REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. E392 OF 2020

LEGAL ADVICE CENTRE T/A KITUO CHA SHERIA.....1ST PETITIONER

ELIZABETH KASOHA ZEZE.....2ND PETITIONER

ELIZABETH NYAMBEKI ASUMA.....3RD PETITIONER

AND

THE CHIEF JUSTICE.....1ST RESPONDENT

THE NATIONAL COUNCIL ON THE ADMINISTRATION OF JUSTICE.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

THE LAW SOCIETY OF KENYA.....INTERESTED PARTY

JUDGMENT

PETITION

1. The Petitioners through a Petition dated 27th November 2020, pray for the following orders:-

a. An order directed at the 1st and 2nd Respondents to reopen Courts for open physical public hearings including registries to members of the public and advocates with all necessary safeguards to curb the spread of the COVID-19 disease.

b. A declaration that the Respondents have failed to consider the plight and realities of many Kenyans particularly the indigent, self-representing litigants, the marginalised, those unfamiliar with court procedures, illiterate and semi-illiterate, rural and some urban communities which entrenching the electronic system within the judicial system therefore violating the rights of Kenyan public under Articles 10 (a) (b) and (c), 25 (c), 27, 48, 50 (2) (d), 159 (2) (a) and (e) of the Constitution of Kenya.

c.A declaration that the Respondents failed to accord the Kenyan public participation in the whole process of digitization and use of technology in the judicial system hence violating Article 10 (a) of the Constitution of Kenya on the participation of the people.

d. A declaration that the 1st and 2nd Respondent violated the Petitioners' and the Kenyan public legitimate expectation by failing to implement initiatives and programmes aimed at ensuring that ordinary members of the public seeking court services, especially those who may not have access to the necessary infrastructure, or are unrepresented and unfamiliar with court procedures as promised thus violating Article 48 of the Constitution of Kenya.

e. An order directed at the 1st Respondent to within 30 days of the court judgement to implement initiatives and programmes that will ensure access to courts and services by members of the public and advocates.

f. This being a matter of public interest there be no orders as to costs.

PETITIONER'S CASE

2. The Petitioners through the Petition and the Supporting Affidavit of John Mwariri dated 27th November 2020, allege that the Respondents have violated the right to access to justice and fair trial of Kenyan citizens by entrenching an electronic system in the judicial system without the necessary and adequate legal framework and initiatives that cover the indignant and self-representing litigant and the realities faced by many ordinary Kenyans. Moreover, it is complained that the Respondents have failed to implement initiatives and programmes with which indigent and self-representing litigants can overcome the constraints of technology in access to justice.

3. The Petitioners contend that the actions and omissions of the Respondents offend/contravenes the Petitioners' and many citizens' right to be treated equally and not to be discriminated against. Furthermore, the State has violated the right of the Petitioners to public participation by failing to subject the whole process of digitization and use of technology in the judicial system to public participation; and failing to consult the relevant stakeholders being the indigent and self-representing litigants and the 1st Petitioner.

THE 1ST AND 2ND RESPONDENT'S RESPONSE

4. The 1st and 2nd Respondents filed a Response dated 15th March 2021 to the Petition asserting that the restrictions imposed by them are reasonable, proportionate and Constitutional and are reflective of the steps taken world over in the fight against the COVID-19 pandemic. The Respondents further contend that the public interest lies in saving the lives of Kenyans and protecting their well-being against COVID-19. The Respondents aver that it would not be in the public interest to re-open courts, as this will result in the rapid spread and exposure of Kenyans to COVID-19.

5. The Respondents in addition claim that the Petition offends the doctrine of separation of powers as the Court cannot direct the executive on which policies to enact and or the manner in which to undertake that policy-making mandate.

6. In response to the prayers sought by the Petitioners, the Respondents contend that the Petitioners have not placed material facts before the Court of any identifiable person whose rights have been violated or evidence of the violation of any provisions of the Constitution. Moreover, the Respondents contend that the Petition as pleaded does not meet the test required of a Constitutional Petition as the Petitioners pleadings should go beyond mere allegations of violations.

7. The Respondents pray that the Petition be dismissed and the Petitioners bear the costs of the Petition.

THE INTERESTED PARTY'S RESPONSE

8. The Interested Party through the Replying Affidavit of Mercy Wambua dated 8th March 2021, highlights the alleged challenges faced by its members including lack of access to computers and other facilities which have led to an impediment to access to justice and miscarriage of justice.

9. The Interested Party further complains that it is in the interest of justice and the public that the system as it is currently be improved or that the court system and process revert to the manual and physical system. The Interested Party prays that the Petition be allowed as prayed.

PETITIONERS' SUBMISSIONS

10. The Petitioners filed Written Submissions dated 1st March 2021 identifying six issues for determination:

i. Whether the Petitioners' and the Kenyan citizens' rights to access to justice has been infringed.

ii. Whether the Constitution contemplates open and public hearings and whether virtual court hearings are legitimate and contemplated by the Kenyan law.

iii. Whether the electronic system has maintained confidence in the integrity of the administration of justice.

iv. Whether the Petitioners' and the Kenyan citizens' right to public participation has been infringed.

v. Whether the indigent, unskilled on technology, self-representing, marginalised, some urban and rural communities of the public have been discriminated.

vi. Whether a legitimate expectation was created by the Respondents through the speech of 1st July 2020 and whether the Respondents are in violation of the legitimate expectation.

11. On the first issue, the Petitioners submit that the 2nd and 3rd Petitioners, like a significant number of the Kenyan population, have no access to the internet due to the costs of internet and lack of digital devices. They assert that the introduction of technology in the judicial system is elitist and foreign to the conditions of existence of so many Kenyans. It is further submitted that the Respondents have not formulated any programmes to ensure that ordinary Kenyans access justice through the electronic system.

