



**Constantine Joseph Advocates LLP v National Council of Persons
with Disabilities & 3 others (Constitutional Petition E414 of 2021)
[2023] KEHC 2622 (KLR) (Constitutional and Human Rights) (31 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2622 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E414 OF 2021**

AC MRIMA, J

MARCH 31, 2023

BETWEEN

CONSTANTINE JOSEPH ADVOCATES LLP PETITIONER

AND

**NATIONAL COUNCIL OF PERSONS WITH DISABILITIES & 3
OTHERS RESPONDENT**

RULING

Introduction

1. By a Notice of Preliminary Objection dated 29th March, 2022, the Respondents impugned the jurisdiction of this Court and urged the Court to strike out the Petition.
2. The objection was opposed and parties filed their respective List and Bundles of Authorities in support of their rival positions.
3. This ruling is, therefore, in respect of the objection.

Analysis:

4. The objection was tailored as follows: -
 1. This Honourable Court lacks the requisite Jurisdiction to handle the matter.
 2. The Orders sought may not be issued, being orders that violate the decisional independence of County Governments.



3. The Petition is incurably defective in substance and form.
5. This Court has carefully considered the objection alongside the comprehensive parties' submissions and the authorities cited. Since one of the issues at hand hinges 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 Abdullabi Abdi & another* Civil Appeal No. 103 of 2016 [2018] eKLR). The Court can also raise such issue on its own motion.
6. 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-v-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.

7. The other issue raised in the objection include that the legal insufficiency of the Petition.
8. I will first deal with the issue of the insufficiency of the pleadings.
9. In Nairobi High Court Constitutional Petition No. E406 of 2020 *Renita Choda V Kirit Kapur Rajput* (2021) eKLR, this Court considered the above issue. This is what was stated: -

33. Long before the downing of the new constitutional dispensation under the *Constitution* of Kenya 2010, Courts have variously emphasized the need for clarity of pleadings. I echo the position.

34. The *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 (commonly referred to as 'the Mutunga Rules') also provide for the contents of Petitions. Rule 10 thereof provides seven key contents of a Petition as follows: -

Form of petition.

10.

- (1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.
- (2) The petition shall disclose the following—
 - (a) the petitioner's name and address;
 - (b) the facts relied upon;
 - (c) the constitutional provision violated;
 - (d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;



- (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
 - (f) the petition shall be signed by the petitioner or the advocate of the petitioner; and
 - (g) the relief sought by the petitioner.
35. Rule 10(3) and (4) of the *Mutunga Rules* also have a bearing on the form of petitions. They provide as follows: -
- (3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.
 - (4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.
36. Rules 9 and 10 are on the place of filing and the Notice of institution of the Petition respectively.
37. The Supreme Court in *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others case* (*supra*) had the following on Constitutional Petitions: -
- Although Article 22(1) of the *Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the *Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.
38. Both parties are in agreement with what a constitutional issue is. They both referred to *Fredricks & Other v MEC for Education and Training, Eastern Cape & Others case* (*supra*) where the Court, rightly so, delimited what a constitutional issue entails and the jurisdiction of a Constitutional Court as follows: -
- The *Constitution* provides no definition of ‘constitutional matter’. What is a constitutional matter must be gleaned from a reading of the *Constitution* itself: if regard is had to the provisions of... Constitution, constitutional matters must include disputes as to



whether any law or conduct is inconsistent with the *Constitution*, as well as issues concerning the status, powers and functions of an organ of State.... the interpretation, application and upholding of the *Constitution* are also constitutional issues. So too is the question of the interpretation of any legislation or the development of the common law promotes the spirit, purport and object of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the *Constitution*, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly on extensive jurisdiction...

