



**Yatani v Law Society of Kenya; Njeri & 2 others (Interested Parties) (Petition E042 of 2023)
[2023] KEHC 1853 (KLR) (Constitutional and Human Rights) (10 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1853 (KLR)

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

PETITION E042 OF 2023

M THANDE, J

MARCH 10, 2023

BETWEEN

VINCENT GODANA YATANI PETITIONER

AND

LAW SOCIETY OF KENYA RESPONDENT

AND

BENSON NGUGI NJERI INTERESTED PARTY

PARLIAMENTARY SERVICE COMMISSION INTERESTED PARTY

CHIEF REGISTRAR OF THE JUDICIARY INTERESTED PARTY

JUDGMENT

1. The Petitioner filed a Petition dated 13.2.23, seeking the following reliefs:
 - a. A declaration be and is hereby made that the impugned appointment of the 1st interested party as the respondent's nominee to the selection panel for the appointment of chairperson and members of the Independent Electoral and boundaries Commission is null and void *ab initio*.
 - b. A declaration be and is hereby made that the petitioner's nomination to the selection panel for the appointment of chairperson and members of the Independent Electoral and Boundaries Commission communicated *vide* a letter dated 28th October 2022 is valid and remains in force as initially issued.
 - c. A declaration be and is hereby made that the petitioner is the duly appointed nominee of the respondent to the selection panel for the appointment of chairperson and members of the Independent Electoral and Boundaries Commission.



- d. An order of certiorari be and is hereby issued bringing into the court and quashing the resolution of the respondent communicated *vide* the minutes dated 10th February 2023 nominating the 1st interested party as the respondent's representative to the selection panel for the appointment of chairperson and members of the Independent Electoral and Boundaries Commission.
 - e. This Honourable Court be pleased to issue a prohibition order restraining the 2nd interested party from acknowledging and/ or forwarding to the President of Kenya for the purpose of gazettment, the name of the 1st interested party or any other person other than the petitioner herein as the respondent's representative to the selection panel for the appointment of chairperson and members of the Independent Electoral and Boundaries Commission.
 - f. This Honourable Court be pleased to issue a prohibition order restraining the 3rd interested party, her agents or anyone under her instructions from swearing in the 1st interested party or any other person other than the petitioner as the respondent's representative to the selection panel for the appointment of chairperson and members of the Independent Electoral and Boundaries Commission.
 - g. This Honourable Court be pleased to issue a prohibition order restraining the respondent by itself, its agents or anyone under its instructions from frustrating or in any other manner unlawfully interfering with the petitioner's nomination to the selection panel for the appointment of chairperson and members of the Independent Electoral and Boundaries Commission communicated *vide* the respondent's letter dated 28th October 2022.
 - h. Special damages of Kshs. 83,000 for travel expenses.
 - i. Punitive damages against the respondent for violating the petitioner's rights.
 - j. The costs of this petition and interest thereon be *provided* for.
 - k. Any other order that this Honourable Court may deem just in the circumstances.
2. Together with the Petition, the Petitioner filed an application of even date seeking similar reliefs in the interim.
 3. The Petitioner is a member of the Respondent. His case is that the Respondent sent out a notice to its members on 23.10.22 calling for applications for members interested in serving in the selection panel for the appointment of commissioners of the Independent Electoral and Boundaries Commission (IEBC). Being interested in so serving, the Petitioner applied and was on 27.10.22 selected to be the Respondent's representative in the said selection panel. On 28.10.22, the Respondent forwarded the name of the Petitioner to the 2nd Interested Party as its representative in the selection panel. On 29.11.22, the Petitioner took a sabbatical break from his doctoral studies at the University of Debrecen, Hungary and returned home in readiness for the task that had been entrusted to him.
 4. The Petitioner averred that he was appalled and surprised when the Respondent on 9.2.23 at 2.40 pm, sent out another notice to its members calling for applications for the same position that it had earlier nominated him for. The Respondent made reference to the amendment of the Independent Electoral and Boundaries Commission (Amendment) Act 2023 that came to force on 6.2.23. On the same day at 3.06 pm, the Petitioner wrote to the Respondent seeking an explanation, given that his nomination had not been revoked. Later, in what was referred to as an extraordinary meeting held on 10.2.23, the Respondent resolved that its nominee for the selection panel was the 1st Interested Party. No reasons were given to the Petitioner for the purported revocation of his nomination. He was also



not given any notice of the purported revocation of his nomination, nor was he given a chance to be heard. The Petitioner is thus apprehensive that unless the Petition is heard and the orders sought granted, his nomination will continue to be undermined and frustrated by the Respondent which has contravened Articles 2, 10, 24, 47, and 50 of the Constitution and Sections 4 and 7 of the FAAA.

5. The Respondent opposed the Petition *vide* filed preliminary objection dated 15.2.23. The objections raised are that:
 1. The Petitioner has not exhausted the alternative dispute resolution mechanism as envisaged in line with Regulations 95 and 96(1) of the Law Society of Kenya (General) Regulations, as read with section 41(q) of the LSK Act.
 2. The Petitioner has not sought and obtained exemption from exhaustion of Internal Dispute Resolution Mechanisms as contemplated by the provisions of the Fair Administrative Actions Act.
 3. The Petitioner has failed the test of specificity established in the celebrated case of Anarita Karimi vs Republic (No. 1) (1979) 1 KLR 154. The Petitioner has failed to lay down with precision the manner in which his constitutional rights have been violated or threatened.
 4. This Honourable Court lacks jurisdiction to hear and determine the Petition and the Application filed herein.
6. In a replying affidavit sworn on 15.2.23 by Florence Muturi, its Chief Executive Officer, the Respondent reiterated the objections raised in the preliminary objection. The Respondent admits that the Petitioner was nominated as the Respondent's representative in the selection panel and his name submitted to the 2nd Interested Party, but added that the selection panel was never constituted. Florence Muturi averred that pursuant to the High Court Constitutional Petition Number E 364 of 2020; Okoiti v Attorney General & 5 others (Constitutional Petition E364 of 2020) [2021] KEHC 439 (KLR) (Constitutional and Human Rights) (29 November 2021) (judgment), Section 2(2) (a) of the Independent Elections and Boundaries Commission (Amendment) Act No. 18 of 2020 was declared unconstitutional and the court proceeded to quash the whole Section. Consequently, everything done pursuant to the said provision was nullified including the Constitution of the selection panel.
7. She further deposed that at the time of annulling the composition of the selection panel and at the time the Petitioner was appointed, there was pending before Parliament an amendment bill intended to regularize the selection panel in line with the decision of the Court. Further, the First Schedule to the IEBC Act was amended on 23.1.23 and the entire paragraph 1(2) of the Act was repealed and replaced by the amendment. Subsequently, the Independent Elections and Boundaries Commission (Amendment) Act 2023 was enacted into law and came into operation on 6.2.23. By a letter dated 7.2.23 received by the Respondent on 9.2.23, the 2nd Interested Party requested the Respondent to nominate its representative in line with the new amendments that necessitated the composition of the selection panel. She further averred that *vide* Gazette Notice No. 1901 issued on 14.2.23, the President of the Republic of Kenya issued a notification of impending vacancies in the office of the chairperson and two members of the IEBC, nullifying any previous declarations and any applications to the selection panel.
8. Florence Muturi stated that post the nomination of the Petitioner to the selection panel and the passage of the amendment bill, 3 more commissioners of the IEBC resigned from office creating an additional three vacancies. The Respondent called for expression of interest to serve in the reconstituted panel wherein the Petitioner made an application among other 82 Advocates for consideration. The Petitioner's application was considered and he received one vote. His application was unsatisfactory for the reasons that he had indicated in that he was a member of the Mt. Kenya Branch yet the Branch had



no record of his membership or of his participation in any of their activities. Further, the Petitioner had indicated in his CV that he is a lecturer at the University of Nairobi and that he is in academia but misrepresented where his offices are by indicating that he was at the Governor's office in Marsabit. The Council took into account the Petitioner's lack of candor and found the 1st Interested Party to be the best candidate for nomination and the majority of the members of the Council voted in favour of the 1st Interested Party. Additionally, the Amendment Act having come into force on 6.2.23, it could not have been possible that the actions of the Respondent were to apply retrospectively.

9. It is the Respondent's case that the decision to call for new applicants to fill the said post of the IEBC Selection Panel was necessitated by the amendment to the Law which came into force on 6.2.23 and there was nothing wrong done. Further that the Petitioner was among the applicants but was not successful as per the majority decision of the Council.
10. The Respondent further asserted that the Petition has failed the test of specificity as required in the Anarita Karimi case and has not cited with precision the manner in which the Petitioner's constitutional rights have been violated or threatened and has not met the threshold required to bring this matter as a petition. Further, the Petition and Application provide no evidence in support of the various issues raised. There is also no evidence tendered to prove that the reason for travel was solely to participate in the affairs of the selection panel being that the selection panel had not been constituted and there had been no call for any meeting of the members of the selection panel. The Respondent asserted that it followed due process and law in nominating the 1st Interested Party and the Petitioner has not shown any decision that has been undertaken by the Respondent in total disregard of the law. Further that the Petitioner cannot seek orders on the ground that he was not given fair hearing or fair administrative action and yet he applied, was considered but was not successful. The Respondent accused the Petitioner of not coming to equity with clean hands and that he deceived the Court to obtain the orders by stating that he was never considered. He failed to disclose that he was never sworn into the selection committee and that he participated in the process which outcome has never been challenged. The Respondent contended that this Court lacks jurisdiction to interfere with the functions and conduct of affairs of the Respondent and urged that the Application and Petition be dismissed with costs.
11. The 1st Interested Party Benson Ngugi Njeri filed a replying affidavit by sworn on 15.2.23 in opposition to the Petition. He deposed that on 9.2.23, he received an email from the Respondent, requesting advocates interested in being nominated to the selection panel to submit their applications by 5.00 pm the same day. He submitted his application together with his CV. By a letter dated 10.2.23 addressed to the clerk of the National Assembly and him, the Respondent indicated that he had been found the most suitable candidate. He was thus nominated as the Respondent's representative to the selection panel. He reiterated the averments of the Respondent regarding the reasons the IEBC Act was amended. He asserted that the Petitioner's nomination could not survive, having been done pursuant to a provision of the law that had been declared unconstitutional. As such, seeking the validation of his nomination through this Petition is tantamount to reviewing and overturning the judgment in Pet. No. E364 of 2020 through the back door. According to the 1st Interested Party, the Petition and Application are based on an erroneous understanding that the Respondent made an administrative decision against the Petitioner. The nomination of the Petitioner was rendered illegal by a decision of the court and operation of law and there is no administrative decision to be reviewed as claimed by the Petitioner. The 1st Interested Party further averred that the Petitioner has not enumerated with specificity to the required standard the constitutional rights that have been alleged violated and/or infringed upon. Further, being that he has been nominated by the Respondent to represent the interests of its members and the society at large, the prejudice to be suffered shall be substantial in the



- event the Respondent is enjoined from appointing any person to the selection panel. Hence it is in the interest of justice that the Petition and Application are dismissed with costs.
12. The 2nd Interested Party opposed the Petition *vide* a replying affidavit sworn by Jeremiah Nyegenye CBS on 15.2.23. He reiterated the averments of the Respondent and the 1st Interested Party. He deposed that the First Schedule to the [IEBC Act](#) provided for the procedure for appointment of chairperson and members of the IEBC. Following the High Court judgment, the recruitment process for chairperson and members of the IEBC could not commence immediately as there was a lacuna in law with regards to the composition of the selection panel. The [Independent Electoral and Boundaries Commission \(Amendment\) Act, 2023](#) as enacted came into force on 6.2.23 to address the lacuna. The said [Act](#) reconstituted the membership of the selection panel to include 1 man and 1 woman nominated by the Parliamentary Service Commission, 1 person nominated by the Public Service Commission, 1 person nominated by the Political Parties Liaison Committee, 1 person nominated by the Law Society of Kenya and 2 persons nominated by the Inter-Religious Council of Kenya.
 13. Following the changes to the law and pursuant to the provisions of paragraph 1(3) of the First schedule to the [IEBC Act](#), and considering the strict timelines provided in law for the recruitment process, the 2nd Interested Party resolved to once again request the nominating bodies under paragraph 1(2) of the First schedule to the IEBC Act to forward the names of their nominees for onward transmission to the President for appointment as members of the selection panel. Consequently, *vide* a letter dated 10.2.23, the Respondent forwarded the name of the 1st Interested Party.
 14. He further deposed that pursuant to the provisions of paragraph 1(3) of the First schedule to the Act, the role of the 2nd Interested Party is limited to receiving nominations from the nominating bodies under paragraph 1(2) and forwarding them to the President for appointment. Accordingly, it acted within the law and the orders sought against it by the Petitioner are unwarranted. He averred that the First schedule of the IEBC Act provides for strict timelines within which the nomination of the members of the selection panel must be carried out and timelines within which, once appointed the selection panel must discharge its mandate. In view of this, the conservatory orders sought by the Petitioner are an affront to the statutory timelines required under the Act.
 15. Parties filed their written submissions which I have duly considered. I have also considered the the cited authorities. The Court will first consider the preliminary objection and make a determination as to whether this Court has the jurisdiction to entertain the Petition.
 16. For the Respondent, it was submitted that the jurisdiction of this Court has been improperly invoked as the Petitioner has circumvented the established procedures in instituting the instant Petition. The Respondent contended that where a clear procedure for redress of any particular grievance is prescribed by the [Constitution](#) or an Act of Parliament, that procedure should be strictly followed. The Respondent asserted that Sections 26(3) and 41(q) the [Law Society of Kenya Act](#) and Regulations 19(1), 20(1) and 96(1) of the Law Society of Kenya Regulations 2020 oust the jurisdiction of this Court in the first instance.
 17. The Respondent further submitted that all the 11 prayers sought in the Petition speak to the enforcement of the Petitioner's alleged accrued rights, not to an interpretation of any violation of any provision of the [Constitution](#) or a violation of the Petitioner's rights. Hence an arbitration tribunal could apply the [Constitution](#) and the law and grant him the prayers upon proof. Additionally, it was submitted that the Petition contravenes section 9(2) of the Fair Administrative Actions Act which is mandatory. Further that it is settled law that alternative dispute resolution mechanisms are anchored in the [Constitution](#) and should be resorted to before the jurisdiction of this Court is invoked. In view



of the foregoing, the Respondent urged that the Court should not entertain the case as the Petitioner has not exhausted the alternative dispute resolution mechanism.

18. The Respondent further submitted that the Petition runs afoul Section 9(2) of the FAAA. Additionally, the Petitioner has not pleaded any special circumstances to warrant a departure from the requirement to exhausted available dispute. The Petition is thus fatally defective and is for striking out with costs.
19. In opposing the preliminary objection, the Petitioner submitted that this Court has competent jurisdiction to obviate him from the ongoing violation of his right to fair administrative action under Article 47 of the Constitution and right to fair hearing embedded in Article 50 of the Constitution. His argument is that pursuant to Article 165 of the Constitution this Court is the court of first instance with regard to interpretation and application of the Constitution. He contended that the Petition is not only a dispute between him and the Respondent but also a matter of violation of his rights envisaged in the Bill of Rights in the Constitution of Kenya. He further submitted that the Petition raises substantial issues about due process, fair administrative action, right to fair hearing and violation of the principle of legitimate expectation. He contended that matters of constitutional violations cannot be redressed by the Respondent internally and do not fall within the ambit of Regulations 96 and 96(1) of the Law Society of Kenya (General) Regulations as read with section 41(q) of the Law Society of Kenya Act. He accordingly urged the Court to declare that the matter is competently before and that the preliminary objection be dismissed with costs to the Petitioner.
20. It is a truism that jurisdiction is everything and 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.

21. The jurisdiction of this Court flows from both the Constitution and statute. 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.

22. Article 23(1) of the Constitution provides:

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.

23. 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.

24. 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”.

25. 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.
26. Flowing from the above decision it is *evident* that 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.
27. The LSK Act has in built dispute resolution mechanisms for resolution of disputes between members inter se or between members and the Council, branch executive or chapter committee of the LSK. The mechanisms *provided* for include negotiation, conciliation & mediation.
28. Regulation 95(1) *provides*:
 - (1) Parties to a dispute referred to in regulation 96(1) may attempt to reach settlement by—
 - a. negotiation;
 - b. conciliation; or
 - c. mediation.
29. Regulation 96 *provides*:
 1. Where a dispute arises—
 - d. relating to the exercise of the mandate or the management of the affairs of the Society, a branch or a chapter; or
 - e. relating to the rights of a member against any other member or the Council, branch executive or chapter committee, the aggrieved party shall—



- i. refer the dispute in writing to the secretary, where the dispute concerns the national office of the Society; or
 - ii. refer the dispute in writing to the branch secretary of the relevant branch where the dispute involves an issue or a party at the branch level.
30. The Regulations 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.
31. A reading of Regulation 96 shows that the same is couched in mandatory terms and requires the aggrieved party to refer the dispute in writing to the Secretary of the LSK or branch secretary as the case may be. Upon referral, the specified dispute resolution mechanisms are then employed. It is noted that Regulation 96 applies where a dispute arises relating to the rights of a member against any other member or the Council of the LSK. In the particular circumstances herein, the Petitioner claims that his rights have been violated by Council of the LSK.
32. The Regulations were made by the Council of the LSK with the approval of members and are binding upon all members, including the Petitioner. The Regulations are made pursuant to Section 41(q) of the LSK Act which *provides*:
- The Council may, subject to the provisions of this Act and with the approval by a resolution of members, make regulations, which shall be binding on all members of the Society, prescribing any of the following matters—
- (q) alternative forms of dispute resolution, including reconciliation, mediation and arbitration;
33. I have carefully perused the Petitioner’s email of 10.2.23 to the CEO of the LSK. What the Petitioner sought in the email is advice on the new call for nomination for representatives of the LSK in the select committee. It was not a referral of the dispute as envisaged under Regulation 96.
34. The decision by the Council 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;
35. Section 9 of the FAAA sets out the procedure for judicial review 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.
36. 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.
37. The doctrine of exhaustion was substantively dealt with by a 5-Judge Bench in the case of 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.

38. 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.

39. And in Okiya Omtatah Okoiti & another v Kenya Power and Lighting Company Limited (KPLC) & 4 others [2020] eKLR, Makau, J. had this to say about exhausting existing dispute resolution mechanisms before approaching the Court:

63. From the aforesaid findings herein above it is clear that there exists an alternative remedy that is sufficient, effective, expedient and economical to resolve the issues raised by the Petitioners, herein which, the Petitioners have by passed and rushed to this Court. The Petitioners cannot be allowed to overlook a clearly laid out procedures and processes, that exists for resolution of disputes. Such processes must be exhausted first, before a party approaches a court. The mere fact that the constitutional provisions are cited or the Constitution is invoked is not sufficient reason to elevate the matter to a constitutional status, and confer jurisdiction to the High Court, to inquire, arbitrate, determine or in any manner deal with issues which are required to be dealt with through a clearly prescribed dispute resolution mechanism, that is provided for in a specific statute.

40. 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.

41. 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.
42. 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.
43. The contested decision by the Respondent by which the Petitioner is aggrieved is a dispute relating to the rights of the Petitioner against the Council. This being the case, the first port of call by dint of Section 9 of the FAAA was the arbitrator or arbitrators contemplated under Regulation 96(4).
44. In the end I find that the Petitioner ought to have had recourse to, and exhausted the remedies available under the Regulations, before seeking the intervention of this Court. The Court appreciates that there was urgency in the matter and that the Petitioner may not have had the luxury of time to go through the mechanisms provided under the LSK Act. In the circumstances, his recourse lay in seeking exemption from the obligation to exhaust said remedy. As things stand, the Petitioner did not invoke the provisions of Section 9(4) of the FAAA by applying for exemption.



45. Having considered the matter herein and by dint of Section 9(2) of the FAAA, I find and hold that this Court lacks the jurisdiction to entertain the Petition herein. Without jurisdiction, the Court has no basis to grant any of the orders sought. Accordingly, I uphold the preliminary objection dated 15.2.23 with the result that the Petition dated 13.2.23 is hereby struck out. I direct that each party bears own costs.

DATED AND DELIVERED IN NAIROBI THIS 10TH DAY OF MARCH 2023

M. THANDE

JUDGE

