REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 140 OF 2020

CONSOLIDATED WITH PETITION NO. 28 OF 2020 AND

PETITION NO. 128 OF 2020

OKIYA OMTATAH OKOITI..1ST PETITIONER

MUSLIM FOR HUMAN RIGHTS (MUHURI......................2ND PETITIONER

GEORGE BUSH..3RD PETITIONER

-VERSUS –

THE CABINET SECRETARY, MINISTRY OF HEALTH..1ST RESPONDENT

ATTORNEY GENERAL...2ND RESPONDENT

INSPECTOR GENERAL OF POLICE...................................3RD REPSONDENT

AND

KENYA NATIONAL COMMISSION

ON HUMAN RIGHTS..INTERESTED PARTY

JUDGMENT

INTRODUCTION

THE 1ST PETITIONER'S PETITION

1. The 1st Petitioner moved this Honourable Court vide petition dated 22nd April, 2020 and supported by the affidavit of **Okiya Omtatah Okoiti** of even date. The 1st Petitioner is aggrieved that contrary to the express provisions of ***Section 27 of the Public Health Act, 1921 Cap 242 Laws of Kenya (hereinafter the "PHA")*** the Cabinet Secretary, Ministry of Health (hereinafter the "CS") forced persons required to go into compulsory quarantine for public health protection to pay for their upkeep yet the law requires the State to foot their bills with some individuals having had their period of compulsory quarantine un-procedurally and unfairly extended. The 1st Petitioner is further aggrieved that the CS exceeded his powers to make regulations under ***Section 36 of the PHA*** by purporting to create criminal offences and penalties which is a preserve of the Parliament. It is also the 1st Petitioner's

contention that none of the Regulations issued or purportedly issued under ***Section 36 of the PHA*** define what COVID-19 is, despite the disease caused by coronavirus 2 (SARS-CoV-2) being new and previously unknown both in law and as a health concern thereby making them vague and legally unenforceable

2. The 1st Petitioner also contends that the CS issued Legal notice No. 46 of 3rd April, 2020 and Legal Notices Nos. 50, 51, 52, 53, and 54 of 6th April, 2020 without both public participation and parliamentary approval being in violation of ***Articles 1(1), 2(1-4), 3(1), 4(2), 10(1) & (2), 19(1), 20(1), 21(1), 24, 39, 8, 73, 75, 93, 94(5) & (6), 129, 153(4), 234 and 259(1) of the Constitution and Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 of the Statutory Instruments Act, 2013***. The 1st Petitioner further avers that ***Sections 11(1) & (4) and 14 of the Statutory Instruments Act, 2013*** are unconstitutional and therefore invalid, null and void to the extent that they contradict ***Article 94(5) and (6) of the Constitution*** by allowing statutory instruments or subsidiary legislation made by the Executive to be implemented before it is scrutinized and sanctioned by Parliament

3. The 1st Petitioner therefore seeks the following prayers:

(i) A DECLARATION THAT

a) The decision to quarantine members of the public at various facilities without order of magistrate and forcing them to pay for their upkeep was contrary to Section 27 of the PHA and it contravened the constitutional imperative of the rule of law under Articles 10 and 47(1), tenet that they were not subjected to public participation and to parliamentary scrutiny and approval.

b) The Government should refund in full the money each and every person who it quarantined was forced to pay for their upkeep.

c) To the extent that they were not subjected to public participation and to parliamentary scrutiny and approval, LN No. 46 of 3rd April, 2020 and LN Nos. 50, 51, 52, 53 and 54 of 6th April, 2020 are unconstitutional and therefore invalid, null and void.

d)To the extent that they allow for the implementation of subsidiary legislation before parliamentary scrutiny and approval, Sections 11(1) & (4) and 14 of the Statutory Instruments Act, 2013 are unconstitutional and therefore, invalid, null and void.

e) To the extent that the expression 'face mask' is not defined, the requirement to wear a mask while in public is vague and not enforceable and therefore invalid, null and void.

f) LN No. 46 of 3rd April, 2020 and LN Nos. 50, 51, 52, 53 and 54 of 6th April, 2020 are vague and void as none of them defines what COVID-19 is.

g) Every regulation-making authority as define by the Statutory Instruments Act is under a strict duty and requirement to publish and widely publicize every statutory instrument it enacts through electronic means, newspapers, radio and all other available means, as required by Article 35 of the Constitution and its duties under the Access to Information Act, 2016.

h) To the extent that it is impossible for any person to observe and maintain, without any exception whatsoever, a physical distance of no less than one meter from the next person when in public place during the restriction period, a physical distance that has been selected arbitrarily and without any known public health protection justification whatsoever, is null void and unenforceable

ii) AN ORDER THAT:

a) QUASHING LN No. 46 of 3rd April, 2020 and LN Nos. 50, 51, 52, 53 and 54 of 6th April, 2020.

b) QUASHING sections 11(1) & (4) and 14 of the Statutory Instruments Act, 2013.

c) COMPELLING the Government of Kenya to refund in full with interest at the court rates the money each and every person who it quarantined was forced to pay for their upkeep.

d) COMPELLING the respondents to bear the costs of this suit.

iii) Any other relief this Honourable Court may deem just to grant.

THE 2ND PETITIONER'S PETITION

4. The 2nd Petitioner on the other hand moved this Honourable court vide a petition dated 23rd April, 2020 and supported by the affidavit of **Khelef Khalif** of even date. The 3rd Petitioner is challenging the mandatory isolation and/or quarantined in government health facilities both at the county and national government levels in relation to the COVID-19 pandemic whereby people are being compelled to bear costs related to their medical, accommodation and general upkeep while in such facilities. The 2nd Petitioner further contends that the Inspector General through his officers ensured that those who were picked up breaking the curfew rules set out by His Excellency the President between 1900hours and 0500hours were taken into compulsory quarantine yet they were unable to pay the daily rate of payment in relation to their medical, accommodation and general expenses incurred while at the Government designated quarantine and/or isolation centres.

5. It was further averred that the said isolation centres lack sufficient number of beds, food and other essential basic human needs required by the standards of health within the laws of Kenya yet some individuals have been forcefully quarantined without reasonable cause or probable infection of the Covid-19 virus and/or without prior testing to confirm the status of the individuals in relation to the Covid-19 virus. That ***Section 27 of the PHA*** provides that in the case of an epidemic and a health official concludes or is of the suspicion that an individual is infected then the local authority is mandated to incur all costs relating to the treatment of such persons throughout their isolation.

6. The 2nd Petitioner further contends that the power of the CS to mandatorily require asymptomatic carriers of COVID-19 virus provide specimens for investigations and examination without the carrier's consent raises plausible legal questions of infringement of constitutional rights and freedom including the right to property, right to freedom and security of the person, human dignity and privacy. Furthermore, it was averred that the designated Government isolation centers are in poor degradable conditions contrary to the constitutional provisions.

7. Accordingly, the 2nd Petitioner seeks the following prayers:

a) A DECLARATION that the Respondent's said actions and inactions complained of offend, violate, transgress upon and/or threaten to offend, violate and transgress upon the Petitioners' equal protection of the law, human dignity and right to safety and security as enshrined under Articles 27, 28, 29, 35 and 43 of the Constitution of the Republic of Kenya respectively.

b) A DECLARATION that the Respondent's said action and inactions complained of offend Section 27 and 36 of the PHA, Cap 242, Laws of Kenya.

c) A DECLARATION that the local/county government is mandated to cater for all expenses related to the health care and treatment of patients relating to the COVID-19 virus and epidemic.

d) A DECLARATION that those who are being forcefully quarantined and or isolated without sufficient reasonable cause or prior testing justifying their quarantine and or isolation is against their right and freedoms and should be released unconditionally.

THE 3RD PETITIONER'S PETITION

8. The 3rd Petitioner moved this court vide a Petition dated 6th April, 2020 and supported by the affidavit of **George Bush** of even date. The 3rd Petitioner contends that the directive given by the CS has declined to acknowledge the sanctity of life and denying the poor Kenyans the right to medical services. Furthermore, he contended that quarantine is not given the sensitive attention it deserves but instead has been made punitive even against the poor. As such, he averred that the directive is presumptive, unenforceable as it undermines express provisions of the constitution and must be vacated. He further averred that the CS' directive is in contravention of ***Articles 26(1), 27(5), 28 and 43(1) of the Constitution.***

9. The 3rd Petitioner therefore prays for:-

a) That the Honourable Court do issue an order compelling the 1st Respondent to fully pay for those individual members of the public costs of quarantine to those who cannot afford it to achieve sanctity of life to all Kenyans.

b) A declaration that the action of the 1st and 2nd Respondents of directing the cost of quarantine to be borne by the suspected victims of COVID-19 expressly and singularly violated the provision of Article 26(1) of the Constitution which provides that every person has a right to life and Article 43(1) which provides that every person has a right to health care services.

c) A declaration that the actions of the 2nd Respondent of not paying cost of quarantine against COVID-19 under the Government directive expressly and singularly violates the provisions of Article 26(1) of the Constitution which provides that every person has a right to life and Article 43(1) which provides that every person has a right to health care services.

d) A declaration that the 1st Respondent directive is inconsistent with the Article 2(g) of the WHO Constitution (1946) supplement 2006 which provides that human right creates a legal obligation on states to ensure access to timely, acceptable and affordable health care of appropriate quality as well as to providing for the underlying determinants of health.

e) A declaration that the respondents directive to pay costs of quarantine is denying the public health services and a violation of Article 28 of the Constitution of Kenya which provides that every person has inherent dignity that must be respected and protected.

f) A declaration that the actions of the 1st Respondent to provide quarantine cost to patients admitted at the quarantine institution expressly and singularly violates the provision of the Article 27(5) which provides that no person shall discriminate against another as all do not have income during this pandemic.

g) The 1st Respondent to pay costs of this Petition.

RESPONSE

THE 1ST AND 2ND RESPONDENTS' RESPONSE

10. In response to the Petitions, the 1st and 2nd Respondents filed a Replying Affidavit by **Mutahi Kagwe**, the CS Ministry of Health sworn on 5th May, 2020. He averred that the instant petitions are premised on the same grounds as in ***Nairobi Petition No. 132 of 2020, LSK v Attorney General and Another*** challenging the legality of the ***Public health (Covid-19 Restriction of Movement of Persons and Related Measures) Rules, 2020*** and the legal notices thereunder and premised on the alleged grounds of lack of public participation, introduction of criminal penalty contrary to statute, vagueness, lack of approval by Parliament and contrary to the Statutory Instruments Act and therefore *sub-judice*. He further averred that in ***Nairobi Constitutional Petition No. 120 of 2020, LSK v Hillary Mutyambai & Others***, the Court upheld that the Government is entitled to act on the basis of precautionary principle to contain the spread of the deadly COVID-19 virus and in view of the emergency circumstances occasioned by the rapid spread of the virus, the need for immediate action to prevent and control the spread of the same, public consultations was not feasible prior to the publication of the rules. Furthermore, he averred that the precipitate measures that the rules seek to implement were undertaken within the context of necessity which is permitted in law within the context of prevailing circumstances.

11. It was further his contention that the provisions of ***Section 5A (2) of the Statutory Instruments Act*** contemplates instances where statutory instruments may be promulgated without prior consultations. Be that as it may, he averred that without the restrictions imposed by the rules, uncontrolled interactions between persons, including those who are asymptomatic, infected persons would accelerate community transmissions across the country thereby jeopardizing efforts at containing the spread of the virus. However, had the rules not been in the nature of precipitate pre-emptive actions then the same would have been subjected to public participation as was the case with the preceding ***Public Health (Prevention, Control and Suppression of Covid-19) Rules***. That pursuant to ***Rule 12 of the said Rules***, the CS has power to declare any place to be an infected area and regulate and/or prescribe such activities and conduct that may be carried out in the infected area. It was also his averment that the provisions of the Statutory Instruments Act and government actions both enjoy the presumption of constitutionality and legality. Accordingly, he urged that the petitions be dismissed.

