



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**IN THE ENVIRONMENTAL AND LAND COURT**

**CONSTITUTIONAL PETITION NO 3 OF 2019**

**IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA AND**

**IN THE MATTER OF ARTICLES 1, 2, 3, 19(2), 20(5), 21, 22, 23, 26,27,28,29,**

**40, 42 ,70 159, 258 & 259 OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION AND VIOLATION**

**OF THE NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE ENSHRINED**

**IN ARTICLES (1); 2(1) (2)& (3); 3(1); 4(2); 10(2); 69; 70; 71; 73;232(1) (D) &E**

**(F) AND 259(1) & (3) OF THE CONSTITUTION**

**IN THE MATTER OF: THE ALLEGED VIOLATION OF SECTIONS 3,**

**4 AND 5 OF THE FAIR ADMINISTRATIVE ACTION ACT; AND SECTION 6**

**OF THE STATUTORY INSTRUMENT ACT.**

**IN THE MATTER OF: THE CONSTITUTIONAL VALIDITY OF ENVIRONMENTAL**

**IMPACT ASSESSMENT REPORTS ISSUED WITH RESPECT TO THE PROPOSED**

**CONSTRUCTION OF THE KIPSIGIS HIGHLANDS TEA FACTORY BY KIPSIGIS**

**HIGHLANDS MULTI-PURPOSE CO-OPERATIVE SOCIETY AND THE VARIOUS**

**LICENCES AND/OR APPROVALS ISSUED THEIR UNDER**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 1, 2, 3, 19(2),**

**20(5), 21, 22, 23, 26,27,28,29, 35, 40, 42 and 70 OF THE CONSTITUTION OF KENYA 2010**

**BETWEEN**

**PHILIP KIPTANUI RUGUT.....1<sup>ST</sup> PETITIONER**

**PETER KIPKEMOI CHERUIYOT.....2<sup>ND</sup> PETITIONER**

**JOSEPH KIPSANG A CHEROP.....3<sup>RD</sup> PETITIONER**

**VERSUS**

**NATIONAL ENVIRONMENT**

**MANAGEMENT AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF BOMET.....2<sup>ND</sup> RESPONDENT**

**KIPSIGIS HIGHLANDS MULTI-PURPOSE**

**CO-OPERATIVE SOCIETY.....3<sup>RD</sup> RESPONDENT**

**KIPSIGIS HIGHLANDS TEA FACTORY.....4<sup>TH</sup> RESPONDENT**

**RULING**

**Introduction**

1. The Petitioners commenced this suit by way of Petition dated 13<sup>th</sup> May 2019 alleging violation of a number of their rights under the Constitution of Kenya. In the said Petition, the Petitioners are challenging the validity of the Environmental Impact Assessment (EIA) report issued by the National Environment Management Authority (1st Respondent) with respect to the proposed construction of the Kipsigis Highlands Tea Factory (4<sup>th</sup> Respondent) by Kipsigis Highlands Multi-Purpose Co-operative Society ( 3<sup>rd</sup> Respondent) and the various licenses and approvals issued by the County Government of Bomet (2<sup>nd</sup> Respondent). They are also alleging a violation of various articles of the Constitution of Kenya by the Respondents, in particular articles 2 (1), (2) and (3), 4 (2), 10 (2), 27, 28, 29 (c) and (f), 35, 40, 42,47, 69, 70, 73, 91, 232 (1) (d) and (e) and (f) and 259 (1) and (3). They further allege that sections 3, 4 and 5 of the Fair Administrative Action Act have been violated by the Respondents.

2. The Petitioners allege that the existence of the Tea Factory in Chemamul area is a big threat to the people living in that area as the factory will be releasing its waste into Rivers Koruma, Chepchabas/Kobosio yet the Petitioners and other people living in this area depend on these rivers for their livelihood. It is their contention that this is a violation of their right to a clean and healthy environment.

