



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Otieno v Kenya Revenue Authority (Petition E193 of 2023) [2026] KEHC 3264 (KLR)  
(Constitutional and Human Rights) (12 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 3264 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION E193 OF 2023**

**LN MUGAMBI, J**

**MARCH 12, 2026**

**BETWEEN**

**PETER OTIENO ..... PETITIONER**

**AND**

**KENYA REVENUE AUTHORITY ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petition dated 9<sup>th</sup> June 2023, is supported by the Petitioner's affidavit in support of similar date and further supplementary affidavits dated 15<sup>th</sup> May 2024, 20<sup>th</sup> February 2025 and 4<sup>th</sup> March 2025.
2. The core of this Petition is that, Joseph Legei, the deponent who swore on behalf of the Respondent in Mombasa High Court Petition No. 190 of 2018; Car Importers Association of Kenya v. Kenya Revenue Authority & 3 others made false allegations in his affidavit against the Petitioner and tarnished the Petitioner's name thereby violating his rights under Articles 10, 28, 33, 47 and 50 of *the Constitution*.
3. Consequently, the Petitioner seeks the following reliefs against the Respondent:
  - a. A declaration that the Respondent acted illegally and in violation of Articles 10, 28, 33, 47 and 50 of *the Constitution* in making falsified statement against the Petitioner as stated at Paragraph 7 in the Petition.
  - b. General damages for violation of the Petitioner's fundamental rights as provided under Articles 10, 28, 33, 47 and 50 of *the Constitution*.
  - c. Costs of the Petition be awarded to the Petitioner herein.



## Petitioner's Case

4. The Petitioner depones that he is the Chairman of the Car - Importers Association of Kenya and the Director of Petrosa General Contractors Limited, a clearing and forwarding firm that deals with car importation.
5. He states that in February 2018, the Respondent published new current retail selling prices (CRSP) for used imported cars. He asserts that prior to the decision being made, the Car Importers Association of Kenya being a stakeholder, was not consulted neither was it given a chance to participate in the making of the new prices. Due to this, the Car Importers Association of Kenya protested the decision in Mombasa High Court Petition No. 190 of 2018; Car Importers Association of Kenya v. Kenya Revenue Authority & 3 others.
6. He alleges that in the matter, the Respondent in its replying affidavit sworn by Joseph Legei, intentionally falsified information against the Petition by averring that " the deponent of the Affidavit in Support of the Petition, Peter Otieno, who is the Chairman of the Car Importers Association of Kenya has concealed the fact that he is a Director at Petrosa General Contractors Limited, the clearing and forwarding firm that is responsible for the under- declaration ..... Peter Otieno is not only abusing the office he holds as the Chairman of the Car Importers Association of Kenya but also abusing the Court process to avoid paying the rightful taxes to the 2<sup>nd</sup> Respondent."
7. He decries that this allegation is contrary to his track record noting that he has always been given clearance certificates by the Ethics and Anti-Corruption Commission and the Directorate of Criminal Investigation. Equally that he has received tax compliance certificates from the Respondent individually and also for his company periodically.
8. He claims that the Court in its Judgment dated 16<sup>th</sup> October 2019 also highlighted the deponed falsehoods by the Joseph Legei that "On those allegations this court observes that it is the duty of parties to testify the truth of documents they rely on in Court. Intentional falsehood is punishable. The damaging averments by Joseph Legei in the Replying Affidavit were not proved and the said Mr.Legei did not come to Court to shed more light on them. However, there is no prayer in the petition concerning those allegations in the Replying Affidavit. The best this Court can do is to castigate the author of those allegations for failure to explain, substantiate or prove the same."
9. The Petitioner asserts that the Respondent despite making these falsehoods did not care to give an apology or give a statement recanting its statements. The Petitioner further argues that the Respondent's malicious lies calculated at maligning his business, has caused him loss of business and profits.
10. Specifically, he claims that in 2019, a Chinese based company, Hunan Tonggang Science and Technology Company Limited sought to enter a joint venture partnership with his company. This engagement would have earned him Ksh. 24,400,872 per year (225,934 dollars). He asserts that once the Chinese Company learnt of the Respondent's false statements, it declined to proceed with the deal. A similar fate befell his engagement with one Sokratis Simos, a Greece partner he had engaged for importation of spare parts, thus loosing Ksh.500,000 per month.
11. In light of this underscores that he had a legitimate expectation that the Respondent would treat him with dignity and in addition the work he has done to ensure its smooth operations through participation in policy formation and other avenues. For this reason, he contends that the existence of these untruths continues to tarnish his name and violate his rights under Articles 10, 28, 33, 47 and 50 of *the Constitution*.



