



**Ekipor v Chief Magistrate Isiolo Law Courts & 2 others (Constitutional
Petition 2 of 2024) [2025] KEELC 4160 (KLR) (19 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4160 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
CONSTITUTIONAL PETITION 2 OF 2024**

**JO MBOYA, J
MAY 19, 2025**

BETWEEN

ANNA ACHWA APAGA EKALE EKIPOR PETITIONER

AND

THE CHIEF MAGISTRATE ISIOLO LAW COURTS 1ST RESPONDENT

HON ATTORNEY GENERAL 2ND RESPONDENT

MOHAMMED NOOR 3RD RESPONDENT

RULING

1. The Petitioner/Applicant [hereinafter referred to as the Applicant] approached the court vide petition dated 4th of March 2024; and wherein the petitioner sought diverse reliefs. The petition under reference was subsequently amended, culminating into the amended petition dated 6th March 2024 and wherein the petitioner sought the following reliefs [verbatim]:
 - i. A declaration that the proceedings of 6th February 2024 in Isiolo Chief Magistrate ELC case N. 96 of 2015 and all consequential orders issued or likely to be issued by the 1st respondent against the petitioner violates Article 10, 50, 159, 47 of *the constitution* and Section 4 of the *fair administrative action act* 2015, order 11 of the civil procedure rules 2010.
 - ii. A declaration that he proceedings of 6th February 2024 in Isiolo chief magistrate ELC case No. 96 of 2015 were undertaken in an arbitrary and capricious manner, besides being in violation of the principles of natural justice and fair hearing.
 - iii. An order of staying and setting aside of the proceedings/judgment, exparte judgment and all consequential orders issued in the ELC case No. 96 of 2015 and an order that he matter begin de novo before another magistrate of equal jurisdiction.



- iv. An order of certiorari to quash the unlawful proceedings of 6th February 2024 in Isiolo Chief Magistrates' court case no. 96 of 2015 and all resultant orders, decrees and judgments that will result therefrom.
 - v. An order of certiorari to quash the judgment of the court dated 5th March 2024.
 - vi. An order for damages for breach of the constitutional rights and freedoms.
 - vii. Cost of the petition.
 - viii. Any other order the court may deem fit and just to grant.
2. The amended petition by the petitioner/applicant was premised on various grounds which have been enumerated at the foot thereof. In particular, the petitioner has averred that the 3rd respondent herein filed civil proceedings vide Isiolo CMC ELC No. 96 of 2015 and where in the 3rd respondent sought various orders including eviction of the petitioner from the suit property.
 3. Furthermore, the petitioner averred that the said suit [details in terms of paragraph 2 hereof] was scheduled for hearing but the petitioner's advocate was engaged in various matters before the Court of Appeal. In this regard, it has been contended that the petitioner's advocate thereafter intimated her engagement to the advocates for the 3rd respondent who was the Plaintiff in the civil suit.
 4. Be that as it may, it has been averred that despite the intimation by the petitioner's advocate, the civil suit before the 1st respondent proceeded for hearing culminating into a judgment that was subsequently rendered on 5th March 2024. Furthermore it was averred that following the delivery of the said judgment the 3rd respondent proceeded to and engaged the county commissioner and the OCS Isiolo to facilitate the eviction. In any event, it was posited that the eviction was ultimately undertaken on the 24th November 2024.
 5. The petition under reference came up for directions on various occasions, whereupon the advocates for the parties agreed to have a preliminary objection filed by the 3rd respondents to be canvassed by way of written submissions. In this regard, the court proceeded to and circumscribed timelines for the filing of written submissions.
 6. It is instructive to underscore that the respondents indeed filed their written submissions as pertains to the preliminary objection challenging the propriety and competence of the petition. However, learned counsel for the petitioner did not file written submissions as pertains the preliminary objection.
 7. On the 20th January 2025, the matter came up for mention to confirm whether the petitioner had filed her submissions. Nevertheless, learned counsel for the petitioner intimated to the court that even though same had not filed written submissions in respect of the preliminary objection same [learned counsel for the petitioner] was keen to file an application for leave to amend the petition.
 8. It is instructive to state that the court thereafter granted liberty to the petitioner to file and serve the application. To this end the petitioner proceeded to and filed the notice of motion application dated 27th January 2025 and wherein the petitioner has sought the following reliefs:
 - i. The honourable court be pleased to grant leave to the petitioner to re-amend her petition in terms of the annexed draft amended petition.
 - ii. The annexed draft amended petition be deemed as duly filed upon payment of the requisite court fees.
 - iii. Costs of the application be provided.



