



**Law Society of Kenya v Director of Public Prosecutions & 4 others (Petition 09 of 2019) [2025] KEHC 11980 (KLR) (Constitutional and Human Rights) (13 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 11980 (KLR)

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

**PETITION 09 OF 2019**

**LN MUGAMBI, J**

**AUGUST 13, 2025**

**BETWEEN**

**LAW SOCIETY OF KENYA ..... RESPONDENT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 2<sup>ND</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**CHIEF JUSTICE OF KENYA ..... 5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petition dated 25<sup>th</sup> January 2019 was later on amended on 22<sup>nd</sup> July 2019. The Petition is supported by the Petitioner’s affidavit in support sworn on even date by its Chief Executive Officer, Mercy Wambua.
2. The Petition assails the actions of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents’ alleging harassment, arrest, detention or prosecution of advocates in respect of matters arising from discharge of professional duties on behalf of their clients and in complete disregard of advocate-client privilege.
3. The Petitioner contends that this conduct undermines the rule of law and constitutional values and principles since with the advocate-client relationship, such information is held in confidence.
4. Accordingly, the Petitioner seeks the following reliefs against the Respondents:



- i. A declaratory order that the inhibition of Advocates' right to represent their Clients within the ambit of the *Advocates Act* and the *Evidence Act* by the Respondents contravene the provisions of *the Constitution* under Articles 10, 22, 23, 35, 47, 48, 49, 50, 156, 165, 232 and 258 thus contravened the rights and Freedoms of the Petitioner and members of the public.
- ii. A prohibitory injunction proscribing the Respondents from harassing or arresting Advocates of the High Court insofar as it relates to their practice of law.
- iii. A prohibitory injunction proscribing the Respondents from proffering or entertaining any charges against Advocates before exhaustion of the mechanisms set out in the Advocates' Act.
- iv. A mandatory injunction compelling the Respondents to always release Advocates of the High Court on Free Bond on the basis of personal cognizance whenever they are arrested in relation to their practice.
- v. Any other relief the Court deems fit to grant.
- vi. Costs of this Application be borne by the Respondents.

### **The Petitioner's Case**

5. The Petitioner states that its members are legally mandated to represent their clients and keep their information and details confidential. This is a sacred privilege which at the core of their practice.
6. The Petitioner alleges however that the Respondents have in the recent past prevailed upon its members seeking to have them provide confidential information concerning their clients. The Petitioner contends that its members have been subjected to negative legal consequences such as arbitrarily arrest and prosecution for standing their ground and refusing to give the information.
7. As a consequence, advocates have also been subjected to arbitrary arrests whilst representing their clients and even been imprisoned. Moreover, as a show of might and dominance by police officers, arrested Advocates have been in some instances denied their constitutional rights such as being granted bail or bond.
8. The Petitioner alleged that impugned actions by the Respondents contravene the laid down legal mechanism under the *Advocates Act* since any action against its members in relation to their legal conduct ought to be brought against them before the Advocates Complaint Commission and the Disciplinary Tribunal. The Petitioner avers that despite its numerous correspondences to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents condemning these acts, they have continued in the same perpetrate the same.
9. In view of foregoing, the Petitioner stresses that allowing the Respondent to continue this perilous trend is an affront to the rule of law, constitutionality and the pursuit and defense of justice by citizens of Kenya. The Petitioner adds that its members and citizens at large will suffer irreparable prejudice owing to Advocates' inability to offer legal services to members of the public in light of these circumstances.

### **The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' Case**

10. In response, these Respondents filed a replying affidavit by PC Abdi Mohammed Ali sworn on 15<sup>th</sup> March 2019.
11. He stated that the contents of the Petition are generic, vague, ambiguous, filled with conjecture and merely speculative. That the Petition lacks specificity and is an abuse of the Court process as it raises hypothetical and academic issues which do not contain any live or ripe issue to justify this



- Court's intervention. That it fails to raise any serious questions of law and fact and the mandatory and prohibitory orders sought are blanket in nature and ambiguous thus untenable in law and detrimental to public interest.
12. Furthermore, he alleged that Petition is inviting the Court to curtail the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' constitutional powers invoking the provisions of the *Advocates Act*.
  13. That the Petitioner's allegations are in fact unsubstantiated as there is no material before this Court to demonstrate that the 1<sup>st</sup> Respondent colluded with the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent to make the alleged arrests. In addition, the Petitioner did not attach any affidavits from the alleged Advocates and failed to demonstrate how the 1<sup>st</sup> Respondent acted arbitrarily and ultra vires.
  14. He pointed out that the Criminal Procedure Code does not provide for preferential and special treatment for advocates or any other professional persons upon arrest as that would be fostering discrimination in violation of Article 27 of *the Constitution*. That the right to liberty can be restricted on reasonable grounds and as such, the right of an arrested person to bail or bond is not absolute as it depends on the circumstances of each case.
  15. He further stated that the 1<sup>st</sup> Respondent's mandate as envisaged under Article 157 of *the Constitution* is independent and not subject to the control of any authority unless it can be proved that the power was discharged in a manner that inhibited the Petitioner's members ability to represent their clients or were compelled to breach the confidentiality clause.
  16. It is contended that contrary to the Petitioner's assertions, where an advocate commits a crime whether while representing a client or otherwise, these actions are not protected by the privilege clause. It was noted nonetheless that the Petitioner's members rights are guaranteed and equally protected by the Courts.
  17. In closing, it is argued that the public interest in this matter outweighs the interests of the Petitioner and the balance of convenience tilts in the favour of the Respondents.

