



**Oluoch v Easy Coach Limited (Petition 24 of 2022)
[2023] KEHC 4155 (KLR) (10 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 4155 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
PETITION 24 OF 2022**

**HM NYAGA, J
MAY 10, 2023**

BETWEEN

KEZZY OLUOCH PETITIONER

AND

EASY COACH LIMITED RESPONDENT

RULING

1. This ruling is in respect to the Respondent’s Notice of Preliminary Objection dated November 30, 2022. The objection challenges this court’s jurisdiction on the grounds that the complaints raised by the Petitioner are contractual in nature and that the petition offends the principle of constitutional avoidance.
2. The Preliminary objection was canvassed through Written Submissions.

Respondent’s Submissions

3. On whether the petition offends the principle of constitutional avoidance, the respondent’s Counsel submitted that the principle of constitutional avoidance entails that a court will not determine a constitutional issue when a matter may properly be decided on another basis.
4. He argued that the petitioner has not demonstrated that there are any constitutional issues arising in this matter. He referred this court to the case of *Joseph Mwangi Mbote & 2 others vs Kenya Tea Development Agency (Holdings) Ltd & another; Kiru Tea Factory Limited (Proposed Co-Petitioner)* [2020] eKLR where the court cited the case of *Maggie Mwauki Mtalaki vs Housing Finance Company of Kenya* [2015] eKLR where Emukule, J pronounced himself on the issue thus:-

“The test whether a Petition raises a constitutional issue, and adopted by Tuiyott J in *Four Farms Limited vs Agricultural Finance Corporation* [2014] eKLR following the decision



in *Damian Belfonte vs The Attorney General of Trinidad and Tobago* where it was stated inter....

... where there is a parallel remedy, Constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a General rule there must be some feature, which, at least arguably indicates that the means of least redress otherwise available would not be adequate. To seek constitutional relief in the absence of such feature would be a misuse, an abuse of the Court's process.”

5. The Counsel further submitted that the *Constitution* should only be resorted to when it is necessary to do so and that disputes should be decided within the boundaries of the procedures provided by the statutes applicable to them. For this proposition, reliance was placed on the case of *CNM vs WMG* [2018] eKLR
6. The Advocate also submitted that the petitioner claims that the respondent violated his rights under Article 46 of the *Constitution* due to the manner in which it handled his booking to travel aboard its bus on June 28, 2022, and points to the existence of a contractual relationship between the parties. He argued that this relationship was formed when the petitioner booked a bus ticket with the respondent and the question to be put across would be whether the Petitioner and Respondent performed their respective contractual obligations.
7. The counsel therefore contended there is a mechanism under Civil Law that deals with contractual relationships and as such this petition does not raise any constitutional claims.
8. To further buttress this position , the Counsel cited the cases of the *Speaker of the National Assembly vs Karume* (Civil Application 92 of 1992) [1992] KECA 42 (KLR) (29 May 1992) & *Makori Beatrice Kwamboka vs Kenya Airways Limited PLC* [2021] eKLR.
9. Regarding whether this Honourable Court lacks jurisdiction to determine this petition as the issues raised by the petitioner are contractual in nature, the counsel referred this court to the cases of *KKB vs SCM & 5 others* (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) where the court stated the doctrine of ripeness and the doctrine of avoidance ,just like res judicata or the doctrine of exhaustion, can preclude a court from entertaining a case like the present one.
10. Also cited was the decision *Isaac Makokha Okere vs Mumias Outgrowers Sacco Society Limited & 9 others* [2021] eKLR where the court stated that one of the circumstances which would deprive the constitutional court of jurisdiction is the doctrine of constitutional avoidance. Another cited case was *Dhow House Limited vs Kenya Power and Lighting Company* (Constitutional Petition E058 of 2021) [2022] KEHC 11840 (KLR) (19 August 2022) where the court invoked the doctrine of constitutional avoidance and declined to entertain the matter before it.
11. In light of the above, the Counsel for the Respondent submitted that this Honourable Court lacks jurisdiction to entertain this claim.

Petitioner's Submissions

12. The Counsel for the petitioner submitted that the jurisdiction of this Honourable Court in relation to this petition is derived from Article 165(3) (b) of the *Constitution of Kenya, 2010* and that the petitioner invoked the Jurisdiction in a claim founded on the violation of this consumer protection right provided for under Article 46 of the *Constitution*.



13. The counsel further submitted that the facts in the petition create an unmistakable link between the petitioner's right to consumer protection and the events of June 28, 2022 where the respondent misrepresented to the petitioner the availability of services only to subject him to harassment.
14. The Counsel contended that petitioner's pleadings in all respects comply with the test enumerated in the high court case of *Anarita Karimi Njeru vs Republic* [1979] eKLR requiring a party to plead with specificity when approaching this honorable court on matters related to or seeking redress with reference to the *constitution*.
15. It was further submitted that the petitioner has not come to court by way of judicial craft as was admonished by the Supreme Court in *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & others* (2012) eKLR.
16. The Counsel urged this Honourable court to find that the issues raised by the petitioner touch on Constitutional matters.
17. The Advocate further submitted that the respondent failed to disclose to this Honourable court that there are no statutory processes or remedies under the *Consumer Protection Act* to redress the violation of the rights pleaded by the petitioner. He referred this court to the case of *Anthony Miano & others vs Attorney General & others* [2021] eKLR in which the court while dealing with the doctrine of exhaustion stated inter alia that 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.
18. The petitioner's Advocate argued that the case of *C N M vs W M G (supra)* is distinguishable from the instant case because the petitioner therein failed to disclose a constitutional violation.
19. He submitted that the petitioner rightly invoked the jurisdiction of this court and the remedies sought can only be granted by this Honourable Court.
20. He urged the court to dismiss the notice of preliminary objection.

Issues for determination

21. The only issue that arises for determination is whether this petition offends the Principle of Constitutional Avoidance.
22. The threshold of what constitutes a preliminary objection was established in the case of *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* (1969) EA 696. Sir Charles Newbold,P expressed himself as follows:

“ A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop”.
23. I am of the view that whether or not the petition raises a constitutional issue is a pure point of law that qualifies as a preliminary objection. The court need not go beyond the pleadings by the petitioner to determine this issue, thus bringing the objection raised within the parameters of what constitutes a preliminary objection as set out in *Mukisa's* case (*supra*).



24. The Respondent challenges the jurisdiction of this court on grounds that the petitioner's case is contractual in nature and the same offends the principle of constitutional avoidance.
25. The challenge on the jurisdiction of the Court to entertain the petition is a legal issue that can be properly taken as a Preliminary objection. As has been repeatedly, stated, Jurisdiction is everything, without it, a court or tribunal cannot take any further step save to declare its lack of jurisdiction and consequently bring the proceedings before it to a close. (See *Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd* [1989] eKLR.
26. It is well settled law that the High Court is the primary go to court when there is an allegation of a violation of any constitutional right or freedom. The court need not look any further than the provisions of Article 165 of the *Constitution* which provides for the jurisdiction of the High Court as follows;

- “(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) 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.”

The only limitation to the above jurisdiction is clearly stated under sub-article 5 of that article and sets them out as being in respect of matters—

- “(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or



(b) falling within the jurisdiction of the courts contemplated in Article 162. (The courts of equal status)”

27. It is thus not in doubt that this court has the jurisdiction to entertain a petition of the nature of the one in court.
28. I think that the Objection was based on the question of Constitutional avoidance, to mean that the petitioner needed not come to the court vide a constitutional petition when there are mechanisms set out in law to address the complaint.
29. The threshold of what constitutes a constitutional petition is established in the case of *Anarita Karimi Njeru vs The Republic* (supra) eKLR. The court in this case held that a Constitutional petition should set out with a degree of precision the petitioner’s complaint, the provisions infringed and the manner in which they are alleged to be infringed.
30. This principle was later reaffirmed by the Court of Appeal in the case of *Mumo Matemo vs Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR when the Court at paragraph 87(3) of the judgment stated as follows:-

“It is our finding that the petition before the High Court was not pleaded with precision as required in Constitutional Petitions. Having reviewed the petition and supporting affidavit we have concluded, that they did not provide adequate particulars of the claims relating to the alleged violations of the constitution of Kenya and the Ethics and Anti-corruption Commission Act, 2011, accordingly the petition did not meet the standard enunciated in the Anarita Karimi Njeru case.”

31. In a constitutional petition, a party is not supposed to merely cite constitutional provisions. He/she must with some reasonable degree of precision identify the constitutional provisions that are alleged to have been violated or threatened to be violated and the manner of the violation and/or threatened violation and state some particulars of alleged infringement to enable the respondent to be able to respond to each allegations accordingly.
32. What is constitutional avoidance? *The Supreme Court in Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others* [2014] eKLR stated as follows:-

“The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

(257) Similarly the US Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Ashwander v Tennessee Valley Authority*, 297 US 288, 347 (1936)).”



33. In *Sumayya Athmani Hassan vs Paul Masinde Simidi & Another* [2019] eKLR the Court of Appeal stated:

“... Where legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the Constitution without challenging the legislation in question. That principle has been reinforced by the Supreme Court in Communications Commission case (supra).

In conclusion, we find that the alleged unlawful interdiction and termination of a contract of employment was not a constitutional issue and thus the petition did not disclose a cause of action anchored on the Constitution. Accordingly, the petition being incompetent, the court acted in excess of jurisdiction and erred in law in determining the petition...”

34. The court in *KKB vs SCM & 5 others* (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) cited by the respondent stated that Constitutional avoidance has been defined as a preference of deciding a case on any other basis other than one which involves a constitutional issue being resolved.

35. Flowing from above, it is clear that one of the circumstances which would deprive the petitioner hearing before a constitutional court is the doctrine of constitutional avoidance, which the respondent herein has invoked.

36. The petitioner’s case is that on June 28, 2022 he booked a bus ticket on the Respondent’s online booking portal for the purpose of travelling from Nakuru to Nairobi. He was assigned Seat No 8 A and was duly notified that he was to board at 14.30hrs. He averred that at the said time, he reported to respondent’s office ready to travel but he was informed by the respondent that the bus in issue was not available for travel due to an error in the respondent’s system which booked a non-existent bus. The petitioner contended that the respondent neither accommodated him in another bus nor refunded his money but instead he was subjected to harassment by a staff at the Respondent’s office in Nakuru.

37. The petitioner further stated that he underwent a lot of hardship and inconvenience on account of Respondent’s neglect and dereliction of duty and was necessitated to book alternative travel with Legacy Shuttle Services Limited, thereby incurring additional travel expenses.

38. The petitioner thus prayed for a declaration that the respondent violated his protected consumer rights under Article 46 of the *Constitution* and the *Consumer Protection Act*; a declaration that the Respondent unjustly enriched itself by violating his Protected Consumer rights; an order for compensation against the acts of violation of rights complained of herein; an order of restitution directed to the Respondent to reimburse to the petitioner the monies unjustly and unconstitutionally obtained from him; General damages as against the Respondent; exemplary damages as against the Respondent and costs of this petition.

39. It is the Respondent’s position that the Petitioners claim is contractual in nature. I fully agree with it, and I will proceed to give my reasons.

40. A contract is an agreement between parties, creating mutual obligations that are enforceable by law. The basic elements required for the agreement to be a legally enforceable contract are: Mutual assent, expressed by a valid offer and acceptance; adequate consideration, capacity and legality. (See https://www.law.cornell.edu/wex/mutual_assent)

41. A contract is the source of primary legal obligations upon each party to it to procure that whatever it had promised will be done was done. To successfully claim damages for breach of contract, the plaintiff must show that a contract was in existence, that the contract was breached by the defendant and that



the plaintiff suffered damage (loss) as a result of the defendant's breach. (See *Hyrdo Water Well (K) Limited v Sechere & 2 others (Sued in their representative capacity as the officers of Chae Kenya Society)* (Civil Suit E212 of 2019) [2021] KEHC 22 (KLR) (Commercial and Tax).

42. There indeed existed a contract between the Petitioner and the Respondent. If there was a breach on the part of any party therein, the petitioner had another mechanism under which he can make his claim, on breach of contract.
43. I have perused the petition and I do note that the Petitioner not only cited the article purportedly infringed but he also set out the manner in which they are alleged to be infringed at paragraphs 21 to 24 thereof.
44. However, in the case of *Ashwander vs Tennessee Valley Authority* 297 US 288, 347 (1936) cited in *KKB vs SCM & 5 others* (supra) the courts held that it would not decide a constitutional question which was properly before it if there was also some other basis upon which the case could have been disposed of.
45. Courts will not normally consider a constitutional question unless the existence of a remedy depends on it. If a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of rights.
46. Guided by the above cases, it is my opinion that this petition offends the doctrine of constitutional avoidance. The petitioner would have been able to get all the remedies sought in a normal suit filed in court. A finding that there was a breach of the contract by the respondent would be sufficient for the court to make any of the other awards sought by the petitioner. A declaration of a violation of a constitutional right was thus an unnecessary prayer. In fact a breach of a contractual term ought not always be interpreted as a breach of a constitutional violation. A finding to the contrary would lead to the demise of civil courts and litigation on contractual issues.
47. Contrary to their averments, I find that the petitioner's petition is a crafty way of trying to invoke the court's powers under Article 165 cited hereinabove.
48. For the foregoing reasons I find that the Notice of Preliminary objection succeeds and this court upholds the same.
49. Consequently, I do proceed to strike out the Petitioner's Petition dated October 31, 2022 with costs to the Respondent.

DATED, SIGNED & DELIVERED IN NAKURU THIS 10TH DAY OF MAY, 2023.

HESTON M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

Mr. Wanjala for Petitioner

Mr. Oduor for Respondent

