



**Opati v Safaricom Plc (Civil Suit E161 of 2023)
[2025] KEHC 12798 (KLR) (Civ) (18 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12798 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL SUIT E161 OF 2023**

**JN MULWA, J
SEPTEMBER 18, 2025**

BETWEEN

DAVID OPATI PLAINTIFF

AND

SAFARICOM PLC DEFENDANT

RULING

(On Preliminary Objection Dated 7/04/2025)

1. The Plaintiff herein filed this case against the Defendant by a plaint dated 11/09/2023 seeking damages allegedly arising from an unauthorized, illegal and unlawful use of his voice and image in commercial advertisements of its products being Mpesa products which he claims were never authorized and in particular, Mpesa Global Pay, and therefore violation of his data protection rights.
2. In its statement of defence dated 11/10/2023, the Defendant denied using the plaintiff's image or voice to advertise Mpesa Global Pay products and or uploading an advertisement of the Plaintiff marketing or publishing any of its products, stating that whatever it interviewed the plaintiff on was on his golf journey to which he had given his consent to the defendant to interview him and to take photographs of the player (Plaintiff) with his couch on the golf course, and therefore urged for the suit to be struck out.
3. By a Notice of Preliminary Objection(PO) dated 7/04/2025 the Defendant sought an order striking out the plaintiff's suit on the following grounds that:-
 1. This Honourable Court lacks jurisdiction to hear and entertain this suit as it offends the provisions of Sections 56 and 57 of the Data Protection Act (No. 24 of 2019) which designate the Office of the Data protection Commissioner as the primary authority responsible for handling complaints related to personal data protection, including image rights.



2. The plaintiff's suit is premature and unripe for determination by this honourable Court as the plaintiff has not invoked or exhausted the administrative avenues available in the Data Protection Act 2019 having failed to lodge a complaint with the Office of the Data Protection Commissioner first as provided under Section 56 of the Data Protection Act 2019.
3. The orders sought by the Plaintiff are statutory remedies available under Section 65 of the [Data Protection Act, 2019](#), and the Data Protection Commissioner has the jurisdiction to grant them. Accordingly, this Honourable court should discourage the invocation of the trial process where there is an alternative statutory remedy.
4. This ruling is therefore in respect of the Preliminary Objection to which parties have filed their respective submissions.

Defendant's Submissions

5. The Defendant's submissions in support of the Preliminary Objection are dated 9/07/2025 in which it raises jurisdictional objections to the suit being handled by this court in the first instant, citing the doctrine of exhaustion, and citing the old time decision in Mukisa Biscuit Manufacturing Co. Ltd. V. West End Distributors Ltd [1969] EA 695, and Owners of Motor Vessel "Lillian S" vs Caltex Oil Kenya Limited [1989] KLR for the holding that jurisdiction is everything and without it a court of law must down its tools.
6. Further, the defendant holds the view that the main claim by the Plaintiff being compensation for violation of privacy rights, the same ought to have been filed heard and determined by the Data Protection Commissioner whose jurisdiction is provided under Article 31 of [the Constitution](#) of Kenya and Section 8 of the Data Protection Act No. 24 of 2019.
7. The defendant further cited several superior court decisions wherein the courts rendered in common that where there are alternative avenues legally provided for dispute resolution, such avenues should be exhausted adequately before the matter is escalated to the High Court.
8. Among such decisions are the Court of Appeal decision in Kweri v. Beehive media Limited, Capwel Industries Limited (interested Party)[2023] KEHC 2684 (KLR); Geoffrey Muthiga Kabiru & 2 Others v. Samuel Munga Henry & 1756 others [2015] eKLR; and William Odhiambo Ramaogi & 3 Others V. Attorney general & 4 others; Muslims For Human Rights & 2 Others (Interested Parties)[2020].
9. In summation, the Defendant urged the court to find that the Data Protection Commission has the requisite jurisdiction to determine the dispute in the first instance based on Article 31 of [the constitution](#) and if successful provide for the remedies sought by the Plaintiff.

