Osman v Registrar of Political Parties & another (Petition E180 of 2023)
[2024] KEHC 614 (KLR) (Constitutional and Human Rights) (1 February 2024) (Ruling)

Neutral citation: [2024] KEHC 614 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E180 OF 2023

LN MUGAMBI, J

FEBRUARY 1, 2024

BETWEEN

HASSAN ADEN OSMAN ..... PETITIONER

AND

REGISTRAR OF POLITICAL PARTIES ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

RULING

1. The petition is dated 30th May, 2023. The main grievance by the Petitioner is the alleged violation of the right of Access to Information under Article 35(1) (b) of *the Constitution*.

2. The filing of this Petition can be traced to a request for information by the Petitioner through a letter dated 4th May, 2023 to the 1st Respondent. The letter was received by the 1st Respondent on 5th May, 2023.

3. The 1st Respondent responded through the letter dated 10th May, 2023, in which it declined to provide the information requested and instead directed the 1st respondent to apply for those documents from Jubilee Party. The petitioner stated that his previous attempt to get the documents from Jubilee Party had been met with opposition by the Jubilee Party and was the subject of a dispute between him and the Jubilee Party at the Political Parties Dispute Tribunal in E007 of 2023 which was even denying his Party membership.

4. The Petitioner thus directed his Advocate to write another letter to the 1st Respondent on 23/5/23 detailing this frustration in his attempt to get the information from Jubilee Party and insisting on the supply of the said information by the 1st Respondent but this latter letter was not responded to by the 1st Respondent.

5. The thus asserted that the failure and/or refusal to supply the information requested vide letter dated 4th May, 2023 by 1st Respondent was a violation and infringement of petitioner's rights of Access to Information as envisioned in Article 35 (1) of the Constitutional of Kenya.

6. The petitioner thus sought the following reliefs: -

   a) A declaration that the failure by the 1st Respondent to provide information sought under Article 35(1) on the basis of the petitioner's request dated 4th and 23rd May, 2023 is a violation of the right to access information.

   b) That this Honourable Tribunal do order the 1st Respondent Registrar of Political Parties not to effect any changes emanating from any Special Delegates Convention of the Jubilee Party of 22nd May, 2023 in any other National Delegates Convention.

   c) A declaration that the failure by the 1st respondent to provide information sought under Article 35(1)(a) on the basis of the petitioner's request dated 4th and 23rd May, 2023 is a violation of Article 10 of *the Constitution* specifically the values of the role of law, participations of the people, human rights good governance transparency and accountability.

   d) A declaration that failure by the 1st Respondent to provide information sought under Article 35(1)(a) Article 35(3) is a violation of the obligations imposed on the said respondents by chapter six specifically Articles 73(1) and 75(1) of *the Constitution* and section 3 of the *leadership and integrity Act* and sections 8, 9 and 10 of the Public Officers Ethics Act.

   e) An order of mandamus compelling the 1st Respondent to forthwith the information sought by the petitioner in his Advocates letter to the 1st respondent dated 4th and 23rd May, 2023.

   f) An order does issue that 1st Respondent to pay compensation to the Petitioner for violation of his right of access to information under Article 35 of *the Constitution*.

   g) An order do issue to the 1st Respondent to report to court on the status of compliance within a stipulated time period.

   h) A declaration that the Respondents is in breach of Article 35(1)(b) of *the Constitution* of Kenya 2010 by failing, refusing and or neglecting to provide the Petitioner with information requested for vide the letter dated 4th and 23rd May, 2023, addressed to the 1st Respondent by the Petitioner's Advocates.

   i) In an alternative, a Prohibitory Order do issue prohibiting the 1st Respondent from neglecting and or violating Article 35(1)(b) of *the Constitution* of Kenya by failing, neglecting, and or refusing to supply, furnish and or avail information and copies of public documents asked for or demanded for through a letter dated 4th May, 2023 and 23rd May, 2023 addressed to the 1st Respondent by the Petitioner's Advocates..

   j) Costs of this Petition and interests thereon.

   k) Any other and further relief that this Honourable court may deem just and fit to grant in the circumstances.

7. The 1st Respondent filed a Notice of Preliminary Objection dated 13th July, 2024 seeking to have the Petition struck out on the following grounds:

   1. That this honourable court's jurisdiction is delayed in the basis of legal doctrine of exhaustion.

2. That the honourable court does not have jurisdiction on account of Section 9, 20, 34, 40 (f) and 41 (2) of the *Political Parties Act*, 2011.

