Brian t/a SB Otieno & Company Advocates v Law Society of Kenya & another (Petition E083 of 2023) [2023] KEHC 23391 (KLR) (Constitutional and Human Rights) (12 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23391 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E083 OF 2023

LN MUGAMBI, J

OCTOBER 12, 2023

BETWEEN

OTIENO SAMUEL BRIAN T/A SB OTIENO & COMPANY ADVOCATES ..... PETITIONER

AND

LAW SOCIETY OF KENYA ..... 1ST RESPONDENT

COMMUNICATIONS AUTHORITY OF KENYA ..... 2ND RESPONDENT

RULING

1. This is a ruling on the preliminary objection dated 11th April, 2023 filed by the 1st respondent against the petition dated 22nd March 2023.

2. The 2nd respondent filed written submissions dated 24th May 2023 supporting the preliminary objection.

3. The petitioner opposed the notice of preliminary objection vide written submissions dated 29th May 2023.

4. In addition to filing their written submissions, the parties appeared in court physically on 6th April, 2023 to highlight their written submissions.

1st Respondent's Case

5. Prof. Albert Mumma and Company Advocates who represent the 1st respondent filed the notice of preliminary objection citing the following grounds:

    i. The Petition violates Regulations 4, 5, 7 and 8 of the Kenya Information and Communications (Dispute Resolution) Regulations, 2010.

    ii. The Petition violates Rule 96(1)(b) (i) as read together with Rules 95, 96(4) and 96(8) of the Law Society of Kenya (General) Regulations, 2020.

    iii. The Petition violates Section 2.4 and Section 6 of the Kenya Network Information Centre Policy for Registration of Second Level Domain Names in the .ke TLD as read together with Kenya Network Information Centre Alternative Domain Name Dispute Resolution Policy.

    iv. The petition violates the test of specificity as established in the case of Anarita Karimi V Republic (No.1) (1979) 1KLR 154.

1st Respondent's Submissions

6. The 1st respondent argued that the petition was in violation of the doctrine of exhaustion.

7. Further that it contravenes the test of specificity as established in the case of Anarita Karimi v Republic (No.1) (1979) 1KLR 154.

8. On the doctrine of exhaustion, counsel submitted that the petition is in violation of Regulations 4, 5, 7 and 8 of the Kenya Information and Communications (Dispute Resolutions) Regulations,2010. In the Regulations he submitted that a dispute refers to any matter in contention such as between a licensee and another; a consumer and a licensee or where either party is aggrieved by the conduct of the other and an amicable resolution has not been reached between them. He contended that the grievance in light of registration of the website domain www.legalassistant.co.ke is a dispute between the petitioner (as licensed by the 2nd respondent) and the 1st respondent.

9. Counsel submitted that the dispute pertains to the legality and use of the domain name www.legalassistant.co.ke. The 1st respondent contended that the registration of this domain name is contrary to the provisions in the *Advocates Act* Cap.16 that prohibits advertising, undercutting, touting among others. It is for this reason that the 1st respondent in its letter dated 14th March 2023 sought to have the website deregistered.

10. He submitted that Regulation 3(3) of the Kenya Information and Communications (Dispute Resolutions) Regulations,2010 grants the 2nd respondent power to hold hearings and investigations with a view to resolving disputes such as the one between the petitioner and the 1st respondent. Further, that Regulation 8(6) provides an appeal mechanism before the Appeals Tribunal for a party dissatisfied by the 2nd respondent's decision as established under Section 102 of the *Kenya Information and Communications Act* Cap 411A.

11. Accordingly, Counsel argued that a party ought to exhaust the dispute resolution mechanism that is provided for before invoking the Court's jurisdiction and relied on the Supreme Court case of Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs

and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) [2019] eKLR where the court held thus:

> "(116)] The foregoing verdict also finds support in an adage principle in administrative law of "Exhaustion of Administrative Remedies"... where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their jurisdiction conferred by *the constitution* and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance..."

12. A similar position was reached in Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR.

13. Moreover, it was equally submitted that petition was in contravention of Section 2.4 and Section 6 of the Kenya Network Information Centre Policy for Registration of Second Level Domain Names in the .ke TLD as read together with the Kenya Network Information Centre Alternative Domain Name Dispute Resolution Policy. It was submitted that Section 83D(1b) of the Kenya Information Act Cap 411A gives the 2nd respondent the mandate to develop a framework for the administration and management of the .ke ccTLD domain name. That those sections provide that any dispute regarding the domain name is to be referred to mediation under the Alternative Domain Name Dispute Resolution Policy. Counsel thus contended that this dispute resolution process had also not been exhausted by the petitioner prior to filing this suit.

