Han & another (On behalf of all students within Rangwe Sub-County) v National Government Constituency Development Fund Manager, Rangwe & another (Petition E001 of 2025) [2026] KEHC 351 (KLR) (22 January 2026) (Ruling)

Neutral citation: [2026] KEHC 351 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

PETITION E001 OF 2025

OA SEWE, J

JANUARY 22, 2026

BETWEEN

NYACHARO FINKEN HAN ..... 1ST PETITIONER

EVANS OBULO ..... 2ND PETITIONER

ON BEHALF OF ALL STUDENTS WITHIN RANGWE SUB-COUNTY

AND

NATIONAL GOVERNMENT CONSTITUENCY DEVELOPMENT FUND MANAGER, RANGWE ..... 1ST RESPONDENT

NATIONAL GOVERNMENT CONSTITUENCY DEVELOPMENT FUND COMMITTEE, RANGWE ..... 2ND RESPONDENT

RULING

1. The petitioners filed this Petition seeking declaratory and other orders with a view of compelling the Fund Manager and the Constituency Development Fund Committee for Rangwe Constituency to disburse bursary funds to the eligible students residing in Rangwe Sub County. Along with their Petition, they filed an application by way of the Notice of Motion dated 31st March 2025 pursuant to Articles 27, 35, 47 and 159 of *the Constitution* of Kenya seeking the following orders:

    (a) That pending the hearing and determination of the application, the Court be pleased to issue an interim order directing the respondents to provide full disclosure of all documents related to the National Government Constituency Development Fund (NG-CDF) disbursements for the Financial Year 2024/2025 including records of allocation, schedules of all expenditure (if any) and approved proposals pertaining to the subject disbursements;

(b) That the Petition filed herein be certified as extremely urgent and deserving of a priority hearing date to ensure expedited resolution given the significant educational implications;

(c) That the Court be pleased to grant such further or other orders as it may deem fit and just in the circumstances.

2. The application was premised on the grounds that the delay in the disbursement of bursary funds in Rangwe Constituency had resulted in unjustifiable discrimination against the students, perpetuating educational and socio economic disparities in flagrant violation of their constitutional rights. They therefore contended that immediate disbursement is critical to rectifying the alleged misuse of the funds and ensuring rightful allocation to the intended beneficiaries. These grounds were expounded on in the Supporting Affidavit sworn by the 1st petitioner.

3. In response to the application, the respondents filed a Notice of Preliminary Objection dated 9th June 2025 contending that:

(a) The Petition discloses no constitutional issue and is an attempt to constitutionalize an ordinary civil dispute;

(b) The Petition offends the doctrine of constitutional avoidance by seeking the application of *the Constitution* to matters fully addressed by statute.

(c) The Petition offends the doctrine of exhaustion in so far as it relates to the administration of the National Government Constituencies Development Fund, 2015.

4. The respondents therefore prayed that the Petition along with the application, be struck out with costs.

5. The application and the Preliminary Objection were argued simultaneously by way of written submissions. The petitioners filed written submissions dated 27th June 2025 and underscored the urgency of the application. They submitted that prolonged delay has already caused and threatens to cause further harm to the affected students; especially those on the verge of being locked out of school as well as examinations. Accordingly, the applicants proposed the following issues for determination:

(a) Whether the respondents' delay or failure to transparently and equitably disburse fund to student within Rangwe Constituency violates the rights to equality and non-discrimination (Article 27), access to education (Article 35), fair administrative action (Article 47 and the national values and principles of governance under Article 10 of *the Constitution*;

(b) Whether the petitioners' Notice of Motion discloses justiciable constitutional issues warranting the grant of the interim orders sought, as opposed to being shut out on account of the doctrines of avoidance and exhaustion;

(c) Whether the Petitioner have satisfied the requirements of locus standi and public interest litigation under Article 22 and are properly before the Court;

(d) Whether the Preliminary Objection by the respondents has merit where administrative and statutory dispute resolution mechanisms proved ineffective.

6. The petitioners then set out the provisions of *the Constitution* alleged to have been violated and the manner of their violation. They therefore contended that they have been the threshold for purposes of Article 22 of *the Constitution*. The petitioners then cited provisions of the National Government-Constituency Development Fund Act on dispute resolution, including Section 56 of the Act and submitted that the Board declined to assume jurisdiction in the matter on the ground that it is not the appropriate forum considering the reliefs sought herein.

