

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
PETITION NO. E008 OF 2024
AS CONSOLIDATED WITH PETITION NO. E010 OF 2024

**IN THE MATTER OF ARTICLES 2, 10, 22 (C), 23, 48, 50(1), 95(3), 109,
165, 259 AND 258 OF THE CONSTITUTION OF KENYA, 2010**

=AND=

**IN THE MATTER OF SECTIONS 3,4,12,17 AND 32 OF THE SMALL
CLAIMS COURT ACT, CHAPTER 10 LAWS OF KENYA**

=AND=

**IN THE MATTER OF RULES 5(3) AND 31 OF THE SMALL CLAIMS
COURT RULES, 2019**

=AND=

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF
RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE
RULES, 2013**

=BETWEEN=

JAMES MURIITHI GATHAIYA PETITIONER

=VERSUS=

**THE ATTORNEY GENERAL 1ST
RESPONDENT**

**THE NATIONAL ASSEMBLY 2ND
RESPONDENT**

**THE REGISTRAR SMALL CLAIMS COURT 3RD
RESPONDENT**

=AND=

176 INTERESTED PARTIES

Coram Before: Justice E. Ogola - Principal Judge

Justice A. Mabeya, FCI Arb, Judge

Justice R. Nyakundi, Judge

Legal Team: M/S Mathai Maina Advocate for the Petitioners in No. E008 of 2024
M/S Winnie Cheruiyot for the 1st and 3rd Respondents
M/S Ruth Nyaberi for the 2nd Respondent
M/S Kimondo Gachoka & Co. Advocates for the Interested Parties
M/S Morgan Omusundi & Co. Advocates for the Petitioner in No. E010 of 2024

J U D G M E N T

1. This judgment determines the instant petition which was consolidated with **Petition E010 of 2024** vide an Order made on **27/1/2025**. As at the time of consolidation, the Hon. Chief Justice had on the **13/12/2024** empaneled this bench to hear and determine **Petition No. E008 of 2024**.

The Parties

2. The Petitioner in **Petition E008 of 2024** is **James Muriithi Gathaiya** the Claimant in **Eldoret SCCC No. E1026 OF 2023 James Muriithi Gathaiya vs. Javan Kedode Mwanga**.
3. The Petitioner in **Petition No. E010 of 2024** is **Reuben Oyamo Odoyo** the Respondent in **Eldoret SCCOM Case No. E247 of 2023 Jane Rose Ekisa vs. Reuben Oyamo Odoyo**.
4. The 1st Respondent is the **Attorney General of the Republic of Kenya**, a public Office created under **Article 156 of the Constitution of Kenya** and is the Principal Legal Adviser to the Government of Kenya.
5. The 2nd Respondent is the **National Assembly**, one of the two Chambers of Parliament created pursuant to **Article 93 of the Constitution of Kenya** holding amongst other functions, legislative powers.

6. The 3rd Respondent is the Registrar of Small Claims Court an Office created pursuant to **Section 8 of the Small Claims Court Act** and is the administrative head of the Small Claims Court (“the Court”).
7. The Interested Parties are parties against whom various claims had been lodged in the Small Claims Court in Eldoret which claims are pending determination in that Court. They had challenged the jurisdiction of that Court to hear and determine claims for personal injuries arising out of road traffic accidents (“RTA”), but which objections were dismissed by the Court and they preferred appeals against that dismissal. Those appeals are pending before the High Court at Eldoret for determination.

Petition No. E008 OF 2024

8. In Petition E008 of 2024 dated **9/4/2024**, the Petitioner sought the following reliefs:
 - a) *A declaration that the Small Claims Court has jurisdiction to entertain personal injuries claim pursuant to **Section 12(d) of the Small Claims Court Act and Rules, and Rule 5(3) of the Small Claims Court Act and Rules, 2019.***
 - b) *A declaration that there is no ambiguity on **Section 12(d) of the Small Claims Court Act and Rules 5(3) of the Small Claims Court, Rules 2019.***
 - c) *The interpretation import, intention and purpose of **Section 12(d) of the Small Claims Court Act and Rules 5(3) of the Small Claims Court, Rules 2019.***
 - d) *Costs and interest on the petition.*
 - e) *Any other order the Court may deem fit and just to grant*

The Petitioner’s case

9. The Petitioner laid down the background behind the enactment of the **Small Claims Court Act “the Act”** and its jurisdiction. He contended that the Act was designed with a specific philosophy in mind and it was

given control over its own procedures in determining claims before it, guided by principles of natural justice which procedures are distinct and separate from other procedural frameworks, including common law principles not directly or indirectly adopted by the Act.

10. The Petitioner avers that to facilitate expeditious disposal of matters, strict rules of evidence were deliberately excluded under **Section 32 of the Act**. He pointed out that the Act provides that when a person is claiming compensation for personal injuries, it is not mandatory to plead particulars but rather all that a claimant is required to do is to attach to the statement of claim a medical report from a licensed medical practitioner and any receipts for medical expenses incurred on treatment.
11. The Petitioner further avers that acting on these provisions, thousands of suits were filed seeking compensation for personal injuries sustained as a result of road traffic accidents that eventually ended up being dismissed based on challenges to the jurisdiction of the Court to handle and determine personal injury claims. It is on that basis that the Petitioner moved the Court for the aforesaid reliefs.

1st and 3rd Respondent's case

12. The Attorney General opposed the petition vide Grounds of Opposition dated **27/9/2024**, contending that there was no ambiguity or lack of clarity in **Section 12 of the Act and Small Claims Rules, "the Rules"**, which clearly outlines the jurisdiction of the Small Claims Court and includes personal injury claims; that that Court was a subordinate Court pursuant to **Article 169(1)(d) of the Constitution** and as such shall be guided by the rules of evidence, doctrines of equity, common law and any other written law; that the Petition was premature and the Petitioner should have waited for the preliminary objections to be determined first before lodging the Petition; that there was no ruling to show that any case had been dismissed on grounds of lack of jurisdiction on the part of the Court to determine personal injury claims; that the Act

has specifically excluded those matters that the Court has no jurisdiction on in **Section 13 of the Act** and personal injury claims is not part thereof.

13. The Petitioner states that the mere fact that the Small Claims Rules do not provide in mandatory terms that the particulars of negligence should be pleaded does not ipso facto mean that the same should not be pleaded. That the First Schedule to the Small Claims Rules Form SCC1 shows how a statement of claim ought to look like and under paragraph 4 thereof, a party is supposed to state briefly the circumstances under which the claim arose and those particulars can be inserted there.

2nd Respondent's Case

14. The 2nd Respondent opposed the petition vide a replying affidavit sworn on the **16/9/2024** by **Samuel Njoroge**, the Clerk of the National Assembly. It was deposed that the Petitioner had failed to meet the mandatory requirements of precision in pleading, as established in **Anarita Karimi Njeru vs Republic (No, 1) [1979] KLR 154**; that he had not clearly specified Constitutional provisions that had been violated; and that the Petition did not provide a concise factual basis for the alleged breaches but merely made general references to the **Act** and its provisions.
15. It was further deposed that the Petition failed to spell out the specific actions or omissions attributable to the National Assembly that warranted its inclusion as a Respondent; that the Petitioner had overlooked an available remedy under **Article 119 of the Constitution** which allows for a Petition to be made to Parliament to consider any matter within its authority. It was maintained that the petition lacked merit and should be dismissed with costs.

Interested Parties' Case

16. The Interested parties opposed the Petition vide a replying affidavit sworn on **23/9/2024** by one **Wilson Waweru**. He deposed that the Petition was (incompetent and bad in law). That a claim for personal injury resulting from a Road Traffic Accident is based in Tort and/or Negligence and negligence ought to be pleaded and the same is not provided for under the '*Form SCC- 1 - the statement of Claim*'; that a Claim for personal injury resulting from RTA is a question of negligence that can only be determined by way of facts advanced through oral and documentary evidence and testimonies, which question does not qualify as a simple issue to be determined summarily without a comprehensive hearing; further, that **Rule 23 (3) of the Small Claims Court Rules and Section 38 of the Act** restrict appeals from the Small Claims Court to *Points of Law*, yet a claim in tort/negligence, more so on RTA, requires the advancing of factual evidence which facts, should they be misinterpreted by the Adjudicator, would prejudice an appellant who shall be barred from challenging such decision on appeal hence a gross contravention and/or curtailment of the Right to Fair Hearing under **Article 50 (1) of the Constitution of Kenya 2010**.
17. The Interested Parties contended that Courts have selectively applied the provisions of the Act more so **Section 34 (1) of the Act** in favor of the Claimants whereby the Respondents have been compelled to honor judgments that have been delivered out of the 60 days period stipulated under **Section 34 of the Act**.
18. The Interested Parties maintained that in unquantified claims like negligence leading to personal injury claims, the Court is unsuited to handle the same since when a claim is unquantified, it ceases being a Small Claim and may morph into a claim at large.
19. The Interested Parties further aver that a Second Medical Examination is statutorily provided for under **Section 3A of the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act 2013**. Under that provision, no judgment or claim is payable to any Claimant unless, on the

request of the Insurer, such Claimant subjects himself to a second medical examination by a certified medical practitioner. That this is not feasible in view of the timelines set out under **Section 34 of the Act** thereby contravening **Article 50 of the Constitution**.