THE INTERESTED PARTY'S RESPONSE

12. The Interested Party on its part filed a Replying Affidavit by **Dr. Bernard Mogesa** sworn on 26th May, 2020 in support of the Petitions. He deponed that on 27th March, 2020, the 1st Respondent established the COVID-19 Quarantine Protocol (hereinafter referred to as "the Protocol") which was meant to provide a framework for the management of quarantine in the mandatory government designated areas and hotels whereby all persons in mandatory quarantine were expected to pay the cost of their accommodation prior to checking out which in the Interested Party's view is unconstitutional, oppressive, illegal and unfair. It was further his averment that the Protocol provides that persons should undergo quarantine for a duration of fourteen (14) days and therefore any arbitrary and/or unilateral extension of the period without any justifiable or cogent reason is not only unconstitutional but a violation of the individual's legitimate expectation and the right to fair administrative action.

13. It was further his contention that based on the Protocol and consistent with the World Health Organization (WHO) recommendations, persons suspected to be infected with the virus should be quarantined for a period of fourteen (14) days only for purposes of early detection of cases. However, the Interested Party has documented incidents of Kenyans who had been held in mandatory quarantine within state facilities and ordered to pay for the quarantine related costs before they could be released from the said facilities with some even unable to meet such costs thereby being coerced into depositing their passports as security for payment and signing a contract binding them to clear the charges within a duration specified in the contract. That ***Section 27 of the PHA*** provides that any expenses related to the removal and isolation of a suspected patient should be borne by the state.

14. That the 1st Respondent on 6th May, 20020 confirmed that the state shall meet the quarantine related costs incurred by Kenyans quarantined at state facilities and for the 1st Respondent to go back and charge accommodation costs is a grave violation of the constitutional rights of persons. Furthermore, he averred that the Respondents have neither refunded the quarantine costs illegally charged to quarantined persons nor have they revoked contracts signed by those who could not afford the quarantine costs and still holds the passports illegally obtained.

THE 1ST PETITIONER'S REBUTTAL

15. In his rebuttal, the 1stPetitioner filed a Supplementary Affidavit dated 27th May, 2020. He deposed that the consolidated petitions are not sub-judice ***Petition No. 132 of 2020*** because the present petitions are challenging the constitutionality of Legal Notices No. 37, 46, 50, 51, 52 and 53 of 2020 and abuse of certain sections of the PHA and the constitution. To the extent that the Government was acting on the basis of precautionary principles to contain the virus, he averred that the government does not enjoy any *de facto* emergency powers. He further averred that the CS exceeded his powers to make rules for prevention of disease under ***Section 36 of the PHA*** by purporting to create criminal offences and penalties contrary to ***Section 13(n) of the Statutory Instruments Act.***

16. It was further his deposition that Section 5A(2) of the Statutory Instruments Act, 2013 does not oust the constitutional, statutory and case law requirement for public participation but strictly limited to application of ***Section 5A(1) of the Act***. That regarding LN Nos. 46 and 50, despite being tabled in the National Assembly, the same have not been approved due to very serious concerns about their legality. Be that as it may, he averred that ***Section 13 of the PHA*** does not vest the CS with unbridled powers but to act within the law. He further averred that the regulations published in the ministry's website and not gazetted deprives them of any force of law in line with ***Article 94(5) and (6) of the Constitution*** as read together with the Statutory Instruments Act. He therefore reiterated that the impugned measures the Government has taken to contain the COVID-19 pandemic are unconstitutional, unlawful and therefore invalid, null and void.

PARTIES SUBMISSIONS

THE 1ST PETITIONER'S SUBMISSIONS

17. The 1st Petitioner filed written submissions dated 26th May, 2020. On the issue whether the consolidated petitions are sub-judice, Mr. Okiya Omtata submitted that the consolidated petitions are challenging the constitutionality of LN Nos. 37, 46, 50, 51, 52 and 53 of 2020 and sections of the Public Health Act in so far as people suspected of having been exposed to COVID-19 have been put in compulsory isolation without a certificate from a medical officer or an order from a magistrate and forced to pay for compulsory confinement. Mr. Omtata further submitted that in addition, the consolidated petitions are challenging the failure of the Government to strictly adhere to ***Section 27 of the PHA*** thereby leading to previously uninfected people in isolation facilities getting infected from fellow, infected detainees in breach of ***Article 43(1)(a) of the Constitution, Section 4(a) and 5(1) and (2) of the Health Act***. Furthermore, it was submitted that the petitions are challenging the arbitrary extension of the period of compulsory isolation, contrary to ***Article 47 of the Constitution and the Fair Administrative Action Act, 2015.***

18. On the issue whether a declaration of a State emergency was necessary and a condition precedent to the enactment and enforcement of the emergency policies and legislation, it was submitted that while the High Court in **Nairobi Constitutional Petition No. 120 of 2020 between the Law Society of Kenya v Hillary Mutyambai & Others** validated the actions of the Respondent by upholding that the government was entitled to act on the basis of precautionary principle to contain the spread of the deadly Covid -19 virus, the court failed to comprehend the precautionary principle in law and how it applies in Kenya and furthermore, there is no provision for the exercise of *de facto* emergency power. It was further his submission that under Kenyan law, the precautionary principle is restricted to matters of environment and is enshrined in ***Article 70 of the Constitution*** and operationalized in the ***Environmental Management and Co-ordination Act, 1999.***

19. It was further submitted that a plain reading of ***Article 58 of the Constitution*** shows that a mere declaration of a state of emergency does not change any laws but instead empowers the National Assembly to enact laws that meet the exigencies. In his view therefore, emergency rule is a legal regime governed by the principles of legality of administration, based on the rules of law. Accordingly, it was submitted that by dint of ***Article 29(b) and 58 of the Constitution***, there was need to declare a state of emergency before the enactment and enforcement of the emergency policies and legislation which limit rights and fundamental freedoms and which were and continue to be implemented by the Government to contain the corona virus pandemic. Therefore in his view, in the absence of a declaration of a state of emergency, the executive decrees made by the Government to contain Covid-19 pandemic are without the force of law and cannot bring about restrictions on rights and fundamental freedoms.

20. To that end, he cited the case of **Republic v Independent Electoral and Boundaries Commission (IEBC) Ex parte National Super Alliance (NASA) Kenya & 6 Others (2017) eKLR** whereby a three-judge bench held that the constitution expresses the will of the people and that will must be respected at all times. He further cited the case of **Dr. Christopher Nadarthi Murungaru v SG & Anor, Civil Application No. 43 of 2006 (24/2006)** where the Court of Appeal held that the constitution is reflection of the supreme public interests and its provisions must be upheld by the courts sometimes even to the annoyance of the public and the only institution charged with the duty to interpret the provisions of the Constitution and to enforce those provisions is the High Court and where permissible, with an appeal to the Court of Appeal.

21. On the issue whether the decision to quarantine members of the public at various facilities without order of a magistrate and forcing them to pay for their upkeep was contrary to ***Section 27 of the Public Health Act***, it was submitted that the plain reading of ***Section 27 of PHA*** prescribes the irreducible minimum regarding isolation of persons who have been exposed to infection being the opinion of the medical officer of health, the order of a magistrate and the local authority of the district where such person is found bears the costs of detaining the person which he submitted the Respondents had not demonstrated. It was further his submission that the constitutional rights of persons placed under isolation and/or compulsory quarantine were violated and as such there was no basis in law for charging those people for their upkeep at the mandatory isolation centres.

22. On the issue whether the provisions of LN No. 46 of 3rd April, 2020 and LN Nos. 50, 51, 52, 53 and 54 of 6th April, 2020 are vague and void, incurably defective and not enforceable, Mr. Omtata submitted that the impugned legal notices do not define Covid-19 and corona virus and there is no recognition of the novelty of the new virus. Further, he submitted that there is no definition of what a *'proper face mask'* is and no specifications are given for what kind of face mask is required to be worn to prevent the spread of the corona virus and to comply with the mandatory requirement to wear one. Accordingly, the impugned legal notices were vague and void and not enforceable.

23. In addition to the lack of public participation, Mr. Omtata submitted that the order required under Section 35 of the Public Health Act, 1921, was not published and became legally effective until 27th March, 2020 yet by the time of its publication, the seriousness of the SARS-CoV 2 was already widely known and not in any doubt. As a matter of fact, he submitted that the executive decision that set out the government's plans to deal with the pandemic had been in force for almost a month before the gazettement of COVID-19 as a notifiable disease under the PHA and it is not clear what framework and plans the government was following and implementing between the date of the Executive Order (28.02.2020) and the bringing of the disease under the PHA (27.03.2020). It was further submitted that the LN 37/2020 merely declares the "coronavirus disease 2019" as a notifiable disease for the purposes of the PHA, 1921 which in his view was arguably so vague as to have no legal consequences considering there are many types of coronaviruses currently in circulation. He notes that the formal designation by WHO happened on 30.01.2020 and the legal and formal legal name of the disease caused by novel Coronavirus 2 (SARS-CoV-2) is COVID-19 and not 'Coronavirus disease 2019' which fact ought to have been known by the Cabinet Secretary for Health. Consequently, it was submitted that this legal notice and anything done under its authority is null and void on account of ambiguity and lack of precision of what it seeks to address.

24. Regarding LN 46/2020, it was submitted that in addition to the lack of public participation, the legal notice introduces to the Laws of Kenya a claimed public health threat known as 'COVID-19' with no definition provided of what this threat might be, how

it threatens public health in the country and hence the need to take action to secure and maintain health. Further, it was submitted that Regulation 3(1) and 11(3) explicitly contravene ***Sections 26 and 27 of the PHA*** whereby compulsory confinement of people with infectious disease in a place other than their ordinary residences is only allowed if such people cannot be accommodated or be treated or nursed in such a manner as to adequately guard against the spread of the disease. This is contrary to the regulations which require the mandatory removal of people with COVID-19 into compulsory quarantine even where such people can be accommodated or treated or nursed away from such facilities in such a manner as to adequately guard against the spread of the illness.

25. To buttress his argument, Mr. Omtata cited the case of **Daniel Ng'etich & 2 Others v Attorney General & 3 Others** where the court confirmed the severe limitations of when the government can require individuals who need to be quarantined for public health protections and are unable to adequately accommodate themselves, can be held in places others than registered medical institutions.

26. Regarding LN No. 50/2020, it was submitted that similarly, it was enacted without any public participation and there is no definition of what 'COVID-19' is. Furthermore, the legal notice does not appear to be anchored on any specific provision of Section 36 of the PHA. In addition, it was submitted that the Regulations interfere with rights under the Bill of Rights of the Constitution including the right to freedom of movement, right to enjoy one's property and association. Further, they create new offences, the basis of which is not provided for by the enabling Act of Parliament neither has any explanation been given by the Ministry how providers of personal services would carry out their trade and still maintain the mandatory, legally enforceable physical distance of not less than one meter between them and their clients.

27. Regarding LNs Nos. 51-54/2020, it was submitted that no efforts whatsoever were made to involve the public before the measures were enacted. Moreover, none of the Regulations identify the specific, applicable subsections of ***Section 36 of the PHA*** and therefore impossible to determine if these Regulations meet the constitutional and legal requirements especially under ***Article 24*** to make them reasonable and justifiable in an open and democratic society. It was therefore submitted that all the COVID-19 Regulations should be nullified for failing to fully comply with the Constitution of Kenya and the applicable Act of Parliament.

28. On the issue whether the penalties imposed in the impugned regulations are invalid, null and void, it was submitted that the Cabinet Secretary, Ministry of Health exceeded his powers to make rules for preventions of disease under ***Section 36 of the PHA*** by purporting to create criminal offences and penalties which is the preserve of Parliament and which Parliament already exercised in ***Sections 28 to 31 of the PHA***. To the extent that the LNs were not subjected to public participation, Mr. Omtata submitted that the Executive and other branches of Government do not enjoy any inherent powers to act outside the law or impose a *de facto* state of emergency but the same must be done strictly in accordance with the Constitution otherwise such action or omission is unconstitutional and therefore, invalid, null and void.

