Mwebi v Jubilee Health Insurance Limited & 2 others; Office of the Data Protection Commissioner (Interested Party) (Petition E532 of 2023)
[2025] KEHC 8600 (KLR) (Constitutional and Human Rights) (19 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8600 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E532 OF 2023

LN MUGAMBI, J

JUNE 19, 2025

BETWEEN

EDNAH KWAMBOKA MWEBI ..... PETITIONER

AND

JUBILEE HEALTH INSURANCE LIMITED ..... 1ST RESPONDENT

EVANS EDGAR NJAGI NJURE ..... 2ND RESPONDENT

VINCENT CHARLES KARANI ..... 3RD RESPONDENT

AND

OFFICE OF THE DATA PROTECTION COMMISSIONER .... INTERESTED PARTY

RULING

Introduction

1. The Petitioner in the Petition dated 21st December 2023 accuses the 1st Respondent of failing to include her as a beneficiary in the medical insurance policy that was taken out by the 3rd Respondent for her and their daughter, A.K. after taking her personal details.

2. The Petitioner thus asserts that the Respondents violated her constitutional rights under Article 20, 31(c) and 35(1) (b) of *the Constitution* as well as the provisions of the Data Protection Act.

3. In response to the Petition, the 1st Respondent filed a Notice of Preliminary Objection dated 22nd February 2024 which is the subject of this ruling.

4. The Preliminary Objection is based on the following grounds:

   i. This Court's jurisdiction has been improperly invoked; this Court as presently constituted (Constitutional and Human Rights Division) lacks the requisite jurisdiction to hear and entertain the Petition as drawn.

   ii. The Petition does not meet the threshold set out in Anarita Karimi Njeru v Republic (1979) KLR 154 and reiterated by the Court of Appeal in Mumo Matemu v Trusted Society of Human Rights Alliance, Civil Appeal No. 290 of 2012, for having failed to specifically demonstrate with reasonable precision the manner in which the Respondents have violated their Constitutional rights.

   iii. The Petition lacks precision as to which human rights has been limited and/or infringed and to what degree and does not indicate whether the said limitation is not that which is provided for under Article 24 and that the same does not qualify under Article 25 of *the Constitution*.

Petitioners and other Parties Case

5. The Petitioner, the 3rd Respondent and Interested Party's response and submissions to the Notice of Preliminary Objection are not in the Court file or Court Online Platform (CTS).

1st Respondent's Submissions

6. Kiptinness and Odhiambo Associates LLP on behalf of the 1st Respondent filed submissions dated 22nd May 2024 in support of its Preliminary Objection. The issues identified for determination were: whether this Court as constituted has jurisdiction over this matter and whether the Petition meets the threshold in the locus classicus of Anarita Njeru Karimi (supra).

7. On the first issue, Counsel submitted that this Court does not have jurisdiction to entertain the matter as the issues raised revolve around Article 31(c) and (d) of *the Constitution* which is operationalized by the Data Protection Act. That, this Act establishes a mechanism to address such grievances through the Interested Party as the first port of call.

8. Counsel pointed out that the Petition is anchored on the use of personal data and rectification of the data held by the 1st Respondent. Counsel stressed that these issues are extensively covered in the Data Protection Act and further a party aggrieved by the decision of the Interested Party has the right of appeal to the High Court as provided under Section 64 of the Act.

9. Reliance was placed in Speaker of the National Assembly v Karume [1992] KLR 21 where the Court of Appeal held that:

> "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."

10. Like dependence was placed in Mwangi & Another v Naivasha County Hotel t/a Sawela Lodges [2022] KEHC 10975 (KLR).

11. Turning to the second objection, Counsel submitted that in Dr. Rev. Timothy Njoya vs The Hon. Attorney General and Kenya Review Authority HC Constitutional and Human Rights Division Petition No. 479 of 2013 the Court held that:

> "The Petitioner.....must also plead his case with some degree of precision and set out the manner in which *the Constitution* has been violated by whom and even state the Article of *the Constitution* that has been violated and the manner in which it has been violated."

12. Counsel guided by this, submitted that the Petitioner had not particularity set out the constitutional provisions that have been violated and neither had she established how the provisions had been violated. Furthermore, that the Petitioner had not provided a clear and detailed explanation of how violation of the purported provisions had resulted in any injury or loss to her. Counsel as well observed that the Petitioner had sought unreasonable damages which had not been pleaded specifically in the Petition and the constitutional basis not established. Owing to this, Counsel submitted that the Petitioner had not satisfied the requirements of a constitutional petition.

2nd Respondent's Submissions

13. In support of the 1st Respondent's Preliminary Objection, the 2nd Respondent filed submissions dated 8th November 2024 through Kariuki Karanja and Company Advocates.

14. On whether this Court has jurisdiction, Counsel informed that as can be gleaned from the annextures in the Petition, the 3rd Respondent's expression to take out the medical insurance cover for their daughter was as a result of the holding in E471 of 2021 Edna Kwamboka Mwebi Vs Vincent Charles Karani. The Court ordered that one of his duties would be to cater for the minor's medical expenses.