#### **The 4<sup>th</sup> Respondent's Case**

18. The 4<sup>th</sup> Respondent in reply filed Grounds of Opposition dated 14<sup>th</sup> March 2019 on the basis that:
  - i. The Petition is frivolous, misconceived and an abuse of the Court's process.
  - ii. The Petitioner has not demonstrated a prima facie case with a likelihood of success to warrant grant of conservatory orders.
  - iii. The Petition does not disclose any denial, violation, infringement or threat to any of the fundamental rights and freedoms protected by *the Constitution*.
  - iv. The actions complained of by the Petitioner constitute the legitimate obligations of the Respondents under the relevant statutes therefore no triable issues arise.
  - v. The Petition seeks to have advocates accorded preferential treatment over and above other Kenyans which is contrary to Article 27 of *the Constitution*.
  - vi. The actions complained of do not in any way interfere with the advocate's duty to his client or the confidentiality element as between advocates and their clients.
  - vii. The Petition is speculative, premised on conjecture and without any real issues for determination to warrant intervention by this honorable court.



- viii. Consideration of public interest militates against the grant of the orders sought.
- ix. The constitutional rights sought to be enforced are not absolute and, in any event, do not apply to the Petition herein.
- x. The Petition lacks merit and the same ought to be dismissed in limine.

### **5<sup>th</sup> Respondent's Case**

- 19. This Party's response and submissions to the Petition are not in the Court file or Court Online Platform (CTS).

### **Petitioner's Submissions**

- 20. The Petitioner's written submissions are neither in the Court file nor in the Court Online Platform (CTS). However, the Petitioner's Advocate, Mr. Akusala briefly made oral submissions in Court on 13<sup>th</sup> March 2025.
- 21. Counsel submitted that the Petition underscores an advocate's right to represent their clients without being subjected to harassment by the Respondents or coerced to breach the duty of confidentiality owed to their clients which is protected by Section 134 of the *Evidence Act*.
- 22. He argued that the key issue in the Petition is the Respondents use of intimidation against advocates who are performing their professional functions as advocates and not criminals who happen to be advocates or advocates directly involved in fraudulent transactions.
- 23. Counsel argued that at the time of filing this Petition, an Advocate who is properly instructed sitting in a Board or is in private practice could be arrested for the conduct of business of his client where the only link between the fraud and the Advocate is only the client. He argued that *the Constitution* under Article 50 grants a client the right to be represented by an advocate including cases where the client may have committed fraud and even in such cases, the advocate is not to be treated as an offender. He argued that the only way to pierce the confidentiality veil is once the Court has ascertained that there was a fraudulent transaction. He argued that fraud is not a construct of fiction, guesswork or fiction but a legal concept that the Court is required to interpret.
- 24. Furthermore, Counsel submitted that even where an advocate is in error in the course of conducting his or her professional duty, there are mechanisms in law such as the *Law Society of Kenya Act* which provide for the action that is supposed to be taken against an advocate who makes mistakes in the course of duty. He submitted that these administrative remedies must be followed first. Counsel thus stated:

“This Petition is humble prayer of legal practitioners both in public or private sector to protected from being bundled together with clients when legal wrong has been committed. When an Advocate is required to give information, he is an officer of the Court. Advocate should be allowed to present information without arresting or incarcerating him as long as they positively identify themselves. They should not be in handcuffs when required to assist law enforcement agencies in investigations. We pray that he agrees with the petitioner and grant declaratory orders...”

- 25. Counsel further opposed the Respondent's claim that the Petitioner lacks locus standi. Citing Article 22 of *the Constitution*, he submitted that LSK has the requisite standing to file this Petition on behalf of its members, further, that the Petition presents a genuine grievance as a violation can be based on an



apprehension let alone the actual violations hence it was not even necessary that the statements from the affected advocates be provided.

