



Okoiti v Njenga & 7 others (Sued as the registered trustees of the Agricultural Society of Kenya) & 19 others (Petition 33 of 2019) [2022] KEHC 74 (KLR) (26 January 2022) (Judgment)

Okiya Omtatah Okoiti v James R Njenga & 19 others [2022] eKLR

Neutral citation: [2022] KEHC 74 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS**

PETITION 33 OF 2019

GV ODUNGA, J

JANUARY 26, 2022

**IN THE MATTER OF:ARTICLES 3(1), 22, 23, 48, 50(1), 258
AND 259(1) OF THE CONSTITUTION OF KENYA, 2010.**

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION AND VIOLATION OF
ARTICLES 1(1), 2(1-4), 3(1), 4(2), 10(1) & (2), 19, 20, 24, 129, 131(2)(A), 153(4)(A), 201(A)
& (D), 232(1) (B), (D), (E) & (F), AND 259(1) OF THE CONSTITUTION OF KENYA, 2010.**

**IN THE MATTER OF:THE ALLEGED CONTRAVENTION AND VIOL
ATION OF THE RIGHTS AND FUNDAMENTAL FREEDOMS UNDER
ARTICLE 35(3), 40, AND 47 OF THECONSTITUTION OF KENYA, 2010.**

**IN THE MATTER OF:THE MISMANAGEMENT OF PUBLIC ASSETS
ENTRUSTED TO THE AGRICULTURAL SOCIETY OF KENYA.**

BETWEEN

OKIYA OMTATAH OKOITI PETITIONER

AND

**MR JAMES R NJENGA, HON SENATOR JUSTICE STEWARD MADZAYO,
MRS HELLEN KOMBO, MRS ALICE KALYA, MR BENSON KAARIA,
MR ACHIYA ECHAKARA, MRS RHODA AHONOBADHA AND GEN
JEREMIA KIANGA (RTD) (SUED AS THE REGISTERED TRUSTEES OF THE
AGRICULTURAL SOCIETY OF KENYA) 1ST RESPONDENT**

**THE COUNCIL OF AGRICULTURAL SOCIETY OF KENYA 2ND
RESPONDENT**

THE NATIONAL EXECUTIVE 3RD RESPONDENT

THE HON ATTORNEY GENERAL 4TH RESPONDENT



NAIROBI CITY COUNTY GOVERNMENT	5 TH RESPONDENT
MOMBASA COUNTY GOVERNMENT	6 TH RESPONDENT
NAKURU COUNTY GOVERNMENT	7 TH RESPONDENT
KISUMU COUNTY GOVERNMENT	8 TH RESPONDENT
ELDORET COUNTY GOVERNMENT	9 TH RESPONDENT
NYERI COUNTY GOVERNMENT	10 TH RESPONDENT
KITALE COUNTY GOVERNMENT	11 TH RESPONDENT
MERU COUNTY GOVERNMENT	12 TH RESPONDENT
NANYUKI COUNTY GOVERNMENT	13 TH RESPONDENT
EMBU COUNTY GOVERNMENT	14 TH RESPONDENT
MACHAKOS COUNTY GOVERNMENT	15 TH RESPONDENT
KISII COUNTY GOVERNMENT	16 TH RESPONDENT
KAKAMEGA COUNTY GOVERNMENT	17 TH RESPONDENT
KABARNET COUNTY GOVERNMENT	18 TH RESPONDENT
GARISSA COUNTY GOVERNMENT	19 TH RESPONDENT
MIGORI COUNTY GOVERNMENT	20 TH RESPONDENT

Eligibility of a private entity to receive public funds and other State resources in the performance of public functions.

The main issue was whether a private entity could lawfully receive and utilize public funds and other public resources. The High Court held that the Agricultural Society of Kenya, though a private entity, was in certain circumstances eligible to receive public funds and other State resources in the performance of public functions or duties of a public nature or purpose. A declaration was issued that any private entity that received public funds and other State resources was obliged to account for the utilization of the same to the public and the Auditor General was mandated to investigate the same and report to Parliament for appropriate action.

Reported by Ribia John

Constitutional Law – constitutional petitions – proceedings – whether an interested party in a constitutional petition could file a cross-petition – Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, rules 2 & 15(3).

Constitutional Law – public funds – use of public funds and resources for public purposes – whether a private entity could lawfully receive and utilize public funds and other resources – whether the Constitution contemplated situations where other entities could be funded from public funds – Constitution of Kenya, 2010, articles 229(5), (6) & (7).

Constitutional Law – public funds – provision for the Auditor General to audit and report on the accounts of any entity funded by public funds – whether Parliament had enacted regulations providing for the procedures under which a third party could be authorized to receive, control or pay public money as a grant – Constitutions of Kenya, 2010, articles 221, 223 & 229; Public Finance Management Act No. 18 of 2012, sections 47(1) and (5) & 48(1)(g).



Words and Phrases – *public purpose – definition of public purpose – synonymous with governmental purpose, it had for its objective the promotion of public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents – Black’s Law Dictionary, 9th Edition.*

Brief facts

The petition sought a declaration that the Agricultural Society of Kenya (ASK) was a private entity which was not eligible to receive public funds and other State resources, to host national events, and to host installations of the Kenya Defence Forces, the National Police Service, and the Kenya Prisons Service. The petitioner also asked the court to direct the 3rd to 20th respondents to recover all the public funds and resources the government had spent on the Agricultural Society of Kenya since the promulgation of the Constitution of Kenya, 2010 on August 28, 2010, among other reliefs sought.

The petitioner contended that it was fraudulent and against public interest for the ASK, a private entity totally outside the control of the State, to be fully dependent on State largesse, without being held accountable for the same. According to the petitioner, unless the society was made a public entity, there was no basis in law for the 3rd to 20th respondents to spend any more public funds and resources on the society. It was in the public interest to stop supporting the society and to recover all public funds and resources spent on it so far.

The cross-petitioner filed a cross-petition against the ASK and sought various reliefs including; a declaration that the ASK being a recipient of public funds was governed by article 227 of the Constitution; a declaration that the ASK breached the provisions of article 227 of the Constitution by failing to conduct a procurement process as required by the Constitution and the Public Procurement & Asset Disposal Act No. 33 of 2015; and, a declaration that in the management of public funds ASK violated the principles enshrined in article 10 of the Constitution. The cross-petitioner submitted that the ASK had become a criminal enterprise through which public funds had been appropriated.

Seeking a dismissal of both the petition and the cross-petition, the 2nd respondent stated that it was founded in December 1901 with voluntary membership with clear objectives and mandate. The ASK asserted that the roles and structures of the ASK organs were distinct and there was no conflict on the roles of the ASK Trustees and the Council. The ASK was a non –profit making organization whose nature of business was for the interest of and benefited the whole Kenyan society and humanity at large, duties normally reserved for the National and County Government.

Issues

- i. Whether an interested party in a constitutional petition could file a cross-petition.
- ii. Whether a private entity could lawfully receive and utilize public funds and other public resources.
- iii. What were the circumstances where a private entity could receive public funds?
- iv. What was the meaning of public purpose?
- v. Whether the Constitution contemplated situations where other entities could be funded from public funds.
- vi. Whether a private entity that received public funds could be subject to audit by the Office of the Auditor General as established and mandated under the Constitution of Kenya, 2010?
- vii. Whether Parliament had enacted regulations providing for the procedures under which a third party could be authorized to receive, control or pay public money as a grant.

Relevant provisions of the Law

The Constitution of Kenya, 2010

Article 229

(5) *The Auditor-General may audit and report on the accounts of any entity that is funded from public funds.*

(6) *An audit report shall confirm whether or not public money has been applied lawfully and in an effective way.*

(7) *Audit reports shall be submitted to Parliament or the relevant county*



assembly.

Public Finance Management Act No. 18 of 2012

Section 47

(1) Regulations approved by Parliament shall provide for the administration, control and management of grants, including—

- (a) procedures to ensure that grants are spent on the basis of the integrated national development plan;*
- (b) procedures for the allocation and disbursement of the grants;*
- (c) requiring that grants be used only to finance programmes within the integrated development plan;*
- (d) the publication of transparent criteria for the allocation of grants;*
- (e) requiring specific terms and conditions in agreements to which grant recipients are subjected;*
- (f) procedures for the budgeting, financial management, accounting and reporting of grants by grants recipients;*
- (g) procedures under which a third party may be authorised to receive, control or pay public money as a grant; and*
- (h) measures to ensure that a third party authorised to receive, control or pay public money as a grant, or responsible for any other aspect of administration of a grant, is subject to the same obligations as a public officer under this Act.*

Held

1. The cross-petitioner was enjoined as an interested party. Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (the Rules) defined the term interested party as a person or entity that had an identifiable stake or legal interest or duty in the proceedings before the court but was not a party to the proceedings or could not be directly involved in the litigation.
2. Rule 15(3) of the Rules entitled a respondent in a petition to file a cross-petition. A literal reading of that rule meant that only a respondent was permitted to file a cross-petition. There was no other provision under the Rules that permitted an interested party to file a cross-petition.
3. Jurisprudence emanating from the Supreme Court had established that an interested party had no *locus* to cross-petition under rule 15(3) of the Rules. An interested party could not urge new substantive issues which were not the subject of the existing petition.
4. In the instant cross-petition, one of the issues that was raised was the contractual relationship between the cross-petitioner and the ASK. That ground was substantive and could not be termed as a collateral ground to the other grounds. New substantive issues ought not to be introduced by an interested party in that capacity.
5. The principle established in Kenya's jurisprudence was that an interested party was a peripheral party in a suit and could not introduce new issues for determination by the court. An interested party's stake ought to be a stake in the action as commenced and not a stake that was introduced by itself.
6. In public interest litigation, courts had been reluctant to permit the proceedings to be conducted in the same manner as adversarial proceedings where the parties were free to determine the course their action took. In such cases, for example, where the parties were no longer keen to proceed with the action, courts readily permitted other parties interested in carrying on with the matter to do so in the interest of the public, so that an issue germane to the public was not lost merely because, for reasons other than



- the merits of the action, the petitioner was no longer keen on pursuing the matter. In such cases, the new party could well introduce a new issue by amending the petition. That was not the scenario in the instant matter.
7. Article 163 (7) of the Constitution provided that all courts, other than the Supreme Court, were bound by the decisions of the Supreme Court. That did not necessarily mean that the courts had to agree with the decision of the Supreme Court. What was required was that at the end of the day, the decision of the Supreme Court ought to be binding notwithstanding whatever reservations the other courts had regarding the decision.
 8. The issues, the subject of the cross-petition, were the subject matter of the arbitral proceedings and a case before the Environment and Land Court. No reason had been advanced why the issues could not be conclusively determined before the tribunal and particularly the Environment and Land Court which was constitutionally empowered to deal with constitutional matters regarding interests in land. Accordingly, the cross-petition was incompetent.
 9. A preliminary objection was only competent where its success would dispose of the whole suit. In the instant case, the success of the preliminary objection would only lead to the striking out of the 2nd respondent but would leave the petition largely intact. Accordingly, that ground was not properly taken as a preliminary objection.
 10. Articles 22 and 258 of the Constitution permitted the petitioner to institute court proceedings, claiming that the Constitution had been contravened, or was threatened with contravention. A petitioner could institute proceedings not only in their own interest, but in the public interest as well. Under article 3(1) of the Constitution, every person was obligated to respect, uphold and defend the Constitution. Accordingly, where a person was of the *bona fide* view that a provision of the Constitution had been violated or was threatened, the person was not only entitled to but was enjoined to bring an action to protect the Constitution. As such, the instant petitioner was well within his rights in bringing the instant petition to ventilate issues which in his view were geared towards upholding and defending the Constitution.
 11. A copy of the ASK's constitution revealed that it was registered under the Societies Act, Cap. 108, Laws of Kenya. Accordingly, it was a private society.
 12. The petitioner alleged that ASK had received funds from County Governments (the 5th to 20th respondents). However, the petitioner did not produce any evidence of funding of the Society by the County Governments. There was no basis, therefore, to find that the said County Governments were or had been funding ASK.
 13. Public purpose was synonymous with governmental purpose. It had for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents.
 14. From the record, the ASK mandate included promotion of excellence in agriculture, provision of forums for exchange of information and learning in agriculture and agribusiness and participation in developing agriculture and related policies. From the material placed before the court, the ASK offered services for the benefit of the general public.
 15. From the provisions of article 229(5), (6) and (7) of the Constitution, the Constitution contemplated situations where other entities could be funded from public funds.
 16. The petitioner maintained that section 47(1) of the Public Finance Management Act No. 18 of 2012 only dealt with conditions for receiving grants and donations by national government or its entities or third parties and did not deal with circumstances under which the grants or donations were being made by the national government. However, section 48(1)(g) of the Act provided that Parliament should approve the regulations providing for the procedures under which a third party could be authorized to receive, control or pay public money as a grant. Therefore, though not expressly provided for, it



- was contemplated that in certain circumstances, public funds could be remitted to private entities. However, there ought to have been a legislative framework to guide such donations and grants.
17. Section 47(5) of Public Finance Management Act No. 18 of 2012, provided that funds received in form of grants or donations ought to be spent only in accordance with articles 221 and 223 of the Constitution and the section.
 18. Some of the questions that the instant court was being called upon to determine necessitated an intense fact-finding investigation which was inappropriate to an affidavit-based inquiry. Based on the material placed before the court, it could not, for example, be determined which parcels of land had been allocated to the Society, the amount of money so allocated and the process under which they were allocated in light of the finding that in certain circumstances, the national government could give grants and donations to third parties.
 19. Not every grievance ought to be elevated to a constitutional issue simply because some point of a constitutional nature was involved even if it was not what was required to be determined by the court in order to arrive at a decision. It had to always be remembered that most legal principles were a derivative of some underlying constitutional principle yet not all legal principles amounted to constitutional principles. That was not to say that in a constitutional matter, issues of fraud ought not to be canvassed. Similarly, it did not necessarily mean that in matters where *viva voce* evidence was required, the matter could not be litigated as a constitutional matter. Nothing barred the court from taking oral evidence and arriving at a just determination. However, in cases where contested factual averments were raised, cold print affidavits were not the appropriate mode of dealing with the same.
 20. The foregoing findings underscored the need by any organ that received money from the National Government to account for the same and the Society was not an exception. The Auditor General was entitled to investigate the manner in which public funds and resources allocated to third parties had been utilized and to table its report before Parliament for deliberations.

