



**Musyoka & another v Mama Lucy Kibaki Hospital & 6 others
(Constitutional Petition E039 of 2022) [2023] KEHC 18304 (KLR)
(Constitutional and Human Rights) (30 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18304 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E039 OF 2022**

AC MRIMA, J

MAY 30, 2023

BETWEEN

EVERLINE NDINDA MUSYOKA 1ST PETITIONER

EDGAR MUNYOKI MUTEMI 2ND PETITIONER

AND

MAMA LUCY KIBAKI HOSPITAL & 6 OTHERS RESPONDENT

RULING

Introduction:

1. This ruling relates to the Notice of Preliminary Objection dated 10th May, 2022 taken out by the 1st, 2nd, 5th and 6th Respondents in response to the Petition herein.
2. The objection impugned the jurisdiction of this Court on the principles of exhaustion and sub-judice.
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: -

TAKE NOTICE that the 1st, 2nd, 5th and 6th Respondents shall raise a preliminary Objection to the Petition dated 10th December 2021 and urge the same be struck out on the following grounds;

1. That this honourable Court lacks jurisdiction to hear and determine this Petition since the issues raised in the Petition can be aptly decided by the Kenya Medical Practitioners and Dentists Council.
2. That the Petition is sub judice as there is a similar matter between similar parties raising similar issues that has been filed before the Kenya Medical Practitioners and Dentists Council as DC Case No. 38 of 202 that is currently awaiting ruling.
3. That this Petition offends the doctrine of Constitutional avoidance.

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 & Anther -vs- 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 this Court lacks jurisdiction on two grounds. First, that the dispute ought to be determined by the Kenya Medical Practitioners and Dentists Council (hereinafter referred to as ‘the Council’) as provided for under the *Medical Practitioners and Dentists Act*, Cap. 253 of the Laws of Kenya. Second, that a similar dispute is pending determination before the Council in *Disciplinary & Ethics Case No. 38 of 2021* between the parties herein.

9. The Petitioner vehemently disagreed with the Respondents. They contended that the doctrines of exhaustion and sub-judice were not applicable in this case.

10. Going forward, I will first look at whether the objection on the doctrine of exhaustion is sustainable. To that end, the legal position of the doctrine of exhaustion and its applicability in this matter is paramount.

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 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.

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

This is Geoffrey Muthiga Kabiru & 2 others – 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.



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. 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.



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 vs. 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 -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.



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) An order for general damages for physical and emotional trauma to the 1st Petitioner and 2nd Petitioner.
 - b) An order for damages for loss of job of the 1st Petitioner.
 - c) A declaration that the negligence by the medical personnel in the provision of reproductive and maternal care amounted to violation of the 1st Petitioner's right to highest attainable standard of health, which includes the right to health care service including reproductive healthcare.
 - d) A declaration that the neglect and discrimination suffered by 1st Petitioner was as a result of the failure by the 1st Respondent to create a seamless structure to ensure the 1st Petitioner's access to treatment by a trained health professional for conditions occurring during pregnancy violated her constitutional rights.
 - e) A declaration that the 1st and 2nd Respondents failure to implement and monitor the standards of free and material care and services caused the mistreatment and violation of the Petitioner's rights to dignity, right to free, from cruel, inhumane and degrading treatment.
 - f) A declaration that the poor quality obstetric and psychological health care was a risk to the 1st and 2nd Petitioner's right to life and family.
 - g) A declaration that the Respondents violated the 2nd Petitioner's right to health, family and human dignity.
 - h) A declaration that the failure by the 1st Respondent to clearly provide the compliant procedures to the 1st and 2nd Petitioner contravened the Petitioner's right to access information, right to fair administrative action and the right of a consumer to quality goods and services.
 - i) An order compelling the 2nd, 3rd and 5th Respondents to monitor quality of care standards in county referral health facilities to promote maternal healthcare.
 - j) An order compelling the Respondents through the 3rd Respondents to take up disciplinary action against all medical providers involved and the Court be appraised of such disciplinary measures taken within a specified period as deemed fit.
 - k) An order requiring the nurses at the 1st Respondent facility and more specifically the nurses who violated the Petitioner's rights be compelled to undertake continuous patients' rights training/ human rights training by the Nursing council of Kenya and nursing Council to give periodic progress of such training.



- l) A declaration that the medical negligence by the Respondents deteriorated the health of the 1st and 2nd Petitioners.
 - m) An order to the 1st Respondent compelling for fresh DNA test to be conducted to verify the paternity and the Court to be appraised of the same on the timelines it deems fit.
 - n) An order compelling the 2nd and 3rd Respondents to release a DNA result of the previous two tests to the Petitioners and furnish copies to the Court.
 - o) An Order compelling the 1st Respondent under the watch of the 2nd, 3rd and 5th Respondent to ensure the 1st and 2nd Petitioners get medical care.
 - p) A formal apology to the Petitioners from the 1st, 2nd and 3rd Respondent.
 - q) This honourable Court be pleased to issue such further order as it may deem just and expedient for the ends of justice.
 - r) Costs of this Petition be borne by the Respondents.
19. This Court has carefully considered the parties' positions alongside the manner in which the Petition was technically framed. It has, as well, considered the provisions of the *Medical Practitioners and Dentists Act*, Cap. 253 of the Laws of Kenya (hereinafter referred to as 'the Medical Practitioners Act').
20. The Medical Practitioners Act in Section 3 creates the Council as a body corporate with perpetual succession and a common seal and capable, in its corporate name to, among others, sue and be sued.
21. The functions of the Council are enumerated in Section 4 of the Medical Practitioners Act as under: -
- 4. Functions of the Council
 - (1) The functions of the Council shall be to—
 - (a) establish and maintain uniform norms and standards on the learning of medicine and dentistry in Kenya;
 - (b) approve and register medical and dental schools for training of medical and dental practitioners;
 - (c) prescribe the minimum educational entry requirements for persons wishing to be trained as medical and dental practitioners;
 - (d) maintain a record of medical and dental students;
 - (e) conduct internship qualifying examinations, preregistration examinations, and peer reviews as deemed appropriate by the Council;
 - (f) inspect and accredit new and existing institutions for medical and dental internship training in Kenya;
 - (g) license eligible medical and dental interns;
 - (h) determine and set a framework for professional practice of medical and dental practitioners;
 - (i) register eligible medical and dental practitioners;