26. Counsel referred to annexure 5 which he said was an ex-parte order issued to a layman not covered by the rules for a search into the office of an advocate and claimed that the hazard that such an order may cause is injurious yet there was no opportunity provided to the advocate for inter-partes hearing.
27. Reacting to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' assertion the Petition seeks to interfere with their constitutional mandates, counsel refuted this stating that the petition does not seek to shield advocates who are criminals from prosecution but focuses on advocates rights to be protected while discharging their legal duty hence the Law of Kenya Society Act takes precedence while the 1<sup>st</sup> Respondent's mandate will take precedence over any other act of criminal nature.
28. In conclusion, Counsel urged the Court to appreciate the public interest since the general public engages advocates and gives information trusting that the same will be held in confidence.

### **1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' Submissions**

29. These Respondents' through Senior Prosecution Counsel, Akula Alex filed submissions dated 8<sup>th</sup> April 2021. The issues for determination were highlighted as: whether the Petition is generic/theoretic and purely academic, whether the Petitioner proved any threat of and/or violation of a right and fundamental freedom and the import of Article 157 of the Constitution and Section 80 of the Advocates Act and Section 134 of the Evidence Act.
30. To begin with, Counsel submitted that the Petitioner did not adduce any minutes or resolution authorizing it to institute this suit on behalf of its members thus doesn't have the requisite locus standi to file this suit. Counsel also highlighted that no advocate had raised any complaint with the Petitioner concerning violation of their rights as the same was not proved by any lodged complaint or affidavit to that effect.
31. In essence, Counsel submitted that the Petitioner had willfully concealed material facts of the actual complaints against these Respondents and also no material had been adduced to show that an advocate has been arrested without lawful cause. Counsel argued that the Petition is an abuse of the Court process and thus ought to be struck out with costs.
32. In addition, Counsel submitted that the Petitioner is required under Section 107 and 109 of the Evidence Act to prove the existence or non-existence of a fact which it failed to do. Counsel relied in Yako Supermarket (K) Ltd & another v National Land Commission & 4 others [2016] eKLR where it was observed that where the parties are non-existent the pleading ought to be struck off.
33. Additional reliance was placed in Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others [2013] eKLR.
34. Turning to the second issue, Counsel similarly submitted that the Petitioner had not proved the purported violation of the advocates' constitutional rights. Furthermore, it was argued that the Petitioner had not adduced any evidence to demonstrate that indeed these Respondents actions in exercise of their mandate violated these rights. According to Counsel, failure to issue this evidence makes the Petition frivolous, vexatious and an abuse of the process of the court.
35. Moreover, Counsel submitted that the Petitioner's allegations were generic and academic as fail to specify the particular person who acted ultra vires or specific persons whose rights were violated. For this reason, Counsel contended that the Petitioner had failed to demonstrate the alleged violations to its members' constitutional rights.



36. Reliance was placed in *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others*[2020]eKLR where it was held that:

“The petitioners having failed to discharge their evidential burden, the plea of unfair process stood unproven, and there was no material before the Court to show unfair determination. In our view of the goals of justice, we see no need to refer the cross-appeal back to the Appellate Court”.

37. Like dependence was placed in *Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others, Stanley Muluvi Kiima (Interested Party): International Commission of Jurists Kenya Chapter (Amicus Curiae)* [2019] eKLR.

38. What is more, Counsel submitted that *the Constitution* guards against discrimination. In this matter, Counsel submitted that the Petitioner seeks to place advocates on a higher pedestal than ordinary Kenyans in relation to exercise of these Respondents mandate, which this Court should frown upon. Dependence was placed in *Francis Mburu Machua v Director of Public Prosecutions & 3 others* [2018] eKLR where it was held that:

“As rightly pointed out in the DPP’s submissions, an advocate does not enjoy a higher standard of rights and fundamental freedoms than other ordinary persons. As stated in *Anarita Karimi Njeru V A G* (supra) and many other decisions after that, a person who approaches the court seeking redress on the basis of a violation of a right must demonstrate the right infringed and the manner of the alleged infringement in relation to him.”

39. On the third issue, Counsel submitted that while Section 134 (1) of the *Evidence Act*, provides for Advocate-Client privilege, the said privilege does not apply under Section 134( 1) ( a) & (b) of the *Evidence Act* where such communication was made in furtherance of an illegal purpose and/or the where the advocates discover in the course of his employment facts that show a crime or fraud has been committed irrespective of whether the attention of such advocate was or was not directed to the fact by or on behalf of his client.

40. On this premise, Counsel argued that the advocate-client privilege is not an absolute right where investigations reveal that indeed there exists some criminal activity done by the client and/or by the advocate during the cause of the employment of an advocate by his client.

