



**Kenya Breweries Limited v Mutuku & 3 others; Commission on Administrative Justice (Interested Party) (Petition E029 of 2024) [2025] KEHC 15419 (KLR) (Commercial and Tax) (23 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15419 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
PETITION E029 OF 2024  
FG MUGAMBI, J  
OCTOBER 23, 2025**

**BETWEEN**

**KENYA BREWERIES LIMITED ..... PETITIONER**

**AND**

**MUTINDA MUTUKU ..... 1<sup>ST</sup> RESPONDENT**

**JILK CONSTRUCTION COMPANY LTD ..... 2<sup>ND</sup> RESPONDENT**

**ARCHITECTURAL ASSOCIATION OF KENYA ..... 3<sup>RD</sup> RESPONDENT**

**DIRECTORATE OF CRIMINAL INVESTIGATIONS ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**COMMISSION ON ADMINISTRATIVE JUSTICE ..... INTERESTED PARTY**

**RULING**

**Background and Introduction**

1. The petitioner filed its petition dated 1<sup>st</sup> December 2024, invoking a wide array of constitutional provisions including Articles 2, 10, 20, 21, 22, 23, 27(1), 35, 40, 47, 48, 50, 73(1), 159(1) & (2), 165(3), 258(1) and 259 of *the Constitution* of Kenya alongside statutory claims under the *Fair Administrative Action Act* and the *Access to Information Act*. In response, the 2<sup>nd</sup> respondent raised a preliminary objection which is the subject of this ruling.
2. The 2<sup>nd</sup> respondent contends that this Court lacks jurisdiction to entertain the petition, arguing that the grievances raised, particularly those alleging criminal offences and conspiracies, fall within the exclusive remit of investigative and prosecutorial agencies, namely the Directorate of Criminal



Investigations (DCI) and the Office of the Director of Public Prosecutions (ODPP). It further asserts that the petitioner failed to exhaust the statutory mechanisms provided under the National Police Service Act (Cap 84), the ODPP Act (Cap 6B), and the Criminal Procedure Code (Cap 75) before approaching this Court. Additionally, the 2<sup>nd</sup> respondent relies on Section 10 of the Arbitration Act to argue that this Court is barred from intervening in the arbitral process except as expressly provided under the Act.

3. In rebuttal, the petitioner maintains that this Court is vested with unlimited jurisdiction under Article 165(3)(a) of the Constitution to determine constitutional questions, including alleged violations of fundamental rights and freedoms. The petitioner argues that the issues raised in the petition transcend a purely commercial dispute and implicate serious constitutional concerns that cannot be adequately addressed within the confines of arbitration. It further submits that it has already lodged a complaint with the 4<sup>th</sup> respondent and sought information from the DCI, which was not forthcoming, thus justifying the joinder of the DCI to the petition. The petitioner clarifies that no orders are sought against the ODPP and that it does not seek to direct prosecutorial discretion.

### **Analysis and Determination**

4. I have carefully considered the preliminary objection, the responses as well as the written submissions filed by the parties and the applicable legal framework. I have also considered the oral submissions made by Learned Counsels Mr. Kibe Mungai for the 2<sup>nd</sup> respondent, Ms Chepkurui for the 1<sup>st</sup> respondent and Mr. Kamau Karori for the petitioner.
5. The threshold for a valid preliminary objection is well established in *Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd*, [1969] EA 696. It requires that such an objection raises pure points of law capable of disposing of the matter without recourse to contested facts or judicial discretion. While the 2<sup>nd</sup> respondent raises jurisdictional arguments under Section 10 of the Arbitration Act and the principle of prosecutorial independence, the petitioner has identified factual disputes central to the petition, such as the nature of the relationship between the 1<sup>st</sup> and 2<sup>nd</sup> respondents, alleged financial transactions between them, and claims of misconduct.
6. I agree that the factual disputes raised, such as the nature of the relationship between the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the alleged financial transactions, and claims of misconduct, are contested and cannot be resolved at the preliminary stage without the benefit of evidence and full trial. These matters require factual interrogation and are therefore unsuitable for determination through a preliminary objection. Nonetheless, I also concur with Mr. Kibe that the jurisdictional issues raised under Section 10 of the Arbitration Act, the constitutional mandate of this Court under Article 165, and the principles governing the independence of the Office of the Director of Public Prosecutions (ODPP) and the Directorate of Criminal Investigations (DCI) are pure points of law.
7. These legal questions do not depend on the resolution of disputed facts and are capable of being determined without delving into the merits of the petition. They go to the heart of whether this Court is properly seized of jurisdiction to entertain the petition and whether the petitioner has prematurely invoked the Court's constitutional mandate without exhausting alternative statutory remedies. As such, they meet the threshold for determination by way of a preliminary objection as set out in *Mukisa Biscuit* case.
8. It is now settled law that the High Court, including its Commercial and Tax Division, retains jurisdiction to adjudicate constitutional issues arising from commercial disputes. This position was affirmed in *David Ramogi & 4 Others V Cabinet Secretary, Ministry of Energy & Others*, Constitutional Reference No. 531 of 2016, where the Court held that jurisdiction under Article



165 of *the Constitution* is conferred on the High Court as a whole and is not limited by its internal administrative divisions.

