



**Liptons Teas & Infusions Kenya PLC Liptons Teas & Infusion & 2 others v Keter & 48 others (Civil Appeal E1132 & E1130 of 2024 (Consolidated)) [2025] KEHC 13416 (KLR) (30 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13416 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL APPEAL E1132 & E1130 OF 2024 (CONSOLIDATED)  
AC MRIMA, J  
SEPTEMBER 30, 2025  
AS CONSOLIDATED WITH CIVIL APPEAL NO. E1130 OF 2024**

**BETWEEN**

**LIPTONS TEAS & INFUSIONS KENYA PLC LIPTONS TEAS & INFUSION ..... 1<sup>ST</sup> APPELLANT  
KENYA PLC CENTRAL HOSPITAL ..... 2<sup>ND</sup> APPELLANT  
BROWNS INVESTMENT PLC ..... 3<sup>RD</sup> APPELLANT**

**AND**

**SAMMY KIPLANG'AT KETER & 48 OTHERS & 48 OTHERS .... RESPONDENT**

*(Being an appeal from the Ruling and Order of The HIV & AIDS Tribunal (Hon. Osiemo, Hon. B.O. Yogo, Hon. W. G Jaoko, Hon J. N. Ngoiri and Hon. S.K Musani) in HAT No. 66/E0022 of 2023 delivered on 6 th September 2024)*

**JUDGMENT**

**Background:**

1. When Sammy Kiplang'at Keter and 48 Others, the Respondents herein, lodged a complaint before the HIV & AIDS Tribunal, (hereinafter referred to as 'the Tribunal'), the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants herein, through applications by way of Notices of Motion dated 12<sup>th</sup> June 2024 and a Preliminary Objection dated 13<sup>th</sup> June 2024, variously objected to the Tribunal's jurisdiction. It was their position that the matter ought to have been filed before the Employment and Labour Relations Court which, according to the Appellants, was vested with the requisite jurisdiction over the dispute.



2. In its ruling dated 6<sup>th</sup> September 2024, which is the subject of this appeal, [hereinafter referred to as ‘the impugned ruling’], the Tribunal declined the applications and the objection and held that the Tribunal was the right forum for adjudicating the row.
3. It was that decision which prompted the filing of the two appeals which are now subject of this consolidated judgment.

### **The Appeals:**

4. Disgruntled, the Appellants preferred appeals against the impugned ruling. The 1<sup>st</sup> and 2<sup>nd</sup> Appellants filed Civil Appeal No. E1132 of 2024 and vide a Memorandum of Appeal dated 2<sup>nd</sup> October 2024 preferred the following grounds of appeal: -
  1. That the Tribunal erred in law and in fact in failing to appreciate that despite the amendments made to the 1<sup>st</sup> to the 49<sup>th</sup> Respondents’ statement of claim, the nature and character of the Claim remained a constitutional dispute arising from an employment relationship.
  2. That the Tribunal erred in law and fact in failing to appreciate that the 1<sup>st</sup> to 49<sup>th</sup> Respondents statement of claim also raised several issues in dispute that fell within the context of an employer-employee relationship and which are wholly within the purview of the Employment and Labour Relations Court. These include allegations relation to;
    - i. Sexual harassment of employees resulting in their alleged infection with HIV & AIDS as set out in paragraphs 4, 5, 7, 15, 19 and 20 of the amended Statement of Claim.
    - ii. Failure to provide a safe working environment as set out at paragraph 7, 8, 9 and 13 of the Amended Statement of Claim.
    - iii. Gender based discrimination in the assignment of roles as set out at paragraph 11 and 12 of the Amended Statement of Claim.
    - iv. Discrimination of employees on medical grounds as set in paragraphs 11 and 12 of the Amended Statement of claim.
  3. That the Tribunal erred in law and in fact in failing to uphold the decision of the High Court at Kericho i.e Constitutional Petition No. 2 of 2023; Sammy Kiplangat Keter 7 20 Others -vs- Finlays (Kenya) Limited & Ekatera Tea Kenya PLC and Federation of Kenya Women Lawyers & 3 Others (Interested Parties) wherein the court determined that the dispute between the parties herein, including the alleged sexual harassment and HIV/AIDS claims, ought to be determined by the employment and Labour Relations Court.
  4. That the Tribunal erred in law and fact in failing to uphold the well settled position in law with respect to the doctrine of stare decisis.
  5. That the Tribunal erred in in law and in fact in cherry picking matters relating to HIV & AIDS from the statement of Claim, at the exclusion of all others and thereafter arrogating itself jurisdiction exceeding that which is conferred under section 26 of the [HIV and AIDS Prevention and Control Act](#).
  6. That the Tribunal erred in law and fact in failing to consider, in totality the submissions and case law availed by the Appellants.



