Dhow House Limited v Kenya Power and Lighting Company (Constitutional Petition E058 of 2021) [2022] KEHC 11840 (KLR) (19 August 2022) (Ruling)

Neutral citation: [2022] KEHC 11840 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CONSTITUTIONAL PETITION E058 OF 2021

JM MATIVO, J

AUGUST 19, 2022

BETWEEN

THE DHOW HOUSE LIMITED ..... PETITIONER

AND

KENYA POWER AND LIGHTING COMPANY ..... RESPONDENT

RULING

1. This ruling determines the Respondent's Notice Of Preliminary Objection dated March 3, 2022 objecting to this court's jurisdiction to entertain this case on grounds that the Petition offends the provisions of sections 3, 10, 11(e) (f), (i) (k) & (i), 23, 24, 36, 40, 42, 159 (3), 160(3) and 224 (2)(e) of the *Energy Act* together with Regulations 2, 4, 7 and 9 of the *Energy (Complaints and Disputes Resolution) Regulations, 2012* as read with Article 159 (2) (c) and 169 (1) (d) and (2) of the *Constitution* and sections 9(2) and (3) of the *Fair Administrative Action Act*(The FAA Act).

2. In order to put the objection into a proper perspective, it is necessary to highlight, albeit briefly, the Petitioner's case as I gleaned it from its Petition dated October 14, 2021. The Petitioner operates a hotel, a bar and a restaurant on Plot Number 8479/1/MN. The premises is supplied with electricity by the Respondent vide supply account number 14432108 and on March 23, 2021, it received an electricity bill of Kshs 14,763/=which it paid. It avers that from March 23, 2021 to May 25, 2021, it did not receive an electricity bill but nevertheless it paid Kshs 30,000/=. However, its contestation is that on May 25, 2021, it received an inflated bill of Kshs 2,619,857/= for the month of May even though its average monthly bill for the previous months ranged between Kshs 25,000/= and Kshs 35,000/= per month. It states that it disputed the said bill in writing and also it lodged a complaint with Energy and Petroleum Regulatory Authority (EPRA) vide a letter dated September 27, 2021 but the issue has not been addressed. It avers that the bill complained of violates Articles 10(1) (2) (c), 35(1) (b) (2), 46(1) (b) (c) (3), 47 (1) (2) of the *Constitution*, sections 61 of the *Energy Act*, section 24(2) of the *Competition Act*and section 12 (1) of the *Consumer Protection Act*.

3. As a consequence of the foregoing, the Petitioner claims that it has suffered irreparable damage and risks to continue suffering damage. It seeks a gamut of reliefs namely: - (i) a declaration that the said sum is outside the applicable tariff, its illegal and it violates its rights under Articles 10, 35, 46 and 47 of the *Constitution*; (ii) an order directing the Respondent to correct or delete the said bill; (iii) a permanent injunction restraining the Respondent from demanding or recovering from the Petitioner the said bill; (iv) general damages; and (v) any other order the court may deem fit plus costs.

4. In support of the Preliminary Objection, the Respondent's counsel cited *Adero Adero & Company v Ulinzi Sacco Society Limited* in support of the proposition that where a cause is filed in court without jurisdiction, the court has no power to transfer it to a court of competent jurisdiction. He also cited *Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others* in which the Supreme Court underscored the need for the relevant person, bodies, tribunals and any other quasi-judicial authorities and organs to be given the first opportunity to deal with disputes as provided for in the relevant parent statute. He also cited *United Millers v Kenya Bureau of Standards, Directorate of Criminal Investigations & 5 others* in which the Supreme Court held that courts must exercise restraint in exercising their jurisdiction conferred by the *Constitution* and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance. Buttressed by the above decisions, counsel submitted that jurisdiction in the instant case lies with the Energy and Petroleum Regulatory Authority and Energy and Petroleum Tribunal.

5. Additionally, the Respondent's counsel cited *Joseph Njuguna Mwaura & 2 others v Republic* which held that jurisdiction is the first hurdle that a court will cross before it embarks on its decision-making function and that courts have no jurisdiction in matters over which other arms of government have been vested with jurisdiction. He also cited the Court of Appeal in *Phoenix of EA Assurance Company Limited v S M Thiga t/a Newspaper Service* which held- "jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place... A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied..."

