



**Njoroge v Kenya Power & Lighting Company (Constitutional Petition E533 of 2021)
[2023] KEHC 1924 (KLR) (Constitutional and Human Rights) (10 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1924 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E533 OF 2021**

AC MRIMA, J

MARCH 10, 2023

BETWEEN

CHARLES KINYANJUI NJOROGE PETITIONER

AND

KENYA POWER & LIGHTING COMPANY RESPONDENT

RULING

Introduction

1. The respondent's notice of preliminary objection dated December 17, 2021 is the subject of this ruling. The objection was filed in response to the petition herein.
2. The objection impugned the jurisdiction of this court on the principle of exhaustion.
3. Parties filed written submissions which were quite elaborate and referred to several decisions. This court is indeed grateful to all the parties.

Analysis:

4. Given the length and nature of the submissions, I will not reproduce the same verbatim in this ruling. However, I will consider the parties' positions, arguments and decisions referred to in the discussion herein.
5. The objection was tailored as follows: -

“Take notice that the respondent shall at the earliest opportune time raise a preliminary objection that this honorable court lacks jurisdiction to hear and determine this dispute and suit together with all consequential orders should be struck out with costs as the same



offends the provisions of sections 3, 10; 11(e), (f), (i), (k) & (l); 23; 24; 36; 40; 42; 159(3); 160(3) and 224(2)(e) of the Energy Act, 2019 together with regulations 2, 4, 7 and 9 of the Energy (Complaints and Disputes Resolution) Regulations, 2012 as read together with article 159(2)(c) and 169(1)(d) and (2) of the Constitution of Kenya, 2010 and sections 9(2) and (3) Fair Administration Act, 2015”

6. It was strongly argued that the dispute before court squarely falls within the jurisdiction of Energy and Petroleum Regulatory Authority (hereinafter referred to as ‘the Authority’) established under section 9 of the Energy Act, No 1 of 2019. I will hereinafter refer to the Energy Act as ‘the Act’.
7. Alternatively, it was argued that the dispute would be wholly dealt with before the Energy and Petroleum Tribunal(hereinafter referred to as ‘the tribunal’) established under section 25 of the Act.
8. The petitioner vehemently disagreed with the respondent. It contended that the constitutional issues raised in the petition were outside the purview of the authority and the tribunal.
9. Going forward, since the objection is centered on the doctrine of exhaustion, I will now deal with the legal position of the doctrine of exhaustion and its applicability in this matter.
10. The doctrine of exhaustion in Kenya 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.

11. Clause 3 is on traditional dispute resolution mechanisms.
12. 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 v Independent Electoral and Boundaries Commission (IEBC) 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 v 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.

13. 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 v Independent Electoral and Boundaries Commission (IEBC) & 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 v 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.
14. 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 v 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.

15. Further, in civil appeal 158 of 2017, *Fleur Investments Limited v 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 v 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.

16. 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.

17. Returning to the matter at hand, the petition seeks the following prayers: -

- a. A declaration that the respondent has violated the petitioner's fundamental rights as enshrined by article 46 of the *Constitution* to goods and services of reasonable quality and gaining full benefit of the said goods and services.
- b. A declaration that the violation of the petitioner's right to goods and services of reasonable quality and the enjoyment of their full benefit thereof has occasioned him economic loss, time spent following up on the issue he has been raising with the respondents.
- c. An order that electricity supply bill of 909,115.21 as at 1 November 16, 2021 in respect to electricity account number 22602409 at the petitioner's private is without basis and or justification
- d. An order directed at the respondent to bill the petitioner based solely on the actual meter readings on the tariffs set approved by the law.
- e. An order permanently restraining the respondent from blocking petitioner's prepaid account numbers 141405922610, 37182977852, 31414076372, 14140697971, 14140176398, 14140176232, 14141076513 with respect to the petitioner's rental units without any justifiable cause.



- f. An order directed at the respondent to correct or delete all untrue or misleading information in the electricity bills that affects the petitioner.
 - g. Any other relief that this honourable court may deem fit
18. 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 sections 9 and 25 of the Act.
19. This court affirms the position that the petition centres on the manner the petitioner and the respondent have engaged over time in respect to the charges levied on the petitioner's electricity supply account in Karen within the Nairobi city county. The matter also relates to the manner in which the respondent has generally acted on the petitioner's other electricity supply accounts within other areas within the Nairobi city county. The petition, therefore, is about whether the petitioner's rights and fundamental freedoms guaranteed in the *Constitution* were infringed by the actions of the respondents. To that end, the petition mainly seeks declarations and orders correcting the billing information in the accounts.
20. It is this court's further position that an entity like the tribunal which is chaired by a person who qualifies to be appointed as a judge of the High Court of Kenya (section 26(1)(a) of the Act) and whose vice chairperson also holds similar qualifications as the chairperson (section 26(2) of the Act) is capable of determining whether a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened. However, the tribunal lacks the jurisdiction to interpret the *Constitution*.
21. The reason for the foregoing holding is simple. The members of the tribunal 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 tribunal must be in a position, through the expertise of the chair and the vice chair, and in upholding the *Constitution*, to be able to determine whether a given set of circumstances reveal denial, violation, infringement or threat to a right or fundamental freedom in the bill of rights.
22. 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.
23. Unlike the High Court, tribunals and other quasi-judicial bodies 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.
24. There is, therefore, a defined distinction between determining the denial, violation, infringement or threat to a right or fundamental freedom in the bill of rights and interpreting the *Constitution*. Whereas the former is not exclusively a judicial function, the latter is.
25. Having said so, there is also an important issue which calls for clarification. The issue is whether an entity with powers to determine the denial, violation, infringement or threat to a right or fundamental



freedom in the bill of rights outrightly ousts the jurisdiction of the High Court. Indeed, that is the heart of the doctrine of exhaustion.

26. In such instances, unless the exceptions to the doctrine of exhaustion apply, the High Court will postpone judicial consideration of such disputes until after the available avenues are fully adhered to. Therefore, on one hand, in cases where a party calls upon the High Court to determine whether there is denial, violation, infringement or threat to a right or fundamental freedom in the bill of rights and, on the other hand, a statute provides for an alternative avenue for the consideration of the dispute, then unless any of the exceptions to the doctrine of exhaustion applies, the High Court must decline jurisdiction over the matter.
27. In the instant matter, the tribunal has the jurisdiction to determine whether the petitioner's rights or fundamental freedoms in the bill of rights were denied, violated, infringed or threatened. It also has powers to grant equitable remedies as sought by the petitioner.
28. The tribunal established under the Act, therefore, possess the jurisdiction to deal with all the issues raised. To that extent, therefore, the objection is relevant and is legally sustainable.
29. With such a finding, the objection is determined as follows: -
 - a. This court lacks the jurisdiction to hear and determine the petition on the basis of the doctrine of exhaustion.
 - b. The notice of preliminary objection dated December 17, 2021 is hereby allowed and the petition is struck out.
 - c. Since the dispute between the parties still subsists, each party shall bear its own costs.
30. 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:

Mr. Kipkurui, Counsel for the Petitioner.

Mr. Walala, Counsel for the Respondent.

Regina/ Chemutai – Court Assistants.