7. That the Tribunal erred in law and in fact in dismissing the Appellant's Notice of Motion Application dated 12<sup>th</sup> June 2024 and the Respondents Preliminary Objection dated 13<sup>th</sup> June 2024 and further by making an order for cost in favour of the Appellant.
5. On its part, the 3<sup>rd</sup> Appellant filed Civil Appeal No. E1130 of 2024. Through a Memorandum of Appeal dated 1<sup>st</sup> October 2024, it preferred the following grounds of appeal: -
  1. That the Tribunal erred in law and in fact by holding that the Claimant had not invoked and or relied on Articles and provisions of *the Constitution* of Kenya in their statement of claim.
  2. That the Tribunal erred in fact by failing to appreciate that the claim before it was public interest suit which can only be entertained by a superior court.
  3. That the Tribunal erred in fact in dismissing the 1<sup>st</sup> Respondent's Notice of Preliminary Objection citing lack of jurisdiction following the invocation of constitutional provisions and Articles whereas it had already determined affirmatively that the Claimants Statement of Claim was framed as a Petition.
  4. That the Tribunal erred in fact by failing to take into account that the statement of claim by the Claimants sought compensation based on allegations of breach of fundamental rights and freedoms.
  5. That the Tribunal erred in law and in fact by failing to take into consideration the pleadings on record by the claimants in so far as the facts concerned thereby reaching a wrong conclusion that the claims before it were not time barred.
  6. That the Tribunal erred in law and fact in awarding the Claimants costs as against the Respondents.

**The 1<sup>st</sup> and 2<sup>nd</sup> Appellants' submissions:**

6. In their written submission dated 4<sup>th</sup> April 2024, the 1<sup>st</sup> and 2<sup>nd</sup> Appellants argued that despite express referral to specific constitutional provisions, the Amended Statement of Claim invited the Tribunal to address various constitutional violations including degrading treatment under Article 25 and sex-based discrimination contrary to Article 27(4) of *the Constitution* and as such the claim took the character of a constitutional petition. It was argued that the Respondents categorically placed themselves within the ambit of Article 258(2)(b) and (c) of *the Constitution*, a public interest case, when they claimed to represent a group or class of persons.
7. They further submitted further that despite the Tribunal acknowledging that the claim was crafted like a petition, it nevertheless failed to consider the evidence presented by them demonstrating the lack of jurisdiction. They also argued that the Respondents' claim aligned with the decision in *Mumo Matemu -vs- Trusted Society of Huma Rights Alliance* (2013) eKLR as regards the basic elements of constitutional petitions. In asserting the position that the Tribunal erred in arrogating itself jurisdiction, the 1<sup>st</sup> and 2<sup>nd</sup> Appellants cited the decision in *Royal Media Services Limited -vs- Attorney General & 6 Others* (2015) eKLR where it was observed that a reading of Section 23(2) or (7) of the Sixth Schedule of *the Constitution* does not accord the Tribunal any jurisdiction to hear and determine questions on whether a right or freedom has been violated. Further to the foregoing, the Appellants, in reference to the 5-judge bench decision in *William Odhiambo Ramogi & 3 Others -vs- Attorney General & 4 Others; Muslim of Huma Rights and 2 others* (Interested Parties) submitted that the claim filed by the Respondents presented a plethora of polycentric issues and significant public interest thereby placing it within the exceptions to the doctrine of exhaustion.



