



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
(Coram: A.C. Mrima, J.)
CONSTITUTIONAL PETITION NO. E387 OF 2020

VINCENT MWANTHI KIOKO.....PETITIONER

-VERSUS-

1. EDWARD SIGEI
2. ETHICS AND ANTI-CORRUPTION COMMISSION
3. KENYA COPYRIGHT BOARD
4. CABINET SECRETARY,
MINISTRY OF ICT, INNOVATION & YOUTH AFFAIRS
5. THE HON. ATTORNEY GENERAL.....RESPONDENTS

RULING NO. 1

Introduction:

1. This ruling relates to a Notice of Preliminary Objection dated 21st December, 2020. It is filed by the 1st and 3rd Respondents and centres on the jurisdiction of this Court.
2. Whereas the objection is supported by the rest of the Respondents, it is opposed by the Petitioner.

The Parties' positions and submissions:

3. The objection is tailored as follows: -

1. *This Court lacks jurisdiction to determine the matter and grant the reliefs sought.*
2. *This honourable court lacks jurisdiction to address the factual allegations as it is legally not the proper place for doing so.*
3. *This honourable court is not the forum for conducting an inquiry into the merits of claims as to the lack of integrity.*

4. The parties tendered submissions on the objection. I was, however, unable to find the submissions by the Hon. Attorney General allegedly filed on 13th May, 2021 on the Court's electronic filing platform. Be that as it may, I will nevertheless proceed on with the decision as it is likely that the position taken by the Hon. Attorney General on the objection is similar to those by the rest of the Respondents. The parties also variously referred to several decisions in support of their rival positions.

5. Due to the nature of the submissions tendered and the gist of the objection coupled with urgency in this matter, I will not, at this point in time, reproduce the submissions *verbatim*. I will however, make reference to the submissions in the analysis. That said, I must state that I

have carefully considered the submissions and the decisions referred to by each of the parties and I have not lost sight of any of the arguments put forth by the parties as I render this ruling.

6. I will now deal with the issues for determination.

Issues for Determination:

7. From the record, I discern the following issues for determination: -

(i) *Whether the Preliminary Objection is sustainable in law.*

(ii) *Whether the Court is barred by the doctrine of exhaustion from entertaining the dispute.*

(iii) *Disposition.*

8. I will deal with the above issues in seriatim.

(a) Whether the Preliminary Objection is sustainable in law:

9. The validity of any preliminary objection is gauged against the requirement that it must raise pure points of law capable of disposing the dispute at once. It is, therefore, mandatory for a Court to ascertain that a preliminary objection is not caught up within the realm of factual issues that would necessitate the calling of evidence.

10. The foregoing nature of preliminary objections was discussed in *Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd*, (1969) E.A. 696 page 700 when the Court observed as follows: -

...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.

...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.

11. In *Civil Suit No. 85 of 1992, Oraro vs. Mbaja* [2005] 1 KLR 141, **Ojwang J**, as he then was, cited with approval the position in *Mukisa Biscuit -vs- West End Distributors* (supra) and stated as follows on the operation of preliminary objection: -

... I think the principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.

12. In *Omondi -vs- National Bank of Kenya Ltd & Others* {2001} KLR 579; [2001] 1 EA 177, it was observed that a Court in determining a preliminary objection can look at the pleadings and other relevant documents but must abide by the principle that the objection must raise pure points of law. It was held thus: -

...In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion.

13. The question whether jurisdiction is a point of law was set out clearly by the Supreme Court in *Petition No. 7 of 2013 Mary Wambui Munene v. Peter Gichuki Kingara and Six Others*, [2014] eKLR, when the Learned Judges stated that 'jurisdiction is a pure question of law' and should be resolved on priority basis.

14. The Apex Court had earlier on in *Constitutional Application No. 2 of 2011, In the Matter of Interim Independent Electoral Commission (2011)* eKLR observed as follows in regard to jurisdiction and its source: -

... Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid down in judicial precedent.

