Mwanzia v Rhodes (Constitutional Petition E115 of 2022) [2023] KEHC 2688 (KLR) (Constitutional and Human Rights) (31 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2688 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION E115 OF 2022

AC MRIMA, J

MARCH 31, 2023

BETWEEN

MERCY MWIKALI MWANZIA ..... PETITIONER

AND

ALLAN J. RHODES ..... RESPONDENT

JUDGMENT

1. The Petition subject of this judgment is a challenge to alleged infringement of the Petitioner and her child's privacy rights by the Respondent.

2. The Respondent did not, however, take part in the hearing of the Petition despite service.

3. In the main, the Petitioner prayed for the following reliefs: -

    i. A declaration that the disparaging post published by the Respondent on 16th January 2021 constitutes a violation of the Petitioner's Constitutional rights, to wit, the right to have her dignity respected and protected and her right to privacy including the right to privacy including the right not to have information relating to her family to private affairs unnecessarily revealed.

    ii. A declaration that the disparaging post published by the Respondent on 16th January 2021 constitutes a violation of the Petitioner's minor child's Constitutional rights, to wit, the right to have inherent dignity respected and protected, its right ot privacy including the right not to have information relating to its family or private affairs unnecessarily revealed and the right to have its best interests protected in every matter concerning it.

iii. An order of Compensation in form of general damages and exemplary damages for violation of the Petitioner's and the Minor's TJM fundamental rights and freedoms.

iv. Costs of this Petition.

v. Interests on both (iii) and (iv) at 14% per annum.

4. On directions of this Court, the Petitioner filed her written submissions on the Petition, hence, this judgment.

5. As a preliminary issue, it is the duty of a Court before which a matter is laid to ascertain whether it has the requisite jurisdiction. In this case, upon perusal of the Petition and the submissions, the provisions of the *Data Protection Act,* No. 24 of 2019 (hereinafter referred to as 'the *Data Act*') came to the fore.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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'.

11. 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'.

12. 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.*

13. 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.

14. Section 65 of the *Data Act* gives the Data Commissioner the power to determine the compensation payable to a data subjectwho suffers damage by reason of a contravention of any requirement of the *Data Act* and in instances where the Commissioner finds as much.

15. 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 failto comply with any provision of the *Data Act.*

16. Under Section 64 of the *Data Act*, any appeal from the decision of the Commissioner lies to the High Court.

17. 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.

18. Returning to the case at hand, the Petitioner's complaint is the alleged publication of the Petitioner's and her child's images and/or photographs by the Respondent in his social media accounts without the Petitioner's consent. The Petitioner alleged breach of her Article 31 rights under *the Constitution*. Shee then sought for inter alia some declarations as well as compensatory damages.

19. This Court ascribes to the position that in a case where Parliament donated powers to an entity like the Data Commissioner to determine if one's privacy rights under Article 31(c) and (d) of the Commissioner are infringed, then it means as much; that the Commissioner has such power determine whether privacy rights as provided for in the Bill of Rights has been denied, violated, infringed or threatened. However, the Commissioner lacks the jurisdiction to interpret *the Constitution*.

20. The reason for the foregoing holding is simple. The members of the Office of the Data Commissioner, as an entity and individually so, are public officers and Article 10 calls upon them to infuse the national values and principles of governance while undertaking their duties. Article 3 obligates every person to respect, uphold and defend *the Constitution*. Therefore, the Commissioner must be in a position to uphold *the Constitution*, and in doing so, to be able to determine whether a given set of circumstances reveal denial, violation, infringement or threat to the privacy rights in the Bill of Rights.

21. The above duty is to be distinguished from the duty to interpret *the Constitution*. Determining whether a given set of circumstances reveal denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights is just that simple. Conversely, interpretation of *the Constitution* is a

serious judicial function. While interpreting *the Constitution*, the High Court is called upon to apply its legal mind to determine the applicability and extent thereof of a constitutional provision to a set of facts. In arriving at such an interpretation, the High Court is supposed to consider all the applicable principles in constitutional interpretation. (See the Supreme Court in *In the Matter of Interim Independent Electoral Commission* [2011] eKLR). The High Court may also look at comparative jurisprudence from other jurisdictions on the subject. Such a determination yields to a binding legal principle unless overturned by a Court with superior jurisdiction.

22. Unlike the High Court, Tribunals and other quasi-judicial bodies, including the Data Commissioner, do not make the law. They can, however, apply themselves to a given set of facts and determine denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights.

23. There is, therefore, a defined distinction between determining the denial, violation, infringement or threat to the privacy rights in the Bill of Rights and interpreting *the Constitution*. Whereas the former is not exclusively a judicial function, the latter is. The jurisdiction, therefore, to interpret *the Constitution* is the exclusive duty reserved to the High Court vide Article 165(3)(d) of *the Constitution*.

24. In the instant matter, the Data Commissioner has the jurisdiction to determine whether the Petitioner's privacy rights in the Bill of Rights were denied, violated, infringed or threatened. The Commissioner has further powers to order appropriate compensation in the event of proof of the infringement.

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

26. In such a case, it was incumbent upon the Petitioner to demonstrate to the Court any of the exceptions to the doctrine of exhaustion. At this point in time, this Court will briefly look at the doctrine of exhaustion before ascertaining whether the Petitioner demonstrated any of the exceptions.

27. 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:
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> 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:
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> Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law

must be strictly adhered to since there are good reasons for such special procedures.

43. While this case was decided before *the Constitution* of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.

This is *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR, where the Court of Appeal stated that:

It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.

28. 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.

29. 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.
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> 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.

30. 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.

31. 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.

32. Returning to the matter at hand, it appears that the Petitioner did not demonstrate any of the exceptions discussed above. As a result, this Court's jurisdiction has been improperly invoked. The Petitioner ought to lay her claim under the provisions of the Data Act.

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

    (a) This Court declines jurisdiction on the basis of the doctrine of exhaustion.

    (b) The Petition dated 22nd March, 2022 is hereby struck out.

    (c) No order as to costs with costs.

    Orders accordingly.

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

A. C. MRIMA

JUDGE

Judgment No. 1 virtually delivered in the presence of:

Mr. Kizangi for Nganga, Learned Counsel for the Petitioner.

Regina/Chemutai – Court Assistants