



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 159 OF 2018

**IN THE MATTER OF: CONTRAVENTION AND THREATENED CONTRAVENTION OF FUNDAMENTAL RIGHTS
ENSHRINED UNDERS ARTICLES 6, 10, 43(1), 55, 174 & 186 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF: DEFENCE OF THE CONSTITUTION UNDER ARTICLE 3(1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: INTERPRETATION, ENFORCEMENT AND

**PROTECTION OF BILL OF RIGHTS UNDER ARTICLES 19, 20, 22, 23, 24, 165 AND 258 OF THE CONSTITUTION OF
KENYA**

BETWEEN

WILLIAM ODHIAMBO RAMOGLI.....1ST PETITIONER

ASHA MASHAKA OMAR.....2ND PETITIONER

GERALD LEWA KITI.....3RD PETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE CABINET SECRETARY, MINISTRY OF TRANSPORT AND

INFRASTRUCTURE.....2ND RESPONDENT

KENYA PORTS AUTHORITY.....3RD RESPONDENT

KENYA RAILWAYS CORPORATION.....4TH RESPONDENT

AND

MUSLIMS FOR HUMAN RIGHTS.....1ST INTERESTED PARTY

MAINA KIAI.....2ND INTERESTED PARTY

COUNTY GOVERNMENT OF MOMBASA..3RD INTERESTED PARTY

RULING OF THE COURT

A. Introduction

1. The Petitioners first moved this Court *vide* their Petition filed on 24th May 2018. The Petition was later amended and filed on 3rd October 2018. The Petitioners seek certain declaratory orders and reliefs. As discussed later in this ruling, the Petition is centrally pivoted on Articles 43 and 55 as read together with Articles 174 and 186 of the Constitution.

2. The crux of this Petition is that the 3rd and 4th Respondents, the Kenya Ports Authority and the Kenya Railways Corporation respectively, entered into an Agreement dated the 30th day of September, 2014 wherein the 3rd Respondent is, *inter alia*, obligated to consign to the 4th Respondent as a carrier a set volume of freight and/or other cargo pursuant to commencement of the operations of the Standard Gauge Railway to the 3rd Respondent's Inland Container Depot at Embakasi in Nairobi.

3. The Petitioners are aggrieved by the implementation of the agreement and contend that their various constitutional human rights and fundamental freedoms and those of the people of Mombasa County have been infringed by the manner in which the Agreement was concluded and implemented, and are further apprehensive that the contended infringements shall persist.

4. Upon filing of the Petition, the 1st and 2nd Respondents filed a Notice of Preliminary Objection dated 24/09/2018 and the 3rd Respondent filed a Notice of Motion dated 12/06/2018, both of which seek to have the instant Petition struck out.

5. The Notice of Preliminary Objection is based on the following points of law:

a) THAT the suit as drawn and filed offends Article 6,159(c), and 189(3) & (4) of the Constitution (all read together) and therefore a non-starter and should be dismissed and/or referred to an alternative dispute resolution forum.

b) THAT this petition is an inter-governmental dispute whose resolution is envisaged and provided for differently under the Constitution.

c) The Petition is filed contrary to the Constitution and section 30-35 of the Intergovernmental Relations Act No. 2 of 2012 which provides that National and County Governments to have mutual relations on the basis of consultation and cooperation and settle disputes amicably.

d) THAT this suit is premature and Court ought to decline to hear it as provided for under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, Rule 31, Sec 35 of the Intergovernmental Relations Act No 2 of 2012 and the inherent powers of the Court refer this matter for hearing and determination by alternative dispute resolution mechanisms.

e) This Court lacks jurisdiction on the matter until alternative dispute resolution mechanisms have been exhausted.

6. On the other hand, the Notice of Motion is supported by the affidavit of Turasha J. Kinyanjui, and seeks orders striking out the instant Petition on the following grounds:

1. That the Petition dated 23rd May and filed on 24th May 2018 (now amended) be struck out for want of jurisdiction.

2. That the Petition dated 23rd May and filed on 24th May 2018 (now amended) be struck out for want of jurisdiction be struck out for being an abuse of the Court process.

3. That the costs of the struck-out Petition be awarded to the 3rd Respondent to be paid by the 1st, 2nd and 3rd Petitioners jointly and severally.

7. Following the Petitioners' Application dated 25/06/2018, Justice Ogola by a ruling dated 24/07/2018 certified the Petition as one raising substantial points of law warranting the appointment of a multi-judge bench by the Honourable Chief Justice. Consequently, the Honourable Chief Justice appointed the present bench consisting of Achode J. (Presiding); Ngugi J.; Nyamweya J.; Ogola J; and Mrima J. to hear the matter.

8. On 26/09/2018, the Bench sat and gave directions on the hearing of the Preliminary Objection and Notice of Motion. The Court directed that the Preliminary Objection and the Notice of Motion be heard contemporaneously and further directed the parties to file Written Submissions. Oral highlighting was scheduled for 29/10/2018.

9. We have read the Written Submissions filed by all the parties and considered the oral submissions of all the advocates who appeared before us. After due consideration, we have identified the following five issues for determination as arising from the Preliminary Objection

and Notice of Motion:

i. Is the Court barred from considering the suit at present by virtue of Article 189 of the Constitution as read together with sections 33 and 34 of Intergovernmental Relations Act (IGRA)?

ii. Is the suit *res judicata* **Mombasa (CA) Civil Appeal No. 15 of 2017: Mombasa County Government v Kenya Ferry Services & Another?**

iii. Is the suit an abuse of the Court process by virtue of the existence of another suit namely **Mombasa High Court Petition No. 80 of 2018: Makupa Transit Shed Limited & 14 Others v Kenya Ports Authority & Another?**

iv. Should the Court bar the present Petitioners from bringing the present suit under the standing doctrine?

v. Should the Court decline jurisdiction for prudential reasons by dint of the non-justiciability doctrine?

10. We will deal with each of these issues *in seriatim*.

B. Is the Court barred from considering the suit at present by virtue of Article 189 of the Constitution and sections 33 and 34 of Intergovernmental Relations Act of 2012 (“IGRA”)?

11. The first salvo the 1st and 2nd Respondents as well as the 3rd Respondent shoot is that the Petition offends Article 189 of the Constitution as well as section 33 as read together with section 34 of the Intergovernmental Relations Act of 2012 (“IGRA”).

12. Section 33 of IGRA provides that:

(1) Before formally declaring the existence of a dispute, parties to a dispute shall, in good faith, make every reasonable effort and take all necessary steps to amicably resolve the matter by initiating direct negotiations with each other or through an intermediary.

(2) Where the negotiations under subsection (1) fail, a party to the dispute may formally declare a dispute by referring the matter to the Summit, the Council or any other intergovernmental structure established under this Act, as may be appropriate.

13. On the other hand, section 34 of IGRA provides as follows:

Where all efforts of resolving a dispute under this Act fail, a party to the dispute may submit the matter for arbitration or institute judicial proceedings.