12. On the second issue, it is submitted that open and public access to courts is grounded in our Constitution and our common law heritage. There is no legitimacy in closing the Courts from public hearings. The Petitioners rely on the decisions in ***Scott v Scott [1913] AC 417 at 463; John Fairfax Group Pty Ltd. v Local Court of New South Wales and others [1992] 26 NSWLR 131; Russel v Russel [1976] 134 CLR 495 at 520*** on the legitimacy of public hearings and access to justice. Further reliance is placed on the case of ***Nairobi High Court Constitutional and Human Rights Petition 120 of 2020 (COVID 025) Law Society of Kenya v Hillary Mutyambai, Inspector General of the National Police Service and others*** on the access to courts of advocates during the ongoing COVID-19 pandemic. The Petitioners also draw from the International Covenant on Civil and Political Rights on the public's participation in court hearings, however, they do not clarify which Article they are relying on.

13. On the third issue, it is asserted that the entrenching of the technology locks out so many ordinary Kenyans the result is that many Kenyans lose confidence in it. They further allege that for ordinary Kenyans to receive judicial services they must resort to bribery. The Court is invited to take judicial notice of the fact that particularly Milimani Commercial Courts gates have been locked to members of the public meaning they cannot access services.

14. On the issue of public participation, the Petitioners submit that the judiciary did not convene any meetings and forums to deliberate on the entrenchment of technology in the judicial system. There is no evidence placed before the Court that stakeholder meetings were held while entrenching technology in the judicial system. Reliance is placed on the cases of ***Kiambu County Government & 3 others v Robert N. Gakuru & others [2017]; William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR*** on the importance of public participation. The Petitioners contend that the policy/directions for employing technology in the judicial system by the Respondents contained in a press statement and gazette notice violate ***Articles 10 and 47 of the Constitution*** for want of public participation and stakeholder consultations where ordinary Kenyans and stakeholders would give their views.

15. On the allegation of discrimination, the Petitioners submit that the directives and policy to introduce technology to the judicial system; to the extent that it is only convenient to a section of the members of the public while locking out the indigent, unskilled on technology, self-representing, marginalised, some urban and rural communities; violates ***Article 27 of the Constitution of Kenya*** and is discriminatory.

16. On the issue of whether a legitimate expectation was created by the Respondents through the speech of 1st July 2020, it is asserted that the former Chief Justice created an expectation that programmes and ICT support would be established to ensure that all sections of the Kenyan population access the courts. The Petitioners assert that the 1st Petitioner placed reliance on the promise of the former Chief Justice on behalf of its clients, and therefore by failing to initiate programmes and establishing ICT centres across the country, the Respondents are in violation of the legitimate expectation of the Petitioners.

THE 1ST AND 2ND RESPONDENT'S SUBMISSIONS

17. The 1st and 2nd Respondents filed submissions dated 13th July 2021 and identifying the issues for determination as:-

a. Whether the Petitioners' and the Kenyan citizens' right to access to justice has been infringed by the introduction of virtual Court hearings.

b. Whether the Petition meets the requisite threshold of a Constitutional Petition.

c. Whether there exists an alternative remedy in lieu of constitutional remedies.

18. On the first issue, the Respondents submit that the Petitioners have not adduced any cogent facts to enable this Honourable Court to exercise its discretion in their favour. The Respondents assert that the right to life of the judicial staff members super-cedes the Petitioners' push for the re-opening of Courts for physical hearings. The restrictions imposed by the Respondents are therefore reasonable, proportionate and Constitutional and are reflective of the steps taken world over in the fight against COVID-19. Reliance is placed on the decisions in ***Kenya Tea Development Agency Holdings Limited & 55 others v Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries & Co-operatives & 2 others; Kenya Small Tea Holders Growers Association (KESTEGA) (Interested Parties) [2021] eKLR; and Kenya Union of Commercial, Food and Allied Workers v Shoprite Checkers Kenya Limited [2021] eKLR;*** where the Courts postulated on the right to access to justice vis-à-vis the use of technology.

19. On the second issue, it is submitted that in accordance with the principle established in the case of ***Anarita Karimi Njeru v The Republic [1979] eKLR*** which was later restated in ***Mumo Matemo v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR***, the current Petition as it is does not meet the requisite threshold of a constitutional Petition, as it is not merely enough to cite constitutional provisions. There have to be some particulars of the alleged infringements to enable the Respondents to be able to respond to and/or answer to the allegations or complaints.

20. Lastly, the Respondents submit that an alternative remedy to the issues raised by the Petitioner is to file a suit in the ordinary civil courts. Matters that do not call for the Court's constitutional interpretive mandate under the Bill of Rights provisions should not be disguised as Constitutional Petitions seeking enforcement of the Bill of Rights. This is buttressed by the holdings in ***Godfrey Paul Okutoyi & others v Habil Olaka & another [2018] eKLR; and Bernard Murage v Fine Serve Africa Ltd & others [2015] eKLR***.

ANALYSIS AND DETERMINATION

21. I have carefully considered the pleadings herein, the rival submission and from the same, I find that the following issues arise for consideration:-

a. Whether the Petition meets the requisite threshold for a Constitutional Petition.

b. Whether the Petitioners' right to public participation was infringed by the impugned directive.

c. Whether the Petitioners and Kenyan Citizens' constitutional rights under Article 10(a) (b) and (c), 25(1), 27, 48, 50 (2) (d), 159(2)(a) and (e) have been infringed by the impugned directives.

d. Whether a legitimate expectation was created by the Respondents through the speech of 1st July 2020 and whether the Respondents are in violation of the legitimate expectation.

A. WHETHER THE PETITION MEETS THE REQUISITE THRESHOLD FOR A CONSTITUTIONAL PETITION.

22. Before I proceed to consider other issues raised in this Petition, I find that it is of paramount important to consider the question as to whether or not there is a competent Constitutional Petition before this Honourable Court. The principles of what constitutes a Constitutional Petition was sufficiently considered in the case of ***Annarita Karimi Njeru vs the Republic (1970) eKLR***, which principle was later restated by the Court of Appeal in the case of ***Mumo Matemo vs Trusted society of Human Rights Allied & 5 others (2013) eKLR***.