Petition disallowed.

Orders

- i. *The Agricultural Society of Kenya, though a private entity, was in certain circumstances eligible to receive public funds and other State resources in the performance of public functions or duties of a public nature or purposes.*
- ii. *A declaration was issued that any private entity that received public funds and other State resources was obliged to account for the utilization of the same to the public and the Auditor General was mandated to investigate the same and report to Parliament for appropriate action.*
- iii. *Pursuant to sections 47 and 48 of the Public Finance Management Act No. 18 of 2012, Parliament was obligated to formulate a legislative framework to guide donations and grants by national government or its entities or third parties.*
- iv. *No order as to costs.*

Citations

Cases

1. Albert Ruturi, JK Wanywela & Kenya Bankers' Association vs. The Minister of Finance & Attorney General and Central Bank of Kenya — Explained
2. Association of Retirement Benefits Schemes v Attorney General & 3 others ([2017] eKLR) — Mentioned
3. Communications Commission of Kenya & 5 others vs. Royal Media Services Limited & 5 Others ([2014] eKLR) — Mentioned
4. Dry Associates Ltd v Capital Markets Authority and Another ([2012] eKLR) — Mentioned
5. Githunguri Dairy Farmers Co-operative Society vs. Attorney General & 2 others ([2016] eKLR) — Explained



6. Independent Electoral and Boundaries Commission & Others vs. The National Super Alliance & Others (Nairobi Civil Appeal No. 224 of 2017) — Mentioned
7. Jemimah Wambui Ikere v Standard Group Ltd and Another (Petition No. 466 of 2012) — Mentioned
8. John Harun Mwau and 3 Others vs. Attorney General and 2 Others ([2012] eKLR) — Mentioned
9. Judicial Service Commission v Mbalu Mutava & another ([2014]) — Mentioned
10. Judicial Service Commission vs. Mbalu Mutava & Another ([2015] eKLR) — Mentioned
11. Kamumu Contractors Limited vs. County Government of Machakos [2019] eKLR (Civil Appeal No. 76 of 2017) — Mentioned
12. Kenya Bus Service Limited & Another vs. Minister for Transport & 2 others ([2012] eKLR) — Mentioned
13. Kenya Bus Service Ltd & Another vs. Minister for Transport & 2 Others ((2012) eKLR) — Explained
14. Kenya Human Rights Commission vs. Attorney General & Another ([2018] eKLR) — Mentioned
15. Kimani Waweru & 4 others vs. Central Bank of Kenya & 7 Others ([2018] eKLR) — Explained
16. Matatu Welfare Association & Another vs. Invesco Assurance Co. Ltd & 3 Others ([2019] eKLR) — Mentioned
17. Mukisa Biscuits Manufacturing Ltd vs. West End Distributors Ltd ([1969] EA 697) — Mentioned
18. Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others (Civil Appeal No. 290 of 2012) — Mentioned
19. Peter Nganga Muiruri vs. Credit Bank Limited & Another (Civil Appeal No. 203 of 2006) — Mentioned
20. Rachael Muaka vs. Kahawa Sukari Ltd & Another ([2010] eKLR) — Mentioned
21. Republic vs. Council of the Agricultural Society of Kenya Ex-parte John B. Nthuku ([2016] eKLR, Miscellaneous Civil Application No. 41 of 2015) — Mentioned
22. Republic vs. The Attorney General & Another ex parte Hon. Francis Chachu Ganya (Nairobi High Court (Judicial Review Division) Miscellaneous Application No. 374 of 2012) — Mentioned
23. Robert N. Gakuru & Others vs. The Governor Kiambu County & 3 Others (Petition No. 532 of 2013) — Mentioned
24. Silas Make Otuke vs. Attorney General & 3 Others ([2014] eKLR) — Explained
25. Pharmaceutical Manufacturers Association of SA and another (2000 (2) SA 1 (CC)) — Mentioned
26. President of the Republic of South Africa and Others v South African Rugby Football Union and Others ((CCT16/98) 2000 (1) SA 1) — Mentioned
27. R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery ([1994] 1 All E.R. 651 (Q.B.)) — Mentioned

Statutes

1. Constitution of Kenya, 2010 — article 1(c), 3(1), 4(2), 6(2), 10(2), 19(c), 20(3)(4), 22(2), 23, 25, 35 (j), 40, 47, 48, 50(1), 129, 130(1)(a)(b), 156(4)(a), 156(6), 157(4)(6)(10), 159, 165, 176, 186, 201(a) (d), 221, 223, 227, 229(5)(6), 232, 258, 259, 260; Rule 5 — Interpreted
2. Exchequer And Audit Act (412) — section 2 — Interpreted
3. Government Proceedings Act (Cap. 40) — section 13A(1) — Interpreted
4. High Court (Organization and Administration) Act, 2015 — section 5 — Interpreted
5. Public Finance Management Act, 2012 (Act No 18 of 2012) — section 47(1), 48(1)(g) — Interpreted
6. Public Procurement and Asset Disposal Act, 2015 (Act No 33 of 2015) — section 2(f) — Interpreted
7. State Corporations Act (446) — section 2(c) — Interpreted

Texts

1. Green Book

Advocates

None mentioned



JUDGMENT

1. The petitioner filed this Petition seeking the following orders:-
 - (i) A declaration that the Agricultural Society of Kenya is a private entity which is not eligible to receive public funds and other State resources, to host national events, and to host installations of the Kenya Defence Forces, the National Police Service, and the Kenya Prisons Service.
 - (ii) A declaration that the 3rd to 20th respondents should recover all the public funds and resources the government has spent on the Agricultural Society of Kenya since the promulgation of the Constitution of Kenya, 2010 on August 28, 2010.
 - (iii) An order permanently prohibiting the President, the Deputy President, the Cabinet, County Governors, the Kenya Defence Forces, the National Police Service, the Kenya Prisons Service, the Kenya Wildlife Service, and the National Youth Service from presiding over shows and trade fairs hosted by the Agricultural Society of Kenya as though they are national events.
 - (iv) An order compelling the 3rd to 20th respondents to audit and recover all public land, unpaid land rates and any other fees, and any other public resources from the Agricultural Society of Kenya within a period of one year from the date of judgment.
 - (v) In the alternative, this honourable court declares that as conditions precedent to the Government's continued engagement with the Agricultural Society of Kenya:
 - i. The National government should seek parliamentary approval, through legislation, of how to align the current functions of the Agricultural Society of Kenya with the Constitution, especially as it also involves the counties and must, therefore, be approved by an Act of Parliament passed by both the National Assembly and the Senate;
 - ii. The management of the Agricultural Society of Kenya must strictly be in accordance with the *Constitution of Kenya, 2010* and national legislation; and
 - iii. The society's Chief Executive Officer and members of the Council should step aside for the Auditor General to conduct a forensic audit of the Agricultural Society of Kenya's finances from the date the new Constitution was promulgated to date of the court's decision and subsequently, subject to any legislation about the status of the organisation
 - (vi) An order compelling the respondents to bear the costs of this suit.
2. According to the petitioner, the Agricultural Society of Kenya (hereinafter referred to as "the ASK" or "the Society") is a private entity under the Society's Act founded in December 1901 under the name East African Agricultural and Horticultural Society whose central objective was to promote agricultural development based on European settlement. However, the ASK masquerades as a public entity entitled to receive public funds and other resources and the government treats ASK as a bonafide state corporation merely because under article 34 of the *ASK Constitution*, the President and other public officials are co-opted as ex-officio members of the society.
3. It was further contended that that though the ASK has trustees, none of whom is a government representative, the accounts of the ASK are not audited by the Auditor General despite it still fully



dependent on State largesse, without being held accountable for the mismanagement of the same. To the petitioner this amounts to fraud and is against the public interest.

4. The petitioner cited Kenya Year Book 2018 where under Agriculture Parastatals on the www.ask.co.ke website, the society is referred to as follows:

Agriculture Society of Kenya (ASK)

Its work is promotion of agricultural development. The Agricultural Society of Kenya's objective is to promote agriculture in Kenya. This objective is achieved through hosting of agricultural shows in 15 different ecological zones in Kenya. The shows provide a forum for the exchange of agricultural and agribusiness ideas as well as an opportunity to show case new farming technologies as they emerge.

5. According to the petitioner, in <http://kenyayearbook.co.ke/who-we-are/about-us/>, it is stated that:

“The Kenya Yearbook Editorial Board is a State Corporation under the Ministry of Information, Communications and Technology whose mandate is to enhance Government communications as well as produce publications that highlight developments in all sectors. KYEB's publications also promote awareness on the different initiatives by the country's stakeholders. Through a yearly publication called Kenya Yearbook, as well as other sector specific books, the Board aims to promote public awareness by ensuring that citizens and the international community understand and appreciate Government efforts in promoting development.”

6. It was disclosed by the petitioner that there are pending matters in court involving the ASK which he particularised as hereunder;-

- a. On April 25, 2013, the society signed a sixty year lease with Farmer's Trust Limited, the cross-petitioner, to invest some Kshs. 85 billion to improve 15 show grounds across the country. However, on October 27, 2016 the ASK terminated the said lease as a result of which the Farmers Trust commenced arbitral proceedings lodged a request for arbitration registered as Case No.23993/TO of 2018 at the International Chamber of Commerce International Court of Arbitration (ICC) in Paris, France, claiming USD 800 million and a filing fee of Kshs. 15 million. The same dispute, according to the Petitioner, is the subject matter of Environment and Land Court Case No. 250 of 2019, Farmers Trust Limited (Plaintiff) vs. the Registered Trustees of the Agricultural Society of Kenya (defendant).
- b. On August 28, 2018, the Kenya Revenue Authority communicated a tax assessment of Kshs.253, 824,047 for the tax period July 2013 to 2017, a matter that is pending determination before the Tax Appeals Tribunal.

7. To the petitioner, the confusing instances in the manner in which the ASK is being run are;-

- a. The inter-play between the Registered Trustees of the ASK & the Council of the ASK is not clear as the trustees of ASK are subject to the directions of the Council yet they are supposed to be the Apex. This contention, according to the petitioner, is based on article 35 (j) of the ASK's Constitution that provides that; “The Council shall have its exclusive power to initiate in the name of registered Trustees of the Society any legal proceedings on behalf of the Society or provide defence for any proceedings against the Society.”



- b. That contrary to the above, under article 19(c) of the *Constitution*, the Trustees deal with the property of the society, and have the power to sue and generally to represent and act for the society in all legal matters.
 - c. Rule 3(7)(b) in the Green Book (Rules of the Agricultural Society of Kenya), states expressly that “The society shall sue and be sued in the name of the Registered Trustees of the Agricultural Society of Kenya.”
 - d. It is not clear why there are eight trustees rather than twelve as per ASK constitution.
 - e. Based on the society’s constitution, there is absolutely no basis in law for expending public funds and resources on it since the society is a membership organisation, which raises funds from members’ subscriptions and from the shows and trade fairs it holds in which exhibitors pay hefty fees and charges to exhibit and/or to use its facilities.
 - f. The society’s properties are held in the name of the corporate entity known as the Registered Trustees of the Royal Agricultural Society of Kenya, the Agricultural Society of Kenya.
 - g. Currently, the society’s primary product is the series of annual State subsidised exhibitions and trade fairs held throughout the country, namely; Nairobi International Trade Fair, Mombasa International Show, Nakuru National Show, Eldoret National Show, Kisumu Regional Show, Nyeri National Show, Kitale National Show, Meru National Show, Nanyuki Branch Show, Embu Branch Show, Machakos Branch Show, Kisii Branch Show, Kakamega Branch Show, Kabarnet Branch Show, Garissa Branch Show and Migori Show
8. To the petitioner, there is no basis in law for the 3rd to 20th respondents to spend any more public funds and resources on the society, and it is in the public interest to stop supporting the society and to recover all public funds and resources spent on it so far. In his view, the use of public funds and other resources to sustain the ASK are both inconsistent with article 201(a) and (d) of the *Constitution of Kenya, 2010* and legislation and, therefore, invalid, null and void ab initio. He laments that despite receiving public funding and utilizing public resources:
- a. The society is not audited by the Auditor General.
 - b. The society it is run like the personal property of its CEO, who has been in office for an unbroken term of 15 years since he assumed office as Acting Chief Executive in November 2004 and was confirmed as the CEO in March 2005.
 - c. The CEO’s tenure is not fixed.
 - d. The society is not under the oversight of the Ministry of Agriculture which is the line ministry.
 - e. The Green Book (Rules of the Agricultural Society of Kenya), which governs elections of the society is revised regularly to ensure the appointment of subservient officials (for example, Mrs. Annabel Kariinya, the Society’s National Chairperson, is the Principal Tala Girls High School, who hardly has time for her duties because of her employment by the Teachers Service Commission). The *Green Book* was printed in 2009 and then revised in 2010, 2013, 2014, 2015, and 2017.
 - f. The society is not subject to *Public Finance Management Act*.

