Republic v Competition Authority of Kenya; Airtel Networks Kenya Limited (Exparte Applicant); Pesapal Limited & 3 others (Interested Parties) (Judicial Review Miscellaneous Application E195 of 2023) [2024] KEHC 14694 (KLR) (Judicial Review) (3 October 2024) (Ruling)

Neutral citation: [2024] KEHC 14694 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E195 OF 2023

JM CHIGITI, J

OCTOBER 3, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

COMPETITION AUTHORITY OF KENYA ..... RESPONDENT

AND

AIRTEL NETWORKS KENYA LIMITED ..... EXPARTE APPLICANT

AND

PESAPAL LIMITED ..... INTERESTED PARTY

MAWINGU AIRTIME LIMITED ..... INTERESTED PARTY

INTERINTEL TECHNOLOGIES LIMITED ..... INTERESTED PARTY

OKAZAKI LIMITED ..... INTERESTED PARTY

RULING

1. This ruling is in relation to two Notices of Preliminary Objection being, the 1st Interested Party's Notice of Preliminary Objection dated 25th June 2024 wherein it raises the following grounds;

    1. The Honourable Court lacks jurisdiction to hear the Judicial Review Claim herein by dint of:

        I. Section 40 of The *Competition Act*, Cap 504

            A. The Judicial Review Claim herein is an abuse of the Court process in so far as the Ex-parte, Applicant having been aggrieved by the decision of the

Competition Authority as regards the manner of hearing and determining the Complaint before it, ought to have, under Section 40 (1) of the Act, appealed to the Competition Tribunal established under section 71 of the Act.

B. This Court's Jurisdiction can only be invoked by the Ex-parte Applicant through an Appeal under Section 40(2) of the Act in the event it is dissatisfied by the decision of the Competition Tribunal under Section 40(1) of the Act.

II. Section 9 Of The *Fair Administrative Action Act*, Cap 7L

A. This Court has no jurisdiction to entertain these proceedings in so far as the ex-parte Applicant, has contrary to Section 9(2) of the *Fair Administrative Action Act*, Cap 7L, failed to pursue and exhaust the mechanisms including internal mechanisms for appeal provided for under Section 40(1) of the Competition Authority Act, Cap 504.

B. Without prejudice to Grounds 1 and 2C above, the ex-parte applicant, prior to filing these Judicial review proceedings, failed to apply under Section 9(4) of the *Fair Administrative Action Act*, Cap 7L for exemption from the obligation to exhaust the Appeal remedy available undersection 40(1) of the *Competition Act*, Cap 504. These proceedings are therefore incompetent.

III. Admission (Nature of Dispute/Complaint)

A. Vide its own pleadings, viz; paragraph 4 of the Statutory statement dated 5/12/2023 and the Verifying Affidavit of Lilian Mugo sworn on even date, the Ex-parte applicant alleges to have withdrawn/re-called the letters that sparked the Complaint before the Authority. In essence, the substratum of these proceedings that the Ex-parte applicant does not known what and nature of complaint it faces is feigned. These proceedings are an abuse of the Court process.

IV. Abitrability Of Public Statutory Complaints Using Private Arbitration

A. These Proceedings are misconceived in law in so far as they would want to pigeon-hole, limit and or oust the mandate of a Public Statutory body using private arbitration dispute resolution agreements between the Ex-parte Applicant and the Interested Parties.

B. The provisions of the *Arbitration Act*, by dint of Section 5(2) of the *Competition Act*, Cap 504, cannot be used to micromanage the Competition Authority.

2. The 2nd one is the Respondent's Notice of Preliminary Objection dated 7th March 2024 on the following grounds:

1. That Section 40 of the *Competition Act* has an elaborate appeal mechanism for an undertaking aggrieved by the Respondent's decision as it provides that an undertaking aggrieved by a determination by the Authority shall appeal to the Competition Tribunal within 30 days of receiving the Authority's decision and should they be dissatisfied by the Competition Tribunal's decision, they may appeal further to the High Court within 30days of receiving the Competition Tribunal's decision, which appeal shall be final.

2. That section 9(2) of the *Fair Administrative Action Act*, 2015 dispossesses the High Court jurisdiction from reviewing administrative action or decisions unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

3. That section 9(3) of the *Fair Administrative Action Act*, 2015 provides that the High Court shall direct an applicant to first exhaust all remedies available under any other written law before instituting judicial review proceedings.

4. That from the foregoing, the ex-parte Applicant's Notice of Motion dated 11th December,2023 and the Certificate of Urgency, Chamber Summons, Statutory Statement and the Verifying Affidavit of Lillian Mugo all dated 5th December, 2023 were filed prematurely and pre-emptively before this Honourable Court, since the ex-parte Applicant has not exhausted the statutory avenues for redress outlined in the *Competition Act*.

5. That in this regard, this Honourable Court is dispossessed of the jurisdiction to hear and determine the current matter and to issue the orders sought by the ex-parte Applicant, before the statutory processes and avenues of dispute resolution provided by the *Competition Act* are exhausted.

