

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NYERI**  
**CONSTITUTIONAL PETITION NO. E002 OF 2024**

**IN THE MATTER OF CONTRAVENTION OF ARTICLES 2,  
3, 10, 19, 20, 21, 22, 23(1) & 3, 24, 47, 48, 50, 94(1), (5)  
& (6) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION  
OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER  
ARTICLE 10, 26, 28, 43, 46, 47 AND 94 OF THE  
CONSTITUTION**

**BETWEEN**

**KENYA PHARMACEUTICAL  
DISTRIBUTORS ASSOCIATION..... 1<sup>ST</sup>  
PETITIONER**  
**PHARMACEUTICAL SOCIETY OF KENYA..... 2<sup>ND</sup>  
PETITIONER**

**VERSUS**

**CABINET SECRETARY FOR INTERIOR  
AND NATIONAL ADMINISTRATION.....1<sup>ST</sup>  
RESPONDENT**  
**COUNTY COMMISSIONER, NYERI.....2<sup>ND</sup>  
RESPONDENT**  
**INSPECTOR GENERAL OF POLICE ..... 3<sup>RD</sup>  
RESPONDENT**  
**THE ATTORNEY GENERAL.....4<sup>TH</sup>  
RESPONDENT**

**AND**

**PHARMACY AND POISONS BOARD.....1<sup>ST</sup>**  
**INTERESTED PARTY**

**CABINET SECRETARY FOR HEALTH ..... 2<sup>ND</sup>**  
**INTERESTED PARTY**

**JUDGMENT**

1. By a Petition dated 26.3.2024, the Petitioners sought the following reliefs:

- (i) A declaration that the decision of the Respondents to interfere with pharmaceutical practice through shutting down pharmacies, investigating conduct related to sale of medical products and inspecting pharmacies without any guiding legislation are in contravention to Articles 10, 24, 25, 35, 46, 47, 94 of the Constitution and thus unconstitutional.
- (ii) A declaration that the 1<sup>st</sup> Respondent's directive issued on 6<sup>th</sup> March 2024 purporting to Direct the National Government and Security Officers to usurp the powers of the Interested Party by revoking licenses of chemist, shutting down pharmacies, investigating conduct related to sale of medical products and inspecting pharmacies are ultra vires and unlawful, unconstitutional and null and void.
- (iii) A declaration that the directive issued by the 1<sup>st</sup> Respondent on 6<sup>th</sup> March 2024 to all licensed pharmacists with respect to dispensing of

prescription drugs are ultra vires, unlawful and unconstitutional and therefore null and void.

- (iv) A declaration that the 1<sup>st</sup> Interested Party and the Respondent's directives issued on 6<sup>th</sup> March 2024 to all licensed pharmacists with respect to the dispensing of prescription drugs are ultra vires and unlawful, unconstitutional and null and void and the provisions of Section 2, and 34B of the Anti-Counterfeit Act 2010, Legal Notice No. 117 (the Anti-Counterfeit Amendment Regulations 2021 are unconstitutional to the extent that they amount to criminalization of trade in generic medicines and other pharmaceutical products.
- (v) An Order of Permanent Injunction barring the implementation of the 1<sup>st</sup> Respondent's Directive issued on 6<sup>th</sup> March 2024.
- (vi) An Order of Permanent prohibitory Injunction prohibiting the National Government Administrations Officers, namely the County Commissioner, Deputy County Commissioners, Assistant County Commissioners, Chiefs, Assistant Chiefs as well as security officers namely members of the Kenya Police Service, Administration Police and other authorized officers under the Pharmacy and Poisons Act from revoking licenses of chemists, shutting down pharmacies, investigating conduct related to sale of medical products and inspecting pharmacies.

(vii) Costs be borne by the 1<sup>st</sup> Respondent.

2. The Petition was not supported by any affidavit. There was however an affidavit sworn by Dr. Isaac Kamamia wa Murichu who swore an affidavit in support of the interlocutory application. It appears it was meant to be used for both the petition and the application. The same was to the effect that:

- a) The respondents had no mandate under the law and interfered with pharmaceutical practice through shutting down pharmacies, investigating conduct related to sale of medical products and inspecting pharmacies without any guiding legislation.
- b) The arrests and harassment of the officials of the Petitioners was unwarranted, unlawful and unconstitutional.
- c) The Petitioners members were unable to operate their duly licensed pharmacies due to illegal disruption and harassment by the Respondent officials.
- d) The 1<sup>st</sup> Respondent usurped the powers of the 1<sup>st</sup> Interested Party through unauthorized officers contrary to the Pharmacies and Poisons Act.

e) The directives amounted to new rules and regulations without due process of legislation and were an illegality.

3. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents and the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties filed a joint Replying Affidavit sworn by Pius M. Murugu, the County Commissioner, Nyeri on 24.4.2024 as follows:

a) The implementation of the impugned directive of 6<sup>th</sup> March 2024 was a multiagency exercise involving all the relevant departments and the police would work closely with the said agencies on implementing the directive.

b) It was false to assert that the police and the chiefs had inspected the pharmacies and harassed officers of the Petitioners.

c) The exercise was done to protect the interest of the public and should not be prevented by few noncompliant persons.

