



**Wahome v Public Health Officers & Technicians Council & another
(Constitutional Petition E418 of 2021) [2023] KEHC 2680 (KLR)
(Constitutional and Human Rights) (31 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2680 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E418 OF 2021**

AC MRIMA, J

MARCH 31, 2023

BETWEEN

JOYOUS MBUTHIA WAHOME PETITIONER

AND

PUBLIC HEALTH OFFICERS & TECHNICIANS COUNCIL . 1ST RESPONDENT

KENYATTA UNIVERSITY 2ND RESPONDENT

RULING

Introduction:

1. The 2nd Respondent's Notice of Preliminary Objection dated December 9th December, 2021 is the subject of this ruling. The objection was filed in further response to the Petition herein.
2. The objection impugned the jurisdiction of this Court on the principle of exhaustion.
3. The 1st Respondent supported the objection whereas the Petitioner strenuously opposed it. The Petitioner filed a Replying Affidavit in response to the objection.
4. On this Court's directions, parties filed their respective elaborate written submissions. This Court is indeed grateful to all the parties for making its work relatively simple.

Analysis:

5. 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.



6. The objection was tailored as follows: -

Take Notice that before the hearing of the Petition and or the Petitioner's Notice of Motion dated October 12, 2021, the 2nd Respondent shall raise a Preliminary Objection on a point of law to be heard and determined *in-limine*, seeking dismissal of the entire Petition with costs to the 2nd Respondent on the grounds, *inter alia* that:-

1. This Court has no jurisdiction to entertain, hear or determine the Petition.
 2. From the facts pleaded in the Petition it is apparent that the dispute is in fact in substance a dispute between the 1st Respondent and an Applicant for registration under the [Public Health Officers \(Training, registration and licensing\) Act](#) No 12 of 2013.
 3. The crus of the Petition is alleged refusal by the 1st Respondent to commence the process of registering the Petitioner as a Public Health Officer.
 4. In the premises, the issues raised in the Petition ought to be dealt with through the dispute resolution mechanisms prescribed under section 27 of the [Public Health Officers \(Training, registration and licensing\) Act](#) No 12 of 2013.
 5. Under section 27 of the [Public Health Officers \(Training, registration and licensing\) Act](#) No 12 of 2013. Any dispute of the nature raised in the Petition herein must be taken to the Cabinet Secretary for the time being responsible for matters relating to public health.
 6. This Petition is therefore premature, misplaced, mischievous, vexatious and an abuse of Court process
 7. This Honourable Court therefore lacks Jurisdiction to entertain, hear or determine the issues raised in this Petition.
7. The Respondents strongly argued that the dispute before Court squarely falls within the jurisdiction of the Cabinet Secretary for the time being responsible for matters relating to public health pursuant to Section 27 of the [Public Health Officers \(Training, Registration and Licensing\) Act](#), No 12 of 2013 (hereinafter referred to as 'the Act').
8. The Petitioner vehemently disagreed with the Respondents. He contended that whereas the said Section 27 accorded the Cabinet Secretary with the powers to deal with the dispute at hand, the section of the Act used the word may, thereby according the Petitioner a choice on where to prefer his claim.
9. 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.
10. 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: -

159(2) In exercising judicial authority, the Courts and tribunals shall be guided by the following principles-

- (a)...
- (b)...



(c)

alternative forms of dispute resolution including resolution, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause 3.

11. Clause 3 is on traditional dispute resolution mechanisms.

12. The doctrine of exhaustion was comprehensively dealt with by a 5-Judge Bench in Mombasa High Court Constitutional Petition No 159 of 2018 consolidated with Constitutional Petition No 201 of 2019 *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR. The Court stated as follows:

52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the *Constitution* and was aptly elucidated by the High Court in *R v Independent Electoral and Boundaries Commission (IEBC) 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 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.

13. The Court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In *R vs Independent Electoral and Boundaries Commission (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 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.

14. The above decision was appealed against by the Respondents. The Court of Appeal in upholding the decision and in dismissing the appeal in Mombasa Civil Appeal No 166 of 2018 *Kenya Ports Authority v William Odhiambo Ramogi & 8 others* [2019] eKLR held as follows: -

The jurisdiction of the High Court is derived from Article 165 (3) and (6) of the *Constitution*. Accordingly, the High Court has unlimited original jurisdiction in criminal and civil matters, including determination of a question of enforcement of the bill of rights and interpretation of the *Constitution* encompassing determination of any matter relating to the Constitutional relationship between the different levels of government.

