

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**CONSTITUTIONAL PETITION NO. E331 OF 2024**

**IN THE MATTER OF ARTICLES 2,3,10, 19, 20, 22(1), 23(1), 24, 28, 35(2), 45, 47(1),  
53(1)(a), 7, 75(1) (a) and (b), 165(3)(b) AND 232(1)(a) (e) OF THE CONSITUTION  
OF KENYA, 2010**

**AND**

**IN THE MATTER OF DEPRIVATION OF SURNAME & PATERNITY AND**

**IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS**

**BETWEEN**

**BENARD KARINO NTAYIA..... 1<sup>ST</sup> PETITIONER**

**CHUPKEL OLE NDAIYO.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**SIMON SALAY NTAYIA ..... RESPONDENT**

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**JUDGMENT**

**Introduction**

1. The Petitioners, Benard Karino Ntaya and Chupkel Ole Ndaiyo, have moved this Honourable Court by way of a Petition dated 17<sup>th</sup> June 2024, seeking redress for alleged violations of their fundamental rights and freedoms as guaranteed under Articles 2, 3, 10, 19, 20, 22(1), 23(1), 24, 28, 35(2), 45, 47(1), 53(1)(a), 75(1)(a) and (b), 165(3)(b), and 232(1)(a) and (e) of the Constitution of Kenya, 2010, together with other enabling provisions of the

law. The 1<sup>st</sup> Petitioner is the son of the 2<sup>nd</sup> Petitioner and one Kiraita Simpiri, while the 2<sup>nd</sup> Petitioner is the biological father of the 1<sup>st</sup> Petitioner.

2. The Respondent is a public officer serving in the capacity of Assistant Chief of Olkinyei Location, Narok County. It is the Petitioners' case that the Respondent, while acting in his official capacity, unlawfully, maliciously, and in abuse of his office, caused the registration of the 1<sup>st</sup> Petitioner's birth certificate with false paternity particulars, an act which they contend resulted in the violation of their fundamental rights and freedoms under the Constitution.

### **The Petitioners' case**

3. The Petitioners' case is anchored on the contention that the 1<sup>st</sup> Petitioner was born on 25<sup>th</sup> January 2000 as the last-born child of the 2<sup>nd</sup> Petitioner and his mother, Kiraita Simpiri. They state that the parents separated in the year 2013, allegedly following an extramarital relationship between the said mother and the Respondent. It is common ground that at the time of the 1<sup>st</sup> Petitioner's birth, no birth certificate was obtained. Subsequently, when the 2<sup>nd</sup> Petitioner sought to register the birth, the County Civil Registration Office, Narok, directed that the process of late registration be undertaken through the local Assistant Chief. The Respondent, in his capacity as the Assistant Chief of Olkinyei Sub-Location, was accordingly required to certify the relevant registration documents.

4. The Petitioners contend that on or about 22<sup>nd</sup> October 2015, the Respondent, in what they describe as a manifest abuse of office, unlawfully completed the application for late registration by falsely inserting his own name as the father of the 1<sup>st</sup> Petitioner, notwithstanding that the form had allegedly been duly completed by the 2<sup>nd</sup> Petitioner with his correct particulars. They assert that the said act was deliberate, malicious, and without any lawful justification, and that it culminated in the issuance of a birth certificate bearing erroneous paternity details. It is further contended that despite repeated demands, including a letter dated 29<sup>th</sup> April 2024, and interventions by community elders, the Respondent has failed and/or refused to cause the correction of the impugned entry, thereby perpetuating the alleged violation of the Petitioners' constitutional rights.
  
5. According to the Petitioners, the Respondent's conduct has occasioned profound and continuing adverse consequences. The 1<sup>st</sup> Petitioner is said to have been denied access to educational opportunities, bursaries, social recognition, inheritance, and other benefits attendant upon legal acknowledgment by his biological father. The 2<sup>nd</sup> Petitioner, on the other hand, is alleged to have been deprived of his parental rights, familial relations, and the social and material benefits associated with fatherhood. In their view, the Respondent's actions amount to a direct infringement of their rights to human dignity, recognition, protection of the family, fair administrative action, and the correction of misleading information.

