

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. E500 OF 2024**

**BETWEEN**

**JADE LOUISE  
SALTHOUSE.....PETITIONER**

**VERSUS**

**MARK MAINA.....  
.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petition dated 25<sup>th</sup> September 2024 is supported by the Petitioner’s affidavit of similar date and a further affidavit dated 1<sup>st</sup> October 2024. The core of the Petition is the alleged illegal and unlawful seizure of the Petitioner’s passport by the Respondent which the Petitioner alleges was in breach of the Petitioner’s constitutional rights.
2. Accordingly, the Petitioner seeks the following reliefs against the Respondent:
  - i. An order do issue, directing the Respondent to immediately release the Petitioner’s Passport to the Officer Commanding Station, Ruai Police Station, who shall facilitate the***

**safe delivery of the Passport to the Petitioner or this Court before 1<sup>st</sup> October 2024 to enable her to make the appropriate flight bookings before expiration of her Travel Authorization on 23<sup>rd</sup> October 2024.**

- ii. A declaration be made that the Petitioner's fundamental rights as stated in the Petition were violated by the Respondent.**
- iii. A declaration be made that the Respondent's action of gaining unjustified entry into the apartment amounted to a blatant violation of Article 31 of the Constitution.**
- iv. A declaration be made that the forceful removal of the Petitioner from the apartment and dragging her to the car for the purposes of making payments amounted to gross humiliation contrary to Article 28 of the Constitution.**
- v. A declaration be made that the act of accosting the Petitioner in the company of strangers with an aim to cause intimidation is a violation of Article 29 of the Constitution.**
- vi. A declaration be made that the seizure of the Petitioner's Passport was illegal, unconstitutional and a violation of Articles 27, 28, 36, 39 and 40 of the Constitution.**
- vii. A declaration be made that the continued holding of the Petitioner's Passport is unlawful and in breach of her rights under Articles 27, 28, 29, 39, and 40 of the Constitution.**
- viii. General damages be awarded for violation of the Petitioner's fundamental rights and**

**freedoms as guaranteed under the Constitution.**

- ix. Special damages be awarded to the Petitioner to the tune of four million shillings (KES.4,000,000) for emotional and psychological torture, pain and suffering caused by the Respondent.**
- x. Costs of this Application and the Petition herein be borne by the Respondent.**
- xi. Any other or further orders as this Court deems fit and appropriate be granted.**

### **Petitioner's Case**

3. The Petitioner stated that she is a British Citizen who was scheduled to visit Kenya between **23<sup>rd</sup> July 2024 - 23<sup>rd</sup> October 2024**. While in Nairobi, she booked a short - stay apartment at Utawala with the Respondent through *booking.com*.
4. She avers that before occupying the apartment on **10<sup>th</sup> August 2024**, she notified the Respondent that she would be staying there with a friend, *Maggie Wachira and her cat*. Moreover, that she proposed to make the payments in three installments. She planned to stay at the apartment **until 6<sup>th</sup> September 2024**. The Respondent was agreeable to the terms and let the apartment to her at a discounted rate of **Kshs.2250/-** per night.
5. The Petitioner made the initial payment of **Kshs.6825/- via Mpesa** was made on **10<sup>th</sup> August 2024**. She asserts that

before payment of the second installment that was scheduled for **20<sup>th</sup> August 2024**, the Respondent showed up at the apartment. The Petitioner deposited **Kshs.10,000/-** to the Respondent's Mpesa account and informed him that she would clear the **balance of Kshs.5000** once the Western Union transaction was processed.

6. She stated that this appeared to have infuriated the Respondent who started to hurl insults at her in Kiswahili. She adds that when she tried to take medication to ease her anxiety at that moment, the Respondent denied her access to water. The Respondent pulled her to his car then drove her to an ATM to withdraw money so as to clear the outstanding balance of the second instalment.
7. The following day, 21<sup>st</sup> August 2024, the Respondent unilaterally and randomly raised the daily payments to **Kshs. 2500/-**. The Respondent also forced her to surrender her passport to him and sign an agreement to that effect it was to be held until the final instalment was paid. She stresses that the Respondent never confiscated Maggie Wachira's passport which is an indication that he seized hers because she is a foreigner.
8. On 28<sup>th</sup> August 2024, the Respondent once again showed up at the apartment. He demanded the Petitioner must get rid

of the cat failing which she shall pay a fine of **Kshs.500/-** daily.

