



Mohamed & another v Attorney General & 2 others (Constitutional Petition E007 of 2023) [2024] KEHC 12089 (KLR) (9 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12089 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION E007 OF 2023**

OA SEWE, J

OCTOBER 9, 2024

**IN THE MATTER OF ARTICLES 22, 23 AND
165 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLES 41(1) (2) (A)(B)
AND 43(1) (A) AND (E) OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF SECTION 5(1) (G) AND (E), 5(2) AND 6(2) OF
THE OFFICE OF THE ATTORNEY GENERAL ACT NO. 49 OF 2012.**

AND

IN THE MATTER OF SECTION 5(3)(5), 6 AND 7(1) OF THE WA QF ACT NO. 8 OF 2022

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

BETWEEN

ATHMAN NAAMAN MOHAMED 1ST PETITIONER

ARUMII HUSSEIN 2ND PETITIONER

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

THE PUBLIC TRUSTEE 2ND RESPONDENT

THE WAKF COMMISSION 3RD RESPONDENT



JUDGMENT

1. The Petition dated 9th February 2023 was filed by the two petitioners, Athman Naaman Mohamed and Arumii Hussein, in their capacity as Imams employed by the 3rd Respondent. They averred that their main function is to lead daily congregational prayers and offer daily and Friday sermons in their respective mosques for which they are paid a monthly income by the 3rd Respondent, the Wakf Commission. They mentioned that the 3rd Respondent is also responsible for the structural maintenance of the mosques, the payment of electricity and water bills as well as other expenses incurred at the mosques.
2. The petitioners averred that the 3rd Respondent informed them that with effect from February 2023, their salaries would not be paid as there were no commissioners in office to sign cheques for payment of any kind. They added that they were informed that the term of the previous commissioners had lapsed in April 2019; and that the term of the last Secretary General, who was the only other person mandated to execute documents for the 3rd respondent, had also expired in March 2021.
3. The petitioners averred that, upon receiving this information, they sought legal advice and were informed by their counsel that it is the 1st respondent's statutory mandate to appoint a selection panel for the nomination of new commissioners within 14 days after the occurrence of a vacancy in the Commission; and that since the 2nd respondent is an automatic and permanent member of the Commission there should be no vacuum in terms of the daily operations of the 3rd respondent. That they then proceeded to the offices of the 3rd respondent to seek clarification whether the 2nd respondent was authorized to sign all documents for the 3rd respondent including cheques in the absence of the Commissioners and the Secretary General.
4. At paragraph 12 of the Petition, the petitioners averred that they were informed by the employees of the 3rd respondent that the 2nd respondent had refused to execute any documents, contending that express authority was required for such a function to be executed by him.

It was the contention of the petitioners that the 1st respondent had taken undue advantage of the independence accorded to the office by Section 6(5) of the Office of the Attorney General Act in declining to make the necessary appointments.

5. Convinced that the respondents had misapprehended the applicable law, and apprehensive that the situation could go on indefinitely, thereby constituting a violation of their rights as enshrined in Articles 41(2)(a) and (b) and 43(a) and (e) of the Constitution, the petitioners filed this Petition seeking the following reliefs:
 - (a) A declaration that the authority described under Section 5(5) of the Wakf Act is the authority from the 1st respondent herein who is the appointing authority and not the Chairperson of the Commissioners nor the Secretary General of the Commission.
 - (b) An order compelling the 1st respondent to authorize the 2nd respondent to execute all documents described under Section 5(5) of the Wakf Act, 2022 including cheques pending appointment by him of a panel to nominate Commissioners in accordance with the Wakf Act, 2022.
 - (c) Any other order that the Court deems fit.