### Submissions

4. The 1<sup>st</sup> Petitioner filed submissions dated 8.5.2025. It was submitted that the profession of the pharmacies, drugs and poisons had put in place measures to regulate the profession under the Pharmacy and Poisons Act and the Respondents' directives were not supported by legislation,

constitution or law. Reliance was placed on Section 3, 45 and 47 of the Pharmacy and Poisons Act.

5. It was the submission of the 1<sup>st</sup> Petitioner that raiding on and arresting the officers of the Petitioners without search warrants and the unwarranted collection of data was unlawful and unconstitutional. Reliance was placed on **Private Health Practitioners Mombasa Cluster v Pharmacy and Poisons Board Ex-Parte Private Health Practitioners Mombasa Cluster [2017] KEHC 5867 (KLR)** as follows:

19. In fact, under Section 2 of the PPA, an “*authorized officer*” is defined to be the registrar, pharmaceutical analyst, pharmaceutical inspector, a medical officer, an inspector of drugs, an administrative officer or a police officer not below the rank of Superintendent.

20. This court believes that it is in this regard that the Board through the authorized officers recognized under the PPA, carries out its necessary regulatory inspections in order to ensure that the relevant licenses and permissions have been obtained by different premises and that there is no danger posed to members of the public. Clearly the law does recognize several Offences which may be committed under the PPA and the role of the Board as a regulator is to ensure that those Offences are not committed.

6. On the part of the Respondents and Interested Parties, they filed submissions dated 21.5.2025, where they submitted

that the 1<sup>st</sup> Respondent had not usurped the powers of the 1<sup>st</sup> Interested Party. Reliance was placed on Sections 3, 3A and 3B of the Pharmacy and Poisons Act, that the power of the 1<sup>st</sup> Interested Party under Section 3A included and was reinforced by the power to enter and search premises. Under Section 45 of the Act an administrative officer above the rank of a superintendent would exercise such powers.

7. It was as such submitted that the effort by the Respondents was to curb consumption and abuse of prescription drugs and ought not to be faulted.

### Analysis

8. Before I venture into the depths of the factual conundrum of this Petition I have to state from the outset that on allegations of violation of the Bill of Rights, this Court is bound to adopt the interpretation that most favors the enforcement of the right. Article 2(1) of the Constitution provides that the Constitution is the supreme law of the Republic and binds all person. In the case of **Charles Muturi Macharia & 6 Others V. Standard Group & 4 Others SC Petition No. 13 (E015) of 2022**, the Supreme Court [Mwilu; DCJ & VP, Wanjala, Njoki, Lenaola & Ouko, SCJJ] posited as follows:

The canons of constitutional interpretation that have been infused in our judicial system over the years and which are today expressed in Article 259 of the Constitution, adjure the courts to interpret the Constitution in a manner that promotes its purposes, values and

principles and contributes to good governance. Those constitutional values and principles are expressed in the Preamble to include a commitment to nurturing and protecting the well-being of the individual, the family, communities and the nation: the recognition of 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. This is in addition to the consideration of national values and principles of governance under Article 10 of the Constitution. They are also discoverable through purposive, holistic, organic and liberal interpretations of the Constitution.

9. Further, Article 259 of the Constitution enjoins the court to interpret the constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and in a manner that contributes to good governance. Furthermore, 159 (2) (e) of the Constitution confers upon this court the power to protect and promote the purposes and principles of the Constitution. Also, the Constitution should be given a purposive, liberal interpretation. The Constitution of Kenya gives prominence to national values and principles of governance.

10. Therefore, the Constitution imposes an obligation on all courts to promote the spirit, purport and the objects of the Bill of Rights, when interpreting legislation. In **Phumelela Gaming and Leisure Ltd v Gründlingh and Others**

**(2006) ZACC 6; 2007 (6) SA 350 (CC); 2006 (8) BCLR 883**, the Constitutional Court observed as follows:

"A court is required to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation, and when developing the common law or customary law'. In this no court has a discretion. The duty applies to the interpretation of all legislation and whenever a court embarks on the exercise of developing the common law or customary law. The initial question is not whether interpreting legislation through the prism of the Bill of Rights will bring about a different result. A court is simply obliged to deal with the legislation it has to interpret in a manner that promotes the spirit, purport and objects of the Bill of Rights. The same applies to the development of the common law or customary law.

11. This obligation bestowed on this court resounds the special role of the judiciary in our system with respect to constitutional interpretation. In *Marbury vs. Madison*, 5 U.S. 137 (1803), it was observed that the courts as well as other departments are bound by the Constitution and must interpret it when a dispute so requires. In the case of **Kuria & 3 Others vs Attorney General** [2002] 2 KLR 69 the Court expressed itself as follows:

So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine

questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions..... This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit."