6. That the ex-parte Applicant's Notice of Motion dated 11th December, 2023 and Statutory Statement and the Verifying Affidavit of Lillian Mugo all dated 5th December, 2023 should thus be dismissed with costs for being frivolous, vexatious and an abuse of the court process.

The Respondent's case;

3. It is their case that the ex-parte Applicant filed a Notice of Motion Application dated 11th December, 2023 seeking the following orders:

    a. An order of mandamus compelling the Respondent to furnish the Applicant with:

        i. the complaints lodged by the Interested Parties and all the annexures thereto forming the basis of investigations being undertaken by the Respondent; and

        ii. the preliminary analysis in respect of each of the complaints lodged by the interested parties and forming the basis of investigations currently being undertaken by the Respondent.

    b. An order of prohibition barring the Respondent from undertaking any investigations in respect of the complaints lodged by the Interested Parties

    c. Costs of the proceedings to be provided for.

4. The Application is supported by a Statutory Statement dated 5th December, 2023 and Verifying Affidavit sworn by Lillian Mugo on 5th December, 2023.

5. According to the them, the ex-parte Applicant has not exhausted all the remedies available to it under the *Competition Act* Cap 504 of the Laws of Kenya and thus the High Court lacks jurisdiction to entertain the instant proceedings.

6. Section 40 of the *Competition Act* provides:

a. A person aggrieved by a determination of the Authority made under this Part shall appeal in writing to the Tribunal within thirty days of receiving the Authority's decision.

b. A party to an appeal under subsection (1) who is dissatisfied with the decision of the Tribunal may appeal to the High Court against that decision within thirty days after the date on which a notice of that decision has been served on him and the decision of the High Court shall be final.

7. Section 71 (1) of the Act stipulates that there is hereby established a Tribunal to be known as the Competition Tribunal which shall exercise the functions conferred upon it by this Act.

8. Reliance is placed in the Court of Appeal Ruling of Speaker of the National Assembly v James Njenga Karume 1992 eKLR; Nairobi Civil Application No.92 of 1992 (NAI 40/92 UR):

> "In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions."

9. The cause of action in the suit herein is the Respondent's decision contained in its letter of 22nd November, 2023 allegedly declining to furnish its Advocates with the complaint and annexures thereto and to furnish it with a copy of its preliminary analysis.

10. It is their case that the Applicant should have invoked Section 40(1) of the *Competition Act* before the Competition Tribunal which is the statutory forum of first instance for the hearing and determination of disputes arising from the interpretation and application of the *Competition Act* and not this Honourable Court.

11. In the case of Republic v Principal Magistrate Lamu Magistrate's Court & another ex-parte Kenya Forest Service [2016] eKLR the High Court while quoting the Court of Appeal in Eliud Wafula Mailo vs. Minister of Agriculture & 3 others [2016]eKLR which cited with approval the views of the learned authors of Halsbury's Laws of England, Volume 10, paragraph 723 where the authors say –

> "Where a tribunal with exclusive jurisdiction has been specified by a specific statue to deal with claims arising under a statute, the county court's jurisdiction to deal with these claims is ousted, for where an Act creates an obligation to, and enforces the performance of it, it cannot be enforced in any other manner."

12. Reliance is also placed on *Stephen Asura Ochieng & 2 others v Orange Democratic Movement Party & 2 others; Nairobi H.C. Pet. No. 288 of 2011* wherein it was held that:

> "12. To my mind, the intention behind the establishment of the Political Parties Tribunal was to create a specialised body for the resolution of inter party and intra party disputes. The creation of the Tribunal was in line with the provisions of Article 159 of *the Constitution* which provides for the exercise of judicial power by courts and tribunals established under *the constitution* and for the use of alternative dispute resolution mechanisms. Further, a major concern in the administration of justice in Kenya has been the extent to which the courts have been unable to deal expeditiously with matters before them. A situation in which disputes between members of political parties amongst

themselves or with their parties wind up in the Constitutional division of the High Court would clearly be prejudicial to the expeditious disposal of cases.

13. To my mind, the provisions of Section 40 (2) of the *Political Parties Act* must be interpreted as permitting aggrieved members of a political party to bring their grievance before the Political Parties Tribunal where the political party has neglected or refused to activate the internal party dispute resolution mechanism. The section must be read as contemplating assumption of jurisdiction by the Tribunal where the internal party mechanism has failed to hear and determine a dispute. Indeed, I do not believe that this court has jurisdiction to entertain this Petition at all in view of the nature of the petitioners' grievance and the parties involved.

13. It is its case that Section 9(2) of the *Fair Administrative Action Act*, 2015 provides that; "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."