14. The Respondents point out to the Court that IGRA was enacted pursuant to Articles 6, 159 and 189 of the Constitution. In short, the three Articles call for the two levels of Government – the National and County Governments – to carry out their functions on the basis of consultation and cooperation, and, to make every reasonable effort to settle any disputes between them outside Court using a procedure to be provided under a National Legislation. The National Legislation envisaged under Article 189 of the Constitution is IGRA.

15. Article 6(2) of the Constitution provides that:

The governments at the National and County levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation.

16. The spirit of this section is buoyed by the mantra in Article 159(2)(c) of the Constitution which provides that:

In exercising judicial authority, the Courts and tribunals shall be guided by the following principles:

(a)

(b) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause (c).

17. On the other hand, Article 189 of the Constitution is to the following effect:

Government at either level shall:-

(1) In any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under National Legislation.

(2) National Legislation shall provide procedures for settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation, and arbitration.

18. The Respondents’ position is that the dispute at hand is an intergovernmental dispute within the meaning envisaged in Article 189 of the

Constitution. As such, the dispute should only be filed in Court after the alternative mechanism for dispute resolution provided in section 33 of IGRA has been exhausted.

19. To reach that conclusion, the Respondents argue that looking at the Amended Petition, it is quite clear that the Petitioners want the Court to interpret Article 186 of the Constitution and, upon such interpretation, to find that the operations of the Port of Mombasa which are currently a preserve of the National Government should be handed over to the County Government of Mombasa, “a move which the County Government of Mombasa supports.” The Respondents, therefore, argue that it seems clear from this perspective that this is a dispute pitting the National Government on the one hand, and the County Government on the other.

20. The Respondents insist that even though the present claim is brought by individual Petitioners who are natural persons, it does not change the fundamental character of the controversy at hand – which they insist is a dispute between the County Government of Mombasa and the National Government. If the issue was ever in doubt, Prof. Githu Muigai, Counsel for the 3rd Respondent and Mr. Nguyo, State Counsel appearing for the 1st and 2nd Respondents, submitted during oral highlighting, the entry into the controversy by the County Government of Mombasa as an Interested Party reveals the dispute for what it truly is: a dispute between the National Government and the County Government of Mombasa respecting a conflict of division of functions related to the operations of the Port of Mombasa.

21. The Petitioners and the Interested Parties have resisted the characterization of the dispute as an intergovernmental dispute which should, therefore, be referred to the Dispute Resolution Mechanism created under IGRA.

22. The Petitioners’ and Interested Parties’ responses in this regard are two-fold.

23. First, the Petitioners and Interested Parties argue that the Petitioners are in Court seeking interpretation and determination “with respect to port activities as relates to harbour functionas predicated on the constitutional question of infringement of *inter alia* social-economic rights of the affected residents of Mombasa County and its environs and those whose rights continue to be threatened by the actions of the 3rd and 4th Respondents.”

24. The Petitioners and Interested Parties insist that the question of threatened and/or violated Social and Economic Rights of the Petitioners and other residents of Mombasa County under Article 43 of the Constitution is premised on the 3rd Respondent’s actions as a State Organ currently running the Port of Mombasa. The Petitioners and Interested Parties are of the view that the 3rd Respondent is running some of the operations of the Port of Mombasa in contravention of the provisions of the Constitution delineating functions between the National and County Governments.

25. The Position taken by the Petitioners and Interested Parties, therefore, is that the questions presented before the Court do not constitute an “intergovernmental dispute” as envisaged and provided for in IGRA. IGRA, the Petitioners and Interested Parties argue, only comes into play when there is a dispute between the National Government and County Government and “that either of the two be the party to invoke its dispute resolution mechanism” and that it does not apply where natural persons or members of the public such as the Petitioners are the disputants.

26. While the Respondents relied on the High Court’s decision in *Isiolo County Assembly Service Board & Another v Principal Secretary (Devolution), Ministry of Devolution and Planning & Another [2016] eKLR* for its position, the Petitioners and Interested Parties relied on *County Government of Nyeri v Cabinet Secretary, Ministry of Education, Science & Technology & Another [2014] eKLR* as well as *Council of County Governors v Lake Basin Development Authority & 6 Others [2017] eKLR*.

27. In any event, the 1st and 2nd Interested Parties argue in the second place, that even if the dispute was properly seen as presenting an “intergovernmental dispute”, the doctrine of exhaustion would not apply in this case to bar the Petitioners from accessing the Court because the other available “alternative” forum, they say, is not accessible to the Petitioners. The effect of accepting that argument would, then, be to leave the Petitioners without a remedy –a situation, the 1st and 2nd Interested Parties insist, cannot be countenanced by the Courts and the Constitution. They rely on *Republic v IEBC Ex Parte NASA-Kenya & 6 Others [2017] eKLR* for that proposition.

28. The key question is whether the Petitioners are barred by Articles 6 and 189 of the Constitution as read together with sections 30-35 of IGRA from approaching the Court with their grievances in the first instance.

29. As this Court remarked in *Republic v IEBC Ex Parte NASA-Kenya & 6 Others [2017] eKLR*, the doctrine of exhaustion which the Respondents plead is a salutary one and is well accepted in our jurisprudence. In that case, the three-judge bench stated as follows:

42. This doctrine [of exhaustion] is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 in the following oft-repeated words:-

Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

43. While this case was decided before the Constitution of Kenya, 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine. This is Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 Others [2015] eKLR, where the Court of Appeal stated that:-

It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the

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

45. We have read these cases carefully and considered the salutary decisional rule of law they announce.....

30. In the **IEBC Case (Supra)**, the Court, after extensive analysis of case law, announced the outer limits of the doctrine of exhaustion. First, the Court held that the doctrine does not apply where its effect would be to defeat important constitutional values especially when the party seeking to approach the Court has pleaded issues verging on constitutional interpretation. The Court stated the exception thus:

46. As the Court of Appeal acknowledged in the **Shikara Limited Case**, the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.

47. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. ...

31. Second, the Court held that the doctrine of exhaustion does not apply where the party seeking the Court's intervention does not have audience before the alternative forum created by statute:

50. The second principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the Court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit. This situation arises where, as here, the right to approach the statutory forum created (in this case the Review Board) is limited to certain parties who are aggrieved in a particular manner defined by the statutory scheme and where the particular party seeking to bring the suit does not fit into any of the categories defined by the Statute.

32. In the present case, the Respondents urge the Court to find that the grievances presented by the Petitioners are either truly those of the 3rd Interested Party or even if they are Petitioners' own, they should be brought within the framework of IGRA.

