Kipkoti & 2 others (Suing on their Own Behalf and as Officials and Representatives of Dik Dik Gardens Residents Association) v Deputy and Acting Governor of Nairobi City County Government & 3 others (Constitutional Petition E202 of 2021) [2023] KEHC 22325 (KLR) (Constitutional and Human Rights) (21 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22325 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION E202 OF 2021

AC MRIMA, J

SEPTEMBER 21, 2023

BETWEEN

ARNOLD KIPKOTI ..... 1ST PETITIONER

ADAN KANCHORO MULATA ..... 2ND PETITIONER

ANUJ RAJANI ..... 3RD PETITIONER

SUING ON THEIR OWN BEHALF AND AS OFFICIALS AND REPRESENTATIVES OF DIK DIK GARDENS RESIDENTS ASSOCIATION

AND

DEPUTY AND ACTING GOVERNOR OF NAIROBI CITY COUNTY GOVERNMENT ..... 1ST RESPONDENT

NAIROBI CITY COUNTY GOVERNMENT EXECUTIVE COMMITTEE MEMBER FOR ROADS, PUBLIC WORKS AND TRANSPORT .... 2ND RESPONDENT

NAIROBI CITY COUNTY GOVERNMENT ..... 3RD RESPONDENT

FRANCIS ATWOLI ..... 4TH RESPONDENT

High Court revokes the decision to re-name the Dik Dik Road to Francis Atwoli Road for want of public participation, stakeholders' engagement and administrative fair procedures

The petition challenged the decision to rename 'Dik Dik Road' to 'Francis Atwoli Road'. The court held that the Data Protection Commissioner lacked the jurisdiction to interpret the Constitution. The court noted that the decision to re-name the impugned road called for public engagement prior to being made. Such processes would have been carried out in Parliament or in the County Assembly of the Nairobi City County. The court held that

the 4th respondent, having been informed of the intention to re-name the impugned road in his favour, was under a duty to ensure that the re-naming was within the Constitution and the law.

Reported by Kakai Toili

Constitutional Law *– national values and principles – public participation - claim that a road was renamed without public participation - whether a decision to rename a road required public participation - whether a person who had been informed of an intention to re-name a road in his/her favour was under a duty to ensure that the re-naming was within the law – Constitution of Kenya, 2010, articles 3, 10(2), 47, 174 and 232(1)(d) and (h).*

Constitutional Law *– fundamental rights and freedoms – right to equality and freedom from discrimination - whether differential treatment was necessarily discrimination – Constitution of Kenya, 2010, article 27.*

Jurisdiction *– jurisdiction of the Data Protection Commissioner – jurisdiction to interpret the Constitution - whether decisions of the Data Protection Commissioner on the interpretation of the Constitution were binding – Constitution of Kenya, 2010, articles 31(c) and (d).*

Constitutional Law *– interpretation of the Constitution vis a vis determining denial, violation, infringement or threat to a right or fundamental freedom – distinction - what was the distinction in determining denial, violation, infringement or threat to a right or fundamental freedom and the interpretation of the Constitution.*

Jurisdiction *– jurisdiction of the High Court - jurisdiction to determine allegations of infringement on the right to information - whether the jurisdiction of the High Court could be invoked in respect to allegations of infringement on the right to information under article 35 of the Constitution before exhausting the avenues provided by the Data Protection Act - Constitution of Kenya, 2010, article 35.*

Brief facts

The petitioners were aggrieved that the 1st, 2nd, 3rd and 4th respondents, without seeking concurrence of the petitioners uprooted the road sign post bearing the name 'Dik Dik Road' and replaced it with another post with the name 'Francis Atwoli Road' and immediately after announced that the road shall henceforth be renamed 'Francis Atwoli Road'. The petitioners sought to challenge renaming of the road by the respondents. The petitioners posited that the road was maintained and used by the petitioners and members of public visiting the estate and any administrative action by any Government agency must be done with prior notice, concurrence, participation and or having heard and considered the petitioners and its member's opinion.

The petitioners contended that the 1st to 3rd respondents' decision with concurrence of the 4th respondent to rename the road was devoid of public participation from concerned members of the public, the petitioners and discriminative of the petitioners. It was further the petitioner's case that the respondents actions were devoid of the values enshrined in the Constitution that called for equitable sharing of resources and accountable exercise of power. The petitioners prayed for among other orders a declaration that the respondents' administrative actions to rename the road were to contrary the provisions of Fair Administrative Action Act, County Government Act and the Constitution.

Issues

i. Whether a decision to rename a road required public participation.
ii. Whether a person who had been informed of an intention to re-name a road in his/her favour was under a duty to ensure that the re-naming was within the law.
iii. Whether differential treatment was necessarily discrimination.
iv. Whether decisions of the Data Protection Commissioner on the interpretation of the Constitution were binding.
v. What was the distinction in determining denial, violation, infringement or threat to a right or fundamental freedom and the interpretation of the Constitution?
vi. Whether the jurisdiction of the High Court could be invoked in respect to allegations of infringement on the right of access to information under article 35 of the Constitution before exhausting the avenues provided by the Data Protection Act.

Held

1. From a reading of the petition, there was a profound link between the petitioners, the provisions of the Constitution alleged to have been contravened and the manifestation of contravention or infringement. The petition, properly so, raised several constitutional issues.
2. It was only the High Court and courts of equal status which could interpret the Constitution. The issue at hand was the constitutionality of the impugned actions which were undertaken by the respondents. The County Assembly, as a forum, lacked the quality of audience which was proportionate to the interests which the petitioners wished to advance. Such a forum could not thereby oust the jurisdiction of the High Court.
3. The court was constitutional-bound under article 165(3)(d) of the Constitution to stand by its calling and it could not run away from such a constitutionally-decreed mandate. To that end, the doctrine of exhaustion did not apply in the unique circumstances of the matter. Notwithstanding section 88(1) of the County Governments Act, the High Court had the jurisdiction to consider the petition.
4. Article 27 of the Constitution was on equality and freedom from discrimination. It guaranteed every person the equality before the law and the right to equal protection and equal benefit of the law. On equality, the Constitution had it that it included the full and equal enjoyment of all rights and fundamental freedoms. Article 27 also guaranteed non-discrimination on every person.
5. On discrimination, the position in law was that differential treatment was not necessarily discrimination. It was not clear how the aspect of discrimination allegedly arose. The petitioners did not state the basis of the discrimination. The court could not fault the respondents on the basis of discrimination in re-naming of the road. The ground also failed. There was no demonstration of any infringement of article 27 of the Constitution in the matter.
6. Matters concerning access to information were principally governed by the provisions of the Data Protection Act, No. 24 of 2019. A close scrutiny of the Data Protection Act revealed a deliberate design to ensure that all claims arising from allegations of infringement of article 31(c) and (d) of the Constitution were wholly dealt with by the Data Protection Commissioner (Data Commissioner) as the first port of call. Such position could only be overruled by a party demonstrating any of the exceptions to the doctrine of exhaustion in a matter.
7. In a case where Parliament donated powers to an entity like the Data Commissioner to determine if one's privacy rights under article 31(c) and (d) of the Constitution were infringed, then it meant as much; that the Data Commissioner had such power determine whether privacy rights as provided for in the Bill of Rights had been denied, violated, infringed or threatened. However, the Data Commissioner lacked the jurisdiction to interpret the Constitution.
8. The members of the Office of the Data Commissioner, as an entity and individually so, were public officers and article 10 of the Constitution called upon them to infuse the national values and principles of governance while undertaking their duties. Article 3 of the Constitution obligated every person to respect, uphold and defend the Constitution. Therefore, the Data Commissioner must be in a position to uphold the Constitution and in doing so, to be able to determine whether a given set of circumstances revealed denial, violation, infringement or threat to the privacy rights in the Bill of Rights.
9. Determining whether a given set of circumstances revealed denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights was just that simple. Conversely, interpretation of the Constitution was a serious judicial function. While interpreting the Constitution, the High Court was called upon to apply its legal mind to determine the applicability and extent thereof of a constitutional provision to a set of facts. In arriving at such an interpretation, the High Court was supposed to consider all the applicable principles in constitutional interpretation. The High Court may also look at comparative jurisprudence from other jurisdictions on the subject. Such

a determination yielded to a binding legal principle unless overturned by a court with superior jurisdiction.

10. Unlike the High Court, tribunals and other quasi-judicial bodies, including the Data Commissioner, had no power to make the law. They could, however, apply themselves to a given set of facts and determine denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights. Therefore, there was a defined distinction between determining the denial, violation, infringement or threat to the privacy rights in the Bill of Rights and interpreting the Constitution. Whereas the former was not exclusively a judicial function, the latter was. The jurisdiction, therefore, to interpret the Constitution was the exclusive duty reserved to the High Court vide article 165(3)(d) of the Constitution.
11. The Data Commissioner had the jurisdiction to determine whether the petitioners' privacy rights in the Bill of Rights were denied, violated, infringed or threatened. The Data Commissioner had further powers to order appropriate remedies in the event of proof of the infringement. The Data Protection Act, therefore, wholly provided for the dispute at hand as well as the remedies in the event the dispute was successful.
12. It was incumbent upon the petitioners to demonstrate to the court any of the exceptions to the doctrine of exhaustion. The petitioners did not demonstrate any of the exceptions to the doctrine of exhaustion. As a result, the court's jurisdiction had been improperly invoked in respect to the allegations on article 35 of the Constitution. The petitioners' rights under article 35 could be adequately addressed under the provisions of the Data Protection Act.
13. It would be wrong for the court to find specific persons in contravention of articles 73 and 75 of the Constitution (for being the occupiers of the offices) where such persons were not personally called upon to defend themselves against the allegations.
14. Articles 10(2), 47, 174 and 232(1)(d) and (h) of the Constitution cumulatively provided for participation of the people in decision making and how administrative decisions were to be arrived at. A decision taken in exercise of Executive authority may have to be subjected to public participation or not depending on its resultant effect. If the decision only impacted on the normal and ordinary day-to-day operations of the entity, subjecting to public participation was undesirable and would result to more harm than any intended good. The harm was that public entities would be unable to carry out their functions efficiently as they would be entangled in public participation processes in respect to all their operational decisions. It would likely be impossible for any public entity to satisfactorily discharge its mandate in such circumstances. As long as a decision dealt with the internal day-to-day operations of the entity such a decision needed not be subjected to public engagement. The converse was also correct.
15. The impugned road served the estate and that the residents had, for ages, been using the road which had borne the name Dik Dik road. Whereas the petitioners urged that the association maintained the road, the respondents held that it was the Kenya Urban Roads Authority that was charged with the duty of maintenance of the road. Surprisingly, the respondents did not avail any evidence to support such an averment. The respondents further contended that the naming and re-naming of roads was the preserve of the Parliament and county assemblies through appropriate resolutions. The respondents did not avail any such resolution on the change of the name.
16. The decision to re-name the impugned road was such one that transcended the operational borders of the respondents into the arena of, and had a significant effect on the petitioners, other sector players, stakeholders and/or the public. Such a decision called for public engagement prior to being made. Such processes would have been carried out in Parliament or in the County Assembly of the Nairobi City County. Alternatively, that was a matter which called upon the 1st to 3rd respondents to, at least, make the petitioners aware of why the road was being re-named and to also accord them an opportunity to contribute to the process by giving their views.

