



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**(Coram: A. C. Mrima, J.)**

**PETITION NO. E343 OF 2020**

**ANTHONY MIANO & OTHERS.....PETITIONERS**

**VERSUS**

**THE HON. ATTORNEY GENERAL & OTHERS.....RESPONDENTS**

**RULING**

1. This ruling is in respect of a Notice of Preliminary Objection filed by *The National Transport and Safety Authority*, the 3<sup>rd</sup> Respondent herein. The objection is dated 6<sup>th</sup> November, 2020. I will hereinafter refer to the Preliminary Objection as ‘**the objection**’ and to the National Transport and Safety Authority as ‘**the NTSA or the 3<sup>rd</sup> Respondent**’.

2. The objection is tailored as follows: -

1. *THAT the Petitioners have not exhausted the internal appeal mechanism to the Transport Licensing Appeal Board established under Section 38 of 39 of the National Transport and Safety Authority Act*

2. *That the Applicant has not made any application to be exempted from such exhaustion of internal appeal mechanism.*

*REASONS WHEREFORE the 3<sup>rd</sup> Respondent pray that the petition and Application herein be dismissed with costs opt the 3<sup>rd</sup> Respondent.*

3. The objection is supported by the *Hon. Attorney General* and the *Minister for Transport*, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents respectively.

4. The Petitioners are opposed to the objection.

5. On this Court’s directions, the objection was argued by way of written submissions. Counsel for the 3<sup>rd</sup> Respondent and the Petitioners filed their respective written submissions. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents associated herself with the submissions filed by the Counsel for the 3<sup>rd</sup> Respondent.

6. In urging this Court to allow the objection, Counsels for the Respondents, in a joint approach, argued that Sections 38 and 39 of *The National Transport and Safety Authority Act, No. 33 of 2012* (hereinafter referred to as ‘**the NTSA Act**’) ousts the jurisdiction of this Court over this matter.

7. Counsel further relied on the decisions in *Owners of Motor Vessel ‘Lilian S vs. Caltex Oil (Kenya) Limited (1989) KLR* and *Nairobi High Court Judicial Review No. 10 of 2017 Safe Rider Vehicle Technologies & 2 Others vs. National Transport & Safety Authority* in support of their position. They prayed that the objection be sustained with costs.

8. The Petitioners are of the converse position. They posit that Section 38 of the NTSA Act does not apply in the context of the Petition since the Petition raises pure constitutional issues which can only be adequately litigated before the High Court.

9. Relying on *Nairobi High Court Judicial Review No. 1 of 2018 Marimba Investments Limited vs. The Director General of the National Transport & Safety Authority*, the Petitioners aver that the use of the word ‘may’ in Section 38 of the NTSA Act connotes discretion on the part of the Petitioners and does not bar them from approaching the High Court. The Petitioners prayed that the objection be dismissed with

costs.

10. I have carefully considered the material presented before Court by the parties including the submissions and the decisions referred to. I will, in the first instance, consider whether the objection has attained the threshold of a pure objection in law.

11. Law, J.A. in **Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors (1969) EA 696** had the following to say on preliminary objections: -

*So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....*

12. Differently put, the High Court in **John Musakali vs. Speaker County of Bungoma & 4 others (2015) eKLR** held that: -

*The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law.*

13. Before I leave this discourse, my attention has been drawn to the words of **Ojwang, J (as he then was) in Oraro -vs- Mbaja (2005) KLR 141** where after quoting the statement of Law, J.A. in the Mukisa Biscuits case (supra) went on to state that: -

*A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, 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 point....*

*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.....*

14. By juxtaposing the preliminary objection and the contents of the Petition with the law, I find that the objection, if successful, is capable of finally disposing the whole matter. The objection, therefore, attains the threshold of a pure preliminary point of law. The objection is also clear on the provision of the law allegedly contravened.