33. To properly respond to the question whether the controversy herein is an "intergovernmental dispute", we need not do more than look at the ruling dated 24/07/2018. In that ruling, at the urging of all the parties in the matter, Justice Ogola summarized the issues in this case for purposes of certifying that the case involved substantial questions of law for the empanelment of a multi-judge bench by the Honourable Chief Justice. He summarized them thus:

25. I have carefully read through the Petition. Accordingly, I find that the following issues arise:

- a. Whether the agreement dated 30th September, 2014 between the 3rd and 4th Respondents threatens and/or violates the rights of the Petitioners and residents of Mombasa County as expressed under Article 43 of the Constitution.
- b. Whether the management and operation of the Port of Mombasa is a function of the National Government or the County Government of Mombasa.
- c. The correct interpretation of Article 43 of the Constitution and whether the rights expressed therein can be limited.
- d. Whether the agreement dated 30th September, 2014 is unconstitutional or whether it violates Articles 6, 10, 43(1), 55, 174 & 186 of the Constitution.
- e. To what extent was the aspect of transportation devolved to the county governments.
- f. The correct interpretation of Article 189 of the Constitution.

26. The above issues are in my view substantial questions of law and the outcome of their determination may not only affect the residents of Mombasa County but the public in general. The Standard Gauge Railway (SGR) is a project of the national government which is meant to benefit Kenyans by easing transportation to and from the coastal region. The agreement dated 14th September, 2014 entered into by the 3rd and 4th Respondents revolves around the transportation of cargo from Mombasa to Embakasi ICD in Nairobi. Prior to the construction of the SGR, cargo was predominantly transported by trucks. Various businesses have been established for the purpose of facilitation of cargo transportation. These businesses not only belong to residents of Mombasa but to persons across the country and even outside our borders. The agreement has been the subject of great discussion on its merits and demerits. The impact of the agreement can therefore not be restricted to the County of Mombasa.

34. A review of that ruling and the proceedings in Court that led to it bear out the Court's delineation of the issues to be determined in this case. Three things are readily obvious from this delineation of the issues:

- a. First, the Petition raises important issues verging on the violation of fundamental rights and freedoms of the Petitioners as well as

other residents of Mombasa County – including claimed violations of Articles 43 and 55 of the Constitution;

b. Second, the question of violation of the Petitioners’ fundamental rights intersects with and can only be determined in the context of interpretation of Articles 174, 186 and 189 of the Constitution as well as the Fourth Schedule of the Constitution; and

c. Third, contrary to the arguments by the 3rd Respondent, there is no question of transfer of functions under Article 187 of the Constitution that has been raised in the present Petition. Article 187 of the Constitution deals with the transfer of functions and powers between the two levels of government by agreement, while the Petitioners here seek interpretation of Article 186 and the Fourth Schedule of the Constitution with respect to the operations of the Port of Mombasa.

35. Restating the issues in this format easily resolves a number of issues. First, we agree with the Respondents that the test to utilize in determining if a matter is an intergovernmental dispute for purposes of application of IGRA is not to simply to look at who the parties to the dispute are but the nature of the claim. Where a Petitioner approaches the Court espousing a grievance on behalf of the County Government, IGRA applies and the matter will be remitted for resolution in the alternative forum in the first instance. This was the holding in **Isiolo County Assembly Service Board & Another v Principal Secretary (Devolution) [2016 eKLR]** and we agree that it is good and sound law. When confronted with a suit where the question is presented, the Court will have to scrutinize the issues presented and the nature of the claim to determine if it is an appropriate one for the alternative forum. In doing so, the Court will have firmly in mind the exceptions to the doctrine of exhaustion discussed above.

36. Second, where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to Court, that suit is not primarily an intergovernmental dispute and IGRA does not apply to disbar the Court from considering it in the first instance. This is the holding in **County Government of Nyeri v Cabinet Secretary, Ministry of Education, Science & Technology & Another [2014] eKLR**. We find it to be a salutary decisional law.

37. Applying this dual-pronged test to the case at hand, it is clear that this suit is not an inter-governmental dispute between the County Government of Mombasa and the National Government even though both have distinct interests in the resolution of the case. Contrary to the situation in the **Isiolo County Assembly Service Board & Another v Principal Secretary (Devolution) [2016 eKLR]**, here there is no evidence, indication or even tell-tale sign that the grievances presented are truly those of Mombasa County Government framed as individual grievances of the Petitioners. As delineated by the Court in the Ruling dated 24/07/2018 with the concurrence of the parties to the suit, the issues raised in the present suit are centrally about the violation of fundamental rights of the Petitioners in the context of the correct interpretation to be given to Articles 174, 186 and 189 of the Constitution. There is simply no demonstration that the claimed constitutional violations are simply “bootstraps” to espouse a claim by the County Government of Mombasa.

38. Consequently, applying the test outlined above to determine if the case at hand is an intergovernmental dispute, we are satisfied that it is not; that IGRA does not apply to the controversy; and that the Petition is properly before the Court in the first instance.

C. Is the suit res judicata?

39. The **Black’s Law Dictionary, 10th Edition** defines the term “*res judicata*” to mean “*a thing adjudicated. Once a lawsuit is decided, the same issue or an issue arising from the first issue cannot be contested again.*”

40. Section 7 of the Civil Procedure Act provides for when a suit is *res judicata*. It reads as follows:

7. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

41. A reading of this provision reveals that for a matter to be *res judicata* the suit must raise issues that are directly and substantially similar to those in a former suit. In examining whether, indeed, a matter is *res judicata*, the Court has to examine the two suits: the current suit and the former suit in totality. This would mean that the Court has to investigate whether the parties in both suits are the same; whether issues raised are substantially similar; and whether the prayers sought are the same. The purpose of this doctrine is to bring an end to litigation and ensure that litigants do not abuse the Court process by bringing suits which evoke issues that have already been determined by the Court in other suits. In **Ukay Estate Ltd & Another vs Shah Hirji Manek Ltd & 2 Others [2006] eKLR**, Justice Waki elaborated on the relevance of this doctrine by expressing himself as follows:

The doctrine is not merely a technical one applicable only on records. It has a solid base from considerations of high public policy in order to achieve the twin goals of finality to litigation and to prevent harassment of individuals twice over with the same account of litigation. Put another way, there must be an end to litigation and no man shall be vexed twice over the same cause.

42. What, then, is the test for whether a suit is *res judicata*? In **Uhuru Highway Development Limited v Central Bank of Kenya & 2 Others [1996] eKLR**, the Court of Appeal stated that for the doctrine of *res judicata* to apply the following conditions must be fulfilled:

- (i.) [There must be] a previous suit in which the matter was in issue;
- (ii.) the parties were the same or litigating under the same title.
- (iii.) a competent Court heard the matter in issue;

(iii.) the issue has been raised once again in a fresh **SUIT**.

43. Similarly, in **John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR** the Court of Appeal observed as follows:

The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of Court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent Courts. It promotes confidence in the Courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably.

44. This being a constitutional Petition, the principle of *res judicata* can only be applied in the clearest of circumstances. However, this does not mean that a Court should shy away from declaring a suit *res judicata* simply because the suit is in the form of a constitutional petition. The Court of Appeal in the **John Florence Maritime Services Limited Case (supra)** discussed the principle of *res judicata* as it relates to constitutional petitions. The Court opined that:

The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the Court, may be raised as a valid defence to a constitutional claim even on the basis of the Court's inherent power to prevent abuse of process under Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of res judicata. However, we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions.

