



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURT

Petition 88 of 2011

CONSUMER FEDERATION OF KENYA (COFEK)

SUING THROUGH ITS OFFICIALS NAMELY

**STEPHEN MUTORO, EPHRAHIM GITHINJI KANAKE
AND HENRY MESHACK OCHINEG**

**PETITIONER
VERSUS**

**HON. ATTORNEY GENERAL.....1ST
RESPONDENT**

**MINISTER FOR ENERGY2ND
RESPONDENT**

DEPUTY PRIME MINISTER AND MINISTER FOR FINANCE.....,3RD RESPONDENT

**ENERGY REGULATORY COMMISSION4TH
RESPONDENT**

**NATIONAL OIL CORPORATION OF KENYA5TH
RESPONDENT**

JUDGMENT

Introduction

1. In the petition dated 30th May 2011 and supported by the affidavit of Mr. **Stephen Mutoro**, the Secretary –General of the petitioner, of the same date, the petitioner, a non-governmental organisation registered under the Societies Act, Cap 108, Laws of Kenya, seeks the following orders:

- (a) **A DECLARATION** that the respondents’ failure to stabilize and reduce high fuel prices violates article 43 of the constitution which guarantees the petitioners and other citizens economic and social rights to wit; free from hunger and adequate food of acceptable quality among others.
- (b) **A DECLARATION** that the respondents’ failure to stabilize and reduce high fuel prices has occasioned high food prices thus violating article 43 of the constitution which guarantees the petitioners and other citizens economic and social rights to wit; free from hunger and adequate food of acceptable

quality among others.

(c) **A DECLARATION** that the respondents' failure to stabilize and reduce high fuel prices violates article 46 of the constitution which guarantees the petitioners and citizens consumer rights to wit; to goods and services of reasonable quality and to the information necessary for them to gain full benefit from the goods and services among others.

(d) **A DECLARATION** that the 4th respondent's actions to control fuel prices to guarantees maximum profits in favour of the petroleum companies is discriminatory, against fair trade practices, reasonable competition and unconstitutional.

(e) **AN ORDER** compelling the respondents to take appropriate fiscal, administrative, regulatory, good governance and other necessary steps to stabilize and reduce high fuel prices to ensure that the rights and freedoms of the respondents and citizens are not infringed.

(e) **AN ORDER** compelling the respondents to take appropriate fiscal, administrative, regulatory, good governance and other necessary steps to reduce high food prices and the looming food shortage to ensure that the rights and freedoms of the respondents and citizens are not infringed.

(f) **AN ORDER** that failure to comply with the above within a reasonable period of time, the board of directors of the 4th respondent and the 5th respondents be reconstituted/ restructured in accordance with the constitution of Kenya and other statutory provisions.

(g) **ANY OTHER** or further remedy that this Honourable court shall deem fit to grant.

(h) **AN ORDER** that the respondents do pay the costs of this petition.

2. The petition was opposed by the respondents. Replying affidavits were filed on behalf of the 2nd, 4th and 5th respondents. The petitioner and all the respondents save the 5th respondent filed written submissions which they relied on at the hearing of the petition.

3. The petition was filed on the 30th of May 2011. When the matter was placed before Musinga, J for directions, the petitioner alleged that the matter was urgent as there were various constitutional rights that were being violated as the high prices of fuel had increased the rate of inflation and affected people's living standards. The Court certified the matter urgent and directed that the petition be served forthwith upon all the respondents as well as all oil marketing companies in Kenya. The matter was then fixed for directions on the 7th of June 2011.

4. On the 7th of June 2011, by consent of the parties, the matter was fixed for mention on the 13th of June 2011 with a view to enabling the parties agree on directions. On that day, in the presence of Counsel for the petitioner, the 2nd, 4th, and 5th respondents and the oil marketing companies which had been joined as Interested Parties pursuant to the orders of the court namely Oil Libya, Total Kenya, and Kenya Shell Ltd, the matter was fixed for mention on the 14th of July 2011. The parties agreed by consent on the 14th of July 2011 that the petitioner would file its submissions within 21 days from that date, the respondents would file their submissions within 30 days from the date of service with the petitioner's submissions, and the petition was fixed for hearing on the 31st of October 2011.

