



**KKB v SCM & 5 others (Constitutional Petition 014 of 2020)
[2022] KEHC 289 (KLR) (22 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 289 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION 014 OF 2020**

**JM MATIVO, J
APRIL 22, 2022**

BETWEEN

KKB PETITIONER

AND

SCM 1ST RESPONDENT

CM 2ND RESPONDENT

RKB 3RD RESPONDENT

KNB 4TH RESPONDENT

KKB 5TH RESPONDENT

PKB 6TH RESPONDENT

RULING

1. This ruling determines both the 1st and 2nd Respondent’s Notice of Preliminary Objection dated 26th January 2021 objecting to this court’s jurisdiction to entertain this Petition on grounds that the issues raised in this Petition involve a matrimonial union between the Petitioner and the 1st Respondent which is an exclusive jurisdiction of the High Court, Family Division and the Petitioner’s Notice of Motion dated 9th December 2020. In order to put the objection and the application into a proper perspective, it is useful to highlight, albeit briefly, the facts which triggered this Petition and the Responses thereto.
2. Some of the facts as I glean them from the pleadings are essentially uncontroverted or common ground. For example, the 1st Respondent is a son to the 2nd Respondent, the 3rd Respondent is the Petitioner’s biological father while the 4th, 5th and 6th Respondents are the Petitioner’s biological brothers. At the heart of this dispute is a simple question. i.e. whether there existed a “marriage” between the Petitioner



and the 1st Respondent and if at all such a “marriage” existed whether it was consensual, lawful or forced.

3. The point of divergence is that both combatants have taken fiercely uncompromising contrasting positions. The Petitioner’s position as I discern it from her affidavits ranges from “there was no marriage at all,” to it was a “forced marriage.” Also, she contends that it was “an arranged marriage” and/or “she agreed to the marriage out of respect she has for her father.” She implicates her own father and brothers for allegedly planning a pivotal role in “planning her marriage.” On the other hand, the 1st Respondent maintains that he lawfully married the Petitioner and all the rituals/customs were performed but the marriage took a downward trajectory owing to the Petitioner’s character.
4. The nub of the Petitioner’s contention is that the 1st Respondent has been illegally detaining her against her free will at his home in Webuye. She accuses his father, the 2nd Respondent of facilitating and assisting the detention. She accuses the 3rd Respondent (her own father) of conspiring with the 2nd Respondent’s family to forcefully take her to Webuye with the intention of detaining her and forcing her to cohabit with the 1st Respondent.
5. The details of her claim are that sometimes in 2019 the 2nd and 3rd Respondents organized a forced union between her and the 1st Respondent in violation of her Right to human dignity under Article 28 of the *Constitution*. She states that the Respondents forcefully took her to Webuye where she was forcefully detained in the 1st Respondent’s house for 6 months in breach of her constitutional rights. She states that she could not go to work or move out of the house causing her emotional and psychological torture. She says that she convinced the 1st and 2nd Respondents that she needed to travel to Mombasa to visit her family members but they ensured that she travelled with the 1st Respondent.
6. She avers that upon arriving at Mombasa she explained her misfortunes to her family members and told them that she was not willing to go back to the 1st Respondent’s house in Webuye. She states that the 3rd to 6th Respondents held discussions with the 1st and 2nd Respondents and they resolved that she should travel back to the 1st Respondent’s house in Webuye, so she was forced to travel back to Webuye together with the 1st and 2nd Respondents where she was locked inside the house, only to be allowed to leave the house in the company of the 1st Respondent who would at all times monitor her movements. She states that she explained to the 3rd to 6th Respondents for the second time and informed them that she urgently needed to leave Webuye and join them in Mombasa.
7. She avers that when the 1st and 2nd Respondents learnt of her intention to leave Webuye, they remained adamant and blocked her from leaving Webuye for fear that the 2nd Respondent’s family name would be tarnished if the community learnt how they treated her in Webuye. She states that she assured the 1st and 2nd Respondents that she would not disclose what had ensued in Webuye but the 1st and 2nd Respondents followed her to Mombasa where they held meetings with her and the Respondents and during the said meeting, she learnt that the 3rd to 6th Respondents had colluded with the 1st and 2nd Respondents to forcefully take her back to Webuye with the 1st Respondent.
8. She avers that the 1st Respondent took her from the 3rd Respondent’s house in Nyali where she had been locked and took her to Southern Palms hotel and he planned for her to travel back to Webuye where she was to stay with the 1st and 2nd Respondents. She contends that she was forced to seek refuge at an undisclosed location where she is staying but she is apprehensive that the 1st to 6th Respondents are looking for her to forcefully take her back to Webuye. As a consequence, she prays for: -
 - a. A declaration that there is a violation of the Constitution and an infringement of her right to human dignity, freedom and security of persons, freedom of movement and residence,



economic and social rights protected under Article 28,29,39 and 43 of the Constitution and that the Respondents' actions are unlawful, void abinitio.

