



**Savla v Okonjl & 9 others (Petition E287 of 2022) [2024] KEHC 11315 (KLR)  
(Constitutional and Human Rights) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11315 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION E287 OF 2022  
LN MUGAMBI, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**NAVAN SAVLA ..... PETITIONER**

**AND**

**MARX MO OKONJL ..... 1<sup>ST</sup> RESPONDENT**

**EDEN HALFWAY HOUSE ..... 2<sup>ND</sup> RESPONDENT**

**THE RETREAT FACILITY ..... 3<sup>RD</sup> RESPONDENT**

**CHIROMO LANE HOSPITAL ..... 4<sup>TH</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 5<sup>TH</sup> RESPONDENT**

**AVENUE HOSPITAL ..... 6<sup>TH</sup> RESPONDENT**

**PIYUSH MANSUKHAL SAVLA ..... 7<sup>TH</sup> RESPONDENT**

**KAPILA MANSUKHAL SAVLA ..... 8<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 9<sup>TH</sup> RESPONDENT**

**INDEPENDENT POLICE OVERSIGHT AUTHORITY ..... 10<sup>TH</sup> RESPONDENT**

**RULING**

**Introduction**

1. The Petitioner alleges that he was arrested by the 5<sup>th</sup> Respondent on 20/4/21 and committed to the 4<sup>th</sup> Respondent to a mental facility on 21/2/2021 against his will, under the instructions of the 7<sup>th</sup> and 8<sup>th</sup> Respondents who are his brother and mother. He stated that as a consequence of the



Respondents actions violated his constitutional rights and freedoms under Articles 28, 29 and 39(1) of *the Constitution*.

2. In replying to the Petition, the 7<sup>th</sup> and 8<sup>th</sup> Respondents put in a Notice of Preliminary Objection dated 25<sup>th</sup> May 2023, which is the subject matter of this ruling. The preliminary objection is premised on the grounds that:
  - i. This Court lacks jurisdiction to entertain this matter because the Petitioner lacks locus standi to institute these proceedings under Order 32 Rule 15 of the Civil Procedure Rules or otherwise.
  - ii. This Court lacks jurisdiction under Section 46 of the *Mental Health Act* and Section 20 of the *Medical Practitioners and Dentists Act*, Cap 253 of the Laws of Kenya.
  - iii. Under the doctrine of exhaustion, where there is an alternative method of dispute resolution established by legislation, courts must exercise restraint in exercising their jurisdiction conferred by law and must give deference to such dispute resolution mechanisms established by law with the mandate to deal with such specific disputes in the first instance.

### **Parties Responses**

3. The Petitioner in response to the Preliminary Objection filed submissions dated 29<sup>th</sup> April 2024.
4. The other Respondents responses or submissions in reply to the Notice of Objection are not in the Court file or Court online platform (CTS).

### **Parties Submissions**

#### **7<sup>th</sup> and 8<sup>th</sup> Respondents' Submissions**

5. In support of their preliminary objection, the Respondents' through Macharia – Mwangi & Njeru Advocates filed submissions dated 12<sup>th</sup> April 2024.
6. On locus standi, the 7<sup>th</sup> and 8<sup>th</sup> Respondents submitted that that Order 32 Rule 15 of the Civil Procedure Rules bars a person of unsound mind from instituting legal proceedings in their own name. The 7<sup>th</sup> and 8<sup>th</sup> Respondent submitted that there was a medical report dated 10<sup>th</sup> February, 2022 issued by the 1<sup>st</sup> Respondent and annexed to their Replying Affidavit to prove that the Petitioner suffers a mental disorder called schizoaffective disorder.
7. The second limb of the objection was based on Section 46 of the *Mental Health Act* and Section 20 of the *Medical Practitioners and Dentists Act*. That the two sections protect any person who carries out functions under the Acts in good faith and with reasonable care. Furthermore, Section 46 bars proceedings brought after expiry of 6 months from the act complained of. Equally, Section 20 provides that anyone dissatisfied with any professional service offered or alleges breach of standards by a registered practitioner under the Act may lodge a complaint in the prescribed manner to the Council.
8. The 7<sup>th</sup> and 8<sup>th</sup> Respondents submitted that the Petition revolve around a claim for medical negligence. They contend that the Petitioner failed to exhaust the internal mechanisms established both Acts.



Reliance was placed in *Mwanzia v Rhodes (Constitutional Petition No. E115 of 2022)* [2023] KEHC 2688 (KLR) (Constitutional and Human Rights) (31 March 2023) (Judgment) where it was held that:

“The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency’s action seeks redress from a Court of law on an action without pursuing available remedies before the agency itself.”

9. Other authorities relied on were: *Anthony Miano & others v Attorney General & others* [2011] eKLR and *Ezekiel Otieno v Funds Account Manager Mathare National Constituency Development Fund & 2 others; Public Procurement Review Board & 12 others (Interested Parties)* [2022] eKLR.
10. For these reasons, they urged the Court to find that the preliminary objection has merit and thus should be allowed.

