AK & another v Joyce Njoki Ngigi t/a Kora Spa (Constitutional Petition E468 of 2021) [2023] KEHC 1126 (KLR) (Constitutional and Human Rights) (23 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1126 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION E468 OF 2021

AC MRIMA, J

FEBRUARY 23, 2023

BETWEEN

AK .... 1ST PETITIONER

LH (MINOR) (SUING THROUGH HIS NEXT FRIEND) HK ... 2ND PETITIONER

AND

JOYCE NJOKI NGIGI T/A KORA SPA .... RESPONDENT

RULING

Background:

1. The preliminary objection, subject of this ruling is dated 15th November, 2021. It was lodged by Joyce Njoki Ngigi, T/A Kora Spa, the Respondent herein, upon being sued by AK LH, a minor, suing through his father, HK, as the 1st and 2nd Petitioners herein respectively.

2. A synopsis of the facts giving rise to the dispute will suffice. Joyce Njoki Ngigi runs a beauty, cosmetic and personal care service in the name and style of Kora Spa.

3. On 11th September, 2021, the 2nd Petitioner took his son, the 1st Petitioner herein, to the Spa to get barber services.

4. It is the Petitioner's case that whilst getting attended to, the servants of the Respondent took photographs of them.

5. The Petitioners contended that they were not informed of the reasons or intention of the photographs.

6. The Petitioners posited that subsequently, on 16th September, 2021, they discovered that the Respondent had published their photographs on their social Facebook and Instagram handles under the caption "Barbers are culturally significante @ spa.kora@juan".

7. Aggrieved by the publication, the Petitioner unsuccessfully sought explanation from the Respondent.

8. It is upon failure to get recourse from the Respondent that the Petitioners instituted the Petition herein seeking to vindicate their constitutionally guaranteed right to privacy under Article 31 of the *Constitution*.

9. Accordingly, the Petitioners prayed for the following reliefs: -

    a. A declaration be and is hereby issued that the capturing and or taking of the Petitioners images or photographs, and the publication and or sharing thereof by the Respondent in their social media accounts and or handles, without the Petitioners' knowledge and consent is unlawful unconstitutional and a violation of the Petitioner's fundamental rights and freedoms enshrined in Article 31 of the *Constitution*.

    b. An Order the Respondent be compelled to compensate the Petitioners for damages arising from the publication and or sharing of the Petitioner's images and or photographs without their express authority;

    c. General damages for breach of Constitutional rights.

    d. Costs of this Petition be awarded to the Petitioner.

    e. Any other relief that the Honourable Court may deem fit and just to grant in the interest of Justice.

The Preliminary Objection:

10. In opposition to the Petition, the Respondent filed the preliminary objection herein seeking to strike out the Petition on the following basis: -

    1. That this Honourable Court does not have Jurisdiction.

    2. That the suit is bad in law and is incurably defective.

Submissions in support:

11. The Respondent urged the objection through written submissions dated 1st December, 2021 and supplementary submissions dated 8th February, 2022.

12. In seeking to oust the jurisdiction of this Court, it was the Respondent's submission that Sections 56 to 65 of *Data Protection Act* 2019 provides for alternative dispute resolution mechanism and to that end, this Court ought to invoke constitutional avoidance doctrine.

13. The Respondent buttressed the foregoing by referring to various decisions on constitutional avoidance doctrine, among them, the Supreme Court decision in *Communication Commission of Kenya & 5 Others v Royal Media services Ltd & 5 Others* (2014) eKLR where it was observed: -

    > ... The principle of Constitutional avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis.

14. In a quest to lend further credence to its case, the Petitioner submitted that the *Data Protection Act* is constitutionally anchored as it was enacted by Parliament pursuant to Article 21 of the *Constitution* which obligates the State to protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.

15. In reference to Section 2 as read with Section 30 of the *Data Protection Act*, the Petitioners submitted that the Petition herein lies squarely within the *Data Protection Act since* it is in respect of an identifiable person, collection of data and processing of the data.

16. The Respondent's position was that this Court's jurisdiction may only be invoked an as appellate Court.

17. The Respondent fortified its case further by referring to the Supreme Court in *Benson Ambuti Adega & 2 Others v Kibos Distillers limited & 5 Others* (2020) eKLR where it was observed: -

> Judicial abstention, as with judicial restraint, is a doctrine not founded in constitutional or statutory provisions, but one that has been established through common law practice. It provides that a court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination, if there would be other appropriate legislatively mandated institutions.

