



REPUBLIC OF KENYA



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**Kabundu & 2 others v County Government of Mombasa & 6 others;
Director of Public Prosecutions & 4 others (Interested Parties) (Petition
195 of 2018) [2025] KEHC 3079 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 3079 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
PETITION 195 OF 2018
OA SEWE, J
FEBRUARY 27, 2025
IN THE MATTER OF ARTICLES 2, 22(1), 23, 24, 29(C), 40,
159 AND 165 OF THE CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF ALLEGED THREAT OF VIOLATION OF
ARTICLES (3), 10 AND FOURTH SCHEDULE OF THE
CONSTITUTION OF KENYA
AND
IN THE MATTER OF ALLEGED THREAT TO AND
CONTRAVENTION OF SECTION 3, 4, 7, 8, 10 OF THE ACCESS
TO INFORMATION ACT, NO. 31 OF 2016 AND ARTICLE 35 OF
THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF THE COUNTY GOVERNMENTS ACT, NO.
17 OF 2012
AND
IN THE MATTER OF THE MOMBASA COUNTY INSPECTORATE
ACT, 2016
AND
IN THE MATTER OF MOMBASA COUNTY OFFICE OF THE
COUNTY ATTORNEY BILL, 2017



BETWEEN

FRANCIS KABUNDU 1ST PETITIONER
MUTUMA CALEB MWITI 2ND PETITIONER
CHICHI KIMANI 3RD PETITIONER

AND

COUNTY GOVERNMENT OF MOMBASA 1ST RESPONDENT
GOVERNOR, MOMBASA COUNTY 2ND RESPONDENT
MOMBASA COUNTY PUBLIC SERVICE BOARD 3RD RESPONDENT
CLERK, MOMBASA COUNTY ASSEMBLY 4TH RESPONDENT
COMMITTEE ON JUSTICE AND LEGAL AFFAIRS, THROUGH
THE CHAIRPERSON, MOHAMED AMIR, MOMBASA COUNTY
ASSEMBLY 5TH RESPONDENT
CHAIRMAN, COMMITTEE ON SECURITY AND ADMINISTRATION,
COUNTY ASSEMBLY OF MOMBASA 6TH RESPONDENT
MOMBASA COUNTY ASSEMBLY 7TH RESPONDENT

AND

DIRECTOR OF PUBLIC PROSECUTIONS INTERESTED PARTY
ATTORNEY GENERAL INTERESTED PARTY
CHIEF MAGISTRATE, MOMBASA INTERESTED PARTY
INSPECTOR GENERAL, NATIONAL POLICE SERVICE . INTERESTED PARTY
MOMBASA LAW SOCIETY INTERESTED PARTY

JUDGMENT

1. The factual basis of this Petition, as set out in the Petitioners’ Amended Petition, is that the County Assembly of Mombasa purported to make County legislation without inviting a key stakeholder, the Jubilee Party, for public participation. The petitioners further complained that no publication was ever done in any of the local newspapers, inviting members of the public to give their views on certain County Bills. They, therefore, faulted the process employed by the respondents to enact various legislations, including the County Inspectorate Bill, 2016 and the County Attorney Bill, 2016.
2. In particular, the petitioners complained that:
 - (a) the Mombasa County Assembly Clerk, the 4th respondent herein, was in breach of the *Constitution* and the County Government Act, 2012, when his advice misled the Committee members of Security and Administration, led by the Chairman, Mr. Mohamed Ndanda, on procedural issues.



- (b) That the 5th respondent, failed to invite the Jubilee Party, the second largest party in Mombasa, for public participation and thereby acted in breach of Article 10 of the Constitution.
- (c) The 2nd respondent signed or assented to the Mombasa County Inspectorate Bill which was unconstitutional in so far as the Act purported to form a parallel enforcement body to the County policing authorities established under the National Police Service Act, No. 11A of 2011.
- (d) The residents of Mombasa were never invited to submit their opinions to the Bill either through written memoranda to the Clerk of the Mombasa County Assembly or orally to the Committee.
- (e) That the 3rd respondent, being in charge of employment and vetting of Mombasa County staff as mandated by the County Government Act 2012, purported to quality and select Mr. Mohamed Amir as the director of Mombasa County Inspectorate without following the due process of law that provides for competitive recruitment; selecting him merely on the basis of him being the brother of the then Governor, Ali Hassan Joho.
- (f) That the Judiciary and the Council of Governors held the first in a series of meetings which were expected to culminate in a partnership agreement on the handling of the revenue generated by the County Court.
- (g) That the Chief Magistrate, the 3rd Interested Party, failed to implement the directive of the Chief Registrar of the Judiciary dated 26th May 2015 and thereby allowed the Mombasa County to use the County Court to extort money, harass innocent residents and raise illegal revenue.
- (h) That the County Attorney Bill purported to give the County Attorney powers to act both as an attorney and as a DPP of the County, against the principles of the Constitution of Kenya.
- (i) That the decisions and actions of the Mombasa County Inspectorate are oppressive, punitive and unlawful.
- (j) That the decisions of the County Assembly through the County Clerk and the County committees are illegal.

