



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO.585 OF 2014**

**BETWEEN**

**ISAAC ALUOCH POLO ALUOCHIER.....PETITIONER**

**AND**

**KENYA NATIONAL COMMISSION ON**

**HUMAN RIGHTS AND 2 OTHERS.....1<sup>ST</sup> RESPONDENT**

**GILBI CONSTRUCTION COMPANY LIMITED.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY-GENERAL.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. This is a Petition filed in this Court on 28<sup>th</sup> November, 2014 by the Petitioner seeking a host of remedies in the form of declaratory orders and payment of monies due to him as a result of an alleged breach of contract. For avoidance of doubt, the reliefs sought have been reproduced in verbatim below:

***“(1) The court declares that the failure by a contractual party to pay contractually overdue money to a contractual counterparty on the performance of a contract is a contravention of the counterparty’s right to property pursuant to Article 40 of the Constitution.***

***(2) The Court finds that the 1<sup>st</sup> Respondent contravened Article 47(1) of the Constitution, in that its administrative action was not expeditious, not efficient, not lawful, not reasonable and not procedurally fair.***

***(3) The Court finds that the 1<sup>st</sup> Respondent contravened Article 48 of the Constitution, in that it failed to ensure access to justice for the Petitioner.***

***(4) The Court finds that the 1<sup>st</sup> Respondent contravened Article 59(2)(c) and (e) of the Constitution, by having failed to promote the protection and observance of human rights in a***

*private institution, being the 2<sup>nd</sup> Respondent, and by having refused to investigate the Petitioner's complaint about alleged abuse of his human rights, and by not having taken steps to secure appropriate redress where the Petitioner's human rights had been violated.*

*(5) The Court finds that the 1<sup>st</sup> Respondent contravened Article 27(4) of the Constitution, in that it discriminated directly against the Petitioner on an arbitrary ground, by having refused to admit his complaint based on a private contract pursuant to violation of the Petitioner's property right under Article 40 of the Constitution, yet has been admitting complaints based on private contracts pursuant to violation of the complainants' labour rights under Article 41 of the Constitution.*

*(6) The Court finds that the 1<sup>st</sup> Respondent contravened Article 21(1) of the Constitution by failing in its fundamental duty to observe, respect, protect promote and fulfill the rights and freedoms in the Bill of Rights, on account of its contravention of Articles 27(4), 47(1), 48 and 59(2)(e) of the Constitution.*

*(7) The Court declares Section 30(f) of the Kenya National Commission on Human Rights Act, 2011, invalid to the extent that it purports to limit the access to justice right in Article 48 of the Constitution, without having been compliant with Article 24(2) of the Constitution.*

*(8) The Court declares Sections 34(a) of the Kenya National Commission on Human Rights Act, 2011, invalid, to the extent that it purports to limit the access to justice right in Article 48 of the Constitution for the persons mentioned in Article 22(b), (c) and (d) of the Constitution.*

*(9) The Court declares Section 32 of the Kenya National Commission on Human Rights Act, 2011, invalid, to the extent that it purports to limit or exclude the access to justice right in Article 48 of the Constitution for the persons mentioned in Article 22 (b), (c), and (d) of the Constitution, without having been compliant with Article 24(2) of the Constitution.*

*(10) The Court finds that the 2<sup>nd</sup> Respondent contravened Article 40(1) and (2) of the Constitution by refusing to pay the petitioner outstanding money arising from a contract for professional services entered into between them, yet performance of the contract had been completed.*

*(11) The Court orders the 1<sup>st</sup> Respondent to pay exemplary damages to the Petitioner, pursuant to the Court's powers under Articles 23(3) and 259(4), on account of the 1<sup>st</sup> Respondent's breaches of constitutional and statutory duties towards the petitioner, of an amount the Court deems to be just in the circumstances, and suggests to be about KShs 1 million.*

*(12) The Court orders the 2<sup>nd</sup> Respondent to pay compensation to the Petitioner, pursuant to the Court's powers under Article 23(3), being outstanding amounts due on their contract for professional services based on either of the two valuation methods presented, together with interest on the same at interest rates specified in section 94 of the Income Tax Act, i.e., 2% monthly from the time the outstanding payments became due, together with the late tax penalty at the rate specified in section 72D of the Income Tax Act, i.e., 20% of the overdue amount.*

*(13) The Court orders the 2<sup>nd</sup> Respondent to pay the Petitioner, onward transmission to the Kenya Revenue Authority (KRA), the amount of tax the Petitioner assigned to the KRA, together with additional late tax payment penalty as specified in section 72D of the Income Tax Act and late payment interest at the interest rate specified in section 94 of the Income Tax Act.*

*(14) The Court orders the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, as apportioned by the Court as between them, to pay the Petitioner's costs, according to Schedule 6 of the Advocates (Remuneration) (Amendment) Order, 2014, pursuant to the Advocates Act, 2006, assessed on a Party and Party basis."*

2. Instead of grounding his claim in contract law, the Petitioner has elected to pin his Petition on constitutional law – alleging that the breach of contract has violated several of his human rights and freedoms entrenched in the **Constitution** such as, for example, his right to property under **Article 40** of the **Constitution**. But before I delve into the merits, a brief discussion of the factual background is necessary to provide context.