18. In a different line of argument, the Respondent submitted that the Petitioner had filed Petition No. E411 of 2021 where it raised similar factual and legal issues as in the instant Petition, and that when it responded contesting jurisdiction, the Petitioners withdrew the said Petition unilaterally in violation of Rule 3 of the *Constitution of Kenya (protection of rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (Mutunga Rules).

19. According to the Respondent, such withdrawal requires formal application to be made and all parties heard.

20. In conclusion, the Respondent invited this Court to abide by the foregoing and have the Petition be resolved as provided for under the *Data Protection Act*.

21. On the issue of costs, the Respondent submitted that it ought to be awarded for the trouble and expenses it had incurred in prosecuting a case which ought not to have been in Court.

The Petitioner's case:

22. The Petitioners opposed the objection through written submissions dated 1st February, 2022.

23. In reference to Article 22(1) and 23(1) of the *Constitution*, the Petitioners submitted that the dispute before the Court involves breach of rights and fundamental freedoms which do not fall within the purview of *Data Protections Act*.

24. It was its case that access to justice was the foundational stability of the society and as such, its limitation ought to be reasonable and justifiable.

25. It was its case further that the foregoing test was set out in Nairobi Petition No. 280 of 2017, *Council of Governors v Lake Basin Development Authority & 6 Others* (2017) eKLR.

26. While urging the Court to determine jurisdiction on the basis of the pleading and not the merits, the Petitioners relied on the South African case in *Vuyile Jackson Gcaba v Minister for Safety and Security First & Others* where it was observed: -

> Jurisdiction is determined on the basis of the pleadings... and not the substantive merits of the case. In the event the Court's jurisdiction being challenged at the onset (in limine), the applicant's pleadings are the determining factor...

27. The Petitioner further asserted this Court's jurisdiction stating that under Article 165 of the *Constitution*, this Court has the mandate to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated or is threatened. To that end, it was its case that the issues raised in the Petition cannot be dealt with by Data Commissioner as provided for under Section 9 of the *Data Protection Act.*

28. It was the Petitioners' position that under section 9, the Commission carries investigations upon receipt of a complaint and gives the Commissioner the discretion to impose administrative fines for failure to comply with the *Act.*

29. On the foregoing it was submitted that the *Data Protection Act* does not donate power to the Data Commissioner to determine complaints on the constitutionality of actions.

30. The Petitioner urged the Court to restrictively construe statutory provisions which oust the Court's jurisdiction.

31. In challenging the claim that the Petition is incurably defective, the Petitioner referred to Rule 3 of the *Constitution of Kenya (protection of rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 (Mutunga Rules) which requires Courts to observe the overring objective of facilitating access to Court as required under Article 48 of the *Constitution*.

32. With respect to the claim of unprocedural withdrawal of Petition No. E411 of 2021, the Petitioner submitted that under Rule 27 of *Mutunga Rules*, the Petitioner reserved the right to withdraw the Petitions and, in any event, they duly served the Respondent with the Notice of Withdrawal but the Respondent failed to attend Court on that date.

33. It was further its case that the Respondent suffered no prejudice and it only withdrew after realizing the error of listing a party with no capacity to be sued.

34. In the end, it urged that the preliminary objection be dismissed with costs.

Analysis:

35. From the reading of the objection and the parties' submissions alongside the decisions referred to, it is apparent that the objection is centred on the doctrine of exhaustion. It is, therefore, the Respondent's contention that there exists a defined statutory resolution mechanism for the dispute at hand which ought to be strictly, and in the first instance, adhered to and that the High Court only exercises appellate jurisdiction over the subject dispute.

36. In Kenya, the doctrine traces its origin from Article 159(2)(c) of the *Constitution* which recognizes and entrenches the use of alternative mechanisms of dispute resolution in the following terms: -

159(2) In exercising judicial authority, the Courts and tribunals shall be guided by the following principles-

(a) ...

(b) ...

(c) alternative forms of dispute resolution including resolution, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause 3.

37. Clause 3 is on traditional dispute resolution mechanisms.

38. The doctrine of exhaustion was comprehensively dealt with by a 5-Judge Bench in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others* (Interested Parties) (2020) eKLR. The Court stated 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. This encourages alternative dispute resolution mechanisms in line with Article 159 of the *Constitution* and was aptly elucidated by the High Court in *R v Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others* [2017] eKLR, where the Court opined thus:
>
> > 42. This doctrine 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:
> >
> > > 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.
> >
> > 43. 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 Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR, where the Court of Appeal stated that:
> >
> > > 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.

39. The Court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

> 59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In *R v Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte*

The National Super Alliance Kenya (NASA) (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

> What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved - including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. 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 values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 Others v Aelous (K) Ltd and 9 Others.*)

60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the *Constitution* or law and allow the suit to proceed before it. 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.