6. In response, the 1st and 2nd respondents filed an Answer to the Petition dated 16th June 2023. They contended that:
 - (a) The Petition is misconceived, vexatious and an abuse of the process of the court.
 - (b) The Petition is based on hearsay and inadmissible evidence as the petitioners did not disclose the names of the persons that allegedly gave them the information or advise.
 - (c) The Court lacks the jurisdiction to entertain the Petition to the extent that it arose out of an employment relationship.
 - (d) The orders sought are contra-statute and incapable of being granted.
 - (e) The petitioners have failed to discharge the burden of proof.
7. There is no indication that the 3rd respondent filed any response to the Petition.
8. Pursuant to the directions given herein on 15th February 2023, the Petition was canvassed by way of written submissions. The petitioners relied on their written submissions dated 7th July 2023 in which they proposed the following issues for determination:
 - (a) Whether or not the Court has jurisdiction to entertain the Petition; and if so,
 - (b) Whether the authority described in Section 5(5) of the Wakf Act is the authority from the 1st respondent.
 - (c) Whether the Court can grant the orders sought.
9. The petitioners resisted the stance taken by the respondents that by virtue of the employment relationship between the 3rd respondent and the petitioners, this Court lacks jurisdiction to handle the dispute. They relied on Articles 22, 23, 162(2) and 165 of the Constitution and the cases of *A O O & 6 others v Attorney General* [2017] eKLR and *Law Society of Kenya v the Federation of Kenya Employers* [2021] eKLR to buttress their submission that this Court has the requisite jurisdiction to handle proceedings for violation or threatened violation of constitutional rights and fundamental freedoms. While admitting that the relationship between them and the 3rd respondent is an employment relationship for purposes of Section 12(1) of the Employment and Labour Relations Court, the petitioners submitted that there is no such relationship between them and the 1st or 2nd respondents, against whom the declaratory orders are sought.
10. The petitioners further submitted that, since the High Court and the Courts of equal status have coordinate jurisdiction, the reliefs sought ought to determine which Court has jurisdiction in a matter. They relied on *Sollo Nzuki v Salaries and Remuneration Commission & 2 others* [2019] eKLR for the proposition that the courts of equal status to the High Court cannot embark on a generalized handling of petitions, but is entitled to and is jurisdictionally empowered to address such matters if they arise directly and in relation to the matters within their jurisdiction.
11. In connection with the refusal by the 2nd respondent to sign documents on behalf of the 3rd respondent, the petitioners submitted that the respondents misconstrued the provisions of Section 5 of the Wakf Act. They submitted that, since the 1st respondent is independent and cannot be directed in the performance of its functions, the present scenario where there were no Commissioners or Secretary General could obtain for years on end. One of the consequences thereof would be that the office and functions of the 3rd respondent would grind to a halt with a domino effect on the management of the mosques countrywide.



12. The petitioners further urged the Court to consider the public interest and ensure that there is no lacuna in the implementation of the law and posited that the only reasonable interpretation of Section 5(5) of the Wakf Act is that which mandates the 1st respondent to action. They relied on *Law Society of Kenya v Kenya Revenue Authority & Another* [2017] eKLR, *Law Society of Kenya v Mwenda & 5 others*; *IEBC (Interested Party)* [2021] KEHC 449 (KLR) and *Samwel Mweru & others v National Land Commission & 2 others* [2020] eKLR to buttress their submissions.
13. The petitioner concluded their submissions by urging the Court to grant the orders sought as failing to do so would aggravate their plight and compound further infringements of their rights.
14. In their written submissions dated 26th July 2024, the 1st and 2nd respondents relied on Articles 162(2) and 165(5)(b) of the Constitution and reiterated their assertion that this Court lacks the jurisdiction to entertain this Petition. On the authority of *Juma Nyamawi Ndungo & 5 others v Attorney General, Mombasa Law Society (Interested Party)* [2019] eKLR, the 1st and 2nd respondents maintained the stance that disputes relating to or arising from the employment relationship between an employer and employee, as is the case herein, fall within the exclusive jurisdiction of the Employment and Labour Relations Court (ELRC). They accordingly urged the Court to down its tools by striking out the Petition.
15. With regard to Section 5 of the Wakf Commission Act, the 1st and 2nd respondents submitted that the Act came into force on 21st March 2022 at a time when no Commissioner or Secretary General was in office. They further submitted that the Public Trustee (the 2nd respondent herein) was yet to be nominated or appointed as a Commissioner of the 3rd respondent in terms of the provisions of the new Act. The 1st and 2nd respondents also submitted that the import of Section 5(5) of the Wakf Act is that all documents, other than those required by law to be under seal, can only be signed by the Chairperson, any Commissioner authorized to do so in the absence of the Chairperson, or the Director-General.
16. Their contention therefore was that, in the absence of the Chairperson, Commissioners and the Director General, there is no person capable of signing the 3rd respondent's documents or even to authorize the 2nd respondent in that regard. Their postulation therefore was that petitioners' prayers are not available as such orders would contravene the Wakf Act.
17. Having given due consideration to the averments set out in the Petition, the response thereto by the 1st and 2nd respondents as well as the written submissions filed herein by the 1st and 2nd respondents, the issues that arise for consideration are:
 - (a) Whether or not the Court has jurisdiction to entertain this Petition; and if so,
 - (b) Whether any violation or threatened violation of Articles 41(2)(a) and 43(1)(a) and (e) of *the Constitution* has been demonstrated by the petitioners; and if so,
 - (c) Whether the petitioners are entitled to the reliefs sought in the Petition.