15. The Preliminary objection in this matter is founded on basis of the doctrine of exhaustion. The doctrine is a sound legal one which is

applicable to constitutional petitions. In essence, except in instances where the exceptions to the doctrine apply to a matter, the doctrine of exhaustion presents a complete bar to proceedings in Court. Therefore, the objection is capable of wholly disposing the matter if successful. To that end, the objection passes the propriety test and is for consideration.

(b) Whether the Court is barred by the doctrine of exhaustion from entertaining the dispute:

16. The main contention in this matter is that the Court is barred from dealing with the Petition on account of lack of jurisdiction.

17. In support of the objection, the 1st and 3rd Respondents submit that it is trite law that where there is an alternative remedy provided by an Act of Parliament which remedy is effective and applicable to the dispute before the Court, the Court ought to ensure that the dispute is resolved in accordance with the relevant statute. In this matter, it is further submitted that the role of oversight in respect of integrity issues, including enforcement of Chapter six of the constitution and the Leadership and Integrity Act, No. 19 of 2012 is vested upon the Ethics and Anti-Corruption Commission (the 2nd Respondent herein) by dint of Articles 79 and 80 of the Constitution and Part IV of the Leadership and Integrity Act No. 19 of 2012.

18. The decisions in *Dickson Mukweluine Vs. Attorney General & 4 Others* Nairobi High Court Petition No. 390 of 2012 and in *Johnstone Ewoi Lotiir & Basil Anguræ Lokoyan. Vs. Hon. Jeremiah Ekamais Lomorukai & others* were referred to in support of the position that statutory processes be followed particularly where such processes are for the specific purpose of realising, promoting and protecting certain rights.

19. The 1st and 3rd Respondents amplified their submissions in stating that the issues raised in the Petition touch on ethics and integrity of the 1st Respondent hence involve the application of Chapter 6 of the Constitution and the Leadership and Integrity Act which role is vested in the 2nd Respondent. It is also submitted that there is no evidence that the Petitioner or anyone else lodged any complaint with the 3rd Respondent or the 2nd Respondent against the 1st Respondent and that they failed to act.

20. The 2nd Respondent mainly reiterated the position taken by the 1st and 3rd Respondents. The 2nd Respondent submitted that it is a body corporate under the Ethics and Anti-Corruption Commission Act, No. 22 of 2011 and is statutorily mandated to combat corruption as provided under Section 11 of the aforesaid Act.

21. It is also submitted that in the performance of its functions the Commission is not subject to the direction of any person or authority and it cannot be compelled to institute disciplinary action against the 1st Respondent as such an order would be contrary to the provisions of Section 7 (2) and 25 of the Anti-Corruption and Economic Crimes Act, 2003 and Section 13 (2) (c) of the Ethics and Anti-Corruption Commission Act.

22. It is, as well, submitted that the Petitioner has not invoked any of the procedures or mechanisms prescribed by Section 42 of the Leadership and Integrity Act, 2012. The 2nd Respondent revealed that it is in receipt of a complaint related to the facts alleged in the Petition. As such, since the 2nd Respondent has internal investigative procedures which must be followed and the same apply to all complaints lodged with it, the Petition and orders sought against the 2nd Respondent are misconceived, as the investigative process must be followed.

23. The 2nd Respondent also submitted that the application and or the Petition does not show that the 2nd Respondent has failed, refused and or neglected to exercise its jurisdiction in respect to the allegations made in the Application and Petition. Further, the Petition does not show that any state organ, independent office, commission, person or authority, charged with the responsibility of enforcing Chapter Six has failed, refused and or neglected to exercise its jurisdiction in respect of the allegations therein.

