

**THE REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. E129 OF 2025**

**BETWEEN**

**PASQUALE TIRITO.....**  
**.....PETITIONER**

**VERSUS**

**JOSEPH MURAGE T/A MURAGE JUMA AND COMPANY**  
**ADVOCATES.....**  
**RESPONDENT**

**RULING**

**Introduction**

1. In the Petition dated 10<sup>th</sup> March 2025, the Petitioner alleges that the Respondent unlawfully obtained and attached his confidential travel information and documents to prop his case in a suit, **Malindi ELC Case Number E041 of 2024 Andrea Moretti & 6 Others Vs. Jockafa Limited and Pasquale Tirito & 2 Others.**
  
2. The Petitioner complains that the unauthorized use of his personal documents violates his right to privacy under Article 31 of the Constitution as read with the Data Protection Act.

3. The Respondent's filed Notice of Preliminary Objection dated 25<sup>th</sup> March 2025 in response to the Petition stating the following grounds that:

- i. The Petition does not disclose any cause of action as against the Respondent.***
- ii. The Petition is filed contrary to the express and mandatory provisions of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.***
- iii. The Court lacks jurisdiction to hear and determine issues raised in the Petition as the said Petition does not raise any justifiable constitutional matters.***
- iv. The matters raised by the Petitioner fall under the jurisdiction of a separate, distinct and independent body established by statute and this Court ought to discourage invocation of the constitutional process where there exists, a parallel or alternative statutory remedy.***
- v. Even if the allegations raised in the Petition merit litigation, the claim is founded on tort and should not be entertained as a constitutional petition.***
- vi. The Petition does not meet the required standards for Petitions alleging the violation of the Bill of Rights.***

#### **Petitioner's Case**

4. The Petitioner in opposition to the Respondent's Preliminary Objection filed grounds of opposition dated 2<sup>nd</sup> April 2025 on the premise that:

- i. The Petition discloses a well-founded cause of action in law.*
- ii. The Petition is duly filed in conformity with express rules for the protection of fundamental rights and freedoms.*
- iii. The Court has an inherent constitutional jurisdiction to hear and determine the Petition.*
- iv. The grounds raised in the preliminary objection are contradictory.*
- v. The preliminary objection does not meet the threshold of a preliminary objection and it's a waste of Court's time.*

### **Respondent's Submissions**

5. The Respondent filed submissions dated 23<sup>rd</sup> May 2025, in support of its Preliminary Objection.
6. For context, Counsel submitted that the Petitioner is an Italian national and the 2<sup>nd</sup> defendant in **Malindi ELC Case Number E041 of 2024**. He averred that in the suit, a replying affidavit was purported to have been sworn by the Petitioner, in Nairobi before a commissioner for oaths.
7. In light of this, the Plaintiff in the suit vide a letter dated 27<sup>th</sup> May 2024 wrote to the Director General of Immigration seeking confirmation whether the Petitioner was in the country at the alleged time of swearing the affidavit. It was confirmed that he was not in the country.

8. Counsel averred that following this, the Plaintiff filed an affidavit in Court informing them of this fact. This led to the striking out of the Petitioner's affidavit in that suit vide a Ruling that was delivered on 6<sup>th</sup> February 2025.
9. Counsel contended that instead of challenging the Ruling on appeal, the Petitioner proceeded to file the instant suit against his firm instead of the Plaintiff in **Malindi ELC Case Number E041 of 2024**. Considering this, Counsel asserted that the Petitioner was abusing the Court process.
10. With this background in mind, Counsel outlined the issues for determination as: *whether the Court is barred by the doctrine of exhaustion and whether there are any constitutional issues raised in the Petition.*
11. Collapsing the grounds of the preliminary objection, Counsel underscored that the key issue is that the Petition, violation of data, falls under the jurisdiction of a separate and distinct entity. As such, Counsel argued that the Court ought to discourage invocation of the constitutional process where there exists a parallel remedy. To buttress this point reliance was placed in **Geoffrey Muthiga Kabiru & 2 others - vs- Samuel Munga Henry & 1756 others [2015] eKLR** where it was 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. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”*