### **The Parties**

3. The Petitioner, Isaac Aluoch Polo Aluochier, who has described himself as a quantity surveyor and construction projects manager, was contracted by the 2<sup>nd</sup> Respondent, Gilbi Construction Company Limited, to provide certain quantity surveying services. The 2<sup>nd</sup> Respondent was the main contractor over a construction project in Chania Gardens Housing Estate, Kiboko, Thika.

4. The 1<sup>st</sup> Respondent is the Kenya National Commission on Human Rights (the KNCHR), an independent commission established in terms of **Article 59(1)** of the **Constitution** as well as **Section 3** of the **Kenya National Commission on Human Rights Act No 11 of 2011 (the KNCHR Act)**. Its functions are set out in **Article 59(2)** of the **Constitution** – one of which is to receive and investigate complaints about alleged abuses of human rights and take steps to secure appropriate redress where human rights have been violated.

5. The 3<sup>rd</sup> Respondent is the Attorney-General whose office is established in terms of **Article 156(1)** of the **Constitution** and it is the principal legal adviser to Government and his functions include *inter alia*, representing the national government in court or in any other legal proceedings to which the national government is a party and also to promote, and protect and uphold the rule of law and defend public interest.

### **Background facts**

6. On 6<sup>th</sup> February 2012, the Petitioner and the 2<sup>nd</sup> Respondent concluded an agreement via email in terms of which the Petitioner would render certain quantity surveying services to the 2<sup>nd</sup> Respondent in respect of a construction project in Chania Gardens, Thika.

7. It appears that there was some performance of the contract by the Petitioner as the 2<sup>nd</sup> Respondent paid him Kshs 250,000.00 for some services rendered. However, it seems that a dispute arose as to the extent of the 2<sup>nd</sup> Respondent's liability to the Petitioner. The 2<sup>nd</sup> Respondent viewed the Kshs 250,000.00 paid to the Petitioner to be in full and final settlement of all his claims against it. According to the Petitioner however, there were still certain outstanding amounts due to him by the 2<sup>nd</sup> Respondent and as such, he proceeded to demand these amounts from the 2<sup>nd</sup> Respondent from January 2013 to about August 2013.

8. When his efforts seemed to yield no results, he lodged a complaint with the KNCHR on 12<sup>th</sup> September 2013. The basis of his complaint was that the 2<sup>nd</sup> Respondent had violated his rights to property under **Article 40** of the **Constitution** by not paying him as per their agreement.

9. The Petitioner then, on 30<sup>th</sup> October 2013, approached the **Commission on Administrative Justice** when the KNCHR failed to respond within the statutory prescribed time frame of 21 days, alleging that the Commission had not dealt with his complaint as required by the law. This time frame is found in **Regulation 17** of the **Kenya National Commission on Human Rights (Complaints Procedures) Regulations 2005**.

10. It seems that upon being prodded by the **Commission on Administrative Justice** through a letter dated 31<sup>st</sup> January 2014, the KNCHR eventually responded to his complaint in a letter dated 16<sup>th</sup> April 2014. It dismissed his complaint on the basis that—

***“the core of the complaint is a private contractual matter between Alouchier [the Petitioner] and***

*the Contractual Company [the 2<sup>nd</sup> Respondent]”. As such, the complaint lies outside the KNCHR’s statutory mandate as outlined in section 8 of the KNCHR Act as read with our Admissibility Criteria.”*

In finding that the Petitioner’s complaint fell outside the scope of its statutory mandate, the KNCHR advised the Petitioner that **“this matter would be better pursued as a civil claim before a court of law”**.

11. The **Commission on Administrative Justice** also rejected the Petitioner’s complaint against the KNCHR. In its letter to the Petitioner dated 18<sup>th</sup> June 2014, the said Commission cited the following reason for dismissing the said complaint:

*“We have carefully reviewed this matter and noted that when you lodged a complaint with the KNCHR on 12<sup>th</sup> September 2013, your complaint was based on breach of a contractual obligation between yourself and Gilbi Construction Company Ltd. ...*

*Having set out the above, we do not find fault in KNCHR’s decision not to admit your complaint for want of jurisdiction. Section 8 of the KNCHR Act that you have cited gives it jurisdiction to address human rights issues in both public and private institutions. Your complaint regarded alleged breach of contract and not of violation of Article 40 of the Constitution on the right to property.*

*While we agree with the position taken by KNCHR on your complaint, we also wish to bring to your attention that KNCHR is a constitutional commission and pursuant to Article 249(2) of the Constitution, it is independent and not subject to direction or control by any person or authority in the proper exercise of its functions and subject only to the Constitution and the law. Its decisions are however subject to judicial review. Thus, in the absence of claims of bias, complete inaction, administrative injustice or other malfeasance, we cannot intervene where the Commission has properly exercised its consideration on admissibility and come to a specific conclusion.”*

12. It also considered the explanation proffered by KNCHR regarding its delayed response to the Petitioner’s complaint to be reasonable and pardonable.