9. The Petitioner opted to leave the apartment on 29<sup>th</sup> August 2024. She paid **Kshs.22,500/-** for the days she had been at the Respondent's apartment but the Respondent demanded that she had to make the full payment until the 6<sup>th</sup> September 2024 as previously scheduled. She asserts that this was despite the Respondent's false advertisement on *booking.com* dated 27<sup>th</sup> August 2024 that the apartment was vacant and that she never arrived at the apartment. Further, the Respondent refused to return her passport.
10. It is her case therefore, that the Respondent's actions were illegal, unfair, unreasonable, ultra vires and in direct violation of her constitutional rights. She made a report at Ruai Police Station but the Police did not help, instead, they advised that she should file a Court case. She contends that she was unable freely move within Kenya and visit various tourist attraction sites because her movement was curtailed by the Respondent's action of refusing with her passport.
11. She asserted that the actions of the Respondent violated her constitutional rights under Articles 27, 28, 29, 31, 36, 39 and 40 of the Constitution.
12. Further to this, she affirms that the Petition raises constitutional issues being the alleged violation of the

Petitioner's rights to freedom from discrimination, human dignity, freedom of security, and freedom of movement. It is stressed therefore that sustaining the preliminary objection would deny her a forum to seek redress for the purported violations thus leading to a miscarriage of justice.

### **Respondent's Case**

13. The Respondent in response filed his Replying Affidavit sworn **on 26<sup>th</sup> September 2024**. He affirmed that he runs an *air BnB business at Utwala* based on terms set out by *Booking.com*. He stated that as per the policy cancellation guidelines, a guest is charged the full price of reservation if they cancel after reservation. Furthermore, pets are not allowed under this arrangement.
14. He averred that the Petitioner had booked his apartment on *Booking.com* and made the payments as alleged in the Petition. He states that when he discovered that the Petitioner was staying at the apartment with the cat, they agreed that the daily charge would be **Kshs.2500/-**.
15. He avers that since the Petitioner appeared to be undergoing some financial difficulties, they agreed that he would keep her passport until she made the full payment for her stay which was set to end on **2<sup>nd</sup> September 2024**. Nevertheless, the Petitioner left the apartment on **29<sup>th</sup> August 2024** without notice or payment of the full balance.

16. As a result, he states that he reported the matter to the police on 2<sup>nd</sup> September 2024 vide *OB No.17/2/9/2024*. He states that when the Petitioner was summoned, she maintained that she would only pay for the days that she had been in the apartment. He claims that the balance for the remaining days was Ksh.20,000 which has not been paid todate.
17. He depones that he did not harass the Petitioner as alleged. In fact, he states that he drove the Petitioner to the ATM at her request and at his own cost. Equally, that she offered her passport willingly. He went on to suggest that the passport should be deposited in Court as security for the Ksh.20,000. He denied violating the rights of the Petitioner and described the instant Petition as misconceived, incompetent, bad in law and an abuse of the Court process.
18. The Respondent as well filed a Notice of Preliminary Objection dated 30<sup>th</sup> September 2024 on the basis that:
- i. No constitutional issues are discernible from the entire Petition to warrant its admission and adjudication before the Court.*
  - ii. The Petitioner's entire Petition raising entirely contractual issues is misconceived, incompetent, bad in law and an abuse of the Court process.*