5. When the matter came up for hearing on the 31st of October 2011, Counsel for the petitioner was absent and the respondents and Interested Parties asked the court to stand the matter over generally and indicated that they would be applying for dismissal of the petition on the basis that the petitioner had not complied with the direction given on the 14th of July 2011 with regard to the filing of submissions. The Court declined to stand the matter over generally but fixed it for further directions on the 23rd of November 2011 and ordered that a mention notice be served on the petitioner.

6. On 23rd November, 2011, Counsel for the petitioner, Mr. Kurauka, applied for leave to file a further affidavit to reflect the current situation and for more time to file the petitioner's submissions. The court granted the prayers and gave further directions with regard to the filing of affidavits and submissions. It also fixed the matter for mention on the 20th of January 2011 on which date the hearing of the petition was fixed for the 28th of February 2011. It did not, however, proceed for hearing on that date as the petitioner had not filed its submissions on time and the respondents, some of whom had been served with the petitioner's submissions in court that morning, asked for time to respond. The matter was eventually heard on the 30th of July 2012.

The Petitioner's Case

7. In presenting the case for the petitioner, Mr. Kurauka relied on the petition dated 30th May 2011 and the affidavit in support, as well as the written submissions dated 28th October 2011. The petitioner bases its case on Articles 43 and 46 of the Constitution and the Universal Declaration of Human Rights. It alleges that the socio-economic rights guaranteed under Article 43 require government to take affirmative action to ensure their realization. According to the petitioner, the 3rd and 4th respondents are duty bound to formulate fiscal policies in respect of the petroleum energy prices under the Energy Act and to protect the interest of consumers, investors and other stake holders; to monitor and ensure implementation of the observance of the principles of fair competition in the energy sector as provided for under section 5(b) and (d) of the Energy Act, and to make proposals to the 2nd respondent for regulations envisaged by section 6 (b) of the energy Act.

8. The petitioner argues that Article 3 (1) of the Constitution imposes an obligation on every person, including the respondents, to respect, uphold and defend the Constitution. On its part, the petitioner has a right to seek the Court's intervention in the event the Constitution is contravened or infringed. The petitioner contends that under Article 43, it was guaranteed socio-economic rights such as the right to be free from hunger and to have adequate food of acceptable quality, among other rights. It was also entitled, under Article 35, to access information held by the state or by another person required for the exercise and protection of any right or fundamental freedom.

9. The petitioner contends that the respondents have violated the provisions of Article 46 of the Constitution which guarantees the petitioner consumer rights to goods and services of reasonable quality and to the information necessary for them to gain full benefit from the goods and services. The respondents were under a duty to effectively control the refinery, distribution and supply of petroleum products in the country. However, the petitioner contends that the 4th respondent has been controlling fuel prices in a discriminatory manner in order to guarantee maximum profits for oil companies. As a result of the failure of the respondents to effectively discharge their legal obligation of stabilizing and controlling high fuel prices, many Kenyans were dying of hunger due to ravaging drought and a rise in the cost of living.

10. The petitioner argues that the respondent should take '*appropriate fiscal, administrative, regulatory, good governance and other necessary steps*' to reduce high food prices and the looming food shortage so as to ensure that the rights and freedoms of the petitioner and the other citizens are not infringed.

11. Mr. Kurauka conceded at the hearing of this petition, however, that since the petition was filed a lot of changes had taken place: the rains had come and the oil prices had come down. He argued that it was the duty of the respondent to ensure that fuel prices are reasonable as that is the only way to bring the cost of living down. He contended that the new Constitution at Article 43 guarantees to Kenyans access to food and other socio-economic rights; that the Universal Declaration of Human Rights also guarantees access to these rights and Article 46 guarantees consumer rights to citizens.

12. Mr. Kurauka submitted that the petition was well founded in view of the circumstances so that the respondents can be compelled to comply with article 43 and 46. He argued that after the petitioner came to court, the respondent took fiscal measures on taxation as a result of which oil prices have come down, and the respondents have a duty to regulate oil prices so that they do not escalate.

13. The petitioner submitted that the 4th respondent has been capping fuel prices in favour of oil companies and guaranteed minimum prices to oil companies. He referred to a Public Notice annexed to the petitioner's affidavit as annexure 2 and submitted that this gives the respondents an unfair advantage over other Kenyans; that if all the respondents join hands, they can bring down oil prices to the benefit of all Kenyans.