13. Disgruntled with the approach taken by both these Commissions, the Petitioner filed the present petition in this Court.

#### **Petitioner’s case**

14. The crux of the Petitioner’s case is that: the 2<sup>nd</sup> Respondent breached its contractual obligations by failing to pay him outstanding fees for services rendered as per their contract. That as a result of this breach, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents infringed upon a number of his constitutional rights and freedoms, including in **Articles 40** and **47** thereof. His case does not end there. He also seeks for a declaration of constitutional invalidity of **Sections 30(f), 32** and **34(a)** of the **Kenya National Commission on Human Rights Act**.

#### **Alleged breach of Article 40**

15. The Petitioner argues that a breach of contract and a violation of **Article 40** of the **Constitution** on the right to property are not mutually exclusive as the reasoning of the **Commission on Administrative Justice** and the KNCHR’s reasoning in dismissing his complaint would suggest.

16. He argues that in terms of **Articles 227(1)** and **260** of the **Constitution**, read in *tandem*, contracts for goods are contracts for property because the **Constitution** defines “property” to include goods and any vested or contingent right to, or interest in or arising from goods.

17. Although he accepts that a contract/agreement does not constitute property he argues that it can be elevated to “contracts for property” by virtue of the definition of “property” in the **Constitution**, in two instances:

(a) Where a contract’s subject matter concerns goods or property, conferring on either party any vested or contingent right to the goods, or an interest in or arising from goods.

(b) Where the subject matter of the contract is money – conferring on either parties any vested or contingent right or interest in or arising from money.

This is because, so the argument goes, the constitutional definition of property includes “goods” or “money”.

18. Further, because the contract between him and the 2<sup>nd</sup> Respondent concerned the provision of professional services in exchange for money, he, as the provider of the said professional services, acquired a vested right to the money due, upon performance of the professional services as per the contract. Due to the fact that money falls within the constitutional definition of “property”, he acquired a vested right to the money or property held by the 2<sup>nd</sup> Respondent by virtue of the professional services he rendered as per their contract.

19. Further, he argues that **Article 40(1)** of the **Constitution** guarantees every person the right to acquire and own property of any description and by providing professional services to the 2<sup>nd</sup> Respondent, he exercised his right to acquire property, in the form of money by rendering the said professional services.

20. He also argues that as per **Article 40(2)(a)** of the **Constitution**, the 2<sup>nd</sup> Respondent is prohibited from arbitrarily depriving him of money that he has a vested ownership right in, arising from the professional services he rendered.

21. It is his case therefore that both the **Commission on Administrative Justice** and the KNCHR erred in viewing a breach of contract and the right to property as mutually exclusive. In light of the aforementioned constitutional provisions, so the argument goes, it is clear that a contract can confer property rights, and once those property rights exist, their violation would be a contravention of **Article 40** of the **Constitution** – and the complaint would fall within the jurisdiction of the KNCHR. This would be by virtue of **Article 59(2)** of the **Constitution** and **Section 8(d)** of the **Kenya National Commission on Human Rights Act, 2011**. To bolster this line of argument, he cites the case of *Jasbir Sing Rai and 3 Others v Tarlochan Sing Rai Estate and 4 Others [2013] eKLR*.

22. He further posits that there are crystallized property rights that arose out of the performance of the contract and constituted of money, vesting on him. Further, that just because the contract between him and the 2<sup>nd</sup> Respondent was between private individuals does not make this matter any less deserving of constitutional protection because rights apply vertically and horizontally.

### **Alleged violation of Article 47**

23. The Petitioner also argues that his rights under **Article 47(1)** of the **Constitution** were contravened by the 1<sup>st</sup> Respondent on several grounds. The first is that it failed to respond to its complaint within 21 days as per **Regulation 17** of the **Kenya National Commission on Human Rights (Complaints Procedures) Regulations, 2005** which it summarily dismissed on the ground of lack of jurisdiction. That by failing to timeously respond to his complaint in accordance with **Regulation 17**, it contravened the injunction under **Article 47(1)** of expeditious administrative action.

24. Secondly, that it lost jurisdiction to determine the complaint when it failed to dismiss it within the requisite 21 days and any attempt to determine the matter outside of that time frame is null and void.

25. Further, that the KNCHR’s mode of dispensing administrative action was not efficient and thus

contrary to **Article 47(1)**. That this can be gleaned from the delay in responding to the complaint. Additionally, that its failure to comply with **Regulation 17** is evidence that its administrative action with respect to his complaint was not procedurally fair as required by **Article 47(1)**.

