



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CONSTITUTIONAL PETITION NO. 12 OF 2019

IN THE MATTER OF ARTICLES 10, 20, 21, 22, 23, 24, 73, 165(3)(d), 232, 235, 236 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 57, 58 AND 59 OF THE COUNTY GOVERNMENT ACT

AND

IN THE MATTER OF A REPORT BY THE COUNTY ASSEMBLY OF SIAYA FINDING THE CHAIRMAN OF SIAYA COUNTY PUBLIC SERVICE BOARD, HON. JOE AKETCH DONDE IN CONTRAVENTION OF THE LAW

BETWEEN

SIAYA COUNTY PUBLIC SERVICE BOARD.....PETITIONER

AND

COUNTY ASSEMBLY OF SIAYA.....1ST RESPONDENT

SECTORAL COMMITTEE ON JUSTICE

AND LEGAL AFFAIRS SIAYA COUNTY ASSEMBLY....2ND RESPONDENT

JUDGMENT VIA SKYPE

1. The petitioner herein is **Siaya County Public Service Board** an entity established under Chapter 11 of the Constitution of Kenya 2010 as read together with sections 57 and 58 of the County Governments Act lodged this petition against the County Assembly of Siaya described as an entity established under Articles 176 and 177 of the Constitution of Kenya 2010 as read together with County Government Act (1st Respondent) and the Siaya County Assembly's Sectoral Committee On Justice And Legal Affairs described as being established under section 14 of the County Governments Act (2nd Respondent).

2. The petition was filed on 11th March 2019 and simultaneous with the lodging of the Petition, the Petitioner filed an Application under certificate of urgency seeking, amongst other orders, conservatory order restraining the Respondents from carrying on with the process of implementing the Report titled "**Report on the Petition to the County Assembly of Siaya to find the Chairman of Siaya County Public Service Board, Hon. Joe Aketch Donde in contravention of the law**" both at the interim and pending the hearing of the substantive petition. However, by consent and *vide* orders of this court made on 26.03.2019, the Application for conservatory orders was marked as spent and the parties took directions as to the hearing of the main Petition.

3. In the said petition, the petitioner laid the **factual background** and averred that the County Government Act of 2012 (Act No.17) establishes a framework for the manner, procedure, qualifications and modalities for the appointment of members of the County Public Service Boards (sections 57 to 59 of the Act,) but that the said Act fails to provide for the quorum of the Board. That the respondents had developed a report titled "**Report on the Petition to the County Assembly of Siaya to find to find the Chairman of Siaya County Public Service Board Hon. Joe Aketch Donde in contravention of the law**" wherein they had resolved that **all the activities and resolutions made by the petitioner where less than four members were present were not official and not binding**. The petitioner averred that the said resolution had far reaching consequences as it would not only nullify the operations of the petitioner in the past year but also those of the County Government of Siaya (particularly those to do with recruitment of its staff and creation of offices) and thus leave the petitioner vulnerable to myriad of law suits on the basis of infringement of fundamental rights and freedoms and the violation of labour laws, as more than five hundred County Government employees risked losing their jobs.

4. It was averred that in making the resolution, the Respondents had argued that the quorum of the Board ought to be four members at any given time and that in doing so, failed to appreciate the fact that the County Governments Act was silent on the quorum of the Board which situation created a lacuna in the law and which this court ought to pronounce itself on. According to the Petitioner, the Respondents acted *ultra vires* their Constitutional and statutory mandates and made directives contrary to the law and which was against the legitimate expectations that the Respondents would at all times be guided by the law in executing their mandates (including the Constitution, constitutive Acts, Fair Administrative Actions Act and Regulations made thereunder).

5. It was further averred that the **petitioner's interest** was to the effect that if the report was implemented, it would nullify not only its operations and activities in the past year but also those of the County Government of Siaya particularly those to do with recruitment of its staff and creation of offices and ultimately leave the petitioner vulnerable to a myriad of law suits on the basis of infringement of fundamental rights and freedoms and the violation of labour laws and further, expose the petitioner to employment suits as more than five hundred County Government employees stood to lose their jobs.

6. The Petitioner further averred that the petition was founded on Articles 10, 20(3), 21(1), 22(1), 23(1) 73, 165(30(d) and 236 of the Constitution.

