Radheylal v Director Immigration & 3 others (Petition E293 of 2024)
[2025] KEHC 6316 (KLR) (Constitutional and Human Rights) (15 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6316 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E293 OF 2024

LN MUGAMBI, J

MAY 15, 2025

BETWEEN

SANJAY GUPTA RADHEYLAL ..... PETITIONER

AND

DIRECTOR IMMIGRATION ..... 1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF INTERIOR & COORDINATION ON NATIONAL GOVERNMENT ..... 2ND RESPONDENT

INSPECTOR OF POLICE ..... 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

RULING

Introduction

1. The petitioner in the petition dated 27th May 2024 challenges the 1st and 2nd respondents' decision to deport him back to India and listing him as a prohibited immigrant.

2. In response, the respondents filed a Notice of Preliminary Objection dated 8th September 2024. Correspondingly, the petitioner filed a Notice of Motion application dated 28th February 2025. Both the application and the Notice of Preliminary Objection are the subject matter of this ruling.

Respondents' Notice of Preliminary Objection

3. The respondents through their Notice of Preliminary Objection opposed the petition on the premise that:

i. By dint of Section 9(2) of the *Fair Administrative Action Act* 2015 which provides that the High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. Also relevant is sub-section (3) which provides that "the High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in sub-section (2) have been exhausted, direct that an applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

ii. The same was emphasized in R vs Kenya Revenue Authourity Ex-parte Style Industries Limited (2019)eKLR where Justice M. Mativo dismissed a suit based on the fact that the applicant failed to exhaust all the mechanisms available before approaching the court, further the learned Judge clearly stated that the case offended Section 9(2) of the *Fair Administrative Action Act* 2015, moreover the applicant had failed to satisfy the exceptional circumstances required section 9(4)

iii. The use of "shall" under Section 9(2) of the *Fair Administrative Action Act* 2015 was further elaborated with the following terms;

"It is instructive to note the use of the word "shall" in the above provisions. The classification of statutes as mandatory and directory is useful in analysing and solving the problem of the effect to be given to their directions. There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory. The real question in all such cases is whether, a thing, has been ordered by the legislature to be done, and what is the consequence, if it is not done. The general rule is that an absolute enactment must be obeyed, or, fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance. The word "shall" when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation. The Longman Dictionary of the English Language states that "shall" is used to express a command or exhortation or what is legally mandatory. Ordinarily the words 'shall' and 'must' are mandatory and the word 'may' is directory."

iv. The law is that Section 9(4) of the *Fair Administrative Action Act* 2015 postulates an application to the court, by the aggrieved party, for exemption from the obligation to exhaust an internal remedy. Put differently, an applicant must formally apply to the court and demonstrate exceptional circumstances. That is to say, that the petitioner needed to seek the leave of the Court before filing this suit before this Court this is after fully exhausting Section 9(1) of the *Fair Administrative Action Act* 2015 which provides the High Court is only to entertain such a recourse where the petitioner has exhausted all internal mechanisms for review and appeal and all other remedies available under any other written laws first as spelled out under Section 9(1) of the Administrative Action Act 2015.

v. By dint of Section 57 (1) & (2) of the Kenya Citizen and Immigration Act provides the basis for a review and appeal for any person aggrieved by a decision of a public officer made under this Act. It further stipulates that such a person may apply to the High Court for a review of that decision and an Appeal shall lie against the decisions of the Cabinet Secretary or of the Service under this Act and the same may be made to the High Court.

Petitioner's Case

4. The petitioner in rejoinder to the Notice of Preliminary Objection filed his replying affidavit sworn on 25th February 2025.

5. On a preliminary note, he avers that the preliminary objection is legally untenable and an abuse of the Court process as seeks to have this Court determine substantive issues which can only be determined on merit and upon the full hearing of the matter. He claims that the preliminary objection is not a pure point of law as requires the Court to undertake an extensive analysis of the facts and the regulatory scheme to ascertain whether the doctrine of exhaustion applies.

