

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. E233 OF 2022**  
**BETWEEN**

**LEGAL ADVICE CENTRE T/A KITUO CHA SHERIA.**

.....**1<sup>ST</sup> PETITIONER**

**GEOFFREY MAINA MWANGI.....2<sup>ND</sup>**  
**PETITIONER**

**VERSUS**

**ATTORNEY GENERAL.....1<sup>ST</sup>**  
**RESPONDENT**

**CABINET SECRETARY, MINISTRY OF EDUCATION.....**  
**....2<sup>ND</sup> RESPONDENT**

**CABINET SECRETARY, MINISTRY OF HEALTH.....**  
**.....3<sup>RD</sup> RESPONDENT**

**CABINET SECRETARY, MINISTRY OF ICT INNOVATION AND**  
**YOUTH**  
**AFFAIRS.....4<sup>TH</sup>**  
**RESPONDENT**

**CABINET SECRETARY, MINISTRY OF INTERIOR AND CO-**  
**ORDINATION OF NATIONAL GOVERNMENT**  
**.....5<sup>TH</sup> RESPONDENT**

**CABINET SECRETARY, MINISTRY OF LANDS AND PHYSICAL**  
**PLANNING.....6<sup>TH</sup>**  
**RESPONDENT**

**CABINET SECRETARY, MINISTRY OF NATIONAL TREASURY**  
**AND PLANNING.....7<sup>TH</sup>**  
**RESPONDENT**

**CABINET SECRETARY, MINISTRY OF PETROLEUM AND**  
**MINING...8<sup>TH</sup> RESPONDENT**

<b>BUSINESS REGISTRATION SERVICE.....</b>	
<b>....9<sup>TH</sup> RESPONDENT</b>	
<b>INFORMATION AND COMMUNICATIONS TECHNOLOGY</b>	
<b>AUTHORITY.....</b>	<b>10<sup>TH</sup></b>
<b>RESPONDENT</b>	
<b>KENYA COPYRIGHT BOARD.....</b>	<b>11<sup>TH</sup></b>
<b>RESPONDENT</b>	
<b>KENYA INSTITUTE OF CURRICULUM DEVELOPMENT.....</b>	
<b>12<sup>TH</sup> RESPONDENT</b>	
<b>KENYA REVENUE AUTHORITY.....</b>	<b>13<sup>TH</sup></b>
<b>RESPONDENT</b>	
<b>NATIONAL COUNCIL FOR PERSONS WITH DISABILITIES....</b>	
<b>.....14<sup>TH</sup> RESPONDENT</b>	
<b>NATIONAL HOSPITAL INSURANCE FUND.....</b>	
<b>....15<sup>TH</sup> RESPONDENT</b>	
<b>NATIONAL TRANSPORT AND SAFETY AUTHORITY.....</b>	
<b>...17<sup>TH</sup> RESPONDENT</b>	
<b>PUBLIC SERVICE COMMISSION.....</b>	<b>18<sup>TH</sup></b>
<b>RESPONDENT</b>	
<b>NATIONAL COUNCIL FOR LAW REPORTING.....</b>	
<b>19<sup>TH</sup> RESPONDENT</b>	
<b>COUNTY GOVERNMENT OF</b>	
<b>BUNGOMA.....</b>	<b>20<sup>TH</sup> RESPONDENT</b>
<b>COUNTY GOVERNMENT OF BUSIA.....</b>	
<b>21<sup>ST</sup> RESPONDENT</b>	
<b>COUNTY GOVERNMENT OF</b>	
<b>KAKAMEGA.....</b>	<b>22<sup>ND</sup> RESPONDENT</b>
<b>COUNTY GOVERNMENT OF KISUMU.....</b>	
<b>.....</b>	<b>23<sup>RD</sup> RESPONDENT</b>
<b>COUNTY GOVERNMENT OF</b>	
<b>MERU.....</b>	<b>24<sup>TH</sup> RESPONDENT</b>
<b>COUNTY GOVERNMENT OF MIGORI.....</b>	
<b>....</b>	<b>25<sup>TH</sup> RESPONDENT</b>

**COUNTY GOVERNMENT OF  
MOMBASA.....26<sup>TH</sup> RESPONDENT  
COUNTY GOVERNMENT OF NAIROBI CITY.....  
27<sup>TH</sup> RESPONDENT  
COUNTY GOVERNMENT OF NYERI.....  
....28<sup>TH</sup> RESPONDENT  
COUNTY GOVERNMENT OF UASIN GISHU.....  
....29<sup>TH</sup> RESPONDENT  
NAIROBI METROPOLITAN SERVICE.....  
30<sup>TH</sup> RESPONDENT  
INSPECTOR GENERAL OF THE NATIONAL POLICE  
SERVICE.....31<sup>ST</sup> RESPONDENT  
CHIEF JUSTICE OF THE REPUBLIC OF KENYA AND  
PRESIDENT OF THE SUPREME COURT OF KENYA.....  
....32<sup>ND</sup> RESPONDENT**

**AND**

**IDEATE TECH POLICY AFRICA LIMITED.....  
AMICUS CURIAE**

## **J U D G M E N T**

### **Introduction**

1. The Petition dated 18<sup>th</sup> May 2022 is supported by the 1<sup>st</sup> Petitioner’s affidavit in support sworn on even date by its Executive Director, Dr. Annette Mbogoh and the 2<sup>nd</sup> Petitioner’s supporting affidavit. The Petition is also supported by supplementary affidavits dated 28<sup>th</sup> March and 15<sup>th</sup> November 2023 by Dr. Annette Mbogoh.
2. The Petitioners aver that following the roll out of Government Vision 2030, government agencies who include the Respondents herein switched their services to the online

platform and in so doing ensured that government services are exclusively availed online to the exclusion of all the other alternatives.

3. The Petitioners assail this move for being disadvantageous to majority of the population in Kenya especially those in rural areas and marginalized groups who do not have access to internet or possess the requisite skills to use.
4. They faulted the government for making the transition without setting up ICT infrastructure in the whole country, educating and training to people to be able to access these services online.
5. Accordingly, the Petitioners seek the following reliefs against the Respondents:
  - a) ***A declaration that in view of the constitutional obligation for national State organs to ensure reasonable access to its services in all parts of the Republic of Kenya, for as long as government agencies are offering their services on the internet, access to the internet is a fundamental right in Kenya.***
  - b) ***A declaration that the right to access the internet in Kenya should be read into the Right to life, Right to Equality and freedom from discrimination, Right to Human dignity, Freedom of expression, Right of Access to information, Freedom of association, Consumer Right, Access to justice, and Right to Fair Trial enshrined under Article 26, 27,***

**28, 33, 35, 46, 48, and 50 of the Constitution.**

- c) A declaration that internet access is essential to the enjoyment of basic human rights, thus members of the Public in all parts of the Republic of Kenya must be able to access the internet to exercise and enjoy their rights to life, Equality and freedom from discrimination, Human dignity, Freedom of expression, Access to information, Freedom of association, Consumer Right, Access to justice, and Fair Trial under Article 26, 27, 28, 33, 35, 46, 48, and 50 of the Constitution and other fundamental human rights.**
- d) A declaration that the State is under an obligation to provide its citizens with meaningful access to the internet to be able to benefit from the services offered to the members of the public in all parts of the Republic of Kenya on internet platforms by the Respondents and any other State agencies for as long as government agencies are offering their services to the members of the public in all parts of the Republic of Kenya predominantly on internet platforms.**
- e) A declaration that the right to public services provided by the State Government should be read into the Right to life enshrined under Article 26 of the Constitution respectively.**
- f) A declaration that the Respondents have failed to ensure meaningful access to government services to the Petitioners and members of the public who are unable to access government services on the internet**

**on account of either being unfamiliar with ICT skills, illiterate, semi-illiterate, marginalized, and/or poor.**

- g) An order directed at the Respondents to carry out continuous e-literacy and e-enterprise skills basic training targeting members of the public who have no ICT skills.**
- h) An order directed at the Respondents to install data centers to equip members of the public to be able to access the government services offered by the Respondents on internet platforms.**
- i) An order directed at the Respondents to implement programs within 6 months of this Court's judgment aimed at ensuring members of the public have alternative means to access the services of the Respondents apart from accessing their services exclusively on online systems.**
- j) A declaration that the Respondents have threatened and contravened Articles 10, 26( 1 ), 27, 28, 33(la), 35(1), 46(1), of the Constitution by offering a number of services to the members of the public in all parts of the Republic of Kenya exclusively on the internet and failing to consider the plight and realities of members of the public who are unable to access their services on the internet on account of either being unfamiliar with ICT skills, illiterate, semi-illiterate, marginalized, and/or poor.**
- k) A declaration that the Respondents particularly the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 18<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup>, 23<sup>rd</sup>, 24<sup>th</sup>, 25<sup>th</sup>, 26<sup>th</sup>, 27<sup>th</sup>, 28<sup>th</sup>, 29<sup>th</sup>, 31<sup>st</sup> and 32<sup>nd</sup> Respondents**