17. The respondents having taken the position that the decision to re-name the road did not call for any form of stakeholders' engagement, affirmed that no such engagement was ever held. Having so acted, the respondents were in clear derogation of the constitutional principle of public participation as enshrined in articles 10(2), 174 and 232(1)(d) and (h) of the Constitution.
18. The impugned decision ran contra article 47 of the Constitution for want of administrative fair procedures. Further, there was no compliance or at all with section 5 of the Fair Administrative Action Act which laid the procedure in arriving at holding administrative decisions, like the one in the instant matter, which were likely to materially and adversely affect the legal rights or interests of a group of persons or the general public.
19. The 4th respondent, having been informed of the intention to re-name the impugned road in his favour, was under a duty to ensure that the re-naming was within the Constitution and the law. In particular, the 4th respondent was, to at least, ensure that there was public engagement before the decision was made so as to be off the hook of acting in derogation of the Constitution and the law. The 4th respondent failed to ensure such compliance. Having failed to ensure as much, the 4th respondent violated articles 3 and 10(1) of the Constitution by not ensuring that the Constitution was upheld. He, could not now hide under the rest of the respondents and claim that he was not the one who made the impugned decision.
20. Articles 10(2), 47, 174 and 232(1)(d) and (h) of the Constitution were variously infringed by the respondents for want of public participation, stakeholder consultations and administratively fair procedures. The impugned decision could not, therefore, stand the test of the Constitution and the law. The decision was constitutionally infirm and void *ab initio*.
21. A party who offered himself/herself/itself to be part of a decision by a public entity must ensure that the resultant decision complied with the Constitution and the law especially when such a decision was likely to materially and adversely affect the legal rights or interests of a group of persons or the general public otherwise such a person suffered running against the grain of the Constitution and the law.

Petition partly allowed.

Orders

i. *The claim that the petition did not meet the threshold of constitutional petitions failed and was dismissed.*
ii. *The claim that the decision to re-name the Dik Dik Road to Francis Atwoli Road contravened articles 27, 35, 73 and 75 of the Constitution failed and was dismissed.*
iii. *A declaration was issued that the respondents' decision to re-name the Dik Dik Road in Kileleshwa within the Nairobi City County to Francis Atwoli Road was in violation of articles 10, 47, 174 and 232(1)(d) and (h) of the Constitution for want of public participation, stakeholders' engagement and administrative fair procedures as well as the failure to defend the Constitution. The court declared that decision constitutionally infirm.*
iv. *An order of certiorari to call, remove and deliver up to the court and quash or revoke the decision to re-name the Dik Dik Road to Francis Atwoli Road was issued. Therefore, the decision to re-name the Dik Dik Road to Francis Atwoli Road by the respondents was quashed.*
v. *Each party to bear its own costs.*

Citations

Cases

1. Abe Semi Bvere v County Assembly of Tana River & another; Speaker of the National Assembly & another (Interested Parties) (Constitutional Petition E001 of 2021; [2021] KEHC 8558 (KLR)) — Explained
2. Borniface, Akusala & another v Law Society of Kenya & 12 others; Law Society of Kenya Nairobi Branch (Interested Party) (Constitutional Petition E260 of 2021; [2021] KEHC 4343 (KLR)) — Explained

3. Choda, Renita v Kirit Kapur Rajput (Petition No. E406 of 2020; (2021) eKLR) — Explained
4. County Assembly Forum & 6 others v Attorney General & 2 others; Senate of the Republic of Kenya (Interested Party) (Constitutional Petition E229, E225, E226, E249 & 14 of 2021 (Consolidated); [2021] KEHC 304 (KLR)) — Explained
5. Fleur Investments Limited v Commissioner of Domestic Taxes & another (Civil Appeal 158 of 2017; [2018] KECA 341 (KLR)) — Explained
6. Gateria, Mundia Njeru v Embu County Government & 5 others (Petition 5 of 2015; [2015] KEELRC 249 (KLR)) — Explained
7. In the Matter of Interim Independent Electoral Commission (Constitutional Application 2 of 2011; [2011] eKLR) — Explained
8. Judicial Service Comission v Mbalu Mutava & another (Civil Appeal 52 of 2014; [2015] KECA 741 (KLR)) — Explained
9. Kenya Ports Authority v William Odhiambo Ramogi & 8 others (Civil Appeal 166 of 2018; [2019] KECA 305 (KLR)) — Explained
10. Muswahili, Evans Ladtema v Vihiga County Public Service Board & 2 others (Petition E028 of 2021; [2022] KEELRC 981 (KLR)) — Explained
11. Njeru v Republic (Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR); (1979) KLR 154) — Explained
12. Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties) (Petition 56, 58 & 59 of 2019 (Consolidated); [2020] eKLR.) — Explained
13. Otieno, Leonard v Airtel Kenya Limited (Petition 218 of 2017; [2018] eKLR) — Explained
14. Republic v County Government of Kiambu Ex-parte Robert Gakuru & another ([2016] eKLR) — Explained
15. Royal Media Services Ltd v Attorney General & 6 others ((2015) eKLR) — Explained
16. Speaker of the National Assembly v Karume (Civil Application 92 of 1992; [1992] KECA 42 (KLR); (1990-1994) EA 546; [1992] KLR 22) — Explained
17. William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (Constitutional Petition 159 of 2018 & 201 of 2019 (Consolidated); (2020) eKLR) — Explained
18. Minister of health and another v New Clicks South Africa (PTY) Ltd and others (2006 (2) SA 311 (CC)) — Explained
19. Poverty Alleviation Network & others v President of the Republic of South Africa &19 others — Explained

Statutes

1. Constitution of Kenya, 2010 — article 2(1)(4); 3; 10(1)(2); 24; 27; 31(c)(d); 35; 47; 48; 50(1); 73; 75; 96(1); 119; 165(3)(d); 174; 179(4); 201(d); 232(1)(d)(h); 258; 259(1) — Interpreted
2. County Governments Act (cap 265) — section 15, 30(3)(g); 88(1) — Interpreted
3. Data Protection Act, 2019 (cap 411C) — section 3, 5, 8(1)(f); 9(1)(a); 58; 59; 64; 65 — Interpreted
4. Elections Act (cap 7) — section 22(1)(b)(ii) — Interpreted
5. Fair Administrative Action Act (cap 7L) — section 4, 5 — Interpreted
6. Kenya Roads Act (cap 408) — section 4, 22 — Interpreted
7. Societies Act (cap 108) — section 44 — Interpreted

Advocates

Mr. Litoro for Petitioners

JUDGMENT

Background

1. Dik Dik Gardens (hereinafter referred to as 'the Estate') is a residential estate located between Kenya High School, Gem Lane and Riverside Drive in Kileleshwa within Nairobi City County.

2. The Estate is a registered association comprising of about 100 natural persons who are residents and/or proprietors of the houses thereon (hereinafter referred to as 'the Association').

3. The petitioners, Arnold Kipkoti, Adan Kanchoro Mulata and Anuj Rajani are officials and representatives of the Association.

4. The petitioners are aggrieved that on or about May 27, 2021, The Deputy and Acting Governor ofNairobi City County, Nairobi City County Government Executive Committee Member for Roads, Public Works and Transport, the employees of Nairobi City County Government and Francis Atwoli, 1st, 2nd 3rd and 4th respondents herein respectively, without seeking concurrence of the petitioners uprooted the road sign post bearing the name 'Dik Dik Road' and replaced it with another post with the name Francis Atwoli Road and immediately after announced that the road shall henceforth be renamed 'Francis Atwoli Road'.

5. The respondents opposed the petition.

The Petition

6. Through the petition dated June 7, 2021, supported by the affidavit and supplementary affidavit of Arnold Kipkoti, the Estate's Treasurer, deposed to on June 7, 2021 and October 1, 2021 respectively, the petitioners sought to challenge renaming of Dik Dik Road by the respondents.

7. The petitioners averred that Dik Dik Gardens is well established estate with a tarmacked road network within the estate named Dik Dik Road, off Mandera road linking the estate to Ring Road on Kileleshwa.

8. It was their case that in the year 2010 when Kenya Urban Roads Authority (KURA) was tarmacking the road, it did not rename it or make any indication that it intended to take it over. As such, they averred, the road at all material times has been known as Dik Dik Road.

9. The petitioners posited that Dik Dik Road is maintained and used by the petitioners and members of public visiting the Estate and any administrative action by any government agency must be done with prior notice, concurrence, participation and or having heard and considered the petitioners and its members opinion.

10. It was the petitioners' case that the 4th respondent, Francis Atwoli, is an owner of a rented residential home in the Estate and member of the Association who participated and or is aware that the road to the Estate was collectively named Dik Dik Road by the residents of the estate.