3. Accordingly, the petitioners prayed for the following reliefs, among others:

- (a) An order directing the County Government of Mombasa to produce for perusal by the Court and the petitioners, the consolidated fund collected for three years and all the receipt books and other records of payment made by the public in the County, the Bank Statements for KCB Account No. 1162415967 from 1st June 2015 to date, and the Mpesa Statements for PayBill No. 856355 from its registration to date.
- (b) An order allowing the petitioners to place notice and/or advertisement in the print and other media calling on any and all persons who have ever been fined and/or paid any money to the Mombasa County from 1st June 2015 to date and issued with a County Government receipt to forward such receipts to the petitioners and the Court for accounting purposes.
- (c) An order directing the County Government to remit to the Judiciary any and all funds, monies or payments made by the public in the County Court since 1st June 2015 to date for transmission to the Consolidated Fund.
- (d) A declaration that the Mombasa County Inspectorate Bill be quashed or nullified.



- (e) A declaration that the Office of the County Attorney Bill, 2017 be quashed or nullified.
 - (f) A declaration that the respondents have no powers to investigate, arrest or institute any criminal proceedings against anyone.
 - (g) A declaration that the repeal of the Local Government Act, Cap 265 of the Laws of Kenya after the promulgation of the Constitution on 27th August 2010 rendered the city/municipal courts obsolete.
 - (h) A declaration that to the extent that the 1st respondent had charged the 1st petitioner and other residents of Mombasa clamping fees without giving them an opportunity to defend themselves before any tribunal or court, the 1st respondent violated the right to fair administrative action under Articles 47 and 50 of the Constitution.
 - (i) An order of Certiorari to remove to this Court for purposes of its being quashed the decision made by Mombasa County Government to impose a penalty in the form of towing charges through Mombasa County Inspectorate and the department of Transport and Infrastructure.
 - (j) An order of Certiorari to remove to this Court for the purpose of its being quashed the decision made by Mombasa County Government to impose a penalty by way of clamping charges.
 - (k) A declaration that the decision by Mombasa County Government to charge clamping fees and towing charges is ultra vires, null and void to the extent that the 1st respondent had arrogated itself a judicial function contrary to Article 50(2)(d) and 160 of the Constitution.
 - (l) Any other relief and or further orders that the Court may deem fit and just to grant in the circumstances.
 - (m) Costs of the Petition.
4. The Petition was premised on the 1st respondent's affidavit and the documents annexed thereto.
 5. The respondents filed a Response to the Petition on the 31st July 2018 and a Supplementary Affidavit sworn on the 15th November 2023. They prayed that the Petition dated 11th July 2018 as amended should be dismissed as it does not meet the threshold for Constitutional Petitions; in particular, the requirement that a party that alleges violation of his or her rights must plead with reasonable precision the manner of the alleged violation.
 6. In addition to the responses mentioned herein above, the 5th -7th Respondents filed a Replying Affidavit sworn on 21st October 2020 by Mr. Jimmy Waliaula, County Attorney, County Government of Mombasa. They posited that the Petition before the court is inconclusive, as there are no Articles of the Constitution or Sections of the County Government Act that have been specifically mentioned as having been breached and in what manner.
 7. The 5th – 7th Respondents further contended that the Amended Petition herein should be struck out for want of compliance with the procedure set out in Sections 15 and 88 of the County Government Act; which requires that the County Assembly be consulted before a suit can be filed for redress.
 8. Regarding public participation, again it was the contention of the respondents that the petitioners' manner of addressing issues was indistinct. They averred that there was no particular complaint on public participation or a clear indication as to which legislation it was directed. The respondents maintained that any claims that public participation was not conducted on any Bill including the County Inspectorate Bill are all without factual basis. It was further the contention of the respondents that the petitioners have not proved their case as required under Section 107 of the Evidence Act



when they claimed that the selection of Mr. Mohammed Amir for the position of Mombasa County Inspectorate was flawed.

