Makanga v Kenyatta University (Constitutional Petition E373 of 2021)
[2023] KEHC 1604 (KLR) (Constitutional and Human Rights) (10 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1604 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION E373 OF 2021

AC MRIMA, J

MARCH 10, 2023

BETWEEN

JOSHUA MAKARA MAKANGA ..... PETITIONER

AND

KENYATTA UNIVERSITY ..... RESPONDENT

RULING

Introduction and Background

1. This ruling relates to the Notice of Preliminary objection dated 22nd March, 2022.
2. The objection was filed by the Respondent and was tailored as follows: -
    a. This honourable Court has no jurisdiction to entertain, hear or determine the Petition.
    b. From the facts pleaded the Petition is patently clear that the dispute herein is in fact and n substance a dispute about the alleged violation of the privacy rights of a data subject.
    c. In the premises, the issues raised in the petition ought to be dealt with in the dispute resolution mechanisms mandatorily prescribed under section 8(1),(f), (9)(1)(a), 56 and 57 of the *Data Protection Act* Number 24 of 2019.
    d. Under the aforesaid legal provision, the dispute herein ought to be investigated, heard and determined by the Office of the Data Commissioner established under the Act.
    e. This petition is therefore premature, mischievous, vexatious and an abuse of Court process.
    f. This Court therefore lacks jurisdiction to entertain, hear or determine the issues raised in the Petition.

3. Parties filed written submissions on the objection. One of the issues raised by the Petitioner in opposing the objection was that objection was not a proper one in law.

Analysis:

4. Having carefully considered the objection and the submissions, the following issues are for determination: -

    i. Whether the Preliminary Objection is proper in law.

    ii. Depending on (i) above, whether the Preliminary Objection is merited.

5. I will begin with the first issue.

Whether the Preliminary Objection is proper in law:

6. As a general principle of law, preliminary objection is considered only if it raises pure points of law. In instances where it contains factual issues requiring the calling of evidence, it fails the test and in such scenarios is dismissed.

7. In *Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd*, (1969) E.A 696 pg. 700 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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.

8. Similarly, in Civil Suit No. 85 of 1992, *Oraro -vs- Mbaja* [2005] 1 KLR 141, Ojwang J, as he then was, added his voice to the finding in Mukisa Biscuit -vs- West End Distributors case (supra) regarding the nature of preliminary objections when he observed as follows: -

> ... I think the principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.

9. The High Court in *John Musakali vs. Speaker County of Bungoma & 4 others* (2015) eKLR held as follows: -

> The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial.

> If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law.

10. In assessing the propriety of a preliminary objection, the Court in *Omondi -vs- National Bank of Kenya Ltd & Others* {2001} KLR 579; [2001] 1 EA 177, made the following important remarks: -

> .....In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion.

11. The objection in this matter challenges the jurisdiction of this Court on the basis of the exhaustion doctrine.

12. As to whether a jurisdictional point is a pure point of law, the Supreme Court of Kenya in Petition No. 7 of 2013 Mary *Wambui Munene -vs- Peter Gichuki Kingara and Six Others*, [2014] eKLR, held that 'jurisdiction is a pure question of law'. The Court also observed that a challenge on jurisdiction ought to be resolved on a priority basis.

13. Earlier on, the Apex Court in Constitutional Application No. 2 of 2011, In *the Matter of Interim Independent Electoral Commission* (2011) eKLR addressed the question regarding the source of a Court's jurisdiction as follows: -

> .... Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid down in judicial precedent....

14. The foregoing position was buttressed the same Court in *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & Others* (2012) eKLR, when the Learned Judges observed as follows: -

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

15. The foregoing, hence, settles the fact that jurisdiction is a pure question of law.

16. It is, therefore, the finding of this Court that the objection raises a pure point of law capable of disposing of the entire Petition if successful. The objection passes the proprietary test and is for consideration.