Cross -Petition



9. There was also a cross-petition filed on the November 19, 2019 by Farmers Trust Limited (the cross-petitioner) against the Agricultural Society of Kenya, the 2nd Respondent in this matter. In the cross-petition, the cross-petitioner seeks:
- (a) A declaration that the 2nd respondent as a recipient of public funds is falls within the ambit and is governed by express provisions of article 227 of the *Constitution of Kenya, 2010*.
 - (b) A declaration that the 2nd respondent as a recipient of public funds has in the utilisation of the said funds breached the provisions of article 227 of the *Constitution of Kenya, 2010* by failing to conduct an open, transparent, competitive and cost effective procurement process to which the public, stakeholders and interested parties could have participated in as mandated by the Constitution and by statute.
 - (c) A declaration that in the management of public funds the 2nd respondent has violated the principles enshrined in article 10 of the *Constitution*.
 - (d) A declaration that the cross-petitioner's concretised rights over the 2nd respondent's land necessarily means the Treasury as the custodian of all public investments is unable to secure the public funds illegally transferred to the 2nd Respondent by the government and further that public funds have, as a consequence, now been lost forever.
 - (e) A declaration that to utilise public funds to engage in works over the 2nd respondent's land infringes the rights of the cross-petitioner under article 40 of the *Constitution*.
 - (f) Costs.
 - (g) Any other or further relief that this honourable court may deem proper and just to grant.
10. According to the cross-petitioner, the 2nd respondent advertised for a competitive bidding process for the redevelopment of its 15 showground sites across the country to which they bid and won and they entered into a 60-year concession agreement after what he terms a thorough and independent process. The terms of the agreement were that the cross petitioner would be granted leases over the Show Grounds and that the services to be provided would include;
- a. Designing, constructing, financing and maintaining the new facilities at the Show Grounds;
 - b. Operating and maintaining hotels, convention centres, restaurants, museums, galleries and related activities;
 - c. Operating and maintaining Trade centres to be used as liaison offices for companies exhibiting goods, for trading and as a multi-media centre and an international financial centre;
 - d. Operating and maintaining warehouses where Exhibitors would store, receive orders, and offer for sale merchandise;
 - e. Operating and maintaining service apartments to provide accommodation for exhibitors and their staff, visiting traders, tourists and for recuperating patients and other persons;
 - f. Any and all other activities and investments which in the opinion of the plaintiff are viable and suitable for the individual Show Grounds; and
 - g. All matters ancillary to the running thereof but subject to and in accordance with the provisions contained in the Agreement, the Lease and the Agreement for Lease.



11. Further, it was pleaded, the 2nd respondent would not grant any encumbrance over, or create interests, rights, easements or reservation in or over or in respect of the Show Grounds without the prior written consent of the cross petitioner.
12. The cross-petitioner disclosed that he has initiated arbitral proceeding before the International Chamber of Commerce, International Court of Arbitration (ICC) which has registered the dispute as Case No. 23993/To and has also registered a caveat against the Nairobi Show Ground and filed a suit for interim measure of protection being Nairobi ELC No 250 of 2019 – *Farmers Trust Limited v The Registered Trustees of Agricultural Society of Kenya* which is pending before the said court.
13. According to the cross-petitioner, it was surprised to discover from the 2nd respondent’s replies to the Petition that the respondent has received public monies to undertake developments at the Nairobi Show Grounds and that the said funds have been surreptitiously siphoned away through opaque and non-transparent ventures calculated at deceiving the public and thereby committing serious fraud on the public good contrary to express provisions of the *Constitution of Kenya, 2010*. The Cross petitioner averred that by soliciting and receiving public funds, the 2nd respondent, has, perforce, become a public entity subject to public law with regard to the necessary safeguards of the said public funds. That the act of commissioning the construction of a facility at the Nairobi Show Grounds and using millions of the shillings sourced from public funds without compliance with the *Public Procurement & Asset Disposal Act, 2015* amounts to a clear breach of the *Anti-Corruption & Economic Crimes Act* and that the failure to comply with *Public Procurement & Asset Disposal Act, 2015* was deliberate.
14. The cross petitioner asserted that the acts of the 2nd Respondent amounts to a conspiracy to defraud the public of Kenya by siphoning off public funds to undertakings which have not been properly secured in accordance with the law leading to loss of public funds. Further, that the pretended works illegally financed by the said public funds amount to a clear interference with constitutionally-protected property rights of the cross-petitioner.
15. It was therefore the cross-petitioner’s case that the 2nd respondent has become a criminal enterprise through which public funds have been appropriated.
16. The cross-petition was supported by the petitioner.

1st Respondent’s Response

17. In response the Society filed a replying affidavit sworn by Batram Muthoka, its Chief Executive officer dated November 15, 2019 in which he sought for the dismissal of the petition. According to him the Society was founded in December 1901 with voluntary membership and he set out its objectives and mandate. He denied authoring or participating in the publications of the Kenya Year book and stated that the same was an appreciation of the ASKs efforts on agricultural and industrial development in this country.
18. He averred that the roles and structures of the ASK organs are distinct and there is no conflict on the roles of the ASK Trustees and the Council and that the petitioner’s allegations are his own figment of imagination, spite and calculated to invite annoyance. Since the petitioner is not a member of the ASK, it was his contention that the petitioner has no standing to question the internal governing instruments of the ASK.
19. According to the deponent, the ASK is a non –profit making organization whose nature of business is for the interest of and benefits the whole Kenyan society and humanity at large, duties normally reserved for the National and County Government. He disclosed that they developed a master plan with a view of modernizing showgrounds and in particular Jamhuri Park situate in Nairobi through



construction of a multipurpose hall; enhanced Livestock Pavilion; business incubation centres; and cold storage facility. This master plan, according to the deponent, would be done in phases, the first phase being the construction of the Expo hall that commenced in August 2010 at an estimated Kshs. 620,000,000. He stated that they sought a grant from the Government of Kenya which grant was approved by Parliament in 2017 for Parliamentary budget approvals for the financial year of 2017/2018 and in 2018 they received Kenya Shillings One Hundred and Seventy-five million (Kshs. 175,000,000) which was disclosed in their financial statements prepared by their auditors Messrs Ernest and Martin. According to him, the building is now 85% complete. He therefore denied all the allegations of misappropriation of funds and averred that they have other sources of income including annual show activities revenue, membership fees, publications and investments.

20. As regards exhibition fees, he submitted that during the annual shows, state agencies desirous of participating in the scheduled events apply for space in the premises stating the location and size preferred which they would pay for which payment would include trade rent rates. According to him, the fee was low, very fair and reasonable and since the Petitioner has never been an exhibitor, the allegation that the charges are hefty is without any scientific or factual foundation. He was however, unaware of any subsidies by the state as the ASK exhibitions are conducted by the ASK.
21. Based on sections 33 and 34 of the ASK constitution, he stated that the Council of the ASK is the supreme organ and that the government is well represented in the management organ through co-opting of the Principal Secretary, Ministry of Agriculture, Director of Veterinary Services and Tourism and therefore they have a good working relationship with the Government which has no exhibition grounds, facilities or expertise as possessed by ASK.
22. The deponent averred that the ASK patron was the Queen of England who relinquished her position to President Jomo Kenyatta, then President Daniel Arap Moi from 1978 to 2002, then President Mwai Kibaki from 2002 to 2013 and that its current patron is President Uhuru Muigai Kenyatta who has been the patron since 2013 as per article 16(a)(1) the ASK constitution. This, according to him, is also in line with Commonwealth traditions that they borrowed. In addition, the Deputy Patrons, Vice Patrons and County Patrons are designated state officers as provided under Article 16,17 and 18 of the ASK constitution.
23. In response to the ownership of land, he deposed that just like any other person, they are entitled to own land which they do having been lawfully acquired. The ASK however has special user licenses for areas that have been reserved for forests from the Kenya Forest Service. Further, land rates are not charged on ASK since 7th December 1987 when a directive was issued by the Government of Kenya through the Ministry of Local Government but they will continue engaging various county governments on the issue of land rates. With reference to land rate demand from Mombasa and Nakuru County, he stated that land rates are levied under a statutory regime which is self-exhausting even on matters recovery.
24. According to the 1st 2nd respondent, the National Police Service, Kenya Prisons Services and Kenya Defence forces normally showcase their talent, discipline and professionalism for entertainment and enlightenment purposes as well as awards amongst themselves. In addition, it was his view that since the President is the Commander in Chief, he has to inspect a guard of honour wherever the Kenya Defence forces has pitched camp and that when the President graces the official opening of the ASK shows, he does so as a Chief Guest, Patron and the President of the Republic of Kenya. He disclosed that the KDF is a tenant of ASK and has been issued with licenses hence the presence of military installations at the ASK showgrounds. It was averred that the ASK has its own cleaning and maintenance staff and does not use prisoners for such purpose and relied on the annexed contracts with external service providers.



25. According to the deponent, there was no risk of the ASK properties being lost to 3rd parties. He lamented the personal attack by the Petitioner on his person as being unfair as the claims were unsubstantiated. The deponent deposed that the ASK is oversighted by regulatory authorities within the Ministry of Agriculture. As regards the amendments, he stated that the same were regular and geared towards ensuring appointment of subservient officials. In his view, since they are not the only body that receives grants from the government and belong a non-profit organization, they are justified in receiving support from the government.
26. In answer to the cross-petition, the 2nd respondent averred that since the cross petitioner was admitted as an interested party, its involvement is limited to the proceedings and that they are not allowed to institute an independent cause of action.
27. According to the 2nd respondent, the cross petition is seeking reliefs on same or similar matters pending before other legal forums and had breached the doctrine against multiplicity of causes of action, vexatious proceedings and sub judice. It was its case that the cross-petition has been filed to taint the image of the 2nd respondent and that the false allegations in the cross petition have not been backed by any evidence.
28. It was averred that the construction of the multi-purpose hall began in 2007 and was not conditioned on the availability of the grants from the Government of Kenya and the receipt thereof does not convert ASK to a public body and that there has been no loss of funds on its part. That the cross petitioner has no right over the ASK's property and cannot demolish the works undertaken by it. It was further stated that the cross petitioner unlawfully and irregularly presented itself as a bidder and upon breach of the terms of the concession agreement, the contract was terminated and remains unenforceable to date. The 2nd respondent asserted that the cross petitioner has never developed any of the ASK's show grounds and no lease is registered in its favour.
29. The 2nd respondent filed notice of preliminary objection on November 18, 2019 stating that;
- a. The 2nd respondent is not a legal person capable of suing and/or being sued before a court of law.
 - b. The prayers sought are a procedural and substantive legal nullity, fatally and irredeemably incompetent, an abuse of the court process, an afterthought, in vain, vexatious and a proper candidate for dismissal and/or striking out with costs.
30. The 4th respondent filed grounds of opposition dated November 12, 2019 in opposition to the petition on the grounds that;
- a. By virtue of the provisions of section 47(1) of the [*Public Finance Management Act, 2012*](#), the National Government may expend funds in the form of grants and donations to third parties or entities for purposes intended to facilitate the development of projects and/or delivery of services so as to achieve goals that are consistent with the policy objectives of the national government.
 - b. The books of accounts of third parties funded under section 47 of the [*Public Finance Management Act, 2012*](#) may under article 229 (5) of the [*Constitution*](#) be audited and reported by the Auditor General on the accounts funded from public funds to ascertain that public money has been applied lawfully and in an effective way.



- c. The application seeks to curtail the performance of functions and duties bestowed upon the Executive arm of government by the Constitution which functions and duties are well within the law.
 - d. The petitioner has not demonstrated a case to warrant the grant of orders sought in both the application and the petition.
 - e. Both the application and petition are misinformed, misconceived and unmerited and ought to be dismissed forthwith.
31. The 6th respondent, Mombasa County Government, filed a replying affidavit by Jimmy Waliula on 19th of February 2021 in which he deposed that it is established by article 176 of the Constitution and mandated by article 186 as set out in the Fourth Schedule part 2. In addition, under the Public Finance Management Act, 2012, grants and donations may be given by governments in a bid to facilitate delivery of services and development of projects that benefit the general public consistent with its mandate. That in case of misappropriation, an audit is done by the auditor general and not the petitioner. He terms the petition as malicious and an abuse of the court process and asked that it be dismissed.
 32. The 10th respondent, Nyeri County Government, in a replying affidavit sworn by its Attorney, Kimani Rucuiya, supported the 1st and 17th respondents replying affidavits and took the view that the petition does not disclose any cause of action, is merely academic and intended to achieve a collateral objective and should be struck out/dismissed. Further, that the ASK is not a public body within the meaning of section 2 of the Audit and Exchequer Act, Cap 412 and it is a competent organization for the education of farmers, organization of trade fairs and exhibitions, innovation and excellence in agriculture, forum for exchange of agricultural and agribusiness information, recognition and reward of excellence of local farmers within counties and that the co-operation with counties offers good value proposition for the funds they expend as it is beneficial to the greater public.
 33. The 12th respondent, Meru County Government, vide a replying affidavit sworn by its legal officer, Irah Nkuubi, on February 17, 2021 asked the court to dismiss the petition on the grounds that they do not fund the ASK and it is in fact ASK that pays them to host Agricultural shows in the county and for advertisements which he says helps the members of the public be informed about agricultural developments. He cited article 6 that requires interdependence between the national and county government and that any misappropriation of funds is cured by article 229(5) and (6) of the Constitution.
 34. The 14th respondent, Embu County Government, responded to the petition by way of grounds of opposition filed on 23rd of January 2021 and a replying affidavit sworn on 12th of April 2021 by Johnson Nyaga in which he deposed that they do not fund the 2nd respondent and termed the allegations against it baseless. According to the deponent, the only evidence attached was from the national government and not the county government and thus the orders sought against them is untenable. He therefore asked the court to dismiss the petition.
 35. James Kathili, the Chief Legal Officer of the 15th respondent, Machakos County Government, swore a replying affidavit dated February 5, 2020 in which he deposed that the petitioner has failed to comply with the Government Proceedings Act in instituting the suit by failing to serve the Attorney General with a notice of institution and the pleadings in this matter thus it is void *ab initio*. He deposed that in line with article 6 (2) of the Constitution of Kenya, 2010, the National and County Governments are inter dependent. Further, that the 1st respondent's objective of promotion of agriculture is achieved through hosting of agricultural shows in 15 different ecological zones and in line with schedule 4 of the



- [Constitution of Kenya, 2010](#) the agricultural show provides a forum for the exchange of agricultural and agribusiness ideas as well as an opportunity to showcase new emerging farming technologies. He asserted that there was no violation nor infringement of rights under the [Constitution of Kenya, 2010](#)
36. In his further affidavit sworn on May 28, 2020, the petitioner deposed that the replying affidavits by the respondents were meritless. In particular, he responded to the 1st respondent's replying affidavit and averred that the that the ASK would not be having tax issues with KRA if it was a non-profit organisation as it is subject to investment tax. Further, he deposed that ASK is treated as if it is a government institution because the Head of State is its Permanent Patron, it does not pay rates, a guard of honor is held at their functions and that is why it was recognised as such in the Kenya Year Book to which the 2nd respondent has never raised an objection.
37. The petitioner further stated that he did not require to be a member of the ASK before he could raise concerns on a private institution that is irregularly underwritten by public funds and other resources. He averred that the 2nd respondent should subject itself to the controller of budget, the auditor general and Parliament for purposes of the public fund which it utilizes and that the tenure of the CEO ought to be subject to government policy.
38. He pointed out that private companies do not receive public funding and have other public resources, including the security forces, at their disposal and any entity that so benefits must be open to public scrutiny.