20. Finally, the Interested Parties state that the strict timelines of 60 days for the Claim to have been concluded curtails the Respondents' chance to investigate and authenticate the documents filed by the Claimant in support of a case, and further that **Rule 18 (4) of the Small Claims Court Rules** deny a Respondent a chance to cross examine the makers of such documents.

Petitioner's Submissions

21. The Petitioner submitted that the High Court has jurisdiction to interpret statutes. That the Petition satisfies the precision test as held in the case of **Anarita Karimi Njeru Vs Republic (supra)** and as affirmed in **Mumo Matemu Vs Trusted Society of Human Rights Alliance, Civil Appeal No. 290 of 2012** since he had set out the impugned provisions.
22. That **Section 12(1)(d) of the Act** expressly donates authority to that Court to determine claims for "*compensation for personal injuries,*" and that applying the literal rule, purposive rule and contextual statutory interpretation, the statutory language is plain and unambiguous and fully aligns with Parliament's intention under Article 94 of the Constitution. The cases of **County Government of Kiambu Vs The Senate & Others (2017) eKLR** and **Rotich Samwel Kimutai Vs Ezekiel Lenyongopeta & 2 Others (2015) eKLR** were cited in support of that proposition.
23. The Petitioner submitted that owing to **Sections 17 and 32 of the Act**, the Court is not bound by strict pleading requirements under the **Civil Procedure Rules** and therefore particulars of negligence are not mandatory as held by Aburili J. in **Kenya Orient Insurance Co. Ltd Vs Otieno (KSM Civil Appeal No. E166 of 2023)**.

24. On the effect of admissions, it was submitted that all the Respondents had, in their responses, conceded that the Small Claims Court has jurisdiction to determine personal injury claims and that these concessions reinforce the legislative intention that **Section 12(d) of the Act** be given its full effect.
25. Regarding the power of that Court to issue warrants of arrest and committal to Civil Jail, it was submitted that **Rule 25(1) of the Small Claims Court Rules** imports the **Civil Procedure Rules** on execution. That **Sections 38 and 40 of the Civil Procedure Act** together with **Order 22 Rules 31 and 32 of the Civil Procedure Rules 2010**, empowers that Court to arrest and commit Judgment Debtors in appropriate cases.
26. Finally, on whether the Court may entertain declaratory suits, it was submitted that, that Court is a subordinate Court under **Article 169(1) (d) of the Constitution**, with Adjudicators who are Judicial Officers appointed under **Article 172 of the Constitution** and **Section 6 (1) of the Act**.
27. The Petitioner, in conclusion, submitted that he had demonstrated both Constitutional and statutory grounds warranting the Court's intervention, and further that, the petition was meritorious and the Small Claims Court properly has jurisdiction over personal injury claims, declaratory suits and execution by arrest and committal. That in the premises, it was prayed that all the reliefs sought be granted.

1st and 3rd Respondents Submissions

28. For the 1st and 3rd Respondent, it was submitted that the Petition was **premature** as the Petitioner had not demonstrated any factual or legal basis to justify invoking the Constitutional jurisdiction of the High Court at this stage. That although the Petitioner claimed that preliminary objections challenging the Small Claims Court's jurisdiction to hear

personal injury matters were “at the brink of being dismissed”, no evidence was adduced to support this claim. That the Small Claims Court was empowered to interpret the law and determine its own jurisdiction and since it had not yet delivered its ruling on the objections, the Petitioner should have allowed that process to run its course.

29. It was submitted that the Petitioner had failed to show any crisis, ambiguity or uncertainty in the interpretation of **Section 12(1)(d) of the Act or Rule 5(1) of the Small Claims Court Rules** that would justify prematurely invoking Constitutional relief; that Constitutional remedies are remedies of last resort; therefore, the Petitioner should have first litigated the preliminary objections before the Small Claims Court and, if dissatisfied, pursue an appeal. Any attempt to invoke Constitutional proceedings at this stage would improperly circumvent statutory appellate procedures and undermine the jurisdiction of the High Court sitting as an appellate Court over the Small Claims Court.
30. On jurisdiction to determine personal injury claims, it was submitted that **Section 12(1)(d) of the Act** vests the Small Claims Court with jurisdiction over personal injury claims, subject only to the Court’s pecuniary limit of **Kshs. 1,000,000/-**. That “personal injury” is a broad concept that includes claims arising from assault, psychological harm and injuries caused by negligence and since different injuries attract different levels of damages, ousting jurisdiction merely on the basis of the nature of personal injury would be inappropriate.
31. It was further submitted that **Form SCC-1** in the First Schedule to the Rules required a claimant to briefly describe the circumstances giving rise to the claim. In the context of motor vehicle accidents or other negligence-based injuries, this necessarily involves pleading particulars of negligence to disclose a reasonable cause of action. It was opined that a mere statement that an accident occurred, without explaining how the Respondent is liable, would lead to dismissal for failure to disclose a cause of action not for want of jurisdiction hence, the requirement to plead

negligence does not remove personal injury matters from the jurisdiction of the Court. The case of **Gichovi Vs Kilem (Civil Appeal E020 of 2024) [2024] KEHC 10859 (KLR)** was cited in support of that proposition.

32. On statutory interpretation, it was submitted that **Section 12(1)(d) of the Act** presented no ambiguity and that the provision clearly conferred jurisdiction on the Small Claims Court to hear personal injury claims. Additionally, that under **Section 4 of the Act**, the Court is designated as a subordinate Court pursuant to **Article 169(1)(d) of the Constitution** and there is no Constitutional or statutory basis for excluding personal injury claims arising from road traffic accidents from its jurisdiction.
33. The 1st and 3rd Respondents concluded that the Petitioners attempt to prematurely invoke Constitutional jurisdiction was unfounded, unnecessary and contrary to established legal principles governing exhaustion of remedies.

2nd Respondent's Submissions

34. The 2nd Respondent filed written submissions dated **18/11/2024**. It urged that jurisdiction is a critical issue that must be determined at the outset of any legal proceedings placing reliance on the case of **Owners of Motor Vessel "Lilian S" Vs Caltex Oil (Kenya) Ltd [1989] KLR 1**.
35. It was submitted that under **Article 163 of the Constitution**, the High Court exercises appellate jurisdiction. That **Section 38 of the Act** limited appeals to the High Court on matters of law only; that **Section 38(2) of the Act** signifies that once the High Court has rendered itself on an appeal from the Small Claims Court, no further appeal is allowed to any other Court. It was submitted that this created a finality clause ensuring that the High Court's decision is conclusive, with no avenue to escalate the matter to the Court of Appeal or Supreme Court.

36. The 2nd Respondent submitted that the jurisdiction of the High Court on Constitutional matters is delineated under **Article 165(3)(d)**. That decisions under this Article are appealable to the Court of Appeal and ultimately to the Supreme Court as provided for under **Article 164(3)(a) of the Constitution**. Additionally, that these two jurisdictions are distinct in nature and scope and ought to be exercised separately and not contemporaneously.
37. It was therefore submitted that the consolidated matters before the Court comprising **Eldoret High Court Petition E010 of 2024, Petition E008 of 2024, and Civil Appeals E082-E088 of 2024** were fundamentally distinct in nature. That by consolidating the two categories of matters, this Court risked to unlawfully expand the appellate chain of the Small Claims Court, thereby violating statutory and Constitutional limits set under the **Act and Article 165(3)(d)** of the Constitution. This, it was submitted, that would violate the principles set out the cases of **Samuel Kamau Macharia & Another v KCB & 2 Others [2012] eKLR**, and **Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 Others [2017] eKLR**. It was submitted that this Court must interpret statutory provisions in light of legislative purpose, in accordance with the decision in **Alcoholic Beverages Association of Kenya Vs Kenya Film Classification Board & 2 Others (Civil Appeal 232 of 2017) [2022] KECA 1051 (KLR)**.
38. It was further submitted that the joinder of the **National Assembly** in both the petition and the appeals was improper and constituted a misjoinder of parties and causes of action; that the National Assembly was not a party before either the Small Claims Court or in **Petition E010 of 2024** and no nexus had been established between its actions and the alleged violations. Reliance was placed on **Trusted Society of Human Rights Alliance Vs Attorney General & 2 Others [2012] eKLR**, which required a Petitioner to demonstrate a direct link between the Respondent's conduct and the alleged infringement of rights. Additional

authorities cited included **Departed Asians Property Custodian Board v Jaffer Brothers Ltd [1999] 1 EA 55, Julius Meme v Republic [2004] eKLR; Trusted Society v Mumo Matemu & 5 Others [2014] eKLR; Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR; and Ledama ole Kina v Samuel Kuntai Tunai & 10 Others [2013] eKLR**, all of which emphasize the need for specificity, direct interest and demonstrable cause of action before a party can properly be joined.