6. To underscore the importance of jurisdiction, he cited *Kenya Ports Authority v Modern Holdings (EA) Limited and Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd*. He also cited *John Musakali c Speaker, County of Bungoma & 4 others* which stressed that *the Constitution* has created institutions which must be allowed to function and carry out their mandate. He also cited *Amy Kagendo Mate v Prime Bank Credit Reference Bureau (Africa) Limited* which emphasized the need to stick to the dispute resolution mechanism availed by the law. He submitted that the provisions of the law he cited in the objection as read with section 5 of the *Civil Procedure Act* limit this court's jurisdiction.

7. He also cited Article 159 (2) (d) of the *tConstitution* which provides for alternative dispute resolution and Article 162(2) and submitted that the *Constitution* recognizes the role of Parliament in creating tribunals. (Also cited: *Laws Society of Kenya v Centre for Human Rights and Democracy & 13 others* and *Joshua Sembei Mutua v Attorney General & 2 others*). He submitted that section 3(1) of the *Energy Act* which provides that the Act prevails over any other act of Parliament, as was held in *Abidha Nichola v Attorney General & 7 Others; National Environment Complaints Committee 9NECC0 & 5 others (Interested Parties)*.

8. He also cited section 9 of the *Energy Act* which provides for the powers of the Authority and section 167 (m) of the Act which provides for promulgation of Regulations - prescribing the procedures for hearing, settlement of disputes and any proceedings before the Authority. He argued that the Regulation 2 (4) of the Energy (Complaints and Disputes Resolution) Regulations 2012 confers the Authority with jurisdiction to settle the instant dispute. He cited *Speaker of National Assembly v*

Njenga Karume and *Cyrus Komo Njenga v Kiringa Njoroge Gachoka & 2 others* in support of the holding that: - where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.

9. Additionally, counsel submitted that section 25 of the *Energy Act* establishes the Energy & Petroleum Tribunal to hear and determine matters provided at section 36(1) of the Act; that the Respondent falls under the definition at section 36(3) of the Act while the Petitioner is the third parry contemplated in the said definition. He also cited the reliefs available from the Tribunal under section 36 (5) and section 37 of the Act which provides for Review by the Tribunal and appeals to the High Court.

10. Additionally, counsel cited section 9(2) and (3) of the FAA Act and argued that the said provisions are couched in mandatory terms which strips this court its jurisdiction. He relied on *Night Rose Cosmetics (1972)Ltd v Nairobi County Government & 2 others* in support of the holding that the use of the word shall in the said provisions connotes a mandatory obligation. He argued that the Petitioner by-passed the Tribunal established by the Act and relied on *Republic v Energy Regulatory Commission & 2 others* which underscored the need to exhaust dispute resolution mechanisms established by a statute. (Also cited: *Abidha Nicholas v Attorney General & 7 others*; *National Environmental Complaints Committee (NECC) & 5 others (Interested Parties)*, *Mutanga Tea & Company Ltd v Shikara Limited & another*, *Republic v Public Procurement Administrative Review Board & Energy Sectors Contractos Association, Zoec-Zhepedc-Ngiru Ex parte Kenya Power & Lighting Company Limited*, *Geoffrey Muthinja & another v Samuel Muguna Henry & 176 others* and *Josiah Tatiya Kipelian v Dr. David Ole Nkadienye & 2 others*).

11. In opposition to the Preliminary Objection, the Petitioner's counsel argued that since the Respondent did not file a Relying affidavit, the Petitioner's averments remain unchallenged. He argued that the instant Petition raises constitutional questions which fall within the exclusive jurisdiction of this court because the Petition involves contravention of the national values and principles of governance under Article 10, right to access information under Article 35, breach of consumer rights under Article 46 and the right to a Fair Administrative Action under Article 47 of the *Constitution*. He cited *Fredricks & others v MEC for Education and Training, Eastern Cape & others* which defined a constitutional question and argued that the instant Petition discloses constitutional issues concerning upholding the bill of rights. He argued that this court has jurisdiction under Article 165(3)(a) (d) of the *Constitution* to determine the issues raised. He submitted that the mere existence of an alternative remedy cannot oust the courts jurisdiction and cited *Evans Ladtema Muswahili v Vihuga County Public Service Board & 2 others; Marley Ezekiel Ayiego*. He argued that the tribunal has no jurisdiction to determine constitutional questions citing Evans Ladtema Muswahili(*supra*) and *Barsogat Investment Ltd v County Government of Vihiga* and *Alan E Donovan v Kenya Power & Lighting Company*).