The bells for expansion of the scope of JR rang even louder after the promulgation of the Constitution 2010. Odunga, J. for example, in **Republic vs Commissioner of Customs Services ex parte Imperial Bank Limited** [2015] eKLR recognized that "Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision" and the "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". Mativo, J. similarly in the case of **Ernst & Young LLP vs Capital Markets Authority & Another** [2017] eKLR (decided on 7th March, 2017), extensively examined comparative jurisprudence before expressing the following view:-

".Judicial review is available as relief to a claim of violation of the rights and freedoms guaranteed in the Constitution. The Constitution has expressly

granted the High Court jurisdiction over any person, body or authority exercising a quasi-judicial function. The point of focus is no longer whether the function was public or private or by a statutory body, but whether the function was judicial or quasi-judicial and affected constitutional rights including the right to fair administrative action under Article 47, or the right to natural justice under Article 50. The Kenyan judiciary must guard against the development of a two-tracked system of judicial review. One that looks like the old cases influenced by the common law, on the one hand, and cases that are decided under the 2010 Constitution's principles of judicial review [on the other]. Those two tracks are likely to undermine the establishment of a vibrant tradition of judicial review as required by the 2010 Constitution... Judicial review is now entrenched in our constitution and this ought to be reflected in the court decisions and any decision making process that does not adhere to the constitutional test on procedural fairness, then the decision in question cannot stand court scrutiny..... 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."

One of the sources of that bold view by the High Court is our own Supreme Court which had earlier, in the case of Communication Commission of

Kenya vs Royal Media Services & 5 Others [2014] eKLR held that "... the Constitution of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law." and that ".. the power of judicial review in Kenya is found in the Constitution, as opposed to the principle of the possibility of judicial review of legislation established in Marbury vs Madison 5 U.S. 137 (1803)."

Finally, as we settle the principles upon which we shall consider the matter before us, this Court, as recently as 20th July, 2017, in the case of Independent Electoral and Boundaries Commission (IEBC) vs National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR the court was in no doubt about the current place of JR in our system of governance. After extensively reviewing the CCK Supreme Court decision (supra) and other cases, including Suchan Investment Limited vs Ministry of National Heritage & Culture & 3 Others (2016) eKLR 51, and Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others 2000 (2) SA 674 (CC) at 33, the five - Judge bench held:

"In our considered view presently, judicial review in Kenya has Constitutional underpinning in Articles 22 and 23 as read with Article 47 of the Constitution and as operationalized through the provisions of the Fair Administrative Action Act. The common law judicial review is now embodied and ensconced into constitutional and statutory judicial review. Order 53 of the Civil Procedure Act and Rules is a procedure for applying for remedies under the common law and the Law Reform Act.

These common law remedies are now part of the constitutional remedies that the High Court can grant under Article 23 (3) (c) and (f) of the Constitution. The fusion of common law judicial review remedies into the constitutional and statutory review remedies imply that Kenya has one and not two mutually exclusive systems for judicial review. A party is at liberty to choose the common law Order 53 or constitutional and statutory review procedure. It is not fatal to adopt either or both.... We hold that Kenya has one and not two mutually exclusive systems for judicial review. The common law and statutory judicial review are complementary and mutually non-exclusive judicial review approaches.

12. This court is thus the ultimate guardian of the constitution and its values. It is however not the only body bound under Article 3 to interpret and defend the constitution. Section 3(1) provides as follows:

**(1) Every person has an obligation to respect, uphold and defend this Constitution.**

13. The interpretation by the court is however binding on other bodies. This is because judicial authority is vested to the judiciary. Article 159(1) of the constitution provides as follows:

*Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.*

14. While addressing the question of who has been given the responsibility of being the ultimate guardian of the Constitution and its values, the constitutional court of South Africa in **My Vote Counts NPC vs Speaker of the National Assembly and Others** (CCT121/14) [2015] ZACC 31 (30 September 2015) stated thus:

We are mindful that it is this Court that is the final arbiter on adherence to the Constitution and its values. On this, in *Doctors for Life*, Ngcobo J says:

..This Court 'has been given the responsibility of being the ultimate guardian of the Constitution and its values'. Section 167(4)(e), in particular, entrusts this Court with the power to ensure that Parliament fulfils its constitutional obligations. This section gives meaning to the supremacy clause, which requires that 'the obligations imposed by [the Constitution] must be fulfilled'. It would therefore require clear language of the Constitution to deprive this Court of its jurisdiction to enforce the Constitution."

15. In this Petition, the issue that presents to me for determination is whether the Respondents acted in breach of the constitutional rights of the Petitioner under Articles, 10, 26, 28, 43, 46, 47 and 94 of the Constitution as to entitle the 1<sup>st</sup> Petitioner to the reliefs sought.

16. The 1<sup>st</sup> Petitioner maintained that the rights and fundamental freedoms of the Petitioners were threatened and infringed as follows:

- a. The Respondents had no mandate under the law and interfered with pharmaceutical practice through shutting down pharmacies, investigating conduct related to sale of medical products and inspecting pharmacies without any guiding legislation.
- b. The arrests and harassment of the officials of the Petitioners was unwarranted, unlawful and unconstitutional.
- c. The Petitioners members were unable to operate their duly licensed pharmacies due to illegal disruption and harassment by the Respondent officials.
- d. The 1<sup>st</sup> Respondent usurped the powers of the 1<sup>st</sup> Interested Party through unauthorized officer contrary to the Pharmacies and Poisons Act.
- e. The directives amounted to new rules and regulations without due process of legislation and were an illegality.

17. The 1<sup>st</sup> Petitioner's case was also that there was unwarranted and arbitrary arrests of its officers without search warrants and that the directive of 6.3.2025 was without stake holder consultation and flew in the face of Article 10 of the Constitution. Article 10 of the constitution provides as follows:

10. (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them

- a. applies or interprets this Constitution;
- b. enacts, applies or interprets any law; or
- c. makes or implements public policy decisions.

