

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E015 OF 2025

**IN THE MATTER OF ARTICLES 2, 19, 20, 21, 22, 23, 24, 28,
31, 33, 47 AND 50 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF VIOLATION OF CONSTITUTIONAL
RIGHTS TO PRIVACY, HUMAN DIGNITY, SECURITY OF THE
PERSON, FAIR ADMINISTRATIVE ACTION AND FAIR
HEARING**

BETWEEN

WILLY KIPKORIR

BORE.....PETITIONER

VERSUS

**ALLIANCE LEASING LIMITED.....1ST
RESPONDENT**

**AEN SECURITY CONSULTANCY LIMITED..... 2ND
RESPONDENT**

RULING

1. This Ruling determines the 1st Respondent's Notice of Preliminary Objection dated 11th February 2026. The 1st Respondent objects to the jurisdiction of this Honourable Court to hear and determine the Petition herein on the grounds that the Petitioner has failed to exhaust the statutory dispute resolution mechanism established under the Data Protection Act, No. 24 of 2019.

2. The 1st Respondent contends that the dispute is, in substance, a data protection grievance that falls within the exclusive mandate of the Office of the Data Protection Commissioner (hereinafter "ODPC") pursuant to Sections 8, 9, 56 and 57 of the Data Protection Act.

3. The Petitioner opposes the objection, arguing that the Petition raises substantial constitutional questions beyond the jurisdiction of the ODPC, and that the statutory remedy is inadequate to address the violations alleged under Articles 28, 29, 31, 47 and 50 of the Constitution.

4. The Preliminary Objection was canvassed by way of written submissions. The 1st Respondent filed its submissions dated 17th February 2026, while the Petitioner filed his submissions dated 22nd February 2026. Both parties also filed lists of authorities in support of their respective positions which I have considered.

5. The 1st Respondent's Notice of Preliminary Objection dated 11th February 2026 is premised on the following grounds;

a) The court lacks jurisdiction to hear and entertain this suit as it offends the mandatory provisions of Sections 8(1)(f), 9(1)(a), 56 and 57 of the Data Protection Act, 2019, which designates the Data Protection Commissioner as the primary authority responsible for handling complaints related to personal data protection.

b) The Petition is premature as the Petitioner has not invoked or exhausted the available administrative

avenues, having failed to lodge a complaint with the Office of the Data Protection Commissioner first as required under Section 56 of the Data Protection Act, 2019.

c) The reliefs sought by the Petitioner are available under Section 65 of the Data Protection Act, 2019.

6. In its written submissions, the 1st Respondent contends that the Data Protection Act was enacted to operationalize Article 31 of the Constitution, and that Parliament created a specialized regulatory and adjudicatory framework to address data protection grievances. The 1st Respondent argues that the Petitioner has merely clothed what is fundamentally a statutory complaint as a constitutional Petition, and that the invocation of constitutional provisions does not automatically confer jurisdiction on the High Court.

7. The 1st Respondent submits that the Petitioner has not lodged a complaint with the Data Protection Commissioner, requested investigation, or sought enforcement or compensation under Section 65 of the Data Protection Act. It contends that by proceeding directly to this Court, the Petitioner has failed to exhaust available remedies, which constitutes a clear contravention of the doctrine of exhaustion and amounts to an abuse of the court process.

8. The Petitioner opposes the Preliminary Objection and submits that it is misguided, bad in law, and should be dismissed with costs.

9. The Petitioner contends that the High Court has original and unlimited jurisdiction under Articles 22, 23 and 165(3)(b) of the Constitution to hear and determine disputes concerning the enforcement of fundamental rights and freedoms. The Petition alleges violations of multiple constitutional provisions, including Article 28 (right to human dignity), Article 29 (right to security of the person), Article 31 (right to privacy), Article 47 (right to fair administrative action), and Article 50 (right to fair hearing).

10. The Petitioner submits that the Office of the Data Protection Commissioner, being a statutory body, is limited to administrative regulation, compliance oversight, and investigation of statutory breaches under the Data Protection Act. He further contends that the Commissioner lacks jurisdiction to;

a) Interpret the Constitution or determine whether constitutional rights under Articles 28, 29, 47, and 50 have

been violated;

b) Grant declaratory relief on constitutional questions;

c) Issue permanent injunctions;

d) Award general damages for violation of constitutional rights beyond statutory compensation under Section 65.