6. He asserts that he resorted to petitioning this Court on the basis that the respondents denied to grant him a hearing. He depones that through his Counsel, he sought to have his appeal resolved by the 1st and 2nd respondents Review and Appeal Committee. His Counsel has however never received any communication from the Committee to date. He avers that this action is in blatant violation of Article 47 of *the Constitution*. Further follow ups on the same have also been futile.

7. He informs that his appeal to the Committee was meant appeal the respondents arbitrarily decision to deport him without issuing reasons and to exhaust the internal mechanisms first before petitioning the Court. Considering this, he stresses that while a party is required to exhaust the available mechanisms, the same is subject to exceptions as is justified in his case.

Respondents' Submissions to their Preliminary Objection

8. The respondents Counsel, Wanja Wanjiru filed submissions dated 7th October 2024 and outlined the issues for determination as: whether this Court lacks jurisdiction in view of the doctrine of exhaustion as provided for under Section 9 (2) of the *Fair Administrative Action Act* and Section 57 (1) (2) of the Kenyan Citizen and Immigration Act; whether the claim offends the requirements of Section 9 (2) of the *Fair Administrative Action Act* and Section 57 (1) (2) of the Kenyan Citizen and Immigration Act and whether the petitioner exhausted all the internal dispute resolution mechanisms as set out under Section 9 (2) of the *Fair Administrative Action Act* 2015 and Section 57 (1) (2) of the Kenyan Citizen and Immigration Act.

9. Counsel answering in the affirmative submitted that this Court does not have the requisite jurisdiction to entertain this matter. This argument is anchored on the available mechanisms outlined under Section 9(2) of the *Fair Administrative Action Act* 2015 and Section 57 (1) (2) of the Kenyan Citizen and Immigration Act, which the petitioner failed to exhaust.

10. Reliance was placed in Martin Kabubii Mwangi v County Government of Laikipia [2019] eKLR where it was held that:

> " The exhaustion principle enunciated in precedents such as the case of Secretary, County Public Service & Another v Hulbhai Gedi Abdille Civil Appeal 202 of 2015 does not permit an election as to the parts of a statute that one should rely on. Put another way, it removes discretion on the part of a litigant from choosing whether to follow the provision or not. In this case the suit was filed before the exhaustion of the remedy under the law, namely the provisions of Section 77 of the *County Governments Act*, the Claimant ought to have appealed against his removal to the Public Service Commission before moving the court. The suit did not fall in the category of suits that can be entertained by the court. As he did

not appeal as provided for in law, the suit is a non-starter and is accordingly struck out with no order as to costs."

11. Further reliance was placed in William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR and Peter Odour Ngoge v Francis Ole Kaparo & others; SC Petition No. 2 of 2012, [2012] eKLR.

Petitioner's Submissions

12. On 25th February 2025, the petitioner through Gitonga Mureithi and Company Advocates filed submissions and set out the issue for discussion as: whether the preliminary objection dated 8th September is merited.

13. Counsel relying in Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696 submitted that any factual assertion that can be contested and calls upon the Court to investigate facts, cannot be considered to be a preliminary objection.

14. Equal dependence was placed in Catherine Mwihaki Ngambi v International Leadership University [2022] eKLR.

15. Counsel submitted that the respondents' preliminary objection does not meet the threshold as requires ascertainment of facts, including whether or not the internal appeal mechanisms are effective and available, thereby making it unsustainable.

16. Counsel added that Section 9(4) of the *Fair Administrative Action Act* provides that a party can be exempt from such an obligation where the Court considers that such an exemption is in the best interest of justice. Reliance was placed in Catherine Mwihaki Ngambi (Supra) where the court opined as follows:

> "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."

17. Similar dependence was placed in Krystalline Salt Limited v Kenya Revenue Authority (2019) eKLR.

18. In this matter, Counsel submitted that the petitioner had taken the necessary steps to have the matter resolved through the 1st and 2nd respondents' Review and Appeal Committee. However, the same bore no fruits. Additional follow ups on the matter by the petitioners Counsel had also been futile. Consequently, Counsel submitted that this matter qualifies as an exceptional case under the *Fair Administrative Action Act*.