### **Petitioner's Submissions**

19. The Petitioner through William Karoki & Associates Advocates filed two sets of submissions dated 1<sup>st</sup> October 2024 and 13<sup>th</sup> November 2024. Counsel identified the issues for determination as: *whether the Respondent's Preliminary Objection is sustainable, whether a Passport can be issued as collateral for a debt, whether the alleged Agreement between the Petitioner and the Respondent was valid, whether the unlawful and illegal retention of the Petitioner's Passport constituted a violation of the Petitioner's rights under Articles 27, 28, 29, and 39 of the Constitution, whether the Respondent violated the Petitioner's rights under Article 31 of the Constitution, whether the Respondent violated the Petitioner's rights under Articles 27, 28 and 29 of the Constitution and whether the Petitioner is entitled to damages as a result of the breach of her constitutional rights.*
20. Counsel on the first issue stressed that the Respondent's objection is not a pure point of law as is based on disputed facts. In this regard, Counsel argued that the Respondent pleads that there are no constitutional issues and Petition raises contractual issues while the Petitioner argues otherwise. To buttress this point reliance was placed in **Kyule v Gitaari [2024] KEHC 5819 (KLR)** where it was held that:

*“Evidently, a preliminary objection must be founded upon a settled and crisp point of law, to the intent that*

*its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with the point of law.”*

21. Comparable reliance was placed in **Hassan Nyanje Charo v Khatib Mwashetani & 3 others, [2014] eKLR, Hassan Ali Joho & another v Suleiman Said Shabal & 2 others SCK Petition No 10 of 2013 [2014] eKLR** and **Mukisa Biscuits Manufacturing Ltd v West End Distributors (1969) EA 696**.
22. Relying on Section 24 of the Kenya Citizenship and Immigration Act, counsel argued that a passport or travel document remains the property of the Government of Kenya. Similarly, Counsel submitted that British Passports are the property of His Majesty’s Government in the United Kingdom because they are issued by His Majesty's Passport Office, as even made manifest in the body of the Passport.
23. On this basis, Counsel stressed that a passport cannot be used as collateral as it does not have an inherent monetary value since its significance is its ability to identify an individual and their citizenship. Furthermore, Counsel maintained a passport remains to be the property of the Crown and not the property of the passport holder. Consequently, Counsel reasoned that the detention of the Petitioner’s passport as collateral is illegal and oppressive.

24. On the third issue, Counsel submitted that the alleged Agreement entered into by the Petitioner was void as it was procured under duress on being threatened with eviction from the house if she failed to cooperate. Accordingly, Counsel argued that the contract is not enforceable. Reliance was placed in **Madhupaper International Ltd & another v Kenya Commercial Bank Ltd & 2 others [2003] eKLR**, where it was held that:

*“It is duress if a person, with the object of coercing another to pay money claimed from the other as a debt due under a contract, harasses the other with demands for payment, which, in respect of their frequency or the manner or occasion of making any such demand, or of any threat of publicity by which any demand is accompanied, are calculated to subject him or members of his family or household to alarm, distress or humiliation...”*

25. Further reliance was placed on **Scott vs Brown, Denning & McNab Company (3) [1892] 2QB 724**.

26. Counsel underscored that the Respondent unlawfully, maliciously and illegally seized the Petitioner’s passport. He submitted first that the Respondent’s selective retention of the Petitioner’s passport without seizing Maggie Wachira’s National Identification Card amounted to racial discrimination.

27. Furthermore, Counsel submitted that the invasion of the Petitioner’s apartment in the manner he did in company of

unknown persons, denying her access to drinking water, dragging her to his car, seizing her passport, coercing her to sign a purported agreement consenting to the illegal seizure and making false reports at Ruai Police Station, violated her right to dignity and freedom and security of person. Equally, the act of seizing her passport was a in violation of her right to movement. Reliance was placed in **Kenya Anti-Corruption Commission v Deepak Chamanlal Kamani & 4 others [2014] eKLR** where it was held that:

*“The right to personal liberty and freedom of movement guarantees the citizens, among other things, the right to leave and return to Kenya. To facilitate this, the Government issues Passports to all its citizens because a Passport is a necessary condition for travel abroad.”*