3. The Petitioners seek the following reliefs:

*a) A Declaration that the constitutional right of access to information as enshrined under Article 35 of the Constitution was violated by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.*

*b) A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents abdicated their roles in ensuring that the citizens enjoy a clean and healthy environment by approving plans for construction of the Kipsigis Highlands tea factory on the parcel of land registered as 7779/3 in Chemamul without following the due process of the law.*

*c) A Declaration that the Petitioners' right to a clean and healthy environment and the rights of the people living around Kipsigis Highlands tea factory on the parcel of land registered as 7779/3 in Chemamul was violated by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents who did not follow the due process of the law prior to construction of Kipsigis Highlands tea factory.*

*d) That this Honourable court be pleased to cancel the Environmental Impact Assessment license issued by the National Environment Management Authority and the licences and approvals issued by the County Government of Bomet to the 3<sup>rd</sup> Respondent prior to the construction of Kipsigis Highlands tea factory on the parcel of land registered as 7779/3.*

*e) A Declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent did not follow the right procedure when issuing approvals for construction of Kipsigis Highlands Tea Factory on the parcel of land registered as 7779/3 in Chemamul and for that reason the same be cancelled.*

*f) A Declaration that there was no public participation carried out prior during the preparation of the Environmental Impact Assessment (EIA) report prior to the construction of Kipsigis Highlands tea factory on the parcel of land registered as 7779/3 in Chemamul.*

*g) An Order directing that the 3<sup>rd</sup> Respondents conduct a fresh Environmental Impact Assessment, and if found unsafe, Kipsigis Highlands Tea Factory on the parcel of land registered as 7779/3 in Chemamul be destroyed and the environment be restored to the manner in which it was in before the illegal factory was put up and an environmental restoration order be issued.*

*h) An order for Judicial Review to quash any decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents made pursuant to flawed, biased and unreasonable environmental impact assessment report and/or recommendations for the construction of Kipsigis Highlands tea factory on the parcel of land registered as 7779/3 in Chemamul.*

*i) An award of general damages for pain and suffering, humiliation and distress visited upon the petitioners.*

j) *Costs of this Petition.*

k) *Any other or further relief that this Honourable Court considers appropriate and just to grant*

4. Contemporaneously with the Petition, the Petitioner filed a Notice of Motion dated 13<sup>th</sup> May 2019 under Certificate of urgency seeking the following orders:

a) *Spent*

b) *That this Honourable court be pleased to make an order compelling the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein to supply the Petitioners/Applicants with the Environmental Impact Assessment report, approved structural and building plans submitted by the 3<sup>rd</sup> Respondent with respect to Kipsigis Highlands Tea Factory on the parcel of land registered as 7797/3 in Chemamul area*

c) *Spent*

d) *That this honourable court be pleased to issue a temporary injunction stopping the commissioning and operations of Kipsigis Highlands Tea Factory on parcel number 7797/3 in Chemamul area pending the hearing and determination of this Petition.*

e) *That this Honourable Court be pleased to make a site visit of Kipsigis Highlands Tea Factory on the parcel of land registered as 7797/3 Chemamul area and its surroundings before the hearing and determination of this Petition.*

f) *Any other orders that this Honourable court may deem fit.*

g) *The Petitioners be paid the costs of this Petition*

5. The application is premised on the grounds stated in the Notice of Motion and the supporting affidavit of Philip Kiptanui Rugut, the 1<sup>st</sup> Petitioner herein sworn on the 13<sup>th</sup> May 2019. The said affidavit is sworn on his behalf and on behalf of the other Petitioners.

6. Soon after they were served with the Petition and application, the 2<sup>nd</sup> Respondent filed a Notice of Preliminary Objection raising the following grounds:

i) *That this Honourable court is deprived of jurisdiction to entertain the suit herein*

ii) *That the Petitioners/Applicants have not exhausted the mechanisms, processes and remedies provided for under the Environment Management and Coordination Act, No 8 of 1999. (EMCA)*

iii) *That the Petitioners did not issue a Notice to institute proceedings against the 2<sup>nd</sup> Respondent as required by section 13A of the Government Proceedings Act Cap 40 of the Laws of Kenya*

iv) *That the Petition does not disclose any cause of action against the Respondent*

iv) *That the Petition herein is incompetent, fatally and incurably defective.*

7. It is the said Preliminary objection that is the subject of this ruling. The Preliminary objection was canvassed by way of written submissions and all the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents filed their submissions.