8. On the issue that the Tribunal erred in ousting the jurisdiction of the ELRC, the 1<sup>st</sup> and 2<sup>nd</sup> Appellants submitted that under Article 162(2)(a) of the Constitution as read alongside Section 12 of the Employment and Labour Relations Court Act, the Tribunal's jurisdiction did not include determination of sexual harassment claims or other claims arising from employment matters. It was its case that the Tribunal transgressed by failing to find that the claim before it had previously been canvassed before a Superior Court which determined that the proper forum was the ELRC.
9. In conclusion it was submitted the impugned ruling was bad in law and ought to be set aside in its entirety. To that end, the Appellants prayed that the appeal be heard and the ruling be set aside with a further finding that the Tribunal's jurisdiction be ousted.

### **The 3<sup>rd</sup> Appellant's case:**

10. The 3<sup>rd</sup> Appellant urged its case through written submissions dated 3<sup>rd</sup> April 2025 where it extensively referred to the decision in Benson Makori Makworo -vs- Nairobi Metropolitan Service & 2 Others where the concept and significance of jurisdiction was discussed. It was its case that the Respondents own Statement of Claim gave it a constitutional underpinning as provided for under Articles 22 and 258 of the Constitution. It submitted that the HIV & AIDS Act does not feature the expression fundamental rights and freedoms, which was pleaded in the Statement of Claim.
11. It was further submitted that Section 26 of the HIV & AIDS Prevention and Control Act grants the Tribunal jurisdiction to enforce provisions under it only and as such, it would act ultra vires if it purported to entertain a suit requiring it to enforce provisions under the Bill of Rights. In addition to the foregoing, the 3<sup>rd</sup> Appellant submitted that it was untenable that the Respondents were private persons suing other private persons, albeit a statutory person, a position contrary to the finding of the Court in Hon. Uhuru Kenyatta -vs- The Nairobi Star Publications Limited (2015) eKLR where it was observed that fundamental rights and freedoms set out in the Bill of Rights are enforceable by a private person by way of constitutional reference only as against the State and State Organs and not private individual as against private individual and that if any party had a claim against another, then it ought to pursue such action under private law.
12. It was its case that the dispute before the Tribunal amounted to abuse of process and ought to be struck out.  
The 1<sup>st</sup> to 49<sup>th</sup> Respondents' case:
13. The Respondents challenged the appeal through written submissions dated 16<sup>th</sup> May 2025 wherein they identified the only issue for determination as whether the appeal was merited. The Respondents submitted that the decision in Royal Media Services Limited -vs- Attorney General & 6 Others (2015) eKLR relied upon by the 1<sup>st</sup> and 2<sup>nd</sup> Appellants had been considered by the Tribunal and its irrelevance explained.
14. As regards the decision in Keter & 20 others v Finlays (Kenya) Limited & another; Federation of Kenya Women Lawyers & 3 others (Interested Parties) (Constitutional Petition 2 of 2023) [2023] KEHC 22429 (KLR) (20 September 2023) (Ruling), the Respondents submitted that it was filed due to violation of human rights but was dismissed due to lack of jurisdiction by the High Court in Kericho. They asserted that the Appellants failed to point out the constitutional provisions which they claim they have pleaded in their Statement of claim so as to reflect the remedies sought in the Keter's case [supra]. The Respondents maintained that when they amended their Statement of Claim, they deleted orders for violation of Articles 3, 10, 22, 159(2)(d) and 259 of the Constitution and as such there was no known remedy sought in relation to violation of the fundamental rights under the Constitution.