3. The Honourable Court lacks jurisdiction on account of Sections 6, 14 and 21 of *Access to Information Act*, 2016.

8. The 1st Respondent filed written submissions dated 13th October, 2023 through its Advocates Wafula Wakoko.

9. In his submissions, the advocate for the 1st Respondent submitted broadly on the concept of jurisdiction before narrowing to the doctrine of exhaustion. As is the norm, the locus classicus case of Motor Vessel "Lilians" Vs Caltex Oil (Kenya) Ltd (1989) eKLR featured prominently in his discussion on jurisdiction. He also referred to the case of Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Ltd 7 Others (2012) eKLR which is a Supreme Court of Kenya decision where it was held that a Court of Law can only exercise jurisdiction as conferred by Constitution or written law and cannot expand its jurisdiction through craftmanship or innovation.

10. Venturing into the doctrine of exhaustion, Mr. Wakoko contended that where clear path of dispute settlement exists outside courts, that principle requires that route before one approaches the court for a judicial relief. He relied on the Court of Appeal decision of Speaker of National Assembly Vs James Njenga Karume (1992) KLR 21, in which the court expounded the principle as follows: -

> " ...where there is a clear procedure for the redress of any particular grievance prescribed by Constitution or an Act of Parliament, that procedure should be strictly followed.... Since there are good reasons for such procedures..."

11. Counsel submitted that the procedure for addressing grievances against the decision of the 1st Respondent was the *political parties Act*, 2011 and cited Sections 9, 10, 34 and 40 (1). He pointed out that there were no special circumstances had been demonstrated to exempt the Petitioner from complying with the laid down dispute resolution mechanism in the *Political Parties Act*.

12. Alternatively, the 1st Respondent contended that if for any reason, the provisions of the *Political Parties Act* are insufficient, then there was the *Access to Information Act*, No. 31 of 2016 which the petitioner could resort to have the dispute solved.

13. The 1st Respondent cited Section 6 (5) of the *Access to Information act* and asserted that the 1st Respondent was not obliged to supply the information requested because it was reasonably accessible through other means that the Petitioner could deploy.

14. Further, that the Petitioner had not applied for review of the decision by the Commission on Administrative Justice pursuant to Section 14 on the basis the alleged failure or refusal by the 1st Respondent to supply him with the information he had sought which has powers under Section 21 to investigate violations of the right of access to information.

15. The 1st Respondent castigated the petitioner for dressing up this dispute as a constitutional matter so as to involve the Court instead of having settled through the alternatives mechanisms that are available. The Respondent cited various court decisions where the exhaustion principle has been upheld. The cases included Rich Production Limited Vs Kenya Pipeline Company & Another (2014) eKLR where Mumbi J, remarked:

> " The reason why *the Constitution* and the law establish different institutions and mechanism for dispute resolution in different sectors is to ensure that such disputes as may arise are

resolved by those with the technical competence and the jurisdiction to deal with them. While the Court retains the inherent and wide jurisdiction under Article 165 to supervise bodies such as the 2nd respondent, such supervision is limited in various respects which I need not go into here. Suffice to say that it cannot exercise such jurisdiction in circumstances where the parties before it seek to avoid the mechanisms and process provided by law, and convert the issue into constitutional issues when it is not..."

16. Others were: Geoffrey Muthiga Kabiru & 2 others Vs Samuel Munga Henry & 1756 Others (2015) eKLR and Francis Gitau Parsimei & 2 others Vs National alliance party and 4 Others – Constitutional Petition No. 356 of 2012.

17. Finally, the 1st Respondent summarized his submissions by highlighting the features that define a Preliminary Objection as explained in the case of Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) E.A. 69; naming them as follows:

    i. It must be on a pure point of law.

    ii. It is argued on assumption that all facts pleaded by the other side are correct.

    iii. It cannot be raised by any fact has to be ascertained or what is sought is the exercising of Judicial discretion, and

    iv. Once raised, the preliminary objection should have potential to dispose the suit at that point without the need to go for the trial.

18. Counsel for the Petitioner contended that the instant preliminary objection met this legal threshold and urged this Court to uphold it.

Petitioner's Submissions to the Preliminary Objection

19. In Reply, the Petitioner's Advocates, Mr. Hassan N. Lakicha filed submissions dated 18th July, 2023.

20. Counsel reviewed the law relating to preliminary objections extensively. He distinguished the difference between a point of law and a point of fact explaining that a point of law is answered by applying relevant legal principles to interpretation of the law whereas point of fact is a question that must be answered by reference to facts and evidence.

21. Counsel for the petitioner likewise relied on Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Limited (1969) EA 696 and Dismas Wambola Vs Cabinet Secretary Treasury & 5 Others (2017) eKLR to buttress his submissions on what in law constitutes a preliminary objection.

