Nthia v Kenyatta University (Petition E093 of 2025) [2025] KEHC 13220 (KLR) (Constitutional and Human Rights) (25 September 2025) (Ruling)

Neutral citation: [2025] KEHC 13220 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E093 OF 2025

LN MUGAMBI, J

SEPTEMBER 25, 2025

BETWEEN

NZIOKI IAN NTHIA ..... PETITIONER

AND

KENYATTA UNIVERSITY ..... RESPONDENT

RULING

Introduction

1. In the Petition dated 24th February 2025 the Petitioner assails the Respondent's action of discontinuing the Petitioner's studies alleging failure to abide by the due process or the principles of fairness enshrined in Articles 47 and 50 of the *Constitution*.

2. Upon service of the Petition, the Respondent filed a Notice of Preliminary Objection dated 14th April 2025 against the Petitioner's Application dated 24th February 2025 premised on the following grounds:

    i. This Court lacks jurisdiction to entertain, hear and determine the Application dated 24th February 2025 as filed by the Petitioner for reasons that the same offends the doctrine of exhaustion.

    ii. Section 9(2) of the *Fair Administrative Action Act* states that this Court shall not review an administrative action or decision unless all remedies available under any other written law are first exhausted.

    iii. This Court lacks jurisdiction to hear this matter, as the Applicant vide its uncontested letter of 4th February 2025 received by the Respondent on 10th February 2025 requested for access to information pursuant to Article 35 of the *Constitution*.

iv. Part III of the *Access to Information Act* provides a remedy and procedure where the Applicant can access the information required from the Respondent.

v. Article 159(2) (c) of the *Constitution* guides this Court to honor the principle that alternative forms of dispute resolution shall be promoted.

vi. In light of the foregoing this Court does not have the requisite jurisdiction to entertain the Petitioner's Application on the premise that the same offends the doctrine of exhaustion.

The Application

3. For context, In the Application dated 24th February 2025 and further affidavit sworn on 24th April 2025, the Petitioner challenges the Respondent's alleged failure to supply him with the information sought vide an email dated 4th February 2025 and also a physical letter delivered on 10th February 2025 in reference to the disciplinary proceedings that were taken out against him. Consequently, the Petitioner seeks the following Orders in the Application:

a. Pending the hearing and determination of this Application inter partes the Respondent be compelled to provide copies of the Notice to Show Cause letter, Discontinuance letter issued to the Petitioner, the minutes of the proceedings of the disciplinary hearings of the allegations against the Petitioner before the Student's Disciplinary Committee and the Appeal's Committee.

b. Pending the hearing and determination of this Petition, the Respondent be compelled to provide copies of the Notice to Show Cause Letter and Discontinuance letter issued to the Petitioner.

c. Pending the hearing and determination of this Petition, the Respondent be compelled to provide copies of the Minutes of the proceedings of the disciplinary hearing of the allegations against the petitioner before the Student's Disciplinary Committee and the Appeal's Committee.

d. Any other order this Court may deem fit.

e. The Respondent do pay to the Petitioner the costs of this application.

Respondent's Submissions

4. The Respondent through its Counsel, Rachier and Amollo LLP filed submissions dated 3rd June 2025 in support of its Preliminary Objection. The issues underscored for discussion were: whether this Court has jurisdiction to entertain the Petitioner's Application dated 24th February 2025 in light of the doctrine of exhaustion and whether the email request to the Respondent was properly delivered as required under the Civil Procedure Rules.

5. On the onset, Counsel stated that it is trite law that jurisdiction is everything and without it a Court cannot take any further step as held in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR) and echoed in Samuel Kamau Macharia –v- Kenya Commercial Bank & Another (2012) eKLR.

6. Counsel submitted that this Court's jurisdiction is challenged on the ground of the doctrine of exhaustion as espoused in Section 9(2) of the *Fair Administrative Action Act*. Reliance was placed in

Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others [2015] eKLR where it was held that:

> " 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 of courts. This accords with Article 159 of the *Constitution* which commands Courts to encourage alternative means of dispute resolution."

7. Similar dependence was placed in Speaker of the National Assembly v James Njenga Karume [1992] eKLR.

8. Counsel submitted that the Petitioner herein seeks to compel the Respondent to issue certain documents and disclose certain information which include the Notice to Show Cause Letter dated 14th October 2021, minutes from the Student's Disciplinary Committee Hearing and the Appeal Committee Hearing, the Discontinuance Letter and the witness statements and evidence relied on. Counsel submitted that this is a right envisaged under Article 35 of the *Constitution* as governed by the *Access to Information Act*. Counsel noted that this Act under Section 8 and 9, provides the procedure one is supposed to follow so as to access the needed information.