11. The petitioners contended, therefore, that the 1st to 3rd respondents' decision with concurrence of the 4th respondent to rename the Estate Road Francis Atwoli Road, was devoid of public participation from concerned members of the public, the Petitioners and discriminative of the Petitioners in violation of article 27 and 47 of the *Constitution*.

12. The petitioners averred that there was no Gazette Notice or Legal Notice published by the 1st to 3rd respondents to rename Dik Dik Road to Francis Atwoli Road.

13. It was their case that the respondents actions were devoid of the values enshrined in article 10(2), 73, 75, 174 and 232(1)(d)(h) of the *Constitution* that call for equitable sharing of resources and accountable exercise of power.

14. The petitioners further claimed violation of their right to information on the failure by the 1st to 3rd respondents to inform them of the administrative decision to rename Dik Dik Road, a right guaranteed under article 35 of the *Constitution*.

15. It was their case further that, withholding such information not only stifled and frustrated their right to raise objections or concerns for or against the said administrative decision, but also violated their right access to justice provided for under article 48 of the *Constitution* as appreciated alongside section 4 and 5 of the *Fair Administrative Action Act*.

16. The petitioner asserted that unliterally and forcefully removing the road sign post violated their right to fair hearing otherwise guaranteed under article 50(1) of the *Constitution*.

17. The petitioners asserted that the 1st to 3rd respondents are public and state officers who must act in strict compliance with article 73 and 75 of the *Constitution* by being consistent with objects of the *Constitution* as opposed to engaging in personal interests and friendships.

18. Based on the foregoing legal and factual basis, the petitioners prayed for the following reliefs;

    i. A declaration that the respondents' administrative actions illustrated by the 1st – 3rd respondents by unilateral decision to rename Dik Dik Road in the petitioners estate namely Dik Dik Gardens situate in Kileleshwa in Nairobi City County to Francis Atwoli Road without notice to, concurrence, consultation with and or public participation of the Petitioners is to contrary the provisions of *Fair Administrative Action Act*, *County Government Act* and the *Constitution* of Kenya, 2010 without notice to or public participation of the petitioners and thus illegal. unlawful, un-procedurally fair, discriminatory null and void.

    ii. An order of certiorari to call remove, deliver up to honorable court and quash or revoke the 1-3 respondents unilateral decision to rename Dik Dik Road in the petitioners estate namely Dik Dik Gardens situate in Kileleshwa in Nairobi City County this to Francis Atwwoli Road without notice to, concurrence, consultation with and or public participation of the petitioners contrary to the provisions of *Fair Administrative Action Act*, *County Government Act* and the *Constitution* of Kenya, 2010.

    iii. A conservatory order compelling the respondents whether by themselves or through its officers or any Committee to forthwith remove and or uproot the sign post erected on petitioners estate (Dik Dik Gardens situate in Kileleshwa in Nairobi City County) road with publications of the name Francis A Twoli Road in purported renaming of the said road previously known as Dik Dik Road in the said Petitioners estate and in default, the petitioners to forthwith remove the impugned sign post with publications such as Francis Atwoli Road and replace the same with the indigenous name and signage with publication of the name Dik Dik Road.

iv. An order of permanent injunction to restrain the respondents whether by themselves and or their servants or agents from erecting, maintaining. guarding and or putting up any signage on any road or in any manner undertaking any actions in purported renaming of the road previously known as Dik Dik Road in Dik Dik Gardens situate in Kileleshwa in Nairobi City County or any such name to Francis Atwoli Road or any other name whatsoever without notice to, concurrence, consultation with and or public participation of the petitioners contrary to or in any manner in violation of the provisions of *Fair Administrative Action Act*, *County Government Act* and the *Constitution* of Kenya, 2010

v. Costs of the petition

vi. Any other relief that that this honourable court may may deem fit to grant.

The Petitioners' Submissions

19. The petitioners further urged its case through written submissions and supplementary written submissions dated August 31, 2021 and October 1, 2021 respectively.

20. The petitioners identified the issues for determination as follows; whether the 1st to 3rd respondents had an obligation to facilitate public participation and failed to do so, whether renaming Dik Dik Road to Francis Atwoli Road constitute unfair Administrative Action Act and whether they are entitled to the reliefs sought.

21. On the first issue, the petitioners submitted that under article 10 and 174 of the *Constitution*, participation of the people is a national value and principle of governance.

22. It was its case further that under article 96(1) of the *Constitution* it is a requirement that a County Assembly shall facilitate public participation and involvement in the legislative and other business of the Assembly and its committees.

23. The petitioners cited the decision in *Republic v County Government of Kiambu ex-parte Robert Gakuru & another* [2016] eKLR to illustrate the import of public participation and its facilitation. In the case it was observed;

> ".... According to their plain and ordinary meaning, the words 'public involvement' or 'public participation' refer to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process... The democratic government that is contemplated in the *Constitution* is thus a representative and participatory democracy which is accountable, responsive and transparent and which makes provision for the public to participate in the law-making process."
>
> "...Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. In this sense, public involvement may be seen as "a continuum that ranges from providing information and building awareness, to partnering in decision-making."

24. Based on the foregoing, the petitioner submitted that DIK DIK ROAD was named through a consultative and collaborative process among the petitioners' members, including the 4th respondent, who are residents and owners of the Dik Dik Gardens Estate having taken into consideration the neutrality and identity of the said name which reflected the values and identity of the Petitioners' community.

25. The petitioners asserted that it was thus statutorily and constitutionally incumbent upon the 1st to 3rd respondents to take steps to ensure that public participation was facilitated and undertaken before renaming the Dik Dik Road.

26. On the second issue regarding the right to Fair Administrative Action Acts, it was submitted that failure by the 1st to 3rd respondents to facilitate public participation constituted unFair Administrative Action Act and was fatal to the legitimacy of the decision to rename Dik Dik Road to Francis Atwoli Road.

27. The claimed illegitimacy of the respondents' actions found support in the decision in *Abe Semi Bvere -vs- County Assembly of Tana River & another; Speaker of the National Assembly & another (Interested Parties)* (*supra*) where the decision in *Poverty Alleviation Network & others v President of the & Republic of South Africa 19 others* was cited with approval for stating as follows;

> "....engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision..."

28. Further support was drawn from the Court of Appeal in *Judicial Service Commission v Mbalu Mutava & Another* [2015] eKLR where it was held:

> "Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to *Fair Administrative Action Act* in the Bill of Rights. The right to *Fair Administrative Action Act* is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of Constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed."

29. In the supplementary submissions, the petitioner rebutted the respondents' claim that the petition was caught up by the exhaustion doctrine by submitting that the dispute before the court was a purely a constitutional issue.

30. It was the petitioners' submission that their case was anchored on article 10, 73, 201(d) and 232 and to that end were entitled to approach this court under article 2(1), 2(4), 258 and 259(1) of the *Constitution*.

31. The petitioner drew support from *Evans Ladtema Muswahili -vs- Vihiga County Public Service Board & 2 Others*; where it was observed: -

> "... The fact of existence of alternative processes, does not oust the jurisdiction of the High Court to entertain and determine constitutional petitions. Related to it is the argument that the doctrine of exhaustion of remedies operates to oust the jurisdiction of the High Court

to determine Constitutional petitions, where the other remedies have not been exhausted. I doubt that the doctrine applies to constitutional petitions..."

32. In the end, the petitioners submitted that they had surpassed the legal threshold for grant of the reliefs prayed for. they urged the court to allow the petition.

The 1st, 2nd & 3rd Respondents' Case

33. The Deputy and Acting Governor of Nairobi City County Government, Nairobi City County Government Executive Committee Member for Roads, Public Works and Transport Nairobi City County Government and Nairobi City County opposed the petition through the replying affidavit of Eric Abwao Odhiambo, the Acting County Solicitor of Nairobi City County Government, deposed to on September 15, 2021.

34. It was his case that the petition ought to be dismissed since the petitioners had not established or disclosed violation of any right by the 1st respondent, a requirement in constitutional petitions.

35. He deposed that, under article 179(4) of the *Constitution*, the County Governor, Deputy County Governor, the Chief Executive and Deputy Chief Executive of the County exercised authority of the County in accordance with the laws and regulations and did not offend any provision in renaming Dik Dik Road.

36. He deposed further that there exists no law, by-laws and/or regulations governing naming and renaming of roads within Nairobi City County and as such, the 1st respondent has not affronted none.

37. He deposed further that the petitioners were mistaken to believe that the road is a private road whereas in fact it was constructed and is maintained by Kenya Urban Roads Authority whose mandate is to manage, develop, rehabilitate and maintain all public roads in cities and municipalities in Kenya.

38. It was his case that roads are renamed vide resolution of Parliament and or County Assembly as a result of a mover of the motion.

39. On the foregoing, it was his deposition that the petitioners had not demonstrated violation of articles 24, 27, 47 and 50 of the *Constitution*.

40. With respect to alleged violation of article 35 of the *Constitution*, he deposed that he stated that the petitioners had not made attempt to access information from the respondents which was denied.

41. In response to the alleged failure to conduct public participation, he deposed that it was practically impossible to conduct public participation in the exercise of renaming of the road and in any instance, the action is for the common good of all residents of Nairobi City County and that no prejudice was suffered by the petitioners.

The Submissions

42. In their written submissions dated October 12, 2021, the 1st, 2nd and 3rd respondents defended their actions by virtue of the authority granted to them by article 179(4) of the *Constitution*.

43. To buttress the foregoing, support was drawn from the decision in *Mundia Njeru Gateria v Embu County Government & 5 Others* (2015) eKLR where it was established that executive authority of the County is vested in, and is exercised by a County Executive Committee.

44. Pursuant to the conditions set in section 30(3)(g) of the *County Government's Act* that mandates public participation in development of policies and plans and delivery of services, the Respondents submitted that public participation did not apply in the instant dispute.

