Ribathi & 2 others v Office of Registrar of Political Parties & 2 others (Petition E442 of 2021) [2023] KEHC 1851 (KLR) (Constitutional and Human Rights) (17 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1851 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E442 OF 2021

M THANDE, J

MARCH 17, 2023

BETWEEN

GICHUKE RIBATHI .... 1ST PETITIONER

DUNCAN KINARO .... 2ND PETITIONER

JANUARY KIVINDO .... 3RD PETITIONER

AND

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

ANN N. NDERITU, REGISTRAR OF POLITICAL PARTIES 2ND RESPONDENT

OFFICE OF THE ATTORNEY GENERAL .... 3RD RESPONDENT

RULING

1. By a Petition dated 25.10.21, the Petitioners seek the following reliefs:

    a. THAT a declaration be issued that Rules 3(4) and 4(5) of the Political Party (Registration) Rules are in conflict with Sections 5(2) and 7(4) respectively of the *Political Parties Act* 2011 and therefore unlawful.

    b. THAT a declaration be issued to declare the Respondents MUST issue or decline to issue Registration certificates in both cases of provisional or full registrations within 30 days upon application for registrations.

    c. THAT a declaration be made to declare that by failing to issue/decline to issue the Petitioners together with other founder members with provisional registration certificate for "Msingi wa Utaifa Party (MUP)" within the

stipulated period of 30 days of compliance was illegal as it contravenes the express and mandatory provisions Sections 5(2) of *Political Parties Act* 2011.

d. THAT a declaration be made to declare that by failing to issue or decline to issue the Petitioners together with other founder members with full registration certificate for "Msingi wa Utaifa Party (MUP)" within the stipulated period of 30 days of compliance was illegal as it contravened the express and mandatory provisions Section 7(4) of *Political Parties Act* 2011.

e. THAT a declaration be issued to declare that by failing to issue the petitioner together with other founder members with provisional registration certificate for "Msingi wa Utaifa (MUP) "within the stipulated period of 30 days of compliance denied the said petitioner and other founder members their rights and freedoms as enshrined in Constitution of Kenya (2010) and more specifically Articles 36 and 38 of *the Constitution*.

f. THAT a declaration be issued to declare that the 1st and 2nd respondents act violated *the Constitution* and offended the mandatory provisions of section 5 and 7 of *Political Parties Act* 2011 which she swore to defend when taking her oath of office.

g. THAT a declaration be issued to declare that a political party contemplated under Article 260 and part 3 of Chapter 7 are fully registered Political Parties and not provisionally registered political parties.

h. THAT a provisionally registered political party cannot acquire assets, open offices in its own name contemplated under Article 260 and part 3 of Chapter 7 are the fully registered political parties and not provisionally registered Political parties.

i. A declaration be issued to declare that Provisions of Rules 17, 18 and 19 of the Rules 2019 only apply to fully registered parties as contemplated under section 16 of the *Political Parties Act* (2011) and Article 260 and Part 3 Chapter Seven of *the Constitution* of Kenya and not for provisionally registered Political Parties as in the case of MUP.

j. That a declaration be issued to declare that to require provisionally registered political party to open countrywide offices before full registration (existence) is unlawful, unreasonable and impractical.

k. THAT a declaration be issued to declare that Msingi wa Utaifa Party (MUP) as provisionally registered party complied with provisions of section 7(2() (f) (ii) and (iii) when the Petitioners submitted their application for full registration to the Respondents on 28th May 2021.

l. THAT an order do issue compelling the 1st and 2nd respondents to issue forthwith certificate of full registration for Msingi was Utaifa (MUP) to the petitioners herein and other founder members or in the alternative Msingi wa Utaifa Party (MUP) be allowed through a court order to operate as a fully registered political party.

m. THAT a declaration be issued to declare that to charge/ payment of Kshs. 100,000 and Kshs. 500,000 for provisional and full registration respectively

before a political party is registered is unconstitutional as it is discriminatory against the majority of Kenyans who cannot afford to pay the said charge and therefore offends the provisions of Article 27 of *the Constitution*

n. THAT a declaration be issued to declare that to charge / demand a payment of Kshs. 100,000 and Kshs 500,000 as prescribed in the second schedule to the regulations for provisional and full registration respectively before a political party is registered denies a majority of Kenyans who cannot afford to pay the said charges/ fees their rights and freedoms as enshrined in Articles 36 and 38 of *the Constitution* of Kenya (2010)

o. An order of permanent injunction be issued barring the 1st and 2nd respondents of their agents, servants or any other person acting for them and on their behalf from charging/ demanding a payment of Kshs. 100,000 and Kshs 500,000 for provisional and full registration respectively before a political party is registered.