9. The subject application came up for mention on the 3rd March 2025 and whereupon the advocates for the parties covenanted to canvass and dispose of the application by way of written submissions. In this regard, the court ventured forward and circumscribed the timelines for the filing and exchange of written submissions.
10. The petitioner/applicant filed written submissions dated 7th March 2025 and wherein same has highlighted and canvassed three [3] salient issues for consideration by the court. The issues raised by the petitioner applicant are namely; the applicant is desirous to amend the petition with a view to bringing on board additional parties and reliefs; the petition before hand captures and discloses fundamental freedoms that have been violated and or infringed upon; the issues raised at the foot of the amended petition fall outside the doctrine of exhaustion; and finally that the eviction complained of was illegal.
11. Regarding the first issue, namely; the applicant is desirous to amend the petition with a view to bringing on board additional parties and reliefs, it was submitted that the petitioner/applicant had filed the original petition prior to and before the implementation of the eviction orders. However, it was posited that subsequent to the filing of the petition, the petitioner herein was evicted from the suit property and thus the necessity to amend the petition and join the OCS Isiolo police station and the county commissioner, respectively, in so far as same participated in the illegal eviction.
12. Moreover, it has been submitted that the petitioner is also keen to implead an additional relief, namely; compensation by way of damages for illegal and unlawful demolition of her properties as well as reinstatement of the petitioner back to the suit property.
13. In the premises, it has been submitted that the current application which seeks leave to amend the petition ought to be allowed with a view to enabling the petitioner to bring forth the additional parties, as well as the additional reliefs.
14. In respect of the second issue, learned counsel for the petitioner has submitted that the petition beforehand, has raised and disclosed various human rights and fundamental freedoms which have been violated by the respondents. In particular, it has been posited that the 1st respondent proceeded with the hearing and determination of a civil suit which had been filed by the 3rd respondent without affording the petitioner an opportunity to be heard. To this end, it was posited that the 1st respondent therefore violated the petitioner's rights to fair hearing and fair trial.
15. Moreover, it was submitted that the learned counsel for the 3rd respondent had equally had been apprised of the absence of the petitioner's counsel but same failed to intimate the information to the 1st respondent. In this respect, it has been posited that the 3rd respondent's advocate; the 3rd respondent and the 1st respondent therefore breached and violated the petitioner's right in terms of article 47 of [*the constitution*](#).
16. Regarding the third issue, it was submitted that the issues raised and canvassed at the foot of the current petition fall outside the doctrine of exhaustion and constitutional avoidance. In any event, it has been contended that the petitioner filed an application before the trial court [1st respondent] and wherein the petitioner sought to set aside the ex-parte proceedings, but the application was side-stepped by the 1st respondent herein, who thereafter proceeded to craft and deliver the impugned judgment.
17. In addition, it was submitted that even after the delivery of judgment, the 1st respondent failed to give directions pertaining to and or concerning the application that had been filed by the petitioner. To this end, it has been posited that the petitioner was therefore at liberty to file the instant petition with a view to protecting her fundamental rights and freedoms.