15. I, will now, consider whether the objection ought to be sustained. The facts in this matter are largely uncontested.

16. The Petitioners have described themselves as persons, natural and legal, who are engaged in car hire transport businesses within the Republic of Kenya.

17. In paragraph 22 of the Petition, the Petitioners plead that: -

*The petitioners have always applied and received a road service license for the carriage of passengers and goods from the authority [NTSA]. The license has always allowed them to operate across the country without being limited to a specific route or county.*

18. The gist of the Petitioners' grievance is captured in paragraphs 23 and 26 of the Petition, and, as follows: -

23. *On 12<sup>th</sup> of December 2019 the third respondent by a notice on the local dailies announced that they will suspend the issuance of the nationwide road service license and only issue licenses to specific provided by the applicants.*

26. *The 3<sup>rd</sup> Respondent neither give (sic) any notices, sufficient or otherwise on the intended actions nor did consultations with the petitioners in a decision or matter that would gravely affect them.*

19. There is consensus that the Petitioners are licensed by NTSA. They are, hence, **licensees**. Their complaint is in the manner NTSA made the decision to suspend the licenses which allowed them to carry out their duties within the entire country. As a result of the impugned decision, the Petitioners' licenses, were instead, limited to specific routes.

20. At this point in time, I will deal with the legal aspect of jurisdiction. *Jurisdiction* is defined in **Halsbury's Laws of England** (4<sup>th</sup> Ed.) Vol. 9 as "...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.". **Black's Law Dictionary**, 9<sup>th</sup> Edition, defines *jurisdiction* as the Court's power to entertain, hear and determine a dispute before it.

21. In **Words and Phrases Legally Defined** Vol. 3, John Beecroft Saunders defines *jurisdiction* as follows:

*By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission*

under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognisance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

22. That, jurisdiction is so central in judicial proceedings, is a well settled principle in law. A Court acting without jurisdiction is acting in vain. All it engages in is nullity. *Nyarangi, JA, in Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited [1989] KLR 1* expressed himself as follows on the issue of jurisdiction: -

*Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...*

23. Indeed, so determinative is the issue of jurisdiction such that it can be raised at any stage of the proceedings. The Court of Appeal in *Jamal Salim v Yusuf Abdulahi Abdi & another* Civil Appeal No. 103 of 2016 [2018] eKLR stated as follows: -

*Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in Adero & Another vs. Ulinzi Sacco Society Limited [2002] 1 KLR 577, as follows;*

1) .....

2) *The jurisdiction either exists or does not ab initio ...*

3) *Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.*

4) *Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.*

24. On the centrality of jurisdiction, the Court of Appeal in *Kakuta Maimai Hamisi -vs- Peris Pesu Tobiko & 2 Others (2013) eKLR* stated that: -

*So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.*

25. On the source of a Court's jurisdiction, the **Supreme Court of Kenya** in *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others (2012) eKLR* stated as follows: -

*A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.*

26. And, in *Orange Democratic Movement v Yusuf Ali Mohamed & 5 others [2018] eKLR*, the Court of Appeal further stated: -

[44] .... a party cannot through its pleadings confer jurisdiction to a court when none exists. In this context, a party cannot through draftsmanship and legal craftsmanship couch and convert an election petition into a constitutional petition and confer jurisdiction upon the High Court. Jurisdiction is conferred by law not through pleading and legal draftsmanship. It is both the substance of the claim and relief sought that determines the jurisdictional competence of a court...

27. From the foregoing, it is sufficiently settled that a Court's jurisdiction is derived from the Constitution, an Act of Parliament or both.

28. In this case, the objection is anchored on Sections 38 and 39 of the NTSA Act. The provisions provide as follows: -

### **38. Appeals against .....**

(1) A person who -

(a) being an applicant for the grant or variation of a licence, is aggrieved by the decision of the Authority on the application;

(b) having made an objection to any such application as aforesaid, being an objection which the Authority is bound to take into consideration, is aggrieved by the decision of the Authority thereon; or

(c) being the licensee, is aggrieved by the revocation or suspension thereof, may within the time and in the manner prescribed appeal to the Appeals Board established under Section 39.