24. In the end, the 2nd Respondent urges the Court to sustain the objection.

25. The Petitioner strenuously opposed the objection. It is submitted that in appreciating the question on jurisdiction, it behooves on this Honourable Court to examine the facts leading to this suit and the type of reliefs being sought. The Petitioner further submits that as disclosed in the averments contained in the Petition, the Petitioner is a musician with copyrighted musical works and registered sound recording rights administered by collective management organizations. The Petitioner thereafter goes ahead to plead that the 1st Respondent being the Executive Director of the Kenya Copyright Board, that is statutorily mandated with the responsibility of regulating CMOs, has grossly violated the provisions of the Constitution on integrity. The Petitioner ultimately pleads that his intellectual property rights under Article 40 of the Constitution has been violated by the very people enjoined to protect it (the state) and on this grounds seeks for reliefs.

26. The Petitioner posits that it is without doubt that the *locus* by the Petitioner to institute the Petition herein is derived from Article 22 of the Constitution which gives each and every person the right to institute Court proceedings claiming that a right as enshrined in the Bill of Rights has been violated, infringed or is threatened. Article 258 further grants *locus* to any person to institute proceedings where a provision of the Constitution is contravened. Article 23(1) then goes ahead to bestow jurisdiction upon the High Court to hear and determine issues pertaining to the violation of human rights which jurisdiction is further restated under Article 165(3).

27. Responding to the position taken by the 1st and 3rd Respondents that the reliefs sought by the Petitioner are the preserve of the 2nd Respondent by dint of Article 79 and 80 of the Constitution and Part IV of the Leadership and Integrity Act, the Petitioner reiterates that Article 79 of the Constitution mandates the legislature to enact legislation that will facilitate the EACC in ensuring compliance with and enforcement of the provisions of Chapter 6. Article 80 highlights what the said legislature should entail. The legislation contemplated by Article 79 is the Leadership and Integrity Act. Part IV of the Leadership and Integrity Act goes ahead to provide an enforcement mechanism with the EACC, under section 42, tasked with the responsibility of prescribing disciplinary mechanisms and procedures.

28. The Petitioner contends that a look at the provisions as highlighted above discloses that there is no particular provision that can be construed as ousting this Honourable Court's jurisdiction. Article 165(3)(a) of the Constitution is clear in its terms that the High Court has unlimited original jurisdiction in Civil Matters. It has been an interpretation of the Superior Courts on several occasions that the court's jurisdiction in view of the unlimited jurisdiction can be technically restricted but that should never be construed as ousting the court's jurisdiction. Case in example is the case relied upon by the 1st and 3rd Respondents in their submissions, *Johnstone Ewoi Lotiir & another v Jeremiah Ekamais Lomorukai & 4 others* [2017] eKLR.

29. The Petitioner further contends that this Court is enjoined to consider the circumstances despite the law prescribing other mechanisms that ought to be exhausted and referred to *Francis Nzioki Kavuu v Kenya Copyright Board & 2 others* [2021] eKLR.

30. Whereas the Petitioner submits that it is not in dispute that in seeking to enforce Chapter 6 of the Constitution, the Courts have numerously held that the Courts of law should not be the first port of call, it was submitted that this does not necessarily oust the superior court's jurisdiction. In so submitting, the Petitioner put forth a question; can the Court's jurisdiction be invoked where the mechanism contemplated under the Leadership and Integrity Act has been invoked prior?

31. In his further submissions, the Petitioner admitted that he lodged a complaint in accordance with the law and seeks, through this Petition, to compel the relevant entities to take further action. This is well within the purview of the Court's jurisdiction as was held in *Thomson Kerongo & 2 others v James Omariba Nyaoga & 3 others* [2017] eKLR.

32. The Petitioner posits that in the circumstances, the Court is bequeathed with sufficient jurisdiction to deal with the question as to whether the 2nd Respondent has failed, refused and/or neglected to exercise its jurisdiction in respect to the allegations made through the complaint they confirmed having received. As such, the objection is based on controverted facts and cannot stand as such. The Petitioner called upon the Court to find that the Preliminary objection lacks merit and be dismissed with costs.

33. From the above arguments, there is the need to look at the doctrine of exhaustion and its applicability in this matter. The starting point is a discussion on the nature and the intention of the doctrine.

