



REPUBLIC OF KENYA



**Mulili v Kenya Judicial Staff Association Elections Board & 13 others
(Constitutional Petition E187 of 2021) [2023] KEHC 2685 (KLR)
(Constitutional and Human Rights) (31 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2685 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E187 OF 2021**

AC MRIMA, J

MARCH 31, 2023

BETWEEN

LAZARO MUTUA MUTULA MULILI PETITIONER

AND

**KENYA JUDICIAL STAFF ASSOCIATION ELECTIONS BOARD & 13
OTHERS RESPONDENT**

RULING

Introduction

1. The Petition herein is a challenge to the election of the officials of the Kenya Judicial Staff Association. The election was carried out on the 15th May, 2021 by Admedia Communications Limited, the 2nd Respondent herein on behalf of the Kenya Judicial Staff Association Elections Board, the 1st Respondent.
2. Out of the said election, the 4th to 14th Respondents were appointed as the officials of the Kenya Judicial Staff Association (hereinafter referred to as ‘the Association’).
3. Dissatisfied with the outcome of the election carried out on 15th May, 2021 (hereinafter referred to as ‘the impugned election’), the Petitioner herein instituted the instant Petition. The Petitioner also filed a Notice of Motion dated 26th May, 2021 seeking some conservatory orders.
4. In response to the Petition and the application, the 1st, 4th to 14th Respondents filed inter alia a Notice of Preliminary Objection dated 31st May, 2021 in which they impugned the jurisdiction of this Court. I will hereinafter collectively refer to the 1st, 4th to 14th Respondents as ‘the objectors’.
5. The objection was heard by way of written submissions, hence this ruling.



6. The 2nd Respondent supported the objection whereas the Petitioner strenuously opposed it. The 3rd Respondent did not take part in the hearing of the objection.
7. On this Court's directions, parties filed their respective elaborate written submissions. The parties centred their submissions mainly on the second limb of the objection which was in respect to the jurisdiction of this Court on the basis of the doctrine of exhaustion. They also filed Lists of Authorities.
8. This Court is indeed grateful to all the parties for such elaborate and exhaustive submissions thereby making its work relatively simple.

Analysis:

9. Given the length and nature of the submissions, I will not reproduce the same verbatim in this ruling. However, I will consider the parties' positions, arguments and decisions referred to in the discussion herein.
10. The objection was tailored as follows: -
 - Take Notice that the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11, th 12th 13th and 14th Respondents herein shall raise objections on points of law as a preliminary on points of law as preliminary issue to be determined by the Honourable Court against the Petitioner's suit herein and oppose the validity of the same on the following ground; That;
 1. The Petitioner's suit falls short on the doctrine of res-subjudice under section 6 of the Civil Procedure Act as there is a suit on the same subject matter pending determination under Civil Suit No. E8405 of 2021 *Lazaro Mutua Mutula Mulili vs The Kenya Judicial Staff Association Elections Board & 13 Others* at Milimani Commercial Court.
 2. This Honourable Court lacks primary jurisdiction to handle disputes concerning determination of the questions of election disputes of the Kenya Judicial Staff Association. The Primary jurisdiction is vested with the KJSA Election Commission as per the election Rules and Guidelines.
11. The objectors strongly argued that the dispute before Court squarely falls within the jurisdiction of the Election Commission as established in the 1st Respondent's Election Rules and Guidelines under the Constitution of the Kenya Judicial Staff Association. I will hereinafter refer to the Election Commission as 'the Commission', the Constitution of the Kenya Judicial Staff Association to as 'the Constitution' and the 1st Respondent's Election Rules and Guidelines to as 'the Election Rules'.
12. The Petitioner vehemently disagreed with the Respondents. He contended that whereas the said Election Rules accorded any party dissatisfied with an election to file an Election Petition before the Commission, the Rules used the word may, thereby according the Petitioner a choice on where to prefer his claim. Further, the Petitioner contended that the Commission was not an appropriate forum to adjudicate the dispute since it was the body which carried out the impugned election.
13. Going forward, since the objection is centered on the doctrine of exhaustion, I will now briefly deal with the legal position of the doctrine of exhaustion and its applicability in this matter.
14. The doctrine of exhaustion in Kenya 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: -



- (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.

15. Clause 3 is on traditional dispute resolution mechanisms.

16. 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.

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.

17. 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.



18. 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.

19. 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.
20. Courts have in many occasions reiterated the position that where there are alternative avenues legally provided for in dispute resolutions, there should be postponement of judicial consideration of such



disputes until after the available avenues are fully adhered to or unless it is adequately demonstrated that the matter under consideration falls within the exception to the doctrine of exhaustion.

