Muthoni v Solpia Kenya Limited t/a Sista Kenya (Constitutional Petition E457 of 2021) [2023] KEHC 22373 (KLR) (Constitutional and Human Rights) (21 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22373 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION E457 OF 2021

AC MRIMA, J

SEPTEMBER 21, 2023

BETWEEN

HELLEN MUTHONI ..... PETITIONER

AND

SOLPIA KENYA LIMITED T/A SISTA KENYA ..... RESPONDENT

JUDGMENT

Introduction and Background

1. The dispute, subject of this judgment, is in respect of alleged violation of the right to privacy and dignity occasioned by the use of a person's image for commercial purposes without first seeking and obtaining their consent.

2. Hellen Muthoni, the Petitioner herein describes herself, among other things as, a Television host, Gospel artist, Youth mentor, public figure and media personality. She works at Inooro TV, a Kikuyu dialect Television broadcast station.

3. Sometimes in October 2020, the Petitioner did a unique hair style. Having developed her image and brand in fashion over time, and as a way of engaging with her followers and supporters, she took a photo of herself and posted it on her Instagram page @hellen_msoo and her Facebook account Hellen Muthoni Kenya.

4. On 6th October 2020, the Respondent herein, Solpia Kenya Limited T/A Sista Kenya, an incorporated company running hair products business, obtained and posted the Petitioner's image and likeness in its Facebook account, http:*www.facebook.com/solpiasistarkenya/photos/3381014658685958 and Instagram page http:*www.instagram.com/p/CFkKvMlrN8/ to market its hair products without the authorization, permission or consent of the Petitioner.

5. The Petitioner was aggrieved by the unauthorized invasion of her privacy and dignity hence the dispute.

6. The Respondent opposed the Petition.

The Petition:

8. Through the Petition dated 28th October 2021, supported by the Affidavit of Hellen Muthoni deposed to on a similar date and further affidavit deposed to on 15th December 2021, the Petitioner sought to vindicate violation of her constitutional entitlements.

9. The Petitioner pleaded that, having enhanced her professional image among the youth as an influencer and media personality, her image was used commercially to market and advertise different products subject to mutually agreeable terms.

10. She averred that being a media personality and business lady, she had invested heavily on her general demeanour, countenance, fashion and presentation for commercial exploitation.

11. The Petitioner posited that she had invested in building her social media followership and managed to attract 406,000 followers on Facebook and 17,000 on Twitter and 153,000 on Instagram and it is on that basis that she has endorsed several corporate products and conducted advertisements on social sites.

12. On the foregoing, the Petitioner pleaded that the Respondent's conduct was unlawful and unconstitutional for taking advantage of her image, popularity, influence and brand to gain financially by placing an advertisement with her image on its social media.

13. The Petitioner pleaded that the advertisement couched as; "Afro Bulk Twist, Crochet braid, girls with natural hair style we found a hair inspiration by @hellen_msoo in #afrobulktwist a true fireball ~Repost @hellen_msoo (with report.for.insta)" drew interest of numerous customers and benefitted the Respondent commercially, upon seeing an influential media personality using similar products.

14. It was the Petitioner's case that the publication violated her right to Privacy and dignity otherwise guaranteed under Articles 31 and 28 of *the Constitution* respectively.

15. She posited that her employer, Royal Media Services, has in place advertising guidelines and policies, that demand prior approval of its employee's engagements outside the company which are binding upon her.

16. It was her case that by publishing here image/photo, the Respondent led the Kenyan public, her followers and employer to construe the advertisement to the effect that; she had endorsed the Respondent's products, is one of the models offering modelling services to the Respondent to boost its sales, had contravened her employer's policy on advertising and that as the owner of copyright, she had licensed, given consent ad authorized the Respondent to use and exploit her copyright.

17. She pleaded that the Respondent's conduct jeopardized her job as a Television host and has suffered mental and psychological torture for the time the post remained on the Respondent's social media pages knowing that her career might end anytime.

18. The Petitioner asserted that the Respondent's conduct was contrary the provisions of Section 33 and 35 of the *Copyright Act*, which require assignment of copyright to be in writing and signed by or on behalf of the assignor and makes it unlawful to use a person's-controlled copyright.