45. To bolster its position, the respondents relied on the South African decision in *Minister of health and Another v New Clicks South Africa (PTY) Ltd and Others* 2006 (2) SA 311 (CC) where it was observed: -

> "...that public participation cannot be determined with arithmetic precision; a reasonable test must be used..."

46. In submitting that there was no infringement or violation of the petitioners' rights, the respondents stated firstly that the petition did not set out the constitution}}al provisions violated and the manner of violation, a requirement established in the case of *Anarita Karimi Njeru vs. Republic*, (1979) KLR 154.

47. It was its case that there was no violation of article 47 of the *Constitution* and section 5 of the *Fair Administrative Action Act* is only operationalized where it can be established that renaming of the road is likely to materially and adversely affect legal rights or interest of a group of persons.

48. It was the respondents case that from the facts herein, the respondent's actions did not fall within the definition of an administrative action contemplated under The *Fair Administrative Action Act*.

49. In conclusion, it was submitted that the court ought to decline the invitation to issue judicial review orders since it only ought to be granted in the clearest of cases.

50. The 1st, 2nd and 3rd respondents submitted that the petitioners had failed to avail any evidence of impropriety, bias or illegality in renaming Dik Dik Road.

The 4th Respondent's case

51. Francis Atwoli, the Secretary General of Central Organization of Trade Unions (COTU) opposed the petition through his replying affidavit deposed to on November 15, 2021.

52. From the outset, he deposed that the petition is devoid of merit as it is speculative and not properly grounded in law.

53. He deposed that he was not aware of any rights created by any law that was violated by himself or by the respondents. It was his case that the Petition defective and incapable of being allowed.

54. Mr. Atwoli denied being aware or having participated in any process by the petitioners leading to the naming of Dik Dik Road.

55. He deposed that he honoured the invitation by the 1st respondent to have Dik Dik Road renamed after him as a result of his long and distinguished service in the labour industry.

56. It was his deposition, therefore, that his attendance could not be said to be unconstitutional.

57. He denied hiring goons to protect the signage and deposed that he was only a beneficiary of the 1st respondent's internal process in renaming of Dik Dik Road.

58. It was his case further that he was not aware of any obligation by the 3rd respondent to gazette any proposed changes to the roads in the Kenya Gazette.

59. He deposed further that the road, subject of the dispute, is not a private for the exclusive use by the petitioners since it was constructed and is maintained by Kenya Urban Roads Authority pursuant to sections 4 and 22 of the *Kenya Urban Roads Act*, 2007.

60. In conclusion, it was Mr. Atwoli's position that renaming of roads falls squarely within the ambit of the 3rd respondents and that no justiciable cause had been presented by the petitioners.

61. He urged the court to find the petition frivolous and an abuse of court process and to dismiss it with costs.

The Submission

62. The 4th respondent filed written submissions dated January 17, 2022.

63. It was his case that the petitioners had failed to produce any proof in line with section 44 of the *Societies Act* that indeed they were *bona-fide* officials of The Estate of Dik Dik Gardens.

64. The 4th respondent further submitted that the petitioners had not provided any proof that in the year 2010 they petitioned Kenya Urban Roads Authority to tarmac the road and it (KURA) did so without renaming or taking over the said road.

65. The 4th respondent submitted that the petitioner was largely based on unsupported facts which counts for nothing in a court of law.

66. To buttress the foregoing, the 4th respondent referred this court to Petition No 218 of 2017, *Leonard Otieno v Airtel Kenya Limited* where it was observed: -

> "...the onus lies on the petitioner to prove every element constituting his cause of action. This includes sufficient facts to justify a finding that his consumer rights have been violated.
>
> ...It is a fundamental principle in law that a litigant bears the burden 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 vacuum."

67. The 4th respondent submitted that there was no proof that Dik Dik Road had been named through a consultative and collaborative process.

68. On the aspect of public participation, the 4th respondent submitted that under section 15 of the *County Government Act*, a person has the right to petition a County Assembly to consider any matter within the authority of the County Government including, enacting, amending or repealing any of its statutes.

69. It was further his case that under section 88(1) of the said *Act*, Citizens have the right to petition the County Government on any matter under the responsibility of the County Government.

70. It was the 4th respondents case that petitioners failed to exhaust the mechanism contemplated by section 88(1) of the *County Governments Act* before approaching this court.

71. In sum, the 4th respondent submitted that the petition was underserving of the reliefs prayed for, he urged that it be dismissed with costs.

Analysis

72. From the foregoing arguments and counter-arguments, two broad issues emerge for determination. They are the following: -

    a. Whether the petition raises any constitutional issues and if so, whether the petition is barred by the principle of exhaustion.

b. In the event the petition survives issue (a) above, whether the renaming of the Dik Dik Road to Francis Atwoli Road by the respondents violated articles 10(2), 27, 35, 47, 73, 75, 174, 232(1)(d) and (h) of the *Constitution*.

73. This court will deal with the above issues in seriatim.

Whether the Petition raises any Constitutional issues and if so, whether the petition is barred by the principle of exhaustion:

74. This issue comprises of two sub-issues being whether the petition raises any constitutional issues and whether the petition is barred by the principle of exhaustion.

75. On the first sub-issue, what constitutes a constitutional issue was considered at length in Nairobi High Court Constitutional Petition No E406 of 2020 *Renita Choda vs. Kirit Kapur Rajput* (2021) eKLR where it was stated as follows: -

> 33. Long before the downing of the new constitutional dispensation under the *Constitution* of Kenya 2010, courts have variously emphasized the need for clarity of pleadings. I echo the position.
>
> 34. the *Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (commonly referred to as 'the Mutunga Rules') also provide for the contents of petitions. Rule 10 thereof provides seven key contents of a petition as follows: -
>
> 10. Form of petition.
>
> (1) 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.

35. 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.

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

37. The Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* case (*supra*) 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 v 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.

38. Both parties are in agreement with what a Constitutional issue is. They both referred to *Fredricks & other v MEC for Education and Training, Eastern Cape & others* case (*supra*) where the court, 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...

39. 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*.

40. 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. In the words of Langa, J in *Minister of Safety & Security v 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...

41. 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 v Manjit Singh Amrit* case (*supra*) '... Courts must interpret it with all liberation they can marshal...'

42. Resulting from the above discussion and the definition of a constitutional issue, this court is in agreement with the position in *Turkana County Government & 20 others v Attorney General & Others* case (*supra*) where a Multi-Judge bench affirmed the profound legal standing that claims of statutory violations cannot give rise to constitutional violations.

76. Having deduced what a constitutional issue is, a careful reading of the petition herein reveals a profound link between the petitioners, the provisions of the *Constitution* alleged to have been contravened and the manifestation of contravention or infringement.

77. It is, therefore, the finding of this court that indeed the petition, properly so, raises several constitutional issues.

Whether the Petition is barred by the principle of exhaustion.

78. In interrogating the doctrine of exhaustion and its applicability in *Akusala Borniface & another v Law Society of Kenya & 12 Others; Law Society of Kenya Nairobi Branch (Interested Party)* [2021] eKLR, the court traced its origin as follows: -

> 25. The doctrine of exhaustion in Kenya traces its origin from article 159(2)(c) of the *Constitution* which recognizes and entrenches the use of alternative mechanisms of dispute resolution in the following terms: -
>
> > 159(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles-
> >
> > (a) ...
> >
> > (b) ...
> >
> > (c) alternative forms of dispute resolution including resolution, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause 3.

26. Clause 3 is on traditional dispute resolution mechanisms.

79. The doctrine of exhaustion was comprehensively dealt with by a 5-Judge Bench in Mombasa High Court Constitutional Petition No 159 of 2018 consolidated with Constitutional Petition No 201 of 2019 *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* (2020) eKLR. The court stated as follows: -

> 52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. This encourages alternative dispute resolution mechanisms in line with article 159 of the *Constitution* and was aptly elucidated by the High Court in *R v Independent Electoral and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya and 6 others* [2017] eKLR, where the court opined thus:
>
> > 42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in *Speaker of National Assembly v Karume* [1992] KLR 21 in the following oft-repeated words:
> >
> > > Where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.
> >
> > 43. While this case was decided before the *Constitution* of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 *Constitution*. We can do no better in this regard than cite another Court of Appeal decision which provides the constitutional rationale and basis for the doctrine.
> >
> > This is *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR, where the Court of Appeal stated that:
> >
> > It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is

> invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The ex parte applicants argue that this accords with article 159 of the *Constitution* which commands courts to encourage alternative means of dispute resolution.

80. The court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

> 59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In *R v Independent Electoral and Boundaries Commission (IEBC) & others ex parte The National Super Alliance Kenya (NASA)* (*supra*), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:
>
> > "What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the *Shikara Limited* case (*supra*), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the *Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important Constitutional value is at stake. See also *Moffat Kamau and 9 others vs Aelous (K) Ltd and 9 others*.)"
>
> 60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the *Constitution* or law and allow the suit to proceed before it. It is also essential for the court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.
>
> 61. The second principle is that the jurisdiction of the courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting court's jurisdiction must be construed restrictively. This

was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.

62. In the instant case, the petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.

81. The above decision was appealed against by the respondents. The Court of Appeal in upholding the decision and in dismissing the appeal in Mombasa Civil Appeal No 166 of 2018 *Kenya Ports Authority v William Odhiambo Ramogi & 8 others* [2019] eKLR held as follows: -

> "The jurisdiction of the High Court is derived from article 165(3) and (6) of the *Constitution*. Accordingly, the High Court has unlimited original jurisdiction in criminal and civil matters, including determination of a question of enforcement of the bill of rights and interpretation of the *Constitution* encompassing determination of any matter relating to the Constitutional relationship between the different levels of government.
>
> At the High Court, we note that the learned Judges dealt with this matter under the question framed as follows: Is the court barred from considering the suit at present by virtue of article 189 of the *Constitution* and sections 33 and 34 of Inter-Governmental Relations Act of 2012 (IGRA)? The parties have advanced similar arguments as before the learned Judges of the High Court. The High Court went further than just looking at the ruling by Ogola J. They also took into account the doctrine of exhaustion as enunciated in *Republic v Independent Election and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR. They applied a dual pronged approach before concluding that the dispute was not an inter-governmental dispute under IGRA. First, they considered that the test for determining the matter as an inter-governmental dispute for purposes of application of IGRA was not simply to look at who the parties to the dispute were, but the nature of the claim in question and; secondly, they considered that the claimed Constitutional violations seeking to be enforced are not mere "bootstraps." We have keenly addressed our minds to the learned Judges' decision and are satisfied that they stayed within the expected contours and properly directed themselves. Once they determined that the dispute was not inter-governmental in nature, we do not think it is necessary to consider whether the petitioners had exhausted their legal avenue. Jurisdiction by the High Court under article 165(5) of the *Constitution* became automatic. And in our view, it could not be ousted or substituted."