(2) The national values and principles of governance include-

- a. patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
- b. human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
- c. good governance, integrity, transparency and accountability; and
- d. sustainable development.

18. They lamented further, that the right to fair hearing was taken away and declarations of pharmacies and chemist as illegal without a hearing was injurious. The right to a fair hearing is provided under Article 25 of the Constitution and is not limited. The article provides as follows:

25. *Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited.*

- a) freedom from torture and cruel, inhuman or degrading treatment or punishment;*
- b) freedom from slavery or servitude;*
- c) the right to a fair trial; and*
- d) the right to an order of habeas corpus.*

19. It was the case of the Petitioner that Article 43 of the Constitution on the right of health was prejudiced by disruptions in the supply chain for necessary medicines and drugs owing to the unlawful directive. The relevant part of the said section provides as follows:

*43. (1) Every person has the right -*

*(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;*

*(b) ...*

*c) ....*

*(d) ...*

*(e) ...*

*(f) ...*

*(2) A person shall not be denied emergency medical treatment.*

*(3) ...*

20. It was submitted that the right to administrative action was abused as a limited period of compliance of 30 days was

inadequate. The right to fair administrative action is enshrined under Article 47 of the 2010 Constitution as doth;

(1) Every person has the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration

21. However, the manifestation of contravention or infringement of the constitutional rights is a matter that should be clearly spelt out by the grievant Petitioner. The apex court has discussed the predeterminants of a proper Constitutional Petition. In **Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others** [2014] eKLR the court stated as follows:

Although article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision

in *Anarita Karimi Njeru v Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

22. Therefore, the Petitioner herein should set out with a reasonable degree of precision that of which she complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed. The foregoing was fittingly captured in Miscellaneous Criminal Application 4 of 1979, **Anarita Karimi Njeru v Republic** [1979] KLR where the court observed as follows:

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

23. The requirement of precision is thus crucial to serve to derive the actual dispute for the determination by the court and goes to the root of the Petition as a pleading. In Constitutional Petition No E265 of 2021, **Kenya Medical Practitioners, Pharmacists and Dentists' Union v**

**University of Nairobi & another** [2021] eKLR, A.C. Mrima, J, discussed the need for precision in approval to the precedent in Anarita Karimi decision and observed as follows: -

87. The foregoing finding received endorsement from the Court of Appeal in Nairobi Civil Appeal No. 290 of 2012, Mumo Matemu v Trusted Society of Human Rights Alliance when the Learned Judges remarked on the importance of compliance with procedure under Article 159 of the Constitution, the overriding objective principle under section 1A and 1B of the Civil Procedure Act and need for precision in framing issues in constitutional Petitions. It was observed thus:

(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.

24. Having the foregoing in mind, the Petition meets the threshold for constitutional petition. However, the next and

most crucial question is whether the violations pleaded were proved.

25. The jurisdiction of this court is circumscribed under Article 165(3) of the Constitution of Kenya, which posits as follows: -

**(2) 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;**

26. The foregoing is set out view of the truism set out in the case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**, where the supreme court stated as doth: -

“This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission* (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It

cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

27. The court will therefore assume jurisdiction where it has and eschew jurisdiction where none exists. The condition was that the Petitioner raises constitutional questions as anticipated in the *locus classicus* case of **Anarita Karimi Njeru v Republic [1979] KECA 12 (KLR)**. Further, once the court was satisfied that there was a justiciable case, based on a real and substantial controversy which unequivocally calls for adjudication of the rights asserted, then the court can assert its jurisdiction. In the case of **Patrick Ouma Onyango & 12 others v The Attorney General & 2 others, Misc Appl No 677 of 2005**, the Court endorsed the doctrine of justiciability, as stated by Lawrence H Tribe in his book *American Constitutional Law*, 2<sup>nd</sup> Edition, p 92 that:

In order for a claim to be justiciable as an article III, it must present a real and substantial controversy which unequivocally calls for adjudication of the rights asserted. In part, the extent to which there is a 'real and substantial controversy is determined under the doctrine of standing' by an examination of the stake of the person making the claim, to ensure the litigant

has suffered an actual injury which is fairly traceable to challenged action and likely to be redressed by the judicial relief requested. The substantially of the controversy is also a part of the controversy itself-an aspect of the appropriateness of the issues for judicial decision....and the actual hardship of denying litigants the relief sought. Examination of the contours of the controversy is regarded as necessary to ensure that courts do not overstep their constitutional authority by issuing advisory opinions. The ban on advisory opinion is further articulated and reinforced by judicial consideration of two supplementary doctrines: that of 'ripeness' which requires that the factual claims underlying the litigation be concretely presented and not based on speculative future contingencies and of 'mootness' which reflects the complementary concern of ensuring that the passage of time or succession of events has not destroyed the previously live nature of the controversy. Finally, related to the nature of the controversy is the 'political question' doctrine, barring decision of certain disputes best suited to resolution by other governmental actors'.

28. The Petitioners had the burden to prove violations of the constitution and the bill of rights. They must state and specifically so and prove the manner in which the alleged constitutional provisions were threatened or violated.