18. Furthermore, it has been submitted that the totality of the circumstances surrounding the instant matter demonstrates that the doctrine of exhaustion and constitutional avoidance are not applicable in the instant matter. In particular, it has been submitted that the instant matter falls within the exceptions to the doctrine of exhaustion as highlighted in the case of *William Odhiambo Ramogi & 3 others vs Attorney General & 4 others; Muslim for Human Rights and 2 others* [interested parties] (2020) eKLR.
19. Finally, it was submitted that the eviction that was carried out and or undertaken by and on behalf of the 3rd respondent was illegal, unlawful and thus void. In particular, it was contended that the impugned eviction violates the provisions of section 152 G of the *Land Act*, 2012, in so far as no notice was issued and served upon the petitioner.
20. Moreover, it has been contended that it was obligatory upon the 3rd respondent to ensure that a 3-month notice was duly served upon the petitioner before undertaking the impugned eviction.
21. Arising from the foregoing, learned counsel for the petitioner/applicant has therefore submitted that both the application seeking amendment and the petition under reference disclose a reasonable cause of action and thus same ought to be allowed.
22. The first & 2nd respondents filed written submissions dated 11th March 2023 and where in same have raised three [3] salient issues, namely; whether the eviction was lawful or otherwise; whether the intended amendment ought to be allowed and whether the petition before hand is defeated by the doctrine of exhaustion.
23. Regarding the first issue, learned counsel for the 1st and 2nd respondent has submitted that the 3rd respondent indeed filed a suit that was heard and disposed of by the 1st respondent. Furthermore, it has been contended that following the hearing and determination of the suit filed by the 3rd respondent, the 1st respondent proceeded to and rendered a judgment where in same [1st respondent] decreed inter alia eviction of the petitioner from the suit property.
24. It was contended that upon the issuance of the judgment by the 1st respondent, the 3rd respondent [who was the beneficiary of the judgment was at liberty to execute same. To this end, it has been submitted that the 3rd respondent was therefore not obliged to issue and serve the 3-month notice envisaged under section 152 of the *land act* 2012.
25. Furthermore, it was submitted that the provisions of section 152 of the *Land Act*, 2012 [2016] and in particular, 152C thereof, do not apply to instances where the eviction order has been issued by a court of law. On the contrary, it was posited that section 152 of the *Land Act* relates to an instance where the registered owner of land or [sic] his agent desires to pursue eviction by issuance and service of the statutory notices.
26. In short, it was submitted that the impugned eviction was carried out and or conducted in accordance with the decree of the court and hence the claims by the petitioner as against the 1st & 2nd respondents are misconceived and legally untenable.
27. Regarding the second issue, it has been submitted that the application for amendments is intended to alter and or change the character of the suit before the court. In this regard, it has been contended that a party ought not to be allowed to amend the pleadings, with a view to altering and or changing the character and texture of the dispute. To this end, learned counsel for the 1st and 2nd respondents has invited the court to find and hold that the amendment is not merited.



28. In respect of the third issue, it has been submitted that the petitioner was at liberty to file and lodge an application for setting aside of the impugned proceedings of the 1st respondents and or to file an appeal against the said proceedings and consequential orders. Nevertheless, it was averred that the petitioner failed to adhere to the statutory provisions, including an appeal against the impugned orders.
29. Arising from the foregoing, it has been submitted that the petitioner ought not to have filed the instant petition, with a view to challenging the proceedings before the first respondent, yet various statutory mechanisms, including appeal, were available. In short, it has been posited that the petition before hand is barred and or prohibited by the doctrine of exhaustion and constitutional avoidance.
30. Flowing from the foregoing, it has been submitted that the petition beforehand is therefore untenable and same ought to be struck out. In any event, it has been posited that the petition which is the subject of the application for amendment, violates section 6 of the Judicature Act Cap. 8 Laws of Kenya.
31. The 3rd respondent filed written submissions dated the 17th February 2025 and wherein same [3rd respondent] has highlighted and canvassed four [4] salient issues, namely; whether the further amended petition offends the provisions of order 8 rule 7 of the civil procedure rules; whether the instant petition constitutes and or amounts to an abuse of the due process of the court; whether the petitioner has established any nexus between the 3rd respondent and the intended respondents; and whether the petition is vexatious and frivolous or otherwise.
32. Regarding the first issue namely; whether the amended petition offends the provisions of Order 8 Rule 7 of the Civil Procedure Rules 2010, it has been submitted that it was incumbent upon the petitioner to ensure that the further amended petition is amended in accordance with the law. In this regard, it was posited that the aspects of the petition that were subject of amendment ought to have been cancelled in red pen and or underlined in red pen.
33. Furthermore, it was posited that if the amendment was a second or further amendment, then the petitioner ought to have deployed colours other than red for purposes of cancellation of what was being deleted and underlining of what was added.
34. Nevertheless, it has been submitted that the proposed amended petition does not comply with and or meet the established standards/threshold as captured vide order 8 rule 7 of the civil procedure rules 2010. To this end, learned counsel for the 3rd respondent has therefore implored the court to find and hold that the intended amended petition is irregular and illegal.
35. As pertains to the second issue, it has been submitted that the instant petition constitutes and or amounts to an abuse of the due process of the court, in so far as the petitioner has also filed an appeal against the proceedings, orders and the judgment of the first respondent. To this end, it has been posited that by filing the petition, the petitioner is guilty of abusing the due process of the court.
36. Regarding the third issue, it has been submitted that the petitioner has also failed to demonstrate the nexus between the 3rd respondent and the intended parties, namely; the OCS Isiolo and the county commissioner Isiolo county respectively. In the absence of any nexus between the 3rd respondent and the parties to be joined it has been submitted that the intended amendment would therefore not serve any useful legal purpose.
37. Furthermore, it has been submitted that the entire petition constitutes an abuse of the due process of the court and same is also frivolous. In particular, it has been submitted that the subject petition seeks to challenge valid and legal court proceedings that were undertaken by and before the 1st respondent. In this regard, it has been submitted that where the proceedings were undertaken before a court of law,



