



**Kaikai v Telkom Kenya Limited (Constitutional Petition E455 of 2021)
[2022] KEHC 17131 (KLR) (Constitutional and Human Rights) (16 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 17131 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E455 OF 2021**

AC MRIMA, J

DECEMBER 16, 2022

BETWEEN

PHILIP KAIKAI PETITIONER

AND

TELKOM KENYA LIMITED RESPONDENT

RULING

Introduction

1. The preliminary objection, subject of this ruling, is dated March 21, 2022. It was instituted by Telkom Kenya Limited, the respondent herein, upon being sued by Philip Kaikai, the petitioner herein, for various constitutional violations.
2. Briefly, the petitioner's cause of action was precipitated by the discovery that despite having never subscribed to telecommunication services by Telkom Kenya Limited, the mobile number 07xxxxx5, was registered to him on the basis of his personal details including his name, date of birth and identification number.
3. Upon following up the issue with the respondent at Bungoma Town, the petitioner learned that the mobile number was registered to his name on June 5, 2021 without his knowledge.
4. Consequently, the petitioner, lodged his complaint with the respondent on June 18, 2021. The respondent's advocates responded requesting for time to carry out investigations.
5. Later, the petitioner was told that the information he sought could not be furnished without a court order.



6. Aggrieved by the turn of events, the petitioner instituted the petition dated October 27, 2021 supported by the affidavit of Philip Kaikai deposed to on a similar date seeking redress occasioned by the respondent's breach of statutory duty to protect his privacy and personal information from abuse.
7. Filed contemporaneously with the main petition was the notice of motion application supported by the affidavit of the Philip Kaikai where he sought interim orders pending hearing and determination of the petition.

The Objection

8. In opposition to the petition, Telkom Kenya Limited lodged the notice of preliminary objection dated March 21, 2022 in the following terms;
 1. That the honourable court lacks jurisdiction to hear this petition by virtue of doctrines of constitutional avoidance and exhaustion of statutory remedies as the petitioner has failed to exhaust the statutory remedies under part iv of the [Access to information Act](#) No 31 of 2016, and part vii of the [Data Protection Act, 2019](#)
 2. In view of the foregoing, the petition is bad in law and ought to be struck out with costs.

The Submissions

9. In its written submissions and case digest dated May 6, 2022, the respondent stated that the petitioner's failure to pursue any statutory remedies before instituting the instant petition stripped this court of jurisdiction to hear and determine the suit.
10. It was submitted that since the petition is anchored on [Access to Information](#) and [Data Protection Act](#), this court's jurisdiction is divested by the remedies provided for under the two statutes.
11. The respondent made reference to section 14(1) of [Access to Information Act](#) which the petitioner did not invoke on the right granted to an aggrieved person to request for review of any of the decisions of a public body in relation to request for access to information.
12. The respondent further faulted the petitioner for not utilizing redress procedure under section 22 of the [Access to Information Act](#) which donates powers to the commission on administrative justice to issue summons to question persons or require persons to disclose information held by them.
13. In respect of violation of the petitioner's right as a data subject under [Data Protection Act](#), it was the respondent's case that according to section 56(1) of the [Data Protection Act](#), a data subject who is aggrieved by a decision of any person may lodge a complaint with the Data Commissioner.
14. On the foregoing, the respondent submitted that the petitioner jumped the gun and as such was caught up by the constitutional avoidance and exhaustion of statutory remedies.
15. The decision in [Makoru Beatrice Kwamboka v Kenya Airways Limited PLC](#) [2021] eKLR and the one in [Geofrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others](#) eKLR were relied on to demonstrate the operation and applicability of the constitutional avoidance doctrine and exhaustion of statutory remedies respectively to the case.
16. The respondent further referred to the decision in [Savraj Signh Chana v Diamond Trust Bank \(Kenya\) Limited & another](#) to reiterate that even in instances where the court has jurisdiction by virtue of article 23 and 165(3) of the [Constitution](#), it ought not to be invoked when there is an existing statutory remedy.



17. In urging the court to allow the decline jurisdiction, it was submitted that there is no constitutional value that is at stake or at risk and that there are no novel issues that would operate as an exception to the exhaustion doctrine.
18. It was his case that the commission on administrative justice and the data commissioner have specialized bodies capable of handling the issues raised in the petition. Support to that end was drawn from the decision in *Republic v Sam Nthenya, Chief Executive Officer, Nairobi Women's Hospital & Another Ex-parte Christine Nzula: Commission on Administrative Justice (interested Party)* [2021] eKLR.
19. In conclusion it was urged that the court declines jurisdiction in favour of the data commissioner and commission on administrative justice.

