**Okoiti v Clerk of the National Assembly (Petition E373 of 2023) [2024] KEHC 16468 (KLR) (Constitutional and Human Rights) (31 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16468 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION E373 OF 2023**

**LN MUGAMBI, J**

**DECEMBER 31, 2024**

**BETWEEN**

**OKIYA OMTATAH OKOITI ..... PETITIONER**

**AND**

**CLERK OF THE NATIONAL ASSEMBLY ..... RESPONDENT**

**RULING**

## Introduction

1. In a Petition dated 18th September 2023, the Petitioner states that he unsuccessfully requested for information from the Respondent regarding the tabling in the National Assembly, 'the Kenya Development Corporation Limited (Vesting) Order, 2001' by the National Treasury. He avers the Respondent thus violated the Petitioner's right to access information as envisaged under Article 35 of the *Constitution*.

2. In response, the Respondent filed a Notice of Preliminary Objection dated 14th October 2023 which is the subject matter of this ruling. The Preliminary Objection is premised on the grounds that:

    i. This Court lacks jurisdiction to determine this matter because Section 14 of the *Access to Information Act*, 2016 grants the Commission on Administrative Justice (CAJ) original jurisdiction, in the first instance, to review a decision on release or denial of access to information.

    ii. The Petitioner has failed to exhaust the mandatory statutory dispute resolution forum by first moving CAJ before instituting these proceedings.

    iii. Under Section 13 and 35(2) of the *Parliamentary Powers & Privileges Act*, 2017, the Respondent has no mandate and is not authorized to issue the requested information before

first obtaining special leave of the Speaker of the National Assembly and the National Assembly's Committee of Powers & Privileges.

iv. The matter is actively before the National Assembly's Committee of Powers & Privileges.

**Petitioner's response**

3. In reply the Petitioner filed grounds of opposition dated 20th October 2023 on the ground that:

i. The Preliminary objection is incompetent.

ii. The Preliminary objection is vexatious, scandalous, and is brought malafides.

iii. The Preliminary objection is an abuse of the process of the Court.

iv. The Petitioner reiterates that, by virtue of Articles 23 and 165(3) of the *Constitution*, this Court has jurisdiction to hear and determine constitutional claims arising herein.

v. The Respondent's preliminary objection lacks the necessary details and characteristics of a preliminary objection. It is intended to confound the issues at hand and delay the swift resolution of this suit.

vi. Under Article 1(3)(c), 23, 48, 50(1), 159, 160(1), and 165 of the *Constitution* and Section 5 of *High Court (Organization and Administration) Act* No. 27 of 2015, this Court has original jurisdiction to hear and determine all disputes referred to it relating to the violation of rights, and the interpretation of the Constitution, including questions of contradiction between any law and the *Constitution*, and whether anything said to be done under the authority of the *Constitution* or of any law is inconsistent with, or in contravention of, the *Constitution*.

vii. Since the Respondent has not made a decision which can be reviewed administratively, the mechanisms provided under Section 14 of the *Access to Information Act*, for the Commission on Administrative Justice to review decisions of information access officers, cannot be invoked. Hence, the High Court is the Court of first instance.

viii. In *Kenya Vision 2030 Delivery Board v Commission on Administrative Justice & 2 others* [2021] eKLR, the Supreme Court stripped the Commission on Administrative Justice (CAJ) of any judicial powers when the Court held that the recommendations of the CAJ are not binding as a recommendation can only be binding when it is specifically provided for in the Constitution or in law. Neither the Constitution nor the *Commission on Administrative Justice Act* states that the recommendations of the CAJ are binding.

ix. The Supreme Court held further that, where there has been non-compliance with the CAJ's recommendations, the remedy is for the CAJ to prepare a report of the failure to implement the recommendations to the National Assembly for appropriate action.

x. It is important to note that, while Section 14 of the *Access to Information Act*, 2016 grants the Commission on Administrative Justice (CAJ) original jurisdiction, in the first instance, to review a decision on release or denial of access to information, the remedy it is clothed with is mere recommendations which is futile or ineffective in the circumstances of this case. Particularly, the Supreme Court has clarified that mandamus, the relief the Petitioner is seeking, is outside the CAJ's jurisdiction. Therefore, denying the Petitioner access to the High Court would leave the Petitioner without a recourse.

xi. Be that as it may, Section 9 (4) of the *Fair Administrative Actions Act*, 2015 provides that in exceptional circumstances, the Court may exempt a party from the obligation of exhausting alternative remedies if the Court considers such exemption to be in the interest of justice.