14. Mr. Kurauka submitted further that the Constitution placed responsibility on the government, and the government had not shown that it has no resources to implement rights. He argued that contrary to the respondents' assertions, the matters raised in the petition were not hypothetical but related to issues which had been hotly discussed by Kenyans and required joint efforts, and that is what had led the court, (Musinga J), to bring in the oil companies. The petitioner urged the court to grant the orders sought and contended that the matters were of public interest and so no costs should be awarded, but that if any costs were to be awarded, then the same should be borne by the 1st - 4th respondents.

The 1st and 3rd Respondent's Case

15. Mr. Bitta for the 1st and 3rd respondents submitted that in light of the submissions on behalf of the petitioner and the concessions made, the petition had been overtaken by events. The conditions that formed the basis of the petition had been ameliorated and the measures that the petitioner was asking the court to order the respondents to take had already been taken. Mr. Bitta referred to the replying affidavit sworn by Mr. Joseph Kinyua on the 18th of June 2011 in which he sets out in detail the policy measures taken by government. He submitted that as Counsel for the petitioner had conceded that these measures have been taken and been successful in the government meeting its constitutional obligations, this petitioner no longer had any basis.

16. Mr. Bitta argued further that the issues in questions are issues dealing with the formulation of policy which, under the doctrine of separation of powers, is under the exclusive jurisdiction of the executive arm of government. In this petition, the petitioner seeks to question government policy without providing a scientific basis to support the questioning. Mr. Bitta pointed out that the petition is supported by the affidavit of Mr. Stephen Mutoro who had not stated his expertise, had not stated the government policy that he was questioning or an alternative policy, and that therefore the petition was supported by an affidavit with no probative value.

17. Mr. Bitta referred the court to Article 20(5) of the Constitution on the questioning of state policy by the courts, and submitted that no nexus has been shown between the high food prices and government policy and no evidence produced to show the connection. He asked the court to strike out the petition as it had been overtaken by events.

The 2nd and 4th Respondents' Case

18. In presenting the case for the 2nd and 4th respondents, Mr. Njiru relied on the affidavit of Mr. Patrick Nyoike, the Permanent Secretary, Ministry of Energy, sworn on the 18th of January 2012 and the affidavit of Engineer Kaburu Mwirichia, the Director General of the 4th respondent, sworn on 16th January 2012. He agreed with the submissions made on behalf of the 1st and 3rd respondents with regard to the concessions made by the petitioner. The concessions in question were made with respect to measures that had been taken before the petition had been filed.

19. Mr. Njiru submitted that under Article 20 (5), the court may interfere with policy, but it cannot do so merely because it would have reached a different decision than the decision reached by the policy maker. He contended that the petitioner had not shown how the respondents had failed in policy formulation.

20. With regard to the energy policy which the petitioner was challenging, the 2nd and 4th respondents submitted that the policy is the result of stakeholder consultation which took place annually as the policy was formulated every year. Mr. Njiru submitted that the respondents had carried out their obligations as

set out in the Energy Act in regulating the energy sector and formulating policy for the sector. The factors that resulted in the escalation of fuel prices were beyond the control of the respondents, including as they did weather fluctuations, forex exchange, rising international oil prices and global demand, as well as political instability in several oil producing countries.

21. With regard to the rights guaranteed under Article 43, Mr. Njiru submitted that the rights are subject to progressive realization on the basis of availability of resources. While conceding that the 3rd respondent has the duty to regulate oil prices, Mr. Njiru submitted that the petitioner had failed to take into account the fact that the price of oil was affected by external factors which are outside the control of the 4th respondent, and it could not be held directly or indirectly liable for the high cost of fuel and food.

22. Finally, Mr. Njiru submitted that from the comparative analysis of the price of oil in various countries in the region done by the 4th respondent, Kenya is in a better off position. The petitioner had therefore failed to show any violation of constitutional rights and the petition should be dismissed with costs to the respondents.

The 5th Respondent's Case

23. Mr. Mosota for the 5th respondent relied on the affidavit of Eunice Arwa sworn on the 11th of November 2011 and the written submissions dated the 5th of February 2012. The position taken by the 5th respondent is that the petitioner does not have a cause of action against the 5th respondent and does not meet the threshold set by Article 22 as it does not plead which rights the 5th respondent had violated.