22. Further, Counsel navigated through the jurisdictional question and just like the respondents, cited the case of Owners of the Motor Vessel Lillian 'S' Vs Caltex Oil (Kenya) Ltd 1989 KLR 1 quoting th famous words by Nyarangi, J.A's that:

> "...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction..."

23. Counsel referred to the court to the definition of jurisdiction in Halsbury's laws of England (4th Edition Vol. 9) and Blacks Law, 9th Edition and the further elaboration of the same through case law citing the

case of Samuel Kamau Macharia Vs Kenya Commercial Bank Ltd & 2 Others, Civil Application No. 2 of 2011, Jamal Salim Vs Yusuf Abdulahi Abdi & Another (2018) eKLR where the court said:

> " 2) The jurisdiction either exists or does not ab initio ...
>
> 3) Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.
>
> 4) Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal..."

24. He also made reference to Orange Democratic Movement Vs Yusuf Ali Mohammed & 5 others (2018) eKLR, where the Court of Appeal held: -

> "...party cannot through its pleadings confer jurisdiction to a court when none exists. In this context, a party cannot through draftsmanship and legal craftsmanship couch and convert an election petition into a constitutional petition and confer jurisdiction upon the High Court. Jurisdiction is conferred by law not through pleading and legal draftsmanship. It is both the substance of the claim and relief sought that determines the jurisdictional competence of a court..."

25. Submitting on the exhaustion principle, the Petitioner's advocate argued that this doctrine may be a complete bar to a court action but only in instances where exceptions did not apply. He relied on the case of William Odhiambo Ramogi & 3 Others Vs Attorney General & 4 Others, Muslim for Human Rights and 2 Others (Interested parties) (2021) eKLR; Speaker of National Assembly Vs Karume (1992) KLR 21 and Geoffrey Muthiga Kabiru & 2 Others Vs Samuel Munga Henry & 1756 Others (2015) eKLR in support of that contention.

26. According to counsel, exceptions to this principle of exhaustion would apply where the court finds that upon analysis of facts, the regularity of the scheme involved, the appeal mechanism available, including public interest; the exhaustion requirement would not serve the values enshrined in *the Constitution* or law.

27. The 2nd exception is if the court considers that the valid grievances for parties would not get adequate audience before the forum created by the statute or that parties may lack quality audience before that forum. See Kenya Ports Authority Vs William Odhiambo Ramogi & 8 Others (2019) eKLR and Fleur Investments Limited v Commissioner of Domestic Taxes & Another [2018].

28. Applying principles articulated in his submissions to the present petition, the Petitioner's Advocate contended that the request by counsel on behalf of the Petitioner for supply of documents by the 1st Respondent was done through the letter of 4th and a further letter of 23rd May, 2023 but the 1st Respondent did not supply the Petitioner with the information requested.

29. He argued that this court has jurisdiction under Article 165 (3) (b) to determine the question whether a fundamental freedom in the bill of Rights has been denied, violated, infringed or threatened. That although the law requires a public entity to respond to the request within 21 days, the 1st Respondent ignored the law yet it was under Constitutional obligation to give access to that information to the petitioner thereby violating Article 35 of *the Constitution*.

30. On whether the Petitioner is barred by the doctrine of exhaustion, counsel pointed out that the doctrine has no application in this particular case which concerns enforcement of fundamental rights

or freedoms hence a preserve of the High Court. Citing the case of Katiba Institute Vs President's Delivery Unit & 3 Others (2017) eKLR he emphasized the fact that the court in that case held that Section 21 of *Access to Information Act* did not make it a condition precedent that procedure in the Act must be followed before the High Court can be moved to deal with the violation of right of Access to Information under article 35 of *the Constitution* reasoning as a High Court it had unlimited jurisdiction under Article 165 (3) (b) of *the Constitution*.

Analysis and Determination

31. Having regard to the submissions made by both sides, it is apparent that the dominant issue in this ruling for consideration is whether the doctrine of exhaustion applies in this case to bar this Court from entertaining this Petition.

32. The heart of the Petitioner's argument is that this Petition relates to violation of rights and freedoms being denial of to access information under Article 35 (1) (b) hence falls squarely within the jurisdiction of the court as provided for in Article 165 (3) (b) of *the Constitution*.