23. The Principle established in the ***Annarita Karimi Njeru case (Supra)*** was that a Constitutional Petition should set out with a degree of precision the Petitioner's complaint, the provisions infringed, and he manner in which they are alleged to be infringed. The ***Mumo Matemo case (supra)*** simply reaffirmed the principle in the ***Anarita Karimi case*** when the Court at paragraph 44 of the Judgment stated as follows:-

> **"(44) We wish to reaffirm the principle holding on this question in Anarita karimi Njeru (supra). In view of this, we find that the Petition before the High Court did not meet the threshold established in that case. At the very least, the 1st Respondent should have seen the need to amend the Petition so as to provide sufficient particulars to which the Respondents could reply. Viewed thus, the Petition feel short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these short comings, it was not enough for the Superior Court below to lament that the Petition before it was not the "epitome of precise, comprehensive or elegant drafting, without remedy by the 1st Respondent."**

24. The 1st and 2nd Respondents placing reliance in the principles set in the aforesaid cases contend that the current Petition does not meet the requisite threshold of a constitutional Petition. They urge further it is not enough for anyone to merely cite constitutional Provision without setting out some particulars of the alleged infringements to enable the Respondents to be able to respond to and/or answer the allegations on complaints.

25. In determining the issue herein this Court this Court is called upon to peruse the Petition as drawn and filed and confirm whether the 1st and 2nd Respondents contention is correct or not.

26. Upon perusal of the Petitioners Petition, it is clear that the Petitioners have set out with degree of precision their complaint under paragraphs 6(1) – (26) of the Petition, the provisions contained therein are clearly set out under paragraphs 31 – 37 of the Petition. The manner in which the provisions have been infringed is set out under the facts under paragraphs 6(1) – (26). In view of the aforesaid I find that the Petition meets the requisite threshold of a Constitutional Petition and I accordingly decline to strike out the Petition on this ground.

B. WHETHER THE PETITIONERS' RIGHT TO PUBLIC PARTICIPATION WAS INFRINGED BY THE IMPUGNED DIRECTIVE.

27. Article 10(a)(b) and (c) of the Constitution envisions national values and principles of governance of:-

> **"a) Rule of law and participation of the people**
>
> **b) Human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.**
>
> **c) Good governance, integrity, transparency and accountability."**

28. The essence of the aforesaid Article is to ensure involvement of the people in judicial process is key as an indicator of level of democracy. The Petitioner contend that Kenya as a democratic country cannot entrench an electronic system in Judicial system without involving the same people. It is urged that the people as users of the judicial system ought to be given a chance to participate Lenaola J. (as he then was) while addressing the Judges at the Judges Colloquium, August 2011, had this to say regarding participation:-

> **"A country's justice system is a key indicator of its level of democracy, rule of law and respect for human rights. It must as a matter of necessity rely heavily on involvement of all stake holders. The public is the key stakeholder in that regard and therefore the <u>importance of its participation in any judicial process</u> can never be over emphasized."** *(Emphasis added)*

29. The Petitioner further urge that such collaborative interactions lead to more creative and acceptable outcomes. Improved communications between groups also increases the chances of successful implementation of decisions. Furthermore, a well-structured collaborative process can remedy some of the problems that arise in establishing a system. This is why the Petitioners state that had they been involved some of the difficulties with the digitized system would have been addressed.

30. It is additionally the Petitioners position that citizen participation have the dual function and effect of assisting members of the public to exercise their constitutional rights of access to government and help the government identify the needs of the diverse groups and the

solutions to such needs.

31. In support of the Petitioner's submission reliance is placed in ***Article 159 (1) of the Constitution*** which clearly recognises that Judicial authority is derived from the people and vets in, and shall be exercised by the courts and tribunals established by or under the Constitution. The position taken by Kenya therefore is that judicial authority is from the people and the Judiciary cannot purport to exercise this authority without involving the same people. It should be noted as submitted that ***Article 159(1) of the Constitution*** is an extension of ***Article 1(1) of the Constitution*** under which the citizens surrender to the state the right to be governed in exchange for protection. This makes the government an agent of the people meaning that it has to implement the will of the people and be accountable to them.

32. The Petitioners further urge the acknowledgement of the people's sovereignty with regards to Court makes the people identify with the courts and regard it as one of their own. Furthermore, such an acknowledgment show a commitment to involve the citizens in the administration of Courts.

33. The Petitioners contention is that the Judiciary did not convene any meetings and forums to deliberate on the entrenchment of technology in the judicial system. It was expected that in such meetings with citizens the judiciary would develop a better understanding of what the public wants and expects in terms of service provision and what were the limitations in access to Courts. Further it is stated by the Petitioners that there is no evidence placed before Court that stakeholder meetings were held while entrenching technology in the judicial system. The 1st Petitioner is the oldest human rights and legal aid centre. It is key justice actor together with the Interested Party, the Law Society of Kenya. If the Respondents in deed carried out public participation, then it ought to have involved them.

34. The significance of public participation was well elaborated in case of ***Court of Appeal in Kiambu County Government & 3 others v Robert N. Gakuru & others (2017) eKLR*** where while affirming the significance of public participation stated thus:-

> **"[20] …The issue of public participation is of immense significance considering the primacy it has been given in the supreme law of this country and in relevant statutes relating to institutions that touch on the lives of the people. The Constitution in Article 10 which binds all state organs, state officers, public officers and all persons in the discharge of public functions, highlights public participation as one of the ideals and aspirations of our democratic nation…."**

35. The Petitioners contention therefore is that the policy/directions for employing technology in the judicial system by the Respondents contained in a press statement and gazette notice are in violation of ***Article's 10 and 47 of the Constitution*** for want of public participation and stakeholder consultations where ordinary Kenyans and stakeholders would give their views. This is notwithstanding the fact that the directives and policy affect the people. It is urged that has not been demonstrated that the policy/directions which have the effect of impending access to justice was subjected to public participation.

36. The Petitioners on the issue of public participation place reliance in the case of ***William Odhiambo Ramogi & 3 Others vs. Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR*** which set out the test which a law / policy / directive must meet for it to attain the constitutional muster to wit:

> **"Third, even where a policy or law passes muster under the rational basis test, it is incumbent for the State to demonstrate that the Policy or law limiting the non-fundamental right was crafted after a process of public participation or administrative fair hearing in which those most affected by the policy or law have been given an opportunity to air their views and to have those views considered before the policy or law is made final. This is a due process requirement."**

37. The Petitioners further rely on the decision of ***Robert N. Gakuru & others v. Kiambu County Government & 3 others (2014) eKLR*** the Court observed:

> **"Public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not enough, in my view, to simply "tweet" messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many for a as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action. Article 19691)(b) just like the South African positon requires just that.**

38. It is Petitioners case as stated in the above case that public participation is not merely a formality and ought to be genuine attempt to engage the people in what affect them and their constitutional rights.