24. Mr. Mosota submitted that the 5th respondent is a state corporation established under the state corporations Act. Its mandate is to store and market oil and does not include fixing the price of oil; that it has been wrongly joined as a party to this matter as a result of the petitioner's misapprehension of its mandate. There was no connections between its mandate and oil fixing and pricing and so it cannot have breached any of the rights of the petitioner.

25. Mr. Mosota enumerated the measures that the 5th respondent has taken to fulfil its statutory mandate, including acquiring 75 petrol stations which offer fuel at prices that are affordable, and reducing its profit margin by availing fuel at affordable prices. He argued that the price of oil is outside the 5th respondent's mandate and it cannot do more than it is already doing to ensure availability of oil. He therefore asked the court to dismiss the petition.

The Interested Parties' Case

26. The Interested Parties were joined as parties to the petition pursuant to directions by Musinga, J that the petition be served on all oil marketers. Mrs. Otaba for **Kenya Shell Limited** submitted that though no declarations are sought against it, Kenya Shell adopted the submissions of Mr. Njiru with regard to international oil prices that affected the prices of oil in Kenya. She submitted further that it had not been shown how the Articles of the Constitution alleged to have been violated had indeed been violated, and what a reasonable person in the shoes of the respondents would have done to achieve what the petitioner expected. Mrs. Otaba further submitted that the petitioner had failed to place before the court decisions from other jurisdictions from where many of the provisions of the Kenya Constitution had been borrowed, and where there are many decisions on the issues raised. In her view, had the petitioner a genuine grievance, it would have placed those decisions before the court. She therefore asked the court to dismiss the petition with costs.

27. Mr. Monda for **Oil Libya** associated himself with the submissions by the respondents and asked the court to dismiss the petition with costs.

Issues For Determination

28. The petitioner is to be commended for bringing up the critical issue of the enjoyment of socio-economic rights by the citizen which it alleges have been violated through a failure to control the rising cost of living. The country now has, for the first time ever, recognition in the Constitution of the socio-economic rights. Article 43 contains the constitutional guarantees to food, adequate health care, housing, water and sanitation. However, while the Constitution contains guarantees to these rights and imposes an obligation on the state to ensure their enjoyment, it also, at Article 20, limits the powers of the Court to question the fulfilment by the state of its obligations under Article 43. Article 20 (5) provides as follows:

(5) In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles—

(a) it is the responsibility of the State to show that the resources are not available;

(b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and

(c) The court, tribunal or other authority 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. (Emphasis added).

29. It is imperative therefore that, in alleging a failure by the state to fulfil its obligations under Article 43, a party in the position of the petitioner places before the court such material as would inform the court what the existing policies, if any, were with regard to the right in question, what the state had done or failed to do to ensure enjoyment of the rights, in question and how it had failed to meet its obligations under the Constitution.

30. The petitioner alleges that the respondents have violated Article 43 of the Constitution by failing to adequately control fuel prices, thus leading to an escalation in the cost of living as a result of the increase in the price of food, transport and other essentials. The petitioner asks the court to direct the respondents to take ***'legislative, policy and other measures'*** to control the rise in the price of fuel and thus bring down the cost of living. While conceding that there has been a rise in the cost of living resulting from increases in the price of oil, the respondents however argue that the increases are due to factors beyond their control such as weather conditions, international oil prices and foreign exchange losses due to a weak shilling. They argue that they have taken measures to cushion the citizen from such increases. Such measures include the energy policy which is arrived at after stakeholder consultation and the taking of tax measures such as the removal of excise duty on kerosene.

31. I believe that it is not in dispute that the court has jurisdiction to determine whether there has been a violation of the socio-economic rights set out in Article 43. The inclusion of the rights in the Bill of Rights, and the vesting of jurisdiction in the High Court under Article 165 to determine whether a right or fundamental freedom has been violated, is a clear indication of the intention by Kenyans to ensure social transformation through the protection of these rights. This court has expressly upheld the protection of these rights in the case of **John Kabui Mwai and Others – v - Kenya National Examination Council and Others High Court Petition No 15 of 2011** where the court observed as follows:

'the inclusion of economic and social, cultural rights in the constitution is aimed at advancing the socio - economic needs of the people of Kenya, including those who are poor, in order to uplift their human dignity. The protection of these rights is an indication of the fact that the constitution's transformative agenda looks beyond merely guaranteeing abstract equality. There is a commitment to transform Kenya from a society based on socio-economic deprivation to one based on equal equitable distribution of resources. This is borne out by Article 6(3) and 10(2) (b)'

32. Similar sentiments were expressed in the case of **Satrose Ayuma & 11 Others - v - Registered Trustees of the Kenya Railways Staff Retirement Benefit Scheme & 2 Others High Court Petition**

No. 65 of 2010, where the court, in comparing the Kenyan situation with that of South Africa, observed that;

'the crave for a new constitution in this country was driven by peoples' expectation of better lives in every aspect, improvement of their living standards and just treatment that guarantees them human dignity, freedom and a measure of equality.'