14. The High Court in Republic v Joe Mucheru, Cabinet Secretary Ministry of Information Communication and Technology & 2 Others; Katiba Institute & Another (Exparte); Immaculate Kasait, Data Commissioner (Interested Party) (Judicial Review Application E1138 of 2020) [2021] KEHC 122 (KLR) held as follows regarding the above position:

> " 43. Whether there is a remedy alternative to judicial review, which is equally convenient, beneficial and effective is one of the factors that a judicial review court would consider in exercising its discretion to grant or not to grant orders for judicial review. The alternative remedy may take one of several forms but one with which we are concerned at the moment is the right of appeal which, in my humble view, is the right encapsulated in section 56 (1) of the Act. I say so because, according to that section, it is only where one is aggrieved by decision made under the Act, that he may lodge a complaint to the Data Commissioner. The complaint in this context would be an appeal against the decision by which the subject data is aggrieved."

15. Section 9(3) of the *Fair Administrative Action Act*, 2015 provides that the High Court shall direct an applicant to first exhaust all remedies available under any other written law before instituting judicial review proceedings.

16. Given the foregoing, they argue that the Court lacks jurisdiction in the instance of existence of alternative remedies provided by an Act of Parliament and a suit is fatally defective in the instance that it is filed before an applicant exhausts alternative remedies provided by law as in the present case.

17. They argue that the judicial review application is premised on its decision delivered via its letter of 22nd November,2023 that should have been appealed to the Competition Tribunal as provided under section 40(1) of the *Competition Act*.

18. They urge this court to dismiss the ex-parte Applicant's Notice of Motion Application dated 11th December, 2023 together with the Statutory Statement dated 5th December, 2023 and Verifying Affidavit sworn by Lillian Mugo on 5th December, 2023 with costs.

The 1st Interested Party Case;

1. The substratum of these proceedings is largely that the Ex-parte Applicant has been denied an opportunity to know the particulars or nature of the complaint it is facing. These are matters falling under Part III of the Act.

2. The Ex-parte Applicant has failed to pursue and exhaust the mandatory dispute resolution mechanism set under section 40 (1) of the Act as regards decisions of the Authority.

3. This Court has under section 40(2) no original but Appellate Jurisdiction as regards the decision of the Tribunal made under section 40 (1) of the Act.

4. It is its case that Section 9 (2) and 9(3) of the *Fair Administrative Action Act*, Cap 7L are applicable to the circumstances of this case.

5. The Ex-parte Applicant has failed to pursue and exhaust the internal mechanisms for Appeal provided for under Section 40(1) of the Competition Authority Act, Cap504.

6. It is its case that by dint of the Doctrine of exhaustion, these proceedings should be dismissed with costs.

7. Section 9(4) of the *Fair Administrative Action Act*, Cap 504, it provides that 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.

8. The Ex-parte Applicant, never made an application to be exempted from the obligation to exhaust the mandatory Appeal remedy provided for under Section 40 (1) of the *Competition Act*, Cap 504.

9. In the case of United Millers Limited v Kenya Bureau of Standards, Director, Directorate of Criminal Investigations & 5 others [2021] eKLR, the Supreme Court held as follows;

> "(22) In response, the 1st respondent, filed a preliminary objection challenging the High Court's jurisdiction to entertain the judicial review proceedings pursuant to Sections 11 and 14A (4) of the *Standards Act* and Section 9of the FAA Act. The Court (Mativo J) delineated two issues for determination in considering the preliminary objection: whether it was divested of jurisdiction on grounds that the suit offends the doctrine of exhaustion of statutory provided dispute resolution mechanism; and whether the ex-parte applicant had demonstrated any grounds to warrant grant of judicial review orders.
>
> (23) On the first issue, the trial court found that the ex-parte applicant ought to have exhausted available dispute resolution mechanism before approaching it. The learned Judge therefore found that the judicial review application offended the doctrine of exhaustion of statutorily available remedies set out under Sections 11 and 14A (4) of the *Standards Act* and Section 9 (2) of the FAA Act, and further failed to satisfy the exceptional circumstances under section 9(4) of the FAA Act. It thus held that the application must fail. The court however did not down its tools upon making the determination that it lacked jurisdiction. It determined the second issue and found that the ex-parte applicant had failed to establish a case to warrant grant of judicial review orders.

(24) On appeal, the Court of Appeal delimited three issues for determination, namely: whether the High Court properly exercised its jurisdiction, whether it was right in invoking the principle of exhaustion, and whether it was right in finding that the substantive motion failed the threshold for grant of the judicial review. The Appellate Court upheld the trial court's determination and entirely endorsed its reasoning. It found that the trial court in reaching its determination was guided by the need to serve substantive justice to the parties and exercised it discretion soundly and on reasonable judicial principles. The Court of Appeal opined that having failed to revert to the internal dispute resolution mechanisms provided for under Section 14A (4) of the *Standards Act* and Section 9 (2) of the FAA Act and having also failed to apply for exemption from this requirement as is provided for under Section 9 (4) of the FAA Act, the High Court was divested of jurisdiction to entertain the judicial review proceedings. The Court of appeal also found that having reached this conclusion on jurisdiction, the High Court ought to have downed its tools. Nonetheless, it considered the third issue and agreed with the trial court that the substantive motion failed to satisfy the grounds for grant of judicial review.

