REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. E015 OF 2025

CALVINCE OMONDI BODO……1ST PETITIONER

ADA OCHIENG AYUGI……2ND PETITIONER

VERSUS

ROYAL MEDIA SERVICES LIMITED……RESPONDENT

RULING

1. The Respondent herein has filed a Notice of Preliminary Objection dated 15/9/2025 seeking the following reliefs:

    1) That this court lacks jurisdiction to entertain the Petition herein.
    2) That this Petition is barred by the doctrine of constitutional avoidance.
    3) That the petition is barred by the doctrine of exhaustion as held by this court in among others, **Motiga v Lugalla & 4 Others (Petition E328 of 2023) [2025] KEHC 275 (KLR)** and in **Ndung'u & Another v Wachira & Another**

(Constitutional Petition E047 of 2025) [2025] KEHC 7265 (KLR).

4) That the petition is barred by the provisions of Section 8 (f) and 56 the Data Protection Act and as was held by the Court of Appeal in **Speaker of the National Assembly vs James Njenga Karume [1992] eKLR** 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 as held in **Owners of the Motor Vessel Lilian S v Caltex Oil Kenya Ltd [1989] KLR 1**, where a court lacks jurisdiction, it must down its tools; this is a suitable case for this court to down its tools.

2. The Petitioners filed a response to the said preliminary objection vide a replying affidavit dated 22/9/2025 wherein they averred inter alia; that the objection is misconceived, frivolous, and bad in law as this court has jurisdiction under Article 22, 23 and 165 (3) (b) of the Constitution to hear and determine claims of alleged violation of fundamental rights and freedom; that the petition raises issues of violation of rights under Article 27,28, 29(d) 30, 31 and 41 of the Constitution, including the rights to dignity, privacy, equality, and freedom from servitude, which can only be adjudicated by this Honourable court; that the Respondent's reliance on the doctrines of constitutional avoidance and exhaustion is misplaced since the alternative forum under the Data

Protection Act is neither adequate nor effective as it lacks jurisdiction to grant constitutional remedies such as declarations, conservatory orders and damages under Article 23(3) while the Petition raises pure constitutional questions which require this court's intervention; that Section 8(f) and 56 of the Data Protection Act do not oust this Honourable court's jurisdiction to enforce the Bill of Rights as enshrined in the Constitution, that while the Respondents have invoked the doctrines of exhaustion and constitutional avoidance, it is settled law that these doctrines are not applied as rigid or inflexible bars to the jurisdiction of this Honourable court; that in Mitu-Bell Welfare Society v Kenya Airports Authority & 2 Others [2021] eKLR, the Supreme Court confirmed that constitutional avoidance and exhaustion doctrine cannot be invoked to defeat access to justice where claims involve allegations of violation of constitutional rights. The court held that remedies under Article 23 (3) of the Constitution are wide and flexible, and courts must not shy away from granting appropriate reliefs even where alternative forums exist, if such forums are inadequate to secure protection of constitutional rights; that in view of the above, this Honourable court is properly seized of jurisdiction to hear and determine the Petitioners' claims, as the dispute raises substantive constitutional question that cannot be effectively addressed through the alleged alternative mechanism; that the Preliminary Objection therefore does not meet the threshold of a proper preliminary objection as set out in Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696; that the objection is therefore a

deliberate attempt to defeat the ends of justice and to deny them the constitutional right to access to justice under Article 48 of the Constitution.

3. The Preliminary Objection was canvassed by way of written submissions. Both parties complied.

4. Respondent's submissions are dated 15th September 2025. The Respondent raised several issues for determination inter alia; whether the Petition is barred by the doctrine of constitutional avoidance and whether the petition is barred by the doctrine of exhaustion.

5. As regards the first issue, the Respondent placed reliance in the case of **Patron IDPS Gusii Regional Steering Committee Kisii & Nyamira Counties Rev Brethren Nemwel Momanyi v Egesa FM Radio Programmer, Kisii & another; Managing Director Royal Media Citizen (Third party) (Constitutional Petition 2 of 2022) [2024] KEHC 1883 (KLR) (29 February 2024) (Ruling)** where the court held as follows:

> As to what constitutes a constitutional petition, Mativo J (as he then was) had this to say in the case of Hakizimana Abdoul Abdulkarim v Arrow Motors (EA) Ltd & another [2017] eKLR:-
>
> > "A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute..."

6. That from the pleadings in the petition, the cause of action appears to be defamation and breach of the of sub-judice rule and not any matter that requires the interpretation of the Constitution. That ddefamation is a civil tort that can be determined in a civil suit whereas any commentary or publication relating to active judicial proceedings that would bring the Court into disrepute or substantively prejudice or undermine the administration of justice amounts to breach of the sub-judice rule and is punishable, for contempt of Court, by the court handling the matter in issue.

7. Regarding the Supreme Court decision in **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR explicated at paragraph [256]** it was held that: -

> "… The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis."

Whereas it is trite that the doctrine of constitutional avoidance does not strip this Court of the jurisdiction to hear and determine this matter, it implores the court to restrain itself from hearing a matter where there exists another appropriate forum that can hear and determine the matter effectively.

8. Concerning alternative remedy in lieu of constitutional remedies**, Chacha J in Godfrey Paul Okutoyi & others vs Habil Olaka & Another (2018) eKLR stated at paragraph 65: -**

> **"It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a court of law in the manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a Constitutional petition. A party should only file a constitutional petition for redress of a breach of the Constitution or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure."**

9. Further, Mutungi J expressed himself as follows on the same issued in **Grays Jepkemoi Kiplagat v Zakayo Chepkoga Cheruiyot [2021] eKLR:-**

“I need to observe that parties are increasingly filing matters that are essentially civil matters and christening the same as Constitutional Petitions which is not proper. Where there is the alternative remedy of filing a suit in the ordinary Civil Courts, a party ought not to invoke the jurisdiction of the Constitutional Court.” - (See also the case of Abraham Kaisha Kanziku -vs- Governor of Central Bank & others [200] eKLR).This Court fully associates itself with the persuasive decisions of the learned justices in the above referenced cases and i agree with the Respondent that matters that do not call for the Court’s Constitutional interpretative mandate under the Bill of Rights should not be disguised as Constitutional Petitions seeking enforcement of the Bill of Rights. The constitutional jurisdiction of the court is a very specific jurisdiction which is not open to general claims. It is invoked pursuant to Articles 22 (1) and 23 of the Constitution by filing a Petition., this The doctrine of constitutional avoidance frowns upon the practice of bringing ordinary disputes to the constitutional court. (See Mutyaene v KCB Bank Ltd & another (Petition 412 of 2020) [2023] KEHC 2205 (KLR) (Constitutional and Human Rights) (17 March 2023) (Judgment)). From the foregoing analysisCourt has come to the

conclusion that the Preliminary Objection is merited. The same is upheld and the Petition dated 22nd June, 2021 is struck out with costs to the 1st Respondent and the 3rd Party.