19. Reliance was placed in Fazal Dharamshi & Company Limited v Kenya Revenue Authority [2024] KEHC 2717 (KLR) where it was held that:

> "On exhaustion of other legal relief or other constitutional remedies, where an alternative remedy would entail delay or uncertainty in providing a remedy, then such an alternative remedy is not available or effective and the doctrine of exhaustion does not apply."

Petitioner's Application

20. The petitioner in his application seeks orders that:

    i. Spent.

ii. The ruling fixed by this Court on 8th May 2025 be arrested pending the hearing and determination of this application.

iii. There be an order directing the 1st and 2nd respondent to temporarily remove or otherwise cancel the petitioner's name in the List of Prohibited Immigrants within 30 days pending the hearing and determination of this application.

iv. Upon granting prayer 3, leave be granted to the petitioner to return to the Republic of Kenya pending the hearing and determination of this petition.

v. There be an order restraining the respondents by themselves, their agents or anyone acting under them from arresting and deporting the petitioner upon this court granting an order for his re-entry back to Kenya.

vi. The Court be pleased to make any other order it deems expedient in the circumstances.

vii. Costs be provided for.

21. The application is supported by the petitioner's affidavit, sworn on even date and the grounds on the face of the application.

22. The petitioner asserts that he is a citizen of Kenya having been granted the same following his application dated 17th November 2023. He claims that despite fulfilling all the requirements and paying the necessary fees, he was deported from Kenya without any justification and adherence to the due process in violation of Article 47 of *the Constitution*.

23. He depones that through his Counsel he filed an application dated 14th August 2024 seeking to temporarily return to Kenya pending the hearing and determination of this petition. He alleges that the respondents have failed to address his appeal lodged on 16th September 2023 before the 1st and 2nd respondents' Review and Appeals Committee. He also notes that now that he is a citizen, he cannot be deemed to be a prohibited immigrant.

24. He contends that despite now being a Kenyan citizen, the 1st and 2nd respondents' have refused to allow him back into the Country and continue to retain his name in the list of prohibited immigrants. He for this reason urges the Court to intervene so that he may return to Kenya to continue with his business and be reunited with his family.

Respondents' Response

25. In reaction to the petitioner's application the respondents filed their grounds of opposition dated 2nd April 2025.

26. Counsel on the onset sought to bring to this Court's attention a number of articles and a Court finding with reference to the petitioner that are in the public domain in both jurisdictions as follows:

i. The first article is dubbed "Gujarat-based businessman arrested from Kenya after decade-long hunt" which alleged as follows; Sanjay Radheylal Gupta had allegedly escaped to Nairobi, Kenya, nearly 10 years ago after committing the fraud in Mumbai. A Gujarat-based businessman, who was on the run for nearly a decade, was arrested by the Central Bureau of Investigation (CBI) on Saturday for defrauding a bank of ₹20 crore. Sanjay Radheylal Gupta had allegedly escaped to Nairobi, Kenya, nearly 10 years ago after committing the fraud. He has a Red Corner Notice and a Non-Bailable warrant of a Special CBI Court issued against him. CBI officials said that he was apprehended in Mumbai after he arrived in India on Saturday.

According to the CBI, its Mumbai Economic Offences Branch (EOW) had in June 2012 registered a cheating case against Gupta's company Nova Shipping Pvt. Ltd., Kishore Poshiya Director of Nova Shipping Pvt. Ltd. and Dharmendra Lohiya, Proprietor of OM Exim, Jamnagar, Gujarat on the complaint of Mukesh Mahajan, Deputy General Manager, Canara Bank, Ahmedabad. CBI suspects that Gupta entered into criminal conspiracy along with other accused -- Dharmendra Lohiya of OM Exim; Shashi Ranjan Kumar, then manager of Canara Bank, Jamnagar Branch; D. A. Kamble, Officer, Credit Department, Canara Bank, Jamnagar Branch; Krishan Kumar Gulabsingh Chaudhary, Proprietor of Jai Balaji Transport Company, Jamnagar; Hiren Dilipsingh Rathod, Proprietor of Apex Trading company, Gandhidham and Mukesh Azad, Proprietor of Durga Enterprises Gandhidham.