9. Regarding the operations of the County Court and the management of revenue generated thereat, the respondents averred that there is no formal agreement between the Judiciary and Council of Governors that gave rise to a partnership agreement or that concretized the contents of the letter dated 26th May 2015 from the Chief Registrar of the Judiciary. The respondents asserted that they understood the aforementioned letter to be about the need for future guidelines towards transitioning the functions of the municipal courts.
10. The respondents denied that the Mombasa County Inspectorate's Bill was intended to collect revenue at the County Court without any form of accountability. They contended that, as far as they are concerned all revenues collected from the County Court are handled in strict adherence to Section 116 of the *Public Finance Management Act*. It was the respondents' case that the complaint about the power of the County Inspectorate to conduct prosecutions is res judicata, the same having been determined conclusively by the Court of Appeal in Civil Appeal No. 2 of 2016, Patrick Mukiri Kabundu v County Government of Mombasa & Others.
11. The respondents also contended that the Committees of the County Assembly have no legal capacity and cannot sue or be sued and thus, this Petition should be dismissed against the 6th and 7th Respondents. The 5th-7th Respondents also stated that, whereas Mr. Amir was employed as the head of the Inspectorate Department, County of Mombasa, he is no longer an employee of the County. They added that the Mombasa County Inspectorate Bill was never passed, and therefore there is nothing to challenge.
12. The Petition as amended was canvassed by way of written submissions, pursuant to the directions of the Court made herein on 25th October 2023. The petitioners relied on their written submissions dated 2nd December 2020. They reiterated the factual basis of their Petition and submitted that they have the requisite locus standi to bring the Petition. They relied on Articles 3, 22 and 258 of the *Constitution* as the basis for their action. The Petitioners therefore proposed the following issues for determination:
 - (a) Whether the promulgation of the *Constitution* of Kenya rendered the city and municipal courts obsolete, and whether there is in existence such courts as "county courts".
 - (b) Whether the County Government has the legal mandate to collect revenue paid and received on behalf of the National Government and/or administrate the Consolidated Fund.
 - (b) Whether the monies received or accruing out of violation of the County By-laws constitute monies that are to be deposited into the Consolidated Fund.
 - (c) Whether the Mombasa County Office of the County Attorney Act, 2017 can deal with the prosecution of criminal cases and manage the county court.
 - (d) Whether the proclamation of the *Constitution* of Kenya 2010 renders the Mombasa County Inspectorate Bill, 2016 unconstitutional.
 - (e) Whether there was public participation in the enactment of the Mombasa County Inspectorate Bill, 2016, and the Mombasa County Office of the County Attorney Bill, 2017.
 - (f) Whether the Mombasa County Inspectorate can enforce their own bye-laws after the promulgation of the *Constitution* of Kenya, 2010.
 - (g) Whether the Mombasa County Government Court can maintain its own registry independently from the Kenya Judiciary.