29. The Petitioner failed to demonstrate the manner in which investigating conduct related to sale of medical products and inspecting pharmacies was without any

guiding legislation. The mandate was clearly with the 1<sup>st</sup> Interested Party under Section 3A of the Pharmacies and Poisons Act CAP 244.

30. The Petitioner too did not demonstrate that the alleged arrests and harassment of the officials of the Petitioners was in fact done and so conducted unlawfully and unconstitutionally.

31. The Court finds that no sufficient case was made for the necessity of stakeholder consultation prior to the issuance of warrants of arrest. The alleged infringement of Article 10 of the Constitution is therefore not illusory.

32. I am unable to agree with the Petitioner's contention that the right to a fair hearing of its members was infringed, or that the declaration rendering certain pharmacies and chemists illegal without a hearing was injurious. The right to a fair hearing is guaranteed under Article 25 of the Constitution and is non-derogable. However, it was incumbent upon the Petitioner to demonstrate, with precision, the manner in which that right was violated. No such demonstration was made. The issue of arrest of Boniface Chege Kariuki for an offence he did not allegedly commit has no bearing on the matter herein. It will depend on the factual matrix in the trial.

33. Further, in their absence, the court cannot question the decision of the office of the Director of Public Prosecutions to prosecute Boniface. It is only the director who can make

such a decision to charge. A blanket forestalling of criminal proceedings is anathema to a good constitutional order.

34. Requiring statistics of the county commissioners is not a burden to the petitioners. The letter of 1.4.2024 has no effect on any of the rights of the parties. There is no factual basis for the case that chiefs were involved and their role. A generalized averment in a bare petition does not in any way amount to proof.
35. Further, it is preposterous to aver that unlicensed pharmacies are a business of the interested party. An unlicensed business is not a business under the interested party. The letter also covered the unlicensed and illegal alcohol manufacturers. The police and the 1<sup>st</sup> respondent have a role in ensuring safety of Kenyans. Unfortunately, there is no evidence that the Respondents infringed on the roles of the interested party.
36. No material was also placed before this court to demonstrate the manner in which Article 43 of the Constitution on the right of health was prejudiced due to limited supply chain for necessary medicines and drugs owing to the unlawful directive. There was no evidence that there existed any limited supply as a result of which any persons suffered. The letter dealt with illegal pharmacies, chemists and manufacturers. I have not seen any part dealing with generic drugs.

37. The alleged violations did not meet the threshold to be redressed through constitutional remedies stipulated under Article 23 (3) of the Constitution as follows:

*In any proceedings brought under Article 22, a court may grant appropriate relief, including—*

*(a) a declaration of rights;*

*(b) an injunction;*

*(c) a conservatory order;*

*(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;*

*(e) an order for compensation; and*

*(f) an order of judicial review.*

38. In the case of **John Harun Mwau vs. Peter Gastrow & 3 Others [2014] eKLR** the court held that the Constitution only ought to be invoked when there is no other recourse for disposing of the matter and in which the Court expressed itself in the following terms:-

**“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights... It is an established practice that where a**

**matter can be disposed of without recourse to the Constitution, the Constitution should not be invoked at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so.”**

39. The 1<sup>st</sup> Petitioner failed to lay plain the alleged violations of the constitutional rights. There was no evidence depicting breach of constitutional rights. The acts complained of were not shown to have been illegal. The Respondents have statutory powers to act. This court cannot interfere with the functioning of independent bodies without a legal basis. In the case of **Godfrey Paul Okutoyi & others -vs- Habil Olaka & Another (2018) eKLR** Chacha, J on the issue of there being an alternative remedy in lieu of constitutional remedies at paragraph 65 stated:-

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

**violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure.**

40. The alleged breach of the right to fair administrative action under Article 47 of the Constitution it is provided as doth:

**(1) Every person has the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**

**(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.**

41. The 1<sup>st</sup> Petitioner's submission was that the police officers had no justification for entering their premises without search warrants or seizure letter. This is not true, in respect of cognisable offences. Section 2 of the Criminal Procedure Code provides as follows:

*Cognizable offence" means an offence for which a police officer may, in accordance with the First Schedule or under any law for the time being in force, arrest without warrant;*

42. Further section 29(a) of the criminal procedure code provides as follows in relation to a cognizable offence:

*A police officer may, without an order from a magistrate and without a warrant, arrest-*  
*(a) any person whom he suspects upon reasonable grounds of having committed a cognizable offence;*

43. There was no evidence that the offences sought to be dealt with, were not cognizable offences including manufacture of noxious substances in a form of illicit brew. The courts cannot direct the national government on how to collect intelligence on illicit brew and illegal pharmacies. It will be a different thing for the government to control the way registered pharmacies carried their business. Identifying the names of persons dispensing medicine is not unlawful.

44. The position relating to Article 47 of the Constitution was addressed in the case of **Judicial Service Commission vs. Mbalu Mutava & Another**[ {2015} eKLR] where the Court of Appeal held that:-

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies

are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

45. The 1st Petitioner had the duty to prove oppressive or vexatious investigations and arrests. Indeed, this was the caution given by the Court of Appeal in the case of **Commissioner of Police & the Director of Criminal Investigation Department & Another vs. Kenya Commercial Bank Limited & 4 Others [2013] eKLR** as follows:

...It has further been held that an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (or prosecute in the case of the DPP) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process.