28. Further reliance was placed on **Kituo Cha Sheria & 8 others v Attorney General [2013] eKLR, MWK & another v Attorney General & 4 others (Constitutional Petition 347 of 2015)** and **S v Makwanyane and Another [1995] ZACC 3.**
29. Further to this, Counsel submitted that the Respondent had violated the Petitioner’s right under Article 31(a) of the Constitution not to have her person or house searched. Counsel contended that one’s privacy is not to be infringed upon unless legally warranted. In support of this submission, Counsel cited the case of **JWI & Another v Standard**

**Group Limited & another [2015] eKLR** where it was held as follows:

*“In determining the scope of the right to privacy, the Consultative Assembly of Council of Europe has defined article 8(2) of the European Convention on Human Rights, which provides for the right to privacy of an individual’s private and family life, his home and correspondence as follows:*

*“The right to privacy consists essentially in the right to live one’s own life with a minimum interference. It concerns private family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelations of irrelevant and embarrassing facts, unauthorized publication of private information given or received by the individual confidentially.”*

30. In view of the foregoing, Counsel submitted that it was evident that the Petitioner’s rights had been violated hence ought to be granted redress. For this reason, Counsel argued that the Petitioner is entitled to general damages and special damages of Ksh.4,000,000 for the emotional and psychological torture, pain and suffering caused by the Respondent.
31. Reliance was placed in **MWK & Another v Attorney General & 4 others; Independent Medical Legal Unit (IMLU) (Interested Party); The Redress Trust [2017] eKLR** where it was held that:

*“It is well settled that award of compensation is an appropriate and effective remedy for redress of an*

*established infringement of a fundamental right under the Constitution. The quantum of compensation will, however, depend upon the facts and circumstances of each case.”*

32. Similar reliance was placed on **MM (Suing for His Behalf and that of MK, WK TN Minors) v Ngomo [2023] KEHC 24499 (KLR)**.

### **Respondent’s Submissions**

33. On 15<sup>th</sup> February 2025, the Respondent through Gicheha Kamau and Company Advocates filed submissions in support of his case. Counsel outlined the issues for discussion as: *whether the Petition raises constitutional issues to invoke the jurisdiction of this Court, whether the passport was used as collateral for debt, whether the agreement was valid and whether the Petitioner's rights have been infringed.*
34. On whether this Petition raises constitutional issues, the Respondent’s Advocate argued that the dispute is whether the Petitioner should pay the Respondent for the days she had booked for her stay in his apartment and whether their Agreement concerning the retention of the passport in view of the pending payment is valid. According to Counsel, these issues ought to be determined by the Rent Restriction Tribunal or Civil Court as the issues stem from an Agreement. To buttress this point reliance was placed in

**Patrick Mbau Karanja vs Kenyatta University (2012)**

**eKLR** where it was held that:

*“...The Bill of rights and constitutional interpretative mandate of this Court should not be invoked where other remedies lie.”*

35. Reliance was also placed on **Godfrey Paul Okutoyi & Others -Vs- Habil Olaka & Another (2018) eKLR** and **Purity Wangechi Njogu -Vs- WPP- Scan Group Ltd & 2 Others (2019) eKLR**.
36. On whether the passport can be used as a collateral for the payment of debt, Counsel contended that the passport was never used as collateral for debt but only used to secure the Petitioner’s promise that she would pay for any extended stay before leaving the Country. Counsel stressed that the retention was solely for security of the promise, which he argued is a common and widely accepted practice in Kenya. Considering this, Counsel argued that the retention was not an illegal seizure as argued by the Petitioner.
37. Moving to the next issue, Counsel underscored that the impugned Agreement was written by the Petitioner and allegations that she was coerced to issue her passport are untrue. Counsel pointed out that the Petitioner was not under any duress as she had no rent arrears at the time of making the Agreement and was at liberty to find another apartment. As such, Counsel emphasized that the Petitioner

willingly gave out her passport as security for her promise to pay the money as it became due.