13. The petitioners made detailed submissions in respect of each of their proposed issues.
14. On behalf of the 5th to 7th respondents, written submissions were filed herein on 15th June 2022 by the Office of the County Attorney, County Government of Mombasa. Their counsel submitted that the suit against them is ill-advised and is therefore an abuse of the process of the Court. They submitted that they have no legal capacity and can therefore not sue or be sued. They further submitted that although the 7th respondent was sued in his personal capacity, he is no longer an employee off the County Government of Mombasa; and therefore the orders sought against him cannot issue.
15. The 5th to 7th respondents further submitted that the petitioners were under obligation to first petition the County Assembly under Sections 15 and 18 of the County Government Act before filing the instant Petition; which was not done. They further argued that, since the Mombasa County Finance Act is passed annually, the issues raised in the Petition in connection with the revenue collection measures employed by the County Government of Mombasa have been overtaken by events. They also mentioned that the Mombasa County Inspectorate Bill is yet to be passed into law; and therefore matters pertaining to its constitutionality or lack thereof have not crystalized and cannot be deliberated upon by the Court.
16. The respondents further submitted that, during the pendency of this suit, the petitioner filed Mombasa High Court Miscellaneous Criminal Application No. 14 of 2020 raising some of the issues he raised in this Petition; and that the Court gave its ruling on issues pertaining to receipts for filing fees paid by the County Government of Mombasa. They added that the Court also ruled that the Magistrate’s Court handling matters filed pursuant to County legislation is not a “County Court” as such since judicial services have not been devolved. According to the respondents those issues are res judicata. They urged for the dismissal of the Petition contending that the petitioners have not been able to prove the constitutional violations complained about.
17. Written submissions were also filed by the 1st interested party, the Director of Public Prosecutions. On whether the Office of the County Attorney had prosecutorial powers, the 1st respondent submitted that the issue is res judicata, having been determined in Patrick Mukiri Kabundu v Executive, Tourism Development & Culture, Mombasa County & 22 others [2016] eKLR, which was an appeal from the determination made in Mombasa High Court Miscellaneous Application No. 27 of 2015. The 1st respondent relied on Section 7 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya and the case of Sri Ram Kaura v M.J.E Morgan [1961] EA 462 and urged the Court to find that the issue of prosecutorial powers of the county prosecutors was addressed with finality by the Court of Appeal.
18. In response to the submissions by the petitioners on whether the arrest of the 1st petitioner by the county askaris was proper, the 1st interested party relied on Section 21 of the *Criminal Procedure Code* which recognizes that an arrest can be effected by a police officer “or other person”. It was further submitted that Article 6(2) of the *Constitution* provides for interdependency between the National and County Government in the performance of functions; and therefore the arrest of the 1st petitioner was lawful. Accordingly, the 1st interested party urged for the dismissal of the Petition.
19. The other parties appear to not have filed their submissions. Hence, in the light of the foregoing summary, the main issues arising for determination are:
 - (a) Whether the 6th -7th Respondents can sue and be sued.
 - (b) Whether this Petition raises any constitutional questions.
 - (c) What order ought to be made on costs?



A. Whether the 6th -7th Respondents can sue and be sued:

20. The Petitioners have sued the Committee on Security and Administration through the Chairperson of the Mombasa County Assembly and the Committee on Justice and Legal Affairs through the Chairperson Mohammed Amir as the 6th and 7th respondents. The 6th and 7th Respondents argued that a suit cannot be instituted against them and therefore, the Petition herein should be dismissed against them on that ground alone.
21. The key complaint raised against the 6th respondent by the petitioners is in connection with the fact that no public participation was conducted during the processing of the County Inspectorate Bill and the Office of the County Attorney Bill. In this regard Article 196 of the Constitution provides: -
- (1) A county assembly shall—
 - (a) conduct its business in an open manner, and hold its sittings and those of its committees, in public; and
 - (b) facilitate public participation and involvement in the legislative and other business of the assembly and its committees.
 - (2) A county assembly may not exclude the public, or any media, from any sitting unless in exceptional circumstances the speaker has determined that there are justifiable reasons for doing so.
 - (3) Parliament shall enact legislation providing for the powers, privileges and immunities of county assemblies, their committees and members.
22. Additionally, Section 11 of the County Assemblies Powers and Privileges Act provides: -
- (1) No civil or criminal proceedings shall be instituted against any Member for words spoken before, or written in a report to a county assembly or a Committee, or by reason of any matter or thing brought by him or her therein by a report, petition, Bill, resolution, motion or other document written to a county assembly.
 - (2) No civil suit shall be commenced against the Speaker, the leader of the majority party, the leader of the minority party, a chairperson of a committees or any member for any act done or ordered by them in the discharge of the functions of their office.
 - (3) The Clerk or other members of staff shall not be liable to be sued in a civil court or joined in any civil proceedings for an act done or ordered to be done in the discharge of their functions relating to proceedings of a county assembly or its committees.
23. There is no doubt therefore that, by dint of Section 11 above, County legislative bodies enjoy privileges, powers and immunities often referred to as “Parliamentary Privilege.” Parliamentary privilege has been seen to be necessary so that the legislative organs can perform their functions without interference from the other organs of Government. In essence, such immunity and privilege is to be encouraged to safeguard separation of powers within the three arms of Government in the due performance of their mandates under the Constitution. Nevertheless, such immunity does not and cannot oust the jurisdiction of the Court to inquire into the constitutionality of the functions and the output of such bodies.