**have threatened and contravened Article 6(3), of the Constitution by offering a number of services to the members of the public in all parts of the Republic of Kenya exclusively on the internet and failing to consider the plight and realities of members of the public who are unable to access their services on the internet on account of either being unfamiliar with ICT skills, illiterate, semi-illiterate, marginalized, and/or poor.**

- l) A declaration that the Respondents, particularly the 1<sup>st</sup> and 9<sup>th</sup> Respondents, have threatened and contravened Articles 36(1) of the Constitution by offering services relating to the registration, and other dealings of different forms of business associations to be exclusively done on internet platforms by members of the public in all parts of the Republic of Kenya.**
- m) A declaration that the Respondents, particularly the 32<sup>nd</sup> Respondent threatened and contravened Articles 48, and 50(1) of the Constitution by limiting and restricting the filing of pleadings and Court attendance by members of the public in a number of Courts, to be predominantly done on internet platforms.**
- n) A declaration that the Respondents, particularly the 1<sup>st</sup> to 31<sup>st</sup> Respondents have threatened and contravened Article 129, of the Constitution by offering a number of their services to members of the public in all parts of the Republic of Kenya exclusively on internet platforms and failing to consider the plight and realities of members of the public who are unable to access their services on the internet on account of either being**

***unfamiliar with ICT skills, illiterate, semi-illiterate, marginalized, and/or poor.***

- o) A declaration that the Respondents, particularly the 20<sup>th</sup> to 30<sup>th</sup> Respondents have threatened and contravened Articles 174, and 176(2) of the Constitution by centralizing provision of some of its key services to members of the public in all parts of their regions predominantly on internet platforms.***
- p) A declaration that the Respondents, particularly the 18<sup>th</sup> Respondent have threatened and contravened Article 249(1), of the Constitution by offering a number of their services to members of the public in all parts of the Republic of Kenya exclusively on internet platforms and failing to consider the plight and realities of members of the public who are unable to access their services on the internet on account of either being unfamiliar with ICT skills, illiterate, semi-illiterate, marginalized, and/or poor.***
- q) This being a matter of public interest there be no orders as to costs.***
- r) Any other order(s) as this Court shall deem just.***

### **Petitioners' Case**

6. On 10<sup>th</sup> June 2008, Kenya's Vision 2030 was launched by the late President Mwai Kibaki with the goal of transforming Kenya into a rapidly industrialized middle-income nation by 2030. To commence this journey, the Vision Delivery Board was appointed by the President on 13<sup>th</sup> February 2009.

7. With the aim of transforming connectivity and transmission in the Country, the East African Marine System (TEAMS) fibre optic cable arrived in Mombasa in 2009. In the same year, SEACAOM, a privately funded fibre optic project, also arrived in Mombasa. Fundamentally, this set the stage for internet connectivity and communications in the Kenya. The government has over the years since then, made and implemented public policy decisions, laws, and programs to promote the use of ICT in the country.
8. The Petitioners aver that the Respondents have developed online systems for delivery of their services to the public in all parts of the Kenya, predominantly over internet platforms. In fact, it is stated that **some of the government services** are now exclusively only offered online.
9. Despite the great strides in this area, the Respondents are accused of failing to provide the public with meaningful access to the internet to enable it benefit from these services.
10. The Petitioners contend that the reality is that most of the Kenyan population lack the necessary ICT skills, lack infrastructure to access the internet, including laptops, desktop computers, phones and tablets. Additionally, many have no access, or have limited access and cannot afford internet services.

11. For context, the 1<sup>st</sup> Petitioner illustrates this through the range of services offered by the 1<sup>st</sup> Respondent which include: *lodging applications for registration of marriages, licensing of Ministers of Faith, Application for Certificate of No Impediment to Marriage, Licensing of Ministers of Faith to be appointed as marriage officers, application for a Certified Copy of marriage certificates and application for issuance of marriage books to the marriage officers for purposes of solemnization solely on its online web portal: <https://oag.ecitizen.go.ke/dashboard>.*
12. Similarly, the 2<sup>nd</sup> Respondent offers services on *access to scholarship information, form one student's selection, ministry training projections and information of technical and vocational education and training management information system* on its online platform: <http://www.education.go.ke>. Comparable illustrations are further outlined in the Supporting Affidavit with reference to the other Respondents and the services they exclusively offer on their online platforms.
13. It is further deponed that according to the Kenya National Bureau of Statistic, *2019 Kenya Population and Housing Census Report*, only 11.3% of the rural population have access to the internet compared to the 39.8% in the urban areas. Further, in the rural areas only 4.4% of the people have access to a desktop computer, laptop and tablet.

14. In a further Report dubbed '*A review of the status of e-government implementation in Kenya*', it was established that the technological era has resulted in digital exclusion of some vulnerable groups such as the physically challenged, those living in rural areas, the aged and illiterate. Equally, it was noted that most Huduma Centres are found in the urban areas.
15. It was thus recommended therein that the government should empower these groups so that they can participate in online activities they offer by deploying more resources to ensure that citizens get access to the services.
16. The 2<sup>nd</sup> Petitioner in his own lived experience, narrates that some intruders sought to evict him from his parcel of land *Nairobi/Block 105/13683*. This caused him to seek the 1<sup>st</sup> Petitioner's assistance. He depones that the 1<sup>st</sup> Petitioner assisted him prepare the letter dated 2<sup>nd</sup> November 2021 to issue to the Lands Registrar.
17. He depones that when he arrived at the office, he was directed to make an application online to which he informed them that he did not possess any ICT skills to be able to do so. In addition, he informed them that he does not have an email address and also does not have resources to make the online application.

18. He avers that the land office informed him that they would do the application for him if he had Ksh.5000, which he did not. His continuous visits to the land office are said to have been futile. In the end, he states that he was advised to go to a cyber café to make the application. He was charged Ksh.3000 by the cyber café to do the application.
19. He informs that thereafter he was issued with the search on 20<sup>th</sup> May 2022 although the Certificate had been generated on 3<sup>rd</sup> December 2021. He asserts that these are some of the challenges Kenyans are facing trying to access government services exclusively offered online.
20. The Petitioners in light of these, fault the Respondents for failing to implement initiatives and programs aimed at ensuring that members of the public seeking services, especially those who may not have access to the necessary infrastructure or are unfamiliar with ICT skills such as the 2<sup>nd</sup> Petitioner, have alternative means to access their services apart from accessing their services on their online web portals and websites. It is stated that the 2<sup>nd</sup> Petitioner like many Kenyans, has to pay for these services for instance through a cybercafé so as to access these services.
21. According to the Petitioners, the Respondents have failed to carry out sufficient e-literacy and e-enterprise skills basic training for members of the public who have no ICT skills. Likewise, that they have failed to install data centers

countrywide to equip members of the public to access their services offered on internet platforms prior to them offering their services exclusively there. Moreover, it is alleged that the Respondents have failed to implement initiatives and programs aimed at ensuring members of the public have alternative means to access the services of the Respondents apart from accessing the services on their online systems.

22. In like manner, the Petitioners assert that the Respondents have also failed to implement initiatives and programs that will enable members of the public who have challenges in accessing services, still access the services. It is stated that the Respondents have failed to accord meaningful participation and training to members of the public who are unable to access government services on the internet on account of lacking ICT skills, being illiterate, marginalized, poor, prior to offering their services exclusively online.
23. Additionally, it is stressed that the Respondents' assertions that they have made an attempt to offer resources to ensure that citizens get access to these services so as to access online services, is false and misleading. Furthermore, that no demonstration is made by the Respondents to ascertain that they have taken these necessary steps.
24. Consequently, the Petitioners postulate that by offering services over the internet without alternatives and failing to consider the plight and realities of the members of the public

who are unable to access these services on the internet, the Respondents have threatened and contravened Articles 6(3), 10, 26(1), 27, 28, 33(1)(a), 35(1), 36(1), 46(1), 48, 50, 129, 174, 176(2) and 249(1) of the Constitution.

25. It is underscored that the Respondent have a duty to take measures to ensure that the members of the public have relevant education and training; have opportunities to associate, be represented and participate in political, social, economic and other spheres of life; access employment; and are protected from exploitation as they access services offered by the Respondents on their online web portals or websites.

### **Respondents' Case**

26. The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup>, 12<sup>th</sup>, 14<sup>th</sup>, 16<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup>, 23<sup>rd</sup>, 24<sup>th</sup>, 25<sup>th</sup>, 29<sup>th</sup>, 30<sup>th</sup>, 31<sup>st</sup> and 32<sup>nd</sup> Respondents' responses and submissions are not in the Court file or Court Online Platform (CTS).