46. There were allegations of breach of Article 46 of the Constitution. Under Article 46. (1) consumers have the right

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- (a) to goods and services of reasonable quality;
- (b) to the information necessary for them to gain full benefit from goods and services;
- (c) to the protection of their health, safety, and economic interests; and

(d) to compensation for loss or injury arising from defects in goods or services.

(2) Parliament shall enact legislation to provide for consumer protection and for fair, honest and decent advertising.

47. There were no allegations of any of the applicants being consumers. It is not shown how any other consumers were affected in the manner set out in article 46 of the Constitution. The Court of Appeal [HM Okwengu, KI Laibuta & JM Mativo, JJA] in the case of **Nairobi Bottlers Limited v Ndung'u & another [2023] KECA 839 (KLR)**, posited as follows regarding Consumer Protection Act:

50. Section 2 defines a consumer as follows:

(a) a person to whom particular goods or services are marketed in the ordinary course of the supplier's business;

(b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of this Act;

(c) a user of particular goods or a recipient or beneficiary of particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods and services; and

(d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of this Act.

51. From the above definition and the preamble to the act, it is clear that the whole tenor of the Act is to protect consumers. The act must be interpreted keeping in mind that its focus is the protection of

consumers. As the Constitutional Court of South Africa observed in Natal Joint Municipal Pension Fund v Endumeni Municipality (2012) ZASCA 13; 2012 (4) SA 593 (SCA) para 18 while discussing a similar provision in their Consumer Protection Act, "... a sensible meaning is to be preferred to one that leads to insensible or un-business-like results..."

52. Regarding the applicable standard of prove, the general principle governing the determination of cases is that the party who alleges or, as it is sometimes stated, the party who makes the positive allegation, must prove. Moreover, the onus on the petitioner to establish violation of alleged consumer rights is not a mere formality; it is important. As the Constitutional Court of Uganda observed in Lyomoki & others v Attorney General (2005) EA 127:

- a. The onus is on the petitioner to show a prima facie case for violation of their constitutional rights, thereafter, the burden shifts to the respondent to justify that the limitations to the rights in the statute is justified by article 43 of the Constitution;
- b. The purpose and effect of an impugned legislation are relevant in the determination of its constitutionality;
- c. The Constitution ought to be looked at as a whole with no one particular provision destroying another but each supporting the other. All the provisions on an issue should be considered so as to give effect to the purpose of the instrument;
- d. The constitution should be given a generous and purposive construction especially the part which protects the entrenched fundamental

rights and freedoms; and 5. where human rights provisions conflict with other provisions, human rights provisions take precedence and interpretation should favour enjoyment of human rights and freedoms.

48. In regard to 1st petitioner's alleged infringement of the rights under the constitution, it had the burden to prove the violation on the part of the respondents. As held by Mativo, J (as he then was) in **Leonard Otieno vs. Airtel Kenya Limited** [2018] eKLR:

"It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the constitution and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses."

49. With respect to the Consumer Protection Act, the Petitioner failed to lay any factual or legal basis in support of that claim. In the circumstances, the allegations relating to consumer protection are without merit and are accordingly dismissed.

50. The Order of permanent injunction and an order of permanent prohibitory injunction flow from the foregoing.

Before commenting on them, the court is aware of the doctrine of separation of powers as set out in the Commonwealth (Latimer House) Principles. In the case of **Katiba Institute v Attorney General & 9 others** [2023] KESC 47 (KLR), the Supreme Court posited as follows:

It is now settled on the authority of article 165(3) (d) (ii) and numerous judicial pronouncements, that it is the duty of the court to ensure that State organs comply with the Constitution, its values and principles and the law, when discharging their functions to obviate any danger of constitutional violation; and to determine whether anything said to be done under the authority of the Constitution or of any law is inconsistent with or in contravention of the Constitution. The only caveat to this constitutional proclamation is that, in reviewing the administrative actions of these organs, the court must not substitute itself into the organs whose actions or decisions are the subject of review or substitute the impugned decision with its own decision. That is what the doctrine of separation of powers demands. See the persuasive decision in Kenya Youth Parliament & 2 others v AG & another, Constitutional Petition No 101 of 2011; [2012] eKLR, our own, in the case of Judicial Service Commission v Speaker of the National Assembly & 8 Others [2014] eKLR, where we restated that:

'The Constitution disperses powers among various constitutional organs. Where it is alleged that any of these organs has failed to act in accordance with the Constitution, then the Courts are empowered by article 165(3)(d) (ii) to determine whether anything said to be

done under the authority of the Constitution or of any law is inconsistent with, or in contravention of the Constitution.'

See also our decisions in *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* SC Petition No 32 of 2014; [2017] eKLR and *Speaker of the Senate & Another v Attorney General & 4 Others* Reference No 2 of 2013; [2013] eKLR.