- b. A declaration that the Respondents' act of forcefully detaining her against her free will is unlawful, void abinitio
 - c. In the alternative to prayer (b) above, a declaration that the Respondent's act to unlawfully detain her against her free will is unlawful and an infringement of her freedom of movement and residence.
 - d. A mandatory injunction to issue against Respondents to refrain from monitoring and/or looking for her.
 - e. A declaration that her economic and social right have been violated.
 - f. Compensation by way of damages for loss of employment, by virtue of the illegal detention.
 - g. The Respondents be condemned to pay costs of this Petition together with interest at Court rates.
9. Concurrent with the Petition, the Petitioner filed a Notice of motion dated 9th December 2020 seeking a temporary injunction restraining the Respondents, their servants, agents or proxies from forcefully detaining her in Nyalı or any other building pending the hearing and determination of the Petition. She also seeks to restrain the Respondents, their servants, agents or proxies from taking her forcefully back to Webuye pending the hearing and determination of the Petition herein. Further she prays for an injunction to restrain the Respondents, their servants, agents or proxies from accessing her residence and place of work with the aim of monitoring her movements and forcefully taking her from her residence or place of work pending the hearing and determination of this Petition. Lastly, she prays that the OCS Nyalı Police station supervises execution of this court's orders. Prayers (1), (2), (3), (4) & (5) are spent.
10. The grounds in support of the application are substantially a replication of the averments in the Petition, so, it will add no value to rehash them here, save to mention that she states that after the celebration of the marriage under the Hindu Customary Law, the marriage has never been solemnized nor was it registered but she was forced to cohabit with the 1st Respondent at their family home in Webuye.
11. The 3rd to 6th Respondent did not file any responses to the application and the Petition nor did they participate in the proceedings.
12. The 1st and 2nd Respondents filed a Notice of a Preliminary Objection dated 26th January 2021 stating that this court has no jurisdiction to entertain this suit because it involves a matrimonial dispute and or issues which fall under the exclusive jurisdiction of the High Court, Family Division.
13. SCM, the 1st Respondent swore the Replying affidavit dated 29th January 2021 on behalf of himself and his father the 2nd Respondent. He denied that the Petitioner was detained and averred that the union went through all the rituals under the Hindu Customary Law and the Marriage Act. He also averred that an engagement ceremony and a 3-day wedding ceremony were held at Jumeirah Beachfront, Mombasa and Braham Samaj in Mombasa and annexed a marriage certificate and photographs. He deposed that he travelled to Mombasa in August 2018 to meet the Petitioner and her family and spent 3 days with her after which her family informed him that she was happy and to be engaged to him after which he and his family visited her and her family at Mombasa.



