REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

JUDICIAL REVIEW CASE NO. E007 OF 2025

IN THE MATTER OF AN APPLICATION FOR LEAVE TO FILE JUDICIAL REVIEW FOR ORDERS OF MANDAMUS, CERTIORARI & PROHIBITION

AND

IN THE MATTRER OF ARTICLES 22, 23, 47, 50 & 165(6) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

SHADDY CHRISPINE ODHIAMBO……1ST APPLICANT

AYIEMBA STEPHEN OMONDI……2ND APPLICANT

VERSUS

JOMO KENYATTA UNIVERSITY OF AGRICULTURE & TECHNOLOGY…… ……RESPONDENT

R U L I N G

Brief facts

1. Coming up for determination is the respondent's Notice of Preliminary Objection dated 21st May 2025 on the grounds that the

application is fatally defective and offends the provisions of Section 9(2) and (3) of the Fair Administrative Action Act, 2015 as the applicants have failed and neglected to exhaust the respondent's existing mechanisms of appeal before approaching this Honourable court as required by **Section 22(vi)(g)of the Jomo Kenyatta University of Agriculture and Technology Statues, 2014** by failing to appeal the decision of the disciplinary committee to the Vice Chancellor. The respondent argues that under the doctrine of exhaustion, continued pendency of the instant application before the court is misguided and offends Section 22(vi)(g) of the Statutes. Thus, the current court lacks the requisite jurisdiction to entertain the matter.

2. Parties put in written submissions.

The Respondent's Submissions

3. The respondent refers to **Article 9 of the Fair Administrative Action Act** and the cases of **Geoffrey Muhinja & Another vs Samuel Muguna Henry & 1756 Others (2015) eKLR** and **Waity vs Independent Electoral & Boundaries Commission & 3 Others [2019] KESC 54 (KLR)** and submits where a dispute resolution mechanism exists outside courts, the same must be exhausted before the jurisdiction of the court is

invoked. The respondent argues that the *ex parte* applicants did not exhaust the remedies as they did not appeal as provided.

The *Ex-parte* Applicants' Submissions

4. The *ex-parte* applicants submit that they appealed to the Vice Chancellor within the stipulated time frame but the respondent blatantly failed to act upon, acknowledge or respond to the said appeal until on 19th June 2025 when the appeal was heard which was way after filing the current suit and notice of preliminary objection. Upon hearing of the appeal, they were subsequently notified by the respondent that their appeal was not successful and thus they stand expelled from school.

5. Relying on the case of **Republic vs National Environment Management Authority]2011] eKLR**, the *ex parte* applicants submit that the doctrine of exhaustion is not absolute as courts have held that judicial review may be entertained despite the existence of internal mechanisms where the process is ineffective, it has unreasonably delayed or where invoking it would cause undue hardship as is the instant case. The respondent's silence and failure to respond to their appeal for an unreasonable period and subsequently dismissing their appeal constitutes a constructive denial of justice.

6. The *ex parte* applicants refer to the case of **Republic vs District Land Registrar, Bondo & 2 Others; Kayongo (*ex parte* applicant); Owala (Interested Party) [2024] KEELC 13798 (KLR)** and submits that respondent's failure to act on their appeal violates Article 47 of the

Constitution thus justifying recourse to the current court under Article 23 and 165(6) and (7) of the Constitution.

The Law

Whether the preliminary objection is sustainable

7. The case of **Mukisa Biscuits Manufacturing Ltd vs West End Distributors (1969) EA 696** is notorious on the issue of what constitutes a preliminary objection. The court observed thus:-

…..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.

8. Sir Charles Newbold P. stated:-

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The

improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.

9. Similarly the Supreme Court in the case of **Hassan Ali Joho & Another vs Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR** held that:-

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.

10. Further in the case of **Hassan Nyanje Charo vs Khatib Mwashetani & 3 Others, [2014] eKLR** the court held that:-

Thus a preliminary objection may only be raised on a 'pure question of law.' To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.

11. It is trite that preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.

12. The respondent argues that the instant court lacks jurisdiction to hear the *ex parte* applicants' application as they failed to comply with **Section 22(vi)(g) of the Jomo Kenyatta University of Agriculture and Technology Statutes, 2014**. It is my considered view that the matters raised in the preliminary objection properly fall within the ambit of pure points of law. The issue of the doctrine of exhaustion goes to the heart of the court's jurisdiction and is determinable on the basis of the pleadings alone, without the need for ascertainment of contested facts or the exercise of discretion.

13. The doctrine of exhaustion requires a party to exhaust any alternative dispute resolution mechanism provided by statute and/or law before resorting to courts. The Court of Appeal in the case of **Geoffrey Muthinja & Another vs Samuel Muguna Henry & 1756 Others [2015] eKLR** reiterated on the doctrine of exhaustion and held as follows:-

We see this as the crux of the matter in this and similar cases. 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 the for a of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. 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 of courts. This accords with article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution.

14. Similarly in the case of **William Odhiambo Ramogi & 3 Others vs Attorney General & 4 Others; Muslims for Human Rights & 2 Others (Interested parties) [2020] eKLR,** a five judge bench held as follows:-

The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all,
diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts…

15. The Court went on to outline the exceptions to the rule as follows:-

As observed above, the first principle is that the High court may, in exceptional circumstances consider and determine that the exhaustion

requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J. in Night Rose Cosmetics (1972) Ltd vs Nairobi County Government & 2 Others [2018] eKLR.

In the instant case, the petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the
claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights

language as a pretext to gain entry to the court, it is not barred by the doctrine of exhaustion.

16. In the instant case, **Section 22(vi)(g) of the Jomo Kenyatta University of Agriculture and technology Statutes** provides:-

The Committee shall have the power to impose any one or more of the following measures and/or penalties depending on the nature and gravity of the offences committed and the evidence called in support thereof.

Students have the right to appeal to the Vice Chancellor against the decision of the disciplinary committee if he considers himself aggrieved by the said decision and such appeals will be made in wiring within fourteen (14) days of the date of communication of the Committee's decision.

17. The respondent annexed evidence of a letter dated 10th January 2025 requiring the ex-parte applicants' attendance before the disciplinary committee scheduled for 29th January 2025. A preliminary objection must be purely based on a point of law and not evidence. Evidence of this nature can only be introduced in the pleadings of the parties. A court hearing a preliminary objection shall not entertain evidence in way of letters, affidavits or otherwise.

18. The *ex parte* applicants state that they filed an appeal to the Vice Chancellor but it was not acknowledged. Further, it took long to be heard and they decided to file these judicial review proceedings. It was much later that they learnt that the appeal had been heard and dismissed. In other words, the *ex parte* applicants argue that they followed the laid down procedure but there was a delay. On the part of the *ex parte* applicant, the late hearing of the appeal points to these proceedings having been filed prematurely.

19. To the preliminary objection, the respondent has annexed letters which is evidence. It is trite that a preliminary objection shall only be based on points of law. In support of the objection, the respondent has discussed the letters attached to their preliminary objection. In my view, these attachments and related arguments render this preliminary objection moot.

20. In other words, the preliminary objection does not meet the threshold of a preliminary objection.

21. As for the *exparte* applicant's who say they filed an appeal which was heard and dismissed, they need to re-look at their pleadings with a view of either withdrawing them or applying to amend.

22. I find this preliminary objection not merited and I dismiss it accordingly.

23. Each party to meet their own costs.

24. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 4TH DAY OF DECEMBER 2025.

F. MUCHEMI

JUDGE