17. With such a finding, I will now consider the second issue.

Whether the Preliminary Objection is merited:

18. The parties were sharply divided on whether the objection is merited.

19. The Respondent posited that the issues raised in the Petition ought to be dealt with in the dispute resolution mechanisms mandatorily provided for under Section 8(1)(f), 9(1)(a), 56 and 57 of the Data Protection Act, No. 24 of 2019 and as such this Court's jurisdiction is improperly invoked. Several decisions were referred to in support of the position.

20. On its part, the Petitioner was of the contrary position. He contended that since the Petition related to the infringement of his rights and fundamental freedom, then it is only the High Court with the requisite jurisdiction to hear and determine the claim. The Petitioner also referred to some decisions in furtherance of the position.

21. As the objection now rests on whether the exhaustion doctrine is applicable in this case, it is imperative to have a brief look at the said doctrine.

22. This Court recently discussed the exhaustion doctrine in doctrine of exhaustion was comprehensively dealt with by a 5-Judge Bench in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* (2020) eKLR. The Court stated as follows:

> 52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine 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. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution* and was aptly elucidated by the High Court in R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, where the Court opined thus:
>
> > 42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in *Speaker of National Assembly v Karume* [1992] KLR 21 in the following oft-repeated words:
> >
> > 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 procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.
> >
> > 42. While this case was decided before *the Constitution* of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the

> doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.
>
> This is *Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others* [2015] eKLR, where the Court of Appeal stated that:
>
> 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 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. The Ex Parte Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.

23. The Court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

> 59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In *R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA)* (*supra*), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:
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> > What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the *Shikara Limited Case* (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others*.)
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> 60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.

62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.

24. The above decision was appealed against by the Respondents. The Court of Appeal in upholding the decision and in dismissing the appeal in Mombasa Civil Appeal No. 166 of 2018 *Kenya Ports Authority v William Odhiambo Ramogi & 8 others* [2019] eKLR held as follows: -

> The jurisdiction of the High Court is derived from Article 165 (3) and (6) of *the Constitution*. Accordingly, the High Court has unlimited original jurisdiction in criminal and civil matters, including determination of a question of enforcement of the bill of rights and interpretation of *the Constitution* encompassing determination of any matter relating to the Constitutional relationship between the different levels of government.
>
> At the High Court, we note that the learned Judges dealt with this matter under the question framed as follows: Is the court barred from considering the suit at present by virtue of Article 189 of *the Constitution* and sections 33 and 34 of Inter-Governmental Relations Act of 2012 (IGRA)? The parties have advanced similar arguments as before the learned Judges of the High Court. The High Court went further than just looking at the ruling by Ogola J. They also took into account the doctrine of exhaustion as enunciated in *Republic vs. Independent Election and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR. They applied a dual pronged approach* before concluding that the dispute was not an inter-governmental dispute under IGRA. First, they considered that the test for determining the matter as an inter-governmental dispute for purposes of application of IGRA was not simply to look at who the parties to the dispute were, but the nature of the claim in question and; secondly, they considered that the claimed Constitutional violations seeking to be enforced are not mere "bootstraps." We have keenly addressed our minds to the learned Judges' decision and are satisfied that they stayed within the expected contours and properly directed themselves. Once they determined that the dispute was not inter-governmental in nature, we do not think it is necessary to consider whether the petitioners had exhausted their legal avenue. Jurisdiction by the High Court under Article 165 (5) of *the Constitution* became automatic. And in our view, it could not be ousted or substituted.

25. Further, in Civil Appeal 158 of 2017, *Fleur Investments Limited -vs- Commissioner of Domestic Taxes & another* [2018] eKLR, the Learned Judges of the Court of Appeal relied on an earlier decision

in *Speaker of National Assembly vs Njenga Karume* (1990-1994) EA 546 to assume jurisdiction by bypassing the mechanism under Income Tax Tribunal. They observed as follows: -

> 23. For the reasons we have given earlier and others that will become apparent, there were definitely exceptional circumstances that existed in this case that were outside the ambit of the Income Tax Tribunal which called for intervention by way of judicial review. Whereas courts of Law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under *the Constitution* and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.