51. The Supreme Court [MK IBRAHIM, JB OJWANG, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ] while addressing the same question in the case of **Mate & another v Wambora & another [2017] KESC 1 (KLR)** held as follows:

58. The Supreme Court has also pronounced itself on this issue. In, *In Re the Matter of the Interim Independent Electoral Commission* [2011] eKLR, the court observed [paragraph 54]:“The effect of the Constitution’s detailed provision for the rule of law in the processes of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the Executive branch. The essence of separation of powers, in this context, is that the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several governmental organs functions in splendid isolation...”

83. While bearing in mind such precious caution for sustaining judicial authority, we have addressed our minds to the uniqueness of the instant case, which is embodied in the express

terms of a comprehensive, newly-formulated constitutional document: especially the fact that it bears express terms on the separation of powers. Interpretation of the *Constitution* calls for a delicate balance in the respective mandates of the different arms of government. While such refinements in the reserved governmental mandates had not elicited focussed assessment at the High Court, *ex parte* conservatory orders were made: the effect being to hamstring the due performance of the constitutional mandate of the County Assembly. Notwithstanding the conventional judicial perception of ultimacy in judicial orders, a question remains: what is the tenability of such orders that directly abrogate the discharge of commanded legislative-agency process?

84. From the facts of this case, it is clear to us that the integrity of court orders stands to be evaluated in terms of their inner restraint, where the express terms of the *Constitution* allocate specific mandates and functions to designated agencies of the State. Such restraint, in the context of express mandate-allocation under the Constitution, is essential, as a scheme for circumventing conflict and crisis, in the discharge of governmental responsibility. No governmental agency should encumber another to stall the constitutional motions of the other. The best practices from the comparative lesson, signal that the judicial organ must practice the greatest care, in determining the merits of each case.

52. The power to enforce the law and weed out criminality is in the hands of the police. They are the ones vested with power of arrest under Article 243 of the Constitution. To

delegate that power to other bodies will be a coup d'état against the constitution. There is therefore nothing wrong for the police to effect arrests where there are cognizable offences. In this case, other than arrests, there is no evidence of violation of the powers given to the police.

53. This Court has the power and is enjoined to interrogate the constitutionality of actions by state organs and all persons. However, I am unable to find that the 1<sup>st</sup> Petitioner's rights were violated. Having found no constitutional breaches on the part of the Respondents and Interested Parties, I also dismiss the Petition.

54. The Petitioners prayed for a declaration that the decision of the Respondents to interfere with pharmaceutical practice through shutting down pharmacies, investigating conduct related to sale of medical products and inspecting pharmacies without any guiding legislation are in contravention to Articles 10, 24, 25, 35, 46, 47, 94 of the Constitution and thus unconstitutional.

55. I do not find the reading of the 1<sup>st</sup> Respondent's letter issued on 6th March 2024 to be directing the National Government and Security Officers to usurp the powers of the Interested Party. The letter does not in any way revoke any licenses of chemist or shut down licensed pharmacies. The investigating the sale of medical products is a preserve of the Pharmacies and Poisons Board. The letter does not order the police to raid pharmacies. Of course the police

must and should assist in law enforcement when accompanied by members of the 1<sup>st</sup> Interested Party.

56. It must be remembered that there is already an offence under the Pharmacies and Poisons Board as follows:

- 1) No person other than a registered pharmacist shall, except as provided for in sections 21 and 22 of this Act-
  - a. Carry on, either on his own behalf, or on behalf of another, the business of a pharmacist;
  - b. In the course of any trade or business, prepare, mix, compound or dispense any drug except under the immediate supervision of a registered pharmacist;
  - c. Assume, take, exhibit or in any way make use of any title, emblem or description reasonably calculated to suggest that he is registered as a pharmacist.
- 2) Any person who contravenes subsection (1) shall be guilty of an offence and liable to a fine not exceeding thirty thousand shillings or to imprisonment for a term not exceeding three years or to both.
- 3) For the purpose of paragraph (c) of subsection (1) of this section, the use of any of the words "pharmacist", "druggist", "chemist", "medical" or any similar word or combination of words in any language shall be deemed to be reasonably calculated to suggest that the owner of the business and the person having control of the business on the premises are registered pharmacists.
- 4) Nothing in this section shall extend to or interfere with the supply of medicine to a

particular person by a medical practitioner or his assistant working under his immediate supervision, direction and control, a qualified dentist or a qualified veterinary surgeon, for the purpose of legitimate medical treatment, dental treatment or veterinary treatment, as the case may be.

5) Nothing in this section shall be deemed to make it unlawful for any person to sell any non-poisonous drugs provided that such drug is sold in its original condition as received by the seller or to require such person to be registered as a pharmacist.

57. The whole of government means that the entire government works interconnectedly. The executive has the ultimate responsibility to keep the people safe. The request for data on pharmacies is not an extra ordinary directive but part of the existing law. The foregoing section is part of Kenyan law and therefore enforceable.