#### **Issues for determination**

8. Having considered the pleadings, grounds raised in the Preliminary Objection and rival submissions, the following issues fall for determination:

i) Whether this Honourable court has jurisdiction to entertain the Petition herein

ii) Whether the Petitioners have exhausted the mechanisms, processes and remedies available under the Environment Management and Coordination Act, No 8 of 1999.

iii) Whether the Petition is fatally and incurably defective and thus an abuse of the court process for

iv) Whether the Petitioners were required to issue a 30-day notice to the 2<sup>nd</sup> Respondent prior to instituting the Petition herein.

#### **Analysis and Determination**

9. The starting point is to define what a Preliminary Objection is. In the case of **Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd 1969 EA 696** the court held as follows:

*“A preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings and which if argued as preliminary point may dispose of the suit.*

Justice Newbold in the said suit argues that:

*A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion”*

10. Viewed against the above definition only 2 grounds in the Notice of Preliminary Objection qualify as preliminary objections. The first one is the question of jurisdiction while the second one is whether failure to comply with section 13A of the Government Proceedings Act Cap 40 of the Laws of Kenya renders the Petition incurably and fatally defective.

#### **Whether this court has jurisdiction**

11. In dealing with the jurisdiction question I will also tackle the question as to whether the Petitioners have exhausted the mechanisms, processes and remedies available under the Environment Management and Coordination Act, No 8 of 1999.

12. In the case of **R V Karisa Chengo and 2 Others (2017) eKLR** the Supreme Court of Kenya pronounced itself on the issue of jurisdiction and observed that in almost all legal systems of the world, jurisdiction has emerged as a critical concept in litigation. The Court cited **John Beecroft Saunders** in his treatise **Words and Phrases legally defined Vol 3 at P. 113** where jurisdiction is defined as follows:

*“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the Statute, Charter or Commission under which the court is constituted and may be extended or limited by like means....Where a court takes upon itself to exercise a jurisdiction which it does not possess, its decisions amount to nothing”*

13. As was stated by Court of Appeal in the celebrated case of **The Owners of Motor Vessel Lillian “S” V Caltex Oil Kenya Limited 1989 KLR 1653** the *“Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it has no jurisdiction”*

14. Counsel for the 2<sup>nd</sup> Respondent has submitted that this honourable court lacks jurisdiction to entertain this Petition as the Petitioners have not exhausted the processes and procedures provided for in the Environment Management and Coordination Act, 1999. It is his further submission that the Petitioners have not demonstrated that there are exceptional circumstances to warrant them to move this honourable court and bypass the National Environment Tribunal. It is his contention that a reading of the Petition shows that the main underlying grievances of the Petitioners are the lack of, or inadequacy of the EIA, issuance of a licence by the 1<sup>st</sup> Respondent and non-compliance with the provisions of EMCA generally.

15. He submits that Article 169 (1) (d) of the Constitution of Kenya provides for subordinate courts which include “any other court or local tribunal established by an Act of Parliament, other than courts established as required by article 162(2)”.

16. One such tribunal that is established to address grievances arising out of EMCA is the National Environment Tribunal which is established under sections 125, 126, 127 and 129 of EMCA.