26. Furthermore, that the 1<sup>st</sup> Respondent also violated **Article 59(2)(e)** of the **Constitution** as well as section **8(d)** of the **KNCHR Act** in that it failed to investigate the complaint and to take steps to secure appropriate redress on the Petitioner's behalf.

### **Alleged violation and constitutional invalidity of Articles 30(f), 32 and 34 of the KNCHR Act**

27. It is the Petitioner's argument in this regard that by limiting the KNCHR not to investigate any matter that has a right of appeal or other legal remedy, **Section 30(f)** of the **KNCHR Act** is effectively inconsistent with the Constitution. This is because, a person alleging that his/her human right has been denied, violated or threatened can have recourse in terms of **Article 22(1)** of the **Constitution** and thus the KNCHR is **"prohibited from entertaining any complaint pursuant to a human rights violation within the Bill of Rights."**

28. Further, that **Section 34** of the **KNCHR Act** gives the KNCHR discretionary powers to decline to investigate a complaint in certain circumstances delineated under that section – one of which is the existence of adequate remedies under any written law or contract. If this section authorizes the KNCHR to decline to investigate complaints of human rights violations then it is unclear, the Petitioner argues, what the KNCHR's **"purpose of existence with respect to the provision of redress to human rights violations"** is.

29. He also posits that when a complainant lodges his complaint with the KNCHR, he has a "legitimate expectation" that the KNCHR will carry out its functions in accordance with **Article 59(2)(e)** of the **Constitution** read together with **Section 8(d)** of the **KNCHR Act** and **"not to be chased away ... pursuant to Section 30(f) and 34(a) of the KNCHR Act."**

30. In addition, he contends that **Article 59(2)(d)** requires the KNCHR to monitor, investigate and report on the observance of human rights in all spheres of life in this country and cannot rely on **Sections 30(f)** and **34(a)** of the **KNCHR Act** to decline the investigation of a human rights violation on the ground that the courts have jurisdiction to provide redress. He argues in that regard that the provisions of **Article 59** of the **Constitution** trump **Sections 30(f)** and **34(a)** to the extent that they are inconsistent with the **Constitution**.

31. He also argues that **Article 48** of the **Constitution** obliges the KNCHR, being an organ of state, to ensure access to justice to all persons including complainants who have lodged complaints with it. That the KNCHR cannot deny access by complainants who lodge human rights complaints with it by referring them to another **"house of justice ... when it is itself a house of justice, and must, as required by Article 48, ensure that such complainant access justice"**. If it does reject a complaint, then in compliance with its obligations under **Article 48** it must ensure that that complaint is lodged in another forum. It is insufficient for the KNCHR to merely refer the complaint to another forum without following up on the complaint at that referred forum until justice has been accessed.

32. He argues therefore that the appropriate remedy in this case would be "exemplary damages" against the KNCHR amounting to Kshs 1 million for contravening **Articles 21(1), 27(4), 47(1), 48** and **59(2)(e)** of the **Constitution**.

### **1<sup>st</sup> Respondent's case**

33. The 1<sup>st</sup> Respondent argues that the reason for the delay in responding to the Petitioner's complaint was due to **"human resource – related challenges"**. That the number of complaints it receives exceeds its staff compliment and it is actively trying to find solutions to this problem – one of which is a complaints-handling referral committee that assist it to refer complaints outside its mandate to the appropriate public and private complaints handling mechanisms.

34. It maintains that the Petitioner's complaint falls outside its mandate as it is a commercial dispute which should be dealt with as a civil claim in accordance with the principles of the law of contract. Moreover, it does not have the power to compel the 2<sup>nd</sup> Respondent to pay the Petitioner any money it may owe him in terms of their contract and therefore it is an inappropriate forum to enforce contractual claims.

35. In response to the alleged impugned provisions that the Petitioner seeks to have declared unconstitutional; the 1<sup>st</sup> Respondent argues that by acknowledging that certain sections of the **KNCHR Act** limit it from handling his complaint, the Petitioner thereby tacitly admits that it lacks the jurisdiction to determine his complaint.

36. Further, that the 1<sup>st</sup> Respondent, like every governmental or private institution has a limited mandate to avoid unproductive duplication of work and that is the purpose of these sections that limit the 1<sup>st</sup> Respondent's mandate. It continues to compare these mandate restricting sections in the **KNCHR Act** to other similar provisions found in legislation governing similar sister commissions. These include for example, **Section 30** of the **Commission Administrative Justice Act**, and **Section 30** of the **National Gender & Equality Commission Act** and each of these commissions, like the KNCHR, has a separate and specific function and if these provisions were to be invalidated – on account of limiting what these commissions can investigate, such an action would be destructive and chaotic.