33. The exhaustion doctrine must be understood; the doctrine does not deny the existence of the court's jurisdiction in the broad sense, but in the strict sense, in that broadly, the court has jurisdiction but in the strict sense, the court acknowledges the existence of other institutions or mechanisms that have put place by law to facilitate dispute resolution before a party can approach the court for a judicial relief. Black's Law Dictionary 10th Edition explains what "exhaustion of remedies" means as follows:

> " The doctrine that if an administrative remedy is provided by statute, a claimant must seek relief from the administrative body before judicial relief is available. The doctrine purpose is to maintain comity between courts and administrative agencies and to ensure that courts will not be burdened by cases in which judicial relief is unnecessary – also termed exhaustion of remedies doctrine, exhaustion of administrative remedies; exhaustion doctrine"

34. Arising from the above, it obvious that mean that the court jurisdiction is not ousted absolutely, it is only delayed to allow parties exhaust the available administrative remedies before approaching the court for the remedy which can be obtained in those other forums provided for in law.

35. This principle has received judicial interpretation and application by Kenyan Courts in many decisions as demonstrated by various cases cited by both parties.

In Albert Chaurembo Mumba & 7 Others vs Maurice Munyao & 148 Others (2019) eKLR the court held:

> "... it is our disposition that disputes disguised and pleaded with obvious intention of attracting the jurisdiction by Supreme Court is not a substitute for known legal procedures.... Even where Superior Courts had jurisdiction to determine profound questions of law, doctrine of exhaustion is indeed Article 159 (c) of *the Constitution* which acknowledges and advocates the use of alternative dispute resolution mechanisms in settlement of disputes..."

36. The definitive question that needs to be answered therefore is whether the instant petition violates the doctrine of exhaustion as urged by the Respondent and vehemently opposed by the Petitioner.

37. This being a matter that principally touches on the right of access to information, it is my considered view that the provisions of the *Political Parties Act* are secondary to the main issue and thus the relevant

law to consider is *the Constitution* and the *Access to Information Act* No. 31 of 2016 which directly relate to the issues at hand.

38. Article 35 of Constitution provides:

Access to information

(1) Every citizen has the right of access to:

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

(3) The State shall publish and publicise any important information affecting the nation.

39. The *Access to Information Act* No. 31 of 2016 was created to breathe life to the Right of Access to information. The preamble states that it is "An Act of Parliament to give effect to Article 35 of *the Constitution*; to confer to the Commission on Administrative Justice the oversight and enforcement functions and powers and for connected purposes"

The Act contains objectives set out in Section 3 as follows:

a. Give effect to the right of Access to Information by Citizen under Article 35 of *the Constitution*.

b. Provide framework for public and private entities and provide bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles

c. Provide a framework to facilitate access to information held by private bodies in compliance with any right protected by *the Constitution* and any other law

d. Promote routine and systematic information disclosure by public entities and private bodies on constitutional principles relating to accountability, transparency and public participation and access to information

e. Provide for the protection of persons who disclose information of public interest in good faith; and

f. Provide framework to facilitate public education on the right to access information under the Act.

40. Under Section 9(1) of the Act, when an application for information is made, a decision to that application is to be made to the person that sought this information as soon as possible but not more than 21 days.

S. 9 (1) Subject to Section 10, a public officer shall make a decision on an application as soon as possible, but in any event, within twenty- one days of receipt of the application.

41. The nature of the response will determine if the applicant can invoke the provisions of section 14 as the applicant can apply in writing to the Commission on Administrative Justice seeking to have decisions of any public or private entity reviewed in relation to a request for access to information.

42. Under Section 23 (2) of the Act, the Commission may, if satisfied that there has been an infringement of the provisions of the Act, order-

a. The release of any information withheld unlawfully

b. Recommendation for the payment of compensation; or

c. Any lawful remedy or redress

Under Section 23 (3): a person who is not satisfied with an order of made by the Commission under sub-section 2 may appeal to the High Court within twenty-one days from the date the order was made.

43. Section 14:

1. Subject to subsection (2), an applicant may apply in writing to the Commission requesting a review of any of the following decisions of a public entity or private body in relation to a request for access to information;

    a. a decision refusing to grant access to the information applied for;

    b. a decision granting access to information in edited form;

    c. a decision purporting to grant access, but not actually granting the access in accordance with an application;

    d. a decision to defer providing the access to information;

    e. a decision relating to imposition of a fee or the amount of the fee;

    f. a decision relating to the remission of a prescribed application fee;

    g. a decision to grant access to information only to a specified person; or

    h. a decision refusing to correct, update or annotate a record of personal information in accordance with an application made under Section 13.

2. An application under subsection (1) shall be made within thirty days, or such further period as the Commission may allow, from the day on which the decision is notified to the applicant.

3. The Commission may, on its own initiative or upon request by any person, review a decision by a public entity refusing to publish information that it is required to publish under this Act.