12. Furthermore, the Petitioner maintained that the issues raised herein are distinct from those raised in Petition No. 190 of 2018. He argues that just because his cause of action arose from the cited suit does not render this Petition an abuse of the Court process since it concerns a legitimate violation of his rights.

### **Respondent's Case**

13. The Respondent opposing the Petition filed a Replying Affidavit sworn on 2<sup>nd</sup> November 2023 by David Kipkemoi Kirui. Its case is as well supported by a further affidavit sworn on 25<sup>th</sup> March 2025.
14. At the start, he affirms Petition No. 190 of 2018, which was heard and determined on 16<sup>th</sup> October 2019. Reiterating the allegations made by Joseph Legei, he argued that the Petitioner ought to have made an application before the Court to cross-examine the deponent on the contents of the impugned Replying Affidavit.
15. Equally, he argues that the Petitioner was at liberty to file a further affidavit in response to the impugned averments. That said, Counsel opposed the Petitioner's reliance on the Court's opine at Paragraph 40 of the Judgment since the same does not constitute the holding of the Court. Nonetheless he reasoned that the commentary had been made without affording the deponent a chance to be heard. Tying to this, he argued that the Court did not issue an adverse finding against him to warrant issuance of the sought apology.
16. Referring to the Petitioner's email correspondence with Hunan Tong Gang Company Limited, he alleges that it does not suggest a business relationship or intention to create one as advanced by the Petitioner. The claims for payment with reference to this engagement is also said to have not been substantiated. Equal sentiments were shared in relation to the adduced Joint Venture Agreement which is additionally faulted for not being notarized.
17. He as well opposes the Petitioner's introduction of an affidavit sworn by one Michael Githua in his supplementary affidavit, arguing that it was not filed procedurally.
18. Consequently, he claims that the Petition is an abuse of the Court process as the same is an afterthought meant to oversight and re-litigate Petition No. 190 of 2018. On top of this, Counsel contended that the Petition is a defamation suit framed as a constitutional petition, to circumvent the statutory limitation period of 1 year as provided under Section 4 (2) of the Limitations of Actions Act.
19. It was further stated that the Petitioner had not pleaded the Petition with precision as provided in *Anarita Karimi Njeru v Republic* [1979] eKLR. Moreover, that the Petitioner failed to prove how the Respondent had violated his rights and loss of business is as a result of their deponent's statement. In sum, he argued that the Petition made in bad faith, lacks merit and thus unworthy of the orders sought.

### **Petitioner's Submissions**

20. Gikandi and Company Advocates for the Petitioner filed submissions dated 25<sup>th</sup> February 2025 and supplementary submissions dated 5<sup>th</sup> March 2025. The issues identified for determination were: whether this Court has jurisdiction to entertain the matter and whether the Respondents violated Articles 10, 28, 33 and 47 of *the Constitution*.
21. Counsel submitted that the High Court has the jurisdiction to enforce and uphold the Bill of Rights in claims of infringement as provided under Article 22 and 23 of *the Constitution*. Counsel noted that the Petitioner brings this Petition in view of the alleged violation of his fundamental rights. Similarly, Counsel argued that the Respondent being a state organ is required to uphold the values set out under



Article 10 and 47 of *the Constitution* while performing their mandate, which they failed to do by harming his reputation. Counsel argued that while defamation is a civil claim, invasion of one's rights by the State amounts to a constitutional tort enforceable by this Court. As such, Counsel argued that this Court is the proper forum to ventilate this issue.

22. Reliance was placed in *John Atelu Omilia & another v Attorney General & 4 others* [2017] eKLR where it was held that:

“A constitutional tort refers to a private civil suit brought to redress a constitutional violation. Constitutional torts are violation of one's constitutional rights by a government servant. Constitutional tort actions are an avenue through which individuals can directly appeal to *the Constitution* as a source of right to remedy government-inflicted injury...When examined as individual remedy, it becomes clear that the constitutional tort action has had more than a narrowing influence on rights by shifting the attention of the courts to the injury suffered by individuals, constitutional tort actions have influenced courts, encouraging the establishment of constitutional rights that both protect individuals from governmental injury and regulate the discretion of the government to inflict injury.”

23. Similar reliance was placed on *Kimunai Ole Kimeywa & 5 others v Joseph Motari Mosigisi (The then District Commissioner, Rongai District) & 3 others* [2019] eKLR.