p. An order do issue compelling the 1ts and 2nd respondents to charge registration fees of Kshs. 500, or any other amount the court may deem fit to charge for both provisional and full registration of political parties.

q. Any other order this Honourable Court may deem fit to give.

r. An order for compensation do issue to the petitioners for financial loss opportunities and violation sad deprivations of their rights and freedoms occasioned by the 1st and 2nd respondents.

s. Cost be provided.

2. Simultaneously with the Petition, the Petitioners filed the Application of even date seeking the following orders in the interim:

   1. Spent

   2. THAT pending hearing and determination of this application, an order be issued compelling the 1st and 2nd respondents to issue the petitioner/ applicant and other founder members full registration certificate for “Msingi wa Utaifa Party(MUP)” and in alternative the court order so granted do operate as a full registration certificate for the “Msingi wa Utaifa (MUP)” , or in the alternative pending hearing and determination of this application an order so issue maintaining the “ Msingi wa Utaifa (MUP) “ as a provisionally registered party.

   3. THAT pending hearing and determination of this petition, an order be issued compelling the 1st and 2nd respondents to issue the applicant and other founder members with full registration certificate for “Msingi wa Utaifa Party (MUP)”and in alternative the court order so granted do operate as a full registration certificate for the said “Msingi wa Utaifa (MUP) “.

   4. THAT the cost of this application be provided by the respondents herein.

3. The Petitioners averred that they are founders of the Msingi wa Utaifa (MUP) party (the Party) and intended to participate in the General Elections of 2022 as candidates for presidency, governor,

parliament and members of county assemblies using the said party. To this end, they submitted the Respondents Party's nomination rules to the Respondents in 2018. The petitioners have moved to this Court as they are aggrieved by the actions of the 1st and 2nd Respondents of deregistering the Party on 13.8.21, on the premise that the Party did not have functional offices throughout the country. This was after taking them through a rigorous process. As a result of the deregistration of the Party, the Petitioners are greatly prejudiced.

4. The 1st and 2nd Respondents filed a preliminary objection dated 8.11.21 in opposition to the Petition and Application. The objections are:

   1. That this Honourable Court has no jurisdiction to hear and determine this Application together with the entire Petition in line with Article 169(1)(d) and (2) of *the Constitution*.

   2. That this Honourable Court has no jurisdiction to hear and determine this Application together with the entire Petition in line with Sections 7, 34(a), 40(f) and 41 of the *Political Parties Act* 2011 of the Laws of Kenya.

5. It is the preliminary objection that is the subject of this Ruling, and only issue for determination is whether this Court jurisdiction to hear and determine this matter.

6. The 1st and 2nd Respondents submitted that the Political Parties Disputes Tribunal (the Tribunal) established under Section 39 of the Act has juridiction under Section 40, to hear and determine appeals from decisions of the Registrar of Political Parties. The jurisdiction of the Tribunal is envisioned under Article 169(2) of *the Constitution* and actualized through Section 40(1) of the Act. It was submitted that a court of law must first satisfy itself on the question of jurisdiction before it presides over any matter placed before it. Where the court finds it has no jurisdiction, it must down its tools. It was further submitted that whereas this Court has unlimited jurisdiction under Article 165 of *the Constitution*, it is good law that every suit shall be instituted in the Court of the lowest grade competent to try it.

7. The 1st and 2nd Respondents submitted that where there exists sufficient and adequate legal avenue to seek redress, a party must seek such avenue under the relevant statutory provision otherwise such statutory provision would be rendered otiose. In light of this, they submitted that under Section 40(1)(f) of the Act, the Petitioners' recourse lies in the Tribunal and not in this Court. Additionally, that Section 9(2) of the Fair Administrative Actions Act (FAAA) prohibits the High Court and subordinate courts from reviewing an administrative action or decision unless all remedies under any written law are exhausted.

8. It was further submitted that the preliminary objection is on a pure point of law and that no evidence is required to determine the same. The 1st and 2nd Respondents urged the Court to dismiss the Petition and Application with no order as to costs against them.