41. In addition, Counsel submitted that Sections 80 and 61 of the *Advocates Act*, were meant to cushion the client against unprofessional conduct of breach of trust and on the other hand to cushion the advocate from embarrassment that would arise from legal redress that the client would seek.

42. Consequently, it was contended that this Section does not cover the advocate’s criminal conduct in furthering a client’s illegal purpose or fraud during the employment of an advocate by his client. Counsel noted that this is aspect is further even appreciated by the Petitioner in its Regulations, the Law Society of Kenya Anti-Money Laundering Guidance for Legal Practitioners, 2020.

43. Considering this, Counsel stressed that just like other people, advocates are human beings who are vulnerable and may also falter. Reliance was placed in *Phimomena Mbete Mwilu* (supra) where it was held that:

“Like other human beings, judges are afflicted with frailties, vulnerabilities and temptations that may from time to time cause them to falter and fall afoul of the law. These afflictions may also lead to conduct that falls short of the ethical and professional standards their oath of



office requires. Such behaviour may sometimes amount to criminal conduct. At other times, it may be misconduct that is in breach of ethical and professional standards. On occasion, that behaviour may well fall into both categories. Sometimes, however, the line between criminal and ethical misconduct may be blurred. The question may then arise as to which process is appropriate to address the conduct of the judge or judicial officer-whether it is the criminal justice process of the state or the disciplinary process within the judiciary. We seem to find ourselves in this position with regard to this petition.”

44. Consequently, Counsel maintained that the advocate-client relationship is not absolute. Reliance was placed in *Mohammed Salim Batala & Anor vs Tor Allan Safaris Ltd (2015)eKLR* where it was held that:

“The Court of Appeal held that advocate-client privilege can only be breached where the communication between an advocate and the client furthers an illegal purpose or where the advocate observes that the client used the privilege to commit a crime.”

45. Additional dependence was placed in *Tom Ojienda t/a Tom Ojienda & Associates Advocates v Ethics and Anti-Corruption Commission & 5 others [2016]eKLR* and *Francis Mburu Machua v Director of Public Prosecutions & 3 others [2018] eKLR*.

46. Counsel also submitted that the 1<sup>st</sup> Respondent under Article 157 of *the Constitution* is granted the power to initiate and conduct prosecutions without interference as long as complies with Article 157(11). Additionally, Counsel submitted that it would be unlawful and unconstitutional to subject the powers of the 1<sup>st</sup> Respondent under Article 157 of *the Constitution* under the statutory provisions of Section 61 and 80 of the *Advocates Act*, especially in pure criminal or fraudulent cases that occur during an advocate's employment but do not relate to breach of trust between the advocate and his client.

47. Dependence was placed in *Thomas Nyakambi Maosa v Kibera Chief Magistrate & 3 others [2015] eKLR* where it was held that:

“It is therefore clear that the conduct complained of may well constitute an offence even under the *Advocates Act* and I do not agree with the Applicant that the mere fact that the said conduct may be subject of disciplinary proceedings precludes the 2<sup>nd</sup> to 4<sup>th</sup> Respondents from proceeding in the manner they did. In the premises I find no merit in this application. As was held in *Kuria & 3 Others vs. Attorney General*, (supra): "In the circumstances of this case it would be in the interest of the applicants, the respondents, the complainants, the litigants and the public at large that the criminal prosecution be heard and determined quickly in order to know where the truth lies and set the issues to rest, giving the applicants the chance to clear their names."

48. Additional dependence was placed in *Philomena Mbete Mwilu (supra)* and *William S. K. ruto & Another vs Attorney General [2010]eKLR*. To this end, Counsel submitted that the Petition lacks merit as the same is not supported by any factual basis.

### **Analysis and Determination**

49. In my humble view, the key issues that arise for determination in this matter are as follows:

- i. Whether the Petitioner has locus standi to file this suit.
- ii. Whether the Petition satisfies the threshold of a Constitutional Petition.



- iii. Whether the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' violated the Petitioner's rights under Articles 10, 22, 23, 35, 47, 48, 49, 50, 156, 165, 232 and 258 of the Constitution.
- iv. Whether the Petitioner is entitled to the relief sought.

