Act* would undermine the doctrine of separation of powers between the executives and legislatures of the counties.

37. Section 30 of *Intergovernmental Relations Act* provide as follows;

(1) In this Part, unless the context otherwise requires, "dispute" means an intergovernmental dispute.

(2) This Part shall apply to the resolution of disputes arising—

(a) between the national government and a county government; or

(b) amongst county governments.

Section 31 to 35 provides for measures for dispute resolution as hereunder;

Section 31 states;

The national and county governments shall take all reasonable measures to—

(a) resolve disputes amicably; and

(b) apply and exhaust the mechanisms for alternative dispute resolution provided under this Act or any other legislation before resorting to judicial proceedings as contemplated by Article 189(3) and (4) of *the Constitution*.

Section 32 provides for dispute resolution mechanisms

(1) Any agreement between the national government and a county government or amongst county governments shall—

(a) include a dispute resolution mechanism that is appropriate to the nature of the agreement; and

(b) provide for an alternative dispute resolution mechanism with judicial proceedings as the last resort.

(2) Where an agreement does not provide for a dispute resolution mechanism or provides for one that does not accord with subsection (1), any dispute arising shall be dealt with within the framework provided under this Part.

Section 33 states;

(1) Before formally declaring the existence of a dispute, parties to a dispute shall, in good faith, make every reasonable effort and take all necessary steps to amicably resolve the matter by initiating direct negotiations with each other or through an intermediary.

(2) Where the negotiations under subsection (1) fail, a party to the dispute may formally declare a dispute by referring the matter to the Summit, the Council or any other intergovernmental structure established under this Act, as may be appropriate.

Section 34 provides for procedure after formal declaration of a dispute as follows;

(1) Within twenty-one days of the formal declaration of a dispute, the Summit, the Council or any other intergovernmental structure established under this Act shall convene a meeting inviting the parties or their designated representatives—

(a) to determine the nature of the dispute, including—

(i) the precise issues in dispute; and



- (ii) any material issues which are not in dispute; and
- (b) to—
 - (i) identify the mechanisms or procedures, other than judicial proceedings, that are available to the parties to assist in settling the dispute, including a mechanism or procedure provided for in this Act, other legislation or in an agreement, if any, between the parties; or
 - (ii) subject to Article 189 of *the Constitution*, agree on an appropriate mechanism or procedure for resolving the dispute, including mediation or arbitration, as contemplated by Articles 159 and 189 of *the Constitution*.
- (2) Where a mechanism or procedure is specifically provided for in legislation or in an agreement between the parties, the parties shall make every reasonable effort to resolve the dispute in terms of that mechanism or procedure.
- (3) Where a dispute referred to the Council or any other intergovernmental structure established under this Act, fails to be resolved in accordance with section 33 (2), the Summit shall convene a meeting between the parties in an effort to resolve the dispute and may recommend an appropriate course of action for the resolution of the dispute.

Section 35 states;

Where all efforts of resolving a dispute under this Act fail, a party to the dispute may submit the matter for arbitration or institute judicial proceedings.

38. Clearly there is a dispute resolution mechanism in place for resolving disputes between county governments as stipulated under section 30 above. The Petitioner’s argument however is that the dispute herein is not between county governments hence not subject to section 30 and section 31 to 35 of the Act.

39. It is therefore prudent to determine whether county assemblies are subject to *Intergovernmental Relations Act*. County assembly is a formation of *the Constitution*. Article 176 of *the Constitution* provides that;

- (1) There shall be a county government for each county, consisting of a county assembly and a county executive.

40. Article 185 states that;

- (1) The legislative authority of a county is vested in, and exercised by, its county assembly.
- (2) A county assembly may make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule.
- (3) A county assembly, while respecting the principle of the separation of powers, may exercise oversight over the county executive committee and any other county executive organs.
- (4) A county assembly may receive and approve plans and policies for—
 - (a) the management and exploitation of the county’s resources; and
 - (b) the development and management of its infrastructure and institutions.