21. Returning to the matter at hand, the Petition seeks the following prayers: -
- a) A declaration be and is hereby issued declaring that the Petitioner's rights to privacy under Article 31(c) of the Constitution of Kenya 2010 was violated by the Respondent's unauthorized, unjustified and unlawful processing of sensitive personal data of the Petitioner and other members of KJSA out of Kenya.
 - b) A declaration be and is hereby issued declaring that KJSA National Elections held on 15th May 2021 were not free, fair and transparent and they violated the Constitution of KJSA, Election Rules and Guidelines of KJSA and the Constitution of Kenya.
 - c) Further as a consequence of prayer (a), this Honourable Court be pleased to award the Petitioner general damages for the unauthorized, unjustified and unlawful processing of sensitive personal data of the Petitioner out of Kenya
 - d) An Order quashing the results of the KJSA National Elections held on 15th May 2021.
 - e) A permanent injunction restraining the 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th and 14th Respondents from being sworn into respective offices as officials or trustees of the Kenya Judicial Staff Association.
 - f) A mandatory Injunction compelling the 1st Respondent to take steps to hold a repeat National Elections in full compliance with KJSA Constitution, KJSA Elections Rules and Guidelines as well as principles of free and fair elections as espoused in the Constitution of Kenya 2010.
 - g) An Order by this Honourable Court directing that the Independent Electoral and Boundaries Commission (IEBC) to carry out the next elections as it the only credible body with expertise and experience in carrying out free, fair and credible elections.
 - h) Any other relief this Honourable Court deems fit to grant.
 - i) Costs of this Petition.
 - j) Interest on (h) hereinabove at Court rates from the date of filing this Petition until payment in full.
22. This Court has carefully considered the parties' positions alongside the manner in which the Petition was framed. It has, as well, considered inter alia the Constitution and the Election Rules.
23. The Petition mainly raises two points of challenge. First, the manner in which the impugned election was conducted, and, second, the infringement of the Petitioner's privacy rights under Article 31(c) of the Constitution.
24. I will, henceforth, ascertain whether the doctrine of exhaustion applies to any of the two points raised in the Petition.
25. In respect to the impugned election, there is no dispute on the existence of the Election Rules. The said Rules provide for Election Petitions. The Rules state as follows: -

Election Petitions:

1. A Petition may be lodged with the Election Commission by a candidate or any member of KJSA on any of the following grounds;



- a. Whenever such a candidate or member has reason to believe or has evidence that there has been a contravention of any election procedure or rule during the election.
 - b. Whenever there is an allegation of bribing of voters, intimidation and/or harassment of voters and/or candidates.
 - c. Whenever there is an allegation that a candidate has otherwise breached the Constitution of Kenya 2010, the Public Officers Ethics Act, the Anti-Corruption and Economic Crimes Act.
2. Petitioner may bring the Petition regarding nominations, campaigns and/or elections.
 3. A Petition must be lodged not later than three (3) days after the election and must be signed by at least 20 KJSA fully registered for the positions or any other matters.
26. The Petitioner in response to the objection admitted that indeed an aggrieved party may file a Petition before the Commission. He, however, contended that the Election Rules were not mandatory in nature in the use of the word ‘may’. He also raised the unlawfulness and insufficiency of the Commission as the alternative forum for the adjudicating the dispute. The Petitioner referred to several decisions in support of the arguments.
27. This Court has carefully considered this issue. At this point in time, it is important for the parties to understand that the doctrine of exhaustion does not contend that a Court has no jurisdiction over a dispute. However, the doctrine recognises the jurisdiction of a Court over the dispute, but favours 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. In other words, a Court will postpone jurisdiction on the basis of the doctrine of exhaustion so as to accord an opportunity to an entity established by a statute or by any other lawful instrument to deal with the matter as a first port of call. The only exception to this longstanding understanding of the operation of the doctrine of exhaustion is where it is adequately demonstrated that the matter under consideration falls within the exception(s) to the doctrine of exhaustion.
28. Bearing in mind the foregoing, the argument fronted by the Petitioner on the use of the word ‘may’ can only be interpreted in the context of this matter to mean an option on the part of the aggrieved party where any of the exceptions to the doctrine of exhaustion apply. It is on that score that this Court will now ascertain if any of the exceptions do apply in the unique circumstances of this matter.
29. In attempting to demonstrate the inapplicability of the exhaustion doctrine, the Petitioner contended that ‘... the Commission is the same body that conducted and supervised the impugned elections and as such it cannot make a just and unbiased decision on a Petition that questions how the elections were conducted...’
30. Whereas the Petitioner may have raised an issue worth consideration, this Court declines to agree with him at this point in time for two reasons. One, the constitutionality and legality of the Election Rules is not part of the instant Petition. Two, the issue has not been in any raised in the matter save in the Petitioner’s submissions.