10. The Respondent further submits that in **Mutyaene v KCB Bank Ltd & another (Petition 412 of 2020) [2023] KEHC 2205 (KLR) (Constitutional and Human Rights) (17 March 2023) (Judgment)**, this court stated the law as follows: -

32. As I consider this issue, I am aware that the doctrine of constitutional avoidance does not divest this Court of the jurisdiction to hear and determine this matter. What the doctrine means is that while this Court can indeed hear and determine the matter, it restrains itself from hearing the same because there exists another appropriate forum that can hear and determine the matter effectively.

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11. It can be discerned from the foregoing that where another legal course is available, through which a matter can be properly decided and which can give an applicant the relief he seeks, such course should be pursued and the constitutional court should decline to determine a constitutional issue in such matter.

12. Reliance was placed in **Uhuru Muigai Kenyatta v Nairobi Star Publications Limited [2013] eKLR** where **Lenaola, J.** (as he then was) stated: -

> **''I need say no more. Where there is a remedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in Haco Industries (supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in AG vs S.K. Dutambala Cr. Appeal No.37 of 1991 (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions.The complaint in this case is not so serious as to attract Constitutional sanction.The prayers sought by the Petitioner in the Petition are civil in nature with civil remedies and could have readily been redressed in a civil court. The Petitioner ought to have filed a civil suit as opposed bypassing the same and coming to the constitutional court.Having found that there exists a remedy in civil law, which the Petitioner ought to have pursued, this Court must refuse to be bogged down by a matter which is so plainly provided for under statute. Having considered the foregoing, I find and**

hold that the Petitioner's claim which is founded on his relationship with the Bank as its customer is a plain civil claim. Equally, the compensation contemplated in Article 23 of the Constitution may only be available to a claimant who proves denial, violation or infringement, or threat to a right or fundamental freedom in the Bill of Rights under Article 22. Accordingly, the Petition is not properly laid before this Court as a constitutional issue. As such, this Court invokes the doctrine of avoidance and declines jurisdiction.

13. The Respondent submits that in **Murayi alias Jamal v Nation Media Group Limited & 6 others (Constitutional Petition E666 of 2024) [2025] KEHC 12289 (KLR) (Constitutional and Human Rights) (12 August 2025) (Judgment)**, this court stated the law as follows: -

14. Again, in the case of **Godfrey Paul Okutoyi & others v Habil Olaka & Another [2018] eKLR** Chacha J. was of a similar view where he stated thus: -

"65. It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute

are redressed through a court of law in a manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a constitutional petition. A party should only file a constitutional petition for redress of a breach of *the Constitution* or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure."

15. It was submitted that in the instant petition the allegations raised heavily lie in the civil claim of defamation. The Petitioner's cause of action could have adequately been remedied by conventional civil law not as a constitutional grievance. In the premise, to the extent that the Petition seeks to vindicate the Petitioner's alleged defamation, it is misconceived. The jurisdiction of this court was improperly invoked and therefore this court declines the invitation to deal with the petition further. Moreover, the Petitioners have not adduced evidence to show how the Respondents publications violated *the Constitution* and has also not shown how the information published was false and how the same was in violation of his constitutional

rights as guaranteed in the Articles of *the Constitution* as cited.

It is no**t** in dispute that the remedies sought by the Petitioners are civil in nature and relate to an alleged publication done by the Respondent. The Respondent submits that the Petitioners' remedy lied in the defamation law in a suit filed before the Civil Division of this court and not this court. The Respondent urges this court to find and hold that the said doctrine of constitutional avoidance applies to the Petition before this court and proceeds to strike it out with costs to the Respondent.

16. On whether this Petition is barred by the doctrine of exhaustion**,** Counsel for Respondent submitted that this Petition is barred by sections 8 (f) and 56 of the Data Protection Act which provide as follows: -

8. Functions of the Office

(1) The Office shall—(f) receive and investigate any complaint by any person on infringements of the rights under this Act.

56. Complaints to the Data Commissioner

(1) A data subject who is aggrieved by a decision of any person under this Act may lodge a complaint with the Data Commissioner in accordance with this Act.

(2) A person who intends to lodge a complaint under this Act shall do so orally or in writing.

(3) Where a complaint made under sub-clause (1) is made orally, the Data Commissioner shall cause the complaint to be recorded in writing and the complaint shall be dealt with in accordance with such procedures as the Data Commissioner may prescribe.

(4) A complaint lodged under sub-clause (1) shall contain such particulars as the Data Commissioner may prescribe.

(5) A complaint made to the Data Commissioner shall be investigated and concluded within ninety days.

17. In **Arunda v Office of the Data Protection Commissioner & another; Data Privacy and Governance Soccciety of Kenya (Interested Party) (Constitutional Petition E010 of 2025) [2025] KEHC 12262 (KLR) (Constitutional and Human Rights) (12 August 2025) (Judgment)**, this court stated the law as follows as regards the said **Data Protection Act** and the **Data Protection (Complaints Handling Procedure and Enforcement) Regulations (Legal Notice 264 of 2021):**-

1. This Petition raises a significant constitutional question regarding the jurisdiction of the Office of the Data Protection Commissioner (ODPC) under the *Data Protection Act, 2019* (DPA) to

investigate and adjudicate complaints involving alleged breaches of the right to privacy guaranteed under Article 31 of the *Constitution*. The Petitioner seeks a declaration that Section 56 of the DPA and Regulation 14 (5) of the Data Protection (Complaints Handling and Enforcement Procedures) Regulations, 2021 are unconstitutional to the extent that they vest the ODPC with powers akin to those of a judicial authority.

2. The Petition further challenges the ODPC's authority to award remedies, including compensation, for privacy violations, arguing that such powers belong exclusively to the High Court under Article 23 (1) and 165 (3) (b) of the *Constitution*.

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22. Consequently, this Court is not persuaded by the Petitioner's argument that the ODPC unlawfully usurps the High Court's jurisdiction under Articles 23 (1) and 165 (3) (b). The ODPC acts within the statutory framework of the DPA, and its determinations are administrative in nature, subject to judicial review. There exists a clear distinction between the adjudicative role of the High Court in constitutional enforcement and

the administrative redress mechanisms facilitated by the ODPC.

23. In conclusion, the Court finds that the ODPC does not usurp the jurisdiction of the High Court. Rather, it provides an important, constitutionally permissible mechanism for the realization of the right to privacy under Article 31, subject to the supervisory jurisdiction of the High Court as preserved under Section 64 of the DPA.

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47. Accordingly, this Court finds that the Petitioner prematurely approached the High Court in contravention of the doctrine of exhaustion. He neither utilized the ODPC's mechanisms nor sought exemption from the statutory obligation to do so. No exceptional circumstances have been shown to exist, and the available administrative remedy is adequate, effective, and subject to judicial oversight.

48. In conclusion, the doctrines of exhaustion and constitutional avoidance apply to this Petition. The Petitioner's direct approach to the High Court is procedurally improper and inconsistent with the legal framework established by the DPA and the FAAA. The Petition is therefore premature.

