



**Gandhi v UBA Kenya Bank Limited & 2 others (Constitutional Petition E483 of 2022)
[2023] KEHC 17492 (KLR) (Constitutional and Human Rights) (19 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17492 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E483 OF 2022**

M THANDE, J

MAY 19, 2023

BETWEEN

SATYA BHAMA GANDHI PETITIONER

AND

UBA KENYA BANK LIMITED 1ST RESPONDENT

**THE DEPUTY REGISTRAR MILIMANI HIGH COURT, COMMERCIAL & TAX
DIVISION 2ND RESPONDENT**

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. The Petitioner herein filed a Petition dated 21.10.22 seeking the following orders:
 - a. A declaration that the respondents violated Articles 2(1), 3(1), 10, 19, 20, 21, 27, 28, 29, 39, 40, 43, 47, 48 and 50 of *the Constitution* as well as the provisions of Chapter Six of *the Constitution* of Kenya, 2010.
 - b. A declaration that the ordered arrest and committal to civil jail of the petitioner in the manner proposed is unfair, discriminatory, an abuse of the process of the Court, irrational, unreasonable, malicious, vexatious, oppressive and therefore unconstitutional and unsustainable.
 - c. An order that the 2nd respondent failed to consider the provisions of the law regarding the execution and arrest and committal to civil jail of a judgment debtor.



- d. An order be made setting aside the 2nd respondents orders of the 31st day of May 2022 seeking the arrest and committal to civil jail to the petitioner.
 - e. An order stopping the 1st respondent from proceeding with parallel execution against the petitioner as the same is illegal, arbitrary and unlawful and violates the petitioner's freedoms and rights under *the Constitution* of Kenya 2010.
 - f. An order that the action of the trial court of making the petitioner defendant in suit where she had initiated as plaintiff was erroneous and violate the petitioner's rights and fundamental freedoms to a fair hearing and fair administrative action as envisaged under Article 50 and 47 of *the Constitution* of Kenya 2010.
 - g. An order that the actions of the trial court of proceeding with the hearing against the petitioner alone without the substitution of the other defendants in Milimani High Court Commercial Civil suit No. 171 of 2014 as consolidated with High Court Commercial Court Civil case No. 20 of 2016 and entering judgment against all the defendants jointly and severally violated the petitioner's rights to a fair hearing as there was need for the other defendants' representatives to be made part of the suit before its determination.
 - h. Any other relief that the court may deem just and expedient in the circumstances.
 - i. That the costs of this petition be borne by the respondents.
2. In opposition to the Petition, the 1st Respondent filed an Application dated 20.1.23, pursuant to Article 165(6) and 162(1) of *the Constitution* and Order 2 Rule 15 of the Civil Procedure Rules, seeking orders that:
1. Spent
 2. This Honourable Court be pleased to strike out the petition herein for want of jurisdiction and being an abuse of the court process.
 3. This Honourable Court be pleased to order that the petitioner and her advocate bear the costs of this petition.
 4. Honourable Court be pleased to issue any other orders/ reliefs as it may deem just and expedient in the circumstances of this case.
3. The Application is premised on the grounds on its face and the supporting affidavit of Micky Matheka, the 1st Respondent's Ag. Company Secretary and Head of Legal, sworn on even date. In summary the grounds are that, the Petition seeks to challenge, set aside and/or declare as unconstitutional the decision of the High Court Commercial and Tax Division, to consolidate High Court Commercial Civil Suit No. 171 of 2014 and High Court Commercial Civil Suit No. 20 of 2016 as well as the decision to proceed with hearing of the main suit against the Petitioner after the death of Prieya Darshani and striking out from the companies register, of Mits Electrical Company Limited who were the Petitioner's co-defendants in the suit before the Commercial Division. The Petition further challenges the subsequent execution process before the Deputy Registrar by way of notice to show cause why the Petitioner herein should not be arrested and committed to civil jail. It is the 1st Respondent's case that the Commercial and Tax Division of the High Court is a superior court of



concurrent jurisdiction with this Court. By dint of Article 165(6) of *the Constitution*, this Court lacks jurisdiction to exercise its supervisory jurisdiction over it. Further, that the Petition raises issues that are subject or ought to be the subject of appeals which the Petitioner has pursued. The Petitioner filed Civil Application No. E 397 of 2020 in the Court of Appeal. She was granted conditional stay of execution and was required to deposit security of USD 200,000 and file appeal within 30 days but failed to comply. She later filed Civil Application No. E 129 of 2022 seeking additional time to file appeal and was granted leave to file the appeal within 30 days, but is again yet to comply.