Petitioner's Submissions

39. In his submissions, the petitioner asserted that he had filed this Petition on his own behalf and on behalf of the public at large pursuant to article 22(2) of the [Constitution](#) as read with articles 3(1), 22, 48 and 258 thereof. He also relied on the cases of *Albert Ruturi, JK Wanywela & Kenya Bankers' Association v The Minister of Finance & Attorney General and Central Bank of Kenya, John Harun Mwau and 3 others v Attorney General and 2 others* [2012] eKLR and *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal No. 290 of 2012.
40. As regards whether the High Court has jurisdiction to hear and determine this Petition, the Petitioner submitted that, the jurisdiction of this court is granted by the Constitution of Kenya 2010 under articles 1(c), 4(2), 10, 20(3) and (4), 22, 23, 50(1), 159, 165, 258 and 259 as read together with section 5 of the [High Court \(Organization and Administration\) Act](#), 2015, which vest jurisdiction in the High Court, the mandate to hear, *inter alia*, any question regarding the violation of rights and fundamental freedom; determining if acts or omissions are constitutional; and the interpretation of the Constitution, and to protect the Constitution from any threats or violations. Reliance was placed on the case of *Rachael Muaka v Kabawa Sukari Ltd & another* [2010] eKLR and that of *Peter Nganga Muiruri v Credit Bank Limited & another*, Civil Appeal No 203 of 2006.
41. It was the petitioner's position that the Cross-Petition is properly filed before this court.
42. As regards compliance with the provisions of the [Government Proceedings Act](#), he relied on the case of *Kenya Bus Service Ltd & another v Minister for Transport & 2 others* (2012) eKLR where the Court declared that the mandatory requirement of section 13A(1) of the [Government Proceedings Act](#), violated the provisions of the article 48 of the Constitution. He also referred the court to *Kamumu Contractors Limited v County Government of Machakos* [2019] eKLR, Civil Appeal No 76 of 2017.
43. In rejecting the Preliminary Objection filed by the Attorney General dated 12th November, 2019 and the responses by the 4th and 6th respondent, he submitted that sections 47 and 48 of the [Public Finance Management Act](#), 2012 relates to conditions and the legal framework for receiving and using grants and



- donations by national government or its entities or third parties. It does not relate to the Government making grants to third parties such as ASK which is a private entity registered under the *Societies Act* thus not capable of being funded from public funds as prescribed by article 229(5) of the *Constitution* which only mandates the Auditor-General to audit and report on the accounts of any entity that is legitimately funded from public funds. He submitted that the Position taken by the 6th and 4th respondents is a perverse exercise of State power that sets a dangerous precedent in the management of public funds.
44. On the issue of whether the 2nd respondent had been properly sued the petitioner submitted that under article 33(a) of the ASK Constitution the 2nd respondent is established as the Supreme body of the society and in addition, article 35 (j) of its *Constitution* gives exclusive power to initiate in the name of registered Trustees of the Society any legal proceedings on behalf of the Society or provide defence for any proceedings against the Society to the Council. That further, a person under article 260 of the Kenyan *Constitution* is defined a company, association, or other body of persons whether incorporated or unincorporated. He cited the case of *Jeminah Wambui Ikere v Standard Group Ltd and another*, Petition No. 466 of 2012.
45. According to the petitioner, the 2nd respondent’s preliminary objection dated November 15, 2019 did not raise matters of pure law upon which this petition can be determined but merely lists contested facts contrary to what was held in the case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors Ltd* [1969] EA 697.
46. He submitted that even if the council had been wrongfully enjoined then that is curable by amendment and cited Rule 5 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 and the case of *Republic v Council of the Agricultural Society of Kenya Ex-parte John B. Nthuku* [2016] eKLR, Miscellaneous Civil Application No. 41 of 2015.
47. As to whether 1st respondent is a private entity or a State Corporation, he submitted that it is not a public entity within the meaning of the section 2(f) and section 2(c) of the *Public Procurement and Asset Disposal Act*, 2015 and the *State Corporations Act* respectively. He submitted that the later defines a ‘state corporation’ to include a bank or a financial institution licensed under the *Banking Act* or a company incorporated under the *Companies Act*, the whole or the controlling majority shares or stock of which is owned by the Government or by another state corporation. The *Public Procurement and Asset Disposal Act*, 2015 on the other hand, defines a ‘public entity’ to include a state corporation within the meaning of the *State Corporations Act*. He relied on the case of *Githunguri Dairy Farmers Co-operative Society v Attorney General & 2 others* [2016] eKLR where a public entity was defined as;
- “...simply not a body which draws support for both its operations and capital expenditure from the public exchequer but additionally, its purpose ought to be amongst other things, to render public service whether delegated or otherwise.”
48. On the question of whether the respondent contravened the Constitution as pleaded, he submitted that the 3rd to the 20th respondents had violated the *Constitution* particularly article 10(2) and article 201(a) by not consulting the public on their decision to use public funds and other resources to support the ASK. Reliance was placed on the cases of *Kenya Human Rights Commission v Attorney General & another* [2018] eKLR, *Robert N Gakuru & others v The Governor Kiambu County & 3 others* Petition No 532 of 2013, *Republic v The Attorney General & another ex parte Hon Francis Chachau Ganya*, Nairobi High Court (Judicial Review Division) Miscellaneous Application No 374 of 2012 and Nairobi Civil Appeal No. 224 of 2017 - *Independent Electoral and Boundaries Commission & others v The National Super Alliance & others*.



49. He also submitted that the 3rd to 20th respondents violated and continue to violate article 47 of the Constitution by taking administrative action that is not expeditious, efficient, lawful, reasonable and procedurally fair. Reliance was placed on the case of *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR, *R v Higher Education Funding Council, ex parte Institute of Dental Surgery*, [1994] 1 All ER 651 (QB.), *President of the Republic of South Africa and others v South African Rugby Football Union and others* (CCT16/98) 2000 (1) SA 1, *Judicial Service Commission v Mbalu Mutava & another* [2014] and *Dry Associates Ltd v Capital Markets Authority and another*, [2012] eKLR.
50. To illustrate further violation of the Constitution, he submitted that the 3rd to 20th respondents violated article 129 of the Constitution which stipulates the principles of executive authority by expending public funds in affairs of the ASK, which is a private entity for its own benefit at the expense of the general public.
51. Further, that the 3rd respondent violated article 129 and article 131 (a) (b) of the Constitution, for having allocated the ASK some Kshs 750 million and out of it paid Kshs. 750 million on April 20, 2018 by the Ministry of Agriculture. He also relied on article 130(1) of the Constitution that defines the national executive of the Republic to include the President, the Deputy President and the rest of the Cabinet. Furthermore, he submitted, the exercise of public power by the 3rd to 20th respondent should not be arbitrary but in compliance with the law as stated in the case of *Pharmaceutical Manufacturers Association of SA and another* 2000 (2) SA 1 (CC).
52. The petitioners submitted that failure by, the 4th respondent to advise the Government to uphold the rule of law in spending public funds in a manner that is in contravention to the Constitution violated his duties under article 156(4)(a) and 156(6) of the Constitution and reliance was placed on the case of *Kenya Bus Service Limited & Another v Minister for Transport & 2 others* [2012] eKLR.
53. On contravention of the Constitution of Kenya, he submitted that the respondents violated article 201 on the principles of public finance one of which is that public funds ought to be used in a prudent and responsible way. The act of funding the ASK, a private entity amounted, in his view, to wastage of public money, which money would have been used elsewhere. The petitioner also pointed out that the 1st and 2nd respondents contravened Constitutional principles on the procurement of public goods and services provided under article 227(1) on Public Procurement Rules by receiving public funds and not demonstrating if they used the funds in a manner acceptable under the law. To buttress this point, he cited the case of *Githunguri Dairy Farmers Co-operative Society Ltd v Attorney General & 2 others* [2016] eKLR and *Association of Retirement Benefits Schemes v Attorney General & 3 others* [2017] eKLR where it was held that private entities that obtain government funding become public for purposes of procurement law.
54. It was submitted that the respondents contravened the values and principles of public service under article 232 of the Constitution and added that the Counties names have supported the ASK by acting as the local branches of ASK, sponsoring the shows which they host, purchasing tickets in bulk for county staff and encouraging them to attend the shows they host and paying for advertisements in newspapers and on Television.
55. On recovery of all the public funds and resources the government has spent on 1st respondent, the petitioner submitted that despite their right to own property being guaranteed under article 40(6) of the Constitution, the same does not extend to property acquired unlawfully. He relied on ACEC Application No 7 of 2019 -Assets Recovery Agency vs Joseph Wanjohi & others and *Kenya Anti-Corruption Commission vs Stanley Mombo Amuti* [2017] eKLR.



56. On the issue of costs, he submitted that the respondents should bear the costs of these proceedings because he spent a lot of personal resources prosecuting this case in public interest and without selfish interest. He relied on [*Kenya Human Rights Commission vs Communications Authority of Kenya & 4 Others*](#) [2018] eKLR and submitted that when it comes to awarding of costs in constitutional litigation between a private party and the State, a private party who is successful should have costs paid by the State, and if unsuccessful, each party should bear their own costs. Reliance was also placed on [*John Harun Mwau and 3 others vs Attorney-General and Two others*](#) [2012], [*Boaz Waruku vs Kenya Universities & Colleges Central Placement Service & 3 others*](#) [2020] eKLR as well as the South African case of [*Biowatch*](#) case cited as CCT 80/2008 or 2009 ZACC 14.
57. In conclusion, the petitioner submitted that the Court is clothed with powers under article 23(3) of the [*Constitution 2010*](#) to grant appropriate reliefs in any proceedings seeking to enforce fundamental rights and freedoms such as this one based on the case of [*Fose vs Minister of Safety and Security*](#) [1997] (3) SA 786(CC)1997(7) BCLR 851 for and [*Hoffmann v South African Airways*](#) (CCT17/00) [2000] ZACC 17.

1st and 2nd Respondent's Submissions

58. The 1st and 2nd respondents filed joint submissions in which they ask the court to dismiss the petition with costs. In their submissions, the 2nd respondent is just a department in the structure and establishment of the 1st respondent and therefore not a person whether incorporated or unincorporated capable of suing or being sued before a court of law and they relied on [*Football Kenya Federation vs Kenyan Premier League Limited & 4 others*](#) [2015] eKLR and [*Geoffrey Chege Kirundi versus Dispute Resolution Committee of Kenya Tea Development Agency Holdings Ltd & another*](#) [2017] eKLR.
59. Submitting on the doctrine of Constitutional Avoidance, they contended that it will be un-procedural and illegal to entertain the Petition and prayers sought for taking of accounts/auditing of the purported illegal payments without first hearing the parties on merit in full trial where parties can be subjected to cross examination. He submitted that the National Government and the County Governments who are parties had not sued nor made an allegation on the alleged illegal payments against ASK. They relied on the case of [*Edermann Property Ltd vs Development Bank of Kenya Limited*](#) [2015] eKLR and [*National Bank of Kenya Ltd vs Pipeplastic Samkolit \(K\) Ltd & Another*](#) [2001] eKLR.
60. According to the two respondents, based on [*Matatu Welfare Association & another v Invesco Assurance Co. Ltd & 3 others*](#) [2019] eKLR, the allegations raised in the petition, which were denied, were criminal in nature and would require evidence to be presented and the same proved beyond reasonable doubt and that they had demonstrated that their operations are not funded by the state. They relied on [*Silas Make Otuke vs. Attorney General & 3 others*](#) [2014] eKLR in support of their position that the Petition ought to have been brought after the criminal process is exhausted and a relevant finding made of guilt against the Respondent since the procedure and burden of proof in criminal cases was distinct from that in Constitutional cases. Their position was further based [*Kimani Waweru & 4 Others vs Central Bank of Kenya & 7 Others*](#) [2018] eKLR, [*Kenya Anti-Corruption Commission vs Stanley Mombo Amuti*](#) [2017] eKLR and ACEC Application No 7 of 2019 - [*Assets Recovery Agency v Joseph Wanjohi & Others*](#).
61. According to the 1st and 2nd respondents, the petition was supported by documentary evidence that was illegally obtained particularly Exhibit OOO1 which include ASK Annual Financial Report and Bank Statements and hence could not be relied upon by this court because the alleged makers of those documents have not produced the said documents, neither are they primary nor secondary evidence. Therefore, the documents were inadmissible and should be expunged from the court record. They



