Njeru v Neolife International Limited (Petition E259 of 2023) [2025] KEHC 12710 (KLR) (Constitutional and Human Rights) (18 September 2025) (Ruling)

Neutral citation: [2025] KEHC 12710 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E259 OF 2023

LN MUGAMBI, J

SEPTEMBER 18, 2025

BETWEEN

RUCETAH NJERU ..... PETITIONER

AND

NEOLIFE INTERNATIONAL LIMITED ..... RESPONDENT

RULING

Introduction

1. The matter before this Court revolves around the Respondent's Notice of Preliminary Objection dated 25th August 2023 which was later on amended on 9th October 2024.

2. The Preliminary Objection was filed in response to the Petition dated 15th March 2023. The dispute between the Petitioner and Respondent pertains a distributorship agreement that the Petitioner and her husband entered into and which it is alleged they breached its terms leading to its cancellation/ termination.

3. The Respondent thus filed a Preliminary objection against the Petition citing the following grounds, that:

    i. The grievances raised by the Petitioner arise from a contract that was executed between the parties therefore the dispute is purely contractual.

    ii. The petition offends the doctrine of constitutional avoidance which demands that a case should not be resolved by deciding a constitutional question if it can be resolved in another fashion.

iii. The contract that was executed between the parties provides that the laws of the Republic of South Africa would govern their relationship. This Court lacks jurisdiction to hear this matter.

iv. The Petition should therefore be struck out with costs.

Respondent's Submissions

4. In support of its Objection, the Respondent filed submissions dated 30th October 2023 and 22nd October 2024 through Hamilton Harrison & Matthews Advocates.

5. On a introductory note, Counsel submitted that 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 point may dispose of the suit as held in Mukisa Biscuit Manufacturing Co.LTD. Vs West End Distributors Ltd. (1969) EA 696.

6. Counsel submitted that a reading of the Petition shows that the dispute is strictly contractual as it relates to the legality or otherwise of termination of the distributorship agreement, which in essence offends the doctrine of constitutional avoidance. Reliance was placed in S v Mhlungu, 1995 (3) SA 867 (CC) where it was held that:

> " Would lay it down as a genera principle that where it is possible to decided any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."

7. Like dependence was placed in Communications Commission of Kenya & 5 others v. Royal Media Services Limited & 5 Others [2015] KESC 15 (KLR), Orange Demoractic Movement v Yusuf Ali Mohammed & 5 others [2018]eKLR and Roshanara Ebrahim v Ashleys Kenya Limited & 3 others [2016] eKLR.

8. Furthermore, Counsel submitted that no constitutional issue arises in the termination of the distributorship agreement between the parties. Considering this, Counsel stressed that nothing bars the Petitioner from filing a claim before the Commercial Division seeking damages for the alleged termination of the distributorship agreement. Reliance was placed in Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another [2016] eKLR where the Court of Appeal held that:

> " Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation."

9. Concerning application of South Africa laws to the Agreement, Counsel pointed out that the Petitioner does not dispute the Agreement dated 15th October 2001 which they entered into. That in the Agreement, Clause 15 clearly indicates that the Agreement between the Respondent and the Petitioner would be governed by the laws of South Africa. Counsel pointed out that this was clear from the beginning and as such this Court lacks jurisdiction to entertain the dispute as both parties agreed that they would be bound by the laws of South Africa. For this reason, Counsel argued that the Petitioner ought to have filed this suit in South Africa.

10. To buttress this point reliance was placed in Ndunda v Qatar Airways QCSC [2023] KEHC 22752 (KLR) where it was held that:

> " The fact that the petitioner was employed by the respondent is not in dispute. A perusal of the employment contract indicates that it was executed in Qatar Airways Tower in Doha Qatar. Clause 14 reads as follows:
>
> > 'This offer letter and your employment contract shall be governed by the Qatar Labour Law and all other applicable laws of the State of Qatar. Any dispute shall be referred to the Qatari Courts an shall be construed in accordance with Qatari laws.'
> >
> > ...
> >
> > The information she seeks is basically one that pertains to the employment period which according to the terms of the employment contract was governed by the laws of Qatar. She cannot thus invoke article 35 of *the Constitution* to demand the said documents. That contract ousted the jurisdiction of this court by defining the forum that was to govern matters arising or relating to the employment contract. This case is distinguishable from the PRS v Qatar Airways Case (supra) that was relied upon by the petitioner because the said case was for copyright infringement inflight by Qatar Airways."