Plaintiff's Submissions

10. In opposition to the preliminary objection, the plaintiff filed submissions dated 19/08/2025 urging the court to find that the Preliminary Objection raises no pure points of law and therefore ought to be dismissed.
11. The plaintiff submits that its claim is not based on Sections 56 and 57 of the [Data Protection Act, 2019](#) as claimed by the Defendant; stating that what the defendant did was pirate a Citizen TV clip which it used as its own to promote its products during an international golf event, and therefore states that it was right to file its case in the High Court.



12. In support to above submissions, the plaintiff relied on the Mukisa Biscuits manufacturing Case (*supra*) to support its jurisdictional question as well as *Dorcas Mbath v. Kenya Power & Lighting Co. Ltd* [2017] eKLR.
13. On the doctrine of exhaustion, it is the plaintiff's case that it is alive to the exceptions of the doctrine and that court must undertake extensive analysis of the facts and regulatory schemes involved and the issues raised to determine whether an exception applies.
14. Cited decisions in the above regard are the cases of *Roy Trans motors Limited & Another v. Kenya Bureau of Standards* [2024] KEHC, for the proposition that Section 8(1) (f) of the Data Protection Act grants the Data Protection Commissioner power to receive and investigate any complaint on infringement of rights under the Act was intended to effect Article 31(c) & (d) of *the Constitution*,
15. Further, it is therefore urged that the doctrine of exhaustion does not preclude the High Court from entertaining the controversy in the case being based on infringement of fundamental rights under the Bill of Rights of privacy, which is the Plaintiffs claim against the Defendant.
16. Cited also, are the cases of *Ahmed Isaak Hassan v. Auditors General* [2015] eKLR wherein it was held that the right to human dignity is the foundation of all other rights and forms the basis for the enjoyment of all other rights, and *Royal Media Services Ltd. V. AG & 6 others* [2015] where the court held that only the High Court can interpret *the constitution*.
17. Additionally, the Plaintiff submits that the Preliminary Objection has no merit as the Defendant had violated his rights to privacy, human dignity to unjustly enriched itself stating that at stake is the plaintiff's violation of his rights in his private affairs which are protected under Article 28 and 31 of *the Constitution*, hence the High Court has jurisdiction to determine the case.

Issues For Determination

- i. Whether the Preliminary Objection raises a pure point of law
- ii. Whether the suit as filed offends Sections 56 and 57 of the Data Protection Act 2019.

Analysis and Determination

19. Data Protection Act No. 24 of 2019 was enacted to give effect to Article 31(c) and (d) of *the Constitution* and to establish the office of the Data Protection Commissioner, and to make provision for the regulations of the processing of personal data to provide for the rights of data subjects and obligations of data controllers and processors and for connected purposes.
20. The functions of the Data Commissioner are stated at Section 8. Of relevance herein is Section 8(1) (f) that allows the Data Commissioner to receive and investigate any complaint by any person on infringement of the rights under this Act.
21. Section 3 provides the object and purpose of the Act as hereunder:
 3.
 - (c) To protect the privacy of individuals; and
 - (d) Establish the legal and institutional mechanism to protect personal data; and
 - (e) to provide data subjects with rights and remedies to protect their personal data from processing that is not in accordance with this Act.



