

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CONSTITUTIONAL PETITION NO. E026 OF 2025

ESTHER AKINYI OTHIM PETITIONER/APPLICANT
- VERSUS -
KILIMANI HOSPITAL LIMITED 1ST RESPONDENT
LARRY NICK MAO MATETE 2ND RESPONDENT
FRANCIS ORIWA GORDON MATETE 3RD RESPONDENT
NELVIN ADAMBO TAAKA 4TH RESPONDENT
KENYA MEDICAL &
DENTIST PRACTITIONERS COUNCIL 5TH RESPONDENT

R U L I N G

1. The applicant filed a petition dated **10/09/2025** against the respondents seeking declarations against the respondents following the death of her deceased husband arising out of alleged inexcusable commissions and omissions by the respondents.
2. Contemporaneously with the petition, the applicant moved the Court vide a Motion of the even date in which she sought orders compelling the respondents to adduce call logs, email, WhatsApp messages of conversations between the 3rd & 4th respondents, video recordings of client review sessions related to the deceased between **2nd & 11th March 2025**. She also sought that the Court

conduct a site visit of the 1st respondent and compile a report on its conditions and that the OCS Kisumu Central Police Station do enforce the said orders.

3. The 1st – 4th respondent filed a joint Notice of Preliminary Objection dated **16/10/2025** raising the following grounds: -

- a) That this Honourable Court lacks jurisdiction to entertain, hear and determine the application and petition as filed by the petitioner for reasons that the same offends the doctrine of exhaustion.*
- b) That section 9 (2) of the Fair Administrative Action Cap 7L espouses on the doctrine of exhaustion and states that this Honourable Court shall direct an applicant, to first exhaust available remedies before instituting proceedings before a High Court or subordinate court.*
- c) That the jurisdiction of this Honourable Court is thereby ousted pursuant to the provisions of section 20 of the Medical Practitioners & Dentists Act Cap 253 where the Council has authority to issue the orders sought by the petitioners in orders (d) to (f) in the petition and in respect to deregistration and revocation of licenses affecting the respondents herein.*

- d) That the petitioner equally lacks the necessary locus standi to institute the petition on behalf of the deceased. Article 22 (1) and (2) of the Constitution of Kenya make provisions for persons who cannot act in their own name and not deceased persons as is the case in the application and petition.*
- e) That section 54 of the Law of Succession Act Cap 160, the Fifth Schedule to the said Act as well as Rule 7 of the Probate & Administration Rules clearly provide for the procedure of representation of a deceased person even in limited circumstances which the petition ought to have pursued.*
- f) That the petition equally offends the Doctrine of Constitutional Avoidance as in substance the petition is a private and ordinary civil dispute against the respondents capable of determination before a different, adequate and competent forum. Consequently, this Honourable Court should decline to ascribe itself of jurisdiction that would offend this established and settled doctrine.*
- g) That section 7 of Fatal Accidents Act Cap 32 require the Petitioner in pursuing an action to do so in the name or names whose benefit the*

action would have been brought who have not been identified or their consent established in the instant application and petition.

h) That the application and petition are therefore incompetent, misconceived, bad in law and an abuse of the court process.

4. The 5th respondent similarly filed a Notice of Preliminary Objection dated 13/10/2025 raising the following grounds: -

a) The petition and Notice of Motion offend the doctrine of exhaustion as provided under section 9 (2) & (3) of the Fair Administrative Action Act, 2015, section 20 of the Medical Practitioners & Dentist Act and the Medical Practitioners & Dentist (Disciplinary Proceedings) (Procedures) Rules 1979, in that the Petitioner failed to invoke or exhaust the statutory and administrative remedies available before the 5th respondent prior to approaching this Honourable Court.

b) This Honourable Court lacks jurisdiction to entertain the Petition or the Notice of Motion at this stage, the same being premature and improperly before the Court.

c) The petition and the notice of motion further disclose no reasonable cause of action against the 5th respondent, whose role is purely

regulatory under the Medical Practitioners & Dentists Act and which was not involved in the clinical management, treatment or handling of the deceased.

d) The application and petition, to the extent that they seek substantive or mandatory orders against the 5th respondent, are misconceived, incompetent and an abuse of the process of this honourable court.

5. The court directed that the parties dispose of the preliminary objections by way of written submissions which were highlighted on the **21/10/2025**.
6. The 1st – 4th respondents submitted that under **Article 159 (2) (c) of the Constitution and section 9 (2) (3) & (4) of the Fair Administrative Act**, the petitioner had an obligation to exhaust the statutory remedies available before approaching this Court. That had the petitioner wanted to avoid exhausting the statutory remedies, she ought to have applied for this exemption as provided for under **section 9 (4) of the Fair Administrative Act**.
7. That the remedies available to the petitioner are provided for under **section 20 of the Medical Practitioners & Dentists Act**. Further, that under **sections 4, 4(a) and 20** of the same Act, the 5th respondent has capacity to deal with issues raised in the petition being issues of alleged professional misconduct, revocation and

deregistration of licenses. That the remedies are time bound and in the current instance the petitioner is not out of time. Reliance was placed on the case of **Mumba & 7 Others v Munyao & 138 Others.**

8. That the petition and application offend the doctrine of constitutional avoidance as there is sufficient remedy under ordinary civil jurisdiction to remedy the petitioner's claims and she should not have approached the Court by way of constitutional petition.
9. That the petitioner/applicant lacked locus standi to approach the Court as she had not obtained letters of administration.
10. It was submitted on behalf of the 5th respondent that the present application and petition offend the doctrine of exhaustion as the issues raised therein are on professional misconduct thus fall under ***section 4 of the Medical Practitioners & Dentist Act.*** That ***section 15 (10) of the Medical Practitioners & Dentist Act*** provides for the inspection of health institutions.
11. That an aggrieved party has to use ***section 20 of the Medical Practitioners & Dentist Act*** seeking to lodge investigations and complaints and in this case, no complaint had been received by the 5th respondent.