### **2<sup>nd</sup> Respondent's Case**

27. The 2<sup>nd</sup> Respondent, through Principal Secretary, Dr. Belio Kipsang filed a Replying Affidavit sworn on 24<sup>th</sup> April 2023 in response to the Petition.
28. He stated that the Ministry of Education is responsible for implementing the government's obligation of ensuring every

person's right to education under Article 43(1)(f) of the Constitution and children's right to free and compulsory basic education under Article 53(1)(b) of the Constitution, is accessible to all.

29. He depones that *Sessional Paper No.1 of 2019, a policy framework for reforming education and training for sustainable development in Kenya*, underscores the government's commitment through their Ministry to provide access, equity, quality and relevant education and training to its citizens including the marginalized.
30. He depones that in this regard the Ministry of Education has decentralized its services to the County, sub-county and school levels by ensuring that its services are accessible both online and physically to all citizens.
31. On this premise, he avers that the Petition is baseless, misconceived and devoid of any merit, as such so should be dismissed.

### **10<sup>th</sup> Respondent's Case**

32. This Respondent through its Chief Executive Officer, Stanley Kamanguya filed its Replying Affidavit sworn on 20<sup>th</sup> April 2023.
33. He deponed that the 10<sup>th</sup> Respondent a State Corporation under the Ministry of Information Communication and Digital

Economy was established in August 2013 with the task of rationalizing and streamlining the management of all government ICT so as to enable efficient and effective access in the delivery of public service.

34. He depones that at the establishment of the 10<sup>th</sup> Respondent, there was 4300KM of fibre across the country covering all provincial headquarters and six key border towns. After its establishment, the 10<sup>th</sup> Respondent between 2014 and 2017 laid an additional 2100KM of fibre connecting all the 47-county headquarters. In addition, in 2017, an additional 2500KM of fibre was laid covering 290 sub county headquarters. Furthermore, he depones that an additional 3436 KM of fibre have been laid under the *Government Common Core Network, Universal Health Care Connectivity and the County Connectivity Project*.
35. It is further deponed that the 10<sup>th</sup> Respondent between 2017 and 2021 distributed 1.2 million devices to 22,891 primary schools with the goal of equipping the students with ICT skills. At the moment, he states that the 10<sup>th</sup> Respondent is undertaking a project in partnership with UNICEF to connect schools with internet and has so far connected 19 schools.
36. As well, he informs that markets and Technical and Vocational Education and Training (TVETs) have been connected with internet. Equally, he depones that the 10<sup>th</sup> Respondent in collaboration with other government agencies

is currently undertaking a project dubbed "Jitume" aimed at connecting TVETs institutes to the internet and providing training on digital skills and online jobs.

37. He further states that the 10<sup>th</sup> Respondent has undertaken various activities to build capacity and literacy of citizens in ICT. In this regard, he avers that it has launched a portal for registration of citizens aimed at training 20 million citizens on ICT at: <https://smartacademy.icta.go.ke/basic-skills-registration>.
38. He informs that the 10<sup>th</sup> Respondent continues to lay fibre and has commenced the process of laying 100,000 kilometers of fibre in the next 5 years. Likewise, it intends to roll out 25,000 hot spots throughout the Country to boost the public's access to internet and to set up 14,500 digital labs to increase connectivity. He notes that the 10<sup>th</sup> Respondent is providing connectivity to Telecommunications Service providers through the National Fibre Backbone to provide connectivity to homes and other areas so as to reduce the cost of connectivity.
39. He in view of this contends that the Petitioners filed this Petition without giving regard to the efforts that have been undertaken in the nation's ICT area and existing success stories. For this reason, he argues that the Petition is premature and fails to disclose any breach against the 10<sup>th</sup> Respondent.

## **11<sup>th</sup> Respondent's Case**

40. This Respondent through its Deputy Executive Director, George Nyakweba filed its Replying Affidavit sworn on 12<sup>th</sup> June 2023.
41. He depones that the 11<sup>th</sup> Respondent offers its services both online through its email: [info@copyright.go.ke](mailto:info@copyright.go.ke) and physically at its offices located at NHIF Building in Upper hill, Nairobi. He notes that the 11<sup>th</sup> Respondent also engages people through its X platform, Facebook, Instagram and YouTube.
42. He informs that on 14<sup>th</sup> January 2020, the then President, Uhuru Kenyatta directed the Ministry of ICT to work with all industry stakeholders so as to stream and solve the legacy challenges in the music industry, through the use of ICT, by creating a National Rights Registry and royalties' management system for Collective Management Organisations.
43. He avers that in order to operationalize the amendments made to the Copyright Act in 2019 and 2022, the 11<sup>th</sup> Respondent created the National Rights Registry (NRR) portal, which is the central repository for collating details pertaining to ownership of various copyright works. It is used by copyright holders to allow them register, view and download their copyright certificates. This portal is also available to the public on: [nrr.copyright.go.ke](http://nrr.copyright.go.ke).

44. He states that in terms of enforcement of copyright and related rights, the 11<sup>th</sup> Respondent has a legal and compliance department which the public can seek free legal advice from by making a physical visit to their offices or making an appointment online through the website at [copyright.go.ke](http://copyright.go.ke). Additionally, he depones that members of the public who are desire to report a case on infringement of copyright can either visit their offices to lodge their complaint or write a formal complaint addressed to the Executive Director.
45. Also, he states that the 11<sup>th</sup> Respondent is mandated to devise and implement training programmes on copyright and related rights. He notes that this is done by reaching out to creatives from different parts of the country and organizing training sessions where they are enlightened about copyright and related rights.
46. In view of the foregoing, he argues that the Petitioners have failed to acknowledge these ICT efforts as adopted by the 11<sup>th</sup> Respondent. He argues thus that the Petition does not disclose with precision any breach on the 11<sup>th</sup> Respondent's part.

### **13<sup>th</sup> Respondent's Case**

47. On 15<sup>th</sup> September 2022, the 13<sup>th</sup> Respondent swore its Replying Affidavit through its officer, Diana Akivaga.

48. She asserts that the Petitioners case against the 13<sup>th</sup> Respondent lacks clarity and precision in setting out the violation against it. In that the Petitioners have failed to show how this Respondent failed to perform its constitutional duties.
49. She informs that the 13<sup>th</sup> Respondent has undertaken several steps to ensure it meets its obligation such as: *setting up 38 service centers and* is presently in 52 Huduma Centers; in addition during the 2021 filing season, the contact centre and huduma centres extended their opening hours from 2<sup>nd</sup> June to 30<sup>th</sup> June 2022 which was communicated through all channels including newspapers and radio; moreover this Respondent has communication and education initiatives executed across the country to enhance its reach to taxpayers in addition to providing customer support and education such as offsite.support (Jaza Mapema); likewise this Respondent has ensured continuous direct communication via letters and emails to employers, taxpayers and tax agents; and also it introduced various digital communications such as the KRA website and google ads.
50. In addition to the above, she depones that the 13<sup>th</sup> Respondent has introduced building sweeps which entails visiting buildings with large number of occupants in towns such as KICC, to sensitize them on returns filing and offer

onsite filing support. Likewise, it conducts street storms aimed at creating awareness around income tax filing and offering support to persons wishing to file their returns. In addition, it has a Mobile Tax Unit which is used across the country, to offer filing support outreach to tax payers.

51. On this premise, she contends that the issues canvassed against the 13<sup>th</sup> Respondent in this Petition are baseless and unfounded as it is evident that it has put in place mechanisms to provided equal access and opportunities to all persons.
52. That said, she avers that the realization of the right to access internet which is a socio-economic right is subject to the availability of resources at the State's disposal. It is noted that no reasonable cause has been demonstrated neither the existence of the purported circumstances to warrant issuance of the sought relief and moreover which would be prejudicial to the 13<sup>th</sup> Respondent. As such, the Petition is deemed to be fatally defective and so should be struck out.

### **15<sup>th</sup> Respondent's Case**

53. The Acting Chief Executive Officer, Dr. Samson Kuhora for the 15<sup>th</sup> Respondent filed his Replying Affidavit sworn on 12<sup>th</sup> April 2023.

54. He depones that the 15<sup>th</sup> Respondent has 105 fully autonomous branches and satellite offices, in addition to being present in 47 Huduma Centers across the Country. He informs that each of this offer comprehensive customer service both in person and digitized services.
55. He depones that none of the 15<sup>th</sup> Respondent's services are exclusively digitized. He states that all the services available digitally are also available in each of these offices and centres. Furthermore, he avers that this Respondent has a user-friendly website: <http://www.nhif.or.ke> where members of the public can access information about the Fund. This service is also available through a mobile app which is available for free.
56. Moreover, he informs that this Respondent has developed a USSD code \*155# which allows for self-registration and access to various services even without internet access. Similarly, there is a toll-free line 0800720601 which can also be utilized in addition to its social media platforms.
57. Considering this, he asserts that the 15<sup>th</sup> Respondent has made great efforts to increase its reach to the public and ensure optimum service delivery to Kenyans both digitally and in-person. He argues as such that the instant Petition was lodged without regard to all these efforts. The Petition is thus deemed premature and as failing to disclose any breach.