The Petitioner's Case

20. The petitioner opposed the preliminary objection through the replying affidavit of Philip Kaikai deposed to on April 28, 2022.
21. It was his deposition that the preliminary objection offends the overriding objective of just expeditious, proportionate and affordable resolution of civil disputes.
22. On the substance of the objection, it was deposed that the dispute subject of this petition is made under section 25(3a) of *Kenya Information and Communication Act* (KICA) and Kenya information and Communications (Registration of Subscribers of Telecommunication Services) Regulations, 2013 as opposed to *Access to Information Act* and *Data Protection Act* and as such there is no recourse to any mechanism under KICA.
23. It was his case further that constitutional avoidance and exhaustion doctrine are not absolute in instances where the court is of the opinion that claimed constitutional rights are not mere 'bootstraps' designed to gain entry to the constitutional court.
24. To buttress the foregoing, reference was made to the Supreme Court decision in Independent Electoral & Boundaries Commission & others ex-parte The National Super Alliance Kenya (NASA) and the one in *Gatirau Peter Munya v Dicksom Mwendwa Kitinji & 2 others*.
25. The petitioner deposed that upholding the objection would amount to elevating the statutory provisions above the *Constitution* thereby violating the right to access justice under the *Constitution* while at the same time usurping the powers of the High Court under article 165(3)(b).
26. The petitioner hastened to add that the issues raised in the petition are virgin areas of public interest which this court ought to hear.
27. Differently, the petitioner challenged the propriety of the objection stating that it does not meet the minimum required of it as established in *Mukisa Biscuit Manufacturing Company v West End distributors* [1969] eKLR. It was his case that the issues raised need interrogation of facts including the contention on how his SIM card was done.
28. In conclusion, the petitioner deposed that the petition raised issues of constitutional interpretation whose responsibility is this court to enforce any alleged violation of right of fundamental freedom.

The Submissions

29. In its written submissions dated May 4, 2022, the petitioner reiterated its case stating that the petition did not meet the threshold required of preliminary objections as established in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors* [1969] EA.



30. As to whether the respondent complied with the cited provisions of KICA, it was submitted that the issue goes not only to the breach of the statute but also constitutionality of their actions that this court can make a determination upon each party adducing evidence.
31. In urging this court to find inapplicability exhaustion doctrine, the petitioner submitted that it lacks adequate audience before the forum created by the statute and to that end, this court is invited to construe restrictively statutes that oust the court's jurisdiction.
32. Reliance was placed on the decision in *Collins Odhiambo Odundo & another v Nelson Andayi Havi & 11 others; Riziki Emukule & 20 others (interested parties)* to urge this court to take into extensive consideration analysis of facts, regulatory schemes involved, nature of interests involved including level of public interest involved and the polycentricity of the issue in determining whether exception applies.

Analysis

33. From the foregoing, the issues that arise for determination are as follows: -
 - i. The nature and validity of the objection.
 - ii. Whether the objection is merited.
34. The issues will be dealt with sequentially.
 - a. The nature and validity of the objection:
35. The validity of any preliminary objection is measured against the settled principle that it raises pure questions of law capable of disposing of the suit at once.
36. By their very nature, therefore, preliminary objections are invalidated in instances where parties or the court is invited to decipher veracity of contested factual issues through the calling of evidence.
37. The foregoing was established and settled in *Mukisa Biscuit Manufacturers Ltd v West End Distributors Ltd* [1969] EA 696 where it was observed: -

.... so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.

...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.
38. Later, in civil suit No 85 of 1992, *Oraro v Mbaja* [2005] 1 KLR 141, Ojwang J, as he then was, cited with approval the position in *Mukisa Biscuit v West End Distributors* (supra) and he spoke to the operation of preliminary objection in the following manner;

.... I think the principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which



claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.

39. In *Omondi v National Bank of Kenya Ltd & others* [2001] KLR 579; [2001] 1 EA the court discussed and appreciated the leeway court has in perusing the documents filed in a bid to ascertain the validity of the preliminary objection. It was observed: -

...In determining (preliminary objections) the court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters... What is forbidden is for counsel to take, and the court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done *ex debito justitiae* (as of right) but as a matter of judicial discretion.