9. Counsel averred that the letter requesting this information was received physically by the Respondent on 10th February 2025. Counsel pointed out that Section 9 of the *Access to Information Act* provides that once such a request is received, the Respondent has to make a response within 21 days and where necessary within an additional 14 days. Where this information is not issued, the Act directs that a complaint be lodged with the Commission on Administrative Justice (CAJ).

10. Counsel contended that the Petitioner proceeded to file the Application prematurely, only 14 days after making his request to the Respondent. Counsel as such argued that the Petitioner failed to exhaust the available remedy before approaching this Court. Considering this, Counsel submitted that the Petitioner's failure to pursue the statutory remedies before approaching this Court renders the Application premature and offends the doctrine of exhaustion. Consequently, Counsel stressed that the jurisdiction of this Court is ousted by operation of the law.

11. Reliance was placed in Sadia & another v Rarieda Sub County Fisheries Officer & 3 others [2023] KEHC 4105 (KLR) where it was held that:

> " Petitioners had failed to use the mechanisms under both the *Access to Information Act* and the *Fair Administrative Action Act*; therefore, the petition was premature."

12. On the second issue, Counsel submitted that the Petitioner alleged that the letter dated 4th February 2025 had been shared with the Respondent via email. Counsel submitted that even if this was the case, the same cannot be used to oust the obligation to pursue the available remedies as contemplated in the *Fair Administrative Action Act* as well as the *Access to Information Act*. Reliance was placed in Inland Beach Enterprises Ltd v Sammy Chege & 15 Others [2012] eKLR where it was held that:

> " In my view, with the cardinal principle of procedure that rules are handmaids of justice not mistresses; the rules must serve the justice of the case as the court may determine in the circumstances of the proceedings."

13. Secondly, Counsel submitted that as per Order 5 Rule 22B of the Civil Procedure Rules, the Petitioner bears the burden to show that Court process was served. Basically, that the Petitioner must demonstrate

the existence of a delivery receipt confirming that the email was received and not just sent as is the case in the present circumstances. To buttress this point reliance was placed in Sifuna & Sifuna Advocates – Versus - Patrick Simiyu Khaemba [2021] eKLR where it was held that:

> " In regard to service of documents, the burden bearer is the one who asserts that he effected service. It is not the other way round. That is why the Rule 22B (4) of the Civil Procedure Rules provides that the officer of the Court who effected service should file an Affidavit of Service accompanied with an attachment of "the Electronic Mail Service delivery receipt confirming service."

14. To this end, Counsel submitted that the Respondent's Preliminary Objection was merited and thus ought to be allowed.

Petitioner's submissions

15. On 20th June 2025, the Petitioner through ICK Law Advocates LLP filed submissions and set out the issues for discussion as: whether this Court has jurisdiction to entertain the Petitioner's application dated 24th February 2025 in light of the doctrine of exhaustion under Section 9(2) of the Fair Administrative Actions Act and the provision of the *Access to Information Act* and whether the email request to the Respondent was properly delivered as required under the Civil Procedure Rules.

16. Counsel on the first issue submitted that the doctrine of exhaustion does not apply where the remedies provided under statute are illusory, ineffective, or have already been attempted and failed. According to Counsel, the Petitioner did not receive any response from the Respondent with regard to the letter dated 4th February 2025.

17. Counsel added that Section 9(2) and 9(3) of the *Access to Information Act* are not applicable in this matter as refer to information regarding the 'life or liberty of a person' while the information being sought by the Petitioner relates to the disciplinary proceedings with the Respondent. Counsel stressed that the Respondent was obligated to disclose the information sought. Reliance was placed in Okiya Omtatah Okoiti v Communication Authority of Kenya & 8 others [2018] KEHC 7513 (KLR) where it was held that:

> " The obligation to disclose information is heightened where the information is necessary for the protection of constitutional rights and freedoms, especially those relating to privacy, liberty and security of the person."

18. Counsel argued that, that notwithstanding, Article 35(1) of the *Constitution* guarantees the right of every citizen to access information held by the State or any other person without qualification. Counsel submitted that the doctrine of exhaustion does not bar constitutional redress where administrative mechanisms are inadequate. Reliance was placed in Republic v IEBC Ex parte NASA [2017] eKLR where the Court held that:

> " On our part, we decline to subscribe to this school of thought. The enforceability of the constitutional provisions does not depend on whether or not Parliament has enacted a facilitative legislation, guidelines or framework. We hold the view that the national values and principles of governance enunciated in Article 10 of the *Constitution* are themselves justiciable whether or not there is a facilitative legislation, guidelines or framework. Whereas such legislation or legislative framework could be a useful guide to an agency or State Organ, it does not derogate from the core or essential content of the *Constitution*. Indeed, such legislation, guideline or legislative framework must conform to the constitutional

requirements. This Court cannot shirk from its constitutional mandate of protecting the *Constitution* simply because Parliament has failed in its obligations to enact legislation, rules or legislative framework."