58. The questions of parts of the anti-counterfeiting were inserted in the middle of the petition. Absolutely no materials were placed before the court, on which part of part 2 was impugned. Further section 34B of the Anti-Counterfeit Act 2010, provides as follows:

- a. Trademarks relating to goods to be imported into Kenya, irrespective of the place of registration, shall be recorded with the Agency, in the prescribed manner if the registration is current.
- b. Applicants for recordation of trademarks shall be notified of the approval or denial of an application filed under this section in a

- prescribed manner by notice in the Anti-Counterfeit newsletter published by the Agency.
- c. An application to record one or more trademarks shall be in writing in the prescribed manner and addressed to the Agency and shall include the following information-
    - i. The name, complete business address, and citizenship of the trademark owner or owners (if a partnership, the citizenship of each partner; if an association or corporation the State, country, or other political jurisdiction within which it was organized, incorporated, or created);
    - ii. The places of manufacture of goods bearing the recorded trademark;
    - iii. Sample of the trademarked goods or a sufficient digital photographic representation of the trademarked goods with appropriate details for identification and differentiation from any counterfeits;
    - iv. The name and principal business address of each foreign person or business entity authorized or licensed to use the trademark and a statement as to the use authorized; and
    - v. The identity of any parent or subsidiary company or other foreign company under common ownership or control which uses the trademark abroad.
  - d. The application shall be accompanied by
    - i. A status copy of the certificate of registration certified by the registering authority showing title to be presently in the name of the Applicant;
    - ii. The application shall be accompanied by a fee set out in the Second Schedule to the Act: Provided that if the trademark is registered for more than one class of goods, the fee for recordation shall be for each class.

- e. The recordation of the trademark and protection thereunder shall be effective on the date an application for recordation is approved.
- f. The recordation of a trademark shall remain in force for a period of one year from the date of approval of the application for recordation or the current registration period of the trademark, whichever is shorter.
- g. Recordation of a trademark shall be cancelled if the trademark registration is finally cancelled or revoked.
- h. If there is change in ownership of a recorded trademark and the new owner wishes to continue the recordation with the Agency, the new owner shall apply immediately by-
  - i. complying with subsection (4) hereinabove;
  - ii. describing any time limit on the rights of ownership transferred;
  - iii. submitting a status copy of the certificate of registration certified by the registering authority showing title to be presently in the name of the new owner; and
  - iv. paying a fee as prescribed in the Second Schedule to the Act.
- i. If there is a change in the name of the owner of a recorded trademark, but no change in ownership, written notice thereof shall be given to the Agency accompanied by -
  - i. a status copy of the certificate of registration certified by the registering authority showing title to be presently in the name as changed; and
  - ii. a fee as prescribed in the Second Schedule to the Act.

- j. The owner of a recorded trademark shall submit a written application in the prescribed manner to the Agency not later than 30 days to the expiration of the current recordation.
- k. An application for renewal of recordation shall be accompanied by –
  - i. a status copy of the certificate of registration certified by the registering authority showing the title to be in the name of the applicant; and
  - ii. a statement describing any change of ownership or in the name of the owner and any change of addresses of the owners and places of manufacture;
  - iii. a fee as prescribed in the second schedule to the Act.
- l. The provisions of this Section shall apply to the recordation of copyrights, trade names or any other form of intellectual property rights mutatis mutandis.
- m. The Agency shall after satisfying itself that imported goods have complied with the provisions of this section issue to the importer of goods a certification mark in the form of an anti-counterfeit security device at a fee to be set out in the Second Schedule to the Act.
- n. The Agency shall have the power to seize and destroy any goods originally imported into Kenya but found within Kenya that do not bear the anti-counterfeit security device. [Act

59. There was no specific complaint on the said Act. The court cannot make a decision in vacuo. The same were based only on submissions. However, submissions are not evidence. Submissions are not, strictly speaking, part of the case, the absence of which may do no prejudice to a party.

Their presence or absence does not in any way prejudice a case as held in **Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749**, where the Court held that:

“As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable.”

60. The Court of Appeal was more succinct in that submissions cannot take the place of evidence when they addressed the question in the case of **Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another** [2014] eKLR:

Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each

side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.

61. There was also an unrelated complaint relating to Legal Notice No. 117 (the Anti-Counterfeit Amendment Regulations 2021). They posited that they are unconstitutional to the extent that they amount to criminalization of trade in generic medicines and other pharmaceutical products.

62. How they do so is beyond the court. The court is not supposed to seek for the sections or rules and compare with unknown Articles. The extent to which they are unconstitutional was not pleaded or proved. There was insufficient material placed before the court for this claim.

63. The case by the second petitioner was not made out at all. In the circumstances, the same is untenable and is consequently dismissed.

64. Having weighed the entire petition, though it raises certain issues, it is not supported by any evidence. The only order available is to dismiss the petition. The next issue is costs. The same are governed by Section 27 of the Civil Procedure Act, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of

the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

65. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited** [2018] KECA 158 (KLR) had this to say:

**It is our finding that the position in law if that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.**

66. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR**, as follows: -

[18] It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs- that costs follow the event - it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases.

67. The case regards the question of public interest which was poorly pleaded. The order available is that each party bears its costs.

#### Determination

68. In the circumstances, the court makes the following orders: -

a) The Petition is not merited and is dismissed.

b) Each party will bear its own costs.

**DELIVERED, DATED and SIGNED** at **NYERI** on this **7<sup>th</sup>** day of **October, 2025**. Judgment delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**  
**JUDGE**

**In the presence of:-**

Ms. Magogo for the 1<sup>st</sup> Petitioner

No appearance for the 2<sup>nd</sup> Petitioner

Mr. Kibe for the Respondents

Mr. Kibe for the Interested Party

Court Assistant - Michael