



**Talanta Institute v Office of the Data Protection Commissioner;
Muhuga (Interested Party) (Judicial Review E165 of 2024)
[2025] KEHC 8530 (KLR) (Judicial Review) (16 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8530 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW E165 OF 2024
JM CHIGITI, J
JUNE 16, 2025**

BETWEEN

TALANTA INSTITUTE APPLICANT

AND

OFFICE OF THE DATA PROTECTION COMMISSIONER RESPONDENT

AND

TOIVO KIAI MUHUGA INTERESTED PARTY

RULING

1. Before this court for determination is the Notice of Preliminary Objection dated 12th February, 2025 to the Notice of Motion drawn and filed on the 2nd August 2024. The application is brought under Sections 9(2) and (4) of the *Fair Administrative Action Act*, 2015 & Sections 56 (5) and 64 of the Data Protection Act (CAP 411C). It seeks the following declarations: -
 1. That this Court lacks the jurisdiction to hear and determine this suit in the first instance.
 2. That the Application herein offends the doctrine of exhaustion.
2. The Applicant in the suit is a body corporate registered in the republic of Kenya that serves as a Technical and Vocational Education and Training (TVET) Center offering practical skill development, committed to nurturing the potential of the youth.
3. The respondent is the designated head officer of the Office of the Data Protection Commissioner established under section 5 of the Data Protection *Act, No. 24 of 2019*- Chapter 411 C of the Laws of



Kenya giving effect to article 31 (c) and (d) of *the Constitution* of Kenya 2010. The functions of the officer are further stated in section 9 of the Data Protection Act

4. The interested party is the Applicant's former employee and the Complainant before the Respondent who resides within Nairobi in the Republic of Kenya.

Applicant's Submissions

5. The Applicant in the matter submitted that firstly, the determination of the Respondent's decision or determination is a nullity as the timelines since the complaint was filed were not clearly articulated among other things.
6. The Applicant respectfully requested that this Honourable Court grant the following judicial review orders:
 - a. A declaration that the Respondent's finding — holding the Applicant liable for unauthorized commercial use of the Interested Party's image and for failing to remove it upon request, thereby ordering compensation of KES 750,000 — is null and void from the outset for contravening Article 50 of *the Constitution* of Kenya (2010).
 - b. A declaration that the Respondent's decision dated 30th June 2024 violates Article 50 of *the Constitution*, Sections 37 and 56(5) of the Data Protection Act, and Regulation 12 of the Data Protection (General) Regulations, 2021, rendering it null and void ab initio.
 - c. An order of certiorari to quash the Respondent's decision dated 30th June 2024.
 - d. An order of prohibition restraining the Respondent, its agents, or servants from executing or enforcing the orders made in the aforementioned determination.
 - e. An order of mandamus compelling the Respondent not to enforce its decision made on 30th June 2024.
 - f. That the above orders operate as a stay of execution of the decision delivered on 30th June 2024 until the matter is fully determined.
 - g. That leave be granted to file the certified typed proceedings and substantive application upon receipt from the Respondent.
 - h. That this Honourable Court issue appropriate directions to facilitate the swift resolution of this matter.
 - i. That costs be in the cause.
 - j. Any other relief this Honourable Court deems just in the circumstances.

Grounds for Seeking Relief

7. The reliefs are sought on the following grounds:
 - i. Violation of *the Constitution* and relevant laws;
 - ii. Illegality, for acting ultra vires;
 - iii. Consideration of irrelevant factors;
 - iv. Irrationality; and
 - v. Unreasonableness.



8. The Respondent, in carrying out its mandate, is constitutionally obligated under Article 3(1) to uphold and defend *the Constitution*. Additionally, Article 10(2) enshrines national values including the rule of law, equity, human rights, good governance, integrity, and accountability.
9. Article 31 guarantees the right to privacy, which underpins the Respondent's duties and responsibilities and directly relates to the subject matter between the Applicant and the Interested Party.