then the only way to challenge such proceedings and the consequential orders is by filing an application for review and or appeal.

38. To this end, it has been submitted that the petition beforehand and the intended amended petition are therefore misconceived and legally untenable.
39. Arising from the foregoing, learned counsel for the 3rd respondent has implored the court to find and hold that the intended amendment does not serve any meaningful purpose. In any event, it has been contended that the application under reference is frivolous, vexatious and an abuse of the due process of the court.
40. Having reviewed the petition beforehand; the amended petition and the application dated 27th January 2025 and upon considering the written submissions filed by and on behalf of the parties, I come to the conclusion that the determination of the matter beforehand turns on two [2] key issues namely; whether the petition before hand is barred by the doctrine of exhaustion and constitutional avoidance; and whether the intended amendment ought to be allowed or otherwise.
41. Regarding the first issue, namely; whether the petition beforehand is barred by the doctrine of exhaustion and constitutional avoidance, it is important to recall and reiterate that the dispute underpinning the subject petition touch on and arise from the proceedings that were undertaken before the 1st respondent vide Isiolo chief magistrate's court ELC No. 96 of 2015 and wherein the 1st respondent rendered/ delivered a judgment on the 5th March 2024.
42. It is the said proceedings and judgment which have aggrieved the petitioner/applicant and thus culminated into the filing of the petition beforehand. For good measure, the petitioner seems to suggest that the proceedings and the judgment by the 1st respondent have violated, breached and or infringed upon her human rights and fundamental freedoms.
43. The petitioner has contended that her rights under articles 47, 50 and 159 of *the constitution* have been breached. In this regard, the petitioner has sought a plethora of reliefs, whose details were highlighted elsewhere at the beginning of this ruling.
44. The question that does arise is whether lawful court proceedings and judgments, like the one that was rendered by the 1st respondent herein, can be challenged and or impeached by filing a constitutional petition or otherwise. Instructively, it is important to underscore that where a party is aggrieved by the proceedings undertaken by a court of law, such a party is called upon to deploy and utilize the statutorily prescribed mechanism to challenge the proceedings and the resultant decisions.
45. Suffice it to posit that the law is replete with various avenues for challenging judicial proceedings, which are contra-distinct from quasi-judicial proceedings. Notably, where the impugned proceedings are quasi-judicial in nature, then a party who is aggrieved is at liberty to take out judicial review proceedings either under the provisions of sections 8 & 9 of the *law reform act*, cap 26 laws of Kenya as read together with order 53 of the civil procedure rules 2010 or judicial review proceedings under the fair administrative actions act, 2016.
46. Furthermore, a party aggrieved by quasi-judicial proceedings and decisions arising therefrom is also at liberty to invoke and deploy the provisions of articles 22, 23 and 258 of *the Constitution* 2010.
47. However, where the proceedings complained of and the resultant decision arising from are judicial in nature, same can only be challenged by way of review, setting aside and or an appeal in the manner prescribed under the relevant law. For good measure, judicial proceedings like the ones that were undertaken before the 1st respondent cannot be challenged by way of a constitutional petition.