We also resist the invitation by the appellants to hold that all constitutional petitions must be heard and disposed of on merit and that parties should not be barred from the citadel of justice on the basis of technicalities and rules of procedure which have no place in the new constitutional dispensation. The doctrine is not a technicality. It goes to the root of the jurisdiction of the Court to entertain a dispute. If it is successfully ventilated, the doctrine will deny the Court entertaining the dispute jurisdiction to take any further steps in the matter with the consequence that the suit will be struck out for being res judicata. That will close the chapter on the dispute. If the doctrine has such end result, how can it be said that it is a mere technicality? If a constitutional petition is bad in law from the onset, nothing stops the Court from dealing with it peremptorily and having it immediately disposed of. There is no legal requirement that such litigation must be heard and determined on merit.

45. The issue herein, therefore, is whether this Petition is *res judicata* **Civil Appeal No. 15 of 2017: Mombasa County Government v. The Kenya Ferry Services & Another**.

46. For a better understanding of this matter reference must also be made to **Constitutional Petition No. 9 of 2016: Kenya Ferry Services Limited v Mombasa County Government & 2 Others** before the High Court (herein after referred to as the "**High Court Ferries Case**").

47. In the **High Court Ferries Case**, the Petitioner sought the following prayers:

(a) A declaration that the Petitioner's fundamental right to the protection of its property held by law and protection from arbitrary deprivation by the Respondent as well as its right to fair administrative action and fair hearing has been breached;

(b) A declaration that the Respondent's actions to take over functions clearly set out by law from the Petitioner is a breach of the powers, duties and obligations as set out under the provisions of the Ferries Act, Chapter 410, Companies Act, Chapter 486, (now repealed) Sessional Paper No. 3, Legal Notice No. 152 of 2013 and the Constitution of Kenya 2010;

(c) A declaration that the decision of the Respondent contained in the letter dated 10th February, 2016, to the effect that the Petitioner hands over its functions to the Respondent unconstitutional, and is null and void;

(d) A declaration that the power conferred upon the Roads Authority under Ferries Act Cap 410, and the law setting up the Petitioner as a limited liability company supersede and prevail over the Mombasa Port Authority Act and the intended Mombasa Ferries and Harbours Bill 2014, and a further declaration that the Petitioner is not obliged to relinquish its functions;

(e) A prohibitory order prohibiting the Respondent whether by themselves, agents, servants or through any other person purporting to derive title, powers or authority from the Respondent from interfering, taking over, collecting rent or any other levies within the confines of the land belonging to the Petitioner, being land reference numbers M.S./1/1762 & Plot No. M.S.1763;

f) An order prohibiting the Respondent from taking over the Petitioner's parking areas, waiting bays, terminus, rental space/buildings and advertising space and cease from enforcing any such county laws preventing third parties duly contracted by the Petitioner from carrying out their mandate and cease collecting payments therein;

(g) An order compelling the Respondent to refund to the Petitioner all sums of money collected as rent, gate fees, and rental space fees and advertising space from the 18th day of February, 2016, till judgment herein and thereafter until payment in full, and account for such sums or in the alternative, compensate the Petitioner at the rates specified in contracts between it and its agents;

(h) An order compelling the Respondent to refund to the Petitioner all the monies they have collected or been collecting from the Matatu/Bus termini, Business Stalls and Advertising Media space/LED Large Screen Displayers from 18th February, 2016, to the date of judgment or compensate the Petitioner at the rates specified in the contracts between the Petitioner and its agents;

(i) The costs of and consequent upon this Petition be paid and borne by the Respondent and all other or such reliefs as this Honourable Court may deem just and fit or appropriate to grant.

48. In that case, the High Court, was faced with the following issues:

- a) Division of the transportation function between the national and County Government of Mombasa, specifically, the function of operating ferries and harbours.
- b) Whether the assets or property on properties known as M.S/1/1762 & M.S.1763 belong to the County Government of Mombasa or the Kenya Ferry Services.
- c) Whether the facilities on the aforementioned properties should be managed by the County Government of Mombasa.
- d) Whether the Respondent (County Government of Mombasa) should refund the Petitioner all sums of money collected from the ancillary facilities on the Likoni Channel from 18th February, 2016.

49. At the High Court, the Petitioner was successful. When an appeal was lodged in the Court of Appeal against the decision of the High Court, the appeal rested on the issue whether since the enactment of the Constitution of Kenya, 2010, the operation of the Likoni Ferry is a function of the National Government or the County Government. Additionally, the Appellate Court was faced with the issue of whether the properties known as MS/1/1762 and MS/1/1763 on either side of the Likoni Channel should be managed by the County Government of Mombasa or the Kenya Ferry Services.

50. The Court of Appeal rendered itself thus on the questions:

We take judicial notice of the fact that international ships pass through the Likoni Channel before they go to dock at the Kilindini harbor. It is, therefore, part of the international waterways which the Constitution assigned to the National Government. We do not see how the Appellant can claim the mandate to manage the Likoni Channel which is, without doubt, an international waterway, and part of the country's marine navigational system.

51. We have already delineated the issues raised in the present Petition above. From the foregoing exposition it is evident that the matter herein is not *res judicata* **Constitution Petition No. 9 of 2016** and **Civil Appeal No. 15 of 2017**. The parties in the matters are different, and the issues raised are substantially distinguishable. While the harbor function was an issue raised in the aforementioned matters, it was only discussed to the extent that it relates to the Kenya Ferry Services and the Likoni Channel and not the operations of the Port of Mombasa by the 3rd Respondent, Kenya Ports Authority.

D. Is the suit an abuse of the Court process by virtue of the existence of another suit namely *Mombasa Petition No. 80 of 2018*?

52. The 3rd Respondent averred that this Petition seeks to challenge the 3rd Respondent's decision to consign containers through the SGR, which issue is the subject of determination in ***Mombasa High Court Petition No. 80 of 2018: Makupa Transit Shed Limited & 14 others v. Kenya Ports Authority & Another***. Further, the 3rd Respondent submitted that Container Freight Stations which are mentioned in this Petition are the Petitioners in the aforementioned matter, hence their interests are already under the consideration of the Court in that other matter. Counsel for the 3rd Respondent submitted that the Court should either stay Petition 80 of 2018 or that the Petitioners herein should join Petition 80 of 2018 as concurrence of the two suits may lead to conflicting decisions. Without saying so in so many words, it is the Respondents' case that the issues raised in this Petition are *sub judice*.

53. The real question for determination, then, is whether this suit is *sub judice* in light of ***Mombasa High Court Petition No. 80 of 2018: Makupa Transit Shed Limited & 14 others v. Kenya Ports Authority & Another***.

54. The **Black's Law Dictionary Free Online Legal Dictionary 2nd Ed**, defines the term "*sub-judice*" to mean "*a matter or case that is before a judge or Court for determination*".