39. In the United States of America, a constitutional issue refers to any political, legal, or social issue that in some way confronts the protections laid out in the US Constitution.
40. Taking cue from the foregoing, and broadly speaking, a constitutional issue is, therefore, one which confronts the various protections laid out in a Constitution. Such protections may be in respect to the Bill of Rights or the Constitution itself. In any case, the issue must demonstrate the link between the aggrieved party, the provisions of the Constitution alleged to have been contravened or threatened and the manifestation of contravention or infringement. In the words of Langa, J in *Minister of Safety & Security v Luiters*, (2007) 28 ILJ 133 (CC): -

... When determining whether an argument raises a constitutional issue, the Court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the Court to consider constitutional rights and values...

41. Whereas it is largely agreed that the *Constitution* of Kenya, 2010 is transformative and that the Bill of Rights has been hailed as one of the best in any Constitution in the world, as Lenaola, J (as he then was) firmly stated in *Rapinder Kaur Atal v Manjit Singh Amrit* case (supra) ‘... Courts must interpret it with all liberation they can marshal...’
 42. Resulting from the above discussion and the definition of a constitutional issue, this Court is in agreement with the position in *Turkana County Government & 20 Others v Attorney General & Others* case (supra) where a Multi-Judge bench affirmed the profound legal standing that claims of statutory violations cannot give rise to constitutional violations.
10. The Petitioner’s main complaint in this matter is the insufficiency of the Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009 (hereinafter referred to as ‘the impugned Regulations’).
 11. It is contended that the impugned Regulations failed to provide the guideline on how to adapt public service vehicles to suit persons with disabilities.



12. In the main, the Petition seeks for the following prayers: -
 1. A declaration that Persons with disabilities have a constitutional right to a reasonable access to public transportation.
 2. An order of mandamus requiring the 1st Respondent to specify how public service vehicles should be adapted to suit persons with disabilities.
 3. An order of mandamus requiring the 2nd Respondent to by Notice in the Gazette to direct the owners of public service vehicles on how to adapt rail compartments, buses, vessels and aircraft in such a way as to permit easy access to persons with disabilities.
 4. An order o mandamus requiring the 3rd Respondent to provide incentives to local manufacturers and importers fo public service vehicle to build and import public service vehicles that suit persons with disabilities.
 5. Costs of this Petition.
13. The Petitioner, therefore, appreciated the promulgation of the impugned Regulations towards the implementation of The *Persons with Disabilities Act*, No. 14 of 2003 (hereinafter referred to as ‘the PWD Act’). The Petitioner is, however, not satisfied with the manner in which the said regulations will be implemented in respect to public service vehicles.
14. The dispute, therefore, hinges on the implementation of the Act and the impugned Regulations. For a Petition to properly raise a constitutional issue, as described above and in line with the Supreme Court in *Communications Commission of Kenya & 5 Others V Royal Media Services Limited & 5 Others case* (supra), there must be a link between ‘...the aggrieved party, the provisions of the *Constitution* alleged to have been contravened, and the manifestation of contravention or infringement...’
15. In this case, the complaint is not on the infringement of specific constitutional provisions, but rather that the impugned Regulations in place do not sufficiently provide for the realization of the rights of persons with disabilities. In such a case, this Court holds the position that a dispute as to infringement of a statute does not transcend into and yield a constitutional issue.
16. The Respondents are, therefore, right in contending that there are no constitutional issues raised in the Petition.
17. Further, even if the Petitioner raised constitutional issues, still that would have to be interrogated against the internal dispute mechanism provided for in the *PWD Act*.
18. The *PWD Act* is an Act of Parliament to provide for the rights and rehabilitation of persons with disabilities, to achieve equalisation of opportunities for persons with disabilities, to establish the National Council for Persons with Disabilities and for connected purposes.
19. The *PWD Act* establishes the National Council for Persons with Disabilities (hereinafter referred to as ‘the Council’) in Section 3 thereof.
20. Section 7 of the *PWD Act* provides the functions and powers of the Council in great detail. The Council has power to issue various orders in the course of discharging its duties including adjustment orders in Section 24 of the *PWD Act*.
21. As the contention in the applications is the failure to comply with the said Section 24 of the *PWD Act*, a reproduction thereof suffices: -



