



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.56 OF 2016

JAMES GACHERU KARIUKI & 19 OTHERS.....PETITIONERS

VERSUS

THE COUNTY GOVERNMENT OF

MOMBASA & 56 OTHERS.....RESPONDENTS

JUDGMENT

Petitioner's Petition

1. The Petitioners herein through a petitioner dated 21st January 2015 against all the above-mentioned Respondents from 1st to 57th Respondents sought several prayers and mainly the following:-

- a) A Declaration do issue that effective September 2008 (when the Kenya National Highways Authority, the Kenya Urban Roads Authority and the Kenya Rural Roads Authority were inaugurated), Sections 72A,72B, 72C, 72D, 72E, 72F, 72G, 72H, 72I, 72J,91 and 93 of the Traffic Act Cap 403 laws of Kenya were impliedly repealed by the provisions of section 4, 7, 10, 22,31,40 & 53 of the Kenya Roads Act Cap 408 laws of Kenya as read with the provision of the fourth schedule to the Kenya Roads Act Cap 408 laws of Kenya.
- b) A Declaration do issue that sections 72C and 72G of the Traffic Act Cap 403 Laws of Kenya having been impliedly repealed in August 2008, sections 26 and 27 in the Kenya gazette supplement No. 164 (Acts No 38) Dated 9th November 2012 is null and void.
- c) A Declaration do issue that effective 8th March 2013 the Kenya National Highways Authority, the Kenya Urban Roads Authority and The Kenya Rural Roads Authority as the case maybe, are National state organs performing the functions under clause 5 of the Fourth Schedule to the Constitution of Kenya 2010 for County Governments, the FUNCTIONS, POWERS and RESOURCES having been transferred, assigned and delegated to the three Roads Authorities as the case may be pursuant to and/or under the provisions of sections 4, 7, 10, 22, 31, 40 & 53 of the Kenya Roads Act Cap 408 laws of Kenya as read together with the Fourth Schedule to the Kenya Roads Act Cap 408 laws of Kenya and in conformity with the provisions of Article 6, 186 & 187 of the Constitution of Kenya 2010 read together with the provisions of clause 7 of the sixth schedule to the Constitution of Kenya 2010 until and unless the Kenya Roads Act Cap 408 Laws of Kenya is amended and/or repealed.
- d) A Declaration do issue that motor vehicles parking facilities and/or services are a connected purpose to roads for the purposes of the provisions of section 4 (2)(b), 7(2)(b) and 10(2)(b) of the Kenya Roads Act Cap 408 Laws of Kenya.
- e) A Declaration do issue that there are only two Constitutional procedures of transferring, assigning and/or delegating a function and/or power of one level of Government to the other level of government in respect of National and County Government(s) which are either by a National legislation pursuant to and/or under the provisions of Article 186(4) of the Constitution of Kenya 2010 or by an agreement by both levels of Governments pursuant to and/or under the provisions of Article 187(1) of the Constitution of Kenya 2010 as read with the provisions of the Inter Governmental Relations Act Cap 5G laws of Kenya.
- f) A Declaration do issue that Kenyans and/or Kenyan motorists are only legally bound to directly pay for Roads construction, maintenance and connected purposes which include and is not limited to parking facilities or services through the provisions of the Roads Maintenance Levy Fund Act Cap 425D Laws of Kenya and further all Kenyans indirectly pay for the same through thirty per cent of the funds in the Annual County Allocation of Revenue in their respective counties or such higher portion of such funds as the Minister for Finance may direct until and unless the provision of section 31(c) of the Kenya Roads Act Cap 408 Laws of Kenya is amended and/or repealed.

g) A Declaration do issue that pursuant to and/or under the provisions of section 31(c) of the Kenya Roads Act Cap 408 Laws of Kenya, Counties are to remit thirty percent of the funds in the annual county allocation of revenue or such higher portion of such funds as the minister for finance may direct, to the Kenya Urban Roads Authority for Nairobi, Mombasa and Kisumu Counties and the Kenya Rural Roads Authority in respect of all other Counties for the construction and maintenance of roads and connected purposes in their respective territorial jurisdiction until and/or unless the provision of section 31(c) of the Kenya Roads Act Cap 408 Laws of Kenya is amended and/or repealed.