6. The Petitioners further contend that the Respondent's conduct was in breach of the constitutional principles of integrity, accountability, and professionalism as enshrined in Articles 75 and 232 of the Constitution. They assert that the impugned actions were further tainted by a personal conflict of interest arising from the Respondent's alleged extramarital relationship with the 1<sup>st</sup> Petitioner's mother, in violation of Article 75(1)(a) and (b).
7. It is the Petitioners' case that, by reason of the wrongful registration, the Respondent contravened Articles 28, 45, 47, and 53(1)(a) of the Constitution by denying the 1<sup>st</sup> Petitioner his rightful name, identity, and familial recognition, while simultaneously infringing upon the 2<sup>nd</sup> Petitioner's paternal rights. They aver that the erroneous registration has resulted in psychological distress, social stigma, discrimination, and deprivation of rights, benefits, and inheritance, thereby undermining their human dignity and family life.
8. In their written submissions dated 19<sup>th</sup> November 2024, the Petitioners emphasized that the matter before Court raises issues of significant public law importance, arising, in their view, from a deliberate and sustained abuse of public office. They submit that the Respondent's conduct violated Articles 2, 3, 10, 19, 28, 35(2), 45, 47(1), 53(1)(a), 75(1)(a) and (b), and 232(1)(a) and (e) of the Constitution, thereby infringing their rights to identity, family, dignity, and fair administrative action. They further contend that the Respondent acted unlawfully, unreasonably, and maliciously in contravention of Section 12 of the Births and Deaths Registration Act, Cap 149, which

restricts the registration of a person as the father of a child except upon lawful proof.

9. In the circumstances, the Petitioners seek the following reliefs:

- a) *A declaration that the conduct of the Respondent is contrary to and inconsistent with the provisions of the Constitution of Kenya, 2010;*
- b) *A declaration that the Respondent abused his office by uttering false documents and causing their registration;*
- c) *A declaration that the Respondent breached the rights of the Petitioners;*
- d) *An order of adequate compensation of Kenya Shillings Four Million (Kshs. 4,000,000) and further damages for breach of fundamental rights guaranteed under the Constitution of Kenya, 2010;*
- e) *Any other relief that this Honourable Court shall deem fit, by virtue of Article 23(3) of the Constitution, and as just in the circumstances; and*
- f) *Costs of this Petition.*

10. The Petitioners contend that an award of general, exemplary, and punitive damages is warranted both as compensation for the violations allegedly suffered and as a deterrent against future abuse of public office by the Respondent. In support of this position, they place reliance on the decisions in ***Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR, Akusala A.***

*Borniface v OCS Langata Police Station & 4 Others [2018] eKLR*, and *Peter Ndegwa Kiai t/a Pema Wines & Spirits v Attorney General & 2 Others [2021] KECA 328*, which they submit articulate the principles governing the award of damages for constitutional violations. They argue that the Respondent, being the direct author of the impugned acts, ought to bear personal liability for the alleged violations, and that an award of compensation is justified both in law and in principle.

11. The Petitioners further submit that the costs of the Petition should follow the event pursuant to Rule 26 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, and Section 27 of the Civil Procedure Act, Cap 21. They assert that these proceedings were necessitated by the Respondent's unlawful conduct and that they should, in the circumstances, be indemnified for the expense and inconvenience incurred in seeking the vindication of their constitutional rights.
12. Ultimately, the Petitioners urge this Honourable Court to declare that their rights under Articles 28, 45, 47, and 53(1)(a) of the Constitution were violated; to order the correction of the 1<sup>st</sup> Petitioner's birth certificate; and to grant all the reliefs sought, including compensation and costs, as may accord with justice, equity, and the dictates of the Constitution.

### **Respondent's case**

13. The Respondent, Samson Salau Ntayia, the Assistant Chief of Olkinyei Sub-Location, Narok County, opposes the Petition and contends that it is vexatious, scandalous, and an afterthought, instituted with the sole intention of maligning his character and embarrassing him in the discharge of his official duties. He states that he has served as an Assistant Chief since the year 2002, having been appointed pursuant to Section 15(2)(e) of the National Government Co-ordination Act, Cap 127, and in accordance with the Chiefs Act, Cap 128. He avers that throughout his tenure, he has faithfully discharged his functions in compliance with the Constitution of Kenya, 2010, and in adherence to the values and principles of integrity, professionalism, and accountability espoused under Chapter Six of the Constitution.
  