33. Article 21 of the Constitution places an obligation on the state and state organs to observe, respect, protect and fulfill the rights and fundamental freedoms in the Bill of Rights. With regard to socio-economic rights, the state is required to **'take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation'** of these rights.

34. In this petition, the petitioner is asking the court to make declarations and orders with regard to matters that the respondents are under a constitutional obligation to do-in other words, there can be no dispute that the state has an obligation to **'take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation'** of socio-economic rights. It is incumbent on the petitioner to demonstrate the failure by the respondents to formulate policy or take measures to ensure enjoyment of the socio-economic rights by citizens.

35. In the affidavit sworn by the Secretary of the petitioner, Mr. Stephen Mutoro, and in the petition itself, the petitioner first sets out the constitutional provisions with regard to socio-economic rights and the obligations of the respondents with regard to these rights. It then sets out from paragraph 13-20 the alleged failures by the respondents which are reproduced below verbatim:

13. THAT the 4th respondent controls fuel prices to guarantees maximum profits in favour of the petroleum companies which the petitioners aver that it is discriminatory, against fair trade practices, reasonable competition and unconstitutional as spelt out under the completion Act, Cap 504. Annexed hereto marked SM 2 is the 4th respondent's the current public notice on maximum pump price.

14. THAT the 5th respondent is duty bound to effectively control refinery, distribution and supply of the petroleum products.

15. THAT the action by the 4th respondent of capping fuel prices in favour of fuel companies to guarantee their minimum profits is discriminatory, oppressive and unfair to the citizens and is against competitive trade practices.

16. THAT the petitioner avers that the respondents have not effectively discharge their legal obligation to stabilize and reduce high fuel prices.

17. THAT the petitioners aver that the high fuel prices have resulted in very high and unaffordable transport costs such as private, bus and matatu expenses.

18. THAT the petitioners aver that the high fuel prices has also resulted in very high and unaffordable cost of basic commodities including all household goods such as unga, the staple diet of a majority of Kenyans among others.

19. THAT the petitioners and members of the public stand to suffer irreparable loss and great inconvenience if the respondents are not ordered to urgently perform their legal obligations to protect citizens from further suffering, slow economic growth, declining living standards and high inflation thus infringing the aforesaid fundamental rights and freedoms.

20. THAT the petitioner avers that the respondents have failed neglected and or refused to control and stabilize fuel prices thus leading to extreme hardship of many citizens.

36. Other than the statements set out above, the petitioner has placed nothing before the court that can assist the court in determining the alleged failures by the respondents. The bundle of documents annexed

to the affidavit in support of the petition contains a notice indicating the maximum fuel prices permitted in various towns, and a warning that selling the fuel beyond the price indicated would attract a penalty. It also contains correspondence between the Ministry of Energy and Kenol Kobil, one of the industry players, regarding oil imports by a company known as Gulf Energy. It is not clear how the petitioner interprets these documents as demonstrating a failure by the respondents to control oil prices, or as amounting to discriminatory practices in favour of oil marketers.

37. While it is indeed true, as conceded by the respondents, that high fuel prices do have a negative impact on the cost of living, how, for instance, does the petitioner arrive at the conclusion that the respondents cap oil prices in favour of oil companies? What policy measures have the respondents failed to take in order to ***‘protect citizens from further suffering, slow economic growth, declining living standards and high inflation thus infringing the aforesaid fundamental rights and freedoms’?***

38. The respondents have set out in their affidavits in opposition to the petition the measures they have taken in order to fulfil their obligations to citizens. They have also submitted extensively on the policies and measures they have undertaken to stabilise the fuel prices, and have also set out in detail, as in the affidavit of Patrick Nyoike, the Permanent Secretary in the Ministry of Energy, the factors that impact on the cost of fuel. These averments and submissions have not been controverted by the petitioner.