4. The 1st Respondent accused the Petitioner of filing numerous suits and applications all intended to frustrate the 1st Respondent in pursuing a debt owed to it and confirmed by a judgment for the sum of USD 427,400.68 issued by the High Court, Commercial and Tax Division. The Petitioner filed High Court Commercial Civil Appeal Number E072 of 2022 against the decision of the Deputy Registrar to commit her to civil jail which was determined on 10.11.22. In spite of this, she is now challenging the same decision before this Court, an action which is res judicata.
5. The 1st Respondent contended that the Petitioner is a vexatious litigant who is perennially abusing the court process to frustrate all attempts by the 1st Respondent to recover a loan amount advanced to her, in the sum of USD 427,400.68. In Judicial Review Misc. Civil Application No. 685 of 2017 Mativo, J. ordered her and her advocate to jointly bear the costs of the Judicial Review. The Petition herein is thus a gross abuse of this court's process and should be struck out. Further that appropriate sanctions should be issued to deter the Petitioner and the advocate from continually abusing the court process.
6. The Petitioner opposed the Application vide grounds of opposition dated 1.2.23 and her replying affidavit sworn on 9.2.23. The grounds raised are that the application is bad in law, vexatious, malicious and an abuse of the due process of this court; that the 1st Respondent has approached the Court with dirty hands, is guilty of laches and that the Application is an afterthought; that granting the orders sought would deny her the right to a fair hearing as encapsulated in Article 50(2) of *the Constitution*. She urged that the Application be struck out with costs and that the Court gives directions on the hearing of the Petition.
7. The Petitioner reiterated the contents of the grounds of opposition in her replying affidavit and denied all the allegations in the Application. She contended that the Petition challenges the infringement of her right to a fair trial by the Deputy Registrar of this Court in proceeding with multiple modes of execution against her, which this Court is well placed to stop, by exercising its powers under Article 165(3) (b) and (6) of *the Constitution*.
8. The 2nd and 3rd Respondents did not oppose the Application.
9. The record shows that the genesis of this matter was High Court Commercial Civil Suit No. 171 of 2014 consolidated with Civil Case No. 20 of 2016 wherein Majanja, J. delivered a judgment dated 3.2.2020 in favour of the 1st Respondent, which was the plaintiff therein. The Petitioner being dissatisfied with the decision filed Civil Application No. E129 of 2022 before the Court of Appeal, seeking leave to file appeal out of time and which was pending ruling on 4.11.22. On the other hand, the 1st Respondent proceeded with execution and took out a notice to show cause dated 13.1.22 against Mits Company Limited, the deceased co-director, Prieya Darshani Gandhi and the Petitioner, by way of attachment and sale by public auction of their moveable assets. In another notice to show cause of 19.1.22, the 1st Respondent sought to execute against Mit Electrical Company, the deceased co-director Prieya Darshani Gandhi and the Petitioner by way of arrest and committal to civil jail for failure to settle the decretal sum of USD 749,777,89 and USD 2,182,830.12.



10. The Petitioner states that she explained to the 2nd Respondent her inability to pay the decretal sum due to the fact that the co-director who took out the facility from the 1st Respondent had died, making it difficult to sustain the company and collect any payments to satisfy the decree. She also informed the 2nd Respondent that she was suffering from high blood pressure and bipolar hence not fit to be committed to civil jail. This notwithstanding, the 2nd Respondent proceeded anyway and in its ruling of 31.5.22, directed that the Petitioner be arrested and committed to civil jail on account of failure to pay the decretal amount stated in the notice to show cause. Being dissatisfied, the Petitioner filed High Court Commercial Civil Appeal Number E072 of 2022 which was determined vide ruling of 10.11.22. She further filed an application dated 3rd June 2022 seeking interim orders of stay of execution or suspension of the 2nd Respondent's orders, pending the hearing and determination of the application and the court granted status quo orders on 10.6.22. The Petitioner claimed that during the pendency of the same, the 1st Respondent on 6.9.22 instructed auctioneers to collect the debt due. She therefore avers that the 1st and 2nd Respondents' actions violated her constitutional rights. She additionally contends that the 2nd Respondent violated Order 22 Rule 34 and 35 of the Civil Procedure Rules 2010; Article 11 of the United Nations International Covenant of Civil and Political Rights; Section 39 of the *Civil Procedure Act*, Cap 21 Laws of Kenya and Articles 3(1), 27, 50, 29, 39, 43 47 of *the Constitution* while the 1st Respondent violated Articles 40 and 3(1) of *the Constitution*.
11. I have carefully considered the parties' respective pleadings and submissions. The following issues arise for determination:
- i. Whether this court has jurisdiction to hear and determine this matter.
 - ii. Whether the Petition is an abuse of the court process.
 - iii. Whether the Petitioner and her advocate should be ordered to pay costs.