29. Mr. Omtata further submitted that ***Sections 11(1) & (4) and 14 of the Statutory Instruments Act, 2013*** are unconstitutional and therefore, invalid, null and void to the extent that they contradict ***Article 94(5) and (6) of the Constitution*** by allowing statutory instruments or subsidiary legislation made by the Executive to be implemented before being scrutinized and sanctioned by Parliament. He further submitted that every regulation making authority as defined by the Statutory Instruments Act is under a strict duty and requirement to publish and widely publicize every statutory instrument it enacts through electronic means, newspapers, radio and all other available means.

30. On the issue of costs, Mr. Omatata submitted that he relies on the principles of award of costs in constitutional litigation between a private party and the State being that a private party who is successful should have costs paid by the State, and if unsuccessful, each party should bear their own costs as was held in the case of **Kenya Human Rights Commission v Communications Authority of Kenya & 4 Others (2018) eKLR**. Mr. Omtata also relied on the *ratio decidendi* in the South African case of **Biowatch Case as CCT 80/2008 or 2009 ZACC** at paragraph 21 where the court held that as a general rule in constitutional litigation, an unsuccessful litigant in proceedings against the state ought not to be ordered to pay costs. Accordingly, he urged that he had made a case for the court to allow the consolidated Petitions.

THE 2ND PETITIONER'S SUBMISISONS

31. The firm of Lumatete Muchai appearing for the 2nd Petitioner filed written submissions dated 18th May, 2020. Regarding the duty of the Central and Local government to citizens in relation to Covid-19, it was submitted that persons being isolated and quarantined are being forced to pay for their own general expense and upkeep which goes against ***Section 27 of the PHA*** and a violation of ***Articles 20 and 43 of the Constitution of Kenya***. It was further submitted that the National and County governments

have failed to ensure that persons who are undergoing isolation and quarantine are provided with the highest attainable health care and accessible and hygiene friendly housing. This position, counsel submitted was established in **Petition No. 5 of 2014 J.O.O v Attorney General & Others.**

32. On the issue whether the Government actions on compulsory/forceful isolation quarantine are legal, it was submitted that actions by the Ministry of Health and Inspector General can clearly be seen as blatant disregard of the law particularly ***Section 27 of the PHA*** which requires any health official to obtain a warrant and or order from a magistrate before admitting any person to mandatory isolation and or quarantine. Furthermore, counsel submitted security and law enforcement officers are arbitrarily, and in the absence of reasonable grounds, causing indiscriminate mandatory quarantine of persons who are not carriers of or are not suffering or suspected of suffering from Covid-19 contrary to the ***Public Health Act, Cap.242, the Public Health (Prevention, Control and Suppression of Covid-19) Regulations, 2020***. Accordingly, he relied on the case of ***Michael Rotich v Republic, Miscellaneous Criminal Application No. 304 of 2016*** where the learned Judge stated that it is unlawful for the police to seek to have a person who has been arrested to continue to remain in its custody without a formal charge being laid in court. If this trend continues, counsel submitted it would erode all the gains made in the advancement of human rights and fundamental freedoms as provided in the Bill of Rights since the Constitution was promulgated in August 2010.

33. On the issue whether persons previously under isolation and quarantine should receive damages/compensation, counsel cited ***Section 21(1) and (3) of the Government Proceedings Act***. He also relied on ***Miscellaneous Application No. 268 of 2017 Judicial Review Republic v The Principle Secretary State Department of Interior, Ministry of Interior & Coordination of National Government & Others*** *and* ***Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] eKLR.***

34. On the issue whether the rights and fundamental freedoms of persons placed under voluntary or mandatory quarantine are or have been violated, counsel submitted that the National and County governments through the Ministry of Health and Inspector General of Police have and continue to violate the rights and freedoms of persons under isolation and or quarantine contrary to ***Article 43 of the Constitution*** by failing to provide the highest attainable health care and health care environment at the government-established Covid-19 health centres. Further, the Ministry of Health and the Inspector General of Police directly and or through their agents have and continue to violate the Rights of persons under mandatory or forceful isolation and or quarantine contrary to ***Articles 49 and 50 of the Constitution of Kenya***. Accordingly, he urged that the Petition be allowed.

<u>THE THIRD RESPONDENTS SUBMISISONS</u>

35. The 3rd Respondent filed submissions dated 27th April 2020.

36. The 3rd Respondent on issue of whether there are those who cannot afford quarantine cost strongly believe that many Kenyans cannot pay the cost of quarantine and argues that the government do pay quarantine costs. It is urged that there are many Kenyans who are not employed, who live from hand to mouth. It is further submitted that the pandemic directives to ***"stay at home"*** have left the bigger population with no jobs. That the directives have caused many Kenyans suffer and further caused many to be jobless.

37. The 3rd Respondent submit that ***Articles 27(1) of Constitution of Kenya*** states that ***"Every person is equal before the law and has the right to equal protection and equal benefit of the law."***

38. He avers that those Kenyans who do not have permanent jobs do not stand equal chance to meet costs needed under quarantine.

39. The current jobless Kenyans who are living from hand to mouth and are compelled to pay for quarantine costs are not able to pay the quarantine sum. The lowest quarantine cost amount is 2,500 according to LIST OF QUARANITINE HOTEL/FACILITIES IN NAIROBI AND MOMBASA dated 24th March, 2020 as per 3rd Respondent's annexed affidavit marked as "GB2".

40. The 3rd Petitioner submit that the government directive is not touching on the plight of the poor who are the majority. He urges that this Court has a duty to up hold the sanctity of life and protect the vulnerable group in the society.

41. It is urged by the 3rd Respondent that the rights to health care services are under attack, and the Court should arise strongly and protect achievements which have been made by Kenyans.

42. It is averred by the 3rd Respondent that the directive is presumptive that only the rich are under quarantine, and context that to protect the poor the directive should be vacated and replaced with implementable directive by the minister for health.

43. The 3rd Respondent further contend that, the directive given by the minister has declined to acknowledge the sanctity of life and is denying the poor Kenyans the right to medical services or opportunities which the law is clear about.

44. The 3rd Respondent submit that the Minister of Health directive is in breach of Fundamental Law as it negatively attacks the Supreme Law of Kenya.

45. On issue of whether the 1st and 2nd Respondents are in breach of ***Article 43(1) of the Constitution*** which provides that every person has the right to health care services, the 3rd Petitioner on quarantine cost submits that quarantine costs which are above Kshs.2,500 according to the Nairobi and Mombasa provided Hotels cannot be afforded by Kenyans who are earning below Kshs.500 per day.

46. On whether the Respondent is in breach of ***Article 2(g) of the WHO Constitution (1946) Supplement 2006*** which provides that human right creates a legal obligation on states to ensure access to timely, acceptable, and affordable health care of appropriate quality, it is urged ***Article 2(g) of the WHO Constitution (1946) Supplement 2006*** provides "***that human right creates a legal obligation on states to ensure access to timely, acceptable, and affordable health care of appropriate quality."***

47. The 3rd Petitioner submits the government directive which cannot be met by majority of Kenyans fails to meet the legal obligation on states to ensure access to timely, acceptable, and affordable health care of appropriate quality.

48. The 3rd Petitioner submits that the action of the 1st Respondent to have quarantine cost met by patients admitted at the quarantine institutions expressly and singularly violates the provisions of ***Article 27(5) of the Constitution.***

49. ***Article 27(5) of the Constitution of Kenya*** states that ***"A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4)." Article 27(4) of the Constitution of Kenya*** states that; ***"The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth."***

50. The Petitioner submits that the majority of Kenyans earn less than Kshs.500 per day. It is therefore practically impossible for that group to afford to quarantine themselves.

51. It is 3rd Respondents contention that the Quarantine facility seems to have been put only for the rich, as the amount charged, and where they are situated is discriminative and not meant for the general public.

THE INTERESTED PARTY'S SUBMISSIONS

52. Also in support of the consolidated petitions, the Interested Party filed written submissions dated 26th May, 2020. On the issue whether the impugned rules are unconstitutional due to lack of public participation, it was submitted that public participation is a national value and principle of governance enshrined under ***Article 10(2) (a) of the Constitution*** and cited the case of ***British American Tobacco Ltd v Cabinet Secretary for the Ministry of Health & 5 Others [2017] eKLR*** where the Court of Appeal held that public participation and consultation has been entrenched and indeed, the concept is consistent with the principle of sovereignty of the people that permeates the Constitution and in accordance with ***Article 1(4) of the Constitution*** is exercised at both national and county levels.

53. It was further submitted that there was a failure of public participation and blatant disregard for the law in coming up with the impugned Rules without affording members of the public and/or their elected representatives an opportunity to interrogate the contents thereof. The 1st Respondent did not at all facilitate any (meaningful or otherwise) public participation and/or engagement with the Rules in public or in Parliament. Firstly, the Rules were gazetted on the 6th April 2020 and enforcement commenced immediately. There was no opportunity to facilitate compliance especially for members of the public who were traveling into and out of the Nairobi Metropolitan Area. Secondly, it was submitted that the Rules have been extremely difficult to obtain, even for those who might have been in a position to access the Legal Notice electronically making it exceptionally hard for the public to know with certainty what conduct was prohibited and punishable. Therefore, in counsel's view failure to facilitate public

participation renders the impugned Rules unconstitutional, null and void.

54. To buttress his argument, counsel cited the case of ***Doctors for Life International v Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC),*** whereby Ngcobo, J who delivered the leading majority judgment expressed himself as follows on the issue of public participation. He held that the right to political participation is a fundamental human right, which is set out in a number of international and regional human rights instruments. In most of these instruments, the right consists of at least two elements: a general right to take apart in the conduct of public affairs and a more specific right to vote and/or to be elected.

55. Counsel further submitted that ***Section 5 of the Statutory Instruments Act, 2013***, which requires regulation-making authorities to undertake appropriate consultation before making statutory instruments embodies public participation. It was his submission that in **British American Tobacco Ltd v Cabinet Secretary for the Ministry of Health & 5 others** *(supra)* making of the Tobacco Control Regulations, 2014 (regulations) was vitiated by lack of public participation and consultation so as to render the Regulations unconstitutional or unlawful. The Court of Appeal noted that **Section 5 of the Statutory Instruments Act, 2013** clearly provides that consultation must be held "with persons who are likely to be affected by the proposed instruments." In the circumstances, counsel submitted that public participation would have been conducted and the failure thereof renders the impugned Rules unconstitutional, null and void.

56. On the issue whether the impugned rules are invalid on account of failure to comply with the procedure for enactment of statutory instruments, Counsel submitted that the ***Statutory Instruments Act, 2013 (Act No. 23 of 2013)*** provides an elaborate procedure for enactment of subsidiary legislation including the making, scrutiny, publication and operationalization of statutory instruments and the impugned Rules are null and void on account of failure to comply with the mandatory provisions of the Statutory Instruments Act particularly ***Section 5*** and ***Section 11 of the Act***. Accordingly, counsel cited the case of ***Kenya Country Bus Owners' Association (Through Paul G. Muthumbi –chairman, Samuel Njuguna – Secretary, Joseph Kimiri –Treasurer) & 8 Others v Cabinet Secretary for Transport & Infrastructure & 5 others [2014] eKLR*** where the High Court held that the failure to comply with ***Section 11 of the Statutory Instruments Act*** rendered the ***National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, 2013*** null and void.