19. On the foregoing factual, constitutional and statutory provisions, the Petitioner prayed for the following reliefs;

a. A declaration that the Respondent violated the Petitioner's fundamental rights to privacy and human dignity under Articles 28 and 31 by publishing the Petitioner's image for purposes of commercial advertisement without her consent.

b. A declaration that the Respondent violated the Petitioner's fundamental rights to privacy and human dignity under Article 30 by publishing the Petitioner's image likeness for their own commercial gain with no personal financial advantage gained by the Petitioner herein and denying her a choice thus amounting to forced labour.

c. A declaration that the Respondent violated the Petitioner's Copyrights under Article 10 of *the Constitution* and statutes by publishing the Petitioner's image and likeness as it was its own.

d. A declaration that the Respondent violated the Petitioner's freedom not to be subjected to physical and psychological torture under Article 29 of *the Constitution* by failing to pull down the advertisement unlawfully published forcing it to agonize the risk of losing her job the entire period.

e. A declaration that the Petitioner is entitled to general, exemplary and punitive damages against the Respondent as may be assessed by this Honourable Court for the violations of her constitutional rights.

f. An order of permanent injunction restraining the Respondent from publishing and or using the Petitioner's image and likeness in any way in its advertisement or promotions in any way without the Petitioner's consent and compelling the Respondent to stop any further advertisement or promotions featuring the Petitioner's image and likeness on their social media platforms.

g. An order that the Respondent be compelled to compensate the Petitioner for violations of her constitutional rights and freedoms in a, b, c, and d above and damages and loss arising from the publication of the Petitioner's photograph without her express authority and the exploitation to the Petitioner by the Respondent for commercial gain.

h. An order for the costs plus interest for the Petition.

i. Any other relief that this honourable Court may deem fit and just to grant.

The Submissions:

20. In its written submissions and supplementary submissions dated 27th December 2021 and 28th February 2022 respectively, the Petitioner identified two issues for determination namely; whether the Respondent misappropriated the Petitioner's image for commercial for commercial purpose without consent and whether the Respondent breached the Petitioner's copyrights.

21. On the first issue, the Petitioner submitted that the Respondent's publication showed the Petitioner's image from head to abdomen with conspicuous hand with fingers interlocked.

22. It was submitted that the image also had the name 'hellen_msoo', the Petitioner's Instagram page, and to prove her influence, the Petitioner referred to annexture HM 3, her communication with followers, in respect of the kind of products she uses on her hair.

23. To that end, she submitted that her popularity influenced her followers to develop interest in the product by inquiring about prices.

24. It was the Petitioner's case that the Respondent used her image to encourage Facebook and Instagram users to contact the Respondent to get the product and to that end gained commercially.

25. To buttress it position, the Petitioner relied on Mutuku Ndambuki Matingi -vs- Rafiki Microfinacne Bank Limited (2021) eKLR where it was observed: -

> ..... There is no doubt therefore that the unjustified invasion of one's privacy is a violation of one's fundamental right and must be protected and where it is violated one is entitled to a relief. In this case, it is not in doubt that the Petitioner's images were taken and published in order to promote the Respondent's business.....

26. The Petitioner further relied on Jessicar Clarise Wanjiru -vs- Davinci Aesthetics & reconstruction Centre & 2 Others to assert the position that the right to the protection of one's image is one of the essential components of personal development and presuppose the individual's right to control the use of that image including the right to refuse publication.

27. On the issue regarding violation of the right to privacy and dignity, the Petitioner referred the Court to JMK & Another -vs- Standard Digital and Anther (2020) eKLR to buttress that her right to privacy and dignity go hand in hand.

28. It was the Petitioner's further case that the Respondent's act of continuing to use his image in its social media platforms despite demand to pull them down and the risk of losing her job amounted to forced labour, servitude and torture in violation of the Article 30 and 29 of *the Constitution* respectively.

29. It was submitted that owning a Facebook account, YouTube Page or a channel in the 21st century era is an income generating activity and ought to be protected by Courts from unwarranted exploitation.

30. Based on the foregoing and the provisions of Section 32, 33(3) and 35 of the *Copyright Act*, the Petitioner submitted that having taken the photograph in question using her mobile phone, she was the author of the image and hence the owner of the copyright. To that end, she was the only one who could copy, reproduce and publish the photo on social media for her personal or commercial use.

