



REPUBLIC OF KENYA



**Motiga v Lugalia & 4 others (Petition E328 of 2023) [2025] KEHC 275 (KLR)
(Constitutional and Human Rights) (22 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 275 (KLR)

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

PETITION E328 OF 2023

LN MUGAMBI, J

JANUARY 22, 2025

BETWEEN

JOEY MAINA MOTIGA PETITIONER

AND

STANLEY LUGALIA 1ST RESPONDENT

THE INFORMER KENYA 2ND RESPONDENT

GOOGLE INC 3RD RESPONDENT

GOOGLE KENYA LIMITED 4TH RESPONDENT

SAFARICOM PLC 5TH RESPONDENT

RULING

Introduction

1. In the Petition dated 7th September 2023; the Petitioner alleges that the 1st and 2nd Respondent published a defamatory online publication that injured his reputation which was in violation of his constitutional rights.
2. In response to the Petition, the 2nd, 3rd, 4th and 5th Respondents' filed Notices of Preliminary Objection and Notice of Motion application hence this ruling.

2nd Respondent's Preliminary Objection

3. The 2nd Respondent filed a Notice of Preliminary Objection dated 22nd January 2024 which is premised on the grounds that:



- i. The proceedings are offensive of the doctrine of exhaustion in so far as the matters raised are largely complaints within the meaning of Section 102A of the [Kenya Information and Communications Act](#) Number 2 of 1998 and/or Sections 5, 8(1) (t), 9(1)(a), and 65 of the [Data Protection Act, 2019](#), the determination of which lies within the exclusive jurisdiction of the Communications and Multimedia Appeals Tribunal and/or Data Commissioner.
- ii. The Petition does not meet the legal threshold on what constitutes a constitutional petition in as far as the Petitioner alleges the violation of his rights and fundamental freedoms under the Bill of Rights.
- iii. The Petition offends the doctrine of constitutional avoidance by seeking application of the [Constitution](#) to matters fully addressed by statute. All the issues arising from the Petition ought to be adjudicated under the [Defamation Act](#), Cap 36 of the Laws of Kenya through a normal suit brought by a Plaintiff under the rules of procedure of the High Court.

3rd Respondent's Application

4. By a Notice of Motion application dated 22nd January 2024, the 3rd Respondent seeks orders that:
 - i. This Court be pleased to strike out the Petition dated 7th September 2023 in its entirety.
 - ii. Costs of the Application be in the cause.
5. The application is supported by Hadi El- Hibri's affidavit, sworn on 20th January 2024 and the grounds on the face of the application.
6. He states that the Petition is vague and ambiguous on alleged constitutional breaches. That in any case, the alleged violations do not constitute a constitutional dispute but is a defamation matter that does not require this Court's intervention under the doctrine of constitutional avoidance.
7. Further that the Petition offends the doctrine of exhaustion as it relates to violation of privacy rights which can be dealt with under Sections 5, 8(1) (f), 9(1) (a) and 65 of the [Data Protection Act, 2019](#). Accordingly, he points out that the Petitioner ought to have filed his complaint before the Data Protection Commissioner first.
8. In view of the foregoing, the Petition is misconceived and an abuse of the Court process.

4th Respondent's Application

9. By a Notice of Motion application dated 31st October 2023, the 4th Respondent seeks orders that:
 - i. The 4th Respondent be struck out from the Petition dated 7th September 2023.
 - ii. The costs of this Application be awarded to the 4th Respondent.
10. The application in addition to the grounds on the face of it, is supported by Agnes Gathaiya's affidavit of even date and a further supplementary affidavit sworn on 22nd May 2024.
11. She informs that the 4th Respondent does not own neither operates the Google search engine (www.google.com or www.google.co.ke). These are owned by the 3rd Respondent which is a company registered under the laws of the State of Delaware, USA.
12. She stresses that the 3rd Respondent is not a subsidiary of the 4th Respondent and that it is a separate and independent legal entity incorporated in Kenya as is evidenced by the documents adduced in the



supporting affidavit and the supplementary affidavit. In light of this, she avers that the information being sought by the Petitioner relates to services offered by the 3rd Respondent not the 4th Respondent.

13. Furthermore, she avers that the Petitioner has not particularized any constitutional violations that are attributable to the 4th Respondent. For this reason, she argues that there is no basis for the action against the 4th Respondent and thus the Petition is an abuse of the Court process.