### **Whether the Petitioner has locus standi to file this suit**

50. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents contended that the Petitioner had neither exhibited minutes or resolution that authorized it to institute this Petition on behalf of its members nor was there any demonstration that any of the advocates had raised any complaint with the Petitioner concerning violation of their rights hence it lacked the locus standi to institute this Petition.
51. In answering the Respondents on this submission, the Petitioner cited Article 22 of the Constitution and vehemently argued that LSK has the requisite standing to file this Petition on behalf of its members and that the Petition presents genuine grievances of violation since even apprehensions that are well founded can form the basis of a Petition and need not even require the actual violation to be proved by way of statements of the affected advocates.
52. The argument by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents cannot withstand both statutory and constitutional provisions on standing. To begin with Section 4 of the Law Society Act Cap 18 sets out the functions and objects of the Law Society which at Section 4 (h) provides as follows:

“represent, protect and assist members of the legal profession in Kenya in matters relating to conditions of practice and welfare”
53. Taking up cases to safeguard legal professionals from harassment in the course of carrying their professional duties as Advocates is one of LSK's core mandates hence it is preposterous to claim that LSK has no locus standi to bring a Petition that aims to guarantee its members the right to practice without being subjected to intimidation by authorities.
54. Besides, even without Section 4 (h) of the Law Society of Kenya Act, Cap 18; Article 22 of the Constitution is wide enough to accommodate such a Petition on behalf of its members. In *Randu Nzai Ruwa & 2 others v Secretary, the Independent Electoral and Boundaries Commission, Independent Electoral and Boundaries Commission, Clerk to the National Assembly, Registrar of Societies, Commission on Revenue Allocation, Minister for Transport, Minister for Energy, Minister for Environment and Mineral Resources, Minister for Planning & Attorney General* [2016] KECA 371 (KLR); the Court commenting expanded nature of locus under the new constitutional dispensation stated:

“Articles 22, 258 and 260 of the Constitution are cited to make the point that historical common law restrictions on the standing have been overhauled by the Constitution of Kenya, 2010....

The three Articles give an enlarged view of locus standi to the effect that every “person” including persons acting in the public interest, can move a court of law contesting infringements of any provision in the Bill of Rights or the Constitution.”

Each of the first two Articles starts with the phrase “Every person has the right to institute court proceedings.” They also provide that that person may either bring the proceedings as an individual in his/her own interest. He/she can, in addition bring proceedings in many other capacities, on behalf of persons who cannot act in their own name, or as a member of or in the interest of a group or class of persons, or, like in the above cited Supreme Court



case of Mumo Matemo (*supra*), acting in the public interest or, finally an association acting in the interest of one or more of its members can also institute court proceedings for the enforcement of the Bill of Rights.”

55. Further, in *Consumers Federation of Kenya (COFEK) suing through its officials namely Stephen Mutoro, Ephraim Kanake and Henry Ochieng v National Social Security Fund Board of Trustees & another; Cabinet Secretary, Ministry of Labour and Social Protection (Interested Party)* [2022] KEELRC 248 (KLR) the Court held as follows:

“

“86. Article 258 of *the Constitution* of Kenya, 2010 provides that:

Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

a person acting on behalf of another person who cannot act in their own name;

a person acting as a member of, or in the interest of, a group or class of persons;

a person acting in the public interest; or

an association acting in the interest of one or more of its members.

Under clause (1) above every person has locus standi to file a claim on alleged or threatened contraventions of *the Constitution*. Relatedly, Article 260 of *the Constitution* states that “person” includes a company, association or other body of persons whether incorporated or unincorporated.

It is not in dispute that the Petitioner is a registered society and is thus a person within the meaning of Article 260 of *the Constitution* of Kenya, 2010.....

The petitioner states that it is a duly registered society and a consumer rights lobby group in Kenya and operates as a non-political, non-profit and nondenominational and urges the Court to consider the sensitivities, consumers and public interest raised by the Petitioner. For the above reasons, it is the finding of the Court that the Petitioner has standing to file and prosecute the petition.”

56. Consequently, the position that the Petitioner lacks locus standi because there are no minutes that were exhibited to show it was authorized to bring the Petition on behalf of its members has no basis, the Petitioner has both the Constitutional and statutory mandate to take up that role should it consider that the rights of its members are at risk.

#### **Whether the Petition satisfies the threshold of a Constitutional Petition.**

57. A constitutional petition must meet the threshold of specificity and precision in the manner the Petition is pleaded. It should identify the provisions of *the Constitution* that were violated and the manner the violation alleged violation was occasioned.
58. In the instant Petition, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents argue that the instant Petition is blend of generic allegations as it does disclose the names of the advocates/members whose rights were violated thereby failing the specificity test or the manner in which the specific members’ constitutional rights were violated.



59. Precision in pleading Constitutional Petitions has been emphasized in numerous in judicial decision authorities since the locus classicus case of Anarita Karimi Njeru v Republic (1979) eKLR. In Japheth Ododa Origa v Vice Chancellor University of Nairobi, Academic Registrar, University of Nairobi & B.M Waweru [2018] KEHC 4861 (KLR) the Court explained the importance of specificity as follows:

“ 15. Precision in pleading is vital in Constitutional petitions because it enables the opposite party to fully understand the case they face and be in a position to adequately respond to it. It also enables the Court to decipher the issues brought before it for adjudication. It helps in avoiding surprises and ambiguities in the litigation but more importantly it shows the link between the aggrieved party, the constitutional provisions at play and the possible infringement. This was well stated by the Supreme Court in the case of Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR thus:-

“[349] 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 Annarita 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...”