(25) Considering all the above, it is clear to us that the judicial review application before the trial Court and the subsequent appeal to the Court of Appeal were determined on a preliminary jurisdictional issue. We have previously in Peter Odour Ngoge v Francis Ole Kaparo & others; SC Petition No. 2 of 2012, [2012] eKLR, emphasized the significance of respecting the hierarchy of the judicial system, as one of the principles guiding the exercise of our jurisdiction under Article 163 (4) (a) of *the Constitution*. From the foregoing, we find no difficulty in concluding that the issues before the High Court as well as the Court of Appeal did not either involve the interpretation and application of *the Constitution* or take a trajectory of Constitutional interpretation or application. While issues of constitutional interpretation and application had been raised in the substantive application for Judicial Review, they were nipped in the bud when the preliminary objection was upheld for failure to exhaust the statutory alternative dispute resolution mechanisms.

(26) We also take judicial notice that the superior courts' findings on jurisdiction is in harmony with our finding in Albert Chaurembo Mumbo & 7 others v Maurice Munyao & 148 others; SC Petition No 3 of 2016, [2019] eKLR, wherein we stated that, even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi- judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute. We emphasized that 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."

10. In the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969) EA 696 as regards the nature of a Preliminary Objection, the assumption that all the facts pleaded by the Ex-parte Applicant on the alleged withdrawal are correct, in essence, the substratum of these proceedings that

the Ex-parte applicant does not known what and nature of Complaint it faces before the Authority is feigned.

11. The Ex-parte Applicant clearly knew what it was facing hence the withdrawal. The withdrawal, the Ex-parte Applicant confirms that the complaints were legitimate.

12. It argues that only the Competition Authority that has the power to look at the withdrawal and give parties the opportunities to make representation as to the effect.

13. The Ex-parte Applicant seems to suggest that because of existing private Arbitration Agreements it has with the Interested Parties; the Competition Authority's mandate or role has been ousted. The interested party is of a different view.

14. Section 5(2) of the Competition Authority Act, Cap 504 speaks for itself. It provides as follows;

> " 5. Application
>
> 1. ...
>
> 2. Where there is a conflict between the provisions of this Act and the provisions of any other written law with regard to matters concerning competition, consumer welfare and the powers or functions of the Authority under this Act, the provisions of this Act shall prevail."

The Ex parte Applicant's case;

19. The Applicant opposes to the Preliminary Objections filed by Respondent dated 7th May 2024 and the 1st Interested Party's Preliminary Objection dated 25th June 2024.

20. In the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696 the erstwhile Court of Appeal for East Africa defined a Preliminary Objection and deprecated its misuse by holding:

> " 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and on occasion confuses the issues. This improper practice should stop."

21. It is its case that the grant of orders of mandamus and prohibition involves the exercise of judicial discretion of the High Court and for this reason, the Preliminary Objections would fail as held in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696.

22. It is its case, the facts which have been pleaded and not demurred by way of Replying Affidavit by the Respondent and/or 1st Interested Party and are to be considered as correct by the Court for purposes of determining the Preliminary Objection are as follows (and are drawn from the Applicant's Statutory Statement and Verifying Affidavit as well as the 2nd Interested Party's Replying Affidavit):

    a. The Applicant and the Interested Parties herein entered into Distributorship Agreements (dated: 5th December 2012; 1st December 2015; 23rd July 2019; and 24th July 2019 respectively) under which the Interested Parties were to sell and distribute the Applicant's products in

accordance with the terms set out there in which included a dispute resolution clause which provided for disputes between the parties to be resolved by Arbitration which said arbitration clauses oust the jurisdiction of the Respondent. Article 159(2) (c) of *the Constitution* advocates for the promotion of alternative dispute resolution such as arbitration. Arbitration of competition related has been accepted and adopted by the High Court of England in the case of ET Plus SA v Welter [2005] EWHC 2115 (Comm)/ [2006] 1 Lloyd's Rep 251. Copies of the Distributorship Agreements entered between the parties appears on pages 21 to 24,25 to 28 ,29 to 32 and 33 to 38 respectively of Exhibit "LM1" and the Arbitration Clauses appear on pages 24,27,31 to 32 and 37 respectively of Exhibit "LM1;

b. On various dates in the month of September and October 2023 the Applicant received notifications of investigation from the Respondent, wherein the Applicant was notified by the Respondent that:

   i. The Respondent was undertaking investigations in respect of complaints lodged by the Interested Parties relating to alleged abuse of buyer power under Section 31 of the *Competition Act*;

   ii. The alleged conduct set out in the aforesaid notification if proven contravened Section 24A (1) of the *Competition Act* and was subject to the penalties set out in Sections 24A (9) and 36 of the *Competition Act*; and

   iii. The Applicant was given to respond to the Complaints within 14 days of the aforesaid letters.

c. The Respondent's notifications of investigation referred to various remedies sought such as refunds of commissions which are matters within the dispute resolution clauses set out in the contracts between the Applicant and the Interested Parties herein who have been engaged in mutually beneficial contracts that have resulted in many engagements over the course of the years without demur and/or complaint.