5th Respondent's Preliminary Objection

14. The 5th Respondent equally filed a Notice of Preliminary Objection dated 18th January 2024 on the basis that:
- i. The proceedings are offensive of the doctrine of exhaustion in so far as the matters raised are largely complaints within the meaning of Section 102A of the [Kenya Information and Communications Act](#) Number 2 of 1998 the determination of which lies within the exclusive jurisdiction of the Communications and Multimedia Appeals Tribunal.
 - ii. The jurisdiction of this Court is not to be invoked for purposes of enabling it to arrogate itself statutory powers and obligations placed upon disclosed constitutional office holders as regards receiving, investigating, and acting on any complaint a citizen might have.
 - iii. The matters the subject of the Petition can be conclusively dealt with by the Trial Courts in Nairobi Chief Magistrates' Court Commercial Court Case No.E462 of 2002) (Beth Mobility LLP & Another vs Beatrice Njeri Chege) and Kibera Chief Magistrates Court Criminal Case No.1220 of 2023 (R v Beatrice Njeri Chege & 3 others).
 - iv. The reliefs sought herein as against the 5th Respondent are contrary to statute particularly Section 27 A (3)b of the [Kenya Information and Communications Act](#) Number 2 of 1998.
 - v. Such other objections to be raised at the hearing hereof.

The Petitioner's case

15. The Petitioner in response to the 3rd Respondent's application filed a Replying affidavit sworn on 3rd April 2024. Additionally, the Petitioner in reaction to the 4th Respondent's application filed his Replying Affidavit sworn on 28th March 2024 and filed submissions in light of the preliminary objections.
16. On the 3rd Respondent's case, the Petitioner emphasizes that his Petition filed under Article 165(3) of the [Constitution](#) and Rules 10(3) and (4) of the [Constitution](#) of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, clearly identifies Articles 28, 29(d), 31, 43 and 50 of the [Constitution](#) as having been infringed by the Respondents.
17. Furthermore, he states that the Petition seeks to have the 3rd, 4th and 5th Respondents divulge the identity of the 2nd Respondent pursuant to Article 35(1)(b) of the [Constitution](#). Considering this, he argues that contrary to the 3rd Respondent's assertion his Petition is not solely based on the claim of defamation but also raises constitutional issues.
18. He adds that being that he does not know the identity of the persons who own the 2nd Respondent, his matter cannot be referred to the Data Commissioner as advanced. Be that as it may, he stresses that the provisions of the Data Protection Act cannot oust this Court's jurisdiction to determine this matter and that the same are not adequate to address the issues raised herein. For this reason, it is argued that the exhaustion principle is not applicable.



19. Turning to the 4th Respondent's application, the Petitioner asserts that an official search by his advocate revealed that the 3rd Respondent is a shareholder of the 4th Respondent with 99 ordinary shares and 1 share held by the 4th Respondent.
20. On this basis he argues that the 3rd Respondent is the parent company of the 4th Respondent. Furthermore, he avers that the 4th Respondent carries out the business of marketing, support services, research and development on behalf of the 3rd Respondent. He posits that it is evident that the two are linked and control the google search engine.
21. The Petitioner further states that contrary to the 4th Respondent's allegation, he elaborated in his petition how the impugned publication violated his constitutional rights. It is noted that the impugned Article can still be found on the 3rd and 4th Respondent's search engine www.google.com and www.google.co.ke. As such his prayer in this regard is in line with Article 35 (1) (b) of the [Constitution](#).
22. Owing to this, the Petitioner argues that the facts set out in the Petition can only be fully determined at the trial. Moreover that the orders sought, should the Petition be successful could possibly attach the 4th Respondent. Considering this, the 4th Respondent is argued to be a necessary party in this suit.

1st Respondent's and Interested Party's Case

23. These parties' responses and submissions to the applications and preliminary objections herein, are not in the Court file or Court Online Platform (CTS).