17. The jurisdiction of NET is set out under Section 129 of the **EMCA** which provides as follows: -

129. (1) *“Any person who is aggrieved by:-*

*(a) a refusal to grant a license or permit or a refusal to grant a license or permit, or the transfer of a license or a permit, under this Act or its regulations;*

*(b) the imposition of any condition, limitation or restriction on his license under the act or regulations made thereunder;*

*(c) the revocation, suspension or variation of his license under the Act;*

*(d) the amount of money which he is required to pay as a fee under this Act or regulations made thereunder;*

*(e) the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations, made thereunder, may within sixty days after the occurrence of the event against which he is dissatisfied, appeal to the tribunal in such a manner as may be prescribed.”*

18. Section 129 (2) of the Act provides that:

*“Unless otherwise expressly provided in this Act, where this Act empowers the Director General, the Authority or Committees of the Authority or its agents to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such*

*procedures as may be established by the Tribunal for that purpose”*

19. Appeals on the decisions of the Tribunal lie to the Environment and Land Court by virtue of Article 162(2) (b) of the Constitution and Section 130 of the EMCA.

20. One may also challenge the grant of an EIA licence pursuant to regulation 46(1) (f) of the Environmental (Impact Assessment and Audit) Regulations 2003 which provide that:

*“Any person who is aggrieved by....the approval or reinstatement by the Authority of an Environment Impact Assessment license .. may appeal to the Tribunal”*

21. Counsel has cited the case of **Joseph Owino Muchesia & Another v National Environment and Management Authority & 2 Others [2014] eKLR** for the proposition that an appeal against the decision of the Authority to issue an Impact Environmental Assessment licence lies with the National Environment Tribunal under section 129 (2). He has also cited the case of **Kenya Revenue Authority & 2 Others v Darasa Investments Limited [2018] eKLR** where the Court of Appeal held that:

*It is trite that where the Constitution or statute confers jurisdiction upon a court, Tribunal; person, body or any authority, that jurisdiction must be exercised in accordance with the Constitution or statute. In Secretary, County Public Service Board & Another v Hulbhai Gedi Abdille [2017] eKLR this court expressed itself thus:*

*“Time and again, it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such a party ought to seek redress under the other regime”*

22. The Court further stated that:

*“It is only in exceptional cases that the High Court can entertain Judicial Review proceedings where such alternative remedies are not exhausted”*

23. Counsel has submitted that in the instant case, the Petitioners have not demonstrated that there are exceptional circumstances that warranted them to move the court instead of the National Environment Tribunal. These submissions have been echoed by counsel for the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents.

24. Additionally, counsel for the 1<sup>st</sup> Respondent has argued that the courts have repeatedly held that where an infringement can be redressed within the legislative framework, the course to follow is to take out proceedings under the framework and not under the Constitution unless that framework does not provide an efficacious and satisfactory answer to the litigant’s grievance. See the cases of **Isaac Ngugi v Nairobi Hospital & Another [2013] eKLR** and **Rich Productions Ltd v Kenya Pipeline Ltd & Public Procurement Oversight Authority [2014] eKLR**. She further cited the **C.A No. 84 of 2004 Damian Belafonte v The Attorney General of Trinidad and Tobago** which set the approach to be followed in examining whether the invocation of a constitutional relief, where a parallel remedy exists, amounts to an abuse of the Court process. The court held that:

*“Where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which the compliant is made include some feature which makes it inappropriate to take that course. As a general rule, there must be some feature which, at least arguably, indicates that means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a nuisance, or abuse, of the court’s process. A typical, but by no means exclusive, example of such a feature would be a case where there has been an arbitrary use of state power.”*

25. It was her further submission that a party cannot be heard to move a court in glaring contradiction of the judicial hierarchical system of the land.

26. Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents has similarly submitted that where there is procedure for redress available elsewhere, that redress must be pursued within the rubric provided. He cited the case of **Patrick Musumba v National Land Commission & 4 Others [2016] eKLR** for the proposition that the Courts must exercise restraint and first give an opportunity to the relevant bodies or state organs to deal with the dispute as provided in the relevant statute.

27. In their Petition the Petitioners are challenging the validity of the Environmental Impact Assessment (EIA) report issued by the National Environment Management Authority with respect to the proposed construction of the Kipsigis Highlands Tea Factory by Highlands Multi-Purpose Co-operative Society and the various licenses and approvals issued thereunder. They are also alleging a violation of various articles of the Constitution of Kenya in particular articles 2 (1), (2) and (3), 4 (2), 10 (2), 27, 28, 29 (c) and (f), 35, 40, 42,47, 69, 70, 73, 91, 232 (1) (d) and (e) and (f) and 259 (1) and (3). They further allege that sections 3, 4 and 5 of the Fair Administrative Action Act have been violated by the Respondents.