- also alleged that their right to privacy under article 31 of the Constitution had been infringed. The said respondents lamented that the petitioner is notorious in obtaining evidence illegally and invoking illegal evidence in abuse the court processes and in this regard reference was made to the cases of Okiya Omtatab Okoiti & 2 others vs Attorney General & 3 others [2014] eKLR and Okiya Omtatab vs Central Bank of Kenya & 7 others [2018] eKLR.
62. As regards receipt of financial support and grants by non-profit making organizations such as ASK (the 1st respondent herein), the said Respondents justified the same based on the relationship between ASK and the Government as being lawful, regular, Constitutional, valid and ought to be encouraged as the same is for the benefit of the public at large. Reference was made to the definition of public purpose in the Black's Law Dictionary as "synonymous with governmental purpose ... It has for its objective the promotion of the public *health*, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents ..."
 63. Further reliance was placed on the cases of Slawson v Alabama Forestry Commission, 631 So.2d 953 (Ala.1994) and Opinion of the Justices No 269, the Alabama Supreme Court and it was submitted that the ASK serves public purpose through its activities for instance the annual shows that bring together different stakeholders who share information with an aim of uplifting and improving the agricultural sector in Kenya thus any allocation of public funds and resources is therefore justified.
 64. The 1st and 2nd respondent referred to the conditions for receiving grants and donations by national government or its entities or third parties under section 47(1) and section 48 (1)(g) of the Public Finance Management Act on the role of parliament in approving such funds.
 65. On oversight, they submitted that the Auditor General is empowered to audit and report on the accounts of any entity such as ASK that has received public funds and under article 229 of the Constitution and they also cited section 47(5) of PMFA that provides that grants and donations shall be spent in accordance with articles 221 and 223 of the Constitution. They submitted that they have demonstrated that the grant received has been used for ASK projects geared towards benefiting the Kenyan Citizenry as a whole and reference was made to the case of Political Parties Forum Coalition & 3 others vs. Registrar of Political Parties & 8 others [2016] eKLR.
 66. According to the said respondents, the Court cannot interfere with the internal management of a society such ASK, and they cited the cases of Gad Omondi Opiyo vs. Peter Kibinda, Scrutineer & 7 others [2020] eKLR and Republic v Registrar General & another ex-parte James Papa [2014] eKLR. Regarding public participation, they submitted that public participation ends with the legislative process whereby the public are given the opportunity to air one's views on matters that affect one's life and livelihood and it does not extend to technical construction of contracts entered into by legitimate government officials under whose mandate the issue belongs and they cited Commission for Human Rights & Justice vs. Board of Directors, Kenya Ports Authority & 2 Others; Dock Workers Union (Interested Party) [2020] eKLR and William Ole Ntimama & 2 Others v Governor, Narok County & 2 others [2014] eKLR.
 67. According to the 1st and 2nd respondents, the petitioner cannot purport to argue that the 3rd respondent has violated the Constitution, yet the 3rd respondent does not exist in law and cannot sue or be sued as the components of the 3rd respondent are discernible and have the offices of the President, Deputy President and Cabinet and they referred the court to Okiya Omtatab Okoiti vs. National Executive of the Republic of Kenya & 14 Others; Agricultural Development Corporation (ADC) (Interested Party) [2021] eKLR and Okiya Omtatab Okoiti vs Judicial Service Commission & 2 Others; Katiba Institute (Interested Party) [2021] eKLR.



68. Lastly, they submitted that the prayer for recovery of funds was not capable of being granted in a constitutional petition and that there are other avenues to handle the petitioner's grievances. This submission was grounded on the case of *Okiya Omtatah Okoiti & 2 others vs Cabinet Secretary, Ministry of Health & 2 Others; Kenya National Commission on Human Rights (Interested Party)* [2020] eKLR.
69. Submitting on the cross-petition, the 2nd respondent reiterated its position in its answer to the petition and asserted that the law governing interested parties never envisaged and or permits such a party to institute its independent alleged cause(s) of action at all. Reliance was placed on the case of *Communications Commission of Kenya & 4 Others vs Royal Media Services Limited & 7 others* [2014] eKLR.
70. It was submitted that the cross-petitioner having been joined as an interested party did not have a right to file a cross-petition since that right is preserved for the Respondents who are primary parties to the suit; that the cross-petition introduces new facts with new issues such as a declaration of rights over ASK's land on alleged breach of a concession agreement which were not primarily in the Petition and that the cross-petition does not seek to counter the claim as raised by the petitioner but instead supports the petitioner's claim as raised in the Petition. Reliance was also placed on *Francis Kariuki Muruatetu & Another v. Republic & 5 Others*, Sup. Ct. Pet. 15 & 16 of 2015 (Consolidated); [2016] eKLR, *Methodist Church in Kenya vs. Mohamed Fugicha & 3 others* [2019] eKLR and *Raila Amolo Odinga & another vs. Independent Electoral and Boundaries Commission & 3 others* [2017] eKLR.
71. The 1st and 2nd respondent also raised the issue of Constitutional avoidance and stated that that a Constitutional Court cannot be subverted to investigate criminal matters in particular fraud, prosecute or make pronouncements in matters outside its Jurisdiction and that the cross-petitioner is introducing extraneous criminal issues in a Constitutional court purely for emotive and sentimental purposes in order to subvert the ends of justice which amounts to an abuse of the court process.
72. The 1st and 2nd respondent also opined that the issues raised in the cross petition was sub judice as a similar matter was pending being Case No. 23993/TO before the International Chamber of Commerce, International Court of Arbitration (ICC), which matter as of dated 19th October, 2020 was considered withdrawn. Counsel for the said respondents submitted that Nairobi ELC No. 250 of 2019 was also filed and an injunction was issued pending determination of the arbitration. He relied on section 6 of the *Civil Procedure Act* and the cases of *Kenya National Commission on Human Rights vs. Attorney General; Independent Electoral & Boundaries Commission & 16 others* [2020] and *Thika Min Hydro Co. Ltd vs. Josphat Karu Ndwiga* [2013] eKLR.
73. Based on Kampala High Court Civil Suit No. 450 of 1993 - *Nyanza Garage vs. Attorney General*, counsel submitted that the doctrine against multiplicity of suits before different courts are well intended to guard the integrity of the courts and avoid possibility of issuance of two conflicting decisions by different courts. He thus opined that the Cross- Petition is without merit, misdirected, premature, vexatious, incompetent and fatally defective and should be dismissed with costs to the 2nd Respondent.

6th Respondent's Submissions

74. On behalf of the 6th respondent, it was submitted that the Petitioner has not disputed that the show grounds are run by ASK and a number of government agencies and public bodies offering services to Kenya including promotion of the right of access to information. It submitted that under article 6(3) of the *Constitution*, the State a duty to ensure reasonable access to its services in the country and this has been done through funding and provision of personnel for different projects undertaken by ASK.



75. The 6th respondent submitted that county governments through partnering with ASK has ensured that there is access to information which is part of their mandate thus allowing this petition would lead to more petitions being filed where there have been partnerships between government and private bodies. It was submitted that County Governments are established under article 176 and mandated under article 186 as read together with the Fourth schedule, part 2 of the *Constitution* with agriculture being one of them. It was further submitted that there was no misappropriation of funds as the Public Finance and Procurement Act, 2012 allows for grants and donations to 3rd parties in a bid to facilitate service delivery and development projects. According to the 6th respondent, the investigative bodies are the Auditor General and the Ethics and Anti Corruption Commission and not the petitioner. Reference was made to *Raphael Mlewa Mzare & 515 other vs. Agricultural Corporation* [2014] eKLR.

14th Respondent's Submissions

76. According to the 14th respondent, it does not fund activities of the ASK and the petitioner has not tabled any documentary evidence of funding of the activities of the ASK by the 14th respondent hence the accusations of violation of the Constitution are baseless. The Court was therefore urged not to rely on conjecture, speculation and unproved allegations.
77. As regards the question whether there is public land and unpaid rates against the ASK within the 14th respondent's jurisdiction and whether the 14th respondent should be asked to conduct audit, it was submitted that no evidence has been tendered to support the said allegations and that the mandate of conducting audits remains the duty of the Auditor General pursuant to article 229(4)(a) of the *Constitution*. Furthermore, public land is held in trust for the residents of that county as per article 62(2) of the *Constitution* and it does not have the power to recover the same from the National Land Commission.

17th Respondent's Submissions

78. On behalf of the 17th respondent its justification on spending funds and resources on the ASK was based on the promotion of its functions under part 2 of the fourth schedule. In addition, it was submitted that ASK is a non-profit organization dependent on donations from stakeholders. Based on sections 138 and 139 of the *Public Finance Management Act, 2012*, it was submitted that ASK is a public entity within the meaning of section 2 of the *Public Procurement and Disposal Act, 2015* and reliance was placed on the case of *Association of Retired Benefits Schemes vs. Attorney General & 3 other* [2017] eKLR.
79. To the 17th respondent, the petition does not raise any cause of action against it nor a constitutional question and should be dismissed based on *Anarita Karimi Njeru vs Republic* [1979] eKLR.

Determination

80. I have considered the petition, the cross –petition, the responses thereto and the submissions of parties. The thrust of the petitioner's case is that it is fraudulent and against the public interest for the Agricultural Society of Kenya (the society or ASK), a private entity totally outside the control of the State, to be fully dependent on State largesse, without being held accountable for the same. According to the petitioner, unless the society is made a public entity, there is no basis in law for the 3rd to 20th respondents to spend any more public funds and resources on the society, and it is in the public interest to stop supporting the society and to recover all public funds and resources spent on it so far.
81. It is the petitioner's case, as supported by the cross-petitioner, that all the 643 Hectares of land occupied by the ASK are donated by the State and the ASK does not pay any land rates for it and that further, the



ASK requested and was allocated funds by the government of Kshs 750 Million and that he is aggrieved that public assets under the management of ASK are at risk of being lost.

82. From the pleadings, the evidence and the submissions and I find the following issues falling for determination;-

- I. Whether the Cross-Petition is properly before this court.
- II. Whether this court has jurisdiction to hear and determine the issues raised in the petition.
- III. Whether the petitioner has locus to institute this matter
- IV. Whether the 2nd respondent is a public entity.
- V. Whether the 2nd respondent has illegally received funds from the Government of Kenya.
- VI. Whether the 1st and 2nd respondent should account for the funds it has received.
- VII. Whether the 3rd to 20th respondent have funded the 2nd respondent using public funds.
- VIII. Whether the petitioner is entitled to the orders sought.

83. As regards the propriety of the cross-petition, it is clear that the cross-petitioner was joined to these proceedings as an interested party.

84. Rule 2 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* defines the term “interested party” as:

a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.

85. This definition was adopted in *Judicial Service Commission vs. Speaker of the National Assembly and Attorney General*, High Court Constitutional and Human Rights Division Petition No. 518 of 2013, 2013 e[KLR].

86. Rule 15(3) of the said Rules which provides that:

- (3) The respondent may file a cross-petition which shall disclose the matter set out in rule 10 (2)

87. A literal reading of the said rule clearly permits the “respondent” to file a cross-petition. There is no other provision under the Rules that permits an interested party to file a cross-petition. The question that arises is whether an interested party can similarly file a cross-petition. Makau, J in *Jasper Ndeke Shadrack vs. Director of Public Prosecutions & another; Florence Wangari Hungi & 4 others (Intended Interested Parties)*[2021], found that:

- “ 17. ... the Constitution and the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure, 2013 has not provided for filing of Cross-Petition by an Intended Interested Party or Interested Party in the same Petition. The Intended Interested Parties were not at any time barred before seeking to be enjoined in these proceedings from filing their individual respective petitions without seeking to be enjoined and had they opted to do so they would have rightly exercised their constitutional rights to access justice. I find that it would be an abuse of court process for intended Interested Parties to seek to be enjoined as Interested Parties and at the same time file either a Petition or cross Petition in the same proceedings. I find



the intended Interested Parties cross-Petition or Petition to be bad in law and warrants dismissal in limine.”

88. In dealing with the status of an interested party, the Supreme Court, by a majority, in *Methodist Church in Kenya vs. Mohamed Fugicha & 3 Others*[2019] eKLR expressed itself, inter alia, as follows:

“ [40] In addressing the cross petition, the status of the 1st respondent in the High Court petition cannot be overlooked. The 1st respondent was admitted to the suit as an ‘interested party.’ The question then arises as to whether an ‘interested party’ has the capacity to institute a ‘cross petition’. [50] The 2nd and 3rd respondents’ case in the High Court was made through a replying affidavit sworn on October 17, 2014 by the 2nd respondent, on behalf of herself and the 3rd respondent. She stated that the decision to allow the Muslim students to adorn hijabs was only meant to mitigate the animosity that had caused much unrest in the school, and to allow the students to settle down and prepare for national examinations.

[51] The interested party’s case brought forth a new element in the cause: that denying Muslim female students the occasion to wear even a limited form of hijab would force them to make a choice between their religion, and their right to education: this would stand in conflict with article 32 of the Constitution. It is on this basis that he cross-petitioned at paragraph 34 of his replying affidavit, for the Muslim students to be allowed to wear the hijab, in accordance with articles 27 (5) and 32 of the *Constitution*.

[52] The cross-petition was expressed in straight terms: “I am swearing this affidavit in opposition to the petition herein for it to be dismissed with costs, and ... I am also cross-petitioning that Muslim Students be allowed to wear a limited form of hijab (a scarf and a trouser) as a manifestation, practice and observance of their religion consistent with article 32 of the *Constitution of Kenya*, and their right to equal protection and equal benefit of the law under article 27 (5) of the *Constitution*.”