41. The court in the case of *Simon Wachira Kagiri v County Assembly of Nyeri & 2 others* [2013]eKLR held that;
- 42.
- “On the issue of whether the County Assembly may be sued in its own name the court takes the view that the County Assembly as a distinct institution in the County Government carrying out public duties as mandated by *the Constitution* and the County Government Act, is capable of suing or being sued in the absence of an express statutory provision...”
43. Under Article 185 (3) of *the Constitution* the county assembly is adorned with oversight role over the county executive committee and any other county executive organs. Hence it can be stated that the County Assemblies are clothed with supervisory mandate over the county executive committee and any other county executive organs. A proper and purposive interpretation of *the constitution* and the law would lead to the logical conclusion that County Assemblies cannot carry out their constitutional mandate of oversight over County Governments and at the same time be appendages of the same governments. The doctrine of separation of powers reflected at the national government is applicable mutatis mutandis in the county governments and 2ndly, there is no obligation on a county to undergo the dispute resolution procedure provided for in the *Intergovernmental Relations Act* when in dispute with another County Assembly or Organ of a County Assembly. The Act in my view is applicable to the Executive both at the National and County level and not to the county assemblies.
44. The Respondent is defined in their website as the coordinating body of the 47 county assemblies in Kenya with the mandate of promoting networking and synergy amongst the county assemblies, coordinating intergovernmental relations and enhancing good practice in legislative development. It also seeks to institutionalize law-making and oversight capacity of the County Assemblies and to form linkages with other Arms of Government. The 1st Interested Party is a body under the Respondent with the mandate of organizing sports between county assemblies.
45. From a reading of the relevant statute I cannot agree more with Counsel for the Petitioner that to argue that County Assembly of Bungoma, CASA and CAF are governments for purposes of the *Intergovernmental Relations Act* would be to overstretch the objectives of the said Act as well as to undermine the doctrine of separation of powers between the executives and legislatures of the counties. It is clear that that governments referred to in the Act do not include County Assemblies for the reasons that the Act under Sections 7, 11, and 19 provides for Intergovernmental Relations Structures thus, the Council of county governors, technical committee, national and county government coordinating summit and none of the above structures recognizes the County Assemblies either as an intergovernmental relations structure or as part of either of the said intergovernmental Relations Structures.
46. Further, section 19 creates a council of County Governors which clearly denotes an intention of the law to relate to County Executives and not County Assemblies. Again, in the Act, the term county assembly or speaker of county assembly does not feature anywhere. It follows then that the dispute before the Honourable Court is outside the ambit of the *Intergovernmental Relations Act*. The preliminary objection raised in this regard fails.
47. The preliminary points raised by the Respondent are, first, the Petitioner has not established a prima facie case for the grant of conservatory orders sought on account that the evidence by the Petitioner of the resolutions to confer Laikipia County with the hosting rights are unsigned and on the other hand, the Respondent have presented the signed resolutions of the CASA NGC conferring the said rights to the 2nd Interested Party.



48. My view on the above is that the Respondent is inviting this court to scrutinize the evidence which is contrary to the purpose of a preliminary objection. It falls short of meeting the threshold of a pure point of law that is likely to dispose of the Petition. A point of law does not require the court to interrogate the petition on merit. It must be a pure point of law and a Preliminary Objection cannot be raised if certain facts have to be ascertained. The objection raised on this limb fails the test of a preliminary objection and is dismissed.

49. The second point raised by the Respondent is that the prayers sought are civil in nature which can be redressed in a civil court. The Respondent relies on the doctrine of constitutional avoidance. The doctrine of constitutional avoidance has been addressed in quite a number of decisions by our courts. It was expounded by the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR where court held as follows;

“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.’

50. What the doctrine means is that while this court can indeed hear and determine this matter, it can restrain itself to hear the same because there is another appropriate forum provided in law where the matter can be heard and determined effectively.