### **Petitioner’s Submissions**

11. In response, the Petitioner through Maingi Kamau and Associate Advocates filed submissions in which the Petitioner emphasized that the Petition is founded on violation of his rights. Referring to the Petition, he stated that the Petitioner had been involuntarily admitted at 4<sup>th</sup> Respondent’s Medical Centre on 21<sup>st</sup> April, 2023 to 4<sup>th</sup> May, 2021. He pointed out that the 1<sup>st</sup> Respondent did not examine the Petitioner on the first day.
12. The Petitioner submitted that he had been sedated under handcuffs contrary to his constitutional rights. The Petitioner further pointed out that his right to safety and health had been compromised and that he was never supplied with his medical records even after making the request.
13. Moreover, the Petitioner was later on, on 4<sup>th</sup> May, 2021 transferred involuntarily to 3<sup>rd</sup> Respondent’s facility against his will. It is submitted that the Petitioner in the process was injured by the 3<sup>rd</sup> Respondent’s staff. That the Petitioner’s attempt to report these issues to the police were futile.
14. Speaking to the doctrine of exhaustion, The Petitioner’s submission was that Section 9(4) of the Fair Administrative Actions Act provides for exceptions to the rule in extraordinary circumstances and relied on *Republic vs Independent and Boundaries Commission Ex-Parte National Supper Alliance (Nasa) Kenya and 6 Others* (2017) eKLR where it was held that:

“As the Court of Appeal acknowledged in the SHIKARA LIMITED CASE (SUPRA), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the value enshrined in *the constitution*”.
15. Turning to the Order 32 Rule 15 of the Civil Procedure Rules, The Petitioner submitted that no evidence had been adduced to establish his health status. Accordingly, Counsel urged the Court not to judge the Petitioner on this ground. The Petitioner argued that he had stated his case with precision and accuracy as made manifest in his supporting documents.
16. He opposed the attempt to rely on Section 46 of the *Mental Health Act* and Section 20 of the Medical Practitioners and Dentist Act. He contended that the 7<sup>th</sup> and 8<sup>th</sup> Respondents who are his family were intent on cutting out the Petitioner from the family business on this pretext. He submitted that this was made obvious by the fact that the Petitioner has never received dividends from their family business since being detained in hospital. The Petitioner urged the Court to disallow the Notice of Preliminary objection.



## Analysis and Determination

17. It is my considered view that the issues that arise for determination are as follows:
- i. Whether the 7<sup>th</sup> and 8<sup>th</sup> Respondent's Notice of Preliminary Objection meets the threshold for preliminary objections.
  - ii. Whether the Preliminary Objection is merited.

### Whether the threshold for a preliminary objection has been met.

18. What constitutes a preliminary objection was set out in *Mukisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Ltd* (1969) EA 696 and later emphasized by the Supreme Court in the *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others* (2014) eKLR as follows:

“(31) To restate the relevant principle from the precedent-setting case, *Mukisa Biscuit Manufacturing Co Ltd –vs. - West End Distributors* (1969) EA 696:

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....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”.

19. Discussing the essential characteristics of a preliminary objection; the Court in *Dismas Wambola v Cabinet Secretary, Treasury & 5 others* (2017) eKLR, stated as follows:

“A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law.

It may be noted that preliminary objections are narrow in scope and cannot raise substantive issues raised in the pleadings that may have to be determined by the court after perusal of evidence....”

20. Additionally, the observation in *Oraro vs. Mbaja* [2005] 1 KLR offers significant insight where the Court observed that:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration..... 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 facts



pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop... The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.....”

21. The instant Preliminary Objection raises two issues. First a challenge to the Petitioner’s locus standi owing Order 32 Rule 15 of the Civil Procedure Rules. On this objection, the 7<sup>th</sup> and 8<sup>th</sup> Respondents argue that the 1<sup>st</sup> Respondent issued a medical report to the effect that the Petitioner has a mental disorder. The Petitioner opposes this allegation claiming that the mental disability claim is decoy by the Respondents to disinherit him from the family business.
22. The issue of mental incapacity is a contested fact which makes the preliminary objection unsustainable as it can only be based on undisputed fact.
23. The next ground upon which the preliminary objection relies is the doctrine of exhaustion of remedies. Under the doctrine of exhaustion of remedies, Courts do not take up disputes that are specifically fall for adjudication an administrative forum or body. Black’s Law Dictionary 10<sup>th</sup> Edition explains the doctrine of exhaustion of remedies as follows:

“The doctrine that if an administrative remedy is provided by a Statute, a claimant must seek relief first from the administrative body before judicial relief. The doctrine’s purpose is to maintain comity between the courts and administrative agencies and to ensure courts will not be burdened by cases in which judicial relief is unnecessary.”