h) A Declaration do issue that fees or rates or levies or charges or taxes on roads and/or connected purposes imposed by any County Government and/or its predecessor(s) effective October, 2008 until March 2013 was an illegal imposition and after March 2013 is an illegal and unconstitutional imposition hence null and void.

i) A Declaration do issue that one cannot claim to have acquired interest in or over an illegal and unconstitutional thing and/or issue and/or fees and/or rates and/or levies and/or charges and/or taxes.

j) A Prohibitory injunction do issue prohibiting the 1 st,2nd ,3rd ,4th, 5th, 6th , 7 th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st , 22nd , 23rd, 24th,l 25th, 26th, 27th, 28th, 29th, 30th, 31st, 32nd, 33rd, 34th, 35th , 36th, 37th ,38th, 39th, 40th,41st, 42nd, 43rd, 44th, 45th, 46th and 47th Respondents from imposing any taxes other than property rates, entertainment tax, taxes authorized by an Act of parliament and/or for services rendered and the imposition must be done as provided by legislation in pursuance of the provisions of Article 210(1) of the Constitution of Kenya 2010.

k) A Mandatory injunction do issue compelling the 54th and/or the 55th Respondents to forthwith revise the Traffic Act indicating the implied repeal of sections 72A, 72B, 72C, 72D, 72E, 72F, 72G, 72H, 72I, 72J, 91 & 93 of the Traffic Act Cap 403 laws of Kenya through a corrigenda of the annual supplement of the Law of Kenya for the year 2008 or 2009 the case maybe and in any case within 30 days of the order.

l) A Declaration do issue that Kenyan are entitled to thoroughly refined revised editions of all Laws of Kenya hereinafter and in any case within 90 days of the order. m) A Declaration do issue that Kenyans are entitled to the expunging from the Kenya law reports all rulings and/or judgements that were made after September 2008 and which referred to and/or relied on any of the provisions of section(s) 72A, 72B, 72C, 72D, 72E, 72F, 72G, 72H, 72I, 72J, 91 and 93 of the Traffic Act Cap 403 laws of Kenya. n) A Declaration do issue that the judgements in High court at Nairobi petition no. 486 of 2013. High court at Eldoret constitutional Petition No.3 of 2014 and Republic versus city council of Nairobi & 2 others, exparte Kaka Travellers cooperative savings and credit society limited & others, high court at Nairobi petition no 472 of 2014, Nairobi High Court Judicial Review No. 223 of 2010, Petition 300, 490, 35 & 247 of 2014 (Consolidated) were made without the information that section(s) 72A, 72B, 72C, 72D, 72E, 72F, 72G, 72H, 72I,72J, 91 and 93 of the Traffic Act Cap 403 Laws of Kenya were on 12th September 2008 impliedly repealed by the provisions of section(s) 4, 7, 10, 22,31,40 & 53 of the Kenya Roads Act Cap 408 laws of Kenya as read with the provision of the fourth schedule to the Kenya Roads Act Cap 408 laws of Kenya and are hereby impeached.

o) Aggravated damages included in general damages for conspiracy to rip off money from the public to be paid to the petitioners herein who petitioners have had to forego personal obligations for establishing the disturbing state of affairs behind the conspiracy herein.

p) Exemplary damages to vindicate the strength of the law.

q) Cost of this suit and interest at court rates until full payment of the same.

r) Any other or further order(s) and /or writ(s) or direction

(s) The honourable court may deem fit to grant.

54th Response to the Petition

2. The 54th Respondent herein filed a Notice of Preliminary Objection dated 29th April 2016 challenging this courts jurisdiction to here and determine the claim against the 54th Respondent in the petition based on two grounds namely:-

a) The Kenya Roads Act does not repeal the impugned sections of the Traffic Act as alleged by the Petitioners; and

b) Without the repeal in a) above the court cannot legislate and issue declarations that some provisions of the Traffic Act were repealed by the Kenya Roads Act as stated in prayers a,b,c,d,e,f and m of the Petition.