55. On the other hand, section 6 of the Civil Procedure Act makes provision for the principle of *sub-judice* in the following terms:

6. No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.

56. The purpose of this principle is to avoid instances where multiple suits are filed by the same parties on the same issues before Courts of competent jurisdiction. In ***Standard Chartered Bank Limited –Versus- Jenipher Atieno Odok, HCCC No. 120 of 2003***, Warsame J. (as he then was), had the following to say about the doctrine of *sub judice*:

It is not within the rights of parties to engage in multiplicity of suits as the multiplicity of suits is meant to obstruct due process of law, and when a party shows design to abuse the powers of the Court, such actions must be stopped to avoid unnecessary costs and waste of judicial time.

57. The test to be utilized to determine if a matter is *sub judice*, therefore, is to ask whether the parties in the suits are the same; whether the issues raised or subject matters of the suits are the same; and whether the matters are pending before Courts clothed with appropriate jurisdiction.

58. The question that now begs an answer is whether the Petition herein is similar to the matter in **Petition No. 80 of 2018**?

59. An appropriate place to begin the analysis is to note that the parties in the two cases are different: In **Petition No. 80 of 2018** the parties are **Makupa Transit Shed Limited & 14 other Container Freight Stations (CFS)** who are the Petitioners, while the Respondents are the **Kenya Ports Authority and Kenya Railways Corporation**. In this Petition, the petitioners are **William Odhiambo Ramogi & 2 other individuals** (who are natural persons) while the Respondents are: **The Attorney General, Cabinet Secretary, Ministry of Transport and Infrastructure; Kenya Ports Authority; and Kenya Railways Corporation** and the **Interested parties** are: **Muslims for Human Rights (MUHURI); Maina Kiai; and The County Government of Mombasa**. The only similarity in terms of the parties is that the Kenya Ports Authority and Kenya Railways Corporation are Respondents in both suits.

60. In relation to the subject matter and issues raised in both suits, in **Petition No. 80 of 2018** the Petitioners seek the following prayers:

a) An injunction be issued to restrain the 1st Respondent, its servants, employees or any other person under its authority, from blocking, withholding and or failing to release to any of the Petitioners, or interfering in any manner whatsoever, with Nominated cargo specified in a Bill of Lading for delivery to the Petitioners or any of them, and to divert the same either to itself, to the 2nd Respondent, or any other person for haulage to Nairobi or any other destination by rail or any other way to the exclusion of the Petitioners or any to whom the said cargo should be delivered.

b) An injunction be issued to restrain the 2nd Respondent, its servants, employees, or any other person under its authority, from receiving from the 1st Respondent or any other person, and transporting by rail or any of the Port of Mombasa, nominated cargo specified in a bill of lading for delivery to the Petitioners or any of them, in violation of the rights of the Petitioners or any of them, in violation of the rights of the petitioners to receive such cargo pursuant to the internationally recognized contract in the bill of lading.

c) A mandatory injunction be issued, directed at the 1st Respondent, its servants, employees, or any other person under the authority to immediately release for delivery to the Petitioners, or any of them, all nominated cargo specified in all bills of lading for delivery to the petitioners or any of them, as ordained by both the Constitution and the law.

In the alternative:

d) A prohibitory order be issued to prohibit the 1st Respondent, its servants, employees or any other person acting pursuant to its authority, from blocking, withholding and/or failing to release to any of the Petitioners, nominated cargo specifically designated in a bill of lading for delivery to the Transit Sheds/CFSs of the Petitioners, and be further prohibited from handing over to, or giving such nominated cargo to the 2nd Respondent for transportation by rail to either Nairobi or any other destination.

e) A prohibitory order be issued, to prohibit the 2nd Respondent, its servants, employees, or any other person acting pursuant to its authority, from receiving from the 1st Respondent, nominated cargo specifically designated in a Bill of Lading for delivery to the Petitioners Transit Sheds or any of them, for the said 2nd Respondent to transport such nominated cargo by rail to Nairobi or any other destination.

f) A declaration that the conduct of the 1st Respondent to block cargo specifically designated in a Bill of lading for delivery to the Container Freight Station/Transit Sheds of the Petitioners, and diverting the same for handover to the 2nd Respondent for haulage to Nairobi for delivery by rail is in violation of the international conventions enshrined in the Hague & Hague visibly Rules, 1924 and 1968 respectively, as well as the Carriage of Goods by Sea which conduct is a further violation of Articles 2(1), (5) and (6) of the Constitution, and to that extent, the conduct aforesaid is invalid by reason of Article 2(4) of the Constitution.

g) A declaration that the conduct of 1st and 2nd respondent to divert nominated cargo that is specifically designated in bill of lading for delivery to the Petitioners for the same to be hauled by the 2nd Respondent by rail to Nairobi, taken either singly or cumulatively, is in violation of the Economic rights of the Petitioners protected by Article 19 (1) and (3) and 40 of the Constitution, and to that extent, the said conduct is invalid by reason of the provisions of Article 2(4) of the Constitution.

h) Costs of this Petition to be paid by the Respondents jointly and severally to the Petitioners.

i) Such further or other relief as this Court may deem just.

61. From the prayers and a reading of the Petition, the main contention in **Petition No. 80 of 2018** is whether the 1st and 2nd Respondents' conduct by virtue of the agreement dated 30th September, 2014 between the Kenya Ports Authority and the Kenya Railways Corporation, of transporting nominated cargo allegedly designated to the Petitioners *vide* bills of lading is valid, and whether the said conduct infringes on the Petitioners' social and economic rights under Article 43 of the Constitution and their right to protection of their property under Article 40

of the Constitution.

62. In the Petition before this Court the subject matter is the 3rd Respondent's harbor functions. As discussed in Part B of this ruling, the main issues that arise in the present Petition are centrally about the violation of fundamental rights of the Petitioners (primarily as enshrined in Articles 43 and 55 of the Constitution) in the context of the correct interpretation to be given to Articles 174, 186 and 189 of the Constitution. To determine that question, the Court has to answer a question that is admittedly raised in **Petition No. 80 of 2018**: the correct interpretation of Article 186 of the Constitution respecting operations of the Port of Mombasa. Another issue raised in both cases is whether the agreement dated 30th September, 2014 has infringed on the social and economic rights of the residents of Mombasa.

63. While some of the issues are similar, the two Petitions are not identical. One, the Petitioners in the two cases are distinct: in **Petition No. 80 of 2018**, the Petitioners are Container Freights Stations (CFSs). They have brought the suit as a distinct segment of the population affected by the Agreement dated 30th September, 2014 and the operations of the Port of Mombasa by the National Government. On the other hand, the Petitioners here are individual residents of Mombasa County. They have brought this suit on their own behalf and on behalf of the other residents of the County. They, too, find the Agreement and the operations of the Port of Mombasa to be violative of their rights *qua* citizens and residents of Mombasa County. They complain of the same Agreement and the same operations, but they represent different interests and rights.

64. Two, while **Petition No. 80 of 2018** deals with the issue of nominated cargo, this Petition is centered on the harbor functions of the 3rd Respondent.