Petitioner's Submissions

11. The Petitioner through BM Musau and Company Advocates LLP filed submissions dated 9th January 2024 and supplementary submissions dated 6th December 2024. Counsel highlighted that what is issue is: whether this Court has the Jurisdiction to hear and determine this Petition.

12. Counsel relied on decision of the Supreme Court in Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others (2012) eKLR on jurisdiction where the Court stated:

> " A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law".

13. Counsel submitted that the Distributorship Agreement was a unique contract as it provided for a disciplinary hearing process which is said to have been breached by the Respondent thus violating the Petitioner's constitutional rights. According to Counsel the key issue in the Petition is the acts and decisions of the Respondent during the disciplinary hearing. Counsel asserted that the Petitioner had

exhausted all the dispute resolution mechanisms set out in the Respondent's Policies and Procedures and therefore it was not possible for her grievances to be addressed under the contract between parties.

14. Counsel stated that the Petitioner in line with the principle in Anarita Karimi Njeru v Republic No.1 (1979) I KLR 54 and echoed in Mumo Matemo v Trusted Society of Human Rights Alliance (2013)eKLR is required to set out with particularity the specific right allegedly breached and how it was violated. Counsel submitted that the Petitioner in this matter had done so, making it manifest that this matter is a constitutional suit not a contractual one.

15. Contrary to the Respondent's allegation, Counsel submitted that the Petitioner in her further affidavit sworn on 5th April 2024 emphasized that the Petitioner had no intention to be bound by South African laws as the distributorship business was wholly performed in Kenya in accordance with the laws of Kenya. Counsel added that the laws applicable to all distributorships in Kenya are the Laws of Kenya.

16. Furthermore, Counsel noted that the Petitioner questioned the authenticity of the alleged Agreement as she noted it was missing the key requirement for signature against the conditions. This is because the conditions in the alleged Agreement require distributors to acquaint themselves with the laws applicable to marketing the Respondent's products in South Africa and yet the Petitioner signed up to market the products wholly in Kenya.

17. Counsel further urged that the distributorship application is not a stand-alone document and must be read together with the Respondent's Policies and Procedures. In this regard, Counsel submitted that Regulation 3 of the said Policies and Procedures provides that distributors must conduct their distributorship in compliance with all national laws and regulations which govern their business. As such, Counsel argued that there was no plausible reason advanced why the Petitioner would have agreed to be bound by the Laws of South Africa. On this premise Counsel argued that this Court has jurisdiction to entertain the suit.

18. Moreover, Counsel submitted that this Court has discretion to assume jurisdiction if there is a strong reason for overriding the jurisdiction clause in the contract. In this regard, Counsel submitted that the Petitioner is Kenyan citizen and the Respondent duly incorporated in Kenya entered into a distributorship agreement in Kenya. Similarly, that the distributorship business was wholly performed in Kenya. Furthermore that, the witnesses and the evidence for use in the trial are both readily available in Kenya thus referring the suit to South Africa will add to the expenses of the trial in travel costs for the Petitioner and witnesses.

19. Counsel also stated that if successful, the Petitioner will have to transfer the decree for execution against the Respondent in Kenya and have to face a challenge that it may not be executed in Kenya which is another possible long wrangle. Counsel on this basis argued that enforcement of the exclusive jurisdiction clause is unreasonable in the circumstances of this case.

20. Reliance was placed in United India Insurance Co. Ltd & 2 Others v East African Underwriters (Kenya) Ltd [1985] KLR 998 where it was held that:

> "The courts of this country have a discretion to assume jurisdiction over an agreement which is made to be performed in Kenya notwithstanding a clause therein conferring jurisdiction upon the courts of some other country. The exclusive jurisdiction clause however should normally be respected because the parties themselves freely fixed the forums for the settlement of their disputes; the court should carry out the intention of the parties and enforce the agreement made by them in accordance with the principle that a contractual undertaking should be honoured unless there is strong reason for not keeping them bound by their agreement...