39. In determining this issue it is important to find out whether their exists peculiar circumstances, of this case as it is settled law that each case should be considered on its own facts inspite of the general principle that public participation is a requirement enshrined in ***Article 10 of the Constitution***.

40. In consideration of the above reliance is paled the case of ***Law Society of Kenya v. Attorney General & Another National Commission for Human Rights & another (Interested Parties) [2020] eKLR*** where the Court stated:-***:-***

> **95. From the above I find the general issue of restriction of movement had indeed been subjected to public participation. I**

find that government has right to put in place precautionary and restrictive measures in order to slow the spread of COVID - 19 in line with the precautionary Principle and Public Health (Prevention, Control and Suppression of COVID – 19) Rules.

96. The importance of urgent preventive measures cannot be down -played in any society and the same has been recognized and upheld in a number of jurisdictions. In the case of Friends of Danny Devito, Kathy & others vs. Tom Wolf, Governor, And Rachel Levine, Secretary of Pa Department of Health, No. 68 Mm 2020 the Petitioners grievances included the assertion that they had been deprived of procedural due process. The learned Judges rejected the argument in the following terms:

> **"Under the circumstances presented here, namely the onset of the rapid spread of Covid-19 and the urgent need to act quickly to protect the citizens of the Commonwealth from sickness and death, the Governor was not in a position to provide for predeprivation notice and an opportunity to be heard by Petitioners (and every other business in the state on the non-life-sustaining list). The result would have been to delay the entry of the Executive Order by weeks, months, or even years, an entirely untenable result given the duties and obligations placed on the Governor under the Emergency Code to abate the looming disaster. As such, Petitioners were not entitled to pre-deprivation notice and an opportunity to be heard."**

97. A review of previous decision of the Courts as relates to the issue of public participation show that indeed public participation may not always be applicable as a blanket requirements. For instance in the case of National Super Alliance (NASA) Kenya v Cabinet Secretary for Interior and Co-ordination of National Government & 3 Others [2017] eKLR the Court held that public participation was not applicable at the time of imposition of the curfew because information relating to matters of national security cannot be shared with members of public in view of the limitations in Section 6(1) of the Access to Information Act No. 31 of 2016.

98. Further in Independent Electoral and Boundaries Commission (IEBC) v national Super Alliance (NASA) Kenya & 6 Others (2017) eKLR the Court of Appeal held that allegations of lack of public participations must be considered in the peculiar circumstances of each case. The judges proceeded to find that whereas as a general principle public participation is a requirement in all procurement by a public entity, the same did not extend to direct procurement. *(Emphasis mine)*

41. Upon consideration of the aforesaid authorities and circumstances of this case, I am of the view that the issue of public participation must be considered on a case to case basis as public participation may not be applicable in all cases depending on the circumstances in existence at the time, and lack of public participation, must in my view be considered in the peculiar circumstances of each case as no two cases are similar.

42. Upon consideration of the peculiar circumstances of this matter I find that the Petitioners and 1st Interested Party contention that the Rules should be declared unconstitutional for lack of public participation have failed to take into account the peculiar circumstances of the current environment and the fact that indeed the Respondents facilitated consultation as relates to restrictions of movement generally. I find therefore public participation could not be applicable at the time the Rules were made. I find no basis or justifiable reasons to declare the rules unconstitutional, null and void.

43. It is further noted from the Acting Chief Justice statement on Judiciary efforts to combat Covid-19 in the zoned Counties of Nairobi, Machakos, Kajiado, Kiambu and Nakuru on 29th March 2021, was that:-

> **"1. Our key imperative in the circumstances remains the health and safety of all our judges, judicial officers and Judiciary staff, court users and their families whilst, to the greatest extent possible, mitigating the effects of such closures on the justice delivery through, amongst others, the use of digital solutions. The Judiciary thus seeks to ensure that the virtual processing and hearing of matters can be effectively and efficiently undertaken whilst ensuring the comprehensive safety of all Judiciary personnel."**

44. Further the ***National Emergency Response Committee on Corona Virus update on Covid-19*** in the Country and Response Measures, as at August 9, 2021 stated that:-

> **"Today 745 people have tested positive for the disease, from a sample size of 6,209 tested in the last 24 hours. The positivity rate is now 12.0%."**
>
> **"In terms of County distribution; Nairobi 441…"**

45. It is clear from the above in arriving at the above decision, the Judiciary rightly pointed out that there were circumstances in which public participation cannot always be undertaken depending on the circumstances of the case. As we have seen the COVID-19 pandemic is unpredictable and circumstances are continuously changing. As of 9th August 2021, the positivity rate of COVID-cases stood at 12.0% with the majority of the reported cases in Nairobi. Only 4 days earlier on 6th August 2021, the positivity rate was at 15.5%, with the number of cases in Nairobi recorded at 674. Moreover, on 1st August 2021, the positivity rate was down to 9.0%, showing the unpredictability of the circumstances that we are in. In my view, these unpredictable circumstances make public participation difficult to procure. At the end of the day, the priority for the government and judiciary is the safety of the members of the public and the judiciary staff, and the prevention of the spread of COVID-19.

46. In view of the aforesaid I find that public participation was not applicable at the time of imposition of the rules complained of, as that in my view was a peculiar circumstances in which public participation would not have been possible to procure and lack of public participation in the circumstances of this case cannot be a basis or justification to declare the rules or directions unconstitutional, null and void as sought

by the Petitioners. I find what the Respondnets did was correct and justified as the right to life of Judicial staff and members of public supersedes the Petitioners push for re-opening of Courts for physical hearing. The restrictions as already imposed by the Respondents are reasonable, proportionate and constitutional. This Court takes judicial notice that virtual hearing enables litigants access justice, currently physical Court hearing are sometimes allowed depending on the nature of the matter and in strict compliance with Covid – 19 health protocals this should add is one case to case basis and depending on circumstances of the case. I find that the Petitioners have not demonstrated any violations of access to justice to justify re-opening Courts for open physical public hearing including registries to members of public and Advocates as of now.