### 2<sup>nd</sup> Respondent's case

37. The 2<sup>nd</sup> Respondent argues that the nature of this Petition is one of employment falling within the jurisdiction of the **Labour and Employment Relations Court** and not this Court.

38. Further, this petition is an abuse of court process because not only does this Court lack jurisdiction to determine it, but also because the Petitioner has skipped arbitration as per **clause A.6** of the **4<sup>th</sup> Schedule** to the **Architect and Quantity Surveyors Act**.

39. In addition, that this Court should follow the well-established principle that where there is a clear procedure for the redress of any particular grievance prescribed by the **Constitution** or an **Act of Parliament**, that procedure should be strictly followed.

40. The 3<sup>rd</sup> Respondent also refutes the claim that the Petitioner was ever in its employ as a quantity surveyor or consultant in any of its projects. Instead, it avers that the Petitioner was a **“temporary assistant for purposes of running general errands and proof reading, on behalf of the 2<sup>nd</sup> Respondent's Director, of documents prepared by the latter or the Project Consultants on the Chania Gardens project”**. Consequently, he was not entitled to any percentage fees or commission and all that he was entitled to receive was Kshs 3,000.00 for every day for meetings on the project site as well as an agreed total remuneration of Kshs 250,000.00. Further, that his engagement with it ended due to a deterioration in working relations between him and its lead project consultants.

41. Moreover, it is the 2<sup>nd</sup> Respondent's case that the Chania Gardens Project is in dispute and has been subjected to arbitration proceedings the outcome of which is still pending and it is still to receive payment of substantial amounts of money to the tune of Kshs 225, 446,048.70 plus interest and costs. That therefore, the Petitioner cannot claim the percentage he is allegedly entitled to before a determination has been made in the arbitration proceedings.

42. Further, there is no agreement evidencing that the Petitioner is indeed entitled to the fees claimed and that the Petitioner is in any event not registered and licensed as a quantity surveyor to entitle him to fees as such.

43. Lastly, it is the 2<sup>nd</sup> Petitioner's case that not only are the sums he claims not in accordance with the scales provided for in the **Quantity Surveyors Act Cap 525** and by-laws thereunder and thus

unenforceable; but the fact that he is not a registered and licensed quantity surveyor also precludes him from claiming sums in accordance with the scales in the aforementioned Act. That therefore the Petitioner comes to this Court with unclean hands and this Court cannot assist him in his illegalities.

### **3<sup>rd</sup> Respondent's case**

44. In essence the 3<sup>rd</sup> Respondent argues that this matter does not fall within the jurisdiction of this Court as defined in **Article 165** of the **Constitution** and further argues that this matter is one involving a breach of contract entered into between an employer and employee (at the time). As such it falls within the jurisdiction of the **Employment and Labour Relations Court** as a labour matter. Alternatively, that it should be pursued through the normal civil procedures for breach of contract.

45. Further, that the Petitioner has failed to set out precisely which of his rights and freedoms have been violated and how. That this Petition is bad in law and it falls to be dismissed.

46. Moreover, it argues that the Petitioner has not prayed for a remedy in respect of the alleged infringement of his fundamental rights and freedoms.

47. The 3<sup>rd</sup> Respondent further posits that not only is the Petition bad in law but it is also an abuse of court process. That the issue arising from it is a commercial one based on a private contract void of public interest issues and as such there is no cause of action against it for this Court to determine. That he has also sought no prayer against the state as would be expected in public law matters.

48. It is also its case that he who alleges constitutional invalidity must prove the same and that the Petitioner has failed to prove that the alleged impugned provisions of the **KNCHR Act** are unconstitutional.

49. Consequently, and for the above reasons, the Attorney General argues that the Petition falls to be dismissed.

### **Determination**

50. The Petitioner has raised a host of issues relating to the alleged infringement of his rights as well as the constitutionality of certain sections in the **KNCHR Act**. I have in that regard read the Petition, carefully considered both written and oral submissions of all parties and in my view these are the issues that lie at the heart of this Petition:

- a) Whether the issues raised are constitutional and which should detain this Court? And if the answer is yes, then I will move to the next question.
- b) Whether the Petitioner's right to property under **Article 40** of the **Constitution** was infringed?
- c) Whether the Petitioner's right under **Article 47** was infringed by the delay of the KNCHR responding to his complaint.
- d) The constitutionality of **Sections 30(f), 32 and 34** of the **KNCHR Act**.
- e) Remedies.

All other questions will effectively be determined while addressing the above questions.

51. I now turn to deal with each of them.

### **Analysis**



52. From reading the submissions of the parties there seem to be some confusion relating to the nature of the jurisdiction of this Court so perhaps it may be appropriate to briefly deal with that issue before I turn to the merits of the Petition. A clarification of this issue will also be important in understanding the final findings I shall make in the judgment.