60. Further emphasis was laid by the Court of Appeal in Mumo Matemu v Trusted Society of Human Rights Alliance, Attorney General, Minister of Justice & Constitutional Affairs, Director of Public Prosecutions, Kenyan Section of the International Commission of Jurists & Kenya Human Rights Commission [2013] KECA 445 (KLR) where the Court stated thus:

“...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.”

61. I have carefully scrutinized the Petition. Firstly, while the Petition generally complains of a number violations done against its members who are advocates, it omits to disclose who the members whose



rights have been violated or threatened in the manner alleged exactly were and when in particular. For instance, Section D of the Petition makes a collective claim at paragraph 1, where the Petition states:

“...The 1<sup>st</sup> Respondent in collusion with the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents has made a habit of holding arrested advocates beyond 24-hour constitutionally permitted period by shrewdly and maliciously carrying out arrests on Friday afternoons and periods that fall outside court hours operation.” Here no specific incidents are cited or the names of specific members of the Petitioner subjected to these arrests and held beyond the 24 hour period are provided.

62. The second illustration of this universal nature of pleading is contained in another statement in the same Petition which states:

‘The Respondents have been applying for, and being granted orders to detain citizens to permit conclusion of investigations, without corresponding rights of advocates and of privacy to parameters in Article 24 and confidentiality of their clients’.

63. The Petition continues:

‘In some cases, the Respondents are applying for, and indeed are granted search warrants of homes and offices, before even they made aware of charges they are facing nor recorded statement, and yet there would be less restrictive methods of getting information, to wit, advocates’ statements.’

64. In paragraph 2 of Section D where the Petition is alleging the violation on the right of security of the person, the facts are again pleaded in general without giving any specific incidents or naming the advocates whose rights were violated in the manner alleged; It states:

‘Arresting and depriving advocates their liberty arbitrarily, without basis for the arrest especially in alleged non-cognizable offences in line with their duty as officers of court, and the Respondents charge or otherwise, but just detain. Arrests following non-cognizable offences must be done with warrants of arrest.’

65. Same case applies to paragraph 4 where the Petition states:

“the respondents refusing to expeditiously grant bail to arrested advocates where there is no justification’ the arrested advocates are not given reasons for their arrest, thus trampling their right to information, as well as is enshrined in Article 35 of *the Constitution* of Kenya. In many instances, the arrested advocates are not informed or given opportunity to talk to their attorneys’

66. This style of pleading characterizes the entire Petition; no specific instances cited or advocates who have been subjected the said treatment named. It does not mention any actual incidents or give details of the members whose rights have violated in the manner alleged in the Petition. The Petition thus is not pleaded with reasonable precision; it is embarrassing and does not therefore meet the threshold required of a Constitution Petition.

67. Even the main prayers sought in the Petition are not spared this perturbing trend. They are infinite, vague and comprised of universal statements that are impractical to implement. These four main prayers are:

- i. A declaratory order that inhibition of Advocates right to represent their clients within the ambit of *Advocates Act* and *Evidence Act* by the Respondents contravene the provisions of *the*



Constitution under Articles 10, 22, 23, 33, 35, 47, 48, 49, 50, 156, 165, 232, and 258 and thus contravened the rights and Freedoms of the Petitioner and members of the public.

- ii. A Prohibitory injunction proscribing the Respondents from harassing or arresting Advocates of the High Court insofar as it relates to their practice of law.
- iii. A prohibitory injunction proscribing the Respondents from proffering or entertaining any charge against Advocates before exhaustion of the mechanisms set out in the Advocates Act.
- iv. A Mandatory Injunction compelling Respondents to always release Advocates of the High Court on Free Bond on the basis of personal cognizance whenever they are arrested in relation to their practice.

**Whether the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' violated the Petitioner's rights under Articles 10, 22, 23, 35, 47, 48, 49, 50, 156, 165, 232 and 258 of the Constitution.**

68. Notwithstanding the flaws identified in the drafting of the Petition, the Court understood this Petition to be about the protection afforded to an Advocate in the course of discharging their professional duties as advocates and the protection that the law accords them which in my view should not be difficult to reiterate.

69. The Advocates Act and the Law Society of Kenya Act are the main statutory instruments that regulate the practice of law in this country. Advocates are subject to strict standards of professional responsibility to the Court, their client, opposing Counsel and to the public at large. The standards are set out in the Law Society's Code of Conduct. The law and Code stipulates the privileges, ethics and rules of professional conduct that the advocates are bound to.