82. Further, in Civil Appeal 158 of 2017, *Fleur Investments Limited v Commissioner of Domestic Taxes & another* [2018] eKLR, the Learned Judges of the Court of Appeal relied on an earlier decision in *Speaker of National Assembly v Njenga Karume* (1990-1994) EA 546 to assume jurisdiction by bypassing the mechanism under Income Tax Tribunal. They observed as follows: -

> 23. For the reasons we have given earlier and others that will become apparent, there were definitely exceptional circumstances that existed in this case that were outside the ambit of the Income Tax Tribunal which called for intervention by way of judicial review. Whereas courts of Law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution

> Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the *Constitution* and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.

83. The High Court has variously reiterated the position that it is only the High Court and courts of equal status which can interpret the *Constitution*. (See *Royal Media Services Ltd v Attorney General & 6 others* (2015) eKLR among others).

84. Returning back to the case at hand, the 4th respondent contended that the petitioners ought to have, in the first instance, complied with section 88(1) of the *County Governments Act* before approaching this court.

85. Section 88 of the *County Governments Act* provides as follows: -

> 88. Citizens right to petition and challenge:
>
> (1) Citizens have a right to petition the county government on any matter under the responsibility of the county government.
>
> (2) Citizen petitions shall be made in writing to the county government.
>
> (3) County legislation shall give further effect to this section.

86. This court dealt with a like issue in High Court at Nairobi in Constitutional Petition No E229 of 2021 (Consolidated with Petition Nos E225 of 2021, E226 of 2021, E249 of 2021 and No 14 of 2021 (formerly Machakos High Court Constitutional Petition No E008 of 2021) *County Assembly Forum & 6 others v Attorney General & 2 others; Senate of the Republic of Kenya (Interested Party)* (Constitutional petition E229, E225, E226, E249 & 14 of 2021 (Consolidated)) [2021] KEHC 304 (KLR) (Constitutional and Human Rights) (15 October 2021) (Judgment).

87. In the said case, the issue was whether the High Court had jurisdiction, under the doctrine of ripeness, to entertain a constitutional petition on the constitutionality of section 22(1)(b)(ii) of the *Elections Act* whereas there were pending public petitions presented before Parliament on the same issue.

88. Article 119 of the *Constitution* was cited as the provision declining the jurisdiction of the High Court. The said provision is similar to section 88 of the *County Governments Act* save that the later refers to public petitions to County Assemblies whereas the former relates to those forwarded to Parliament.

89. Since this court still holds its position as in the *County Assembly Forum & 6 others v Attorney General & 2 others; Senate of the Republic of Kenya (Interested Party) case* (*supra*), this court will reproduce what it rendered in the said matter. This is what this court stated: -

> 178. The question that begs for an answer is whether the public petitions presented before parliament concerning the constitutionality of section 22(1)(b)(ii) of the *Elections Act* can competently address the fundamental rights and freedoms

of the petitioners herein as to render the consolidated petitions herein not ripe for consideration.

179. In determining this contention, I will first resort to article 119 of the *Constitution* which provision was heavily relied upon by the 3rd respondent in its argument aforesaid. It provides as follows: -

> 119. Right to petition Parliament
>
> (1) Every person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation.
>
> (2) Parliament shall make provision for the procedure for the exercise of this right.

180. The National Assembly is part of the Parliament of Kenya. Its primary function is codified in articles 94 and 95 of the *Constitution*. It largely provides that the National Assembly exercises legislative authority on behalf of the people. Under article 95, its role is to represent the people of the constituencies and special interests in the National Assembly, deliberate on and resolve issues of concern to the people and enacts legislation in accordance with Part 4 of chapter 8.

181. There has been judicial discussion as to whether courts have jurisdiction over matters which are subject of pending petitions before Parliament. In Petition 381 & 430 of 2014 (consolidated) *Council of Governors & 3 others v Senate & 53 others* [2015] eKLR the Court dismissed the argument that courts did not have such jurisdiction. The Learned Judges referred to an earlier decision in The Council of Governors and others vs. The Senate Petition No 413 of 2014 and made the following emphatic remarks: -

> ".... It is also incumbent on the court to consider its jurisdiction in relation to the present matter, which revolves around the functions and distribution of powers between the national and county governments. This is in light of the argument by the AG that the petitioner should have approached Parliament if it was dissatisfied with the provisions of the CGAA, implying that the court has no jurisdiction to deal with this matter and that any dispute with regard to its provisions should be addressed to Parliament.
>
> This argument, in our view, runs counter to the constitutional provisions with respect to the jurisdiction of this court. At article 165(3)(d)(i), this court is given the jurisdiction to determine the question whether any law is inconsistent with or in contravention of the *Constitution*. The jurisdiction of the court to invalidate laws that are unconstitutional is in harmony with its duty to be the custodian

of the *Constitution*, which pronounces its supremacy at article 2 by proclaiming, at article 2(4), that "Any law, including customary law, that is inconsistent with this *Constitution* is void to the extent of the inconsistency, and any act or omission in contravention of this *Constitution* is invalid."

Similarly, the general provisions of the *Constitution*, which are set out in article 258 contain the express right to every person to "... institute court proceedings, claiming that this *Constitution* has been contravened, or is threatened with contravention." As this court held in *The Council of Governors and Others v Senate* (*supra*):

> We are duly guided and this court vested with the power to interpret the *Constitution* and to safeguard, protect and promote its provisions as provided for under article 165(3) of the *Constitution*, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the *Constitution* has either been violated or threatened with violation. In that regard, the petition before us alleges a violation of the *Constitution* by the respondent and in the circumstances, it is our finding that the doctrine of separation of power does not inhibit this court's jurisdiction to address the Petitioner's grievances so long as they stem out of alleged violations of the *Constitution*. In fact the invitation to do so is most welcome as that is one of the core mandates of this court".

182. In *Council of Governors & 3 others v Senate & 53 others* [2015] eKLR the learned Judges interpreted the right to petition Parliament under article 119 and whether it takes away the right to approach the High Court as follows: -

> ... The question is whether this provision is intended to take away the right of a party to question the constitutionality of an Act of Parliament, or indeed any action taken by the legislature, guaranteed under articles 22 and 258. further, whether it can also be taken as ousting the jurisdiction of the court under article 165(3)(d) to determine any question respecting the interpretation of the *Constitution*, including "the question whether any law is inconsistent with or in contravention of" the *Constitution*, or under article 165(3)(d)(iii), to determine 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"?
>
> In our view, the answer must be in the negative. Doubtless, article 119(i) will serve a useful purpose in allowing citizens to petition Parliament to consider matters of concern to them that are within the purview of Parliament, including the repeal or amendment of legislation. It appears to us, however, that article 119 is not intended to cover situations such as is presently before this court.

> It would therefore be, in our view, for the court to abdicate its responsibility under the *Constitution* to hold that a party who considers that legislation enacted by Parliament in any way violates the *Constitution* is bound to first petition Parliament with respect to the said legislation. The constitutional mandate to consider the constitutionality of legislation is vested in the High Court, and articles 2(4) and 165(3(d)(i) mandate this court to invalidate any law, act or omission that is inconsistent with the *Constitution*. This is in harmony with the mandate of the courts to be the final custodian of the *Constitution*.
>
> This court appreciates that where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. Article 3(1) of the *Constitution* enjoins every person to respect, uphold and defend the *Constitution*. Similarly, article 258(1) thereof donates the power to every person to institute court proceedings claiming that the *Constitution* has been contravened, or is threatened with contravention. If this court were to shirk its constitutional duty under article 165(3)(d), it would have failed in carrying out its mandate as the temple of justice and constitutionalism and the last frontier of the rule of law. In the circumstances, the argument that the petitioner should have approached Parliament under article 119(1) is without merit.

183. I am in agreement with the above. I, however, wish to add that the power of Parliament under article 119 of the *Constitution* to enact, amend or repeal any legislation is not in any way curtailed by the High Court's exercise of its jurisdiction under article 165(3) of the *Constitution*. Whereas Parliament has the preserve to enact, amend or repeal any legislation, courts have the duty to ensure that Parliament inter alia keeps within the constitutional borders while discharging its mandate. That is where the difference lies. As such, the court's exercise of its jurisdiction in determining whether Parliament acted within the *Constitution* in coming up with the impugned law cannot be seen as an affront to the doctrine of separation of powers. The two are distinct mandates under the *Constitution*.

184. In this case, the petitioners contend that the National Assembly in passing the amendment that resulted to the impugned section 22(1)(b)(ii) of the *Elections Act* did not act within the *Constitution*. That is very different from the Parliament's power to reconsider and possibly amend or repeal the impugned provision. In any event, there is no proposition that the decision of Parliament on the Public Petitions is binding on this court.

185. As a result, this court finds that the contention that the consolidated petitions are caught up by the doctrine of ripeness fails and is hereby dismissed.

90. Applying the foregoing to this case, the issue at hand is the constitutionality of the impugned actions which were undertaken by the respondents. It is contended that the actions were an affront to, and

a total derogation of the Constitution thereby calling upon the High Court to intervene, protect the Constitution and to accord appropriate remedies.

91. It is, therefore, the case that the County Assembly, as a forum, lacks the quality of audience which is proportionate to the interests which the petitioners wish to advance. Such a forum cannot thereby oust the jurisdiction of the High court.