9. For the Petitioners, it was submitted that in filing the Petition, they considered the provisions of Article 165(3)(b) and 23(1) of *the Constitution*. They contended that the Petition alleges contravention, violation, deprivation and threat to rights and fundamental freedoms of individuals as enshrined in Articles 27, 28, 36, 38, 47 and 48 of *the Constitution* arising from the actions and decisions of the 1st and 2nd Respondents. They thus submitted that the preliminary objection is a diversionary tactic aimed at diverting the Court from the main and important constitutional issues raised by the Petitioners.

10. The Petitioners further argued that the 1st and 2nd Respondents did not cite any constitutional or statutory provisions conferring the Tribunal or any other court the jurisdiction to hear and determine

the Petition and that none exists. According to them, the Tribunal does not have the status of the High Court and cannot hear and determine the Petition. They contended that the conduct of the 1st and 2nd Respondents herein has been scandalous, vexatious and frivolous and urged that the preliminary objection be dismissed with costs.

11. It is an established principle of law that a court may only exercise such jurisdiction as has been conferred upon it and cannot arrogate to itself jurisdiction not so conferred upon it. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, the Supreme Court stated as follows:

> (68). 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 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.

12. The jurisdiction of this Court stems from *the Constitution* and certain statutes. Article 165(3) of *the Constitution* provides:

> (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. (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.

13. As can be seen from the above provisions, this Court has the jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened and to hear and determine 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.

14. Article 22(1) of *the Constitution* guarantees to every person, 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. Such party may approach this Court for redress. Article 23(1) of *the Constitution* has conferred upon this Court, the jurisdiction to entertain such claim as follows:

> The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

15. The Petitioners claim that their rights and fundamental freedoms have been denied, violated, infringed or threatened by the 1st and 2nd Respondents.

16. In the case of Linus Kamunyo Muchina v Speaker Embu County Assembly Majority Leader – Embu County Assembly [2016] eKLR, Bwononga, J. stated as follows about the jurisdiction of the Court:

> Under Article 23 (1) of the 2010 Constitution of Kenya, the High Court is vested with jurisdiction to enforce the Bill of Rights. It is authorized "to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights". In exercise of its powers, the court is required to act in accordance with Article 165 (3) of the 2010 Constitution of Kenya. The jurisdiction under Article 165 (3) (b) is "to determine the question whether the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened". It is clear that this provision gives the High Court original jurisdiction in those matters that are set out in that article. In exercise of its powers under Article 165 (3) the High Court acts as a court of first instance. Furthermore, under Article 165 (6), the High Court "has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court".

17. The jurisdiction of this Court may however be limited, ousted or restricted by statute, in particular matters or instances. In the case of Eliud Wafula Maelo v Ministry of Agriculture & 3 others [2016] eKLR relied on by the Respondent, the Court of Appeal considered the question of limitation of the jurisdiction of the High Court and stated as follows:

> 11. The jurisdiction of the High Court in particular matters or instances can be ousted or restricted by statute. In Halsbury's Laws of England, Volume 10 at paragraph 319, the learned authors state:
>
> " The subject's right of access to the courts may be taken away or restricted by statute."
>
> ...
>
> Paragraph 723 states:

> "Where a tribunal with exclusive jurisdiction has been specified by a statute to deal with claims arising under the statute, the County Court's jurisdiction to deal with those claims is ousted, for where an Act creates an obligation to and enforces the performance of it in a specified manner only, the general rule is that performance cannot be enforced in any other manner."

12. In Narok County Council V Trans-mara County Council (supra) this Court held that:

> " … though section 60 of *the Constitution* gave the High Court a limited jurisdiction, it did not cloth it with jurisdiction to deal with matters that a statute had directed should be done by a Minister as part of his statutory duty."

13. In determining whether a court has jurisdiction in a particular matter, a court cannot consider the provisions of *the Constitution* only. Regard must also be taken of relevant statutes. That is what was stated by the Supreme Court in THE MATTER OF THE INTERIM INDEPENDENT ELECTORAL COMMISSION [2011] eKLR:

    [29] "Assumption of jurisdiction by courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent."

14. Similarly, in SULEIMAN IBRAHIM V AWADH SAID [1963] E. A. 179, Windham, C. J. held that section 33 of the *Rent Restriction Act* of Tanzania excluded concurrent jurisdiction of the High Court in respect of a matter which could be handled by the Rent Restriction Board.