70. Due to the inherent risk that characterizes the work of an advocate, the law has prescribed ways to ensure they are protected. That is the rationale behind the enactment of the 'Basic Principles on the role of lawyers' (As adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990).

71. These principles in my view form part of the Kenya law by dint of Article 2(5) and (6) of the Constitution.

72. Principle 16 of the Basic Principles on the role of lawyers provides as follows:

'Governments shall ensure that lawyers

- (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference;
- (b) are able to travel and to consult with their clients freely both within their own country and abroad; and
- (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.'

73. Further, Principle 18 provides as follows:

'Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions'.



74. It must however be appreciated that an advocate’s professional privilege is not absolute. In connection with the professional employment of an advocate, the law provides:

Section 80 of the *Advocates Act* - Betrayal of trust

Any person who, being an advocate, is entrusted in his professional capacity with any money, valuable security or other property to retain it in safe custody with instructions to pay or apply it for any purpose in connection with his duty as an advocate fails to pay, apply or account for the same after due completion of the purpose for which it was given, shall be guilty of an offence:

Provided that no prosecution for an offence under this section shall be instituted unless a report has been made to the Attorney-General by the Tribunal under subsection (3) of Section 61.

Section 134 of the *Evidence Act* - Privilege of advocates

- (1) No advocate shall at any time be permitted unless with his client’s express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure—

- a. any communication made in furtherance of any illegal purpose;
  - b. any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client.
2. The protection given by subsection (1) of this section shall continue after the employment of the advocate has ceased.

75. Where there is no legal justification for charging of an Advocate, the Court must intervene and stop the unjustified persecution of the Advocate for doing his professional duties as was held in *Richard Malebe v Director of Public Prosecutions & 2 others* [2020] KEHC 5413 (KLR) where the DPP was stopped from prosecuting an Advocate who had merely been retained to register a Company that was later investigated for commission of an offence. The Court explained:

“ 169. I agree with the DPP that Advocates, like all other professionals, do not have a special immunity if they commit, in the course of their professional duties, acts which are criminal in nature. There is a danger, however, that in circumstances such as are before me, a zealous prosecutor may cast his net too wide and catch even those, like the petitioner, who only performed the basic professional function of facilitating the local registration of one of the companies that allegedly was involved in the dams scandal. Had the petitioner indeed been disclosed in the statutory forms as a director and local representative of the said company, or had there been other evidence such as account opening forms which demonstrated that he was indeed a director or local representative of the companies involved, this court would have had no hesitation in saying that the



DPP has a factual foundation, has a prima facie case, that should be left to the trial court.

170. However, in the circumstances of this case, and bearing in mind the Basic Principles on the Role of Lawyers relied on by the petitioner, I take the view that the DPP, in seeking to prosecute the petitioner, is identifying the petitioner with the acts allegedly committed by the company that he had, several years prior to the perpetration of the alleged offences, participated in the local registration of, and was indicated as the ‘authorised person’ for purposes of service of process...”

76. To determine whether or not privilege applies, the Court must be apprised of facts of the particular case, hence it is not possible to make a universal declaration as urged by the Petitioner. This is what emerges from the reading of the case of Tom Odhiambo Ojienda SC v Director of Public Prosecutions & 3 others [2020] KEHC 2686 (KLR) where the in Court discussing an advocates criminal culpability explained thus:

“42. However, it is important to clarify at the outset that where there exists a complaint, which raises criminal culpability, against an advocate arising from the relationship between the advocate and the client, the client is free to seek criminal redress and is not bound by the procedure in the *Advocates Act*. It is also possible that in the course of transactions between an advocate and a client, crimes may be committed. In such circumstances the procedure for dealing with criminal offences can be engaged by the 1st and 2nd respondents. In that regard I agree with the holding of Lenaola, J (as he then was) in Tom Ojienda t/a Tom Ojienda & Associates Advocates v Ethics and Anti-Corruption Commission & 5 others [2016] eKLR that:

“132. The question that now arises is whether the issues in contest before me should first have been placed before the Advocates Complaint Commission and/or the Advocates Disciplinary Tribunal. To my mind the answer is simple; criminal offences including questions of corruption committed by advocates are not any different from those committed by laymen in law. The regime of the Commission and Tribunal aforesaid is limited to professional misconduct and not criminal conduct. To say otherwise would give advocates a special place in the criminal justice system and however attractive such a proposition may be to advocates, it is fallacious and against the public interest and the need to apprehend criminals, whatever their profession. In any event, an advocate may suffer both a professional sanction as can be seen above and simultaneously suffer a criminal sanction and in the circumstances, I see no value in the Petitioner’s arguments on that point. That is all there is to say on that matter.”

