

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA HIGH COURT**

**PETITION NO.E018 OF 2025**

**IN THE MATTER OF: ENFORCEMENT OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: ARTICLES 1, 2, 3, 6, 10, 19, 20, 21, 22, 23, 27, 43, 47, 159, 174, 175,  
176, 186, 187, 189, 190, 201, 214, 224, 225, 226, 227 & 228**

**OF THE CONSTITUTION OF KENYA 2010;**

**AND**

**IN THE MATTER OF: SECTION 30(3)(f), 34 AND 48 OF COUNTY GOVERNMENT ACT NO.  
17 OF 2012 LAWS OF KENYA;**

**AND**

**IN THE MATTER OF: SECTION 109(4)(b), 125 AND 126 OF PUBLIC FINANCE  
MANAGEMENT ACT NO. 17 OF 2017 LAWS OF KENYA;**

**AND**

**IN THE MATER OF: SECTION 3, 4, 33 (PART III), PART IV, SECTION 55, 70, 74, 78, 83, 85,  
86, 87 AND 134 OF PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT NO. 33 OF 2015  
LAWS OF KENYA;**

**-BETWEEN-**

**MILESTONE DEVELOPERS LIMITED.....1<sup>ST</sup>  
PETITIONER**

**RASMICOM CONSTRUCTION & EXCAVATION LIMITED.....2<sup>ND</sup>  
PETITIONER**

**SINAI EAST AFRICA COMPANY LTD.....3<sup>RD</sup> PETITIONER**

**HORMUD CONSTRUCTION LTD.....4<sup>TH</sup> PETITIONER**

**MEJJAR CONSTRUCTION LTD & SUPPLIERS LTD.....5<sup>TH</sup> PETITIONER**

**ALMAS CONSTRUCTION CO. LTD.....6<sup>TH</sup> PETITIONER**

**BASHIR BUILDING & CONSTRUCTION CO. LTD.....7<sup>TH</sup> PETITIONER**

HIRAD CONSTRUCTION COMPANY.....	8 <sup>TH</sup> PETITIONER
HASPA CONSTRUCTION COMPANY LTD.....	9 <sup>TH</sup> PETITIONER
ORE INVESTMENT & SUPPLIES LIMITED.....	10 <sup>TH</sup> PETITIONER
HANSHIS CONSTRUCTION LTD.....	11 <sup>TH</sup> PETITIONER
RIZAK CONSTRUCTION LTD.....	12 <sup>TH</sup> PETITIONER
QUADCORE TECHNOLOGY SOLUTIONS.....	13 <sup>TH</sup> PETITIONER
ELMOGE CONTRACTOR CO LTD.....	14 <sup>TH</sup> PETITIONER
AL-MADAD CONSTRUCTION LTD & SUPPLIERS LTD.....	15 <sup>TH</sup> PETITIONER
HARERI CONSTRUCTION & SUPPLY.....	16 <sup>TH</sup> PETITIONER
ABDILLE CONTRACTORS & SUPPLIES.....	17 <sup>TH</sup> PETITIONER
GANALAMARO CONSTRUCTION COMPANY LTD.....	18 <sup>TH</sup> PETITIONER
GUTALE CO LTD.....	19 <sup>TH</sup> PETITIONER
LILAF CONSTRUCTION CO LTD.....	20 <sup>TH</sup> PETITIONER
NEXIS SUPPLIERS LTD.....	21 <sup>ST</sup> PETITIONER
KASIM MOHAMUD.....	22 <sup>ND</sup> PETITIONER
NORTHERN LIBERTY BUILDERS LTD.....	23 <sup>RD</sup> PETITIONER
BURA CONTRACTORS LTD.....	24 <sup>TH</sup> PETITIONER
TAHRIR LTD.....	25 <sup>TH</sup> PETITIONER

MINLE CONSTRUCTION & LANDSCAPING CO LTD.....	26 <sup>TH</sup>
PETITIONER	
BAOMAO CONSTRUCTION CO LTD.....	27 <sup>TH</sup>
PETITIONER	
BALGORY CONSTRUCTION CO LTD.....	28 <sup>TH</sup>
PETITIONER	
WAMO CONSTRUCTION CO LTD.....	29 <sup>TH</sup>
PETITIONER	
HOLWADAG CONSTRUCTION CO LTD.....	30 <sup>TH</sup>
PETITIONER	
MUBASHIR CONSTRUCTION & CIVIL ENGINEERING CO LTD.....	31 <sup>ST</sup>
PETITIONER	
HIJAZ CONSTRUCTION LTD.....	32 <sup>ND</sup>
PETITIONER	
KASSIM CONSTRUCTION LTD.....	33 <sup>RD</sup>
PETITIONER	
SINAY CONSTRUCTION CO LTD .....	34 <sup>TH</sup>
PETITIONER	
HARA CONSTRUCTION CO. LTD.....	35 <sup>TH</sup>
PETITIONER	
TAWADUL CONSTRUCTION & INVESTMENT LTD.....	36 <sup>TH</sup>
PETITIONER	
ELGHAL CONSTRUCTION & INVESTMENT LTD.....	37 <sup>TH</sup>
PETITIONER	
AHLAN CONSTRUCTION & SUPPLIES LTD.....	38 <sup>TH</sup>
PETITIONER	
SOUTH BUKUREI BUILDING &CONSTRUCTION GARISSA.....	39 <sup>TH</sup>
PETITIONER	
WARSAN CONSTRUCTION CO LTD.....	40 <sup>TH</sup>
PETITIONER	
ABDI KALOSH ABDULLIH-GARISSA.....	41 <sup>ST</sup>
PETITIONER	
HILAC CONSTRUCTION CO LTD.....	42 <sup>ND</sup>
PETITIONER	
NUGAL CONSTRUCTION CO LTD.....	43 <sup>RD</sup>
PETITIONER	