92. Drawing from above, this court is constitutional-bound under article 165(3)(d) of the *Constitution* to stand by its calling and it cannot run away from such a Constitutionally-decreed mandate. To that end, the doctrine of exhaustion does not apply in the unique circumstances of this matter.

93. As such, it is this court's finding that notwithstanding section 88(1) of the *County Governments Act*, the High Court has the jurisdiction to consider the instant petition.

94. Having found that the petition raises constitutional issues and it is barred by the doctrine of exhaustion, a consideration of the second main issue follows.

Whether the re-naming of the Dik Dik Road in Kileleshwa within the Nairobi City County to Francis Atwoli Road by the respondents violated articles 10(2), 27, 35, 47, 73, 75, 174, 232(1) (d) and (h) of the *Constitution*:

95. The parties' arguments and counter-arguments on this issue have already been aptly captured above.

96. Going forward, this court will ascertain if the alleged violations of the Constitution were committed.

Article 27 of the *Constitution*

97. Article 27 of the *Constitution* is on equality and freedom from discrimination. It guarantees every person the equality before the law and the right to equal protection and equal benefit of the law. On equality, the *Constitution* has it that it includes the full and equal enjoyment of all rights and fundamental freedoms. The said article also guarantees non-discrimination on every person.

98. In urging that article 27 of the *Constitution* was infringed, the petitioners indeed asserted that there was both unequal treatment before the law and unjustified discrimination.

99. The petitioners did not point out which law the respondents failed to comply with in the process of re-naming of the impugned road. In fact, the respondents are on record stating that there was no legislation regulating the naming and re-naming of roads within the Nairobi City County. As such, the contention on infringement of the right to equal protection and equal benefit of the law cannot hold.

100. On discrimination, the position in law that differential treatment is not necessarily discrimination was discussed at length in a Multi-Judge bench in Petition 56, 58 & 59 of 2019 (Consolidated), *Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties)* [2020] eKLR.

101. In the case, the court considered whether differential treatment amounts to violation of the right to equality and non-discrimination as guaranteed under article 27 of the *Constitution*. The learned judges referred to various decisions and finally observed as follows: -

> 983. The precise meaning and implication of the right to equality and non-discrimination has been the subject of numerous judicial decisions in this and other jurisdictions. In its decision in *Jacqueline Okeyo Manani & 5 others v*

Attorney General & another (*supra*) the High Court stated as follows with respect to what amounts to discrimination:

> 26. *Black's Law Dictionary*, 9th Edition defines "discrimination" as (1)" the effect of a law or established practice that confers privileges on a certain class because of race, age sex, nationality, religion or hardship" (2) "Differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured".
>
> 27. In the case of *Peter K Waweru v Republic* [2006] eKLR, the court stated of discrimination thus: -
>
> Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or have accorded privileges or advantages which are not accorded to persons of another such description... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured."(emphasis)
>
> 28. From the above definition, discrimination, simply put, is any distinction, exclusion or preference made on the basis of differences to persons or group of persons based such considerations as race, colour, sex, religious beliefs political persuasion or any such attributes that has real or potential effect of nullifying or impairing equality of opportunity or treatment between two persons or groups. Article 27 of the *Constitution* prohibits any form of discrimination stating that. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law, and that (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
>
> 29. the *Constitution* advocates for non-discrimination as a fundamental right which guarantees that people in equal circumstances be treated or dealt with equally both in law and practice without unreasonable distinction or differentiation. It must however be borne in mind that it is not every distinction or differentiation in treatment that amounts to discrimination. Discrimination as seen from the definitions, will be deemed to arise where equal classes

of people are subjected to different treatment, without objective or reasonable justification or proportionality between the aim sought and the means employed to achieve that aim.

30. In this regard, the Court stated in the case of *Nyarangi & 3 others v Attorney General* [2008] KLR 688 referring to the repealed *Constitution*; "discrimination that is forbidden by the *Constitution* involves an element of unfavourable bias. Thus, firstly unfavourable bias must be shown by the complainant; and secondly, the bias must be based on the grounds set in the Constitutional definition of the word "discriminatory" in section 82 of the *Constitution*.

984. It is thus recognised that it is lawful to accord different treatment to different categories of persons if the circumstances so dictate. Such differentiation, however, does not amount to the discrimination that is prohibited by the *Constitution*. In *John Harun Mwau v Independent Electoral and Boundaries Commission & another* (*supra*), the court observed that:

> it must be clear that a person alleging a violation of article 27 of the *Constitution* must establish that because of the distinction made between the claimant and others, the claimant has been denied equal protection or benefit of the law. It does not necessarily mean that different treatment or inequality will per se amount to discrimination and a violation of the *Constitution*.

985. When faced with a contention that there is a differentiation in legislation and that such differentiation is discriminatory, what the court has to consider is whether the law does indeed differentiate between different persons; if it does, whether such differentiation amounts to discrimination, and whether such discrimination is unfair. In *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another:* Petition 150 & 234 of 2016 (consolidated) the court held that:

> 288. From the above definition, it is safe to state that the *Constitution* only prohibits unfair discrimination. In our view, unfair discrimination is differential treatment that is demeaning. This happens when a law or conduct, for no good reason, treats some people as inferior or less deserving of respect than others. It also occurs when a law or conduct perpetuates or does nothing to remedy existing disadvantages and marginalization."

986. In *Harksen v Lane NO and others* (*supra*) the court observed that the test for determining whether a claim based on unfair discrimination should succeed was as follows:

> (a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate purpose? If it does not, then there is a violation of the *Constitution*. Even if it does bear a rational connection, it might nevertheless amount to discrimination.
>
> (b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis: -
>
> > (i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
> >
> > (ii) If the differentiation amounts to 'discrimination,' does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then the unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end

> of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation...
>
> c. If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause.

988. It must also be noted, as observed by Mativo J in *Mohammed Abduba Dida v Debate Media Limited & another* (*supra*) that:

> It is not every differentiation that amounts to discrimination. Consequently, it is always necessary to identify the criteria that separate legitimate differentiation from constitutionally impermissible differentiation. Put differently, differentiation is permissible if it does not constitute unfair discrimination.

102. By applying the above to this case, it is not clear how the aspect of discrimination allegedly arose. The petitioners did not state the basis of the discrimination. One, therefore, wonders if the alleged discrimination was directly or indirectly and on which ground. Could it have been on account of race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth or any other class or consideration.

103. Arising from the foregoing, this court cannot fault the respondents on the basis of discrimination in re-naming of the road. The ground also fails.

104. The upshot is that there was no demonstration of any infringement of article 27 of the *Constitution* in this matter.

Article 35 of the *Constitution*

105. The instant provision is on access to information. The petitioners seem to allege that they were not favoured with any information on how the change of the name was effected.

106. Matters concerning access to information are principally governed by the provisions of the *Data Protection Act*, No 24 of 2019 (hereinafter referred to as 'the Data Act').

107. The preamble of the Data Act states that it is an Act of Parliament to give effect to article 31(c) and (d) of the *Constitution*; to establish the Office of the Data Protection Commissioner; to make provision for the regulation of the processing of personal data; to provide for the rights of data subjects and obligations of data controllers and processors; and for connected purposes.

108. Article 31(c) and (d) of the *Constitution* provides as follows: -

> 31. Privacy
>
> Every person has the right to privacy, which includes the right not to have—
>
> (a) their person, home or property searched;
>
> (b) their possessions seized;

(c) information relating to their family or private affairs unnecessarily required or revealed; or

(d) the privacy of their communications infringed.

109. The *Data Act* further provides for the rights of a data subject, the enforcement of rights of data subjects, investigation of complaints by data subjects, compensation for breach of the rights of data subjects, the registration of data controllers and data processors, the principles and obligations of personal data protection, processing of sensitive personal data, among many other aspects of personal data.

110. Section 3 of the *Data Act* provides for the objectives as follows: -

The object and purpose of this Act is-

(a) to regulate the processing of personal data;

(b) to ensure that the processing of personal data of a data subject is guided by the principles set out in section 25;

(c) to protect the privacy of individuals;

(d) to establish the legal and institutional mechanism to protect personal data; and

(e) to provide data subjects with rights and remedies to protect their personal data from processing that is not in accordance with this Act.

111. Section 5 of the *Data Act* establishes the Office of the Data Protection Commissioner which is a body corporate with perpetual succession and a common seal and has the power to conduct business in its corporate name. I will hereinafter refer to the said office as 'the Data Commissioner" or 'the Commissioner'.

112. One of the many functions of the Data Commissioner is provided for in Section 8(1)(f) as 'to receive and investigate any complaint by any person on infringements of the rights under this Act'.

113. The Commissioner further has powers to conduct investigations on its own initiative, or on the basis of a complaint made by a data subject or a third party. That is provided for in section 9(1)(a) of the *Data Act*.

114. In discharging its functions and exercising its powers, the Commissioner is authorized under section 59 of the *Data Act* to seek the assistance of such person or authority as it deems fit and as is reasonably necessary to assist the Data Commissioner in the discharge of the functions.

115. Section 65 of the *Data Act* gives the Data Commissioner the power to determine the compensation payable to a data subject who suffers damage by reason of a contravention of any requirement of the *Data Act* and in instances where the Commissioner finds as much.

116. With a view to protect the integrity of the processes under the Data Act, the statute provides for enforcement notices under section 58 in respect of those who fail to comply with any provision of the *Data Act*.

117. Under section 64 of the *Data Act*, any appeal from the decision of the Commissioner lies to the High Court.

118. A close scrutiny of the *Data Act* reveals a deliberate design to ensure that all claims arising from allegations of infringement of article 31(c) and (d) of the *Constitution* are wholly dealt with by the Commissioner as the first port of call. Such position can only be overruled by a party demonstrating any of the exceptions to the doctrine of exhaustion in a matter.

119. Returning to the case at hand, the petitioners' complaint is the alleged lack of information on how the re-naming of the road was done. To that end, the petitioners alleged breach of article 31 rights under the *Constitution*. They then sought for judicial review orders.