40. Returning to the contents of the respondent's preliminary objection, it can be discerned that the respondent's sole contest derives from failure by the petitioner to exhaust statutory remedies and hence this court's lack of jurisdiction.
41. This court will, in the first instance, look into the concept of jurisdiction and its implication on a court's ability to resolve disputes and subsequently, whether the exhaustion doctrine is a jurisdictional contest.
42. In constitutional petition No 169 of 2020, *Jeremiah Memba Ocharo v Evangeline Njoka & 3 others* [2022] eKLR, this court comprehensively discussed jurisdiction as follows: -

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:

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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 v 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 v 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 v 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...

43. The Supreme Court in petition No 7 of 2013 *Mary Wambui Munene v Peter Gichuki Kingara and six others*, [2014] eKLR, stated that 'jurisdiction is a pure question of law' and should be resolved on priority basis.
44. As can be discerned from the foregoing discussion, jurisdiction is a pure question of law and, therefore, the exhaustion doctrine one of the various facets of the doctrine of jurisdiction that a party may plead on a preliminary basis to oust a court's capacity to delve into a dispute.
45. It is, hence, the finding of this court that the objection in this matter raises no factual issues and is valid for consideration on merits.

b. Whether the objection is merited:

46. The only question for resolution is whether, in the circumstances of the case, there existed statutory avenues for resolution of the petitioners case as to oust this court's jurisdiction.
47. To that extent, it is necessary to understand the mechanics of the exhaustion doctrine, and more importantly the exceptions to it that allow a court to claim jurisdiction.
48. 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, a 5-judge bench discussed the exhaustion doctrine in following detailed fashion: -

52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a court of law on an action



without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. This encourages alternative dispute resolution mechanisms in line with article 159 of the Constitution and was aptly elucidated by the High Court in *R v Independent Electoral and Boundaries Commission (IEBC) Ex Parte National Super Alliance (NASA) Kenya and 6 others* [2017] eKLR, where the court opined thus:

42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in *Speaker of National Assembly v Karume* [1992] KLR 21 in the following oft-repeated words:

Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

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

This is *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR, where the Court of Appeal stated that:

It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The ex parte applicants argue that this accords with article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution.

49. The High Court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In *R v Independent Electoral and Boundaries Commission (IEBC) & others ex parte The National Super*



Alliance Kenya (NASA) (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the *Shikara Limited Case* (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 others v Aelous (K) Ltd and 9 others*

60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.
 61. The second principle is that the jurisdiction of the courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.
50. The petitioner claimed jurisdiction on the basis that the petition derived its cause of action from the provisions of section 25(3A) of Kenya Information and Communication Act (KICA) and Kenya information and Communications (Registration of Subscribers of telecommunication Services) Regulations, 2013 which do not provide for internal dispute resolution mechanisms.
 51. The respondent on the other hand was of the position that the petition revolves around rights that can be pursued under the mechanisms provided for under Access to Information Act and Data Protection Act.
 52. Of particular importance in this matter is the position taken by the respondent when the petitioner engaged it before instituting this suit.
 53. In a letter dated August 20, 2021, the respondent's advocates in response to a demand letter issued by the petitioner requesting for information stated as follows: -

Finally, our client is not legally authorised to furnish the information demanded in your letter at paragraph e, f & g in the absence of a court order.....



54. It was on the basis of the respondent's position that the petitioner instituted the instant proceedings. However, in a turn of events, the respondent now posits that the very court that it held must issue an order for compliance has no jurisdiction.
55. The respondent is engaged in approbating and reprobating. It cannot, on one hand, claim that a court must issue an order for it to supply the information sought and, on the other hand, contend that the very court lacks jurisdiction.
56. From the respondent's point of view, even if the petitioner engaged other entities as suggested by the respondent, still the respondent would contend that it can only furnish some of the information *vide* a court order. Therefore, any other avenue, apart from a court, would not have the quality of audience which is proportionate to the interests the parties wished to advance in the matter.
57. In this matter, it is imperative that this court determines whether it must issue an order for purposes of the respondent furnishing the information required or not. That cannot be in the province of a quasi-judicial body, but only the court.
58. It is, therefore, on that score that the second exception applies in this matter.
59. This court now finds and hold that the exhaustion doctrine does not apply in the circumstances of this case.

Disposition:

60. In the premises, this court makes the following final orders: -
 - (a) The preliminary objection dated March 21, 2022 is hereby dismissed.
 - (b) Costs of the objection to be borne by the respondent.
61. It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 16TH DAY OF DECEMBER, 2022.

A. C. MRIMA

JUDGE

Ruling No. 1 delivered virtually in the presence of: -

Miss. Mbugua, Learned Counsel for the Petitioner.

Miss. Mutua, Learned Counsel for the Respondent.

Kirong/Regina – Court Assistants**