## **17<sup>th</sup> Respondent's Case**

58. The Director and General and Deputy Director in charge of Licensing, George Njao filed his Replying Affidavit sworn on 10<sup>th</sup> May 2023.
59. He avers that the 17<sup>th</sup> Respondent's services are accessible through a hybrid model, both online and through physical services dependent on the type of service required.
60. He informs however that majority of their services are online based such as, vehicle registration though once done a registered owner collects the same physically. Similarly, motor vehicle inspection is done online but the process conducted physically at their inspection centres. Equally, the driving test and licenses booking are done online but examination conducted physically. He makes known that prior to the digital migration so as to bring its services closer to the people, they had long queues just to access these services.
61. He depones that the 17<sup>th</sup> respondent has 17 regional offices across the Country where the services can be accessed easily. They also have offices in all the Huduma Centers in Kenya.
62. To this end, he argues that the Petitioners have not demonstrated with preciseness the specific provisions of the

Constitution purported to have been violated and demonstrated how the 17<sup>th</sup> Respondent violated them.

### **18<sup>th</sup> Respondent's Case**

63. The 18<sup>th</sup> Respondent through its Chief Executive Officer, Simon K. Rotich filed a Replying Affidavit sworn on 18<sup>th</sup> July 2022. On an introductory note, he states that the instant Petition is misinformed and contains misrepresentation of facts. For that reason, he contends that the Petitioners ought to have sought the requisite information before filing this suit.
64. He depones that the 18<sup>th</sup> Respondent whose mandate revolves around recruitment, appointments and hearing of appeals, advertises all job vacancies in newspapers and on its website in accordance with the provisions of Section 37 of the Public Service Commission Act. He informs that the Act also requires that these advertisements be done on radio. He informs however due to its budgetary allocation it has not been able to achieve radio advertising. That said, job applicants have the option of delivering their application physically to their offices, by post or by filing an online application form.
65. He informs that up until 2020, the 18<sup>th</sup> Respondent always conducted physical interviews unless where one is out of the country. Thereafter, the Respondent commenced virtual

interviews either online, through telephone calls and where necessary physical interviews. He makes known that the virtual interviews have been well received particularly by candidates from far-flung areas. He affirms that the Commission nonetheless is always willing, able and ready to conduct physical interviews for any person who is not able to participate in a virtual interview.

66. In addition to this, he depones that this Respondent commenced the process of establishing remote ICT Centres that will enable applicants and candidates with no access to internet and other infrastructure to use the Commission's ICT Centres to apply for advertised jobs and also to attend the virtual interviews. He informs that these will be operationalized soon.
67. He states that with regard to county appeals, the Public Service Commission (County Appeals Procedures) Regulations, 2022 provides for filing of appeals either physically or by post or email. He states that where this Respondent finds it necessary to hear an appeal orally, the same is heard physically at their offices in Nairobi. He informs in fact that no Appeal has ever been heard virtually.
68. On this basis, he asserts that the allegations made against the 18<sup>th</sup> Respondent are baseless and unfounded as the Commission has put in place mechanisms to provide equal access and equal opportunity to all persons. For this reason,

he argues that the 18<sup>th</sup> Respondent has been wrongly sued in this matter and Petition lacks merit.

### **26<sup>th</sup> Respondent's Affidavit**

69. The 26<sup>th</sup> Respondent through its Director Legal Services, Julius Waliaula filed a Replying Affidavit sworn on 14<sup>th</sup> November 2022.
70. He asserts that the Petition is misinformed and with misrepresentation of facts, considering this it is frivolous, vexatious and an abuse of the Court process so should be dismissed.
71. He asserts further that Article 24 of the Constitution allows limitation of fundamental rights and freedoms as long as the same conforms with the provisions of this Article.
72. He avers that it is evident that the Covid 19 pandemic in 2020, necessitated alternative means that would allow majority of the public to access services. In view of this, he contends that services offered through the online platforms were essential to the general public and hence it was the only rational alternative to provide the maximum amount of people the services.
73. He depones that the 26<sup>th</sup> Respondent in collaboration with the 18<sup>th</sup> Respondent set up various Huduma centres where

the public can access internet services for free and with guidance.

74. To this end, he argues that the Petitioners have failed to show how the 26<sup>th</sup> Respondent has failed to perform its constitutional mandate.

### **27<sup>th</sup> Respondent's Case**

75. The 27<sup>th</sup> Respondent in reply filed Grounds of Opposition dated 18<sup>th</sup> April 2023 on the basis that:

- i. The Petition against the 27<sup>th</sup> Respondent lacks clarity and precision in setting out the violation against the Petitioners.*
- ii. The grounds upon which the Petition is predicated are superfluous, frivolous and inconsequential.*
- iii. The Petitioners insinuate that the Respondent has completely phased out all manual records and has embraced the use of digital records, when in reality, the digital transformation is happening in bits. The Petitioners therefore, have no reason whatsoever to claim that their rights have been infringed.*
- iv. The Petitioners have failed to show how the Respondent failed to perform its constitutional duties since the Respondent has undertaken several steps to ensure it meets its obligation by:*
- v. Setting up Huduma Centers in all 47 counties to improve public service delivery by providing efficient and accessible Government services at the convenience of citizens through various integrated service delivery platforms and it has*

*enhanced internet connectivity across the country through partnership with Telkom Kenya and Google East Africa.*

- vi. Inviting public participation via notice dated 20<sup>th</sup> January 2021 to submit memorandum or representation on the state of service delivery in the county.*
- vii. It is the government's policy that its services must be available online and that every Kenyan should have online access and the government's services must be delivered quickly and fully at the time and place they are needed. The Respondent is only adhering to this, with a bid to enhance enjoyment of human rights and not violate them as stated by the Petitioners. The realization of right to access the internet which is a socio-economic right subject to the availability of resources at the state's disposal.*
- viii. The issues canvassed in the Petition against the Respondent are baseless and founded as the Respondent has put in place mechanisms to provide equal access and equal opportunities to all persons.*
- ix. The Petition herein has failed to demonstrate and advance reasons to justify any contravention of the Constitution by the Respondents.*
- x. No reasonable cause has been demonstrated not the existence of extenuating circumstances to warrant a declaration in the view of constitutional obligation for national state organs or to warrant the exercise of discretion in favor of the Petitioners.*
- xi. Granting of the said orders would be prejudicial to the Respondent noting that the Petitioners herein have not demonstrated reasonable cause of the*

*failures to use the available avenues of services to the satisfaction of the Court to warrant the exercise of discretion in their favor.*

- xii. The instant Petition is devoid of merit, is misconceived, fatally defective and is a gross abuse of the Court process and ought to be struck out with costs.*

### **28<sup>th</sup> Respondent's Case**

76. The 28<sup>th</sup> Respondent's County Attorney, Kimani Rucuiya filed his Replying Affidavit sworn on 13<sup>th</sup> July 2023.
77. He states that one of the 28<sup>th</sup> Respondent's mandate under Article 174(f) of the Constitution is to promote social economic development and provision of proximate, easily accessible services throughout Kenya. On this basis, he avers that the National Information Communications and Technology Guidelines, 2020 were issued vide Gazette Notice No.5472 dated 7<sup>th</sup> August 2020. This Guidelines were established to realize the potential of the digital economy by creating an enabling environment for all citizens.
78. He notes that this Policy obligates and guides County Governments in providing various services to the extent possible and reasonable, on ICT platforms, for ease of access and affordable costs. He depones that the 28<sup>th</sup> Respondent renders certain services on the online platforms that are easily accessible by most citizens.

79. He contends that the Petition is speculative and academic for the most part as the 28<sup>th</sup> Respondent has never received any complaint, objection, or petition against its use of ICT, even from the County Assembly of Nyeri which exercises oversight over the County Government in the discharge of its functions. He adds that the prevailing ICT infrastructure ably and sufficiently supports the provision of government services on digital platforms. Consequently, he argues that the Petition lacks merit.

### **Petitioner's Submissions**

80. On 15<sup>th</sup> October 2023, Mosongo and Company Advocates filed submissions on behalf of the Petitioners and listed the issues for determination as: *what are the constitutional provisions that the Petitioners assert to have been infringed by the Respondents; what are the acts or omissions of the Respondents that the Petitioners are complaining of; what manner have the Respondents contravened or threatened the contravention of the constitutional provisions identified by the Petitioners or infringed the Petitioners' rights and whether the Petitioners are entitled to the reliefs sought.*

81. On the first issue, Counsel submitted that the Petition had been pleaded with clarity and precision as the Petitioners plainly stated that the Respondents have violated Articles 6(3), 10, 26(1), 27, 28, 33(1a), 35(1), 36(1), 46(1), 48, 50, 129, 174, 176 (2), 249(1) of the Constitution. Counsel noted

that the Petitioners had even particularized how each Respondent had violated these provisions at Paragraph 72 of the Petition.

