



REPUBLIC OF KENYA



KENYA LAW
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Olaly & another v Duba & 3 others; Registrar of Societies (Interested Party) (Constitutional Petition E434 of 2020) [2023] KEHC 1125 (KLR) (Constitutional and Human Rights) (23 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1125 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E434 OF 2020**

AC MRIMA, J

FEBRUARY 23, 2023

BETWEEN

BROWN ASHIRA OLALY 1ST PETITIONER

KENNETH NGARI OGENDO 2ND PETITIONER

AND

MOHAMMED BAGAJO DUBA 1ST RESPONDENT

MATHEW KORE 2ND RESPONDENT

DANIEL ANDATI OKWARA 3RD RESPONDENT

ASSOCIATION OF PUBLIC HEALTH OFFICERS (KENYA) .. 4TH RESPONDENT

AND

REGISTRAR OF SOCIETIES INTERESTED PARTY

RULING

1. This ruling is in respect of two applications. They are the petitioner’s notice of motion dated December 28, 2020 (hereinafter referred to as ‘the application’) and the notice of preliminary objection dated February 9, 2021 (hereinafter referred to as ‘the objection’) which was taken out by the 2nd and 4th Respondents.
2. The application sought an array of 7 orders, as under: -
 1. Spent



2. This Honourable Court be pleased to freeze, restrict and or prohibit operations and or transactions of the 4th Respondent's Bank Account Number 010208xxxxxx held with standard Chartered Bank, Harambee Avenue Branch, Nairobi and any accounts held by the Association and further prohibit usage of any of the 4th Respondent's resources pending the hearing and determination of this Petition.
 3. This Honourable Court be pleased to suspend the 1st, 2nd and 3rd Respondents until it submits annual returns from the year 2016 and also holds proper elections in accordance with the current and or revised/ratified Constitution.
 4. This Honourable Court do order the 1st 2nd and 3rd Respondent's to provide accounts of the Association and audited accounts from the year 2016 and further do direct the 3rd Respondent to produce all books and papers necessary for the complete examination of the 4th Respondents account in the next 30 days.
 5. This Honourable Court be pleased to direct the 4th Respondent through the 1st and the 2nd Respondent to convene annual General Meeting for the transaction of Ordinary business of Association not more than 30 days and or special General Meeting to be held not later than thirty days whose agenda shall include.
 - a. auditing the association book of accounts
 - b. ratification of the *Constitution*.
 - c. valuation of the Association Assets
 - d. election of officials
 - e. inspection of accounts and list of members
 6. This Honourable Court be pleased to direct parties to appoint a caretaker committee to take over the affairs of the Association of Public Health Officers (Kenya) pending the hearing and determination of the Petition.
 7. Costs of this Application be borne by the Respondents.
3. The application was premised on the grounds appearing on the body thereof and was supported by the Affidavit of Brown Ashira Olaly, the 1st Petitioner herein.
 4. The objection was tailored as follows: -
 1. That the 4th Respondent lacks the legal capacity to be sued since it is not a legal person and can only be sued through its trustees.
 2. The Petitioners lack *locus standi* to institute the Petition.
 3. That the Petitioners have not exhausted the internal dispute resolution mechanism and the statutory dispute mechanisms before invoking the jurisdiction of this Honourable Court.



5. On this Court's directions, the application and the objection were to be heard together and by way of written submissions. Whereas the Petitioners and the 1st and 3rd Respondents duly complied with the filing of submissions, the 2nd and 4th Respondents did not. Instead, the 2nd and 4th Respondents they relied on the submissions filed by the 1st and 3rd Respondents.
6. The objection impugned the jurisdiction of this Court on the basis of the doctrine of exhaustion. It was contended that the Petitioners had not exhausted the internal dispute mechanisms and the statutory dispute resolution mechanisms prior to making their way to Court.
7. Surprisingly, none of the parties addressed that aspect of the objection. The Petitioners and the 1st and 3rd Respondents laid more premium on the application. Be that as it may, since the issue runs to the jurisdiction of this Court, this Court remains under a duty to deal with it on priority basis. (See the Supreme Court of Kenya on Petition No 7 of 2013, *Mary Wambui Munene v Peter Gichuki Kingara and Six Others* [2014] eKLR).
8. This Court will, therefore, address itself on whether the doctrine of exhaustion applies in this matter as a complete jurisdictional bar.
9. 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."