- (j) regulate the conduct of registered medical and dental practitioners and take such disciplinary measures for any form of professional misconduct;
- (k) register and license health institutions;
- (l) carry out inspection of health institutions;
- (m) regulate health institutions and take disciplinary action for any form of misconduct by a health institution;
- (n) accredit continuous professional development providers;
- (o) issue certificate of status to medical and dental practitioners and health institutions; and
- (p) do all such other things necessary for the attainment of all or any part of its functions.

22. Section 4A of the Medical Practitioners Act establishes committees of the Council. One of them is the Disciplinary and Ethics Committee whose mandate shall include: -

- (i) conducting inquiries into complaints submitted to it;
- (ii) regulating professional conduct;
- (iii) ensuring fitness to practice and operate;
- (iv) promoting mediation and arbitration between parties; and
- (v) at its own liberty, recording and adopting mediation agreements or compromise between parties, on the terms agreed;

23. Section 20 of the Medical Practitioners Act provides for the disciplinary proceedings before the Council. It provides as follows: -

20. Disciplinary proceedings:

- (1) Any person who is dissatisfied with any professional service offered, or alleges a breach of standards by a registered or licensed person under this Act, may lodge a complaint in the prescribed manner to the Council.
- (2) The Council may, or through a committee appointed for that purpose, inquire into any complaint of professional misconduct, malpractice or any breach of standards.
- (3) Upon an inquiry held by the Council to determine the complaint made under subsection (2), the person whose conduct is being inquired into shall be afforded an opportunity of being heard, either in person or through a representative.
- (4) For purposes of proceedings at any inquiry held under this section, the Council may administer oaths, enforce the attendance of witnesses and production of books and documents.
- (5) The Council shall regulate its own procedure in disciplinary proceedings.



- (6) Where after an inquiry, the Council determines that a person is guilty, the Council may—
 - (a) issue a caution or reprimand in writing;
 - (b) direct a medical practitioner or dentist to undergo remedial training for a period not exceeding twelve months;
 - (c) direct the medical practitioner or dentist be placed on probation for a period not exceeding six months;
 - (d) suspend, withdraw or cancel the practising licence of a medical practitioner or dentist for a period not exceeding twelve months;
 - (e) suspend, withdraw or cancel the licence of a health institution or a section of the health institution for a period not exceeding twelve months;
 - (f) permanently remove the name of a medical practitioner or dentist from the registers under section 5(3); or
 - (g) in addition to the penalties stipulated in paragraphs (a), (b), (c), (d), (e) or (f), impose a fine which the Council deems appropriate in the circumstance.
- (7) A person or health institution whose licence has been withdrawn or cancelled under subsection (6), shall forthwith surrender the license to the Council.
- (8) A person or health institution whose name has been removed from the register under subsection (6)(f) shall forthwith surrender the registration certificate to the Council.
- (9) A person aggrieved by a decision of the Council made under subsection (6) may, within thirty days from the date of the decision of the Council, appeal to the High Court.
- (10) Notwithstanding the provisions of section 3A (5), the Council shall not remove the name of a person from the register under subsection (6) unless at least seven members of the Council are present in the inquiry.

- 24. From the foregoing, there is no doubt that the Council is mandated to deal with complaints by an aggrieved party against registered and/or licenced medical service providers.
- 25. This Court has carefully scrutinized the complaint lodged by the 2nd Petitioner herein, Edgar Munyoki Mutemi, before the Council vide Disciplinary & Ethics Case No. 38 of 2021 (hereinafter referred to as ‘the complaint’). The complaint is in the usual standard form. The complaint sought for compensation in the nature of general and special damages.
- 26. At the time the Petitioners filed the instant Petition, the complaint was pending determination by the Council.
- 27. A look at the Petition reveals that most of the remedies sought by the Petitioners were indeed within the purview of the Council. However, the remedies under Section 20(6) of the Medical Practitioners Act do not include compensation in the nature of damages. The much the Council can do is to impose



a fine, but it has no mandate to compensate for wrongs committed by a registered or licenced medical service provider.

28. As such, the complaint lodged by the 2nd Petitioner before the Council seeking compensation must have suffered a false start.
29. In this matter, therefore, the doctrine of exhaustion is voided in that the Council lacks the legal and adequate jurisdiction to grant compensatory reliefs. If the Petitioners are to be compelled to proceed with their dispute before the Council, then that will be tantamount to acting in vain on account of the Council lacking jurisdiction.
30. This Court will also be denying the Petitioners their right to access justice under Article 48 of *the Constitution* since they will be rendered without any legal redress or forum or at all.
31. It is on the basis of the foregoing that this Court finds and hold that, given the nature of remedies sought in the realm of compensatory damages, the doctrine of exhaustion does not apply in the unique circumstances of this case.
32. With such a finding, 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 10th May, 2022 is dismissed.
 - c. Costs in the Petition.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:

Mr. Mwale, Counsel for the Petitioners.

N/A for the 1st & 2nd Respondents.

Miss. Koome, Counsel for the 3rd Respondent.

****N/A, Counsel for the 4th Respondent.***

Regina/ Chemutai – Court Assistants.