A. On the Jurisdiction of the Court:

18. In the work, the Major Law Lexicon, Volume 4, jurisdiction is aptly defined thus:

By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it, or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by Statute or Chapter or Commission under which the Court is constituted and may be extended or restricted by similar means. If no restriction or limitation is imposed, the jurisdiction is said to be unlimited. A limitation may be either



as to the kind or nature of the actions or the matters of which the particular court has cognizance or as to the area over which the jurisdiction extends, or it may partake of both these characteristics..."

19. Accordingly, in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR, the Supreme Court held that:

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 by law. We agree with counsel 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 on 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."

20. Hence, in *the Owners of Motor Vessel "Lilian s" vs. Caltex Oil (K) Ltd* [1989] KLR 1, the Court of Appeal pointed out 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 downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

21. The Supreme Court restated the principle in the case of *Ngugi v Commissioner of Lands; Owindo & 63 others (Interested Parties) (Petition 9 of 2019)* [2023] KESC 20 (KLR) (Civ) (31 March 2023) (Judgment), and held:

36. Jurisdiction goes to the root of any cause or dispute before a court of law. A court must exercise restraint to avoid overstepping its constitutional role in order to maintain its legitimacy. If a court has no jurisdiction, a judgment rendered therein does not adjudicate the dispute. It does not bind the parties, nor can it be made the foundation of any right. It is a nullity without life or authority. In short, it is coram non iudice and amounts to a nullity...
37. It is, therefore a basic rule of procedure that jurisdiction must exist when the proceedings are initiated. Because the question of jurisdiction is so fundamental, a limitation on the authority of the court, it can be raised at any stage of the proceedings by any party or even by the court suo motu. As a matter of practice, this court has a duty of jurisdictional inquiry to satisfy itself that it is properly seized of any matter before it.
38. It is a settled legal proposition that conferment of jurisdiction is a legislative function and it can only be conferred by *the Constitution* or statute. It cannot be conferred by judicial craft. See *Samuel Kamau Macharia & another v Kenya commercial Bank & 2 others*, SC Application No 2 of 2011; [2012] eKLR. Nor can parties, by consent confer on a court power it does not have.



22. It is therefore preferable that the issue of jurisdiction be raised at the earliest possible opportunity and determined in limine. In the Owners of Motor Vessel Lilian “S”, the Court of Appeal (per Nyarangi, JA) held that:

...it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it...”

23. There is no gainsaying that this Court has the requisite jurisdiction under Article 165(3) of the Constitution to determine, inter alia, disputes in connection with the contravention or threats of violation of constitutional rights. Article 165 (3) of *the Constitution* is explicit that:

(3) Subject to clause (5), the High Court shall have—

- (a) unlimited original jurisdiction in criminal and civil matters;
- (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
- (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
- (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and (iv) a question relating to conflict of laws under Article 191; and
- (e) any other jurisdiction, original or appellate, conferred on it by legislation.

24. Nevertheless, the 1st and 2nd respondents took the view that, this being a dispute arising out of an employer/employee relationship, it falls within the exclusive jurisdiction of the ELRC and is therefore excluded from the jurisdiction of the High Court by dint of Article 165(5) of *the Constitution*, which states:

The High Court shall not have jurisdiction in respect of matters—

- (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
- (b) falling within the jurisdiction of the courts contemplated in Article 162(2).”

