



REPUBLIC OF KENYA



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Ndegwa v Muthoni t/a Peter M Muthoni & Co Advocates & another (Constitutional Petition E019 of 2024) [2025] KEHC 16344 (KLR) (11 November 2025) (Judgment)

Neutral citation: [2025] KEHC 16344 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CONSTITUTIONAL PETITION E019 OF 2024
DKN MAGARE, J
NOVEMBER 11, 2025

IN THE MATTER OF MISCELLANEOUS CIVIL APPLICATION NO. 30 OF 2019
IN THE MATTER ARTICLE 27, 28, 29(A) AND
39(1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 19, 20, 21,
22, 23, 27, 28, 29 (A), 39(1), 47, 48, 50, 159(2), 160(5), 232(1) (C) AND
(E), 232(2), AND 259 (1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS UNDER SECTIONS 79, 83(D) OF
THE LAW OF SUCCESSION ACT; CHAPTER 160 LAWS OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS UNDER SECTION 37
OF THE CIVIL PROCEDURE ACT; CAP 21 LAWS OF KENYA

AND

IN THE MATTER OF RIGHT TO FAIR ADMINISTRATION OF JUSTICE AND
IN THE MATTER OF DIGNITY OF THE PERSON UNDER
ARTICLE 28 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE FREEDOM AND SECURITY OF THE PERSON
UNDER ARTICLE 29 OF THE CONSTITUTION OF KENYA, 2010



AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO.
4 OF 2015 AND IN THE MATTER OF EQUALITY AND FREEDOM FROM
DISCRIMINATION UNDER ARTICLE 27, THE KENYA CONSTITUTION, 2010

BETWEEN

FRANCIS JAMES NDEGWA PETITIONER

AND

PETER M MUTHONI T/A PETER M MUTHONI & CO

ADVOCATES 1ST RESPONDENT

DEPUTY REGISTRAR 2ND RESPONDENT

JUDGMENT

1. By a Petition dated 13.11.2024, the Petitioner sought the following reliefs:
 - i. A declaration that the detention and imprisonment for 6 months of the Petitioner on 21st August 2022 pursuant to an order of committal to civil jail by Hon. Edina Nyaboke Angima (DR) in High Court Miscellaneous Case No. 30 of 2019 was malicious illegal, unconstitutional, ultra vires, actuated by mischief, other ulterior motives or plain sheer incompetence contrary to fair administration of justice and *the Constitution* of Kenya 2010.
 - ii. A declaration that the arrest and committal to civil jail for 6 months by an order of the 2nd Respondent as aforementioned was unprocedural, illegal, unconstitutional and violated the Petitioner's constitutional rights to liberty, right to human dignity, freedom of movement and lowered social standards as a senior citizen.
 - iii. A declaration that the 2nd Respondent failed and/or neglected their primary role of according the Petitioner the full benefit and protection of the law when they acted in the whim and the Application of the 1st Respondent and committed the Petitioner to civil jail as aforementioned.
 - iv. An Order for compensation to the 1st Petitioner for the loss of his personal liberty having been in custody for 6 months.
 - v. A declaration that the Petitioner is entitled to compensatory, general and exemplary, aggravated and punitive damages for wanton and gross violation of his constitutional rights by the Respondents severally and jointly and consequently an award of Ksh. 7,000,000/= or such an amount as the court deems fit to grant.
 - vi. A declaration that the Petitioner is entitled to costs.
2. The Petition was supported by the Supporting Affidavit of the Petitioner sworn on 13.11.2024 in which it is deposed as follows:
 - a. There was High Court Civil Case (OS) No. 63 of 2010 in which the Petitioner was the Respondent following which one Juliet Wangui Ndegwa was declared to be the sole registered



owner of LR Nyeri Municipality Block III/170 and the Petitioner retained the matrimonial home erected on Thegenge/Karia/288.