xii. The Supreme Court in *NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae)* (Petition 16 of 2019) [2023] eKLR held that in cases where an alternative remedy available, particularly when Parliament has provided a specific appeal procedure, the court will generally only grant an order for judicial review in exceptional circumstances. To decide whether an exception should be made and judicial review granted, the court will carefully assess the suitability of the statutory appeal within the context of the specific case. It will consider the underlying issue that needs to be resolved and determine if the statutory appeal process is appropriate for resolving it effectively.

xiii. Similarly, the Court of Appeal in *Republic v National Environmental Management Authority* [2011] eKLR framed the central question that arises when a court must decide whether to defer a matter to alternative remedies.

xiv. In upholding Section 9 (4) of the *Fair Administrative Actions Act*, 2015, the Courts have taken into consideration the practicality and effectiveness of the statutory remedies, as well as the specific nature of the issue before deciding on granting such exemptions. Hence in *Krystalline Salt Limited v Kenya Revenue Authority* (2019) eKLR, the Court determined that an exemption could be granted if it would be impractical to make an application to the administrative body.

xv. It is now settled that, where there is no effective remedy available through administrative channels, a person may be exempted from the requirement to exhaust administrative remedies before approaching the court. This is because the purpose of the doctrine of exhaustion is to allow administrative bodies to address disputes before they are escalated to the court. However, if there is no effective administrative remedy available, there is no point in requiring a person to exhaust administrative remedies before approaching the court.

xvi. Under Section 13 of the *Parliamentary Powers & Privileges Act*, 2017, the Clerk (the respondent in this suit) has a duty to follow up with the Speaker to grant the said special leave. Therefore, if either the Speaker or the Clerk fail to act, or unreasonably refuse information, they can be compelled to comply with Article 35 of the constituent and Section 5 of the *Access to Information Act*, and protect the rights of persons seeking information. As such, it is incorrect to assert that under Section 13 and 35(2) of the *Parliamentary Powers & Privileges Act*, 2017, the Respondent has no mandate and is not authorized to issue the requested information before first obtaining special leave of the Speaker of the National Assembly and the National Assembly's Committee of Powers & Privileges. Furthermore, the Respondent's contention that the matter is actively before the National Assembly's Committee of Powers & Privileges must fail due to the unreasonable delay on the part of the Respondent to procure the special leave. Section 9 of the *Access to Information Act*, grants the Respondent a maximum of twenty-one days to respond upon receiving an information request. However, the Petitioner's request remains unaddressed after a very long time.

xvii. The Petitioner made multiple requests for information. On August 31, 2021, they sought details about the Kenya Development Corporation Limited (Vesting) Order, 2021 (Legal Notice No. 113 of 11th June, 2021), but received no response. On November 5, 2021, they requested information about the Standards Order, 2020 (Legal Notice No. 170 of 10th August, 2020) without success. After futile office visits, the petitioner warned of legal action on January

16, 2023. The respondent finally acknowledged the request on February 9, 2022, indicating unreasonable delays and reluctance to provide the information sought.

xviii. Therefore, as the Respondent has both unlawfully and unreasonably delayed responding to the information request and has not provided any anticipated timeline for the alleged consideration of the request by the National Assembly's Committee of Powers & Privileges, there is no discernible action by the Respondent that would trigger the jurisdiction of the CAJ. Furthermore, the CAJ lacks the jurisdiction to compel either the Respondents or the National Assembly's Committee of Powers & Privileges to take any specific action. Denying the Petitioner access to this Court would effectively leave the petitioner without any legal recourse.

xix. Consequently, this Court should dismiss the preliminary objection with costs and proceed to hear the petition on the merits.

**Parties Submissions**

**Respondent's Submissions**

4. Submissions dated 14th February 2024, were filed by Counsel, Mbarak Awadh Ahmed Kakai Mugalo in support of the Respondent's preliminary objection. The only issue identified for discussion was: whether this Court has jurisdiction to entertain this matter.

5. Firstly, Counsel relying in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited* [1989] 1 KLR submitted that this Court lacks jurisdiction to entertain this matter as Section 13 and 35(2) of the *Parliamentary Powers & Privileges Act*, provides that the Respondent has no mandate to issue the requested information before first obtaining permission of the Speaker of the National Assembly and the Committee.

6. It was noted that in the letter dated 9th February 2023, the Petitioner was informed that the request had been forwarded to the Committee for consideration. In light of this, Counsel argued that the issues raised herein were not ripe for determination and thus the Court should allow the Committee to complete its mandate first.