39. It was therefore urged that the Court should strike out the consolidated matters for want of jurisdiction; to expunge **Petition E010 of 2024** for non-compliance with **Article 165(4)**; and to expunge the **National Assembly** from all proceedings for lack of a cause of action.

Interested Parties' Submissions

40. The Interested parties' filed submissions dated **7/10/2024** in which it was submitted that **Rule 23(3) of the Small Claims Court Rules** contravenes **Article 50 of the Constitution**. This is because it allows documentary evidence and expert reports to be adduced without calling the makers. That **Section 35 of the Evidence Act** provides that the maker of a document has to attend Court, arguing that the two provisions appear contrasting. The case of **Stephen Mwau Wariari v Dennis Mutwiri Muriuki & another [2022] eKLR** was cited in support of that contention.
41. It was further submitted that in proving negligence and towards proving loss and damages, claimants file several expert reports including police abstracts, medical reports and P3 forms among other documents. That an expert witness testimony enhances the credibility of a case, and expert qualifications and reputation lend weight to a party's arguments. That to deny either party a chance to test the makers of expert reports either by way of examination or cross examination was a miscarriage of justice.

42. That **Section 38 of the Act** which restricts appeals to purely points of law curtails the right to fair hearing. The cases of **Wachira v Mwai (Civil Appeal E022 of 2023) [2024] KEHC 3173 (KLR)** and **Mwangi v Kihiu (Civil Appeal 16 of 2023) [2023] KEHC 18643 (KLR)** were cited in support of that proposition. That since claims arising from RTA needed to satisfy the limb of liability (duty of care and breach of the same) and injuries, liability is discerned from a set of facts which point towards negligence. A court has to arrive at a holding on whether the said duty was breached and therefore, denying a Respondent a chance to seek a second opinion on appeal curtails the right to a fair hearing.
43. It was submitted that by the use of the term 'shall' in **Section 34(1) of the Act**, the proceedings in the Small Claims Court should be finalized within 60 days. The cases of **Commission for Human Rights & Justice (CHRJ) & Another v Chief Officer, Medical Services County Government of Mombasa & 3 others (Constitutional Petition E003 of 2022) [2022] KEHC 12994 (KLR)** was cited on the meaning of the term 'shall'. That the Small Claims Court was acting irregularly when it issued warrants of attachment beyond the 60-day period. The case of **Martha Wangari Karua v Independent Electoral and Boundaries Commission & 3 others [2019] eKLR** was cited in support of that submission.
44. It was submitted that unliquidated claims fall beyond the jurisdiction of that Court as it was a unique commercial Court brought into being by statute with specific duties and powers designed to provide judicial determination involving small amounts of money. Its establishment was to intensify and facilitate the effortless nature of business in the country by setting up a favorable condition for small and medium enterprises to grow by minimizing the cost and time by expediting commercial actions and not for unliquidated claims. Reference was made to **Black's Law Dictionary** definition of liquidated damages and the cases of **Cox V**

Mclaughlin76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164 and Ogwari vs. Hersi [2023] KEHC 20111 (KLR) in support of that proposition.

45. It was concluded that the provisions of **Sections 28, 32, 34(2), 38 of the Small Claims Court Act Cap 10A** and **Rules 18, 23 and 32** contravene **Articles 50 of the Constitution of Kenya 2010** and the Principles of Natural Justice.

Petition No. E010 OF 2024

46. In this Petition dated **6/5/2024**, the Petitioner sought the following reliefs: -

- a) *THAT a declaration do issue that **Rule 25 (1) of the Small Claims Court Rules**, in so far as it incorporates the modes of execution in the Civil Procedure Rules that have provisions for arrest and committal to civil jail are ultra vires and inconsistent with **Sections 37, 39, 40 and 50 (2) (b) of the Small Claims Court Act, Cap. 10A** as read with **Article 94 (6) of the Constitution of Kenya, 2010**.*
- b) *THAT a declaration do issue that **rule 25 (1) of the Small Claims Court Rules** in so far as it incorporates the application of the Civil Procedure Rules in execution of its judgments by way of arrest and committal to civil jail it fails to meet limitations to the right under **Article 24 of the Constitution of Kenya, 2010** and also does not accord a reasonable and justifiable limitation to the right to liberty guaranteed under **Article 29 of the Constitution of Kenya, 2010** and it is null and void by dint of **Article 2 of the Constitution of Kenya, 2010**.*
- c) *THAT a declaration do issue that the arrest and incarceration of the Petitioner at the Eldoret Central Police Station was a breach of the right to liberty under **Article 29 of the Constitution of Kenya, 2010** coupled with an award of damages.*
- d) *Costs and Interests.*

47. The Petitioner laid down the facts preceding the Petition. He averred that the dispute originated when one **Jane Rose Ekisa**, instituted a claim against him in the Eldoret Small Claims Court, filed as **SCCOM. Case No. E247 of 2023 - Jane Rose Ekisa v Reuben Oyamo**. It resulted in a judgment being entered in her favour for a money decree.
48. Subsequently, she obtained a warrant of arrest in execution of the money decree. The Petitioner was then arrested by police from the Eldoret Central Police Station on the night of **28/3/2024**, detained over the civil debt and compelled to enter into an arrangement to settle the judgment in order to regain his liberty on the afternoon of **29/3/2024**.
49. He contended that this arrest and incarceration over a civil debt constituted a breach of his fundamental right to liberty guaranteed under **Article 29 of the Constitution**. That the Act does not authorize arrest or committal to civil jail as a mode of execution but specifies only four alternatives. That **Rule 25(1) of the Rules**, which incorporates the **Civil Procedure Rules** to permit civil jail, is *ultra vires* **Sections 37, 39 and 40 of the Act** and unlawfully exceeds the delegated legislative authority under **Article 94(6) of the Constitution**.
50. That the incorporation of civil jail by **Rule 25(1) of the Rules** constitutes an unreasonable and unjustifiable limitation of the right to liberty under **Article 24 of the Constitution**. That the Act only limits liberty for contempt of Court (**Section 47**) for a maximum of five days. This makes the potential six-month committal under the incorporated provisions of the Civil Procedure Rules unconstitutional. Furthermore, that the use of civil jail violates **Article 11 of the International Covenant on Civil and Political Rights (ICCPR)**, which prohibits incarceration merely on the ground of inability to fulfil a contractual obligation.
51. It is on these facts and statements that the Petitioner sought the aforementioned prayers.

1st Respondent's Replying affidavit in response to the petition

52. The 1st Respondent opposed the petition vide a Replying affidavit dated **14/10/2024**, sworn by **Winnie Jebet Cheruiyot**, the Principal State Counsel opposing the Petition. She detailed the history of the execution proceedings and denied the Petitioner's allegation that he was compelled to enter into a debt settlement agreement while at the police station.
53. The 1st Respondent opposed the Petitioner's Constitutional arguments, urging that the right to liberty is not an unlimited Constitutional right and can be limited by law, among other things, pursuant to a Court order. That the fact that the Act does not explicitly provide for committal to civil jail does not bar the Court from applying any other law, including the **Civil Procedure Rules and Act**, to ensure that its orders are complied with when all the options are frustrated. Additionally, that the Petitioner had not provided any evidence to demonstrate that the International Covenant on Civil and Political Rights has been ratified in Kenya.

Petitioner's submissions

54. It was submitted for the Petitioner that his arrest in execution of the civil debt was unconstitutional, null and void as the Act had not expressly provided for arrest and committal to civil jail as a mode of execution; that arrest and committal to jail is not provided as a mode of execution in that Court under **Section 37 (1) of the Act**; that the procedure and manner of execution of a decree of the Court are expressly provided for in **Sections 37, 39 and 40 of the Act**; that **rule 25 (1) of the Rules** was therefore ultra-vires **Sections 37 and 40 of the Act**.
55. Further that, by incorporating by reference the Civil Procedure Rules, it went beyond the delegated authority to make rules as conferred by **Section 50 (2) (b) of the Act** as read with **Article 94 (6) of the**

Constitution of Kenya. That the authority under section 50 of the Act was limited to bringing into effect the provisions of the Act. That since the Act had not specifically expressed an intention to limit the right to liberty by providing for arrest and committal to jail as a mode of execution of a money decree, **rule 25 of the rules** was in breach of **Article 24 (2) (a), (b) and (c) of the Constitution of Kenya** for incorporating the provisions for arrest and committal to civil jail under the Civil Procedure Act. The case of **Katiba Institute & another v Attorney General & another; Independent Policing and Oversight Authority & 3 others (Interested Parties) (Constitutional Petition 379 of 2017) [2022] KEHC 17072 (KLR)** was relied on in support of the argument that the incorporation by reference was irregular.