38. Counsel further argued that the Petitioner's allegations of being dragged to the car and driven to the ATM machine, are false and unsupported by any evidence. This allegation is as well argued to have never been reported to the police. In Counsel's view, the Petitioner's accusations are a fallacious and an afterthought to gain the Court's sympathy.
39. On the next point, Counsel argued that Article 24 of the Constitution allows limitation of rights as long as it is done in a reasonable and justifiable manner. In this matter, Counsel argued that the Petitioner voluntarily entered into an agreement that she wrote herself agreeing to hand over her passport to the Respondent. To buttress this point reliance was placed in **Purity Wangechi Njogu**(supra) where it was held that:

*"I find that by agreeing, in writing, to have her image used by the respondents to market their products for an indefinite period, the petitioner expressly gave up her right to privacy, at least in as far as the use of her image is concerned, and she cannot therefore turn around and claim that her rights under Articles 28 and 31 of the Constitution have been infringed".*

40. To this end, Counsel submitted that the Petitioner is not entitled to the relief sought as failed to establish her case. Equally, Counsel submitted that the Petitioner seeks special damages of Ksh.4,000,000 yet the same were not proved.

## **Analysis and Determination**

41. It is my considered view that the issues that arise for determination are:

***i. Whether the Petition raises a constitutional issue.***

***ii. Whether the Petitioner's rights under Articles 27, 28, 29, 31, 36, 39 and 40 of the Constitution were violated by the Respondent.***

***iii. Whether the Petitioner is entitled to the relief sought.***

***Whether the Petition raises a constitutional issue***

42. In determining this issue, the Court must profoundly evaluate the Petitioner's grievance and determine whether it is a constitutional or non-constitutional dispute. Should the Court find it can properly be resolved through the ordinary legal framework without reference to the Constitution the Court must decline to entertain the matter under the doctrine of constitutional avoidance.

43. In **Abdulkarim v Arrow Motors (EA) Limited & another [2017] KEHC 9674 (KLR)** observed as follows:

***“37. A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute... When determining whether an argument***

***raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values...***

**40. The question of what constitutes a constitutional question was ably illuminated in the South African case of Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others in which Justice O'Regan recalling the Constitutional Court's observations in *S vs. Boesak* notes that:-**

***"The Constitution provides no definition of "constitutional matter." What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions of .....the Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State....., the interpretation, application and upholding of the Constitution are also constitutional matters. So too,....., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues***

***connected with decisions on constitutional matters is clearly an extensive jurisdiction.”***

***41. Put simply, the following are examples of constituting constitutional issues; The constitutionality of provisions within an Act of Parliament; the interpretation of legislation, and the application of legislation. At the heart of the cases within each type or classification is an analysis of the same thing - the constitutionally entrenched fundamental rights. Therefore the classifications are not discreet and there are inevitably overlaps, but the classifications are nonetheless useful theoretical tools to organize an analysis of the nature of constitutional matters arising from the cases before the Court...”***

44. During oral highlighting of submissions, Mr. Ongeru for the Respondent amplified the Respondent’s written submissions on this issue. He argued that this Court’s constitutional interpretive mandate should not extend to matters where other remedies lie. In the written submissions, the Respondent had submitted that this Petition relates to a contractual dispute over payment of rent and should thus not be a Constitutional Petition, instead, it ought to have been filed in the Rent Restriction Tribunal or as an ordinary civil suit.
45. In a brief rejoinder, Mr. Muinde for the Petitioner asserted the dispute is of a constitutional nature given that the Respondent was using the passport to enforce payment and

has never filed a commercial suit against the Petitioner despite alleging it is a commercial matter.

46. In my view, the overriding issue in this Petition is whether or not the Respondent could lawfully withhold the Petitioner's passport to enforce a promise for the payment house rental charges. The question would be, did this action have any implication on the Petitioner's constitutionally guaranteed rights? Better still, can one's liberty (right of movement) be contracted away as security for the payment of a debt? These issues are beyond any contractual dispute between the parties, they raise genuine constitutional questions that can only be resolved through the application of Constitutional principles. This Court under Article 22 (1) is entitled to inquire into the Petitioner's grievance and determine if under the circumstances of this case, any of her constitutionally guaranteed rights were violated in the light of facts on record. This inquiry is thus beyond the competence of the Rent Restriction Tribunal or ordinary civil claim as suggested by the Respondent. It is a matter that perfectly belongs to this Court as raising fundamental constitutional questions.