ii. The second article reads as Indian Tycoon Arrested After Hiding in Kenya for 10 Years by Derrick Okubasu on Sunday, 27th March 2022 - 6:00 pm:

> An Indian tycoon who had successfully evaded the South Asian country's authorities by hiding in Nairobi was arrested upon touchdown in Mumbai, India.
>
> Leading Indian publications reported, on Sunday. March 27, that the businessman identified as Sanjay Radheylal Gupta was nabbed by the Central Bureau of Investigation (CBI) in Mumbai upon arrival
>
> He was wanted in the country after being accused of defrauding a bank Ksh312 million (₹20 crore) and a Red Corner Notice, as well as a Non-Bailable warrant of a Special CBI Court, were issued against him.
>
> "The accused in connivance allegedly deceived the Jamnagar Branch of Canara Bank during 2007-08 by submitting false transport documents for discounting the bills of Om Exim under ILC opened by Nova Shipping Pvt. Ltd., Jamanagr, and cheated the bank to the tune of ₹20 crore," reads a statement from CBI.
>
> At the height of the investigations in 2012, the tycoon is reported to have boarded a plane destined for Nairobi where he has been holed up. He was accused of the crime alongside OM Exim executive, Canara Bank manager as well as other officers. All the institutions operate in India.
>
> At the time, Gupta was the director of Nova Shipping Company which also operates in the South Asian country.
>
> "After investigation, a charge sheet was filed in the special CBI court at Mirzapur in Ahmedabad on December 24, 2013 against the eight accused," added the CBI statement.
>
> It is, however, not clear what business he was running in Kenya for the 10 years since his arrival.
>
> This is the second arrest in a month touching on Individuals traveling from Kenya to India. Two Kenyans were, at the beginning of March, arrested by Indian security agencies after they were nabbed trying to sneak heroin valued at Ksh900 million (60 million Rupees) in one of the country's airports. The duo had been arrested shortly after arriving at the Sardar Vallabhbhai Patel International (SVPI) Airport in the city of Ahmedabad.

The operation was led by the Directorate of Revenue Intelligence (DRI) which is the premier intelligence and enforcement agency of the Government of India on anti-smuggling matters.

iii. The Gujarat High Court in Sanjay Radheylal Gupta vs State of Gujarat on 26 August, 2022 among its orders in the matter ordered that the petitioner not to leave the State of Gujarat without prior permission of the trial Court concerned.

The respondents also objected the application on the premise that:

iv. Citizenship can be revoked on the grounds set out under Article 17 of *the Constitution* and particularly in this matter under sub-article (1) (a) that if a person acquired citizenship by registration, the citizenship may be revoked if the person acquired the citizenship by fraud, false representation or concealment of any material fact.

v. Section 42 of the *Kenya Citizenship and Immigration Act* 2011 provides for Permits, etc., void for fraud etc. Stating further that; Any entry permit, pass, certificate or other authority, whether issued under this Act or under the repealed Acts, which has been obtained by or was issued in consequence of fraud or misrepresentation, or the concealment or nondisclosure, whether intentional or inadvertent, of any material fact or circumstance, shall be and be deemed always to have been void and of no effect and shall be surrendered to the service for cancellation.

vi. In law, "null and void" means something, like a contract or agreement, is considered invalid and has no legal force or effect, as if it never existed.

vii. The matter is slated for the Ruling of our Preliminary Objection on 8th May 2025 and thus, it is only proper that for counsel for the petitioner allows this Court pronounce itself on the issue at hand.