56. It was submitted that the Act had only expressly provided a limitation to the right to liberty in cases of the offence of contempt of Court under **Section 47 (2) and (3) of the Act**. That by **rule 25 (1) of the Rules** incorporating the provisions of the Civil Procedure Rules, which have an extended provision of committal to civil jail to a maximum of 6 months, it could not constitute a reasonable and justifiable limitation by dint of **Article 24 (1) of the Constitution of Kenya**.
57. Finally, that the Act was enacted with the knowledge and the fact in mind that Kenya had ratified the **International Covenant on Civil and Political Rights 1966** which by **Article 11** expressly prohibits having a provision of incarceration of a person merely on the ground of inability to fulfil a contractual obligation.

1st Respondent's written submissions

58. The 1st Respondent submitted that the right to liberty enshrined in **Article 29 of the Constitution** was not absolute and can be curtailed by law, especially where there is a "just cause", such as a lawful Court order.

That since the Civil Procedure Rules provide for committal to civil jail where a debtor has not honored a debt without a plausible explanation, and the Petitioner offered no such reason, the Court's order was deemed lawful. Thus, the Petitioner's rights under **Article 29** were not violated.

59. It was submitted that the Act should be interpreted wholesomely and purposively to ensure that justice is rendered in the simplest form and that Court orders are enforced. That the Act's execution provisions (**Sections 37, 39, 40**) may not always work for instances, if a debtor lacks movable property or salary. That **Section 36(4) of the Act** was open-ended and was intended to give the Court the freedom to adopt any process to deliver justice and that the "any other order" includes committal to civil jail as a "very last resort" against an uncooperative litigant. Therefore, **Rule 25(1)** is Constitutional and not *ultra vires*, but merely gives effect to the force of the law.

Analysis and Determination

60. We have considered the pleadings, the written submissions and oral highlights by learned Counsel. The issues that fall for determination are: -

- a) ***Whether this Court has jurisdiction to entertain the consolidated petition.***
- b) ***Whether Petition No. E008 of 2024 meets the threshold of a Constitutional Petition.***
- c) ***Whether the Small Claims Court has jurisdiction to entertain personal injury claims under Section 12 (1) (d) of the Small Claims Court Act, CAP 10A as read with Rule 5 (3) of the Small Claims Court Rules, 2019.***
- d) ***Whether Sections 34(1) and 38 of the Act and Rules 18 and 23(3) of the Small Claims Court Rules are null and void to the extent of their being inconsistent with Article 50(1) of the Constitution of Kenya.***

e) ***Whether Rule 25 of the Small Claims Court Rules is unconstitutional in so far as it permits execution by committal to civil jail.***

Whether this Court has jurisdiction to entertain the consolidated petition.

61. By a preliminary objection dated **15/11/2024**, the 2nd Respondent contended that this Court has no jurisdiction to entertain the consolidated petitions because the Chief Justice had not empaneled this bench to determine **Petition No. E010 of 2024**; that this Court cannot entertain matters emanating from different jurisdictions simultaneously, to wit, under **Articles 165 (3) (d) and 165 (3) (e)**; that by consolidating **Petition No. E010/2024** and **Civil Appeal Nos. E082 - E088 of 2024** and **Petition No. E008 of 2024**, it creates procedural conflicts that cannot be reconciled in a single consolidated hearing. Finally, that the 2nd Respondent was not a party to **Petition No. E010 of 2024** and the **Civil Appeal Nos. E082 - E088 of 2024** and therefore there was misjoinder of parties.

1. **Ms. Nyaberi**, Learned Counsel for the 2nd Respondent submitted that since the Chief Justice had not assigned **Petition No. E010 of 2024** to the bench, the bench had no jurisdiction to entertain it. That in that petition, the Petitioners sought Constitutional Interpretation under this Court's original jurisdiction to hear and determine questions of interpretation of the Constitution under **Article 165(3)(d)**.
2. That under **Article 165 (3) (e)**, this Court exercises its appellate jurisdiction and its determination on matters emanating from the Small Claims Court is final. That if the matter proceeded as consolidated, the matters to be determined in this Court's appellate jurisdiction will be subject to appeal to the Court of Appeal and Supreme Court when its decision on the interpretation of the Constitution is appealed against.

3. We have carefully considered the record. We agree with **Ms. Nyaberi** that as at the date of the Preliminary Objection, the Chief Justice had not yet empaneled this bench to hear **Petition No. E010 of 2024**. However, on **13/12/2024**, the Chief Justice empaneled this bench to hear and determine the said petition. The order for consolidation of **Petition Nos. E008 of 2024 and E010 of 2024** was subsequently made on **27/1/2025** which was after the empanelment. Accordingly, that part of the objection became otiose.
4. The other ground is that this Court cannot exercise two distinct jurisdictions simultaneously, viz, Constitutional interpretation under **Article 165(3)(d) of the Constitution** and the appellate jurisdiction over Small Claims Court matters under **Article 165(3)(e)**. That is so because, while a decision under **Article 165(3)(d) of the Constitution** is appealable all the way to the Supreme Court, a decision under **Article 165 (3) (e)** as read with **Section 38 of the Small Claims Court Act** is final.
5. We agree with **Ms. Nyaberi** that the two jurisdictions cannot be exercised simultaneously on the grounds she advanced. However, that is not the case here. From the record, this Court did not consolidate the two petitions, **E008 of 2024 and E010 of 2024** with **Civil Appeal Nos. E082 - E088 of 2024** as contended. Indeed, the said appeals were never referred to this bench by the Chief Justice for any determination. There is no order on record to that effect. The appeals may have been consolidated at their Station of filing but they were never referred to us or assigned to this bench by the Chief Justice for determination.
6. Our understanding is that, when the said appeals were filed, they triggered the filing of Constitutional Petition **No. E008 of 2024** dated **4/4/2024** while **CA No. 103 of 2024** triggered the filing of Constitutional Petition **No. E010 of 2024**. The fact that the records of the said appeals were placed before us did not mean that they were so placed for our determination. In our view, they were only produced as

exhibits or evidence of the prejudice that the Petitioners alleged they stood to suffer if the **Sections of the Act** they sought to be interpreted were not interpreted in their favor. The said appeals were basically placed before us as evidence of what had transpired prior to the institution of the Petitions but not for our determination.

7. Accordingly, there is no appeal before us invoking this Court's appellate jurisdiction under **Article 165 (3)(e) of the Constitution**. This Court is only exercising its jurisdiction under **Article 165(3) (d) of the Constitution**.
8. Accordingly, the preliminary objection by the 2nd Respondent dated **15/11/2024** is without merit and is hereby dismissed.

Whether Petition No. E008 of 2024 meets the threshold of a Constitutional Petition.

9. It was contended by the 2nd Respondent that the said Petition did not satisfy the requirements of precision pleading in Constitutional violations as was enunciated in the case of **Anarita Karimi Njeru v Republic (supra)**; that the Petitioner did not clearly specify the Constitutional provisions that had been violated; that the factual basis of the breaches by the 2nd Respondent had not been specifically pleaded.
10. In the aforesaid **Anarita Karimi Njeru v Republic (supra)**, it was held that: -

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

11. In **Mumo Matemo v Trusted Society of Human Rights Alliance [2014] eKLR**, the Court of Appeal re-enforced and re-emphasized the said position as follows: -

“... the principle in Anarita Karimi Njeru (supra) underscore the importance of defining dispute to be decided by the Court ... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the Court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in Constitutional Petitions is an extension of this principle.”

12. And, in **Khen Kharis Mburu v Inspector General of Police Service & 3 Others 2019] eKLR**, the Court held that: -

“One of the cardinal principles in Constitutional litigation is that a party who claims that a right or fundamental freedom has been violated, is being violated or is threatened, must plead with accuracy and precision demonstrating the right violated or infringed, the Article of the Constitution violated and the jurisdictional basis for it. That is, it is now an established principle of law that anyone who wishes the Court to grant a relief for violation of a right or fundamental freedom must plead in a precise manner the Constitutional provisions said to have been violated or infringed, the manner of infringement and the jurisdictional basis for it.”

13. Simply put, precision pleading is a mandatory requirement in Constitutional Petitions. A Petitioner should clearly specify the right or fundamental freedom that has been violated or infringed or threatened with infringement. He must state how the violation or infringement occurred, the specific Articles of the Constitution that are alleged to have

been infringed or violated and the jurisdictional basis for the Court's exercise of its jurisdiction. This will not only enable a Respondent to know the case he is facing to be able to make an appropriate response but will also assist the Court to understand the case before it to be able to give the appropriate remedy or relief.