12. It was his submission that the requirement to exhaust remedies established by the statute does not apply to constitutional Petitions and cited Evans Ladtema Muswahili v Vihiga County Public Service Board & 2 others (*supra*) and Barsogat Investment Ltd v County Giovernment of Vihiga.

13. Alternatively, counsel argued that the Petitioner exhausted the internal mechanism by submitting his complaint to the Respondents internal complaints but the Respondent never replied, so, the Respondent is estopped by section 120 of the *Evidence Act* from raising the instant objection. He argued that the requirement for referral of the dispute to the Tribunal under the Act is not mandatory under the Regulations and cited the use of the word "may" in Regulation 7(1). He argued that section 9(2) of the FAA Act is inapplicable in the instant case because the Petitioner alleges violation of constitutional rights. To support his argument, he cited *Capital Markets Authorit v Jeremiah Gitau Kiereini & another*.

14. I find it convenient to commence my analysis and determination of the Preliminary Objection by recalling the Supreme Court decision in *Aviation & Allied Workers Union Kenya v Kenya Airways & Others* which held that once a court's jurisdiction is objected to by a party to the proceedings, such an objection must be dealt with as a preliminary issue, before determining the case on merits.

15. The core issue for determination is whether this suit offends the doctrine of exhaustion of remedies. Put differently, the question is whether this court is divested of jurisdiction by the doctrine of exhaustion of remedies The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks Judicial Review of that action or approaches the court challenging the decision without pursuing the available remedies before the agency itself. The court must decide whether to review the agency's action or to remit the case to the agency, permitting the case to proceed only when all available administrative proceedings fail to produce a satisfactory resolution. This doctrine is now of esteemed juridical lineage in Kenya. Our courts are replete with jurisprudence on the doctrine of exhaustion of remedies. Perhaps this doctrine was most felicitously stated by the Court of Appeal in *Speaker of National Assembly v Karume* in the following 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."

16. Even though the above case was decided before the promulgation of the *Constitution* of Kenya, 2010, many post 2010 court decisions have followed the reasoning and provided justification and rationale for the doctrine under the 2010 Constitution. The Court of Appeal provided the Constitutional rationale and basis for the doctrine in *Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others* where it 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...These accords with Article 159 of the *Constitution* which commands Courts to encourage alternative means of dispute resolution."

17. The High Court *in the Matter of the Mui Coal Basin Local Community* stated the rationale for the doctrine of exhaustion follows: -

> " The reasoning is based on the sound Constitutional policy embodied in Article 159 of the *Constitution*: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Supreme Court Justice J B. Ojwang' has felicitously called an "Ascendant Judiciary." The *Constitution* does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, the *Constitution* creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases..."

18. Luckily for me, I have travelled a similar route before because I have on numerous occasions pronounced myself on the doctrine of exhaustion of remedies. In *Republic v Kenya Bureau of Standards & 4 others and the Department of Health Services, Nakuru County, (Interested Party), ex parte United Millers Limited* I upheld the said doctrine and discussed in detail the applicable principles and tests. In inevitably, I will restate the principles laid down in the said decision. However, it is important at the outset to mention that the said decision was up held by both the Court of Appeal and the Supreme Court in *United Millers Limited v Kenya Bureau of Standards, Director, Directorate of Criminal Investigations & 5 others*. The following excerpts from the Supreme Court decision are worth reproducing: -

