



**Law Society of Kenya & another v Mutayi & 4 others (Petition E303 of 2024)
[2025] KEHC 2777 (KLR) (Constitutional and Human Rights) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2777 (KLR)

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

PETITION E303 OF 2024

LN MUGAMBI, J

MARCH 13, 2025

BETWEEN

**LAW SOCIETY OF KENYA 1ST PETITIONER
IRENE OTTO 2ND PETITIONER**

AND

**MOSES MUTAYI 1ST RESPONDENT
ADMSON BUNGEI 2ND RESPONDENT
INSPECTOR GENERAL OF POLICE 3RD RESPONDENT
NATIONAL POLICE SERVICE 4TH RESPONDENT
ATTORNEY GENERAL 5TH RESPONDENT**

RULING

Introduction

1. The petition dated 25th June 2024 is as a result of the 18th June 2024 protests against the tax proposals in the Finance Bill 2024/2025.
2. The petition alleges that young Kenyans exercising their rights under Article 37 of the *Constitution* to peacefully protest were met with grave resistance from the police that was characterized with chaotic running battles, lobbing of tear gas and unlawful arrests and abductions.
3. Rex Masai, one of the protestors was shot dead while another identified as Evans succumbed to the injuries inflicted by the police soon thereafter.



4. Furthermore, the advocates who stepped in to intervene on behalf of the arrested youths were also harassed and threatened by the police.
5. The petitioners filed this petition against the respondents for the unlawful conduct of the 1st and 2nd respondents and against the 3rd, 4th and 5th respondent's failure to stop the perpetration of the said illegal acts.
6. In a rejoinder, the respondents filed a Notice of preliminary objection dated 11th July 2024 opposing the petition hence this ruling. The notice of preliminary objection was based on the following grounds:
 - i. It is inappropriate, under the doctrine of Exhaustion of Remedies and the scheme of the [Constitution](#) under Article 159, for this Court to exercise jurisdiction over the subject matter in light of the alternative redress mechanisms available under Part X of the [National Police Service Act](#) and the provisions of the [Independent Policing Oversight Authority Act](#).
 - ii. The petition/application cannot be considered by this Court unless and until the Court dispenses with the jurisdictional question in line with the legal principle established by the Court of Appeal in Owners of Motor Vessel 'Lilian S' V. Caltex Oil (Kenya) Limited [1989] KLR 1 and affirmed by the Supreme Court in the Matter of the Interim Independent Electoral Commission (2011) eKLR.

Respondents' Submissions

7. In support of their case, the respondents filed submissions dated 17th July 2024 through Principal State Counsel, Kaumba S.O.
8. It was argued that the petition revolves around the conduct of police officers during the protests over the Finance Bill, 2024 hence the petitioner ought to have exhausted the mechanism for redress provided under Part X of the [National Police Service Act](#).
9. Counsel submitted that Part X of the [National Police Service Act](#) provides an administrative and specialized avenue for determining the legality of the conduct of police officers. Furthermore, Counsel stated that the Act provides for an internal administrative redress mechanism to any compliant against police officers with the Internal Affairs Unit under Section 87(1).
10. Additionally, Counsel submitted that the [Independent Policing Oversight Authority Act](#) establishes the Independent Policing Oversight Authority that is mandated to hold the Police accountable to the public in the performance of their functions. In carrying out its mandate the Authority has the power to investigate any complaints related to disciplinary or criminal offences committed by any member of the Service.
11. In view of the foregoing, Counsel submitted that Article 159(2) of the [Constitution](#) obliges Courts to promote alternative dispute resolution mechanism as affirmed by the Supreme Court in Waity v Independent Electoral & Boundaries Commission & 3 others [2019] KESC 54 (KLR).The superior Court held as follows:

“(59) ... Where the [Constitution](#) or any other law establishes an organ, with a clear mandate for the resolution of a given genre of disputes, no other body can lawfully usurp such power, nor can it append such organ from the pedestal of execution of its mandate. To hold otherwise, would be to render the constitutional provision inoperable, a territory into which no judicial tribunal, however daring, would dare to fly.”