31. The Petitioner found support of the foregoing in the Court of appeal decision in Hoswel Mbugua Njuguna t/a Fischer Marketing Concept -vs- Equity Bank & Another (2017) eKLR where it was observed: -

> .... Copyright law is in essence, connected with the negative right of preventing the copying of physical material existing in the field of literature and the arts...

32. In the end the Petitioner, referred to various decisions among them Godfrey Julius Ndumba Mbogori & Another -vs- Nairobi City County (2018) eKLR and submitted that she was entitled to Kshs. 10,000,000/- under exemplary and punitive damages, Kshs. 15,000,000/- for violation of her privacy and dignity, Kshs. 5,000,000/- for violation of the freedom from forced labour and servitude, Kshs. 3,000,000/- for violation of her freedom from torture and Kshs. 3,000,000/ for violation of her copyrights.

33. In the supplementary submissions, the Petitioner submitted that the contention by the Respondent that this Court does not have jurisdiction was an afterthought which ought to be discarded for having not featured in their pleadings.

34. To that end, the Petitioner relied on Daniel Orieno Migore -vs- South Nyanza Sugar Company Ltd where it was observed that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection.

35. It was its case further that the Industrial Court could not be the right forum since there was no employment relationship between the Petitioner and the Respondent.

The Respondent's case:

36. Solpia Kenya Limited opposed the Petition through the Replying Affidavit of Grace Muthoni Faith, its Marketing Manager, deposed to on 7th December 2021.

37. He deposed that Solpia Kenya Limited works with various Artists and salons that use its products and among the stylists and hair artists in one John Mwangi who had obtained hair products from the Respondent.

38. She deposed that, the Petitioner, upon being styled with products by John Mwangi took a photo of herself and posted it on her account and tagged several people including John Mwangi, in his Instagram handle @dghniehairarts.

39. It was her case that John Mwangi when posting his artistic work done using the Respondent's products tags the Respondent and does so when his clients post any instance where they were styled using the products procured from the Respondent.

40. She deposed that once tagged, the Respondent can see the account if the person tagged and make a brief comment in accordance with standard operating regulations of the social media platform.

41. It is on the foregoing that the Respondent viewed the Petitioner's account and made brief comments, which appeared only as a 'repost'.

42. She deposed that the Respondent did not in any way interfere, add or edit the contents of the photo uploaded by the Petitioner and the only feature allowable by the social media was to repost and add comments.

43. It was her case that the repost by the Respondent was not in any way to be construed that the Petitioner was modelling or is any way advertising the Respondent's products.

44. To the contrary, she deposed that the Petitioner's looks in the photograph was an admiration of the artistic expression of the hair artist who did a good job of creating true natural look of the Petitioner.

45. It was deposed that the Respondent would never have the post by the Petitioner had she (the Petitioner) not posted the same and tagged John Mwangi who subsequently tagged the Respondent.

46. Ms. Muthoni faulted the Petitioner for not disclosing that she tagged other parties in the initial post including John Mwangi who then tagged the Respondent.

47. It was her case that those following her on social platforms have access to her page and can repost her image and make comments like the Respondent did.

48. She deposed that people can directly chat with the Petitioner and all those with access directly or by being tagged can follow the chat and therefore any person who made comments or inquiries were the Petitioner's followers who had direct access to her social media page or were tagged by her followers.

49. The Respondent claimed, therefore, that at no time were the rights and fundamental freedoms of the Petitioner violated since the Petitioner posted the photo complained of in social media and tagged several people in the knowledge that the people tagged were free to tag others thereby allowing more people to view her photos and make comments and, in the process, enhancing her popularity.

50. The Respondent denied advertising her products using the Petitioner by deposing that the repost it did was a consequence of the Petitioner's original posting and it only inputted word to the repost which cannot be construed as an advertisement.

51. She deposed that the Petitioner had not demonstrated how the comments it made violated her rights since it has never been in possession of her original photos or likeness.

52. It was its case that the Respondent has never enticed customers using the Petitioner's perceived fame.

53. Ms. Muthoni deposed further that the social media is not enough to influence the public to buy into hair products since the buyer evaluates several factors before buying. It was its case that there was no evidence to establish any commercial gain that accrued to it by being tagged to the Petitioner's account.