7. In the **summary of the legal arguments** in support of the petition, the petitioner reiterated its averments on the factual background and further averred that it was incumbent that this court do interpret the law on the issue of quorum of the Petitioner's Board and do so in a manner that protects and promotes the purposes and principles of the Constitution as enshrined in Article 259.

8. The petitioner prayed for:

1. A final determination on the issue of the acceptable quorum of the Siaya County Public Service Board during its sittings.

2. Any other relief the Honourable Court deems fit in the circumstances; and

3. Costs of the petition

9. The said petition was supported by the supporting affidavit sworn by Mr. William Luballo (the Secretary of the Petitioner) wherein he reiterated the averments contained in the petition.

10. The petition was opposed vide the Replying Affidavit sworn by Eric Ogenga, Deputy Clerk of the County Assembly of Siaya on behalf of the Respondents. The affidavit in reply is sworn on 9th April 2019 and filed on the same day. The deponent deposed that as a result of devolution contemplated in Article 6 of the Constitution, the Constitution under Article 176 created County Governments which consist of the County Assembly and the County Executive and the executive authority vested in and exercised by the County Executive Committee which consist of the County Governor, Deputy Governor and members appointed by the County Governor (with approval of the County Assembly) and which authorities ought to perform their duties in a manner that accords with Chapter 6 of the Constitution and in tandem with the spirit and the letter of the Constitution.

11. It was further deposed in opposition that the County Governments Act was enacted to govern the county governments and its reading and interpretation ought to be done in the manner which accords with the dictates and the spirit of the Constitution and the rule of law and the same provided for the manner of nomination or appointment of persons to, and their removal from offices, in the county government.

12. The Respondent further contended in deposition that section 57 of the (County Government)Act establishes the County Public Service Board as a body corporate and section 58 provides for its composition which include the Chairperson and not less than 3 and not more than five other members and further a Certified Public Secretary of good professional standing (who ought to be the Secretary of the Board).

13. In addition, it was contended that section 58 provides that the appointment of members of the Board ought to be through a competitive process and that the section also provides for the qualifications for one to be appointed as a member of the Board (which he listed down in paragraph 10 of the affidavit) and that the reasons behind the high standards for the appointment was due to the seriousness of the decisions the Board was expected to make and the consequences attendant and the impact on the affected persons.

14. It was further contended that a reading of the said section (section 58) was clear on the intentions that at any single time, there was to be appointed a minimum number of 5 members and a maximum of 7 members of the petitioner because of the seriousness of the decisions made by it and which decisions could not be left to the whims of a few people who would be subject and/or prone to compromise for individual selfish gains.

15. The Respondents further contended that section 59(1) and 59(4) provides for the functions and the powers of the Petitioner respectively (which functions and powers he listed down in paragraph 13 and 15 of the affidavit respectively) and further that section 63 provides for the powers of the County Public Service Board to make appointments including promotions in respect of offices in the county public service and provides for when such appointments were to be made (instances which he listed down in paragraph 16 of the affidavit).

16. Further contention on the part of the Respondents was that the Constitution and the County Governments Act establishes the County Assembly and provides for its roles (listed in paragraphs 17 and 18) and further that section 14 of the Act allows the County Assembly to establish committees of the assembly for any purpose as it considers fit and regulate the procedure of the committees so established.

17. It was deposed further that the Act provides for the right to petition the County Assembly to consider any matter within its authority and that the Constitution (Article 185) gives the County Assembly the power to make laws necessary for the effective performance of the functions of the County Governments and further, a power to exercise oversight over the county executive committees and other executive

organs.

18. The Respondents deposed that the petition was in bad faith and ought to be dismissed and the County Assembly be allowed to continue performing its Constitutional mandate as the impugned report was made in the performance of the Respondents' duties as contemplated in the Constitution and the County Governments Act.

19. According to the deponent, the Respondent was the party supposed to implement the report and if it chose not to implement the same, that would amount to breach of the Constitution and all its values and principles and that the Petitioner wanted to overthrow the Constitution by use of the court and cause the Respondents to fail to perform their duties under the Constitution.