24. Counsel referring to the pronouncement of the Court in *Petition No.190 of 2018*, maintained that the Court observed that the Respondent's deponent therein had made intentional falsehoods in his averments. Counsel stressed that as a result of the malevolent averments, the Petitioner suffered loss of business in addition to violation of his constitutional rights. Counsel emphasized that the Respondent is bound by the constitutional principles however failed to abide by them, causing this injury to the Petitioner.

25. Accordingly, Counsel argued that the Petitioner is entitled to the reliefs sought. Dependence was placed in *Imanyara & 2 others v Attorney General* [2022] KESC 78 (KLR) where it was held that:

“We therefore agree with the trial court's observation that the only issue for determination was the assessment of damages for the constitutional violations. Article 23(3) of *the Constitution* is the launching pad of any analysis on remedies for constitutional violations, it provides that:

“In any proceedings brought under article 22, a court may grant appropriate relief including:-

- a. A declaration of rights;
- b. An injunction;
- c. A conservatory order;
- d. A declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under article 24;
- e. An order for compensation; and
- f. An order of judicial review”.



This Court interrogated the scope of article 23(3) in the case of Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae), SC Petition No 3 of 2018; [2021]eKLR where the case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 Others; Petition No 14, 14A, 14B and 14C of 2014 (Consolidated) was cited with approval. The Court stated:

“... a close examination of these provisions (article 23(3) and 165(3) (d) of *the Constitution*) shows that *the Constitution* requires the Court to go even further than the US Supreme Court did in the Marbury case, and that article 23(3) grants the High Court powers to grant appropriate relief“ including” meaning that this is not an exhaustive list.”

50. In the instant case, the appellants’ prayers for compensation for damages under article 23(3) of *the Constitution* is two-pronged; compensation available to the appellants for gross violation of their fundamental rights and freedoms, and compensation for losses suffered by the appellants’ companies as a result of the violation of the appellants’ rights. We shall determine the issues simultaneously.”
26. Counsel on damages submitted that the Petitioner as deponed in his affidavit had lost significant business opportunities presented by Tonggang Science and Technology Company Limited and the business venture with Sokaritis Simos. Counsel submitted that in the Petitioner’s further supplementary affidavit had demonstrated in the attached annexures that he lost these business deals and future income flowing therefrom, solely because of the Respondent’s malicious and unfounded allegations.
27. Counsel calculated that the Petitioner would have earned Ksh.24,400,872.00 per year in the first venture and Ksh.30,400,872.00 in the second venture. He noted that the Petitioner was 56 at the time and expected to work up to 75 years. In total therefore the Petitioner would have earned Ksh.557,616,568.00. Deducting other exigencies, Counsel urged the Court to award the Petitioner Ksh.365,077,712.00 To buttress this point reliance was placed in Peter M. Kariuki vs Attorney General [2014] eKLR where it was held that:
- “It bears repeating that assessment of quantum of damages is a matter for the discretion of the trial judge, which must be exercised judicially and with regard to the general conditions prevailing in the country and to prior relevant decisions...”
28. Additional reliance was placed in Rahimkhan Afzalkhan Rahimkhan & 4 others v Chief Land Registrar & 2others [2017] KEHC 4856 (KLR).
29. Counsel added that an award for general damages for mental and psychological anguish is merited and under this point sought an award of Ksh.100,000,000.00 for the Petitioner.

### **Respondent’s Submissions**

30. The Respondent’s advocate Kelvin Kinyua filed submissions dated 14<sup>th</sup> January 2025 and further submissions dated 8<sup>th</sup> April 2025. Counsel outlined the single issue for discourse as whether the instant Petition is merited.



31. Counsel submitted that the Petitioner's key assertion is that the Respondent's deponent in Petition No.190 of 2018 falsified information against him. Counsel reiterated that if at all the Petitioner felt aggrieved by these averments he ought to have sought leave of the Court to cross examine the deponent.
32. Counsel argued that it is trite law that where allegations of matters touching on fraud, mala fides, authenticity of the facts deponed, bad motive among others are raised in a Replying Affidavit, cross-examination of a deponent of an affidavit may be ordered. Equally, Counsel submitted that the Petitioner had an opportunity to file a further affidavit in response to the deponed allegations thus those averments remain uncontroverted. For this reason, Counsel contended that the Petition is an afterthought.
33. Further to this, Counsel stated that the cause of action of the Petition is defamation disguised as a constitutional petition to circumvent the one-year statutory limitation period provided under Section 4(2) of the Limitations of Actions Act. Reliance was placed in *Satya Bhama Gandhi V Director Of Public Prosecutions & 3 Others* [2018]eKLR where it was held that:

“The civil justice system depends on the willingness of both litigants and lawyers to try in good faith to comply with the rules established for the fair and efficient administration of justice. When those rules are manipulated or violated for purposes of delay, harassment, or unfair advantage, the system breaks down and, in contravention of the fundamental goal of the Civil Procedure Rules, the determination of civil action becomes unjust, delayed and expensive... o me this suit constitutes abuse of Court process. It is trite law that the Court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The black law dictionary defines abuse as “Everything which is contrary to good order established by usage that is a complete departure from reasonable use ”An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use”.
34. Counsel as well stressed that the remarks of the Judge in the cited Judgment do not constitute the holding of the Court and thus not authoritative enough to form the basis of the instant Petition. Tying to this, Counsel reasoned that the Respondent had no obligation to issue an apology or issue a statement rectifying the falsified information since no adverse finding or Court order had been made in that regard.
35. Counsel arguing that the Petition was not pleaded with precision in line with *Anarita Karimi* (supra) added that the Petitioner had also not proved the alleged violation of rights and loss of business as a result of the alleged false averments. To this end, Counsel urged the Court to dismiss the Petition.

### **Analysis and Determination**

36. It is my considered take that the issues that arise for determination in this matter are as follows:
  - i. Whether this matter raises a constitutional question.
  - ii. Whether the Petitioner's constitutional rights under Articles 10, 28, 33, 47 and 50 of *the Constitution* were violated by the Respondent.
  - iii. Whether the Petitioner is entitled to the relief sought.



### Whether this matter raises a constitutional question.

37. Where a matter may be resolved on non-constitutional grounds through the application of statutes or well established legal principles without the Court requiring to apply or interpret *the Constitution*, then the matter does not truly raise constitutional questions and thus should not be litigated as Constitutional Petition. In *Lugo v Director of Public Prosecutions* [2022] KEHC 10574 (KLR) the Court observed as follows:

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on 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....

It is a fact that every legal dispute is capable of either direct or indirect application of the Bill of Rights. Every dispute is essentially a constitutional issue when one looks at it. This arises necessarily because of the principle of constitutional supremacy. One needs to be aware, however, of the singleness of the legal system. This is embodied in the fact that the supremacy of *the Constitution* does not detract from the usefulness of the rest of the body of law. In essence, all other laws give full expression to the ideals of *the Constitution* until found to be inconsistent with it.

....

The exceptions to the application of the doctrine of constitutional avoidance are: -

- i. where the constitutional violation is so clear and of direct relevance to the matter,
- ii. in the absence of an apparent alternative form of ordinary relief and
- iii. where it is found that it would be a waste of effort to seek a non-constitutional resolution of the dispute.”

38. In like manner, in *C O D & another vs Nairobi City Water & Sewerage Co. Ltd* [2015] KEHC 7762 (KLR) the Court noted as follows:

“... To my mind therefore, not every litigant ought to come to court by way of a constitutional petition even where there are no constitutional issue arising and where there are adequate remedies provided in other laws to determine such situations.

15. *The Constitution* cannot be used as a general substitute for the normal procedures. The mere allegation that a human right has been contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the High Court under Article 165 of *the Constitution*: See *Harrikissoon v A-G* [1979] 3 WLR 62. Where it is possible to decide any case or dispute, civil or criminal, without reading a constitutional issue then that is the course that should be followed. The court sitting as a constitutional court must through the doctrine of avoidance steer clear of determining such disputes as if there were constitutional questions being raised: see *S v Mhlungu*[1995] 3 SA 867 (CC) and also *Ashwander v Tennessee* 297 US 288.”



39. On the other hand, Constitutional tort, the term refers actions of the State agents that violate the Bill of rights by abusing or acting in excess of their authority. The Court in *John Atelu Omilia & another v Attorney General & 4 others* [2017] KEHC 8784 (KLR) explained:

“The concept of constitutional “Tort”

Michael Wells [17] argues that:-

“Officers may harm persons in many ways. When an official inflicts a physical injury, causes emotional distress, publishes defamatory statements, or initiates a malicious prosecution, the victim’s traditional recourse is a tort suit brought under common law or statutory principles. But an alternative to ordinary tort may also be available. The growth of damage remedies for constitutional violations in the decades following *Monroe v. Pape*’ has encouraged litigants to frame their cases as breaches of *the Constitution*. These litigants may sue for damages....., or assert the damages cause of action implied from *the Constitution* .... In either case, the Court’s task is to fix the boundary of constitutional tort. It must determine whether the plaintiff has a good claim for breach of a substantive constitutional right, or instead must sue under ordinary tort law.”