7. Reliance was placed in *Pevans East Africa Limited & another v Chairman, Betting Control & Licensing Board & 7 others* [2017] eKLR where the Court of Appeal held that:

> "Where the Constitution had reposed specific functions in an institution or organs of state, the courts must give those institutions or organs sufficient leeway to discharge their mandates and only accept an invitation to intervene when those bodies are demonstrably shown to have acted in contravention of the Constitution."

8. Like dependence was placed in *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 Others* [2016] eKLR.

9. Secondly, Counsel submitted that the *Access to Information Act* under Section 14 (1) grants the CAJ original jurisdiction, to review a decision on release or denial of access to information. Counsel argued that the Petitioner's dispute that the Respondent had not responded was false as it was evident that the Respondent informed that the matter was under consideration by the Committee.

10. Nonetheless it was asserted that even where there would not have been a response, Section 14 of the Act allows a complainant to raise the issue with the CAJ for review as constitutes a failure to respond. Moreover, the argument that the CAJ's decision was not binding was asserted to be erroneous as the

authority is statutorily mandated and provided for. Equally, that jurisdiction is not an optional element as has been held severally by the Courts.

11. Reliance was placed in *Consumer Federation of Kenya v Cabinet Secretary for Petroleum and Mining & 4 others* [2023] KEHC 24015 (KLR) where it was held that:

> "96. On violation of Article 35, I also find it was necessary for the Petitioner to demonstrate that it had first sought that information in writing from the 1st Respondent (Section 8 of *Access to Information Act*). This was not done. Further, even where the Respondent may have refused to provide the information (which should ought to be provided within 21 days per Section 9), the recourse was to refer the matter to Commission on Administrative Justice (per Section 14) before approaching the court. This procedure is provided for in the *Access to Information Act* and the Petitioner should have followed it. It is thus premature to seek an order of the Court when those statutory remedies are yet to be exhausted."

12. Like dependence was placed 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 and *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties)* [2023] KESC 113 (KLR).

**Petitioners Submissions**

13. The Petitioner filed submissions dated 5th May 2024 and highlighted the issues for determination as: whether the preliminary objection is competent; whether this Court has jurisdiction to determine the Petition; whether the CAJ has jurisdiction over the circumstances of the Petition and whether pursuant to Section 9 (4) of the *Fair Administrative Action Act*, it would be justified for this Court to grant the Petitioner an exemption from the requirement to pursue alternative remedies.

14. The Petitioner on a preliminary note submitted that the Objection was incompetent in substance as the matter herein is adjudicated under the discretion of the Court under Section 9(4) of the *Fair Administrative Action Act*. Dependence was placed in *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others* [2014] eKLR, where the Supreme Court held that:

> "(31) To restate the relevant principle from the precedent-setting case, *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors* (1969) E„ 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 ....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".

15. The Petitioner in the second issue submitted that this Court has jurisdiction to entertain this suit as it raises constitutional claims which can only be determined by the Court not an administrative body.

This Court in view of Article 165(3)(d) of the *Constitution* is argued to have original jurisdiction to determine such matters amongst others. He stressed that his Petition purely raises inter alia the alleged violation of Article 35 of the *Constitution*.

16. Reliance was placed in Dr. Magare Gikenyi J. *Benjamin & 4 Others v The Cabinet Secretary Lands, Public Works, Housing and Urban Development and The Cabinet Secretary, The National Treasury and Economic Planning And 20 Others* Petition 154 of 2024 consolidated with 173; 176; 181; 191 and 11 of 2024 where it was held that:

> "All matters other than those reserved for other courts as contemplated in Article 162 (2) and as restricted by 165(6). The sweep of the constitutional authorization given to the High Court cannot be lightly taken and should not be easily compromised or given up. That is: the court has wide jurisdiction to hear and determine various matters that may be brought before it."

17. The Petitioner in the third issue submitted that the CAJ does not have jurisdiction as neither the Respondent or the Speaker of the National Assembly nor the Committee made any decision for its jurisdiction to be invoked. Nonetheless it was argued that the decision of the CAJ as held by the Supreme Court in *Kenya Vision 2030 Delivery Board* (*supra*) is not binding. This is because a recommendation is not provided for in the Constitution or the law.

18. In light of this, the Petitioner argued that the circumstances in this case warrant exemption under Section 9(4) of the *Fair Administrative Action Act*. This is because as seen in NGOs Co-ordination Board(supra) the mechanism before the CAJ is not suitable and appropriate within the context of this case. This is because the CAJ does not have power to compel the Respondent and further the issues raised in the Petition cannot be resolved by the CAJ.