11. The Petitioner further submits that the Preliminary Objection does not meet the threshold of a pure point of law as defined in

Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696, as it requires factual inquiry into whether the dispute is purely statutory, whether violations extend beyond the Act, and whether the remedies before the ODPC are adequate.

12. From the pleadings, submissions, and authorities cited by both parties, the following issues arise for determination;

a) **Whether the 1st Respondent's objection meets the threshold**

of a Preliminary Objection as defined in Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696.

b) **Whether this Honourable Court has jurisdiction to hear and**

determine the Petition in light of the statutory dispute

resolution mechanism under the Data Protection Act, 2019.

c) **Whether the doctrine of exhaustion of remedies applies to**

bar the Petition.

13. The law on Preliminary Objections is well settled in our jurisdiction. The locus classicus is the case of ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696*** , where the Court of Appeal for East Africa held;

"A Preliminary Objection consists of a pure 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. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

14. Sir Charles Newbold, P., further 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."

15. Applying the ***Mukisa Biscuit*** test to the instant objection, this Court makes the following observations;

a) The 1st Respondent's objection requires this Court to determine whether the dispute is purely statutory or raises constitutional questions. This determination cannot be made without examining the substance of the Petition, the nature of the violations alleged, and the specific reliefs sought. These are matters that go beyond the four corners of the pleadings and require substantive inquiry.

b) The objection further requires the Court to assess whether the remedies available before the ODPC under Section 65 of the Data Protection Act are adequate to address the reliefs sought by the Petitioner. The Petitioner seeks declaratory relief, injunctive orders, and general damages for constitutional violations. Determining whether these remedies are available before the ODPC requires the Court to interpret the scope of the Data Commissioner's powers and compare them with the reliefs sought in the Petition.

c) These are not pure points of law. They require the Court to inquire into facts, examine the scope of the Petitioner's grievances, and exercise judicial discretion in determining the adequacy of alternative remedies.

16. In ***Mwangi v Agence Francaise De Developpement (Petition E120 of 2025) [2025] KEELRC 3664 (KLR)*** , the Court addressed a similar preliminary objection brought under Sections 8 and 9 of the Data Protection Act and held;

"The objection requires determining whether the dispute is

purely statutory, whether violations extend beyond the Act,

and whether remedies are adequate. These are all factual and

evidential matters that require judicial inquiry, and therefore

fall outside the scope of a true preliminary objection, which

must be limited to pure points of law."

17. The 1st Respondent's objection invites the Court to engage in factual inquiry and the exercise of judicial discretion, which is impermissible at the preliminary stage. A Preliminary Objection must be capable of disposing of the suit without the need for further evidence or inquiry. The instant objection does not meet that standard.

18. The 1st Respondent argues that the Data Protection Act donates exclusive jurisdiction to the ODPC over disputes concerning data privacy, and that this Court's jurisdiction is therefore ousted.

24. In ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR***, the Court of Appeal authoritatively affirmed;

"The High Court has the constitutional mandate to interpret

the Constitution and enforce fundamental rights and freedoms."

25. The Petition before this Court alleges violations of multiple constitutional provisions. Paragraphs 34 to 43 of the Petition specifically plead violations of;

· **Article 28 - Right to human dignity: The Petitioner alleges that subjecting him to secret surveillance and insinuations of criminality without cause violates his inherent dignity and worth as a human being.**

· **Article 29 - Right to security of the person: The Petitioner alleges that the malicious investigations caused him mental distress, fear, anxiety, and reputational insecurity.**

· **Article 31 - Right to privacy: The Petitioner alleges that the Respondents unlawfully accessed, processed, and sought disclosure of his M-Pesa and bank records, financial dealings, and personal information without consent or a court order.**

· **Article 47 - Right to fair administrative action: The Petitioner alleges that the Respondents made adverse administrative decisions affecting him without giving notice, reasons, or an opportunity to be heard.**

· **Article 50 - Right to fair hearing: The Petitioner alleges that by condemning him unheard and acting on secret investigations, the Respondents violated the audi alteram partem principle.**

26. This Court finds that the Data Protection Commissioner, being a statutory body established under Section 5 of the Data Protection Act, has limited jurisdiction. The Commissioner's powers are circumscribed by the Act and include;

a) **Receiving and investigating complaints on infringements of rights under the Act (Section 8(1)(f));**

b) **Conducting investigations on own initiative or on complaint (Section 9(1)(a));**

c) **Awarding compensation for damage suffered by reason of contravention of the Act (Section 65).**