47. The argument that the Petition does not raise a constitutional question is thus misconceived and must therefore inevitably fail.

***Whether the Petitioner’s rights under Articles 27, 28, 29, 31, 36, 39 and 40 of the Constitution were violated by the Respondent.***

48. Not only must the Petitioner plead with clarity the rights that have been violated, the Petitioner is also required to prove the allegations by adducing cogent, credible and admissible evidence. The Supreme Court in **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] KESC 53 (KLR)** guided thus:

***“[349] .... Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement...”***

49. Further in **Edward Akong'o Oyugi & 2 others v Attorney General [2019] KEHC 10211 (KLR)** held that:

***“73. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in Britestone Pte Ltd vs Smith & Associates Far East Ltd[38] :-***

***“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”***

***74. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Court decisions cannot be made in a factual vacuum. To attempt to do so would trivialize the Constitution and inevitably result in improper use of judicial authority and discretion. It will be a recipe for ill-considered opinions. The presentation of clear evidence in support of such prejudice is a prerequisite to a favourable determination on the issue under consideration. Court decisions cannot be based upon the unsupported hypotheses***

50. The Petitioner traced the genesis of the grievance against the Respondent to events of 20/8/2024 or thereabout when she made a payment of Kshs. 10,000/- via Mpesa leaving a balance of 5000/- because her money was still being processed through the Western Union. The Respondent showed up at the Apartment in company of some unknown

persons and started hurling insults at in Swahili yet she could not understand the language. This heightened her anxiety as she was also unwell at the time. When she tried to take her medicine, the Respondent denied her access to drinking water and she had to take the drugs without the water. The Respondent then dragged her to her car and drove her to an ATM where she withdrew Kshs. 5000 and paid him in cash. He then demanded that she must surrender the passport and forced her to write a note indicating she had surrendered it willingly.

51. On 29/8/2024, when she eventually moved out of the Respondent's premises, the Respondent refused to hand over the passport to her. She reported to Ruai Police Station but the Police told her to file a court case. Her Advocate wrote a demand letter on 4/9/2024 seeking the release of the passport to her but the Respondent refused to yield.
52. According to the Petitioner the Respondent's conduct towards her not only violated her right of movement by interfering with her plans to visit various tourist attraction sites but contravened her right to dignity, freedom and security of the person and discriminated against her just because she was a foreigner. The allegation of discrimination arises from the fact that the Petitioner had been staying with her Kenyan friend- Maggie Wachira yet the Respondent did not detain her passport.

53. The Respondent denied that he intimidated, harassed or insulted the Petitioner on 20/8/24 and stated that had this been the case, the Petitioner would not have requested him for the extension of her stay, further that, she had not made any report of the alleged intimidation and insults at the time. The Respondent explained that it is the Petitioner who in fact requested him to drive her to the ATM because the bank transfer was not working and she was unable to book a uber cab.
54. He also denied that he demanded the surrender of her passport insisting that it was the Petitioner who offered it security for the payment of the rental amount and proceeded to write the agreement herself. He thus denied infringing on the Petitioner's right to human dignity, freedom from discrimination, freedom and security of the person and the freedom of movement.
55. The incident of 20/8/2024 is controverted by the Respondent and it is the Petitioner's word against the Respondent. Despite the Petitioner stating that she was staying with her friend Maggie Wachira at the Respondent's premises, it is not indicated whether Maggie witnessed this incident or not or why she did not file an affidavit on the matter. Further, in the absence of cross-examination of the Petitioner and the Respondent, it is difficult for this Court to tell if indeed the