15. It was their further submission that Section 31 of the HIV & AIDS Prevention and Control Act prohibited discrimination at the workplace based on HIV status, a provision that is in line with their Statement of Claim and as such, the claim was within the jurisdiction of the Tribunal. The Respondents argued that the appeals were intended to hold them captives of the law and to delay the expeditious hearing before the Tribunal. While relying on MKA -vs- NKA aka NAC (Civil Appeal E120 of 2023) 2024 KECH 7396, the Respondents submitted that the grounds in the Memoranda of Appeals were frivolous and all the appeals ought to be dismissed with costs.

**Analysis:**

16. Given that the main issue for determination in these appeals is whether the Tribunal had the requisite jurisdiction over the claim, likewise, this Court has to, in the first instance, ascertain whether it has any such jurisdiction to entertain the present appeals.

17. Whereas the *HIV and AIDS Prevention and Control Act*, Cap. 246 A of the Laws of Kenya [hereinafter referred to as ‘the Act’] does not provide for such a jurisdiction to this Court, the HIV and Aids Tribunal Rules [hereinafter referred to as ‘the Rules’] enacted pursuant to the provisions of the Act provide for a right of appeal from any decision of the Tribunal to the High Court. That is in Rule 33. Therefore, this Court is appropriately seized of this matter and shall now proceed to substantively determine the appeals.

18. Having carefully considered the records, the parties’ submissions and the decisions made therein, this Court discerns the following issues for discussion: -

- (i) The concept of jurisdiction.
- (ii) The effect of raising constitutional issues before the Tribunal coupled with the doctrine of exhaustion.
- (iii) Whether the claim is statute barred.
- (iv) Whether there was failure to uphold the doctrine of stare decisis.

19. This Court will now deal with the above issues in seriatim.

- (a) The concept of jurisdiction:

20. As the appeals hinge on the jurisdiction of the Tribunal, it is imperative to briefly look at what jurisdiction entails. The Court of Appeal in Nakuru Civil Appeal No. 119 of 2017 Public Service Commission & 2 Others vs. Eric Cheruiyot & 16 Others consolidated with Civil Appeal No. 139 of 2017 County Government of Embu & Another vs. Eric Cheruiyot & 15 Others (2022) KECA 15 (KLR) correctly so, rendered itself on the doctrine of jurisdiction as follows: -

36. Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in “Words and Phrases Legally Defined”, Volume 3 at Page 113 defines court 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 the 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 the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which



the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

36. The locus classicus on jurisdiction is the celebrated case of Owners of the Motor Vessel “Lillian S’ v. Caltex Oil (Kenya) Ltd [1989] KLR 1. Nyarangi, JA. relying, inter alia, on the above cited treatise by John Beecroft Saunders held as follows:

...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 pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

36. A decision made by a court of law without proper jurisdiction amounts to a nullity ab initio, and such a decision is amenable to setting aside ex debito justitiae.
37. The Supreme Court in In the Matter of Interim Independent Electoral Commission [2011] eKLR, Constitutional Application No. 2 of 2011 held that jurisdiction of courts in Kenya is regulated by *the Constitution*, statute, and principles laid out in judicial precedent. The Supreme Court at paragraph 30 of its decision held in part as follows:

...a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of Legislation is clear and there is no ambiguity.

36. In Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited & 2 others [2012] eKLR, Application No. 2 of 2011, the Supreme Court reiterated its holding on a court’s jurisdiction. In the matter of the Interim Independent Electoral Commission (supra) at paragraph 68 of its ruling, the Supreme Court held as follows:

(68). 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 itself jurisdiction exceeding that which is conferred upon it by law.

21. The jurisdiction of a Court or a Tribunal, therefore, emanates from either *the Constitution* or legislation or both and is so cardinal that it must be settled once its raised in a matter. It is the very issue which these appeals seek to unravel.