### 39. Transport Licensing .....

(1) There is established the Transport Licensing Appeals Board.

(2) The Appeals Board shall consist of a chairperson and four other members appointed by the Cabinet Secretary.

(3) The members of the Appeals Board shall hold office for such term and under such conditions as the Cabinet Secretary may determine.

(4) Three members of the Appeals Board shall form a quorum.

(5) The Appeals Board may, on any appeal, affirm or reverse the decision of the Authority, or make such other order as the Board considers necessary and fit.

(6) Where the Appeals Board has received an appeal under this section, it shall consider that appeal and, if it determines that the grounds of appeal are frivolous or vexatious or do not disclose sufficient reason for interfering with the decision of the Authority, may summarily reject the appeal.

(7) Save as may be prescribed, the Appeals Board shall regulate its procedure and proceedings as it may consider appropriate.

(8) The Cabinet Secretary shall make rules for regulating the practice and procedure of the Appeals Board.

(9) Without prejudice to the generality of subsection (8), such rules may provide for—

(a) regulating the sittings of the Appeals Board;

(b) prescribing forms and fees in respect of proceedings in the Appeals Board and regulating the costs of and incidental to any such proceedings;

(c) prescribing the time within which any requirement of the rules is to be complied with; and

(d) any other matter required under this Act or any other written law.

29. Before I deal with the above provisions, I, will generally and for completeness of a jurisprudential discussion, look at the *concept of non-justiciability*. The concept of non-justiciability of disputes before Courts is a sound one in law. It has its basis in Article 159 of the Constitution which routes for alternative dispute resolution mechanisms. The concept of non-justiciability is comprised of three doctrines: Firstly, **the Political Question Doctrine**; secondly, **the Constitutional-Avoidance Doctrine**; and, thirdly, **the Ripeness Doctrine**. The doctrines are crosscutting and closely intertwined.

30. The three doctrines making up the concept of non-justiciability were discussed in length by a 3-Judge Bench of the High Court in **Nairobi Constitutional Petition No. 254 of 2019, Kiriro wa Ngugi & 19 Others v Attorney General & 2 others [2020] eKLR**. The Court stated as follows: -

96. *The Black's Law Dictionary, 9th Edition, Thomson Reuters Publishers at page 943-944 defines justiciability as follows:*

“proper to be examined in courts of justice” or “a question as may properly come before a tribunal for decision”

97. A Court must satisfy itself that the case before it is not caught up by the bar of non-justiciability. The concept of non-justiciability is comprised of three doctrines: Firstly, the Political Question Doctrine; secondly, the Constitutional-Avoidance Doctrine; and, thirdly, the Ripeness Doctrine. The doctrines are crosscutting and closely intertwined. We shall however endeavour to as far as possible delimit the operation of each doctrine in isolation.

98. *We shall commence with the political question doctrine. Black's Law Dictionary, 10<sup>th</sup> Edition, Thomson Reuters Publishers, at page 1346 defines it as:*

*The judicial principle that a court should refuse to decide an issue involving the discretionary power by the executive or legislative branch of government. [underlining added]*

99. *The political question doctrine focuses on the limitations upon adjudication by Courts of matters generally within the area of*

responsibility of other arms of Government. Such matters mostly deal with foreign relations and national security. [See generally Ariel L. Bendor; *Are there any limits to justiciability? The jurisprudential and constitutional controversy in light of Israeli and American experience?*]

100. According to the political question doctrine, certain sets of issues categorized as political questions, even though they may include legal issues, are considered to be external to the Judiciary as an arm of Government. Such issues are handed over to other branches of Government for adjudication. The political question doctrine therefore focuses on limiting of adjudication of disputes by courts in favour of the legislative and the executive interventions. It is underpinned by the concept of separation of powers. All that the Courts are doing in such situations is assigning discretion on the issue to another branch of Government. [See generally Friez W. Scharpf; *Judicial Review and the Political Question: A functional analysis* and Herbert Weschler; *Towards Neutral Principles of Constitutional law.*]

