



**Mbugua & 10 others v Attorney General & 54 others; Communication
Commission of Kenya (Interested Party) (Constitutional Petition E237 of 2021)
[2023] KEHC 1917 (KLR) (Constitutional and Human Rights) (10 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1917 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E237 OF 2021**

AC MRIMA, J

MARCH 10, 2023

BETWEEN

JOHN MBUGUA & 10 OTHERS PETITIONER

AND

ATTORNEY GENERAL & 54 OTHERS RESPONDENT

AND

COMMUNICATION COMMISSION OF KENYA INTERESTED PARTY

RULING

1. This ruling is in respect of three applications. They are a Notice of Motion dated 10th November, 2021 by the 10th Respondent, a Notice of Motion dated 13th September, 2021 by the 41st Respondent and a Notice of Preliminary Objection dated 17th September, 2021 taken out by the 4th, 5th, 6th, 7th, 14th, 19th, 20th, 22nd, 24th, 32nd, 34th, 39th, 44th and 46th Respondents.
2. The applications sought a common prayer; that the Amended Petition be struck out for want of compliance with Section 24 of the *Persons with Disabilities Act* and failure to adhere to the threshold for instituting constitutional Petitions. The effect is that the Court's jurisdiction was improperly invoked and that the Court ought to decline any further dealing.
3. The applications were supported by the rest of the Respondents and opposed by the Petitioners. The parties filed written submissions to that end.
4. This Court has carefully considered the applications alongside the parties' submissions. Since the issue at hand hinges on the jurisdiction of this Court, such can be raised at any time of the proceedings and



even on appeal (See Court of Appeal in Jamal Salim v Yusuf Abdullahi Abdi & another Civil Appeal No. 103 of 2016 [2018] eKLR). The Court can also raise such issue on its own motion.

5. The Supreme Court in Petition No. 7 of 2013, Mary Wambui Munene v. Peter Gichuki Kingara and Six Others, [2014] eKLR, while affirming its earlier position in Samuel Kamau Macharia & Anther -vs- Kenya Commercial Bank Limited Kenya & 2 Others (2013) eKLR on jurisdiction, observed as follows: -

... jurisdiction is a 'pure question of law' and should be resolved on priority basis.

6. The essence of the objection is to oust the jurisdiction of this Court on the basis that the Petitioner did not first submit to the procedure set out in Section 24 of the Persons with Disabilities Act. In essence, the applications invoked the doctrine of exhaustion.
7. In Kenya, the doctrine traces its origin from Article 159(2)(c) of the Constitution which recognizes and entrenches the use of alternative mechanisms of dispute resolution in the following terms: -

159(2) In exercising judicial authority, the Courts and tribunals shall be guided by the following principles-

- (a) ...
- (b) ...
- (c) alternative forms of dispute resolution including resolution, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause 3.

8. Clause 3 is on traditional dispute resolution mechanisms.
9. The 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.

43. 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.

10. 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:

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.*)

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.

11. 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.

12. 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.

13. From the foregoing discussion, the doctrine of exhaustion is a complete bar to the jurisdiction of a Court save in cases where any of the exceptions apply.

14. Applying the above to this matter, the starting point is the manner in which the Petition was tailored. The Petition was instituted by and on behalf of persons with disabilities.

15. The main grain running throughout the Petition is that the alleged Respondents’ failure to put in place special facilities to take care of the disabled clients who variously seek services from the Respondents’ premises. The Petitioners have detailed the manner in which persons with disabilities suffer while seeking services from the Respondents due to lack of the appropriate special facilities. They also sought for compensation running into billions of Kenya Shillings.

16. In the main, the Petition prayed for the following orders: -

a) Any Respondent that fails to comply with the Public health, Sanitation and disability rules within 30 days their entire chain be deregistered, shut down, they are fined and the directors arrested and prosecuted according to the laws of Kenya and *the constitution*;



- b) All Respondents invest millions to have braille’s for the blind and sign language for the deaf;
- c) The Petitioners be compensated in excess of a billion shillings for the damages of consuming illegal products and facilities and their rights being violated daily by the Respondents who are motivated by profit and greed;
- d) Respondents through the Bankers Association, Supermarkets, telecommunication associations and the Mega Mashujaa Act 2014 Trust to invest their 50% profit in MOU joint venture with Chinese Tech Giants, techno, Huawei, Korean Samsung and Hyundai industries to have these e corporations and others have their manufacturing plants in Kenya so that we may create millions of jobs to the youth to fulfil vision 2030 among other failed millennium development goals;
- e) The Respondents jointly through their association to have ambulance and Fire Engine services in all the counties where they operate as part of corporate social responsibility;
- f) For compliance the Petitioners, be added as directors of the corporations so that they may enforce the law accordingly;
- g) A declaration that its great violation of *the constitution* of Kenya 2010 by the respondents to defraud consumers their protection that violates the rights of the Petitioners on behalf of over 50,000,000 Kenyans and thus the consumers be compensated handsomely in excess to 1,000,000,000 Kenya shillings to set up special faculties for the disabled in the country and the rules of natural justice be followed to the letter.

17. The *Persons with Disabilities Act*, No. 14 of 2003 (hereinafter referred to as ‘the PWD Act’) is an Act of Parliament to provide for the rights and rehabilitation of persons with disabilities, to achieve equalisation of opportunities for persons with disabilities, to establish the National Council for Persons with Disabilities and for connected purposes.

18. The PWD Act establishes the National Council for Persons with Disabilities (hereinafter referred to as ‘the Council’) in Section 3 thereof.

19. Section 7 of the PWD Act provides the functions and powers of the Council in great detail. The Council has power to issue various orders in the course of discharging its duties including adjustment orders in Section 24 of the PWD Act.

20. As the contention in the applications is the failure to comply with the said Section 24 of the PWD Act, a reproduction thereof suffices: -

24. Adjustment orders:

(1) This section shall apply to—

- (a) any premises to which members of the public are ordinarily admitted whether on payment of a fee or otherwise; and



- (b) any services or amenities ordinarily provided to members of the public.
- (2) Without prejudice to the provisions of section 22, if the Council considers that any premises, services or amenities are inaccessible to persons with disabilities by reason of any structural, physical, administrative or other impediment to such access, the Council may, subject to this section, serve upon the owner of the premises or the provider of the services or amenities concerned an adjustment order—
 - (a) setting out—
 - (i) a full description of the premises, services or amenities concerned; and
 - (ii) the grounds upon which the Council considers that the premises, services or amenities are inaccessible to persons with disabilities;
 - (b) requiring the owner or provider concerned to undertake at his own expense such action as may be specified in order to secure reasonable access by persons with disabilities to the premises, services or amenities concerned; and
 - (c) stipulating the period within which the action referred to in paragraph (b) shall be commenced and completed.
- (3) Before serving an order under subsection (2) the Council shall serve notice upon the person concerned—
 - (a) specifying the ground upon which the adjustment order is to be issued and the nature of the action which the Council considers necessary to rectify the situation which has given rise to the proposed order;
 - (b) stipulating the maximum period that the Council considers reasonable for the implementation of the action it proposes to order; and
 - (c) calling upon the person concerned, if he wishes to do so, to make representations to the Council within thirty days from the date of the service of the notice.
- (4) After considering any representations described in subsection (3) (c) the Council may issue, or refrain from or defer the issuing of, an adjustment order.



- (5) Within thirty days after an adjustment order is confirmed or issued under subsection (4), the person concerned may appeal against the confirmation or issue to the High Court in the prescribed manner on any grounds including on the grounds that —
- (a) he cannot reasonably be expected to bear the whole or any part of the expense required in implementing the adjustment order;
 - (b) the period stipulated for implementing the adjustment order is unreasonable;
 - (c) the nature of the action required to be taken in terms of the adjustment order is, in the circumstances of the case, unreasonable; or
 - (d) adequate access to the premises, services or amenities concerned may be secured without recourse to the action required by the adjustment order.
- (6) Upon hearing an appeal under subsection (5), the Court may—
- (a) confirm, vary or set aside the adjustment order appealed against; and
 - (b) make such order as to the costs of the appeal as it thinks fit.

21. By placing the above provisions of Section 24 of the PWD Act and the Petition side by side, it apparently comes to the fore that the Council and the provisions of Section 24 cannot sufficiently address the grievances raised by the Petitioners. For instance, whereas the Petitioners seek compensation, the PWD Act does not make any provision for such.
22. As a result, it, therefore, means that even if the matter is referred to the Council for consideration still part of it will remain unattended to. The scenario is what was captured as part of the second exemption to the exhaustion doctrine, that is, the doctrine will not be applicable if the alternative forum is incapable of according the parties' adequate audience or the parties may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance. That is the position in this matter. The Council lacks the jurisdiction to deal with all the matters raised by the Petitioners.
23. The upshot is that the objection based on the basis of the exhaustion doctrine fails.
24. This Court will now deal with the other limb raised in the applications. That is whether the Amended Petition has been drafted with such clarity and specificity as to raise constitutional issues.



25. In Nairobi High Court Constitutional Petition No. E406 of 2020 Renita Choda vs. Kirit Kapur Rajput (2021) eKLR, this Court considered the above issue. This is what was stated: -

33. Long before the downing of the new constitutional dispensation under *the Constitution* of Kenya 2010, Courts have variously emphasized the need for clarity of pleadings. I echo the position.

34. *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (commonly referred to as ‘the Mutunga Rules’) also provide for the contents of Petitions. Rule 10 thereof provides seven key contents of a Petition as follows: -

Form of petition.

10.

- (1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.
- (2) The petition shall disclose the following—
 - (a) the petitioner’s name and address;
 - (b) the facts relied upon;
 - (c) the constitutional provision violated;
 - (d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
 - (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;
 - (f) the petition shall be signed by the petitioner or the advocate of the petitioner; and
 - (g) the relief sought by the petitioner.

35. Rule 10(3) and (4) of the Mutunga Rules also have a bearing on the form of petitions. They provide as follows: -

- (3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.



- (4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.
36. Rules 9 and 10 are on the place of filing and the Notice of institution of the Petition respectively.
37. The Supreme Court in Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others case (supra) had the following on Constitutional Petitions: -

Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru vs. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

38. Both parties are in agreement with what a constitutional issue is. They both referred to Fredricks & Other vs. MEC for Education and Training, Eastern Cape & Others case (supra) where the Court, rightly so, delimited what a constitutional issue entails and the jurisdiction of a Constitutional Court as follows: -

The Constitution provides no definition of ‘constitutional matter’. What is a constitutional matter must be gleaned from a reading of *the Constitution* itself: if regard is had to the provisions of... Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with *the Constitution*, as well as issues concerning the status, powers and functions of an organ of State.... the interpretation, application and upholding of *the Constitution* are also constitutional issues. So too is the question of the interpretation of any legislation or the development of the common law promotes the spirit, purport and object of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of *the Constitution*, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly on extensive jurisdiction...

39. In the United States of America, a constitutional issue refers to any political, legal, or social issue that in some way confronts the protections laid out in the US Constitution.



40. Taking cue from the foregoing, and broadly speaking, a constitutional issue is, therefore, one which confronts the various protections laid out in a Constitution. Such protections may be in respect to the Bill of Rights or *the Constitution* itself. In any case, the issue must demonstrate the link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened or threatened and the manifestation of contravention or infringement. In the words of Langa, J in Minister of Safety & Security vs. Luiters, (2007) 28 ILJ 133 (CC): -

... When determining whether an argument raises a constitutional issue, the Court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the Court to consider constitutional rights and values...

41. Whereas it is largely agreed that *the Constitution* of Kenya, 2010 is transformative and that the Bill of Rights has been hailed as one of the best in any Constitution in the world, as Lenaola, J (as he then was) firmly stated in Rapinder Kaur Atal vs. Manjit Singh Amrit case (supra) ‘... Courts must interpret it with all liberation they can marshal...’

42. Resulting from the above discussion and the definition of a constitutional issue, this Court is in agreement with the position in Turkana County Government & 20 Others vs. Attorney General & Others case (supra) where a Multi-Judge bench affirmed the profound legal standing that claims of statutory violations cannot give rise to constitutional violations.

26. The Petitioners have enjoined 55 Respondents in the Petition. That means the Petitioners must have a specific complaint against each of the Respondents. Further, the complaints must transcend ordinary claims on failure to comply with certain statutes to constitutional issues.

27. That is the challenge which caught up with the Petitioners in this matter. Whereas the Petitioners may have valid complaints against- the Respondents, such cannot be tendered in an omnibus style. It is imperative that pleadings are drafted with a certain degree of clarity and specificity as to accord a Respondent a fair opportunity to know what the complaint is all about and to possibly prefer a response thereto.

28. Further, and more importantly, the disputes raised must not be claims of statutory violations since such cannot give rise to constitutional violations. There must be a ‘link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened and the manifestation of contravention or infringement’.

29. In this matter, and as said above, the Petitioners failed to raise to the expected occasion. Apart from claiming violation of the PWD Act and the *Public Health Act*, they only glossed over and cited various provisions of *the Constitution*. The Petition did not bring out the nexus between the Petitioners, the provisions of *the Constitution* alleged to have been contravened and the manifestation of contravention or infringement.

30. Given the nature of the Petition and the gravity of the issues raised, there remains the need that the pleading be crafted in such a manner as to demonstrate how each Respondent violated which of the Petitioners’ constitutional rights. Having failed to attain such a threshold, the Petition suffered a false start and lacks any legal leg to stand on.



31. Therefore, on the basis of failure to raise constitutional issues, the jurisdiction of this Court was not properly invoked.
32. Consequently, the following orders do hereby issue: -
 - a. This Court declines jurisdiction on the basis that the Amended Petition fails to raise any constitutional issues for determination.
 - b. The Amended Petition is hereby struck out.
 - c. Each party shall bear its costs.

Orders accordingly.

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

A. C. MRIMA

JUDGE