### **The nature of the Constitutional and Human Rights Division of the High Court**

53. The High Court is established by **Article 165(1)** of the **Constitution** which provides:

***“(1) There is established the High Court, which***

***(a) shall consist of a number of judges prescribed by an Act of Parliament; and***

***(b) shall be organized and administered in the manner prescribed by an Act of Parliament.”***

The **High Court (Organisation and Administration) Act No 27 of 2015** is the legislation that is referred to in **Article 165(1) (a)** and **(b)** of the **Constitution**. It was assented to on 15<sup>th</sup> December 2015 and commenced on 2<sup>nd</sup> January 2016. Its preamble provides that it is:

***“AN ACT of Parliament to give effect to Article 165(1) (a) and (b) of the Constitution; to provide for the organization and administration of the High Court of Kenya and for connected purposes.”*** (Emphasis added.)

Further, in **Section 11**, it makes provision for the establishment of different Divisions of the High Court – one of which is the Constitutional and Human Rights Division. The purpose of establishing these Divisions is set out in **Subsection (1)** and states:

***“(1) For purposes of promoting effectiveness and efficiency in the administration of justice and promoting judicial performance, the Chief Justice may, where the workload and the number of judges in a station permit, establish any of the following divisions—***

***(a) the Family and Children Division;***

***(b) the Commercial Division;***

***(c) the Admiralty Division;***

***(d) the Civil Division;***

***(e) the Criminal Division;***

***(f) the Constitutional and Human Rights Division;***

***(g) the Judicial Review Division; and***

***(h) any other division as the Chief Justice may, on the advice of the Principal Judge determine.”*** (Emphasis added.)

54. These Divisions of the High Court are equal in status and source their jurisdiction from **Article 165** of the **Constitution** which provides as follows:

***“(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;*

*(a) 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;*

*(b) 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;*

*(c) any other jurisdiction, original or appellate, conferred on it by legislation.”*

55. Further, **Article 23(1)** is also relevant in the High Court’s jurisdiction. It provides that—

*“The High Court has jurisdiction, in accordance with Article 165 to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.”*

56. From the above, not only does the High Court have unlimited jurisdiction in civil and criminal matters but it also has jurisdiction in constitutional matters set out under **Article 165(3)** aforesaid. This means that every Division of the High Court has the competence to deal with any matter involving and falling under any of the categories listed under **Article 165(3)** of the **Constitution**.

57. However, for the purpose of efficiency and effectiveness in the administration of justice, the Chief Justice has set up these Divisions to each focus on certain aspects of the High Court’s jurisdiction under **Article 165(3)** of the **Constitution**. This Division, as the Constitutional and Human Rights Division, was set up to focus on the High Court’s jurisdiction under **Article 165(3)(b)** and **(d)** of the **Constitution**.

58. In the words of the Honourable Chief Justice in his speech entitled “**Progress Report on the Transformation of the Judiciary the First Hundred and Twenty Days**” of 19<sup>th</sup> October, 2011:

*“The Constitution and Human Rights division will be the court of first instance in constitutional cases; and will play a leading role in addressing the many issues around the interpretation and enforcement of our expanded Bill of Rights.”*

It is therefore clear that any case that comes before this Division must be a constitutional matter in the sense that it must fall under **Article 165(3)(b)** or **(d)** and **Article 258** of the **Constitution** and would be addressed by principles applicable to constitutional interpretation generally. While this Division may however also address civil and criminal claims, it can only do so where parties so invoke these areas of law.

### **Constitutional issues**

59. I now turn to the question whether this matter is a constitutional matter. Prima facie there is no doubt that it does raise constitutional issues falling within **Article 165(3)(b)** and **(d)** of the **Constitution** but

whether or not those issues are meritorious is a separate issue, which I now turn to address immediately below.

60. In that regard, every issue in any matter can potentially be a constitutional issue – which would fall within the jurisdiction of this Court. However, this Court should not overlook the well-established principle of constitutional avoidance. The Supreme Court in *Communications Commission of Kenya & 5 Ors v Royal Media Services Ltd & 5 Ors. (2014) eKLR* expressed itself thus in regard to this principle:

*[256] The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:*

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

*[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.”*

61. Stripped to its basics, removing all the elaborate arguments about violations of constitutional rights and the constitutional invalidity of certain sections in the **KNCHR Act**, what this Petition boils down to is actually a simple breach of contract question and a purely commercial issue between two private parties that can and should be disposed of in terms of the laws of contract. This matter should therefore have initially been pursued through the ordinary civil process and I so find the basis for that finding is clear from my rendition of the Petitioner’s case and the specific prayers in the Petition.

62. However, even if I were to overlook this principle of constitutional avoidance, the constitutional issues raised by the Petitioner still have no merit. I say so for reasons to be seen shortly.