101. Courts have dealt with application of the doctrine. In **William Odhiambo Ramogi & 2 others -v- Attorney General & 6 Others**, Mombasa High Court Petition No.159 of 2018 [2018] eKLR, the five-judge bench observed as follows:

[79] It was held in **Council of Civil Service Unions vs Minister for the Civil Service** [1985] AC 374 at 418 that a challenge is referred to as being non-justiciable because its nature and subject matter is such as not to be amenable to the judicial process. The “justiciability” doctrine is rooted in both constitutional and prudential considerations and evince respect for the separation of powers, including a properly limited role of the courts in a democratic society. One justiciability concept is the “political question” doctrine—according to which courts should not adjudicate certain controversies because their resolution is more proper within the political branches.

[80] In **Baker v Carr** 369 U.S. 186 (1962) the United States Supreme Court outlined six matters that could present political questions as follows:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due to coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

[81] In the Kenyan context, the political question doctrine was discussed by the Court of Appeal in **Kenya Airports Authority v Mitu-Bell Welfare Society & 2 Others** (supra) where the Court held as follows:

98. In considering the issue, we are alive to the provisions of Article 159 (2) (c) of the Constitution which enjoins courts to promote alternative dispute resolutions mechanism inter alia through reconciliation, mediation or arbitration. We emphasize that these alternative dispute resolution mechanisms must be adopted and effectuated prior to judgment by the trial court. With this in mind, the role of the legislature is to make laws and policy and that of the executive is to implement those laws and policies. The role of the judiciary is to interpret the policies and laws as enacted and approved by the legislature and executive. Generally, courts have no role to play in policy formulation; formulation of government policy is a function best suited for the executive and legislature. In **Marbury -vs- Madison- 5 US. 137** it was stated that:

The province of the court is solely, to decide on the rights of individuals and not to enquire how the executive or executive officers perform duties in which they have discretion.

100. In **Ndora Stephen -v- Minister for Education & 2 Others**, Nairobi High Court Petition No. 464 of 2012, Mumbi Ngugi, J. correctly observed that the formulation of policy and implementation thereof were within the province of executive. Questions which are in their nature exclusively political should never be adjudicated upon by courts. In the instant case, the trial court directed that State policies and programs on the provision of shelter and access to housing for marginalized groups be presented to the trial court. What would the trial court do with such policies if tabled? Would the court interfere or evaluate the soundness of the policy? A court should not act in vain and issue orders and directions that it cannot implement. In making orders and directions in relation to Article 43 (1) of the Constitution, the provisions of Article 20 (5) (c) of the Constitution must be borne in mind. Article 20 (5) (c) stipulates that the court may not interfere with a decision by a State organ concerning the allocation of available resources solely on the basis that it would have reached a different conclusion. We opine that it is advisable for courts to practice self-restraint and discipline in adjudicating government or executive policy issues. This precautionary principle should be exercised before delving and wading into the political arena which is not the province of the courts.

[82] It is evident from the case law that the two main criteria that will influence the justiciability of an issue or otherwise are firstly, whether there is a clear constitutional commitment and mandate to a particular government organ to make a decision on the issue, and secondly, even where such a constitutional mandate exists, whether the nature of the issue and dispute is such that it is more effectively resolved by conventional political methods of majoritarian decision-making rather than by a deliberative constitutional judgment. This will include situations where a Court lacks the capacity to develop clear and coherent principles to govern litigants’ conduct.