20. Further, that the Petitioner's fears that the implementation of the report would be prejudicial to its officers and staff and a threat to the fundamental rights and freedoms of individuals was misplaced.

21. The Respondents deposed further that the quorum of the Board (Petitioner) had been less than what was contemplated in law and as such their decisions fell short of the requisite Constitutional threshold and that the County Governments Act was not silent on the quorum of the petitioner and that given the nature of the duties of the petitioner and the consequences thereof, and in appreciating that such decisions affects the whole county, they should not be left to the whims of a few persons. In the Respondent's view, a proper interpretation of section 58 of the County Governments Act ought or meant that the quorum at any time had to be the majority of the members.

22. Further, it was deposed that there was no act of the Respondents which could be termed as *ultra vires* its Constitutional mandate as the 1st Respondent was mandated to exercise checks and balances on the executive organs amongst them which include the Petitioner which it sought to be immunized through court of law. Further deposition was that the petition was not specific on what provisions of the law and specifically the Constitutional provisions that had been violated, the extent of the violation and how it affected the petitioner as the petitioner had the option of implementing the report or not and that the Respondents could not force the implementation.

23. In addition, it was deposed that the petitioner's rights could not be violated and that the petitioner had not indicated how the alleged violation had threatened its purported rights. It was further deposed that the petition was unintelligible as the petitioner did not know what it wanted (whether an order or a declaration) and that the petition was an abuse of the court process as there was another case in court being **Kisumu ELRC Judicial Review No. 5 of 2018 Republic v County Assembly of Siaya & Another Exparte Siaya County Public Service Board [2018]e KLR** where the petitioner sought to challenge the subject report and which matter was dismissed.

24. Further deposition by the Respondents was that the prayers sought were inapplicable and only served to annoy the court as there was no dispute as to the quorum needed and that case law did exist and which could be applied so as to determine the quorum and further that chances of success of the petition was zero. According to the Respondents, what was in issue was not the quorum but rather the actions of the petitioner which were not in accordance with the law and that the petitioner had downplayed what was exactly in issue and brought up the issue of quorum.

25. The Respondents contended further that Article 119 of the Constitution as read together with section 15 of the County Governments Act 2012 mandated the County Assembly to consider petitions brought before it and that it was in exercise of this function that it considered the petition by one Mr. Ismael Noor Onyango about the Chairman of the County Public Service Board (that he had acted unilaterally and suspended two Board members and put the Vice Chairperson on compulsory leave without any known legal guidance or provisions bestowing him with jurisdiction to exercise disciplinary control over the members of the Board). That the Chairman of the Board lacked jurisdiction to make such decision against the members and acted illegally and that that was the issue but the petitioner had camouflaged the issue and changed it to that of the quorum and ultimately the suspension of the Board had called into question the quorum of the County Public Service Board and its ability to effectively undertake its activities taking into account the nature, sensitivity and consequences on its decisions and the Chairman had thus violated Article 251(1) of the Constitution 58(5) of the County Government Act. Further that by him exercising disciplinary actions against the members of the Board an action which was not within his mandate and jurisdiction was in violation of Article 73(1) and (2) of the Constitution of Kenya 2010.

26. That the requisite quorum of the County Public Service Board was 4 members and since only 3 were present, they could not make official and binding decisions and neither did they constitute a quorum for the purposes of carrying out their functions.

27. The Respondents invited the court to find that the petitioner as was constituted did not satisfy the quorum needed to perform its functions and as such dismiss the prayers sought in the Petition as they are not merited.

SUBMISSIONS

28. Pursuant to the orders and directions made on 26.03. 2019, parties herein filed their written submissions in support of their respective positions. The petitioner in its submissions framed the following as the issues of determination:

i. Whether the Respondents erred in finding that the quorum of the Board at any given time had to be four members?

ii. What was the acceptable quorum of the Board?

29. On behalf of the Petitioner, it was submitted that section 57 of the County Government Act established the County Public Service Board; section 58 provides for composition of the Board, the qualifications of the members therein and the terms of office; and that section 59 provides for the functions of the said Boards. However, it was submitted that the Act did not provide for the quorum of the Board and further that there was no legislation to guide the operation of the Board and as such there was a lacunae in the law. It was submitted that quorum was a very touchy issue in any given setting as it ultimately determined the legality of any institution's resolution and as such the matter was novel. It was further submitted that this court has the power to determine the issue on quorum under Article 165(3)(d) of the Constitution as

it was one of the questions which the court had the powers to determine in exercise of its powers to interpret the Constitution under the said Article.