27. What the Commissioner lacks jurisdiction to do is equally important;

a) ***The Commissioner cannot interpret the Constitution or determine whether constitutional rights under Articles 28, 29, 47, and 50 have been violated. Those are questions of constitutional interpretation reserved for the High Court.***

b) ***The Commissioner cannot grant declaratory relief on constitutional questions. A declaration that the Respondents' actions violated the Petitioner's constitutional rights is a remedy that only a superior court can grant.***

c) ***The Commissioner cannot issue permanent injunctions. The power to restrain conduct through injunctive orders is a judicial function vested in courts of law.***

d) ***The Commissioner cannot award general damages for violation of constitutional rights. Section 65 of the Data Protection Act provides for compensation for damage suffered by reason of contravention of the Act, not for violation of constitutional rights under the Constitution.***

28. Accordingly, this Court finds that it has original and unlimited jurisdiction under Articles 22, 23, and 165(3)(b) of the Constitution to hear and determine the Petition.

29. The 1st Respondent relies heavily on the doctrine of exhaustion as articulated in ***Speaker of the National Assembly v Karume [1992] KECA 42 (KLR)*** , where the Court of Appeal held;

"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."

30. The doctrine of exhaustion is a well-established principle of law that serves important policy goals, including respect for institutional mandates, allowing specialized bodies to develop expertise, and promoting judicial economy. However, as the 1st Respondent itself acknowledges through its reliance on ***NGOs Co-ordination Board v EG & 4 others [2023] KESC 17 (KLR)*** , the doctrine is not absolute.

31. In ***NGOs Co-ordination Board v EG & 4 others*** (supra) , the Supreme Court recognized exceptions to the doctrine, particularly where;

a) ***The administrative process is inadequate;***

b) ***The dispute involves constitutional interpretation that the administrative body cannot handle;***

c) ***There are exceptional circumstances warranting direct access to court.***

32. The Supreme Court in ***Nicholus v Attorney General & 7 others [2023] KESC 113 (KLR)*** further clarified;

"The right to access the court for redress of alleged constitutional violations should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms. The availability of an alternative remedy did not necessarily bar an individual from seeking constitutional relief. That was because the act of seeking constitutional relief was contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy was deemed inadequate in

addressing the issue at hand, then the court was not restrained from providing constitutional relief."

33. In *William Odhiambo Ramogi & 3 Others v Attorney General & 4 Others [2020] eKLR*, a five-judge bench of the High Court extensively analyzed the doctrine and laid down the following principles;

"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 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.

Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere bootstraps, it is not barred by the doctrine of exhaustion."

34. Applying these principles to the instant case, this Court finds that the statutory remedy before the ODPC is inadequate and ineffective.

35. This Court finds that exceptional circumstances exist in this case. The alleged violations are ongoing and threaten irreversible harm to the Petitioner's privacy, dignity, and reputation. The

statutory remedy is inadequate to address the full scope of the violations or to grant the comprehensive relief sought.

36. Accordingly, this Court finds that the doctrine of exhaustion does not bar the Petition, as the case falls squarely within the recognized exceptions to the doctrine.

37. This Court is mindful of the special nature of constitutional litigation. In ***Satrose Ayuma & 11 Others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 Others [2011] eKLR***, the Court held that constitutional petitions are not subject to the same procedural technicalities as ordinary suits. The Court stated;

"Constitutional litigation is a special category of litigation. The Constitution donates enormous powers to the court to ensure that it meets the interests of justice. The court must ensure that it administers substantive justice and should not be hamstrung by procedural technicalities."

38. Article 159(2)(d) of the Constitution reinforces this principle, providing that justice shall be administered without undue regard to procedural technicalities. To strike out this Petition on the basis of a procedural objection would be contrary to the constitutional mandate to administer substantive justice.

39. The Petitioner has invoked this Court's jurisdiction under Article 22 of the Constitution, which guarantees every person the right to institute court proceedings where a right or fundamental freedom has been denied, violated, infringed, or is threatened.

This right is fundamental to the constitutional order and must be protected, not impeded by technical objections.

40. In the end,

(a) The Notice of Preliminary Objection dated 11th February

2026 is hereby dismissed with costs to the Petitioner.

b) The Petitioner's application dated 30th December 2025 is

set down for inter partes hearing on 6/5/2026.

Dated, signed and delivered at Kericho this 10th day of March, 2026.

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**J. K. SERGON
JUDGE**

In the Presence of:-

C/Assistant - Rutoh

Miss Jausiku for the Petitioner

Miss Musiani holding brief for Njiru