57. Counsel submitted that ***Section 11(4)*** is couched in mandatory terms and given its literal meaning, it is crystal clear that "the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void." In support of their proposition, counsel cited the case of ***Republic v Cabinet Secretary, Ministry of Agriculture, Livestock & Fisheries & 4 Others Ex Parte Council of County Governors & another [2017] eKLR*** where the High Court held that ***Section 11(4)*** does not give the Court an option since the section is couched in mandatory terms and the consequences for non-compliance are similarly provided. It follows that the requirement must be read in mandatory terms as opposed to being merely directory. The Court, citing ***"Judicial Review of Administrative Action" 5th Edition, Sweet and Maxwell, 1995*** further observed that if, however, the instrument is required to be laid before Parliament, it is arguable that the instrument acquires legal validity only when it is so laid. Counsel also cited ***Okiya Omtatah Okoiti v Commissioner General, Kenya Revenue Authority & 2 Others [2018] eKLR*** where the High Court held that Statutory Instruments must conform to the Constitution, Interpretation and General Provisions Act, The Parent Act and The Statutory Instruments Act. The Court observed that the laying of the Regulations before the National Assembly is a key safeguard to ensure that the people's representatives are satisfied with the legality, fairness, necessity and propriety of subsidiary legislation.

58. While also relying on ***Section 34(1) of the Interpretation and General Provisions Act***, it was submitted that that the said provision makes it clear that while the law requires that subsidiary legislation made under an Act of Parliament be laid before the National Assembly, there are circumstance where this will not be required if the provisions of the parent Act make it apparent that this is not required. However, the Public Health Act does not make any exceptions to this requirement and the impugned Rules should have been tabled before Parliament for scrutiny. The Interested Party therefore submitted that the impugned Rules are invalid, null and void for failure to comply with the law and should be so declared.

59. On the issue whether the 1st Respondent's decision to quarantine people without a Magistrate's Order and at their own cost contravenes ***Section 27 of the Public Health Act*** and thereby unconstitutional, counsel submitted that the import of the aforesaid section is two-fold; that a person can only be isolated based on the opinion of a Medical officer accompanied by an order of a Magistrate; and that the costs associated with the isolation are borne by the local authority of the district (the State) where the isolated person is found. It was further submitted that ***Section 27 of the Public Health Act*** is consistent with the State's obligation as enshrined under ***Article 43(1)(a) of the Constitution*** which provides that every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care. It was further submitted that

the said Article is further amplified by ***Section 5(1) & (2) of the Health Act, 2017***.

60. Counsel further submitted that the right to health equally finds expression in regional and international law which form part of the Kenyan law by dint of ***Article 2 (6) of the Constitution***. Accordingly, he cited Article 16 of the ***African Charter on Human and Peoples' Rights*** (The Banjul Charter); ***Article 12(1) of the International Covenant on Economic, Social and cultural*** at paragraph 37 and ***General Comment No. 14 of the Committee on Economic, Social and Cultural Rights*** at paragraph 37. To further buttress their argument, counsel cited the case of ***MAO & Another v Attorney General & 4 Others [2015] eKLR*** whereby while interpreting the aforesaid Paragraph 37 in relation to persons who were detained in a public health facility due to inability to pay the hospital costs, the court held that in circumstances such as the petitioners found themselves in, where they were not able to provide for themselves, the state was under an obligation to provide affordable reproductive health care services. Based on the foregoing, it was submitted that the actions of the 1st Respondent of quarantining persons without an order form a Magistrate and at their own cost is a violation of ***Section 27 of the Public Health Act, Article 43 (1)(a) of the Constitution*** and the relevant regional and international instruments.

61. On the issue whether the provision of ***Section 11(4) of the Statutory Instruments Act, 2013 i***s unconstitutional, counsel submitted that the said ***Section 11(4) offends Article 94(5) of the Constitution*** to the effect that it purports to "legalize" any actions that might be done on the strength of a statutory instrument before tabling in the relevant House of Parliament. The import of ***Article 94(5) of the Constitution*** is that any legislation must be subjected to parliamentary scrutiny consistent with the spirit and intention of the Statutory Instruments Act unless the same meets the tests espoused under ***Article 94 (6) of the Constitution*** which is not the case in the present situation. Accordingly, the said ***Section 11(4)*** is incongruent with the spirit and object of the ***Statutory Instruments Act, 2013*** and has the deleterious effect of vesting law-making powers to regulatory authorities and/or sanctioning laws made by regulatory authorities contrary to the Constitution. In the circumstances, it is was submitted that ***Section 11(4) of the Statutory instruments Act, 2013*** is unconstitutional to the extent that it purports to sanction actions that may be done on the strength of a Statutory Instruments before it is laid before the relevant House of Parliament.

62. To buttress his argument counsel cited Ringera J. (as he then was) in ***Njoya and Others v Attorney General [2004] 1 KLR 232*** where he observed that the Constitution is the supreme law of the land; it is a living instrument with a soul and a consciousness; it embodies certain fundamental values and principles and must be construed broadly, liberally and purposely or teleologically to give effect to those values and principles. This position he submitted is further fortified by the decision of this Honourable Court in ***Katiba Institute & another v Attorney General & another [2017] eKLR*** where it was held that that under ***Article 2(4) of the Constitution***, any law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid. Given the undoubted unconstitutionality of the said section, they submitted that it goes without saying that any action purported to be done on the basis of the same is a nullity and further perpetuates an illegality.

63. To buttress this point, reliance was placed on the sentiments expressed by this Court in ***Law Society of Kenya v Kenya Revenue Authority & Another [2017] eKLR*** to the effect that it is trite that an unconstitutional law is not law and actions or decisions taken pursuant to the unconstitutional law would outrightly be illegal. In their view therefore, the failure by the 1st Respondent to transmit the impugned Rules to the relevant House of Parliament for consideration cannot be cured by ***Section 11(4) of the Statutory Instruments Act*** and as such all the resultant actions purported to be done on the strength of the said section are illegal and a grave violation of the Constitution. They further invited the court to declare ***Section 11(4) of the Statutory Instruments Act*** unconstitutional as it fails to meet the constitutional muster. In the same breath, they sought that the impugned Rules be declared invalid, illegal and in contravention of the constitution for flouting the mandatory procedural requirements of the ***Statutory Instruments Act, 2013***. In conclusion therefore, counsel urged the court to allow the consolidated Petitions as prayed.

THE RESPONDENTS SUBMISSION

64. Mr. Bitta learned State Counsel, appearing for the Respondents filed written submissions dated 6th July, 2020 in opposition of the consolidated petitions. Counsel submitted that the Plaintiffs bear both the legal and evidential burden of proof and the incidents of legal burden and evidential burden were clearly enunciated in the case of ***Raila Odinga v IEBC & 3 Others Supreme Court of Kenya Election Petition No. 5 of 2013*** where the Supreme Court held that the Petitioner should be under obligation to discharge the initial burden of proof, before the Respondents are invited to bear the evidential burden. Similarly, he cited Mativo J in ***Kiambu County Tenants Welfare Association v Attorney General & another [2017] eKLR*** who also observed that courts have over the years established that for a party to prove violation of their rights under the various provisions of the Bill of Rights they must not only state the provisions of the Constitution allegedly infringed in relation to them, but the manner of infringement and the nature and extent of that infringement and the nature and extent of the injury suffered (if any).

65. Counsel argued that the 2nd Petitioner in the consolidated Petitions who was the sole petitioner in Mombasa Petition No. 28 of 2020 filed a verifying affidavit in support of its petition sworn by Khelef Khalifa on the 23rd of April 2020 which affidavit contains only three paragraphs'; the first paragraph sets out Khelef Khalifa as the Chairperson of the 2nd Petitioner, the second paragraph allegedly verifies the averments set forth in the Petition and the last paragraph states that what is deponed to is true to the best of the deponents knowledge. It was counsel's submission that the Petition by the 2nd Petitioner has no actual basis upon which it should succeed since the 2nd Petitioner has failed to discharge its evidential and legal burden of proof and should be dismissed with costs to the Respondents.

66. Similarly, he argued that the 3rd Petitioner has not substantiated any of the allegations in his Petition by way of an affidavit rendering his Petition bare and incurably defective and accordingly relied on the decision by the High Court in the case of ***Patrick Ochieno Obachi & 6 Others v Kenya Anti-Corruption Commission [2010] eKLR***, where the court observed that it is a fatal technicality as it determines the substance, namely the completeness of the petition. It follows that in terms of rule 14 that Petition contains allegations without the affidavit evidence intended to accompany the petition to support allegations in the petition and that makes the petition incompetent.

67. Counsel further argued that the verifying affidavit annexed to the 2nd Petitioner's petition does not meet the mandatory requirements of the ***Mutunga Rules*** and the documents filed with the 3rd Petitioner's Petition are strictly speaking not annexures to any affidavit as the same have not been commissioned by the commissioner of oaths as exhibits to any affidavit. The documents are also therefore not properly presented before the court. Under ***Order 4 Rule 1 (2) of the Civil Procedure Rules*** verifying affidavits were intended to accompany plaints in verification of the correctness of the averments contained in the plaint. Counsel therefore submitted that the verifying affidavit filed with the 2nd Petitioner's Petition is misplaced and of no legal effect whatsoever.

68. Further, it is the Respondents' submission that the 2nd Petitioner's verifying affidavit and the documents attached to the 3rd Petitioner's Petition have no evidentiary value to this petition. To buttress his argument, counsel cited the case of ***Charles Okello Mwanda v Ethics and Anti-corruption Commission and 3 others [2014] eKLR*** where it was held that the requirement that a petition be accompanied by a supporting affidavit is not a procedural technicality as affidavit contains the evidence a party wishes to rely on in support of his case and urged the Honourable Court to find that the Petitions are fatally defective for lack of an affidavit in it support.

69. Counsel further submitted that most of the issues raised in Petition 140 of 2020 were *sub judice*; pending determination in ***Nairobi Constitutional Petition No. 132 of 2020, Law Society v. Cabinet Secretary for Health & Another*** which petition has since been determined and the issues are now *res judicata*. He relied on Olao J in ***Kenya Planters Co-operative Union Limited Kenya Co-operative Coffee Millers Limited & another [2016] eKLR*** who while citing ***Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 (The Mutunga Rules)*** held that such orders include striking out a Constitutional Petition that amounts to an abuse of the Court process. Counsel also cited Kimaru J in ***Stephen Somek Takwenyi & Another v David Mbuthia Githare & Others Nairobi (Milimani) HCCC No. 363 of 2009*** where he held that there is the inherent jurisdiction of every Court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it. He also cited Odunga J in ***Legal Advice Centre aka Kituo Cha Sheria v Communication Authority of Kenya [2015] eKLR*** where he held that in the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided since it clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or addition to the backlog of cases courts have to deal with.

70. Counsel further submitted that in ***Petition No. 132 of 2020, the Law Society of Kenya*** instituted the petition on behalf of the public as public interest litigation in respect of public rights just as in the instant petition. Further, that the Law Society of Kenya challenged the Public Health (COVID-19) Restriction of Movement of Persons and Related Measures) Rules 2020 contained in Legal Notices, No. 50, 51, 52, 53, 54 which were annexed to the supporting affidavit of Mercy Wambua as annexure "W-2" sworn on 14th April 2020 in support of the Law Society of Kenya Petition. However, he noted that ***Petition No.132 of 2020*** was premised on the allegations that the rules were made without public participation; the rules were not tabled before the National Assembly within 7 days; the Rules were not published; the Rules introduce criminal penalty contrary to the ***Public Health Act***; the rules are void for vagueness; the Rues were not approved by parliament contrary to the ***Statutory Instruments Act*** and; the Offences are ultra vires the Statute under which they are made.

71. Counsel therefore submitted that it is apparent that the constitutionality or otherwise of Legal Notices 50 to 54 was in issue in ***Nairobi Petition No. 132 of 2020*** between ***The Law Society of Kenya and the Cabinet Secretary of Health & Others*** and further that the premise upon which the 1st Petitioner is seeking to quash the rules made by the 1st Respondent are *sub judice* the said Petition. He went on to submit that Hon. Mr. Justice Kanyi Kimondo in ***Murang'a county Government v Murang'a South Water***

& Sanitation Co. Ltd & another [2019] eKLR declined to determine certain issues in the said Petition on account of sub-judice. Counsel therefore submitted that upon delivery of judgment by myself on the same issues, the petition herein to the extent that it seeks to challenge constitutionality or otherwise of ***Public Health (COVID-19) Restriction of Movement of Persons and Related Measures) Rules 2020*** is now *res judicata* and that it would indeed be a waste of judicial time to rehash the arguments in the present Petition where the High Court has already considered and pronounced itself on the very same issues most eloquently as it did in ***Nairobi Petition No. 132 of 2020; Law Society of Kenya v Cabinet Secretary for Health & Others.***

72. To further buttress his argument, counsel cited the case of ***Henderson v Henderson [1843] 67 ER 313*** *and* ***John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR,*** where the Court of Appeal observed that ***res judicata*** is a bar to subsequent proceedings involving the same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives.

