



REPUBLIC OF KENYA



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**Sharifow v Agriculture and Food Authority; Habco Agencies Limited & another
(Interested Parties) (Petition E072 of 2022) [2025] KEHC 13177 (KLR)
(Constitutional and Human Rights) (19 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13177 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E072 OF 2022
LN MUGAMBI, J
SEPTEMBER 19, 2025**

BETWEEN

ABDIRAHID ABDUL SHARIFOW PETITIONER

AND

AGRICULTURE AND FOOD AUTHORITY RESPONDENT

AND

HABCO AGENCIES LIMITED INTERESTED PARTY

KIPEVU 3PL SUPPLY CHAIN LIMITED INTERESTED PARTY

RULING

Introduction

1. On 18th February 2022, the Petitioner brought the instant Petition against the Respondent in public interest, purporting that it unlawfully awarded and entered into a lease agreement with the Interested Parties for public property, without following the procedures outlined in the [Public Procurement and Asset Disposal Act](#) (PPADA).
2. The Respondent in rejoinder, filed its Notice of Preliminary Objection dated 31st May 2022 on the grounds that:
 - i. The jurisdiction of this Court has been prematurely invoked as the Petitioner has not exhausted the alternative remedy provided under Section 9(1)(h) and/or Section 167 as read with Section 170(c) of the [Public Procurement and Asset Disposal Act](#), 2015.



- ii. The Petition fails to illuminate constitutional issues for adjudication as it is a procurement dispute in substance and form to be resolved under the regime of the [Public Procurement and Asset Disposal Act](#), 2015.
- iii. The Petition also fails to enumerate the perceived constitutional violations as required under rule 10(2) (c) of [the Constitution](#) of Kenya (Fundamental Rights and Freedoms) Practice and Procedure Rules 2013.
- iv. The Orders sought in the application are also long overtaken by events since the Respondent already executed the leases on 17th February 2021 and any restraining order issued now will be otiose.
- v. The remedies sought in the application and the Petition are in nature and substance, judicial review writs of certiorari to quash the leases which orders ought to have been sought not later than six (6) months of the execution of the leases; thus, the application and Petition are time barred under Section 9(2) of the [Law Reform Act](#).
- vi. The application and Petition are therefore incurably defective, bad in law and ought to be struck out with costs.

Respondent's Submissions

3. The Respondent through its Counsel, Oundo Muriuki and Company Advocates filed submissions dated 8th March 2023 in support of its Preliminary Objection. The key issues for discussion were identified as: the non-exhaustion of the alternative remedy, the failure to particularize constitutional violation and delay.
4. On the first issue, Counsel submitted that the Petition is violates the doctrine of exhaustion remedies as there is an alternative remedy under the [Public Procurement and Asset Disposal Act](#) that the Petitioner disregarded.
5. Reliance was placed in Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR where it was held that:

“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. 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.”
6. Equal dependence was placed in Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex-parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR.
7. It was submitted that the Petition hinges around a claim that the Respondent did not adhere to the prescribed procedure for the disposal of assets as outlined in the [Public Procurement and Asset Disposal Act](#). It was argued that although the Petitioner cited a number of constitutional provisions, this is a dispute that ought to have been lodged before the Public Procurement Regulatory Authority or the Public Procurement Administrative Review Board.



8. To buttress this point dependence was placed in *Ezekiel Otieno v Funds Account Manager, Mathare National Constituency Development Fund & 2 others; Public Procurement Review Board & 12 others (Interested Parties)* [2022] eKLR where it was held that:

“27. The two bodies i.e. the Public Procurement Regulatory Authority and the Public Procurement Review Board have the technical officers to carry out the required investigations into complaints such as those raised by the petitioner herein. The petitioner never reported his complaints to the Regulatory Authority. Once a decision has been made by the Review Board an aggrieved party has the right to move to the High Court for Judicial Review... My finding is that the petitioner was not locked out from invoking the provisions under the Public Procurement Asset and Disposal Act and in particular sections 170(d), 174 and 175 of the said Act. I do not agree with the argument that the only recourse for the petitioner was the court.”