14. The Respondent explains that in the year 2015, he was requested by the Head Teacher of Entoltol Primary School to certify applications for late registration of births for pupils who had not previously obtained birth certificates, a requirement for registration for the Kenya Certificate of Primary Education (KCPE). He states that he certified the said applications in accordance with Part II, Rule 3 of the Second Schedule to the Births and Deaths Registration Rules. With respect to the 1<sup>st</sup> Petitioner, the Respondent maintains that he was neither the biological father nor the legal guardian of the child and that, at the time of certification, he was not indicated as the father in the application. He avers that the appearance of his name on the birth certificate was therefore an inadvertent administrative error. In support of his position, the Respondent points to his consistent practice of assisting

parents to rectify similar errors, citing instances such as Magdaline Sainapei, where the mother's name was incorrectly recorded, and Julius Sanare, in which case he coordinated with the County Civil Registration Office to facilitate correction.

15. The Respondent categorically denies the allegations of an extramarital relationship with the 1<sup>st</sup> Petitioner's mother, describing them as false, malicious, and calculated to tarnish his reputation. He avers that he has never sought custody, guardianship, or any parental role over the 1<sup>st</sup> Petitioner and that he has no personal or proprietary interest in the child's paternity. He further states that at no time did he request the Registrar of Births and Deaths to record him as the father, nor did he present proof of marriage to the child's mother, as contemplated under Section 12 of the Births and Deaths Registration Act, Cap 149. He maintains that any entry of his name on the birth certificate was the result of an honest administrative mistake rather than a deliberate or malicious act.
  
16. The Respondent further asserts that he is willing and ready to facilitate the correction of the 1<sup>st</sup> Petitioner's birth certificate to reflect the accurate parental particulars, in accordance with Section 28 of the Births and Deaths Registration Act, Cap 149, and Article 35 of the Constitution, which guarantees the right to the correction of untrue or misleading information. Reliance is placed on *NTA v SVK & 2 Others [2020] eKLR*, in which the Court sanctioned the rectification of an erroneous birth certificate, to demonstrate

that such administrative errors are correctable and do not, without more, amount to violations of constitutional rights.

17. In response to the alleged constitutional violations, the Respondent submits that the Petitioners have failed to adduce any evidence establishing a causal connection between his actions and the purported infringement of their rights. He emphasizes that the mere listing of constitutional provisions, without evidentiary support, is insufficient to sustain a constitutional petition. In this regard, reliance is placed on ***Mohammed Abduba Djda v Debate Media Limited & Another [2018] eKLR*** and ***Christian Juma Wabwire v Attorney General [2019] eKLR***, which affirm that the burden of proof lies upon the party alleging a violation. Further reliance is placed on ***Khen Kharis Mburu v Inspector General of Police Service & 3 Others [2019] eKLR*** and ***Halima Nerima Musa & Another v Nairobi City Water & Sewerage Co. Ltd [2021] eKLR***, which underscore the requirement that a constitutional petition must clearly set out the specific right alleged to have been violated, the manner of violation, and the basis of the Court's jurisdiction. The Respondent contends that the Petitioners have failed to satisfy this threshold.
  
18. On the reliefs sought, the Respondent submits that no evidence has been placed before the Court to demonstrate actual damage or prejudice arising from the alleged administrative error. The Respondent places reliance on ***Fresco Bushlands (K) Limited v National Police Service & 4 Others [2024] eKLR***, where claims unsupported by evidence were held to be unsustainable,

and *Emmah Muthoni Njeri v Nairobi Women's Hospital [2021] eKLR*, which reiterates that monetary compensation for constitutional violations is contingent upon proof of an actual infringement. He contends that the Petitioners' claims are founded on unproven allegations and personal animosity, and that they have not approached the Court with the requisite candour.

19. The Respondent maintains that the inclusion of his name on the 1<sup>st</sup> Petitioner's birth certificate was an inadvertent administrative error and not a violation of the Constitution or any written law. He reiterates that the Petitioners have failed to establish any causal link between his actions and the alleged harm, that the accusations of extramarital conduct remain unsubstantiated, and that the Petition is vexatious and malicious. He accordingly prays that the Petition be dismissed with costs, while reaffirming his willingness to assist in the lawful rectification of the birth certificate so as to accurately reflect the parentage of the 1<sup>st</sup> Petitioner.