At the High Court, we note that the learned Judges dealt with this matter under the question framed as follows: Is the court barred from considering the suit at present by virtue of Article 189 of the *Constitution* and sections 33 and 34 of *Inter-Governmental Relations Act of 2012* (IGRA)? The parties have advanced similar arguments as before the learned Judges of the High Court. The High Court went further than just looking at the ruling by Ogola J. They also took into account the doctrine of exhaustion as enunciated in *Republic 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.

15. Further, in Civil Appeal 158 of 2017, *Fleur Investments Limited vs Commissioner of Domestic Taxes & another* [2018] eKLR, the Learned Judges of the Court of Appeal relied on an earlier decision in *Speaker of National Assembly vs Njenga Karume* (1990-1994) EA 546 to assume jurisdiction by bypassing the mechanism under Income Tax Tribunal. They observed as follows: -

23. For the reasons we have given earlier and others that will become apparent, there were definitely exceptional circumstances that existed in this case that were outside the ambit of the Income Tax Tribunal which called for intervention by way of judicial review. Whereas Courts of Law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the *Constitution* and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural



justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.

16. 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.
17. Returning to the matter at hand, the Petition seeks the following prayers: -
 - i An order compelling the 1st Respondent to administer the Petitioner herein with the professional examinations.
 - ii An order compelling the 1st Respondent to license him under the professional body within his area and scope of study, to wit, Public Health Officer.
 - iii An Order of Prohibition restraining the 1st Respondent from further violating the Petitioner's rights and freedoms to join and be licensed as a public Health Officer within the Republic of Kenya
 - iv The Cost of this Petition.
 - v Any other relief as the Court may deem fit.
18. 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 provisions of Section 27 of the Act.
19. The Court affirms the position that the Petition mainly challenged the refusal by the 1st Respondent to administer some professional examinations to the Petitioner.
20. The preamble of the *Public Health Officers (Training, Registration and Licensing) Act* describes the Act as an Act of Parliament to make provision for the training, registration and licensing of public health officers and public health technicians, to regulate their practice, to provide for the establishment, powers and functions of the Public Health Officers and Public Health Technicians Council and for connected purposes.
21. Section 3 of the Act establishes the Public Health Officers and Technicians Council (hereinafter referred to as 'the Council'). Section 4 of the Act provides for the objects and functions of the Council. One of its functions is to prescribe and conduct examinations in collaboration with the approved institutions. Section 25 of the Act provides for the duty of the Council to register Public Health Officers and Public Health Technicians.
22. Any dispute arising from a decision of the Council not to register a person as a Public Health Officer or Public Health Technician is to be referred to Cabinet Secretary for the time being responsible for matters relating to public health. Section 27 of the Act states as follows: -

A person aggrieved by a decision of the Council not to register him under Section 24 may appeal to the Cabinet Secretary within sixty days of being notified of the decision.
23. Section 24 of the Act provides for the persons eligible to be registered as public health officers or public health technicians.
24. The plain and simple meaning derived from the reading of Section 27 of the Act is that the provision is limited to instances where the Council fails to register an Applicant as a public health officer or public



health technician. The provision does not encompass all disputes arising from the Act. If that was the intention of the Parliament, then the provision would state as much.

25. In this case, the Petitioner is yet to apply to the Council for registration as a Public Health Officer. He is aggrieved by the refusal of the 1st Respondent to administer professional examinations on him. The Petition is very specific on the grievance and the relief sought.
26. In the event the examinations are administered and the Petitioner succeeds, then the issue of registration as a Public Health Officer will arise. If the Council then refuses to register him as such, then the Petitioner would be mandatorily supposed to appeal to the Cabinet Secretary under Section 27 of the Act.
27. Arising from the foregoing, this Court finds and hold that the objection is premature. The Petitioner is challenging the refusal by the 1st Respondent to administer examinations on him and not a decision refusing to register him as a public health officer. In fact, the Council is yet to make the decision to either register or refuse to register the Petitioner as a public health officer since the Petitioner must, in the first instance, pass the professional examinations and then apply for registration. It can only be illusory for one to challenge a non-existent decision.
28. The objection, therefore, suffers a false start. It is for rejection.
29. With such a finding, the objection is determined as follows: -
 - (a) This Court has the jurisdiction to hear and determine the Petition herein.
 - (b) The Notice of Preliminary Objection dated December 9, 2021 is hereby dismissed 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 Mwangi, Counsel for the Petitioner.

Mr Mwinzi, Counsel for the 1st Respondent.

Ms Amica for Thuo for the 2nd Respondent.

Regina/Chemutai – Court Assistants.