[53] What should we make of a cross-petition fashioned as such” Yet this Court has been categorical that the most crucial interest or stake in any case is that of the primary parties before the Court. We did remark, in *Francis Kariuki Muruatetu & Another v. Republic & 5 others*, Sup. Ct. Pet. 15 & 16 of 2015 (Consolidated); [2016] eKLR, as follows (paragraphs 41, 42):

“Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties’ before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.



Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court” [emphasis supplied].

[54] In like terms we thus observed in *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 others*, Civil Appeal No. 290 of 2012 (paragraph 24):

“A suit in Court is a ‘solemn’ process, ‘owned’ solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings.”

[55] Against such a background, the trial Court ought not to have entertained issues arising from the cross-petition by the interested party, especially in view of article 163 (7) of the *Constitution* which provides that ‘All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.’ Moreover, this cross-petition did not comply with Rule 15 (3) of the Mutunga Rules which speaks to a respondent filing a cross-petition; and it was also not in conformity with Rule 10 (2) of these Rules. Rule 10(3) cannot also be invoked as the replying affidavit of the interested party does not fit any of the descriptions contained therein.

[56] We further note that the petition is unyielding that the cross – petition did not meet the set out requirements, it was defective and inconsistent with the Mutunga Rules, further, they argue that consideration of the same by the Appellate Court violated their right to fair trial denying them opportunity to prepare and canvass the issue raised in the cross-petition.

[57] We agree that the issues set out in the cross-petition did not afford the opportunity for the petitioner to respond to the same effectively. Firstly, because it introduced a different cause of action from that raised in the original petition; and secondly, because it was not framed in a manner, for which there was a known laid out procedure for an exhaustive response. The fact, that the petitioner may have referred to the issues therein through oral arguments, could not, as wrongfully determined by both the High Court and the Court of Appeal, have amounted to formal pleadings in response to those issues. As such we find that both superior Courts violated the petitioner’s right to be heard, as provided for under articles 25 and 50 of the *Constitution*.



[58] Furthermore and with due respect to the Appellate Court, we are persuaded that the cross-petition was improperly before the High Court, and ought not to have been introduced by an interested party, and in that light, it should not and could not have been entertained by the Court of Appeal; neither court having proper jurisdiction to do so.

[59] In the same breadth, we recognize that the issue as contained in the impugned cross petition is an important national issue, that will provide a jurisprudential moment for this Court to pronounce itself upon in the future. However, to do so, it is imperative that the matter ought to reach us in the proper manner, so that when a party seeks redress from this court, they ought to have had the matter properly instituted, the issues canvassed and determined in the professionally competent chain of courts leading up to this Apex Court. In view of this, it is our recommendation that should any party wish to pursue this issue, they ought to consider instituting the matter formally at the High Court.

89. My understanding of the said decision is that the Supreme Court was not only dealing with the manner in which the purported cross-petition was brought but also the locus standi of the interested party to bring the same. It found, in no uncertain terms that an interested party has no locus to cross-petition under Rule 15(3) of the Mutunga Rules aforesaid. It also found that such an interested party cannot urge new substantive issues not the subject of the existing petition.

90. That position seemed to resonate with its earlier position in *Francis Karioko Muruatetu & another vs. Republic & 5 others*, Sup. Ct. Pet. 15 & 16 of 2015 (Consolidated); [2016] eKLR where the Court held that:

“

“(42) Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the court will always remain the issues as presented by the principal parties, or as framed by the court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues, or introduce new issues for determination by the court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the court. That stake cannot take the form of an altogether a new issue to be introduced before the Court.

[43]...Any interested party or amicus curiae who signals that he or she intends to steer the Court towards a consideration of those ‘new issues’ cannot, therefore, be allowed.”

91. In fact, the Supreme Court took issue with the fact that the Court of Appeal did not follow its said earlier decision.

92. The same position was adopted by the same Court in *Raila Amolo Odinga & another vs. Independent Electoral and Boundaries Commission & 3 others* [2017] eKLR where, in refusing to join a new interested party who intended to introduce new issues, stated that:

“(12) When the applicant introduces a new petition, with issues not already laid before the Court, he is improperly making claims on a cause that belongs to



other parties, in the main proceedings. This cannot be allowed. We are also not convinced that the applicant would suffer any prejudice, if his proposed intervention is declined.”

93. In the cross-petition, one of the issues intended to be raised is the contractual relationship between the Cross-Petitioner and the society. I agree that the said ground is substantive and cannot be termed as a collateral ground to the other grounds.
94. That new substantive issues ought not to be introduced by an interested party in that capacity was also appreciated in *Republic vs. Public Procurement Administrative Review Board; Rhombus Construction Company Limited (Interested Party) ex parte Kenya Ports Authority & another* [2021] eKLR, where it was held that:
- “ 33. What emerges from the above decisions is the principle established in our jurisprudence that an interested party is a peripheral party in a suit and cannot introduce new issues for determination by the Court. Further, that in determining the matters before it, the Court will only consider the issues raised in the pleadings by the principal parties.”
95. Similarly in *Japhet Muroko & Another vs. Independent Electoral and Boundaries Commission (IEBC) & 3 others* [2017] eKLR, it was held that:-
- “ 29. Participation of an interested party should not amount to introduction of new causes of action altogether. In the Muruatetu case, referred to above, the court thus stated: [42] Therefore in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court. [43]....Any interested party or amicus curiae who signals that he or she intends to steer the Court towards a consideration of those ‘new issues’ cannot, therefore, be allowed.”
96. What my understanding of these authorities is that an interested party’s stake must be a stake in the action as commenced and not a stake that is introduced by itself.
97. I appreciate that in public interest litigation, courts have been reluctant to permit the proceedings to be conducted in the same manner as adversarial proceedings where the parties are free to determine the course their action takes. In such cases, for example, where the parties are no longer keen to proceed with the action, courts do readily permit other parties interested in carrying on with the matter to do so in the interest of the public so that an issue germane to the public is not lost merely because, for reasons other than the merits of the action, the petitioner may no longer be keen in pursuing the matter. In such cases, the new party may well introduce a new issue by amending the petition. That however is not the scenario before me.
98. Article 163 (7) of the *Constitution* which provides that:
- ‘All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.’”



99. Whereas article 163(3) of the *Constitution* binds all Courts to a decision of the Supreme Court, it does not necessarily mean that the said Courts must agree with the decision of the Supreme Court. What is required is that at the end of the day, the decision of the Supreme Court must be binding notwithstanding whatever reservations the other Courts may have regarding the said decision. This was appreciated in *Mwai Kibaki vs. Daniel Toroitich Arap Moi* Civil Appeal Nos. 172 & 173 of 1999 [2008] 2 KLR (EP) 351; [2000] 1 EA 115 where it was held that:

“The High Court, while it has the right and indeed the duty to critically examine the decisions of the Court of Appeal, must in the end follow those decisions unless they can be distinguished from the case under review on some other principle such as that obiter dictum if applicable. It is necessary for each lower tier to accept loyally the decisions of the higher tiers. Even in the same tier, where it has taken the freedom to review its own decisions, it will do so cautiously. Precedent is regarded as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as an orderly development of legal rules...” [Underlining mine].

100. A similar view was expressed in *National Bank of Kenya Ltd vs. Wilson Ndolo Ayah* Civil Appeal No. 119 of 2002 [2009] KLR 762 where it was held:

“It is good discipline in courts for the proper smooth and efficient administration of justice that the doctrine of precedent be adhered to. If for any reason a Judge of the High Court does not agree with any particular decision of the Court of Appeal, it has been the practice that one expresses his views but at the end of the day follows the decision which is binding on that court. The High Court has no discretion in the matter.”

101. Omolo, JA in *Abu Chiaba Mohamed vs. Mohamed Bwana Bakari & 2 others* Civil Appeal No 238 of 2003 expressed himself as hereunder:

“The learned judge of the High Court had no jurisdiction to over-rule a decision of the Court of Appeal even if she disagrees with the decision and the comments in her judgement must be ignored as having been made without jurisdiction and in violation of the well-known doctrine of precedent. Like all other judges in her position, under the doctrine of precedent, she is bound by the decision of the Court of Appeal even if she may not approve of a particular decision and any attempts to over-rule or side-step the court’s decisions can only result in unnecessary costs to the parties involved in the litigation.”

102. This position was restated in *Cassell & Co Ltd vs Broome & Another* [1972] AC 1072 in which the Court held:

“The fact is and I hope it will never be necessary to say so again, that in the hierarchical system of the courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of higher tiers. Where decisions manifestly conflict, the decision in *Young vs. Bristol Aeroplane Co. Ltd* [1944] KB 718 offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom. Even this House, since it has taken freedom to review its own decisions, will do so cautiously”.



103. Whereas I may not necessarily agree with the broad position taken by the Supreme Court in *Methodist Church in Kenya vs. Mohamed Fugicha & 3 others* [2019] eKLR line, hook and sinker, the Constitution binds me to follow the same. Apart from the foregoing, it is clear that the issues the subject of the cross-petition are the subject matter of the arbitral proceedings and the case before the Environment and Land Court. No reason has been advanced why the issues cannot be conclusively determined before the sad tribunal particularly the Environment and Land Court which is constitutionally empowered to deal with constitutional matters regarding interests in land.
104. Consequently, I find the cross-petition filed by the interested party herein, Farmer's Trust Limited, incompetent and the same is hereby struck out. There will be no order as to the costs of the cross-petition as the matter is a public interest dispute.
105. The next issue is whether the 2nd respondent is a legal person capable of being sued. According to the 1st and 2nd respondents, it is now trite law that only a legal person is capable of suing or being sued before a court of law. The 2nd respondent herein is not an incorporated body which can assume capacity to sue or be sued in its own name in any legal proceedings as it is just a department in the structure and establishment of the 1st respondent and therefore not a person whether incorporated or unincorporated capable of suing or being sued before a court of law.
106. To this, the petitioner retorted that the 2nd respondent is established under article 33 (a) of the Agricultural Society's Constitution as the Supreme body of the society and under article 35 (j) thereof, the Council has "exclusive power to initiate in the name of registered Trustees of the Society any legal proceedings on behalf of the Society or provide defence for any proceedings against the Society."
107. It is noteworthy that this objection was taken as a preliminary objection. That ground of objection, in my view, amounts to misjoinder of parties. Rule 5(b) of *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (otherwise known as "the Mutunga Rules") provides that:
- A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.
108. What I understand that rule to be saying is that even where there is misjoinder or non-joinder, the discretion as to the manner of dealing with the matter is left to the Court. Since preliminary objection is not permissible where the discretion of the court is called upon, this point, as a preliminary objection, cannot be sustained.
109. Further, in the celebrated case of *Mukisa Biscuits Manufacturing Ltd vs. West End Distributors Ltd* Civil Appeal No 9 of 1969 [1969] EA 696, Law, JA opined that:
- "A preliminary objection consists of a point of law which has been pleaded, or which arises from a clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."
110. The question is therefore whether the alleged misjoinder even if true, is capable of disposing of the suit. In *Garden Square Limited vs. Sammy Boit Kogo & another* Nairobi (Milimani) HCCC No. 1266 of 2003 [2003] KLR 20, the Court held, a holding I associate myself with, that misjoinder is not a proper point of preliminary objection for misjoinder cannot itself defeat the suit and should be canvassed in



a substantive application for striking out the name since a preliminary point of law is a pure point of law which if successfully taken, would have the effect of disposing the suit or application entirely.

111. Therefore, a preliminary objection is only competent where its success would dispose of the whole suit. In this case, the success of the preliminary objection will only lead to the striking out of the 2nd respondent but would leave the petition largely intact. Accordingly, that ground was not properly taken as a preliminary objection.
112. Does the petitioner have *locus* to institute this matter? According to the respondents, the financial affairs of the Society ought to be investigated by the Auditor General and since there is no complaint lodged by the County Governments, the petitioner herein has no locus to institute these proceedings. The position taken by the petitioner is that this Petition involves constitutional questions which are public in nature and cited *Black's Law Dictionary*, 9th Edition which defines "Public interest" as:
- “the general welfare of the public that warrants recognition and protection” or “something in which the public as a whole has a stake, especially an interest that justifies governmental regulation”.
113. In addition, the petitioner submitted that he filed this Petition on his own behalf and on behalf of the public at large pursuant to articles 22 and 258 of the *Constitution* as read with articles, 48 and 3(1) thereof.
114. In *Ms. Priscilla Nyokabi Kanyua vs. Attorney General & Interim Independent Electoral Commission* Nairobi HCCP No. 1 of 2010, the Court expressed itself on the issue of locus as follows:

“over time, the English Courts started to deviate and depart from their contextual application of the law and adopted a more liberal and purposeful approach. They held that it would be a grave lacuna in the system of public law if a pressure group or even a single spirited taxpayer, were prevented by an outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. The strict rule of locus standi applicable to private litigation is relaxed and a broad rule is evolved which gives the right locus standi to any member of public acting bona fide and having sufficient interest in instituting an action for redress of public wrong or public injury by a person who is not a mere busybody or a meddling interloper; since the dominant object of Public Interest Litigation is to ensure observation of the provision of the constitution or the law which can be best achieved to advance the cause of the Community or public interest by permitting any person, having no personal gain or private motivation or any other oblique consideration, but acting, bona fide and having sufficient interest in maintaining an action for judicial redress for public injury to put the judicial machinery in motion like action popularis of Roman Law whereby any citizen could bring such an action in respect of public delict. Standing will be granted on the basis of public interest litigation where the petition is bona fide and evidently for the public good and where the Court can provide an effective remedy...In Kenya the Court has emphatically stated that what gives locus standi is a minimal personal interest and such interest gives a person standing even though it is quite clear that he would not be more affected than any other member of the population. The court equally has recognised that organisations have rights similar to that of individual private member of the public. A new dawn was ushered in and the dominion of Private Law and its restrictive approach was dealt a final blow. A new window of opportunity emerged in the area of Public Law and shackles of inhibition in the name of locus standi were broken and the law was liberalised and a purposeful approach took



the driving seat in the area of Public Law. In human rights cases, public interest litigation, including lawsuits challenging the constitutionality of an Act of Parliament, the procedural trappings and restrictions, the preconditions of being an aggrieved person and other similar technical objections, cannot bar the jurisdiction of the court, or let justice bleed at the altar of technicality. The court has vast powers under section 60 of the Constitution of Kenya, to do justice without technical restrictions and restraints; and procedures and reliefs have to be moulded according to the facts and circumstances of each case and each situation. It is the fitness of things and in the interest of justice and the public good that litigation on constitutionality, entrenched fundamental rights, and broad public interest protection, has to be viewed. Narrow pure legalism for the sake of legalism will not do. We cannot uphold technicality only to allow a clandestine activity through the net of judicial vigilance in the garb of legality. Our legal system is intended to give effective remedies and reliefs whenever the Constitution of Kenya is threatened with violation. If an authority which is expected to move to protect the Constitution drags its feet, any person acting in good faith may approach the court to seek judicial intervention to ensure that the sanctity of the Constitution of Kenya is protected and not violated. As part of reasonable, fair and just procedure to uphold the Constitutional guarantees, the right to access to justice entails a liberal approach to the question of locus standi. Accordingly in constitutional questions, human right cases, public interest litigation and class actions, the ordinary rules of Anglo-Saxon jurisprudence, that an action can be brought only by a person to whom legal injury is caused, must be departed from. In these types of cases, any person or social action groups, acting in good faith, can approach the court seeking judicial redress for a legal injury caused or threatened to be caused or to a defined class of persons represented, or for a contravention of the Constitution, or injury to the nation. In such cases the court will not assist on such a public-spirited individual or social action group espousing their cause, to show his or their standing to sue in the original Anglo-Saxon conception...”