54. In conclusion, the it was the Respondent's case that the Petitioner had not demonstrated how the comments made on the repost can be construed as product endorsement, advertisement in violation of her constitution al rights.

55. It urged the Court to dismiss the Petition with costs.

The Submissions:

56. The Respondent further urged its case through written submissions dated 22nd February 2022.

57. Apart from reiterating the deposition of Ms. Muthoni, it was submitted that the Petitioner's claim fell in the jurisdiction of Employment and Labour Relations Court and other to the Civil Court.

58. It was its case that the Petitioner's followers and employer construed the photo posted to mean that the Petitioner was duly compensated for the Respondent. To that end it was its case that this Court had no jurisdiction to entertain the Petition.

59. It was the Respondent's further submission that the Petitioner could not claim infringement of copyright since both of her hands were visible in the photo in question.

60. It was its case that there was no nexus between the production of the Petitioner's image, the storage and reproduction since there was a likelihood that it was done by different devices manged by different people, a position no in consonance with section 78A of the *Evidence Act* on admissibility of electronic evidence.

61. In respect the comments it made, the Respondent submitted that the plain reading of the words only conveyed admiration of the artistic work of the artist which did the job of bringing out the Petitioner's natural appearance.

62. It was the Respondent's submission that Petitioner had not made its case to the required standard as established in the case of Jessicar Clarise Wanjiru -vs- Davinci Aesthetics & reconstruction Centre & 2 Others.

63. Further to the foregoing, the Respondent submitted that the Petitioner had not demonstrated the substantial gains that arose in favour of the Respondent as a result of the repost.

64. In rebutting the claim of violation of the freedom from servitude, torture and slavery, it was submitted that there was no evidence to back the incidence of such violation. It was its case that even if it was established, the Industrial Court is the best forum for redress.

65. In the end, the Respondent submitted that the Petition was lacking in evidence and not deserving of the prayers sought. It prayed that it be struck off or dismissed with costs.

Analysis:

66. Having considered the pleadings, the submissions and the decisions referred thereto, what stands out at the heart of this Petition is the issue as to whether the Petitioner's privacy rights were infringed. Once that main issue is answered in the affirmative, then the allegations of the subsequent breach of the rights to dignity, slavery or servitude, torture and copyrights follow. In other words, if this Court finds that the Petitioner's privacy rights were not violated by the Respondent as alleged, then the allegations of breach of the subsequent rights will also fall by the wayside.

67. On that score, it is of paramount importance to look at the constitutional provision underpinning the protection of the right to privacy. That is Article 31 of *the Constitution*.

68. Article 31 of *the Constitution* provides as follows: -

> 31. Privacy:
>
> Every person has the right to privacy, which includes the right not to have—
>
> (a) their person, home or property searched;
>
> (b) their possessions seized;
>
> (c) information relating to their family or private affairs unnecessarily required or revealed; or
>
> (d) the privacy of their communications infringed.

69. In order to give effect to the above constitutional provision, Parliament enacted the Data Protection Act, No. 24 of 2019 (hereinafter referred to as 'the Data Act').

70. The Preamble of the Data Act states that it is an Act of Parliament to give effect to Article 31(c) and (d) of *the Constitution*; to establish the Office of the Data Protection Commissioner; to make provision for the regulation of the processing of personal data; to provide for the rights of data subjects and obligations of data controllers and processors; and for connected purposes.

71. The Data Act further provides for the rights of a data subject, the enforcement of rights of data subjects, investigation of complaints by data subjects, compensation for breach of the rights of data subjects, the registration of data controllers and data processors, the principles and obligations of personal data protection, processing of sensitive personal data, among many other aspects of personal data.

72. Section 3 of the Data Act provides for the objectives as follows: -

> The object and purpose of this Act is-
>
> (a) to regulate the processing of personal data;
>
> (b) to ensure that the processing of personal data of a data subject is guided by the principles set out in section 25;
>
> (c) to protect the privacy of individuals;
>
> (d) to establish the legal and institutional mechanism to protect personal data; and

(e) to provide data subjects with rights and remedies to protect their personal data from processing that is not in accordance with this Act.

73. Section 5 of the Data Act establishes the Office of the Data Protection Commissioner which is a body corporate with perpetual succession and a common seal and has the power to conduct business in its corporate name. I will hereinafter refer to the said office as 'the Data Commissioner' or 'the Commissioner'.