Parties' Submissions

2nd Respondent's Submissions to its Application

24. The 2nd Respondent's submissions in support of its case are not in the Court file or Court Online Platform (CTS).

3rd Respondent's Submissions to its Application

25. The 3rd Respondent through Kaplan and Stratton Advocates filed submissions dated 21st March 2024 and further supplementary submissions dated 7th June 2024.
26. Counsel begun by submitting that the Petition does not satisfy the constitutional threshold set out in *Anarita Karimi Njeru v. The Republic* [1979]eKLR and re – affirmed in *Mumo Matemo -vs- Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR. This is because the constitutional violations claims were not presented with precision. It was stressed that it is not enough to allege infringement without particularizing the details and the manner of infringement. Like dependence was placed in *Gravs Jepkemoi Kiplagat v Zakavo Chepkoga Cheruiyot* [2021] eKLR.
27. In like manner, Counsel submitted that the Petition offends the doctrine of constitutional avoidance as the issues raised revolve around a defamation claim which is a tort and provided for under the [Defamation Act](#). Counsel argued that this is not a constitutional issue and hence ought to be canvassed as such. Reliance was placed in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014]eKLR where the Supreme Court held that:

“The appellants in this case are seeking to invoke the "principle of avoidance", also known as "constitutional avoidance". The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v. Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge



AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

"I would lay it 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."

Similarly, the US. Supreme Court has 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 (*Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936))."

28. Corresponding dependence was placed in *Sumayya Athmani Hassan v Paul Masinde Simidi & another* [2019] eKLR, *Juliana Yegon v Justus Kigen & 4 others* [2016] eKLR and Constitutional Case No. E406/20 *Choda versus Rajput East Africa Law Reports* [2020] 3EA94.
29. Similarly, the Petition it was submitted that the Petition offends the doctrine of exhaustion as the Petitioner's claim of violation of the right to privacy is provided for under the Data Protection Act. Counsel also pointed out that the Petitioner had sought to rely on the Data Protection Act, the [Access to Information Act](#) and the [Media Council Act](#) all of which provide mechanisms that can address the Petitioner's claim.
30. In particular, the Commission on Administrative Justice under Section 14(1) of [Access to Information Act](#) reviews disputes where parties are not granted access to information. Furthermore, the Office of the Data Commissioner under Section 5 of the Data Protection Act provides for investigation of complaints on alleged infringement of privacy rights. Equally, the Complaints Commission under Section 27 of the [Media Council Act](#) is empowered to hear and make determinations on claims made by persons aggrieved by publications of journalists or media enterprises. It is argued that these mechanisms are provided as the first points of call while the High Court as the appellate call.
31. Reliance was placed in *Anthony Miano & others v Attorney General & others* [2021] eKLR where it was held that:

"even if there are constitutional issues raised in a Petition, such issues ought to await the consideration of the relevant tribunal."
32. Identical dependence was placed in *Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others* [2019] eKLR, *United Millers Limited V Kenya Bureau of Standards, Director, Directorate Of Criminal Investigations & 5 Others* [2021] eKLR, *Mwanzia v Rhodes* [2023] KEHC 2688 (KLR) and *Geoffrey Muthiga Kabiru & 2 others - vs- Samuel Munga Henry & 1756 others* [2015] eKLR.
33. Counsel submitted that the Petitioner had not shown whether he had utilized these mechanisms and also whether failure to do so was as a result a justified exception under the doctrine of exhaustion.

4th Respondent's Submissions to its Application

34. On 12th June 2024, Coulson Harney LLP Advocates filed submissions for the 4th Respondent and highlighted the issues for discussion as:

"whether the 4th Respondent is improperly joined to the Petition and whether the 4th Respondent's presence in the Petition is necessary."



35. Counsel in the first issue, submitted that the Petitioner had failed to justify the 4th Respondent's joinder in these proceedings. Further, it was contended that the Petitioner had not demonstrated that he had sought the said information under the *Access to Information Act* from the 4th Respondent and denied the same before filing this suit.
36. As such it was argued that the Petitioner could not thus claim that the 4th Respondent violated its rights and neither does the Petition disclose breach of any such rights by the 4th Respondent.
37. Moreover, Counsel submitted that information can only be sought from the person or body that holds the required information. As deponed by the 4th Respondent, Counsel noted that the information sought by the Petitioner relates to services offered by the 3rd Respondent not the 4th Respondent.
38. It was as well stressed that the two as deponed are separate legal entities and hence the 4th Respondent cannot be sued on the 3rd Respondent's behalf. Reliance was placed in *Republic v Chief Magistrate Milimani Law Courts & 5 others Ex-parte Google Kenya Limited* [2018] eKLR where it was held that:

“Google Inc, which is the owner of the www.gmail.domain where the Gmail account the 4th Respondent sought to investigate is domiciled, is a separate legal entity from the Applicant [Google Kenya]”.
39. Similar sentiments were also stated in *Hellen Winfrida Arika v Tamesha Corporation Ltd & 8 others* [2021] eKLR which was also cited in support.
40. Equal dependence on this subject was also placed in *Salomon v Salomon and Co. Ltd* [1897] AC 22, *Githunguri Dairy Farmers Co-operative Society v Ernie Campell & Co. Ltd & another* [2018] eKLR and *Crescent Construction Ltd v Kenya Commercial Bank Limited* [2019] eKLR.
41. In view of the foregoing, Counsel in the next issue was certain that the 4th Respondent is neither a proper or necessary party in this suit. Counsel underscored that the Court in *Kingori v Chege & 3 Others* [2002] 2 KLR 243 stated that necessary parties who ought to be joined to a suit are parties who are necessary to the *Constitution* of the suit without whom no decree can be passed.
42. Equal dependence was placed in *Law Society of Kenya v Communications Authority of Kenya & 1 O others* [2023] KESC 2, *Osman & another v Mohamud & 2 others* [2024] KEELC 957 and *Departed Asians Property Custodian Board v Jaffer Brothers Ltd* [1999] 1 EA 55.
43. For this reason, Counsel submitted that the 4th Respondent ought to be struck out from the instant proceedings as in addition to not having any interest in this matter is a stranger to the facts of the alleged violation of the Petitioner's rights.

5th Respondent's Submissions to its Notice of Preliminary Objection

44. Majanja Luseno and Company Advocates for the 5th Respondent filed submissions dated 6th February 2024.
45. Counsel highlighted that the 2nd Respondent is a media enterprise as defined under Section 2 of the *Media Council Act*. He stated that the Petitioner's case concerns the online publication that was made by the 1st and 2nd Respondent.
46. In this regard, Counsel submitted that the *Kenya Information and Communications Act* under Section 102 establishes the Communications and Multimedia Appeals Tribunal which is granted jurisdiction to hear and determine complaints made against a journalist or media enterprise as the case herein.



47. Considering that the primary grievance revolves around the online publication, Counsel submitted that the same ought to have been filed before the Tribunal as dictated by the Act. It was also submitted that the Petitioner filed the instant Petition before exhausting the Act's mechanism which is the first point of call.
48. Reliance was placed in *Geoffrey Muthiga Kabiru & 2 Others* (supra) where it was held 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”.
49. Equal dependence was placed in ELC Petition No. 044 of 2021 (*Eric Kiprotich Soi & another v Director General Nairobi Metropolitan Services*).
50. Counsel further submitted that the Petition does not demonstrate the existence of any facts which necessitate application of the exceptions to the doctrine of exhaustion. Reliance was placed in *Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR where it was held that:
- “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.”
51. Counsel further argued that the Petition is calling on the Court to arrogate itself statutory powers placed on other statutory organs being the police. Counsel thus urged the Court to decline this invitation.
52. Additionally, Counsel submitted that the issues raised in the Petition are live criminal proceedings which can be properly addressed in Chief Magistrate's Court Commercial Case Number E462 of 2002 (*Beth Mobility LLP & Another v Beatrice Njeri Chege*) and Kibera Chief Magistrate's Court Criminal Case Number 1220 of 2023 (*R v Beatrice Nieri Chege & 3 others*).
53. In this regard, Counsel asserted that a court will not determine a constitutional matter when an issue may properly be decided on another avenue as held in *S v Mhlungu* (supra).
54. Counsel in closing submitted that Section 27 A (2) (C) of the Act prohibits the 5th Respondent from disclosing registration details of a subscriber without the latter's written consent and thus the reliefs sought in this regard are contrary to Section 27 A (3) (b) of the Act.