19. Additional reliance was placed in Matemu v Trusted Society of Human Rights Alliance & 5 others [2014] KESC 6 (KLR) and Jona & 87 others v Kenya Prison Service & 2 others [2021] KEHC 457 (KLR).

20. On the second issue, Counsel submitted that although the Respondent was challenging the receipt of the impugned email did not contest the email address to which the advance copy of the letter dated 4th February 2025 was sent. Nonetheless, Counsel submitted that the Respondent had also not contested receipt of the physical letter on 10th February 2025. Counsel urged the Court to determine the matter paying regard to Article 159(2)(d) of the *Constitution* which guides that justice should be administered without undue regard to procedural technicalities. Reliance was placed in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR where it was held that:

> " The general trend following the adoption of the overriding objectives and Article 159 of the *Constitution* is that the court now strives as much as possible to hear and determine disputes on merit."

Analysis and Determination

21. It is my considered opinion that the single issue that arises for determination is:

> Whether the Respondent's Preliminary Objection is merited.

22. The threshold of a Preliminary Objection was summarized in Parbat Siyani Construction Limited v Kenyatta International Convention Centre [2023] KEHC 1603 (KLR) where the Court citing the classic authorities stated as follows:

> " 54. This Court would wish to remind the parties that it is dealing with a preliminary objection. The validity of any preliminary objection is gauged against the requirement that it must raise pure points of law capable of disposing the dispute at once...
>
> 55. The foregoing nature of preliminary objections was discussed in Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd, (1969) EA 696 page 700 when the Court observed as follows: -
>
> > So far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop..."

23. Likewise, the Court in Dismas Wambola v Cabinet Secretary, Treasury & 5 others [2017] KEHC 8777 (KLR) observed as follows:

> "...a preliminary objection may only be raised on a "pure question of law." To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.
>
> In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts."

24. Going by the case law on what a Preliminary Objection entails, one deduces that a proper Preliminary Objection is identifiable by depiction of the following four major characteristics:

i. Must be on a pure point of law and not a contest of facts;

ii. it is argued on assumption that what is pleaded by the opposite side is correct;

iii. cannot be raised if any fact has to be ascertained by evidence or if what is sought is an exercise of judicial discretion;

iv. If successful, it must be capable of disposing of the entire suit .

25. Manifestly, the instant Preliminary Objection is fundamentally flawed. Firstly, it is expressed to be targeted at the Petitioner's Application dated 14th April, 2025; and not the entire Petition. It means even if it was to be argued successfully, the main Petition would remain intact. A proper Preliminary Objection does not function like its success should be capable of bringing to an end the entire suit. That is a major requirement that a properly raised legal objection should be able to fulfil as affirmed in Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA.

26. It is thus legally untenable to file a Preliminary Objection against an Interlocutory Application yet it cannot bring matter to an end even if it is argued successfully. In my view, the best approach assuming that there were legally viable grounds to be raised against the instant application would have possibly been to file grounds of opposition and not a Preliminary Objection.

27. Moreover, a P.O is raised on assumption that the facts as pleaded by the opposite party are correct. In the instant case, the proponent of the P.O is evidently contesting the electronic service via email by arguing that there was no evidence provided by the Petitioner that the email allegedly sent was received by the Respondent. In contesting the lack non-proof of service, Counsel for the Respondent argued as follows in his filed written submissions:

> "The further affidavit and annexure thereto does not demonstrate any delivery receipt or delivery status. The court has emphasized the importance of the delivery receipt in the Sifuna case (supra) holding that:
>
> > In regard to service of documents, the burden bearer is the one who asserts that he effected service. It is not the other way round. That is why the Rule 22B (4)

of the Civil Procedure Rules provides that the officer of the Court who effected service should file an Affidavit of Service accompanied with an attachment of "the Electronic Mail Service delivery receipt confirming service"

28. In response to this submission, the Petitioner in the written submissions replied:

> " There is no plausible reason provided by the Respondents to cast doubt as to whether the letter shared by email was received by the Respondent. The Respondent does not at any moment deny that the email sent on 4th February 2025 was received. The respondent only questions whether the evidence of the means of delivery was proper."

29. A proper preliminary objection cannot be raised in an environment where there is contestation of facts.

30. Consequently, I find that the Preliminary Objection dated 14th April, 2025 by the Respondent is misconceived for it falls short of meeting the legal threshold of a proper Preliminary Objection in law and is thus disallowed.

31. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF SEPTEMBER, 2025.

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L N MUGAMBI

JUDGE