24. In the case of Peter O. Ngoge v Francis Ole Kaparo & 4 Others [2007] eKLR, the Court held: -

...We must however not miss the chance to state that all organs of state namely the Legislative, Executive and the Judiciary are all subject to the Constitution. The High Court has the power to strike out a law or legislation passed by Parliament which is in conflict with the Constitution. The same applies to any privileges, immunities or powers claimed by Parliament which are in conflict with the Constitution. Nothing is immune from the courts scrutiny, if in conflict with the Constitution...”

25. In the case of Protus Aramba Moindi & another v Speaker of the County Assembly, Kisii County & 2 others [2016] eKLR, the court while considering Section 12 of the National Assembly (Powers and Privileges) Act that provides immunity for both the National Assembly and its Committees, held: -

13. S.12 of the Act provides that:-

No proceedings or decision of the Assembly or the Committee of Privileges acting in a accordance with this Act shall be questioned in any court”.

The Act applies “Mutatis Mutandis” to all the County Assemblies now that we are in the era of devolution and County Governments.

On the face of it, S.12 of the Act purports to exclude interference of the courts in matters of the National assembly or for that matter County Assemblies. However, Article 2 of the Constitution proclaims the supremacy of the Constitution to the effect that it is Supreme Law of the Republic and binds all persons and all state organs at both levels of Government. So that, no person may claim or exercise State authority except as authorized under the Constitution and any law that is inconsistent with the Constitution is void to the extent of the inconsistency and any act or omission in contravention of the Constitution is invalid.

...

15. Jurisdiction being the authority which a court has to decide matters that are litigated before it or to make cognizance of matters presented in a formal way, for its decision and taking into account that Article 165(3) of the Constitution grants the High Court the power to determine any question as to the interpretation of the Constitution and that the High Court is recognized as the custodian of the Bill of Rights which is the framework of social, economic and cultural policies in a democratic state such as Kenya it would follow that S.12 of the National Assembly (Power & Privileges) Act cannot restrict or oust the Constitutional mandate of this court.”

26. Similarly, Mativo, J (as he was the) in the case of Apollo Mboya v Attorney General & 2 others [2018] eKLR, while considering the import of Sections 7 and 11 of the Parliamentary Powers and Privileges Act held: -

73. Parliamentary immunity is not an individual privilege granted to members of parliament for their personal benefit, but rather a privilege for the benefit of the people and the institution which represents them, Parliament. Parliamentary immunity ensures that Parliament can fulfill its tasks and function without obstruction from any quarter. Obviously, a Parliament can only work insofar as its members are free to carry out their mandate. Immunity is therefore a prerequisite for ensuring that a Parliament can indeed function as an independent institution and vindicate its own authority and dignity.



74. The hard core of the privilege of freedom of speech is indisputably constituted by statements made from the floor of the House or in committees, bills or proposed resolutions and motions, written and oral questions, interpellations, reports made at the request of Parliament, and votes cast. These are protected by the absolute privilege of freedom of speech, as are generally documents which are ancillary to those matters, such as drafts of questions or notes. As stated earlier, absolute privilege means that such statements or acts cannot be challenged in court. Members of Parliament cannot therefore be sued for defamatory statements they make nor for statements that would otherwise constitute a criminal offence.
75. The foregoing paragraphs summarize the nature and purpose of Parliamentary immunity. A reading of section 11 leaves no doubt that it covers more than the immunity discussed in the above paragraphs. It bars any person from challenging in Court decisions made by Parliament or its committees. The provision does not specify the nature of the decisions. It does not refer to immunity in the performance of their Parliamentary duties. It seeks to shield their decisions from court scrutiny. It is an ouster or finality clause which restricts or eliminates Judicial Review. In our constitutional dispensation, it is not Parliament, or the executive or the Judiciary that are Supreme, but the *Constitution*.”
27. In am in agreement with the above expositions. Under Article 165(3), the *Constitution* grants the High Court broad authority to address questions regarding constitutional interpretation and to determine whether any action taken under the *Constitution* or any law is inconsistent with or violates the *Constitution*. Article 165(3) of the *Constitution* provides: -
- (3) Subject to clause (5), the High Court shall have—
- (a) unlimited original jurisdiction in criminal and civil matters;
 - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191;and
 - (e) any other jurisdiction, original or appellate, conferred on it by legislation.