12. Counsel stressed that this decision is binding on this Court as emphasized by the Supreme Court in *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others* [2014] eKLR.
13. Counsel acknowledging the exception principle under the doctrine of exhaustion submitted that the petitioners had failed to demonstrate the exception to the rule by filing an application to that effect as provided under Section 9(2) of Fair Administrative Actions Act. Reliance was placed in *Krystalline Salt Limited v Kenya Revenue Authority* [2019] eKLR where it was held that:

“...what constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile...”

Petitioners’ submissions

14. MKA Law LLP Advocates on behalf of the petitioners filed submissions dated 25th July 2024 in answer to the respondents’ preliminary objection.
15. Counsel stressed that primarily, the petitioners challenge the constitutionality of the 1st and 2nd respondents’ actions and by extension the 3rd to 5th respondents failure to protect and uphold the petitioners’ client rights during the protests by not allowing them to communicate with their advocates, thus breached Article 49(1)(c) of the *Constitution* which guarantees arrested persons the right to communicate with an advocate.
16. Counsel as well stressed that during the protests the 1st and 2nd respondents’ commanded their officers to lob tear gas and live ammunition and other lethal weapons on both the protestors and their advocates.
17. In effect the respondents inter alia contravened the protestors’ rights under Article 37 of the *Constitution*. The Petitioners thus asserted that this Court has jurisdiction to entertain the instant petition as mandated under Article 165 (3) (b) of the *Constitution*.
18. It was pointed out that the respondents had appreciated the nature of the petition which challenges the infringement, violation or threat to rights as guaranteed under the Bill of Rights and the interpretation of Article 244 of the *Constitution*.
19. It was submitted on behalf of the Petitioner that the legal provisions referred to by the respondents in the *National Police Service Act* relate to the discipline of the police officers yet the petition is founded on constitutional violations that cannot be addressed under the said mechanism.
20. To buttress the petitioners’ case, Counsel relied in *R v Independent Electoral and Boundaries Commission (IEBC) & others ex parte The National Super Alliance Kenya (NASA)* [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 polycentricism of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies.”
21. Further reliance was placed on *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.



22. It was thus the assertion of the Petitioners that the petition deals with violation and threatened violation of human rights, interpretation of the Constitution that cannot be redressed through the remedies in the said Statute as suggested by the respondents.

Analysis and Determination

23. The singular issue for determination is:

Whether the respondents' Notice of Preliminary objection dated 11th July 2024 is merited.

24. The fundamental characteristics of a preliminary objection are now well settled. The Supreme Court restated the same in the Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others(2014)eKLR as follows:

- (31) To restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co Ltd –vs. - West End Distributors (1969) EA 696:

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point 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”.

25. See also Kyule v Gitaari [2024] KEHC 5819 (KLR) and Dismas Wambola v Cabinet Secretary, Treasury & 5 others [2017] KEHC 8777 (KLR) whose holding on principle characteristics of the preliminary objection were also reiterated.
26. In the instant matter, the Respondent raises the doctrine of exhaustion of remedies. This is jurisdictional issue based on jurisprudential principles that preclude Courts from entertaining a dispute before submitting to established statutory or regulatory mechanisms provided for resolution of such disputes in the first instance.
27. In this case, at this stage there is no contest on facts and in raising this P.O. the Respondent relies fully on the facts as pleaded and argues that the dispute of this nature ought to have been subjected to alternative dispute resolution.
28. In Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] KECA 304 (KLR) the Court of Appeal held as follows concerning the doctrine of exhaustion of remedies:

“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.”



29. Furthermore, the five Judge Bench in *William Odhiambo Ramogi & 3 others v Attorney General & 3 others; Muslims For Human Rights & 2 others (Interested Parties)* [2021] KEHC 3392 (KLR) opined as follows:

“ 52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts...”

30. There are exceptions to this doctrine as was explained by the Court of Appeal in *Fleur Investments Limited v Commissioner of Domestic Taxes & another* [2018] eKLR where the Court expressed itself as follows:

22. For this proposition the appellant called in aid this Court's finding in the case of *Speaker of National Assembly vs Njenga Karume (1990-1994)* EA 546 where the Court expressed itself in relevant part as follows:-

“...where there was an alternative remedy and especially where parliament has provided a statutory procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully to the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it...”