18. Where an alternative mechanism for resolution of disputes or claims has been specified by statute, then the Court's jurisdiction to deal with such disputes and claims is ousted.

19. The office of the Registrar of Political Parties, (the Registrar) is established under Section 33 of the Act. Section 34 of the Act provides for the functions of the Registrar of Political Parties (the Registrar). Section 34(a) provides:

    The functions of the Registrar shall be to—

    a. register, regulate, monitor, investigate and supervise political parties to ensure compliance with this Act;

20. Section 7 of the Act makes provision for the conditions of full registration of a political party. At the heart of this Petition is the deregistration of the Party by the 1st and 2nd Respondents. The 1st and 2nd Respondents' filed their preliminary objection is anchored on Article 169(1)(d) and (2) of *the Constitution* and Sections 7, 34(a), 40(f) and 41 of the *Political Parties Act* (the Act).

21. Article 169(1)(d) makes provision for the establishment of tribunals such as the Tribunal herein as follows:

    1. The subordinate courts are—

    (d) any other court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by Article 162(2).

22. Section 40 of the Act provides for the jurisdiction of Tribunal. Relevant to the matter herein, Section 40(1) (f) stipulates as follows:

    1. The Tribunal shall determine—

f. appeals from decisions of the Registrar under the Act.

23. Section 41 relates to determination of disputes by the Tribunal and provides:

1. The Tribunal shall determine any dispute before it expeditiously, but in any case shall determine a dispute within a period of three months from the date the dispute is lodged.

2. An Appeal shall lie from the decision of the Tribunal to the High Court on points of law and facts and on points of law to the Court of Appeal and the decision of the Court of Appeal shall be final.

3. A decision of the Tribunal shall be enforced in the same manner as a decision of a Magistrates Court but the Tribunal shall have the powers of the High Court to punish for any acts or omissions amounting to contempt of the Tribunal.

(3A) The Chief Justice may, in consultation with the Tribunal, prescribe regulations for determination of disputes under this section.

4. The Tribunal shall apply the rules of evidence and procedure under the *Evidence Act* (Cap. 80) and the *Civil Procedure Act* (Cap. 21), with the necessary modifications, while ensuring that its proceedings do not give undue regard to procedural technicalities.

24. It is clear from the foregoing that the Act has in built mechanisms for addressing the grievances of any party aggrieved by the decision of the Registrar. A party aggrieved by the decision of the Registrar is required to appeal to the Tribunal, before escalating the dispute to the High Court.

25. The said provisions accord with Article 159(2)(c) of *the Constitution* which recognizes and entrenches the use of alternative mechanisms for dispute resolution in the following terms:

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

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

26. The decision by the 1st and 2nd Respondents to deregister the Party constitutes an administrative action within the definition set out in Section 2 of the *Fair Administrative Action Act* (FAAA) which provides that an "administrative action" includes–

i. the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

ii. any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

27. Section 9 of the FAAA sets out the procedure for judicial review of an administrative action as follows:

1. Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any

administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*.

2. The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

3. The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

4. Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

5. A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.

28. Section 9(2) of the FAAA is explicit that courts shall not review an administrative action or decision unless all the mechanisms for appeal or review and all remedies available under any other written law are first exhausted. This is the doctrine of exhaustion.

29. In the case of Peter Ochara Anam & 3 others v Constituencies Development Fund Board & 4 others [2011] eKLR, Asike-Makhandia, J. (as he then was) addressed his mind to the doctrine of exhaustion and stated:

> The provision is couched in mandatory terms and has no exceptions and or provisos. Coming to court by way of a constitution petition is not excepted either much as *the Constitution* is superior law to the statute aforesaid. In view of this provision and there being no allegations or evidence that the petitioner exhausted these remedies, in bringing this petition, the petitioners have deliberately avoided the procedure and remedy provided for under the Act. They have not proffered any explanation as to why they did not refer any of the complaints they have raised to the 1st respondent as required by law. It has been stated constantly that where there exists sufficient and adequate legal avenue, a party ought not trivialize the jurisdiction of the court pursuant to *the Constitution*. Indeed, such a party ought to seek redress under the relevant statutory provision, otherwise such available statutory provisions would be rendered otiose. In the case of Harrikson –vs- Attorney General (1979) WLR 62, the Privy Council held:-
>
> "…The notion that whenever there is a failure by an organ of the Government or public authority or public officer to comply with the law necessarily entails the contravention of some fundamental freedom guaranteed to individuals by Chapter 6 of *the Constitution* is fallacious. The right to apply to the High Court under section 6 of *the Constitution* for redress when any human right or fundamental freedom is, or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for the normal proceedings for invoking judicial controls of administrative action…".

30. That the doctrine of exhaustion encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution* and was aptly elucidated in the case of Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR wherein the Court of Appeal stated:

> 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 the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. 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 of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.

31. The Court may exercise its discretion to exempt a party from the obligation to exhaust all available remedies before applying to the Court for judicial review of any administrative action. Section 9(4) of the FAAA provides:

> Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

32. For the Court to exercise its discretion in favour of a party, it must be demonstrated that exceptional circumstances exist to warrant such exemption and that such exemption is in the interest of justice. Notably, such exemption is made on application by the party desiring the same.

33. In the case of William Odhiambo Ramogi & 3 others v Attorney General & 4 others (supra), the Court considered the exceptions to the doctrine of exhaustion and stated:

> 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.

34. The contested decision by the 1st and 2nd Respondents by which the Petitioner is aggrieved is a decision of the Registrar as contemplated in Section 40(1)(f) of the Act. As such, by dint of Section 9 of the FAAA, the first port of call for the Petitioners, was the Tribunal and thereafter this Court by way of appeal pursuant to Section 41(2) of the Act which provides:

> An Appeal shall lie from the decision of the Tribunal to the High Court on points of law and facts and on points of law to the Court of Appeal and the decision of the Court of Appeal shall be final.

35. The Court notes that the Petitioners have submitted that the Tribunal has no jurisdiction under *the Constitution* or statute to entertain the Petition. They cited the case of Royal Media Services Ltd v Attorney General & 6 others [2015] eKLR, to support their contention. In that case, Mumbi Ngugi, J. (as she then was) considered the question whether, in the absence of enabling legislation under Article 23(2) of *the Constitution*, a subordinate court can hear and determine matters of alleged violation of constitutional rights. The learned Judge made the following orders:

a. I hereby declare that only the High Court and courts of similar status currently have jurisdiction to hear and determine matters of violation of fundamental rights and freedoms in the Bill of Rights.

b. A declaration that in the absence of a legislation enacted by parliament to give subordinate courts original jurisdiction to hear and determine matters of denial, violation and infringement of right or fundamental freedom in the bill of rights, subordinate courts and tribunals, including the 2nd respondent, do

not have jurisdiction to hear and determine matters arising from the bill of rights.

36. With respect, the submission by the Petitioners is a misapprehension of the import of the preliminary objection. There is no suggestion, even remotely, that the Petition which seeks a determination on matters of denial, violation and infringement of rights or fundamental freedoms in the bill of rights, ought to be heard by the Tribunal. The preliminary objection as I understand it is that the redress available to the Petitioners over the decision made by the Registrar to deregister the Party, lay in an appeal under Section of 40 of the Act. It is only after exhausting this procedure that the Petitioners may come to this Court. Preliminary objection by the 1st and 2nd Respondents meerts the

37. Jurisdiction is everything. Jurisdiction is what gives a court the power, authority and legitimacy to entertain a matter before it. The locus classicus on jurisdiction is the oft cited case of Owners of the Motor Vessel "Lillian S' v. Caltex Oil (Kenya) Ltd [1989] KLR 1., where Nyarangi, JA. famously stated:

> 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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.

38. After carefully analysing the matter, the law and the authorities cited, this Court has found that by dint of Section 9(4) of the FAAA, it lacks the jurisdiction to entertain the Petition herein. The Court must therefore down its tools Accordingly, the preliminary objection dated 8.11.21 is hereby upheld. It follows that the Petition dated 25.10.21, having been filed in a Court lacking jurisdiction is hereby struck out. The circumstances herein do not call for an award of costs.

DATED AND DELIVERED IN NAIROBI ON 17TH MARCH 2023

M. THANDE

JUDGE

In the presence of: -

.... **for the Petitioner**

.... **for the 1st and 2nd Respondents**

.... **for the 3rd Respondent**

.... **Court Assistant**