74. One of the many functions of the Data Commissioner is provided for in Section 8(1)(f) as 'to receive and investigate any complaint by any person on infringements of the rights under this Act'.

75. The Commissioner further has powers to conduct investigations on its own initiative, or on the basis of a complaint made by a data subject or a third party. That is provided for in Section 9 of the Data Act. And, in dealing with the complaints, the Commissioner ought to facilitate conciliation, mediation and negotiation of the disputes. The Commissioner also has powers to undertake any activity necessary for the fulfilment of any of the functions of the Office of the Data Commissioner.

76. In discharging its functions and exercising its powers, the Commissioner is authorized under Section 59 of the Data Act to seek the assistance of such person or authority as it deems fit and as is reasonably necessary to assist the Data Commissioner in the discharge of the functions.

77. Section 65 of the Data Act gives the Data Commissioner the power to determine the compensation payable to a data subject who suffers damage by reason of a contravention of any requirement of the Data Act and in instances where the Commissioner finds as much.

78. With a view to protect the integrity of the processes under the Data Act, the statute provides for enforcement notices under Section 58 in respect of those who fail to comply with any provision of the Data Act.

79. Under Section 64 of the Data Act, any appeal from the decision of the Commissioner lies to the High Court.

80. A close scrutiny of the Data Act reveals a deliberate design by Parliament to ensure that all claims arising from allegations of infringement of Article 31(c) and (d) of *the Constitution* are wholly dealt with by the Commissioner as the first port of call. Such position can only be overruled by a party demonstrating any of the exceptions to the doctrine of exhaustion in a matter.

81. Reverting to the instant matter, the Petitioner's main complaint is the alleged publication of her image and/or photograph by the Respondent in its social media accounts without her consent. The Petitioner alleged breach of her Article 31 rights under *the Constitution*. She then sought for declarations as well as compensatory damages.

82. This Court ascribes to the position that in a case where Parliament donated powers to an entity like the Data Commissioner to determine if one's privacy rights under Article 31(c) and (d) of the Commissioner are infringed, then it means as much; that the Commissioner has such power to determine whether privacy rights as provided for in the Bill of Rights has been denied, violated, infringed or threatened. However, the Commissioner lacks the jurisdiction to interpret *the Constitution*.

83. The reason for the foregoing holding is simple. The members of the Office of the Data Commissioner, as an entity and individually so, are public officers and Article 10 calls upon them to infuse the national values and principles of governance while undertaking their duties. Article 3 obligates every person to respect, uphold and defend *the Constitution*. Therefore, the Commissioner must be in a position to

uphold *the Constitution*, and in doing so, to be able to determine whether a given set of circumstances reveal denial, violation, infringement or threat to the privacy rights in the Bill of Rights.

84. The above duty is to be distinguished from the duty to interpret *the Constitution*. Determining whether a given set of circumstances reveal denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights is just that simple. Conversely, interpretation of *the Constitution* is a serious judicial function. While interpreting *the Constitution*, the High Court is called upon to apply its legal mind to determine the applicability and extent thereof of a constitutional provision to a set of facts. In arriving at such an interpretation, the High Court is supposed to consider all the applicable principles in constitutional interpretation. (See the Supreme Court in In the Matter of Interim Independent Electoral Commission [2011] eKLR). The High Court may also look at comparative jurisprudence from other jurisdictions on the subject. Such a determination yields to a binding legal principle unless overturned by a Court of superior jurisdiction.

85. Unlike the High Court, Tribunals and other quasi-judicial bodies, including the Data Commissioner, do not make the law. They can, however, apply themselves to a given set of facts and determine denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights.

86. There is, therefore, a defined distinction between determining the denial, violation, infringement or threat to the privacy rights in the Bill of Rights and interpreting *the Constitution*. Whereas the former is not exclusively a judicial function, the latter is. The jurisdiction, therefore, to interpret *the Constitution* is the exclusive duty reserved to the High Court videArticle 165(3)(d) of *the Constitution*.

87. In the instant matter, the Data Commissioner has the jurisdiction to determine whether the Petitioner's privacy rights in the Bill of Rights were denied, violated, infringed or threatened. The Commissioner has further powers to order appropriate compensation in the event of proof of the infringement.