34. The doctrine of exhaustion in Kenya 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: -

159(2) In exercising judicial authority, the Courts and tribunals shall be guided by the following principles-

(a)...

(b)...

(c) alternative forms of dispute resolution including resolution, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause 3.

35. Clause 3 is on traditional dispute resolution mechanisms.

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

*52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the Constitution and was aptly elucidated by the High Court in **R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others** [2017] eKLR, where the Court opined thus:*

*42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in **Speaker of National Assembly v Karume** [1992] KLR 21 in the following oft-repeated words:*

Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

*43. While this case was decided before the Constitution of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine. This is **Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others** [2015] eKLR, where the Court of Appeal stated that:*

It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to

ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.

37. 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.**

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

The jurisdiction of the High Court is derived from Article 165 (3) and (6) of the Constitution. Accordingly, the High Court has unlimited original jurisdiction in criminal and civil matters, including determination of a question of enforcement of the bill of rights and interpretation of the Constitution encompassing determination of any matter relating to the Constitutional relationship between the different levels of government.

At the High Court, we note that the learned Judges dealt with this matter under the question framed as follows: Is the court barred from considering the suit at present by virtue of Article 189 of the Constitution and sections 33 and 34 of Inter-Governmental Relations Act of 2012 (IGRA)? The parties have advanced similar arguments as before the learned Judges of the High Court. The High Court went further than just looking at the ruling by Ogola J. They also took into account the doctrine of exhaustion as enunciated in *Republic vs. Independent Election and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR*. They applied a dual pronged approach before concluding that the dispute was not an inter-governmental dispute under IGRA. First, they considered that the test for determining the matter as an inter-governmental dispute for purposes of application of IGRA was not simply to look at who the parties to the dispute were, but the nature of the claim in question and; secondly, they considered that the claimed Constitutional violations seeking to be enforced are not mere “bootstraps.” We have keenly addressed our minds to the learned Judges’ decision and are satisfied that they stayed within the expected contours and properly directed themselves. Once they determined that the dispute was not inter-governmental in nature, we do not think it is necessary to consider whether the petitioners had exhausted their legal avenue. Jurisdiction by the High Court under Article 165 (5) of the Constitution became automatic. And in our view, it could not be ousted or substituted.

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

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

40. The High Court has variously reiterated the position that it is only the High Court and Courts of equal status which can interpret the Constitution. (See **Royal Media Services Ltd. -vs- Attorney General & 6 Others** (2015) eKLR among others).

41. Returning back to the case at hand, the Petition herein seeks the following prayers: -

- a. A declaration that the conduct of the 1 Respondent is in violation of Articles 73 (1)(a), 75(1)(a), 2(b), 2(c). 2(e) of the Constitution read together with Sections 3, 8, 10, 11, 12 and 16 of the Leadership and Integrity Act.
- b. A declaration that the 1 Respondent is not fit to hold office as a public and/or state officer
- c. An order directing the 2³ and 5 Respondents to enforce the Leadership and Integrity Act against the 1st Respondent through an appropriate disciplinary action.
- d. Any other order that this Honourable Court shall deem fit to grant.
- e. Costs of this Petition.

42. The Petition is, therefore, anchored on the provisions of Chapter 6 of the Constitution (Articles 73 to 80 inclusive) which deals with leadership and integrity. It is also anchored on the provisions of the Leadership and Integrity Act No. 19 of 2012.

43. Article 79 of the Constitution provides as follows: -

Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter Fifteen, for purposes of ensuring compliance with, and enforcement of, the provisions of this Chapter.

44. Article 80 of the Constitution further provides that: -

Parliament shall enact legislation—

- a) *Establishing procedures and mechanisms for the effective administration of this Chapter;*
- b) *Prescribing the penalties, in addition to the penalties referred to in Article 75, that may be imposed for a contravention of this Chapter;*
- c) *Providing for the application of this Chapter, with the necessary modifications, to public officers; and*
- d) *Making any other provision necessary for ensuring the promotion of the principles of leadership and integrity mentioned in this Chapter, and the enforcement of this Chapter.*

45. The legislation contemplated under Article 80 is the Leadership and Integrity Act No. 19 of 2012. Section 4(2) thereof provides as follows: -

The Commission is responsible for overseeing and enforcing the implementation of this Act.