25. Section 12 of the *Employment and Labour Relations Court Act* provides as follows in respect of the jurisdiction of the ELRC:



- (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including —
- (a) disputes relating to or arising out of employment between an employer and an employee;
 - (b) disputes between an employer and a trade union;
 - (c) disputes between an employers' organisation and a trade unions organisation;
 - (d) disputes between trade unions;
 - (e) disputes between employer organizations;
 - (f) disputes between an employers' organisation and a trade union;
 - (g) disputes between a trade union and a member thereof;
 - (h) disputes between an employer's organisation or a federation and a member thereof;
 - (i) disputes concerning the registration and election of trade union officials; and
 - (j) disputes relating to the registration and enforcement of collective agreements.
26. From the foregoing, the question to pose is whether this is a dispute arising out of employment between an employer and an employee. It is manifest, at paragraphs 1 and 5 of the Petition that the petitioners described themselves as “imams under the employ of the 3rd Respondent”. In terms of particulars of violation of *the Constitution*, the petitioners evidently complained about the refusal to pay their salary. They nevertheless stated that they offer services as imams to their respective congregations independently; and that all that the 3rd respondent does is to pay their monthly salary and to take care of the mosques in terms of structural maintenance and the settlement of expenses for utilities.
27. There is no gainsaying therefore that the relationship between the petitioners and the 3rd respondent is regulated by the Waqf Act and is therefore in the nature of a benefactor and a beneficiary of a trust fund. Indeed, the Waqf Act defines the word ‘waqf’ to mean:
- ...a religious, charitable or benevolent endowment or dedication of any property in accordance with Islamic law.”
28. Hence, Section 3 of the Act states that the Act shall apply to the making and administration of all awqaf in Kenya. In the circumstances, it cannot be said, that merely because the 3rd respondent pays the petitioners a monthly sum from trust funds under its control the relationship between them is that of employer and employee. I am consequently not persuaded that this is a dispute arising out of the relationship between an employer and an employee. To the extent therefore that the petitioners alleged violation of their rights to fair remuneration under Article 41(1) (2) and Article 43(1)(a) and (e) of the Constitution this Court has the jurisdiction to entertain the dispute.
29. Moreover, it is significant that the non-payment complained of is not willful on the part of the 3rd respondent but came about because the Commission is not fully constituted. It is for this reason that none of the prayers by the petitioners is directed at the 3rd respondent. In essence the declaratory orders are directed at the 1st and 2nd respondents with a view of compelling them to perform their public duties under the applicable law.



B. On whether any violation or threatened violation of Articles 41(2)(a) and 43(1)(a) and (e) of *the Constitution* have been demonstrated by the petitioners:

30. Article 22 thereof is explicit that:

- (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
 - (a) a person acting on behalf of another person who cannot act in their own name;
 - (b) a person acting as a member of, or in the interest of, a group or class of persons;
 - (c) a person acting in the public interest; or
 - (d) an association acting in the interest of one or more of its members.
- (3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—
 - (a) the rights of standing provided for in clause (2) are fully facilitated;
 - (b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;
 - (c) no fee may be charged for commencing the proceedings;
 - (d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and
 - (e) an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court.

31. Having alleged violation of their rights under Articles 41(1)(a) and 43(1)(a) of the Constitution, the burden of proof was on the petitioners to prove their allegations to the requisite standard. This point was made by the Supreme Court in *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others (Petition 5, 3 & 4 of 2013)* (Consolidated) [2013] KESC 6 (KLR) (16 April 2013) (Judgment), as follows:

...a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden...”

32. Likewise, in *Leonard Otieno v Airtel Kenya Limited* [2018] eKLR it was emphasized that:

65. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize *the constitution* and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.”



33. The Supreme Court reiterated the position in *Wamwere & 5 Others v Attorney General* (Petition 26, 34 & 35 of 2019 (Consolidated)) [2023] KESC 3 (KLR) (Constitutional and Human Rights) (27 January 2023) (Judgment) and held:

66. The two superior courts below were of the unanimous view that a petitioner bears the burden to prove his/her claim of alleged threat or violation of rights and freedoms to the requisite standard of proof, which is on a balance of probabilities. We affirm this juridical standpoint bearing in mind that such claims are by nature civil causes. See *Deynes Muriithi & 4 others v Law Society of Kenya & another*, SC Application No 12 of 2015; [2016] eKLR.