23. ... Whereas courts of Law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the *Constitution* and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.”

31. The case of *William Odhiambo Ramogi (supra)* also underscores that there may be instances where the doctrine may not apply. The Court explained:

“ 60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the *Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created



by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.

62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court."

32. The respondent bases its objection on the mandate of the Independent Policing Oversight Authority mainly, Part X of the *National Police Service Act* which provides for offences against discipline by police officers. Section 87 provides thus:

Internal Affairs Unit

1. There is established an Internal Affairs Unit (hereinafter referred to as "the Unit") of the Service which shall comprise of—
 - a. an officer not below the rank of assistant Inspector-General who shall be the Director;
 - b. a deputy director; and
 - c. such other staff as the Unit may require.
2. The functions of the Internal Affairs Unit shall be to—
 - a. receive and investigate complaints against the police;
 - b. promote uniform standards of discipline and good order in the Service; and
 - c. keep a record of the facts of any complaint or investigation made to it.
- (2A) Without prejudice to subsection (2), the unit may where necessary investigate and recommend appropriate action in respect of any Found engaging in any unlawful conduct.
- (3) In the performance of its functions, the Unit shall be subject to Article 47 of the *Constitution*.
- (4) The Unit shall investigate misconduct and hear complaints—
 - a. from members of the Service or members of the public
 - b. at the direction of a senior officer;
 - c. on its own initiative; or
 - d. on the direction of the Inspector-General; or
 - e. at the request of the Independent Police Oversight Authority.
- (5) Notwithstanding subsection (4)(e) the Authority may at any time intervene and take over the investigations when they have reason to believe the investigations are inordinately delayed or manifestly unreasonable.



- (6) The Unit may recommend the following disciplinary actions to the Inspector-General—
 - a. the interdiction of an officer;
 - b. the suspension of an officer;
 - c. the administration of a severe reprimand or a reprimand to control or influence the pay, allowances or conditions of service of an officer; or
 - d. any other lawful action.
 - (6A) The Inspector-General may in exceptional cases and in the interest of the service, authorise the unit to undertake disciplinary proceedings against any officer who has been a subject of its investigations, and may for that purpose direct a Deputy Inspector-General or the Director of the Unit to appoint an officer to preside over such proceedings.
 - (7) The Unit shall be located in separate offices from the rest of the Service.
 - (8) The Director shall assign a senior investigating officer in every county who shall be responsible for police internal affairs in that county.
 - (9) The Units shall report directly to the Assistant Inspector-General who shall subsequently report directly to the Inspector-General.
 - (10) There shall be an effective relationship and regular reporting by the Internal Affairs Unit to the Independent Police Oversight Authority, Coroners, the Chief Firearms Licensing Officer as well as the Commission.
 - (11) The Unit shall not be subject to the control, direction or command of the Kenya Police, Administration Police or the Directorate.
33. A reading of the authorities reviewed above shows that for the court to defer to the internal dispute resolution mechanism; it must be real, effective and provide remedies as well as an appellate mechanism, that the court considers appropriate.
 34. Section 87 of *National Police Service Act* outlines the procedure of lodging of complaints but there is no clarity in regard to the dispute resolution procedure or whether there exists a channel for appeal or review to the Court if one is not satisfied by the action taken against a police officer.
 35. The Act does also not mention the reliefs that may be available to the aggrieved party should the complaint be upheld. The Section only specifies disciplinary consequences that may be meted on the errant officer and no more.
 36. This petition is founded on alleged constitutional violations which jurisdiction is vested in this Court and which go beyond with the disciplinary concerns against police officers. The mechanism provided for under the *National Police Service Act* and the *Independent Policing Oversight Authority Act* cannot adequately deal with issues of violation of the rights and fundamental freedoms.
 37. The upshot is that this Court finds the Preliminary Objection to be without merit. It is dismissed in its entirety.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF MARCH, 2025.

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L N MUGAMBI
JUDGE