51. What constitutes a constitutional petition was discussed in the case of *CNM v WMG* [2018] eKLR where J Mativo stated;

“In my view, this Petition does not raise constitutional questions at all. When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values. The issues raised here will only require the Court to examine defamation law. The question of what constitutes a constitutional question was ably illuminated in the South African case of *Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others* in which Justice O’Regan recalling the Constitutional Court’s observations in *S v Boesak* notes that:

‘The Constitution provides no definition of ‘constitutional matter.’ What is a constitutional matter must be gleaned from a reading of *the Constitution* itself: If regard is had to the provisions of *the Constitution*, 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 matters. So too, is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects 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."

52. It therefore follows that for a court to determine whether the argument raises a constitutional issue, the court should consider whether the argument forces the court to consider constitutional rights or values. The court also need to examine the provisions alleged to be contravened and how they have been contravened and whether the petitioner has suffered any damage / loss as a result of the said contravention or violation. It is also important to consider the nature of the orders sought in the petition, as to whether they fall under the ambit of those provided for under Article 23 (3) of *the Constitution*.
53. The Petitioner's case is aggrieved by the cancellation of the right granted to it to host County Assemblies Games and Festival as had been sanctioned vide a resolution contained in the minutes of the Respondent's National Governing Council and National Executive Committee meeting held on 12th -14th July 2024. The turn of events was communicated through a letter dated 13/09/2024, whereby the Respondents invited all county assemblies for the said event to be held in Bungoma County. It is the Petitioner's contention that it was not invited to any forum where the decision for the Petitioner to host the festival was overturned.
54. The rights claimed to be violated is right to fair administrative action, right to legitimate expectation and right to property as provided under Article 40 of *the Constitution*, in that, the decision by the Respondent will affect the businesses in Nyahururu in terms of the profit they would have made by hosting the festival thereby undermining their rights to property.
55. A cursory look at the substratum of the Petition readily reveals that what the Petitioner complains of is an administrative action taken by the Respondents and which the Petitioner holds as adversely affecting it. It is a grouse that finds a ready remedy under the *Fair Administrative Action Act* and from another angle, restitution of rights can be achieved in an ordinary civil claim by way of injunction and damages. Falling back onto the decision in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [supra] and borrowing from the words of Kentridge AJ IN S v Mhlungu I would reiterate as a general principle, where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed. [See also Gabriel Mutava & 2 Others v Managing Director Kenya Ports Authority and Another [2016] eKLR & National Assembly v James Njenga Karume [1992] eKLR
56. Thus, not every infraction should invite a constitutional petition. Care must taken not to inundate the courts with a myriad of constitutional petitions where indeed legislation has provided other mechanisms for redress. Granted, if one was to nitpick, in every dispute between citizens, citizens and government or corporations against either, be it civil or criminal, there exists an element of a breach of a right that is protected under *the constitution*. As seen above useful guidance on parameters to sieve what musters the threshold of a constitutional petition can be gleaned from the holding of Mativo J (as he then was) in CNM v WMG [supra] and it behoves on the parties to choose jurisdiction wisely when instituting suits.
57. And in choosing jurisdiction a party must bear in mind that not every infringement and/or violation of a right qualifies to be taken up as a Constitutional petition or necessarily requires resolution by a constitutional court. Where there are alternative remedies that could be pursued through the ordinary Civil Courts, such remedies ought to be pursued. The present matter has the hallmarks of a Civil dispute that ought to be pursued through the ordinary Courts of Law and not to be couched as a Constitutional Petition.



58. The court is ultimately of the view that constitutional litigation is not open for every claim which may properly be dealt with under the alternative existing mechanism for redress in Civil or Criminal Law. From the facts of this suit and the exposition above am satisfied that the doctrine of avoidance is applicable in this suit.
59. With the result that the preliminary objection succeeds on the basis of the application of the doctrine of avoidance. The preliminary objection is hereby allowed and the Petition dismissed. In the circumstances of this case, I make no orders as to costs.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 16TH DAY OF OCTOBER 2024

A.K. NDUNG’U

JUDGE