15. As such, to procure the insurance policy, the details of the parent with the custody, the Petitioner was required. The Petitioner as averred in the 2nd Respondent's Replying Affidavit dated 19th March 2024, is said to have voluntarily forwarded this information to the 2nd Respondent when the medical insurance cover was being prepared.

16. It was alleged that the Petitioner was grieved because she could not benefit from the cover. As a result, the Petitioner lodged its complaint with the Interested Party. It was averred that the Interested Party in its letter dated 5th October 2023 returned that the issue did not involve data protection but was purely an insurance policy issue.

17. Counsel argued that the Petitioner had failed to exhaust the available mechanism by following up on the matter with the Insurance Regulatory Authority. On this basis, Counsel urged the Court to decline assuming jurisdiction in this matter.

18. Reliance was placed in Mwanzia v Rhodes [2023] KEHC 2688 (KLR) where the Court held that:

> "Courts have in many occasions reiterated the position that where there are alternative avenues legally provided for in dispute resolutions, there should be postponement of judicial consideration of such disputes until after the available avenues are fully adhered to."

19. In line with this, Counsel argued that the Interested Party in its finding had determined that there was no violation of data in the circumstances of this case. Counsel stressed that this finding is binding on the Petitioner as provided under Regulation 14 of the Data Protection (General) Regulations, 2021.

20. Against this background, it was argued that the Petitioner ought to have moved this Court on appeal pursuant to Section 64 of the Data Protection Act, but failed to do so.

21. On the second issue, Counsel submitted that the Petition fails to meet the threshold set in Anarita Karimi (supra), since it does not prove the constitutional violations and neither seeks any declarations for the purported violations. In addition, Counsel submitted that the Petitioner had not linked the purported constitutional violations to the remedies sought.

Analysis and Determination

22. It is my considered view that the only issue for determination is:

    i. Whether the 1st Respondent's Notice of Preliminary Objection meets the set threshold and if so;

    ii. Whether it is merited.

Whether the 1st Respondent's Notice of Preliminary Objection meets the set threshold.

23. What constitutes a preliminary objection was restated 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:
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> > "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".

24. A preliminary objection thus is one that is argued based on the assumption that the facts that are pleaded by the opposite party are correct, meaning that there is no contest as to the facts. Further, should the P.O be successful, it should be capable of disposing the suit in its entirety without a trial on merits. Moreover, a proper P.O cannot be dependent on or premised on the exercise of Court's discretion.

25. In this preliminary objection, there was neither response or submissions by the Petitioner raising any factual contestation to the preliminary objection. The 1st Respondent did not bother to introduce any facts but relied on what the petitioner has pleaded to raise the preliminary objection. Moreover, the issues raised are purely jurisdictional matters based on doctrines developed through judicial precedents.

26. The 1st Respondent on the first objection argued that this Court lacks jurisdiction to entertain the instant Petition by virtue of procedure set out under the Data Protection Act which grants the Interested Party jurisdiction over complaints relating to violation of the right to privacy. Jurisdiction is thus a pure point of law.

27. The Supreme Court, speaking on jurisdiction in the Matter of the Interim Independent Electoral Commission [2011] KESC 1 (KLR) affirmed as follows:

> " Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent."

28. Although the High Court's possesses wide jurisdiction under Article 165(3) of *the Constitution*, that jurisdiction does not operate in a vacuum. As was held in Benson Ambuti Ambega & 2 Others v Kibos Distillers Limited (2020) eKLR

> " ... a Court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination, if there would be other appropriate legislatively mandated institutions and mechanism..."

29. On the failure to exhaust the statutory remedies, it is important to have regard to the uncontested facts relied upon in raising the Preliminary Objection. From the reading of the annextures to the Petition and also submissions by counsel, it is evident that the 3rd Respondent expressed an interest to take out a medical insurance cover for their daughter with the Petitioner following issuance of the Court Order in case No. E471 of 2021 Edna Kwamboka Mwebi Vs Vincent Charles Karani that had ordered him to cater for the minor's medical expenses. In the process of procuring insurance for their daughter, the details of the parent with the custody, namely the Petitioner were required and as averred in the 2nd Respondent's replying affidavit which is not contested, the Petitioner voluntarily forwarded the same to the 2nd Respondent for the said medical insurance cover to be prepared.

30. However, the Petitioner was displeased by the fact that she could not benefit from the said medical cover and thus lodged a complaint with the Interested Party (Office of Data Protection Commissioner-ODPC) alleging misuse of her data.

31. The Interested Party (ODPC) in its letter dated 5th October 2023 informed the Petitioner that the issue was not an issue of data protection but an insurance policy matter.

32. It was contended that the Petitioner was bound by the decision of the interested party by dint of Regulation 14 of the Data Protection (General) Regulations, 2021 and if dissatisfied, the Petitioner ought to have approached the Court by way of an appeal as per Section 64 of the Data Protection Act. Alternatively, take up the matter with the Insurance Regulatory Authority, but not this Court.