3. It is contested by the 54th Respondent, that the petition against the 54th Respondent offends the well-established principles of drafting constitutional petition, as enunciated in the case of **Anarita Karimi Njeru vs Republic (1979) eKLR**. It is further contended, that the claim against the 54th Respondent in the petition is frivolous, vexatious and an abuse of the court process and should be struck out or dismissed.

Petitioner's Response

4. The Petitioners in response to the Preliminary Objection, filed a Replying Affidavit by James Gacheru Kariuki sworn on 27th September, 2018 opposing the same. It was deponed that the Petitioners filed civil suit in Milimani High Court Misc. Civil Application No. 559 of 2015 where they sued all the 47 county governments and on *ex-parte*

hearing, Aburili J directed, that the motion be heard before the Constitutional and Human Rights Division of the High Court. That pursuant to Article 209 (3) (c) of the Constitution, a county government may impose any other tax that is authorized to be imposed by an Act of Parliament. Accordingly, they believe that the learned judge found an inconsistency with the provision of Sections 72A, 72B, 72C, 72D, 72E, 72F, 72G, 72H, 72I and 72J of the Traffic Act to the extent that the said sections of the law contravene the provisions of the Kenya Roads Act.

5. It is further their contention that the provisions of Section 8 of the Revision of the Laws Act provides, that the Hon. Attorney General shall have power to omit all laws or parts of laws which have been repealed expressly or by necessary implication when preparing the annual supplement to the laws of Kenya. They averred that Section 53 of the Kenya Roads Act decrees, that notwithstanding any law to the contrary, no local, or other person shall exercise any power relating to the control, maintenance, development or protection of any road except where such powers have been delegated by an authority established under this Act or by the minister.

6. That sections 72A, 72B, 72C, 72D, 72E, 72F, 72G, 72H, 72I and 72J of the Traffic Act contradict the provisions of the Kenya Roads Act and the remedy of the conflict lies in Sections 7 and 8 of the Revision of Laws Act, where the Attorney General has a statutory obligation to omit sections of the formerly enacted law, which are in conflict with the latter enactment and vide a Legal Notice No. 29 of 2009, the Hon. Attorney General delegated his functions to the 54th Respondent. They therefore content that the Preliminary Objection is misconceived, bad in law, a procedural technicality and an abuse of the court process.

54th Submissions of the Preliminary Objection

7. The 54th Respondent submitted that Article 94 of the Constitution gives Parliament legislative authority to amend or repeal existing legislations. It was their contention that the judiciary therefore has no power to repeal sections of the law or even issue a declaration, that some provision of the law repealed another. A declaration can only be issued if the Kenya Roads Act stated, that it had repealed the Traffic Act. They submitted that the doctrine of implied repeal is a well-established principle which states, that where an Act of Parliament conflicts with an earlier one, the latter takes precedence and the conflicting parts of the earlier Act become legally inoperable as was emphasized in the case of **Martin Wanderi & 19 Others –vs- Engineers Registration Board of Kenya & 5 Others**.

8. It was further their submission, that 72A, 72B, 72C, 72D, 72E, 72F, 72G, 72H, 72I and 72J, 91 and 93 of the Traffic Act are provisos, that allow county governments to levy parking fees in designated areas within the county while the Kenya Roads Act makes no reference whatsoever to levying of parking fees by county governments. Consequently, there is no apparent contradiction or inconsistencies with the two Acts. They further submitted that Article 165(3) of the Constitution clearly outlines the extent of the jurisdiction of the High court and nowhere is it empowered to repeal or order the repeal of statutes.

9. They submitted that the National Council for Law Reporting establishes the National Council for Law Reporting to publish Kenya Law Reports as provided in Section 3 of the Act and therefore it has no mandate to revise or amend laws as this is the preserve of Parliament. It was their contention that since legislation is a preserve of parliament, in the absence of any law granting the 54th Respondent any powers of revision of laws, the court has no jurisdiction to confer the power to revise and amend laws on the 54th Respondent. To buttress this argument, they placed reliance on the case of **Sir Ali Bin Salim - vs. Shariff Mohammed Sharry (1938) eKLR and the “Lillian S” case (1989) KLR1**.