30. This court was invited to consider that quorum was the smallest number of people who must be present at a meeting and further that quorum could not be a constant number as it varied from organization to organization based on their systems and structures. An example was given of the National Gender and Equality Commission Act, 2011 and Independent Electoral and Boundaries Commission Act, 2011 which two Acts provided that quorum ought to be half of the members of the Commission and that the National Cohesion and Integration Act of 2008 which provided for the quorum to be seven members out of the possible twelve members. As such, it was submitted that quorum differs and that it was incumbent that each organization prescribes its own and that in the present case, the petitioners ought not to be penalized for decisions made where only three members were present as there was no legislation (on the quorum issue).

31. It was further submitted that quorum was dependent on the actual number of commissioners appointed or present at any given time and since section 58 of the County Government Act provided for “**not less than three and not more than five members**”, it meant that aside from the Chair and the Secretary, the quorum could be either three others or five others and as such the quorum would automatically change if there was a shortfall in the number of the commissioners either due to a few of them having been appointed or due to some of them not being the able to continue to hold office for one reason or the other. Reliance was placed on the case of **Isaiah Biwott Kangwony –vs- Independent Electoral & Boundaries Commission & Another (2018) eKLR**. The petitioner further submitted that in certain instances, the chair of a tribunal could lawfully perform the duties of the tribunal in the absence of other members and the court was referred to the case of **Peter Mwangi Chege & 13 Others –vs- Joseph Wanyoike & 7 Others (2018)eKLR**.

32. It was therefore submitted that the meeting of three board members was half of the membership and constituted a quorum and thus the decisions of the petitioner were official and binding and ought not to be voided or annulled.

33. Further submission was that, as long as there was no legal framework guiding the operations of the petitioner, the issue of quorum would keep on springing up at every time and as such it was important that the court do consider the petition and further that the issue of quorum in general was a novel issue.

34. On the part of the Respondent, they filed their written submissions and framed these issues for determination:

- i. Whether the petition met the Constitutional threshold*
- ii. Whether the petitioner had a right that could be violated*
- iii. Whether the petitioner had been conducting business with the acceptable quorum*

35. On **whether the petition met the Constitutional threshold**, it was submitted that despite the petitioner citing various provisions that it purported were violated, there was a disconnect between the said provisions and how they had been violated and that it was trite law that a person claiming violation of Constitutional provisions ought to specifically state how those provisions had been violated. The court was referred to the case of **Samuel Ndiba Kihara –vs- Attorney General (2019) eKLR** and the Court of Appeal’s decision in **Judicial Service Commission –vs- Gladys Boss Shollei & Another (2014) eKLR** to buttress this point. The Respondents submitted that the petitioners only set out the provisions of the Constitution that it alleged to have been infringed but failed to set out with a degree of precision the manner in which they had been violated and that the court ought to restrain itself from passing judgments on the basis of hypothetical issues.

36. The Respondents made further submissions and which deviated from the issues they had framed and contended that the petitioner had not come to court with clean hands as it had not lived up to the Constitutional provisions as despite the petitioner being as a result of devolution, it had violated the very objects of devolution as was provided under Article 174 of the same and thus the petitioner’s prayers were nebulous ad aimed at stealing a match from the people of Siaya County.

37. On **whether the petitioner had a right that could be violated**, it was submitted that the petitioner had staged a Constitutional coup and wanted to do so by seeking approval of this court and that it wanted the Respondents to fail in performing their duties, functions and responsibilities and in doing so fail to subscribe to the principles of the Constitution, specifically (Article 10 and Chapter 6) and that the fear by the petitioner that the implementation of the Report by the Respondents would be prejudicial to it, its officers and staff and possessed a threat to the fundamental rights and freedoms of individuals was misplaced and that it was a ploy by the petitioner to shield its chairperson from being held accountable for flagrant and indiscriminate abuse of its powers and exercising the powers with the outer finger of jurisdiction and further that the Respondents’ actions were never *ultra vires* its Constitutional mandate to exercise checks and balances on the executive organ which included the petitioner and that the interests sought to be protected were that of the petitioner and that of its chairperson but framed in a way to suggest public interest. Further submission was that besides the petition not being specific on the provisions of the law that had been violated, the extent of the violation and how it affected the petitioner, the petitioners’ rights could not be violated. The Court was referred to the case of **Speaker, Nakuru County Assembly & 46 others –vs- Commission on Revenue Allocation and 3 Others (2015) eKLR**.