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60. From the foregoing, the Court finds that the Petition is without merit. The legal architecture provided by the DPA, as currently framed, is sufficiently constitutional, functional, and necessary for the effective enforcement of the right to privacy under Article 31 of the *Constitution*.

18. In view of the above express provisions of the law, the Respondent submits that this Petition is barred by the **doctrine of exhaustion** as held by this court in, among others, **Motiga –v- Lugalia & 4 others (Petition E328 of 2023) [2025] KEHC 275 (KLR)** in which the court stated as follows: -

> ‘’**66. The doctrine avoidance precludes the Court from invoking the *Constitution* to settle controversies that can conveniently be dealt with on any other legal basis other than the *Constitution*. Disputes that may appropriately be resolved on the basis of a statute or regulatory regime or other established legal principles should thus not be disguised and tried as Constitutional litigations.**
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> **.....**

69. Turning to the present Petition, the Respondents opposed the Petition for offending the doctrine of constitutional avoidance by pointing out the cause of action is a claim for defamation which can be fully and effectively litigated as a tortious claim either under the *Defamation Act* or as a common law claim in an ordinary civil suit.

70. The Petitioner however maintained that the Petition raises constitutional questions on account that although it alleged defamation by the 1st and 2nd Respondents for publishing the offensive article against the Petitioner; there was also the element of access to information that could enable the Petitioner identify the 2nd Petitioner which only the 3rd and 4th Respondent could supply hence *Defamation Act* was inadequate in scope of remedies that it could order.

71. It is manifest from the reading of this Petition the essential complaint is the alleged publication of the defamatory material against the Petitioner. In any case, even if the matter involves the need for supply of information under Article 35 of the *Constitution*, there is an elaborate procedure that is provided for

under *Access to Information Act* prescribing how this is to be done and consequences of failure to facilitate the access to information when the conditions set out for supply of information have been met. In short, this Court will not necessarily have to turn to the *Constitution* to resolve the two main issues raised by the Petitioner in this Petition. That will require the *Constitution* to resolve. In other words, the resolution of the issues presented through this Petition will only require interpretation of the relevant statutes or principles of common law rather than the *Constitution* as the claim is founded on the tort of defamation and the issue of access to information is also adequately covered in the *Access to Information Act*. I can thus comfortably conclude that this Petition does not raise any Constitutional question that would compel the Court to resort to the *Constitution* to resolve.

72. This leads me into making the finding that the dispute that this Petition presents is not a Constitutional controversy since it can be determined without application of the *Constitution*. Its resolution squarely lies in the application of the tort law and the *Access to Information Act*.

73. It is impermissible for a litigant to found a cause of action on the *Constitution* when the same can be founded on legislation or other established legal principles.''

19. The Respondent further relied on the case of **Ndung'u & another –v- Wachira & another (Constitutional Petition E047 of 2025) [2025] KEHC 7265 (KLR)**, in which this court stated the law as follows:-

''1. This ruling concerns Constitutional Petition E047 of 2025 and arises from the Petitioners' claims that the Respondents published their personal information and images on digital platforms without consent, violating the Petitioners' rights to privacy (Art. 31) and dignity (Art. 28) under the *Constitution*. The Petitioners filed two interlocutory applications–one dated 31/01/2025 seeking injunctive relief (removal of the impugned online content and restraint on further publication) and another dated 11/02/2025 seeking leave to amend or supplement the petition.

2. The Respondents filed a Preliminary Objection on 21/02/2025, contending that the Constitutional Petition herein is improperly before this Court as

they are alternative statutory or civil remedies available to the Petitioners.

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8. Applying these principles, the Court must ask whether the Petitioners indeed had adequate alternative avenues that they failed to use. The *Data Protection Act, 2019* specifically provides a statutory process for privacy complaints. Under Section 56(1) of that Act, an aggrieved data subject may lodge a complaint with the Data Protection Commissioner if a data controller or processor has breached the Act. Any decision by the Commissioner can subsequently be reviewed by the courts, but only after the internal process is pursued.

9. In this case, the Respondents contend that the Petitioners never filed any complaint under the Data Protection Act despite the alleged processing of their "personal data" (their names, images and information). Similarly, the Media Act provide for recourse against journalistic or media misdeeds. The petition references the Media Act, implying that a complaint could have been lodged with the Media Council's Complaints Commission. In addition, civil tort remedies are available: the Petitioners could have sued the Respondents for

defamation, or for the common-law wrong of invasion of privacy. As our courts have recognized, defamation is "a civil wrong or tort, pure and simple, for which the common law remedy is an action for damages", and privacy violations by private parties are typically addressed by ordinary civil actions or by government enforcement (as in criminal libel, though that has now been largely struck down).

10. The Petitioners have not pointed to any special statutory exemption or other reason why these remedies are inadequate or unavailable. On the contrary, they seek extraordinary relief in the constitutional court as if it were the first port of call. The Court notes that this is precisely the situation addressed in Odhiambo & Another v National Police Service & 10 Others(2023), where petitioners attacked a government tender award. The High Court held that the Public Procurement Act had established an elaborate review and appeal process, which the petitioners had ignored, and struck out the petition as an abuse of process. That decision, though in the procurement context, restated the general rule: when a statutory scheme governs dispute resolution, parties must invoke those procedures. Here too, the regulatory regimes for

privacy and media are elaborate and intended to be first tried.

11. In short, the Petitioners have not shown exceptional circumstances to bypass these alternatives. The mere fact that the grievance involves fundamental rights does not automatically entitle them to invoke constitutional jurisdiction. To the contrary, the Supreme Court has cautioned that constitutional litigation should not be used to circumvent ordinary law: one may sue a state actor for a constitutional tort, but private disputes with personal overtones are ordinarily resolved by civil means. The Petitioners' claim is essentially that the Respondents–private individuals–invaded their privacy. The constitutional right to privacy is indeed "guaranteed under Article 31", and it is defined as "the right of the individual to be protected against intrusion into his personal life… or by publication of information". But that right, especially as against non-state actors, has primarily been enforced through tort law or administrative sanctions. The High Court in John Omilia v Attorney General explained that such a "violation of one's constitutional rights by a government servant" can give rise to a "constitutional tort" remedy, but that is a remedy against the state or its agents. Here the Respondents are private entertainers, not acting

under any public authority. While Article 20 (1) does bind all persons to the Bill of Rights, the exercise of jurisdiction in such cases still respects alternative processes.

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18. The weight of authority therefore favours the Respondents. The Petitioners have not exhausted statutory alternatives under Data Protection or Media Council, nor have they initiated civil proceedings for defamation or privacy. No immediate urgency or public interest has been shown that would justify this Court's departure from normal channels. In the absence of any special justification, the constitutional avoidance doctrine dictates that this matter be left to the appropriate forum. Accordingly, the Respondents' Preliminary Objection is upheld. The Petition cannot proceed in its present form. The preliminary objection has merit and is allowed and therefore, this petition is struck out.''