d. The Applicant withdrew the letters that sparked the dispute and there was thus no longer any dispute between the Applicant and the Interested Parties. Despite which withdrawal the Respondent persisted in undertaking investigations which it held might culminate in the imposition of colossal penalties such as the kind imposed on Majid-Al- Futtaim/ Carrefour Super amounting to over Kshs.1 billion (see the Applicant's Further Affidavit sworn by Ms. Lilian Mugo on 9th May 2024 as well as page 18 of Exhibit "LM2" attached thereto);

e. The Applicant maintains that it does not buy any goods or products from the Interested Parties and for that reason there is no buyer-seller relationship between the Applicant and the Interested Parties to warrant the purported exercise of jurisdiction by the Respondent as can be seen from the Agreements which appear on pages 21 to 38 of Exhibit "LM1" wherein it can be seen that it is the Interested Parties that actually purchase the Applicants products either in cash or on furnishing of guarantees.

f. The Applicant instructed its Advocates to respond to the aforesaid notification of investigation from the Respondent which culminated in:

   i. Correspondence wherein the Applicant was allowed additional time to file responses as evidenced by the correspondence which appears on pages 57 and 62 of Exhibit "LM1";

   ii. Meetings on 14th November 2023 as evidenced by the Minutes of the said date which appears on pages 63 to 65 of Exhibit "LM1"; and

iii. Requests by the Applicant's Advocates to be furnished with:

1. the Interested Parties complaints and annexures thereto so as to allow the Applicant to respond to the allegations set out in the Complaints (given the potential gravity of the proceedings and penalties intimated by the Respondent). A copy of the Applicant's Advocates letter dated 14thNovember 2023 appears on page 66 to 67of Exhibit "LM1;" and

2. The Preliminary Analysis forming the basis for the investigation of the complaints.

g. On 22nd November 2023 the Respondent wrote a letter to the Applicant's Advocates wherein it declined to furnish a copy of the complaints and annexures thereto as well as a copy of its preliminary analysis.

h. The Respondent's letter dated 22nd November 2023 which forms the very crux of these proceedings is equally important for the fact that the Respondent further states as follows:

> "It would not furnish the Preliminary Analysis as the "preliminary analysis" is a process by which the Authority determines whether or not it has jurisdiction to investigate a complaint. The Competition Tribunal in Competition Tribunal Case No. CT/006/2020- Majid Al-Futtaim Hypermarkets Ltd v Competition Authority of Kenya & Another available at http://kenyalaw.org/caselaw/cases/view/211430/ addressed itself to a similar request for a preliminary analysis , in that matter referenced to as a ""market analysis." It held that the economic analysis is the "how" the 1stRespondent arrived at its decision after considering the evidence and the law. It is in the inference drawn from the negotiations of the parties, the supply agreements, invoices, and all other documents presented by the Appellant and the 2nd Respondent (par 120). The upshot was the Authority was not obligated to share the analysis. For full clarity, kindly see paragraphs 111 to 120 of the Ruling. In view of the above, and in order to progress investigations herein, do present responses to the Notice of Investigations in relation to the four (4) complaints listed herein at the earliest, but in any event by end of day 6th December 2023." A copy of the Respondent's letter dated 22nd November 2023.

i. It is evident that the Respondent is bent on taking actions to arrive at a pre-determined outcome and will not stop at infringement of the Applicant's constitutionally guaranteed rights to a fair hearing which include the right to be furnished with complaints and/or documents to be utilized in imposing sanctions and penalties against it by the Respondent. Despite the fact that the powers it yields during its investigations can result in imposition of very hefty potential penalties likely to be imposed by the Respondent as indicated in its Notifications of Investigations. Accordingly, the requirements of a fair hearing and fair administrative action guaranteed by *the Constitution* require as a bare minimum that the Respondent does furnish the individual complaints and annexures as well as the Preliminary Analysis so as to enable the Applicant to file a robust and comprehensive response alive to the powers wielded by the Respondent as Investigator and Judge, in imposing the penalties set out in Sections 24A(9) and 36 of the *Competition Act* as indicated in its Notification of Investigation(with Sections 24A(9) and 36 of the *Competition Act* which refer to fines ranging from a minimum of Kshs. 10 million to 10% of the preceding year's gross turnover). Fines

running into hundred of millions of shillings and/or billions are not unheard of as recently exhibit by the Carrefour fine of Kshs.1,108,327,873.60.

j. The Respondent's impugned action of 22nd November 2023 of demanding a response from the Applicant without furnishing documents essential documents such as the individual complaints and the preliminary analysis which are necessary to aid the preparation of a robust response, thus far point to an intention to infringe on the Applicant's right to a fair hearing which includes being supplied with all the documentation intended to be relied upon in prosecution under Article 50(2) (j) of *the Constitution* as was held in the case of Simon Githaka Malombe v Republic [2015] eKLR by the judicial a pre-determination of matters by the Respondent.