33. By and large, this is the position taken by the 1st Respondent and 2nd in urging this Court to uphold the Preliminary objection for the failure to exhaust the available remedies.

34. Section 56(1) of the Data Protection Act provides as follows:

> A data subject who is aggrieved by a decision of any person under this Act may lodge a complaint with the Data Commissioner in accordance with this Act.

35. This Court's jurisdiction under the Act is captured under Section 64 of the Act as follows:

> Right of appeal
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> A person against whom any administrative action is taken by the Data Commissioner, including in enforcement and penalty notices, may appeal to the High Court.

36. In this regard, the Court in Republic v Tools for Humanity Corporation (US) & 8 others; Katiba Institute & 4 others (Exparte Applicants); Data Privacy & Governance Society of Kenya (Interested Party) [2025] KEHC 5629 (KLR) held as follows:

> " 105. It is established law that the doctrine of exhaustion mandates that parties must first exhaust all available administrative remedies before resorting to judicial review. This principle is grounded in the need to respect the institutional competence of administrative bodies and ensure that courts are not prematurely involved in matters that can be adequately addressed within a statutory framework. The principle is enshrined in Section 9(2) of the *Fair Administrative Action Act*, which bars judicial review where an adequate remedy exists, unless exceptional circumstances are demonstrated."

37. The Interested Party in its Replying Affidavit dated 28th March 2024 informed that they received the Petitioner's complaint on 31st August 2023. Upon conducting its investigations and reviewing the matter, it was determined that the complaint did not raise data protection issues, rather, it revolved around an insurance policy. It would appear the Petitioner was satisfied with this finding and did not find it necessary to appeal and thus resorted into filing this Petition. Clearly therefore, having failed to challenge the finding on appeal by ODPC that the matter did not involve breach of data, the Petitioner cannot lodge a Petition in Court alleging that there was violation of Article 31 (c) of *the Constitution* based on the same facts. If she differed with that finding, she ought to have filed an appeal before the High Court to reverse that finding by ODPC. I would thus agree that to that extent, the preliminary objection has merits in this regard.

38. The second reason which I strongly consider as the reason for not entertaining this Petition is based on my assessment of the Petition itself. The heart of the complaint although involves data, primarily revolves around the terms of an insurance policy. As is discernible from the Petition itself and correctly observed by the interested party, it is my view that the Petition does not raise any constitutional questions.

39. For instance, the prayers do not seek any constitutional remedy despite the matter being disguised as violation of *the Constitution*, it merely seeks a rectification of the insurance policy in question. The prayers are outlined as follows:

    i. This Honourable Court be pleased to order that the 1st Respondent to amend the details of the principal member in the minors medical card to reflect the name of the person paying for the medical policy.

    ii. The Honourable Court be pleased to order that the 1st Respondent to amend the medical policy document to reflect the name of the person paying for medical card.

    iii. The Honourable Court be pleased to order that the 1st Respondent to amend the medical policy application documents and change the relationship in the next of kin to 'father' and not 'uncle' as had been admitted by 1st respondent.

    iv. This Honourable Court be pleased to make an order for compensation jointly and severally against the respondents, for said violations tabulated below:

item	Nature of damage suffered	Amount (Kshs)	
a)	Damages for collecting her personal information in disguise to process a wellness card for her and issuing wellness card to her knowing the same to be fake	5,000,000	
b)	Damages for falsifying application documents and forging a signature purporting to be client's signature	5,000,000	
c)	Damages for emotional injury and distress she suffered at Radiant Hospital on suspicion that she had presented a fake medical card	5,000,000	
	Punitive damages	5,000,000	
d)	Legal costs	1,000,000	

v. Any other order that this Court may deem fit and just to grant.

40. The nature of reliefs sought clearly demonstrate that this is an ordinary civil claim with some allegations touching on criminality but the Petitioner is camouflaging the same to appear like a constitutional dispute. Under the doctrine of Constitutional avoidance, *the Constitution* should not be invoked to resolve disputes that are not Constitutional controversies, that is matters that can very well be resolved by application of ordinary legislation or other established legal principles without necessarily invoking *the Constitution*.

41. In this regard, I am guided by the judicial decision of Council of County Governors v Attorney General & 12 others (2018) eKLR where the Court asserted thus:

> " 59. The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved. In that regard, the Supreme Court stated in Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others (supra) (at para 256) that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis.
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> 60. In the South African case of S v Mhlungu, [1995] (3) SA 867 (CC), Kentridge AJ, stated in the dissenting opinion respecting the principle of avoidance (at paragraph 59), that he would lay 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. And in Ashwander v Tennessee Valley Authority, 297 U.S. 288, 347 (1936)), the U.S. Supreme Court 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."

42. Given the above observations, I do find that the Petition offends both the doctrine of exhaustion of remedies and the doctrine of Constitutional avoidance. I thus order that the Petition be struck out with costs to the Respondents and Interested Party that participated in this Preliminary Objection.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF JUNE, 2025.

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L N MUGAMBI

JUDGE