Petitioner's Submissions to its Application

27. The petitioner through Gitonga and Tollo Advocates filed submissions dated 25th April 2025 and stated the issues for discussion as: whether the applicant's continued listing as a prohibited immigrant is unconstitutional in light of his citizenship; whether the Court should grant temporary leave for the applicant to return to Kenya pending determination of the petition and whether the respondents' administrative conduct warrants the urgent intervention of this Court.

28. To begin with, Counsel opposed the respondents' reliance on newspaper extracts and opinions which were not verified by any admissible evidence. Moreover, it was submitted that these allegations were not accompanied by any sworn affidavit but supplied in the respondents' grounds of opposition. Counsel urged the Court to strike out the grounds of opposition as the assertions have no probative and evidentiary value.

29. To buttress this point reliance was placed in Republic v Attorney General [Sued for and on behalf of the ministry of lands] & 2 others ex parte South and Central [Thika] Investments Limited [2015] eKLR where it was echoed that:

> " Affidavits are intended to be probative of the facts which the party filing the affidavit seeks to prove... any attempt to prove facts save in accordance with such rules as the experience of the courts has shown to be essential is worthless."

30. Comparable dependence was placed in Republic v Attorney General ex parte South and Central (Thika) Investments Limited [2015] eKLR, Small Enterprises Finance Co. Ltd. v George Gikubu Mbuthia Nairobi HCCC No. 3088 of 1994 and Republic v Attorney General [Sued for and on behalf of the Ministry of Lands] & 2 others ex parte South and Central [Thika] Investments Limited [2015] eKLR.

31. Turning to the second issue, Counsel submitted that the respondents had not adduced any evidence on revocation of the petitioner's citizenship in line with Article 17 of *the Constitution* and Section 21 of the *Kenya Citizenship and Immigration Act*. Counsel submitted that the India High Court case relied on by the respondents was a civil-commercial dispute and the Indian Court did not bar him from travelling outside the Country.

32. On the third issue, Counsel submitted that the petitioner had demonstrated that he had attempted to exhaust the internal mechanism but was not granted any audience by the respondents. Submitting that the petitioner's case justifies an exemption, Counsel stated that the respondents' actions had contravened Article 12 of the International Covenant on Civil and Political Rights (ICCPR), which guarantees that no one shall be arbitrarily deprived of the right to enter his own country. Consequently, Counsel submitted that the respondents' conduct, which arbitrarily bars a citizen from re-entering his country without lawful justification, runs afoul of both the constitutional principles and Kenya's international obligations.

Respondents' Submissions

33. The Respondents through their Counsel Wanja Wairimu, filed submissions dated 5th May 2025 and identified the single issue for determination as: whether the petitioner's Notice of Motion dated 28th February 2025 is merited.

34. Counsel to begin, with submitted that as an officer of the Court, she was compelled to adduce the cited information so as to ensure that the Court is fully informed of all the relevant facts. She avers that this is information the petitioner's Counsel failed to inform this Court.

35. Counsel noted that while the petitioner opposed the grounds of opposition, proceeded to rely on the same concerning the High Court of India's pronouncement.

36. Counsel stressed that Article 17(1)(a) of *the Constitution* makes it clear that citizenship can be revoked if the same was acquired by fraud, false representation or concealment of any material facts. It was contended that the petitioner had not adduced any evidence to actually show that his registration was not marred with misrepresentation or concealment of information which aided his acquisition of citizenship in Kenya. Counsel added that the petitioner was a prohibited immigrant and as such cannot be granted the orders sought.

37. Reliance was placed in Diana Waceke Wainaina Vs. The Director of Immigration Services & Another (2022) eKLR where it was held that:

> "I find as clearly submitted a foreign national has no independent or inherent right to remain in Kenya. The right to reside, work and or engage in any economic activity in Kenya is restricted and can only be exercised by non-citizens in compliance with the statutes regulating the same. The International Principle of Sovereignty of states presupposes that the right to entry into the Kenya is a preserve of Kenya Citizens only and the State through its authorized agents (the Respondents) reserves the right of entry to foreigners. The Petitioner has not demonstrated otherwise to persuade this Court to decide in her favour."