9. Comparable dependence was placed in *Environmental & Combustion Consultants Ltd v Kenya Pipeline Company Limited & 2 others* [2016] eKLR, *Abdalla Abubakar Miraj & another v Kenya Ferry Services Ltd* [2015] eKLR and *John Kakindu Makau v County Government of Makeni & 6 others* [2018] eKLR.

10. On the second, issue Counsel submitted that the Petitioner had failed to articulate the manner of violation of the provisions of *the Constitution* which the Respondent is alleged to have violated. It was argued that this omission offends Rule 10(2)(c) of *the Constitution* of Kenya (Fundamental Rights and Freedoms) Practice and Procedure Rules, 2013. Reliance was also placed in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR where it was held that:

“Was the principle in *Anarita Karimi Njeru* case requiring that constitutional petitions be pleaded with reasonable precision properly applied by the High Court?

(39) The issue was raised that the 1st respondent had omitted to frame their case or complaint with precision as required under the High Court’s pronouncement in *Anarita Karimi Njeru v The Republic* (1976-1980) KLR 1272. Counsel for the appellant submitted that the petition failed the requirement as it did not state the alleged constitutional provisions violated and the acts or omissions complained of with reasonable precision. Apart from citing omnibus provisions of *the Constitution*, the petition provided neither particulars of the alleged complaints, the manner of alleged infringements or the jurisdictional basis of the action before the court. He maintained that such failure to draft the petition with precision had prejudiced the appellant and the other respondents.”

11. On the final issue, Counsel submitted that the orders sought in the application are long overtaken by events since the Respondent had long executed the leases by the 17th February 2021 and thus this matter now moot.

12. Furthermore, Counsel submitted that the remedies sought in the application and the Petition are judicial review writs of certiorari which orders ought to have been sought not later than six (6) months of execution of the leases. As such, Counsel submitted that, the application and the Petition are time barred under Section 9(2) of the *Law Reform Act*.



13. Reliance was placed in Republic v Council of Legal Education & another Ex parte Sabiha Kassamia & another [2018] KLR where it was held that:

“The above provisions have been the subject of numerous judicial determinations in this county. In *Ako vs Special District Commissioner, Kisumu & Another* cited by Mr. Oduor, the Court of Appeal was emphatic that “it is plain that under sub-section (3) of section 9 of the *Law Reform Act* leave shall not be granted unless application for leave is made inside six months after the date of the judgment.” The Court of Appeal proceeded to hold that the prohibition is statutory and is not therefore challengeable under procedural provisions of the Civil Procedure Rules, which permits for enlargement of time.”

14. Like dependence was placed in *Peter Odoyo & another v Kenya National Highways Authority & 2 others; Council of Governors (Interested Party)* [2021] eKLR.

Petitioner’s Submissions

15. In opposition to the Notice of Preliminary Objection, the Petitioner through Ondabu and Company Advocates filed submissions dated 24th March 2025.
16. On the Respondent’s objection on failure to exhaust the mechanisms under Section 9(1)(h) and Section 167 as read with Section 170(c) of the *Public Procurement and Asset Disposal Act* 2015, Counsel submitted that the argument was misplaced as the Petition concerns constitutional violations which take precedence over the statutory remedies provided under the *Public Procurement and Asset Disposal Act*. Counsel added that the doctrine of exhaustion is not absolute and either way does not apply to constitutional petitions.
17. Equally, Counsel stressed that judicial review proceedings under the *Public Procurement and Asset Disposal Act* do not preclude the Petitioner from invoking this Court’s constitutional jurisdiction, especially where fundamental rights are involved.
18. On the objection that the Petition does not raise constitutional issues, Counsel submitted that the issues raised herein are constitutional in nature. Counsel emphasized that public interest litigation is designed to protect the public from unlawful or unconstitutional actions by state organs and thus not limited by procedural technicalities, such as the doctrine of exhaustion.
19. Counsel pointed out that the Petitioner had brought the matter under Article 258 of *the Constitution* to ensure that public resources are managed in accordance with *the Constitution*. In the same manner, Counsel submitted that the Petition complies with Rule 10(2)(c) of *the Constitution* of Kenya (Fundamental Rights and Freedoms) Practice and Procedure Rules as outlines the specific constitutional rights that have been violated by the Respondent.
20. Counsel further submitted that the orders sought are not moot as advanced by the Respondent. This is because the mere execution of the leases does not preclude this Court from granting appropriate remedies, especially if it is found that the leases were executed in violation of the Petitioner’s constitutional rights. In Counsel’s view, the Petition primarily challenges the legality and constitutionality of the leases and as such, the orders sought are not overtaken by events.
21. Equally, Counsel submitted that the Petition is not time barred as addresses constitutional violations not judicial review reliefs. Counsel noted that the time limits under the *Law Reform Act* specifically apply to judicial review proceedings and not to constitutional petitions.