24. Adjustment orders:

- (1) This section shall apply to—
 - (a) any premises to which members of the public are ordinarily admitted whether on payment of a fee or otherwise; and
 - (b) any services or amenities ordinarily provided to members of the public.
- (2) Without prejudice to the provisions of section 22, if the Council considers that any premises, services or amenities are inaccessible to persons with disabilities by reason of any structural, physical, administrative or other impediment to such access, the Council may, subject to this section, serve upon the owner of the premises or the provider of the services or amenities concerned an adjustment order—
 - (a) setting out—
 - (i) a full description of the premises, services or amenities concerned; and
 - (ii) the grounds upon which the Council considers that the premises, services or amenities are inaccessible to persons with disabilities;
 - (b) requiring the owner or provider concerned to undertake at his own expense such action as may be specified in order to secure reasonable access by persons with disabilities to the premises, services or amenities concerned; and
 - (c) stipulating the period within which the action referred to in paragraph (b) shall be commenced and completed.
- (3) Before serving an order under subsection (2) the Council shall serve notice upon the person concerned—
 - (a) specifying the ground upon which the adjustment order is to be issued and the nature of the action which the Council considers necessary to rectify the situation which has given rise to the proposed order;
 - (b) stipulating the maximum period that the Council considers reasonable for the implementation of the action it proposes to order; and
 - (c) calling upon the person concerned, if he wishes to do so, to make representations to the Council within thirty days from the date of the service of the notice.
- (4) After considering any representations described in subsection (3)(c) the Council may issue, or refrain from or defer the issuing of, an adjustment order.
- (5) Within thirty days after an adjustment order is confirmed or issued under subsection (4), the person concerned may appeal against the confirmation or issue to the High Court in the prescribed manner on any grounds including on the grounds that—
 - (a) he cannot reasonably be expected to bear the whole or any part of the expense required in implementing the adjustment order;
 - (b) the period stipulated for implementing the adjustment order is unreasonable;



- (c) the nature of the action required to be taken in terms of the adjustment order is, in the circumstances of the case, unreasonable; or
 - (d) adequate access to the premises, services or amenities concerned may be secured without recourse to the action required by the adjustment order.
- (6) Upon hearing an appeal under subsection (5), the Court may—
- (a) confirm, vary or set aside the adjustment order appealed against; and
 - (b) make such order as to the costs of the appeal as it thinks fit.
22. By placing the above provisions of Section 24 of the *PWD Act* and the Petition side by side, it apparently comes to the fore that the Council and the provisions of Section 24 can sufficiently address the grievances raised by the Petitioner. In such case, unless the exceptions to the doctrine of exhaustion applies, the Court will initially decline jurisdiction. I will, therefore, briefly look at the exceptions.
23. 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.
24. Clause 3 is on traditional dispute resolution mechanisms.
25. 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.

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 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.

26. 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.
27. 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.

28. 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.

29. 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.

30. In this case, the Petitioner has not demonstrated the application of any of the exceptions. This is a case where the Court ought to ‘... postpone the ‘... 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...’.

Disposition:

31. Deriving from the foregoing, it is this Court’s finding that on the basis of failure to raise any constitutional issue and there being an internal dispute mechanism under the *PWD Act* which has not been utilized, the jurisdiction of this Court was not properly invoked.

32. Consequently, the following orders do hereby issue: -

- a. This Court declines jurisdiction on the basis that the Petition fails to raise any constitutional issues for determination and further on the basis of the doctrine of exhaustion.
- b. The Petition is hereby struck out.
- c. Each party shall bear its costs.

33 Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 31ST DAY OF MARCH, 2023.



A. C. MRIMA

JUDGE

Ruling No. 1 delivered virtually in presence of:

N/A for parties

Regina/Chemutai – Court Assistants.