65. Consequently, the matter herein cannot be said to be an abuse of Court process on the basis of existence of **Petition No. 80 of 2018**. It is, hence, not *sub judice*. It is, therefore, the finding of the Court that this Petition is not improperly before the Court on account of the *sub judice* rule and neither is it otherwise an abuse of the Court process on account of the existence of **Petition No. 80 of 2018**.

E. Should the Court bar the present Petitioners from bringing the present suit under the standing doctrine?

66. The 3rd Respondent argued that the Petitioners lack *locus standi* to institute the Petition. The 3rd Respondent's reasoning is that the present Petition seeks to advance private and political interests and has not been brought in good faith and for the public interest. The 3rd Respondent further argues that whereas Articles 22 and 258 of the Constitution relaxed the approach to *locus standi* none of the said Articles ought to be used to bog down the Courts with private interest petitions disguised as public interest litigation.

67. Advancing the argument further, the 3rd Respondent drew the attention of this Court to four issues. First, that the Petitioners have been residents of Mombasa since their childhood yet it seems that it has only now become apparent to them that the port operations are a devolved function. Second, that the Petitioners are furthering the private interests of members of the Container Freight Association who have already filed **Petition No. 80 of 2018** challenging the "Take or Pay" Agreement. Third, that the Petitioners are likewise advancing the interests of the County Government of Mombasa through the backdoor as demonstrated by **Civil Appeal No. 15 of 2017** and the conduct of the County Government of Mombasa in waiting for the filing of the Petition and then joining as an Interested Party. Lastly, that the Petitioners have not demonstrated any special interest in the management of the port, consignment of cargo and establishment of the Container Freight Services Terminals. Buttressing the argument, the 3rd Respondent referred this Court to the persuasive decisions in **Robinson O. Malombo t/a O. M. Robinson & Company Advocates vs. Disciplinary Tribunal of the Law Society of Kenya & 36 others (2016) eKLR** and **Okiya Omtatah Okiiti & 2 others vs. Attorney General & 3 others (2014) eKLR**.

68. As rightly stated by the 3rd Respondent, the judicial approach to *locus standi* has been relaxed post-2010 courtesy of Articles 22 and 258 of the Constitution. The import of the said provisions is that every person has the right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened or claiming that the Constitution has been contravened or is threatened with contravention. In addition to a person acting in their own interest, Court proceedings under Articles 22(1) and 258(1) of the Constitution may be instituted by—

- a. a person acting on behalf of another person who cannot act in their own name;
- b. a person acting as a member of, or in the interest of, a group or class of persons;
- c. a person acting in the public interest; or
- d. an association acting in the interest of one or more of its members.

69. The issue of *locus standi* in Constitutional Petitions is now well settled. The Court of Appeal in **Nairobi Civil Appeal No. 290 of 2012 Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others (2013) eKLR** substantively dealt with the issue and laid down the applicable test which was affirmed by the Supreme Court. In that case it was argued that the Respondent, an NGO (Trusted Society of Human Rights Alliance) whose mandate included the pursuit of constitutionalism lacked *locus standi* to challenge the appointment of Mumo Matemu as the Chair of the Ethics and Anti-Corruption Commission. In responding to the question, the Court of Appeal firmly stated as follows:

26. It is hard to maintain the argument that the first respondent did not suffer any injury to warrant this standing to lodge the Petition before the High Court. It is equally hard to maintain the position that the first Respondent was acting as an interlocutor for a private third party, in a matter of public interest such as this. In the context of our commitment to integrity in leadership as expressed in the Constitution, we cannot gainsay the importance of the issue of the leadership and institutional integrity of the Ethic and Anti-Corruption Commission.

27. More so, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the Courts. In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the Courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the Petition was filed before the High Court by an NGO whose mandate includes pursuit of constitutionalism and we therefore reject the arguments of lack of standing by Counsel for the Appellant. We hold that in the absence of a showing of bad faith as claimed by the Appellant, without more, the first Respondent had the locus standi to file the Petition. Apart from this, we agree with the Superior Court below that the standard guide for locus standi must remain the command in Article 258 of the Constitution.....

28. It still remains to reiterate that the landscape of locus standi has been fundamentally transformed by the enactment of the Constitution in 2010 by the people themselves. In our view, the hitherto stringent locus standi requirements of consent of the Attorney General or demonstration of some specific interest by a private citizen seeking to enforce a public right have been buried in the annals of history. Today, by dint of Articles 22 and 258 of the Constitution, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest.....

29. It may therefore now be taken as well established that where a legal wrong or injury is caused or threatened to a person or to a determinate class of persons by reason of violation of any constitutional or legal right, or any burden is imposed in contravention of any constitutional or legal provision, or without authority of law, and such person or determinate class of persons is, by reasons of poverty, helplessness, disability or socio-economic disadvantage, unable to approach the Court for relief, any member of the public can maintain an application for appropriate direction, order or writ in the High Court under Articles 22 and 258 of the Constitution.

70. It is imperative to note that the foregoing position had been taken by some Courts well before the promulgation of the Constitution in 2010. (See *Shah Vershi Devji & Co Ltd vs. The Transport Licensing Board Nairobi (1970) EA 631; (1971) EA 289* and *Muriithi vs. Attorney General & 5 others (2006) 1 KLR 443*).

71. Applying the above test to this case it is clear that the Petitioners have instituted these proceedings under the twin Articles of the Constitution. To the extent that the Petitioners are variously claiming violation of their rights and fundamental freedoms as guaranteed in the Bill of Rights, the Petitioners come under Article 22(1) of the Constitution. As to whether the various acts by the Respondents complained of by the Petitioners including the validity of the "Take or Pay" Agreement, administrative actions, the port operations among others are in contravention of the Constitution, the Petition is hinged on Article 258(1) of the Constitution. In either case, the Petitioners are not only advancing their personal interests but also those of the other residents of the Mombasa County and beyond hence squarely acting in public interest. In other words, the Petitioners are putting the actions of the Respondents to the constitutionality test on their own behalf and on behalf of the general public.

72. We further wish to point out that the proceedings before this bench began before a single Judge whom upon application which was supported by all the then parties on record certified that there were substantial questions of law that required the empanelment of a multi-judge bench. The Honourable Judge in his ruling rendered on 24th day of July 2018 concurred with the position taken by the parties and accordingly certified the matter as one raising substantial questions of law. The matter was again reconsidered by the Honourable Chief Justice who was likewise satisfied that the certification was appropriate and proceeded to empanel the present bench of five judges. As at now the findings of the Honourable Judge and the Honourable Chief Justice have not been appealed against.

73. We therefore decline the invitation by the Respondents that the Petitioners lack the requisite *locus standi* in instituting these proceedings. Conversely, we find and hold that the Petitioners are seized of the requisite standing in this matter.