Two of the principles established by the authorities mentioned by Brandon, J in The Eleftheria [1970] p. 94 at p 100 are

(a) in exercising its discretion the court should take into account all the circumstances of the particular case;

(b) in particular, but without prejudice to (a), the following matters, where they arise, may properly be regarded:-

(i) in what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the court of the country and the court of the foreign country.

(ii) whether the law of the foreign court applies, and if so, whether it differs from the law of the country in any material respects

(iii) with what country either party is connected, and how closely

(iv) whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantage

(v) whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would be deprived of security for their claim, be unable to enforce any judgment obtained, be faced with a time bar not applicable in their country."

21. Comparable dependence was placed in Emmanuel Fresco v Camusat Kenya Limited & Camusat Maurice Limited [2019] KEELRC 297 (KLR).

Analysis and Determination

22. Upon a careful perusal of the parties' pleadings and submissions the issue that arises for determination is:

Whether the Respondent's objection is merited.

23. What constitutes a preliminary objection was set out in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969) EA 696 and later emphasized by the Supreme Court in the 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".

24. 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.
>
> 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...."

25. Additionally, the observation in the Oraro vs. Mbaja [2005] KEHC 3182 (KLR) offers significant insight where the Court observed that:

> " 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 facts pleaded by the opposite side are correct. It cannot be raised if any fact is 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 costs and, on occasion confuse issues and this improper practice should stop... The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence....."

26. The Respondent relies wholly on the doctrine of Constitutional avoidance in its preliminary objection. The doctrine asserts that Courts should not invoke their constitutional jurisdiction in a case which can be decided on non-constitutional grounds, ordinary legal channels such as statutory provisions, common law principles or other settled legal principles. The Court in Council of County Governors vs Attorney General & 12 others [2018] KEHC 9670 (KLR) underscored this principle by stating 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.

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."

27. The principle was further expounded on by the Supreme Court in Communications Commission of Kenya & 5 others (supra) as follows:

> " (256) The appellants in this case are seeking to invoke the "principle of avoidance", also known as "constitutional avoidance". The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:
>
> > "I would lay it 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."
>
> (257) Similarly the U.S. Supreme Court has 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 (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936))."

28. Equally, in C O D & another vs Nairobi City Water & Sewerage Co. Ltd [2015] KEHC 7762 (KLR) the Court noted that:

> " 11. Similarly, in Papinder Kaur Atwal -vs- Manjit Singh Amrit Nairobi Petition No. 236 of 2011 where after considering several authorities on the issue, Justice Lenaola remarked as follows:
>
> > "All the authorities above would point to the fact that *the constitution* is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes..... I must add the following; Our Bill of Rights is robust. It has been hailed as one of the best in any Constitution in the World. Our Courts must interpret it [with] all the liberalism they can marshall. However, not every pain can be addressed through the Bill of Rights and alleged violation thereof." (Emphasis added)
>
> 12. The Supreme Court of India has also held that ordinary remedies available under common law and statutes must be pursued in the ordinary manner or

as provided under statute. For instance, in Re Application by Bahadur[1986] LRC (Const) the Court expressed itself as follows at page 307;

> "The Courts have said time and again that where infringements of rights are alleged which can be founded in a claim under substantive law, the proper course is to bring the claim under such law and not under *the Constitution*. This case highlights the un-wisdom of ignoring that advice.... *The Constitution* sets out to declare in general terms the fundamental concepts of justice and right that should guide and inform the law and the actions of men. While an infringement of *the Constitution* might in certain cases give rise to the redress provided for at section 14, yet, as has been proclaimed by the highest Court in the land, it is not, "a general substitute for the normal procedures for invoking judicial control of administrative action." (See Harrikissoon v A-G [1979] 3 WLR 62)...

