

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**CONSTITUTIONAL, HUMAN RIGHTS & JUDICIAL REVIEW**  
**DIVISION**  
**PETITION NO. EO42 OF 2023**

**JULIUS LALMARENY.....PETITIONER**

**-VERSUS-**

**NATURAL WORLD KENYA**

**SAFARIS LIMITED.....1<sup>ST</sup> RESPONDENT**

**KENYA ASSOCIATION OF TOUR OPERATORS.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Kenya Association of Tour Operators (Kato), the 2<sup>nd</sup> respondent in this petition is described on its website as “*one of Kenya’s leading tourism trade associations representing the interests of over 300 of the most experienced tour operators in Kenya*”. It was formed in 1978. At the time material to this suit, the 1<sup>st</sup> respondent was one of its corporate members.
2. Kato publishes what I understand to be an annual publication called “*Accredited Safari Operators Guide*” which, among other things, showcases its activities and those of its members. The publication lists members of Kato and also provides space to the members to advertise their businesses.
3. In its 2018/2019 publication, the petitioner’s picture was published in one of the pages in the publication. In that picture, the petitioner is seen wearing a broad smile and a traditional Maasai attire. Next to picture is a

write-up by the 1<sup>st</sup> respondent captioned: **“We’ll bring a smile to your face...”**

4. In what appears to be an advertisement of its services, on this particular page, the 1<sup>st</sup> respondent wrote as follows:

***“ ‘Jambo’ means ‘hello’ and in Kenya it always comes with a welcoming smile. At Natural World Kenya Safaris, we take great pride in organizing safari tours and local excursions in Kenya, Tanzania and other top Safari locations throughout Africa. Since 2002 we have organized value for money Kenya Safari tours for countless happy guests. What we offer is an affordable safari tour excursion that can be tailored to suit your holiday budget while still ensuring the African adventure experience of a lifetime.”***

5. The petitioner was aggrieved that his picture was published in this manner without his knowledge or consent. It is for this reason that he has filed this petition seeking the following reliefs:

***“a) A declaration that the Respondents’ acts of publishing the Petitioner’s image for purpose of commercial advertisements in their magazine without his consent is a violation of the Petitioner’s fundamental rights to privacy and human dignity.***

***b) An order compelling the Respondents to issue an apology for use of the Petitioner’s image without his authority.***

*c) An order of permanent injunction restraining the Respondents from publishing and/or using the Petitioner's image in any way of its advertisements or posting and reposting the Petitioner's image in any way through their magazines, Safari Operators tour guides, social media and websites without the Petitioner's consent.*

*d) Compensation by the Respondents for using the Petitioner's image in advertisements or posting and reposting the Petitioner's image through their magazines/Safari Operators tour guides without the Petitioner's consent.*

*e) General damages for breach of Petitioner's right to human dignity and privacy*

*f) Cost of the Petition*

*g) Any other relief that this honorable court may deem fit and just to grant.”*

6. The petition, dated 28 July 2023 but amended on 17 April 2024, is expressed to be brought under Rules 3, 4(1), 8, 10 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice Procedure Rules, 2013).

7. According to the affidavit in support of the petition, the petitioner has sworn that he is “*a family man*” working for gain in Diani, in Kwale County and that sometimes back, a group of tourists whom he encountered at Diani Beach bought some of his wares which included traditional bracelets and ornaments. The petitioner met the tourists somewhere between Lagoon Reef and Ocean Village hotels, along the beach. The tourists took pictures of him and others which, according to the petitioner, was normal.
8. On 22 March 2023, the petitioner received a text message from one of his friends informing him that his picture was appearing in a magazine as endorsing or marketing a tour company in Kenya. He got to see the magazine the following day and indeed confirmed that his picture appeared on page 24 of the magazine. It is the petitioner’s position that his image “*was used for commercial purposes and specifically by the respondents to market and advertise their services.*”
9. The petitioner has sworn that he has never been an employee of any of the respondents and that his picture was taken and used without his consent. In summary the petitioner has pleaded:

***“15.The said actions by the Respondents have subjected me to physiological torture contrary to Article 29(d) of the Constitution since the publication of the magazine alongside my image and***

*likeness has led to the me being subjected to harassment and ridicule by colleagues and friends who now see me as person trying to commercialize/hawking culture instead of being a custodian of the said customs. I have also become (sic) a source of laughter as all my peers, friends, family and the society assume that I had hidden fortunes and wondered why I was still surviving in the streets when I was now employed by the Respondents as a model and brand ambassador for the Respondents.”*

10.Despite the petitioner making a demand for apology and compensation, neither of the respondents has done any of these things.