20. Reliance was also placed in the case of **Karani –v- Kenya Private Sector Alliance (Civil Case E120 of 2024) [2025] KEHC 3788 (KLR) (Civ) (27 March 2025) (Ruling)**, where the court stated as follows:-

''9. The plaintiff expresses clearly that his complaint by the suit that his right to privacy and

human dignity were breached by the defendant. Agreed, the Data protection Act did not intend to prevent parties from seeking recourse of their fundamental rights before a court of law, and particularly the High Court, which has original jurisdiction expressed at Article 165(3) of the *Constitution*.

10. However, with the coming into force, the *Data Protection Act* 2019, is the first port of call by dint of Section 65 of the *Act* that provides:-"a person who suffers damage by reason of a contravention of a requirement of this *Act* is entitled to compensation for that damage from the data controller or the data processer."

11. Section 64 thereof gives an aggrieved party by a decision of the Data Protection Commissioner right to appeal to the High Court. The framers of the said legislation envisaged and purposed that the High Court would be the Appeal Court and not the primary court, as the plaintiff would wish the court to find.

12. In the case of *Mwangi & Another v. Naivasha County Hotel t/a Sawela Lodges* [2022] eKLR in very similar circumstances to this suit, wherein the plaintiff had filed its case at the High Court held that:"…I find that the petitioners have not

sufficiently demonstrated why the petition ought to be exempted from the exhaustion rule. I am inclined to find that the petition is barred by the doctrine of exhaustion…The preliminary objection dated 12th August, 2021 is hereby upheld and the petition is hereby struck out with costs to the Respondent"

13. The above decision is a cognition of the application of Article 159 (2) of the 2010 Constitution that promotes the principles that shall guide the courts in exercising their judicial authority by promoting alternative form of dispute resolution in their various forms.

14. Further, the court having considered the remedies sought by the plaintiff in the suit finds that the said remedies are provided under Section 65 of the Data Protection Act. The court begs to differ from the plaintiff's interpretation of Section 65 where it submits that the remedies sought by the plaintiff cannot be fully compensated by the Data Protection Commissioner, citing Article 31 and 38 of the *Constitution* stating that fundamental right to privacy and human dignity underpinned thereon can only be granted by the High Court, and not by the Data Protection Commissioner for lack of such powers.

15. To emphasize the above, the decision of the Court of Appeal in *Samuel Cheratsi Munga James Marangu M'muketyha & 1750 others* (Civil Appeal 10 of 2016) [2015] KECA 304, and cited with authority in the *Mwangi & Another v. Naivasha Hotel Sawela Lodges* (*supra*) held 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."

16. For the foregoing, just as in the above "Sawela lodges decision'', the court finds that the plaintiff has not sufficiently demonstrated why the suit ought to be exempted from the exhaustion rule as the Data Protection Commission is empowered under the Act to interrogate an aggrieved party and issue the remedies sought in the plaint in the instant suit.

17. Where there is a clear procedure for redress of any particular grievance as prescribed by the *Constitution* or an Act of Parliament that procedure should be strictly followed, and there are good reasons for special procedure as was elucidated by the Court of Appeal in *Speaker of National Assembly v. Karume* [1992] KLR 21.

18. The upshot of that is that the Preliminary Objection mounted by the Defendant by the Notice of Preliminary Objection dated 27/09/2024 is upheld.''

The above-cited cases are on all fours with the matter before the court. In those cases, this court held that the regulatory regimes for privacy and media are elaborate and intended to be first tried. It downed its tools and struck out those suits, with costs, as the Petitioners had alternative statutory or civil remedies available to them. The Respondent herein is seeking a similar relief-the striking out of this Petition.

21. The Respondent submits that as held by the Court of Appeal in **Speaker of the National Assembly -v- James Njenga Karume (1992) eKLR**, 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. In that case, the law was stated as follows:-

''In our view, there is considerable merit in the

submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.''

22. The Respondent submitted that costs are awarded at the discretion of the court and whilst the court has an absolute and unfettered discretion to award or not award them, that discretion must be exercised judicially. Please see **Jasbir Singh Rai and 3 Others v Tarlochan Singh Rai and 4 Others [2014] eKLR** where the Supreme Court further held that the awarding of costs is not to penalize the losing party but is a means for the successful litigant to be recouped for the expenses to which he has been put in fighting an action.

23. The Respondent submits that other principles to be considered in the awarding of costs are as stated in **Republic -v- Communication Authority of Kenya and another *ex-parte* Legal Advice Centre aka Kituo Cha Sheria [2015] eKLR** in which the law was stated as follows:-

In determining the issue of costs, the Court is entitled to look at the conduct of the parties, the subject of litigation and the circumstances which led to the institution of the legal proceedings and the events which eventually led to their termination. In other words, the court may not only consider the conduct of the party in the actual

litigation, but the matters which led up to litigation. See Hussein Janmohamed & Sons vs. Twentsche Overseas Trading Co. Ltd [1967] EA 287 and *Mulla (12th Edn) P. 150.*

The Respondent further submits that it has been constrained to defend these proceedings without any probable cause for the reasons stated above. The suit is invalid and a non-starter and should be struck out with costs to it.

24. For the foregoing reasons, the Respondent urges this court to down its tools and hold that it has no jurisdiction to determine the matter before it and consequently, strikes out the said Petition. It also seeks the costs of both the Petition and Notice of Preliminary Objection before this court.

25. The Petitioner's submissions are dated 15th September 2025. The Petitioner raised three issues for determination inter alia; whether this Honourable court has jurisdiction to hear and determine the Petition; whether the doctrines of exhaustion and constitutional avoidance apply to this case and whether the preliminary objection meets the threshold set out in Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696.

25. On the first issue, reliance was placed on Article 165 (3) (b) of the Constitution which vests the High Court with the jurisdiction to hear and determine questions involving the violation of fundamental rights and freedoms. Article 22 (1)

entitles every person to institute proceedings where a right or fundamental freedom has been denied, violated or infringed. Article 23(1) gives the High Court the power to hear and determine applications relating to the enforcement of fundamental rights and freedoms. In **Kenya Ports Authority v William Odhiambo Ramogi & 8 Others [2019] eKLR the** court held as follows:

> ***"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 relationship between the different level of government."***

Again, in **Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others [2012] eKLR,** the Supreme Court affirmed that jurisdiction flows from the Constitution or statute and that a court cannot arrogate to itself jurisdiction exceeding that which is conferred by law. The Petitioners have properly invoked this court's jurisdiction in respect of violations of their constitutional rights to privacy, dignity and equality under Article 27, 28, 29(d), 31 and 41 of the Constitution.

The Petitioners maintain that their rights were infringed and that the reliefs that they have sought include declarations, damages and injunctive orders which can

only be granted by the High Court under Article 23 (3) of the Constitution.