67. In this case, the onus of proof was on the 1st appellant to adduce sufficient evidence to demonstrate that firstly, she owned or erected or lived in the alleged properties; and secondly, that state agents interfered or deprived her of the subject properties. This, as was aptly appreciated by the superior courts, is the import of section 107 of the *Evidence Act* on the burden of proof. The provision stipulates:

107.

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

In addition, section 109 of the *Evidence Act* elaborates on the onus of proof by stipulating that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

34. Although the petitioners relied on Articles 41(1)(a) and 43(1)(a) of the Constitution, absolutely no evidence was presented by them in proof of those allegations. Article 41(1)(a) states that:

- (1) Every person has the right to fair labour practices.
- (2) Every worker has the right—
 - (a) to fair remuneration;

35. At paragraphs 9 to 19 of their Petition, the petitioners set out the circumstances that led to the situation in which they found themselves. The terms of the 3rd respondent’s commissioners lapsed in 2019 and thereafter the operations of the 3rd respondent were under the oversight of the Secretary General until 2021 when his term also came to an end. The non-payment of the petitioner’s salaries was therefore not out of willfulness on the part of the 3rd respondent but on account of the fact that the Commission was yet to be constituted in accordance with Part II of the Waqf Act. Indeed, they acknowledged at paragraphs 10 of the Petition and paragraphs 9 of their Supporting Affidavit that the omission was that of the 1st respondent in failing to initiate the process for the reconstitution of the Commission, as opposed to the 3rd respondent.

36. Under those circumstances it cannot be said that the petitioners discharged their burden of proof against the 3rd respondent. As it is, there is no specific allegation in the particulars set out at paragraph 19 of the Petition against any of the respondents; and as pointed out herein above, the reliefs sought by the petitioners are not available to them.



37. Likewise, Article 43 states that:
- (1) Every person has the right—
 - (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;
38. Looking at the reliefs sought by the petitioners, it is manifest that they are anchored on statute, namely the Wakf Act and to an extent the *Fair Administrative Action Act*, (Cap 7L). I therefore reiterate the position taken by Hon. Chacha, J. in *Godfrey Paul Okutoyi & others v Habil Olaka & Another* [2018] eKLR that:
65. It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a court of law in the manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a Constitutional petition. A party should only file a constitutional petition for redress of a breach of *the Constitution* or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure.”
39. The doctrine of avoidance was well-discussed by the Supreme Court in *Petition 14, 14A, 14B & 14C of 2014 (Consolidated) Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR (29th September 2014) (Judgment) thus:
- (256) ...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)).
- (258) From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents’ claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright- infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court...”
40. In the case of *K K B v S C M & 5 others* (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) (22 April 2022) (Ruling), Hon. Mativo, J. (as he then was) also expressed himself on the doctrine as hereunder:

In summation, the doctrines of ripeness and constitutional avoidance shun to deal with a constitutional issue where there exists another legal course which can give the litigant the relief he seeks. 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. Both constitutional avoidance and ripeness avert the determination of the constitutional issues until it becomes very necessary to the extent that it is the only course available to assist the litigant's cause..."

41. Further in the case of *Faraj & 3 others v Police & 2 others (Constitutional Petition 165 of 2020)* [2022] KEHC 287 (KLR) (27 April 2022) (Judgment) Hon. Mativo, J. (as he then was) indicated:

27. 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* (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."

...

29. The doctrine of ripeness and constitutional avoidance gives credence to the concept that *the Constitution* does not operate in a vacuum or isolation. It has to be interpreted and applied in conjunction with applicable legislation together with other available legal remedies. 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 averted 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..."

42. For the foregoing reasons, it is my considered finding that the petitioners have utterly failed to prove any violation or threatened violation of Articles 41(2)(a) and 43(1)(a) and (e) of the Constitution. Consequently, they are not entitled to any of the reliefs sought by them herein. Their Petition dated 9th February 2023 is hereby dismissed with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 9TH DAY OF OCTOBER 2024

OLGA SEWE

JUDGE

