



REPUBLIC OF KENYA



**Ndung'u & another v Wachira & another (Constitutional Petition E047 of 2025)
[2025] KEHC 7265 (KLR) (Constitutional and Human Rights) (26 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7265 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E047 OF 2025**

AB MWAMUYE, J

MAY 26, 2025

**IN THE MATTER OF THE ALLEGED VIOLATION OF THE FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER ARTICLE 28, 31, 33, 34 & 50 OF THE CONSTITUTION OF
KENYA 2010**

AND

**IN THE MATTER OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES
10,19,20, 21, 22, 23, 28, 31 AND 50 OF THE CONSTITUTION**

AND

**IN THE MATTER OF RULES 3, 4 AND 23 OF THE CONSTITUTION OF KENYA
(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS AND
ENFORCEMENT OF THE CONSTITUTION) PRACTICE AND PROCEDURE RULES
2012 AND ALL OTHER ENABLING POWERS AND PROVISIONS OF THE LAW**

AND

IN THE MATTER OF SECTION 27 AND 213 OF THE CHILDREN'S ACT, 2022

BETWEEN

FARIDA NDUNG'U 1ST PETITIONER

NDUNG'U GETHINJI 2ND PETITIONER

AND

EUNICE WACHIRA 1ST RESPONDENT

BONFACE MWANGI 2ND RESPONDENT



***(Ruling on Petitioners’ Applications dated 31/01/2025 and 11/02/2025;
and the Respondent’s Preliminary Objection dated 21/02/2025)***

RULING

1. This ruling concerns Constitutional Petition E047 of 2025 and arises from the Petitioners’ claims that the Respondents published their personal information and images on digital platforms without consent, violating the Petitioners’ rights to privacy (Art. 31) and dignity (Art. 28) under the Constitution. The Petitioners filed two interlocutory applications – one dated 31/01/2025 seeking injunctive relief (removal of the impugned online content and restraint on further publication) and another dated 11/02/2025 seeking leave to amend or supplement the petition.
2. The Respondents filed a Preliminary Objection on 21/02/2025, contending that the Constitutional Petition herein is improperly before this Court as they are alternative statutory or civil remedies available to the Petitioners.
3. The Petitioners allege that the Respondents jointly produced and published an audio-visual song on YouTube (and other online platforms) using the Petitioners’ names and images without consent. The song contains scandalous allegations concerning the Petitioners’ personal and family affairs. For example, the lyrics accuse one Petitioner (a widow) of “tricking” her late husband and misusing his property, and falsely state that she continues to run businesses that belonged to the deceased. The Petitioners aver that the Respondents (a music producer and his associate) refused demands to remove the song and video, and that its continued circulation has caused them severe embarrassment, psychological distress and invasion of private life. They claim that this conduct violates their constitutional rights, notably the right to privacy (Art. 31) and human dignity (Art. 28).
4. In their petition, the Petitioners seek declaratory and injunctive relief, including orders that the respondents remove the material and pay damages. On 31 January 2025 the Petitioners filed an interlocutory application for immediate injunctive relief to compel removal of the content and prevent further publication. On 11 February 2025 they filed a second application (described in broad terms as seeking leave to amend the petition or join additional particulars). In response, on 21 February 2025 the Respondents filed a Preliminary Objection, arguing that the Petition is “bad in law and fatally defective” because the Petitioners have not exhausted alternative remedies. The Respondents assert that this dispute is essentially a private defamation or privacy matter and that the proper remedies – for example, a civil suit for damages or administrative complaints under statutory schemes – were not pursued. The Petitioners, on the other hand, contend that no adequate alternative remedy exists to vindicate the breach of their constitutional privacy rights, and that exceptional circumstances justify relief in constitutional court.
5. The issues now before the Court are those narrowed by these filings. In particular, the Court must determine (i) whether the Petitioners may invoke this Court’s constitutional jurisdiction or whether the Respondents’ Preliminary Objection is meritorious, and (ii) whether the Petitioners have shown entitlement to the interlocutory relief sought in the two applications.

Preliminary Objection: Constitutional Jurisdiction and Exhaustion.