- b. Juliet Wangui Ndegwa died and the Petitioner filed succession cause number 74 of 2021 in his capacity as her husband and obtained a grant dated 15.2.2023.
 - c. Peter Mwangi Muthoni & Co. Advocates represented Juliet in the OS and so filed an advocate/client bill of costs against Juliet vide Misc. Cause No. 30 of 2019 and obtained certificate of costs for Ksh. 606,603.88/= against Juliet who died in 2020 before satisfying the costs.
 - d. Peter Mwangi Muthoni Advocates filed and obtained an order of substitution of Juliet by the Petitioner only for the purpose of the miscellaneous cause for taxed costs.
 - e. In execution for their bill of costs, the Advocate applied and the Petitioner was arrested and committed to civil jail for 6 months for the inability to settle the taxed costs.
 - f. The Petitioner was the personal representative of the estate of Juliet under Section 79 and 83 of the *Law of Succession Act*.
 - g. The 2nd Respondent violated Article 27 on discrimination, 28 on dignity and 29 on the security of person as well as freedom of movement under Article 39.
3. The 1st Respondents filed a Replying Affidavit sworn on 6.2.2025 in which it was deposed as follows:
- a. The Petition was frivolous and a sham.
 - b. The Petitioner wanted this court to judge itself and should have approached a different forum.
 - c. The Petitioner was an incessant self-litigator and had filed various misfilings in Magistrate court at Nyeri, Cooperatives Tribunal at Nairobi and the Nyeri High Court, ELC as well as the Nairobi and Nyeri Court of Appeal; and has in the past been laden with civil jail committal orders against him.
 - d. This Petition was res judicata.
 - e. The Petitioner did not appeal the decision in the Misc. Application No. 30 of 2019 substituting him.
 - f. The Petitioner was the Administrator of the estate of his wife.
 - g. The estate of the deceased Juliet eventually paid the 1st Respondent's dues in full in December 2023.
 - h. The court is functus officio.
 - i. The 1st Respondent is entitled to the cost of this Petition at Ksh. 200,000/=.
4. Vide the supplementary affidavit sworn by the Petitioner on 1.4.2025, the Petitioner deposed as follows:
- a. The Petitioner's named previous cases filed in courts were based on different facts and were largely determined in his favour.
 - b. Human rights had no restrictions and res judicata did not apply.
 - c. The grant in the estate of Juliet was confirmed when the Petitioner was still in civil jail and such committal was premature and unconstitutional.



Submissions

5. The Petitioner filed submissions dated 8.9.2025. It was submitted that paragraph 27 of the Replying Affidavit by the 1st Respondent confirmed that the Petitioner was unnecessarily and deliberately sent to civil jail.
6. It was the submission of the Petitioners that the Petitioner demonstrated the deliberate and intentional mischief that was sought and propagated by the 1st and 2nd respondents, respectively to intentionally punish the petitioner by unnecessarily sending him to civil jail.
7. It was also submitted that the Petitioner relied on the following provisions of *the constitution*:
 - a. Article 28 of *the Constitution* of Kenya 2010, which provides that: Every person has the inherent dignity and the right to have that dignity respected and protected.
 - b. Article 29: - Every person has the right to freedom and security of the person, which includes the right not to be: a) deprived of freedoms arbitrarily or without just cause. (f) treated or punished in a cruel, inhuman, or degrading manner.
 - c. Article 39: - Every person has the right to freedom of movement.
 - d. Article 47(1): - Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair.
 - e. Article 57: - The state shall take measures to ensure the rights of older persons: - to live in dignity and respect and be free from abuse.
8. On damages, the Petitioner pleaded Ksh. 7,000,000/= and also submitted and relied on Michael Kagoma Maina v The Hon. Attorney General, Civil Appeal No. 9 of 2015, where the Court of Appeal upheld an award of Kshs. 6,000,000/= as general damages for malicious prosecution.
9. On the part of the Respondents, the 1st Respondent filed submissions dated 8.8.2025. It was submitted that the Petitioner, as administrator and the personal representative of the estate of the deceased refused to pay out of the estate the 1st Respondent's taxed costs, which was contrary to the provisions of Section 83, paragraph (d), of *Law of Succession Act*, Cap 160, Laws of Kenya.
10. It was further submitted that Court was competent in making/giving the orders against the Petitioner after considering his responses, and thereby rendering res judicata, the present petition against the said orders, which the Petitioner now finds offending but did not apply to have them set aside.
11. The Petition, it was submitted, was a guise and mischievous, now otherwise seeking that this Honourable Court sit on appeal of its own decision, and decide against itself as a party, for doing constitutionally vested judicial authority. The 1st Respondent did not however cite judicial authorities.

Analysis

12. The Petitioner maintained that the 1st Respondent knew that the 1st Respondent's hard-earned dues were supposed to be recoverable from the Petitioner's wife's estate and the Petitioner was the administrator and the move to have him arrested and committed to civil jail was thus illegal, propagated by ulterior motive, unconstitutional and void.
13. It was the case of the Petitioner that the 2nd Respondent, who is supposed to be mandated with the role of custodian of the law, would, at the whim of the 1st Respondent, violate the same law and that



it did not matter to the 2nd Respondent that the Petitioner was a senior citizen, 80 years old, who was already encumbered with the death of his wife.