14. Similarly, Counsel submitted that the petition was in violation of Rule 96(1)(b) (i) as read together with Rules 95, 96(4) and 96(8) of the Law Society of Kenya (General) Regulations,2020 which provide that a dispute between the rights of the member and the Council ought to be resolved through either negotiation, conciliation, mediation or be referred to an arbitrator for determination. That this is a mechanism that the petitioner overlooked.

15. In view of the foregoing three major factors, the Advocate for the 1st Respondent submitted that the petition was prematurely filed before this court.

16. On specificity test, it was pointed out that the petition does meet the threshold of a constitutional petition for it does not set out with a reasonable degree of precision that which the petitioner complains of, the provisions said to be infringed and the manner in which they are alleged to be infringed. He relied on the Court of Appeal case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR .

17. Counsel pointed out that the petitioner had alleged the violation of his right against discrimination and his right to freedom of thought but had not specified the manner in which these rights had been infringed or the injury suffered as a result. That further, the actions deemed to be unlawful, unreasonable or procedurally unfair in light of Article 47 of *the Constitution* had not been outlined by the petitioner.

18. Counsel urged this Court therefore to allow the 1st respondent's notice of preliminary objection.

2nd Respondent's Submissions

19. Robson Harris Advocates LLP for the 2nd respondent filed written submissions dated 24th May 2023 in support of the 1st respondent's notice of preliminary objection. He took a similar trajectory as the 1st

respondent submissions by submitting on the doctrine of exhaustion and violation of the specificity test established in the Anarita Karimi case(supra).

20. To begin with Counsel submitted that the preliminary objection was proper and in line with the threshold for filing preliminary set out in Mukisa Biscuit Manufacturing Company Limited Vs West End Distributors Ltd (1969) EA 696 which expounded on the nature of a preliminary objection 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..."

21. Other cases relied on were Kandara Residence Association and another Vs. Ananas Holdings Limited and 4 others; Director of Survey and 3 others (Interested Parties) (2020)eKLR and Oraro vs Mbja (2005)eKLR.

22. On the doctrine of exhaustion of alternative dispute resolution mechanisms, Counsel took a substantially similar position as that taken by the Advocate for the 1st Respondent on the provisions of law that provide for alternative mechanism for dispute resolution. As pointed out by 1st Respondent's Advocate, he argued that the petitioner did not utilize the mechanism established under Section 2.4 and Section 6 of the Kenya Network Information Centre Policy for Registration of Second Level Domain Names in the .ke TLD as read together with Kenya Network Information Centre Alternative Domain Name Dispute Resolution Policy. In the same manner, Rule 96(1)(b) (i) as read together with Rules 95, 96(4) and 96(8) of the Law Society of Kenya (General) Regulations, 2020 which also provide a dispute resolution remedy. He relied on the case of William Odhiambo Ramogi and 3 others vs Attorney General and 4 others; Muslims for Human Rights and 2 others (Interested Parties) (2020)eKLR submitted that the Court ruled thus:

> " ...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 protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute mechanism in line with Article 159 of *the Constitution*."

23. He further cited the cases of R. Vs. Independent Electoral and Boundaries Commission Ex parte National Super Alliance Kenya and 6 others (2017)eKLR , Communications Commission of Kenya and 5 others v Royal Media Services Ltd and 5 others (2014)eKLR, Geoffrey Muthiga Kabiru (supra) and Wanjiku Gikonyo and 2 others v National Assembly of Kenya and 4 others(2016)eKLR on this point.

24. Likewise, he argued that the petition does not meet the threshold of a constitutional petition as laid down in Anarita Karimi (supra) as the petitioner as the link between the provisions of *the Constitution* alleged to be have been contravened and the manner in which these provisions had been violated was not clearly stated. Counsel also questioned how the 2nd respondent's performance of its legal mandate violated the petitioner's rights.

25. He argued that the petition ought to be dismissed placing relince on the case of Bernard Ouma Omondi and 2 others vs Attorney General and another (2021) eKLR quoted with approval the case of Minister of Home Affairs vs Bickle and others (1985) L.R.C. Cost.755 where it was held thus:

> " ...Courts will not normally consider a constitutional question unless the evidence 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."

