



**Speaker, County Assembly of Siaya County v Nation Media Group Limited
(Constitutional Petition E245 of 2021) [2023] KEHC 1609 (KLR)
(Constitutional and Human Rights) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1609 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E245 OF 2021**

AC MRIMA, J

MARCH 9, 2023

BETWEEN

SPEAKER, COUNTY ASSEMBLY OF SIAYA COUNTY PETITIONER

AND

NATION MEDIA GROUP LIMITED RESPONDENT

RULING

1. The instant ruling relates to an application taken out by the Respondent by way of Notice of Motion. It is dated 25th October, 2021.
2. The application seeks to strike out the Petition on the ground that the Petition is a defamation claim which is disguised as a constitutional Petition. The application is supported by the affidavit one Sekou Owino sworn on 25th October, 2021.
3. The Respondent/Applicant also filed written submissions and a List of Authorities in further support to the application.
4. The Petitioner is diametrically opposed to the application. It filed a Replying Affidavit sworn by one George Okode on 21st December, 2021, written submissions and a List of Authorities.
5. The application was heard by way of written submissions, hence, this ruling.
6. This Court has carefully considered the application, the response, the parties' submissions and the authorities referred to. What is now for determination is whether the Petition ought to be struck out for being passed on as a constitutional Petition instead of an ordinary civil claim on defamation.



7. This matter focuses on the parameters of constitutional Petitions. Articles 22 and 258 of *the Constitution* remain the anchor provisions relating to the locus standi in instituting Petitions.

8. *The Constitution*, the law as well as Courts have expressed themselves on the manner in which Petitions ought to be presented to Court. *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (commonly referred to as ‘the Mutunga Rules’) provide for the contents of Petitions. Rule 10 thereof provides seven key contents of a Petition as follows: -

Form of petition.

(1) 10. An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.

(2) The petition shall disclose the following—

(a) the petitioner’s name and address;

(b) the facts relied upon;

(c) the constitutional provision violated;

(d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;

(e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;

(f) the petition shall be signed by the petitioner or the advocate of the petitioner; and

(g) the relief sought by the petitioner.

9. Rule 10(3) and (4) of the Mutunga Rules also have a bearing on the form of Petitions. They provide as follows: -

(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.

10. Rules 9 and 10 are on the place of filing and the Notice of institution of the Petition respectively.

11. The Supreme Court in *Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others* (2014) eKLR had the following on Constitutional Petitions: -

Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru vs. Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.



12. The conduct of constitutional Petitions is also guided by various laws. For instance, the Evidence Act applies to matters generally relating to evidence. The Evidence Act is clear on its application to constitutional Petitions and affidavits in Section 2 thereof. The provision provides as follows: -
 1. This Act shall apply to all judicial proceedings in or before any Court other than a Kadhi's Court, but not to proceedings before an arbitrator.
 2. Subject to the provisions of any other Act or of any rules of Court, this Act shall apply to affidavits presented to any Court.

13. Sections 107(1), (2) and 109 of the Evidence Act are on the burden of proof. They state as follows:

107(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.

and

109. Proof of particular fact

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.

14. A Constitutional and Human Rights Court is supposed to exclusively deal with constitutional issues. Courts have defined what constitutional issues are. In *Fredricks & Other vs. MEC for Education and Training, Eastern Cape & Others* (2002) 23 ILJ 81 (CC), the Constitutional Court of South Africa rightly so, delimited what a constitutional issue entails and the jurisdiction of a Constitutional Court as follows: -

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... 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 issues. So too is the question of the interpretation of any legislation or the development of the common law 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 on extensive jurisdiction...

15. In the United States of America, a constitutional issue refers to any political, legal, or social issue that in some way confronts the protections laid out in the US Constitution.

16. Taking cue from the foregoing, and broadly speaking, a constitutional issue is, therefore, one which confronts the various protections laid out in a Constitution. Such protections may be in respect to the Bill of Rights or the Constitution itself. In any case, the issue must demonstrate the link between the



- aggrieved party, the provisions of *the Constitution* alleged to have been contravened or threatened and the manifestation of contravention or infringement.
17. Summing it up in the words of Langa, J in *Minister of Safety & Security vs. Luiters*, (2007) 28 ILJ 133 (CC): -
 - ... 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 and values...
 18. Whereas it is largely agreed that *the Constitution* of Kenya, 2010 is transformative and that the Bill of Rights has been hailed as one of the best in any Constitution in the world, as Lenaola, J (as he then was) firmly stated in *Rapinder Kaur Atal vs. Manjit Singh Amrit* case (supra) ‘... Courts must interpret it with all liberation they can marshal...’
 19. Resulting from the above discussion and the definition of a constitutional issue, this Court agrees with the position in *Turkana County Government & 20 Others vs. Attorney General & Others* (2016) eKLR where a Multi-Judge bench affirmed the profound legal standing that claims of statutory violations cannot give rise to constitutional violations.
 20. Returning to the matter at hand, this Court has closely scrutinized the Petition. The heart of the Petition seems to be anchored on Article 35(2) of *the Constitution*. The provision states as follows: -
 35. Access to information:
 - (2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.
 21. On the basis of the foregoing provision, the Petitioner pleaded in paragraphs 24 and 25 of the Petition as follows: -
 24. The Petitioner and the MCAs disputed the veracity of the information published by the Respondents and sort (sic) deletion/rectification of the same via letters evenly dated 4th June 2020 addressed to the 1st and 2nd Respondents.
 25. As at the time of filing the Petition, the Respondent was yet to delete the misleading, false and malicious publications from its digital platforms.
 22. It is apparent that the Petitioner’s claim is based on Article 35(2) of *the Constitution* where it is pursuing the correction or deletion of information which the Petitioner perceives it as untrue or misleading.
 23. The Petition has, therefore, attained the threshold discussed in *Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others* case (supra) since it has established the link between the Petitioner and the provisions of *the Constitution* alleged to have been contravened. What remains is the proof of the manifestation of contravention or infringement of the alleged Article 35(2) of *the Constitution* which shall be undertaken at the hearing of the Petition.
 24. The Petition as presented before Court is, hence, not a defamatory claim. It is a pleading raising a constitutional issue and calls for this Court’s intervention.
 25. Having said so, the application can only be misplaced. Consequently, the following final orders do hereby issue: -
 - a. The Notice of Motion dated 25th October, 2021 is hereby dismissed.



b. The Respondent shall bear the costs of the application.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 9TH DAY OF MARCH, 2023.

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Mr. Carrey Francis, Learned Counsel for the Petitioner.

Mr. Ochieng, Learned Counsel for the Respondent.

Regina/Chemutai – Court Assistants