11.Responding to the petition, the respondents have not disputed that the petitioner’s image was published in the 2<sup>nd</sup> respondent’s publication; however, they contend that the picture was obtained from a copyright owner at a fee. According to Humphrey Ndara who has sworn an affidavit on behalf of the 1<sup>st</sup> respondent in his capacity as the 1<sup>st</sup> defendant’s director, and also on behalf of the 2<sup>nd</sup> respondent, the petitioner’s image was obtained from a company called Shutterstock which is an American Company that owns a website described as <https://www.shutterstock.com/>. The website is said to be a leading

creative market place for high quality royalty free photographs, vectors, illustrations videos and motion graphics.

12. All the images on Shutterstock are uploaded by contributors who operate accounts on its website and the image the petitioner's image was acquired from a contributor known as Milan Lipowski who is also a photographer. Perhaps to emphasise this point, Ndara has sworn in an affidavit opposing amendment of the petition, that the petitioner's picture was "*sourced from a paid-for and public repository, where it remains to this date still available to the public*". Further, he has sworn in that affidavit that the petitioner's image was acquired for value from one Milan Lipowski whom he has described as "*the copyright owner to the image*".

13. According to Ndara, the petitioner's photograph was rightfully acquired for value under what he has described as "*the editorial license*" and that the 1<sup>st</sup> respondent believed that the copyright owner to the image was and is Milan Lipowski who is also contributor in the 2<sup>nd</sup> respondent's publication.

14. The petitioner's photograph, it is sworn, was utilized by the 1<sup>st</sup> respondent for illustrative purposes which, according to the respondents, essentially tells a story, idea or concept that could be used to illustrate news, current events, or a subject of human interest and not for commercial purposes.

The photograph was not published for endorsing or marketing their services as alleged by the petitioner.

15. The petitioner is said to have been photographed while holding a contract in his hand which contract he voluntarily entered into and signed in the presence of a witness; the contract, it is sworn, represented an irrevocable consent that his picture could be published. Further, it is denied that the photographer or shutterstock sell photos contrary to the law or violate the rights of other people. Ndara has reiterated that the petitioner was financially compensated for posing for photographs after he signed an agreement for that purpose in the presence of a witness.

16. One other crucial issue raised in Ndura's affidavit is that the 2<sup>nd</sup> respondent is registered under the Societies Act, cap. 108 and cannot, therefore, be sued in its own name.

17. It is apparent from the affidavits in support of and in opposition to the petition that the fact, material to the petitioner's claim, that the petitioner's picture was published in the 2<sup>nd</sup> respondent's publication is not in dispute. The dispute is over whether the plaintiff consented to the use of his picture in the manner that the respondents did or at all. The respondents' case is simply that the petitioner's picture was published after the respondents acquired, at a fee, the right to do so from a third party who had obtained from the petitioner prior consent for such publication.

18. At the background of this dispute are two issues that call for determination as preliminary issues. These issues are, first, whether being an association registered under the Societies Act, Kato can be sued in its own name, and, second, whether this suit ought to have been instituted as an ordinary civil suit rather than as a constitutional petition.

19. There should be no dispute that being an unincorporated body, the 2<sup>nd</sup> respondent has no legal personality of its own as to sue or be sued in its own name. There is no express or implied statutory authorisation in the Societies Act under which the 2<sup>nd</sup> respondent can sue or be sued in its own name. On this point it has been held that:

***“An unincorporated association is not a legal person and therefore cannot sue or be sued unless such a course is authorised by express or implied statutory provisions...”*** (see **New Hampshire Insurance Company & Ors v. MGN Ltd & Ors, (1996) EWHC 398 (Comm) (Sep 6, 1996)**).