82. Turning to the second issue, Counsel submitted that these provisions had been infringed by the Respondents in a number of ways primarily being inter alia: *making and implementing policy decisions to offer a majority of their services exclusively on internet platforms, without providing any alternative mode of accessing these services; entrenching an electronic system for service delivery exclusively through their online web portal/websites without providing internet access, putting in place necessary and adequate initiatives that cater to impoverished and marginalized members of the public; disregarding the plight and realities of many Kenyans who suffer from poverty, particularly the marginalized who struggle to meet basic needs and access to the internet; failure to consider the plight and realities of the public who are unable to access the services they offer exclusively on the internet on account of either being unfamiliar with ICT skills, illiterate, semi-illiterate, marginalized, or poor; adopting policy decisions whose effect is to threaten the survival and existence of marginalized communities and vulnerable groups by making it difficult to access fundamental government services among others as captured in the Petition.*

83. Counsel on the third issue submitted that the Respondents as can be gleaned from the 1<sup>st</sup> Petitioner's annextures, have through their policies since 2008 purposed to offer majority of their services to the public in all parts of Kenya exclusively on internet platforms, through their online web portals and websites, without providing internet access, any alternative mode of accessing these services, or putting in place necessary and adequate initiatives that cover impoverished and marginalized members who as a result, suffer inequalities in access to the services offered.
84. For context, Counsel reiterated that as per the Kenya National Bureau of Statistics records, only 11.3% of the Rural Population and 39.8% of the urban population have access to internet and only 4.4% of the Rural Population and 19.3% of the Urban population have access to a desktop computer, laptop, or tablet. Furthermore, that as per, the *Review of the Status of Implementation of E-government Implementation Report* huduma centres are based in urban areas, that there is low intake of government services in rural areas and that the technological era has resulted in exclusion of vulnerable groups.
85. Counsel stressed that the 1<sup>st</sup> Petitioner's annextures contrary to the Respondents assertions clearly disclose that majority of the Respondents services are only accessible online. It was argued that this is a grave disregard of the public's

consumer rights to receive up to date information and also discriminatory due to lack of necessary equipment and infrastructure, good network connectivity, ability to afford and access internet, basic computer literacy, and internet knowledge to other Kenyans since they rely or can only access hard copy information.

86. Furthermore, Counsel submitted that as per the Respondents' affidavits, it was clear that they offer their services in all parts of Kenya exclusively on the internet platforms. Counsel contended that the Respondents in doing so had failed to conduct meaningful public participation in that regard, failed to conduct any training for members of the public, failed to provide meaningful access to the internet to members of the public, failed to provide alternative ways to access their services and failed to safeguard the rights of the significant portion of members of the public who suffer difficulties and are unable to access their services online. Considering this, Counsel submitted that the Respondent had violated Article 6(3) of the Constitution which requires them to ensure reasonable access to its services in all parts of Kenya so far as is appropriate to do so and having regard to the nature of the service.

87. In addition, relying in Article 10 of the Constitution and highlighting its breach, Counsel submitted that the

Respondents had failed to adduce any evidence to show that prior to making or implementation of the public policy decisions to offer their services exclusively on their web portals, they conducted meaningful public participation.

88. Counsel equally submitted that the Respondents actions were in violation of the public's rights under Articles 26, 27, 28, 33(1)(a), 35, 36(1), 40, 43(1)(f), 46(1), 48,50, 51(3) ,53(1)(b), 54(1)(e), 55, 57, 174, 176 (2), and 259 (1) of the Constitution.
89. On the final issue, Counsel was certain that the Petitioners are entitled to the relief sought owing to the manifest violations perpetrated by the Respondents as espoused in the Petitioners affidavits and further expanded on in these submissions.
90. Counsel submitted that the realities of the Respondents actions are a great challenge to the public adding that one requires to access these government services exclusively online from acquiring their birth certificate throughout their life for various services and even when they die for their death certificate.
91. Counsel asserted thus that it is wrong for the Respondents to continue to offer their services exclusively on the internet without providing alternatives, enabling the members of the public to access the internet, or creating means to cover the

gap currently existing between the urban poor and urban rich, ICT illiterate and ICT literate, and rural and urban population in relation to access to internet. As such, Counsel urged the Court to grant the orders sought to stop the Respondents from continuing to speed in the wrong direction.

### **Respondents' Submissions**

92. The Respondents' submissions save for the 1<sup>st</sup> and 27<sup>th</sup> Respondents are not in the Court file or Court Online Platform (CTS).

### **1<sup>st</sup> Respondent's Submissions**

93. This Respondent through Senior State Counsel, Jackline Kiramana filed submissions dated 10<sup>th</sup> March 2024. The issue for determination was highlighted as: *whether there is indeed a violation of rights as alleged by the Petitioners.*
94. Counsel stated that the purpose of digitization of government services, is to increase their reach and make more efficient service delivery, especially for citizens in remote areas. It as well makes it possible for every Kenyan in every part of the country, to have an opportunity to access government services promptly either from their mobile phones using the USSD code or from a nearby cybercafé. Counsel stated that this is in line with Articles 6(1) and 10 of the Constitution.

95. Counsel submitted that the 10<sup>th</sup> Respondent in its affidavit provided the detailed steps which had been undertaken to increase internet accessibility across the country thereby raising the number of people who can access digitized services. In addition to this, it was noted that the 10<sup>th</sup> Respondent had rolled out digital skills training to over twenty million members of the public across the country and continues to invite members of the public to take advantage of the training sessions frequently conducted by the government countrywide.
96. Counsel submitted as well that the government had made enormous strides geared towards promoting ICT literacy and capacity, ICT infrastructure and enterprise development and access to devices and the internet through its partnership with various organizations such as Huawei Technologies (Kenya) Co. Ltd and Oracle Technology Systems Ltd.
97. Counsel pointed out that as deponed by the 15<sup>th</sup> and 19<sup>th</sup> Respondents, their services contrary to the Petitioners allegations are not exclusively offered online and one can access physical services from their offices. This fact was noted to be similar in majority of the government agencies.
98. Counsel on the allegation of discrimination to some groups, submitted that equality does not contemplate uniformity for all, but rather, considering the nature and the varying needs of the people. Counsel underscored that an examination of

the responses filed indicate that despite digitization, there is still room for access to physical services. Reliance was placed in **Elle Kenya Limited & 9 others v Attorney General & 3 others [2013] eKLR** where the Court observed as follows:

*“The principle of equality does not mean that every Law must have universal application for all persons who are not by nature, attainment or circumstances in the same position and the varying needs of different classes of persons require special treatment. The Legislature understands and appreciates the need of its own people, that its Laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds. The rule of classification is not a natural and logical corollary of the rule of equality, but the rule of differentiation is inherent in the concept of equality.*

*Equality means parity of treatment under parity of conditions. Equality does not connote absolute equality. A classification in order to be constitutional must rest upon distinctions that are substantial and not merely illusory. The test is whether it has a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into that category.”*

99. Furthermore, Counsel submitted that the Petitioners allegations on violation of consumer rights, right of access to information and the right to dignity failed to meet the test set out in **Anarita Karimi Njeru v Republic [1979] KECA 12 (KLR)** as they did not plead with specificity how these rights had been violated. To this end, Counsel submitted that the alleged violations in this Petition had not been proved, a

clear indication that the Petition lacks merit and so should be dismissed.

### **27<sup>th</sup> Respondent's Submissions**

100. Kandie Mutai Mudeizi and Company Advocates for this Respondent filed submissions dated 14<sup>th</sup> April 2024 and underscored the key issues for discussion as: *whether the 27<sup>th</sup> Respondent breached its constitutional duties and whether the Petitioners are entitled to the prayers sought.*
101. Counsel submitted that the 27<sup>th</sup> Respondent is mandated to operate in the best interests of the citizens as one of the constitutional imperatives. Counsel stated that Section 117 of the County Governments Act explicitly mandates County Governments to offer public services equitably, in a manner that is prudent, economically efficient, effective and sustainable. It was argued that this Respondent had adhered to these provisions through prudent resource allocation and strategic planning so as to ensure public services are delivered efficiently and effectively.
102. Counsel submitted that this Respondent in doing so had among its initiatives established Huduma Centers across all 47 counties which are properly equipped with resources and staff to ensure effectiveness of service to Kenyans. Moreover, through integration of information technology and the use of digital platforms, the 27<sup>th</sup> Respondent had

enhanced service delivery mechanisms, streamlining processes and reducing bureaucratic bottlenecks.