15. *The Constitution* cannot be used as a general substitute for the normal procedures. The mere allegation that a human right has been contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the High Court under Article 165 of *the Constitution*: See Harrikissoon v A-G [1979] 3 WLR 62. Where it is possible to decide any case or dispute, civil or criminal, without reading a constitutional issue then that is the course that should be followed. The court sitting as a constitutional court must through the doctrine of avoidance steer clear of determining such disputes as if there were constitutional questions being raised: see S v Mhlungu[1995] 3 SA 867 (CC) and also Ashwander v Tennessee 297 US 288."

29. The preliminary objection is based on the claim that this Court's jurisdiction is ousted by the doctrine of constitutional avoidance because the Petition is founded on distributorship contract. The Respondent argues that it is not the citing of the constitutional provisions that makes a matter a constitutional issue.

30. The doctrine of constitutional avoidance ensures that the Court is not unnecessarily dragged into making a determination from a constitutional view-point when the foundations of the dispute are actually a statute or even common law principles that can sufficiently and properly provide a remedy instead of resorting to *the Constitution*. The doctrine is to the effect that where a dispute is one which can be determined under another area of law other than under *the Constitution*, then it is best that it be so determined and pure constitutional issues left to be determined as such.

31. The uncontested background in this case is that the relationship between the Petitioner and the Respondent stems from a commercial Distributorship Agreement. The Petitioner however argues that she did not have any intention to be bound by the laws of South Africa which dictate the distributorship Agreement and also being that the whole business was conducted in Kenya should as well be governed by the laws of Kenya. The Petitioner equally challenged the authenticity of the Agreement insisting that it was missing some of the key requirement such as the signature against the conditions.

32. To appreciate this claim, in need to refer to the Court of Appeal in Five Forty Aviation Limited v Erwan Lanoe [2019] KECA 763 (KLR) where the court needs as follows:

> " The position in law with regard to the binding nature of a contract executed willingly by the parties has now followed a well beaten path. In National Bank of Kenya Ltd versus Pipe Plastic Samkolit (K) Ltd & another [2011] eKLR, the Court was categorical that:
>
> > "it is clear beyond para adventure ,that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain."
> >
> > The Court in Pius Kimaiyo Langat versus Co-operative Bank of Kenya Ltd [2017] eKLR, after reviewing case law on the subject reiterated as follows:
> >
> > > "We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, Fraud or undue influence are pleaded and proved."

33. Similar sentiments were shared in Waithaka v Wanyoike [2024] KEHC 14060 (KLR) as follows:

> " That in the circumstances, the respondent cannot seek the intervention of the court to re-write the contract. She placed reliance on the case of County Government of Migori v Hope Self Help Group [2020] eKLR where the High Court cited the case of Civil Appeal No. 330 of 2003, Hussamudin Gulamhussein Pothiwalla administrator, Trustee and Executor of the Estate of Gulamhussein Ebraihim Pothiwalla -vs- Kidogo Basi Housing Cooperative Society Limited and 31 Others where the Court of Appeal stated that a court cannot rewrite a contract between parties, that ordinarily equity does not allow a party to escape from a bad bargain save for special case."

34. A perusal of the Petition clearly demonstrates that the alleged constitutional violations rotate around the contractual Agreement. In fact, the Petitioner, consistently maintained that the damage and suffering incurred was as a result of the terms and enforcement of the Distributorship Agreement. Taking this into consideration, it is evident that the substratum of the instant Petition stems from the contractual relationship between the Parties.

35. This Court must respect the binding nature of contractual Agreements and the freedom to enter into contracts where parties agree on how their relations shall be governed.

36. This is therefore a private dispute which is regulated by contractual terms and conditions of which civil remedies should be pursued. This is purely a commercial dispute that is camouflaged as a Constitutional Petition.

37. As was held in KKB v SCM & 5 Others [2022) KEHC 289 (KLR);

> " Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights."

38. Having regard to the foregoing, I find that the instant Petition offends the doctrine of Constitution avoidance. I uphold the Preliminary Objection. The Petition is thus struck out with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF SEPTEMBER, 2025.

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L N MUGAMBI

JUDGE