k. The Respondent, being an Administrator, is minded to issue orders against the Applicant without furnishing all the documents supplied to it by the Interested Parties as complainants contrary to Articles 47 and 50 of *the Constitution*. This is confirmed by the fact that as at 2nd May 2024, only the 2nd Interested Party had filed a Replying Affidavit sworn on 22nd February 2024 (despite the very clear directions of the Court contained in its Directions of 5th December 2023 and 14th February 2024). A cursory glance at the complaint dated 24th July 2023 lodged by the 2nd Interested Party indicates that the Complaint not only invoked the Contracts between the Applicant and the 2nd Interested Party, but equally invoked various provisions of the law purportedly clothing the Respondent with unbridled power to impose the highest penalties by inter alia accusing the Respondent of engaging in restrictive practices proscribed by Section 21 of the *Competition Act*.

l. The Respondent's elaborate letter of 12th October 2023 setting out an effective summary of Mawingu Airtime's complaint of 24th July 2023.However, the Respondent's notification of investigation makes no reference to investigation of a restrictive practice purportedly undertaken allegedly by the Applicant in contravention of Section 21 of the *Competition Act*). An allegation made once again against the Applicant by the 2nd Interested Party at paragraph [21] of Ms. Celestine Anyango's Replying Affidavit.

m. Clause [3.3] of the Agreements between the Applicant and the Interested Parties points to the fact that the Distributor is not limited to selling only Airtel products and may have other products and services from Airtel's competitors. A fact confirmed by the Respondent calling from the 2nd Interested Party distribution agreements with other telecommunications companies vide three letters of 4th August 2023, 14th August 2023 and 23rd August 2023, which said contracts / agreements with other telecommunications companies have neither been produced and/or disclosed by either the 2nd Interested Party or the Respondent and the failure to do so is in breach of the duty of disclosure and smirks of double-standards.

n. Moreover, the aforementioned Distributorship Agreements between the Applicant and Interested Parties contain Arbitration Clauses which the Respondent is ignoring contrary to the provisions of Article 159 (2) (c) of *the Constitution*.

o. Moreover, for reasons adduced hereinabove it is evident that the Respondent herein is attempting to assume jurisdiction over matters beyond the scope of its mandate and/or jurisdiction.

p. The impugned decision by the Respondent dated 22nd November 2023 has not been published in the Gazette under Section 39 of the *Competition Act* so as to trigger an alleged right of Appeal under Section 40 of the *Competition Act* (and for this reason as will be demonstrated

further hereunder, no right of Appeal to the Competition Authority has been triggered and/or accrued and for this reason the Preliminary Objections are baseless and lack merit and should be dismissed.

q. The refusal by the Respondent to furnish the documentation further furnished by the 2nd Interested Party (if any such as other Distributorship agreements is discriminatory) in response to its three letters of 4th August 2023, 14th August 2023 and 23rd August 2023 as well as the Preliminary Analysis is a clear indication that the Respondent intends to conduct proceedings before it by way of ambush in contravention of Simon Githaka Malombe v Republic [2015] eKLR.

23. It is equally not in dispute that the Judicial Review proceedings herein concern the infringement of the Applicant's Constitutional right to a fair hearing by the Respondent and want of jurisdiction as the Respondent discharges its mandate in a very unconstitutional manner thereby warranting a review of those proceedings by the High Court exercising its Judicial Review powers as was held in the case of Rex v Electricity Commissioners Ex Parte London Electricity Joint Committee Company [1924] 1 KB 171(at p.204 to p.207), wherein Lord Justice Atkin held:

> "The question now arises whether the persons interested are entitled to the remedy which they now claim in order to put a stop to the unauthorized proceedings of the Commissioners. The matter comes before us upon the rules for writs of prohibition and certiorari which have been discharged by the Divisional Court...Prohibition restrains the tribunal from proceeding further in excess of jurisdiction ...Whenever anybody of persons having legal authority to determine questions affecting the rights of subjects , and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs...

24. It is its case that the Preliminary Objection(s) are based on a misapprehension of the law and in particular since:

a. A Statute must be read and construed as a whole;

b. The decision to infringe Article 50(2) (j) and Article 47 as communicated by Respondent in its letter of 22nd November 2023 is not appealable to the Competition Tribunal under Section 73 of the *Competition Act* (which confers jurisdiction on the Competition Tribunal), which said provision provides:

> 73. Persons entitled to appeal to the Tribunal
>
> The following persons may exercise the right of appeal to the Tribunal conferred under this Act—
>
> a. any person who, by a determination made by the Authority under this Act—
>
> i. is directed to discontinue or not to repeat any trade practice;
>
> i. is issued with a stop and desist order or any other interim order;
>
> ii. is permitted to continue or repeat a trade practice subject to conditions prescribed by the order;
>
> iii. is directed to take certain steps to assist existing or potential suppliers or customers adversely affected by any prohibited trade practices;

iv. is ordered to pay a pecuniary penalty or fine; or

v. is aggrieved by a stop and desist order or any other interim order of the Authority.

b. where any order referred to in paragraph (a) is directed to a class of persons, any person belonging to or representing that class; or

c. any person who by an order made under section 46 is—

i. enjoined from proceeding with a proposed merger; or

ii. authorized to proceed with a proposed merger subject to conditions prescribed by the order.