38. Furthermore, Counsel relying on Section 42 of the *Kenya Citizenship and Immigration Act* submitted that any pass, permit, certificate or other obtained through fraud and misrepresentation is always deemed to be void and of no effect. To buttress this point reliance was placed in Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169 where it was held that:

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

39. Equal dependence was placed in Wambui v Mwangi & 3 others [Civil Appeal 465 of 2019] KECA 144 (KLR).

Analysis and Determination

40. It is my considered view that the issues that arise for determination are:

    i. Whether the respondents' preliminary objection dated 8th September 2024 is merited.

    ii. Whether the petitioner's application dated 28th February 2025 is merited.

Preliminary Objection

41. What constitutes a preliminary objection was set out by the Supreme Court in Joho & another v Shahbal & 2 others [2014] KESC 34 (KLR) 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".

42. Discussing its nature in Dismas Wambola v Cabinet Secretary, Treasury & 5 others [2017] KEHC 8777 (KLR), the Court noted as follows:

> "A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law.
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> It may be noted that preliminary objections are narrow in scope and cannot raise substantive issues raised in the pleadings that may have to be determined by the court after perusal of evidence...."

43. It has been held severally that a party is required to exhaust all alternative dispute resolution mechanisms before filing a matter in Court as a matter of law. The Court in John Githui v Trustees, Nakuru Golf Club [2019] KEHC 5523 (KLR) noted as follows:

> " 25. There is no doubt that the doctrine of exhaustion of local remedies is one of esteemed juridical ancestry in Kenya. In Republic v IEBC Ex Parte NASA-Kenya & 6 Others [2017] eKLR, the Court – a three-judge bench -- described our jurisprudential policy on the doctrine of exhaustion which the Respondents raised in a bid to preliminarily swat away the Applicants' suit in the following words:
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> This doctrine [of exhaustion] is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 in the following oft-repeated words:-
>
> Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.
>
> While this case was decided before *the Constitution* of Kenya, 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine. This is Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 Others [2015] eKLR, where the Court of Appeal stated that:-
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> It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews..... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

44. Correspondingly, the Court in Dhow House Limited vs Kenya Power and Lighting Company [2022] KEHC 11840 (KLR) observed as follows:

> " 19. ...The above Supreme Court decision conclusively settled the law. Where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their Jurisdiction conferred by *the constitution* and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance. The first instance.

20. As stated above, the Supreme Court decision conclusively settled the law, if at there were any doubts on the subject. I may add that from decided cases, at least two principles emerge on the doctrine of exhaustion:- First, while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including the level of public interest involved and the polycentricity of the issues (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. However, the High Court may, in exceptional circumstances, find that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it."

45. Conversely, courts have also discussed instances where an exception is justified in application of this doctrine. The Court also in Krystaline Salt Limited (supra) on this issue opined as follows:

> " 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.
>
> ...this court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy."

46. Additionally, the Court in William Odhiambo Ramogi & 3 others (supra) outlined the exceptions to the rule as follows:

> " 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.
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> 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.
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> 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."

47. The respondents' preliminary objection is anchored in Section 57 of the *Kenya Citizenship and Immigration Act* which provides as follows:

> Review and Appeal
>
> 1. Any person aggrieved by a decision of a public officer made under this Act may apply to the High Court for a review of the decision.
> 2. An appeal against the decisions of the Cabinet Secretary or of the Service under this Act may be made to the High Court.

48. According to the respondents the petitioner failed to exhaust this mechanism before filing this petition. Conversely, the petitioner submitted that he had sought to exhaust this mechanism however the same was frustrated by the respondents hence his move to petition this Court.

49. A look at the material before this Court reveals that the petitioner's advocate on 16th September 2024 wrote to the Chairperson of the Review and Appeal Committee appealing the petitioner's deportation order. A further letter was sent by the petitioner's Counsel on 25th September 2024. No response is registered to have been received from the respondents.

50. While the respondents argued that the petitioners had failed to exhaust this mechanism, they remained silent on these two letters yet the same bear an acknowledgment stamp of receipt by the Ministry of Immigration.