26. As regards the second issue, it was submitted that whereas the doctrine of exhaustion and constitutional avoidance requires that where an alternative forum exists the same to be approached before moving to the courts, the principle is not absolute and does not oust the jurisdiction of this court in view of the fact that the alternative forum is inadequate and incapable of granting the reliefs sought. In the case of **R v Independent Electoral and Boundaries Commission (IEBC) & Others ex parte, The National Super Alliance Kenya (NASA),** the High Court, after a thorough review of local jurisprudence, outlined the first exception as follows:

> *From the decision, two key principles emerge. Although the exceptions to the exhaustion rule are not strictly defined, courts must carefully analyze the facts of each case, the relevant regulatory framework, the nature of the interests involved including the level of public interest and the complexity of the issues to decide whether an exception should apply.* As recognized by the Court of Appeal in the Shikara Limited case, the High Court may, in exceptional situations, determine that requiring exhaustion would not uphold the constitutional or legal values and may thus allow the matter to proceed before it.

It was contended that the doctrine although applicable in exceptional circumstances, the High Court has always been of the view that allowing the principle would undermine constitutional or legal principles and therefore permits the matters to go to trial because the court retains the authority to hear legitimate grievances from parties who lack proper access before those statutory forums. Learned counsel faulted the Respondent for trying to push the Petitioners to take the claims to the office of the Data Protection Commission. However, under Section 8(f) and 56 of the Data Protection Act 2019 the commissioner's role is limited to investigation and issuance of enforcement notices and hence the commissioner lacks power to grant constitutional remedies such as declarations, injunctions or damages contemplated under Article 23(3) of the Constitution. Hence, the Respondent's suggestion would deny the Petitioners meaningful access to justice under Article 48 of the Constitution.

27. As regards the third issue, it was submitted that the preliminary objection fails to meet the threshold held in Mukisa Biscuit case (supra). In that case, it was held that a preliminary objection is raised on the assumption that all facts presented by the opposite party are correct and therefore the same cannot be raised where facts need to be proved or clarified or where the issue calls for the exercise of judicial discretion. In the case of **Oraro v Mbaja [2005] 1 KLR 141,** Ojwang J reaffirmed that the Mukisa Biscuit principle, emphasizing that a true preliminary objection must

rest entirely on a point of law, free from any factual disputes requiring evidence. Any objection that relies on contested facts or demands proof cannot properly be regarded as a preliminary objection.

The objection raised by the Respondent invites the court to examine factual issues, including whether the Data Commissioner provides an adequate forum and whether the petition raises connotational questions. These are matters requiring evidence and judicial evaluation. The objection therefore fails the Mukisa test as it does not raise a pure point of law. It is improperly brought and is a disguised attempt to have the petition summarily dismissed without a hearing on merit.

28. It was finally submitted that this court has jurisdiction to hear and determine the petition and that the doctrines of exhaustion and constitutional avoidance are inapplicable to the facts of this case and that the Preliminary Objection fails to meet the legal threshold established in Mukisa Biscuit case (supra). Learned counsel urged the court to dismiss the Respondent's Preliminary Objection dated 15/9/2025 with costs and to direct that the petition proceeds to hearing on merit.

29. I have considered the preliminary objection as well as the response and submissions together with the authorities cited. I find the issue for determination is whether the preliminary objection has merit.

30. The preliminary objection that has been raised by the Respondent must meet the threshold in the case of **Mukisa Biscuit Manufacturing Ltd vs. West End Distributors Ltd [1969] EA 696**.

A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point 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' . . ."

From the foregoing, a preliminary objection must rest entirely on a point of law free from any factual disputes requiring evidence. Any objection that relies on contested facts or demands proof cannot properly be regarded as a preliminary objection. It is the contention of the Petitioners that the Respondent's preliminary objection raises factual issues which is against the threshold in the Mukisa Biscuit case (supra). On the other hand, the Respondent maintains that its preliminary objection

relates to the jurisdiction of this court to entertain the petition on the ground that the Petitioners have not utilized the doctrine of exhaustion and constitutional avoidance.

The Supreme Court in IEBC Vs Jane Cheperenger & 2 Others [2015] eKLR observes as follows:

"…The true preliminary objection serves two purposes of merit; firstly, it serves as a shield for the originator of the objection-against the profligate deployment of time and other resources. And secondly, it serves the public cause of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword for winning a case otherwise destined to be resolved judicially and on the merits.''

31. As the issue in contention relates to the jurisdiction of the court, guidance must be had in the celebrated case of the **Owners of the Motor Vessel Lilian 'S' v Caltex Oil Kenya Ltd [1989] KLR 1** where Nyarangi JA famously stated:

'' 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 its tools in respect of the

matter before it the moment it holds the opinion that it is without jurisdiction.''

32. The Petitioners have placed reliance on Article 165 (3) (b) of the Constitution which vests the High Court with the jurisdiction to hear and determine questions involving the violation of fundamental rights and freedoms. Article 22 (1) entitles every person to institute proceedings where a right or fundamental freedom has been denied, violated or infringed. Article 23(1) gives the High Court the power to hear and determine applications relating to the enforcement of fundamental rights and freedoms. In **Kenya Ports Authority v William Odhiambo Ramogi & 8 Others [2019] eKLR** the court held as follows:

> ***"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 relationship between the different levels of government."***

Again, in **Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others [2012] eKLR,** the Supreme Court affirmed that jurisdiction flows from the Constitution or statute and that a court cannot arrogate to itself jurisdiction exceeding that which is conferred by law.

The Petitioners maintained that they have properly invoked this court's jurisdiction in respect of violations of their constitutional rights to privacy, dignity and equality under Article 27, 28, 29(d), 31 and 41 of the Constitution. They maintain that their rights were infringed and that the reliefs that they have sought include declarations, damages and injunctive orders which can only be granted by the High Court under Article 23 (3) of the Constitution. The Petitioners thus urged the court to reject the version of the Respondent and allow the petition to proceed to hearing.

30. The Respondent has, vide the preliminary objection, raised the contention that the Petition is barred by the doctrine of constitutional avoidance and the doctrine of exhaustion. The Respondent is of the view that the Petitioners should have exhausted other available remedies such as those provided by the Data Protection Act and could only approach this court by way of an appeal. In the cases of **Patron IDPS Gusii Regional Steering Committee Kisii & Nyamira Counties Rev Brethren Nemwel Momanyi v Egesa FM Radio Programmer, Kisii & another; Managing Director Royal Media Citizen (Third party) (Constitutional Petition 2 of 2022) [2024] KEHC 1883 (KLR) (29 February 2024) (Ruling)** and **Hakizimana Abdoul Abdulkarim v Arrow Motors (EA) Ltd & Another [2017] eKLR,** the courts considered what a constitutional petition entails as follows:

> **"A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute..."**

31. A perusal of the pleadings in the petition reveals that the cause of action appears to be defamation and breach of the of sub-judice rule and not any matter that requires the interpretation of the Constitution. It is noted that defamation is a civil tort that can be determined in a civil suit whereas any commentary or publication relating to active judicial proceedings that would bring the Court into disrepute or substantively prejudice or undermine the administration of justice amounts to breach of the sub-judice rule and is punishable, for contempt of court, by the court handling the matter in issue.