Petitioner's Submissions

26. The petitioner in his written submissions robustly discounted the position taken by the respondents that the dispute raised in this petition akin to the one envisaged under the Kenya Information and Communications (Dispute Resolution) Regulations 2010 and the Kenya National Information Center Alternative Domain Name Dispute Resolution Policy. He took the position that the said Tribunals lack the requisite jurisdiction to adequately resolve the matter at hand. In any case, he disclosed that his attempts to resolve the dispute with the 1st respondent amicably had failed which justified an exemption to the doctrine of exhaustion in the circumstances.

27. The petitioner submitted that the courts have determined that the exhaustion doctrine does not absolutely oust the Court's jurisdiction and so such circumstances form exceptions to the doctrine. He relied on the Court of Appeal case of Fleur Investments Limited v Commissioner of Domestic Taxes & another [2018] eKLR where it was held that:

> "...where there was an alternative remedy and especially where parliament has provided a statutory procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully to the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it..."

28. The petitioner also sought to rely on the case of William Odhiambo Ramogi (supra) in this regard.

29. The petitioner contended that the Kenya Information and Communications (Dispute Resolution) Regulations 2010 were inapplicable as the dispute between him and the 1st respondent pertains to the alleged engaging in professional misconduct on the basis that his website is offends specific provisions of the *Advocates Act* and the Advocates (Marketing and Advertising) Rules (L.N 19/1967, LN 233/1984) which is not the kind of dispute contemplated under the Regulations. He further argued that the 1st respondent is neither a consumer or licensee that the Regulations anticipate.

30. The petitioner submitted that the 1st respondent had abused its discretion by violating the Rules of natural justice since without granting him a hearing, it directed him to cease operating the website. Moreover that, whereas the 1st respondent was aware that the petitioner's websites www.affidavits.co.ke and www.legalassistant.co.ke were registered under his law firm, it is evident that it is only investigating www.legalassistant.co.ke yet both were registered in a similar manner.

31. With reference to the mechanism established in the Kenya National Information Center Alternative Domain Name Dispute Resolution Policy, the petitioner also rejected its application in the instant dispute. According to him, the 1st respondent's complaint against him did not stem from his acquisition of a domain name but from the allegation that he is engaged in professional misconduct which is not within the scope of the Policy. In fact, he asserted that neither he or the 1st respondent had pleaded the issue of the registration and thus it is offensive to put this case within the ambit of the Policy.

32. On the test of specificity, the petitioner submitted that he had certainly met the threshold as set out in the case of Anarita Karimi(supra). The petitioner drew this Court's attention to Part b of the Petition

titled 'Nature of Injuries Caused or likely to be caused to the petitioner' which specified the provisions deemed to have been violated and a demonstration of how the provisions had allegedly been violated. In support he cited the case of Racheal Muthoni Wanyoike & Another V Mentor Sacco Society Limited [2021]eKLR which observed as follows:

> "...The reliance on the authority of Anarita Karimi Njeru does not stand out in the circumstances of this case. This is because the petitioners have issued a detailed and particularized data of the alleged violation of their constitutional rights."

33. The petitioner accordingly urged this Court to dismiss the preliminary objection and allow his case be heard on merit.

Analysis And Determination

The issues for determination are as follows:

i. Whether the preliminary objection has met the threshold.

ii. Whether the preliminary objection dated 11th April 2023 is merited.

iii. Whether the petition meets the specificity test?

Whether the objection meets the legal threshold of what amounts to a Preliminary objection.

34. The cerebrated case of what a preliminary objection entails is the Court of Appeal the case of Mukisa Biscuit Manufacturing Co. Ltd (supra) where it was held as follows:

> "...a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit...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..."

35. Similarly, in the case Dismas Wambola v Cabinet Secretary, Treasury & 5 others (2017) eKLR it was held thus:

> "...A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law.
>
> It may be noted that preliminary objections are narrow in scope and cannot raise substantive issues raised in the pleadings that may have to be determined by the court after perusal of evidence...."

36. The Court proceeded:

> "...a preliminary objection may only be raised on a "pure question of law." To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.

> In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts.
>
> In law, a question of fact, also known as a point of fact, is a question that must be answered by reference to facts and evidence as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant legal principles. The answer to a question of fact (a "finding of fact") usually depends on particular circumstances or factual situations."

37. Equally, the Court in the case of Oraro vs. Mbaja (supra) on the nature of preliminary objections observed that:

> "A preliminary objection is now well identified as and declared to be a point of law which must not be blurred with factual... Any assertion which claims to be a preliminary objection and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary objection anything that purports to be a preliminary objection must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence."

