



Khan & another v Malik & 4 others (Being sued in their Capacity as Members of the Managing Committee of Sir Ali Muslim Club) (Constitutional Petition E093 of 2022) [2023] KEHC 17966 (KLR) (Constitutional and Human Rights) (30 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17966 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E093 OF 2022**

AC MRIMA, J

MAY 30, 2023

BETWEEN

MOHAMED TARIQ KHAN 1ST PETITIONER

ZULFIKAR DIN 2ND PETITIONER

AND

SAHIR MALIK & 4 OTHERS (BEING SUED IN THEIR CAPACITY AS MEMBERS OF THE MANAGING COMMITTEE OF SIR ALI MUSLIM CLUB) RESPONDENT

RULING

Introduction:

1. This ruling relates to the notice of preliminary objection dated May 9, 2022 taken out by the respondents in response to the petition herein.
2. The objection impugned the jurisdiction of this Court on the principle of exhaustion.
3. Parties filed written submissions which were quite elaborate and referred to several decisions. This Court is indeed grateful to all the parties.

Analysis:

4. 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.



5. The objection was tailored as follows: -

The respondents shall raise the following preliminary objection to the petition herein viz,

1. The petitioners have not exhausted the remedies provided by the exclusive contract that they have with other club members which process is plain, speedy, adequate and efficacious.
 2. The petitioners have not demonstrated that the circumstances leading to their expulsion from the club are exceptional thus not requiring them to exhaust the provided remedies.
 3. The petitioners have not formally applied to the honourable court to exempt them from exhausting the alternative remedies.
 4. In view of the above the Honourable Court is not properly seized of the Petition save to dismiss it with costs.
6. Since the issue at hand is 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 Abdullahi Abdi & another* Civil Appeal No 103 of 2016 [2018] eKLR). The Court can also raise such issue on its own motion.
7. 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 & another 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.
8. The respondents strongly argued that the dispute before Court was premature since the Petitioners ought to have fully complied with the dispute resolution mechanism laid out in the *Constitution* and Rules of the Sir Ali Muslim Club (the Court will hereinafter refer to the *Constitution* and Rules as ‘the Rules’ and the Sir Ali Muslim Club as ‘the Club’). To that end, they held that the Petition cannot lie and is for dismissal.
9. On their part, the petitioners argued that it is only the High Court and courts of equal status which have the jurisdiction to determine a question of violation of constitutional rights and since they raised constitutional questions, then the bi-annual general meeting of the Club lacked jurisdiction to deal with such matters.
10. Going forward, since the objection is centered on the doctrine of exhaustion, I will now deal with the legal position of the doctrine of exhaustion and its applicability in this matter.
11. 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.
12. Clause 3 is on traditional dispute resolution mechanisms.
13. 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.

14. 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 (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.



15. 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.

16. 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.

17. 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.

18. Returning to the matter at hand, the Petition seeks the following prayers: -
- a) A declaration that the proceedings of December 1, 2021 and the verdict by the respondents to expel the petitioners from the membership of Sir Ali Muslim Club as contained in the letter dated December 8, 2021 is unconstitutional, illegal and void *ab initio*.
 - b) A declaration that the respondents have breached, infringed and/or violated the petitioners' right to fair administrative actions and the right to fair hearing.
 - c) An order of *certiorari* to bring into this Honourable Court to quash the decision by the respondents to expel the petitioners from the membership of Sir Ali Muslim Club contained in the letter dated December 8, 2021.
 - d) An Order of *mandamus* do issue directing the respondents to forthwith and unconditionally reinstate the petitioners as members of Sir Ali Muslim Club and to the i r status as Assistant Secretary and Sports Secretary respectively, entitled to all rights and privileges as conferred by the Constitution of the Club.
 - e) Damages.
 - f) Any further orders and/or directions as this Honourable Court shall deem fit to grant.
 - g) Costs of and/or incidental to these proceedings.
19. This Court has carefully considered the parties' positions alongside the manner in which the Petition was framed. It has as well considered the Rules of the Club.
20. Rule 16 provides for the conduct of the members of the Club. Under sub-rule (iii), any member who is struck out or expelled from the Club membership for whatever reason may appeal to the Bi-Annual General Meeting of the Club.
21. Given the position taken by the petitioners that the Petition raises constitutional issues not worth consideration by the Bi-Annual General Meeting, it is imperative that this Court looks at what a constitutional issue is.
22. The South African Court in *Fredricks & other v MEC for Education and Training, Eastern Cape & others* [2002] 23 ILJ 81 (CC) 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...