> (22) In response, the 1st respondent, filed a preliminary objection challenging the High Court's jurisdiction to entertain the judicial review proceedings pursuant to Sections 11 and 14A (4) of the *Standards Act* and Section 9 of the FAA Act. The Court (Mativo J) delineated two issues for determination in considering the preliminary objection: whether it was divested of jurisdiction on grounds that the suit offends the doctrine of exhaustion of statutory provided dispute resolution mechanism; and whether the *exparte* applicant had demonstrated any grounds to warrant grant of judicial review orders.
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> (23) On the first issue, the trial court found that the ex-parte applicant ought to have exhausted available dispute resolution mechanism before approaching it. The learned Judge therefore found that the judicial review application offended the doctrine of exhaustion of statutorily available remedies set out under Sections 11 and 14A (4) of the *Standards Act* and Section 9 (2) of the FAA Act, and further failed to satisfy the exceptional circumstances under section 9(4) of the FAA Act. It thus held that the application must fail. The court however did not down its tools upon making the determination that it lacked jurisdiction. It determined the second issue and found that the ex-parte applicant had failed to establish a case to warrant grant of judicial review orders.
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> (24) On appeal, the Court of Appeal delimited three issues for determination, namely: whether the High Court properly exercised its jurisdiction, whether it was right in invoking the principle of exhaustion, and whether it was right in finding that the substantive motion failed the threshold for grant of the judicial review. The Appellate Court upheld the trial court's determination and entirely endorsed its reasoning. It found that the trial court in reaching its determination was guided by the need to serve substantive justice to the parties and exercised it discretion soundly and on reasonable judicial principles. The Court of Appeal opined that having failed to revert to the internal dispute resolution mechanisms provided for under Section 14A (4) of the *Standards Act* and Section 9 (2) of the FAA Act and having also failed to apply for exemption from this requirement as is provided for under Section 9 (4) of the FAA Act, the High Court was divested of jurisdiction to entertain the judicial review proceedings. The Court of appeal also found that having reached this conclusion on jurisdiction, the High Court ought to have downed its tools. Nonetheless, it considered the third issue and agreed with the trial court that the substantive motion failed to satisfy the grounds for grant of judicial review.
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> (25) Considering all the above, it is clear to us that the judicial review application before the trial Court and the subsequent appeal to the Court of Appeal

were determined on a preliminary jurisdictional issue. We have previously in *Peter Odour Ngoge v Francis Ole Kaparo & others*; SC Petition No 2 of 2012, [2012] eKLR, emphasized the significance of respecting the hierarchy of the judicial system, as one of the principles guiding the exercise of our jurisdiction under Article 163 (4) (a) of *the Constitution*. From the foregoing, we find no difficulty in concluding that the issues before the High Court as well as the Court of Appeal did not either involve the interpretation and application of *the Constitution* or take a trajectory of Constitutional interpretation or application. While issues of constitutional interpretation and application had been raised in the substantive application for Judicial Review, they were nipped in the bud when the preliminary objection was upheld for failure to exhaust the statutory alternative dispute resolution mechanisms.

(26) We also take judicial notice that the superior courts' findings on jurisdiction is in harmony with our finding in *Albert Chaurembo Mumbo & 7 others v Maurice Munyao & 148 others*; SC Petition No 3 of 2016, [2019] eKLR, wherein we stated that, even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute. We emphasized that where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their Jurisdiction conferred by the *constitution* and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance.

19. The above passages warrant no amplification. Maybe I should add that under Article 163(7) of the *Constitution* the binding nature of the Supreme Court decisions is absolute. Article 163 (7) is an edict firmly addressed to all courts in Kenya dictating that they are bound by the authoritative pronouncements of the Supreme Court and that where the issues before the court were determined by the Supreme Court, it is not open to the court to examine the same with a view to arriving at a different decision. The above Supreme Court decision conclusively settled the law. Where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their Jurisdiction conferred by the *constitution* and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance.

20. As stated above, the Supreme Court decision conclusively settled the law, if at there were any doubts on the subject. I may add that from decided cases, at least two principles emerge on the doctrine of exhaustion :- First, 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 the level of public interest involved and the polycentricity of the issues (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. However, the High Court may, in exceptional circumstances, find that the exhaustion requirement would not serve the values enshrined in the *Constitution* or law and permit the suit to proceed before it.

21. The Petitioner invoked Article 47 of the *Constitution*. Flowing from Article 47 is the FAA Act. Section 9 (2) of the FAA Act provides that the High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first

exhausted. Also relevant is sub-section (3) which provides that "the High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in sub-section (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

22. The FAA Act defines an "administrative action" as follows: - includes— (i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or (ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates. The impugned decision is an administrative action as envisaged in the above definition, therefore section 9 (2) (3) of the FAA Act applies.

23. The Petitioner cited Regulation 7(1) and argued that section 9 (2) (3) of the FAA Act is not mandatory. This argument is legally frail. Regulations being subsidiary legislation cannot prevail over the substantive legislation. The said argument collapses on this ground alone. I should emphasize that the word shall in section 9 of the FAA Act connotes a mandatory prescription. It is not permissive.