103. Counsel submitted for instance, that implementation of digital platforms for service delivery has significantly reduced processing times for various government transactions, leading to improved efficiency and enhanced citizen satisfaction. Additionally, it was argued that the 27<sup>th</sup> Respondent had adopted sustainable practices in resource management, ensuring that public resources are utilized judiciously to meet the needs of both current and future generations.
104. Taking this into consideration, Counsel stressed that the 27<sup>th</sup> Respondent had demonstrated a steadfast commitment to fulfilling its constitutional duties as mandated by the Constitution and the relevant legislative frameworks.
105. To buttress these arguments Counsel relied in **Speaker of Senate & Another versus Speaker of National Assembly & 2 others advisory opinion preference No.2 of 2013(2013)eKLR** where it was held that:

*“The Kenyan people, by the Constitution of Kenya, 2010 chose to de-concentrate State power, rights, and duties, competences – shifting substantial aspects to county government, to be exercised in the county units, for better and more equitable delivery of the goods of the political order. The dominant perception at the time of constitution-making was that such a de-concentration of*

*powers would not only give greater access to the social goods previously regulated centrally, but would also open up the scope for political self-fulfillment, through an enlarged scheme of actual participation in governance mechanisms by the people - thus giving more fulfillment to the concept of democracy.*

*[137] By Article 1 of the Constitution, the people's sovereign power is delegated to Parliament and the legislative assemblies in the county units, the national and county executives, and the judiciary and independent tribunals.*

*[138] Devolution as a required constitutional practice runs in parallel with an attendant set of values, declared in Article 10 of the Constitution: the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and the protection of the marginalized."*

106. On the second issue, Counsel submitted that the Petitioners assertions were marred with vagueness and a lack of specificity, making it challenging to discern the precise nature of the alleged violations.

107. Equally, Counsel submitted that the Petitioners had failed to provide compelling evidence or empirical data to support their claims as guided under Section 107 of the Evidence Act. It was contended that instead the Petitioners had relied on conjecture and generalizations. On this basis, Counsel submitted that the Petitioners had failed to articulate a cogent legal basis for the relief sought.

## **Amicus Curiae Brief**

108. Ochieng Oginga and Company Advocates for the Amicus Curiae filed its brief dated 10<sup>th</sup> March 2023. This brief focuses on legal issues as discussed below.
109. On the principles of interpretation of the Constitution, Counsel stated that guidance is provided under Articles 20, 21, 22, 23 and 259 of the Constitution. In addition, Counsel highlighted that the Supreme Court in **The Matter of Interim Independent Electoral Commission [2011] eKLR** guided as follows:

*“The rules of constitutional interpretation do not favour formalistic or positivistic approaches (articles 20(4) and 259(1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern Bill of Rights that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in article 10, in Chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts.*

*[87] In Article 259(1) the Constitution lays down the rule of interpretation as follows: “This Constitution shall be interpreted in a manner that - (a) promotes its purposes, values and principles; (b)*

*advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance.” Article 20 requires the Courts, in interpreting the Bill of Rights, to promote: (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights.*

*[88]..... Article 10 states clearly the values and principles of the Constitution, and these include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability, and sustainable development.*

*[89] It is for these reasons that the Supreme Court, while observing the importance of certainty of the law, has to nurture the development of the law in a manner that eschews formalism, in favour of the purposive approach. Interpreting the Constitution, is a task distinct from interpreting the ordinary law. The very style of the Constitution compels a broad and flexible approach to interpretation.”*

110. Counsel noted that additional guidance on interpretation of the Constitution was also issued by the Supreme Court in **Communications Commission Of Kenya & 5 Others Vs Royal Media Services Limited & 5 Others [2015] eKLR**, and **in The Matter Of The Kenya National Human Rights Commission [2014] eKLR** which was equally relied on.

111. Additional dependence was placed in **Tinyefuza Vs Attorney General [1997] UGCC 3** and **EG & 7 Others Vs Attorney General; Dkm & 9 Others (Interested Parties); Katiba Institute & Another (Amicus Curiae), Constitutional Petition No. 150 of 2016.**
112. Counsel drawing from these cases summarized that the Court in interpreting the Constitution should endeavor to give effect to the spirit, purpose, values and principles; adopt a broad and purposive interpretation while bearing in mind the rule of harmony in that each provision complements and supplements the other and more importantly in keeping with the spirit of Article 259 of the Constitution, do so in manner that promotes its purposes, values and principles; advances rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance, ensure that the spirit and tenor of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion and finally interpret the text broadly, liberally and purposively so as to avoid the austerity of tabulated legalism.
113. Counsel moving on discussed the *doctrines of 'Reading into the Constitution' and 'Structural Interdicts' as constitutional remedies under Article 23 of the Constitution.* In this regard, Counsel submitted that this Court should be guided by the

principles of reading into the Constitution and offering structural interdicts as remedies depending on the special circumstances of the case.

114. Counsel stated that the doctrine of reading into the Constitution applies largely to situations whereby the framers of the Constitution left out a word or phrase from a provision in the Constitution. To buttress this point reliance was placed in **Attorney-General & 2 Others Vs Ndi & 79 Others; Prof. Rosalind Dixon & 7 Others (Amicus Curiae) [2022] KESC 8 (KLR)** where it was observed that:

*“The superior courts ignored the fact that the drafters of the Constitution used certain words and went ahead to read in words whose effect was to change the entire meaning of the constitutional text. The tool of reading-in was only applied where the framers had left out a word or phrase from a provision. Further, that reading-in had to be supported by other connected provisions of the Constitution.”*

115. On structural interdicts, Counsel submitted that the Court must first assess each case depending on its own special circumstances and then issue realistic orders, while paying caution to overreaching its mandate and judicial function especially on policy matters. Reliance was placed in **County Government Of Kitui Vs. Ethics & Anti-Corruption Commission (2019) eKLR** where it was held that:

*“In essence, structural interdicts (also known as supervised interdicts) require the violator to rectify the breach of fundamental rights under court supervision.*

Five elements common to structural interdicts have been isolated in this respect. First the court issues a declaration identifying how the government has infringed an individual or group's constitutional rights or otherwise failed to comply with its constitutional obligations. Second, the Court mandates government compliance with constitutional responsibilities. Third, the government is ordered to prepare and submit a comprehensive report, usually under oath, to the court on a pre-set date. This report, which should explicate the government's action plan for remedying the challenged violations, gives the responsible state agency the opportunity to choose the means of compliance with the constitutional rights in question, rather than the court itself developing or dictating a solution. The submitted plan is typically expected to be tied to a period within which it is to be implemented or a series of deadlines by which identified milestones have to be reached. Fourth, once the required report is presented, the court evaluates whether the proposed plan in fact remedies the conditional infringement and whether it brings the government into compliance with its constitutional obligations. As a consequence, through the exercise of supervisory jurisdiction, a dynamic dialogue between the judiciary and the other branches of government in the intricacies of implementation may be initiated. This stage of structural interdict may involve multiple government presentations at several 'check in' hearings, depending on how the litigants respond to the proposed plan and, more significantly, whether the court finds the plan to be constitutionally sound. Structural interdicts thus provide an important opportunity for litigants to return to court and follow up on declaratory or mandatory orders.

The chance to assess a specific plan, complete with deadlines, is especially valuable in cases involving the rights of 'poorest of the poor,' who must make the most of rare and costly opportunities to litigate. After court

*approval, a final order (integrating the government plan and any court ordered amendments) is issued. Following this fifth step, the government's failure to adhere to its plan (or any associated requirements) essentially amount(s) to contempt of court".*

116. Equal dependence was placed in **Mitu-Bell Welfare Society V Kenya Airports Authority & 2 Others; Initiative for Strategic Litigation in Africa (Amicus Curiae) [2021] KESC 34 (KLR).**

117. Counsel on the next topic, *emerging jurisprudence on whether access to the internet is a fundamental right*, submitted that this issue has received various judicial and academic responses by various international organizations.

118. In the United States, Counsel noted that in the *Report of the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, 2011*, the United Nations underscored the importance of the internet as a key means by which individuals can exercise their right to freedom of opinion and expression, as guaranteed under Article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

119. According to the United Nations Special Rapporteur, the aforesaid Article 19 was drafted with foresight to include and to accommodate future technological developments through which individuals can exercise their right to freedom of

expression and hence, the framework of international human rights law remains relevant today and equally applicable to new communication technologies such as the internet. Thereafter in 2016, the United Nations Council in its 32<sup>nd</sup> Session adopted *A Resolution on The Promotion, Protection And Enjoyment Of Human Rights On The Internet*.