4. The procedure for submitting a request for a review by the Commission shall be the same as the procedure for lodging complaints with the Commission stipulated under Section 22 of this Act or as prescribed by the Commission.

44. In the instant case, the uncontested facts are the petitioner by letter dated 4th May, 2023 applied to be 1st Respondent to be furnished with the information contained in the said letter. The letter was received on 5th May, 2023 at the offices of the 1st Respondent (9 public entity). By a letter dated 10th May, 2023, the 1st Respondent declined to supply the documents the Petitioner had applied for and instead referred him to the Jubilee Party which according to the Petitioner was already frustrating him by refusing to give him that information by denying that he was not a party member.

45. He thus asked his Advocate to write a letter dated 23rd May, 2023 protesting the response but still no documents were supplied to him.

46. From these facts, the response by the 1st Respondent was a refusal because it did not say it never had information; it simply refused to give the information and directed the Petitioner to Jubilee Party. As for the second letter of 23/5/2023; there was no reply at all.

47. Under Section 9 (6) of the Act, where the applicant does not receive a response to an application within the period stated in sub-section (1), the application shall be deemed to have been rejected.

48. In essence therefore, the Petitioner's application was thus rejected by the 1st Respondent the first letter yielded nothing positive while the second one was not even responded to. What was the Petitioner to do under the circumstances?

49. A rejection of request for information triggers the application of Section 14(1) of the Act. He was to apply to the Commission on Administrative Justice seeking to review the decision of public or private entity in relation to request for access to information. The application was supposed to have been made within thirty (30) days or such period as the commission may allow from the date the decision was notified to the applicant as per Section 9(2). As already noted, the Commission on Administrative Justice has the power under section 23 (2) to order the release of information withheld unlawfully.

50. The above statutory process envisages that before any person can approach the court to claim that their right of access to information under Article 35 of *the Constitution* has been violated, the person is required to exhaust the procedure provided for under the *Access to Information Act*, and only approach the High Court at the appellate level.

51. The Petitioner did not avail to himself this statutory process to redress the grievances raised in this petition relating to access to Information that allegedly denied by the 1st Respondent. He instead moved to file this petition directly to this court.

52. In support of his assertion that the petition was rightly before the court, the Petitioner cited the case of Katiba Institute Vs President Delivery Unit & 3 Others (2017) eKLR in which Justice E C Mwita made the following observations in regard to procedure provided for in the *Access to Information Act*: -

> "...The respondents further contended that the petition is premature basing their argument on Section 21 of the Act. Their take was that the petitioner should have first complained to the Commission on Administrative Justice (CAJ) before filing the petition. I have read the Act but could not trace a provision making a report to CAJ a condition precedent to triggering the jurisdiction of this Court to deal with petitions filed seeking to challenge violations of the right to access information under Article 35 of *the constitution*. This Court has unlimited jurisdiction under Article 165(3)(b) to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. The respondents' contention that the petition is premature is therefore unsustainable..."

53. My humble view is that there is nothing to bar the application of this doctrine in the circumstances of this case. Indeed, 23 (3) of the *Access to Information Act* which makes it clear that the High Court should come in at later stage after the Commission on Administrative Justice had had the opportunity of addressing the complaint. This tallies with the principle laid down by Article 159(2) (c) of *the Constitution* that requires this court to promote alternative methods of dispute resolution.

54. Justice Mativo elaborately explained the utility of the doctrine of exhaustion in Lugo Vs Director of Public Prosecutions (Petition No. 62 of 2020) 2022 KEHC 10574 by stating thus:

> "...The doctrine of ripeness and constitutional avoidance gives credence to the concept that *the Constitution* does not operate in a vacuum or isolation. Where there are alternative remedies the preferred route is to apply such remedies before resorting to *the Constitution*. The possibility of the elevation of any dispute to a constitutional issue is what is sought

> to be avoided by the doctrines of ripeness and constitutional avoidance. It is borne out of a realisation that all legislative or common-law remedies are part of the legal system. ... In other words, a constitutional issue is not ripe for determination until the determination of the constitutional issue is the only course that can give the litigant the remedy he seeks..."

55. I am persuaded that the Petitioner grossly overlooked express statutory processes for resolution of his grievances by rushing to institute this Petition. I find no valid exceptions to warrant this Court assume jurisdiction over a complaint which ought to have been processed by originally by seeking a review of the 1st Respondent's decision before the Commission on Administrative Justice.

56. I uphold the preliminary objection and strike out the Petition with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT MILIMANI THIS 1ST DAY OF FEBRUARY, 2024.

L N MUGAMBI

JUDGE