32. The issue of constitutional avoidance was discussed by the Supreme Court in **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR explicated at paragraph [256]** where it was held: -

> **"… The principle of avoidance entails that a court will not determine a constitutional issue when a matter may properly be decided on another basis."**

Even though the doctrine of constitutional avoidance does not strip this Court of the jurisdiction to hear and determine

this matter, it implores the court to restrain itself from hearing a matter where there exists another appropriate forum that can hear and determine the matter effectively. Concerning alternative remedy in lieu of constitutional remedies**,** Chacha J **in Godfrey Paul Okutoyi & Others vs Habil Olaka & Another (2018) eKLR** stated at paragraph 65 as follows:

> **"It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a court of law in the manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a Constitutional petition. A party should only file a constitutional petition for redress of a breach of the Constitution or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure."**

33. Again, in **Grays Jepkemoi Kiplagat v Zakayo Chepkoga Cheruiyot [2021] eKLR** Mutungi J held as follows:-

“I need to observe that parties are increasingly filing matters that are essentially civil matters and christening the same as Constitutional Petitions which is not proper. Where there is the alternative remedy of filing a suit in the ordinary civil courts, a party ought not to invoke the jurisdiction of the Constitutional Court.” - (See also the case of Abraham Kaisha Kanziku -vs- Governor of Central Bank & others [200] eKLR).This Court fully associates itself with the persuasive decisions of the learned justices in the above referenced cases and i agree with the Respondent that matters that do not call for the Court’s Constitutional interpretative mandate under the Bill of Rights should not be disguised as Constitutional Petitions seeking enforcement of the Bill of Rights. The constitutional jurisdiction of the court is a very specific jurisdiction which is not open to general claims. It is invoked pursuant to Articles 22 (1) and 23 of the Constitution by filing a Petition… The doctrine of constitutional avoidance frowns upon the practice of bringing ordinary disputes to the constitutional court. (See Mutyaene v KCB Bank Ltd & Another (Petition 412 of 2020) [2023] KEHC 2205 (KLR) (Constitutional and Human Rights) (17 March 2023) (Judgment)). From the foregoing

analysis, this Court has come to the conclusion that the Preliminary Objection is merited. The same is upheld and the Petition dated 22nd June, 2021 is struck out with costs to the 1st Respondent and the 3rd Party.''

34. Also in **Mutyaene v KCB Bank Ltd & another (Petition 412 of 2020) [2023] KEHC 2205 (KLR) (Constitutional and Human Rights) (17 March 2023) (Judgment)**, it was held: -

''32. … the doctrine of constitutional avoidance does not divest this Court of the jurisdiction to hear and determine this matter. What the doctrine means is that while this Court can indeed hear and determine the matter, it restrains itself from hearing the same because there exists another appropriate forum that can hear and determine the matter effectively…''

14. From the foregoing cases, it is clear that where another legal course is available, through which a matter can be properly decided and which can give an applicant the relief he seeks, such course should be pursued and the constitutional court should decline to determine a constitutional issue in such matter. In **Uhuru Muigai Kenyatta v Nairobi Star Publications Limited [2013] eKLR** Lenaola, J (as he then was) stated: -

''I need say no more. Where there is aremedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in Haco Industries (supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in AG vs S.K. Dutambala Cr. Appeal No.37 of 1991 (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions.The complaint in this case is not so serious as to attract Constitutional sanction.The prayers sought by the Petitioner in the Petition are civil in nature with civil remedies and could have readily been redressed in a civil court. The Petitioner ought to have filed a civil suit as opposed bypassing the same and coming to the constitutional court.Having found that there exists a remedy in civil law, which the Petitioner ought to have pursued, this Court must refuse to be bogged down by a matter which is so plainly provided for under statute. Having considered the foregoing, I find and hold that the Petitioner's claim which is founded on his relationship with the Bank as its customer is a plain civil claim. Equally, the compensation contemplated in Article 23 of the Constitution may only be available to a

claimant who proves denial, violation or infringement, or threat to a right or fundamental freedom in the Bill of Rights under Article 22. Accordingly, the Petition is not properly laid before this Court as a constitutional issue. As such, this Court invokes the doctrine of avoidance and declines jurisdiction.''

35. Again, in the case of **Godfrey Paul Okutoyi & others v Habil Olaka & Another [2018] eKLR** Chacha J was of a similar view where he stated thus: -

"65. It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a court of law in a manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a constitutional petition. A party should only file a constitutional petition for redress of a breach of *the Constitution* or denial, violation or infringement of, or threat to a right or

fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure."

36. It is noted that the Petitioners herein contend that their rights should not be curtailed by the application of the above doctrine as they have raised constitutional rights violation and that this court should not be hamstrung but to declare that it has jurisdiction to determine the matter since the Data Protection Act does not have mechanisms to grant the orders sought in the petition.

37. Even though the petitioners have urged this court to determine the matter, it is noted that the instant petition seems to raise allegations which lie mainly in the civil claim of tort. I find the Petitioners' cause of action could have adequately been remedied by conventional civil law and not as a constitutional grievance. I find that the jurisdiction of this court was improperly invoked and therefore this court should decline the invitation to deal with the petition further as it can be seen that the remedies sought by the Petitioners are civil in nature and relate to an alleged publication done by the Respondent and that the Petitioners' remedy lies in the law of tort and in a suit filed before the Civil Division of the high court and not this court. The Petitioners ought to have started of with the procedures provided for in the Data Protection Act from where they could approach this court on appeal by way of a

judicial review and that if the petitioners wished to move to the court directly, then the appropriate place would be a civil court.

38. It is noted that the Respondent has relied on the provisions of sections 8 (f) and 56 of the Data Protection Act which provide the alternative remedy as follows: -

8. Functions of the Office

(1) The Office shall—(f) receive and investigate any complaint by any person on infringements of the rights under this Act.

56. Complaints to the Data Commissioner

(1) A data subject who is aggrieved by a decision of any person under this Act may lodge a complaint with the Data Commissioner in accordance with this Act.

(2) A person who intends to lodge a complaint under this Act shall do so orally or in writing.

(3) Where a complaint made under sub-clause (1) is made orally, the Data Commissioner shall cause the complaint to be recorded in writing and the complaint shall be dealt with in accordance with such procedures as the Data Commissioner may prescribe.

(4) A complaint lodged under sub-clause (1) shall contain such particulars as the Data Commissioner may prescribe.

(5) A complaint made to the Data Commissioner shall be investigated and concluded within ninety days.