38. On **whether the petitioner had been conducting business with the acceptable quorum**, it was submitted that by virtue of section 73 of the Constitution, authority assigned to a person by the public was a public trust and ought to be exercised in a manner which demonstrate respect to the people, bring honour and dignity to the office and promote public confidence in the integrity of the office and further that the Article requires the public officers to be objective and impartial in decision making (amongst other requirements) and that the holders of the offices exercising executive authority in the County government were bound by these provisions.

39. It was further submitted that section 57 of the Act establishes the County Public Service Board as a body corporate and section 58 provides for its composition (which include the Chairperson and not less than 3 and not more than five other members and further a Certified Public Secretary of good professional standing -who ought to be the Secretary of the Board) and further demanded that the appointment of the members of the Board ought to be through a competitive process and provides for the qualifications to be appointed as a member of the

Board and that the reasons behind the high standards for the appointment (it was submitted) was due to the seriousness of the decisions the Board was expected to make and the consequences attendant and the impact on the affected persons.

40. Further submission by the Respondents' counsel was that a reading of the said section (section 58) was clear on the intentions that at any single time, there was to be appointed a minimum number of 5 members and a maximum of 7 members of the petitioner because of the seriousness of the decisions made by it and which decisions could not be left to the whims of a few people who would be subject and/or prone compromise for individual's selfish gains.

41. It was therefore submitted that the Act was not silent on the quorum of the petitioner and that given the nature of the duties of the petitioner and the consequences thereof, and in appreciating that such decisions that affect the whole county could not be left to the whims of a few people a proper interpretation of section 58 of the Act meant that the quorum at any given time had to be the majority of the members and thus the requisite quorum of the County Public Service Board ought to be four out of the total six and that since only three were present, then they could not make official and binding decisions. Further that as it was constituted and considering the suspension by the Chairman of the Board (of 3 members), it meant that only three members remained and the said members could not form the quorum of the Board in order to perform its duties. The Court was referred to the cases of Isaiah Biwott Kangwony –vs- Independent Electoral & Boundaries Commission & Another (supra) and that of Katiba Institute 7 3 Others –vs- Attorney general & 2 Others (2018) eKLR and urged to find that the petitioner as was constituted did not satisfy the quorum needed to perform its functions.

DETERMINATION

42. I have considered the petition herein, the supporting and the Replying affidavits as well as the well written rival submissions filed by the respective parties' advocates with the authorities as cited. In my humble view, the following issues flow for determination:

- 1. Whether the petition met the requisite Constitutional threshold***
- 2. Whether the petitioner had rights which could be violated***
- 3. Whether the petition raised other issues which ought to be considered other than on the basis of the same being a Constitutional petition?***
- 4. Whether the Petitioner as constituted had the requisite quorum***
- 5. Whether the petition ought to succeed***
- 6. What orders should the court make***

43. **On whether the petition met the requisite Constitutional threshold**, the petitioner seeks the orders on the face of the petition relying on the various Constitutional provisions. However, the Respondents are opposed to the petition and in opposition argued/ deposed that the said petition did not meet the Constitutional threshold as required by law in that it only quoted the various provisions of the Constitution which allegedly had been violated but did not show how the violation had occurred or how the violation affects the petitioner. Further it was the Respondents' position that the petitioner was not an entity or person whose rights were capable of being violated. As such the petition should be dismissed.

44. My humble view from the above conflicting positions is that preliminarily this court must decide whether this petition meets the Constitutional threshold as this determination would determine the course the matter would take.