10. On whether the Petitioners offend the principles of drafting constitution petition, they placed reliance on the principles enunciated in the **Anarita Karimi Njeru case (supra)** and submitted, that the petition is defective as it does not outline how the 54th Respondent has infringed on the rights of the Petitioners. In conclusion, they submitted that contrary to what the Petitioners allege, Section 7, 8 and 9 of the Revision of Law Act as read with Section 3 of the National Council for Law Reporting Act do not impose an obligation on or mandate the 54th Respondent to imply a repeal of any law or provision of the law.

Petitioners Submissions on the Preliminary Objection

11. In response, the Petitioners submitted that they have a constitution right to a fair administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair and justice should be dispensed without undue regard to technicalities. That an inadequacy in the pleadings can be cured by way of an amendment. They cited the case of **Grace Ndegwa & Others –vs- the Attorney general Civil Appeal No. 228 of 2002** where it was held that a court of justice should aim a sustaining a suit rather than terminating it by summary dismissal.

12. They further relied on the Court of Appeal case of **Abdi S. Rahman Shire –vs- Thabiti Finance Company Ltd Civil Appeal No. 76 of 2000** where it was held that notwithstanding the fact that an issue does not flow from the pleadings, a court may base its decisions on it where it appears from the course followed at the trial that the issue has been left to the court for decision. Further, the 54th Respondent has not claimed any prejudice if the Petitioners are allowed to pursue their case to full hearing. In that regard, they urged the court to find the preliminary objection untenable in the current constitutional dispensation where the rule of law and accountability are national values and principles of governance.

Analysis and Determination

13. The crux of the preliminary objection against the petition is pegged mainly on the following;

- a) The court lacks jurisdiction to hear and determine the claim against the 54th Respondent in the petition.
- b) The petition offends the well-established principles of drafting constitutional petitions.

c) The petition is frivolous, scandalous, vexatious and is an abuse of the court process.

14. Upon consideration of the preliminary objection and response thereto three issues for consideration arises thereto being as follows:-

a) **Whether the court has jurisdiction to order the repeal of statutory sections?**

b) **Whether the petition offends the principles of drafting constitutional petitions?**

c) **Whether the petition is frivolous, vexatious and is an abuse of the court process?**

A) Whether the court has jurisdiction to order the repeal of statutory sections?

15. The core of the constitution of Kenya 2010 is the doctrine of separation of powers. Pure separation of powers entails both institutional separation and functional separation, institutional separation concerns itself with the architecture and composition of the various arms of government and functional separation being concerned with autonomy of allocation and exercise of functions. In the instant petition the petitioners are seeking to oust the legislative powers of parliament of Kenya which is an affront to the doctrine of separation of powers.

16. **Article 94(1) of the Constitution of Kenya 2010**, provides that the legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by parliament. It should be noted as such the parliament merely acts as agent of the people.

17. **Article 94(5) of the Constitution of Kenya 2010**, articulates, thus, no person or body, other than parliament, has the power to make provision having the force of law in Kenya except under authority conferred by the constitution or by legislation encapsulates the law-making power of the National Assembly.

18. From the reading of the two articles, mentioned herein above, it is clearly revealed that it is only parliament which has powers to amend or repeal existing legislations. The judiciary cannot purport nor has it any powers to repeal sections of law or even issue a declaration, that some provisions of the law, especially the Traffic Act, were repealed by the Kenya Road Act as sought in the petitioners prayers a,b,c,d,e and in the petition. The declaration can only be issued if the said Kenya Roads Act, stated it had repealed the Traffic Act.

19. It should be noted in the statutory interpretation, it is a cardinal rule, that when interpreting a statute, first regard must be paid to the literal words of the legislation. This has been underscored by renown devolution expert Mutakha Kangu, in his seminal book. Constitutional law of Kenya on Devolution, where he states that:-

"The establishment of the meaning of a constitutional provision begins with the literal words of the provision. This approach holds that the meaning of the constitutional provision can and must be deduced from the very words in which the provision is couched. The provision must be taken to mean what the ordinary meaning of the words used discloses and which is assumed to be clear. Such ordinary meaning would be the standard grammatical dictionary meaning of the words. Grammatical interpretation focuses on the natural language and meaning of the words used in the constitutional provision in the hope of avoiding the proliferation of meanings that could be attached to the provision."

