



**Kirima v Solar Panda Company & another (Petition E002 of 2023)
[2024] KEHC 11499 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11499 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
PETITION E002 OF 2023
EM MURIITHI, J
SEPTEMBER 26, 2024**

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
ENSHRINED UNDER ARTICLES 19, 20, 22(1), 23, 28, 31 OF THE CONSTITUTION**

AND

**IN THE MATTER OF ALLEGED VIOLATION OF THE BILL
OF RIGHTS UNDER CHAPTER 4 OF THE CONSTITUTION**

AND

IN THE MATTER OF ARTICLE 165(3) OF THE CONSTITUTION

AND

**IN THE MATTER OF RULES 4 (1) OF THE CONSTITUTION OF KENYA (PROTECTION OF
RIGHTS AND FUNDAMENTAL FREEDOMS, PRACTICE AND PROCEDURE RULES, 2013)**

AND

**IN THE MATTER OF SECTION 25(A), 26(A), 29(A), (B),
(C) OF THE DATA PROTECTION ACT, NO. 24 OF 2019**

BETWEEN

LAWRENCE M'IMPWI KIRIMA PETITIONER

AND

SOLAR PANDA COMPANY 1ST RESPONDENT

ANDY KEITH 2ND RESPONDENT

RULING

1. A Notice of Preliminary Objection dated 4/12/2023 was taken out by the 1st Respondent on the grounds that:



- a. The [Data Protection Act](#) being an Act of Parliament to give effect Article 31(c) and (d) of the [Constitution](#) to establish the Office of the Data Protection Commissioner; to make provision for the regulation of the processing of personal data; to provide for the rights of data subjects and obligations of data controllers and processors and for connected purposes. the [Constitution](#) therefore provided for inbuilt resolution mechanisms within the [Data Protection Act](#) for resolution of the sort of dispute that has been presented before this Honorable Court.
 - b. Section 56 of the [Data Protection Act, 2019](#) requires a data subject who is aggrieved by the decision of any person under the Act to lodge a complaint with the data commissioner. The Data Commissioner is, in turn, enjoined by the Act to investigate any complaint and make a determination within ninety days. Section 65 of the [Data Protection Act](#) actually prescribes various remedies in cases where the Data Commissioner finds that there is a violation or threat of violation of the provisions of the [Act](#).
 - c. There exists an alternative remedy in section 56 and 64 of the [Data Protection Act, 2019](#) as read with regulations 3(a) and 4 of the [Data Protection \(Complaints Handling Procedure And Enforcement\) Regulations, 2021](#) available to the Petitioner. The Petitioner therefore ought to have exhausted the available mechanisms for resolution of the instant dispute before invoking the instant Court's jurisdiction.
 - d. Section 64 of the [Data Protection Act](#) provides that a person against whom any administrative action is taken by the Data Commissioner, including enforcement and notices, may appeal to this Honorable Court. This Court cannot therefore be the first port of call for the nature of the dispute. The Petitioner therefore violated the doctrine of exhaustion.
 - e. The matters raised by the Petitioners fall under the jurisdiction of the Data Protection Commissioner established under sections 3(c) (d) and (e) of the [Data Protection Act, 2019](#) and this Honorable Court ought to discourage invocation of the constitutional process where there exists a parallel or alternative statutory remedy. The Honorable Court lacks jurisdiction to hear and determine issues raised in the Petition as the same does not raise justifiable constitutional matters.
 - f. Even if the allegations raised in the Petition merit litigation, the claim is founded on tort and private law as the issues raised in the instant Petition are in the nature of grievances between private parties and should not be entertained as a Constitutional Petition.
 - g. In the circumstances therefore, this Honorable Court lacks jurisdiction to hear and determine the dispute in the said Petition.
2. In his submissions filed on 7/3/2024, the Petitioner relies on the Supreme Court of Kenya case of [Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others \(Interested Parties\)](#) (Petition E007 of 2023) [2023] KESC 113 (KLR) (28 December 2023) (Judgment) and [Wanjiru v Machakos University](#) (Petition E021 of 2021)} [2022] KEHC 10599 (KLR) (3 August 2022) (Judgment) in urging that the court has jurisdiction to hear and determine issues of alleged violations of the [Constitution](#) , and the doctrine of exhaustion and the availability of an alternative remedy under the [Data Protection Act](#) as alleged in the Preliminary Objection do not bar him from seeking constitutional reliefs from the court.
 3. By its written submissions dated 10/4/2024, the 1st Respondent urges that the doctrine of constitutional avoidance dissuades parties from filing constitutional petitions where the issues could be handled by other means. It urges that the exceptions available to the doctrine of exhaustion do not exist to the Petitioner, and cites [Mwangi & another v Naivasha County Hotel t/a Sawela Lodges](#) (Petition