### **Has there been a violation of rights?**

#### **Article 40**

63. **Article 40** of the **Constitution** provides thus:

#### ***“Protection of right to property***

**(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—**

**(a) of any description; and**

**(b) in any part of Kenya.**

**(2) Parliament shall not enact a law that permits the State or any person—**

**(a) to arbitrarily deprive a person of property of any description or of any interest in, or**

*right over, any property of any description; or*

*(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).*

*(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—*

*(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or*

*(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—*

*(i) requires prompt payment in full, of just compensation to the person; and*

*(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.*

*(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.*

*(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.*

*(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”*

In order for a litigant to benefit from the protections of **Article 40**, he/she must satisfy this Court that the alleged property he is being deprived of is one that he has acquired or owns. The most fundamental flaw in the Petitioner’s argument in that context is that his property rights under **Article 40** of the **Constitution** have been infringed, is that he has not proved that he has acquired or owns the money allegedly due to him. He would be hard pressed to do so because that question is still in dispute between him and the 2<sup>nd</sup> Respondent. That question that would in any event be resolved best by the normal civil courts and throughout the hearing before me, the exact sum owed to the Petitioner was and remains heavily disputed. How then can a right be conferred based on such a disputed sum? All submissions as to the meaning of property under the Constitution have no meaning in such circumstances, however lofty they sounded.

64. It is in fact instructive that the Chania Gardens Project itself is undergoing arbitration proceedings to determine how much is owed to the 2<sup>nd</sup> Respondent and thence how much by way of commission *may* be owed to the Petitioner. It is obvious therefore that any right to property, whatever the property may be defined to be, has yet to crystallize in favour of the Petitioner and his claim in that regard must fail.

65. The fall of this **Article 40** argument has a domino effect on all his other alleged breaches related thereto as can be seen below.

#### **Articles 47 and 48**

66. **Article 47** of the **Constitution** provides:

*“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*

*(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”*

67. **Article 48** then provides:

***“The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”***

The KNCHR, when assessing complaints in terms of the relevant empowering provisions of the **KNCHR Act** is exercising administrative action which this Court can review under **Article 47(1)** of the **Constitution**. The Petitioner’s complaint in essence relates to the delay on the part of the KNCHR in not responding to his complaint within the statutory time period (21 days).

68. The failure to respond within the requisite 21 days to the Petitioner’s complaint by the KNCHR was attributed to the fact that KNCHR did not, at that time, have the staffing capacity to deal with the high volume of complaints it received. This was because it was undergoing **“Internal restructuring and leadership change in [its] Complaints and Investigations Department”** at that time. These circumstances were not the norm or recurring. This is the backdrop with which the delay must be assessed.

69. In this regard, noting the fact that the KNCHR ultimately assessed the Petitioner’s complaints which were further re-assessed by the **Commission on Administrative Justice**, it cannot be said that the KNCHR breached the provisions of **Article 47(1)** of the **Constitution**. Unfortunate as the delay was therefore, the explanation provided for it by the KNCHR is reasonable in the circumstances and I so find.

70. The above finding must also apply to any claim under **Article 48** of the **Constitution** because the fact that the Petitioner was heard both by KNCHR and the **Commission on Administrative Justice** is sufficient evidence that his claims were addressed properly and lawfully. That is all there is to say on that point.

#### **Constitutionality of Sections 30(f) and 34 of the KNCHR Act**

71. The Petitioner seeks declaratory orders relating to the constitutionality of **Sections 30(f), 32 and 34** of the **KNCHR Act** under prayers 7 to 9 of his Petition. A close examination of the Petitioner’s arguments in this regard would show that they are based on a misunderstanding/misinterpretation of the KNCHR’s constitutional and statutory mandate.

72. I say so because the KNCHR is established by **Article 59(1)** of the **Constitution** and its functions are listed under **Sub-Article (2)** which provides:

***“(2) The functions of the Commission are—***

***(a) to promote respect for human rights and develop a culture of human rights in the Republic;***

***(b) to promote gender equality and equity generally and to coordinate and facilitate gender mainstreaming in national development;***

***(c) to promote the protection, and observance of human rights in public and private institutions;***

***(d) to monitor, investigate and report on the observance of human rights in all spheres of life in the Republic, including observance by the national security organs;***

***(e) to receive and investigate complaints about alleged abuses of human rights and take steps to secure appropriate redress where human rights have been violated;***

***(f) on its own initiative or on the basis of complaints, to investigate or research a matter in respect of human rights, and make recommendations to improve the functioning of State organs;***

*(g) to act as the principal organ of the State in ensuring compliance with obligations under treaties and conventions relating to human rights;*

*(h) to investigate any conduct in state affairs, or any act or omission in public administration in any sphere of government, that is alleged or suspected to be prejudicial or improper or to result in any impropriety or prejudice;*

*(i) to investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct;*

*(j) to report on complaints investigated under paragraphs (h) and (i) and take remedial action; and*

*(k) to perform any other functions prescribed by legislation.”*

**Section 8** of the **KNCHR Act** reflects the above provision.

73. Although the KNCHR therefore has broad powers to investigate human rights violations, its mandate has been restricted by **Sections 30(f)** and **34** of the **KNCHR Act**. **Section 30(f)** provides that—

*“The Commission shall not investigate— anything in respect of which there is a right of appeal or other legal remedy unless, in the opinion of the Commission, it is not reasonable to expect that right of appeal or other legal remedy resorted to.”* (Emphasis added.)