120. At a regional level, Counsel submitted that the African Union is on record calling for states to rethink their laws and to consider issues pertaining to access to the internet. It was noted that in its Resolution: *ACHPR/RES. 362(LIX) 2016: Resolution On The Right To Freedom Of Information And Expression On The Internet In Africa* , it pronounced itself as follows:

*Taking note of the African Declaration on Internet Rights and Freedoms, which was developed by a coalition of African civil society organizations and adopted during the 9th Internet Governance Forum in Istanbul, Turkey, in September 2014, which elaborates on the principles which are necessary to uphold human and people's rights on the Internet, and to cultivate an Internet environment that can best meet Africa's social and economic development needs and goals; Concerned by the emerging practice of State Parties of interrupting or limiting access to telecommunication services such as the Internet, social media and messaging services, increasingly during elections; Convinced that it is of critical importance that clear and comprehensive principles are established to guide the promotion and protection of human rights in the online environment; The Commission:*

- 1) *Calls on States Parties to respect and take legislative and other measures to guarantee, respect, and protect citizen's right to freedom of information and expression through access to Internet services;*
- 2) *Urges African citizens to exercise their right to freedom of information and expression in the Internet responsibly;*
- 3) *Encourages the Special Rapporteur of Freedom of Expression and Access to Information in Africa to take note of developments in the Internet age during the revision of the Declaration of Principles on Freedom of Expression in Africa, which was adopted by the Commission by 2002;*
- 4) *Urges State Parties, civil society and other stakeholders to collaborate with the Special Rapporteur by contributing to the process of revising the Declaration to consider Internet rights.*

121. Counsel submitted has been judicially considered by courts citing the Supreme Court of India in **Anuradha Bhasin Vs Union of India, And Others, Writ Petition No. 1031 of 2019.**

122. Similar reliance was placed in **Valdelomar And Sibaj Vs Costa Rican Superintendence Of Telecommunications (SUTEL), 2017, Amnesty International Togo Vs The Togolese Republic [2020] ECOWASSCJ 9 (06 JULY 2020), Faheema Shirin.R.K Vs State Of Kerala, Writ Petition No. 19716 Of 2019, On 19 September, 2019**

and **Cengiz And Others Vs Turkey, Judgment Of 1 December 2015, 49 and 52.**

123. Counsel equally relied in academic scholarly writings that have also addressed this topic being: *The Emerging Human Rights Revolution: The Beginning Of The Fifth Historical Process In The Consolidation Of Human Rights, The Age Of Human Rights Journal, 3 (December 2014) Pp. 63-101* By David Bondia Garcia, "Emerging Human Rights: A New Generation For The 1980s?" *33 Rutgers Law Review, 435 1980-1981* By Stephen P. Marks, and *Toward An International Law Of The Internet', (2013), Volume No. 54, No. 2, Harvard International Law Journal. Molly Land.*
124. In a nutshell, Counsel submitted that it was evident from these materials that human rights and fundamental freedoms are not static and keep evolving in tandem with societal needs and changes. Secondly, that the concept of emerging human rights is a response to the dynamism of contemporary international society and international law which is designed to provide a solution to emerging challenges and needs.
125. Accordingly, the recognition of fundamental rights and freedoms is a process which is constantly evolving and being revised, and which moves forward according to the needs and demands of any particular time and place.

126. Finally, that Article 19 of the International Covenant on Civil and Political Rights explicitly protects the technologies of connection and access to information as it protects rights in and to technology and the use of the clause media therein protects any technology that facilitates connection.

127. On the final topic, whether there has been a violation of the Constitution and the Petitioners' fundamental rights and freedoms, Counsel submitted that in answering this question, this Court should be guided by the principle that he who alleges must prove and that a party must plead with precisions and adduce supporting evidence whenever allegations pertaining to violations and contraventions or a threat to violations and contraventions of fundamental rights and freedoms and the Constitution in general have been made. To buttress this point reliance was placed in **EG & 7 Others** (supra) where it was held that:

*"The general principal governing determination of cases is that a party who makes a positive allegation bears the burden of proving it. [182] Moreover, the onus to establish the violation of alleged rights is not a mere formality. Differently put, the onus lies on he who alleges to prove every element constituting his or her cause of action."*

### **Analysis and Determination**

128. In my humble view, the key issues that arise for determination in this matter are as follows:

- i. Whether access to the internet in Kenya should be declared to a fundamental human right.**
- ii. Whether the Respondents' violated the Petitioners' rights under Articles 6(3), 10, 26(1), 27, 28, 33(1)(a), 35(1), 36(1), 46(1), 48, 50, 129, 174, 176(2) and 249(1) of the Constitution.**
- iii. Whether the Petitioners are entitled to the reliefs sought.**

**Whether access to the internet in Kenya should be declared a fundamental human right.**

129. The reality is that this is not explicitly provided for in the Constitution. However, Article 19 (3) (b) of the Constitution guides as follows:

***"The rights and fundamental freedoms in the Bill of Rights -***

***b) do not exclude other rights and fundamental freedoms not in the Bill of rights, but recognized or conferred by law, except to the extent that they are inconsistent with this Chapter."***

130. It follows therefore that a right is though not expressly enumerated in the Bill of Rights, can still be enforceable if any when recognized by any other law unless it is inconsistent with the Constitution, hence the enumeration in

the Bill of Rights is not an exhaustive codification of all rights.

131. Similarly, Article 20 (3) (a) stipulates thus:

***“In applying the Bill of Rights, a Court shall***

***a) develop the law to the extent that it does not give effect to a right or fundamental freedom”***

132. The phrase to ‘***develop the law to the extent that it does not give effect to a right or fundamental freedom***’ to me means that in developing the judge made law or jurisprudence on human rights law, the court must take caution against the temptation of arrogating itself the law-making power so that in the context of developing the law, the Court does not assume that it has the authority of creating a right or fundamental freedom. Its task however is limited to interpretation and enjoys the latitude to main interpretation that favours the enjoyment of a right or fundamental freedom as opposed to an approach that inhibits it.

133. Consequently, has no power to create new fundamental rights but nothing stops the Court from recognizing any new dimensions that that blend with the existing rights in the context fundamental rights in the Constitution.

134. Indeed, a key tenet for the Constitutional interpretation under Article 259 (1) require that the Constitution be construed in a manner that advances the rule of law and fundamental rights and freedoms in the Bill of Rights among others.
135. In addition, Article 259 (3) underscores that every provision of the Constitution shall be construed according to the doctrine of interpretation that law is always speaking implying that the Constitution has to be interpreted within the context of a forward-moving society.
136. In **Hashmukh Devani v Cabinet Secretary Ministry of Interior and Co-ordination of National Government & 3 others [2016] KEHC 6589 (KLR)** the Court emphasized as follows:

***“...It must also always be remembered that a constitution is a mechanism under which laws are made and not a mere piece of legislation which declares what the law is to be to fit specific situations. These views run from case law retrieved from both within and outside domestic jurisdiction.***

***In Jumbuma Coal Mine -v- Victoria Coal Miners Association [1908] 6 CLR 309 at 367, O’Connor J stated thus:***

***“It must always be remembered that we are interpreting a Constitution broad and general in terms, intended to apply to varying conditions which development of community must involve.***

**For that reason, where the question is whether the Constitution has used an expression in the wider or narrower sense, the court should in my opinion always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose”**

**In the case of James -v- Commonwealth of Australia [1936] AC 578, Lord Wright put it as follows with regard to liberal interpretation.**

**“It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general, and their full importance and true meaning can only be appreciated when considered, as the years go, in relation to the vicissitudes of fact which from time to time emerge. It is not true that the meaning of words changes but the changing circumstances illustrate and illuminate the full import of that meaning”.**

**Closer home the principles of Constitutional interpretation were recently well summarized in the case of Advocates Coalition for Development and Environment & Others -v- Attorney General of Uganda & Another [2014] 3 EA9, where the Constitutional court of Uganda held as follows:**

**“The principles which govern..... the construction of constitutional provisions... include the following:**

- a) The widest construction possible in its context should be given according to the**

**ordinary meaning of the words used, and each general word should be held to extend to all ancillary and subsidiary matters. In certain context, a liberal interpretation of the constitutional provision may be called for.**

- b) A constitutional provision containing a fundamental right is a permanent provision intended to cater for all times to come and therefore, should be given a dynamic progressive and liberal flexible interpretation, keeping in mind the ideals of the people and their social, economic and political-cultural values so as to extend fully the benefit of the right to those it is intended for. (South Dakota -v- North Carolina, 192, US 268 1940 LED 448).**
- c) The entire Constitution has to be read together as an integrated whole and with no one particular provision destroying the other, but rather each sustaining the other. This is the rule of harmony, completeness and exhaustiveness and the rule of paramountcy of the written Constitution.**
- d) No one provision of the Constitution is to be segregated from the others and be considered alone, but all provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate the greater purpose of the instrument.**
- e) Judicial power is derived from the people and shall be exercised by courts established under the Constitution in the name of the people and in conformity with the law and with the values, norms and aspirations of**

***the people and courts shall administer substantive justice without undue regard to technicalities.***

***f) The Constitution is the Supreme law of the land and forms the standard upon which all other laws are judged. Any law that is inconsistent or in contravention of the Constitution is null and void to the extent of the inconsistency.***

***g) Fundamental rights and freedoms guaranteed under the Constitution are to be interpreted having general regard to evolving standards of human dignity.”***

137. Having set the out the applicable principles, I must now turn to the question of whether internet access in Kenya should be declared by this Court to be a fundamental right.