E003 of 2021)[2022] KEHC 10975 (KLR) (19 July 2022) (Ruling) and *Communications Commission of Kenya & 5 others v Royal Media Services & 5 others* (2014) eKLR. It cited *Nicholas Abidha (Supra)*, to urge that each case has to be analyzed with its unique circumstances as to whether the main issue being unauthorized use of photographs can be dealt with, without involving the constitutional process. It urges that the case of *Wanjiru v Machakos University (Supra)* cited by the Petitioner is inapplicable to this case. It urges that the court lacks jurisdiction to determine the dispute herein which is merely private suit camouflaged as a constitutional matter, because the Petitioner neither exhausted the alternative remedy in the resolution of the dispute nor adhered to the doctrine of constitutional avoidance.

4. The 2nd Respondent urges that the dispute resolution mechanisms for issues of violation of the rights to privacy are under the province of the Data Commissioner and thus this court lacks jurisdiction to deal with the issues raised in the petition. He urges that the exceptions available to the doctrine of exhaustion do not assist the Petitioner, and cites *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* (2015) eKLR, *Cleophas Malala & another v Speaker of the Senate & 2 others; Stewart Madzayo & another (Interested Parties)* [2021] eKLR and *Mwangi & another v Naivasha County Hotel t/a Sawela Lodges (Supra)*. He urges that the mere quoting of a constitutional provision does not turn a matter into a constitutional one, and cites *Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (2014) eKLR and *Bernard Murage v Fineserve Africa Limited & 3 Others* (2015) eKLR.

Analysis and Determination

5. Upon considering the Preliminary Objection and the written submissions together with the authorities cited therein, the singular issue for determination is whether this court is vested with the requisite jurisdiction to entertain the matter.
6. What properly constitutes a preliminary objection has been defined times over including in the locus classicus case of *Mukisa Biscuit Company v Westend Distributor Limited* (1969) EA 696 as follows:-

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
7. This court in Meru Succession Cause No. 26/1988 *In the Matter of the Estate of Thomas Mbui Njenge Alias Thomas Nchenge (Deceased) David Mbuko T. Mbui v Susan Gacheri* VOL. 8 NO. 62 held that:

“In the circumstances, a preliminary objection should only be raised where there are no disputations on matters of facts by parties. Although parties did not address the Court on the import and tenor of a preliminary objection, this Court finds this to be an important matter which has the potential of either granting or divesting this Court with jurisdiction to entertain the preliminary object which forms the subject of this Ruling. This Court cannot overlook the question of jurisdiction, even with respect to entertain the preliminary objection. Should this Court find that there are any disputations of fact which will require it to look at evidence adduced and interrogate factual issues, the Court will not have jurisdiction to entertain the preliminary objection.”
8. The cause of action of the Petitioner’s grievance is the alleged violation of his rights under Articles 28 and 31 of the *Constitution*. In his petition dated 7/3/2023, he seeks specific reliefs that:



- a. A declaration be and is hereby issued that the Respondents violated the Petitioner’s fundamental right to privacy and human dignity under Article 28 and 31 of the Constitution by publishing and/or using the Petitioner’s image for purposes of marketing and advertisement without the petitioner’s consent.
 - b. A declaration be and is hereby issued that the Respondents are in breach of Sections 25(a), 26(a), 29(a), (b), (c) of the Data Protection Act, No. 24 of 2019.
 - c. An order of permanent injunction be and is hereby issued restraining the Respondents from publishing and/or using the Petitioner’s image or likeness in advertising/marketing their products without express consent from the Petitioner.
 - d. An order of mandamus to compel the Respondent to compensate the Petitioner general damages of Ksh.10,000,000/- arising from the usage of the petitioner’s image for commercial, marketing and advertising gains at the expense of the petitioner.
 - e. Costs of this Petition and incidentals be provided for.
 - f. The Honorable Court be at liberty to grant any other relief that may be just and expedient.
9. The Petitioner is accused of prematurely rushing to this court without having first exhausted the dispute resolution mechanisms available under Section 56 of the Data Protection Act.
10. As shown in the issues framed in the case, identified as follows:
- “ a. Whether the use and publication of the Petitioner’s image by the Respondent without consent was a violation of the Petitioner’s right to privacy and right to human dignity.
 - b. Whether the use and publication of the Petitioner’s image by the Respondent is a violation of image right and whether key elements of the claim of unlawful use of images has been established.
 - c. Whether public interest outweighs an individual’s right to privacy in image rights.
 - d. Whether the Respondent’s offensive publication and/or advertisement using the Petitioner’s images for their future use violates the petitioner’s data rights.
 - e. Whether the Petitioner is entitled to general damages for the violation of her image rights and data rights by the Respondent.
 - f. Who is to pay the costs of the suit.”

the court in Wanjiru v Machakos University (Petition E021 of 2021) [2022] KEHC 10599 (KLR) (3 August 2022) (Judgment) was not called to determine the issue of exhaustion doctrine and constitutional avoidance.

11. As counseled by the Court of Appeal in the locus classicus case of Owners of Motor Vessel “Lillian S” v Caltex Oil Kenya Ltd [1989] eKLR, jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law must down its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.



12. The Court notes that the Data Protection Act No. 24 of 2019, commencing on 25/11/2019, was enacted as the primary protection of the right to privacy being “AN ACT of Parliament to give effect to Article 31(c) and (d) of the Constitution; to establish the Office of the Data Protection Commissioner; to make provision for the regulation of the processing of personal data; to provide for the rights of data subjects and obligations of data controllers and processors; and for connected purposes.”
13. Article 31 of the Constitution provides for the right to privacy as follows:
- “Privacy.
31. Every person has the right to privacy, which includes the right not to have—
- (a) their person, home or property searched;
 - (b) their possessions seized;
 - (c) information relating to their family or private affairs unnecessarily required or revealed; or
 - (d) the privacy of their communications infringed.”
14. The Data Protection Act is an enforcement mechanism for the right to privacy. Section 56 of the Data Protection Act provides for complaints to the Data Commissioner as follows;
- “(1) A data subject who is aggrieved by a decision of any person under this Act may lodge a complaint with the Data Commissioner in accordance with this Act.
- (2) A person who intends to lodge a complaint under this Act shall do so orally or in writing.
- (3) Where a complaint made under subclause (1) is made orally, the Data Commissioner shall cause the complaint to be recorded in writing and the complaint shall be dealt with in accordance with such procedures as the Data Commissioner may prescribe.
- (4) A complaint lodged under subclause (1) shall contain such particulars as the Data Commissioner may prescribe.
- (5) A complaint made to the Data Commissioner shall be investigated and concluded within ninety days.”
15. Regulation 3 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations provides that;
- “3. The object and purpose of these Regulations is to— (a) facilitate a fair, impartial, just, expeditious, proportionate and affordable determination of complaints lodged with the Data Commissioner in accordance with the Act and these Regulations, without undue regard to technicalities of procedure; (b) provide for issuance of enforcement notices as contemplated under section 58 of the Act; (c) provide for issuance of penalty notices as contemplated under section 62 of the Act; (d) provide for the procedure for hearing and determining of complaints; and (e) provide for the resolution of



complaints lodged with the Data Commissioner by means of alternative dispute resolution mechanisms as specified under section 9(1)(c) of the Act.”

16. Regulation 4 of those *Regulations* provides for lodging of a complaint as follows;

“(1) Pursuant to section 56 of the Act, a data subject or any person aggrieved on any matter under the Act may lodge a complaint with the Data Commissioner. (2) A complaint lodged under subregulation (1) may be lodged in Form DPC 1 set out in the Schedule— (a) orally, subject to section 56(3) of the Act; (b) through electronic means, including email, web posting, complaint management information system; or (c) by any other appropriate means. (3) A complaint under subregulation (1) may be lodged— (a) by the complainant in person; (b) by a person acting on behalf of the complainant; (c) by any other person authorized by law to act on behalf of a data subject; or (d) anonymously. (4) The Data Commissioner shall acknowledge receipt of the complaint within seven days of receipt of the complaint under subregulation (1). (5) The complaint under subregulation (1) shall be lodged free of charge.”