24. The Supreme Court in *Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* (2019) eKLR held thus:

“... the Court must exercise restraint in exercising its jurisdiction under Article 165. Where there exist alternative methods of dispute resolution, the Court must exercise deference to the bodies statutorily mandated to deal with specific disputes in the first instance.... The foregoing verdict also finds support in an adage principle in administrative law of “Exhaustion of Administrative Remedies” and from the jurisprudence emanating from this Court and the lower Courts, which has been restated with notoriety to the effect that, where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their Jurisdiction conferred by *the constitution* and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance ...In the pursuit of such sound legal principles, it is our disposition that disputes disguised and pleaded with the



erroneous intention of attracting the jurisdiction of superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, 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... Such a deferred jurisdiction and the postponement of judicial intervention and reliefs until the mandated statutory or constitutional bodies take action rests, not alone on the disinclination of the judiciary to interfere with the exercise of the statutory or any administrative powers, but on the fact of a legal presumption that no harm can result if the decision maker acts upon a claim or grievance. Such formulation underlies the analogous cases, frequently cited for the exhaustion doctrine, in which the court refuses to enjoin an administrative official from performing his statutory duties on the ground that until he has acted the complainant can show no more than an apprehension that he will perform his duty wrongly, a fear that courts will not allay. Such cases may be expressed in the formula that judicial intervention is premature in the absence of administrative action.”

25. Correspondingly in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* (2020) eKLR the 5-judge bench opined as follows:

“ 52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency’s action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine 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 the Courts...”

26. Be that as it may, courts have also discussed instances where an exception is justified in application of this doctrine. The Court of Appeal in *Fleur Investments Limited vs Commissioner of Domestic Taxes & another* [2018] eKLR opined as follows:

“ 22. For this proposition the appellant called in aid this Court’s finding in the case of *Speaker of National Assembly vs Njenga Karume (1990-1994)* EA 546 where the Court expressed itself in relevant part as follows: -

“...where there was an alternative remedy and especially where parliament has provided a statutory procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully to the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it...”

23. ... Whereas courts of Law are enjoined to defer to specialized Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under *the Constitution* and other legislations for protection.



The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.”

27. The 5 - judge bench in William Odhiambo Ramogi case(supra) addressed themselves to the exceptions to the rule as follows:

“... It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, 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 must not be ousted. The rationale behind this precept is that statutory provisions ousting Court’s jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.

62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.”

28. The doctrine of exhaustion is thus a bars the Court from assuming jurisdiction in a matter where there are statutory remedies exist but have not been exhausted. The doctrine requires the petitioner to seek the remedies provided for in the Statute first before invoking the Court’s jurisdiction. Looking at the substance of the Petitioner’s grievances, it is crystal clear that the major complaint is he is a victim of medical mishandling due to alleged collusion by the Respondents.

29. Section 20 of the Medical Practitioners and Dentist Act requires anyone who feels dissatisfied with the professional services or complains of breach of standards by a medical practitioner is to report to the Medical Practitioners and Dentist Council. It states:

20. Disciplinary proceedings

- (1) Any person who is dissatisfied with any professional service offered, or alleges a breach of standards by a registered or licensed person under this Act, may lodge a complaint in the prescribed manner to the Council.
- (2) The Council may, or through a committee appointed for that purpose, inquire into any complaint of professional misconduct, malpractice or any breach of standards.
- (3) Upon an inquiry held by the Council to determine the complaint made under subsection (2), the person whose conduct is being inquired into shall be afforded an opportunity of being heard, either in person or through a representative.



- (4) For purposes of proceedings at any inquiry held under this section, the Council may administer oaths, enforce the attendance of witnesses and production of books and documents.
- (5) The Council shall regulate its own procedure in disciplinary proceedings.
- (6) Where after an inquiry, the Council determines that a person is guilty, the Council may—
  - (a) issue a caution or reprimand in writing;
  - (b) direct a medical practitioner or dentist to undergo remedial training for a period not exceeding twelve months;
  - (c) direct the medical practitioner or dentist be placed on probation for a period not exceeding six months;
  - (d) suspend, withdraw or cancel the practising licence of a medical practitioner or dentist for a period not exceeding twelve months;
  - (e) suspend, withdraw or cancel the licence of a health institution or a section of the health institution for a period not exceeding twelve months;
  - (f) permanently remove the name of a medical practitioner or dentist from the registers under section 5(3); or
  - (g) in addition to the penalties stipulated in paragraphs (a), (b), (c), (d), (e) or (f), impose a fine which the Council deems appropriate in the circumstance.
- (7) A person or health institution whose licence has been withdrawn or cancelled under subsection (6), shall forthwith surrender the license to the Council.
- (8) A person or health institution whose name has been removed from the register under subsection (6)(f) shall forthwith surrender the registration certificate to the Council.
- (9) A person aggrieved by a decision of the Council made under subsection (6) may, within thirty days from the date of the decision of the Council, appeal to the High Court.
- (10) Notwithstanding the provisions of section 3A (5), the Council shall not remove the name of a person from the register under subsection (6) unless at least seven members of the Council are present in the inquiry.

30. The Petitioner has not demonstrated that he lodged a complaint with the Medical Practitioners and Dentist Council especially as against the 1<sup>st</sup> Respondent whose actions are primarily the facts upon which this petition is founded.

31. In the light of this glaring omission to follow the dispute settlement machinery provided in the Act; I am compelled to find that the institution of this Petition before this Court offends the doctrine of exhaustion of remedies.

32. I uphold the preliminary objection and strike the instant Petition with costs to the Respondents.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

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**L N MUGAMBI**  
**JUDGE**