28. The Petitioners’ complaints include the fact that there was no public participation prior to the commencement of the construction of the Kipsigis Highlands Tea Factory. They aver that the existence of the Tea Factory in Chemamul area is a big threat to the people living in that area as the factory will be releasing its waste into Rivers Koruma , Chepchabas /Kobosio yet the people depend on these rivers for their livelihood. This is as violation of the Petitioners’ right to a clean and healthy environment.

29. Article 70 (1) of the Constitution of Kenya provides as follows:

*“70 (1) If a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be denied, violated, infringed or threatened, the person may apply to Court for redress in addition to any other legal remedies that are available in respect of the same matter”.*

30. It is the Petitioners’ contention that that if an environmental impact assessment was done prior to the construction of the said factory the same is full of falsehoods and is not a true reflection of the situation on the ground. In any event the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are accused of violating the Petitioners’ right to information under article 35 of the Constitution by refusing to furnish them with a copy of the EIA report.

31. It is the submission of Counsel for the Petitioner that this Honourable court has jurisdiction to entertain this matter as provided by the Constitution at Article 162 (2) (b). Furthermore, the Environment and Land Court (ELC) has the mandate to hear disputes relating to environment and the use and occupation of and title to land.

32. Section 13 (1) of ELCA which elaborates the jurisdiction of the Court, provides that the ELC has both original and appellate jurisdiction to hear all disputes relating to environment and land. Such disputes will include as provided in section 13 (2):

*a) disputes relating to environmental planning and protection climate issues, land use planning, title, tenure boundaries, rates, rent, valuations, mining minerals and other natural resources.*

*b) Disputes relating to compulsory acquisition*

*c) Land and administration management*

*d) Public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land and*

33. Section 13 (2) makes it clear that what is set out in (a) to (d) above is not exhaustive, and provides that the ELC can hear any other dispute relating to environment and land. Section 13 (3) provides that “Nothing shall preclude the court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to rights of fundamental freedoms relating to a clean and healthy environment under articles 42, 69 and 70 of the Constitution”

34. Under section 13 (4) the court is empowered to exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the court.

35. Counsel has cited the case of **Ken Kisiang’a V Daniel Kiplangat Kirui & 5 Others (2015) eKLR** for the proposition that the ELC has unlimited original and appellate jurisdiction in all disputes relating to land and environment.

36. It is counsel’s contention that the jurisdiction of the NET is limited to hearing appeals from decisions of NEMA yet the nature of reliefs sought by the Petitioners goes beyond the scope of the National Environment Tribunal. The remedies provided under EMCA are therefore insufficient and inefficacious. He cited the case of **Mara Siana Conservancy Limited & 2 others v Director General National Environment Authority & 4 Others [2018 eKLR** for the proposition that where the issues raised in the Petition go beyond the scope of challenging the EIA licence under NEMA the Environment and Land Court has jurisdiction to deal with the matter and that the provisions of EMCA do not oust the court’s jurisdiction.

37. He concedes that whereas the matter should have been filed in the Tribunal within 60 days after issuance of the NEMA licence, the said period has lapsed and the Tribunal has no provision for extension of time. In the case of **Simba Corporation Limited v Director General National Environment Management Authority (NEMA) & Another [2017] eKLR** the court held that:

*“There is no doubt that section 129 (2) of EMCA provides a limitation period of 60 days from the date of occurrence of the impugned event within which the dissatisfied party is to present an appeal to NET. The framework in section 129 (1) does not provide for extension of the 60-day period. In the same vein rule 7 of NET procedure rules prohibits extension of time in a scenario where the limitation period is expressly limited by EMCA.”*