120. This court ascribes to the position that in a case where Parliament donated powers to an entity like the Data Commissioner to determine if one's privacy rights under article 31(c) and (d) of the Commissioner are infringed, then it means as much; that the Commissioner has such power determine whether privacy rights as provided for in the Bill of Rights has been denied, violated, infringed or threatened. However, the Commissioner lacks the jurisdiction to interpret the *Constitution*.

121. The reason for the foregoing holding is simple. The members of the Office of the Data Commissioner, as an entity and individually so, are public officers and article 10 calls upon them to infuse the national values and principles of governance while undertaking their duties. Article 3 obligates every person to respect, uphold and defend the *Constitution*. Therefore, the Commissioner must be in a position to uphold the *Constitution*, and in doing so, to be able to determine whether a given set of circumstances reveal denial, violation, infringement or threat to the privacy rights in the Bill of Rights.

122. The above duty is to be distinguished from the duty to interpret the *Constitution*. Determining whether a given set of circumstances reveal denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights is just that simple. Conversely, interpretation of the *Constitution* is a serious judicial function. While interpreting the *Constitution*, the High Court is called upon to apply its legal mind to determine the applicability and extent thereof of a Constitutional provision to a set of facts. In arriving at such an interpretation, the High Court is supposed to consider all the applicable principles in constitutional interpretation. (See the Supreme Court in *In the Matter of Interim Independent Electoral Commission* [2011] eKLR). The High Court may also look at comparative jurisprudence from other jurisdictions on the subject. Such a determination yields to a binding legal principle unless overturned by a court with superior jurisdiction.

123. Unlike the High Court, Tribunals and other quasi-judicial bodies, including the Data Commissioner, do not make the law. They can, however, apply themselves to a given set of facts and determine denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights.

124. There is, therefore, a defined distinction between determining the denial, violation, infringement or threat to the privacy rights in the Bill of Rights and interpreting the *Constitution*. Whereas the former is not exclusively a judicial function, the latter is. The jurisdiction, therefore, to interpret the *Constitution* is the exclusive duty reserved to the High Court videarticle 165(3)(d) of the *Constitution*.

125. In the instant matter, the Data Commissioner has the jurisdiction to determine whether the petitioners' privacy rights in the Bill of Rights were denied, violated, infringed or threatened. The Commissioner has further powers to order appropriate remedies in the event of proof of the infringement.

126. The *Data Act*, therefore, wholly provides for the dispute at hand as well as the remedies in the event the dispute is successful.

127. In such a case, it was incumbent upon the petitioners to demonstrate to the court any of the exceptions to the doctrine of exhaustion. To this court, it appears that the petitioners did not demonstrate any of the exceptions to the doctrine of exhaustion as discussed above.

128. As a result, this court's jurisdiction has been improperly invoked in respect to the allegations on article 35 of the *Constituion*. The petitioners rights under article 35 of the *Constitution* could be adequately addressed under the provisions of the Data Act.

Articles 73 and 75 of the *Constitution*

129. The above provisions relate to the conduct of State officers. In this case, the Petitioners did not specifically challenge the conduct of named State officers, but instead dealt with the offices of the 1st to 3rd respondents.

130. In such a case, it will be wrong for this court to find specific persons in contravention of articles 73 and 75 of the *Constitution* (for being the occupiers of the offices) where such persons were not personally called upon to defend themselves against the allegations.

131. The contention cannot, therefore, stand.

Articles 10(2), 47, 174 and 232(1)(d) and (h) of the *Constitution*

132. The above articles cumulatively provide for participation of the people in decision making and how administrative decisions are to be arrived at.

133. In dealing with this issue, the court will look at two sub-issues being that of public participation and fair administrative procedures.

134. The petitioners contended that the decision to re-name the road was unilaterally made and was not subjected to public participation. It was further contended that the decision affects the residents of the estate who put up the road and have been maintaining the same over time. They denied that the road was being maintained by Kenya Urban Roads Authority. The petitioners posited that the processes leading to the re-naming of the road ought to have been subjected to public opinion.

135. The respondents were of the contrary position. They contended that the decision to re-name the road was the responsibility of and an internal decision dealing with the daily operations of the 1st to 3rd respondents as sanctioned under the *Constitution* and the law. To that extent, there was no need of subjecting the processes to public participation as the decision purely dealt with the day to day operations of the County Government.

136. The respondents also contended that the naming and re-naming of roads within Kenya was the preserve of the Parliament and the County Assemblies.

137. The High Court in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 *William Odhiambo Ramogi & 3 others v The Attorney General & others* (*supra*) comprehensively dealt with the issue of article 10 of the *Constitution*. The Court stated as follows: -

> 116. Article 10 provides for the national values and principles of governance which bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the *Constitution*, enacts, applies or interprets any law or makes or implements any public policy decisions.

117. the *Constitution* also provided for alignment of the laws then in force at its promulgation. Section 7(1) of the sixth schedule states as follows: -

> Any law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this *Constitution*.

118. Expounding on article 10 of the *Constitution*, the Court of Appeal in Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others, Civil Appeal No 224 of 2017; [2017] eKLR held that:

> "In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that article 10(2) of the *Constitution* is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in article 10(2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 *Constitution* in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforced gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by article 259(1)(a) which enjoins all persons to interpret the *Constitution* in a manner that promotes its values and principles.
>
> Consequently, in this appeal, we make a firm determination that article 10(2) of the *Constitution* is justiciable and enforceable and violation of the article can found a cause of action either on its own or in conjunction with other Constitutional Articles or Statutes as appropriate."

119. Courts have also dealt with the concepts of public participation and stakeholders' consultation or engagement. The High Court in *Robert N Gakuru & others v Governor Kiambu County & 3 others* [2014] eKLR while referring to the South African decision in *Doctors for Life International v Speaker of the National Assembly & others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (cc); 2006(6) SA 416 (CC) adopted the following definition of public participation: -

> According to their plain and ordinary meaning, the words public involvement or public participation refers to the process by which the public participates in something. Facilitation of public

> involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process.

120. Public participation therefore refers to the processes of engaging the public or a representative sector while developing laws and formulating policies that affect them. The processes may take different forms. At times it may include consultations. The Black's Law Dictionary 10th Edition defines 'consultation' as follows: -

> The act of asking the advice or opinion of someone. A meeting in which parties consult or confer.

121. Consultation is, hence, a more robust and pointed approach towards involving a target group. It is often referred to as stakeholders' engagement. Speaking on consultation the Court of Appeal in *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* [2018] eKLR quoted with approval Ngcobo J in *Matatiele Municipality and others v President of the Republic of South Africa and others (2)* (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC) as follows: -

> .....The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say....

122. In a Three-Judge bench the High Court in consolidated Constitutional Petition Nos 305 of 2012, 34 of 2013 and 12 of 2014 (Formerly Nairobi Constitutional Petition 43 of 2014) *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR the Court addressed the concept of consultation in the following manner: -

> .... A public participation programme, must...show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

123. Consultation or stakeholders' engagement tends to give more latitude to key sector stakeholders in a given field to take part in the process towards making laws or formulation of administrative decisions which to a large extent impact on them. That is because such key stakeholders are mostly affected by the law, policy or decision in a profound way. Therefore, in appropriate instances a Government agency or a public officer undertaking public participation may have to consider incorporating the aspect of consultation or stakeholders' engagement.

124. The importance of public participation cannot be gainsaid. The Court of Appeal in *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* (*supra*) while dealing with the aspect of public participation in lawmaking process stated as followed: -

> "The purpose of permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the law-makers. This requires the law-makers to consider the representations made and thereafter make an informed decision. Law-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have no meaning."

125. In *Matatiele Municipality v President of the Republic of South Africa* (2) (CCT73/05A), the South African Constitutional Court stated as follows: -

> A commitment to a right to...public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect...

126. The South African Constitutional Court in *Poverty Alleviation Network & others v President of the Republic of South Africa & 19 others*, CCT 86/08 [2010] ZACC 5 discussed the importance of public participation as follows: -

> ...engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision.

127. Facilitation of public participation is key in ensuring legitimacy of the law, decision or policy reached. On the threshold of public participation, the Court of Appeal in *Legal Advice Centre & 2 others v County Government of Mombasa & 4 others* (*supra*) referred to *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR stated as follows: -

> "the mechanism used to facilitate public participation namely, through meetings, press conferences, briefing of members of public, structures questionnaires as well as a department dedicated to receiving concerns on the project, was adequate in the circumstances. We find so taking into account that the 1st respondent has the discretion to choose the medium it deems fit as

long as it ensures the widest reach to the members of public and/ or interested party."

128. In *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* (*supra*) the Court enumerated the following practical principles in ascertaining whether a reasonable threshold was reached in facilitating public participation: -

a. First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.

b. Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the courts will not use any litmus test to determine if public participation has been achieved or not. The only test the courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation.

c. Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See *Republic vs The Attorney General & another ex parte Hon. Francis Chachu Ganya* (JR Misc App No 374 of 2012. In relevant portion, the Court stated:

> "Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them."

d. Fourth, public participation does not dictate that everyone must give their views on the issue at hand. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, must, however, show intentional inclusivity and diversity.

Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.

e. Fifth, the right of public participation does not guarantee that each individual's views will be taken as controlling; the right is one to represent one's views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the constitutional box.

f. Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.

138. On the basis of the elaborate discussion on the principle of public participation and stake holder engagement, this court will now consider whether the decision to re-name the road from Dik Dik road to Francis Atwoli Road ought to have been subjected to public participation.

139. The court in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No 201 of 2019 *William Odhiambo Ramogi & 3 Others vs. The Attorney General & Others case* (supra) dealt with the manner in which a state corporation ought to exercise statutory power. The Court defined the requisite threshold as follows: -

133. The manner in which a public body exercises its statutory powers is largely dependent on the resultant effect. This yields two scenarios. The first scenario is when the exercise of the statutory authority only impacts on the normal and ordinary day-to-day operations of the entity. We shall refer to such as the 'internal operational decisions concept'. The second scenario is when the effect of the exercise of the statutory power transcends the borders of the entity into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public.