19. The Petitioner further argued that the dictates of Section 13 and 35(2) *Parliamentary Powers & Privileges Act* are not applicable in the matter herein. Nonetheless it was contended that where the Respondent or the Speaker fails to act, they can be compelled under Article 35 of the *Constitution*. According to him there is no effective or adequate remedy available for him to utilize.

20. Reliance was placed in *Nicholus v Attorney General & 7 others* SC. Petition E007 of 2023, where the Supreme Court held that:

> "... the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief."

21. Like dependence was placed in *Republic v National Environmental Management Authority* [2011] eKLRand *Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR.

**Analysis and Determination**

22. It is my considered view that the issues that arise for determination are as follows:

    i. Whether the Respondent's Notice of Preliminary Objection meets the threshold for preliminary objections.

    ii. Whether the Preliminary Objection is merited.

23. The constituents of a preliminary objection were laid out in the cerebrated case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 which has been adopted in numerous judicial decisions. In the case of *Dismas Wambola v Cabinet Secretary, Treasury & 5 others* (2017) eKLR the Court observed thus:

> " 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...."

24. In *Oraro v Mbaja* [2005] 1 KLR similar sentiments were echoed by the Court which held thus:

> " 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....."

25. The preliminary objection herein raises jurisdictional question based on the doctrine of exhaustion and ripeness. Jurisdiction may be circumscribed by the Constitution, legislation or from principles established through judicial precedent as held by the Supreme Court *in the Matter of the Interim Independent Electoral Commission* [2011] KESC 1 (KLR) which expressed itself as follows:

> " Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent."

26. Under the exhaustion doctrine, a Court is barred from adjudicating a dispute in which a statute or a regulatory regime has provided other alternative ways or means of pursuing a remedy instead of directly approaching the Court for a relief. This principle is reinforced by Article 159 of the *Constitution* which requires that in exercising judicial authority, courts and tribunals shall be guided by the principles stipulated thereunder among them 'alternative forms of dispute resolution...' The issues raised via this

Preliminary Objection are thus jurisdictional in nature and are pure points of law which is the proper subject to be determined through a preliminary objection.

27. Courts have consistently asserted that where other forms of reliefs other than judicial reliefs are provided for in legislation or regulatory regime, parties must exhaust these alternative mechanisms before seeking Court's intervention. In *John Githui v Trustees, Nakuru Golf Club* [2019] eKLR the Court stated:

> "25. There is no doubt that the doctrine of exhaustion of local remedies is one of esteemed juridical ancestry in Kenya. In *Republic v IEBC Ex Parte NASA-Kenya & 6 Others* [2017] eKLR, the Court – a three-judge bench -- described our jurisprudential policy on the doctrine of exhaustion which the Respondents raised in a bid to preliminarily swat away the Applicants' suit in the following words:
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> This doctrine [of exhaustion] is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in *Speaker of National Assembly v Karume* [1992] KLR 21 in the following oft-repeated words: -
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> Where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.
>
> While this case was decided before the *Constitution* of Kenya, 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 *Constitution*. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine. This is *Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others* [2015] eKLR, where the Court of Appeal stated that: -
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> 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 fora of last resort and not the first port of call the moment a storm brews..... 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 the Courts. The Ex Parte Applicants argue that this accords with Article 159 of the *Constitution* which commands Courts to encourage alternative means of dispute resolution.
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> We have read these cases carefully and considered the salutary decisional rule of law they announce...
>
> 26. The existence of the doctrine is not in question. What is in question is whether it is applicable in the case at hand It is instructive that the Respondent does not state what the local remedies which should have been exhausted are. It begs the question, how is the Court to determine if the local remedies have been exhausted or not? On the other hand, there is evidence, as the Petitioner

points out, that there has been some internal process that led to the impugned decision by the Management Committee. If the internal regulations call for a further grievance procedure, that has not been pointed out to the Court. As such, this argument is unavailing to the Respondent."

28. 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..."

29. Nonetheless, there are exceptional circumstances which might warrant disregarding the doctrine of exhaustion in exceptional circumstances as was held in *Fleur Investments Limited v Commissioner of Domestic Taxes & another* [2018] eKLR where the Court explained thus:

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

30. The question thus becomes whether the instant Petition is barred by the doctrine of exhaustion. The Petitioner insisted that it is not because the alternative form is approaching the Commission on Administration of Justice which is incapable of granting a substantive remedy, but can only give a mere unenforceable recommendation.