(b) The effect of raising constitutional issues before the Tribunal coupled with the doctrine of exhaustion:

22. The Preamble to the Act has it that it is an Act of Parliament to provide measures for the prevention, management and control of HIV and AIDS, to provide for the protection and promotion of public health and for the appropriate treatment, counselling, support and care of persons infected or at risk of HIV and AIDS infection, and for connected purposes.

23. Section 3 of the Act is on the object and purpose of the Act and provides as follows: -



3. Object and purpose of Act

The object and purpose of this Act is to—

- (a) promote public awareness about the causes, modes of transmission, consequences, means of prevention and control of HIV and AIDS;
- (b) extend to every person suspected or known to be infected with HIV and AIDS full protection of his human rights and civil liberties by-
  - (i) prohibiting compulsory HIV testing save as provided in this Act;
  - (ii) guaranteeing the right to privacy of the individual;
  - (iii) outlawing discrimination in all its forms and subtleties against persons with or persons perceived or suspected of having HIV and AIDS;
  - (iv) ensuring the provision of basic healthcare and social services for persons infected with HIV and AIDS;
- (c) promote utmost safety and universal precautions in practices and procedures that carry the risk of HIV transmission; and
- (d) positively address and seek to eradicate conditions that aggravate the spread of HIV infection.

24. From the above provision, this Court will now demonstrate whether there is any nexus between the object and purpose of the Act and *the Constitution*. Needless to say, Article 2 of *the Constitution* renders the Act as subordinated to *the Constitution*. Section 3[b] of the Act provides for full protection of the human rights and fundamental civil liberties of every person who is suspected or known to be infected with HIV and AIDS. These human rights and fundamental civil liberties are those contained in the Bill of Rights in Chapter Four of our Constitution which covers Articles 19 to 59 inclusive. For instance, Section 3[b][i] which prohibits compulsory HIV testing ring-fences the rights to human dignity and privacy in Articles 28 and 31 of *the Constitution* respectively, Section 3[b][ii] anchors the right to privacy under Article 31 of *the Constitution*, Section 3[b][iii] is premised on Article 27 [Equality and freedom from discrimination], Section 3[b][iv] anchors Articles 26, 28 and the Article 43-socio-economic rights. Likewise, Section 3[a], [c] and [d] also variously echo many other rights and liberties contained in the Bill of Rights.
25. Deriving from the above rendition, it is apparent that the Act seeks to inter alia protect and enforce the human rights and fundamental liberties of every person suspected or known to be infected with HIV and AIDS and as provided for in the Bill of Rights in *the Constitution*. That is, hence, to mean that the Act aims at enforcing and giving life to *the Constitution*. Therefore, a person seeking the enforcement and protection of the Act has the liberty of referring to *the Constitution* and pointing out with precision the rights and liberties allegedly infringed or threatened with infringement. As such, and generally speaking, such presentations may be made inter alia before a Court of law or a quasi-judicial Tribunal.
26. This Court, therefore, finds and hold that referring to and citing of constitutional provisions in a forum other than a Court of law does not ipso facto [by the fact itself] oust the jurisdiction of the said forum. In other words, the provisions of *the Constitution* can be cited and referred to in any matter before a Court of law, a quasi-judicial forum or anywhere.
27. Having so rendered, this Court shall now clear the air as to whether a Tribunal can deal with a constitutional issue or matter raised before it. But, what is a constitutional issue or matter? The Court



in *Fredricks & Other vs. MEC for Education and Training, Eastern Cape & Others* (2002) 23 ILJ 81 (CC), delimited what a constitutional issue entails as follows: -

.... *The Constitution* provides no definition of 'constitutional matter'. What is a constitutional matter must be gleaned from a reading of *the Constitution* itself: if regard is had to the provisions of... Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with *the Constitution*, as well as issues concerning the status, powers and functions of an organ of State.... the interpretation, application and upholding of *the Constitution* are also constitutional issues. So too .... is the question of the interpretation of any legislation or the development of the common law promotes the spirit, purport and object of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of *the Constitution*, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly on extensive jurisdiction...