20. In the case of **County Government of Kiambu vs**

The Senate & Others (2017) the court stated:-

"There are numerous rules of interpreting a statute, but in my view and without demeaning the others, the most important rule is the rule dealing with the statutes plain language. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinary be taken as conclusive. Thus, when the words of a statute are unambiguous, then this first canon is also the last, judicial inquiry is complete. The implication is that when the language is clear, then it is not necessary to be labor examining other rules of statutory interpretation."

21. It should, however, be noted that courts have been concerned with overreliance on the rule of literal meaning of words to interpret statutes; but have turned to adopt a purposive approach of constitutional and statutory interpretation to guard against instances of ambiguity of the use of literal interpretation. in the case of **Rotich Samuel Kimutai vs Ezekiel Lenyongopeta and 2 others (2015) eKLR**, the Court of Appeal stated thus:-

"The grammatical meaning of the words alone, however is a strict construction which no longer finds favour with true construction of statutes. The literal method is now completely out of date and has been replaced by the approach described as the "purpose approach". In all cases now in the interpretation of Statutes such a construction as will promote the general legislative purpose "underlying the provision to be adopted. It is no longer necessary for the Judges to wring their hands and say," There is nothing I can do about it". Whenever the strict interpretation of a Statute give rise to an absurd and unjust situation, the Judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind."

22. I therefore find that in the instant matter the Literal Rule plain language meaning should be adopted in interpreting the disputed meaning and intention of the statute. In the instant petition, it is alleged by the petitioners the principle of implied Repeal should apply. In the case of **Martin Wanderi & 19 others vs Engineers Registration Board of Kenya & 5 others (2014) eKLR** the court held:-

"This is because of the canons of interpretation with regard to the timing of legislation, and the doctrine of implied repeal,

which is to the effect that where provisions of one Act of Parliament are inconsistent or repugnant to the provisions of an earlier Act, the later Act abrogates the inconsistency in the earlier one...."

23. The doctrine of implied Repeal serves as a precautionary measure against existence of two contrasting statutes. The general rule is normally, that when parliaments repeal legislation, they generally make their intentions both express and clear; however sometimes parliament may enact laws that are inconsistent with existing statutes. This proposition was established by Smith J in **Kutner vs Philips (1891] 2 QB 2 267 (QB)** where the court stated:-

"[i]f ...the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together, the earlier is abrogated by the later, that is, the later statute impliedly repeals the earlier one to the extent of the inconsistency."

24. In view of the above, it is necessary, that there has to be one or more express provisions that are in contrast or in conflict with each other in different statutes for one to repeal the other. Implied Repeal cannot occur where one Act or statute refers to a specific issue yet another does not. Further the court does not construe a later Act as repealing an earlier one unless it is impossible to make the two Acts or the two sections of the Acts stand together.

25. In that respect, sections 72 A, 72 B, 72C, 72 D, 72 E, 72 F, 72 G, 72 H, 72 I, 91 and 93 of the Traffic Act are provisions, that allow County Government to levy parking fees in designated areas within the county. The Kenya Roads Act, is however, silent regarding the issue of parking fees by County Government. There is therefore no apparent inconsistency in the statutes and hence the doctrine of implied Repeal does not apply in this case. I therefore find that in that effect, the Kenya Roads Act does not repeal the Traffic Act. It is apparent and clear, that the County Government Act allows County Government to come up with strategy of raising revenue that include the levying of parking fees.

26. **Article 165(3) of the Constitution of Kenya 2010** creates the High Court and clearly outlines the extent in which the jurisdiction of the High Court extends. The Article is effected by the High Court (*organization and Administration*) Act of 2015. There is nowhere in the Constitution or in the Act where the High Court is empowered to repeal or order the repeal of statutes on sections of statutes, that are considered illegal or contradictory.

27. Further, **Article 209 of the Constitution and Schedule 4 of the Constitution of Kenya 2010** in providing the functions of the County Government allocate their revenue raising powers which include collection of parking fees and charging of relevant taxes subject to an Act of Parliament. This function in my view cannot be said to serve as a contradiction to the Kenya Roads Act and the Traffic Act.