31. in *Albert Chaurembo Mumba & 7 Others* (*supra*) the Supreme Court cautioned as follows:

> "118. 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.
>
> 119. 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."

32. Under Section 7 of the *Access to Information Act*, a party seeking to access information held by the state or private body writes to officer having custody of the information seeking access to the held by the officer.

33. If the request is refused or requester fails to receive the information, Section 14 of the Act directs that the requester notify CAJ in writing requesting its intervention by reviewing reasons given or outlined in refusing to grant access.

34. In execution of its functions under Section 21; the CAJ has been bestowed with powers set out in Section 23 of the *Act* as follows:

    1. In the performance of its functions under this Act, the Commission shall have the power to—

        a. issue summonses or other orders requiring the attendance of any person before the Commission and the production of any document or record relevant to any investigation by the Commission;

        b. question any person in respect of any subject matter under investigation before the Commission; and

        c. require any person to disclose any information within such person's knowledge relevant to any investigation by the Commission.

    2. The Commission may, if satisfied that there has been an infringement of the provisions of this Act, order—

        a. the release of any information withheld unlawfully;

        b. a recommendation for the payment of compensation; or

c. any other lawful remedy or redress.

3. A person who is not satisfied with an order made by the Commission under subsection (2) may appeal to the High Court within twenty-one days from the date the order was made.

4. An order of the Commission under subsection (2) may be filed in the High Court by any party thereto in such manner as the Commission may, in regulations made in consultation with the Chief Justice, prescribe and such party shall give written notice of the filing of the order to all other parties within thirty days of the date of the filing of the order.

5. If no appeal is filed under subsection (3), the party in favour of whom the order is made by the Commission may apply ex-parte by summons for leave to enforce such order as a decree, and the order may be executed in the same manner as an order of the High Court to the like effect.

35. The Court in *Dock Workers Union of Kenya v Kenya Ports Authority; Portside Freight Terminals Limited & another (Interested Parties)* [2021] eKLR discussing the mandate of the CAJ observed as follows:

> " 29. Under section 23 of the *Access to Information Act* No. 31 of 2016, the High Court has been established to have appellate jurisdiction. In *Savraj Singh Chana v Diamond Trust Bank* (Kenya) Limited & another [2020] eKLR, Korir J observed correctly in my view, as follows:
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> > "It is appreciated that the cited decision does indeed recognize that the unlimited jurisdiction of the High Court of Kenya under Article 165(3)(b) of the *Constitution* to determine questions on whether a right or fundamental freedom has been infringed or violated. Nevertheless, it must be appreciated that the High Court does not exercise its jurisdiction in a vacuum. Jurisdiction is exercised within the laid down principles of law. One of those principles is one which requires that where a statutory mechanism has been provided for the resolution of a dispute, that procedure should first be exhausted before the courts can be approached for resolution of that dispute. Indeed, like any other legal principle, this doctrine has exceptions. In my view, it is the duty of a party who bypasses a statutory dispute resolution mechanism to demonstrate that there were reasons for avoiding that route. In the case before me, the Petitioner has simply pointed to the jurisdiction of this Court. The exhaustion principle does not actually take away the constitutional jurisdiction of this Court. What it simply does is to provide the parties with a faster and more efficient mechanism for the resolution of their disputes. The courts will step in later if any party is aggrieved by the decision of the statutory body mandated to resolve the dispute."

36. A keen study of the facts in this case discloses that the Petitioner requested for access to information from the Respondent concerning the tabling before the National Assembly, 'the Kenya Development Corporation Limited (Vesting) Order, 2001' by the Treasury. In response the Respondent informed the Petitioner that the request was being reviewed by its committee.

37. As a consequence, the Petitioner filed the instant Petition alleging violation of his right to access information under Article 35 of the *Constitution*.

38. It is manifest going by the stated facts that the Petitioner shunned the procedure provided for in the *Access to Information Act*. The jurisdiction of this Court was in the circumstances invoked prematurely. I see no exceptional circumstances that necessitated circumvention of this statutory requirement.

39. As was held in *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another* [2016] eKLR;

> "... Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation..."

40. I find that this Petition is barred by doctrine of exhaustion of remedies. I uphold the preliminary objection and decline to exercise this Court's jurisdiction to hear and determine this Petition in view of the failure by the Petitioner to utilize the available statutory mechanisms in the first instance.

41. The upshot is that this Petition is struck out.

42. I make no orders as to costs.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 31ST DAY OF DECEMBER, 2024.**

**.....**

**L N MUGAMBI**

**JUDGE**