24. The only way out is the exception provided by section 9 (4) of the FAA Act which provides that: - "Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice. Two requirements flow from the above sub-section. First, the applicant must demonstrate exceptional circumstances. Second, on application by the applicant, the court may grant the exemption. The Petitioner never sought the exemption prescribed by the above section.

25. The argument advanced before me was that before me is a constitutional Petition which raises constitutional issues which cannot be resolved by the mechanism provided by the Act. The said argument is attractive. However, it collapses on two grounds. One, the applicant never applied for exemption as the law requires. Two, there are no constitutional issues at all in this Petition. I will address this point shortly.

26. The question that begs for an answer is whether the dispute resolution mechanism established under the Act and the Regulations is competent to resolve the issues raised in this Petition. The dispute as disclosed in the Petition is a contested electricity bill which the Petitioner describes as exorbitant. There is nothing to show that the forum established under the enabling statute cannot resolve issues relating to a disputed bill. In fact, the said form is the best suited fora to determine how the bill was arrived at. It has the benefit of the required expertise. The attempt to describe a disputed bill as a constitutional question is to say the least a mockery of the *Constitution*. As case law suggests, our jurisprudential policy is to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute. The Petitioner has not demonstrated that it cannot get an effective remedy resolving the contested bill before the said forum. A remedy will be effective if it is objectively implemented, taking into account the relevant principles and values of administrative justice present in the *Constitution* and our law.

27. The Petitioner argues that this case raises constitutional issues which can only be resolved by this court. In particular, the Petitioner invoked Articles 10, 35, 47 of the *Constitution* and this court's jurisdiction under Article 165 (3) (d) of the *Constitution*. This argument brings to fore two important and closely interrelated concepts. These are the doctrine of ripeness and the doctrine of constitutional 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*).

28. 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. As a principle, constitutional avoidance has been linked to the doctrine of justiciability. In broad terms, justiciability governs the limitations on the constitutional arguments that the courts will entertain. The doctrine of avoidance was fortified in *Sports and Recreation Commission v Sagittarius Wrestling Club and Anor* 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.."

29. The Constitutional Court of Zimbabwe in *Chawira & Ors v Minister of Justice Legal and Parliamentary Affairs & Ors* 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."

30. The court in *S v Mhlungu* 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."

31. 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.

32. And in *Ashwander v Tennessee Valley Authority* 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. Currie and de Waal 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 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. 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. Inessence 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. In the United States of America, and as long back as 1885, *Liverpool, New York and Philadelphia Steamship Co v Commissioners of Emigration*, 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."

35. 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: - (a)where the constitutional violation is so clear and of direct relevance to the matter; (b) in the absence of an apparent alternative form of ordinary relief, and, (c) where it is found that it would be a waste of effort to seek a non-constitutional resolution of the dispute.

36. A reading of the issues presented in this Petition leave no doubt that the Petitioner's grievance if any can effectively be addressed in the forum created by the statute and or in a civil suit. 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.

37. Closely tied to the doctrine of constitutional avoidance and ripeness is the question whether this Petition raises a constitutional question as submitted by the Petitioner. I have severally in my decisions stated that a constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute. 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. The dispute presented in this case arising from a contested electricity bill can be resolved without resorting to the *Constitution*. In fact, the definition of a constitutional question provided in the South African case of *Fredericks & Others v MEC for Education and Training, Eastern Cape & Others* cited by the Petitioner does not support the Petitioner's argument that before this is constitutional Petition. Courts abhor the practice of converting every question into a constitutional question which amounts to trivializing the *Constitution*.

38. Flowing from the issues discussed above, I find and hold that Respondent's Notice of Preliminary Objection succeeds. This suit offends the doctrine of exhaustion of remedies. The Petition as drawn does not raise any constitutional questions at all. Mere recitation of Articles of the *Constitution* is not enough. The Petition must demonstrate how the Articles or fundamental rights have been violated

or threatened. As I have held severally, jurisdiction is determined from the pleadings. The pleadings before reveal a grievance emanating from a contested electricity bill as opposed to violation of any of the Articles cited. Accordingly, I allow the Preliminary Objection and dismiss the Petitioner's Petition dated October 14, 2021 with costs to the Respondent. Right of appeal.

SIGNED AND DATED AT MOMBASA THIS 18TH DAY OF AUGUST 2022.

JOHN M MATIVO

JUDGE

Signed, dated and delivered virtually at Mombasa this 19th day of August 2022

J N ONYIEGO

JUDGE