Petitioner was insulted in Swahili (she says she does not understand the language). Moreover, whether she willingly went to the ATM or was forcefully dragged into the Respondent's vehicle and driven there is a matter that is not corroborated by any other independent testimony considering the conflicting factual assertions by her and the Respondent. In the absence of any other corroborative testimony and considering that there was no cross-examination done to gauge the credibility of the oral testimonies to assist the Court in gauging who between the two is telling the truth, I would be reluctant to rely on the raw testimony as presented. This means that the evidence touching on violation of Petitioner's human dignity, security and freedom of the person is insufficient to establish those allegations. Moreover, the evidence that the Petitioner was discriminated in comparison with Maggie Wachira would also fail. The Petitioner does not say that Maggie Wachira ever booked any House from the Respondent by herself and a dispute over payment in exact similar circumstances as hers had erupted so that the only discriminating factor between them would have been her nationality. In fact, at no point does the Petitioner say Ms. Maggie Wachira had any role to play in the booking and payments. There would no basis of stating therefore that there was discriminatory treatment between Maggie Wachira and the Petitioner.

56. In my view, the only issue that stands out very clearly is the issue of the passport. The Respondent does not deny that indeed he was in possession of the Petitioner's passport and was not going to release until she paid all the monies he believed was due from her (I use the word 'believed' because the amount was contested by the Petitioner - on the basis that it included an amount unilaterally and arbitrary increased by the Respondent contrary to the original agreement and also, amount in respect of payment for days when she had vacated the apartment already). This however is beside the point since what is actually outstanding as a result of the contractual arrangement does not fall on this Court to determine. This Court is only concerned with the conduct that implicates on the violation of fundamental rights.
57. The Respondent in paragraphs 15, 16 and 17 of the Replying Affidavit states:

***"15. THAT I never coerced the petitioner to enter into the agreement as it was her who requested for the extension, willingly offered her passport as security and even wrote the agreement herself and insisted in writing that if I lost the passport I would pay for the same.***

***16. THAT I have not infringed or limited the petitioner's rights to human dignity, freedom from discrimination and the freedom of***

***movement as the petitioner willingly gave me her passport as security and it is her failure to honor the agreement that has delayed the release of the same to the petitioner.***

***17. THAT I am ready and willing to release the petitioner's passport immediately upon payment of the balance in full.''***

58. The fact that the Respondent was refusing to give back the Petitioner her passport until she paid what the Respondent considered as the outstanding amount is manifest because he never even bothered after the demand letter was sent to him on 4/9/2024 to return the passport.
59. The question that this Court must now answer is whether, by agreement one can pledge freedom of movement or liberty as security for the payment of a debt and two, whether such a private agreement can validly be enforced.
60. Article 39 of the Constitution states:

***'Freedom of movement and residence'***

*39(1) Every person has the right to freedom of movement.*

*(2) Every person has the right to leave Kenya.*

*(3) Every Citizen has the right to enter, remain in and reside in Kenya.*

*Under Article 24, on Limitation of rights and fundamental freedoms,*

*24 (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-*

- a) nature of the right or fundamental freedom*
- b) the importance of the purpose of limitation*
- c) the nature and extent of limitation*
- d) the need to ensure the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and*
- e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.*

61. It follows therefore that a private contractual agreement in which one promises to give up his freedom of movement or liberty for that matter as security for the payment of a debt cannot pass the constitutional muster. Pledging a passport as security for payment of a debt directly implicates the fundamental right of movement particularly the right to leave Kenya- Article 39 (2) and for foreigners such as the Petitioner, the right to move freely within Kenya is severely limited by such an act hence is a violation of Article -39 (1). Withholding of the Petitioner's passport under the

circumstances to the extent of even refusing to release it upon demand until payment was received by the Respondent was an unjustified restraint on the Petitioner's right of movement that the Constitution guarantees under Article 39 (1) & 2.