43. It is therefore my view that the 2nd Respondent can investigate and the 1st Respondent can prosecute criminal matters raised in relation to the actions of an advocate in the advocate’s professional capacity.”



77. On circumstances under which the Advocate-client privilege can be pierced in Tom Ojienda t/a Tom Ojienda & Associates Advocates v Ethics and Anti-Corruption Commission & 5 others [2016] KEHC 7343 (KLR) the Court stated:

“It is the Petitioner’s contention that the 1st to 5th Respondents violated the advocate-client privilege as set out under Section 134(1) of the Evidence Act.

Section 134(1) of the Evidence Act provides that;

“(1) No advocate shall at any time be permitted, unless with his client’s express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure—  
any communication made in furtherance of any illegal purpose;

(b) any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client....

... Applying the above principle to the present Petition, therefore, Prof. Ojienda strenuously argued that payment of legal fees was covered by the advocate-client privilege and the Respondents were not entitled to seek a warrant to investigate his advocate-client bank account held at Standard Chartered Bank. In response, the Respondents claimed that the purpose of the warrants to investigate was the gathering of information relating to the alleged commission of corruption-related offences by the Petitioner and they were therefore necessary. With the totality of facts and evidence before me, can the principle be properly applied in this case?

It is uncontested that the information that was sought by the 1st Respondent related to payments from Mumias Sugar Co. Ltd as legal fees to the Petitioner. That information was then related to the investigation whether the legal fees were properly earned or not. Who was the client? Mumias Sugar Co. Ltd was the client and from the paragraph 5 of the Affidavit of Mr. Kasilon, Mumias Sugar Co. Ltd, upon being requested to avail its set of documents relating to the legal fees, co-operated and “was not coerced to avail the documents requested.”

In the nature of things therefore, the investigation had to follow a paper trail starting from the client who voluntarily availed its documents to the investigators and necessarily the next point of call was the Petitioner’s bank account. If the client then voluntarily waives any privilege of communication, how can the advocate benefit from that privilege? Under Section 134(1) of the Evidence Act, the privilege flows from the express consent of the client and not the advocate.



In addition to the above, the proviso to Section 134(1) is such that privilege in every circumstance cannot protect either a client or an advocate from “any communication made in furtherance of any illegal purpose”. If therefore it was alleged corruption that was the subject of the investigation, where is privilege in such a situation?”

78. In my view, the privilege accorded to the Advocates is subject to the law and *the Constitution*. It is not meant to protect them from accountability and would thus not be cited to curtail the powers of the 1<sup>st</sup> Respondent under Article 157(4), (6), (10) and (11) of *the Constitution* unless where it can be demonstrated that the same are being abused.

79. The same applies to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent which have investigatory powers under Section 24(e) of the *National Police Service Act*, 2011. In *Daniel Ogwoka Manduku vs Director of Public Prosecutions & 2 others* [2019] KEHC 12121 (KLR) citing with approval *Isaac Tumunu Njunge v Director of Public Prosecutions & 2 others* [2016] eKLR, stated thus in regard to the power of the police to investigate:

“42. It is however my view that the police are clearly mandated to investigate the commission of criminal offences and in so doing they have powers inter alia to take statements and conduct forensic investigations. In order for the applicant to succeed he must show that not only are the investigations which were being done by the police are being carried out with ulterior motives but that the predominant purpose of conducting the investigations is to achieve some collateral result not connected with the vindication of an alleged commission of a criminal offence. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the predominant purpose is to further some other ulterior purpose and as long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.”

80. With reference to the 1<sup>st</sup> Respondent’s mandate the Court in *Justus Mwenda Kathenge v Director Of Public Prosecutions, Attorney General & Chief Magistrate's Court, Nairobi* [2014] KEHC 7714 (KLR) held as follows:

“It is now trite that Courts cannot interfere with the exercise of the above mandate unless it can be shown that under Article 157(11):

- (i) he has acted without due regard to public interest,
- (ii) he has acted against the interests of the administration of justice,
- (iii) he has not taken account of the need to prevent and avoid abuse of Court process.

These considerations are not new and have over time been taken as the only bar to the exercise of discretion on the part of the 1<sup>st</sup> respondent.

81. Given the generalization that characterizes this Petition, which is wanting in facts regarding specific instances, the Court cannot objectively assess and determine if indeed the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents unlawfully exercised their authority as in interfering with the privilege accorded to the Advocates by



dint of Section 134 of the *Evidence Act*. Such a determination can only be arrived at upon evaluation of specific facts and on a case-by-case basis, not the general averments as contained in the Petition.

82. In the circumstances, and for the reasons aforesaid, I find no merit in the instant Petition which I hereby dismiss with no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13<sup>TH</sup> DAY OF AUGUST, 2025.**

.....

**L N MUGAMBI**

**JUDGE**