28. Further, Articles 165 (6) and (7) of the Constitution, grants the High Court supervisory jurisdiction over any individual, body, or authority performing a judicial or quasi-judicial function, excluding Superior Courts. Articles 165 (6) and (7) of the Constitution provide: -
- (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
 - (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
29. The High Court’s supervisory jurisdiction over entities other than Superior Courts is extensive, allowing the Court, at its discretion, to request the record of proceedings from any such entity. It may issue any order or direction it deems necessary to ensure fair administration of justice. In the same vein, Article 2 establishes the Constitution as the supreme law of the Republic, binding all individuals and State organs at every level of government, and specifies that no person or body may exercise state authority unless authorized by the Constitution.
30. In the premises, the Committee of the County Assembly can be sued in so far it performs public duties mandated by the Constitution and legislation as shown above. Indeed, Article 165(6) of the Constitution is explicit that the supervisory jurisdiction of the High Court encompasses decisions made by “...any person, body or authority exercising a judicial or quasi-judicial function...” In this instance, it is notable that some of the reliefs sought against the respondent were in the nature of judicial review.
31. I am fortified in this stance by the position taken by Hon. Nyamweya, J. in *Republic v Committee on Senior Counsel & Another, Ex parte Allen Waiyaki Gichuhi* [2021] eKLR, that:
- 26. Since judicial review is a special supervisory jurisdiction which is different from both ordinary adversarial litigations between private parties and appeal rehearing on the merits, the question that determines the capacity of a defendant is whether there is some recognizable public law wrong that has been committed. A defendant in judicial review proceedings therefore, is the public body or public office holder which made the decision under challenge (or failed to make a decision where that failure is challenged), or where the public body or official has legal responsibility for the relevant matter.
 - 27. This Court therefore finds for the foregoing reasons, that the Committee of Senior Counsel, being an unincorporated body that has been given existence and duties by the Advocates Act, is a statutory and public body that is capable of suing and being sued for purposes of judicial review.”

B. Whether this Petition raises any Constitutional questions:

32. The respondents have urged this court to dismiss this Petition on the ground that it lacks precision. Their contention was that the petitioners have not identified the rights that they allege have been denied, violated, infringed, or threatened; the articles in the Constitution alleged to have been denied, violated or infringed and they have also not identified the actors responsible for the said denial, violations or infringement as required. They relied on the case of *Anarita Karimi Njeru v Republic* [1979] 1 KLR 154 in which it was held:

...if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that



he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

33. The principle was reiterated by the Court of Appeal in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR as follows:

...the principle in *Anarita Karimi Njeru* (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (Cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of *Thorp v Holdsworth* (1876) 3 Ch. D. 637 at 639 holds true today:

The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

34. Whereas the Constitution, under Article 22, provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated infringed or threatened on their behalf or that of others, it is now trite that a person who alleges a violation of any constitutional rights and freedoms must plead such violations with a reasonable degree of specificity. In *Petition 14, 14 A, 14 B & 14 C of 2014 (Consolidated) Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR, the Supreme Court made this point as follows: -

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

35. With the foregoing in mind, I have looked at the Amended Petition dated 17th February 2023 and noted that, in essence, the petitioners challenge the Mombasa County Inspectorate Bill, 2016 as well as the Mombasa County Office of the County Attorney Bill, 2017, contending that they infringe the Constitution. The Petition alleges that the Mombasa County Inspectorate Bill, 2016 infringes on the



functions of the National Police. There is also a claim that public participation was not conducted in connection with that Bill as required under Article 10 of the *Constitution*.

36. However, it is significant to point out that, as at the time the Petition was filed, these were simply Bills which were yet to be fully processed and enacted into law. It has emerged, from the responses filed herein, that the Bill is yet to be enacted into law; a fact conceded to by the petitioners. In particular, the 1st petitioner conceded at paragraph 13(b) of the petitioners' Further Affidavit sworn on 14th February 2024 that:

From the onset, I wish to categorically state that the above annexed document is just a Bill and has never been passed into a legislation. It is therefore not a law."