73. Counsel further submitted that the ***Statutory Instruments Act*** is an Act of Parliament whose provisions have the sanction of Parliament and therefore it is fool hardy for the 1st Petitioner to allege that the very same provisions and the Cabinet Secretary's action pursuant to the same have no Parliamentary sanction. It was counsel's submission that the Provisions of ***Article 94(5) of the Constitution*** clearly provide that the Cabinet Secretary may make provisions having the force of law under authority conferred by legislation as he did. In counsel's view, the provisions of the ***Statutory Instruments Act*** that allow for implementation of Statutory Instruments is merely an expression of the legal principle of presumption of legality of legal instruments and government action which principle he submitted was acknowledged by the Supreme Court in ***Raila Odinga v IEBC & 3 others Supreme Court of Kenya Election Petition No. 5 of 2013.***

74. Regarding the issue as to whether government measures to contain the spread of the Covid-19 pandemic in Kenya can only be dealt with through declaration of a state of emergency as provided under ***Article 58 of the Constitution***, counsel submitted that the same was dealt with by the Court in ***Nairobi Petition 120 of 2020*** yet another public interest litigation between ***The Law Society of Kenya v Inspector-General Cabinet Secretary for Interior and Co-ordination of the National Government*** determined by the Hon. Mr. Justice Weldon Korir and should not be re-litigated against in yet another public interest litigation. Counsel further submitted that the question as to whether a declaration of a state of emergency was necessary and a condition precedent to the enactment and enforcement of the emergency policies and legislation was not pleaded in any of the petitions and cannot be improperly submitted on as proposed by the 2nd Petitioner herein and that the parties herein are bound by their pleadings. As was aptly stated by Korir J in ***Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 Others; Kenya National Commission on Human Rights & 3 others (Interested Parties)[2020] eKLR,*** parties are bound by their pleadings and any case constructed outside the pleadings cannot be the subject of the court's determination.

75. On the allegation that the decision to quarantine members of the public at various facilities without order of a magistrate and forcing them to pay for their upkeep was contrary to ***Section 27 of the Public Health Act*** and that it contravened the constitutional imperative of the rule of law under ***Article 10 and 47(1) of the Constitution***, counsel submitted that the same was responded to in their Replying Affidavit and furthermore, the 1st Respondent put in place policy measures as envisaged under the provisions of the Health Act and the Public Health Act. Secondly, that the use of quarantine was internationally accepted as a means of containment of pandemics like COVID-19. The 2nd Respondent further made provision for protocols that specified how quarantine sites were to be administered. Consequently, the decision to limit the use of government quarantine facilitates which are limited to more deserving cases as opposed to persons flagrantly breaching the measures put in place to contain the spread of the pandemic was reasonable.

76. Moreover, it was submitted that the provisions of ***Section 27 of the Public Health Act*** that the 1st Petitioner and Interested Party allude to are clearly applicable to County Governments who have not been made party to the proceedings and whom it would be unconstitutional and indeed against the principles of natural justice to be condemned unheard. It was counsel's submission that the fourth schedule to the Constitution in part 2 thereof provides in ***Section 2 that County Health services***, including in ***particular (a) County Health facilities and Pharmacies (c) promotion of primary health care*** are functions of county governments. He was further of the view that since the provisions of the ***Public Health Act*** preceded the ***Constitution of Kenya 2010***, the provisions of ***Section 7*** of the ***Sixth Schedule to the Constitution*** would apply.

77. In any case, it was submitted that the Petitioners have not adduced any evidence of probative value to support their allegations in respect thereto and a claim for refund is one that must be specifically pleaded and proved being a special damage and since the same was neither particularized nor specifically proved, the same must fail. Counsel therefore cited the case of ***Provincial Insurance Co East Africa Ltd versus Nandwa 1995 – 1998 2EA 288*** where the Court of Appeal expressed the need to plead specifically a claim that is ascertainable and quantifiable otherwise failure to do so is fatal to a claimant's claim.

78. Counsel went on to submit that the 1st Petitioner has also made submissions on the state of the quarantine centers but the same is neither premised on his pleadings nor is he seeking any relief in respect thereto in his Petition. However, it was submitted that when it comes to provision of healthcare the same must be viewed within the broader context of limited resources which the Respondent would have readily submitted on had the relevant county governments who are key duty bearers been enjoined in the proceedings. Counsel relied on the South African Constitutional court in ***Soobramoney v Minister of Health (Kwazulu Natal) 1998 (1) SA 765 (CC)*** which interrogated the question of right to access to health care and emergency treatment and the court in its judgment noted that the Ministry of Health had conclusively proved that there were no funds available to provide patients such as the applicant with the necessary treatment. The court also observed that if the overall Health budget was substantially increased to fund all health care programs this would diminish the resources available for the State to meet other social needs.

79. He also cited Majanja J in ***Mathew Okwanda v Minister of Health and Medical Services & 3 others [2013] eKLR*** whereby he stated that it must be recalled that the right guaranteed under ***Article 43(1)(a)*** is premised on establishment of a "standard" which standard must be judged in a holistic manner (see ***Soobramoney case Soobramoney v Minister of Health Kwa Zulu Natal 1997 (12) BCLR 1696*** *and* ***John Kabui Mwai case*** *(Supra).* The learned Judge noted that the issue of the prohibitive costs involved in accessing the treatment and whether such treatment should be free bearing in mind the necessity to progressively realize these rights was not explored in the depositions and therefore there is no basis upon which he could make a finding one way or the other. In conclusion therefore, counsel submitted that the issuance of the orders sought would have a deleterious effect on the general public.

ANALYSIS AND DETERMINATION

80. I have very carefully considered the Petitioners pleadings in the three consolidated Petitions herein and the Respondents responses to the three Petition as well as the interested party's pleadings. I have further considered all the parties written submission and from the same the following issues arise for consideration:-

a) Whether the Petitions as drawn and field are competent"

b) Whether most issues raised in Petition 140 of 2020 were sub judice; pending determination in Nairobi Constitutional Petition 132 of 2020 Law Society vs. CS for Health & Another, and now Res Judicata since determination of the said Petition"

c) Whether government measures to contain the spread of COVID – 19 Pandemic in Kenya can only be dealt with through declaration of a state of emergency as provided under Article 58 of the Constitution and whether the same was dealt with by Court in Nairobi Petition No. 120 of 2020, The Law Society of Kenya v. Inspector General, CS for Interior and Co-ordination of National Government"

d) Whether quarantine for members of public at various facilities without an order of a magistrate and forcing them to pay for their upkeep was contrary to Section 27 of the Public Health Act and whether it contravened the constitutional imperative of the rule of law under Article 10 and 47 of the Constitution"

e) Whether the government should refund the money each person who was quarantined and forced to pay for their upkeep"

A. WHETHER THE PETITIONS AS DRAWN AND FILED ARE COMPETENT"

81. The Respondents contention is that the plaintiff or Petitioner in all pleadings bear both the legal and evidential burden of proof in his/her suit or Petition. This principle was clearly enunciated in the case of ***Raila Odinga v. IEBC & 3 Others in Supreme Court of Kenya, Election Petition No. 5 of 2013***, where the Supreme Court stated thus; -

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

And also that:

Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure did affect the validity of the elections. It is on that basis that the respondents bear the burden of proving the contrary. This emerges from a long standing common law approach in respect of alleged irregularity

in the acts of public bodies. Ominia praesumuntur rite et solemniter asse acta: all acts are presumed to be done rightly and regularly. So, the Petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law."

82. Similarly in the case of ***Kiambu County Tenants Welfare Association v Attorney General & another [2017] eKLR*** the Court also observed that:-

'…Courts have over the years established that for a party to prove violation of their rights under the various provision of the Bill of Rights they <u>must not only state the provisions of the Constitution allegedly infringed in relation to them, but also the manner of infringement and the nature and extent of that infringement [14] and the nature and extent of the injury suffered</u> (if any).

…To my mind the burden of establishing all the allegations rests on the Petitioner who is under an obligation to discharge the burden of proof. All cases are decided on the legal burden of proof being discharged (or not). Lord Brandon in Rhesa Shipping Co SA vs Edmunds [15] remarked:-

"No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."

Whether one likes it or not, the legal burden of proof is consciously or unconsioulsy the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by <u>Rajah JA in Britesone Pte Ltd vs Smith & Associates Far East Ltd [16]</u>:-

"The Court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"

With the above observation in mind, the starting point is that whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of fact which he asserts, must prove that those facts exist. The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the stand of proof is the balance of probabilities. In the case of Miller vs Minister of Pensions. [17] Lord Denning said the following about the standard of proof in civil cases:-

'The ...{standard of proof} …is well settled. It must carry a reasonable degree of probability…if the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not.'

83. In the instant Petition herein, the Respondents urge that the Petition No. 28 of 2020 by the 2nd Petitioner consolidated with the other two Petitions herein; the sole Petitioner in ***Mombasa Petition No. 28 of 2020*** filed a verifying affidavit in support of the Petition sworn by Khalef Khalifa on 23rd April 2020 which Verifying Affidavit contains only three paragraphs: the first paragraph states that the deponent is a chairperson for the Petitioner herein; the second paragraph allegedly verifies the averments set forth in the Petition; whereas the last paragraph states what is deponed is true to the best of the Petitioner's knowledge.

84.The Respondents urge that the Petition by the 2nd Petitioner has no factual basis upon which it should succeed as the 2nd Petitioner has failed to discharge its evidential and legal burden of proof. The Respondents contend the 2nd Petitioner's Petition being not supported by affidavit containing facts in support of the Petition is incompetent and should be dismissed. The Respondents urge similarly the 3rd Petitioner has not substantiated any of the allegations in the Petition by way of an affidavit rendering his Petition bare and incurably defective.

85. A perusal of the ***Constitutional Petition No. 128 of 2020*** filed by the 3rd Petitioner dated 6th April 2020 clearly reveal that there is no supporting affidavit or any affidavit attached to the same. The lack of supporting affidavit, therefore renders the Petition herein bare.

86. The Counsel for the 2nd Petitioner in his oral submissions on the issue of whether the Petition is competent, he urges the application and the Petition herein were directed to be heard together and that the three Petitions herein were accordingly consolidated. The Counsel submitted the affidavit in support of the Petition is displayed in the Petition before the Court, urging further an affidavit need not be considered based on the number of its paragraphs and all that is needed is to state whether what is contained in the averments is true. The Counsel urged the Court to look at ***Article 159 (2) (d) of the Constitution*** and at the ***Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013*** (otherwise referred to as ***"The Mutunga Rules, 2013"***).

87. The Respondents in support of their proposition sought reliance on the decision of the High Court in the case of ***Patrick Ochieno Obachi & 6 others –v- Kenya Anti-corruption Commission [2010] eKLR,*** where the Court observed as follows on failure to file a supporting affidavit:

"…that is a fatal technicality as it determines the substance, namely the completeness of the petition. It follows that in terms of rule 14 that Petition contains allegations without the affidavit evidence intended to accompany the petition to support allegations in the Petition and that makes the Petition incompetent."

88. A party filing a Petition is obligated to file the Petition together with an affidavit if he wishes to rely on any document, which should be annexed to the supporting affidavit, which document should be served upon the Respondent with the Petition. It is therefore clear a Petition without supporting affidavit with annextures to the affidavit contains mere allegations without affidavit evidence intended to accompany the Petition to support allegations in the Petition and that means the Petition is incomplete and incompetent.