28. In exercising of judicial authority, the High Court is obliged under **Article 159(2) of the Constitution of Kenya 2010**, to protect and promote the purposes and principles of the constitution. The constitution must always be given a purposive, liberal interpretation and the provisions of the constitution must be read as an integrated, whole, without any one particular provision destroying the other but each sustaining the other.

29. The National Council for Law Reporting establishing National Council for Law Reporting to publish Kenya Law Reports. The 54th Respondent has no statutory mandate to revise or amend laws as this is the preserve of parliament. The role of the National Council for Law Reporting Act is specifically provided under section 3 of the Act. From the said section it is evident that the 54th has no statutory mandate to revise, amend or update any law unless the publication has been authorized by the Attorney General and unless the amendment have been done by the legislature.

30. I find that since legislation is a preserve of parliament, in the absence of any law granting the 54th Respondent, any powers of revision of laws, the court has no jurisdiction to confer the power to revise and amend law, on the 54th Respondent. The Court of Appeal cited with approval the decision in **Sir Ali Bin Salim vs Shariff Mohamud Shary (1938) KLR** where it stated:-

"If a court has no jurisdiction over the subject matter of the litigation, its judgments and orders, however precisely certain and technically correct, are mere nullities and not only voidable, they are void and have no effect either as estoppel or otherwise, and may not only be set aside at any time by the court in which they are rendered, but be declared void by every court in which they may be presented. It is well established law that jurisdiction cannot be conferred on a court by consent of parties and any waiver on their part cannot make up for the lack or defect of jurisdiction."

31. The Supreme Court of Kenya restated the **SS Lilian case** in the matter of Advisory Opinions of the Supreme Court under Article 163(3) of the Constitution-Constitutional Application No.2 of 2011 where it stated thus:-

"The Lillian 'S' case [1989] KLR 1] establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity."

32. In the case of **Speaker of Senate and Another and the Attorney General and Others (2013)**, the Supreme Court of Kenya rationalized that if Judges decide only those cases that meet certain justiciability requirements, they respect the spheres of their co-equal branches, and minimize the troubling aspects of counter-majoritarian judicial review, in a democratic society, by maintaining a duly limited place in government.

33. I find that the court should restrain itself and should not in any way seek to invalidate the alleged impugned provisions of the Traffic Act where parliament had no intention of repealing through the enactment of the Kenya Road Act. I find that this court lacks jurisdiction to declare that the Kenya Roads Act repealed sections of the Traffic Act as sought by the petitioner as the power to legislate by amending and

repealing laws is a preserve of parliament and not judiciary. The 54th Respondent could therefore not proceed to publish an amendment or revision that had not been sanctioned by parliament. Having found that this court lacks jurisdiction to handle this matter as preferred, the court is required to proceed to down its tools immediately and find itself not legally seized to proceed with this matter, as I so find.

B) Whether the petition offends the principles of drafting constitutional petitions?

34. It is trite that a petition must be concise and precise in showing and citing the violations committed by a Respondent and how the constitution has been violated through the cited violations and the facts setting out how these violations, have been committed (see **Anarita Karimi Njeru vs Republic (1979) KLR**). The petitioner is required to particularize the allegations of violation of the constitution as principal goal posts in drafting informed and well-considered petition.

35. In the instant petition, the petitioners have failed to set out and show how the 54th Respondent and other Respondents have violated or infringed their rights. The petitioners have failed to indicate the manner in which the 54th Respondent and others have infringed their rights.

36. The procedure set out in the **Anarita case (supra)** was meant for furtherance of justice. It is imperative therefore to note that every petition is required to adhere to the set out procedure without undue departure from its tenets. In High Court of Kenya at **Meru in East Africa Pentecostal Churches Registered Trustees & 1754 others vs Samwel Muguna Henry & 4 others [2015] eKLR** stated that;

"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."