14. He averred that she was fully involved in all the wedding planning meetings and they got married on 3rd August 2019, that she was not forced to travel to Webuye and on 9th August 2019 they had a wedding reception at Webuye. Further, she was detained at Webuye or restrained from going to work but it was her decision not to work.
15. Additionally, he averred that he escorted her to Mombasa after her brothers refused to pick her, and she freely decided to return to Webuye. He denied that her movements were monitored and deposed that her irrational behaviour stressed him to the extent he sought counselling services and the counsellor asked to see her but she was very rude to him. He deposed that owing to her unbecoming behaviour, they were forced to separate, but on 31st May 2020, the Petitioner's brother called him to pick her from Kisumu, which he did, but the situation got worse increasing his depression necessitating him to use anti-depressants and later, he was treated in the United Kingdom. He deposed that the arrangement to go to the Southern Palms were made by her own brothers with her full involvement and they enjoyed an intimate relationship for three days but on 30th November 2020 she packed her belongings and left without informing him prompting him to report her disappearance at the police station. As a consequence, he urged the court to decline the conservatory orders.
16. The Petitioner filed a further affidavit dated 15th April 2021 the bulk of which is a replication of her earlier affidavit and essentially denying the 1st and 2nd Respondent's Replying affidavit. She admitted getting married to the 1st Respondent on 3rd August, 2019 as per the Indian traditional ceremony at [Particulars Withheld] Temple in Mombasa which was an arranged marriage since she did not do it out of my free will but because her father and the 2nd Respondent had already planned for her to marry him.
17. She deposed that their marriage was not finalized as per the Kenyan Laws and as such the marriage certificate is not the one recognized by the laws of Kenya. She conceded that the marriage was celebrated as per the Hindu customary law and after the traditional wedding ceremony she moved with her husband to Webuye. She averred that she agreed to marry him out of the respect she had for her father. However, the 1st Respondent wanted to keep her around without consummating the marriage and he never made any sexual advances to her but he limited her freedom of movement and socio-economic rights.
18. The 1st Respondent swore the further affidavit dated 24th May 2021 in reply to the Petitioner's further affidavit essentially rehashing the contents of his earlier affidavit. It will add no value to rehash the same here.
19. The 1st and 2nd Respondents filed a response to the Petition dated 9th December 2021. However, the bulk of the response is essentially a duplication of the earlier affidavit, so, it will add no value to repeat it here.
20. Both parties filed written submissions which they highlighted orally in court addressing the two key issues for determination in this ruling. These are the 1st and 2nd Respondent's Preliminary objecting and the application for conservatory orders.
21. The Petitioner's counsel submitted that Petitioner approached this court under Article 22(1) of the Constitution and urged the court to find that the Petition is properly before the court. He submitted that Article 165 (3)(b) of the Constitution vests this court with jurisdiction to hear and determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. He argued that the Respondent has failed to failed appreciate the import of the above Article.



22. Additionally, he submitted that the argument that the instant dispute constitutes a matrimonial dispute is vague because it does not set out the details said to constitute matrimonial issues. He submitted that the facts pleaded disclose violation of the Petitioner’s fundamental rights by the illegal and unlawful acts of Respondents and urged the court to be guided by *RC v KKR*¹ which extensively discussed jurisdiction citing *Owners of Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Limited*² in which the court stated that without jurisdiction a court cannot proceed with the proceedings. He cited *Minister of Safety & Security v Luiters*³ which held that in determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful and urged the court to find that this Petition is properly before the court.
23. He submitted that constitutional rights are to be enjoyed by all and any violation of a person’s rights warrants the aggrieved party to seek redress from the constitutional court which is clothed with the requisite jurisdiction. He submitted that individual rights are fundamental in that they have been recognized by the Constitution.
24. The 1st and 2nd Respondent’s advocate submitted that this court has no jurisdiction to hear and determine this matter. He cited *Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Limited*⁴ in support of the proposition that without jurisdiction, a court must down its tools and *Kakuta Mamon Hamis v Pene Posi Tobiko & 3 others*⁵ which held that jurisdiction is central and determinative as far as judicial proceedings are concerned. He also cited *Samuel Kamau Macharia v Kenya Commercial Bank Limited & 2 other* which held that a court’s jurisdiction flows from the Constitution or legislation or both and that a court of law can only exercise jurisdiction which is conferred upon it by law.
25. Counsel submitted that the issues raised in this case do not raise a constitutional issue and cited *CNM v WMG*⁶ which held that in determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful, but the question is whether the argument forces the court to consider constitutional rights or values. He also cited *Fredrick’s & others v MEC for Education & Training, Eastern Cape & others* which defined a constitutional issue and *Karuri & others v Dawa Pharmaceuticals Company Limited & 2 others*⁷ cited in *Muema Mativo v Director of Criminal Investigations & 2 others; HFC Limited (Interested Party)*⁸ which cautioned constitutional courts to ensure that their mandate is not abused or trivialized and that the mere allegation that a human right or fundamental freedom has been or is likely to be contravened is not of itself sufficient to entitle an applicant to invoke the jurisdiction of the court especially if it is made for the purpose of avoiding applying the normal judicial remedy. He submitted that the issues raised in this case can be addressed through the High Court, family division.

¹ [2021] e KLR.

² [1989] KLR 1.

³ (2007) 28 ILJ 133 (CC).

⁴ [1989] KLR

⁵ {2013}

⁶ [2018] e KLR

⁷ [2007] 2 EA 235.

⁸ [2021] e KLR.