40. The above decision was appealed against by the Respondents. The Court of Appeal in upholding the decision and in dismissing the appeal in Mombasa Civil Appeal No. 166 of 2018 *Kenya Ports Authority v William Odhiambo Ramogi & 8 others* [2019] eKLR held as follows: -

> The jurisdiction of the High Court is derived from Article 165 (3) and (6) of the *Constitution*. Accordingly, the High Court has unlimited original jurisdiction in criminal and civil matters, including determination of a question of enforcement of the bill of rights and interpretation of the Constitution encompassing determination of any matter relating to the Constitutional relationship between the different levels of government.
>
> At the High Court, we note that the learned Judges dealt with this matter under the question framed as follows: Is the court barred from considering the suit at present by virtue of Article 189 of the Constitution and sections 33 and 34 of Inter-Governmental Relations

Act of 2012 (IGRA)? The parties have advanced similar arguments as before the learned Judges of the High Court. The High Court went further than just looking at the ruling by Ogola J. They also took into account the doctrine of exhaustion as enunciated in *Republic v Independent Election and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 6 Others* [2017] eKLR. They applied a dual pronged approach before concluding that the dispute was not an inter-governmental dispute under IGRA. First, they considered that the test for determining the matter as an inter-governmental dispute for purposes of application of IGRA was not simply to look at who the parties to the dispute were, but the nature of the claim in question and; secondly, they considered that the claimed Constitutional violations seeking to be enforced are not mere "bootstraps." We have keenly addressed our minds to the learned Judges' decision and are satisfied that they stayed within the expected contours and properly directed themselves. Once they determined that the dispute was not inter-governmental in nature, we do not think it is necessary to consider whether the petitioners had exhausted their legal avenue. Jurisdiction by the High Court under Article 165 (5) of the *Constitution* became automatic. And in our view, it could not be ousted or substituted.

41. Further, in Civil Appeal 158 of 2017, *Fleur Investments Limited v Commissioner of Domestic Taxes & another* [2018] eKLR, the Learned Judges of the Court of Appeal relied on an earlier decision in *Speaker of National Assembly v Njenga Karume* (1990-1994) EA 546 to assume jurisdiction by bypassing the mechanism under Income Tax Tribunal. They observed as follows: -

    23. For the reasons we have given earlier and others that will become apparent, there were definitely exceptional circumstances that existed in this case that were outside the ambit of the Income Tax Tribunal which called for intervention by way of judicial review. 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.

42. From the foregoing discussion, the doctrine of exhaustion is a complete bar to the jurisdiction of a Court save in cases where any of the exceptions apply.

43. Applying the above to this matter, it is contended that the provisions of the *Data Protection Act*, No. 24 of 2019 (hereinafter referred to as 'the Data Act') is a complete bar to the jurisdiction of this Court.

44. The Preamble of the *Data Act* states that it is 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.

45. Article 31(c) and (d) of the *Constitution* provides as follows: -

    31. Privacy:

        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.

46. The *Data Act* further provides for the rights of a data subject, the enforcement of rights of data subjects, investigation of complaints by data subjects, compensation for breach of the rights of data subjects, the registration of data controllers and data processors, the principles and obligations of personal data protection, processing of sensitive personal data, among many other aspects of personal data.

47. The Petitioners' complaint in this case is the alleged publication of the Petitioners' images and/or photographs by the Respondent in its social media accounts without their consent. The Petitioners' alleged breach of their Article 31 rights under the *Constitution*. They also sought for compensation and costs.

48. This Court has carefully considered the provisions of the *Data Act* alongside the Petitioners' dispute. The upshot is that the dispute, as presented and couched, wholly falls within the four corners of the *Data Act*.

49. The *Data Act*, therefore, wholly provides for the dispute at hand as well as the remedies in the event the dispute is successful.

50. In such a case, it was incumbent upon the Petitioners to demonstrate to the Court any of the exceptions to the doctrine of exhaustion. The Petitioners did not do so.

51. The upshot is that the doctrine of exhaustion applies in this matter and bears a complete bar to the further exercise of jurisdiction by this Court.

52. As a result of the foregoing, the following orders do hereby issue:

    a. The Notice of Preliminary Objection dated 15th November, 2021 is merited.

    b. The Petition dated 2nd November, 2021 is hereby struck out with costs.

    Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 23RD DAY OF FEBRUARY, 2023.

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Mr. Orina, Learned Counsel for the Petitioners.

Mr. Kipkorir, Learned Counsel for the Respondent.

Regina/Chemutai – Court Assistants