51. At this juncture it is vital to note that this Court is obliged to look at whether the dispute resolution mechanism established by the respondents is not only competent but also the efficacious in regard to the remedies if any, that are available to the petitioner.

52. To my mind a couple of things are noteworthy. First, the Act under Section 57 provides a clear dispute resolution mechanism. This provision provides an appeal mechanism to the High Court where a party is dissatisfied with the decision of the 1st and 2nd respondents.

53. It is my considered opinion that the petitioner's actions were in line with the law. I say so because once the respondents failed to respond, the petitioner proceeded to petition this Court to review the 1st and 2nd respondent's decision. While the petitioner complied with the dictates of the law, the respondents who are obliged to carry out their mandate in line with the principles set out under Article 10 of *the Constitution*, failed to do so. This left the petitioner with the single option of approaching this Court for redress. Considering this, I reason that the respondents Notice of Preliminary Objection is not merited in the circumstances of this case.

Whether the petitioner's application dated 28th February 2025 is merited.

54. The petitioner complains that the respondents continue to list him as a prohibited immigrant yet his application to be a Kenyan citizen was approved. He contended that Section 33 (1) of the *Kenya Citizenship and Immigration Act* provides that a Kenyan citizen cannot be listed as a prohibited immigrant.

55. On the contrary, the respondents maintained that the petitioner's citizenship was acquired fraudulently. Counsel, for the Respondents relied on a Newspaper Articles and a Ruling from the

India High Court but this factual information was not presented in the form of an affidavit but were bare allegations in the grounds of opposition.

56. The International Covenant on Civil and Political Rights Convention states as follows in Article 12:

    1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

    2. Everyone shall be free to leave any country, including his own.

    3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (order public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

    4. No one shall be arbitrarily deprived of the right to enter his own country.

57. Article 13 makes provision for removal of a non-citizen in the following words:

> An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

58. The Court in Mohammed Ibrahim Naz v Cabinet Secretary Responsible for Matters Relating to Citizenship and the Management of Foreign Nationals & another [2013] KEHC 6193 (KLR) applying the said provisions in the light of our Constitutional provisions observed thus:

> " ...The requirement in removing an alien from a state's territory, as provided under the above conventions and in accordance with the constitutional provisions contained in Article 47, is that such removal should be 'in accordance with the law', that due process should be followed. This, I believe, is also the essence of the decision in the case of Samuel Murial Mohochi –vs- The Attorney General of Uganda, though distinguishable from this case to the extent that the court found that the provisions of the Uganda Citizenship and Immigration Act were modified by the Treaty for the Establishment of the East African Community and the East African Common Market Protocol. The question then is whether the petitioner was accorded due process."

59. Similarly, in Oumarou Moumouni Ali v Director General Kenya Citizens and Foreign Nationals Management Services & 3 others [2020] KEHC 9787 (KLR) the Court opined as follows:

> " 27. The Respondents in exercise of their functions as state officers are bound by provisions of Article 10 of *the Constitution* thus the National Values and Principles of Governance which includes the rule of law, democracy, human dignity, equity, social justice, human rights, non-discrimination and protection of the marginalized, transparency and accountability. It is not for them to urge that they should be accorded the autonomy vested in them by statute without unnecessary intervention of the Court when it is clear such autonomy has been abused by issuing deportation order, failing to serve the same and failing to accord the Petitioner the right to be heard. In view of

> the above, I find that the due process was not followed in the Petitioner's deportation... This very act goes against the dictates of our constitution and International Law and should not be allowed at all."

60. A prohibited immigrant is a person who is not a citizen of Kenya who falls under the category of persons listed under Section 33(1) of the *Kenya Citizenship and Immigration Act*. Section 33(5), (6), (7) and (8) of the Act make the following specific provisions in reference to a prohibited person:

    (5) Subject to section 34 the entry into and residence in Kenya of a Prohibited Immigrant or an inadmissible person shall be unlawful, and a person seeking to enter Kenya shall, if he or she is a prohibited immigrant or inadmissible person, be refused permission to enter or transit through Kenya, whether or not he or she is in possession of any document which, were it not for this section, would entitle him or her to enter or transit through Kenya.