14. From the outset, it would seem that the Petitioner did not properly draw his Petition as required. All he did was to cite the various Articles of the Constitution, to wit **Articles 2, 10, 22(c), 23, 48, 50(1), 95(3), 109, 165, 159 and 258 of the Constitution** without specifying how they had been infringed or how they are related to the reliefs he was seeking. In our view, the most pertinent Articles would be **Article 10** (rule of law), **Article 22 (1)** (enforcement of bill of rights in public interest), **Article 48** (access to justice), **Article 50 (1)** (fair hearing), **Article 95 (3)** (Constitutional authority of the National Assembly and therefore jurisdictional basis) **and Article 159** (justice should not be delayed).
15. The Petitioner failed to specifically set out the respective rights violated and how they relate to the reliefs he sought. All he did was to cite the Articles and allege how the right to access to justice was threatened to be violated by the likelihood of the Small Claims Court being held not to have jurisdiction on claims for personal injuries arising out of RTA. If the petition had sought Constitutional reliefs this would have been a proper Petition for striking out.
16. However, the Petition only sought the interpretation of **Section 12(1) of the Small Claims Court Act** vis a vis the right to access to justice and the national principle of the rule of law under **Articles 48 and 10 of the Constitution**, respectively. The Respondents and the interested parties understood the case they faced and responded appropriately. Further, this Court was able to discern the Petitioner's case and will be able to give the appropriate relief.

17. For the said reasons, we are inclined to sustain the Petition, albeit to declare ourselves on the statutory provisions sought to be interpreted. Accordingly, the objection is overruled.

Whether the Small Claims Court has jurisdiction to entertain personal injury claims under Section 12 (1) (d) of the Small Claims Court Act as read with Rule 5 (3) of the Small Claims Court Rules, 2019 and whether, Sections 34(1) and 38 of the Act and Rules 18 and 23(3) of the Rules are null and void to the extent of their being inconsistent with Article 50(1) of the Constitution of Kenya.

18. We have decided to combine, consider and determine issues Nos. (3) and (4) together because they are related. This is so because, the issue of the alleged unconstitutionality of **Sections 34(1) and 38 of the Act** and **Rules 18 and 23(3) of the Rules** was raised on the face of the Small Claims Court entertaining personal injury claims arising out of road traffic accidents. It was contended by the interested parties that in view of the nature of claims for personal injury claims arising out of RTA, the alleged provisions of the Act breached the right to fair hearing under **Article 50(1) of the Constitution**. It is for that reason that we decided to consider the two issues together.

19. It was contended that the Petitioner's suit in **Petition No. E008 of 2024** had been objected to on the basis that the Small Claims Court lacks jurisdiction to entertain personal injury claims in RTA. That due to the holding in **Ogwari vs. Hersi (Civil Appeal 223 of 2022) [2023] KEHC 20111 (KLR) 3 July 2023 (Judgment)**, the Petitioner's case amongst others, may be dismissed for alleged want of jurisdiction. That this Court should declare that the Small Claims Court has jurisdiction under **Section 12 (1) (d) of the Act and Rule 5(3) of the Rules**, so as to save those suits.

20. The Respondents agreed with the Petitioner that, that Court has jurisdiction under the cited provisions. However, the interested parties,

were of a contrary opinion. They opposed the Petitions and raised issues of the unconstitutionality of; **Rule 23(3) of the Rules** (admission of evidence without calling the makers), **Section 38 of the Act** (restriction of appeals to purely points of law), **Section 34(1) of the Act** (finalization of matters within 60 days) as being in violation of **Article 50(1) of the Constitution** on the right to fair hearing.

21. Jurisdiction is everything and it flows either from the Constitution or Statute. The Court of Appeal in **Owners of Motor Vessel “Lilian S” v Caltex Oil (Kenya) Ltd (1989) eKLR**, stated that: -

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction... Where a Court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

22. The Court has been called upon to interpret certain provisions of the Act *vis a vis* **Article 50(1) of the Constitution**. In **Alcoholic Beverages Association of Kenya vs Kenya Film and Classification Board & 2 Others [2022] KECA 1051 (KLR) (23 September 2022) (Judgment)**, the Court of Appeal observed as follows: -

“The Australian Case of Amalgamated Society of Engineers vs. Adelaide Steamship Company Ltd & Others (1920) 28 CLR 129, as quoted in the County Government of Nyeri & Another vs. Cecilia Wangechi Ndungu [2015] eKLR set out the fundamental rule of interpretation as being that a ‘... statute is to be expounded according to the intent of Parliament that made it; and that intention is to be found by an examination of the language used in

the statute as a whole ... what does the language mean ... in its ordinary and natural sense it is our duty to obey that meaning ...'

It is a truth universally acknowledged that the English language, both legal and general, has words which may have more than one meaning, and on account of this, many common law jurisdictions have applied three approaches to statutory interpretation. These are; the Literal Rule (having the ordinary plain meaning), the Golden Rule (which looks at the intention of the Legislature and avoid absurdity) and the Mischief Rule (what remedy did the legislation intend to cure). We concur with the 1st Respondent that the first port of call is to examine the preamble of the statute, ..."

23. From the foregoing, it is clear that the first point of call is to look at the Act itself in order to determine the meaning sought. The question put by the Petitioner in **E008 of 2024**, is a determination as to whether the Small Claims Court has jurisdiction to determine claims for personal injury claims. The **Small Claims Court Act, Cap 10A** was enacted by the Legislature in 2016. It was assented to on **1/4/2016** and commenced on **21/4/2016**. Its preamble provides that it is *"An Act of Parliament to establish Small Claims Court; to provide for the jurisdiction and procedures of the Court and for connected purposes."*

24. The jurisdiction of that Court is provided for in **Section 12(1) of the Act** which provides: -

"Subject to this Act, the rules and any other law, the Court has jurisdiction to determine any civil claim relating to-

- a) A contract for sale and supply of goods or services;***
- b) A contract to money held and received;***

- c) Liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of moveable property;**
- d) Compensation for personal injuries; and**
- e) Set off and counterclaim under any contract.”**

25. Further, **Rule 5 (3) of the Small Claims Court Rules 2019** provides: -

“A person claiming compensation for personal injuries pursuant to Section 12(1)(d) of the Act shall attach to the Statement of Claim—

(a) a medical report from a licensed medical practitioner; and

(b) any receipts in respect of medical expenses incurred on treatment.”

26. A cursory plain reading of the above provisions would show that the Small Claims Court is given jurisdiction to entertain claims for personal injuries. However, as held in the case of **The County Government of Nyeri & Another vs. Cecilia Wangechi Ndungu [2015] eKLR**, the fundamental rule of interpretation is that a statute is to be expounded according to the intent of Parliament that made it. That intention is to be found by an examination of the language used in the statute as a whole and not selectively.

27. Further, as was held by the Court of Appeal in **Alcoholic Beverages Association of Kenya vs Kenya Film and Classification Board & 2 Others [2022]** (supra), there are three approaches to interpretation of statutes. These are; *‘the Literal Rule (having the ordinary plain meaning), the Golden Rule (which looks at the intention of the Legislature and avoid absurdity) and the Mischief Rule (what mischief the legislation intended to cure).*

28. The fundamental grievance in so far as a substantial part of the jurisdiction exercised by the Small Claims Court in personal injury claims

arising out of RTA is its adjudicatory process. The content of the right to a fair hearing implicit in **Article 50 of the Constitution** and in *pari materia* to civil law includes notice, pretrial discovery, fact finding based only on evidence presented, a duty to consider the case properly by the trial Court, application of the concept **seisin** in which the trier of facts hears all the evidence from both the Claimant and the Respondent so as to make a determination on the merits.

29. The notice in this sense will include the requirement of pleadings setting out the elements of negligence and breach of duty of care by the Respondent occasioning loss and damage which gives rise to a cause of action. The pleading in this sense is to ensure the Respondent knows something about the case to be met which includes the notice to persons who will be directly affected by the judgment of the Court.
30. Discovery involves access to most of the relevant documents or real evidence relevant to a case based on the tort of negligence in accident claims. This notice must be issued in advance in the form of a demand letter to avoid surprise or what we would refer to as microwave justice. The Constitutional imperative of notice and to challenge evidence adduced by a Claimant requires that a Respondent be given an opportunity to examine the opposite party under oath on the dispositions used in various levels at the trial. This cannot be limited by a Statute.
31. The Small Claims Court Act in its procedural law appears to be limiting the holistic approach of the **Evidence Act Cap 80 of the Laws of Kenya** which is in tandem with **Article 50 of the Constitution**. A further principle of fairness is that a person or a litigant to a dispute should not have his or her rights affected directly unless there is inclusivity and participation within the due process clauses on fair trial rights.
32. We have had opportunity to revisit the Hansard, the precursor to the enactment of the Small Claims Court Act. It was unanimous during the debate by the 2nd Respondent that the Court was designed to provide an

accessible, fast and cost-effective method for resolving civil disputes involving small amounts of money often without the need for a Lawyer. The procedures contemplated and adopted by the 2nd Respondent were generally more informal as contra-distinguished with the jurisdiction conferred in the Magistrates Courts.