89. In the instant Petition the verifying affidavit annexed to the 2nd Petitioners' Petition does not in my view meet the mandatory requirements as set out in the ***Mutunga Rules; 2013*** as there is no single annexture attached to the verifying affidavit. The documents filed by the 3rd Respondent are not accompanied by any supporting affidavit and as such they do not qualify to be annextures nor are they commissioned by the Commissioner of oaths as exhibits to any affidavits. Under ***Order 4 Rule 1 of the Civil Procedure Rules*** where verifying affidavit are intended to accompany plaints in verification of the correctness of the averments contained in the plaint are required to be properly presented before the Court. I find the verifying affidavit filed by the 2nd Petitioner in this Petition to be misplaced and of no legal effect whatsoever. I further find the verifying affidavit and documents attached to the 3rd Petitioners Petition to have no evidentiary value on these Petitions. In the case of ***Charles Okello Mwanda v. Ethics and Anti-corruption Commission and 3 others [2014] eKLR*** it was held that the requirement that a Petition be accompanied by a supporting affidavit is not a procedural technicality as affidavit contains the evidence a party wishes to rely on in support of his case.

90. The 2nd Petitioner sought to rely on ***Article 159(2)(d) of the Constitution*** which provides that:-

"Judicial authority

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(d) justice shall be administered without undue regard to procedural technicalities;

91. I find that ***Article 159(2)(d) of the Constitution*** cannot come to the 2nd Petitioner's and 3rd Petitioner's aid as the requirement that a Petition be accompanied by supporting affidavit is not a procedural technicality as affidavit contains the evidence, a party wishes to rely on in support of the case. It is an important part of pleading that guides the parties to a matter. In absence of such vital evidence, thus affidavit evidence, I find that the 2nd and 3rd Petitioner's Petitions fatally defective for lack of affidavit evidence in their support.

B. WHETHER MOST ISSUES RAISED IN PETITION 140 OF 2020 WERE SUB JUDICE; PENDING DETERMINATION IN NAIROBI CONSTITUTIONAL PETITION 132 OF 2020 LAW SOCIETY VS. CS FOR HEALTH & ANOTHER, AND NOW RES JUDICATA SINCE DETERMINATION OF THE SAID PETITION"

92. The Respondents submit that most of the issues raised in ***Petition No. 140 of 2020*** were sub-judice pending determination in Nairobi ***Constitutional Petition No. 132 of 2020, Law Society of Kenya vs. CS for Health and another***. The Petition has since been determined. The Respondents therefore contend that the Petition herein is ***res judicata***.

93. The 1st Petitioner contend that the instant Constitutional Petitions are not sub judice ***Petition in Nairobi Constitutional Petition No. 132 of 2020***. The 1st Petitioner aver that the Consolidated Petitions are different to the Petition filed by the Law Society of Kenya as the Petitioners are challenging the Constitutionality and Legal Notice No. 37, 46, 50, 51, 52, and 53 of 2020 and the abuse of ***Sections of Public Health Act, 1921*** in so far as people suspected to having been exposed to COVID – 19 have been put in compulsory isolation without a certificate from a medical officer, an order from a magistrate and have been forced to pay for the compulsory confinement.

94. The Petitioners further state they are challenging the failure of the government to strictly adhere to ***Section 27, PHA***, for people in compulsory isolation, thereby leading to previously uninfected people in the isolation facilities, getting the infection from fellow infected detainees, in breach of ***Article 43(1)(a) of the Constitution. Section 4(a) and 5(1) and (2) of Health Act, 2017***.

95. It is further the Petitioners contention that the consolidated Petition are challenging the arbitrary extension of the period of compulsory isolation, contrary to ***Article 47 of the Constitution and the Fair Administrative Action Act, 2016***.

96. On the issue of sub judice the 2nd Petitioner argue the Petitions should have been heard together and urges the issue of sub judice never arose contending the Petition filed before the Court raised different issues which are yet to be determined. The 2nd Petitioner argue the parties and issues are not the same.

97. The Respondents in support of their contention that most of the issues raised in Petition 140 of 2020 are sub judice, pending determination in ***Nairobi Constitutional Petition No. 132 of 2020*** sought reliance in a decision by Hon. Justice Olao in ***Kenya Planters Co-operative Union Limited v Kenya Co-operative Coffee Millers Limited & another [2016] eKLR*** where the Court held as follows:

'Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 (The Mutunga Rules) provides as follows:

"Nothing in these rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court".

Such orders as are mentioned above include striking out a Constitutional Petition that amounts to an abuse of the Court process. As to what constitutes an abuse of the Court process is a matter to be determined by the circumstances of each case as there is no all en-composing definition of the concept "abuse of process" – Benosi vs. Wiyley 1973 C.A 721. For instance, filing of a fresh Notice of Motion where there is pending in Court another un-determined Notice of Motion has been held to be an abuse of the Court process – Margaret Migwi vs. Barclays Bank of Kenya Ltd 2016 eKLR (C.A Civil Appeal No. 68 of 2015 Nyeri).

As already indicated above, this Petition has been filed while there is pending at this same Court Civil Appeal No. 60 of 2014 arising from the ruling of the Business Premises Rent Tribunal's ruling dated 20th November 2014. In that appeal, as already stated, the Petitioner challenges, inter alia, the tribunal's jurisdiction in dismissing the Preliminary Objection, and that the Tribunal violated its right to a fair hearing. Those are substantially the same issues raised herein and amount to an abuse of the Court process. It is my view that the Petitioner's conduct in filing this Constitutional Petitioner during the pendency of an appeal at this very Court raising the same issues is clearly an abuse of the process of this Court and which, pursuant to Rule 3(8) of the Mutunga Rules, this Court is obligated to strike out because there is need to have good order in litigation. Only then can judicial time and other resources be expended judiciously and not extravagantly or at the whims of litigants. As was held in The King Vs. The General Commissioner for the purpose of income Tax Acts for the District of Kensington Ex-parte Princes Edmond De Polignal (1917) K.B 486 at page 495, there is inherent jurisdiction of every Court to prevent an abuse of its process and it is therefore its duty to intervene and stop such proceedings that amount to an abuse of the court process.

98. The principle of sub judice is defined in ***Section 6 of the Civil Procedure Act*** as follows***:-***

"No Court shall proceed with the trial of any suit or proceeding on in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim litigating under the same title, where such or proceedings is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed" *emphasis added*

99. The term "Sub-judice" is defined in ***Black's Law Dictionary 10th Edition*** as:

"Before the Court or Judge for determination."

100. A court dealing with sub judice stated that:-

A matter which is still pending in Court un-decided or still under consideration is therefore sub-judice and that is precisely the position with regard to Kerugoya Environment and Land Court Civil Appeal No. 60 of 2014. I hold the view that a Constitutional Petition is amenable to the sub-judice rule just like any other civil proceeding and that explains the insertion of the words "or proceedings" in Section 6 of the Civil Procedure Act. I am therefore satisfied that this Constitutional Petition is sub-judice in view of the pendency of the appeal at this Court in which substantially the same issues have been raised.

While this Court affirms the Petitioner's right to approach it to enforce a Constitutional right, it must also be made clear that this Court has a duty to ensure that its process is not abused. This petition is clearly an abuse of the process of this Court and the law enjoins me to make appropriate orders to bring such process to an end.

101. Hon. Justice Luka Kimaru in the case of ***Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No.363 of 2009*** held as follows:-

"This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilized legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognize as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it."

102. Further Odunga J in the case of ***Legal Advice Centre aka Kituo Cha Sheria v Communication Authority of Kenya [2015] eKLR*** held as follows:

'…the Court may in proper cases invoke its inherent jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of its process and this may be done where the principles of sub judice would be applicable. As was held by the High Court of Uganda in Nyanza Garage vs. Attorney General Kampala HCCS No. 450 of 1993:-

"In the Interest of parties and the system of administration of justice, <u>multiplicity of suits between the same parties and over the same subject matter is to be avoided.</u> It is in the interest of the parries because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a <u>multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with.</u> Parties would be well advised to avoid a multiplicity of suits."

However <u>the principle of sub judice does not talk about the "p0rayers sought" but rather "the matter in issue".</u> In Re the Matter of the Interim Independent Electoral Commission Constitutional Application No. 2 of 2011 [2011] eKLR the Supreme Court cited with approval the Australian decision in Re Judiciary Act 1903-1920 & In re Navigation Act 1912-1920 (1921) 29 CLR 257 where it was held:

"…we do not think that the word <u>'matter' …means a legal proceeding, but rather the subject matter for determination in a legal proceeding.</u> In our opinion there can be no matter …unless there is some right, duty or liability to be established by the determination of the Court…"

It is therefore my view that in determining whether or not sub judice applies, it is the substance of the claim that ought to be looked at rather than the prayers sought.

…with respect to the issue whether the parties in the proceedings are the same or are parties under whom they or any of them claim and whether they are litigating under the same title although a superficial look at the parties shows that they are not, my view is that one of the thinking driving forces underlying the principle of sub judice is the need to avoid making conflicting decisions from the same or similar facts.

The Respondent relied on explanation 6 to Section 7 of the Civil Procedure Act as locking out any pretense by the Applicant that the pries in both proceedings are not the same. The said explanation states:

Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating. In my view, for this explanation to apply, the claim must either be in respect of a public right or if in respect of a private right, it must be claimed in common for the applicant/petitioner and others. *(Emphasis added)*

103. This Court dealt ***with Nairobi Constitutional Petition No. 132 of 2020***, in which the ***Law Society of Kenya*** instituted the Petition on behalf of the Public as public interest litigation in respect of public rights just as in the instant Petition.

104. The Law Society of Kenya challenged the Public Health (Covid-19) Restriction of Movement of Persons and Related Measures) Rules 2020. It is important to note that the Rules are contained in Legal Notices, No. 50, 51, 52, 53, 54 and were annexed to the supporting affidavit of Mercy Wambua as annexure "MW-2" sworn on 14th April 2020 in support of the Law Society of Kenya Petition.

Petition 132 of 2020 was premised on the allegations that:-

i. The rules were made without public participation,

ii. The rules were not tabled before the National Assembly within 7 days,

iii. The Rules were not published,

iv. The Rules introduce criminal penalty contrary to the Public Health Act

v. The Rules are void for vagueness

vi. The Rules were not approved by parliament contrary to the Statutory Instruments Act

vii. The Offences are ultra vires the Statute under which they are made.

105. It is noted that the 1st Respondent in his Replying Affidavit to the consolidated Petitions has attached copies of the pleadings in ***Petition No. 132 of 2020*** for ease of reference.

106. The 1st Petition in the present case ***Petition No. 140 of 2020*** has sought to challenge the very same rules on the following grounds:-

i. The 1st Respondent had no power to crate criminal offences

ii. That the rules were vague and therefore legally unenforceable

iii. That the rules were made without public participation

iv. That the rules were not subjected to public scrutiny

107. Considering the pleadings in ***Petition No. 132 of 2020*** and ***Petition No. 140 of 2020*** it is apparent that the constitutionality or otherwise of Legal Notices Nos. 50 to 54 was an issue in ***Nairobi Petition No. 132 of 2020*** between ***the Law Society of Kenya vs. CS of Health and others***. That is the premise upon which the 1st Petitioner is seeking to quash the rules made by the 1st Respondent and which are sub judice in the said Petition. The Respondents referred to a decision by Hon. Justice Kanyi Kimondo in ***Murang'a County Government v. Murang'a South Water & Sanitation Co. Ltd & another [2019] eKLR*** who declined to determine certain issues in the said petition on account of sub-judice where he held as follows;

"49.The next issue is whether the petition is sub-judice. The doctrine is found in Section 6 of the Civil Procedure Act which provides:

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

50. <u>I agree with the respondents that a substantial number of the issues raised in this suit are sub judice.</u> I find that prayers (i), (ii), (iii), (iv), (v) and (ix) which I set out verbatim at paragraph 6 of this judgment are largely the subject of at least two prior and pending suits: Kahuti Water Sanitation Co. Ltd & Others v The Governor Murang'a & Others, Murang'a County & others Murang'a Constitutional petition 55 of 2018.