45. It is trite law and a settled principle that any litigant who wishes to have a relief from a court for the violation of a right or fundamental freedom must plead in a precise manner the Constitutional provisions said to have been violated or infringed, the manner of infringement and the jurisdictional basis for it. The High Court in Anarita Karimi Njeru v Republic (No.1)-[1979] KLR 154 stated:

“if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

46. The principle in the above case was reaffirmed by the Court of Appeal in Mumo Matemu v Trusted Society of Human Rights alliance [2014] eKLR, where the superior court found and held that the petition which was the subject of the Appeal fell short of the threshold established in Anarita Njeru (supra) case.

47. The most important question that I must therefore resolve in this petition is whether the petition indeed meets the set constitutional threshold.

48. Examining the petition and the supporting affidavit, the Petitioner cites Articles 10, 20(3), 21(1), 22(1), 23(1), 24, 73, 165(3) (d), 232, 235 and 236 of the Constitution **as the provisions said to be infringed**. Nonetheless, a perusal of the said Articles reveals that not all of them provides for rights and fundamental freedoms. Article 10 provides for national values and principles of governance, Article 20(3) provides for the Application of the Bill of Rights, Article 21(1) provides for the duty of the state/ state organ to observe and respect the rights and freedoms, Article 22(1) provides for right to institute court proceedings claiming violation of a right or fundamental freedom, Article 23(1) provides for jurisdiction of the High Court to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights, Article 24 provides for the limitation of rights and fundamental freedoms, Article 73 provides for the responsibilities of leadership, Article 165(3) (d) provides for the jurisdiction of the High Court to hear any question

respecting the interpretation of this Constitution, Article 232 provides for the values and principles of public service, Article 235 provides for staffing of county governments and Article 236 provides for protection of public officers.

49. The petition must also be set out with **a reasonable degree of precision the actions complained of as having infringed on the (petitioner's) rights**. A careful perusal and analysis of the petition reveals that the petition was based on an apprehension on the part of the petitioner as to the implementation of recommendations in a report which had been passed by the 2nd respondent in exercise of its Constitutional mandate and which report found that the petitioner has not been well constituted when making its decisions and that the decisions were thus a nullity.

50. On behalf of the Petitioner it was deposed that the implementation of the report by the 2nd defendant would lead to massive lawsuits on the breach of the fundamental rights and freedoms by the workers already hired as it would expose the decisions made by the petitioner to nullification on the grounds of illegality for want of quorum (as had been proposed in the report).

51. According to the petitioner, the fact that the Report by the 2nd Respondent found that the petitioner was acting short of quorum (alleging that the quorum ought to be four as opposed to three), a final determination on the issue of the acceptable quorum of the Siaya County Public Service Board during its sittings ought to be made by this court.

52. In my humble view, the acts complained of by the petitioner as against the Respondents do not amount to infringement of any right or freedom under the Constitution. The intended implementation of the Report does not in any way infringe on the rights of the Petitioner. Further the quorum issue is a statutory issue (under the County Government Act of 2012) which provides for the composition, duties and powers and conduct of business of the Public Service Board (petitioner). The finding that the Petitioner quorum ought to be four members is not a Constitutional matter but an issue under the County Government Act 2012. In **Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) v Habil Olaka – Executive Director (Secretary) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association) & another [2018] eKLR**, the Court (Matiwo J) held as follows, and I concur, on the founding of a Constitutional petition on statutes:

“....

64. Regarding the 2nd respondent, the allegation raised against it is primarily that it has neglected its mandate to enforce the statutory provision which the petitioner contended amounted to a violation of Constitutional rights and fundamental freedoms. I do not agree with this view. Failure to enforce a statutory provision is only failure but is not unconstitutional. The 2nd respondent did not fail to enforce a Constitutional provision and therefore did not act unconstitutionally neither did such failure amount to unconstitutional acts or conduct that violated the Constitution or rights and fundamental freedoms of bank customers.

65. It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a Court of law in the manner allowed by that particular statute or in an ordinary suit as provided for by procedure. It is not every failure to act in accordance with a statutory provision or where an action is taken in breach of a statutory provision that should give rise to a Constitutional petition. A party should only file a Constitutional petition for redress of a breach of the Constitution or denial, violation or infringement of, or threat to a rights or fundamental freedom. Any other claim should be filed in the appropriate forum and in the manner allowed by the applicable law and procedure.