48. In addition, it is not lost on me that this court or such other superior court cannot purport to set aside the orders arising from judicial proceedings vide a constitutional petition, either in the manner sought herein or at all.
49. Put differently, where a party, the petitioner herein not excepted, is aggrieved by the judicial proceedings and the decisions arising therefrom, there exists an established statutory mechanism which are provided for under the law. For example, a party who is aggrieved by the judgment of the 1st respondent is at liberty to file an appeal within the prescribed timelines. [see section 79 of the *Civil Procedure Act*].
50. Suffice it to state that where there is an established statutory mechanism for dealing with and addressing a particular situation, it behooves every party, the petitioner not excepted, to invoke and deploy the statutory mechanism in question. This is the import and tenor of the doctrine of exhaustion, which commands all and sundry to exhaust the statutory dispute resolution mechanisms.
51. The law as it pertains to the doctrine of exhaustion has since crystallized. Instructively, the doctrine has been highlighted in a plethora of decisions by the Supreme Court, the Court of Appeal and the various superior courts of record.
52. In the case of *Bethwell Allan Omondi Okal v Telkom (K) Ltd (Founder) & 9 others* [2017] eKLR, the Court of Appeal stated as hereunder;

The Appellant might want to argue that he has a constitutional right of access to justice, and we agree that he does, but the High Court and this Court have pronounced themselves many times to the effect that a party must first exhaust the other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the High court by way of constitutional petitions. See *International Centre for Policy and Conflict & 4 others vs The Hon. Uhuru Kenyatta and others*, Petition No. 552 of 2012, and *Speaker of National Assembly vs Njenga Karume* [2008] 1KLR 425.

We hold that if indeed the appellant had any dispute with the RBA, he ought to have followed the route prescribed by the RBA, before proceeding to the High Court. We hold like the court below, and for the reasons we have given, that the appellant's petition lacked merit and was for dismissal. Accordingly, we dismiss this appeal, and given the appellant's social and pecuniary status, we shall, albeit most reluctantly, order that each party bears its own costs.

53. The Supreme Court has also elaborated the import, tenor and implications of the doctrine of exhaustion in the case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (Petition 14, 14A, 14B & 14C of 2014 (Consolidated)) [2014] KESC 53 (KLR) (29 September 2014) (Judgment), where the court stated as hereunder;

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.”

(257) Similarly, the U.S. 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)).

(258) From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents' claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright-infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court.

54. Moreover, the Supreme Court re-visited the legal implications of the doctrine of exhaustion and constitutional avoidance in the case of *Albert Chaurembo Numba and others vs Morris Munyao & 148 others* [2021] eKLR, where the court reaffirmed the position in the following manner:

117. Of precise relevance to this case is *Bethwell Allan Omondi Okal v Telkom (K) Ltd (Founder) & 9 others* [2017] eKLR. In that case, the appellants who were former employees of Telkom (K) Ltd felt aggrieved and discriminated against following the implementation of what was referred to as "Trivial Pension Payout", by the Authority which they accused of fraud, corruption and mismanagement and for paying some categories of retirees less increments in their pension payments than others. The trial court made a finding that since the complaints were against the Authority, that there were other statutory inbuilt administrative dispute resolution mechanisms under the RBA Act that ought to have been followed before recourse to the High Court. He opined that any dispute should have been referred to arbitration in the first instance pursuant to Rule 36 of the Consolidated Deed of Trust and Rules, made under the RBA Act and that if the appellant was dissatisfied with the decision of the arbitrator, then he could appeal to the Retirement Benefits Appeals Tribunal established under the RBA Act. On Appeal, the Court of Appeal dismissed the appeal stating that: "The Appellant might want to argue that he has a constitutional right of access to justice, and we agree that he does, but the High Court and this Court have pronounced themselves many times to the effect that a party must first exhaust the other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the High court by way of constitutional petitions. See *International Centre for Policy and Conflict & 4 others vs The Hon. Uhuru Kenyatta and others*, Petition No 552 of 2012, and *Speaker of National Assembly v Njenga Karume* [2008] 1KLR 425. We hold that if indeed the appellant had any dispute with the RBA, he ought to have followed the route prescribed by the RBA, before proceeding to the High Court. We hold like the court below, and for the reasons we have given, that the appellant's petition lacked merit and was for dismissal."

118. In the pursuit of such sound legal principles, it is our disposition that disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, 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.

