



**Musaina v Jubilee Party of Kenya & 4 others (Constitutional Petition E320 of 2020)
[2023] KEHC 1124 (KLR) (Constitutional and Human Rights) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1124 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E320 OF 2020**

AC MRIMA, J

FEBRUARY 23, 2023

BETWEEN

GODFREY MUSAINA PETITIONER

AND

JUBILEE PARTY OF KENYA 1ST RESPONDENT

REGISTRAR OF POLITICAL PARTIES 2ND RESPONDENT

HON. ATTORNEY GENERAL 3RD RESPONDENT

IEBC 4TH RESPONDENT

**CABINET SECRETARY, NATIONAL TREASURY & PLANNING 5TH
RESPONDENT**

RULING

1. The instant proceedings were initiated vide the Petition dated 7th October, 2020. Contemporaneously with the filing of the Petition was a Notice of Motion of even date.
2. The application sought several orders including restraining the 5th Respondent herein from disbursing the sum of Kshs. 161,124,053/78 to the 1st Respondent being its parliamentary allocation from the Political Parties Fund in the 2020/2021 financial year, restraining the 4th Respondent from approving or gazzeting nomination list/nominee from the 1st Respondent for some five by-elections which were scheduled for 15th December, 2020, among other reliefs.
3. On service, the 1st Respondent herein filed a Notice of Preliminary Objection dated 12th November, 2020. The objection was taken on the jurisdiction of this Court over the proceedings.



4. Thereafter, the 3rd and 5th Respondents exited the proceedings on the consensus of all parties. Further, the application was dispensed with a view to expedite the hearing of the Petition. By then, parties had already filed responses and submissions to the application and the objection. The Court then gave directions on the hearing of the objection and the Petition with the objection to be first heard and determined.
5. This ruling is, therefore, in respect of the objection.
6. The gist of the objection was captured in the 1st Respondent's written submissions. It was the 1st Respondent's position that this Court was devoid of jurisdiction as the matters raised ought to have been dealt with by the Political Parties Dispute Tribunal by virtue of Section 40 of the *Political Parties Act*.
7. This Court has carefully considered the objection alongside the parties' submissions. Since the issue at hand is on the jurisdiction of this Court, such can be raised at any time of the proceedings and even on appeal (See Court of Appeal in *Jamal Salim v Yusuf Abdullahi Abdi & another Civil Appeal No. 103 of 2016 [2018] eKLR*). The Court can also raise such issue on its own motion.
8. The Supreme Court in *Petition No. 7 of 2013, Mary Wambui Munene v. Peter Gichuki Kingara and Six Others, [2014] eKLR*, while affirming its earlier position in *Samuel Kamau Macharia & Anther -vs- Kenya Commercial Bank Limited Kenya & 2 Others (2013) eKLR* on jurisdiction, observed as follows: -

... jurisdiction is a 'pure question of law' and should be resolved on priority basis.
9. The essence of the objection is to oust the jurisdiction of this Court on the basis that the Petitioner did not first submit to the *Political Parties Act* by lodging the claim before the Political Parties Dispute Tribunal. By taking such a position, the 1st Respondent, whether knowingly or otherwise, invoked the doctrine of exhaustion.
10. 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.
11. Clause 3 is on traditional dispute resolution mechanisms.
12. 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 vs. 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.

42. 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 – vs- 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.

13. 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. vs 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 vs 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.
14. 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 vs. 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.

15. Further, in Civil Appeal 158 of 2017, Fleur Investments Limited -vs- 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 vs 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.
16. 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.
17. Applying the above to this matter, the starting point is the manner in which the Petition was tailored. The Petition sought the following reliefs: -
 - a. A declaration that the 1st Respondent has violated Articles 10, 38, 91(b), d, f, g and h of *the Constitution* as read with section 4, 7 and 26 of the *Political Parties Act*.
 - b. A declaration that the 2st Respondent does not meet the basic criteria of a political party under Article 91 of *the Constitution* and is operating contrary to *the Constitution* and *political parties Act*
 - c. A judicial Review Order compelling the 2nd Respondent to de-register the 1st Respondent for failure to meet the Constitutional threshold of a political party and to enforce its own constitution.
 - d. Any other order that this Court shall deem appropriate to grant in the circumstances
 - e. Costs.
18. The above substratum was the basis for seeking the orders in the application. A plain reading of the Petition has it that, due to many issues within the 1st Respondent (which the Petitioner was satisfied were contrary to *the Constitution* and the law), the 1st Respondent ought to be de-registered.
19. Suspension and deregistration of a political party is provided for under Section 21 of the *Political Parties Act*, No. 11 of 2011. The section provides as follows: -
 21. Suspension and deregistration of a political party:



- (1) The Registrar may suspend or deregister a political party if the political party—
 - (a) has contravened the provisions of Article 91 of *the Constitution*;
 - (b) does not promote free and fair nomination of candidates;
 - (c) does not adhere to the law relating to the nomination of candidates;
 - (d) does not respect the national values and principles of *the Constitution*;
 - (e) obtained its registration in a fraudulent manner;
 - (f) has instigated or participated in the commission of an election offence;
 - (g) has acted contrary to the provisions of section 26;
 - (h) does not have representation of special interest groups;
 - (i) does not maintain the requirements set out under section 7; or
 - (j) has contravened the provisions of Article 81(b) of *the Constitution*.
- (1A) Where a registered political party contravenes the provisions of subsection (1), the Registrar may—
 - (a) serve the party with a notice in writing specifying the nature of the contravention, requiring the political party to redress the contravention within the period specified in the notice:

Provided that the period of the notice shall not exceed three months;
 - (b) where the political party fails to comply with the notice under paragraph (a) within the specified period, suspend the registration of the political party for a period not exceeding one year; and
 - (c) where, after the expiry of the period specified in paragraph (b), the party fails to remedy the contravention and persists in contravening the provisions of this Act, deregister the party.
- (2) The Registrar shall, before suspending and deregistering a political party—
 - (a) inform the political party, in writing, of the particulars of the breach or contravention;
 - (b) inform the political party, in writing, of the intention to deregister the political party; and
 - (c) direct the political party to remedy the breach or contravention within ninety days or otherwise show cause why the party should not be deregistered.
- (3) Deleted by Act No. 2 of 2022, s. 14 (d).
- (4) A political party that has been suspended under subsection (3) shall not be entitled to any of the rights and privileges specified in section 15.
- (4A) A political party that is dissatisfied with the decision to suspend it under this section may, within thirty days of receiving the notice of suspension, apply to the Registrar for a review of the decision.



- (5) The Registrar shall deregister a political party which has not remedied the breach or complied with the Act as required by the Registrar under subsection (2).
- (6) The Registrar shall deregister a political party which has been declared to be a prohibited organisation under the provisions of any written law.
- (6A) The Registrar shall, within fourteen days after deregistration of a political party under subsection (5), cause a notice of the deregistration to be published in the Gazette.
- (7) A political party which is dissatisfied with the decision of the Registrar under subsections (1) or (2) may appeal to the Tribunal against the decision.
(emphasis added).

20. The above provision, therefore, provides for the procedure for the deregistration of a political party. Therefore, unless the Petitioner demonstrates any of the exceptions to the doctrine of exhaustion, the jurisdiction of this Court shall stand improperly invoked.
21. There is no doubt that the 1st Respondent is a duly registered political party under the [Political Parties Act](#).
22. The prevailing statutory design under the [Political Parties Act](#) is, therefore, to accord the Registrar of Political Parties the first bite of the cherry on matters relating to deregistration of political parties. The obvious exception will be in cases where the exceptions to the doctrine of exhaustion discussed above apply.
23. In this case, there is no mention by the Petitioner of having, in any way, involved the Registrar of Political Parties prior to instituting the instant proceedings. Be that as it may, the Petitioner has also not demonstrated any of the settled exceptions to the doctrine of exhaustion.
24. The Registrar of Political Parties is a public officer. By dint of Article 10 of [the Constitution](#), the Registrar must adhere to the national values and principles of governance while discharging its duties. The Registrar is also under a non-derogable duty to respect, defend and uphold [the Constitution](#) on the basis of Article 3 thereof.
25. The matters in dispute in this case are squarely within the operational parameters of the Registrar. Such are the matters which the Registrar ought to first deal with. In the event the parties or any of them will be dissatisfied with the manner in which the Registrar deals with the issues, such can always access the Political Parties Disputes Tribunal pursuant to Section 21(7) of the [Political Parties Act](#).
26. Having said so, this Court undoubtedly arrives at the finding that the institution of the instant proceedings before this Court was premature. As such, the Court's jurisdiction has been improperly invoked. The Court must down its tools.
27. In the end, the following orders do hereby issue: -
 - a. This Court declines jurisdiction on the basis of the doctrine of exhaustion.
 - b. The Petition and the Notice of Motion dated 7th October, 2020 are hereby struck out.
 - c. The Petitioner shall bear the costs of the proceedings.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:

N/A for the Parties

Regina/Chemutai – Court Assistants