25. A decision of the Respondent triggering Appellate jurisdiction of the Competition Tribunal would need to be published in the Gazette under Section 39 of the *Competition Act* (which has not been published).

26. Moreover, on 28th December 2023, the Supreme Court of Kenya in the case of Nicholus v Attorney General & 7 others National Environmental Complaints Committee *& 5 others (Interested Parties) (Petition E007 of 2023*) [2023] KESC 113, recently had occasion to deal short-shrift to a Preliminary Objection raising the jurisdictional alternative remedy argument, wherein the Supreme Court held that:

> " 104. Having considered the above complaints, we reiterate our earlier finding in this judgment that the mandate and jurisdiction to determine these questions lie with the ELC under Articles 22, 23(3) and 162(2)(b) of *the Constitution* as read with Section 4(1) of the Environment and *Land Act*. We say so because neither the NET, EPRA nor EPT have the jurisdiction to determine alleged violations of *the Constitution*. That right to access the court for redress of alleged constitutional violations, should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms. We say this persuaded by the elegant reasoning in William Odhiambo Ramogi & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR where the High Court (Achode (as she then was), Nyamweya (as she then was), & Ogola, JJ) stated:
>
> > "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." [Emphasis ours].
>
> 105. We agree with the above reasoning and find that the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If

the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief. But there is also a need to emphasize the need for the court to scrutinize the purpose for which a party is seeking relief, in determining whether the granting of such constitutional reliefs is appropriate in the given circumstances. This means that a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs, is a necessary prerequisite on the part of any superior court.

107. Flowing from the above findings and in that context, it is our view that, where the reliefs under the alternative mechanism are not adequate or effective, then there is nothing that precludes the adoption of a nuanced approach, as we have stated. What must matter at the end is that a path is chosen that safeguards a litigant's right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. This is because, to achieve a harmonious and effective legal framework, it is imperative to strike a judicious balance between the emphasis on providing the initial opportunity for resolution to entities established by law and the assertion of a litigant's right to access the court. However, such convergence requires a case-by-case assessment by considering issues such as the nature of the dispute and the adequacy of the alternative dispute mechanism. See also our decision in Bia Tosha Distributors Ltd v Kenya Breweries Ltd & 6 Others (Pet.No.15 of 2020) [2023] KESC 14(KLR) (Const.and JR) (17 February 2023) (Judgment).

108. It was therefore sufficient that the appellant alleged that a right in *the Constitution* had been infringed or threatened with violation, making it clear that in light of the provisions of *the Constitution* and the ELC Act, the issues raised were withi and JR) (17 February 2023) (Judgment).

108. It is the Applicant's case that the Respondent in its impugned letter of 22nd November 2023 is on record as stating it was under no obligation to furnish the preliminary analysis based on authority from the Competition Tribunal which does not exercise the powers of the High Court as set out in under Article 165(3) (b) and 23(3)(f) of *the Constitution* of Kenya. Accordingly, having admittedly infringed the Applicant's rights guaranteed under inter alia Articles 47 and 50 of *the Constitution*, the Respondent's Preliminary Objection is presented in bad faith and ought to be dismissed.

27. In the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696 the erstwhile Court of Appeal for East Africa defined a Preliminary Objection and deprecated its misuse by holding:

> " 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and on occasion confuses the issues.

28. It believes that the cause of action in the suit herein is the Respondent's decision contained in its letter of 22nd November, 2023 allegedly declining to furnish its Advocates with the complaint and annexures thereto and to furnish it with a copy of its preliminary analysis.

Analysis and determination;

29. In the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696 the erstwhile Court of Appeal for East Africa defined a Preliminary Objection and deprecated its misuse by holding:

> " 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and on occasion confuses the issues.

30. Section 40 of the *Competition Act* provides that;

    a. A person aggrieved by a determination of the Authority made under this Part shall appeal in writing to the Tribunal within thirty days of receiving the Authority's decision.

    b. A party to an appeal under subsection (1) who is dissatisfied with the decision of the Tribunal may appeal to the High Court against that decision within thirty days after the date on which a notice of that decision has been served on him and the decision of the High Court shall be final.

31. Section 71 (1) of the Act stipulates that there is hereby established a Tribunal to be known as the Competition Tribunal which shall exercise the functions conferred upon it by this Act.

32. The Ex-Parte Applicant argues that the impugned decision by the Respondent dated 22nd November 2023 has not been published in the Gazette under Section 39 of the *Competition Act* so as to trigger an alleged right of Appeal under Section 40 of the *Competition Act* (and for this reason, no right of Appeal to the Competition Authority has been triggered and/or accrued and for this reason the Preliminary Objections are baseless and lack merit and should be dismissed.