A “constitutional tort” refers to a private civil suit brought to redress a constitutional violation. [18] Constitutional torts are violation of one’s constitutional rights by a government servant. “Constitutional tort” actions are an avenue through which individuals can directly appeal to *the Constitution* as a source of right to remedy government-inflicted injury. This sort of access is a recent phenomenon.”

40. Equally, the Court in *Francis Mulomba Nguyo v Nation Media Group Limited, Stephen Waithaka Gitagama & Mutuma Mathiu* [2021] KEHC 3888 (KLR) observed as follows:

“20. In the case of *Kimunai Ole Kimeywa & 5 others v Joseph Motari Mosigisi* (The then District Commissioner, Rongai District) & 3 others [2019] eKLR, the Court stated that:

“As Prof. Michael Well explains, the prime objective of a constitutional tort is to protect a broad range of common law interests encompassed within the Bill of Rights’ liberty interests in circumstances where the official’s conduct is fairly characterized as an abuse of power.”

21. It therefore seems that the recommended and common course of action for defamation cases is to file a civil case. This was underscored in *Jacqueline Okuta & another v Attorney General & 2 others* [2017] eKLR where the Court stated that:

“It is to be borne in mind that defamation of an individual by another individual is a civil wrong or tort, pure and simple for which the common law remedy is an action for damages.”

22. From the cited cases, it is apparent that ‘constitutional torts’ provide an avenue for individuals to demand compensation for the violation of their rights by the State. This is a claim that is mostly pursued against the State where there has been an abuse of power. One may therefore agree with the respondents that the Petitioner ought to have filed a civil suit instead of commencing constitutional proceedings. It is, however, my view that the issue does not end there and



whether a claim for violation of the constitutional right to privacy can be pursued against a non-state actor is an issue that needs to be revisited later in this judgement.”

41. In the instant matter, the Petitioner claimed that the Respondent, through the deponent swore a false affidavit in court proceedings, which tarnished his name and caused him to lose major business prospects. That in my view does not constitute a constitutional tort. Going by the case law above, a constitutional tort involves abuse of authority by a state official or agent, which primarily violates a right or fundamental freedom that is protected in the Bill of Rights and not merely a wrongful act that can adequately be redressed through the already established common law principles on tortious liability or statutory provisions. If the claim can fairly be resolved using the existing principles in the law of torts, the same does not compel the Court to resort to *the Constitution* to resolve. These facts as pleaded essentially present a defamation claim that alleges a false statement, publication (through affidavit) and the alleged damage (in form of lost business opportunities).
42. This Petition is an attempt at constitutionalizing an ordinary defamation case into a Constitutional litigation which I must reject by refusing to exercise this Court’s jurisdiction under Article 165 (3) (b) to resolve an ordinary tortious liability claim.
43. Further, it is also apparent that the Petition which is premised on false statement made by an adverse Party in judicial proceedings stands on quick sand. In my view, the facts as pleaded do not disclose a reasonable cause of action capable of being remedied in law as a constitutional wrong. Judicial proceedings enjoy absolute privilege or immunity hence the cause of action as pleaded is dead on arrival. In the Book Winfield & Jelowiwicz – Nineteethn Edition – W.e Peel & J. Goudkamp at pg. 380-381, the authors write about this principle as follows:

“Judicial proceedings. Anything said, whether orally or in documentary form, in judicial proceedings is absolutely privileged. It does not matter how false or malicious the statement may be. Neither does it matter who makes it- the Judge, the Jury, the parties, the advocates or witnesses. The function of this head of privilege is to ensure that the administration of justice is not frustrated. Justice could not be done if, for example. Judges could not write freely in their opinions, and if witnesses could give evidence unconstrained by threat that, if they defame someone, they might be sued... The absolute privilege is not confined to what is said in the presence of the court or tribunal but extends to statements made in preparation for judicial proceedings...”
44. In my view, this claim is not legally sustainable. Further, it is my humble view that the perjury allegations ought to have been raised in the same suit they arose so that for the Court that was seized with the matter can inquire into the same and give appropriate directions. The present suit is thus an afterthought and an abuse of the Court process.
45. It is the finding of this Court that this Petition not only offends the doctrine of constitutional avoidance but also the facts as pleaded do not disclose a reasonable cause of action in law.
46. The Petition lacks merit and is hereby dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12<sup>TH</sup> DAY OF MARCH, 2026.**

.....

**L N MUGAMBI**



**JUDGE**