51. I observed recently in the Mercy Kimwe case [supra] as follows

To the petitioners, the question for decision is whether the violent takeover of Murang'a Water and Sanitation Company (hereafter the 2nd respondent or Muwasco) by the governor (the 1st respondent) is lawful. To the 1st respondent, the issue is straight forward; who between the governor of the county government of Murang'a and Muwasco has the power or right to provide water to the residents"

52. In a considered ruling in that suit, I found that at paragraph 9 of the replying affidavit by the Water Services Regulatory Board conceded that "upon the onset of devolution in 2013, all water service providers were subsumed [in] to the new county governments as county entities to provide water services on their behalf."

53. I then held as follows:

But that is not to say that the governor or country government of Murang'a can wake up one morning and violently take over the management of the Water service providers. The Constitution in the Fourth Schedule envisioned a negotiated and orderly transition. For example, some assets of Muwasco may belong to the national government. Accrued loans and other debts will need to be re-assigned or transferred. That position must be respected and remains a live issue in the main petition.

The existing water service providers on the other hand should let go at some point.

54. In a separate interlocutory application in Kahuti Water Sanitation Co. Ltd & others v. The Governor Murang'a & others, [supra], Waweru J held that water services were a devolved function; and, that the exparte applicants could only "continue to provide those services only until such time as the County Government was ready to take on that function."

55. <u>The two suits are still pending , I thus decline the invitation to determine prayers (i), (ii), (iii), (iv), (v) and (ix) sought by the petitioner in the present suit. For the same reason, I shall not delve too deep into the elaborate submission by the parties on those six areas.</u> *(Emphasis added)*

108. This Court pronounced itself when it delved its judgment in Nairobi Constitutional Petition Nairobi No. 132 of 2020 on 25th June 2020 on the same issues. The consolidated Petitions herein to the extent that they seek to challenge the same issues as regards constitutionality or otherwise of ***Public Health (COVID-19) Restriction of Movement of Person and Related Measures) Rules 2020*** is my finding that it is now ***Res judicata***.

109. I agree with the Respondents submission that it would indeed be a waste of judicial time to rehash the arguments in the present Petition where the High Court has already considered and pronounced itself on the very same issues most eloquently as it did in ***Nairobi Petition No. 132 of 2020; Law Society of Kenya –vs- Cabinet Secretary for Health and others***.

110. It is clear that under the principle of *Res judicata*, the court is barred from entertaining a matter by the same parties or those acting on their behalf, over the same issue or subject matter where the issue has been conclusively determined by a court of competent jurisdiction. ***Section 7 of the Civil Procedure Act*** is clear on ***res judicata*** and acts as a bar to such future proceedings as a way of bringing litigation to an end. It is in that regard that the section provides that:

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequently raised, and has been heard and finally decided by such court."

111. The above positon is clearly reinforced in the case of ***Henderson v Henderson [1843] 67 ER 313***, where the court stated with regard to the doctrine of res judicata;

"…where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The pela of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time…"

112. Further it should be noted that the Court of Appeal clearly spoke eloquently on principle of Res Judicata when it dealt with the case of ***John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR, re judicata*** is a bar to subsequent proceedings involving the same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives. The Court went on to state that;

"The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process under Rule 3(8) of the Constitution of Kenya (Protection of rights and Fundamental Freedoms) practice and Procedure Rules, 2013. On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution –based litigation cannot be subjected to the doctrine of res judicata. However we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions." *(Emphasis added)*

113. The 1st Petitioners allege that the provision of ***Section 11(1) and (4) of the Statutory Instruments Act*** are unconstitutional on the grounds that they contradict ***Article 94(5) and (6) of the Constitution*** by allowing statutory instruments or subsidiary legislation made by the Executive to be implemented before scrutiny and sanction by parliament.

114. The provision of ***Article 94(5) of the Constitution*** clearly and in no uncertain terms provides that the Cabinet Secretary may make provisions having the force of law under authority conferred by legislation as he did. ***Article 94(5)*** provides as follows:-

"..No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation."

115. In addition to the above it should be noted that the provisions of the Statutory Instruments Act that allow for implementation of Statutory Instruments is merely an expression of the legal principle of presumption of legality of legal instruments and government action. The said principle was acknowledged by the Supreme Court in ***Raila Odinga v IEBC & 3 Others Supreme Court of Kenya Election Petition No. 5 of 2013*** where the supreme Court stated that;

"…It is on that basis that the respondents bear the burden of proving the contrary. This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies. Ominia praesumuntur rite et solemniter asse acta: all acts are presumed to be done rightly and regularly. So, the Petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law."

116. From the above and upon considering the parties rival submissions I find the issues raised in ***Petition 140 of 2020*** were sub judice, pending determination in ***Nairobi Constitutional Petition 132 of 2020 Law Society v CS for Health & another***. Secondly the Petition has already been determined. The ***Consolidated Petitions Nos. 140 of 2020, 128 of 2020 and 28 of 2020 Okiaya Omtata Okoita, Muslims for Human Rights (Muhuri) and George Bush vs. CS for Health & 2 Others*** are now Res judicata as regards all similar issues raised and determined in ***Petition No. 132 of 2020***.

C. WHETHER GOVERNMENT MEASURES TO CONTAIN THE SPREAD OF COVID – 19 PANDEMIC IN KENYA CAN ONLY BE DEALT WITH THROUGH DECLARATION OF A STATE OF EMERGENCY AS PROVIDED UNDER ARTICLE 58 OF THE CONSTITUTION AND WHETHER THE SAME WAS DEALT WITH BY COURT IN NAIROBI PETITION NO. 120 OF 2020, THE LAW SOCIETY OF KENYA V. INSPECTOR GENERAL, CS FOR INTERIOR AND CO-ORDINATION OF NATIONAL GOVERNMENT"

117. The 1st Petitioner on the issue of whether a declaration of a state of emergency was necessary and a condition precedent to the constitution and enforcement of the emergency polices and legislation, which limit rights and fundamental freedoms, and which were and continue to be implemented by the government to contain the Corona virus (COVID-19) Pandemic contends that the Respondents have pleaded of de facto emergency power, and that the High Court in ***Nairobi Constitutional Petition No. 120 of 2020 between the Law Society of Kenya vs. Hillary Mutyambai and others*** validated their actions by upholding that the government was entitled to act on the basis of precautionary principle to contain the spread of the deadly Covid-19 virus.

118. The 1st Petitioner aver that nothing could be further from the truth pointing out that first and foremost , the Court in ***Nairobi Constitutional Petition No. 120 of 2020*** failed to comprehend the precautionary principle in law, and how it applies in Kenya. Secondly, under Kenya's constitutional framework, there is no provision for the exercise of de facto emergency power.

119. The 1st Petitioner further contend that High Court in Nairobi ***Constitutional Petition No. 120 of 2020*** totally misunderstood the precautionary principle (or precautionary approach), which is a broad epistemological, philosophical and legal approach to innovations with potential for causing harm when extensive scientific knowledge on the matter is lacking. It emphasizes caution, pausing and review before leaping into new innovations that may prove disastrous.

120. The 1st Petitioner contend that the principle is often used by policy makers in situations where there is the possibility of harm from making certain decision (e.g. taking a particular course of action) and conclusive evidence is not yet available.

121. The 1st Petitioner aver that under Kenya law, the precautionary principle is restricted to matters of environment, and is enshrined in ***Article 70 of the Constitution*** and operationalized in the ***Environmental Management and Co-ordination Act, 1999***, where at ***Section 2*** thereof the ***"precautionary principle"*** is defined as ***"the principle that where there are threats of damage to the environment, whether serious or irreversible, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."***

122. The 1st Petitioner submit that the holding of the ***High Court in Nairobi Constitutional Petition No. 120 of 2020*** was made in ignorance of both the law and science, is totally without basis in law, and amounts to the Court misleading itself on the law.

123. The 1st Petitioner further urge the Public emergency situations involve both derogations from normal human rights standards and alternations in the distribution of functions and powers among the different organs of the State.

124. The Respondents reiterate that the issue as to whether government measures to contain the spread of the Covid – 19 pandemic

in Kenya can only be dealt with through declaration of a state of emergency as provided under ***Article 58 of the Constitution*** was dealt by the Court in ***Nairobi Petition 120 of 202***0 yet another public interest litigation between ***The Law Society of Kenya vs. Inspector-General Cabinet Secretary for Interior and Co-ordination of the National Government*** determined by the Hon. Mr. Justice Weldon Korir and should not be re-litigated again in yet another public interest litigation.

125. I have had the benefit of perusing the Consolidated Petitioners' pleadings herein to ascertain the issues raised in the Petitions. The question as to whether a declaration of a state of emergency was necessary and a condition precedent to the enactment and enforcement of the emergency policies and legislation was not pleaded in any of the Petitions and cannot be improperly submitted on as proposed by the Petitioners herein. The Respondents submits that the parties are bound by their pleadings.

126. It is trite that parties are always bound by their pleadings and as the issue herein do not form part of the pleadings, I find the same to be misplaced and I decline the invite to deal with the same as sought by the Petitioners.

127. In dealing with a similar issue Hon. Justice Korir in ***Nairobi Constitutional Petition 120 of 2020*** stated as follows:-

'…Parties are bound by their pleadings and any case constructed outside the pleadings cannot be the subject of the court's determination. In Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR, the Court of Appeal extensively discussed the jurisprudence on the importance of pleading in court disputes and concluded that:-

"As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the Petitioners and answered by the Respondents before her and thereby determined the Petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score."

128. In the instant Petition all the Petitioners allege that the decision to quarantine members of public at various facilities without an order of a magistrate and forcing them to pay for their upkeep was contrary to ***Section 27 of the PHA*** and that it contravened the Constitutional imperative of the rule of law under ***Order 10 and 47 of the Constitution***.

129. It is noted that 1st Respondent countered the Petitions vide his Replying Affidavit wherein he partly stated as follows in material parts:-

a) The power to declare emergency rule is divided between the legislative, executive and judicial branches. The executive purposes, the legislature ratifies the declaration of emergency rule by simple majority, and the judiciary (through the Supreme Court) has the power to review any declarations of emergency.

b) The Constitution provides a time-limit for emergency rule. This period is 14 days, renewable by the National Assembly by specified majorities. The first extension requires a two-thirds majority of all members of the National Assembly, and any subsequent extension requires ratification by a much higher threshold of at least three-quarters of all the members of the House.

c) During the state of emergency, Parliament and the Judiciary enjoy all their powers and none devolve upon the Executive in so far as it is necessary to defend the country and terminate the threat.

d) Emergency rule does not involve changes in the distribution of powers among organs of the State or shifts in the competences of such organs. The normal functioning of the constitutional organs is not affected by the emergency rule.

e) During the emergency, the Executive does not assume the power to legislate by decrees of necessity or to pass decree-laws.

f) Nothing in the Constitution of Kenya, 2020 gives the executive the power to take extra constitutional measures in times of crisis to remedy the situation.

g) The Executive is not empowered by the Constitution to take all necessary measures, even if they are unconstitutional, to

protect the country. The Executive is not authorised to suspend or interfere with the normal operations of the other branches of the Government (the Legislature and the Judiciary) or to permit derogations form fundamental rights. Constitutionally guaranteed rights remain in effect at all times, although they may be limited by legislation enacted inconsequence of a declaration of a state of emergency.

h) Article 58(7) of the Constitution provides that a declaration of a state of emergency, or legislation enacted or other action taken in consequence of any declaration, may not permit or authorize the indemnification of the State, or of any person, in respect of any unlawful act or omission.

i) Article 29(b) of the Constitution allows for detention without trial during a state of emergency subject to Article 58.