33. The jurisdiction of the Court therefore primarily was meant to handle civil claims or actions for the payment of money which was capped at below one million. The jurisdiction of personal injury claims, which by dint of insurance contracts on policy secured between the insurer and the insured, makes them complex which require the entire regulatory framework and applicable statute like **Cap 405 of the Laws of Kenya** not to be rendered moribund.
34. The letter and the spirit of Small Claims Court is the real peoples' Court meant to provide an informal, uncomplicated proceedings to resolve small disputes that do not involve large sums of money to warrant the expense and legal threshold of formal litigation before the Magistrates Courts. We see that Court as a vehicle for social change and the case for equitable relief. Therefore, being a peoples' Court where personal, small valued disputes are quickly and informally resolved without the need for legal representation mitigates the cancer of backlog in a litigious society like Kenya where every dispute is a threat to another 'see you in Court'.
35. A claim for compensation for personal injuries in RTA cannot qualify as a small and simple claim. The law of tort of negligence in Kenya follows the common law principles that require prove of **duty, breach, causation** and **damages awardable for the loss suffered by a claimant**. The litigation on this branch of law focuses and addresses foreseeability, contributory negligence, occupier's liability and doctrines like *res ipsa loquitor*.
36. For example, on negligence the threshold issue must be within the fulcrum of known principles. **Lord Hoffmann**, writing in the **Law Quarterly Review [2005] LQR 592 at 596-597** stated as follows: -

“First, it is usually a condition of liability that not only should one have done, or been responsible for, some act which the law regards as wrongful, but that there should be a prescribed causal connection between that act and damage or injury for which one is held liable. There may be other conditions as well, such as that the harm should have been foreseeable. But some prescribed causal connection is usually required. Secondly, the question of what should count as a sufficient causal connection is a question of law

The claimant must, as a matter of law, establish a causal connection (commonly known as the “but for” test) between the injury suffered and the conduct of the Defendant. “The “but for” test recognizes that compensation for negligent conduct should only be made ‘where a substantial connection between the injury and Defendant’s conduct’ is present. It ensures that a Defendant will not be held liable for the Plaintiff’s injuries where they ‘may very well be due to factors unconnected to the Defendant and not the fault of anyone’ - Snell v Farrell, at p 237, per Sopinka J.” “The material contribution’ test, on the other hand, is to be only applied in ‘special circumstances’ where two requirements are met. These are: (i) where it is impossible (due to factors outside the plaintiff’s control) for the plaintiff to prove that the Defendant’s negligence caused the Plaintiff’s injury using the ‘but for’ test; and (ii) where it is clear that the Defendant breached a duty of care owed to the plaintiff, exposing the plaintiff to an unreasonable risk of injury, and the plaintiff suffered an injury.”

37. In the present case, the provision that sets out the jurisdiction of the Small Claims Court is **Section 12(1) of the Act**. That section states that the jurisdiction given to that Court is **subject to, the Act, the rules**

and any other law. This, in our view, means that if the Act does not expressly allow or provide for any act, the provisions of any other law shall be applicable. The Act will not be interpreted or applied to cause absurdity.

38. The basis for the challenge on the jurisdiction of the Court was that, in **Ogwari vs. Hersi (supra)**, the Court had found that due to the nature of a claim for personal injuries in RTA, those claims were not suitable for the Small Claims Court. However, there were subsequent decisions by the High Court which held that the Small Claims Court has jurisdiction to entertain such cases. These include; **Gichovi v Kilem [2024] KEHC 10859 (KLR)**, **Ochieng v Mshila [2025] KEHC 2660 (KLR)** and **Irungu v Karanja (2024) [2024] KEHC 8162 (KLR)**.

39. It is trite that when the language used in a statute is plain and unambiguous, it is not permissible for the Court to go outside the four corners of the provision to seek the meaning thereof. In the present case, the jurisdiction as provided in ***Section 12 of the Act***, includes; ***compensation for personal injuries***. The Act does not specify the types of personal injuries that are justiciable under that provision. It would therefore be expected that all forms of personal injuries, howsoever arising, are to be covered by that provision.

40. The question then is, did the Legislature intend that the Small Claims Court entertain all manner of claims for personal injury including those arising out of RTA? Is there a difference between the various personal injury claims in existence?

41. It is not clear from the Act itself whether the Legislature intended all kinds of personal injury claims be covered. Personal injury claims may arise out of physical injury out of assault, road traffic accident or psychological trauma.

42. A claim arising out of RTA is based on the tort of negligence that must be proved. For this reason, it cannot be said that ***Section 12(1)(d) of the***

Act is so clear and unambiguous as to the nature of the claims for personal injury contemplated. One needs to read the entire Act in order to discern the intention of the Legislature when it created that Court and the jurisdiction it intended to assign to it.

43. We have already adverted to what was debated in the Chambers of the 2nd Respondent during the enactment of the Act. The Court was meant to deal with and resolve disputes for limited amounts in a faster, more affordable and less complex processes than the traditional Courts. That is why the Act provides for simplified and affordable processes with monetary limit of **Kshs.1m** and below.
44. That Court was designed to be a commercial Court geared towards helping the small and medium businesses to spur economic activities devoid of long torturous litigious road known in the traditional Courts. In other jurisdictions, Small Claims Courts deal with small claims and/or disputes that can be dealt with and determined summarily. For example, in Zambia, the Small Claims Courts are presided over by experienced advocates who have the title of State Counsel. They deal with cases and determine them on the same day the hearing commences and in a summary manner.
45. In our case, in order to achieve the goal meant for that Court, the Legislature introduced certain provisions in the Act in order to achieve its intention. Some of these are; personal representation, representation by a non-legal practitioner (**Section 20 of the Act**), filing of claims by way of simple Forms (**Section 23 of the Act**), exclusion of strict rules of evidence (**Section 32 of the Act**), admission of evidence without calling the makers (**Rule 23(3) of the Rules**), restriction of levels of appeal and to purely points of law (**Section 38 of the Act**) and strict timelines with matters being finalized within 60 days (**Section 34(1) of the Act**).

46. The interested parties invited this Court to declare some of the aforesaid provisions as infringing the right to fair hearing under **Article 50(1) of the Constitution of Kenya**. That provision provides: -

“Every person has the right to have any dispute that can be resolved by the application of law in a fair and public hearing before a Court or, another independent and impartial tribunal or body”.

47. The above provision enunciates the right to fair hearing. That is a right that cannot be derogated. That right connotes the giving a party an opportunity of being heard and that that opportunity should be reasonable. Reasonableness will encompass the giving of a party an opportunity to challenge the adversary’s case. Such challenge includes testing the evidence adduced in support of the adversary’s case especially when it is an opinion such as that of an expert.

48. The notion of procedural fairness is founded in **Articles 10 and 50 of the Constitution**. These Articles are not without undue interpretative strain consonant with subordinate legislation like the one in discussion by the Petitioners and as adverted to by the Interested Parties. The concept of procedural fairness has come to occupy a central place in controlling decision making process of Judges, Magistrates and Chairs of Tribunals as duly constituted under **Article 50 (1) of the Constitution** and the enabling Statutes.

49. In our legal system, procedural fairness is based on natural justice. It is a well-defined concept which comprises, *inter-alia*, fundamental rule of fair procedure that a person must always be fairly heard. The need to secure fairness would highly increase in intensity when it comes to the resolution of disputes which involves complexity of issues and the interest of individuals directly affected cannot be driven out of the judgment seat without observance of the tenets of fair trial rights.

50. In the present case, the issue is whether the Act encompasses or derogates this right to fair trial in claims for personal injuries arising out of RTA. Our reading of the Act reveals that, it was not contemplated that in the claims before that Court, particulars of negligence be pleaded and that the same be proved. This is so because, the claims in that Court are by way of simple Forms which sets out what is to be pleaded (**Section 23 of the Act**). A claim for personal injuries out of RTA cannot be pleaded without particulars of negligence which are to be proved at the trial. The architecture of the Act did not contemplate that fact.

51. It was argued that Paragraph 4 of **form SCC1** permits the pleading of the particulars of negligence. We are afraid that that is not expressly provided for in that paragraph and the same cannot be read into it. In any event, those particulars, if and when pleaded, they must be proved.