    (6) An immigration officer may issue a pass to a prohibited immigrant or inadmissible person to enter or remain temporarily in Kenya for such period or authorize such prohibited immigrant or inadmissible to transit through Kenya subject to such conditions as may be specified in that pass or for transit purposes.

    (7) The Cabinet Secretary may make Regulations for the declaration of prohibited immigrants or inadmissible persons.

    (8) The Cabinet Secretary may from time to time review the status of prohibited immigrants and inadmissible persons, subject to the advice of the relevant committee.

61. Regulation 37(6) of the Kenya Citizenship and Immigration Regulations, 2012 provides:

> "Where a prohibited immigrant or an inadmissible person has been refused permission to enter Kenya, the immigration officer shall issue a notice in Form 39 set out in the First Schedule to the owner, person in charge or agents of the carrier on or from which the prohibited immigrant or inadmissible person entered, intended or attempted to enter Kenya requiring the owner, person in charge or agents of the carrier on or from which the prohibited immigrant or inadmissible person entered, intended or attempted to enter Kenya to take the prohibited immigrant or an inadmissible person into their custody and ensure that the prohibited immigrant or an inadmissible person is removed from Kenya."

62. In the supporting affidavit, petitioner annexes a notice that was generated on 17th November 2023 that conveys information to the effect that his application for citizenship had been received hence he was required to present the relevant documents to the 1st and 2nd respondent at Nyayo House.

63. There is no Certificate of registration citizenship that is annexed or provided.

    Section 18 of the *Kenya Citizenship and Immigration Act* provides:

> 'a person who qualifies to be registered as a citizen of Kenya under this Act, shall upon taking the oath or affirmation or allegiance, in the prescribed manner, be issued with a certificate of registration as a citizen of Kenya'.

64. Two vital requirements must be fulfilled before one is ultimately registered as a Kenyan citizen, namely:

    a. the applicant must take the oath or affirmation of allegiance

    b. must subsequently be issued with a certificate of registration as a citizen of Kenya.

65. The Petitioner has not revealed one, that he has taken the oath or affirmation of allegiance, and two, has not demonstrated that he has been issued with the Certificate of registration specified in Section 18.

66. Having an application form and the payment of fees is a journey that may lead to acquisition of citizenship but until full fulfilment of the requirements of Section 18 the document remains part of that process. Until the actual crossover is completed by satisfying the conditions under Section 18 of the Act, the claim of citizenship by an applicant is an aspiration.

67. If the Certificate of registration of citizenship is not issued, no citizenship is conferred and thus without it, there can be no talk of revocation of citizenship as none exists.

68. Section 34 provides that:

    1. A person who is not a citizen of Kenya or an asylum seeker shall not enter or remain in Kenya unless she or he has a valid permit or pass.

    (2) Subject to the provisions of this section, the presence in Kenya of any person who is not a citizen of Kenya shall, unless otherwise authorized under this Act, be unlawful, unless that person is in possession of a valid work permit or a valid residence permit or a valid pass.

69. Section 33 (8)

> " The Cabinet Secretary may from time to time review the status of prohibited immigrants and inadmissible persons, subject to the advice of the relevant committee."

70. In the Notice of Motion Application, the Petitioner/Applicant wants the Court to issue an order directing the 1st and 2nd Applicant to temporarily remove or otherwise cancel the Petitioner's name from the list of prohibited immigrants and upon granting of this prayer, leave be granted to the petitioner to return to Kenya pending the hearing and determination of this Petition.

71. The facts relied upon by the Petitioner/Applicant do not prima facie support the making of the orders sought at this stage of the trial and the Court is of the humble view that in the circumstances any orders can only be granted after trial on merits of the instant Petition.

72. The application is thus declined. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF MAY, 2025.

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L N MUGAMBI

JUDGE