28. In the United States of America, a constitutional issue refers to any political, legal, or social issue that in some way confronts the protections laid out in the US Constitution. In the words of Langa, J in *Minister of Safety & Security vs. Luiters*, (2007) 28 ILJ 133 (CC): -

... When determining whether an argument raises a constitutional issue, the Court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the Court to consider constitutional rights and values...

29. Therefore, taking cue from the foregoing, and broadly speaking, a constitutional issue is, therefore, any issue which confronts the various protections laid out in a Constitution. Such protections may be in respect to the Bill of Rights or *the Constitution* itself. In any case, the issue must demonstrate the link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened or threatened and the manifestation of contravention or infringement.

30. Returning to the issue at hand, Section 25 of the Act establishes the Tribunal which comprises of 7 members. The Chairperson is an Advocate of the High Court of not less than seven years' standing alongside two other Advocates of the High Court of not less than five years' standing. Those are three fine legal minds of cumulative experience of 17 years in law. Section 26 of the Act provides for the jurisdiction of the Tribunal as follows: -

1. The Tribunal shall have jurisdiction:
  - a. to hear and determine complaints arising out of any breach of the provisions of this Act;
  - b. to hear and determine any matter or appeal as may be made to it pursuant to the provisions of this Act; and
  - c. to perform such other functions as may be conferred upon it by this Act or by any other written law being in force.
- (2) The jurisdiction conferred upon the Tribunal under subsection (1) excludes criminal jurisdiction.

31. With a view of enabling the discharge the above mandate, the Tribunal is vested with the following powers: -



27. Powers of the Tribunal:

1. On the hearing of a complaint or an appeal made pursuant to section 26, the Tribunal shall have all the powers of a subordinate court of the first class to summon witnesses, to take evidence upon oath or affirmation and to call for the production of books and other documents.
2. Where the Tribunal considers it desirable for the purpose of minimizing expense or avoiding delay or for any other special reason, it may receive evidence by affidavit and administer interrogatories and require the person to whom the interrogatories are administered to make a full and true reply to the interrogatories within the time specified by the Tribunal.
- (3) In its determination of any matter the Tribunal may take into consideration any evidence which it considers relevant to the subject of the matter before it, notwithstanding that the evidence would not otherwise be admissible under the *Evidence Act* (Cap. 80).
- (4) The Tribunal shall have power to summon expert evidence as may be necessary for the discharge of its functions under this Act.
- (5) The Tribunal shall have power to award the costs of any proceedings before it and to direct that costs shall be taxed in accordance with any scale prescribed for suits in the High Court or to award a specific sum as costs.
- (6) All summons, notices or other documents issued under the hand of the Chairperson or the Tribunal shall be deemed to be issued by the Tribunal.
- (7) Upon any complaint or appeal being made to the Tribunal under this Act, the Tribunal may—
  - (a) confirm, set aside or vary the order or decision in question;
  - (b) make such other order as may be appropriate in the circumstances;
  - (c) without prejudice to the generality of paragraph (b), make an order—
    - (i) for the payment of damages in respect of any proven financial loss, including future loss, or in respect of impairment of dignity, pain and suffering or emotional and psychological suffering as a result of the discrimination in question;
    - (ii) directing that specific steps be taken to stop the discriminatory practice;
    - (iii) for the maintenance of the status quo of any matter or activity which is the subject of the complaint or appeal until the complaint or appeal is determined;
    - (iv) requiring the respondent to make regular progress reports to the Tribunal regarding the implementation of the Tribunal's order.
- (8) Any interested party may be represented before the Tribunal by an advocate or by any other person whom the Tribunal may, in its discretion, admit to be heard on behalf of the party.