33. This court is of a different view. Once a decision is made like the impugned one then the 30 days' clock under Section 40 of the *Competition Act* starts running. The aggrieved party does not necessarily have to wait for the decision to be gazetted as alleged by the Applicant.

34. To follow such an approach as proposed by the Applicant would expose an aggrieved party to the risk of being caught up by the 30-day's statutory limitation window.

35. Section 73 of the *Competition Act* provides:

> " According to the applicant, the following persons may exercise the right of appeal to the Tribunal conferred under this Act—
>
> a. any person who, by a determination made by the Authority under this Act—
>
> i. ...is issued with a stop and desist order or any other interim order;
>
> ii. ...is aggrieved by a stop and desist order or any other interim order of the Authority.

36. This court finds that the applicant is aggrieved by a directive which is germane to any other interim order of the Authority under Section 73 of the *Competition Act*.

37. In William Odhiambo Ramogi & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR where the High Court (Achode (as she then was), Nyamweya (as she then was), & Ogola, JJ) stated:

> " 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." [Emphasis ours].
>
> We agree with the above reasoning and find that the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief. But there is also a need to emphasize the need for the court to scrutinize the purpose for which a party is seeking relief, in determining whether the granting of such constitutional reliefs is appropriate in the given circumstances. This means that a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs, is a necessary prerequisite on the part of any superior court.
>
> Flowing from the above findings and in that context, it is our view that, where the reliefs under the alternative mechanism are not adequate or effective, then there is nothing that precludes the adoption of a nuanced approach, as we have stated. What must matter at the end is that a path is chosen that safeguards a litigant's right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. This is because, to achieve a harmonious and effective legal framework, it is imperative to strike a judicious balance between the emphasis on providing the initial opportunity for resolution to entities established by law and the assertion of a litigant's right to access the court. However, such convergence requires a case-by-case assessment by considering issues such as the nature of the dispute and the adequacy of the alternative dispute mechanism.

38. In the instant suit it is this court's finding that the Applicant did not show how the redress mechanism under Section 40 of the *Competition Act* was inaccessible or how the reliefs under the alternative.

39. In the case of Clifford Keya v Jackline Inguitiah & 5 others; Atieno Aoko & 3 others (Interested Party) [2022] eKLR

> " The doctrine of exhaustion is applicable to constitutional Petitions. If successfully raised, it is a complete bar and a Court will not move an inch ahead. There are, however, instances where the doctrine will be inapplicable.
>
> The doctrine of exhaustion traces its origin in Article 159(2)(c) of *the Constitution* which recognizes and entrenches the use of alternative mechanisms of dispute resolution.

The doctrine is further entrenched in Section 9 of the *Fair Administrative Action Act* 2015 which provision forbids the High Court from assuming jurisdiction in matters where a party does not exhaust internal remedies except where exceptional circumstances for exemption are proved to exist.

The Supreme Court in Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others Pet. 14A, 14B & 14C of 2014 of [2014] eKLR held: The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis."

40. On the applicability of the doctrine of exhaustion in Kenya, suffice to say that the doctrine traces its origin from Article 159(2)(c) of *the Constitution* which recognizes and entrenches the use of alternative mechanisms of dispute resolution in the following terms:

> "In exercising judicial authority, the Courts and tribunals shall be guided by the following principles-
>
> (c) Alternative forms of dispute resolution including resolution, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause 3."

41. It is this court finding, and I so hold that the applicant did not exhaust all that available avenues for the redress including the Section 40 of The *Competition Act* before moving this court.

42. Section 9(2) and (4) of Fair Administrative Actions Act Which stipulates that:

(2) The High Court or a subordinate court under Sub section (I) 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.

(4) notwithstanding sub section (3), the High Court or a subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from obligation to exhaust any remedy if the court considers such exemption to being the interest of justice.

43. The applicant has not filed any application nor has it secured an order exempting it from the application of the Section 9(2) and (4) of the *Fair Administrative Action Act*.

Disposition:

44. This court finds that it lacks jurisdiction to determine this suit.

45. In arriving at my findings herein, this court is guided by the Supreme Court Case of Dickson Ngigi Ngugi v Commissioner of Lands S.C Petition No. 9 of 2019 [2019] eKLR, [36] wherein it was observed that,

> "Jurisdiction goes to the root of any cause or dispute before a court of law. A court must exercise restraint to avoid overstepping its constitutional role in order to maintain its legitimacy. If a court has no jurisdiction, a judgment rendered therein does not adjudicate the dispute. It does not bind the parties, nor can it be made the foundation of any right. It is a nullity without life or authority. In short, it is coram non judice and amounts to a nullity because, as Nyarangi, JA famously said in the locus classicus, Owners of the Motor Vessel

"Lillian S" v Caltex Oil, (Kenya) Ltd [1989] KLR 1, "jurisdiction is everything. Without it, a court has no power to make one more step".

Order;

1. The Notices of Preliminary objection are upheld.
2. This suit is struck out with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER, 2024.

.....

J. M. CHIGITI (SC)

JUDGE