102. In the **William Odhiambo Ramogi & 2 others v Attorney General & 6 Others** case [supra], the learned judges also dealt with the exceptions to the doctrine as follows:

[89] ....that there are constitutionally permissible situations where this Court may interfere in the policy decisions of the Government, and particularly if a policy decision is in actual or threatened violation of the fundamental rights guaranteed under the Constitution, or in violation of other provisions of the Constitution. The necessity of vindicating constitutionally secured personal

liberties and fundamental freedoms is the principal justification for the anti-majoritarian power that judicial review confers upon the Courts, and we are therefore reluctant to find that a claim of fundamental rights, such as the one presented by the Petitioners is non-justiciable, even though it may concern the political process, or the internal workings of other government branches.

103. The above decision went on appeal in **Kenya Ports Authority v William Odhiambo Ramogi & 8 Others** Mombasa Civil Appeal No. 166 of 2018 [2019] eKLR. While approving the reasoning of the High Court on applicability of non-justiciability concept on intergovernmental disputes, the Court of Appeal held:

*First, they [High Court] 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.*

104. In **Kenya Association of Stock Brokers and Investment Banks v Attorney General & another** High Court, Nairobi, Pet. 22 of 2015 [2015] eKLR [2015] eKLR, Mumbi Ngugi J held:

[65] *In effect, the petitioner is challenging the wisdom of re-introducing capital gains tax in Kenya, and inviting the Court to make a finding thereon. This, however, is not within the mandate of this Court. As observed by the Court in the case of Kenya Small Scale Farmers Forum and 6 Others v Republic of Kenya and 2 Others, Petition No 1174 of 2007:*

*Firstly, it has to be borne in mind that this court is not called upon to carry out an appraisal of the impugned agreement or negotiations to satisfy itself whether or not they are good for Kenya. Those are matters of policy of which this court is not best suited to handle. The dissenting decision of the Supreme Court in U.S v Butler, 297 U.S. 1 [1936], is apposite in this regard that; “...courts are concerned only with the power to enact statutes, not with their wisdom...For the removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic government.*

31. The Court further considered the operation of *Constitutional Avoidance* doctrine and in so doing made reference to Supreme Court decision in **Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others Pet. 14A, 14B & 14C of 2014 of [2014] eKLR** and observed thus: -

[105]. *We shall now turn to the Constitutional-Avoidance Doctrine. The doctrine is at times referred to as the Constitutional-Avoidance Rule. Black’s Law Dictionary, 10th Edition at page 377 defines it as:*

“The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion”

[106]. *The doctrine interrogates whether there are other ways of resolving a dispute outside a constitutional petition. 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:*

[256]. *The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis.*

32. While speaking to *Ripeness doctrine* the Learned Judges stated as follows: -

107. *The doctrine focuses on the time when a dispute is presented for adjudication. The Black’s Law Dictionary 10th Edition, [supra] at page 1524 defines ripeness as:*

*The state of a dispute that has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made*

108. *Courts should therefore frown upon disputes that are hypothetical, premature or academic which have not fully matured into justiciable controversies.*

109. *The Court of Appeal in National Assembly of Kenya & another v Institute for Social Accountability & 6 others Nairobi Civil Appeal 92 of 2015 [2017] eKLR, faulted the Constitutional Court for adjudicating upon hypothetical matters. The court held:*

[72] *The broad questions which were raised in the consolidated petitions, namely, – division of functions, powers and authority; the equitable sharing of revenue of national government, whether the Amendment Bill concerned county government and the role of the Senate in the legislative process, are questions which relate to inter-governmental relations and which should have been raised by either government in the appropriate forum and in case of a dispute such a dispute should have been resolved by the designated institutions through the prescribed mechanism. This is one peculiar case where the Constitution stipulates that a dispute should be in essence be resolved by other institutions through a prescribed mechanism before the jurisdiction of the High Court can be invoked.*

[74] *Furthermore, questions such as division of functions, division of revenue, legislative process and budget process are essentially political questions which fall within the political question doctrine; and which the Constitution has assigned to other*

political institutions for resolution and created institutions and mechanisms for such resolution.