39. In **Arunda v Office of the Data Protection Commissioner & Another; Data Privacy and Governance Soccicty of Kenya (Interested Party) (Constitutional Petition E010 of 2025) [2025] KEHC 12262 (KLR) (Constitutional and Human Rights) (12 August 2025) (Judgment)**, the court stated the law as follows as regards the said **Data Protection Act** and the **Data Protection (Complaints Handling Procedure and Enforcement) Regulations (Legal Notice 264 of 2021):**-

> **1. This Petition raises a significant constitutional question regarding the jurisdiction of the Office of the Data Protection Commissioner (ODPC) under the *Data Protection Act, 2019* (DPA) to investigate and adjudicate complaints involving alleged breaches of the right to privacy guaranteed under Article 31 of the *Constitution*. The Petitioner seeks a declaration that Section 56 of the DPA and Regulation 14 (5) of the Data Protection (Complaints Handling and Enforcement Procedures) Regulations, 2021 are unconstitutional to the extent that they vest the ODPC with powers akin to those of a judicial authority.**

2. The Petition further challenges the ODPC's authority to award remedies, including compensation, for privacy violations, arguing that such powers belong exclusively to the High Court under Article 23 (1) and 165 (3) (b) of the *Constitution*.

…..

22. Consequently, this Court is not persuaded by the Petitioner's argument that the ODPC unlawfully usurps the High Court's jurisdiction under Articles 23 (1) and 165 (3) (b). The ODPC acts within the statutory framework of the DPA, and its determinations are administrative in nature, subject to judicial review. There exists a clear distinction between the adjudicative role of the High Court in constitutional enforcement and the administrative redress mechanisms facilitated by the ODPC.

23. In conclusion, the Court finds that the ODPC does not usurp the jurisdiction of the High Court. Rather, it provides an important, constitutionally permissible mechanism for the realization of the right to privacy under Article 31, subject to the supervisory jurisdiction of the High Court as preserved under Section 64 of the Data Protection Act.

.....

47. Accordingly, this Court finds that the Petitioner prematurely approached the High Court in contravention of the doctrine of exhaustion. He neither utilized the ODPC's mechanisms nor sought exemption from the statutory obligation to do so. No exceptional circumstances have been shown to exist, and the available administrative remedy is adequate, effective, and subject to judicial oversight.

48. In conclusion, the doctrines of exhaustion and constitutional avoidance apply to this Petition. The Petitioner's direct approach to the High Court is procedurally improper and inconsistent with the legal framework established by the Data Protection Act and the Fair Aadministrative Actions Act. The Petition is therefore premature.

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60. From the foregoing, the Court finds that the Petition is without merit. The legal architecture provided by the Data Protection Act, as currently framed, is sufficiently constitutional, functional, and necessary for the effective enforcement of

the right to privacy under Article 31 of the *Constitution*.

40. From the foregoing observations, it is clear that this Petition is barred by the doctrine of exhaustion as held by this court in the case of **Motiga –v- Lugalia & 4 others (Petition E328 of 2023) [2025] KEHC 275 (KLR)** wherein the court stated as follows: -

> "**66. The doctrine of avoidance precludes the Court from invoking the *Constitution* to settle controversies that can conveniently be dealt with on any other legal basis other than the *Constitution*. Disputes that may appropriately be resolved on the basis of a statute or regulatory regime or other established legal principles should thus not be disguised and tried as Constitutional litigations.**
>
> **.....**
>
> **69. Turning to the present Petition, the Respondents opposed the Petition for offending the doctrine of constitutional avoidance by pointing out that the cause of action is a claim for defamation which can be fully and effectively litigated as a tortious claim either under the *Defamation Act* or as a common law claim in an ordinary civil suit.**

70. The Petitioner however maintained that the Petition raises constitutional questions on account that although it alleged defamation by the 1st and 2nd Respondents for publishing the offensive article against the Petitioner; there was also the element of access to information that could enable the Petitioner identify the 2nd Petitioner which only the 3rd and 4th Respondent could supply hence *Defamation Act* was inadequate in scope of remedies that it could order.

71. It is manifest from the reading of this Petition the essential complaint is the alleged publication of the defamatory material against the Petitioner. In any case, even if the matter involves the need for supply of information under Article 35 of the *Constitution*, there is an elaborate procedure that is provided for under *Access to Information Act* prescribing how this is to be done and consequences of failure to facilitate the access to information when the conditions set out for supply of information have been met. In short, this Court will not necessarily have to turn to the *Constitution* to resolve the two main issues raised by the Petitioner in this Petition. That will require the *Constitution* to resolve. In other words, the

resolution of the issues presented through this Petition will only require interpretation of the relevant statutes or principles of common law rather than the *Constitution* as the claim is founded on the tort of defamation and the issue of access to information is also adequately covered in the *Access to Information Act*. I can thus comfortably conclude that this Petition does not raise any Constitutional question that would compel the Court to resort to the *Constitution* to resolve.

72. This leads me into making the finding that the dispute that this Petition presents is not a Constitutional controversy since it can be determined without application of the *Constitution*. Its resolution squarely lies in the application of the tort law and the *Access to Information Act*.

73. It is impermissible for a litigant to found a cause of action on the *Constitution* when the same can be founded on legislation or other established legal principles.''

41. The Respondent further relied on the case of **Ndung'u & Another –v- Wachira & Another (Constitutional Petition E047 of 2025) [2025] KEHC 7265 (KLR)**, in which this court stated as follows: -

‘’1. This ruling concerns Constitutional Petition E047 of 2025 and arises from the Petitioners’ claims that the Respondents published their personal information and images on digital platforms without consent, violating the Petitioners’ rights to privacy (Art. 31) and dignity (Art. 28) under the *Constitution*. The Petitioners filed two interlocutory applications–one dated 31/01/2025 seeking injunctive relief (removal of the impugned online content and restraint on further publication) and another dated 11/02/2025 seeking leave to amend or supplement the petition.

2. The Respondents filed a Preliminary Objection on 21/02/2025, contending that the Constitutional Petition herein is improperly before this Court as they are alternative statutory or civil remedies available to the Petitioners.

……

8. Applying these principles, the Court must ask whether the Petitioners indeed had adequate alternative avenues that they failed to use. The *Data Protection Act, 2019* specifically provides a statutory process for privacy complaints. Under Section 56(1) of that Act, an aggrieved data

subject may lodge a complaint with the Data Protection Commissioner if a data controller or processor has breached the Act. Any decision by the Commissioner can subsequently be reviewed by the courts, but only after the internal process is pursued.

9. In this case, the Respondents contend that the Petitioners never filed any complaint under the Data Protection Act despite the alleged processing of their "personal data" (their names, images and information). Similarly, the Media Act provide for recourse against journalistic or media misdeeds. The petition references the Media Act, implying that a complaint could have been lodged with the Media Council's Complaints Commission. In addition, civil tort remedies are available: the Petitioners could have sued the Respondents for defamation, or for the common-law wrong of invasion of privacy. As our courts have recognized, defamation is "a civil wrong or tort, pure and simple, for which the common law remedy is an action for damages", and privacy violations by private parties are typically addressed by ordinary civil actions or by government enforcement (as in criminal libel, though that has now been largely struck down).