52. Negligence is defined in **Black's Law Dictionary, 10th Edition** as: -

“The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation. ... The elements necessary to recover for negligence are (1) the existence of a duty on part of the Defendant to protect the plaintiff from injury complained of, and (2) an injury to the plaintiff from the Defendant's failure.”

53. In negligence therefore, a claimant ought to establish that the Respondent owed him a duty of care, that there was a breach of that duty and that as a result of that breach, the claimant suffered damages. In the celebrated case of **Donoghue vs. Stevenson [1932] AC 562,** the principles necessary for a claim for negligence were enunciated thus:

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“The law takes no cognizance of, carelessness in the abstract. It concerns itself with carelessness only where there is a duty of care and where failure in that duty has

caused damage. In such circumstances, carelessness assumes the legal quality of negligence and entails the consequences in law of negligence ... the cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care and that the party complaining should be able to prove that he has suffered damage in breach of that duty”.

54. In **Dharmagna Patel & Anor vs T.A (a minor suing through the mother and next friend H.H) (2014) eKLR**, the need to plead and prove negligence was emphasized. The Court held: -

“I also take note of the fact that in our legal system, there is no liability without fault. In this regard, see Kiema Mutuku vs Kenya Cargo Hauling Services (1991) 2KAR 258 where the Court of Appeal held: -

“There is, as yet, no liability without fault in the legal system in Kenya; and a plaintiff must prove some negligence against the Defendant where the claim, is based on negligence.” The fault has to be pleaded and proved by evidence at the hearing.”

55. We are therefore of the view that the provisions of **sections 20, 23, 32 and 38** of the Act and **Rules 23(3)** of the Rules were deliberately introduced in the Act not to restrict the right to fair trial but to facilitate the smooth and informal processes of the nature of Cases contemplated for that Court. From our observations above, claims for personal injuries in RTA were not contemplated to be for that Court.

56. Another fact is that, claims for personal injuries arising out of RTA are governed, *inter-alia*, by the ***Insurance (Motor Vehicle Third Party Risks) Act, 2013***. It is provided thereon, *inter-alia*, that: -

“3A. No judgment or claim shall be payable by an insurer unless the claimant had, before determination of liability

at the request of the insurer, subjected themselves to medical examination by a certified medical practitioner.

3B. An insurer shall have a right to obtain or verify information from the institution which issued the documents intended to be used to prove the claim and this right shall be enforceable before judgment is passed.

Provided that such verification shall be done within a month”

57. When the foregoing rendition on the tort of negligence and the provisions of the **Insurance (Motor Vehicle Third Party Risks) Act, 2013** is juxtaposed with the impugned provisions of the **Small Claims Court Act**, it becomes crystal clear that the claims for personal injuries in RTA were never contemplated for the Small Claims Court.

58. The Jurisdiction set out in **Section 12(1) of the Act** is subject to any other Act or any other law. In this case, the jurisdiction to determine claims for personal claims under **Section 12(1)(d)** will be subject to the provisions of **the Insurance (Motor Vehicle Third Party Risks) Act**. That being the case, as shall appear hereunder, several of the provisions of the Act which were introduced to operationalize the Small Claims Court would fall foul of the latter Act (**the Insurance (Motor Vehicle Third Party Risks) Act**).

59. **Section 32 of the Act** excludes the application of the rules of evidence in that Court. **Section 34** provides that suits in that Court shall be determined within 60 days from the date of filing the claim. This timeline goes contra **Sections 3A and 3B of the Insurance (Motor Vehicle Third Party Risks) Act, 2013** that permits the insurer to refer a claimant for a second medical report and 30 days for verification of information presented by a claimant. Further, **Rule 23 of the Rules** permits the production of expert opinion without calling the makers thereof.

60. From the foregoing, subjecting the claims for personal injury in RTA to the Small Claims Court would limit the rights of the Insurers under **Sections 3A and 3B of the Insurance (Motor Vehicle Third Party Risks) Act** and therefore fall foul with **Article 50 of the Constitution**. If it was the intention of the Legislature to limit that right, it would have used words such as “notwithstanding the provisions of any other law” in **Section 12(1) of the Act**. That would have expressly excluded sections 3A and 3B of **the Insurance (Motor Vehicle Third Party Risks) Act**.
61. In our view, the Legislature did not do so deliberately because it never intended such complicated claims such as those for personal injuries arising out of RTA to be part of the jurisdiction of the Small Claims Court.
62. Further, it will be double standards and therefore discriminative, to allow claimants with claims for personal injuries out of RTA for less than **KShs. 1m** to be treated differently from those with similar claims for more than **Kshs.1m**. In any event, if it was the intention of the Legislature to limit the rights of the Insurers under **Sections 3A and 3B of the Insurance (Motor Vehicle Third Party Risks) Act**, nothing would have been easier than to state so as it did on the application of the rules of evidence under the **Evidence Act**.
63. Indeed, in **Gwari vs Hersi (supra)**, the Court was alive to this fact when it held: -
- “However, for injury claims, there is need to have more thorough review of medical evidence, including having a second medical examination. To be able to fully and properly defend such claims, 60 days will definitely be insufficient.”**
64. The foregoing being the case, we find that the provisions of **Sections 23, 32, 34 and 38 of the Act** and **Rule 23(3) of the Rules** are not in violation of **Article 50(1) of the Constitution**. They were deliberately introduced in the Act in order to operationalize the Act and achieve the

letter and spirit of the Act. To the contrary, it is the nature of the claims for compensation for personal injuries in RTA that were not contemplated in **Section 12(1) (d) of the Act.**

65. In this regard, we find and hold that claims for compensation for injuries arising out of road traffic accidents were not contemplated to be part of the matters to be entertained by the Small Claims Court under **Section 12(1) (d) of the Act.** Their inclusion as part of that Section would introduce the doctrine of strict liability on such claims. If the Legislature intended to introduce strict liability on personal claims in RTA, nothing would have been easier than to expressly state so.

66. Having come to the foregoing conclusion, we are in doubt if there would be jurisdiction for claims for liability in torts in respect of loss or damage caused to motor vehicles arising out of RTA as contained in **Section 12(1)(c) of the Act.** Since however, that issue was not raised before us and the parties did not have an opportunity to address us on the same, we refrain from making any determination thereon.

67. Accordingly, we find and hold that the Small Claims Court has no jurisdiction to entertain claims for compensation for personal injuries arising out of road traffic accidents under **Section 12(1)(d) of the Act.**

Finally, whether Rule 25(1) of the Small Claims Court Rules is ultra vires Sections 37, 39, and 40 of the Small Claims Court Act (the Parent Act) as read together with Article 94(6) of the Constitution.

68. **Section 37 of the Act** provides that: -

“37. Enforcement of orders to pay money

1) Every order made by the Court requiring a party to pay money shall be enforced in accordance with the provisions of this Act.

- 2) Where an application is made to the Court for the issue of any process to enforce an order requiring a party to pay money to another as an alternative to compliance with a work order, that Court shall give notice of application to the party against whom enforcement is sought.**
- 3) If the party referred to in Sub Section (2) does not file in the Court within the period prescribed for so doing a notice of objection in the prescribed form, the order may, after the expiry of that period, be enforced pursuant to Sub Section (1).**
- 4) The notice referred to in Sub Section (3) may only be given on the ground that it is the belief of the party that the order of the Court has been fully complied with and that the party therefore disputes the entitlement of the Applicant to enforce it.**
- 5) If the party against whom enforcement is sought files the notice referred to in Sub Section (3) within the prescribed period, the matter shall be determined as provided under Section 40.**
- 6) No filing fee shall be payable by a person who seeks to enforce an order pursuant to Sub Section (1) but any fee which would otherwise be payable shall be included in and be considered as part of the award of the Court and shall be recoverable from the opposite party for the credit of the Consolidated Fund.”**

69. Section 39 of the Act provides that: -

“39. Procedure for execution

Where a judgment debtor fails to pay to the decree holder any sum specified in a decree or order, the Court may—

- a) where the judgment debtor's movable property is insufficient to satisfy the decree, order execution by**

attachment and sale of the judgment debtor's immovable property;

b) order the attachment of the salary of the judgement debtor; or

c) suspend the execution of the warrant and the order either wholly or in part on such conditions as to security or otherwise as the Court may determine.”

70. **Section 40** provides as follows: -

“40. Manner of execution

Where the judgment debtor fails to discharge the decree in whole or in part within the time or in the terms, if any, specified in any order of the Court, the Court may order execution to issue against the judgment debtor's immovable property or any other of his or her assets.”

71. The power to enact the Small Claims Court Rules is vested in the Chief Justice under **Section 50 of the Small Claims Court Act**. The same provides: -

“50. Power to make Rules

1) The Chief Justice may make Rules of practice and procedure for the better functioning of the Court.