9. Turning to Section 10 of the *Arbitration Act*, the Supreme Court in *Bia Tosha Distributors Limited V Kenya Breweries Limited & 6 Others*, KESC 14 (KLR) clarified that while arbitration is rooted in party autonomy, it cannot be used to shield parties from scrutiny where constitutional violations are alleged. At paragraph 104, which was highlighted by Mr. Karori, the Court stated:

“The jurisdiction of the arbitrator is limited by the appointing document and largely operates with the consent, cooperation and participation of the parties before it. This is commonly referred to as “party autonomy”. Breaches, violations and infringements of *the Constitution* do not fall within the jurisdiction of arbitrators and such breaches cannot be the basis of setting aside arbitral awards. We asserted this position in the case of *Nyutu Agrovot Limited VAirtel Networks Kenya Limited, Chartered Institute of Arbitrators-Kenya Branch (Interested Party) SC Pet No 12 of 2016; [2019] eKLR.*”

10. Mr. Karori further referred this Court to paragraph 106, where the Supreme Court emphasized:

“This court has insisted on the exhaustion of the local remedies in *Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/ Beneficiaries of the Kenya Ports Authority Pensions Scheme SCPetitionNo3 of 2016 [2019] eKLR.* This, however, refers to remedies set out in statutory provisions. The mandate of an arbitrator largely proceeds on the basis of the agreement by parties, and is mainly tasked with the resolution of a dispute as set out in the governing agreement. Where the dispute, however, transcends the commercial dispute, well into the constitutional sphere, as is the case before us, every person is free to access courts and have their day in court. As we see it, there is no tension between arbitration and enforcement of constitutional rights as distinct dispute resolution mechanisms. A court of law cannot turn a blind eye to alleged constitutional breaches in order to invoke the principle of party autonomy that binds parties to their agreements. This in itself does not mean that any person who sets out to petition the court alleging violation of fundamental rights and freedoms under the Bill of Rights must succeed, as cases are determined on their merits.”

11. The summary from the above is that this Court finds that it is not barred by Section 10 of the *Arbitration Act* from entertaining a petition that raises substantial constitutional questions. The mere existence of an arbitral process does not, and cannot, oust the jurisdiction of this Court to uphold and protect fundamental rights and freedoms guaranteed under *the Constitution*. Arbitration, while rooted in party autonomy and contractual consent, is not a shield against constitutional scrutiny, especially where allegations of rights violations are raised.
12. The Supreme Court has made it abundantly clear that constitutional breaches fall outside the jurisdiction of arbitral tribunals and must be addressed by courts of law. This Court, therefore, retains its constitutional mandate under Article 165 to hear and determine such claims, regardless of whether they arise in the context of arbitral proceedings.
13. Furthermore, the petitioner has demonstrated a genuine attempt to engage the relevant statutory mechanisms, including lodging complaints with investigative authorities and seeking information from the Directorate of Criminal Investigations. These efforts have not been contested and they reflect a willingness to pursue available remedies before invoking the Court’s jurisdiction. However,



the doctrine of exhaustion, though foundational to administrative law, is not absolute. Courts are empowered to intervene where statutory remedies are unavailable, ineffective, unduly delayed, or where the issues raised implicate constitutional rights of significant public interest.

14. To insist on strict adherence to exhaustion in such circumstances would be to elevate procedural form over substantive justice. It would risk denying litigants access to judicial redress for violations that may not be adequately addressed through administrative channels. *The Constitution* demands that courts remain vigilant and responsive to claims of rights violations, and this Court will not abdicate that responsibility merely because the dispute arises in the shadow of arbitration.
15. The petitioner has sought interim relief to stay the publication of the award pending the hearing and determination of the constitutional petition. The respondents have challenged the issuance of these interim orders, arguing that they interfere with the arbitral process and undermine the principle of party autonomy. However, I am again guided by the binding decision of the Supreme Court, which has emphatically affirmed the constitutional duty of courts to safeguard fundamental rights and freedoms, even in the context of arbitration.
16. Therefore, where a petitioner alleges ongoing or imminent violations of rights protected under *the Constitution*, this Court is not only empowered but obligated to intervene and preserve the status quo until the issues are fully ventilated. Allowing the arbitral award to be published and potentially acted upon before the petition is determined would risk rendering the petition nugatory.
17. If the petitioner ultimately succeeds, the harm occasioned by the premature publication and enforcement of the award may be irreversible, particularly in light of the Supreme Court's pronouncement that constitutional grounds cannot be used to set aside an arbitral award. This legal position increases the need for caution and judicial vigilance. It means that once the award is published, the petitioner may be left without any effective remedy, even if the Court later finds that their constitutional rights were indeed violated. The respondents' objections to the interim orders must therefore be weighed against the integrity of the constitutional process by preventing actions that could preempt or frustrate the Court's jurisdiction.

### **Disposition**

18. For the foregoing reasons, I find that the Preliminary Objection lacks merit. It is accordingly dismissed with costs to the petitioner.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF OCTOBER 2025.**

**F. MUGAMBI**

**JUDGE**