38. It my considered view that the issues raised herein are primarily matters of law as the facts that are relied upon to advance the arguments by the parties remain unchanged by either side. It's only the application of the law to the facts as they are that the parties appear to differ. The preliminary objection thus meets the test enunciated in the judicial decisions reviewed above.

Whether the preliminary objection dated 11th April 2023 is merited

i) The doctrine of exhaustion

39. The 1st respondent contended that the petitioner has failed to exhaust dispute resolution mechanisms provided in the relevant Statutes of the respondents, notably; Sections 3(3), 4, 5, 7, 8 (6) of the Kenya Information & Communications (Dispute Resolutions) Regulation 2010; Section 2.4 and Section 6 of the Kenya Network Information Center Policy; Section 83 D (1b) of the Kenya Information Act Cap 411A as well as rule 96 (1) (b) (i) as read with rules 95, 96 (4) and 96 (8) of LSK (General Regulation) 2020.

40. The petitioner asserts that the dispute herein does not fall within the jurisdiction of the 2nd respondent under the Regulations 4, 5, 7 and 8 of the Kenya Information and Communications (Dispute Resolution) Regulations, 2010 and Section 2.4 and Section 6 of the Kenya Network Information Centre Policy. This is because according to him the substratum of the case is the 1st respondent's assertion that his website www.legalassistant.co.ke offends some provisions of the *Advocates Act*. On the other hand, he contends that the 1st respondent ignored his efforts to resolve this dispute hence the exception to the doctrine of exhaustion thereby excluding the application of rules 96(1)(b) (i) as read together with Rules 95, 96(4) and 96(8) of the Law Society of Kenya (General) Regulations,2020.

41. The doctrine of exhaustion is statutoriy provided for under Section 9 of the *Fair Administrative Action Act*, 2015 in the following terms:

Procedure for judicial review

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.

42. The Court of Appeal in the case of Geoffrey Muthinja Kabiro(supra) speaking to this doctrine observed as follows:

> " 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 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."

43. Correspondingly the Court of Appeal in the case of William Odhiambo Ramogi & 3 others (supra) expounded 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."

44. Although the Petitioner contends that the registration of his website www.legalassistant.co.ke does not fall within the jurisdiction of the 2nd respondent under the Regulations 4, 5, 7 and 8 of the Kenya Information and Communications (Dispute Resolution) Regulations, 2010 and Section 2.4 and Section 6 of the Kenya Network Information Centre Policy as the dispute according to him is between him and the 1st respondent's on account of an assertion by the 1st respondent that his said website offends the provisions of the *Advocates Act*; I find that the petitioner is merely splitting hairs by trying to run away from the real controversy that he himself has clearly defined. Looking at the prayers in his own petition, prayer 2 seeks an order of prohibition to prohibit the 1st and 2nd respondents from deregistering or in any way hindering the petitioner's innovation www.legalassistant.co.ke. That being the case, one wonders then why the petitioner would say that the registration of his website does not fall within the scope of the 2nd respondent when he actually seeks orders directly against deregistration against the said respondent. In my view, this is a matter that falls within the scope of the 2nd respondent for which it ought to have been the 1st port of call to be required to consider the dispute over the matter. Moreover, I am also persuaded that being a member of LSK which the petitioner acknowledges, the dispute between him and the 1st Respondent ought to have first been resolved through the alternative dispute mechanisms provided for in sections 96 (1) (b) as read with rules 96 (4) and 96 (8). The position taken by the petitioner that the 1st Respondent did not give him a chance for a resolution through the established dispute mechanism holds no water. Once a dispute arose between him and the 1st respondent, as an aggrieved party, it was his duty to formally register the grievance to set in motion the dispute settlement mechanism between him and his professional body as equals in an impartial forum. Article 159 (2) (c) of *the Constitution* requires courts in exercising judicial authority to be guided and promote alternative forms of dispute resolution including reconciliation, mediation, arbitration among others. It would thus be going against this constitutional principle were this court to accept and

deal with such a dispute in the wake of express statutory procedures that amply provided for settlement of such disputes which the petitioner glaringly overlooked in filing this petition.

45. I am of the view that this finding is sufficient to dispose of this preliminary objection and there would thus be no need to proceed to the next issue of specificity in drawing this constitutional petition.

I thus uphold the preliminary objection and strike out this petition with costs to the respondents.

Dated, Signed And Delivered At Nairobi This 12Th Day of October, 2023.

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L N MUGAMBI

JUDGE

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