10. The Petitioners have not pointed to any special statutory exemption or other reason why these remedies are inadequate or unavailable. On the contrary, they seek extraordinary relief in the constitutional court as if it were the first port of call. The Court notes that this is precisely the situation addressed in Odhiambo & Another v National Police Service & 10 Others(2023), where petitioners attacked a government tender award. The High Court held that the Public Procurement Act had established an elaborate review and appeal process, which the petitioners had ignored, and struck out the petition as an abuse of process. That decision, though in the procurement context, restated the general rule: when a statutory scheme governs dispute resolution, parties must invoke those procedures. Here too, the regulatory regimes for privacy and media are elaborate and intended to be first tried.

11. In short, the Petitioners have not shown exceptional circumstances to bypass these alternatives. The mere fact that the grievance involves fundamental rights does not automatically entitle them to invoke constitutional jurisdiction. To the contrary, the Supreme Court has cautioned that constitutional litigation should not be used to circumvent ordinary law: one may sue a state actor for a

constitutional tort, but private disputes with personal overtones are ordinarily resolved by civil means. The Petitioners' claim is essentially that the Respondents–private individuals–invaded their privacy. The constitutional right to privacy is indeed "guaranteed under Article 31", and it is defined as "the right of the individual to be protected against intrusion into his personal life… or by publication of information". But that right, especially as against non-state actors, has primarily been enforced through tort law or administrative sanctions. The High Court in John Omilia v Attorney General explained that such a "violation of one's constitutional rights by a government servant" can give rise to a "constitutional tort" remedy, but that is a remedy against the state or its agents. Here the Respondents are private entertainers, not acting under any public authority. While Article 20 (1) does bind all persons to the Bill of Rights, the exercise of jurisdiction in such cases still respects alternative processes.

……..

18. The weight of authority therefore favours the Respondents. The Petitioners have not exhausted statutory alternatives under Data Protection or Media Council, nor have they initiated civil proceedings for defamation or privacy. No

immediate urgency or public interest has been shown that would justify this Court's departure from normal channels. In the absence of any special justification, the constitutional avoidance doctrine dictates that this matter be left to the appropriate forum. Accordingly, the Respondents' Preliminary Objection is upheld. The Petition cannot proceed in its present form. The preliminary objection has merit and is allowed and therefore, this petition is struck out.''

42. Also in the case of **Karani –v- Kenya Private Sector Alliance (Civil Case E120 of 2024) [2025] KEHC 3788 (KLR) (Civ) (27 March 2025) (Ruling)**, the court stated as follows: -

''9. The plaintiff expresses clearly that his complaint by the suit that his right to privacy and human dignity were breached by the defendant. Agreed, the Data protection Act did not intend to prevent parties from seeking recourse of their fundamental rights before a court of law, and particularly the High Court, which has original jurisdiction expressed at Article 165(3) of the *Constitution*.

10. However, with the coming into force, the *Data Protection Act* 2019, is the first port of call by dint of Section 65 of the *Act* that provides:-"a

person who suffers damage by reason of a contravention of a requirement of this *Act* is entitled to compensation for that damage from the data controller or the data processer."

11. Section 64 thereof gives an aggrieved party by a decision of the Data Protection Commissioner right to appeal to the High Court. The framers of the said legislation envisaged and purposed that the High Court would be the Appeal Court and not the primary court, as the plaintiff would wish the court to find.

12. In the case of *Mwangi & Another v. Naivasha County Hotel t/a Sawela Lodges* [2022] eKLR in very similar circumstances to this suit, wherein the plaintiff had filed its case at the High Court held that:"…I find that the petitioners have not sufficiently demonstrated why the petition ought to be exempted from the exhaustion rule. I am inclined to find that the petition is barred by the doctrine of exhaustion…The preliminary objection dated 12th August, 2021 is hereby upheld and the petition is hereby struck out with costs to the Respondent"

13. The above decision is a cognition of the application of Article 159 (2) of the 2010 Constitution that promotes the principles that

shall guide the courts in exercising their judicial authority by promoting alternative form of dispute resolution in their various forms.

14. Further, the court having considered the remedies sought by the plaintiff in the suit finds that the said remedies are provided under Section 65 of the Data Protection Act. The court begs to differ from the plaintiff's interpretation of Section 65 where it submits that the remedies sought by the plaintiff cannot be fully compensated by the Data Protection Commissioner, citing Article 31 and 38 of the *Constitution* stating that fundamental right to privacy and human dignity underpinned thereon can only be granted by the High Court, and not by the Data Protection Commissioner for lack of such powers.

15. To emphasize the above, the decision of the Court of Appeal in *Samuel Cheratsi Munga James Marangu M'muketyha & 1750 others* (Civil Appeal 10 of 2016) [2015] KECA 304, and cited with authority in the *Mwangi & Another v. Naivasha Hotel Sawela Lodges* (*supra*) held 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."

16. For the foregoing, just as in the above "Sawela lodges decision'', the court finds that the plaintiff has not sufficiently demonstrated why the suit ought to be exempted from the exhaustion rule as the Data Protection Commission is empowered under the Act to interrogate an aggrieved party and issue the remedies sought in the plaint in the instant suit.

17. Where there is a clear procedure for redress of any particular grievance as prescribed by the *Constitution* or an Act of Parliament that procedure should be strictly followed, and there are good reasons for special procedure as was elucidated by the Court of Appeal in *Speaker of National Assembly v. Karume* [1992] KLR 21.

18. The upshot of that is that the Preliminary Objection mounted by the Defendant by the

Notice of Preliminary Objection dated 27/09/2024 is upheld.''

The above-cited cases are similar with the present Petition and in which the courts held that the regulatory regimes for privacy and media are elaborate and intended to be first tried by parties before approaching the courts and that the said courts downed their tools and struck out those suits as the Petitioners had alternative statutory or civil remedies available to them.

43. After analyzing the rival submissions, iam persuaded by the decision of the Court of Appeal in **Speaker of the National Assembly -v- James Njenga Karume (1992) eKLR**, (supra) where it held that 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.

44. As it has transpired that there are other remedies available to the Petitioners such as the procedure for redress under the Data Protection Act and thereafter move to this court as an appeal by way of Judicial Review or file claims for damages in a civil court, it was improper for the Petitioners to fashion their claim as a constitutional petition when it is clear from the pleadings that they seek for damages for intrusion of their privacy and forced labour and servitude which claims could properly be determined by a civil court. Hence, this court must down its tools and hold that it has no

jurisdiction to determine the matter before it and must proceed to strike out the same.

45. In view of the foregoing observations, it is my finding that the Respondent's notice of preliminary objection dated 25/9/2025 has merit. The same is allowed. The Petitioners' petition dated 10/6/2025 is struck out. Each party to bear their own costs.

Dated and delivered at Siaya this 3rd day of December 2025.

D.KEMEI
JUDGE

In the presence of:

N/A Felix Oketch…….for Petitioners

Manyori……for Respondent

Maurine……Court Assistant