23. 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.
24. 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...
25. 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...’
26. Resulting from the above discussion and the definition of a constitutional issue, this Court agrees with the position in Turkana County Government & 20 others v Attorney General & others (2016) eKLR where a multi-judge bench affirmed the profound legal standing that claims of statutory violations cannot give rise to constitutional violations.
27. Having defined what a constitutional issue is, there is no doubt that the Petition alleges contravention of the Bill of Rights. As such, the petition raises some constitutional issues.
28. On that background, this Court remains alive to the calling in article 3(1) of the Constitution that ‘every person has an obligation to respect, uphold and defend this Constitution’.
29. Further, article 10 of the Constitution lays down the national values and principles of governance. Such bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets this Constitution, enacts, applies or interprets any law; or makes or implements public policy decisions.
30. One of the national values and principles of governance is the rule of law; the need to adhere to set down laws and regulations.
31. It is, therefore, the position that since every person has a duty to respect, uphold and defend the Constitution, it then goes without say that all persons must be aware of the contents of the very Constitution otherwise it will be inimical to expect someone to respect, uphold or defend something one is unaware of.
32. Having so said, the question which now begs for an answer is whether the Club through its members and officials ought to apply the Constitution in its processes.
33. The answer is in article 260 of the Constitution which defines a “person” to include a company, association or other body of persons whether incorporated or unincorporated. Therefore, constitutionally-speaking, the Club is a person and remains under a solitary duty to respect, uphold



and defend the Constitution in all its dealings. In other words, the Club must adhere to the Constitution even while deliberating on the conduct of its members.

34. It must, however, be understood that the duty to apply the Constitution is different from the duty to interpret the Constitution.
35. In the context of this case, the Club, in applying the Constitution, is simply called upon to determine whether a given set of circumstances reveal denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights. It 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.
36. There is, therefore, a defined distinction between determining the denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights and interpreting the Constitution. Whereas the former is not exclusively a judicial function, the latter is.
37. From the Petition in this matter, the petitioners are contending that the Management Committee did not adhere to articles 47 and 50 of the Constitution in arriving at the decision to expel them. Consequently, the petitioners sought for an array of reliefs including quashing of the decision, reinstatement and damages.
38. At this point in time, one may pose and ask two questions: First, is the Bi-Annual General Meeting capable of ascertaining whether articles 47 and 50 of the Constitution were adhered to by the Managing Committee in the process of expelling the petitioners. Second, in the event the appeal is successful, is the Bi-Annual General Meeting capable of awarding all the reliefs sought?
39. The answer to the first question is unwaveringly in the affirmative. The Bi-Annual General Meeting is capable of ascertaining whether articles 47 and 50 of the Constitution were infringed. On the second question, one of the reliefs sought is damages. This Court has carefully perused the Rules and noted that neither the Managing Committee nor the Bi-Annual General Meeting is vested with the power to award any damages in a matter relating to infringement of the Bill of Rights.
40. It is, hence, apparent that if the petitioners were to appeal against the decision of the Managing Committee to the Bi-Annual General Meeting, then they will not be accorded an appropriate forum with the quality of audience which is proportionate to the interests they wish to advance in the matter. In other words, given the nature of the reliefs sought in the Petition, the Bi-Annual General Meeting becomes an inappropriate forum for adjudication.
41. Deriving from the foregoing, one of the exceptions to the doctrine of exhaustion applies and as such, the doctrine is inapplicable in this case.

Disposition:

42. The above discussion is capable of disposing the objection. The upshot is that the objection is unsustainable and is for rejection.
43. Consequently, the objection is determined as follows: -
 - a. This court has the jurisdiction to hear and determine the Petition.



b. The notice of preliminary objection dated May 9, 2022 is dismissed with costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 30TH DAY OF MAY, 2023.

A. C. MRIMA

JUDGE

Ruling No 1 virtually delivered in the presence of:

N/A for the Parties

Regina/Chemutai – Court Assistants.