26. To further buttress his argument, he cited *Orange Democratic Movement v Yusuf Ali Mobamed & 5 others*⁹ which held that a party cannot through pleadings confer jurisdiction to a court where none exists and *Republic v Paul Kihara Kariuki, Attorney General & 2 others ex parte Law Society of Kenya limited*¹⁰ which stated that courts abhor the practice of converting every issue into a constitutional question and filing suits disguised as constitutional Petitions where in fact they do not fall anywhere close to violation of constitutional rights. He reiterated that the substance of this claim can rightly be canvassed in the family division because the core issue is whether or not the union was forced upon the Petitioner.
27. Additionally, counsel submitted that even if the court was to find that it has jurisdiction, the question of justiciability and constitutional avoidance would negate the same and bar this court from hearing it. He cited CNM V WMG alias HNC¹¹ in which the Petitioner filed a constitutional Petition instead of a defamation suit and held that the principle of constitutional avoidance holds that where it is possible to decide a case without reaching a constitutional issue, it should be done. He argued that where infringement of rights alleged can be founded on the substantive law, the proper course is to bring the claim under the law and not under the Constitution. Also, he cited *John Harun Mwau v Peter Gastrow & 3 others* which underscored the doctrine of constitutional avoidance. Also he cited RC V KKR,¹² *Mumo Mativo v Director of Criminal Investigations & 2 others*; HF Limited (Interested Party) (supra), *Wafuka v Republic*¹³) and urged the court to decline to hear this matter for want of jurisdiction.
28. The 1st and 2nd Respondent's objection brings to fore two important and closely interrelated concepts. These are the doctrine of ripeness and the doctrine of avoidance. Just like res judicata or the doctrine of exhaustion, these two doctrines can preclude a court from entertaining a case. These two concepts are completely different from the presence or absence of jurisdiction which is the power of the court to entertain a matter which is conferred by the Constitution or a statute. (See *Samuel Kamau Macharia v Kenya Commercial Bank Limited & 2 other*). The other important question raised in this objection is whether this Petition raises constitutional issues.
29. Constitutional avoidance has been defined as a preference of deciding a case on any other basis other than one which involves a constitutional issue being resolved.¹⁴ As a principle, constitutional avoidance has been linked to the doctrine of justiciability.¹⁵ In broad terms, justiciability governs the limitations on the constitutional arguments that the courts will entertain. It encompasses three main principles which are standing, ripeness and mootness.¹⁶ The doctrine of avoidance was fortified in Sports and

⁹ [2018]

¹⁰ [2020] e KLR.

¹¹ [2018] e KLR.

¹² [2021] e KLR.

¹³ HC Misc App No 343 of 2010.

¹⁴ S Woolman & M Bishop, *Constitutional Law of South Africa* (2013) 3-21.

¹⁵ I Currie & J De Waal *The Bill of Rights Handbook* (2013) 72.

¹⁶ *Ibid*, Page 72.



Recreation Commission v Sagittarius Wrestling Club and Anor¹⁷ in which Ebrahim JA said the following: - ———

“...Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights..”

30. The Constitutional Court of Zimbabwe in *Chawira & Ors v Minister of Justice Legal and Parliamentary Affairs & Ors*¹⁸ held:

“As we have already seen, in the normal run of things courts are generally loathe to determine a constitutional issue in the face of alternative remedies. In that event they would rather skirt and avoid the constitutional issue and resort to the available alternative remedies.”

31. The court in *S v Mhlungu*¹⁹ laid out constitutional avoidance as a general principle in the following terms: -

“I would lay it down as a general principle that where it is possible to decide any case, criminal or civil, without reaching a constitutional issue, that is the course which should be followed.”

32. The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved. In that regard, the Supreme Court stated in *Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others* (at para 256) that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis. In the South African case of *S v Mhlungu* (supra) Kentridge AJ, stated in the dissenting opinion respecting the principle of avoidance (at paragraph 59), that he would lay down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed. And in *Ashwander v Tennessee Valley Authority*²⁰ the U.S. Supreme Court held that it would not decide a constitutional question which was properly before it if there was also some other basis upon which the case could have been disposed of. Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of rights.²¹ Currie and de Waal²² opine that the principle of constitutional avoidance is of crucial importance in the application of the Bill of Rights. The author’s state: -

“When applying the Bill of Rights in a legal dispute, the principle of avoidance is of crucial importance. As we have seen, the Bill of Rights always applies in a legal dispute. It is usually

¹⁷ 2001 (2) ZLR 501 (S)

¹⁸ CCZ 3/17

¹⁹ 1995 (3) SA 867 (CC) 59.

²⁰ 297 U.S. 288, 347 (1936).

²¹ See also *Zantsi v Council of State, Ciskei & Ors* 1995 (4) SA 615 (CC).



capable of direct or indirect application and, in a limited number of cases, of indirect application only. The availability of direct application is qualified by the principle that the Bill of Rights should not be applied directly in a legal dispute unless it is necessary to do so.”