12. The petitioner/applicant submitted that the Court had jurisdiction under **Article 165 (3) (b)**. Further, that the Constitution grants the Court power to determine any questions raised on breach of human rights. That similarly, the Constitutional Practice Directions 2013 also grant the Court jurisdiction to entertain her claim.
13. That the doctrine of exhaustion is not absolute as the Court is clothed with discretion to consider the exceptional circumstances raised by a party to assume jurisdiction. That the present petition raises serious allegations of right to privacy and transfer of data from Kenya through digital means and these issues would not be properly determined by the 5th respondent.
14. That all parties are properly before Court but cannot be before the 5th respondents as the 2nd respondent is not a medical doctor but rather the one with the knowledge of all the matters. That similarly, the 4th respondent is not a member of the 5th respondent.
15. That there are inadequate remedies under **section 20 of the Medical Practitioners & Dentist Act** as the petitioner is claiming compensation which the 5th respondent cannot offer. That she ought to have sought remedy within 5 months in accordance with the **Mental Health Act** which time has lapsed.

16.As regards Constitutional Avoidance, it was submitted that there are serious issues of fundamental rights that need to be dealt with, that the public need to know that the institution, the 1st respondent, is still licensed and still operational. That the petitioner has locus under **Articles 22 and 23** to approach the Court for the assessment of damages and thus does not need to obtain letters of administration.

17.I have considered the record. The Court will address itself on whether the doctrine of exhaustion applies in this matter as a complete jurisdictional bar.

18.The doctrine of exhaustion was dealt with by a 5-Judge Bench of this Court in Mombasa High Court Constitutional Petition No 159 of 2018 consolidated with **Constitutional Petition No 201 of 2019 William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR** wherein it was stated that: -

“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 and was aptly elucidated by the High Court in R vs Independent Electoral and Boundaries Commission (I.EBC) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, where the Court opined thus:

42.This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 in the following oft-repeated words: 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. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

43.While this case was decided before the Constitution of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this

regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine. This is Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others [2015] eKLR, where the Court of Appeal stated 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."

19. The Court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

"59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In R vs Independent Electoral and Boundaries

Commission (IEBC) & Others ex parte The National Super Alliance Kenya (NASA) (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.)

60.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.

*61.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 a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR*.*

62.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. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.”

20. In Civil Appeal 158 of 2017, **Fleur Investments Limited v Commissioner of Domestic Taxes & another [2018] eKLR**, the Court of Appeal relied on an earlier decision in **Speaker of National Assembly vs Njenga Karume (1990-1994) EA 546** to assume jurisdiction by bypassing the mechanism under Income Tax Tribunal. It observed as follows: -

"23. For the reasons we have given earlier and others that will become apparent, there were definitely exceptional circumstances that existed in this case that were outside the ambit of the Income Tax Tribunal which called for intervention by way of judicial review. Whereas courts of Law are enjoined to defer to specialized Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the Constitution and other legislations for

protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.”

21. From the foregoing, the doctrine of exhaustion is a complete bar to the jurisdiction of a Court save in cases where any of the exceptions apply.

22. Applying the above to this matter, it is noteworthy that the petition herein involves dissatisfaction with professional services offered up by the 1st respondent as a result of which the petitioner/applicant seeks compensation.

23. Anchored on the petition is the Motion by the petitioner/applicant seeking access to various communication logs held by the 1st – 4th respondents as well as a report undertaken by the Court on the history, existence and operations of the 1st respondent.

24. ***Section 20 (1) of the Medical Practitioners and Dentists Act*** provides that:

“Any person who is dissatisfied with any professional service offered, or alleges a breach of standards by a registered or licensed person under this Act, may lodge a complaint in the prescribed manner to the Council.”

25. The 1st respondent is registered and licensed by the 5th respondent and thus is subject to the provisions of the ***Medical Practitioners and Dentists Act***. The 2nd, 3rd and 4th respondents are co-owners and clinical officers at the 1st respondent thus subject to the provisions of the said Act.

26. The petitioner/applicant submitted that as she is seeking compensation from the respondents as a result of the death of the deceased, then the doctrine of exhaustion does not apply as only the Court is capable of quantifying the same.

27. I must say that compensation can only attach where liability has been established. The 5th respondent is better placed at establishing liability as the issues complained of by the petitioner/applicant are technical issues well known to it and falling within the purview of ***section 20 (1) of the Medical Practitioners and Dentists Act***.

28. I note that the purpose of the doctrine of exhaustion is to prevent premature judicial intervention thus ensuring that administrative agencies have the opportunity to correct their own errors, thus promoting efficiency and comity between courts and administrative bodies.

29. The doctrine of exhaustion of reliefs is contained in Section 9 of the *Fair Administrative Action Act* which provides that: -

“(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.

(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under subsection (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”

30. In the present case, the petitioner/applicant has not sought exemption from the obligation to exhaust all other mechanisms under the above provision.

31. Accordingly, litigants must exhaust local administrative remedies before invoking court jurisdiction, especially in constitutional issues. see the case of **Masese & another v Speaker County Assembly of Kisii & 3 others; Mogire & 2 others (Interested Parties) [2025] KEELRC 919 (KLR).**

32. Flowing from the foregoing, it is discernible that the Court lacks jurisdiction to hear and determine the suit herein and the same is hereby struck out. The same having been a public interest litigation, I will make no order as to costs.

It is so ordered.

DATED and DELIVERED at Kisumu this 19th day of February, 2026.

A. MABEYA, FCI Arb

JUDGE