Respondent's Submissions

10. On the matter of whether the court has jurisdiction to hear and determine the matter, the Respondents submitted that in Samuel Kamau Macharia & another v Kenya Commercial Bank & 2 Others, Application No. 2 of 2011 [2012] eKLR, the Supreme court pronounced itself on matters jurisdiction while drawing its attention to the Court of Appeal in Owners of Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Ltd (1989) KLR 1, specifically Nyarangi JA's (as he then was) dictum at para 14 on the import of jurisdiction. It further submits that the honourable court lacks jurisdiction to the present suit.
11. On the question of the doctrine of exhaustion, the Respondent's submissions are that as per the *Fair Administrative Action act* 2015 in its sections 9 (2) and (4) that precludes the High court or any other subordinate Court from reviewing an administrative action or decision under the Fair Administrative Actions Act 2015, in a matter where a party doesn't exhaust internal remedies except where exceptional circumstances for exemption are proved to exist. The position is advanced in the case of Clifford Kenya v Jackline Ingutiah & 5 others; Atieno Aoko & 3 Others (Interested Party) [2022] eKLR by the court of Appeal in the Speaker of National Assembly v Karume, Civil Application No. NAI 92 of 1992, and by this Honourable Court in Ceres Tech Ltd V Commissioner, Office of the Data Protection Commissioner [2024] KEHC 12833 (KLR).
12. The Respondent further posits that what the Applicant seeks to canvass through the present suit amounts to content which should have been advance through an appeal as a prescribed mechanism under The Data Protection Act (CAP 411C) which were not exhausted nor any cause of exemption advanced from the said provisions as in line with section 64 of the Data Protection Act and Sections 9(2) and (4) of the Fair Administrative Actions Act, 2015.

Analysis and determination

13. The following issues commend themselves for determination:
 1. Whether this court has jurisdiction to hear and determine the matter.
 2. Whether the doctrine of Exhaustion is offended

Whether this court has jurisdiction.

14. In determining this issue, this court shall address its mind to the Respondent's Notice of Preliminary Objection dated 12th February, 2025 which is predicated on the numerous grounds inter alia that;
 1. This Honourable Court lacks the Jurisdiction to hear, entertain and determine the Applicant's Originating Notice of Motion by dint of;
 - a. Section 7 (1) (b) and (7(2) (a) and 9 (2) of the Fair Administration Action *Act No 15 of 2015*.



- b. As a result, the entire suit is improperly before this Honorable Court as the Applicant has failed to exhaust all statutory remedies available to it to be granted audience with this Honourable Court.

15. In the cases of *Natin Properties Ltd vs. Jaggit Singh & Anr.* and in *El-Busaidy vs Commissioner of Lands & 2 others* [2002] 1KLR 508 the court held that a preliminary objection should not raise substantive issues from the pleadings which must be determined by court upon perusal of evidence and the same must be raised only on a point of law.

16. The Supreme Court in the case of *Dickson Ngigi Ngugi v Commissioner of Lands S.C Petition No. 9 of 2019* [2019] eKLR, [36] observed that;

“Jurisdiction goes to the root of any cause or dispute before a court of law. A court must exercise restraint to avoid overstepping its constitutional role in order to maintain its legitimacy. If a court has no jurisdiction, a judgment rendered therein does not adjudicate the dispute. It does not bind the parties, nor can it be made the foundation of any right. It is a nullity without life or authority. In short, it is *coram non jure* and amounts to a nullity because, as Nyarangi, JA famously said in the *locus classicus*, *Owners of the Motor Vessel “Lillian S” v Caltex Oil, (Kenya) Ltd* [1989] KLR 1, “jurisdiction is everything. Without it, a court has no power to make one more step”.

It is a settled legal proposition that conferment of jurisdiction is a legislative function and it can only be conferred by *the Constitution* or statute. It cannot be conferred by judicial craft. See *Samuel Kamau Macharia & Another v Kenya commercial Bank & 2 Others*, SC Application No. 2 of 2011; [2012] eKLR. Nor can parties, by consent confer on a court power it does not have.”

17. Section 9(2) and (4) of Fair Administrative Actions Act stipulates that:

“(2) The High Court or a subordinate court under Sub section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(4) notwithstanding sub section (3), the High Court or a subordinate court may, in exceptional circumstances and on application by the Applicant, exempt such person from obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”

18. In the case of *Mary Wambui Munene v. Peter Gichuki Kingara and Six Others*, Sup. Ct. Petition No. 7 of 2013; [2014] eKLR, the court held:

“...that the question of jurisdiction is a “pure question of law,” and should be resolved on a priority basis.”