SANGOLE CONSTRUCTION CO LTD.....44<sup>TH</sup>  
PETITIONER

HALGAN CONSTRUCTION CO.....45<sup>TH</sup>  
PETITIONER

YUSSUF GOROT CONTRACTORS LTD.....46<sup>TH</sup> PETITIONER

**VERSUS**

THE COUNTY GOVERNMENT OF GARISSA .....1<sup>ST</sup> RESPONDENT

THE MINISTRY OF FINANCE.....2<sup>ND</sup> RESPONDENT

THE NATIONAL ASSEMBLY.....3<sup>RD</sup> RESPONDENT

THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT

**RULING**

1. The petitioners herein who described themselves as registered limited liability companies and contractors operating within Garissa County, moved to this court vide a petition dated 14<sup>th</sup> November 2025 pursuant to various constitutional provisions, sections of the county Government Act, public finance management Act and the public procurement and asset disposal Act seeking;
  - 1) **A declaration that the respondent's failure and or refusal to pay the petitioners for work duly executed and certified is unconstitutional and violates Articles 10,27,43, and 201 of the constitution.**
  - 2) **A declaration that the diversion of funds released by the national treasury for payment of eligible pending bills to new contracts is illegal, null, and void.**
  - 3) **A conservatory order restraining the 2<sup>nd</sup> and 3<sup>rd</sup> respondents from releasing any further funds to the 1<sup>st</sup> respondent pending settlement of the petitioners' verified pending bills.**
  - 4) **An order of mandamus compelling the 1<sup>st</sup> respondent to pay all outstanding balances due to the petitioners of kshs 487,551,090.22 forth with.**
  - 5) **An order of mandamus compelling the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to ensure that no new disbursements are made to the 1<sup>st</sup> respondent until the petitioners' eligible pending bills are settled in full.**



6. In response to the preliminary objection, the petitioners filed a replying affidavit sworn by Omar Yasin on 16-12-2025 claiming that; the court has jurisdiction under article 22,23, and 165; the claim is not confined to debt recovery but also constitutional violations touching on unlawful management, diversion and re-allocation of resources earmarked for pending bills; the petitioners are seeking public law remedy including mandamus orders to compel the respondents perform their statutory obligations and that ordinary civil litigation cannot remedy a constitutional violation.
7. It is however worth noting that save for the 1<sup>st</sup> respondent, the rest of the respondents did not file any response.
8. Parties filed submissions in disposing the Preliminary objection first before canvassing the application for conservatory orders. The first respondent through the firm of Kussow advocates filed their submissions dated 16-12-2025 reiterating the content of their preliminary objection. Regarding jurisdiction, it was counsel's submission that this court has no jurisdiction as the petition is addressing a purely commercial debt recovery claim hence the need for constitutional avoidance. To advance that proposition, the court was referred to the case of **communications commission of Kenya & 5 others v Royal media services & 5 others (2014) eKLR** where the court held that a case should not be determined as a constitutional issue if it can be resolved through other method.
9. That the doctrine of constitutional avoidance restrains courts from determining constitutional questions where a dispute can be resolved through alternative legal means. In support of that position, reference was made to the case of **KKB V SCM & 5 others (2022) KEHC 289( KLR )** where the court stated that not every issue should be resolved through a constitutional reference merely because a constitutional provision has been cited
10. On their part, the petitioners filed their submissions dated 16-12- 2025 through the firm of Abdirazak and company advocates asserting that articles 22 and 16(3) (b) and (d) of the constitution does confer original jurisdiction over the high court to determine civil and criminal cases including determination of constitutional issues. That the issues raised are of public law in nature hence constitutional issues calling for a constitutional remedy.