14. The Petitioner submitted the following constitutional infringements on the part of the Respondents:
- a. Article 28 of *the Constitution* of Kenya 2010, which provides that: Every person has the inherent dignity and the right to have that dignity respected and protected.
 - b. Article 29: - Every person has the right to freedom and security of the person, which includes the right not to be: a) deprived of freedoms arbitrarily or without just cause. (f) treated or punished in a cruel, inhuman, or degrading manner.
 - c. Article 39: - Every person has the right to freedom of movement.
 - d. Article 47(1): - Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair.
 - e. Article 57: - The state shall take measures to ensure the rights of older persons: - to live in dignity and respect and be free from abuse.
 - f. Article 9: - of the International Covenant on Civil and Political Rights (ICCPR): - (i) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty except on the grounds of law and in accordance with such procedure as established by the law. (ii) Anyone who has been a victim of unlawful arrest or detention shall have the enforceable right to compensation.
 - g. Article 11 of the International Covenant on Civil and Political Rights: - No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation.
15. 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.
16. On the other hand, Article 29 of *the Constitution* provides as doth:
- Every person has the right to freedom and security of the person, which includes the right not to be—
- (a) deprived of freedom arbitrarily or without just cause;
 - (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;
 - (c) subjected to any form of violence from either public or private sources;
 - (d) subjected to torture in any manner, whether physical or psychological;
 - (e) subjected to corporal punishment; or
 - (f) treated or punished in a cruel, inhuman or degrading manner.



17. It was the case of the Petitioner that there were multiple violations of his rights as enshrined in the Constitution and the Respondents intentionally and deliberately moved to punish the Petitioner by unnecessarily sending him to civil jail.
18. On the other hand, the 1st Respondent's general case as discernible from the Replying Affidavit dated 6th day of February, 2025 and sworn by Peter Mwangi Muthoni was that the petition was frivolous. It was deposed that the Petitioner rightly served in civil jail from mid-September 2022 through to 13th March 2023.
19. Further, that the 1st Respondent applied to the 2nd Respondent to release the Petitioner by operation of law, and the wife's estate eventually paid the 1st Respondent's hard-earned dues in December 2023 in full.
20. It therefore follows that it is not in dispute that the 1st Respondent caused the arrest and incarceration of the Petitioner in jail with the aim to regain what he termed as his hard earned dues. As was stated in the case of Republic vs. Commissioner of Police and Another ex parte Michael Monari & Another [2012] eKLR:-

The police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.

21. A determination of the Petition turns on the weight of the assertions in the Replying Affidavit by the 1st Respondent. The 1st Respondent's general case was that this court is functus officio on the issues raised in the Petition. The reason for such a sharp direction was that this court had committed the Petitioner to civil jail after hearing him and he had not appealed against the decision to commit him to civil jail.
22. It is the common position of the parties that the Petitioner served 6 months in civil jail. Indeed, the objective of the law was served. In his further affidavit, the Petitioner appeared to state that even though he had been unconstitutionally committed to civil jail, human rights, per the United Nations Declaration of Human Rights, 1945 had no restriction and res judicata could not apply. Section 7 of the Civil Procedure Act, (Cap 21), defined res judicata as follows:

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

23. The question of the conclusion and merit or otherwise of the process of committal of the Petitioner to civil jail was not before this court. The issue of res judicata could not apply. However, was this court functus officio on the determination as related the constitutional rights that were allegedly infringed? The Supreme Court of Kenya in Raila Odinga –Vs- Iebc & 3 Others Petition No. 5 Of 2013 cited



with approval the following passage from *The Origins of the Functus Officio Doctrine with Specific Reference to its Application in Administrative Law* by Daniel Malan Pretorius:-

...The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.

24. This Court, Muchemi J allowed the application filed by the 1st Respondent in Miscellaneous Application No. 30 of 2019 following which the Petitioner herein substituted Juliet Wangui Njenga as the client for the purpose of the Advocate Client Bill of Costs in respect of legal representation in HCCC No. 63 of 2010 OS in which the 1st Respondent represented the late Juliet Wangui Ndegwa. It was the common position of the parties that the OS was in respect of matrimonial property dispute involving the Petitioner and the deceased Juliet Wangui Ndegwa, his estranged spouse. As the Supreme Court reasoned in *Raila Odinga* (supra):

It is a legal and constitutional obligation of any court, from the basic-level to the highest level, to preserve and protect the adjudicatory forum of governance, and to uphold decorum and integrity in the scheme of justice-delivery. It follows that the court's jurisdiction, in oversight of the question of conscientious and dignified management of the judicial process, and in safeguarding the scheme of the rendering of justice, will not be exhausted until the court is satisfied and it declares as much...