26. Courts have in many occasions reiterated the position that where there are alternative avenues legally provided for in dispute resolutions, there should be postponement of judicial consideration of such disputes until after the available avenues are fully adhered to or unless it is adequately demonstrated that the matter under consideration falls within the exception to the doctrine of exhaustion.

27. Returning to the matter at hand, the Petition seeks the following prayers: -

> a. An order of permanent injunction restraining the Respondents, its agents department, officers or any persons acting under their directive from publishing and or using the Petitioner's image and likeness in any way in its advertisements in any way without the Petitioner's consent and compelling the Respondent to stop any further advertisement featuring the Petitioner's image
>
> b. A declaration that the Petitioner has a right to be forgotten.
>
> c. A declaration that the respondent violated the Petitioner's fundamental rights to privacy under 31 by publishing the Petitioner's image to the whole world without his consent.
>
> d. A declaration that the Respondent violated the Petitioner's fundamental rights to human dignity under Article 28 by publishing the Petitioner's image for purposes of advertisements without his consent.
>
> e. Exemplary damages for violation of the Petitioner's rights
>
> f. Punitive damages.
>
> g. Costs of the suit and full indemnity.
>
> h. Interests on c, d, e and f at commercial rates until payment in full

28. This Court has carefully considered the parties' positions alongside the manner in which the Petition was framed. It has as well considered the provisions of the Data Protection Act, No. 24 of 2019 (hereinafter referred to as 'the Data Act').

29. The Preamble of the Data Act states that it is an Act of Parliament to give effect to Article 31(c) and (d) of *the Constitution*; to establish the Office of the Data Protection Commissioner; to make provision

for the regulation 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.

30. Article 31(c) and (d) of *the Constitution* provides as follows: -

> 31. Privacy:
>
> Every person has the right to privacy, which includes the right not to have—
>
> (a) their person, home or property searched;
>
> (b) their possessions seized;
>
> (c) information relating to their family or private affairs unnecessarily required or revealed; or
>
> (d) the privacy of their communications infringed.

31. The *Data Act* further provides for the rights of a data subject, the enforcement of rights of data subjects, investigation of complaints by data subjects, compensation for breach of the rights of data subjects, the registration of data controllers and data processors, the principles and obligations of personal data protection, processing of sensitive personal data, among many other aspects of personal data.

32. Section 3 of the *Data Act* provides for the objectives as follows: -

> The object and purpose of this Act is-
>
> (a) to regulate the processing of personal data;
>
> (b) to ensure that the processing of personal data of a data subject is guided by the principles set out in section 25;
>
> (c) to protect the privacy of individuals;
>
> (d) to 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.

33. Section 5 of the *Data Act* establishes the Office of the Data Protection Commissioner which is a body corporate with perpetual succession and a common seal and has the power to conduct business in its corporate name. I will hereinafter refer to the said office as 'the Data Commissioner" or 'the Commissioner'.

34. One of the many functions of the Data Commissioner is provided for in Section 8(1)(f) as 'to receive and investigate any complaint by any person on infringements of the rights under this Act'.

35. The Commissioner further has powers to conduct investigations on its own initiative, or on the basis of a complaint made by a data subject or a third party. That is provided for in Section 9(1)(a) of the *Data Act*.

36. In discharging its functions and exercising its powers, the Commissioner is authorized under Section 59 of the Data Act to seek the assistance of such person or authority as it deems fit and as is reasonably necessary to assist the Data Commissioner in the discharge of the functions.

37. Section 65 of the *Data Act* gives the Data Commissioner the power to determine the compensation payable to a data subjectwho suffers damage by reason of a contravention of any requirement of the *Data Act* and in instances where the Commissioner finds as much.

38. With a view to protect the integrity of the processes under the *Data Act*, the statute provides for enforcement notices under Section 58 in respect of those who failto comply with any provision of the *Data Act*.