32. With the jurisdiction of the Tribunal well cut out, this Court ascribes to the position that an entity like the Tribunal herein, in exercising its mandate, is capable of determining whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. The reason for this holding is simple. The members of the Tribunal are public officers and Article 10 of *the Constitution* calls upon them to infuse the national values and principles of governance while undertaking their duties. Article 3 of *the Constitution* obligates every person to respect, uphold and defend *the Constitution*. Therefore, the Tribunal must be in a position, through the expertise of the Chair and the two other Advocates, and in upholding *the Constitution*, to be able to determine whether a given set of circumstances reveal denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights. That, therefore, explains why Section 3 of the Act aims at protecting the human rights and fundamental freedoms of any person suspected or known to be infected with HIV and AIDS.
33. For clarity, the above duty is to be distinguished from the duty to interpret *the Constitution* which is the exclusive domain of the superior Courts in Kenya. Determining whether a given set of circumstances reveal denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights is not such an enormous task. Conversely, interpretation of *the Constitution* is a serious judicial function. While interpreting *the Constitution*, a Court is called upon to apply its legal mind to determine the applicability and extent thereof of a constitutional provision to a set of facts. In arriving at such an interpretation, the Court is supposed to consider all the applicable principles in constitutional interpretation. (See the Supreme Court in *In the Matter of Interim Independent Electoral Commission* [2011] eKLR). The Court may also look at comparative jurisprudence from other jurisdictions on the subject. Such a determination yields to a binding legal principle unless overturned by a Court with superior jurisdiction. Therefore, unlike the superior Courts, Tribunals and other quasi-judicial bodies do not make the law. They can, however, apply themselves to a given set of facts and determine denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights. There is, therefore, a defined distinction between determining the denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights and interpreting *the Constitution*. Whereas the former is not exclusively a judicial function, the latter strictly is.
34. In this matter, the Respondents prayed for a declaration that their rights and fundamental freedoms were variously infringed under *the Constitution* and the law, damages, injunction, apology, costs, and interest. Given the jurisdiction and powers of the Tribunal, this Court finds and hold that the issues raised in the Claim fall squarely within the four corners of the Tribunal and as such the Tribunal has jurisdiction to deal with the Claim unless ousted by any of the exceptions to the doctrine of exhaustion.
35. This Court will now ascertain whether there is any ouster under the said doctrine. The exhaustion doctrine operates on the understanding that Courts will postpone judicial consideration of disputes until after any other available avenues provided in law are fully adhered to. Therefore, where a party calls upon a Court to determine whether there is denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights, the Court will first ascertain whether there is a statute providing for an alternative avenue for the consideration of the dispute and if any, the Court will postpone any consideration of the issue until the law is complied with. However, a Court still have jurisdiction even where an alternative avenue is provided in law when any of the exceptions to the doctrine of exhaustion apply.
36. The exceptions to the exhaustion doctrine have been discussed in many decisions including *William Odhiambo Ramogi & 3 Others -vs- Attorney General & 4 Others; Muslim of Huma Rights and 2 others (Interested Parties)* case [supra]. The first exception is that a 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. The second exception 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 in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.

37. Applying the above to the matters at hand, none of the exceptions apply to the claim before the Tribunal. As earlier on held, the Tribunal is competently and technically composed to deal with questions as to whether any human rights and freedoms were violated, infringed or threatened with violation. The Act also provides for an appellate avenue to the High Court and a party may even lodge a further appeal to the Court of Appeal. As such, the doctrine of exhaustion does not apply to oust the jurisdiction of the Tribunal in this matter.

(c) Whether the claim is statute-barred:

38. From the reading of the Claim and law, the Respondents seem to seek legal protection from atrocities allegedly committed against their human rights and fundamental freedoms by the Appellants. The Act and the Rules seem not to affix any timelines to filing any claims under the Act. Further, given that the Respondents are actually enforcing their human rights and fundamental freedoms as guaranteed in the Constitution, then the general principle that such claims cannot be time-barred applies.