Petitioner's Submissions

55. The firm of Kilomenn Advocates on behalf of the Petitioner filed submissions dated 9th May 2022 and 14th April 2024 respectively. The issues for discussion were stated as: whether the Petition raises constitutional issues, whether the Petition offends the doctrine of exhaustion, whether the Petition offends the doctrine of constitutional avoidance, whether the 2nd and 5th Respondents' objections are merited and whether the 4th Respondent is properly joined in this suit.
56. Counsel answering in the affirmative in the first issue, submitted that the Petition revolves around violation of the Petitioner's rights under Articles 28, 29 (d), 31, 43 and 50 of the *Constitution* as made manifest through the impugned online publication. Counsel submitted that the Petitioner had gone ahead and shown how these rights had been infringed by the Respondents. As such, Counsel



emphasized that the issues raised herein are constitutional in nature and transcend the claim of defamation and data protection as alleged by the Respondents.

57. On failure to exhaust the available mechanisms, Counsel submitted that the Petition raises a number of issues pegged on the Constitution and which fall outside the Data Commissioners mandate in the Data Protection Act. Equally that the remedies available before the Commissioner are purely administrative.
58. Counsel with regard to the Media Council Act submitted that the 2nd Respondent's status was not certain so as to bring it within the definition under Section 2 of the Media Council Act. Counsel for this reason asserted that the matter could not be referred to the Media and Communications and Multimedia Tribunal as alleged.
59. Counsel moreover submitted that the Defamation Act as proposed by the Respondents would not be an appropriate avenue to resolve the issues raised in the Petition. This is because while it is the 1st and 2nd Respondents who published the offensive article, it is the 3rd and 4th Respondents' who control the search engines that contain the article hence ones who can supply the information sought.
60. Equally, Counsel submitted that the rights and remedies available under defamation are limited in scope and hence would not be adequate in the circumstances of this case.
61. Counsel in the next issues stated that the raised objections by the 2nd and 5th Respondents' require an inquiry into the facts of the Petitioner's case, before this Court can make a determination.
62. Counsel in view of the 4th Respondent's application submitted that this party was a necessary party whose presence is crucial for the Court to fully adjudicate the matters herein. This is with reference to disclosure of the truth identity of the persons behind the 2nd Respondent and whether indeed the 4th Respondent controls www.google.com and www.google.co.ke. Counsel therefore maintained that these issues can only be addressed at the full trial of this matter. Counsel added that joinder of all the Respondents is geared towards preventing multiplicity of suits.
63. Reliance was placed in *Rubina Ahmed & 3 others v Guardian Bank Ltd* (Sued in the capacity as a successor in Title to First National Finance Bank Limited [2019] eKLR).
64. Counsel in addition submitted that the 4th Respondent's presence in this matter was necessary as the Petitioner relies on this Court's order to compel the 1st, 3rd, 4th and 5th Respondents to disclose the required information regarding the 2nd Respondent in line with Article 35 of the Constitution.

Analysis and Determination

65. It is my considered view that the issues that arise for determination are:
 - i. Whether this Petition offend
 - a. doctrine of Constitutional avoidance
 - b. the doctrine of exhaustion of remedies
 - ii. Whether the 4th Respondent was improperly joined in this suit.
 - ii. Finally, whether or not the 2nd and 5th Respondents' preliminary objections and the 3rd and 4th Respondents' applications are merited.



Whether the Petition offends the doctrine of Constitutional avoidance and the doctrine of exhaustion of remedies

66. The doctrine avoidance is precludes the Court from invoking the *Constitution* to settle controversies that can conveniently be dealt with on any other legal basis other than the *Constitution*. Disputes that may appropriately be resolved on the basis of a statute or regulatory regime or other established legal principles should thus not be disguised and tried as Constitutional litigations.
67. Expounding on the doctrine, the Court in Ibrahim Wakhanyanga & 2 others v Chief Magistrate’s Court Kakamega & 2 others; Attorney General for Land Registrar Kakamega (Interested party) [2022] eKLR observed thus:
17. One of the instances in which a constitutional court loses jurisdiction is through the doctrine of constitutional avoidance. Thus, where there exist ample statutory avenues for resolution of a dispute, the constitutional court will defer to the statutory options and decline to entertain such a dispute. A party seeking relief in a matter that can be addressed through interpretation of statutes and rules made thereunder must seek relief through an ordinary suit as opposed to a constitutional petition. In that regard, the Court of Appeal stated in Sumayya Athmani Hassan v Paul Masinde Simidi & another [2019] eKLR as follows:
- ... where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the *Constitution* without challenging the legislation in question. That principle has been reinforced by the Supreme Court in Communications Commission case (supra).
- (17) In conclusion, we find that the alleged unlawful interdiction and termination of a contract of employment was not a constitutional issue and thus the petition did not disclose a cause of action anchored on the *Constitution*. Accordingly, the petition being incompetent, the court acted in excess of jurisdiction and erred in law in determining the petition.
18. Similarly, the same court stated in Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another [2016] eKLR thus:
- Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation....
- A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done.”
68. Equally, in C O D & another vs Nairobi City Water & Sewerage Co. Ltd (2015) eKLR the Court noted as follows:



11. Similarly, in *Papinder Kaur Atwal -vs- Manjit Singh Amrit Nairobi* Petition No. 236 of 2011 where after considering several authorities on the issue, Justice Lenaola remarked as follows:

All the authorities above would point to the fact that the Constitution is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes..... I must add the following; Our Bill of Rights is robust. It has been hailed as one of the best in any Constitution in the World. Our Courts must interpret it [with] all the liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violation thereof.” (Emphasis added)

12. The Supreme Court of India has also held that ordinary remedies available under common law and statutes must be pursued in the ordinary manner or as provided under statute. For instance, in *Re Application by Bahadur*[1986] LRC (Const) the Court expressed itself as follows at page 307;

The Courts have said time and again that where infringements of rights are alleged which can be founded in a claim under substantive law, the proper course is to bring the claim under such law and not under the Constitution. This case highlights the un-wisdom of ignoring that advice.... the Constitution sets out to declare in general terms the fundamental concepts of justice and right that should guide and inform the law and the actions of men. While an infringement of the Constitution might in certain cases give rise to the redress provided for at section 14, yet, as has been proclaimed by the highest Court in the land, it is not, “a general substitute for the normal procedures for invoking judicial control of administrative action.” (See *Harrikissoon v A-G* [1979] 3 WLR 62).

13. It was further observed in the case of *Minister of Home Affairs vs Bickle & Others* (1985) LRC Const(per (Georges C.J));

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.”

69. Turning to the present Petition, the Respondents opposed the Petition for offending the doctrine of constitutional avoidance by pointing out the cause of action is claim for defamation which can be fully and effectively litigated as a tortious claim either under the defamation Act or as a common law claim in an ordinary civil suit.
70. The Petitioner however maintained that the Petition raises constitutional questions on account that although it alleged defamation by the 1st and 2nd Respondents for publishing the offensive article against the Petitioner; there was also the element of access to information that could enable the Petitioner identify the 2nd Petitioner which only the 3rd and 4th Respondent could supply hence Defamation Act was inadequate in scope of remedies that it could offer.
71. It is manifest from the reading of this Petition the essential complaint is the alleged publication of the defamatory material against the Petitioner. In any case, even if the matter involves the need for supply of information under Article 35 of the Constitution, there is an elaborate procedure that is provided



for under [Access to Information Act](#) prescribing how this is to be done and consequences of failure to facilitate the access to information when the conditions set out for supply of information have been met. In short, this Court will not necessarily have to turn to the [Constitution](#) to resolve the two main issues raised by the Petitioner in this Petition. That will require the [Constitution](#) to resolve. In other words, the resolution of the issues presented through this Petition will only require interpretation of the relevant statutes or principles of common law rather than the [Constitution](#) as the claim is founded on the tort of defamation and the issue of access to information is also adequately covered in the [Access to Information Act](#). I can thus comfortably conclude that this Petition does not raise any Constitutional question that would compel the Court to resort to the [Constitution](#) to resolve.

72. This leads me into making the finding that the dispute that this Petition presents is not a Constitutional controversy since it can be determined without application of the [Constitution](#). Its resolution squarely lies in the application of the tort law and the [Access to Information Act](#).
73. It is impermissible for a litigant to found a cause of action on the [Constitution](#) when the same can be founded on legislation or other established legal principles.
74. Additionally, it has been held a party is required to exhaust alternative dispute resolution mechanisms before approaching the Court. The Court of Appeal Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 Others [2015] eKLR observed as follows:

“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 the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. 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 of courts. This accords with Article 159 of the [Constitution](#) which commands Courts to encourage alternative means of dispute resolution.”