**110.** In *National Assembly of Kenya & Another v The Institute for Social Accountability & 6 others* [supra] the Court of Appeal held:

[73] *Since there was no actual live dispute between the national and county governments about CDF and if any, the mechanisms for resolving such disputes was not employed, the questions which were brought to High Court for determination had not reached constitutional ripeness for adjudication by the court. In reality, TISA and CEDGG invented a hypothetical dispute which was brought to court in the guise of unconstitutionality of CDFA.*

**111.** In *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others* Nairobi Constitutional Petition No. 453 of 2015 [2016] eKLR, Onguto J stated:

[27] *Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases..... The court is prevented from determining an issue when it is too early or is simply out of apprehension, hence the principle of ripeness. An issue before court must be ripe, through a factual matrix for determination.*

33. The doctrine of constitutional avoidance, therefore, deals with instances where a Constitutional Court will decline to deal with a matter because there exists another remedy provided in law which the aggrieved party is yet to utilize. That is also referred to as **the doctrine of exhaustion**.

34. A 5-Judge Bench in ***Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 (2020) eKLR*** elaborately dealt with the doctrine of exhaustion. 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.*

35. 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.**

36. Returning to the case at hand, and as said, the Petitioners are licensees. They are aggrieved by the decision of the NTSA to suspend their licenses. As a result, the Petitioners are among those persons contemplated under *Section 38(1)(c)* of the NTSA Act; that is such licensees who are aggrieved by the revocation or suspension of their licenses.

37. As such, the Petitioners are bound to pursue the remedy provided for under *Section 38* of the NTSA Act unless they demonstrate any such exception to the doctrine of exhaustion.

38. I have carefully considered the submissions by the Petitioners. In essence, the Petitioners are advancing the argument that the Petition raises constitutional issues which cannot be properly and adequately dealt with before the Transport Licensing Appeal Tribunal (hereinafter referred to as '**the Tribunal**').

39. The main issue fronted by the Petitioners is the manner in which the decision to suspend their licenses was made without their involvement.

40. The concept of public participation under Article 10 of the Constitution, has by now, been well settled by Courts. There has been a lot of decisions rendered by Courts on it, and, certainly, one cannot claim novelty in that area.

41. As to the adequacy of audience before the Tribunal, I must take refuge in *Article 10(1)* of the Constitution. The provision, in a mandatory manner, provides that the national values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions. *Article 3* of the Constitution calls upon everyone to respect, uphold and defend the Constitution.

42. Therefore, and in principle, the Tribunal is bound by the Constitution and the law while discharging its duties. Further, under *Section 39(5)* of the NTSA Act the Tribunal has powers to affirm or reverse any decision of the NTSA. The reversal of the decision of the Authority appears to be the gist of the Petition.

43. Having said so, and in the unique circumstances of this case, and further being alive to the legal position that statutory provisions ousting Court's jurisdiction must be construed restrictively, I find and hold that, the Petitioners have failed to demonstrate any of the exceptions to the doctrine of exhaustion.

44. This is one such case that, even if there are constitutional issues raised in the Petition, such issues ought to await the consideration of the matters before the Tribunal. The Petitioners shall, in the first instance, approach the Tribunal for the resolution of the dispute.

45. With such a finding, this Court makes the following final orders: -

**(a) The Preliminary Objection dated 6<sup>th</sup> November, 2020 is hereby upheld.**

**(b) The Petition and the Chamber Summons both dated 23<sup>rd</sup> October, 2020 be are hereby struck out.**

**(c) Costs to be borne by the Petitioners.**

Orders accordingly.

**DELIVERED, DATED and SIGNED at NAIROBI this 4<sup>th</sup> day of March, 2021**

**A. C. MRIMA**

**JUDGE**

**Ruling virtually delivered in the presence of:**

**Mr. Kinyanjui**, Counsel for the Petitioners.

**Miss Wawira**, Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

**Miss Sirai**, Counsel for the 3<sup>rd</sup> Respondent.

**Elizabeth Wamboi** – Court Assistant.