F. Should the Court decline jurisdiction for prudential reasons by dint of the non-justiciability doctrine?

74. The 3rd Respondent's main argument on this issue is that the Petitioner's Petition is asking this Court to make policy proposals, which is not a judicial function, and that the questions raised are not justiciable. Prof Githu Muigai and Mr. Nani Mungai, Counsel for the 3rd Respondent particularly pointed out that the invitation to this Court to adopt the practices in other ports on the assignment of port duties to the national and county governments; and the prayer sought as regards the acceptable radius for the establishment of Inland Container Depots (ICDs) are policy decisions that Courts are not equipped to make, and on which the Courts are being asked to take over the policy formulation role of the Executive. Reliance was placed on the Court of Appeal decision in *Kenya Airports Authority vs Mitubell Welfare Society & 2 Others (2016) e KLR* that Courts have no role to play in policy formulation, which is a function best suited for the Executive.

75. Prof. Githu Muigai, SC further urged in this respect that the authority of the Judicature is founded on the respect it has for the other arms of government which are elected by the people, and the Courts should respect the doctrine of separation of powers. Further, that judges apply the law and should not make policy decisions, and not all grievances brought before the Courts are justiciable constitutional questions.

76. The 3rd Respondent's sentiments were also reiterated by the 4th Respondents, while the 1st and 2nd Respondents largely submitted on the National Government's policy positions on the management of the Port of Mombasa.

77. Ms. Oduor for the Petitioners in response distinguished the decision in *Kenya Airports Authority vs Mitubell Welfare Society & 2 Others (supra)* on the ground that the issue and decision therein was on a specific policy, and submitted that the Court is empowered to interrogate legislative proposals and policies in matters that arise within its jurisdiction. Pheroze Nowrejee, SC for the 3rd Interested Party reiterated that the issue of the Mombasa Port operations and its location are raised in the context of the application of Article 43 on socio-economic rights of the residents of Mombasa County and Article 55 of the Constitution on employment for the youth of Mombasa County. That the complaints by the Petitioners therefore raise constitutional issues which are within the jurisdiction of this Court, and have nothing to do with political questions or executive powers and duties.

78. We have considered the arguments made by the parties on this issue. The question for determination is whether the issues presented by the Petitioners are inappropriate for judicial consideration because they are not justiciable.

79. It was held in *Council of Civil Service Unions vs Minister for the Civil Service (1985) AC 374 at 418*, that a challenge is referred to as being non-justiciable because its nature and subject matter is such as not to be amenable to the judicial process. The “justiciability” doctrine is rooted in both constitutional and prudential considerations and evince respect for the separation of powers, including a properly limited role of the courts in a democratic society. One justiciability concept is the “political question” doctrine—according to which courts should not adjudicate certain controversies because their resolution is more proper within the political branches.

80. In *Baker v. Carr 369 U.S. 186 (1962)* the United States Supreme Court outlined six matters that could present political questions as follows:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

81. In the Kenyan context, the political question doctrine was discussed by the Court of Appeal in *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 Others (supra)* where the Court held as follows:

97. We have examined the judgment, directions and orders made by the trial court. One of the directions is that the appellant and the 2nd and 3rd respondents were to file by way of affidavit State policies and programs on the provision of shelter and access to housing for marginalized groups such as residents of informal and slum settlements; the parties were to report back to the trial court on the progress made toward resolution of the petitioners' grievances. The directions given by the trial court lead us to consider the role of courts in post judgment supervision of implementation of the judgments.

*98. In considering the issue, we are alive to the provisions of Article 159 (2) (c) of the Constitution which enjoins courts to promote alternative dispute resolutions mechanism inter alia through reconciliation, mediation or arbitration. We emphasize that these alternative dispute resolution mechanisms must be adopted and effectuated prior to judgment by the trial court. With this in mind, the role of the legislature is to make laws and policy and that of the executive is to implement those laws and policies. The role of the judiciary is to interpret the policies and laws as enacted and approved by the legislature and executive. Generally, courts have no role to play in policy formulation; formulation of government policy is a function best suited for the executive and legislature. In *Marbury -vs- Madison- 5 US. 137* it was stated that:*

“The province of the court is solely, to decide on the rights of individuals and not to enquire how the executive or executive officers perform duties in which they have discretion.”

99.

*100. In *Ndora Stephen -v- Minister for Education & 2 Others, Nairobi High Court Petition No. 464 of 2012, Mumbi Ngugi, J. correctly observed that the formulation of policy and implementation thereof were within the province of executive. Questions which are in their nature exclusively political should never be adjudicated upon by courts. In the instant case, the trial court directed that State policies and programs on the provision of shelter and access to housing for marginalized groups be presented to the trial court. What would the trial court do with such policies if tabled? Would the court interfere or evaluate the soundness of the policy? A court should not act in vain and issue orders and directions that it cannot implement. In making orders and directions in relation to Article 43 (1) of the Constitution, the provisions of Article 20 (5) (c) of the Constitution must be borne in mind. Article 20 (5) (c) stipulates that the court may not interfere with a decision by a State organ concerning the allocation of available resources solely on the basis that it would have reached a different conclusion. We opine that it is advisable for courts to practice self-restraint and discipline in adjudicating government or executive policy issues. This precautionary principle should be exercised before delving and wading into the political arena which is not the province of the courts. Limited to the facts of this case, post-judgment supervision of implementation of judgments is not a function of a trial court. Implementation and execution of judgments is governed by specific rules and it is to these rules that resort must be made.”**

82. It is evident from the case law that the two main criteria that will influence the justiciability of an issue or otherwise are firstly, whether there is a clear constitutional commitment and mandate to a particular government organ to make a decision on the issue, and secondly, even where such a constitutional mandate exists, whether the nature of the issue and dispute is such that it is more effectively resolved by conventional political methods of majoritarian decision-making rather than by a deliberative constitutional judgment. This will include situations where a Court lacks the capacity to develop clear and coherent principles to govern litigants' conduct.

83. As regards the first criterion, this Court is the constitutionally mandated organ with jurisdiction to adjudicate and make final decisions in two specific areas, namely the violation and protection of human rights and freedoms, and the constitutionality of laws and actions (including policies) by other arms of government. Specifically on violation of fundamental rights, under Article 23(1) of the Constitution this Court is given jurisdiction to, in accordance with Article 165, 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 165(3) further elaborates on this Court's jurisdiction and judicial review powers as follows:

(3) Subject to clause (5), the High Court shall have—

- (a) unlimited original jurisdiction in criminal and civil matters;
- (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
- (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
- (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191; and
- (e) any other jurisdiction, original or appellate, conferred on it by legislation.