22. Section 25 provides for the principles of data protection that include:
- a. Processing in accordance with the right to privacy of the data subject;
 - b. Processed lawfully, fairly and in a transparent manner in relation to any data subject;
23. Of relevance in this case is Section 32; conditions for consent:-
1. A data controller or data processor shall bear the burden of proof establishing a data subjects consent to the processing of their personal data for a specified purpose.
 4. In determining whether consent was freely given, account shall be taken of whether among others, the performance of a contract including the provision of a service is conditional on consent to the processing of personal data that is not necessary for performance of the contract
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24. Section 37:- commercial use of data:
1. A personal shall not use for commercial purposes, personal data obtained pursuant to the provisions of this Act unless the person-
 - a. Has sought and obtained express consent from a data subject; or is
 - b. Authorized to do so under any written law and the data subject has been informed of such use when collecting the data from the subject data subject.
25. Additionally, the manner of enforcement of those provisions of the Data Protection Act are provided at Sections 56 and 57 thereof, including investigations of complaints and enforcement of its orders at Section 58.
26. Citation of the above provisions of the Act, in my view, are necessary as they form the basis upon which the court will be able to come to an informed finding as to the jurisdictional questions of the High Court to determine private violations of an individual's rights underpinned at Article 28 and 31 of [the Constitution](#) vis-à-vis the Data Protection Commission under the Act.
27. There is no dispute that the High Court is the court with original jurisdiction on the interpretation of [the Constitution](#). However, the object and purpose of the [Data Protection Act, 2019](#) was intended to effect Article 31 of [the Constitution](#) in respect of Protection of rights to privacy and violations thereof. The superior courts in the cases of Roy Transmotors Limited (Supra); Mathenge V. Julie Njuhi Muiruri (Supra) upheld the Data Commissioners powers to receive investigate any complaints, in the first instance, of infringement of private rights under Articles 31 (c) and (d) of [the Constitution](#).
28. Whereas I agree with the plaintiff that under very special circumstances the High Court is not excluded from entertaining such complaints, such special circumstances have not been demonstrated in this case by the Plaintiff to cloth this court with the special jurisdiction.
29. The doctrine of exhaustion has been discussed in numerous superior courts cases. In the case of Speaker of National Assembly v. Karume [1992] KLR 21, the Court of Appeal rendered 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 procedures provided by any law must be strictly adhered to since there are good reasons for such special circumstances”



30. Considering the relief sought by the Plaintiff in this suit, Section 37 of the Data Protection Act (reproduced earlier) would ably answer all questions in respect of the suit. These would include use of the plaintiff's voice and images for commercial purposes without his consent none and non-compliance with any contract in respect of the use of his voice and images, and if successful, the mode of enforcement of reliefs in respect of compensation which the Data Commissioner is duly empowered under Section 58 thereof.
31. Further, I fully concur with the holding in the case of Ahmed Isaack Hassan (supra) that the right to human dignity is the foundation of all other rights under *the constitution*, as well as the decision in the Royal Media Services Ltd C. AG and Six Others (supra), and that the enforcement of such fundamental rights have by the regulations provided at the Data Protection Act, by dint of its objects and purposes been granted to the Data Protection Commissioner. For all purposes and intent, the Commissioner is best suited to do all including investigations of complaints, hearing the same and enforcement.
32. In my view, the Data Commissioner has been empowered to actualize Article 28 and 31 of *the Constitution* where there are no special circumstances provided to find otherwise. For all purposes and intent, the office of the Data Protection Commissioner is most suited to handle complaints in the first instance, exhaust the process as aforesaid, and only thereafter would this court then assume jurisdiction on appeal.
33. Considering the relief sought by the Plaintiff in this suit, Section 37 of the Data Protection Act (reproduced earlier) would ably answer all questions in respect of the suit. These would include use of the plaintiff's voice and images for commercial purposes without his consent none and non-compliance with any contract in respect of the use of his voice and images, and if successful, the mode of enforcement of reliefs in respect of compensation which the Data Commissioner is duly empowered under Section 58 thereof.
34. The court is aware of the decisions in the matter of court's jurisdiction as stated in the Owners of Motor Vessel "Lillian S", and the Mukisa Biscuit Manufactures Ltd (supra). I need not reinstate them here.
35. Questions of similar nature to what is before this court were raised in the case of Kweri v. Beehive Media Services (Supra). Upon consideration, the court reiterated the holding in the court of Appeal case of the Speaker of National Assembly v. Karume (supra) that where there are alternative avenues legally provided for in a dispute resolution such avenues should be strictly adhered to unless it is demonstrated that the matter under consideration falls within the exception to the doctrine of exhaustion.
36. The court has already rendered itself that no demonstration of special circumstances have been had in this case, as ably held in the case of William Odhiambo Ramogi (supra)
37. Without further interrogation, I find and hold that this suit was prematurely filed in the High Court, which in the circumstances, ought to have filed before the data commissioner for determination and only be escalated to the High Court by any of the parties upon being aggrieved by the Data Commissioner decision by way of an appeal.
38. For the foregoing the result is that the Defendant's preliminary objection dated 7/04/2025 is upheld. The plaintiff's suit is struck out with costs to the Defendant.

Orders accordingly.

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

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JANET MULWA.



JUDGE