20. Thus, in law, only the principal officers or trustees of a society registered under the Societies Act may sue or be sued in an action for or against the society. It follows that the answer to the first issue is that the 2<sup>nd</sup> respondent is non-suited in these proceedings.

21. Having come to that conclusion, the second question as to whether this petition ought to have been filed as an ordinary suit is a question between

the petitioner and the 1<sup>st</sup> respondent which now assumes the status of the only respondent in this petition.

22. The petitioner has invoked several constitutional provisions to allege that his constitutional rights have been infringed and has invoked the jurisdiction of this Honourable Court to come to that conclusion and grant him appropriate remedies.

That notwithstanding, it has been submitted on the petitioner's behalf that:

*“3. First, it is the Petitioner’s submission that he has not just hinged his claim on the tort of defamation. The Petitioner has gone ahead to demonstrate violation of various constitutional rights. The Petitioner through his amended Petition dated 17<sup>th</sup> April, 2024 contended that his right to dignity under Article 28 and right to privacy under Article 31 were violated through the public display of his photograph without his consent.”*

23. The petitioner has relied on **Francis Mulomba Nguyo v Nation Media Group Limited & 2 others (2021)** where Korir, J. (as he then was) held that the right to privacy is a right that can be abused by both the state and private individual persons. For the same argument, the petitioner cited **Jemimah Wambui Ikere v Standard Group Limited & another (2013) eKLR; Patrick Kamau Gatwechi v Board of Trustees (Kenya**

**Methodist University) & others [2013] Eklr and Satrose Ayuma & 11 Others v Registered Trustees of the Kenya Railways Staff Retirement Benefit Scheme, Petition No. 65 of 2010.** In these cases, it was held, *inter alia*, that non-state actors are constrained by human rights and become bound by them when courts interpret the law in accordance with the Bill of Rights. In the latter decision, the court is said to have held that once the petitioner alleged a violation of his fundamental rights and freedoms, there was no justification for filing the matter in a civil court.

24. After considering the petition and the response thereto together with the submissions filed by the respective parties' representatives, I am persuaded the petitioner's claim is, by and large, a defamation claim. As a matter of fact, the petitioner does not just appear to admit as much when he says that his claim is hinged on the tort of defamation but his pleadings and submissions also point to this direction. In paragraph 34 of the amended petition, for instance, he averred:

***“34. The said actions have thus subjected the Petitioner to psychological torture, harassment and ridicule because the society, peers, family and affiliates perceive him as a model, having hidden fortunes and wonder why he is still struggling financially wondering why he was still working as a caretaker***

*when the Petitioner was now employed by the Respondents as a model.”*

25. And in the submissions, it has been urged as follows:

*“23. The 2<sup>nd</sup> Affidavit sworn by Kadedi Lekerde on 17<sup>th</sup> April, 2024 also indicates that the Petitioner has been subjected to ridicule. He further confirms that the Petitioner was experiencing challenges attending social events back at home. Mr. Lekerde confirms an incident where the Petitioner sought to attend initiation ceremony but the elders refused to grant him permission to join them saying that he was hawking his image in the pretense (sic) of Samburu cultural dressing as a model in newspapers and magazines for his own gain and could only do so after a proper cleansing is conducted.*

*24. The Respondents argument that the Petitioner transferred his right to the image to Shutterstock who in turn transferred the rights to the Respondents are misleading. The Petitioner denied any such agreement with Shutterstock or Mr. Milan Lipowski. He who alleged must prove. The Respondent have not filed any statement or affidavit by the said Milan Lipowski or officer from Shutterstock as such the same remain mere allegations. To fortify their claim that Shutterstock was permitted*

***to use the petitioner’s image; the most feasible way of doing so is by joining them as a party or issuing notice seeking indemnity or contribution from them or calling them as a witness.”***

26. Besides the publication being alleged to be defamatory of the petitioner, the petitioner has urged his picture and advertisement were being used to lure tourists and thus, they were employed for the respondent’s commercial benefits.