66. In that regard, it is worth remembering the warning sounded by Lord Diplock in the case of Harrikissoon V Attorney General of Trinidad and Tobago [1980]AC 265 where he decried the tendency of people rushing to institute Constitutional petitions alleging violation of fundamental freedoms where there was none stating;

“The notion that wherever there is a failure by an organ of government or a public officer to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed for individuals by...the Constitution is fallacious. The right to apply to the High Court... for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action... the mere allegation that a human right of the applicant has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the Court...if it is apparent that the allegation is frivolous, vexatious or abuse of the process of Court as being made solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.” (Emphasis added).

53. Guided by the above decision, the actions which appear to be the basis of the Petitioner's claim were statutory and breach of which could not found a Constitutional petition.

54. In addition, it is my humble view that even if the said actions amounted to an infringement of a Constitutional right or freedom, the petitioner did not further set out with precision, **the manner in which its rights had been infringed by the said actions**. The petitioner did not show any nexus between the implementation of the report and how the same would specifically infringe on the rights of the petitioner. Neither did the petitioner demonstrate how the determination on the issue of quorum by the 2nd Respondent had infringed on its rights.

55. It therefore follows that the failure by the petitioner to set out with a reasonable degree of precision the actions it complained of having infringed on its (petitioner's) rights) made the petition to fall short of the threshold which was established in the **Anarita Njeru (supra) case**.

56. Be as it may, the other question is whether **the failure to adhere to the threshold in Anarita Njeru (supra) case be cured under Article 159 of the Constitution.** Article 159 of the Constitution provides for administration of justice without undue regard to procedural technicalities. However, the Court of Appeal in **Mumo Matemo v Trusted Society of Human Rights alliance (supra)**, held that (in relation to the issue):

“(42) However, our analysis cannot end at that level of generality. It was the High Court’s observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (Cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in Constitutional petitions is an extension of this principle.”

57. On the basis of the above holding, I find and hold that the instant petition cannot survive or be cured by application of Article 159 of the Constitution.

58. It follows, therefore, that despite the petition having set out the Articles of the Constitution which it alleged to have been violated by the Respondent, it did not provide with precision the acts which the Respondents had done which were in breach of the said provisions and further, the manner in which its rights had been infringed by the said actions. As such I conclude that this petition fails the threshold or test set in the **Anarita Njeru (supra) case.**

59. **On whether the petitioner had a right or rights that could be violated, it was deposed on behalf of the Respondents in their replying affidavit opposing the petition that the petitioner’s rights could not be violated. In their submissions, the Respondents’ counsel contended on behalf of the Respondents that beside the petition not being specific on the provisions of the law that had been violated, the extent of the violation and how it affected the petitioner, the petitioner’s rights could not be violated because it was not a person as contemplated in the Constitution. The Court was referred to the case of Speaker, Nakuru County Assembly & 46 others –vs- Commission on Revenue Allocation and 3 others (2015) eKLR.**

60. This court observes that despite the court granting leave to the petitioner to file a further affidavit in response to the replying affidavit (simultaneously with its submissions), the petitioner did not do so and neither did it submit on the issue of lack of rights that were capable of being violated.

61. The question therefore is whether the petitioner had constitutional rights which could be violated. In **Speaker, Nakuru County Assembly & 46 others –vs- Commission on Revenue Allocation and 3 Others (supra)** which the Respondent relied on, the court citing with approval Majanja J’s decision in **Meru County Government v Ethics & Anti-Corruption Commission** (High Court’s decision) held:

“The provisions I have cited above show that there is a clear distinction between a person and a County Government which is a State organ vis-à-vis the rights and obligations under the Bill of Rights. I am doubtful, that the County Government qua County government can lodge a claim under Article 22 of the Constitution against another State organ to enforce fundamental rights and freedoms as the County Governments is not a person for purposes of the Constitution ad more particularly the Bill of Rights. I therefore find and hold that the Petitioner cannot agitate a claim for violation of fundamental rights and freedoms against the Commission. I therefore decline to grant prayer (b) of the Amended Petition.”