19. Section 9 (3) The *Fair Administrative Action Act* 2015 states that:

“The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under subsection (1). (4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances



and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”

20. In *Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others* [2014] eKLR it was held thus: -

“We shall now turn to the Constitutional-Avoidance Doctrine. The doctrine is at times referred to as the Constitutional-Avoidance Rule.

(106) The doctrine interrogates whether there are other ways of resolving a dispute outside a constitutional petition. The Supreme Court in *Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others* Pet. 14A, 14B & 14C of 2014 of [2014] eKLR held:-[256].The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis.”

21. In *the Speaker of National Assembly v Njenga Karume* [2008] 1 KLR 425 the court had this to state;

“In our view there is considerable merit.....that where there is clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.”

22. Section 64 of The Data Protection Act stipulates that;

“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.”

23. It is the Applicant’s case that while Section 9(2) of the *Fair Administrative Action Act* requires the exhaustion of alternative remedies, it is the Applicant’s contention that exceptional circumstances exist, justifying direct recourse to this Honourable Court.

24. In the case of *Mohamed Ali Baadi & Others v The Attorney General & 11 others*; it was held that while our jurisprudential policy is to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. The case of *Dawda K. Jawara vs Gambia*, held that:

“A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality] ... the Governments assertion of non-exhaustion of local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case.”

25. In *Republic vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others Exparte the National Super Alliance (NASA)*. This doctrine is now of esteemed juridical lineage in Kenya. The Court held that:

“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 level of public interest involved and the polycentricism of the



issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies.”

26. As the Court of Appeal acknowledged in the Shikara Limited Case, the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake.
27. The time expended in moving this court for review should have been channeled towards the prosecution of the application to appeal the decision of the Data Commissioner. In electing to file the instant suit the Applicant failed to exhaust the available legislative redress mechanisms or dispute resolution options under The Data Protection Act and the applicant has to contend with the choices that it made.
28. In the case of Fredrick Otieno Outa v. Jared Odoyo Okello & 3 Others the Supreme Court delineated the following as exceptional circumstances which would warrant the exercise of its limited jurisdiction for review:

“(92) ... However, in exercise of its inherent powers, this Court may, upon application by a party, or on its own motion, review, any of its Judgments, Rulings or Orders, in exceptional circumstances, so as to meet the ends of justice. Such circumstances shall be limited to situations where: (i) the Judgment, Ruling, or Order, is obtained, by fraud or deceit; (ii) the Judgment, Ruling, or Order, is a nullity, such as, when the Court itself was not competent; (iii) the Court was misled into giving Judgment, Ruling or Order, under a mistaken belief that the parties had consented thereto; (iv) the Judgment or Ruling, was rendered, on the basis of a repealed law, or as a result of a deliberately concealed statutory provision.”
29. It is this court’s finding that the Applicant is not exempted from the Application of the doctrine of exhaustion. The Applicant does not show that it attempted to lodge an appeal within The High Court.
30. The Applicant did not seek leave from the court to file the suit herein. The Applicant has not demonstrated that the High Court lacks the capacity or the requisite jurisdiction to offer redress via an appeal.
31. The Law on preliminary objection is well settled in the case of Mukisa Biscuit Manufacturing Co. Limited vs. West End Distributors Limited [1969] EA 696, Newbold, V.P, observed as follows;

“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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase cost and, on occasion, confuse issues. This improper practice should stop.”
32. The upshot of the above is that the preliminary objection raises valid points of Law.



Disposition:

33. It is this court's finding and I so hold that the Respondent's Notice of Preliminary Objection dated 12th February, 2025. This court lacks the jurisdiction to hear and determine this suit. In the circumstances the court must down its tools and I so hold.

Order:

1. The Respondent's Notice of Preliminary Objection dated 12th February, 2025 is upheld.
2. The suit is thereby struck out with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE 2025

.....

J. CHIGITI (SC)

JUDGE