39. In Nairobi High Court Constitutional Petition No. 33 of 2020 Peter Odoyo & Stanley Kinyanjui (Suing on behalf of the Outdoor Advertising Association of Kenya) v. Kenya National Highways Authority & 2 Others, the Court at paragraph 159 held as follows: -

(i) That human rights and fundamental freedoms can never be waived or acquiesced to by a person unless there is such enormous and unexplained delay in enforcement.

(ii) Statutory limitations do not apply to Petitions claiming infringement or threat to infringement of human rights and fundamental freedoms. A party, however, must account for the time between the alleged infringement or threat of infringement of the human rights and fundamental freedoms and the filing of the claim.

40. The above legal position, therefore, renders the issue to one of fact. Such has to be dealt with by way of evidence and that is outside the province of preliminary objections. The objection fails.

(d) Whether there was failure to uphold the doctrine of stare decisis:

41. The Supreme Court in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) had the following to say about the principle of stare decisis: -

54. As we have stated before in several cases, unlike in other jurisdictions, Kenya's stare decisis principle is a constitutional obligation meant to enhance the legal system's predictability and certainty. In the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, SC Petition No 2B of 2014 [2014] eKLR, we stated that article 163(7) of the Constitution is the embodiment of the time-hallowed common law doctrine of stare decisis. It holds that the precedents set by this court are binding on all other courts in the land. It is imperative for all courts bound by decisions to rigorously uphold their authority, ensuring



the effective functioning of the administration of justice. Without this steadfast and uniform commitment, the legal system risks ambiguity, eroding public trust, and causing disorder in the administration of justice.

42. This Court has had the liberty of perusing the decision in *Keter & 20 others v Finlays (Kenya) Limited & another; Federation of Kenya Women Lawyers & 3 others (Interested Parties)* case [supra] which was respectfully rendered by Hon. Serگون, J on 20<sup>th</sup> September 2023 sitting in the High Court at Kericho. This Court has absolutely no issue with the said decision since it centred on whether it was the High Court or the Employment and Labour Relations Court which had the jurisdiction over employment-related issues. The Learned Judge, correctly so, rendered himself. However, the issues in this matter are quite distinguishable from those in the said Keter's case [supra] on several grounds. First, the Keter's case [supra] was filed in the High Court and not in the Tribunal. Second, the issue as to whether the Tribunal was seized of jurisdiction was not considered in the Keter's case [supra]. Third, the doctrine of exhaustion was equally not an issue and fourth, the issue of limitation was not considered either.
43. This Court, therefore, finds and holds that the objection that the Honourable Tribunal was guilty of not upholding the doctrine of stare decisis was truly misplaced and is for rejection.

### **Disposition**

44. Having considered the grounds preferred in the appeals and as rendered above, this Court finally finds that the appeals lack merit.
45. Consequently, the following final orders hereby issue: -
- (a) Civil Appeal No. E1132 of 2024 and Civil Appeal No. E1130 of 2024 are hereby dismissed.
  - (b) The order of stay of proceedings in HAT No. 66/E0022 of 2023 is hereby discharged.
  - (c) Given the time taken since the Claim was filed, the Hon. Tribunal shall fast-track the determination of the Claim.
  - (d) The Appellants shall bear the costs of their respective appeals.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2025.**

**A. C. MRIMA**

**JUDGE**

Judgment virtually delivered in the presence of:

Mr. Isoit, Learned Counsel for 1<sup>st</sup> and 2<sup>nd</sup> Appellants

Mr. Semu, Learned Counsel for 3<sup>rd</sup> Appellant.

Michael/Amina – Court Assistants.

Judgment - Nairobi (Milimani) High Court Civil Appeal No. E1132 & E1130 of 2024 Page 10 of 10