### **Analysis and Determination**

20. Having carefully considered the pleadings, affidavits, written submissions, and the authorities cited by the respective parties, this Court is of the view that the dispositive issue for determination is not whether an error occurred in the registration of the 1<sup>st</sup> Petitioner's birth, but whether the Petitioners have discharged the legal and evidentiary burden of demonstrating that such error attained the threshold of a violation of the Constitution of Kenya, 2010. This distinction is fundamental. Constitutional adjudication is not concerned

with the correction of every administrative misstep, but is reserved for acts or omissions that demonstrably infringe constitutionally guaranteed rights and freedoms.

21. The Petitioners invoked an array of constitutional provisions, including Articles 2, 3, 10, 19, 20, 22, 23, 24, 28, 35(2), 45, 47(1), 53(1)(a), 75, 165, and 232 of the Constitution. However, it is now firmly settled that the mere citation of constitutional provisions, without more, does not suffice. In determining whether a constitutional violation has been established, this Court is guided by long-standing Kenyan jurisprudence which places a strict and non-delegable burden upon a petitioner to prove, and not merely allege, the infringement complained of. The locus classicus remains **Anarita Karimi Njeru v Republic [1979] eKLR**, where the Court held that a party alleging violation of fundamental rights must set out with a reasonable degree of precision the nature of the complaint, the specific constitutional provisions alleged to have been infringed, and the manner of the alleged infringement. This principle was reaffirmed and elevated under the 2010 Constitution in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR**, where the Court of Appeal cautioned against transforming constitutional litigation into a forum for generalized grievances unsupported by precise pleadings and cogent evidence.
  
22. In the present Petition, the Petitioners allege that the Respondent maliciously and unlawfully caused his name to be entered as the father of the 1<sup>st</sup> Petitioner, thereby violating their rights to human dignity, family life, identity,

and fair administrative action. These are grave allegations, carrying serious implications for the personal integrity and professional standing of a public officer. However, the law is clear that such allegations must be proved. While Article 22 of the Constitution confers standing to institute proceedings for the enforcement of rights, it does not relieve a litigant of the evidentiary burden. Sections 107 to 109 of the Evidence Act, Cap 80, apply with equal force to constitutional proceedings. In particular, Section 107(1) provides that whoever desires a court to give judgment as to any legal right dependent on the existence of certain facts must prove that those facts exist.

23. Beyond precision in pleading, the Petitioners bore the burden of establishing, on a balance of probabilities, that the Respondent's conduct amounted to a constitutional infringement. In ***Mohammed Abduba Dida v Debate Media Limited & Another [2018] eKLR***, the Court held that the mere reproduction of constitutional provisions, without evidence showing how the respondent's conduct violated those provisions, is insufficient. Similarly, in ***Christian Juma Wabwire v Attorney General [2019] eKLR***, the Court underscored that a subjective sense of grievance does not translate into a constitutional violation unless supported by credible evidence establishing a causal nexus between the impugned conduct and the alleged infringement. Where allegations of malice, abuse of office, or bad faith are directed at a public officer, the standard is necessarily exacting, as reaffirmed in ***Khen Kharis Mburu v Inspector General of Police Service & 3 Others [2019] eKLR***.

24. The Respondent has candidly acknowledged that an error occurred in the registration process. This Court notes, and indeed commends, that candour. However, an admission of administrative error does not, without more, translate into a constitutional violation. The Constitution does not constitutionalise every administrative mistake. In *James Kanyiita Nderitu v Attorney General & Another [2019] KECA 1006 (KLR)*, the Court of Appeal, quoting the Privy Council, observed that “**no human right or fundamental freedom is contravened by a judgment or order that is wrong... ordinary errors should be corrected by invoking the prescribed mechanisms.**” Although that pronouncement arose in the context of judicial error, the principle is equally applicable to administrative action: an error, standing alone, does not amount to a breach of the Constitution.
25. Even where an administrative irregularity is established, the Court must apply the constitutional test to determine whether the impugned conduct rises to the level of a constitutional violation warranting relief under Article 23. In *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2014] eKLR*, the Supreme Court cautioned that not every breach of statute or administrative lapse amounts to a constitutional violation. The Court must interrogate whether the action complained of offends the constitutional standards of legality, rationality, procedural fairness, and proportionality, and whether it occasioned real and demonstrable prejudice to the enjoyment of a specific constitutional right. This approach was reiterated in *Halima Nerima Musa & Another v Nairobi*

*City Water & Sewerage Co. Ltd [2021] eKLR*, where the Court held that constitutional reliefs, particularly compensatory damages, are only available where an actual violation is proved and not where alternative statutory remedies sufficiently address the grievance.