17. The Court of Appeal in *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* [2015] eKLR observed as follows:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the *Constitution* which commands Courts to encourage alternative means of dispute resolution.”

18. Similarly in *Oucho v Joseph Otieno Bee, Chief Executive Officer Bandari Sacco Ltd & 12 others; Sacco Society Regulatory Authority (SASRA) (Interested Party)* (Constitutional Petition 57 of 2021) [2022] KEHC 6 (KLR) (25 January 2022) (Ruling), the court (JM Mativo J. as he then was) held that:-

“The second principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit. The rationale behind this reasoning is that statutory provisions ousting court’s jurisdiction must be construed restrictively. The next question is whether the dispute resolution mechanism established under the Act is competent to resolve the issues raised in this Petition. The jurisdiction of the Tribunal is expressly provided under section 76 of the act. No serious argument was advanced to challenge the jurisdiction of the Tribunal to entertain the dispute.”



19. In the scheme of the [Data Protection Act](#), this court’s jurisdiction may only be properly invoked in terms of section 64 as follows:

“A person against whom any administrative action is taken by the Data Commissioner, including in enforcement and penalty notices, may appeal to the High Court.”

20. A leading decision on the doctrines of exhaustion of remedy and constitutional avoidance is the well-known case of the [Speaker of the National Assembly v Karume](#) (Civil Application 92 of 1992) [1992] KECA 42 (KLR) (29 May 1992) (Ruling) where Court of Appeal (Kwach, Cockar and Muli, JJA.) was emphatic that -

“[T]here is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the [Constitution](#) or an Act of Parliament, that procedure should be strictly followed.”

21. In the Supreme Court decision of [Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others \(Interested Parties\)](#) (Petition E007 of 2023) [2023] KESC 113 (KLR) (28 December 2023) (Judgment), the Court considered the issue and held:

“90. On our part, in [NGOs Co-ordination Board v EG & 4 others; Katiba Institute \(Amicus Curiae\)](#) (Petition 16 of 2019) [2023] KESC 17 (KLR) (Constitutional and Human Rights) (24 February 2023) (Judgment) (NGOs Co-ordination Board) we outlined the doctrine of exhaustion of administrative remedies and adopted our finding in [Albert Chaurembo Mumbo & 7 others v Maurice Munyao & 148 others](#); SC Petition No 3 of 2016, [2019] eKLR where we held that:

“... even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.”

92. In the above decision, we furthermore emphasized that, where there exists an alternative method of dispute resolution established by legislation, courts must exercise restraint in exercising their jurisdiction as conferred by the [Constitution](#) and must give deference to the dispute resolution bodies established by statute with the mandate to deal with such specific disputes in the first instance.”

22. Since the enactment of the [Data Protection Act](#), the jurisdiction of the High Court to remedy breaches of the constitutional right to privacy under Article 31 must on the principle of the constitutional avoidance and doctrine of exhaustion, be last resort and appellate forum in terms of the Statute or where it is demonstrated that the scheme of process and remedy under the Act is not such as to afford quality redress or appropriate relief.

23. In this case, it was not demonstrated that the remedy and mechanism of the statutory process under the Data Protection Act of 2019, was not capable of providing appropriate remedy in the circumstances of the case. Fair hearing before the Data Commissioner is not an inferior remedy as the [Constitution](#)



under Article 50 (1) recognizes tribunal and bodies established by law as capable of giving effect to the right to fair hearing as follows:

- “ 50. Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

24. Consequently, this court finds that the dispute herein falls within the ambit of section 56 of the *Data Protection Act* and it ought, in the first instance, to be heard by the Data Commissioner, and thereafter on appeal to the High Court in terms of section 64 of the Act. The Court, therefore, declines to take up jurisdiction in the matter on account of the doctrine of exhaustion of remedies.

Orders

25. Accordingly, for the reasons set out above, this court makes the following orders:

1. The Petition dated 7/3/2023 is struck out.
2. There shall be no order as to costs.

Order accordingly.

DATED AND DELIVERED THIS 26TH DAY OF SEPTEMBER, 2024.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Mr. Mwendani for the Petitioner.

Mr. Wadegu for 1st Respondent.

Mr. George Gilbert for the 2nd Respondent.