55. Recently, the Supreme Court revisited the doctrine of exhaustion in the case of *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023)* [2023] KESC 113 (KLR) (28 December 2023) (Judgment)

We agree with the above reasoning and find that the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the



act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief. But there is also a need to emphasize the need for the court to scrutinize the purpose for which a party is seeking relief, in determining whether the granting of such constitutional reliefs is appropriate in the given circumstances. This means that a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs, is a necessary prerequisite on the part of any superior court.

106. The restraint and effective remedy rule, which we find favor in, is what led the Supreme Court of India in *United Bank of India vs Satyawati Tondon & Others*; (2010) 8 SCC to state as follows: “44.... we are conscious that the powers conferred upon the High Court under article 226 of *the Constitution* to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under article 226 of *the Constitution*.⁴⁵ It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under article 226 of *the Constitution* and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance.” [Emphasis ours]

107. Flowing from the above findings and in that context, it is our view that, where the reliefs under the alternative mechanism are not adequate or effective, then there is nothing that precludes the adoption of a nuanced approach, as we have stated. What must matter at the end is that a path is chosen that safeguards a litigant’s right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. This is because, to achieve a harmonious and effective legal framework, it is imperative to strike a judicious balance between the emphasis on providing the initial opportunity for resolution to entities established by law and the assertion of a litigant’s right to access the court. However, such convergence requires a case-by-case assessment by considering issues such as the nature of the dispute and the adequacy of the alternative dispute mechanism

See also our decision in *Bia Tosha Distributors Ltd v Kenya Breweries Ltd & 6 Others* (Pet No 15 of 2020) [2023] KESC 14(KLR) (Const. and JR) (17 February 2023) (Judgment).

56. In my humble view, the existing statutory dispute resolution mechanism provided for under the law, including but not limited to review and appeal, would be effective and efficacious. Furthermore, the said dispute resolution mechanism would go towards achieving the desired and intended purpose which the constitutional petition beforehand cannot accrue.



57. To my mind, the dispute underpinning the current petition does not fall within the known exemptions which were highlighted and captured vide the decision in the case of William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR.
58. Flowing from the foregoing analysis, my answer to issue number one is threefold. Firstly, the issues raised at the foot of the petition beforehand have been prematurely canvassed vide a constitution petition. Same ought to have been addressed and canvassed in accordance with the prescribed statutory provisions. [see the Speaker of the National Assembly v James Njenga Karume [1992] eKLR
59. Secondly, the dispute beforehand is barred and prohibited by the doctrine of exhaustion and constitutional avoidance, whose key pillars are to the effect that where there is an established dispute resolution mechanism, such mechanism must be pursued and exhausted before invocation of *the constitution*.
60. Thirdly, the petition beforehand does not only constitute an abuse of due process of the court but same also offends all the known principles of law, including the trite legal position that judicial proceedings and the decisions arising therefrom can only be impugned in accordance with the law, but not by filing a constitutional petition.
61. Regarding the second issue, namely, whether the intended amendment ought to be allowed or otherwise, it is appropriate to reiterate that the purpose of amendments is to enable a party to place before the court the real issues for determination by the court. Simply put, amendments are intended to refine the issues in controversy and thus to enable the court to engage with the real issues and thereafter render a determination on the basis of the real issues as opposed to hypothetical issues, which do not go to the root of the controversy.
62. The legal implication as pertains to amendments and the purpose why a court of law would grant leave for amendment was aptly and succinctly highlighted in the case of Institute For Social Accountability & another v Parliament of Kenya & 3 others [2014] eKLR where the court held as hereunder:-
- “The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings....The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side.”
63. Furthermore, the principles to be considered and the factors to be addressed prior to and before granting an application for leave to amend were elucidated by the Court of Appeal in the case of Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited [2013] eKLR, where the court stated as follows:
- “The law on amendment of pleading in terms of section 100 of the *Civil Procedure Act* and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob’s



Precedents of Pleading - 12th Edition, in the case of Joseph Ochieng & 2 others *vs. First National Bank of Chicago, Civil Appeal No. 149 of 1991* as follows:-

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts.” [emphasis supplied].