74. **Section 34** of the **KNCHR Act** further gives the KNCHR a discretion not to investigate any specific complaint and provides thus:

*“The Commission may decline to investigate a complaint if the Commission considers that—*

*(a) there are in existence adequate remedies under any written law or administrative practice; or*

*(b) the complaint is trivial, frivolous, vexatious or is not made in good faith.”* (Emphasis added.)

75. These provisions read together allow the KNCHR to sift complaints that fall within its mandate from those that do not, and which can be better dealt with in other relevant forums or be disposed of by other appropriate and adequate remedies. This mechanism is of course necessary in ensuring the effectiveness and efficiency of the KNCHR. There is nothing unconstitutional about that mechanism.

76. After assessing the Petitioner’s complaint, the KNCHR found that it was a purely private contractual matter between him and the 2<sup>nd</sup> Respondent and thus fell outside its mandate and advised that he pursue it by normal civil processes. The **Commission on Administrative Justice** also joined the KNCHR in this chorus in dismissing his complaint.

77. My mind is clear that reading the substratum of the Petitioner’s case and all evidence before me, the KNCHR was within its rights to dismiss the Petitioner’s complaint for want of jurisdiction and which action cannot be faulted. His argument in this regard must also fail.

78. In stating so, I reiterate the fact that this matter does not raise a constitutional issue. However, because it was principally couched under constitutional law instead of the principles of contract law relating to breach of contract, his remedy lies in civil law and not a reference under the Constitution. That mandate is reposed in ordinary civil courts and not KNCHR.

79. In that context, this Court in ***Uhuru Muigai Kenyatta v Nairobi Star Publications Limited [2013] eKLR*** expressed a similar view where, in finding that the Petitioner’s remedy for his defamation claim lay in civil law and not constitutional law, reasoned that—

*“ . . . it is obvious that principally, the Petitioner's complaint is that he was defamed by the publication whose facts are summarized above. If so, then the remedy for his pain, if at all, lies in Civil Law and not a reference under the Constitution.*

**14. In NM & Others vs Smith and Others (Freedom of Expression Institute as Amicus Curiae) 2000 (5) S.A. 250 (CC) the Court stated thus:**

*“It is important to recognise that even if a case does raise a constitutional matter, the assessment of whether the case should be heard by this Court rests instead on the additional requirements that access to this court must be in the interests of justice and not every matter will raise a constitutional issue worthy of attention.”*

**15. Similarly in Minister of Home Affairs vs Bickle & Others (1985) L.R.C. Cost.755, Georges CJ held as follows:**

*“It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so (Wahid Munwar Khan vs. The State AIR (1956) Hyd.22).”*

This Court went on to add that—

*“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights.”*

**16. I need say no more. Where there is a remedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in Haco Industries (supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in AG vs S.K. Dutambala Cr. Appeal No.37 of 1991 (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions. The complaint in this case is not so serious as to attract Constitutional sanction.”** (Emphasis added.)

80. I reiterate the above findings as properly applicable to the present circumstances.

81. Lastly, on this issue, in declaring any statute or parts of it to be unconstitutional, this Court ought to be guided by the principles set out in the case of Charles Omanga & Another v Independent Electoral & Boundaries Commission & Another Petition No.2 of [2012] eKLR where this Court stated thus:

*“20. In answering that issue, I wholly agree with the decision of the Supreme Court of India in Hambardda Wakhana vs. Union of India Air [1960] AIR 554 where the learned Judges stated as follows:*

*“In examining the constitutionality of a statute it must be assumed the Legislature understands and appreciates the needs of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a Legislature enacts laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is therefore, in favour of the constitutionality of an enactment.””*

82. In this context, the impugned sections of the **KNCHR Act** were enacted by the Legislature for a purpose. That purpose has been explained elsewhere above and I have stated that the said purpose is reasonable and the presumption of constitutionality must be applied in favour of the KNCHR.

## **Disposition**

83. From my findings above, the Petition dated 28<sup>th</sup> November 2014 is lacking in merit and is hereby dismissed. I will however leave it to the Petitioner to pursue any civil law remedy available to him subject to limitation of time.

84. As the dispute between the Petitioner and the 2<sup>nd</sup> Respondent is not over, let each Party bear its own costs.

85. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF MAY, 2016**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Muriuki – Court clerk

Petitioner present

Miss Kabaya for 1<sup>st</sup> Respondent

Mr. Lubullelah for 2<sup>nd</sup> Respondent

**Order**

Judgment duly read.

**ISAAC LENAOLA**

**JUDGE**