62. In the above decision, the Respondents were challenging the *locus standi* of the petitioner to present a petition alleging violation of its rights under the Constitution. The Court of Appeal sitting in Kisumu in **County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015] eKLR**, was invited to find that the 1st Respondent therein could not enforce its fundamental rights under Article 22(1) of the Constitution as it was not a person. The Court held at (paragraphs 18-20) of the judgment that the 1st Respondent was a person entitled to enforce its fundamental rights and further that there was no any known Constitutional or statutory provision restraining a State organ from enforcing its Constitutional rights against another State organ. The court distinguished the case before it with the judgment by Majanja J in **Meru County Government v Ethics & Anti-Corruption Commission** (High Court’s decision) and held that in that case, the judge was right to hold that the petitioner (Meru County Government) was not entitled to enforce its fundamental rights **under the Bill of Rights**. This reasoning [in **County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others (supra)**] was approved by the Court of Appeal (Waki, Nambuye and Kiage JJ.A) in **Meru County Government v Ethics & Anti-Corruption Commission [2018] eKLR**, when determining the appeal from the High Court’s decision (Majanja J) and held as follows:

“...We respectfully agree with the sentiments expressed in that case. State organs can indubitably file suit inter se to protect various rights, capabilities, competencies and privileges accorded to them by the Constitution. What they cannot in and of themselves do, is to purport to claim for themselves and enforce for themselves qua State organs, the rights enumerated in the Bill of Rights. Such rights as we have stated, and the Kisumu Bench as well, belong only to individuals as natural persons who only can enforce or protect them in person or through any other persons be they natural juristic or jurisdiction.....We are thus persuaded that the learned Judge was correct in holding as he did that the appellant is not a person who can petition the High Court for violation of own fundamental rights and freedoms under Article 22 of the Constitution by another State organ.”

63. From the analysis of the above decisions, the capacity by a state organ to petition the court for infringement of Constitutional rights depends on whether the said rights are fundamental rights under Article 22 (rights and freedoms under the Bill of Rights) or not. If the rights and freedoms being sought to be protected are those under the Bill of Rights, then the state organ cannot seek redress against their infringement/ violation as it is only natural persons who can enforce them. However, if what is being sought to be protected are rights,

capabilities, competencies and privileges accorded to the state organs by the Constitution (outside the Bill of Rights), then the state organ has the capacity to seek redress in the courts and thus acquiring the *locus standi*.

64. To fully determine the above question in the instant petition, it is important to first and foremost consider whether the rights whose violation was alleged falls under the Bill of Rights as provided for under Article 22. However, as opined elsewhere, the petitioner cited Articles 10, 20(3), 21(1), 22(1), 23(1), 24, 73, 165(3) (d), 232, 235 and 236 of the Constitution **as the provisions said to be infringed (the supporting provisions)**. An examination of the cited Articles reveals that none of the said Articles provides for a fundamental right and freedom under Article 22.

65. For the above reason, the petitioner cannot be said to lack the locus standi to enforce the rights in the cited Articles and which it claims to have been infringed. It is my further opinion that it was in recognition of this right that the petitioner indeed came to court to seek redress.

66. That notwithstanding, the petition herein must fail, as earlier stated, for failure to provide or state with precision the acts which the Respondents had allegedly done which were in breach of the Articles cited in the petition and further the manner in which its rights had been infringed by the said actions. Accordingly, this petition fails to meet the threshold in the **Anarita Njeru (supra) case.**

67. Having so found that the petition does not meet the constitutional petition threshold as espoused in the **Anarita Njeru** (supra) case, it would be superfluous and waste of precious judicial time and resources to engage in other discourses including the discourse on whether or not the petitioner's quorum should have been three or four or five as the case may be and or how the impugned recommendations by the Respondents affect or is likely to adversely affect rights of the employees who were recruited in the period when the petitioner is alleged to have violated provisions of the statute on quorum of meetings; noting that such employees have their individual rights and can on their own ventilate their grievances where they are affected by such recommendations.

68. Accordingly, the Petition fails and the same is hereby dismissed. As the petitioner and Respondents are public entities rendering services to the public, I order that the respondent shall pay to the Petitioner costs of the petition to be agreed and in default to be assessed by the court.

69. Orders accordingly.

Dated, Signed and Delivered at Siaya this 7th Day of May 2020 via skype due to Covid 19 situation.

R.E. ABURILI

JUDGE