39. In considering whether or not the state has met its obligations under Article 43 of the Constitution, I take the view that what the court should consider is whether the state has taken reasonable policy and other measures to meet those obligations. I find support in this from a consideration of the position in South Africa, from which our Constitution has borrowed heavily. In ***The Bill of Rights Handbook, Fifth Edition, By Iain Currie & Johan de Waal***, the authors observe as follows with regard to the state’s obligation to take ***‘Reasonable Legislative and other measures’*** so as to meet its obligation to ensure enjoyment of socio-economic rights by the citizen:

‘According to the Constitutional Court, the key to the justiciability of the socio-economic rights in the 1996 Constitution is the standard of reasonableness. Though a considerable margin of discretion must be given to the state in deciding how it is to go about fulfilling the socio-economic rights, the reasonableness of the measures that it adopts can be evaluated by a court.

40. They then cite the decision of the Constitutional Court of South Africa in *Grootboom v Ostenberg Municipality* 2000 (3) BCLR 227(C) where the court expressed itself as follows:

‘The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable. In any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), the question will be whether the legislative and other measures taken by the state are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spend.

The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measure could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.

41. From the pleadings and submissions before me, I am unable to find that the petitioner has made out a case that shows a failure by the respondents to protect the rights guaranteed under Article 43. In this case, the petitioner has conceded that the policy measures taken by the state have ameliorated the situation of citizens. It must also be acknowledged, and this the petitioner did acknowledge in the submissions by Mr. Kurauka, that many factors, including a failure in rainfall, have a negative impact on the availability of food and the cost of living, and that such factors are not a result of the failure on the part of the state to take appropriate *‘policy and other measures’* to ensure the realisation by citizens of the socio-economic rights guaranteed under Article 43. The respondents have therefore in my view, taken ‘reasonable

measures' to meet their obligations under the constitution.

42. It is not possible, on the basis of the material before me, to discern any failure on the part of the respondents to fulfil their constitutional obligations under Article 43. In the circumstances, I find no merit in this petition and the same is hereby dismissed.

43. The respondents and the Interested Parties have asked that the petition be dismissed with costs. I take the view that the petitioner has not, in the filing of this petition and in its prosecution, given sufficient attention and taken seriously the critical issue that it was asking the court to address. This is clearly brought out, as set out in the opening paragraphs of this judgment, by the laxity with which the petition was prosecuted so that it ended up being heard more than a year after it was filed as a result of the failure by the petitioner to appear in court or comply with the court's directions on the filing of pleadings.

44. More importantly, it must be stated that in bringing matters such as this before the court, which have a critical bearing on the rights, lives and livelihoods of citizens, it is not enough to make bare statements with regard to the violation of rights without seriously addressing oneself to the manner in which the violations have occurred and the reasonableness or otherwise of the measures taken to avert or ameliorate their impact. At this nascent stage in the implementation of the new Constitution, parties in the position of the petitioner, should they determine to take on cases which have a bearing on the public interest, must take them on with all due seriousness.

45. The manner in which this matter was conducted by the petitioner would ordinarily have attracted an award of costs against it. However, I agree with the views of this court (Justices Lenaola, Majanja and Mumbi Ngugi) in ***John Harun Mwau & 3 Others –v- Attorney General & 2 Others High Court Petition No. 123 of 2011*** where they expressed themselves as follows with regard to the award of costs:

The intent of Articles 22 and 23 of the Constitution is that persons should have free and unhindered access to this court for the enforcement of their fundamental rights and freedoms. Similarly, Article 258 allows any person to institute proceedings claiming the Constitution has been violated or is threatened. The imposition of costs would constitute a deterrent and would have a chilling effect on the enforcement of the Bill of Rights.

In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed.'

46. I therefore make no order as to costs.

Dated Delivered and Signed at Nairobi this 5th Day of October 2012

MUMBI NGUGI
JUDGE

Judgment delivered in open court in the presence of

Kazungu – Court Clerk

Mrs Otaba for the Interested Party, Kenya Shell and holding brief for Ohaga for Oil Libya.

Mr Mngola for 2nd and 4th Respondent

No Appearance for the Petitioner

MUMBI NGUGI

JUDGE
5/10/2012