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REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A.C. Mrima, J.)

CONSTITUTIONAL PETITION NO. 169 OF 2020

-BETWEEN-

JEREMIAH MEMBA OCHARO.....PETITIONER

-VERSUS-

- 1. DR. EVANGELINE NJOKA**
- 2. KENYA NATIONAL COMMISSION FOR UNESCO**
- 3. THE CABINET SECRETARY EDUCATION**
- 4. THE ATTORNEY GENERAL.....RESPONDENTS**

JUDGMENT

Introduction:

1. The Petition subject of this judgment is anchored on Chapter 6 of the Constitution and the provisions of the Leadership and Integrity Act, No. 19 of 2012.
2. It challenges the suitability of the 1st Respondent herein, *Dr. Evangeline Njoka*, as the Chief Executive Officer and the Secretary-General of the Kenya National Commission for Unesco, the 2nd Respondent herein.
3. The Petition is opposed.

The Petition:

4. The Petition is dated 18th May, 2020. It was supported by the Petitioner's Affidavit sworn on even date. It sought the following reliefs: -
 - a. A Declaration be hereby issued that the 1st Respondent, has violated articles 10, 25, 27, 28, 41, 47, 48, 50, 73, 75, 232 and 260 of the Constitution of Kenya, 2010;
 - b. A Declaration be hereby issued that the 1st Respondent, has violated Sections of 7, 8, 13, 16, 2, and 34 of the Leadership and Integrity Act;
 - c. A Declaration be hereby issued that the 1st Respondent is unfit to hold any public office by dint of the violations of the constitution and leadership and Integrity Act;
 - d. That costs be provided for;

e. Any other order or relief that this Honourable court is pleased to issue in the circumstances.

5. The Petitioner also filed written submissions in further support to the Petition. The submissions were dated 30th May, 2021.

6. The 1st and 2nd Respondents opposed the Petition. The 3rd and 4th Respondents did not take part in the hearing of the Petition.

7. The 1st Respondent filed two Replying Affidavits in opposition to the Petition. The first one was sworn on 4th November, 2020 on behalf of the 2nd Respondent. The second one was sworn on 21st March, 2021 on behalf on the 1st Respondent.

8. Both Respondents also filed separate written submissions.

The jurisdiction of the Court:

9. Although the parties did not address the issue of the jurisdiction of this Court over the subject matter, I have decided to deal with it since a Court is under a primary duty to, at the earliest possible opportunity, satisfy itself of jurisdiction in a matter.

10. The jurisdictional point I will deal with relates to the doctrine of exhaustion. However, before I dwell into the said doctrine, I will venture into the arena of the doctrine of jurisdiction in general.

11. Jurisdiction is defined in *Halsbury's Laws of England* (4th Ed.) Vol. 9 as "...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.". *Black's Law Dictionary*, 9th Edition, defines *jurisdiction* as the Court's power to entertain, hear and determine a dispute before it.

12. In *Words and Phrases Legally Defined* Vol. 3, John Beecroft Saunders defines *jurisdiction* as follows:

By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

13. That, jurisdiction is so central in judicial proceedings, is a well settled principle in law. A Court acting without jurisdiction is acting in vain. All it engages in is nullity. *Nyarangi, JA, in Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited [1989] KLR 1* expressed himself as follows on the issue of jurisdiction: -

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...

14. Indeed, so determinative is the issue of jurisdiction such that it can be raised at any stage of the proceedings. The Court of Appeal in *Jamal Salim v Yusuf Abdulahi Abdi & another* Civil Appeal No. 103 of 2016 [2018] eKLR stated as follows: -

Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in Adero & Another vs. Ulinzi Sacco Society Limited [2002] 1 KLR 577, as follows;

1.

2. The jurisdiction either exists or does not ab initio ...

3. Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.

4. Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.

15. On the centrality of jurisdiction, the Court of Appeal in *Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR* stated that: -

So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.

16. On the source of a Court's jurisdiction, the **Supreme Court of Kenya** in *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others (2012) eKLR* stated as follows: -

A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

17. And, in *Orange Democratic Movement v Yusuf Ali Mohamed & 5 others [2018] eKLR*, the Court of Appeal further stated: -

[44] a party cannot through its pleadings confer jurisdiction to a court when none exists. In this context, a party cannot through draftsmanship and legal craftsmanship couch and convert an election petition into a constitutional petition and confer jurisdiction upon the High Court. Jurisdiction is conferred by law not through pleading and legal draftsmanship. It is both the substance of the claim and relief sought that determines the jurisdictional competence of a court...

18. From the foregoing, it is sufficiently settled that a Court's jurisdiction is derived from the Constitution, an Act of Parliament or both.