75. It would thus be legally objectionable for the Petitioner to approach this Court alleging violation of the [Constitution](#) if the provisions of the statute provide a mechanism for the settlement of the dispute which the Petitioner ought to have utilized in the first instance.
76. Turning to the instant case, the Petitioner wants this Court compel the 3rd, 4th and 5th Respondents to disclose the information relating to the owners of the 2nd Respondent.
77. Under Section 7 of the [Access to Information Act](#), any person seeking to access information held by the state or private body writes to officer having custody of the information seeking access to the held by the officer. If the request is refused or requester fails to receive the information, Section 14 of the Act directs that the requester notify CAJ in writing requesting its intervention by reviewing reasons given or outlined in refusing to grant access. In execution of its functions under Section 21; the CAJ has been bestowed with powers set out in Section 23 of the Act as follows:
 - a. In the performance of its functions under this Act, the Commission shall have the power to—
 - i. issue summonses or other orders requiring the attendance of any person before the Commission and the production of any document or record relevant to any investigation by the Commission;
 - ii. question any person in respect of any subject matter under investigation before the Commission; and



- iii. require any person to disclose any information within such person's knowledge relevant to any investigation by the Commission.
 - b. The Commission may, if satisfied that there has been an infringement of the provisions of this Act, order—
 - i. the release of any information withheld unlawfully;
 - ii. a recommendation for the payment of compensation; or
 - iii. any other lawful remedy or redress.
 - c. A person who is not satisfied with an order made by the Commission under subsection (2) may appeal to the High Court within twenty-one days from the date the order was made.
 - d. An order of the Commission under subsection (2) may be filed in the High Court by any party thereto in such manner as the Commission may, in regulations made in consultation with the Chief Justice, prescribe and such party shall give written notice of the filing of the order to all other parties within thirty days of the date of the filing of the order.
 - e. If no appeal is filed under subsection (3), the party in favour of whom the order is made by the Commission may apply ex-parte by summons for leave to enforce such order as a decree, and the order may be executed in the same manner as an order of the High Court to the like effect.
78. The Court in *Dock Workers Union of Kenya v Kenya Ports Authority; Portside Freight Terminals Limited & another (Interested Parties)* [2021] eKLR discussing the mandate of the CAJ stated:
29. Under section 23 of the [Access to Information Act](#) No. 31 of 2016, the High Court has been established to have appellate jurisdiction. In *Savraj Singh Chana v Diamond Trust Bank (Kenya) Limited & another* [2020] eKLR, Korir J observed correctly in my view, as follows:
- It is appreciated that the cited decision does indeed recognize that the unlimited jurisdiction of the High Court of Kenya under Article 165(3)(b) of the [Constitution](#) to determine questions on whether a right or fundamental freedom has been infringed or violated. Nevertheless, it must be appreciated that the High Court does not exercise its jurisdiction in a vacuum. Jurisdiction is exercised within the laid down principles of law. One of those principles is one which requires that where a statutory mechanism has been provided for the resolution of a dispute, that procedure should first be exhausted before the courts can be approached for resolution of that dispute. Indeed, like any other legal principle, this doctrine has exceptions. In my view, it is the duty of a party who bypasses a statutory dispute resolution mechanism to demonstrate that there were reasons for avoiding that route. In the case before me, the Petitioner has simply pointed to the jurisdiction of this Court. The exhaustion principle does not actually take away the constitutional jurisdiction of this Court. What it simply does is to provide the parties with a faster and more efficient mechanism for the resolution of their disputes. The courts will step in later if any party is aggrieved by the decision of the statutory body mandated to resolve the dispute.”
79. It is apparent that the Petitioner in this case did not follow this procedure in order to access to information from the 3rd and 4th Respondent relating to the identity of the 2nd Respondent. The doctrine of exhaustion of remedies thus applies. The dicta by the Court in *Gabriel Mutava & 2 others*



v Managing Director Kenya Ports Authority & another [2016] eKLR applies on all fours. The Court stated:

“... Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation...”

80. With the above findings, it is crystal clear that this Petition cannot pass the jurisdictional test required of a Constitutional dispute.
81. In view of the foregoing, this Court declines jurisdiction to entertain this Petition on the basis of the doctrine of Constitutional avoidance and exhaustion of remedies. I will not consider the rest of the issues framed and will thus down my judicial tools at this point.
82. The petition is hereby struck out with costs to the 2nd, 3rd, 4th and 5th Respondents.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 22ND DAY OF JANUARY, 2025.

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L N MUGAMBI

JUDGE