22. To buttress these arguments Counsel relied in *Trusted Society of Human Rights Alliance v. Attorney General & 2 Others* [2012] eKLR where it was held that:

“Public interest litigation is a mechanism for enforcing constitutional rights and ensuring accountability in the management of public resources. The Court emphasized that technicalities, such as the exhaustion of alternative remedies, should not bar access to justice in public interest cases.”

23. Like dependence was placed in *Okiya Omtatah Okoiti v. Attorney General & 3 Others* [2017] eKLR and *Communications Commission of Kenya & 5 Others v. Royal Media Services Limited & 5 Others* [2014]eKLR.

Analysis and Determination

24. The only issue for determination here is:

Whether the Respondent’s Preliminary Objection is merited.

25. 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 upon review of various 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. It is, therefore, mandatory for a Court to ascertain that a preliminary objection is not caught up within the realm of factual issues that would necessitate the calling of evidence.

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...”

26. Further, in *Dismas Wambola v Cabinet Secretary, Treasury & 5 others [2017] KEHC 877(KLR)* held:

“...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.”

27. The doctrine of exhaustion compels a person seeking judicial relief to first and foremost exhaust any statutorily provided administrative reliefs before approaching the Court for redress. This principle received judicial approval in the Supreme Court decision of *Waity vs Independent Electoral & Boundaries Commission And Three Others [2019] KESC 54 (KLR)* where the Supreme Court restated the principle thus:

“(63) Where *the Constitution* or the law, consciously confers jurisdiction to resolve a dispute, on an organ other than a court of law, it is imperative that such dispute resolution mechanism, be exhausted before approaching the latter. Were it not so, parties would bide their time, overlooking the recognized forums, and later springing a complaint at the courts. Such a scenario would be a clear recipe for forum shopping, an undertaking that must never be allowed to fester in the administration of justice. We are fortified in this regard, by the persuasive authority by the Court of Appeal, in *Geoffrey Muthinja Kabiru & 2 Others; [2015] eKLR*; wherein the Appellate Court observed:

“It is imperative that where a dispute resolution mechanism exists outside the Courts, the same be exhausted before the jurisdiction of the Courts be invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...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 the Courts.”

28. The Supreme Court re-emphasized the principle yet again in *Mumba & 7 others (Sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Munyao & 148 others (Suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) [2019] KESC 83 (KLR)* by stating as follows:

“...We hold that if indeed the appellant had any dispute with the RBA, he ought to have followed the route prescribed by the RBA, before proceeding to the High Court. We hold like the court below, and for the reasons we have given, that the appellant’s petition lacked merit and was for dismissal.”

(118) In the pursuit of such sound legal principles, it is our disposition that disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.

(119) Such a deferred jurisdiction and the postponement of judicial intervention and reliefs until the mandated statutory or constitutional bodies take action



rests, not alone on the disinclination of the judiciary to interfere with the exercise of the statutory or any administrative powers, but on the fact of a legal presumption that no harm can result if the decision maker acts upon a claim or grievance. Such formulation underlies the analogous cases, frequently cited for the exhaustion doctrine, in which the court refuses to enjoin an administrative official from performing his statutory duties on the ground that until he has acted the complainant can show no more than an apprehension that he will perform his duty wrongly, a fear that courts will not allay. Such cases may be expressed in the formula that judicial intervention is premature in the absence of administrative action.”