38. In order to respond to the central question as to whether the Environment and Land Court has jurisdiction to hear and determine this case I have considered the reliefs sought by the Petitioners. These include *inter alia*; a declaration that the petitioners’ right to a clean and healthy environment for the people living around Kipsigis Highlands tea factory; on the parcel of land registered as 7779/3 in Chemamul was violated by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents who did not follow the due process of the law prior to construction of Kipsigis Highlands tea factory, a declaration that the constitutional right of access to information as enshrined under Article 35 of the Constitution was violated by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents; an order for cancellation of the Environmental Impact Assessment license issued by NEMA and the Licences and approvals issued by the County Government of Bomet to the 3<sup>rd</sup> Respondent prior to the construction of Kipsigis Highlands Tea Factory on the parcel of land registered as 7779/3 and an order directing that the 3<sup>rd</sup> Respondents conduct a fresh Environmental Impact Assessment report, and if found unsafe, Kipsigis Highlands Tea factory on the parcel of land registered as 7779/3 in Chemamul be destroyed and the environment be restored to the manner it was in before the illegal factory was put up and an environmental restoration order be issued.

39. It is clear that the aforementioned reliefs cannot all be granted by the National Environment Tribunal. Coupled with this, the EIA was conducted way back in 2016 and the licence was issued in March 2017 therefore, the period within which the Petitioners ought to have filed their appeal in the Tribunal has lapsed. For these reasons, I am of the view that there are special circumstances in this case that warrant the filing of the Petition in Court as EMCA would not be able to provide an adequate and efficacious remedy. Consequently, the right forum is the Environment and Land Court which has unlimited original and appellate jurisdiction in environment and land matters.

**Whether failure to comply with Section 13A of the Government Proceedings Act is fatal**

40. The second point of law raised by the 2<sup>nd</sup> Respondent is that the Petitioners did not comply with section 13A of the Government Proceedings Act. The said section provides as follows:

*“No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing in the prescribed form have been served on the Government in relation to those proceedings”*

41. Under the Constitution of Kenya 2010, there are two levels of Government, the national Government and the County Government. See the case of **Stephen Wanyee Roki v Rep Bank and 2 Others (2016 eKLR)**.

42. As to whether failure to issue a 30-day notice under section 13A of the Government Proceedings Act renders the Petition incurably and fatally defective, I hold the view that it does not. In arriving at this decision I am guided by the case of **Nyandoche Ibere Cooperative Society v County Government of Kisii & Another [2017] eKLR** where the court cited the case of **Kenya Bus Service Ltd & Another 2012 eKLR** in which Majanja J held as follows:

*“Viewed against the prism of the Constitution of Kenya 2010, it also becomes evident that section 13A of the GPA provides an impediment to access to justice. Where the state is at the front and centre of citizens’ lives, the laws should not place hurdles on accountability of the Government through the courts. An analysis of the various reports of the Commonwealth which I have cited clearly demonstrates that the requirement for a notice, particularly where it is a mandatory requirement, diminishes the ability of the citizen to seek relief against the Government. It is my finding therefore that section 13A of the Government Proceedings Act violates article 48 of the Constitution”.*

*Mutungu noted that: “...I agree that the strict application of the section would impede access to justice considering that it was enacted when there was only one national Government as opposed to today when there are 47 other county Governments. The Government Proceedings Act was not amended to bring it in conformity with the 2010 Constitution.”*

43. I fully associate myself with the above decisions.

44. The upshot is that the P.O lacks merit and is hereby dismissed.

45. I make no order as to costs.

**Dated, signed and delivered at Kericho this 12<sup>th</sup> day of July, 2019.**

.....

**J.M ONYANGO**

**JUDGE**

**In the presence of:**

1. Mr. Mugumya for the Petitioner
2. Mr. Sang for Mr. Mutembei for the 2<sup>nd</sup> Respondent
3. Mr. Orina for the 3<sup>rd</sup> & 4<sup>th</sup> Respondents
4. No appearance for the 1<sup>st</sup> and 5<sup>th</sup> Respondents
5. Court Assistant – Rotich