37. From paragraph 33-54 of the petition, the petition does state how the enactment of the Traffic Act amounts to a violation of the petitioners rights under the Constitution. The petitioners have sued all the County Governments and all government parastatals dealing with infrastructure and roads and from the wording of the petition, it is just seen to be gambling with the respondents in a bid to resuscitate their weak case. It is also urged, that there is no mention of the 39th and 42 Respondents as violators of any of the rights claimed to have been violated. This is a Court of Law and should not be used to handle frivolous and vexatious petitions whose sole intention is to engage in fishing expectation in the high seas of constitutional litigation. It should be noted that in this petition various Articles of the constitution have been cited in the petition, however the petitioners, have not provided particulars of the alleged violations of the constitution. Further no evidence has been produced or attached to demonstrate the petitioners rights have been infringed or threatened. No evidence of payment of parking fees has been produced to show petitioners rights have been violated by alleged illegal collection of parking revenue by the County Governments. The petitioners have further not provided the court with any evidence showing that there are persons who have paid money to County Government whose interest they seek to protect as a public interest litigant. I find the petition to be imprecise and too general to warrant any positive order from this court.

38. I find the principles of drafting of constitutional petitions espoused in **Anarita Case (supra)** are in tandem with the Constitution of Kenya (*Protection of Rights and Fundamental Freedoms*) practice and procedure Rule, 2013, which were already in place at the time of filing this petition. Having considered the petition herein, I find the same is defective for failure to state how the Respondents have infringed on the rights of the petitioners.

C) Whether the petition is frivolous, vexatious and an abuse of the court process?

39. The 54th Respondent contends, that the petition is a mere challenge of exercise of statutory power of the Attorney General in revision of Laws. That section 7,8 and 9 of the Revision of Laws Act as read together with section 3 of the National Council for Law Reporting Act do not impose an obligation on or mandate the National Council for Law Reporting to imply a repeal of any law or provisions of law. It is also noted the petitioners have made a claim of the tort of conspiracy against the 54th Respondent, which is an issue of civil nature, which ought not to be elevated and presented as a constitutional issue.

40. In **Kenya Power & Lighting Company Limited vs American Life Insurance Company (K) Limited (2015) eKLR**, the Court of Appeal in Nairobi, in explaining the meaning of frivolous and vexatious adopted the statement by Ringera J (*as he then was*) in **Mpaka Road Development Ltd vs Kona (2014) 1 E.A 161**; where the learned Judge stated that:-

"...And I would say a pleading is frivolous if it lacks seriousness. If it is not serious then it would be unsustainable in court. A pleading would be vexatious if it annoys or tends to annoy. Obviously, it would annoy or tend to annoy if it was not serious or it contained scandalous matter which was irrelevant to the action or defence. In short, it is my discernment that a scandalous and/or frivolous pleading is ipso facto vexatious."

41. The petitioners herein having failed to show how the 54th Respondent and other Respondents have infringed on their rights exude a lack of seriousness and how that petition is sustainable and not annoying. That could be termed as frivolous and/or vexatious.

42. On the abuse of the court process, the Court of Appeal in **Kenya Power Case (supra)** cited the definition by Black's Law dictionary that the Supreme Court adopted in **Charo Hassan Nyange vs Mwashetani Hatibu & 3 others [2014] eKLR**, as follows:-

"The Black's Law Dictionary defines abuse of process at page 11 as:

'The improper and tortious use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process's scope'.

It includes the deliberate use of the court and court process to settle vendetta, to intimidate, to inflict fear and involves the

bringing of matters to court that have no justiciable cause of action."

43. Having considered the submissions by the Respondents herein and having considered the petitioners petition, I find that the petitioners have failed to demonstrate that they have justiciable cause of action against the 54th Respondent and others. I find the petition against the 54th Respondent and others amounts to an abuse of the court process.

44. The upshot is that I find the preliminary objection by the 54th Respondent dated 29th April 2016 meritorious. I proceed to make the following orders:-

a) The petitioners petition against the 54th Respondent and others is fatally defective and incurable.

b) The preliminary objection as filed is meritorious and to the extent of the petition being defective and incurable the petition against all Respondents is dismissed.

c) The petition was filed in public interest and as such no orders as to costs.

Dated, signed and delivered at Nairobi this 9th day of May, 2019.

J .A. MAKAU

JUDGE