25. It is discernible from the facts of this case and it is not a disputable matter that the Petitioner was the Administrator of the estate of the late Juliet Wangui Ndegwa. The Petitioner was sent to serve a six-month civil jail term on 21.8.2022 pursuant to an order of this court in the taxation proceedings.
26. Another important aspect of these proceedings is that the Petitioner's position is that he participated in the Application by which he was directed to substitute Juliet Wangui Ndegwa, deceased. He opposed the application but the same was allowed in favour of the 1st Respondent. He however, did not file an appeal or review but opted to file a constitutional petition alleging that the committal to civil jail infringed on his rights: dignity, security, discrimination, movement and fair administrative action.
27. This court committed the Petitioner to civil jail through due process and as the Petitioner did not challenge the said process by way of appeal or review, the committal to civil jail is considered lawful. It would be giving and taking at the same time if this court were to find that it issued committal orders in breach of constitutional rights of the Petitioner. A court of law does not countenance an illegality and injustice for the court is only meant to prevent and remedy illegalities and injustices.
28. Failure to satisfy a decree or order of court was contempt but not inherently criminal contempt. The Petitioner did not state how the instigation of the process of his committal to civil jail was malicious and unfounded as to violate his constitutional rights through abuse of the court process. This was a civil procedure and not criminal in nature and was ordered and supervised by this court itself. Nothing was said to fault the police officers who arrested the Petitioner and the process of his arrest and committal to civil jail remained untainted. The joinder of the Honourable Deputy Registrar for Court for matters she conducted in good faith was unwarranted and overreaching. In the case of *R. v Chief Magistrates' court Mombasa Ex parte Ganijee and Another* (2002) 2 KLR 703 it was held that:

It is not the purpose of a criminal investigation or a criminal charge or prosecution to help individuals in the advancement of frustrations of their civil cases. That is an abuse of the process of the



court. No matter how serious the criminal charges may be, they should not be allowed to stand if their predominant purpose is to further some other ulterior purpose. The sole purpose of criminal proceedings is not for the advancement and championing of a civil cause of one or both parties in a civil dispute, but it is to be impartially exercised in the interest of the general public interest. When a prosecution is not impartial or when it is being used to further a civil case, the court must put a halt to the criminal process. No one is allowed to use the machinery of justice to cause injustice and no one is allowed to use criminal proceedings to interfere with a fair civil trial. If a criminal prosecution is an abuse of the process of the court, oppressive or vexatious, prohibition and/or certiorari will issue and go forth... When a remedy is elsewhere provided and available to person to enforce an order of a civil court in his favour, there is no valid reason why he should be permitted to invoke the assistance of the criminal law for the purpose of enforcement. For in a criminal case a person is put in jeopardy and his personal liberty is involved. If the object of the appellant is to over-awe the respondent by brandishing at him the sword of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by the court... In this matter the interested party is more actuated by a desire to punish the applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive and that is when the High Court steps in.

29. This court will only interfere with the powers of the Directorate of Criminal Investigations and the Director of Public Prosecutions where the same is not exercised in the spheres of the law. As was held by Nyamu, J (as he then was) in *Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323*:

The Court can only intervene in the following situations:

- (1) Where there is an abuse of discretion;
- (2) Where the decision-maker exercises discretion for an improper purpose;
- (3) Where the decision-maker is in breach of the duty to act fairly;
- (4) Where the decision-maker has failed to exercise statutory discretion reasonably;
- (5) Where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power;
- (6) Where the decision-maker fetters the discretion given;
- (7) Where the decision-maker fails to exercise discretion; and
- (8) Where the decision-maker is irrational and unreasonable.

30. The Petitioner did not demonstrate how the process of his arrest, though judicially ordered, infringed on his rights. In the same vein, the court in the case of *Kuria & 3 Others vs. Attorney General [20021 2 KLR 69]* observed as doth:

1. The court has the power and indeed the duty to prohibit the continuation of criminal prosecutions if extraneous matters divorced from the goals of justice guide their instigation.
2. It is the duty of the court to ensure that its processes are not used as tools for vilification on issues not pertaining to that which the system was even formed to perform.
3. An order of prohibition should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie on society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious.