37. In effect, the petitioners presented to the Court hypothetical issues for determination, an activity that courts have frowned upon, granted the limited resources available for the administration of justice. Moreover, as correctly pointed out by the respondents Sections 15 and 88 of the County Government Act affords the respondents an avenue for redress. I therefore take the view that the issue of constitutionality of the County Inspectorate Bill was prematurely taken and is therefore not ripe for consideration as to constitutionality.

38. In the case of *K K B v S C M & 5 others* (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) (22 April 2022) (Ruling), Hon. Mativo, J. (as he then was) expressed himself on the doctrine or ripeness as hereunder:

In summation, the doctrines of ripeness and constitutional avoidance shun to deal with a constitutional issue where there exists another legal course which can give the litigant the relief he seeks. In other words, a constitutional issue is not ripe for determination until the determination of the constitutional issue is the only course that can give the litigant the remedy he seeks. Both constitutional avoidance and ripeness avert the determination of the constitutional issues until it becomes very necessary to the extent that it is the only course available to assist the litigant's cause..."

39. Similarly, in the case of *Faraj & 3 others v Police & 2 others* (*Constitutional Petition 165 of 2020*) [2022] KEHC 287 (KLR) (27 April 2022) (Judgment) the court held:

27. The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved. In that regard, the Supreme Court stated in *Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others* (at para 256) that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis."

...

29. The doctrine of ripeness and constitutional avoidance gives credence to the concept that the *Constitution* does not operate in a vacuum or isolation. It has to be interpreted and applied in conjunction with applicable legislation together with other available legal remedies. Where there are alternative remedies the preferred route is to apply such remedies before resorting to the *Constitution*. The possibility of the elevation of any dispute to a constitutional issue is what is sought to be averted by the doctrines of ripeness



and constitutional avoidance. It is borne out of a realisation that all legislative or common-law remedies are part of the legal system...”

40. And, in *Petition 14, 14A, 14B & 14C of 2014 (Consolidated) Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR (29th September 2014) (Judgment) the Supreme Court made it clear that:

(256) ...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 Ketrige 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.”

(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)).

(258) From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd 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...”

41. As for the Office of the County Attorney Bill, 2017, the 1st petitioner averred as hereunder in his Further Affidavit sworn on 14th February 2024:

That in regards to prayers 10 and 11 of the Amended Petition, I wish to state that the Respondents have since corrected the initial unconstitutionality in the Mombasa County Office of the County Bill 2017. The said Bill has since become a legislation pursuant to Article 199(1) of the *Constitution*. The Sections referred to in prayer number 11 have also been deleted from the final legislation thereby correcting the injustice thereon.”

42. It is therefore manifest that, in so far as the impugned Bills are concerned, the Petition was prematurely brought. Moreover, it is plain from the Amended Petition that the petitioners’ complaints related to statutory and procedural aspects of the impugned Bills. They do not constitute constitutional questions properly so called. I therefore reiterate the expressions of Hon. Chacha, J. in *Godfrey Paul Okutoyi & others v Habil Olaka & Another* [2018] eKLR that:

65. It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a court of law in the manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a Constitutional petition. A party should only file a constitutional petition for redress of a breach of the *Constitution* or denial, violation or infringement of, or threat to a right



or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure.”

43. Further the foregoing observations, it is manifest that Prayers 1 to 3 of the Petition had been addressed in Mombasa Criminal Application No. 14 of 2020: Patrick Kabundu v Mombasa County Government & others [2022] eKLR and the orders sought granted. The 1st petitioner adverted to this state of affairs at paragraph 24 of his Further Affidavit as hereunder:

That in regards to prayers 1 to 3, I wish to state that the same had been addressed by Ong’ingo J in Misc. Criminal Application No. 14 of 2020 Patrick Kabundu v Mombasa Government of Kenya and others [2022] at paragraph 20 as follows

The issue raised by the Applicant does not affect him directly because the charges against him in properly founded under the by-laws. However, various correspondences have been exchanged between the County Government of Mombasa and the Judiciary concerning the revenue collection arising out of offences and penalties under the by-laws. It is high time that the matter is resolved. As the Applicant presents himself before this court to have his matter concluded and as he prosecutes the Constitutional Petition No. 195 of 2018, this court hereby orders that the Hon. Chief Registrar of the Judiciary and the County Government of Mombasa put in place structures that will enable the Magistrate who is presiding over cases registered by the County Government to be handled in line with the *Constitution* and relevant statutes within 3 months from the date hereof.”