Whether this Court has jurisdiction to hear and determine this matter

12. Article 162(1) of *the Constitution* of Kenya, 2010 provides that the Superior Courts are the Supreme Court, the Court of Appeal, the High Court, the Employment and Labour Relations Court and the Environment and Land Court. establishes the High Court is established under Article 165.
13. The law, is that a court may only exercise that jurisdiction which has been conferred upon it by *the Constitution*, statute or both. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR the Supreme Court succinctly stated:

A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.

14. Jurisdiction is everything. Jurisdiction is what gives a court the power, authority and legitimacy to entertain a matter before it. The locus classicus on jurisdiction, is the oft cited case of Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd [1989] KLR 1., where Nyarangi, JA. famously stated:

Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending



other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.

15. This Court derives its jurisdiction principally from Article 165 of *the Constitution* which provides as follows:

- (3) Subject to clause (5), the High Court shall have—
 - (a) unlimited original jurisdiction in criminal and civil matters;
 - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191; and
- (e) any other jurisdiction, original or appellate, conferred on it by legislation.
- (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
- (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

16. A careful perusal of the Petition will show that it challenges the decision of the Deputy Registrar in the execution proceedings., in which she was committed to civil jail. The position is that vide a decision on 10.11.22 in Civil Appeal No. E072 of 2022 which she had filed, the ruling of the Deputy Registrar was quashed. The said appeal had not been determined at the time of filing the Petition herein.



17. The Petitioner also challenges the decision of the Commercial and Tax Division of the High Court in consolidating the 2 suits before it and making her a defendant in a suit she had initiated as plaintiff. She also challenges the decision of the said court to proceed with the hearing against her alone without substitution of the other defendants. The question on the table therefore is whether this Court can exercise its jurisdiction over the decision of a court of concurrent jurisdiction.
18. Article 165(6) of *the Constitution*, confers supervisory jurisdiction upon this Court over subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but clearly stipulates that this Court has no supervisory jurisdiction over a superior court. Accordingly, any challenge to the decision of the High Court in the consolidated cases in question cannot be brought before this Court or entertained herein. In this regard, I am duly guided by the decision of *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR where the Court of Appeal stated:

In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.

19. More recently, in the case of *Robert Alai Onyango v Cabinet Secretary in Charge of Health & 7 others* [2017] eKLR, Mwita, J. held as follows:

There seems to be a general misconception among some legal practitioners, litigants, and a section of members of the public that this court, sitting as Constitutional and Human Rights Division of the High Court, has special jurisdiction to supervise superintend or direct other superior courts. Granted, the High Court has jurisdiction under Article 165 (6) to supervise subordinate courts and any person, body or authority exercising a judicial or quasi-judicial functions. The court also has jurisdiction to redress violation and infringement of fundamental rights under the Bill of Rights. However, sub Article (6) is clear that the High Court has no supervisory jurisdiction over superior courts. Superior courts in terms of Article 162 (1) are the Supreme Court, Court of Appeal, High Court and Courts of Equal status. Courts of equal status are those courts mentioned under Article 162(2); that is; Employment and Labour Relations Court and Environment and Land Court.