4. The machinery of criminal justice is not to be allowed to become a pawn in personal feuds and individual vendetta. The power of judicial review is invariably invoked so as to jealously guard it from this abuse.
 5. It is the duty of the court to ensure that the utilization and or invocation of its processes and the law is not actuated by other considerations so divorced from the goals of justice as to make the court virtually a scapegoat in personal score settling and vendetta.
 6. The limits of judicial review should not be curtailed but should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in contemporary society.
 7. 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. It is therefore imperative that the intrusion of judicial review remedies into criminal proceedings would have the effect of requiring a much broader approach.
 8. It does not matter whether the decision has been made or not, what matters is the objectives for which the court procedures are being utilized. Once it is decided that the process is an abuse, it matters not that it has been commenced or whether there was acquiescence by all parties. The duty of the court in such instances is to purge itself of such proceedings. Thus whereas the court cannot order that the prosecution be commenced, because already it can still order that the continued prosecution be stayed. An order of prohibition can be issued to prohibit the continued hearing.
 9. An order of prohibition should be granted where there is an abuse of the process of the court, which will have the effect of stopping the prosecution already commenced. A prerogative order is an order of a serious nature and cannot and should not be granted lightly. There should be concrete grounds for supposing that continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest could be best served by staying of the prosecution.
 10. In the instant case several allegations of selective prosecution, harassment and pressure from the state were made. However no evidence of those allegations or of malice unlawful actions, excess or want of authority and or manipulation had been shown.
 11. In order for an application such as this one to succeed, there is need to show how the court is being abused or misused, there is need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution.

The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in society. There is a public interest underlying every criminal prosecution, which are being jealously guarded, whereas at the same time there is private interest of the rights of an accused person to be protected. Given these bipolar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence.
31. The Petitioner could not subject himself to the jurisdiction of this court, face proceedings in relation to contempt for failure to satisfy the taxed costs and having not disputed the said processes turn around and claim infringement of his constitutional rights based on the same processes. This reminds me of



the words of Portia, disguised as Balthazar in Act 4 Scene 1 (Line 320) in William Shakespeare's *The Merchant of Venice* as doth:

Tarry a little. There is something else.
Unto the state of Venice.
Are by the laws of Venice confiscate
One drop of Christian blood, thy lands and goods
But in the cutting it, if thou dost shed
Take then thy bond, take thou thy pound of flesh,
The words expressly are a pound of flesh.
This bond doth give thee here no jot of blood.

32. As to general damages, the relevant principles applicable to award of damages for constitutional violations under *the Constitution* were explained by the Privy Council in the case of *Siewchand Ramanooop vs The AG of T&T, PC Appeal No 13 of 2004*. It was as doth:

When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches.

33. The same view was expressed by the Court of Appeal in *Peter Ndegwa Kiai t/a Pema Wines & Spirits v Attorney General & 2 others (Civil Appeal 243 of 2017) [2021] KECA 328 (KLR) (17 December 2021) (Judgment)* as doth:

It is notable in this respect that comparative jurisprudence limits the award of general damages in constitutional cases to only proven damages and not presumed damages. In *Ntanda Zeli Fose vs Minister of Safety and Security (supra)*, the Court held that an award of constitutional damages in addition to delictual damages would not be appropriate, and that delictual damages are an adequate vindication of the Plaintiffs constitutional rights. The Court was however not decided on the nature of an award where delictual damages are not available, and observed that the law was flexible to provide relief that was appropriate for a breach of constitutional rights.

14. The US Supreme Court in *Carey vs Phipus, 435 U.S. 247 (1978)* ruled that while presumed compensatory damages may not be awarded in an action for a violation of procedural due process, nominal and proven compensatory damages are appropriate to redress such a grievance. Presumed compensatory



damages in this regard are general damages that are recoverable without proof of actual loss.

34. Therefore, the trite law on the award of general damages in respect of constitutional rights infringement is based on the guiding principle that an award of general damages in constitutional petitions is discretionary and will depend on the circumstances of each case, and can indeed be granted as compensation for proven loss.
35. Having arrived at a conclusion that this court was *funtus officio* on the issue of breach of the constitutional rights of the Petitioner by arrest and committal to civil jail, I find no basis for awarding general damages that the Petitioner claimed since the petition is wrongly before this court. Had I found breach, I would have awarded nominal damages of Ksh. 500,000/=.
36. On costs, the award of costs in this court are governed by Section 27 of the *Civil Procedure Act*. They are discretionary. The Supreme Court has 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.
37. Whereas the 1st Respondent claimed costs of Ksh. 200,000/=, the substratum of the dispute relates to the role of the Petitioner as Administrator of the estate of the late Juliet Wangui Ndegwa. In the circumstances and the spirit of keeping settled matters to rest, I direct each party to meet their own costs.

Determination

38. The upshot is that I make the following orders: -
- a. The Petition is without merit and is dismissed in limine.
 - b. Each party to bear their own costs of the petition.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 11TH DAY OF NOVEMBER, 2025.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for parties