39. Under Section 64 of the *Data Act*, any appeal from the decision of the Commissioner lies to the High Court.

40. A close scrutiny of the *Data Act* reveals a deliberate design to ensure that all claims arising from allegations of infringement of Article 31(c) and (d) of *the Constitution* are wholly dealt with by the Commissioner as the first port of call. Such position can only be overruled by a party demonstrating any of the exceptions to the doctrine of exhaustion in a matter.

41. Returning to the case at hand, the Petitioners' complaint is the alleged publication of the Petitioner's images and/or photographs by the Respondent in its social media accounts without his consent. The Petitioner alleged breach of his Article 31 rights under *the Constitution*. He then sought for inter alia some declarations as well as compensatory damages.

42. This Court ascribes to the position that in a case where Parliament donated powers to an entity like the Data Commissioner to determine if one's privacy rights under Article 31(c) and (d) of the Commissioner are infringed, then it means as much; that the Commissioner has such power determine whether privacy rights as provided for in the Bill of Rights has been denied, violated, infringed or threatened. However, the Commissioner lacks the jurisdiction to interpret *the Constitution*.

43. The reason for the foregoing holding is simple. The members of the Office of the Data Commissioner, as an entity and individually so, are public officers and Article 10 calls upon them to infuse the national values and principles of governance while undertaking their duties. Article 3 obligates every person to respect, uphold and defend *the Constitution*. Therefore, the Commissioner must be in a position to uphold *the Constitution*, and in doing so, to be able to determine whether a given set of circumstances reveal denial, violation, infringement or threat to the privacy rights in the Bill of Rights.

44. The above duty is to be distinguished from the duty to interpret *the Constitution*. Determining whether a given set of circumstances reveal denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights is just that simple. Conversely, interpretation of *the Constitution* is a serious judicial function. While interpreting *the Constitution*, the High Court is called upon to apply its legal mind to determine the applicability and extent thereof of a constitutional provision to a set of facts. In arriving at such an interpretation, the High Court is supposed to consider all the applicable principles in constitutional interpretation. (See the Supreme Court in *In the Matter of Interim Independent Electoral Commission* [2011] eKLR). The High Court may also look at comparative jurisprudence from other jurisdictions on the subject. Such a determination yields to a binding legal principle unless overturned by a Court with superior jurisdiction.

45. Unlike the High Court, Tribunals and other quasi-judicial bodies, including the Data Commissioner, do not make the law. They can, however, apply themselves to a given set of facts and determine denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights.

46. There is, therefore, a defined distinction between determining the denial, violation, infringement or threat to the privacy rights in the Bill of Rights and interpreting *the Constitution*. Whereas the former is

not exclusively a judicial function, the latter is. The jurisdiction, therefore, to interpret *the Constitution* is the exclusive duty reserved to the High Court vide Article 165(3)(d) of *the Constitution*.

47. In the instant matter, the Data Commissioner has the jurisdiction to determine whether the Petitioner's privacy rights in the Bill of Rights were denied, violated, infringed or threatened. The Commissioner has further powers to order appropriate compensation in the event of proof of the infringement.

48. The Data Act, therefore, wholly provides for the dispute at hand as well as the remedies in the event the dispute is successful.

49. In such a case, it was incumbent upon the Petitioner to demonstrate to the Court any of the exceptions to the doctrine of exhaustion. The Petitioner did not do so.

50. The upshot is that the doctrine of exhaustion applies in this matter and bears a complete bar to the further exercise of jurisdiction by this Court.

51. As a result of the foregoing, the following orders do hereby issue:

    a. The Notice of Preliminary Objection dated 22nd March, 2022 is merited.

    b. The Petition dated 15th September, 2021 is hereby struck out with costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 10TH DAY OF MARCH, 2023.

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Miss. Ndegwa, Learned Counsel for the Petitioner.

Mr. Thuo, Learned Counsel for the Respondent.