26. Accordingly, while the Respondent's admission confirms the occurrence of an administrative lapse, the Petitioners were required to demonstrate, by credible evidence, that the error was deliberate, malicious, actuated by improper motive, or otherwise constitutionally infirm, and that it resulted in actual prejudice amounting to a violation of a protected right. On the material placed before this Court, that evidentiary threshold has not been met.
27. The allegations that the Respondent abused his office, acted in a conflict of interest, and engaged in an extramarital relationship with the 1<sup>st</sup> Petitioner's mother are serious imputations touching on the integrity of a public officer. Such allegations cannot be sustained on conjecture, suspicion, or uncorroborated assertion. This Court finds no credible evidence demonstrating malice, improper motive, or personal gain on the part of the Respondent, and accordingly finds no basis upon which to ground a violation of Articles 75(1)(a) and (b) or 232 of the Constitution.
28. With regard to the alleged violations of Articles 28, 45, 47, and 53(1)(a), the Petitioners were required to demonstrate not only that an error occurred, but that such error directly resulted in the denial of dignity, family life, fair

administrative action, or the rights of the child. Beyond broad assertions of denial of educational or social opportunities, no documentary or testimonial evidence was tendered to establish actual prejudice or a causal link between the error and the alleged harm.

29. This Court reiterates that violations of constitutional rights must be specifically pleaded and strictly proved. They cannot be presumed or inferred solely from the existence of an irregularity or procedural lapse. This position was emphatically affirmed in ***Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR***.
  
30. Article 47 of the Constitution guarantees the right to fair administrative action, while Article 35(2) expressly provides for the correction or deletion of untrue or misleading information. Section 28 of the Births and Deaths Registration Act, Cap 149, similarly provides a statutory framework for correcting errors in birth registration. The evidence before this Court demonstrates that the Respondent is willing to facilitate such correction. The availability of these statutory remedies, coupled with the Respondent's willingness to act, underscores that constitutional intervention is neither necessary nor proportionate. Constitutional jurisdiction is not to be invoked where adequate and effective statutory remedies exist, unless such remedies are shown to be unavailable, inadequate, or deliberately frustrated circumstances not demonstrated in this case.

31. On the question of reliefs, declaratory orders and compensation under Article 23(3) of the Constitution are discretionary and contingent upon proof of a constitutional violation. As affirmed in *Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR*, damages for constitutional breaches are not automatic; they are awarded only where a violation and resultant prejudice are proved. In the absence of such proof, the claim for general, exemplary, and punitive damages in the sum of Kshs. 4,000,000 cannot be sustained.
32. In the result, this Court finds that the Petitioners have failed to establish, to the requisite standard, that the Respondent's conduct amounted to a violation of their constitutional rights. While an administrative error may have occurred, the evidence does not disclose a constitutional infraction. The Court further notes, with approval, the Respondent's acknowledgment of the error and his expressed willingness to facilitate its correction, which demonstrates that lawful and adequate avenues for redress exist.
33. Accordingly, the Petition is hereby dismissed. In light of the nature of the dispute and the Respondent's conciliatory posture, each party shall bear its own costs.
34. **Final Orders:**
- a) The Petition is dismissed in its entirety for failure to establish a violation of constitutional rights.
  - b) Each party shall bear its own costs.

c) The Petitioners are at liberty to pursue any statutory remedies available for the correction of the 1<sup>st</sup> Petitioner's birth registration in accordance with Section 28 of the Births and Deaths Registration Act, Cap 149, and Article 35(2) of the Constitution.

Orders accordingly. File closed accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 22<sup>ND</sup> DAY OF  
JANUARY 2026.**

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**BAHATI MWAMUYE MBS  
JUDGE**

In the presence of: -

Counsel for the Petitioners - No appearance

Counsel for the Respondent - Ms. Cheruto

Court Assistant - Ms. Lwambia