12. Comparable reliance was placed in **Mwangi Vs. Naivasha County Hotel t/a Sawela Lodges Petition E003 of 2021** and **Omondi Vs National Bank of Kenya Ltd & Others (2001) KLR 579.**
13. Particularly, Counsel pointed out that the relief sought relates to the alleged data violation under the Data Protection Act. Counsel submitted that Section 56 of the Data Protection Act, 2019 requires a data subject who is aggrieved by the decision of any person under the Act to lodge a complaint with the data commissioner. The Data Commissioner is, in turn, enjoined by the Act to investigate any complaint and make a determination within ninety days. Counsel highlighted that this Court’s jurisdiction under Section 64 of the Data Protection Act can only be invoked on an appellate basis. Counsel as such argued that the Petition breaches the doctrine of exhaustion.
14. Reliance was placed in **Kirima v Solar Panda Company & another [2024] KEHC 11499 (KLR)** where it was held that:

*“Since the enactment of the Data Protection Act, the jurisdiction of the High Court to remedy breaches of the constitutional right to privacy under Article 31 must on the principle of the constitutional avoidance and doctrine of exhaustion, be last resort and appellate forum in terms of the Statute or where it is demonstrated that the scheme of process and remedy under the Act is not such as to afford quality redress or appropriate relief. In this case, it was not demonstrated that the remedy and mechanism of the statutory process under the Data Protection Act of 2019, was not capable of providing appropriate remedy in the circumstances of the case. Fair hearing before the Data Commissioner is not an inferior remedy as the Constitution under Article 50 (1) recognizes tribunal and bodies established by law as capable of giving effect to the right to fair hearing as follows: “Consequently, this court finds that the dispute herein falls within the ambit of section 56 of the Data Protection Act and it ought, in the first instance, to be heard by the Data Commissioner, and thereafter on appeal to the High Court in terms of section 64 of the Act. The Court, therefore, declines to take up jurisdiction in the matter on account of the doctrine of exhaustion of remedies.”*

15. Turning to the second issue, Counsel contended that the Petition does not raise any constitutional issue. This is since, the Petitioner's allegations arise from proceedings in **ELC Case No. E044 of 2024** which is still active and pending before the Court.
  
16. Further to this, Counsel submitted that this suit had been brought against his firm which represents the Plaintiff in the cited suit and not a party therein. In fact, Counsel argued that the impugned information before the ELC Court was sworn by Elena Dardanelli one of the Plaintiffs and not the Respondent.

17. Moreover, Counsel faulted the Petitioner for failing to enjoin the Directorate of immigration which supplied the impugned information. According to Counsel, the issues raised by the Petitioner constitute an alleged private dispute with no constitutional connotation. Counsel thus urged the Court to strike out the Petition.

18. To buttress this point reliance was placed in **C N M v W M G [2018] eKLR** where it was held that:

*“Courts abhor the practice of parties converting every issue into a constitutional question and filing suits disguised as constitutional Petitions when in fact they do not fall anywhere close to violation to constitutional Rights.”*

19. Like dependence **Uhuru Muigai Kenyatta v Nairobi Star Publications Limited [2013] eKLR** and **Kenya Bus Service Ltd & 2 Others vs. The Attorney General & 2 Others [2005] eKLR**.

### **Petitioner’s Submissions**

20. Kimakia Magara and Partners Advocates for the Petitioners filed submissions dated 8<sup>th</sup> August 2025 where the issues for discussion were highlighted as: *whether the Court has jurisdiction to hear the Petition and whether the Preliminary Objection meets the threshold of a Preliminary Objection.*

21. On the first issue, Counsel submitted that the High Court has exclusive jurisdiction to handle matters concerning denial, violation, infringement or threat to fundamental rights and

freedoms as stipulated under Article 23(1) of the Constitution owing to the jurisdiction conferred under Article 165 of the Constitution. In Counsel's view, the jurisdiction of the Data Protection Commissioner does not oust the jurisdiction of the High Court and thus a party can lawfully opt, where to lodge their claim. Counsel added that the High Court has inherent jurisdiction to address violations of fundamental rights even if those rights are addressed in the Data Protection Act.

22. Turning to the second issue, Counsel submitted that the Respondent has raised six points of objection some of which are contradictory. Counsel impugned the points questioning the Respondent's assertion that violation of privacy rights and data protection amount to tortious offences. Counsel argued that the preliminary objection fails the test of such a claim and thus ought to be dismissed.