27. Against this background, I would conclude that a veneer of allegation of violation of the constitutional rights on what, for all intents and purposes, is an ordinary civil suit does not necessarily elevate it into a constitutional petition.

28. In what appeals to me to be an admission of abuse of the process of this Honourable Court, it has been submitted on behalf of the petitioner that he opted for a constitutional petition instead of an ordinary civil suit because he was caught out by the limitation period. To this end, it has been submitted that:

***“12. Secondly, the Respondent’s acts complained of are in the year 2018 when the 2<sup>nd</sup> Respondent published and released a guide titled “Kenya Accredited Safari Operators Guide 2018-2019” intended to guide tourists from within and outside Kenya to visit and celebrate the beauty and diversity of various tourist***

*destinations throughout the world, a marketing strategy between the 2<sup>nd</sup> Respondent and the various tours and travels companies who are registered members of the 2<sup>nd</sup> Respondent in Kenya. The Demand letter from the Petitioner was sent on 04.04.2023. This is about 5 years after the publication was made. Section 4 (2) of the Limitation of Actions Act Cap 22 Laws of Kenya provides that;*

*An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:*

*Provided that an action for libel or slander may not be brought after the end of twelve months from such date.*

*13. From the foregoing, the period for a person aggrieved to lodge a civil suit alleging defamation had lapsed. In any case, there were challenges to prove when the cause of action accrued. The only remaining remedy for the Petitioner was therefore lodging a Petition before this Honourable Court.”*

29. With due respect to the learned counsel for the petitioner, a constitutional petition is not a fall-back position or an alternative procedure when, for whatever reason, parties cannot comply with express provisions of a statute in the filing and conduct of ordinary civil suits. Where a law (whether the statute or common law) expressly states when and how

particular suits should be filed or conducted, it is not open to sidestep the particular law and file a constitutional petition instead. A constitutional petition is not a default procedure for claims, whatever their nature.

30. The question of whether an ordinary suit can be filed as a constitutional petition has been discussed at the apex court in **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (Petition 14, 14A, 14B & 14C of 2014 (Consolidated)) [2014] KESC 53 (KLR) (29 September 2014) (Judgment)**.

31. That case was about digital migration of terrestrial television broadcasting from analogue to digital platform. Media houses, namely, Royal Media Services Limited, Nation Media Services Limited and Standard Group Limited alleged, *inter alia*, that their intellectual property rights had been violated and sought reliefs by way of a constitutional petition.

The late Majanja, J. captured their case as follows:

***“130. The petitioners allege at paragraph 72 of the petition that, “In breach of the Petitioners’ intellectual property rights, the 3<sup>rd</sup> Respondent has by a letter dated 19<sup>th</sup> August 2013 unlawfully authorized the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents to intercept and transmit the Petitioners’ broadcasts, the Petitioners’ locally produced programs and third party licensed programs without***

*their authorization or consent.” As a result they seek a permanent injunction against the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents to restrain the violation.”*

32. In dismissing the petitioners’ s argument that they could seek remedy by way of a constitutional petition, the learned judge held as follows:

*“In any case a violation of intellectual property rights is not a matter to be addressed by a petition to enforce fundamental rights and freedoms because there is a specific legal regime established by law to address intellectual property rights. This court has on several occasions emphasized that where there is a specific mechanism of dispute resolution established by ordinary law, then such a process ought to be pursued and that not every wrong attracts constitutional relief. In Sanitam Services (EA) Ltd v Tamia Ltd and Others Nairobi Petition No. 305 of 2012 [2012]eKLR the court noted that, “[10] Any breach of the intellectual property rights against the respondents can be enforced through the legal mechanisms provided by statute or common law, where applicable, hence it is unnecessary to invoke the provisions of Article 22 to enforce what are ordinary rights.”*

33. When the case escalated to the Supreme Court as **Communications Commission of Kenya & 5 others v Royal Media Services Limited &**

5 others (Petition 14, 14A, 14B & 14C of 2014 (Consolidated)) [2014] KESC 53 (KLR) (29 September 2014) (Judgment), the Supreme Court upheld the learned judge's reasoning and noted as follows:

*“It was the trial Court’s finding that the content generated by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents had been freely available to the public on the digital platform, since its launch in 2009 (paragraph 66 of the Judgment). The learned Judge observed that a case of violation of intellectual property rights is not a matter to be addressed by a petition to enforce fundamental rights (paragraph 134). He relied on Sanitam Services (EA) Ltd. v. Tamia Ltd.&16 Others, Nairobi Petition No. 305 of 2012; [2012] eKLR, in which the Court held that a breach of intellectual property rights can be enforced through the legal mechanisms provided by statute or the common law, and that the invocation of the Constitution, particularly Article 22, was not necessary to enforce ordinary rights (paragraph 10).*

*[254] The Appellate Court (Musinga J.A) agreed with Majanja J.,that if indeed the appellants had violated the intellectual property rights of the broadcasters, a petition to enforce fundamental rights and freedoms was not the proper recourse, as*

*there exists a definite legal regime for the resolution of such complaint (paragraph 136).*

*[255] Section 35(4) of the Copyright Act provides an avenue for redress, in the event of an infringement. It thus provides:*

*Infringement of any right protected under this Act shall be actionable at the suit of the owner of the right and in any action for the infringement the following reliefs shall be available to the plaintiff:*

*a. relief by way of damages, injunctions, accounts or otherwise that is available in any corresponding proceedings in respect of infringement of their proprietary rights;*

*(b) delivery-up of any article in possession of the defendant which appears to the court to be an infringing copy; or any article used or intended to be used for making infringing copies...”*

34. The court went further to underscore the doctrine of constitutional avoidance as articulated by the appellants before and noted, thus:

*“(256) The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly*

*be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:*

*I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”*

35. The court also made reference to a United States decision in which the conditions under which the doctrine of constitutional avoidance may be applied were outlined and held as follows:

*(257) Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936)).*

36. The court then concluded as follows:

*“(258) From the foundation of principle well developed in the comparative practice, we hold that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents’ claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright- infringement*

*claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court.”*

37. The petitioner has admitted that he could claim against the respondent in tort and also seek damages for what he has urged to be commercial use of his picture without his consent; in this latter case, his claim is, to some degree commercial in nature. However, just as it was urged by the petitioners in **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others** (supra), the petitioner has, in his petition, invoked several articles of the Constitution as underpinning his quest for the reliefs sought. But, in my humble view, that is not sufficient to elevate his claim into constitutional petition.

38. A person, for instance, who survives a tragic road traffic accident involving a public service vehicle in which he was lawfully travelling as a fare-paying passenger may very well plead that his constitutional right to life guaranteed under article 26 (1) of the Constitution has been violated or threatened with violation because of the life threatening injuries he may have sustained in the accident. However, it does not follow that he would thereby be entitled to file a constitutional petition for compensation for the loss and damage he has suffered as a result of the

accident. He will have to lodge an ordinary civil claim in in tort for damages.

39. Similarly, owners of adjacent immovable properties, have their rights to these properties protected under article 40 of the Constitution; but a dispute over the boundary of the properties does not, and should not end up in court as a constitutional petition by one owner against the other. That dispute can be resolved through an ordinary suit in the Environment and Land Court.

Article 50 (1) of the Constitution says that every person has the right to have any dispute that can be resolved by the *application of law* decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. The law to be applied in resolution of the dispute in the circumstances of the petitioner's case would, no doubt, include the common law and the Defamation Act under which the petitioner could competently seek a remedy for his grievances.

40. The point remains that a suit, which is, for all intents and purposes, an ordinary civil claim, does not necessarily qualify as a constitutional petition merely because of the description the claimant has given it or by sheer allegations of a violation of the claimant's constitutional rights or by throwing in in the petition several constitutional provisions.

41. In the **Communications Commission of Kenya & 5 Others versus Royal Media Services Limited & 5 others (supra)**, the Supreme Court

agreed with this Honourable Court that the petitioners' right to intellectual property had not been violated but even if there was such a violation, their remedy, as much as the manner of approaching court, was available under statute, in particular, section 34 of the Copyright Act.