20. Faced with a similar matter in the case of *Robert Mwangi v Shepherd Catering Limited & another* [2012] eKLR, Ngugi, J. (as she then was) stated:

27. I do not know how often and for how long this has to be repeated: that the Constitutional and Human Rights Division of the High Court is just an administrative Division of the High Court, with the same powers and jurisdiction as all the other Divisions of the High Court. As Justice Lenaola recently stated in the case of *Philip Kipchirchir Moi -v- Attorney General & Another* Petition No. 65 of 2012 at paragraph 15:

‘.....I must begin by dispelling the fallacy that the Constitutional and Human Rights Division of the High Court in Nairobi has jurisdiction to superintend, supervise, direct, guide, shepherd and/or purport to mend the mistakes, real or perceived, of other Divisions of the High Court in Nairobi or elsewhere in Kenya. In spite of the continued and consistent stand of judges of that Division that it cannot have been the intention of the framers of *the*



Constitution that such a position should exist, parties in every conceivable case, continue to invoke that fallacious and misguided jurisdiction. (Emphasis Mine)

28. After setting out the provisions of Article 165 which I have set out above, Justice Lenaola went on to state at paragraph 18 of his ruling as follows:

‘Nowhere is there mention of the “Constitutional Court” in the above Article or indeed in the whole Constitution. Neither is there mention of a superior Division of the High Court called the “Constitutional and Human Rights Division,” with wide powers over other Divisions or Stations of the High Court.’

29. This message must be brought home to litigants, and the duty to do this lies with their legal counsel. If a party is dissatisfied with a decision or conduct of a judge sitting in any Division or station of the High Court, and alleges that there has been a violation of his or her constitutional rights, the alleged violation must be raised before the judge of the High Court seized of the matter. If the party is still not happy with the decision of that Court, then his or her remedy lies in the Court of Appeal, and from there, the Supreme Court, as provided in the Constitution and the relevant legislation. These are the Courts in our system of courts to which appellate jurisdiction is vested.

21. The consolidated cases in question were heard and determined by a Judge sitting in the Commercial and Tax Division of the High Court. What the Petitioner is seeking is that this Court redresses what she claims is infringement of her rights by the said Judge. As stated by the learned Judges before me, the Constitutional and Human Rights Division has coordinate jurisdiction with other Divisions of the High Court. Accordingly, a Judge sitting in this Division has no powers to superintend, supervise, direct, guide, shepherd and/or purport to mend the mistakes, real or perceived, of Judges sitting in other Divisions of the High Court, including the Commercial and Tax Division. To ask this Court therefore, to entertain a matter that was before another Judge of the High Court is to ask the Court to exercise a jurisdiction it does not have and therefore engage in a nullity. Accordingly, this Court lacking jurisdiction to entertain the Petition has no power to make one more step and must down its tools.

Whether the Petition is an abuse of the court process

22. It is the 1st Respondent’s contention that the Petition is an abuse of the court process, has no jurisdictional foundation or lawful and logical backing. Further that appeals have been filed on the same issues raised in the Petition. Reliance was placed on the decisions in the cases of Kenya Section of the International Commission of Jurists vs Attorney General and 2 others [2012] eKLR; Robert Chesang & 2 others v Gaetano Ruffo & 8 others [2013] eKLR and Kennedy Mwaura Kibebe & 3 others v Annie Wanjiku Kibeh & 3 others [2021] eKLR

23. On abuse of the court process, the Petitioner submitted she has invoked the provisions of Articles 22 and 258(1) of the Constitution to exercise her rights under Articles 28, 29, 39 and 50 of the Constitution. Her assertion is that from the decision in the case of Centre for Rights Education & Awareness (CREAW) v Attorney General & Another [2015] eKLR and that of of Majanja, J. on 10.11.22 in respect of her appeal against the Deputy Registrar’s decision, it can be argued that at the time she filed the petition, her rights had been violated or there was a threat of being violated. She therefore cannot be said to have abused the due process of this court.



24. The concept of abuse of the court process has been the subject of many a decision by our superior courts. In the case of Kenya Section of the International Commission of Jurists v Attorney-General & 2 others [2012] eKLR the Supreme Court stated:

(36) The concept of “abuse of the process of the Court” bears no fixed meaning, but has to do with the motives behind the guilty party’s actions; and with a perceived attempt to manoeuvre the Court’s jurisdiction in a manner incompatible with the goals of justice.

(37) The bottom line in a case of abuse of Court process is that, it “appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption...” [D.T. Dobie & Company (Kenya) Ltd. v. Muchina [1982] KLR 1 – per Madan, JA at p.9]. Beyond that threshold, lies an unlimited range of conduct by a party that may more clearly point to an instance of abuse of Court process. As an example, the Court of Appeal held in Nishith Yogendra Patel v. Pascale Miraille Baksh & Another [2009] eKLR that:

“[W]e are of the view that the application before us is an abuse of...Court process..., by pursuing the same remedies in parallel Courts which are competent to deal with the application. Such conduct must be deprecated and discouraged. It is for that reason that we order that the notice of motion...is hereby struck out.”