29. The Respondent vehemently contended that this is a public procurement dispute and that redress should have been sought under the relevant provisions of the *Public Procurement and Asset Disposal Act*.
30. Section 27 of the Act establishes the Review Board and assigns it the functions and powers specified under Section 28 as follows:
 - a. The functions of the Review Board shall be—
 - i. reviewing, hearing and determining tendering and asset disposal disputes; and
 - ii. to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.
 - b. In performance of its functions under subsection (1)(a) of this section, the Review Board shall have powers to develop rules and procedures to be gazetted by the Cabinet Secretary.
 - c. The Authority shall provide secretariat and administrative services to the Review Board.
31. The procedure for review under the Act is as outlined as follows:

Section 167 - Request for a review

- (1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.
- (2) A request for review shall be accompanied by such refundable deposit as may be prescribed in the regulations, and such deposit shall not be less than ten per cent of the cost of the contract:

Provided that this shall not apply to tenders reserved for women, youth, persons with disabilities and other disadvantaged groups.
- (3) A request for review shall be heard and determined in an open forum unless the matter at hand is likely to compromise national security or the review procedure.
- (4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—



- a. the choice of a procurement method;
- b. a termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act; and
- c. where a contract is signed in accordance with section 135 of this Act.

Section 170 - Parties to review

The parties to a review shall be—

- a. the person who requested the review;
- b. the accounting officer of a procuring entity;
- c. the tenderer notified as successful by the procuring entity; and
- d. such other persons as the Review Board may determine.

Section 173C - Powers of Review Board

Upon completing a review, the Review Board may do any one or more of the following—

- a. annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;
- b. give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;
- c. substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;
- d. order the payment of costs as between parties to the review in accordance with the scale as prescribed; and
- e. order termination of the procurement process and commencement of a new procurement process.

Section 175 - Right to judicial review to procurement

A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.

32. A thorough reading of the instant Petition and its Supporting affidavit shows that the Petitioner's chief grievance is the Respondent's decision to award the impugned tender to the Interested parties, hence seeks reliefs that:
 - a. This Court be pleased to remove to this Court and quash the decision of the Respondent to lease LR. No. 209/10537 by the way of long-term lease to the 1st and 2nd Interested Parties.
 - b. This Court do declare that the Respondent's decision to lease LR. No. 209/10537 by the way of long term lease to the 1st and 2nd Interested Party is in contravention of Article Articles 10(2) (a)(b) & (c) and 61 of *The Constitution*.



- c. This Court do declare that the Respondent's decision to lease LR. No. 209/10537 by the way of long-term lease to the 1st and 2nd Interested Parties offends Article 17(1) of The Universal Declaration of Human Rights and Article 14 of the Commission on Human and Peoples' Rights.
 - d. This Court do award the Petitioner general damages.
33. Manifestly, although this suit is brought as a Constitutional Petition alleging violation of constitutional rights, it is crystal clear that the main challenge that defines the dispute is the procurement process whose redress should have been sought under the provisions of the Public Procurement and Asset Disposal Act to determine if the impugned leases were validly procured. The Petitioner's attempt to elevate a purely statutory procedure into a Constitutional dispute must thus inescapably fail. As was held in nC O D & another vs Nairobi City Water & Sewerage Co. Ltd (2015) eKLR:
- “ 14. The law above is crystal clear that where there exist sufficient and adequate mechanisms or forums to deal with a specific issue or dispute by other designated constitutional organs or under a statute, the jurisdiction of the High Court under Article 165(3) (b) of the Constitution should not be invoked until such mechanisms have been exhausted. To my mind therefore, not every litigant ought to come to court by way of a constitutional petition even where there are no constitutional issue arising and where there are adequate remedies provided in other laws to determine such situations.
 - 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...”
34. The Petitioner herein was required ensure utilization of the primary mechanism set out in the Act before approaching the Court for a remedy. This Petition is thus misplaced for offending the doctrine of exhaustion of remedies and cannot therefore proceed further. The Court must down its tools at this juncture and need not consider any other issue as this is a jurisdictional question.
35. The Preliminary Objection succeeds. The Petition is struck out with costs to the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF SEPTEMBER, 2025.

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L N MUGAMBI

JUDGE