115. The Court continued:

“In the interest of the realisation of effective and meaningful human rights, the common law position in regard to locus standi has to change in public interest litigation. Many people whose fundamental rights are violated may not actually be in a position to approach the Court for relief, for instance, because they are unsophisticated and indigent, which in effect means that they are incapable of enforcing their fundamental rights, which remain merely on paper. Bearing this in mind, where large numbers of persons are affected in this way, there is merit in one person or organisation being able to approach the court on behalf of all those persons whose rights are allegedly infringed. This means that human rights become accessible to the metaphorical man or woman in the street. Accessibility to justice is fundamental to rendering the Constitution legitimate. In this sense, a broad approach to locus standi is required to fulfil the Constitutional court’s mandate to uphold the Constitution as this would ensure that Constitutional rights enjoy the full measure of protection to which they are entitled.”

116. Article 22(1) and (2) of the *Constitution* provides that:

- (1) (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.



- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
- (a) a person acting on behalf of another person who cannot act in their own name;
 - (b) a person acting as a member of, or in the interest of, a group or class of persons;
 - (c) a person acting in the public interest; or
 - (d) an association acting in the interest of one or more of its members.

117. Article 258 of the Constitution which provides as follows:

- (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
- (a) a person acting on behalf of another person who cannot act in their own name;
 - (b) a person acting as a member of, or in the interest of, a group or class of persons;
 - (c) a person acting in the public interest; or
 - (d) an association acting in the interest of one or more of its members.

118. Long before the promulgation of the current Constitution, it was held on March 11, 1970, in *Shah Vershi Devji & Co. Ltd vs. The Transport Licencing Board* Nairobi HMC No. 89 of 1969 [1970 EA 631; [1971] EA 289 that:

“Section 70 of the Constitution of Kenya itself creates no rights but merely gives a list of the rights and freedoms which are protected by other sections of Chapter V of the Constitution. It may be helpful in interpreting any ambiguous expressions in later sections of Chapter V. The word “person” is defined in section 123 as including “any body of persons corporate or unincorporated. Thus, a company is a “person” within the meaning of Chapter V of the constitution which is headed “Protection of Fundamental Rights and Freedoms of the Individual” and would be entitled to all the rights and freedoms given to a “person” which it is capable of enjoying. The word “individual” can be misunderstood. It is not defined in the Constitution nor in the Interpretation and General Provisions Act (Cap 2). But the meaning of it in the context in which it is used is clear. If a right or freedom is given to a “person” and is, from its nature, capable of being enjoyed by a “corporation” then a “corporation” can claim it although it is included in the list of rights and freedoms of the individual”. The word “individual” like the word “person”, does, where the context so requires include a corporation. The word must be construed as extending, not merely to what is commonly referred to as an individual person, but to a company or corporation. Supposing the right to be given by a special Act of Parliament to a limited company, it seems impossible to suppose that they would not be within the word “individual”. “Individual” seems to be any legal person who is not the general public.”



119. The issue of standing was also dealt with by Nyamu, J (as he then was) in *Mureithi & 2 others (for Mbari ya Murathimi Clan) vs. Attorney General & 5 others* Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443 as follows:

“It will be equally difficult to restrain the public spirited citizen or well organised and well equipped pressure groups from articulating issues of public law in our courts. It is for this reason that I think Courts have a wide discretion on the issue of standing and should use it well in the circumstances of each case. The words person aggrieved are of wide import and should not be subjected to a restricted interpretation. They do not include, if course, a mere busybody who is interfering in things that do not concern him but this include a person who has a genuine grievance because an order has been made which prejudicially affects his interests and the rights of citizens to enter the lists for the benefit of the public or a section of the public, of which they themselves are members. A direct financial or legal interest is not required in the test of sufficient interest.”

120. In this case, the petitioner contends that public resources are being expended by the 3rd to 20th respondents in a manner that lacks transparency and accountability. In *Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others* Civil Appeal No. 290 of 2012 the Court of Appeal stated at page 16 as follows:

“Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the petition was filed before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the argument of lack of standing by counsel for the appellant. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the locus standi to file the petition. Apart from this, we agree with the superior court below that the standard guide for locus standi must remain the command in Article 258 of the Constitution.”

121. The respondent’s case, as I understand it, is that the said respondents are applying public resources contrary to articles 10, 129, 131 and 232 of the *Constitution*. Article 232 of the *Constitution* provides one of the values and principles of public service as efficient, effective and economic uses of resources while article 10 provides for the national values and principles of governance which, according to article 4(2) of the *Constitution*, is the foundation of Kenya as a multi-party democratic State. The said values and principles of governance which are binding upon all State organs, State officers, public officers and all persons whenever they apply or interpret the Constitution, enact, apply or interpret any law or make or implement public policy decisions include good governance, integrity, transparency and accountability; and sustainable development.

122. In this case it is contended that the actions of the 3rd to 30th respondents are contrary to the said Articles.



123. In Nairobi Civil Appeal No. 224 of 2017 – *Independent Electoral and Boundaries Commission & others vs. The National Super Alliance & others*, the Court of Appeal was emphatic in paragraphs 80 and 81 that:

“ 80. In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that Article 10 (2) of the Constitution is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in Article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforceable gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by Article 259(1)(a) which enjoins all persons to interpret the Constitution in a manner that promotes its values and principles.

81. Consequently, in this appeal, we make a firm determination that Article 10(2) of the Constitution is justiciable and enforceable and violation of the Article can found a cause of action either on its own or in conjunction with other Constitutional Articles or Statutes as appropriate.”

124. Article 258 of the *Constitution* permits the petitioner to institute court proceedings, claiming that the Constitution has been contravened, or is threatened with contravention and similarly in this case he can do so not only in his own interest, but in the public interest as well. Under the current constitutional dispensation article 3(1) provides that every person has an obligation to respect, uphold and defend the Constitution. Accordingly, where a person is of the bona fide view that a provision of the Constitution has been violated or is threatened, the person is not only entitled to but is enjoined to bring an action to protect the Constitution. I therefore have no hesitation in my mind in finding that the petitioner herein was within his rights in bringing this Petition to ventilate issues which in his view were geared towards upholding and defending the Constitution.

125. The next issue for determination is whether the Society has illegally received funds from the Government of Kenya. To determine this issue one has to first determine the legal status of the Society. According to the petitioner, the Agricultural Society of Kenya is registered as a Private Society under the Society’s Act (cap108) but masquerades as a public entity, because under section 34 of its Constitution, the President and other public officials are co-opted members of the Society. This contention has not been expressly denied by the respondents. The copy of the Society’s constitution clearly reveals that it is registered under the *Societies Act*. Accordingly, I find that the Agricultural Society of Kenya, is a private society.

126. That leads me to the issue whether the 3rd to 20th respondent have funded the 2nd respondent using public funds and if so whether that action is lawful. Of the 5th to the 20th respondents (the County Governments) that responded to the petition, it was denied that they have funded the Society’s activities. I have gone through the records of these proceedings and I have not been able to find any evidence of funding of the Society by the County Governments. Accordingly, I have no basis to find that the said County Governments are or have been funding the Society.



127. It was submitted by the petitioner that the conduct of the 3rd to 20th respondents to expend public funds in affairs of the Agricultural Society of Kenya, which is a private entity for its own benefit at the expense of the general public of Kenya violates article 129 of the [Constitution of Kenya 2010](#). Further, the 3rd respondent further violated article 129 aforementioned and article 131 (a) (b), by allocating The Agricultural Society of Kenya some Kshs 750 million out of which the Ministry of Agriculture paid the Society some Kshs.175 million on 20th April 2018. According to the petitioner, this action breached and/or violated article 153(4)(a) of the [Constitution](#).
128. To the petitioner, the failure by the Attorney General, the 4th respondent herein, to advise the Government to uphold the rule of law and avoid spending public funds in a manner that is in contravention to the Constitution violated his duties under article 156(4)(a) of the [Constitution](#) as the principal legal adviser to the Government to promote, protect and uphold the rule of law and defend the public interest as decreed under article 156(6). In support of his case, the petitioner relied on article 201 of the [Constitution](#) which provides that:
- “The following principles shall guide all aspects of public finance in the Republic:-
- a. There shall be openness and accountability, including public participation in financial matters.
 - b. The public finance system shall promote an equitable society.
 - c. Public money shall be used in a prudent and responsible way.
129. According to the petitioner, the use of Public funds and other resources to sustain the Agricultural Society of Kenya, a private entity, is inconsistent with article 201 (a) and (b) of the [Constitution of Kenya 2010](#) as it amounts to wastage of public money yet article 201(d) states that public money ought to be used in a prudent and responsible way. Further, the said action is contrary to sections 3 and 107 of the [Public Finance Management Act](#), Act No. 18 of 2011.
130. In response, the 1st and 2nd respondents’ position was that the 2nd respondent, the ASK, as a non-profit making organization, is well justified in receiving financial support in the nature of grant from the Government in facilitation of its outlined public oriented objectives since it undertakes activities which are of public character traditionally reserved for the State thereby undisputedly qualifying it as a private entity undertaking activities for a public benefit. Therefore, no law prohibits such expenditure and none has been quoted by the petitioner. While disclosing that the ASK has been in existence since 1901 running its public affairs on its own and continues to do so to date, it was stated that in the instant case it procedurally sought the Government financial assistance due to the magnitude of the projects it seeks to undertake. Therefore, the relationship between ASK and the Government is lawful, regular, Constitutional, valid and ought to be encouraged as the same is for the benefit of the Public at large.
131. I have considered the objectives of the ASK as well as the submissions filed herein as regards whether or not ASK serves a public purpose. “Public purpose” according to [Black’s Law Dictionary](#):
- “... is synonymous with governmental purpose ... It has for its objective the promotion of the public [health](#), safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents ...”



132. As held by the Alabama Supreme Court case of *Slawson vs. Alabama Forestry Commission*, 631 So.2d 953 (Ala.1994),

“The paramount test should be whether the expenditure confers a direct public benefit of a reasonably general character, that is to say, to a significant part of the public, as distinguished from a remote and theoretical benefit ... The trend among the modern courts is to give the term ‘public purpose’ a broad expansive definition.”

133. I also am guided by the Opinion of the Justices No. 269, the Alabama Supreme Court that:

“What is ‘a public purpose’ depends in part upon the time (age), place, objects to be obtained, modus operandi, economics involved, and countless other attendant circumstances. Generally speaking, however, it has for its objective the promotion of public *health*, safety, morals, security, prosperity, contentment, and the general welfare of the community... The paramount test should be whether the expenditure confers a direct public benefit of a reasonably general character, that is to say, to a significant part of the public, as distinguished from a remote and theoretical benefit... There is no fixed static definition of ‘public purpose.’ It is a concept which expands with the march of time. It changes with the changing conditions of our society. What today is not a public purpose may to future generations yet unborn be unquestionably a public purpose. ‘Public purpose’ is a flexible phrase which expands to meet the needs of a complex society even though the need was unheard of when our State Constitution was adopted... A public purpose that will justify the expenditure of public funds generally means an activity that serves as benefit to the community as a whole. *Pack v. Southern Bell Tel. & Tel. Co.* 387 S.W.2d 789 (1965).”

134. From the record, the ASK mandate includes promotion of excellence in agriculture, provision of forums for exchange of information and learning in agriculture and agribusiness and participation in developing agriculture and related policies. From the material placed before this Court, I have no doubt in my mind that the ASK offers services for the benefit of the general public.