C. WHETHER THE PETITIONERS AND KENYAN CITIZENS' CONSTITUTIONAL RIGHTS UNDER ARTICLE 10(A) (B) AND (C), 25(1), 27, 48, 50 (2) (D), 159(2)(A) AND (E) HAVE BEEN INFRINGED BY THE IMPUGNED DIRECTIVES.

47. The main issue raised under this issue relates to a fair trial, hearing and access to justice arising out of Gazette Notice No. 3137 – Practice Directions for Protection of Judges, Judicial Officers, Judiciary Staff, Other Court Users and the General Public from the Risks associated with the Global Corona Virus Pandemic.

48. The practice directives were ***"formulated pursuant to Articles 48 and 159 of the Constitution, Sections IA, 1B and 81 (3) of the Civil Procedure Act, Section 10 of the Judicature Act, Sections 29 and 38 of the Court of Appeal (Organization and Administration) Act, 2015, Section 5 of the Judicial Service Act, 2011, Sections 13 and 16 of the High Court (Organization and Administration) Act, 2015, Section 24 of the Environment and Land Court Act, 2011, Section 27 of the Employment and Labour Relations Act, 2011, Section 14 of the Magistrates Court Act, 2015, and Rule 51 of the Supreme Court Rules, 2011".***

49. The Petitioners contend that their right of access of justice as enshrined under ***Article 48 of the Constitution*** has been infringed by the Respondents action and or omissions. ***Article 48 of the Constitution*** provides:-

> **"The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice."**

50. The Petitioners aver that they and many other Kenyans cannot access the digitized system as like many other Kenyans, they do not have access to the internet due to cost of internet and the fact that they do not have digital devices (phones, smartphones, tablets and computers etc) that would enable them access internet and subsequently the Courts. They also lack digital skills and experience to handle the said devices and even to tap into the internet.

51. In support of the Petitioners case, the Petitioners have through the 2019, KNBS report shown that only 22.6% of Kenyans have access to internet while only 10.4% of Kenyans have use of desktop, laptops and tablet. A partry 47.6% of the Kenyans population have mobile ownership. The Petitioners in view wherefore urge that Kenya is not ready for entrenchment of technology in the Judicial system.

52. The Petitioner further contend the concept of introducing technology in the judicial system is elitist and foreign to the conditions of existence of so many Kenyans. The Kshs.3,000 that is solicited in cybercafes and the amount used to bribe Court officials for Kenyans to receive judicial services is the amount a Kenyan would use to pay rent or place food on the table. This reality is urged by Petitioners is clearly demonstrated by the 2nd Petitioner who has not paid rent for 8 months.

53. It is contended that while entrenching the technology in The Judicial system, the Judiciary failed to take due regard to indigent and self-representing litigants like the 2nd and 3rd Petitioners who cannot access justice through the use of technology. The e-filing platform has caused a lot of challenges to self-representing litigants as it is geared for represented clients. The system requires one to register a case, upload files and then await the activation of the Court file to be granted Court audience. The whole process increases the complexity of the Judicial system which subsequently causes in-access to justice.

54. The Petitioners placed reliance in the case of ***Dry Associates Limited v Capital Markets Authority & Another Interested Party Crown Berger (K) Ltd High Court Constitutional Petition No. 328 of 2011 (2012) eKLR***, where Majanja J succinctly identified some of the components of access to justice as follows:-

> **"Access to justice is a broad concept that defines easy definition. It includes the enshrinement of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to one's rights; equal right to the protection of those rights by the law enforcement agencies; easy access to the justice system particularly the formal adjudicatory processes availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay."**

55. The Petitioners as regards the availability of physical infrastructure, it has been brought out clearly through the evidence of the 2nd and 3rd Petitioners that most ordinary Kenyans have no access to internet, cannot access devices like phones and computers and even electricity. Clearly, this has led to in-access to justice.

56. Further on affording of legal services, it is clear that litigants have to bear costs such as filing fees and not to underestimate the costs of travelling to court. It should not escape our minds that the Court filing fees are a huge burden to many Kenyans. This severely burdens ordinary citizens seeking justice through the formal adjudicatory system. The 2nd and 3rd Petitioner have clearly stated that they are now exposed to extra costs; where the judiciary in digitizing the judicial system has exposed them to exploitative cyber café agents. The Petitioners have recounted instances where they have to part with over Kshs.3,000 in order to access services at cyber cafes which services should ordinarily and reasonably be provided by the judiciary. Such hefty and unregulated amounts charged on ordinary Kenyans impede access to Court.

57. It is stated by the Petitioners that the Respondents have however not formulated any programmes to ensure that ordinary Kenyans access justice through the electronic system. I note that the electronic system as urged would serve as an impediment. The former Chief Justice had contemplated about the establishment of programmes and ICT support centers, however almost a year and half since then the former Chief Justice is said not to have acted accordingly. It is urged that this is what the former Chief Justice stated:-

> **"As I said earlier, this system will not serve the highest ideals of justice delivery if it is only convenient to a section of Court users."**

59. The Petitioner further contend that virtual hearing have brought in a cultural shift in judicial proceedings and the legal profession. Virtual court hearings have now become a standard feature of legal practice. The question that begs is whether the Constitution of Kenya contemplated virtual hearings.

59. The Petitioner further contend that it is instructive to note that the Constitution of Kenya contemplates a fair hearing under ***Article 50(1) of the Constitution of Kenya*** where every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body. ***Article 50 (2)(d)*** provides that every accused person has a right to a fair trial which includes the right to a public trial before a Court of law. Under ***Article 25(c)*** the Right to a Fair Trial is a fundamental right that cannot be limited.

60. The Petitioners aver that where cases are heard virtually, many ordinary Kenyans are locked out. The result is that justice is not perceived to be open. It is further contended that public confidence in the justice system and the administration of justice is consequently undermined and individuals may be more inclined to take justice into their own hands.

61. The Petitioners urge their case is that not even necessity or any changes can justify departure from the law. They proceed to raise questions such as the ones herein below. Are the Petitioners therefore oblivious of the risks posed by the Corona Virus (COVID – 19) pandemic? The answer is an emphatic no. The Petitioners question whether it is not possible to have open physical public hearings including operating of the registries to the members of the public and advocates with all necessary safeguards to curb the spread of the COVID – 19 pandemic.