19. The doctrine of exhaustion may be a complete bar to the jurisdiction of a Court if the exceptions thereto do not apply. A brief look at the said doctrine will set the stage for determining whether the doctrine is applicable in this case.

20. 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.

21. 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.**

22. 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.

23. 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 by-passing 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.

24. The High Court has variously reiterated the position that it is only the High Court and Courts of equal status which can interpret the Constitution. (See **Royal Media Services Ltd. -vs- Attorney General & 6 Others (2015) eKLR** among others).

25. Turning back to the case at hand, from the pleadings, the Petition is mainly aimed at the removal of the 1st Respondent from office.

26. The Kenya National Commission for Unesco Act, No. 5 of 2013 (hereinafter referred to as '**the Act**') is an Act of Parliament to establish the Kenya National Commission for UNESCO and for connected purposes. The Kenya National Commission for UNESCO is the 2nd Respondent in this case.

27. The Act establishes the 2nd Respondent in Section 3 thereof. Section 4 provides for the functions of the 2nd Respondent whereas Sections 5 and 12 is on the powers of the 2nd Respondent.

28. Section 6 of the Act establishes the Board of the 2nd Respondent with a membership of 9 persons. The Chief Executive Officer and Secretary-General of the 2nd Respondent is the Secretary to the Board. In this matter, the 1st Respondent is the Secretary to the Board.

29. Section 17 of the Act provides for the qualifications and appointment of the Secretary-General and Section 18 thereof provides for the term of the Secretary-General.

30. Section 19 of the Act is on the removal of the Secretary-General. The provision states as follows: -

19. Removal of Secretary-General

(1) The Secretary-General may be removed from office by the Cabinet Secretary upon recommendation of the Board in accordance with the terms and conditions of service for—

- (a) inability to perform the functions of the office arising out of physical or mental incapacity;
- (b) gross misconduct or misbehaviour;
- (c) incompetence or neglect of duty;
- (d) **violation of the Constitution;** or
- (e) any other ground that would justify removal from office under the terms and conditions of service.

(2) The Secretary-General shall before being removed under subsection (1), be given—

- (a) not less than thirty days' notice of the allegations made against her or him; and
- (b) an opportunity to present a defence against the allegations raised.

31. The Petitioner vehemently pleaded that the 1st Respondent was in gross violation of Articles 10, 25, 27, 28, 41, 48, 50, 73, 75, 232 and 260 of the Constitution. It was further pleaded that the 1st Respondent was in violation of Sections 7, 8, 13, 16, 24 and 34 of the Leadership and Integrity Act. As a result of the alleged infringement of the Constitution and the law, the Petitioner sought for a declaration that the 1st Respondent was unfit to hold any public office.

32. The consequence of the Petition is, therefore, the removal of the 1st Respondent from office.

33. The Petitioner, however, did not submit to the process under Section 19 of the Act. The Petitioner neither brought his complaints against the 1st Respondent to the Board of the 2nd Respondent for consideration nor did he give any explanation for not doing so.

34. Section 19 of the Act provides for the procedure for the removal of the Secretary-General of the 2nd Respondent from office. It also provides 5 grounds of removal. One of the grounds is violation of the Constitution. Another ground is gross misconduct or misbehaviour.

35. Since the sole ground for the removal of the 1st Respondent from office as put forth by the Petitioner is on account of violation of the Constitution and the law, then the Petitioner had to, in the first instance, submit to the process laid under Section 19 of the Act by laying his complaints before the Board. Alternatively, the Petitioner had to satisfy this Court why complying with Section 19 of the Act would not be appropriate. Unfortunately, the Petitioner failed to undertake any of the two.

36. The upshot is, hence, that the jurisdiction of this Court is curtailed for want of adhering to the removal procedure under Section 19 of the Act.

37. Having so found, this Court has only one option available and it is to down its tools accordingly.

38. In light of the foregoing, a consideration of the Petition would not yield any meaningful results to the Petitioner. This Court, therefore, opts to end this discussion at this point in time.

39. As the Petitioner did not disclose the capacity in which he filed the Petition, he shall shoulder the costs of the Petition.

40. In the end, this Court makes the following final orders: -

a. This Court lacks jurisdiction to hear and determine the Petition herein on account of the doctrine of exhaustion.

b. The Petition dated 18th May, 2020 be and is hereby struck out with costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2022

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Dunstan Omari, Counsel for the Petitioner.

Mr. Kirima, Counsel the 1st Respondent.

Mr. Gitonga, Counsel for the 2nd Respondent.

No appearance for the 3rd and 4th Respondents.

Elizabeth Wanjohi – Court Assistant.