33. An important and critical issue arises from the above statements by Currie and de Waal. It is the fact that every legal dispute is capable of either direct or indirect application of the Bill of Rights. Every dispute is essentially a constitutional issue when one looks at it. This arises necessarily because of the principle of constitutional supremacy.²³ One needs to be aware however of the singleness of the legal system. This is embodied in the fact that the supremacy of/ the Constitution does not detract from the usefulness of the rest of the body of law. In essence all other laws give full expression to the ideals of the Constitution until found to be inconsistent to it.
34. The doctrine of ripeness and constitutional avoidance gives credence to the concept that the Constitution does not operate in a vacuum or isolation. It has to be interpreted and applied in conjunction with applicable legislation together with other available legal remedies. Where there are alternative remedies the preferred route is to apply such remedies before resorting to the Constitution. The possibility of the elevation of any dispute to a constitutional issue is what is sought to be averted by the doctrines of ripeness and constitutional avoidance. It is borne out of a realisation that all legislative or common-law remedies are part of the legal system.
35. In the United States of America, and as long back as 1885, *Liverpool, New York and Philadelphia Steamship Co v Commissioners of Emigration*²⁴, Matthews J said:
- “(N)ever...anticipate a question of constitutional law in advance of the necessity of deciding it;...never...formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.”
36. In summation, the doctrines of ripeness and constitutional avoidance shun to deal with a constitutional issue where there exists another legal course which can give the litigant the relief he seeks. In other words, a constitutional issue is not ripe for determination until the determination of the constitutional issue is the only course that can give the litigant the remedy he seeks. Both constitutional avoidance and ripeness avert the determination of the constitutional issues until it becomes very necessary to the extent that it is the only course available to assist the litigant’s cause. The exceptions to the application of the doctrine of constitutional avoidance are: -
- i. where the constitutional violation is so clear and of direct relevance to the matter,
 - ii. in the absence of an apparent alternative form of ordinary relief and
 - iii. where it is found that it would be a waste of effort to seek a non-constitutional resolution of the dispute.²⁵
37. A reading of the issues presented in this Petition leave no doubt that the Petitioner’s grievance if any can effectively be addressed in a matrimonial suit. The court handling th matrimonial case will be better suited to determine whether or not there was a valid marriage. The court will weigh the veracity or

²² I Currie & J De Waal *The Bill of Rights Handbook* (2013) 72.

²³ See Article 2 (4) of the Constitution.

²⁴ 113 US 33 (1885) at 39.

²⁵ Currie & De Waal above.



otherwise of the diametrically opposed positions presented by the parties. To me, this is a proper and fit case for this court to invoke the doctrine of constitutional avoidance and decline to entertain the matter as I hereby do.

38. Closely tied to the doctrine of constitutional avoidance and ripeness is the question whether this Petition raises a constitutional question. I have severally in my decisions including some cited in this case stated that a constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.²⁶ 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 or values.²⁷ The issues raised in this case will stand or fall on whether the parties entered into a valid marriage and whether the Petitioner was subjected to the acts of cruelty cited and if the family court is persuaded, it will be able to issue effective remedies. These are matters which can be resolved without resorting to the Constitution. My above finding finds backing in the South African case of *Fredericks & Others v MEC for Education and Training, Eastern Cape & Others*²⁸ in which Justice O'Regan recalling the Constitutional Court's observations in *S v Boesak*²⁹ notes that:-

“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 ... the 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 matters. So too,..., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects 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 an extensive jurisdiction.”³⁰

39. The key grievance here as I see it is whether or not there was a valid marriage and if it existed, whether or not there are grounds to invalidate the marriage. Courts abhor the practice of constitutionalizing every dispute. Flowing from the issues discussed above, the 1st and 2nd Respondent's objection succeeds and on this ground the Petitioners Petition is dismissed with no orders as to costs. Having so found, I find no reason to address the application for conservatory orders.

Orders accordingly.

SIGNED, DATED, DELIVERED VIRTUALLY AT MOMBASA THIS 22ND DAY APRIL 2022

JOHN M. MATIVO

²⁶ <http://www.yourdictionary.com/constitutional-question>

²⁷ Justice Langa in *Minister of Safety & Security v Luiters*, {2007} 28 ILJ 133 (CC)

²⁸ {2002} 23 ILJ 81 (CC)

²⁹ {2001} (1) SA 912 (CC)

³⁰ 2001 (1) SA 912 (CC).



JUDGE