62. In support of their proposition the Petitioners sought reliance in the ***Nairobi High Court Constitutional and Human Rights Petition 120 of 2020 (COVID 025) Law Society of Kenya v Hillary Mutyambai, Inspector General of the National Police Service and Others*** where the Court took note of the fact that during a crisis the state tends to overreach itself and therefore violate human rights. The court in that case found merit in the contention by the Petitioner that its members should have been exempted from the operations of the Curfew Order so that they can assist in the protection of the rights guaranteed by ***Article 49 of the Constitution*** whenever called upon to do so. The Court hence saw the intergral role that advocates play in the administration of justice that it listed them as essential service providers. The Court decision was to the effect that advocates should have unrestricted access to Courts. What is happening contradicts this position as Courts are closed. You cannot access Court premises.

63. I find as we deal with this matter that it is important to answer the question of whether online or virtual courts can be termed as public as contemplated under ***Article 50(1) and 50(2) (d) of the Constitution of Kenya***. One principle that was set out by Justice Gibbs in the case ***Russell v Russell (1976) 134 CLR*** quoted above is that judicial proceedings ought to be exposed to the public. Our understanding therefore is that all Kenyans from all walks of life are able to access the courts. It is definitely clear that virtual Courts by the fact that they exclude some members of the Kenyan public are not open to public scrutiny. The Petitioners contend that the Constitution of Kenya contemplates that even the poorest of the poorest in Kenya is able to step into the court and hear a case. A person from Kakamega can travel to the Nyeri or Machakos Court premises and follow Court proceedings. The Petitioners further contend that this is not so with virtual hearings, this is because as highlighted above due to various limitations including the fact that many poor, marginalized, rural communities and women folk are digitally excluded from the courts. They lack the necessary infrastructure including internet and devices i.e. phones and laptops to access the courts. The virtual Court hearings cannot hence be said to be open and public as they are only accessible to those who are able to not to the public at large. The Petitioners further state the exclusion of some members of the public from the administration of justice tends to diminish the confidence that people have in the judicial system.

64. In view of the aforesaid the Petitioners contend that virtual Court hearings are not public for the reason that they are not open to everyone. An example is that admission into a Court session requires you to be admitted by a host who is a judicial officer or Court registry staff. In the Petition for example the Petitioners have cited instances where some litigants are intentionally locked out from virtual court hearings. Litigants and even advocates complain that they at times have to wait for very long at the lobby to be admitted in Court sessions; in most times they don't get admitted and if they are lucky they find that their matter has been called or dismissed. Despite all this difficulties matters have still been listed for dismissal.

65. The ***Black's Law Dictionary (Black's Law Dictionary Free online legal Dictionary 2nd Ed)*** has defined the term "public" to mean:

> **"Pertaining to a state, nation, or whole community; proceedings from, relating to, or affecting the whole body of people or an entire community. Open to all; notorious. Common to all or many; general; open to common use."**

66. It is noted from the above definition a key aspect of the term public is the fact that it affects the whole body of people and is open. The same dictionary defines the term an ***"open hearing"*** to mean, ***"the name of an investigation that is open to the public and is not a closed."***

67. It is contended by the Petitioners that it is clear reading from the above definitions together with the Constitution of Kenya provisions under ***Article 50(1) and 50(2) (d) of the Constitution of Kenya***, it cannot be said that virtual Court proceedings which are inaccessible to all, are public hearings and trials as contemplated by the Constitution.

68. The Petitioners contend that public hearing can take place with the necessary safeguard to the spread of the Covid – 19 disease including

social distancing, limiting the number of people in the Court rooms e.t.c. which is reasonable alternative.

69. The 1st and 2nd Respondent in response contend that the disruptive impact of the Covid – 19 pandemic has forced the Judiciary to enhance the uptake of Information Technology to ensure that the wheels of justice continue rolling. On 15th March 2020, the Chief Justice of the Republic of Kenya announced a scale down of Court activities thought the country due to the concerns created by the outbreak of the pandemic. Courts were seen as possible hotspots for the spread of the pandemic owing to the large crowds of persons including advocates, Court Staff and litigants who are normally part of the day-to-day Court operations. The ensuing period has seen digital upscaling of Court operations through measures such as virtual hearings and video conferencing.

70. It is 1st and 2nd Respondents contend, that it is clear from the above narration that this Petition is founded on misconceived notion that the emergence of the COVID – 19 pandemic is the reason that has purportedly denied the Petitioners' their right to access to justice.

71. It is further the 1st and 2nd Respondents contention that the Petitioners have not adduced any cogent facts to enable the Court exercise discretion in their favour. The 1st and 2nd Respondents support that the Chief Justice gazetted the Practice Directions on Electronic Case Management on 20th March, 2020 to be used in filing of matters. Further, the Law Society of Kenya circulated to its membership the practice direction and in light of this, the Courts have continued to operate and sit albeit virtually.

72. The 1st and 2nd Respondents places reliance of the aforementioned facts as per decision of Hon. Justice A.C. Mrima in ***Kenya Tea Development Agency Holdings Limited & 55 others v. Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries & Co-operatives & 2 others; Kenya Small Tea Holders Growers Association (KESTEGA) (Interested Parties) [2021[eKLR*** where he stated that:-

> **"I am further persuaded that dealing with all related matters together will not in any way impede on any party's right to access to justice guaranteed under Article 48 of the Constitution given that Courts now conduct virtual proceeding throughout the Country."**

73. It is further stated that the Courts have inherent duty to facilitate the just, expeditious, proportionate and affordable resolution of the Court disputes and where necessary, the Court may allow the use of appropriate technology to fulfil that duty. Reliance is placed in the decision of Hon. Lady Justice Onyango in ***Kenya Union of Commercial, Food and Allied Workers v Shoprite Checkers Kenya Limited [2021] eKLR*** where it was held that:-

> **"In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent direction of 21st April 2020, that judgments and Rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court. In permitting this Course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes."** *(Emphasis added)*

74. The 1st and 2nd Respondents in addition contend that not all judicial staff and/or officers have received the COVID-19 jab which is being rolled out by the Government of Kenya. There is no doubt that Judicial Staff and/or officers, like any other Kenyan, must have their Constitutional rights respected, and more specifically, the right to life as clearly provided and enshrined under ***Article 26 of the Constitution***.