134. Subjecting the first scenario to public participation is undesirable and will, without a doubt, result to more harm than any intended good. The harm is that public entities will be unable to carry out their functions efficiently as they will be entangled in public participation processes in respect to all their

operational decisions. It would likely be impossible for any public entity to satisfactorily discharge its mandate in such circumstances. As long as a decision deals with the internal day-to-day operations of the entity such a decision need not be subjected to public engagement.

135. The issue is not foreign to our Courts. In *Commission for Human Rights & Justice v Board of Directors, Kenya Ports Authority & 2 Others; Dock Workers Union (Interested Party)* [2020] eKLR, the petitioner claimed that public participation was ignored in the recruitment of the Managing Director of Kenya Ports Authority. In a rejoinder, the respondents argued that section 5(1) of the KPA Act mandated the Kenya Ports Authority to appoint the Managing Director. They further argued that Boards of Directors of State corporations are independent and that their decisions are only fettered by the law. It was also argued that public participation had been conducted through representation of board members who were involved in the recruitment process. Rika, J, expressed himself as follows:

> Should the process of appointment of the Managing Director of the KPA, be equated to the process of making legislation or regulations in public entities? The High Court, in *Robert N Gakuru& Others v. Governor Kiambu County & 3 others* [2014] eKLR, held that it behoves County Assemblies, in enacting legislation, to do whatever is reasonable, to ensure that many of their constituents are aware of the intention to enact legislation. The constituents must be exhorted to give their input. Should the level of public participation be the same, in appointment of the Managing Director of a State Corporation? Should the respondents exhort Kenyans to participate in the process of appointment of the Managing Director? In the respectful view of this Court, appointment of the Managing Director, KPA, is a highly specialized undertaking, which is best discharged by the technocrats comprising the Board, assisted by human resource expert committees as the Board deems fit to appoint. The existing law governing the process of appointment of the Managing Director KPA leans in favour of technocratic decision-making. Democratic decision-making, involving full-blown public participation may be suitable in the processes of legislation and related political processes, such as the Makueni County Experiment and the BBI, subject matter of Dr Mutunga's case studies. But technocratic decision-making suits the appointment of CEOs of State Corporations. Even as we promote democratic [people-centric] decision-making processes, we must at the same time promote technocracy, giving some space to those with the skills and expertise to lead the processes, and trusting them to provide technical solutions to society's problems. The Board and the Committees involved in the process are in the view of the Court, well - equipped to give the Country a rational outcome. The Court agrees with the respondents, that the 1st respondent is sufficiently representative of stakeholders of the KPA, and the appointment of the Managing Director, is more of a technocratic decision-making

process, than a democratic- decision making process. It need not totally open itself up, to the scrutiny of every person. The public is aided by public watchdogs – DCI, EACC, CRB, KRA and HELB – in assessing the antecedents of the applicants. The State Corporations Inspector General is part of the ad hoc committee set up by the 1st Respondent, to evaluate and shortlist applicants. Interviews shall be carried out by the full Board, face to face with the candidates. There are adequate measures taken by the 1st respondent to ensure the process meets the demands of transparency and accountability to the public.

136. We agree with the Learned Judge. We further find that requiring an entity to subject its internal operational decisions to public participation is unreasonable. It is a tall order which shall definitely forestall the operations of such entity. That could not have, by any standard, been the constitutional desired-effect under articles 10 and 47.

137. While, as aforesaid, it is imprudent to subject internal operational decisions of a public body to the public policy requirement of article 10 of the *Constitution*, the opposite is true of decisions involved in the second scenario: these are operational decisions whose effect transcends the borders of the public body or agency into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public. There is, clearly, ample justification in subjecting the exercise of the statutory power in this scenario to public participation. The primary reason is that the resultant decisions have significant impact on the public and/or stakeholders.

140. Whereas the above decision dealt with a state corporation exercising statutory power, the threshold adopted by the court apply in the circumstances of this case in equal measure. In other words, a decision taken in exercise of executive authority may have to be subjected to public participation or not depending on its resultant effect.

141. As held in the above case, if the decision 'only impacts on the normal and ordinary day-to-day operations of the entity.....subjecting .... to public participation is undesirable and will, without a doubt, result to more harm than any intended good. The harm is that public entities will be unable to carry out their functions efficiently as they will be entangled in public participation processes in respect to all their operational decisions. It would likely be impossible for any public entity to satisfactorily discharge its mandate in such circumstances. As long as a decision deals with the internal day-to-day operations of the entity such a decision need not be subjected to public engagement.'

142. The converse is also correct. As held 'the opposite is true of decisions involved in the second scenario: these are operational decisions whose effect transcends the borders of the public body or agency into the arena of, and has a significant effect on the major sector players, stakeholders and/or the public. There is, clearly, ample justification in subjecting the exercise of the statutory power in this scenario to public participation. The primary reason is that the resultant decisions have significant impact on the public and/or stakeholders.'

143. There is no doubt that the impugned road serves the estate and that the residents have, for ages, been using the said road which has borne the name Dik Dik road. Whereas the petitioners urged that the association maintained the road, the respondents held that it was the Kenya Urban Roads Authority

that was charged with the duty of maintenance of the said road. Surprisingly, the respondents did not avail any evidence to support such an averment.

144. Even if the respondents were right in holding that the road was maintained by Kenya Urban Roads Authority, they further contended that the naming and re-naming of roads was the preserve of the Parliament and County Assemblies through appropriate resolutions. Again, the respondents did not avail any such resolution on the change of the name.

145. With such a position, the respondents were in fact asserting that the decision to name or re-name a road affects the public, hence, the need to involve the Parliament and County Assemblies which entities normally operate, inter alia, on the principle of public engagement.

146. It is, therefore, apparent that the decision to re-name the impugned road was such one that transcended the operational borders of the respondents into the arena of, and had a significant effect on the petitioners, other sector players, stakeholders and/or the public. Such a decision called for public engagement prior to being made. Such processes would have been carried out in Parliament or in the County Assembly of the Nairobi City County.

147. Alternatively, this was a matter which called upon the 1st to 3rd respondents to, at least, make the petitioners aware of why the road was being re-named and to also accord them an opportunity to contribute to the process by giving their views.

148. The respondents having taken the position that the decision to re-name the road did not call for any form of stakeholders' engagement, affirms that no such engagement was ever held. Having so acted, the respondents were in clear derogation of the Constitutional principle of public participation as enshrined in articles 10(2), 174 and 232(1)(d) and (h) of the *Constitution*.

149. Likewise, the impugned decision ran contra article 47 of the *Constitution* for want of administrative fair procedures. Further, there was no compliance or at all with section 5 of the *Fair Administrative Action Act* which laid the procedure in arriving at holding administrative decisions, like the one in this matter, which are likely to materially and adversely affect the legal rights or interests of a group of persons or the general public.

150. As the court comes to the end of this issue, suffice to state that the 4th respondent, having been informed of the intention to re-name the impugned road in his favour, was under a duty to ensure that the said re-naming was within the *Constitution* and the law. In particular, the 4th respondent was, to at least, ensure that there was public engagement before the decision was made so as to be off the hook of acting in derogation of the *Constitution* and the law. The 4th respondent failed to ensure such compliance.

151. Having failed to ensure as much, the 4th respondent violated articles 3 and 10(1) of the *Constitution* by not ensuring that the *Constitution* was upheld. He, cannot now hide under the rest of the respondents and claim that he was not the one who made the impugned decision.

152. With the aforesaid, the upshot is that articles 10(2), 47, 174 and 232(1)(d) and (h) of the *Constitution* were variously infringed by the respondents for want of public participation, stakeholder consultations and administratively fair procedures.

153. The impugned decision cannot, therefore, stand the test of the *Constitution* and the law. The decision is constitutionally infirm and void ab initio.

Conclusion

154. Drawing from the foregoing, the petition has partly succeeded. Whereas the petitioners have failed to prove that the respondents and/or any of them infringed articles 27, 35, 73 and 75 of the *Constitution*,

they were able to demonstrate that Articles 10, 47, 174 and 232(1)(d) and (h) of the *Constitution* were variously infringed by the respondents for want of public participation, stakeholder consultations and administratively fair procedures as well as the failure to defend the *Constitution*.

155. The petition has also affirmed the position that a party who offers himself/herself/itself to be part of a decision by a public entity must ensure that the resultant decision complies with the *Constitution* and the law especially when such a decision is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public otherwise such a person suffers running against the grain of the *Constitution* and the law.

Disposition

156. The petitioners have demonstrated that the petition ought to be sustained.

157. As such, the following final orders do hereby issue: -

a. The claim that the petition does not meet the threshold of constitutional petitions fails and is dismissed.

b. The claim that the decision to re-name the Dik Dik Road to Francis Atwoli Road contravenes articles 27, 35, 73 and 75 of the *Constitution* fails and is dismissed.

c. A declaration hereby issues that the respondents' decision to re-name the Dik Dik Road in Kileleshwa within the Nairobi City County to Francis Atwoli Road is in violation of articles 10, 47, 174 and 232(1)(d) and (h) of the *Constitution* for want of public participation, stakeholders' engagement and administrative fair procedures as well as the failure to defend the *Constitution*. This court declares the said decision constitutionally infirm.

d. An order of *certiorari* to call, remove and deliver up to this honourable court and quash or revoke the decision to re-name the Dik Dik Road to Francis Atwoli Road hereby issue. Therefore, the decision to re-name the Dik Dik Road to Francis Atwoli Road by the respondents is hereby quashed.

e. As the petition has partly succeeded, each party will bear its own costs.

158. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 21ST DAY OF SEPTEMBER 2023.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Litoro, Learned Counsel for the Petitioners.

N/A for the 1st, 2nd and 3rd Respondents

N/A Learned Counsel for the 4th Respondent.

Regina/Chemutai - Court Assistants