46. Part IV of the Leadership and Integrity Act provides for enforcement of the leadership and integrity code. Section 40(1) thereof provides as follows: -

A person who alleges that a State officer has committed a breach of the Code, may lodge a complaint with the relevant public entity and the public entity shall register and inquire into the complaint.

47. There is no doubt that the Constitution and the Leadership and Integrity Act provides for the mechanisms in which matters relating to leadership and integrity may be dealt with. However, the access to Courts is not completely closed. A party may still institute and sustain Court proceedings based on a Petition on leadership and integrity or on any other constitutional issue if the exceptions to the doctrine of exhaustion applies.

48. I will, hence, ascertain if the exceptions to the doctrine of exhaustion applies in this matter. I have discussed two exceptions or principles above. As a recap, 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.

49. 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.

50. The Petitioner admits that there is a complaint lodged with the 2nd Respondent over the matters subject of the Petition herein. It is on that basis that the Petitioner seeks an order to compel the 2nd, 3rd and 5th Respondents to enforce the provisions of the Leadership and Integrity Act against the 1st Respondent.

51. **The Petitioner has not demonstrated the applicability of the exceptions to the doctrine of exhaustion in this case.** As such, I will not interrogate the issue further. In essence, the Petitioner submits that the Petition mainly seeks to compel the rest of the Respondents to enforce the law against the 1st Respondent.

52. I have carefully considered this issue. I am partially in agreement with the Respondents that the doctrine of exhaustion is applicable in this case. I say so because on one hand the Petitioner has admitted that the issues raised in the Petition are similar to those forming the complainant which is before the 2nd Respondent and he has not favoured any argument that the doctrine of exhaustion is inapplicable in this matter. To that end, the doctrine wholly applies and is a complete bar to such proceedings. On the other hand, there is the issue of delay on the part of the 2nd Respondent to deal with the complaint. To me, that is an issue which is not barred by the doctrine of exhaustion since the Petitioner will not have any other appropriate forum to present such a complaint.

53. In sum, the doctrine of exhaustion partially applies in this matter.

Disposition:

54. Based on the foregoing discussion, the following final orders of this Court hereby issue: -

(a) The Preliminary Objection dated 21st December, 2020 partly succeeds.

(b) This Court lacks the jurisdiction, on the basis of the applicability of the doctrine of exhaustion, to deal with the matters raised in the Petition relating to the leadership and integrity of the 1st Respondent as such matters as currently before the Ethics and Anti-Corruption Commission.

(c) This Court, however, has the jurisdiction to deal with the issues on the alleged delay on the part of the Respondents in respect of the complaint raised against the 1st Respondent. To that end, the following further directions hereby issue: -

(i) The remainder of the Petition and the Notice of Motion dated 3rd November, 2020 shall be heard together and by way of reliance on the Affidavit evidence and written submissions.

(ii) The Respondents shall file and serve their respective responses to the remainder of the Petition and the Notice of Motion within 14 days of this ruling.

(iii) The Petitioner shall file and serve any supplementary response, if need be, together with written submissions within 14 days of (ii) above.

(iv) The Respondents shall file and serve their respective written submissions within 14 days of service.

(v) Highlighting of submissions on a date suitable to the Court and the parties.

(d) As the objection has partly succeeded, each party shall bear its own costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021.

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Dr. O’Kubasu, Counsel for the Petitioner.

Mr. Kaindo, Counsel for the 1st and 3rd Respondents.

Miss. Ocharo, Counsel for the 2nd Respondent.

Miss. Mwasao, State Counsel representing the Hon. Attorney General for the 4th and 5th Respondents.

Elizabeth Wanjohi – Court Assistant.