75. A further issue to consider is whether the Constitutional rights the Petitioners urge to have been violated are absolute. ***Article 24 of the Constitution*** provides for limitation of rights and fundamental freedoms. It is clearly provided under ***Article 24(1) of the Constitution*** as follows:

> **"Limitation of rights and fundamental freedoms.**
>
> **24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—**
>
> **(a) the nature of the right or fundamental freedom;**
>
> **(b) the importance of the purpose of the limitation;**
>
> **(c) the nature and extent of the limitation;**
>
> **(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and**
>
> **(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."**

76. The Rights or fundamental freedoms in the Bill of Rights cannot be limited except by law and only to the extent that the limitation is

reasonable and justifiable in an open and democratic society. In the instant Petition, following Covid – 19 pandemic the Government of Republic of Kenya enacted legislation notably restricting movement, and public gathering. In the instant Petition I find no evidence has been adduced demonstrating that the law so enacted has been declared unconstitutional nor has it been demonstrated to be unreasonable and unjusfiable. In view whereof I find that he Petitioners purported rights herein are not absolute and therefore I find this be limited by law as clearly provided under ***Article 24 of the Constitution***.

77. It should be noted and appreciated by all that ***Article 26 of the Constitution***, on the Right to life by far supersedes the Petitioners' push for the re-opening of Courts for open physical public hearings including registries to members of public and Advocates with all necessary safeguard to curb spread of the Covid-19 disease. I find that the restrictions imposed by the 1st and 2nd Respondents as regards public hearings are therefore reasonable, propositionate and constitutional, and reflective of the steps taken worldwide in the fight against the Covid-19. Further the Covid-19, has been declared a pandemic covering the whole world with the resultant deaths in Kenya. Covid-19 no doubt exposes threats to life in Kenya and I find that this is an issue of grave public interest which for all purposes and intention cannot be taken light but seriously. Allowing reopening Courts for open physical hearing at this time when Covid – 19 exposure is most eminent to staff would be like giving lethal poison to an individual and expect him to survive with any side effects.

78. This Court is aware that many jurisdictions across the world have interfered to control the spread of Covid-19 disease through Courts and further have ensured that access to justice is not infringed by allowing use of technology.

79. In South Africa, the Office of Chief Justice on 25th March 2020 guided courts to remain open for filing of papers and hearing of urgent applications, bail applications and appeals on matters relating to violations of liberty, domestic violence, maintenance and those involving children. (Judiciary of South Africa, 2020). On April 16, 2020, the office of the Chief Justice issued guidelines for proper management of superior courts following the lockdown that was announced by the South African President. These guidelines limited court hearings during the lockdown to mostly urgent applications and matters. In reference to unopposed applications already listed for hearing, the Chief Justice directed registrars of courts to identify applications that could be addressed via video conferencing and subsequently facilitate their hearings. Other directives included; non-service of processes except for urgent matters, use of video conferencing, filing of heads of argument electronically, parties being required to agree on waiving of oral arguments and on variation of rules to facilitate electronic exchange of documents (Judiciary of South Africa, 2020).

80. As regards Nigerian, the Covid-19 Pandemic posed challenges to the Nigerian Judiciary necessitating development of a raft of measures to ensure continuity of court work. The National Judicial Council of Nigeria (NJCN) constituted a committee to devise guidelines and measures to enable safe court sittings during the pandemic period. These measures, issued by Chief Justice of Nigeria in May 2020, entailed adoption of legal mail solutions like e-filling of cases, rollout of technology beyond the pilot courts, enforcing the minimum 2-meter distance between persons in courts, use of facemasks and sanitizers in courts and, discouraging persons with minimal business from visiting court premises (NJCN, 2020). Other measures entailed scanning and exchange by parties the case processes by PDF format using e-mail, use of electronic payment of fees by litigants and establishment of virtual courts. The courtrooms, registries, offices and chambers were also periodically disinfected.

81. Looking at the situation and steps taken by Kenya Judiciary, it turns out that Kenya has not been unique in rolling out a number of measures that incorporate the use of ICT services to ensure that there is continued access to judicial services. The intention of adopting and prioritising the use of virtual hearings etc. is to curb the spread of COVID-19 whilst ensuring that Kenyans are still able to access the Courts however in a manner different from usual. The Practice Directions set in place by the Judiciary were formulated with ***Articles 48 and 159 of the Constitution*** in mind and sought to protect those provisions rather than violate them.

82. On issue of equality and freedom from discrimination I seek guidance from the case of ***Jacqueline Okeyo Manani & 5 others v Attorney General & another [2018] eKLR*** where it was stated;-

> **"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."

83. It is important to consider what was the intention of the Judiciary in Kenya in putting in place the new electronic measures. The intention of the Judiciary in putting in place these new electronic measures was to foremost prevent the spread of the COVID-19 virus amongst the judges, and staff members, and also all other stakeholders who access the courts on a daily basis. The other priority in putting in place these measures was to ensure that there is a continuity of the dispensation of justice despite the difficult circumstances. There was no intention on the part of the judiciary to discriminate against the vulnerable part of our community, it must be acknowledged that these new measures may not be easily available to many Kenyans. However, I find that there was no discrimination as contended by the Petitioners against any Kenyan in putting into place the new electronic measures.

D. WHETHER A LEGITIMATE EXPECTATION WAS CREATED BY THE RESPONDENTS THROUGH THE SPEECH OF 1ST JULY 2020 AND WHETHER THE RESPONDENTS ARE IN VIOLATION OF THE LEGITIMATE EXPECTATION.

84. The Petitioners contend that the former Chief Justice in his speech of 1st July 2020 created an expectation that programmes and ICT Support would be established to ensure that all sections of the Kenya population access the Courts. It is averred that the promise contained in the speech of 1st July 2020 by the former Chief Justice was as follows:-

"We have therefore initiated various programmes aimed at ensuring that ordinary wananchi seeking court services, especially… these include the establishment of IT support centres within our stations where court users, …"

85. The Petitioner herein rely on doctrine of legitimate expectation in support of several prayers in this Petition. In support of the Petitioners proposition reliance is placed in the case of ***Keroche Industries Ltd v Kenya Revenue Authority and others (2007) eKLR*** where Nyamu J (as he then was) stated that:-

"Legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher interest beneficial to all… which is, the value of the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enable people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation … public authorities must be held to their practices and promises by the Courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised."