25. And in Satya Bhama Gandhi v Director of Public Prosecutions & 3 others [2018] eKLR, Mativo, J, (as he then was) had this to say on what amounts to abuse of the court process:

23. The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

- a. Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
- b. Instituting different actions between the same parties simultaneously in different court even though on different grounds.
- c. Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.
- d. Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.
- e. Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.[13]



- f. Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.
 - g. Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.
 - h. Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.[14]
26. The learned Judge went on to state:
- 26. It's settled law that a litigant has no right to pursue paripassu two processes which will have the same effect in two courts either at the same time or at different times with a view of obtaining victory in one of the process or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks.
 - 27. It is not open for the applicant herein to institute these Judicial Review proceedings after losing the Petition challenging the same criminal trial. The two processes are in law not available to the applicant. He ought to have appealed against the above-mentioned decision if he was dissatisfied. The Applicant cannot lawfully file this Judicial Review proceedings and seek similar reliefs relying on substantially the same grounds as the Petition referred to above. The pursuit of the second process, that is this Judicial Review Application constitutes and amounts to abuse of court/legal process." [17]
 - 28. Multiplicity of actions on the same matter between the same parties even where there exist a right to bring the action is regarded as an abuse.[18] The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right per se. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interfere with the administration of justice.[19] I find no difficulty in concluding that this Judicial Review Application is based on similar grounds as the Petition referred to above.
27. It is common ground that the Petitioner has filed parallel proceedings. She filed the Petition herein while she was still litigating in the Court of Appeal and awaiting ruling on an application as indicated herein. Additionally, at the time of filing this Petition, the Petitioner had already filed Civil Appeal No. E072 of 2022 against the Deputy Registrar's decision, which was still pending, seeking similar orders. After losing in the Commercial and Tax Division and before the Deputy Registrar in the same Division, it was not open for the Petitioner to institute constitutional proceedings challenging the decisions in question. Her redress lay in appealing the said decisions, which she in fact did. It is therefore baffling that she would during the pendency of the appeals both in the Court of Appeal and the High Court, approach this Court over the said decisions in the guise of a constitutional petition. This is a clear abuse of the Court process, a classic case of litigating in instalments and forum shopping What the Petitioner is seeking is to "maneuver the Court's jurisdiction in a manner incompatible with the goals of justice". This, the Court cannot countenance.
28. Having found, as I have, that the Petition is an abuse of the Court process, the authorities cited by the Petitioner, which are anchored on the premise that there is a competent petition before me, are not useful.



Whether the Petitioner and her advocate should be ordered to pay costs

29. It is the 1st Respondent's case that the Petitioner has a history of abusing the court process, to the extent that in *Satya Bhama Gandhi vs Director of Public Prosecutions & 3 others* (2018) eKLR, the court ordered that she and her advocate bear the cost of the suit. The 1st Respondent urged that similar orders be issued and that the Application be allowed in its entirety.
30. The Petitioner submitted that her rights were under threat of being violated by the Deputy Registrar, which was confirmed by the ruling in High Court Civil Appeal No. E072 of 2022. She maintained that her Petition is merited and that she was entitled to costs. She relied on Rule 26 of the Mutunga Rules and the case of *Feisal Hassan & 2 others v Public Service Board of Marsabit County & another* [2016] eKLR, to buttress her position.
31. It is trite law that costs follow the event and are at the discretion of the court. This is the general principle particularly in civil litigation. (See *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR and *Mohammed Mahamud Ali v Independent Electoral and Boundaries Commission* [2019] eKLR).
32. In constitutional petitions, the award of costs is provided for under Rule 26 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 as follows:
 1. The award of costs is at the discretion of the Court.
 2. In exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms.
33. The award of costs is discretionary. Rule 26(2) enjoins the Court to exercise its discretion with regard to costs, in a manner that ensures that every person has access to the court to determine their rights and fundamental freedoms. Differently put, the Court must be mindful that an award of costs does not become a deterrent or hinderance in accessing the court for enforcement of rights or of *the Constitution*. This was the holding in *Feisal Hassan & 2 others v Public Service Board of Marsabit County & another* [2016] eKLR where Muriithi, J. stated:
 3. In constitutional litigation, the principle of access to the court must, consistently with the public importance and interest in the observance and enforcement of the Bill of Rights in *the Constitution*, override the general principle that costs follow the event, unless it can be shown that the petition was wholly frivolous, or that petitioner was guilty of abuse of the constitutional court process by say filing a constitutional petition on matters that do not raise purely constitutional issues and which properly belonged to other competent courts or tribunals, and which should, therefore, have been filed and competently disposed of by those other courts or tribunals. However, a petitioner for constitutional enforcement need not present a case that must succeed and it cannot therefore, be taken against him that his petition is eventually lost if it otherwise meets the public interest criteria. Although developed in the realm of protection and enforcement of rights and fundamental freedoms, the principle applies with the same force in general constitutional litigation for interpretation and enforcement of *the Constitution*. Indeed, the rights of access to court under Article 22 and 258 of