44. And, in connection with the petitioners’ contention that the Office of the County Attorney lacks prosecutorial powers, the 1st interested party pointed out that the individual officers complained about were authorized to prosecute by the Director of Public Prosecutions and a Gazette Notice issued to that effect. In any event the issue was determined with finality by the Court of Appeal in Patrick Mukiri Kabundu v Executive, Tourism Development & Culture as follows:

...Under clause 8 of the Fourth Schedule to the *Constitution*, Courts are exclusively a function of the national Government. Much as the appellant claims that the courts before which members of the Association are being prosecuted are “Kangaroo courts”, he does not claim that the county governments have established or that they run those courts. The complaint, as we understand it, relates to the persons responsible for prosecuting offences created by county legislation before the courts. Article 157(6) of the *Constitution* vests the power to prosecute in the DPP. Further, by Article 157(12) Parliament may enact legislation conferring powers of prosecution on an authority other than the DPP.

We are of the opinion that in view of the express provisions of Article 157 of the *Constitution*, the appellant is not right in claiming that the powers of prosecution must be exercised exclusive (sic) by the DPP. Article 157(12) empowers the Parliament, by legislation, to confer powers of prosecution on an authority other than the DPP. Even where Parliament has not enacted the legislation contemplated by Article 157(12), Article 157(9) of the *Constitution* allows the DPP to delegate his prosecutorial powers to subordinate officers acting in accordance with his general or special instructions.”



45. The Court of Appeal further held:

...In our view, far from delegation of power by the DPP to county prosecutors being contrary to the Constitution, it is in fact consistent with the Constitution, is reasonable under our constitutional architecture, and is intended to, among other things, give full effect to devolution. The Fourth Schedule to the Constitution sets out the functions of both the National and the County Governments. In respect of the functions, which the Constitution has assigned to County Governments, those Governments have the competence under Article 185(2) of the Constitution to make laws for the effective performance of their functions and exercise of their powers. To accept the appellant's contention would mean that the DPP would have to instantly prosecute all the offences under county legislation in all the 47 counties of Kenya. In our view the genius and wisdom of Article 157(9), which allows the DPP to delegate his prosecutorial powers to subordinate officers, is the appreciation that the demands of our Constitution on the Office of the DPP would not make it possible or efficient for the DPP to personally exercise the powers of prosecution simultaneously at the national and county levels."

46. This Court is bound by the decision of the Court of Appeal on this point and I therefore need not belabor it. That leaves prayers 15 to 18 of the Amended Petition, in which the petitioners alleged that their right to fair administrative action under Articles 47 and 50 were violated. The 1st petitioner alleged that his motor vehicle was clamped and was forced to pay clamping and towing charges, which were illegally imposed.

47. The Supreme Court, in the case of Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others (Petition 5, 3, 4 of 2013 (Consolidated)) [2013] KESC 6 (KLR) (16 April 2013) (Judgment), held: -

...a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden..."

48. Further, in the case of Leonard Otieno v Airtel Kenya Limited [2018] eKLR the court stated that: -

65. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Constitution and inevitably result in ill considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses..."

49. The Supreme Court reiterated the position in Wamwere & 5 others v Attorney General (Petition 26, 34 & 35 of 2019 (Consolidated)) [2023] KESC 3 (KLR) (27 January 2023) (Judgment), where it held: -

18. A petitioner bore the burden to prove his/her claim of alleged threat or violation of rights and freedoms to the requisite standard of proof, which was on a balance of probabilities. Such claims were by nature civil causes. The onus of proof was on the 1st appellant to adduce sufficient evidence to demonstrate that she owned, erected, or lived in the alleged properties; and that State agents



interfered or deprived her of the subject properties. That was the import of section 107 of the *Evidence Act* on the burden of proof...”

50. The claims from prayers 15-18 have not been proved before the court and thus they are dismissed.

51. In the result, this court finds no merit in the Petition as Amended on 17th February 2023. It is hereby dismissed with an order for each party to bear own costs of the Petition.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27TH DAY OF FEBRUARY 2025.

OLGA SEWE

JUDGE