86. The requirement for the doctrine of legitimate expectation to be successful was clearly stated in the case of ***Republic v Principal Secretary Ministry of Mining Ex-parte Airbus Helicopters Southern Africa (PTY) Ltd [2017] eKLR*** where it was stated:-

55. It is a requirement that for the doctrine of legitimate expectation to be successfully invoked, the expectation must in the first place be legitimate "in the sense of an expectation which will be protected by law". See R vs. Department for Education and Employment, ex p Begbie [2000] 1 WLR 1115, 1125C-D. This was the view adopted in Royal Media Services Limited & 2 Others vs. Attorney General & 8 Others [2014] eKLR where it was held that:

"...legitimate expectation, however strong it may be, cannot prevail against express provisions of the Constitution. If a person or a statutory body promises a certain relief or benefit to a claimant or undertakes to do something in favour of a claimant but in a way that offends the Constitution, the claimant cannot purport to rely on the doctrine of legitimate expectation to pursue the claim or the promise."

56. In other words since the doctrine of legitimate expectation is based on considerations of fairness, even where benefit claimed is not procedural, it should not be invoked to confer an unmerited or improper benefit. See R vs. Gaming Board of Great Britain, ex p Kingsley [1996] COD 178 at 241.

57. Similarly in South Bucks District Council vs. Flanagan [2002] EWCA Civ. 690 [2002] WLR 2601 at [18] it was held that:

"Legitimate expectation involves notions of fairness and unless the person making the representation has actual or ostensible authority to speak on behalf of the public body, there is no reason why the recipient of the representation should be allowed to hold the public body to the terms of the representation. He might subjectively have acquired the expectation, but it would not be a legitimate one, that is to say it would not be one to which he was entitled."

See also Rowland vs. Environment Agency [2002] EWHC 2785 (Ch); [2003] ch 581 at [68]; CA [2003] EWCA Civ 1885; [2005] Ch 1 at [67].

58. However as was held in Republic vs. Kenya Revenue Authority ex parte Shake Distributors Limited Hcmisc. Civil Application No. 359 of 2012:

"…the cornerstone of legitimate expectation is a promise made to a party by a public body that it will act or not act in a particular manner. For the promise to hold, the same must be made within the confines of the law. A public body cannot make a promise which goes against the express letter of the law."

87. The 1st Petitioner avers that being the oldest Non-Governmental Organisation dealing with the protection and promotion of the rights of the vulnerable and marginalized individuals and communities it places reliance on the promise by the former Chief Justice on behalf of its clients. The 1st Petitioner further argue that when it noted delay in the establishment of the programmes and ICT support centers, it wrote two letters reminding the Respondents of their promise and the expectation they had created. It is averred that what the Respondents did in return was to ignore the said letters. The letters are marked as "JM 8 (a) and (b)." The 1st Petitioner therefore contend that drawing from the decision cited herein above, it finds that no sufficient reason has been given for the violation of the aforesaid legitimate expectation. It is further urged that by failing to initiate programmes and establishing ICT centers across the County, as promised, the Respondents are in violation of the legitimate expectation of the Petitioners.

88. The Petitioners assert that the former Chief Justice speech of 1st July 2020 stated clearly that the electronic system would be rolled out across the country, however the introduction of the electronic system in the judicial system, fails to appreciate the realities of many Kenyans. It is contended further the roll out to other parts of the County will in fact have a catastrophic effect. The Petitioners further urge that there is need for a well thought out and consultative process before the entrenchment of the electronic system.

89. I find that there is no dispute that in the speech of 1st July 2020 the former Chief Justice stated that:-

> **"We have therefore initiated various programmes aimed at ensuring that ordinary wananchi seeking court services, especially those who may not have access to the necessary infrastructure or are unrepresented and unfamiliar with court procedures are not disenfranchised in any way. These include the establishment of IT support centres within our stations where Court users, especially the severely indigent ones who may not afford the fees charged in cyber cafes, can be assisted to file their matters."**

90. I find that the Petitioners have demonstrated that the 1st Petitioner's clients have not benefited from the above-mentioned ICT support centers, and the Respondents have not answered to this allegation. The former Chief Justice, I find was in a position to speak on behalf of the Judiciary of Kenya and as such the public is in a position to hold the judiciary to the representations made by the former Chief Justice. The promise to provide ICT support also meets the threshold of legitimate expectation as it was a promise made within the confines of the law and in particular, it was made in pursuance of the ***'Overriding Objective'*** under ***Section 1A of the Civil Procedure Act***.

91. In view of the conclusion I have come to herein above, I have no doubt in finding and holding that a legitimate expectation was created, that the Judiciary of Kenya would provide certain ICT support and facilities within a reasonable amount of time to improve the access of common Wananchi to Judicial Services.

92. The upshot is that I proceed to make the following orders:-

a. I find that the Petitioners have failed to prove that they are entitled to prayers Nos (a), (b) and (c) of the Petition.

b. I find that the Petitioners are entitled to prayers (d) and (e) of the Petition and, I proceed to make the following orders:-

i. A declaration be and is hereby issued that the 1st and 2nd Respondents violated the Petitioners' and the Kenyan public legitimate expectation by failing to implement initiatives and programmes aimed at ensuring that ordinary members of the public seeking Court services, especially those who may not have access to the necessary infrastructure, or are unrepresented and unfamiliar with Court procedures as promised thus violating the legitimate expectation created that judiciary would provide certain ICT support and facilitation within reasonable time to improve access of common wanainchi to Judicial services.

ii. An order be and is hereby issued directed at the 1st Respondent to within 90 days of the Court's Judgment to implement initiatives and programmes that will ensure access to courts and services by members of the public and advocates.

c. This Petition being a matter of public interest there will be no orders as to costs.

d. I direct that the copy of the judgment be served upon the Chief Justice by the Deputy Registrar of this Division.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF OCTOBER, 2021

……

J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA