



REPUBLIC OF KENYA



Kariuki v Muchemi t/a Liza Dairies Naivasha & 6 others (Civil Case E003 of 2023) [2023] KEHC 22475 (KLR) (19 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22475 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL CASE E003 OF 2023
SM MOHOCHI, J
SEPTEMBER 19, 2023**

BETWEEN

BENSON MAINGI KARIUKI PLAINTIFF

AND

**DUNCAN MUGUTU MUCHEMI T/A LIZA DAIRIES NAIVASHA 1ST
DEFENDANT**

JOE NJOGU T/A BORESHA DAIRIES 2ND DEFENDANT

NJOROGE WA MUKURUEINI T/A NJONJO FARM 3RD DEFENDANT

PATRICK RUTO T/A THE COWMAN 4TH DEFENDANT

WILLIAM KARIUKI 5TH DEFENDANT

NAFTALI T/A NAF FEEDS EGERTON 6TH DEFENDANT

ANTI-COUNTERFEIT AUTHORITY 7TH DEFENDANT

(On a Notice of Preliminary Objection by the 5th and 6th Respondents)

RULING

1. This Court on the 18th of April 2023, directed that the notice of preliminary objection dated 1st of April 2023, shall be disposed off before hearing of the main application, the 5th and 6th respondents were to serve all parties with their notice and directions on filing written submissions were accordingly issued.
2. At the time of writing this ruling only the applicant and the 5th respondent have filed their written submissions.
3. It is equally surprising that the 7th Respondent a state corporation established under the [Anti-Counterfeit Act](#) 2008 with the mandates to enlighten and inform the public on matters relating



to counterfeiting, combat counterfeiting, trade and other dealings in counterfeit goods, devise and promote training programs to combat counterfeiting and co-ordinate with national, regional or international organizations involved in combating counterfeiting, has opted to disregard the court's directions dated April 18, 2023 and without the leave of the Court has filed its own notice of preliminary objection dated June 19, 2023.

4. The notice of preliminary objection by the 7th respondent has not been shown to have been served on any other party and no efforts have ever been made to have directions on the same issued by the court.
5. The Court noted that this is a state corporation that is bound by Articles 2(1),10 and 232(2) of the [Constitution of Kenya](#) much is expected of this Respondent even in aid of the Court. The principles of good governance have been disregarded by conduct so far, this is a low moment that this institution should reflect on.
6. A state corporation as a litigant and in its presentation before Court, is always expected to demonstrate the highest standard of professionalism, good governance, integrity, transparency which is wanting.
7. The notice by the 7th respondent is thus filed in a disruptive attempt seeking to oust the jurisdiction of the Court on the basis that the relief sought can only granted by the Judicial Review Division of the High Court. This Court is the judicial review of the Court and as such the objection is moot. The 2nd objection is on defectiveness of pleadings and not on substance, the approach by the state corporation to attack a citizen keen on enforcing his industrial proprietary rights is highly regretted. This corporation in fact should be empathetic, bearing in mind the contestation is between a Kenyan Registered Industrial Patent and those imported from China.
8. Directions on this notice shall be given inter-parte after this ruling.
9. The issue raised in the preliminary objection is whether alternative remedies and dispute resolution forums suspend the Court's original unlimited jurisdiction and the principle of exhaustion of remedies provided for by the [Industrial Property Act](#).

Arguments and Submissions in Support of the Objection

10. Mr. Githui Advocate for the 5th and 6th respondents has raised a Preliminary Objection by notice dated 1st of March 2023, filed on the April 4, 2023 based on the following grounds:
 - a. Firstly, they argue that the lawsuit is centered around a breach of a registered patent under the [Industrial Property Act](#). The applicant is seeking an injunction to stop the ongoing infringement, damages, and seizure of the infringing items, all of which remedies provided for in section 55 of the [Industrial Property Act](#).
 - b. Secondly, 5th and 6th Respondents claim that, according to section 106 of the [Industrial Property Act](#), claims of infringement and the corresponding remedies should have been initially filed at the Industrial Property Tribunal. They assert that the jurisdiction of the High Court is only appellate, as stated in section 115 of the [Industrial Property Act](#).
 - c. Thirdly, the 5th and 6th respondents argue that, the applicant has not exhausted the available forum and remedies provided by the [Industrial Property Act](#) before bringing the case to court.
 - d. Lastly, the 5th and 6th Respondents contend that, the lawsuit is improperly before the Court and should be dismissed with costs.
11. The submission by Mr Githui Advocate are specific to the 5th respondent and as such the 6th Respondent did not file any submissions and the 5th Respondent submits that, article 163(3) of the



Constitution grants this Court unlimited jurisdiction in civil and criminal matters. In spite of the wide scope of this jurisdiction, it does not mean that the High Court will entertain all matters irrespective of other aspects of jurisdiction. That the Court's unlimited jurisdiction ought to be interpreted in the context of the existing legislation and principles which clarify its jurisdiction.

12. That one such principle, is the doctrine of "exhaustion of remedies and mechanisms prescribed by the statute".
13. That failure by the plaintiff/applicant to exhaust the remedies provided for under the Industrial Property Act, forms the basis of the preliminary objection. That the issue raised in the preliminary objection is jurisdictional in nature; it relates to the extent to which alternative remedies and alternative dispute resolution forums suspend the Court's original unlimited jurisdiction.
14. The applicant's claims to have registered a patent for the silage baling process and the said patent was registered and granted patent number KE869. He has accused the defendant of infringement of the patent and prayed for *inter alia* orders of permanent injunction against the Respondents, seizure of the offending machines and an inquiry as to damages as well as costs. Putting aside the defence that the silage making machine and the silage making process including the preservation methods are the subject of patents registered over 20 years ago and putting aside the fact that the silage making and preservation process are now in the public domain, this court ought to determine its jurisdiction to determine the matter herein. It is the 5th Respondents position that the doctrine of exhaustion bars this Court from considering the issue raised herein.
15. That this court's original jurisdiction under article 165 (3) never contemplated legal centrism. Instead, it recognizes that certain disputes are best resolved by bodies best suited to resolve them. Thus article 159 (2)(c) makes specific provision for alternative dispute resolution mechanisms. The Constitution recognizes that the social, financial and even technical context would require that certain disputes be dealt with by entities other than the Court. In the case of Dishon B. Ongondi v Kebirigo Tea Factory Co. Ltd & another [2020] e-KLR the Court citing with approval the case of Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR: observed as follows: -

"It is important to point out, as Justice Majanja did in *Dickson Mukwelukeni v Attorney General & 4 others* (Nairobi High Court Petition No 395 of 2012), that in reaching this position the Courts are not merely being formalistic or mechanical. The reasoning is based on the sound Constitutional policy embodied in article 159 of the Constitution: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that Courts respect the Principle of fitting the fuss to the forum even while creating what Justice J.B. Ojwang' has felicitously called an "Ascendant Judiciary."

16. That, the Constitution does not create an Imperial Judiciary zealously fueled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better suited mechanisms for comprehending and dealing with the issues entailed. Instead the Constitution creates a Constitutional preference for other mechanisms for dispute resolution-including statutory regimes - in certain cases. If expressly envisages that some of these regimes will be mainstreamed (and, hence, at certain prudential points intersect with the Judicial system) while some will remain parallel to the Judicial system.
17. The 5th Respondent submits that; these principles have been widely applied by the Court. In the case of *Anthony Miano & others v Attorney General & others* [2021] e-KLR the Court observed that exhaustion is a jurisdictional issue and declined to exercise jurisdiction in a matter falling within the



jurisdictional confines of the Transport Licensing Appeals Tribunal. In the case of *Dishon B. Ongondi v Kebirigo Tea Factory Co. Ltd & another* [2020] eKLR the Court declined to exercise jurisdiction until parties exhausted the Dispute Resolution Mechanisms established under the rules of Kebirigo Tea Factory Co. Ltd.

18. This Court will only entertain a matter and bypass the doctrine of exhaustion under exceptional circumstances. But exceptional circumstances are not platitudes, it is a phrase of a precise legal connotation. Such circumstances must be pleaded and demonstrated. In the case of *Republic v Nelson Andayi Havi & others*-Judicial Review Application No. E1146 of 2020, the Court quoting with approval the case of *Krystalline Salt Limited v Kenya Revenue Authority* [2019] eKLR: defined exceptional circumstances as follows: -

“... this court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the Court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the Court rather than to resort to the applicable internal remedy.”

19. That from the foregoing, matters touching on breach of fundamental rights and contravention of the *Constitution* have been held to constitute exceptional circumstances in the case of *National Gender & Equality Commission v Majority Leader, County Assembly of Nakuru* Petition No 1 of 2019 and in the case of *William Odhiambo Ramogi & ofher v the AG & other* [2020] eKLR. That following from the foregoing, private disputes cannot qualify as exceptional circumstances to warrant bypassing alternative dispute resolution mechanisms.

20. In demonstrating that the Court's jurisdiction is barred by the doctrine of exhaustion, the 5th respondent contends that, the Plaintiff's claim is, that he is the registered owner of a patent and the 5th respondent worked the patent without his authority, permission and without payment of royalties. Consequently, he claims that 5th respondent has breached the patent and he has sought orders of injunction and Compensation for the breach of the patent. That the remedies sought by the plaintiff/ applicant are provided for under section 55 of the Industrial Property Act which provides that;

“Section 55 IPA - The owner of a patent shall have the right:

- (a) To obtain an injunction to restrain the performance or the likely performance, by any person without his authorization, of any of the acts referred to in section 54; and
- (b) To claim damages from any person who, having knowledge of the patent, performed any of the acts referred to in section 54, without the owner's authorization;
- (c) To claim compensation from any person who, without his authorization, performed any of the inventions, claimed in the published application, as if a patent had been granted for that invention: Provided that the said person, at the time of the performance of the act, had:
 - (i) Actual knowledge that the invention that he was using was the subject matter of a published application; or



- (ii) Received written notice that the invention that he was using was the subject matter of a published application, such application being identified in the said notice by its serial number”.

21. That Section 106 of the Act provides for the forum where such remedies should be sought as follows:

“On the request of the owner of the patent or the registered utility model or industrial design, the Tribunal shall grant the following relief-

- (a) An injunction to prevent infringement where infringements imminent or to prohibit the continuation of the infringement. once infringement has started:
(b) Damages; or
(c) Any other remedy provided for in law”.

22. The tribunal is established under section 113 *Industrial Property Act* and clothed with a wide range of powers including powers to punish for Contempt of Court and to hear appeals from decisions made by the Minister.

23. That the issue of the proper forum to try and dispose claims under the *Industrial Property Act* was considered in the case of *Vermont flowers EPZ limited v Wandu Creations Ltd* [2014] e-KLR. In that case the Court stated as follows: -

“I am persuaded and I so hold that the [industrial property] tribunal has the statutory jurisdiction over the claims which have been presented before this Court. The claims fall under section 55(c) of the Industrial Property Act....”

24. That, it is not permissible for the plaintiff, to ignore the statutory procedure and the mechanisms provided therein and file the claim in this Court. For the Court to permit bypassing of the tribunal, the applicant had the obligation to plead and demonstrate that there are special circumstances that would warrant such a step. It has been demonstrated that this Court has in the past found that breach of fundamental rights and breach of the *Constitution* would constitute special circumstances.

25. Further, the fact that a party would not get critical audience in the forum provided under the law, would be considered as a special circumstance. None of these circumstances have been pleaded. At any rate, this case involved contravention of private rights. There are no special circumstances to warrant special intervention by the Court.

26. That section 115 of the Act prescribes the jurisdiction of the High Court to be appellate. Therefore, this Court has no jurisdiction in the first instance. Exhaustion is a jurisdiction question and once it is established that the Court lacks jurisdiction in the first instance, the entire suit ought to be struck out. The 5th Respondent therefore submit that this suit ought to be struck out with costs to him.

Applicants Response and Submissions on Notice of Preliminary Objections

27. Surprisingly the Applicants submit against the preliminary objection raised by the 5th and 6th Respondents that, article 165(3)(a) of the *Constitution* bestows the High Court unlimited original jurisdiction in Civil and Criminal matters. This gives the High Court powers to entertain any original matter.



28. The only exception to this is made under Article 162 (2) (a) and (b) where the High Court is specifically denied powers to here and determine disputes relating to Employment and Labour Relations and the environment and the use and Occupation of, title to, land.
29. That if the Constitution intended to limit further the original jurisdiction of the High Court, there would be no better way than to further mention and establish other Courts and tribunals and however, this does not mean that we have turned a blind eye on the Industrial Property Act, 2001 that establishes the Industrial Property tribunal which is a forum.
30. That further, in relation to this instant suit the Constitution has not divested the High Court's jurisdiction in matters arising from Industrial disputes and if it intended to do so it would specifically and expressly state so that has the capabilities of determining industrial property disputes. The establishment of this tribunal does not limit the original jurisdiction of the High Court.
31. In a case very similar to this instant suit, Apex Creative Ltd. & anor v Kartasi Industries Ltd. [2011] eKLR, Justice E. K.O. Ogola stated that,

“ in my view, if the Constitution intended to divest the High Court of jurisdiction in matters arising under Industrial Property Act 2001 it would have expressly said so. In my view, the fact that an Act of Parliament provides for a forum for determining dispute does not of itself divest the High Court of its original jurisdiction to try all civil matters. The High Court's jurisdiction is here constitutional while the Industrial Court's jurisdiction is provided under the Act. I therefore hold that this Court has the jurisdiction to entertain this matter and to grant or refuse to grant the orders requested.”
32. The Applicant submit that the High Court has jurisdiction to hear and determine this matter and that the establishment of the Industrial Dispute Tribunal does not limit this jurisdiction.
33. In another similar case to this instant suit where the jurisdiction of this Court has been challenged, that is Steel Structures Limited v David Engineering Limited [2007] eKLR, Justice M. A. Warsame held that this Court has jurisdiction to hear and determine the matter and the establishment of the Tribunal does not limit this jurisdiction.
34. Therefore, the applicant contends that, the plea to have the matter be struck-out by this Court for lack of Jurisdiction cannot be sustained, as the establishment of the Industrial Dispute Tribunal does not limit the jurisdiction of the High Court and the issues raised on the Doctrine of exhaustion cannot defeat the enforcement of the rights of the owner of a patent.
35. The fact that the Applicant is the registered owner of the Patent number KE869 and having been issued with a Certificate of grant of Patent by the Kenya Industrial Property Institute after proper examination and there being clear actions by the Respondents that have affected the rights of the Applicant as the owner of the patent the Applicant has a proper cause of action and is entitled to the enforcement of rights under section 55 of the Industrial Property Act, 2001.
36. That the Respondents have never applied for the revocation of the Patent within nine months from the date of the registration of the patent as prescribed under section 103 of the Industrial Property Act, 2001 and therefore the Applicant is entitled to the enforcement of his rights under section 55 of the Industrial Property act, 2001 and article 40 (5) of the Constitution that has the capabilities of determining industrial property disputes. The establishment of this tribunal does not limit the original jurisdiction of the High Court.



37. The fact that the Applicant is the registered owner of the Patent number KE869 and having been issued with a Certificate of grant of Patent by the Kenya Industrial Property Institute after proper examination and there being clear actions by the Respondents that have affected the rights of the Applicant as the owner of the patent the Applicant, has a proper cause of action and is entitled to the enforcement of rights under section 55 of the [Industrial Property Act](#), 2001.
38. The respondents have never applied for the revocation of the Patent within nine months from the date of the registration of the patent as prescribed under section 103 of the [Industrial Property Act](#), 2001 and therefore the Applicant is entitled to the enforcement of his rights under Section 55 of the [Industrial Property Act](#), 2001 and article 40 (5) of the [Constitution](#).

Analysis and Determination

39. The Supreme Court in case of [Hassan Ali Jobo & another v Suleiman Said Shabbal & 2 others](#) cited the leading decision on preliminary objections, [Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd.](#) (1969) EA 696, where the Court held as follows:

“a preliminary objection, consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... 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 the 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”.
40. The Supreme Court in [Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others](#) [2015] eKLR made the following observation as relates to Preliminary Objections:

“ ... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”
41. This Court shall seek to establish whether the grounds outlined in the Preliminary Objection herein, have meet the threshold set out in the aforementioned cases.
42. Tribunals are subordinate Courts falling under the Judiciary and are quasi-judicial in nature with the primary objective of redressing acts constituting infringement as is enshrined in section 105 of the [Industrial Property Act](#) (IPA).
43. The [Industrial Property Act](#) creates the Industrial Property Tribunal as a specialized Court to deal specifically with matters relating to patents, industrial designs, utility models, and technovations. In addition to the substantive provisions in the IP Act the [IPT Rules 2002](#) govern the procedure of proceedings before this Tribunal.
44. The relief for acts constituting an infringement, are provided for in section 106 with the primary forum, being the Intellectual Property Tribunal.



45. This Court has unlimited jurisdiction in civil and criminal matters and jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened which in my estimation would apply subject to the special circumstances informing the mode of initiating the action and the specific relief being sought.
46. This Court can in exceptional circumstances where it is demonstrated that the statutory quasi-judicial mechanism for dispute resolution is either incapable of or unable to offer access to justice such as, to require the immediate intervention of the Court in lieu of the applicable internal remedy.
47. The Applicants Submission is with “bravado” ignoring, the statutory quasi-judicial mechanism for dispute resolution *Industrial Property Act* (IPA) the silence is stealth.
48. The Applicant made no effort whatsoever, to demonstrate or showcase any exceptional circumstance that compelled him to move the high Court instead of the Industrial Property Tribunal.
49. Ironically the Applicant asserts his rights as registered owner of the Patent number KE869 and having been issued with a Certificate of grant of Patent by the Kenya Industrial Property Institute and seeks to enforce his rights as prescribed under section 55 of the *industrial Property Act* (IPA).
50. The Applicant seek to utilize and selectively apply provisions of the *industrial Property Act* (IPA).
51. The Least that was expected of the Applicant was to offer this Court any exceptional circumstantial that would justify moving the High Court instead of the primary quasi-judicial specialized tribunal.
52. I am persuaded that the intention of the creation of the Industrial Property Tribunal was take advantage of its expertise and experience to deliver speedy and sound rulings. This tribunal is a subordinate Court and a port of first call I would hasten to add. Article 169 (1) further defines subordinate Courts under the Judiciary to include, local tribunals as may be established by an Act of Parliament and is subject to the supervisory jurisdiction of this Court like all other tribunals.
53. The court is persuaded that it was not the desire and intention of the law makers to create a dispute resolution mechanism that parties could avoid, sidestep or ignore at will, this would be wasteful and that the Appellate mechanism inbuilt thereby make the Court an appellate Court on decisions of the tribunal.
54. The applicant/petitioner’s failure to present any exceptional circumstance why the tribunal is unideal forum to resolve his dispute and that he cannot be heard to be saying that, the forum he can approach cannot be inhibited and that it is for him, to choose where he shall access justice. The Court says no to this line of argument and restates that, the *Industrial Property Act* creates the primary specialized subordinate Court in the Industrial Property Tribunal and no party can sidestep the procedure at will.
55. This Court will however not strike-out, the pleadings as requested by the 5th Respondent, the same action is draconian, escapist and does not advance access to justice ideals.
56. In the upshot I find the notice of preliminary objection dated April 1, 2023, to be of merit and the same is allowed.
57. This court forthwith directs and refers this dispute, to the Industrial Property Tribunal for hearing and determination.
58. The applicant/plaintiff shall bear the costs of this proceeding assessed at Kshs 40,000/- payable to the 5th respondent/defendant.

It is so Ordered.



**SIGNED, DELIVERED VIRTUALLY ON TEAMS PLATFORM ON THIS 19TH SEPTEMBER,
2023**

MOHOCHI S.M

JUDGE