31. Back to the Petition, prayers (b), (d), (e), (f) and (g) of the Petition are in respect of the manner in which the impugned election was conducted. As such, the issues are within the confines of the Commission courtesy of Rules 1 and 2 of the Election Rules.
32. Resulting from the above discussion, this Court finds that the doctrine of exhaustion applies to the issues raised in the Petition and which issues culminated with prayers (b), (d), (e), (f) and (g) of the Petition. To that extent, this Court will decline jurisdiction over the issues relating to prayers (b), (d), (e), (f) and (g) of the Petition.
33. Turning to the Petitioner's contention of infringement of his privacy rights under Article 31(c) of the Constitution, this Court's attention has been drawn to the provisions of the Data Protection Act, No. 24 of 2019 (hereinafter referred to as 'the Data Act').
34. 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.
35. 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.
36. 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.
37. Section 3 of the Data Act provides for the objectives as follows: -

The object and purpose of this Act is-

 - (a) to regulate the processing of personal data;
 - (b) to ensure that the processing of personal data of a data subject is guided by the principles set out in section 25;
 - (c) to protect the privacy of individuals;
 - (d) to establish the legal and institutional mechanism to protect personal data; and
 - (e) to provide data subjects with rights and remedies to protect their personal data from processing that is not in accordance with this Act.
38. Section 5 of the Data Act establishes the Office of the Data Protection Commissioner which is a body corporate with perpetual succession and a common seal and has the power to conduct business



in its corporate name. I will hereinafter refer to the said office as ‘the Data Commissioner’ or ‘the Commissioner’.

39. One of the many functions of the Data Commissioner is provided for in Section 8(1)(f) as ‘to receive and investigate any complaint by any person on infringements of the rights under this Act’.
40. The Commissioner further has powers to conduct investigations on its own initiative, or on the basis of a complaint made by a data subject or a third party. That is provided for in Section 9(1)(a) of the [Data Act](#).
41. In discharging its functions and exercising its powers, the Commissioner is authorized under Section 59 of the [Data Act](#) to seek the assistance of such person or authority as it deems fit and as is reasonably necessary to assist the Data Commissioner in the discharge of the functions.
42. Section 65 of the [Data Act](#) gives the Data Commissioner the power to determine the compensation payable to a data subject who suffers damage by reason of a contravention of any requirement of the [Data Act](#) and in instances where the Commissioner finds as much.
43. With a view to protect the integrity of the processes under the [Data Act](#), the statute provides for enforcement notices under Section 58 in respect of those who fail to comply with any provision of the [Data Act](#).
44. Under Section 64 of the [Data Act](#), any appeal from the decision of the Commissioner lies to the High Court.
45. A close scrutiny of the [Data Act](#) reveals a deliberate design to ensure that all claims arising from allegations of infringement of Article 31(c) and (d) of the [Constitution](#) are wholly dealt with by the Commissioner as the first port of call. Such position can only be overruled by a party demonstrating any of the exceptions to the doctrine of exhaustion in a matter.
46. Returning to the Petitioner’s contention at hand, this Court finds that the Petitioner has not demonstrated any of the exceptions to the doctrine of exhaustion relating to submitting to the provisions of the [Data Act](#) in respect of the allegations of infringement of his privacy rights.
47. With this finding, this Court also declines jurisdiction over the issues raised and culminating with prayers (a) and (c) of the Petition.

Disposition:

48. Deriving from the above discussion, this Court, therefore, postpones jurisdiction over the issues raised in the Petition which matters culminated with all the prayers in the Petition.
49. Having declined to entertain the Petition on the doctrine of exhaustion, this Court finds no need to deal with the first limb of the objection on whether the Petition herein is sub-judice Chief Magistrates Court at Milimani Civil Suit No. E8405 of 2021 Lazaro [Mutua Mutula Mulili vs. The Kenya Judicial Staff Association Elections Board & 13 Others](#). The reason is simply that the instant Petition has been rendered otiose by the Court’s finding on the second limb of the objection.
50. With such a finding, the objection is determined as follows: -
 - (a) This Court hereby declines jurisdiction to hear and determine the Petition on the basis of doctrine of exhaustion.
 - (b) The Notice of Preliminary Objection dated 31st May, 2021 is hereby allowed with costs.
 - (c) The Petition and Notice of Motion dated 26th May, 2021 are hereby struck out with costs.



Orders accordingly.

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

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Mr. Shikali, Counsel for the Petitioner.

Mr. Otieno, Counsel for the 1st, 4th -14th Respondents.

Mr. Mango, Counsel for the 2nd Respondent.

Regina/Chemutai – Court Assistants.