130. Considering the above it is clear that there is no doubt that the 1st Respondent apparently did act properly and put in place policy measures as envisaged under the provisions of both the Health Act and the Public Health Act. Secondly it is apparent that the use of quarantine is internationally accepted as a means of containment of pandemics like Covid-19. The 2nd Respondent further made provisions for protocols that specified how quarantine sites were to be administered.

131. I find the decision to limit the use of government quarantine facilities which are evidently limited to more deserving cases as opposed to persons flagrantly breaching the measures put in place to contain the spread of pandemic was and is reasonable; widely accepted and recommended by the World Health Organization (WHO) in containment of the spread of COVID-19.

D. WHETHER QUARANTINE FOR MEMBERS OF PUBLIC AT VARIOUS FACILITIES WITHOUT AN ORDER OF A MAGISTRATE AND FORCING THEM TO PAY FOR THEIR UPKEEP IS CONTRARY TO SECTION 27 OF THE PUBLIC HEALTH ACT AND WHETHER IT CONTRAVENED THE CONSTITUTIONAL IMPERATIVE OF THE RULE OF LAW UNDER ARTICLE 10 AND 47 OF THE CONSTITUTION"

132. The 1st Petitioner and the Interested Party urge that ***Section 27 of the Public Health Act*** has been violated by the Respondents. ***Section 27 of the PHA*** provides for isolation of persons who have been exposed to infection and provides:-

"Where, in the opinion of the medical officer of health, any person has recently been exposed to the infection, and may be in the incubation stage, of any notifiable infectious disease and is not accommodated in such manner as adequately to guard against the spread of the disease, such person may, on a certificate signed by the medical officer of health, be removed, by order of a Magistrate and at the cost of the local authority of the district where such person is found, to a place of isolation and there detained until, in the opinion of the medical officer of health, he is free from infection or able to be discharged without danger to the public health, or until the Magistrate cancels the order." *(Emphasis added)*

133. The impact of the above-mentioned section is urged by the Petitioners and Interested Party to be two-fold; that a person can only be isolated based on the opinion of a medical officer accompanied by an order of a magistrate, and that the costs associated with the isolation are borne by the local authority of the district (the state) where the isolated person is found.

134. The 1st Petitioner and Interested Party urge that ***Section 27 of the PHA*** is consistent with the State's obligation as enshrined under ***Article 43 (1)(a) of the Constitution***. The said Article provides that ***"every person has the right to the highest attainable standard of health which includes the right to health care services including reproductive health care."***

135. It is further urged that ***Article 43(1) of the Constitution*** is further amplified by ***Section 5(1) of the Health Act, 2017*** which provides that:-

"every person has the right to the highest attainable standard of health which shall include progressive access for provision of promotive, preventive, curative, palliative and rehabilitative services."

136. ***Section 5(2) of the Health Act*** further states that ***"every person shall have the right to be treated with dignity, respect and have their privacy respected in accordance with the Constitution and this Act."***

137. The right to Health equally finds expression in regional and international law which form part of the Kenyan Law by dint of ***Article 2(6) of the Constitution*** which decrees that ***"any treaty or convention ratified by Kenya shall form part of the law of Kenya***

under this Constitution."

138. ***Article 16*** of the ***African Charter on Human and Peoples' Rights*** (The Banjul Charter) which proclaims that ***"every individual shall have the right to enjoy the best attainable state of physical and mental health."*** In addition, the Banjul Charter requiems state parties to ***"…take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick."***

139. ***Article 12(1)*** of the ***International Covenant on Economic, Social and Cultural Rights (ICESCR)*** provides that ***"The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."***

140. Further, General Comment No 14 of the Committee on Economic, Social and Cultural Rights provides at Paragraph 37 that ***"States parties are also obliged to fulfil (provide) a specific right contained in the Covenant when individuals or a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal."***

141. The Respondents in response urge the provision of ***Section 27 of PHA*** the 1st Petitioner and interested Party allude to are clearly applicable to County Governments who have not been made party to the proceedings and who it would be unconstitutional and indeed against the principles of natural justice to be condemned unheard. The ***Fourth Schedule to the Constitution in part 2*** thereof provides in ***Section 2 that County Health Services***, including in particular (a) County health facilities and Pharmacies (c) promotion of primary health care and functions of country governments.

142. The provisions of the Public Health Act is clear that proceeded the ***Constitution of Kenya 2010***, the provision of ***Section 7 of the Sixth Schedule to the Constitution*** would apply which provision provides that all law in force immediately before the effective date continues in force and shall be construed with alternations, adaptations, qualifications and exceptions necessary to bring it into conformity with the constitution, therefore local government may be construed as County Government.

143. I have considered the parties rival submissions and I am satisfied the issue related to ***Section 27 of the Public Health Act*** was not one of the issues in previous ***Constitutional Petitions No. 132 of 2020*** and ***Petition No. 120 of 2020***. The ***Section 27 of PHA*** is clear that a person may be isolated based on opinion of a medical officer accompanied by an order of a magistrate and that the costs associated with the isolation are to be borne by the local authority of the district (state) where the isolated person is found.

144. I have very carefully considered ***Section 27 of PHA; Section 5(1) (2) of Health Act, 2017; Article 2(6) of the Constitution; Article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR)*** and Counsel submissions, and based on the aforesaid, I find the action of quarantining persons without an order from a magistrate and at their own cost to be a violation of ***Section 27 of the Public Health Act; Article 43(1)(a) of the Constitution***; and the relevant Regional and International Instruments stated herein above. I find that the local authority of the district (state) where the isolated person is found, has the solemn constitutional and statutory duty to provide health care services to the people and this includes but is not limited to shouldering the quarantine costs.

E. WHETHER THE GOVERNMENT SHOULD REFUND THE MONEY EACH PERSON WHO IT QUARANTINED AND FORCED TO PAY FOR THEIR UPKEEP"

145. The 1st Petitioner seek an order that the government should refund in full the money each and every person who it quarantined was forced to pay for his/her upkeep.

146. The 1st Petitioner's claim for refund is one that must be specifically pleaded and strictly proved being a claim for special damages. The 1st Petitioner has neither pleaded the claim nor particularized the same nor specifically proved the same. I find such claim must fail. Further no such parties have been enjoined in these pleadings as Petitioners or Interested Parties. No evidence has been produced before this Court in support of the claim. The claim cannot therefore stand. In addition to the above such a claim is solely against Country Governments, who have not been made a party to these proceedings. It would be against the principle of natural justice and the constitution to condemn County Governments to refund such sums when they have not been enjoined and without affording them an opportunity to be heard on their defence.

147. In dealing with a claim for special damages the Court of Appeal in ***Provincial Insurance Co East Africa Ltd versus Nandwa***

1995 – 1998 2EA 288 at page 291, the Court expressed the need to plead specifically a claim that is ascertainable and quantifiable and stated thus:-

"It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead."

148. It is further noted that the 1st Petitioner has also made submission on state of the quarantine centres but the same is neither premised in his pleading nor is he seeking any relief in respect thereto in his petition.

149. The Respondents further submit that when it comes to provision of healthcare the same must be viewed within the broader context of limited resources which the Respondents would have readily submitted on, had the relevant county governments who are key duty bearers been enjoined in the proceedings. It would in my view be contrary to provisions of the ***Civil Procedure Act*** and Rules of natural justice for this Court to embark on determination on a non-pleaded subject matter and to what parties have not left it to Court to determine.

150. The Respondents sought reliance in the ***South African*** **Constitutional court in Soobranoney v Minister of Health (Kwazulu Ntal) 1998 (1) SA 765 (CC)** where the Court interrogated the question of right to access to health care and emergency treatment. The court was called upon to determine whether the health rights in ***Section 27 of the Constitution*** entitled a chronically ill man in the final states of renal failure to an order obliging a public hospital to admit him to renal dialysis programme of the hospital. According to the guidelines for the programme the applicant was unqualified. The Court in its judgment noted that the Ministry of Health had conclusively proved that there were no funds available to provide patients such as the applicant with the necessary treatment. The court also observed that if the overall health budget was substantially increased to fund all health care programs this would diminish the resources available for the State to meet other social needs. The court stated as follows:

"The State has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than focus on the specific needs of particular individuals within society." This position was adopted in the John Kabui Mwai and 3 others v Kenya national Examinations Council & Others, Nairobi Petition No. 15 of 2011 [2011] eKLR wherein the court observed that, 'The realization of socio-economic rights means the realization of the conditions of the poor and less advantaged and the beginning of a generation that is free from socio-economic need. One of the obstacles to the realization of this objective, however, is limited financial resources on the part of the Government. The available resources are not adequate to facilitate the immediate provision of socio-economic goods and services to everyone on demand as individual rights. There has to be a holistic approach to providing socio-economic goods and services that focus beyond the individual."

151. Further the Respondent relied on the decision of Hon. Justice Majanja in ***Mathew Okwanda v Minister of Health and Medical Services & 3 others [2013] eKLR***; where it was stated that:-

21. It must be recalled that the right guaranteed under Article 43(1) (a) is premised on establishment of a "Standard". This standard must be judged in a holistic manner (see Soobramoney case Soobramoney vs. Minister of Health Kwa Zulu Natal 1997 (12) BCLR 1696 and John Kabui Mwai case (Supra)). On the basis of the material before the court, I find that at least the Government Hospitals provide healthcare to the Petitioner at a cost. Whether the form of healthcare provided in these circumstances meets the minimum core obligation or the highest standard is not one that was the subject of evidence and argument before me. The issue of the prohibitive costs involved in accessing the treatment and whether such treatment should be free bearing in mind the necessity to progressively realize these rights was not explored in the depositions and therefore there is no basis upon which I can make a finding one way or the other. The Petitioner's case was founded on a specific need rather than taking a holistic approach to the issue.

23. In the case of Kenya Society for the Mentally Handicapped v. Attorney General and Others Nairobi Petition No. 155A of 2011 (Unreported), the Petitioner brought a case alleging that the economic and social rights of persons with mental disabilities had been violated. As the allegations were of general nature I stated as follows, "[18] I think the Petitioners have brought this case to address the whole spectrum of issues concerning persons with disabilities. In their submissions, the petitioners have dealt with the right to education, the right to health, the right to employment, access to justice, the right to justice and political rights. In a nutshell, what the petitioner requires is for the Court to direct the State to take steps to adopt its proposals for reform and promotion of persons with disabilities. The Court's purpose is not to prescribe certain policies but to ensure that polices followed by the State meet constitutional standards and that the State meets its responsibilities to take measures to observe, respect,

promote, protect and fulfil fundamental rights and freedoms and to a party who comes before the Court."

152. ***To the extent of my findings herein above I proceed to make the following orders:-***

a) The 2nd and 3rd Petitioners Petition are fatally defective and are accordingly dismissed.

b) The Consolidated Petitions are res judicata by virtue of Nairobi constitutional Petition Nos 132 of 2020 and 120 of 2020 in most of the issues raised thereto save the issue (d) and (e) in the Judgment.

c) A declaration be and is hereby issued that the decision to quarantine members of the public at various facilities without an order of magistrate and forcing them to pay for their upkeep is contrary to Section 27 of the PHA and forcing pay for their upkeep contravenes Section 27 of the Public Health Act and is thereby unconstitutional.

d) A declaration that government should refund in full the money each and every person who it quarantined and was forced to pay for their upkeep is not particularized, specifically pleaded and strictly proved and the County Governments who are required to make payments having not been joined as parties, the claim for refund is not proved and is declined.

e) Prayers under numbers (c), (d), (e), (f), (g), and (h) are Res judicata by virtue of Courts' decisions in Petitions No. 120 of 2020 and Petition No. 132 of 2020 and are accordingly dismissed.

f) In view of the nature of the Petition and the same having been brought in public interest, I order each party to bear its own costs.

Dated, Signed and Delivered at Nairobi on this **3rd** day of **December, 2020.**

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J. A. MAKAU

JUDGE

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