the Constitution for the enforcement, respectively, of the Bill of Rights and the other parts of the Constitution are in the same terms.

34. I agree with the learned Judge that the right of access to the court for determination of a person's rights and fundamental freedoms overrides the general principle that costs follow the event. However, where it has been shown that a petition is wholly frivolous and an abuse of the court process, then the principle does not apply.
35. In the present case, it has been demonstrated to the satisfaction of the Court that the Petition herein is an abuse of the court process. What is disturbing about this Petition is that the same has been filed by an advocate who has been on record for the Petitioner in the other suits. As an officer of this Court, the advocate has a fundamental duty while representing his client's interests, to at all times uphold the rule of law and administration of justice in accordance to his oath of office. The Petitioner's advocate cannot blindly follow his client's instructions in total disregard to his duty to the Court. He was obligated to educate and advise the Petitioner about the court processes and that the filing of multiplicity of suits is an abuse of process.
36. In the case of *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others* [2018] eKLR, in which the Petitioner was the applicant, Mativo, J. (as he then was) found that she and her advocate had abused the court's process. The learned Judge set out the duty of counsel to the Court as follows:
35. A lawyer's duty to the court relates to his or her status as a professional who serves, not only clients, but also the public interest. On admission to the Roll of Advocates, lawyers take an oath in the name of the Almighty God to and to discharge their duties as advocates of the High Court of Kenya.
37. A lawyer's duty to the court also helps define the limits of the zealous representation of a client. The need to create ethical boundaries within an adversarial system was addressed by Gavin MacKenzie in his article *The ethics of advocacy* thus:-
- “Adversarial tactics tend to escalate despite the best of intentions in a competitive system. Lawyers adopt adversarial tactics...because to refrain from doing so would put their clients at a competitive disadvantage relative to the clients of lawyers who show no such restraint... We should be sceptical of justifications of questionable conduct that appeal to the ethics of the adversary system.” [27]
38. We can distil a lawyer's duty to the court to three:- (a) to use tactics that are legal, honest and respectful to courts and tribunals; (b) to act with integrity and professionalism while maintaining his or her overarching responsibility to ensure civil conduct; and (c) to educate clients about the court processes in the interest of promoting the public's confidence in the administration of justice. [28]The duty to the court is also important because there are consequences for lawyers who do not uphold it.
39. One such consequence is that the lawyer can be ordered to pay costs personally. I find that this is a proper case for such an order. Consequently, I dismiss this Judicial Review application with costs to the first Respondent and the Interested Party and order that the applicant and his advocate shall jointly pay the costs of these proceedings on a 50-50 basis. Such costs to be assessed by the taxing master of this Court.
37. I associate with the findings of the learned Judge. I find that the Petitioner's advocate's conduct in the present case is wanting. He led his client in filing the Petition, which is a clear abuse of the court process.



This Court must discourage such conduct by an advocate of this Court and protect itself from such abuse. Directing counsel to personally bear costs is one of the means of achieving this.

38. In the end and in view of the foregoing, I determine that the Application dated 20.1.22 is merited and is hereby granted with the result that the Petition dated 21.10.22 is hereby struck out with costs, which shall be borne by the Petitioner and her advocate equally.

DATED AND DELIVERED IN NAIROBI ON 19TH DAY OF MAY 2023

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M. THANDE

JUDGE

In the presence of: -

..... **for the Petitioner**

.....**for the 1st Respondent**

.....**for the 2nd & 3rd Respondents**

.....**Court Assistant**