6. The Respondents submit that the Petition is a “civil claim clothed as a constitutional petition”. They argue that the Petitioners’ complaints concern private online content and that there are adequate alternative remedies – for example, a complaint to the Media Council under the Media Act,



proceedings under the Data Protection Act, or a civil action for defamation or invasion of privacy – which the Petitioners have not invoked. In support they rely on established principles that a person must exhaust available statutory grievance mechanisms before approaching the constitutional court, and that courts should avoid deciding constitutional questions when a matter may be resolved on other grounds. In response, the Petitioners argue that their rights to privacy and dignity have been breached in a way that statutory bodies or ordinary tort law cannot adequately remedy, and that injunctive relief from this Court is necessary to prevent continuing harm. The Court must examine whether the Preliminary Objection should be upheld.

7. First, under Article 20(1) of the Constitution “the Bill of Rights applies to all law and binds all persons”. Thus, as a matter of principle, even private actors must respect the rights in Chapter Four, and an aggrieved person may claim redress for their violation Article 258(1) expressly permits any person to institute proceedings if a constitutional right has been infringed or threatened. However, this right of access to the courts is not unfettered. Courts have emphasized the doctrine of constitutional avoidance: if a dispute can be resolved on non-constitutional grounds or through other mechanisms, the Court should refrain from reaching constitutional issues. In *Royal Media Services Ltd v Attorney General* (2018), for example, the Court of Appeal reiterated that “where it is possible to decide a case without reaching a constitutional issue, that should be done”. Moreover, Article 50(2) of the Constitution (embodied in the Fair Administrative Action Act 2015) codifies a limitation: judicial review may not be undertaken unless “internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted”. This statutory rule underscores the general principle that litigants must first pursue prescribed remedies in specialized forums before resorting to the High Court.
8. Applying these principles, the Court must ask whether the Petitioners indeed had adequate alternative avenues that they failed to use. The Data Protection Act, 2019 specifically provides a statutory process for privacy complaints. Under Section 56(1) of that Act, an aggrieved data subject may lodge a complaint with the Data Protection Commissioner if a data controller or processor has breached the Act. Any decision by the Commissioner can subsequently be reviewed by the courts, but only after the internal process is pursued.
9. In this case, the Respondents contend that the Petitioners never filed any complaint under the Data Protection Act despite the alleged processing of their “personal data” (their names, images and information). Similarly, the Media Act provide for recourse against journalistic or media misdeeds. The petition references the Media Act, implying that a complaint could have been lodged with the Media Council’s Complaints Commission. In addition, civil tort remedies are available: the Petitioners could have sued the Respondents for defamation, or for the common-law wrong of invasion of privacy. As our courts have recognized, defamation is “a civil wrong or tort, pure and simple, for which the common law remedy is an action for damages”, and privacy violations by private parties are typically addressed by ordinary civil actions or by government enforcement (as in criminal libel, though that has now been largely struck down).
10. The Petitioners have not pointed to any special statutory exemption or other reason why these remedies are inadequate or unavailable. On the contrary, they seek extraordinary relief in the constitutional court as if it were the first port of call. The Court notes that this is precisely the situation addressed in *Odhiambo & Another v National Police Service & 10 Others*(2023), where petitioners attacked a government tender award. The High Court held that the Public Procurement Act had established an elaborate review and appeal process, which the petitioners had ignored, and struck out the petition as an abuse of process. That decision, though in the procurement context, restated the general rule: when a statutory scheme governs dispute resolution, parties must invoke those procedures. Here too, the regulatory regimes for privacy and media are elaborate and intended to be first tried.



11. In short, the Petitioners have not shown exceptional circumstances to bypass these alternatives. The mere fact that the grievance involves fundamental rights does not automatically entitle them to invoke constitutional jurisdiction. To the contrary, the Supreme Court has cautioned that constitutional litigation should not be used to circumvent ordinary law: one may sue a state actor for a constitutional tort, but private disputes with personal overtones are ordinarily resolved by civil means. The Petitioners' claim is essentially that the Respondents – private individuals – invaded their privacy. The constitutional right to privacy is indeed “guaranteed under Article 31”, and it is defined as “the right of the individual to be protected against intrusion into his personal life...or by publication of information”. But that right, especially as against non-state actors, has primarily been enforced through tort law or administrative sanctions. The High Court in *John Omilia v Attorney General* explained that such a “violation of one’s constitutional rights by a government servant” can give rise to a “constitutional tort” remedy, but that is a remedy against the state or its agents. Here the Respondents are private entertainers, not acting under any public authority. While Article 20(1) does bind all persons to the Bill of Rights, the exercise of jurisdiction in such cases still respects alternative processes.
12. Courts have consistently struck out matters that are framed as constitutional disputes when in reality they are not. In *Uhuru Muigai Kenyatta vs Nairobi Star Publication Limited (2013) eKLR* Lenaola J (as he then was) stated:

“...Where there is a remedy in civil law, a party should pursue that remedy and I say so well aware of decision of *Haco Industries* where the converse may have been expressed as the position. My mind is clear however that not every ill in the society should attract a constitutional sanction as stated in *AG V Dutambala Criminal Appeal No. 37 of 1991 (Tanzania Court of Appeal)* such sanctions should be reserved for appropriate and really serious occasions...”
13. Further in *John Harun Mwau v Peter Gastrow & 3 others (2014) eKLR* the Court held:

“...Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if the remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether in addition to breach of the other declaration of rights... it is established practice where a matter can be disposed without recourse of the Constitution, Constitution should not be invoked at all...”
14. In the case of *Grace Jepkemoi Kiplagat vs Zakayo Cheruiyot (2021) eKLR* Mutungi J held thus: -

“... there are no Constitutional issues that warrant adjudication by the Court and that the Petition may very well constitute an abuse of the due process of the court, I need to observe that parties are increasingly filing matters that are essentially civil matters and christening the same as constitutional Petitions which is not proper. Where there is the alternative remedy of filing a suit in the ordinary civil courts, a party ought not to invoke the jurisdiction of the Constitutional Court.”
15. The Court of Appeal in dismissing a similar matter in the case of *James Kanyiita Nderitu v Attorney General and the Director of Public Prosecution (2019) eKLR* stated as follows:

“...As we have stated above, the remedy for the appellant was to institute a suit for malicious prosecution. He has failed to do so and a constitutional petition cannot be used to circumvent primary legislation for enforcement of a given right or violation. It is not open



to the appellant to urge that there can be no wrong without a remedy. Indeed, this legal principle is correct; the appellant had a remedy in the tort of malicious prosecution or an action for defamation, he has chosen not to pursue the causes of action within the legal timeframe...”

16. It is cardinal principle that where there exists an alternative remedy under statutory law or otherwise, then such a remedy should be pursued instead of a constitutional petition. For instance, in *Patrick Mbau Karanja v Kenyatta University* [2012] eKLR Lenaola J (as he then was) held:

“I should only say this as I conclude; in Francis *Waitbaka vs Kenyatta University Petition No. 633 of 2011*, this Court was categorical that it is imperative that the Bill of Rights and the constitutional imperative mandate of this court should not be invoked where other remedies lie.”

17. Chacha J. was of a similar view and which I entirely agree with in the case of *Godfrey Paul Okutoyi & others v Habil Olaka & Another* [2018] eKLR where he stated thus:

“65. It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a court of law in a manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a constitutional petition. A party should only file a constitutional petition for redress of a breach of the *Constitution* or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure.”

18. The weight of authority therefore favours the Respondents. The Petitioners have not exhausted statutory alternatives under Data Protection or Media Council, nor have they initiated civil proceedings for defamation or privacy. No immediate urgency or public interest has been shown that would justify this Court’s departure from normal channels. In the absence of any special justification, the constitutional avoidance doctrine dictates that this matter be left to the appropriate forum. Accordingly, the Respondents’ Preliminary Objection is upheld. The Petition cannot proceed in its present form. The preliminary objection has merit and is allowed and therefore, this petition is struck out.

Interlocutory Applications

19. Having determined that the Petition must be struck out on account of the doctrines of constitutional avoidance and exhaustion, it follows that the applications must be also dismissed as the interlocutory applications no longer have any operative effect. The application dated 31 January 2025 and the application dated 11 February 2025 are therefore dismissed as moot.

Final Orders

- i. The Respondents’ Preliminary Objection dated 21st February 2025 is allowed, and the Constitutional Petition herein is hereby struck out on account of the doctrines of constitutional avoidance and exhaustion.



ii. Each Party to bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIERTUALLY THIS 26TH DAY OF MAY 2025

BAHATI MWAMUYE

JUDGE

In the presence of: -

Counsel for the Petitioners – Ms. Lucy Gikera h/b Ms. Kimathi

Counsel for the Respondents - Mr. James WaNjeri & Ms. Gikenye

Court Assistant – Ms. Neema