88. The Data Act, therefore, wholly provides for the dispute at hand based on Article 31 of *the Constitution* as well as the remedies sought in the event the dispute is successful.

89. In such a case, it was incumbent upon the Petitioner to demonstrate to the Court any of the exceptions to the doctrine of exhaustion. A brief look at the doctrine then follows.

90. The doctrine in doctrine of exhaustion was comprehensively dealt with by a 5-Judge Bench in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR. The Court stated as follows:

> 52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution* and was aptly elucidated by the High Court in R 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.

91. The Court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In R. 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.

92. The above decision was appealed against by the Respondents. The Court of Appeal in upholding the decision and in dismissing the appeal in Mombasa Civil Appeal No. 166 of 2018 Kenya Ports Authority v William Odhiambo Ramogi & 8 others [2019] eKLR held as follows: -

> The jurisdiction of the High Court is derived from Article 165 (3) and (6) of *the Constitution*. Accordingly, the High Court has unlimited original jurisdiction in criminal and civil matters, including determination of a question of enforcement of the bill of rights and interpretation of *the Constitution* encompassing determination of any matter relating to the Constitutional relationship between the different levels of government.
>
> At the High Court, we note that the learned Judges dealt with this matter under the question framed as follows: Is the court barred from considering the suit at present by virtue of Article 189 of *the Constitution* and sections 33 and 34 of Inter-Governmental Relations Act of 2012 (IGRA)? The parties have advanced similar arguments as before the learned Judges of the High Court. The High Court went further than just looking at the ruling by Ogola J. They also took into account the doctrine of exhaustion as enunciated in Republic vs. Independent Election and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR. They applied a dual pronged approach before concluding that the dispute was not an inter-governmental dispute under IGRA. First, they considered that the test for determining the matter as an inter-governmental dispute for purposes of application of IGRA was not simply to look at who the parties to the dispute were, but the nature of the claim in question and; secondly, they considered that the claimed Constitutional violations seeking to be enforced are not mere "bootstraps." We have

keenly addressed our minds to the learned Judges' decision and are satisfied that they stayed within the expected contours and properly directed themselves. Once they determined that the dispute was not inter-governmental in nature, we do not think it is necessary to consider whether the petitioners had exhausted their legal avenue. Jurisdiction by the High Court under Article 165 (5) of *the Constitution* became automatic. And in our view, it could not be ousted or substituted.

93. Further, in Civil Appeal 158 of 2017, Fleur Investments Limited -vs- Commissioner of Domestic Taxes & another [2018] eKLR, the Learned Judges of the Court of Appeal relied on an earlier decision in Speaker of National Assembly vs Njenga Karume (1990-1994) EA 546 to assume jurisdiction by bypassing the mechanism under Income Tax Tribunal. They observed as follows: -

> 23. For the reasons we have given earlier and others that will become apparent, there were definitely exceptional circumstances that existed in this case that were outside the ambit of the Income Tax Tribunal which called for intervention by way of judicial review. Whereas courts of Law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under *the Constitution* and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.

94. Courts have in many occasions reiterated the position that where there are alternative avenues legally provided for in dispute resolutions, there should be postponement of judicial consideration of such disputes until after the available avenues are fully adhered to or unless it is adequately demonstrated that the matter under consideration falls within the exception to the doctrine of exhaustion.

95. In this case, the Petitioner did not demonstrate any of the exceptions to the doctrine of exhaustion.

96. The upshot is that the doctrine of exhaustion applies in this matter and bears a complete bar to the further exercise of jurisdiction by this Court on the claim based on Article 31 of *the Constitution*.

97. Having found that the Petitioner ought to have lodged her complaint on Article 31 of *the Constitution* under the provisions of the Data Act, then this Court ought to exercise restraint and postpone its consideration of the matters raised in the Petition as to accord the dispute to be dealt with, in the first instance, under the Data Act.

98. Since there is a likelihood of the continuation of the dispute between the parties herein, the best order on costs is that each party bears its own.

99. Consequently, the following final orders do hereby issue: -

    a. This Court declines jurisdiction to deal with the claim on Article 31 of *the Constitution* on the basis of the doctrine of exhaustion.

    b. The Petition is hereby struck out.

    c. Each party to bear its own costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 21ST DAY OF SEPTEMBER, 2023.

A. C. MRIMA

JUDGE