62. The restriction of Petitioner's freedom of movement could only have been justified had the Respondent obtained an order of the Court or if it was as result of a lawful legal enforcement action such a lawful arrest.
63. Article 2 (1) of the Constitution provides that '*the Constitution binds all persons and State organs*' whereas Article 3 (1) provides that '*every person has an obligation to respect, uphold and defend the Constitution*' hence there can be no excuse, even for anyone, including a private person such as the Respondent to act in a manner that violates fundamental rights and freedoms that are guaranteed under the Constitution. Indeed, even Article 20 (1) categorically states that:

***'The Bill of Rights applies to all law and binds all State organs and all persons.'***

64. The Respondent cannot thus escape the sanctions violating the fundamental rights and freedoms of the Petitioner by

withholding her passport merely to enforce the payment of a debt.

65. The Respondent has the right to recover the outstanding amount owed to him if any, (as it is disputed) through the legal means, not by resorting to actions that infringe on the Bill of Rights.

***Whether the Petitioner is entitled to the relief sought.***

66. The Petitioner stated that as a result of the unjustified restriction of her movement, she was unable to visit tourist attraction sites she had anticipated to go to while in Kenya. In any case, limiting one's freedom movement by itself is actionable per se. Prove of violation alone suffices to attract a remedy. The Constitution protects the freedom to move freely without unlawful restriction such as what the Petitioner was subjected to by the Respondent during a short stay in the Country.

67. In **Imanyara & 2 others v Attorney General [2016] KECA 557 (KLR)** the Court of Appeal gave the following guideline on constitutional remedies:

***“...the South African Case of Dendy v University of Witwatersrand, Johannesburg & Others - [2006] 1 LRC 291 where the Constitutional Court of South Africa held that:***

**...The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.**

**...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.”.....The Supreme Court of Canada established a consideration on when a remedy in a Constitutional violation case is “just and appropriate” in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 to include, a remedy that will:**

- (1) Meaningfully vindicate the rights and freedoms of the claimants;**
- (2) employ means that are legitimate within the framework of our constitutional democracy;**
- (3) be a judicial remedy which vindicates the right while invoking the function and powers of a court; and**
- (4) be fair to the party against whom the order is made.**

***Consistent with the above judicial experience and philosophy, it seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is "appropriate and just" according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration. Public policy considerations is also important because it is not only the petitioner's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy."***

68. Similarly, in **Jennifer Muthoni Njoroge & 10 Others v Attorney General [2012] KEHC 2705 (KLR)** the Court stated as follows:

***"...Once I have held that the Petitioners are entitled to the finding that their cases were proved to the required standard, then it follows that they were entitled to their declarations and also to damages in compensation. As was held in***

**Dominic Arony Amolo vs. Attorney General H.C. Misc. Appl. No.494/2003;**

**Is the Applicant deserving of an Order in damages? We have held elsewhere and already made declarations that the Applicant suffered certain violations of his Constitutional rights and guarantees. We need not repeat them. Who exactly is to blame for those violations? Clearly in answer to the question, we must find that the Prisons officers at Kamiti Prison at all material times acting in their official capacity should carry the cross for the violations. This should be so because in the Peters Case (supra), it was held that;**

**In Pilkington, Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms [1984] 62 Canadian Bar Rev. 517 it is said that the purpose of awarding damages in Constitutional matters should not be limited to simple compensation. Such an award, the Article suggests, ought in proper cases to be made with a view to deterring a repetition of breach or punishing those responsible for it or even securing effective policing of the Constitutionally enshrined rights by rewarding those who expose breach of them with substantial damages.”**

69. Guided by the above authorities, the Court grants the following reliefs:

- 1. A declaration is hereby issued that the withholding of the Petitioner’s Passport to enforce payment of the house rental charges was illegal, unconstitutional and a violation of Articles 39 (1) and (2) of the Constitution.**

**2. Compensation of Kenya Shillings Three Hundred Thousand (Kshs.300,000/-) is awarded for violation of the Petitioner's fundamental rights and freedoms**

**3. Costs of this Petition.**

**Dated, Signed and Delivered virtually at Nairobi this 5<sup>th</sup> day of March, 2026.**

.....

**L N MUGAMBI**

**JUDGE**

ORIGINAL