138. In prayer 1 of the Petition, the Petitioner seeks this specific relief by stating thus:

*“A declaration that in view of the constitutional obligation for national State organs to ensure reasonable access to its services in all parts of the Republic of Kenya, for as long as government agencies are offering their services on the internet, access to the internet is a fundamental right in Kenya”*

139. One important factor to note from the outset is that by nature, fundamental rights are inherent and timeless and the central focus is the upholding of human dignity of being in an orderly society.

140. As already stated, and by dint of Article 20 (3) (a), the Courts have no authority under the guise of interpretation to create constitutional rights. Internet access is not expressly provided for as a fundamental right in the Constitution of Kenya and this court cannot thus make such a declaration. Such an absolute declaration would arbitrarily and indefensible.
141. It is undeniable that access to internet has transmuted and enhanced the enjoyment of rights and fundamental freedoms such as the freedom of expression, access to information, education, public participation and governance and also socio-economic rights in a transformative way. Internet access is thus an essential catalyst that has greatly broadened and enhanced the enjoyment of the existing fundamental rights. The protection to be accorded to internet access must thus be understood to fall within the context of the existing rights but not as a distinct independent right.
142. That position has been adopted by other comparable jurisdictions. In India, the Supreme Court in **Anuradha Bhasin v Union of India & Others Writ Petition No. 1031 of 2019, & Writ Petition No. 1164 of 2019 Ghulam Nabi Azad v Union of India & Anr** held thus:

*“... In this context, we may note that this Court, in a catena of judgments, has recognized free speech as a fundamental right, and, as technology has evolved, has recognized the freedom of speech and expression over different media of expression. Expression through the internet has gained contemporary relevance and is one of the major means of information diffusion. Therefore, the freedom of speech and expression through the medium of internet is an integral part of Article 19(1)(a) and accordingly, any restriction on the same must be in accordance with Article 19(2) of the Constitution. 27. In this context, we need to note that the internet is also a very important tool for trade and commerce. The globalization of the Indian economy and the rapid advances in information and technology have opened up vast business avenues and transformed India as a global IT hub. There is no doubt that there are certain trades which are completely dependent on the internet. Such a right of trade through internet also fosters consumerism and availability of choice. Therefore, the freedom of trade and commerce through the medium of the internet is also constitutionally protected under Article 19(1)(g), subject to the restrictions provided under Article 19(6) ... We are confining ourselves to declaring that the right to freedom of speech and expression under Article 19(1)(a), and the right to carry on any trade or business under 19(1)(g), using the medium of internet is constitutionally protected.”*

143. For reasons aforesaid, this Court is not persuaded that the declaration sought by the Petitioner to have access to internet be declared to be a fundamental right is legally

tenable is thus rejected. Internet is a medium that facilitates the enjoyment of constitutional rights and fundamental freedoms and is protected within that framework.

***Whether the Respondents' violated the Petitioners' rights under Articles 6(3), 10, 26(1), 27, 28, 33(1)(a), 35(1), 36(1), 46(1), 48, 50, 129, 174, 176(2) and 249(1) of the Constitution.***

144. A cardinal requirement for constitutional petition is specificity and precision. A proper Constitutional Petition should identify the provisions of the Constitution alleged to have been violated and the manner in which the alleged violations were executed. Discussing the threshold the Court in **Japheth Ododa Origa v Vice Chancellor University of Nairobi, Academic Registrar, University of Nairobi & B.M Waweru [2018] KEHC 4861 (KLR)** the Court held as follows:

***“15. Precision in pleading is vital in Constitutional petitions because it enables the opposite party to fully understand the case they face and be in a position to adequately respond to it. It also enables the Court to decipher the issues brought before it for adjudication. It helps in avoiding surprises and ambiguities in the litigation but more importantly it shows the link between the aggrieved party, the constitutional provisions at play and the possible infringement. This was well stated by the Supreme Court in the case of Communication Commission of Kenya & 5***

***others v Royal Media Services Limited & 5 others [2014] eKLR thus:-***

***“[349] 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 Annarita 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 a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement...”***

145. Besides ensuring the threshold for Constitutional Petition is met, the Petitioners are also required to tender proof of the allegations they put forward in the Petition. The Supreme Court in **Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] KESC 66 (KLR)** held as follows on the burden of proof:

***“[49] Section 108 of the Evidence Act provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it***

***is provided by any law that the proof of that fact shall lie on any particular person.”***

***[50] This Court in Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:***

***“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”***

146. Likewise, the Supreme Court in **Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another [2017] KESC 42 (KLR)** held as follows:

***“[132] Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced...”***

147. The present Petition is founded on the basis that the Respondents are now exclusively offering government services through the online platform thereby disadvantaging a large population in rural areas and marginalized communities that have no access to internet, do not have the know how to use the internet, have no or very limited

access to internet and lack the necessary gadgets to be able to access those services online.

148. The Respondents refuted this assertion and insisted that the introduction of online services has not done away with the physical services and that the two approaches go hand in hand to ensure that those who are unable to access online services can visit the offices for the same services. Indeed, the Respondents case was that the introduction of online services has in fact increased the reach especially those in remote areas since they can now access government services using either mobile USSD code or through cyber cafes near them instead of travelling to the government offices.

149. Further, according to Respondents, the Petitioner fails to appreciate the major steps that the Respondents have taken to increase internet coverage including the initiative to impart training skills on the populace aimed at increasing ICT literacy skills by entering into collaboration with major companies to ensure availability of affordable devices in the market.

150. For instance, Stanley Kamaguya, who swore the replying affidavit on behalf of the 10<sup>th</sup> Respondent (The Information and Communications Technology Authority) on 20/4/2023 detailed the efforts the Respondent had been making to

increase internet Penetration. He depones that at the establishment of the 10<sup>th</sup> Respondent, there was 4300KM of fibre across the country covering all provincial headquarters and six key border towns. After its establishment, the 10<sup>th</sup> Respondent between 2014 and 2017 laid an additional 2100KM of fibre connecting all the 47-county headquarters. In addition, in 2017, an additional 2500KM of fibre was laid covering 290 sub county headquarters. Furthermore, he depones that an additional 3436 KM of fibre have been laid under the *Government Common Core Network, Universal Health Care Connectivity and the County Connectivity Project*. Between 2017 and 2021, the 10<sup>th</sup> Respondent distributed 1.2 million devices to 22,891 primary schools with the goal of equipping the students with ICT skills. He further deponed that at the time, the 10<sup>th</sup> Respondent was undertaking a project in partnership with UNICEF to connect schools with internet and by then 19 schools had been connected.

151. Moreover, markets and Technical and Vocational Education and Training (TVETs) had been connected with internet. Besides, the 10<sup>th</sup> Respondent was at the time undertaking various activities to build capacity and literacy of citizens in ICT and had launched a portal for registration of citizens aimed at training 20 million citizens on ICT at: <https://smartacademy.icta.go.ke/basic-skills-registration>.

Furthermore, the 10<sup>th</sup> Respondent had commenced the process of laying 100,000 kilometers of fibre within 5 years and plans were also underway to roll out 25,000 hot spots throughout the Country to boost the public's access to internet and to set up 14,500 digital labs to increase connectivity.

152. The contention that the Respondents were offering government services exclusively online was also equally contested by all the Respondents.

153. I have carefully looked at the evidence adduced by the Petitioner. While the Petitioner claims that the Respondents are now offering all their services exclusively online, this position was strongly debunked by the Respondents. There was no demonstration that there was policy shift by government or its agencies that completely stopped offering its service to the public by physical means.

154. Moreover, while the Petitioner complained of low internet penetration, the respondents were able to demonstrate that they were taking positive steps to gradually increase the coverage by taking appropriate measures.

155. It is unrealistic to expect instant internet coverage throughout the country given the cost implication. Moreover, I would also think that it is unreasonable to suggest that

there should be absolute suspension of government services offered through the internet platform until such a time when the entire country will have been covered. As long as both physical services continue to be rendered to the areas not reached and to those that have challenges in using the internet, this Court sees nothing wrong with the gradual implementation as given the cost implication, the only way to tap on this revolutionary development is through progressive realization.

156. It is my finding that this Petition lacks merit, is misconceived and I thus dismiss the same in entirety with no orders as to costs.

***Dated, signed and delivered virtually at Nairobi this 16<sup>th</sup> day of October, 2025.***

.....  
**L N MUGAMBI**

**JUDGE**