### **Analysis and Determination**

23. Having considered the pleadings and submissions of the Parties herein, the issue that arises for determination in my view is:

***Whether the Respondent's Preliminary Objection meets the threshold and is merited.***

24. The legal threshold of a preliminary objection was set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696** and emphasized later by the Supreme Court in the **Joho &**

**another v Shahbal & 2 others [2014] KESC 34 (KLR)** as follows:

**“[31] To restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co Ltd -vs. - West End Distributors (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”.**

25. The Preliminary Objection is grounded on three issues:

- a) **Whether the Petition disclose a reasonable a cause of action against the Respondent,**
- b) **Whether the Petition satisfies the constitutional threshold, and**
- c) **Whether the Petition offends the doctrine of exhaustion.**

***Whether the Petition disclose a reasonable a cause of action against the Respondent.***

26. In **Isaiah Ondiba Bitange v & 3 others v Institute of Engineers of Kenya another [2017] KEHC 7565 (KLR)** articulated what constitutes a cause of action as follows:

***“A cause of action was defined by Obi Okoye — Essays on Civil Proceedings,[1] thus — “By a cause of action is meant any facts or series of facts which are complete in themselves to found a claim or relief.”[2] In the case of Drummond Jackson v. British Medical Associations & Ors.,[3] Lord Pearson stated as follows:-***

***“..... the expression “reasonable cause of action”[4] ....No exact paraphrase can be given, but I think “reasonable cause of action” means a cause of action with some chance of success when..... only the allegations in the pleading are considered, if it is found that the alleged cause of action is to fail, the statement of claim should be struck out.”***

***The Supreme Court of Nigeria in the case of Oshoboja v. Amuda & Ors;[5] held that a reasonable cause of action means a cause of action with some chances of success, when only the allegations in the Statement of Claim are considered. Our law is the law of the practitioner rather than the law of the philosopher. Decisions have to draw their inspiration and their strength from the very facts which framed the issues for decisions.”***

27. The Court went further to state as follows:

***“The purpose of pleadings is to enable the defendant to know the case he had to meet so***

**that he could properly plead his defence with the result that the issues would be sufficiently defined to facilitate the appropriate questions for decision to be resolved. This purpose cannot be achieved unless the words are pleaded with sufficient particularity. Pleadings do not only define the issues between the parties for the final decision of the court at the trial; they manifest and exert their importance throughout the whole process of the litigation. They contain the particulars or the allegations of which further and better particulars may be requested or ordered, which help still further to narrow the issues or reveal more clearly what case each party is making. They act as a measure for comparing the evidence of a party with which he has pleaded. They determine the range of admissible evidence which the parties should be prepared to adduce at the trial.**

**The pith and marrow of it is that where on a consideration of only the allegations in the pleading the court concludes that a cause of action with some chance of success is shown then that pleading discloses a reasonable cause of action. Person, J in *Drummond Jackson v British Medical Association*, the definition of a cause of action was determined as an act on the part of the Defendant which gives the Plaintiff his cause of complaint.”**

28. In the same way, the Court in **Njunge v Ministry of Interior & Coordination of National Government & 3 others [2024] KEHC 4676 (KLR) (Civ)** citing a number of authorities with approval noted as follows:

**“That the application discloses no reasonable cause of action or defence in law. In *DT Dobie & Co. (Kenya) Limited v Muchina & Another [1982] KLR*, the Court of Appeal defined reasonable cause of action to mean “an action with some**

**chance of success when allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer...” The court went further to define what constitutes a cause of action and held that a cause of action referred to an act on the part of the defendant which gave the plaintiff a cause of complaint. Up to this point the plaintiff has failed to disclose a reasonable cause of action which would enable him to seek a legal remedy against the 3rd Defendant. It is on this basis that we humbly invite the court to strike out the Plaintiff’s application...**

...

**That in the case of Karl Wehner Claasen v Commissioner of Lands & 4 others [2019] eKLR the Court further defined a cause of action as follows:**

**A cause of action denotes a combination of facts which entitles a person to obtain a remedy in court from another person and includes a right of a person violated or threatened violation of such right by another person. The applicant did not disclose any such fact which is sufficient ground for the Court to strike out the application.**

...