7. They further submitted that the doctrine of exhaustion does not bar petitions where the alternative mechanisms are ineffective. To buttress their arguments, the petitioners relied on Consumer Federation of Kenya (COFEK) v Radio Africa Events/Group and 3 others 2024 8254 (KLR), Geoffrey Muthinja Kabiru & others v Samuel Munga Henry and others 2015 eKLR and Republic v Independent Electoral and Boundaries Commission, Ex Parte National Super Alliance (Nasa) Kenya and others. 2017 eKLR.

8. On their part, the respondents proposed the following issues in their written submissions dated 1st July 2025:

   (a) Whether the Petition before the Court has met the threshold for a constitutional petition;

   (b) Whether the petitioners by bringing this Petition have failed to adhere to the doctrine of constitutional avoidance;

   (c) Whether the petitioners by bringing the Petition have failed to adhere to the doctrine of exhaustion;

   (d) Who should bear the costs.

9. The respondents placed reliance on the cases of Anarita Karimi Njeru v Republic 1976-1980 KLR 1272 and Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others 2013 eKLR for their argument that the petitioners merely made broad and generalized references to Articles 10, 27, 35, 47 and 53 of *the Constitution* without specifying the actions or omissions attributable to the them; and therefore the petitioners have not identified with specificity the factual foundation for their claims.

10. The respondents further submitted that, by bringing this Petition despite there being provisions in statute for the resolution of such disputes, they have failed to adhere to the doctrine of constitutional avoidance. They relied on Gabriel Mutava & 2 others v Managing Director, Kenya Ports Authority & another 2016 eKLR and Communications Commission of Kenya & 5 others v Royal Media Services & 5 others, Petition No. 14, 14A, B & C of 2014.

11. On the doctrine of exhaustion, the respondents contended that Section 56(3) of the National Government *Constituencies Development Fund Act* to support their argument that there is in place an alternative dispute resolution mechanism which the petitioners neither invoked nor exhausted before filing the instant Petition. They underscored the fact that the provision employs the word "shall", contending that it is mandatory. They relied on Republic v Kenya Revenue Authority, Ex Parte Style Industries Limited 2019 eKLR and Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & others 2015 eKLR, among other authorities in urging the Court to uphold their Preliminary Objection and dismiss the Petition along with the application with costs.

12. I have given careful consideration to the application, the respective affidavits filed in respect thereof as well as the submissions made by counsel for the parties. Prayer 1 of the application is already spent; and in so far as Prayer 2 is concerned, it is notable that the petitioners asked for interim orders for the provision of documents pending the hearing and determination of the application. That prayer is also spent; the application having been heard and is for determination. In any event, this being one of the petitioners' substantive prayers, it cannot be granted prematurely on an interlocutory basis in the absence of proof.

13. The foregoing being the case, it is manifest that the only outstanding prayer is Prayer 3, which simply seeks that the Petition be certified urgent and disposed of on priority basis. It is my finding therefore that the application is misconceived and is for dismissal.

14. The Petition itself has been challenged on three fronts, namely:

(a) Whether the Petition has been drawn with the requisite specificity;

(b) Whether the petitioners violated the doctrine of avoidance;

(c) Whether the Petition is premature on account of failure by the petitioners to exhaust the alternative dispute resolution mechanisms available.

A. On the Requirement for Specificity:

15 In the case of Anarita Karimi Njeru v Republic 1979 1 KLR 154 it was held that:

> ...if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

16. The principle was reiterated by the Court of Appeal in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others 2013 eKLR as follows:

> ...the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* (Cap 21) and section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:
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> "The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."

17. And, in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others 2014 eKLR, the Supreme Court restated the position as follows: -

> 34... Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a

foundation of conviction and good faith, in engaging the constitutional process of dispute settlement..."

18 Therefore, it is now trite that a person who alleges a violation of any constitutional right or freedom must plead such alleged violation with a reasonable degree of specificity. I have looked at the Petition dated 31st March 2025 and noted that the petitioner has not only set out the provisions of *the Constitution* alleged to have been violated by the respondent at paragraph 2 of the Petition, but that also supplied additional facts at paragraph 3. I am therefore satisfied that the Petition was drawn with sufficient specificity for purposes of Anarita Karimi Njeru v Republic (supra).

19 Besides, Rule 10(3) and (4) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, recognizes that:

(3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.