2) For the purpose of Article 94(6) of the Constitution—

a) the purpose and objective of the delegation under this Section is to enable the Chief Justice to make rules to provide for the better carrying into effect the provisions of this Act;

b) the authority of the Chief Justice to make Rules under this Act shall be limited to bringing into effect the provisions of this Act and fulfilment of the objectives specified under this Section;

c) the principles and standards applicable to the Rules made under this Section are those set out in the

***Interpretation and General Provisions Act (Cap. 2)
and the Statutory Instruments Act (Cap. 2A)."***

72. This Section grants the power to make rules "***for the better carrying into effect of the provisions of this Act.***" Subsidiary legislation is ultra vires if it attempts to amend, contradict or exceed the scope of the parent Act.
73. ***Section 37 of the Small Claims Court Act***, explicitly governs the execution of decrees and orders under the Act, stating in mandatory terms, that execution "***shall be in accordance with the provisions of this Act.***"
74. On the other hand, ***Rule 25(1) of the Rules*** provides that: -
"A decree or order of the Court shall be executed in accordance with the provisions of the Civil Procedure Act and the Rules made thereunder relating to execution."
75. We have deliberately set out above in *ex-tenso*, the execution provisions of the Act in order to juxtapose the same with the impugned rule. In the three execution sections, ***Sections 37, 39 and 40***, the Act specified both the procedure and manner of execution of the Court's orders. We believe that this was deliberate on the part of the Legislature. This was so considering that this was a special statute creating a special Court with special jurisdiction.
76. It is clear that the Act did not expressly provide for arrest and committal to civil jail as a mode of execution. Arrest and committal to jail is not a mode of execution provided under ***Section 37 (1) of the Act***. That was incorporated by ***Rule 25(1)*** by way of reference. We are alive to the fact that the Act has not specifically expressed an intention to limit the right to liberty by providing for arrest and committal to jail as a mode of execution of a money decree. The only limitation in our view is, as submitted by the Petitioner, in cases of the offence of contempt of Court under ***Section 47 (2) and (3) of the Act***. In its detailed provisions, it is

proof that the primary objective of the Court is compensation through recovery, flexibility and settlement, not the immediate enforcement of a penal measure.

77. The authority donated by **Section 50 of the Act** was limited to bringing into effect the provisions of the Act. In our considered view, by **rule 25 of the Rules** incorporating by reference the Civil Procedure Rules, it went beyond the delegated authority to make rules as conferred by **Section 50 (2) (b) of the Act** as read with **Article 94 (6) of the Constitution of Kenya**. We are in agreement with the principle enunciated in the case of **Katiba Institute & another v Attorney General & another; Independent Policing and Oversight Authority & 3 others (Interested Parties (Constitutional Petition 379 of 2017) [2022] KEHC 17072 (KLR)**, that there can be no legislation by reference. Legislation must and should be express and clear.

78. This is clearly buttressed by the provisions of **Article 94(6) of the Constitution** which states as follows: -

“An Act of Parliament, or legislation of a county, that confers on any State organ, State officer or person the authority to make provision having the force of law in Kenya, as contemplated in clause (5), shall expressly specify the purpose and objectives for which that authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority.”

79. We are alive to the fact that the provisions of the **Civil Procedure Rules** for arrest and committal for civil debt is not *per se*, unconstitutional or irregular. It is not a mere leap to committal. The Civil Procedure Act imports the full spectrum of non-punitive remedies under **Section 38 of the Civil Procedure Act**, including attachment of property and garnishment. The ultimate measure of arrest and detention, as provided

under the Civil Procedure Act is subject to the stringent Constitutional and statutory test of wilful default, not mere inability to pay.

80. The strict condition precedent is set out in **Section 38 of the Civil Procedure Act**, which prohibits committal unless the Court is satisfied, *“for reasons to be recorded in writing,”* that the judgment-debtor *“has... the means to pay... and refuses or neglects... to pay the same.”*
81. This statutory safeguard is the mechanism through which the law complies with **Article 11 of the International Covenant on Civil and Political Rights** (ICCPR), an instrument that prohibits imprisonment *“merely on the ground of inability to fulfil a contractual obligation”*. In **Charles Lutta Kasamani v Concord Insurance Co Ltd & Deputy Registrar Milimani High Court Commercial and Admiralty Division [2018] eKLR**, the Court (C. Mwita J.) said: -

“37. Even under Sections 38 and 40 of the Civil Procedure Act, no one should be committed to civil jail because of his or her inability to pay. In the case of an application for committal, the determining factor is always the ability to pay. Inability should be taken to mean that the judgment debtor has completely no means of settling the decree even if he was given how much time to do so. He has completely no means of paying. He is simply unable and cannot pay.... 42. In that regard, therefore, where a party goes through legal process and obtains a decree from a competent Court, s/he has a right that has crystalized in his favour and that right is recognized in law. It can only be realized through execution including committal to civil jail which is a known legal process for enforcing that right. Such a right should not easily be defeated because a judgment debtor who though able to pay, cannot be committed to civil jail and nothing can be done about him. That would be a contradiction in the enforcement of

rights where one right would be deemed superior to another. The law should be read as only protecting those who cannot genuinely pay and not otherwise.”

82. Committal is a coercive process targeting a contumacious debtor, not a penalty for poverty. In the circumstances of the Small Claims Court, there are processes that are set out in **Section 37 of the Act** which when complied with, they end up with the application of **Section 40 of the Act** and not otherwise.
83. In view of the foregoing, we are of the view and so hold that, **rule 25 of the rules** is in breach of **Article 24 (2) (a), (b) and (c) of the Constitution of Kenya** for incorporating the provisions for arrest and committal to civil jail under the Civil Procedure Act. It is therefore unconstitutional and ultra vires **Sections 37, 39 and 40 of the Act** as read together with **Article 94(6) of the Constitution of Kenya**.
84. We note that the Petitioner in **Petition No. 010 of 2024** prayed for damages for the arrest and incarceration. Those actions were undertaken on the basis that the provisions of the **Civil Procedure Act** as incorporated by **Rule 25(1) of the Rules** were applicable. We have found that arrest and committal under the Civil Procedure Act in itself is not unconstitutional or unlawful.
85. The proceedings that culminated in the Petitioner being committed were not produced before us. We are not told whether there was any Notice To Show Cause issued and what transpired there. Had the Petitioner attended the Notice To Show Cause proceedings and proved his inability to pay, we are confident that he would not have been committed to jail.
86. The outcome is that the Petition as consolidated is partially successful. **Petition No. 008 of 2024** is without merit and is dismissed while **Petition No. 010 of 2024** is partially successful.
87. We are alive to the fact that because of the findings we have made above, there will be some difficulties. There are so many litigants who

have their cases for claims for personal injuries in RTA that are pending in the Small Claims Court throughout this country. They must have filed them before the issue of jurisdiction was determined. As we have already found, a casual reading of **Section 12(1) of the Act** could not have disclosed that such claims were never intended for that Court.

88. In the premises, we must guard against such litigants suffering any prejudice in the interests of justice. Further, we should not make orders that may prejudice the cases already pending in those Courts having in mind that even costs, albeit minimal have been incurred. We must be alive to the dictates of **Article 48 of the Constitution**.
89. Accordingly, we dismiss **Petition No. E008 of 2024** and partially allow **Petition No. E010 of 2024** as stated above and make the following orders: -
- a) A declaration hereby issues that claims for personal injuries arising out of road traffic accidents are excluded from **Section 12(1) (d) of the Small Claims Court Act**. Accordingly, the Small Claims Court has no jurisdiction to entertain such claims forthwith.
 - b) A declaration hereby issues that **Sections 34 and 38 of the Small Claims Court Act** and **Rules 18 and 23(3) of the Rules**, in so far as they relate to small claims under the Act, are not in violation of **Article 50(1) of the Constitution**.
 - c) A declaration hereby issues that all cases now pending before the Small Claims Court for claims for personal injuries arising out of road traffic accidents be transferred and are deemed transferred to the Magistrates Court with jurisdiction.
 - d) A declaration hereby issues that **rule 25 of the of the Small Claims Court Rules** is in breach of **Article 24 (2) (a), (b) and (c) of the Constitution of Kenya** for incorporating the provisions for arrest and committal to civil jail under the **Civil Procedure Act**. It is therefore unconstitutional and ultra vires **Sections 37, 39 and**

40 of the Act as read together with **Article 94(6) of the Constitution of Kenya.**

e) The claim for damages in **Petition No. E010 of 2024** is hereby declined.

f) This being a public interest litigation, each party to bear own costs.

It is so decreed.

Dated and Delivered at Nairobi this 22nd day of January, 2026.

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E. OGOLA
PRINCIPAL JUDGE

.....
A. MABEYA, FCI Arb
JUDGE

.....
R. NYAKUNDI
JUDGE