64. Bearing in mind the purpose for which amendments are granted and taking into account the import of the provisions of sections 1A and 1B of the *civil procedure act*, Chapter 21, Laws of Kenya; which enjoin the court to hear and dispose of dispute[s] expeditiously, proportionately, justly and efficiently, I beg to ask myself whether the intended amendments by the petitioner herein will enable the petitioner to generate and canvass a valid legal issue or otherwise.
 65. Be that as it may, I must underscore that amendments to pleadings must not only be granted for the mere asking and for cosmetic purposes. A court of law should only engage with and grant an order for amendments where the amendments under reference shall enable the claimant to espouse a cause of action and not otherwise. Legal proceedings ought not to be undertaken for the sake of it.
 66. Moreover, there is no gainsaying that an amendment ought only to be granted where the suit and or pleading sought to be amended is capable of redemption vide an amendment. However, where the suit or the impugned pleading is a nullity ab initio, no amendment would suffice.
 67. Before concluding on this issue, it is imperative to reference the decision of the Court of Appeal in the case of Deposit Protection Fund Board in Liquidation of Euro Bank Limited (in liquidation) Vs. Rosaline Njeri Macharia & Another (2016) eKLR
- (28) The High Court (Lesiit, J) was, with respect, correct in her decision in the case of John Gachoki Ndenge v Kiambu Dandora Farmers Company Limited & Another (Civil Suit No. 481 of 2006 [2008] eKLR when she stated:
- “...under that section {s.36(1)} of the *Banking Act*, it is the Deposit Protection Fund Board which is the legal entity with corporate powers and therefore capable of suing and being sued. The Deposit Protection Fund is not a legal entity and therefore it is incapable of being sued. It was therefore materially defective and a nullity for the plaintiff to institute the suit against the Deposit Protection Fund. That defect is not curable by an amendment.”
- (29) Clearly, a suit not by or against a person or a body corporate is incompetent. It is a nullity. That answers the first question. If more authority was required, the philosophy in the sagacious words of Madan, JA as he then was in *D. T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another, (Civil Appeal No. 37 of 1978)* that “a court of justice should aim



at sustaining a suit rather than terminating it by summary dismissal...”, show that only there is a suit, however poorly drafted, is amendment possible to save it. Where, as here, the suit is a nullity, there is no litigation in being in law and the issue of amendment does not arise. Madan, JA as he then was alluded to litigation which is akin to a patient who can be treated and healed. Here, the patient is in the morgue. He is dead. (emphasis supplied)

68. What I discern from the dicta in the foregoing decision is to the effect that an amendment can only be allowed and or granted where there is a semblance of a suit and not otherwise. In the instant case, the petition itself is barred and prohibited by the doctrine of exhaustion and constitutional avoidance.
69. Same is therefore legally untenable. In this regard, the intended amendments geared towards [sic] joining additional parties and seeking additional reliefs, would be an act in futility and vanity.
70. Suffice it to posit that courts of law do not act in futility and or vanity. To this end, I am inspired by the observation of the Court of Appeal in the case of *Kakuta Maimai Hamisi vs Peris Tobiko & 2 others* (2013) eKLR where the court stated thus;

So central and determinative is the question of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceeding is 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, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain. (emphasis supplied).

Final Disposition:

71. Flowing from the analysis [details highlighted in the body of the ruling] it must have become crystal clear that the application dated 27th January 2025 is premature and misconceived and same is geared towards achieving no legitimate legal purpose.
72. It is an act in vain and futility taking into account the established and trite legal position underpinned by the doctrine of exhaustion and Constitutional avoidance.
73. In the premises, the final orders that commend themselves to the court are as hereunder;
 - i. The Application dated 27th January 2025 be and is hereby dismissed.
 - ii. The amended petition dated 6th March 2024 be and is hereby struck out.
 - iii. Costs of the Application and the petition be and are hereby awarded to the Respondents.
 - iv. The Costs in terms of clause [iii] shall be agreed upon and in default, be taxed in the conventional manner.
74. It is so ordered.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 19TH DAY OF MAY 2025.

OGUTTU MBOYA, FCI Arb, CPM [MTI]

JUDGE.

In the presence of

Mutuma/Mukami– Court Assistants



Miss Nelima for the Petitioner/Applicant

Mr. Benjamin Kimathi [Principal litigation counsel] for the 1st & 2nd Respondents

Miss Lucy Kaaria for the 3rd Respondent