84. The Court’s mandate in this respect vis-a-vis the non-justiciability of an issue on account of the political question doctrine was the subject of the decision by a three–Judge Bench of this Court in **Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR**, which was faced with similar arguments of non-justiciability and an invitation to decline hearing a case challenging the tendering process of ballot papers for imminent General Elections, on account of the principle of separation of powers and the need to exhibit judicial deference to the autonomous and expert organs of State. The said Court held as follows:

67. *In other words, the only deference that the Court can exercise is one permitted by the Constitution – and, in particular, in accordance with Article 47 of the Constitution which constitutionalizes judicial review as a fundamental right. Having this in mind, we are unable to adopt any judicial theory of Constitutional interpretation by which the Court denies itself clearly enunciated authority and obligation to review administrative decisions. There is simply no Constitutional basis for such a doctrine under our constitutional schema. In any event, we find little prudential reason that recommends such a doctrine under our Constitution. As Jaime Arancibia ably demonstrates, the “orthodox judicial deference” is susceptible to solid and principled objections and is already under serious attack even in the United Kingdom whence it was plucked. Even if that were not so, that approach, as demonstrated above would not apply in Kenya by virtue of the Constitutional basis of judicial review as opposed to Common Law basis.*

68. *In our view, therefore, the issues that the Court has been asked by the Applicant to address in this Application are appropriately justiciable and properly before the Court. Article 165(1) of the Constitution establishes the High Court and vests in it vast powers including the power to ‘determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened’ and the jurisdiction ‘to hear any question respecting the interpretation of the Constitution.’*

70. *The concept of judicial review under the Constitution of Kenya 2010 is similar to that under the Constitution of South Africa where it was held in **Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others** that “[t]he common law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts. The court went further to say that there are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. Rather, there was only one system of law shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.*

71. *As can be seen, the entrenchment of the power of judicial review, as a constitutional principle should of necessity expand the scope of the remedy. Parties, who were once denied judicial review on the basis of the public-private power dichotomy, should now access judicial review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights. Court decisions should show strands of the recognition of the Constitution as the basis of judicial review.*

72. *Our courts need to fully explore and develop the concept of judicial review in Kenya as a constitutional supervision of power and develop the law on this front. Our courts must develop judicial review jurisprudence alongside the mainstreamed “theory of a holistic interpretation of the Constitution. Judicial review is no longer a common law prerogative directed purely at public bodies to enforce the will of Parliament, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The judicial review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution.*

85. In the words of Chief Justice Marshall of the U.S.A, in **Cohens vs. Virginia** 19 US (6 Wheat.) 264 (1821):

It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is exercise our best judgment, and conscientiously perform our duty.

86. On the second criterion, the remit of this Court's jurisdiction on broader political and democratic governance issues that may not be perceived to be technical legal questions is specifically provided by Article 10 of the Constitution, which provides for the national values and principles of governance that shall bind all state organs, state officers, public officers and all persons in interpreting the Constitution, enacting law, or making policy decisions. These values and principles include the rule of law, human rights, non-discrimination, good governance, integrity, transparency and accountability. Article 259 also provides that the Courts shall interpret the Constitution in a manner that:

- (a) promotes its purposes, values and principles;
- (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
- (c) permits the development of the law; and
- (d) contributes to good governance.

87. The Constitution therefore clearly expands the jurisdiction of this Court to areas that were traditionally considered to be in the political realm. This paradigm shift was explained by the Supreme Court of Kenya in **Speaker of the Senate & another v Attorney-General & 4 Others, Advisory Opinion Reference No. 2 of 2013 [2013] eKLR** as follows:

[51] Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today's Constitution is to institute social change and reform, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy. This is clear right from the preambular clause which premises the new Constitution on –

"RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law."

And the principle is fleshed out in Article 10 of the Constitution, which specifies the "national values and principles of governance", and more particularly in Chapter Four (Articles 19-59) on the Bill of Rights, and Chapter Eleven (Articles 174-200) on devolved government.

[52] The transformative concept, in operational terms, reconfigures the interplays between the States majoritarian and non-majoritarian institutions, to the intent that the desirable goals of governance, consistent with dominant perceptions of legitimacy, be achieved. A depiction of this scenario has been made in relation to the unique processes of constitution-building in South Africa, a country that was emerging from an entrenched racialist governance system.....

[54] The context and terms of the new Constitution, this Court believes, vests in us the mandate when called upon, to consider and pronounce ourselves upon the legality and propriety of all constitutional processes and functions of State organs. The effect, as we perceive it, is that the Supreme Court's jurisdiction includes resolving any question touching on the mode of discharge of the legislative mandate."

88. It is evident that not only is non-justiciability an evolving concept, but also that the types of subject matters in relation to which challenges are considered to be non-justiciable has narrowed considerably. It was thus held in **Council of Civil Service Unions vs Minister for the Civil Service (supra)** that it is no longer constitutionally appropriate to deny the Court supervisory jurisdiction over a governmental decision, merely because the legal authority for that decision rested on prerogative rather than statutory powers. Rather, that the Courts intervention should be governed by whether or not in the particular case the subject matter of the prerogative power is justiciable.

89. Coming to the present case, it is thus evident that there are constitutionally permissible situations where this Court may interfere in the policy decisions of the Government, and particularly if a policy decision is in actual or threatened violation of the fundamental rights guaranteed under the Constitution, or in violation of other provisions of the Constitution. The necessity of vindicating constitutionally secured personal liberties and fundamental freedoms is the principal justification for the anti-majoritarian power that judicial review confers upon the Courts, and we are therefore reluctant to find that a claim of fundamental rights, such as the one presented by the Petitioners is non justiciable, even though it may concern the political process, or the internal workings of other government branches.

90. In **DDA v. Joint Action Committee, Allottee of SFS Flats (2008) 2 SCC 672 : AIR 2008 SC 1343**, the Supreme Court of India held as follows in this regard:

64. An executive order termed as a policy decision is not beyond the pale of judicial review. Whereas the superior courts may not interfere with the nitty-gritty of the policy, or substitute one by the other but it will not be correct to contend that the court shall lay its judicial hands off, when a plea is raised that the impugned decision is a policy decision. Interference therewith on the part of the superior court would not be without jurisdiction as it is subject to judicial review.

65. Broadly, a policy decision is subject to judicial review on the following grounds:

- (a) if it is unconstitutional;
- (b) if it is de hors the provisions of the Act and the regulations;
- (c) if the delegatee has acted beyond its power of delegation;
- (d) if the executive policy is contrary to the statutory or a larger policy.

91. It is notable in this respect that the Court of Appeal's decision in *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 Others (supra)* was specifically addressing the circumstances of the case before it, which was the post-judgment supervision of a policy formulation and implementation, unlike in the present case where the Court is being asked to find whether or not a particular policy has infringed the Petitioners' fundamental rights. This Court therefore finds that the issues raised by the Petitioners are justiciable as there are questions of violation of human rights and fundamental freedoms at stake which cannot constitutionally and effectively be resolved by the majoritarian political process, as suggested by the 3rd Respondent. Furthermore, as discussed above it is within this Court's constitutional mandate to subject policy formulations and decisions to judicial review.

G. Conclusion and Disposal

92. Having carefully considered the germane issues raised in the Notice of Motion dated 12th day of June 2018 and the Preliminary Objection dated 24th day of September 2018 we conclude that neither is merited. Consequently, the Notice of Motion and the Preliminary Objection are hereby dismissed. The costs shall be in the cause.

DELIVERED, DATED and SIGNED at MOMBASA this 2nd day of November 2018.

L. ACHODE J. NGUGI P. NYAMWEYA

JUDGE JUDGE JUDGE

E. OGOLA A. C. MRIMA

JUDGE JUDGE