135. That leads to the issue whether the ASK is eligible to receive public funds and resources for public purposes. Article 229(5), (6) and (7) of the *Constitution* provide that:

- (5) The Auditor-General may audit and report on the accounts of any entity that is funded from public funds.
- (6) An audit report shall confirm whether or not public money has been applied lawfully and in an effective way.
- (7) Audit reports shall be submitted to Parliament or the relevant county assembly.
- (8) Within three months after receiving an audit report, Parliament or the county assembly shall debate and consider the report and take appropriate action

136. From the foregoing article, it is clear that the Constitution contemplates situations where other entities may be funded from public funds. In that event section 47(1) of the *Public Finance Management Act, 2012* comes into play. That section provides for the conditions for receiving grants and donations by national government or its entities or third parties and states that:

- (1) In this section and section 48—
 - (a) “donation” means a gift or a contribution;



- (b) “grant” means financial or other assistance by a development partner which is not repayable and—
 - (i) under which public money is paid to or used by a grant recipient;
 - (ii) which is intended to finance or facilitate the development of projects or delivery of services or otherwise assist the grant recipient to achieve goals that are consistent with the policy objectives of the national government; and
 - (iii) under which the grant recipient is required to act in accordance with any terms or conditions specified in a grant agreement.
 - (c) “grant recipient” means the national government or a national government entity authorized to control or spend money under this Act or an incorporated or unincorporated body not otherwise authorized to control or spend money under this Act;
 - (d) “Intended beneficiaries” means the people of Kenya whom the projects or public services financed by a grant are intended to benefit;
 - (e) “Third party” means any other person other than a public officer.
137. The petitioner’s position is that section 47(1) of the *Public Finance Management Act*, 2012 only deals with conditions for receiving grants and donations by national government or its entities or third parties and does not deal with circumstances under which the grants or donations are being made by the national government. However, section 48(1)(g) of the said Act provides that Parliament shall approve the regulations providing for the procedures under which a third party may be authorized to receive, control or pay public money as a grant. Therefore, though not expressly provided for, it is contemplated that in certain circumstances, public funds may be remitted to private entities. However, there ought to be a legislative framework that guides such donations and grants. Section 47(5) of PMFA, however provides that:

“Funds received in form of grants or donations shall only be spent in accordance with articles 221 and 223 of the Constitution and this Section.”

138. Having so said, the next issue is whether the doctrine of the doctrine of constitutional avoidance applies. The said principle was revisited in the case of *Matatu Welfare Association & another vs Invesco Assurance Co Ltd & 3 others*[2019] eKLR where the case of *Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others*[2014] eKLR in which the Doctrine of Constitutional avoidance was set out in the following terms:

“[256]...The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court, 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 US 288, 347 (1936)).”

139. According to the 1st and 2nd respondents, in order to determine the allegations of fraud made by the petitioner, in light of the denials by the said respondents, the Court would require to undertake an intensely fact based inquiry which exercise cannot be undertaken in a Constitutional Court where the evidentiary standard is assessed on cold affidavit evidence.
140. According to the said respondents, a Constitutional Court cannot be subverted to investigate criminal matters, prosecute or make pronouncements in matters outside its Jurisdiction as the procedure for trying criminal offences and the degree of proof therein is distinct from the procedure applicable to Constitutional Petitions.
141. I have considered the material before me and I agree with the said respondents that some of the questions that this court is being called upon to determine may necessitate an intense fact finding investigation which is inappropriate to an affidavit-based inquiry. Based on the material placed before me, I cannot for example find which parcels of land have been allocated to the Society, the amount of money so allocated and the process under which they were allocated in light of my finding that in certain circumstances, the national government may give grants and donations to third parties. In the case of *Silas Make Otuke vs Attorney General & 3 others* [2014] eKLR, the court therefore rightly held as follows;

“The mandate to order investigation and prosecution are vested in the office of the Director of Public Prosecutions pursuant to the provisions of article 157 of the Constitution. Article 157(4) of the Constitution provides:

“The Director of public prosecutions shall have power to direct the inspector-general of the National Police Service to investigate any information or allegation of criminal conduct and the inspector General shall comply with any such direction.”

Article 157(6) provides: “The Director of Public Prosecutions shall exercise state powers of prosecution.”

Under article 157 (10) of the *Constitution* it is provided:

“The Director of public prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions shall not be under the direction or control of any person or authority.”

If we were to allow before us the hearing and determination of the issue of obtaining and of uttering a false degree we would be denying the Director of Public Prosecutions the Constitutional right of directing investigations and prosecuting the alleged crime of fraud.

This petition clearly calls for an intensive fact-based inquiry. The question that has exercised our minds is this: is it proper for the Constitutional Court to undertake the inquiry we are now being invited to undertake? Does this court possess the expertise, mandate and wherewithal to do all of the following:- to investigate what is essentially a criminal matter, entertain its prosecution by private persons before a Constitutional Court to the standard of proof applicable therein, and to eventually arrive at definite findings as to criminal culpability so as to ultimately find the 1st Interested Party unqualified and unfit to hold office as governor, and consequently order fresh elections?



We are of the view that such an undertaking is not only onerous but one that amounts to an usurpation of the mandate the appropriate state organs including the police, CID, the DPP and the criminal courts, and in addition offends the constitutional order. What effect would our decision have on any future prosecution, if any, were to be preferred against the 1st interested party and IEBC officials before the Magistrate’s court? The subordinate court would clearly be embarrassed by our decision one way or the other.”

142. The court further expressed itself as hereunder:

“In our view, if this court takes up this matter the 1st interested party and the 2nd respondent would be effectively denied the opportunity of having the matter commenced at the subordinate court and if found guilty, the opportunity of lodging their appeal to the High Court. We consider that this petition ought to have been brought only after the criminal process is exhausted and a relevant finding of guilt against the 1st interested party is made by a criminal court. We make this determination being well aware of the undesirability of opening the floodgates of litigation, regarding allegations of fraud or other illegal conduct brought against persons holding state office by virtue of the popular mandate of the electorate...The procedure for trying criminal offences and the degree of proof therein is distinct from the procedure applicable to Constitutional Petitions. In relying on *William Cheruiyot Kandie vs Republic* Court of Appeal at Nakuru, Criminal Appeal No. 21 of 1996 [1997] eKLR to support the proposition that the Petitioner’s case has, for want of replying affidavits, not been controverted and is therefore deemed to be proved, the petitioner is improperly avoiding the criminal procedure standard of proof applicable to fraud related offences alleged against the 1st interested party in favour of the much lower standard of balance of probabilities in civil litigation. Returning to the *Mumo Matemu* case, the Court of Appeal noted two crucial observations made in the High Court regarding the evidence of the Petitioner therein. We are alive to the fact that in this Petition the evidence has yet to be produced or tested by cross examination. However, it is possible to glean its general nature from the Petition and affidavits before us. First, the Court of Appeal observed that at the end of the trial (Petition) the High Court could not make a definite finding whether or not allegations concerning the integrity of the respondent had been proved. The High Court had stated:

“That will have to await appropriate legal proceedings tailored for that purpose.”

Second, the Court of Appeal observed that the High Court had noted that the evidence relied upon by the petitioner had “yet to be tested in judicial proceedings and cannot be taken as the truth of the matter”. The Court of Appeal contrasted this situation with the authority considered in the matter namely the South African Constitutional Court decision in *Democratic Alliance v The President of the Republic of South Africa & 3 Others*, CCT 122/11 [2012] ZACC 24. where the Court was supplied with the “tested evidence about the moral probity of the appointee” in the form of reports of Commission of Inquiry and Public Service Commission as well as the sworn testimony of the appointee before the said bodies. In the *Mumo Matemu* case, the Court of Appeal proceeded to give useful guidance as follows:

“The evidentiary standard in Constitutional cases of this nature is a balance of probabilities. In cases involving heightened review, or “intensely fact-based inquiry,” as noted by the superior court below, that balance acquires a higher gradation and must be exercised judiciously. Moreover, it does not do to shift



the burden of proof to the institutions whose actions are impugned, or the person whose appointment is questioned, to prove procedural propriety or suitability...the determination of unsuitability or unfitness of a person to hold State or Public Office on grounds of lack of integrity is a factual issue dependent upon an evaluation of material evidence. When presented as a Constitutional challenge, the evidentiary standard is on a balance of probabilities. This standard is heightened, given its implications on due process, fairness and equal protection. An approach in this regard is to undertake what the High Court called “an intensely fact-based enquiry.”

Under the Constitution, the 1st interested party’s right and indeed the right of every accused to a fair trial in article 50 is one that is not subject to limitation (See Article 25). There are competent State organs charged with the responsibility of receiving and investigating criminal complaints, laying charges before courts which try them in accordance with the law.

Notwithstanding the undisputed jurisdiction of the Constitutional Court under article 258, this court is not persuaded that the circumstances of this case warrant its assumption and exercise of that jurisdiction. We consider that this is an ideal case where the Constitutional Court ought to defer to other relevant bodies created under the Constitution and to give them an opportunity to exercise their respective mandates with regard to the petitioner’s complaint (See the *Mumo Matemu* and Tom Kusienya cases).”

143. That was the court’s view in *Kimani Waweru & 4 others vs Central Bank of Kenya & 7 others* [2018] eKLR, where the Court rendered itself as follows;

“Whereas every person is pursuant to the provisions of Article 3 and 22 under an obligation to respect, uphold and defend the Constitution and a right to right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened, it is my view that those provisions ought not to be abused. As was held in *Karuri & Others vs. Dawa Pharmaceuticals Company Limited and Others* [2007] 2 EA 235:

“Nothing can take the courts inherent power to prevent the abuse of its process by striking out pleadings or striking out a frivolous and vexatious application. Baptising such matters constitutional cannot make them so if they are in fact plainly an abuse of the court process...A Constitutional Court must guard its jurisdiction among other things to ensure that it sticks to its constitutional mandate and that it is not abused or trivialised. There is no absolute right for it to hear everything and it must at the outset reject anything that undermines or trivialises or abuses its jurisdiction or plainly lacks a cause of action... The notion that wherever there is a failure by an organ of the Government or a public authority or public office to comply with the law necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals is fallacious. The Right to apply to the High Court under the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for the normal proceedings for invoking judicial control of administrative action. In an originating application to the High Court, the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to



be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedoms.”

126. Therefore it is my view and I so hold that to institute a Constitutional Petition with a view to circumventing a process by which institutions established by the Constitution are to exercise their jurisdiction is an abuse of the Court process. To allow entertain such a course would lead to the Courts crippling such institutions rather than nurturing them to grow and develop.

127. It is in that light that I understand the Court’s position in *John Harun Mwanu vs. Peter Gastrow & 3 Others* [2014] eKLR that the Constitution only ought to be invoked when there is no other recourse for disposing of the matter and in which the Court expressed itself in the following terms:-

“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 some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights...It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be invoked 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.”

128. Similarly, in *Uhuru Muigai Kenyatta vs Nairobi Star Publications Limited* [2013] eKLR, Lenaola, J (as he then was) held that:

“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 SK Dutambala Cr Appeal No 37 of 1991* (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions.”

129. Fore important as was held in *Jeminah Wambui Ikere vs Standard Group Ltd and Anor* Petition No 466 of 2012 that:

“...each case must be looked at in its specific and unique circumstances and that the Court must determine whether there is a constitutional issue raised in the petition that ought to be addressed by the Court under article 23(1) of the Constitution.”



130. The rationale for this was given in *Rapinder Kaur Atwal vs Manjit Singh Amrit* Petition No 236 of 2011 where it was held that:

“All the authorities above, would point to the fact that the Constitution is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes. In this case, the former must be true.....I must add the following; our Bill of Rights is robust. It has been hailed as one of the best in any constitution in the world. Our courts must interpret it with all the liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violations thereof.”

144. I agree that not every grievance ought to be elevated to a constitutional issue simply because some point of a constitutional nature is involved even if it is not what is required to be determined by the Court in order to arrive at a decision. It must always be remembered that most legal principles are a derivative of some underlying constitutional principle yet not all legal principles amount to constitutional principles. This is not to say that in a constitutional matter, issues of fraud ought not to be canvassed. Similarly, it does not necessarily mean that in matters where *viva voce* evidence is required, the matter cannot be litigated as a constitutional matter. Nothing bars the Court from taking oral evidence and based thereon arriving at a just determination. However, in cases where contested factual averments are raised, cold print affidavits are not the appropriate mode of dealing with the same.
145. Should the Society account for the funds it receives from the National Government? The discourse above clearly underscores the need by any organ that receives money from the National Government to account for the same and the Society is not an exception. It is appreciated even by the 1st and 2nd respondents that the Auditor General is entitled to investigate the manner in which public funds and resources allocated to third parties have been utilised and to table its report therefrom before Parliament for deliberations.
146. Having considered the issues raised in this petition, while I find that some of the reliefs sought herein cannot be granted in the manner sought, this court has the power to grant appropriate reliefs.
147. According to orders that commend themselves to me and which I hereby issue are as follows:
- a) The Agricultural Society of Kenya, though a private entity, is in certain circumstances eligible to receive public funds and other State resources in the performance of duties public functions or purposes.
 - b) A declaration that the any private entity that receives public funds and other State resources is obliged to account for the utilization of the same to the public and the Auditor General is mandated to investigate the same and report to Parliament for appropriate action.
 - c) A declaration that pursuant to the provisions of sections 47 and 48 of the [Public Finance Management Act, 2012](#), Parliament is obligated to formulate a legislative framework to guide such donations and grants by national government or its entities or third parties.
 - d) While appreciating the efforts of the Petitioner in highlighting the need for legislative framework guiding grants and donations from the National Government and the utilisation of public resources by private entities undertaking public objects, in light of the findings made herein there will be no order as to the costs.



148. It is so ordered.

**JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS
26TH DAY OF JANUARY, 2022.**

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Omtatah, the Petitioner.

Mr Nyamweya for Mr Wafula for the 1st and 2nd Respondents

Mr Kithinji for the Cross-Petitioner

Ms Kihara for Mr Njenga for the 10th Respondent, Nyeri County Government

Mr Mburu for Mr Ameyo for the 12th Respondent, Meru County Government.

Mr Kigen for the 14th Respondent, Embu County Government

Mr Ashitiva for the 17th Respondent, County Government of Kakamega

CA Susan