**In answering the question: “what is considered to be a cause of action?” the court borrows from the decision in Anne Jepkemboi Ngeny v Joseph Tireito & another [2021]eKLR where the Court of Appeal succinctly stated the following:**

**“ In the Court of Appeal case of Attorney General & another v Andrew Maina Githinji & Another [2016] eKLR Waki JA. held that,**

**“A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint.”**

***That definition was given by Pearson J. in the case of Drummond Jackson vs Britain Medical Association (1970) 2 WLR 688 at pg 616. In an earlier case, Read vs Brown (1889), 22 QBD 128, Lord Esher, M.R. had defined it as: -***

***“Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court.”***

***Lord Diplock, for his part in Letang vs Cooper [1964] 2 All ER 929 at 934 rendered the following definition: -***

***“A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”***

29. According to the Respondent, the Petitioner in this case an Italian national, is the 2<sup>nd</sup> defendant in **Malindi ELC Case Number E041 of 2024**. In a replying affidavit he had filed in the ELC case, the petitioner had purported to have sworn it in Nairobi before a commissioner for oaths but the Plaintiff in the suit, vide a letter dated 27<sup>th</sup> May 2024, wrote to the Director General of Immigration seeking confirmation whether the Petitioner was in the country at the time of swearing the affidavit. It was confirmed that he was not in the country. As a result, the Plaintiff filed an affidavit in Court disclosing that fact and the Petitioner’s affidavit in that suit was struck out vide the Ruling of 6<sup>th</sup> February 2025.
30. Nevertheless, instead of the Petitioner challenging the Ruling on appeal or review, the Petitioner instituted the instant case against his firm of Advocates and not even against the

Plaintiff in **Malindi ELC Case Number E041 of 2024**. It is on this basis that the Respondent argues that the matter does not disclose a cause of action and is an abuse of the Court process.

31. Reacting to this submission Counsel for the Petitioner argued that the High Court has exclusive jurisdiction to handle matters concerning denial, violation, infringement or threat to fundamental rights and freedoms as stipulated under Article 23(1) of the Constitution owing to the jurisdiction conferred under Article 165 of the Constitution.
32. An advocate acts as an agent of a party he or she represents, commonly known as the client. The advocate does not act in a personal capacity but represents the interests of the client within the confines of the law. Consequently, acts or omissions undertaken by an advocate in the course of the representation are, attributable to the client, unless proved otherwise yet, the instant Petition is directed against the advocate for the Plaintiff in **Malindi ELC Case Number E041 of 2024** in relation to an affidavit sworn in that case by the plaintiff. Even on those facts only, the petition is dead on arrival. It does not disclose any reasonable cause of action in law as, there is no cause of action or wrongdoing attributable to the Respondent.

***Whether the Petition satisfies the constitutional threshold***

33. If the issues raised in a Petition can be resolved fully by application of the provisions of legislation or application of established legal principles without invoking the Constitution, then the same does not genuinely raise constitution questions and must not be resolved as such.

34. The Court in **Hakizimana Abdoul Abdulkarim vs Arrow Motors (EA) Ltd & another [2017] KEHC 9674 (KLR)** observed as follows:

***“37. A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute... When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values. ”***

35. It is an undisputed fact that this suit emanates from what transpired in **Malindi ELC Case Number E041 of 2024** because the core of the Petitioner’s complaint is that his travel information was obtained by the Respondent and used in the said suit and this is what led the Court the striking out the Petitioner’s replying affidavit in the said suit.

36. The Petitioner is silent on whether he objected to the admission of that evidence in the Environment and Land Court when it was introduced or whether he subsequently preferred an appeal against the Court’s finding.

37. This Petition is thus a belated attempt to constitutionalize an issue of admissibility of evidence and is also a collateral attack on ELC decision, yet ELC Court has jurisdiction to deal with the evidential matter before it. As guided in **C N M vs. W M G** [supra]-Courts have consistently discouraged against the practice of converting ordinary disputes into constitutional petitions.
38. For the reasons aforesaid, this Court declines to exercise its constitutional jurisdiction under Article 165 of the constitution as the Petition is a violation of the doctrine of constitutional avoidance.
39. The upshot is that the Preliminary Objection is upheld. This Petition is thus struck out with costs to the Respondent

***Dated, signed and delivered virtually at Nairobi this 26<sup>th</sup> March, 2026.***

.....  
**L N MUGAMBI**

**JUDGE**