10. Clause 3 is on traditional dispute resolution mechanisms.
11. 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.EBC) 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 – 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."

12. 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 (IEBC) & 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."
13. 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."

14. 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.

15. 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.
16. Applying the above to this matter, there is no doubt that the Petition herein relates to the affairs of a registered society being the 4th Respondent herein, the Association of Public Health Officers (Kenya).
17. From the reading of the Petition and the application, it is apparent that the Petitioners, who are members of the 4th Respondent, are utterly dissatisfied with the manner in which the affairs of the 4th Respondent are carried out more so by the members of the Executive Committee.
18. The complaints include failure by the 4th Respondent to conduct Annual General Meetings, attempts to privatize the 4th Respondent, that the Acting Chairman is in office illegally, elections of office bearers, amendments to the 4th Respondent's constitution, failure to file annual returns over time, failure to audit the operations and finances of the 4th Respondent among many others.
19. The Petitioners enjoined the Registrar of Societies as an Interested Party in these proceedings. That means the Petitioners were well aware that the Registrar of Societies has an identifiable interest in this matter.
20. As the 4th Respondent is a society registered under the *Societies Act*, Cap 108 of the Laws of Kenya, then its first port of operational call must be the said statute. Of course, the said statute runs subordinated to the *Constitution of Kenya*.
21. The *Societies Act* is an Act of Parliament providing for the registration and control of societies. Section 8 creates the Office of the Registrar of Societies. Under the Act, the Registrar has significant responsibilities and powers to ensure that the affairs of registered societies are within the confines of



the Constitution and the law. To that end, the Registrar has powers to even cancel or suspend the registration of any society, to hear and determine disputes under Section 18 of the Act, to carry out investigations into the affairs of a society either on its own motion or on a complaint lodged among many more powers.

22. The statutory design under the Societies Act is, therefore, to accord the Registrar of Societies the first bite of the cherry in respect to all operational bottlenecks within registered societies. 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 Petitioners of having, in any way, involved the Registrar of Societies prior to instituting the instant proceedings. Be that as it may, the Petitioners have also not demonstrated any of the settled exceptions to the doctrine of exhaustion.
24. The Registrar of Societies 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 purely operational in nature. 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 this Court for further redress.
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. Coming to the end of this judgment, this Court wishes to profusely apologize for the late delivery of the decision. The delay was mainly occasioned by the number of election-related matters which were filed in the Constitutional and Human Rights Division from December 2021. From their nature and given that the country was heading to a General election, the said matters had priority over the rest. The Court was also transferred in July 2022, on need basis, to a new station which had serious demands that called for urgent attention. The totality of it all yielded to the delay herein. Galore apologies once again.
28. In the end, the following orders do hereby issue: -
 - a. This court declines jurisdiction on the basis of the doctrine of exhaustion.
 - b. The notice of preliminary objection dated February 9, 2021 is hereby allowed.
 - c. The petition and the notice of motion dated December 28, 2020 are hereby struck out.
 - d. Since the disputes within the Association of Public Health Officers (Kenya) still subsist and the parties herein shall engage further, each party shall bear its own costs of these 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:

Miss Kwamboka, Learned Counsel for the Petitioners.

Mr. Odhiambo, Learned Counsel for the 1st and 3rd Respondents.



Mr. Okwach, Learned Counsel for the 2nd and 4th Respondents.

Regina/Chemutai – Court Assistants