(4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court."

B. On the Doctrines of Constitutional Avoidance and ripeness:

20 In the case of K K B v S C M & 5 others (Constitutional Petition 014 of 2020) 2022 KEHC 289 (KLR) (22 April 2022) (Ruling), Hon. Mativo, J. (as he then was) expressed himself on the doctrine or ripeness as hereunder:

> In summation, the doctrines of ripeness and constitutional avoidance shun to deal with a constitutional issue where there exists another legal course which can give the litigant the relief he seeks. In other words, a constitutional issue is not ripe for determination until the determination of the constitutional issue is the only course that can give the litigant the remedy he seeks. Both constitutional avoidance and ripeness avert the determination of the constitutional issues until it becomes very necessary to the extent that it is the only course available to assist the litigant's cause..."

21 Similarly, in the case of Faraj & 3 others v Police & 2 others (Constitutional Petition 165 of 2020) 2022 KEHC 287 (KLR) (27 April 2022) (Judgment) the court held:

27. The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved. In that regard, the Supreme Court stated in Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others (at para 256) that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis."

...

29. The doctrine of ripeness and constitutional avoidance gives credence to the concept that *the Constitution* does not operate in a vacuum or isolation. It has to be interpreted and applied in conjunction with applicable legislation together with other available legal remedies. Where there are alternative remedies the preferred route is to apply such remedies before resorting to *the Constitution*. The possibility of the elevation of any dispute to a constitutional issue is what is sought to be averted by the doctrines of ripeness and constitutional avoidance. It is borne out of a realisation that all legislative or common-law remedies are part of the legal system..."

22. And, in Petition 14, 14A, 14B & 14C of 2014 (Consolidated) Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others 2014 eKLR (29th September 2014) (Judgment) the Supreme Court made it clear that:

(256) ...The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows at paragraph 59:

"I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."

(257) Similarly the U.S.Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936)).

23. Section 56 of the National Government Constituency Development Fund is explicit that:

(1) All complaints and disputes by persons arising due to the administration of this Act shall be forwarded to the Board in the first instance.

(2) Complaints of a criminal nature shall be forwarded by the Board to the relevant government agencies with prosecutorial powers.

(3) Disputes of a civil nature shall be referred to the Board in the first instance and where necessary an arbitration panel whose costs shall be borne by the parties to the dispute, shall be appointed by consensus of the parties to consider and determine the matter before the same is referred to court.

(4) Notwithstanding subsection (3), parties shall be at liberty to jointly appoint an arbitrator of their choice in the event of a dispute but where parties fail to jointly agree on an arbitrator, any of the parties may apply to the Cabinet Secretary direct the Board in collaboration with the Office of the Attorney-General to commence arbitration.

(5) Subject to this Act, no person in the management of the Fund shall be held personally liable for any lawful action taken in his official capacity or for any disputes against the Fund.

24 It is therefore plain that the Petition was prematurely filed. It is now settled that although a court may have jurisdiction to hear and determine certain issues presented before it, it may nonetheless exercise restrain or refrain itself from assuming jurisdiction if there are other appropriate legislatively mandated institutions to handle such disputes. Indeed, in Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others 2020 eKLR the Court of Appeal pointed out, in the lead judgment of Hon. Asike Makhandia, JA, thus:

> ...Even if a court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and determine a dispute. Original jurisdiction is not an ouster clause that ousts the jurisdiction of other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction on a court or body to hear and determine all and sundry disputes. Original jurisdiction simply means the jurisdiction to hear specifically constitutional or legislatively delineated disputes of law and fact at first instance. To this end, I reiterate and affirm the dicta that in Speaker of the National Assembly v James Njenga Karume 1992 eKLR where it was stated 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."

C. On the Doctrine of Exhaustion:

25 The principle was reiterated in William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) 2020 eKLR, as follows:

52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution*..."

26 The same argument was presented in support of this limb of the respondents' Preliminary Objection and I find merit in it. In Geoffrey Muthinja Kabiru & Others v Samuel Muguna Henry & 1756 others 2015 eKLR, the Court of Appeal made it clear that:

> It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

27 In the premises, I find the instant Petition premature. The same is hereby struck out with no order as to costs.

Orders accordingly

DATED, SIGNED AND DELIVERED VIRTUALLY AT HOMA BAY THIS 22ND DAY OF JANUARY 2026

OLGA SEWE

JUDGE