



**Maina v Lufthansa German Airlines (Petition E008 of 2024)
[2025] KEHC 9486 (KLR) (Commercial and Tax) (1 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 9486 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
PETITION E008 OF 2024**

AA VISRAM, J

JULY 1, 2025

BETWEEN

SYLVIA NDUITA MAINA PETITIONER

AND

LUFTHANSA GERMAN AIRLINES RESPONDENT

RULING

1. The Petitioner filed the present Petition dated 29th May, 2024 (“the Petition”) seeking to redress violations of the Petitioner’s constitutional rights by the Respondent. The Petitioner submitted that her husband had been invited to attend a business conference which was to be held from 11th to 13th October, 2022 in Quintana Roo, Mexico (Cancun) at the Dreams Sapphire Resort and Spa.
2. On the day of her intended travel, the Respondent cancelled the Petitioner’s passport and tickets based on, in her view, unsubstantiated claims, despite having successfully undergone an interview and received visa approval.
3. The Petitioner averred that prior to cancellation of her documents, she was subjected to undue scrutiny during checks at the airport, in stark contrast to other passengers who were of Caucasian and Asian ethnicity.
4. That despite her husband and his colleague being permitted to travel on an earlier flight for the same conference, she was left at the airport without any assistance or guidance, thereby causing significant distress and inconvenience.
5. The Petitioner submitted that her constitutional rights, including right to free movement under Article 39, right to expeditious, efficient, reasonable, and procedurally fair administrative action under Article 47, right to non-discrimination under Article 27 among other rights were infringed.



6. On the other hand, it is the Respondent's case that this Court does not have jurisdiction to determine the Petition filed herein on the ground that the Petition violates the doctrine of exhaustion and the doctrine of constitutional avoidance.
7. I have considered the Preliminary Objection dated 18th February, 2025, together with the rival submissions and the applicable law.
8. Before turning to the applicable law, I note from the outset that the Petition at paragraph 45 (E) prays for the following final orders only: (a) compensation relating to various refunds; (b) compensation for violation of the Petitioners various rights; (c) costs and interest of the Petition; (d) damages.
9. No further orders are sought by the Petitioner, and in particular, no declarations are sought declaring that any of the Petitioner's constitutional rights have in fact been infringed. Based on a plain reading of the Petition, it is clear to me that the purpose of the Petition is to seek only a refund in respect the expenses incurred by the Petitioner, amounting to approximately Kshs. 350, 000/- and compensation, more particularly itemised in the Petition.
10. In my view, based on the facts set out above, the Petitioner's case is essentially commercial in nature. It simply seeks damages for breach of contract. This is clear based on the nature of the final orders sought as stated above.
11. The applicable law relating to the doctrine of exhaustion is found in the Supreme Court case of *Nicholous v Attorney General & 7 others; National Environmental Complaints Committee & 5 Others (Interested Parties)* [2023] KESC 113 (KLR) held that: -

“Where there exists an alternative method of dispute resolution established by legislation, courts must exercise restraint in exercising their jurisdiction as conferred by *the Constitution* and must give deference to the dispute resolution bodies established by statute with the mandate to deal with such specific disputes in the first instance.”
12. Returning to the Petition, based on a reading of paragraphs 25 to 29 of the Petition, it is evident that the crux of the Petitioner's complaint is based on the denial of boarding for a flight to Mexico on 11th October, 2022.
13. The Respondent's position is that the National Civil Aviation Administrative Review Tribunal (the Tribunal) has jurisdiction to determine all the claims set out in the Petition. .
14. Section 69 (f) of the *Civil Aviation Act* which provides for the jurisdiction of the Tribunal states that: -

The Tribunal shall have the jurisdiction to hear and determine complaints or appeals arising from-

 - (f) Consumer protection compliance and enforcement activities related to areas such as right violations, unfair and deceptive practices and unfair competition by air carriers and travel agents, deceptive airline advertising including fare, on-time performance, schedule, code sharing, and violations of rules concerning denied boarding compensation, ticket refunds, baggage liability requirements, flight delays and charter flights.
15. Section 69 (f) of the *Civil Aviation Act* expressly therefore grants jurisdiction to the Tribunal to entertain matters concerning 'rights violations' and 'violations of rules concerning denied boarding compensation, ticket refunds...'
16. Based on a plain reading of the above, I am satisfied that the core issues in the Petition are capable of resolution by the said Tribunal. I therefore find that the Petitioner ought to have lodged her claim



before the Tribunal, as mandated by the Civil Aviation Act, prior to invoking the jurisdiction of this Honourable Court.

17. I say the above, guided by the Court of Appeal decisions in the case of Geoffrey Muthinja & another vs Samuel Muguna Henry & 1756 others [2015] eKLR held as follows regarding the doctrine of exhaustion: -

“We see this as the crux of the matter in this and similar cases. 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 the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen.” (Emphasis mine)

18. However, noting the above, I am also cognizant that there exist certain exceptions to the above principles. Namely, in R v Independent Electoral and Boundaries Commission (IEBC) & others ex parte The National Super Alliance Kenya (NASA) (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the exceptions in the following terms:

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.

19. In the present matter, I am satisfied that the exception does not apply, and I am therefore persuaded that by commencing the present Petition, the Petitioner has violated the doctrine of exhaustion.

20. For the sake of completeness, I will briefly address the doctrine of avoidance. The Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] KESC 53 (KLR) held that:-

“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. Once again, based on a plain reading of the Petition it is evident that the dispute between the Petitioner and the Respondent is a contractual issue that is governed by the Respondent's terms and conditions of carriage. The ticket that the Petitioner purchased was subject to the Respondent's General Conditions of Carriage for Passengers and Baggage.

22. The High Court in Makori Beatrice Kwamboka v Kenya Airways Limited PLC [2021] eKLR stated that: -

“In my view, the petition does not raise a constitutional claim as the Petitioners right is well covered under civil law. Embracing the findings in the cited authorities, it would be reasonable to infer that at the core of this petition lies a question that involves the indirect application of the bill of rights. I say so because there already exists an alternative mechanism under the civil law that deals with breach of contractual relationships. In my view, the petition does not raise a constitutional claim as the Petitioners right is well covered under civil law.”



23. I am satisfied that a dispute over the cancellation of a flight ticket is a commercial dispute and may be determined under the provisions of civil law.
24. Based on the reasons set out above, I find and hold the Preliminary Objection dated February 19, 2025, is upheld. The Petition dated May 29, 2024, is struck out with costs.
25. The Petitioner remains at liberty to pursue her claim in the appropriate statutory tribunal, and in accordance with the relevant law.
26. The file is marked as closed.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 1ST DAY OF JULY, 2025

ALEEM VISRAM, FCIArb

JUDGE

In the presence of;

Court Assistant: Sakina