11. On the question that the claim is purely commercial, counsel contended that the petitioners are seeking the respondents to respect the directive to honour payment of pending bills; to be accountable, honour prudent finance management and the fact that there was legitimate expectation to be paid their dues. The court was referred to the case of **Okiya Omtatah Okiiti v Cabinet Secretary national treasury & another (2018)e KLR** where the court held that issues of public finance are issues of constitutional concern,
12. On the question of constitutional avoidance, counsel held that the doctrine does not apply where the alternative remedy is not adequate, illusory or ineffective or where state inaction is in question. The court was consequently referred to the case of **Geoffrey Muthinja Kabiru & 72 others v Samuel Henry Kinyanjui & 1756 others (2015) e KLR** where the court held that constitutional avoidance cannot be used to shut out litigants where constitutional violations are alleged.
13. I have considered the petition herein vis avis the preliminary objection raised and the response thereof. There are basically two issues for determination namely; whether this court has jurisdiction to hear the matter herein and whether the doctrine of constitutional avoidance applies.
14. It is trite that a preliminary objection is raised as a point of law which if upheld can dispose the matter with finality. See **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969)EA 696**.At page 700 Pr. D-F Law JA as he then was had this to say:-

**“...A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”**

**Sir Charles Newbold, P.;** on the other hand at pg.701 paragraph B-C added the following:

**“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the**

**assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion....”**

15. The objectors have raised two issues challenging the petition. One is lack of jurisdiction and two, constitutional avoidance. The issues are matters of law which if established can dispose of the matter with finality.

16. Does this court have jurisdiction to hear the petition? Under Article 165(3) of the constitution, the high court has original jurisdiction to hear both civil and criminal matters. It equally has the powers to hear constitutional claims touching on breach of bill of rights and the violation of fundamental rights. The court can also issue remedies as prescribed under Article 23 among them; Order of mandamus, judicial review, declaratory orders, conservatory orders and compensation.

17. It is not in dispute that jurisdiction is everything and without it a court must down its tools and move no further step. See **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (Civil Appeal 50 of 1989) [1989] KECA 48 (KLR) (17 November 1989) (Judgment) where Nyarangi J A held that;**

**“A question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter was then obliged to decide the issue right away on the material before it. Jurisdiction was everything. Without it, a court had no power to make one more step. Where a court had no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downed tools in respect of the matter before it the moment it held the opinion that it was without jurisdiction. “**

18. A careful reading of the petition does reveal that the suit is anchored on various grounds key among them, discrimination by the 1<sup>st</sup> respondent in paying debts using money specifically set aside by treasury/ministry of finance to clear pending bills. This is a constitutional question which can form the basis of a constitutional reference. However, despite the fact that the court may have jurisdiction just like it has in this case, that jurisdiction is encumbered or gagged by other factors such as, the doctrine of constitutional avoidance. In other words, jurisdiction cannot be applied in a wholesale manner but rather with exclusivity and sieving as to what deserves the ear of a constitutional court. In my view, this court is vested



with jurisdiction to determine the issue in controversy but subject to observance of the doctrine of constitutional avoidance

19. The objective of constitutional avoidance is intended to discourage clogging of the high court with suits or issues which have alternative legal remedies. A constitutional petition is the preserve of strictly deserving cases which cannot be resolved through any other mode of dispute resolution. See **Muturi v Director of Public Prosecutions & another (Criminal Petition E001 of 2025) [2025] KEHC 16333 (KLR) (12 November 2025) (Judgment)** where the court held that;

“Whilst, a party may bring a matter before the court in the form of a constitutional

petition, it may become evident that the orders sought can be granted through

another form besides a constitutional petition. In such cases, the constitutional

court should exercise constitutional avoidance and avoid the matter whose redress

may be found outside a constitutional petition. In the case of *Sports and Recreation Commission v. Sagittarius Wrestling Club and Anor*, 2001 (2) ZLR

501 (S), the South African Court held thus:

“...Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights.” “

20. In the instant case, the fulcrum of the petition is that the petitioners are a group of registered companies and contractors who variously won contracts for the supply of services or goods which they did but were never paid by the 1<sup>st</sup> respondent. That as a consequence, the ministry of finance set aside monies

specifically to pay pending bills a directive the 1<sup>st</sup> respondent ignored and instead used the said amount in clearing debts owed to the new contractors thus discriminating them.

21. From their wording, the petitioners are seeking to be paid their debts using specially designated funds for payment of pending bills. How can a constitutional court order for payment of debts in a petition for claims based on breach of contract for non-payment of alleged legitimate claims? Supposing the respondent disowns the claim or the amount owed by each contractor? Do we then call witnesses to prove their claim?
22. Ideally, the only suitable forum is a civil court which will then have the power to interrogate the claim in case there is a dispute over the amount or the claim itself. I do agree with the 1<sup>st</sup> respondent that the petitioners are not properly before the court as an effective remedy lies in the civil or commercial division. There was need to exercise constitutional restraint or avoidance in the circumstances of this case hence this court has no capacity to determine the petition as the constitutional court is not the right forum through which to canvass this claim.
23. In view of the above holding, the preliminary objection is hereby upheld and the petition thereof dismissed. Each party shall bear own costs.

Dated, signed and delivered virtually this 19<sup>th</sup> day of January 2026

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**J. N. ONYIEGO**

**JUDGE**