42.I addressed this same question in the context of the sanctity of a constitutional petition in enforcement of constitutional rights and with particular reference to suits filed as constitutional petitions when they ought to have been filed as judicial review applications in **Gichuhi & 2 others v Data Protection Commissioner; Waigwa & another (Interested Parties) (Application E202 of 2023) [2024] KEHC 15107 (KLR) (Judicial Review) (2 December 2024)** where I noted as follows:

*Article 23 (3) (f) ought not to be interpreted as creating room for applications for judicial review to be now fashioned as constitutional petitions. By the same token, the same article should not be read as supplanting the procedure to obtain judicial review reliefs.*

*If it was to be argued that one can now file a constitutional petition for judicial review reliefs instead of an ordinary application for judicial review only because these reliefs can be granted under article 22(3)(f) of the Constitution, then nothing stops a litigant from filing a constitutional petition for compensation of damages as a result of, for instance, a running*

*down accident or a wrongful dismissal from employment or a material damage or such other claims where an order for compensation can be made against the state since, according to Article 22(3) (e), the court may make an order for compensation in a constitutional petition filed under Article 22 of the Constitution.*

*This is the absurdity that would ensue if the courts were to proceed on the assumption that, besides filing a judicial review application in accordance with sections 8 and 9 of the Law Reform Act and order 53 of the Civil Procedure Rules, an applicant has an alternative path of filing a constitutional petition for similar judicial review reliefs that he would have sought and, perhaps, obtained in an ordinary judicial review application. Needless to say, procedural rules are necessary if only to avoid chaotic litigation and, for that reason, they must be observed as long as their observance does not fit what the Constitution has described as “undue regard to procedural technicalities.”*

*And not every suit that ought to have been filed as such should be wittingly crafted as a constitutional petition solely to evade the procedural strictures that come with ordinary suits and which, for one reason or another, a litigant may not be in a*

*position to comply with or which he simply wants to skirt around. As much as the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 are liberal in the manner of lodging petitions, the sanctity of constitutional petitions must be jealously guarded.*

*The sanctity of constitutional petitions in addressing violations of the Constitution and constitutional rights is a subject that was addressed by the Privy Council in *Kemrajh Harrikissoon Versus Attorney General of Trinidad & Tobago* (1979) 3WLR 62. The brief facts of that case were that the teaching service commission of Trinidad and Tobago, acting under regulation 135(1) of the public service commission regulations 1966 (as adopted and amended by the commission in 1968), made an order transferring the appellant teacher to another school, without giving him the three months' notice that was required unless the exigencies of the teaching service did not so permit. The appellant considered that the transfer was intended as a punishment for allegations he had made of improprieties at the first school and that the exigencies of the teaching service did not justify his transfer on less than three months' notice. Instead of availing himself of the review procedure provided by regulation 135, he applied to the High Court under section 6 of*

*the Constitution of 1962 for a declaration that the human rights and fundamental freedoms granted to him by section 1 of the Constitution had been violated. The High Court rejected the appellant's claim. He appealed to the Court of Appeal of Trinidad and Tobago, which dismissed his appeal. When the matter went to the Privy Council, the latter held as follows:*

*“The notion that wherever there is a failure by an organ of the Government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter I of the Constitution is fallacious. The right to apply to the High Court under Section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for normal proceedings for invoking judicial control of administrative action. In an originating application to the High Court under Section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle*

*the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedoms.” (Emphasis added).*

*I cannot put it any better save to reiterate that if courts were to entertain ordinary suits as constitutional petitions only because the Constitution allows the courts to grant reliefs that would otherwise be made in those ordinary suits, constitutional petitions would lose their sanctity as the means by which to protect fundamental rights and freedoms under the Constitution. The prescription either by Acts of Parliament or rules made thereunder of the means by which particular suits should be filed is meant to, among other reasons, bring order to litigation or court process and avoid the kind of chaos that would result if all those suits were to be filed as constitutional petitions.”*

43. For the reasons I have given, the petitioner’s purported constitutional

petition appeals to me to be more of an abuse of the due process of this Honourable Court than a competent petition. It is hereby struck out. The respondents will have costs. It is so ordered.

**Signed, dated and delivered on 10 April 2026**

Ngaah Jairus  
**JUDGE**