REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
PETITION NO. E012 OF 2026

(Before Hon. Justice Dr. Jacob Gakeri)

WILLY KIPKORIR BORE ……..……...…..1ST PETITIONER
DAVID GITHENGA KIHARA ……2ND PETITIONER
MARCH WACHIRA …….3RD PETITIONER
NICHOLAS AMBUNYA ……...4TH PETITIONER

VERSUS

ALLIANCE LEASING LIMITED……..RESPONDENT

RULING

The Petitioner commenced the instant suit on 15th January, 2026 vide a Petition of even date seeking various reliefs.

Also filed simultaneously under certificate of urgency was a Notice of Motion dated 15th January 2026 seeking conservatory Orders to compelling the Respondents to retract publication of the Petitioners photographs and the 1st applicant mobile number appearing on the Daily Nation Newspaper of 14th January, 2026 and cease from further publishing or circulating the photographs and the mobile number.

The motion was expressed under various articles of the Constitution of Kenya, section 12 of the Employment and Labour Relations Court Act, Sections 25, 26, 29 and 30 of the Data Protection Act and Rules 17 and 23

of the Employment and Labour Relations Court (Procedure) Rules and is based on the grounds enumerated on its face and the Supporting Affidavit of Willu Kipkorir Bore sworn on 15th January, 2026 deposing on the circumstances in which the Petitioners left the Respondent's employment.

The Respondent filed a Notice of Preliminary Objection dated 3rd March, 2026 urging that:

1. The court had no jurisdiction to hear and determine the suit because there was no employer/employee relationship as the applicants were no longer employees of the Respondent.
2. The Petition offended the mandatory provisions of section 8(1), 9(1)(a), 56 and 57 of the Data Protection Act which designated the Dated Protection Commissioner as the receiver, investigator and determiner of complainants germane to breaches of Data Protection rights.
3. The petition was premature as the Petitioner had neither invoked nor exhausted available administrative avenues to resolve the dispute.
4. The 3rd Petitioner has already filed a complaint with the office of the Data Protection Commissioner from the same case of action seeking compensation.

Directions on disposal of the Notice of Preliminary Objection here given on 10th March, 2026 and a ruling date fixed.

Respondent's Submissions

Reliance was placed on the provisions of section 8(1), 9(1), 56, 57 and 65 of Data Protection Act as well as article 31 of the Constitution of Kenya to submit that the Data Commissioner had power to receive and investigate complaints by a data subject or a third party and had additional power to award compensation to urge that the Data Protection Act provided a forum and clear procedure for enforcement of violations of the Act and the Petitioners were seeking compensation for infringement of their rights and the 3rd Petitioner had already filed a complaint with the Data Commissioner.

Reliance was further placed on the sentiments of the court in Speaker of the **National Assembly v Karume, NGO Co-ordination Board v E G & 4 others, Katiba Institute (*Amicus Carae*) (2023) KESC 12 (KLR) Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others (2015) KECA and Kweri v Beehire Media Ltd; Capureu Industries Ltd (Interested party (2023) eKLR** to urge that the Petitioners had not exhausted the statutorily prescribed grievance resolution mechanisms before invoking the court's jurisdiction and the instant application and petition were filed prematurely and should be struck out.

Applicant's Submissions

As to whether the Respondent's Notice of Preliminary Objection met the threshold of a Preliminary Objection, Counsel submitted that it did not as

the matters before the court were factual and required interrogation by the court and the objection was for dismissal.

As to whether the Preliminary Objection was merited, reliance was placed on various provisions of the Data Protection Act and the decision in **Geoffrey Muthinja Kabiru & 2 others v. Samuel Muguna Henry & 1756 others (2015) eKLR** for the proposition that where there existed a dispute resolution mechanism outside courts, the mechanism had to be exhausted before the court's jurisdiction was invoked.

Counsel further submitted that the doctrine of exhaustion had exceptions and cited the decision in **Mwangi v Agence Francaise Development (2015) KEELRC 3664 (KLR)** where the court rejected the argument that there was an alternative statutory dispute resolution mechanism, as well as the sentiments of the court in **Katiba Institute v Communication Authority of Kenya & 2 others (2025) KEHC 10568,** where the High Court rejected the doctrine of exhaustion in a Constitutional Petition.

Finally, Counsel relied on the sentiments of the Supreme Court in **Nicholus v Attorney General & 7 others: National Environmental Complaints Committee (Interested Party) (2023) KESC 113 (KLR)** on matters requiring Constitutional relief or where the alternative remedy is deemed inadequate to submit that the court retained jurisdiction where the alternative remedy was inadequate ineffective or inappropriate.

Counsel urged that the Data Protection Commissioner had no exclusive jurisdiction over violation of the right to privacy under the Constitution and the Petition raised other interrelated violations of other articles of the constitution, to submit that the process before the Data Commissioner was neither sufficient nor appropriate.

On costs, reliance was placed on **Stanley Kaunga Nkarichia v Meru Teachers College & another (2016) eKLR** to urge the court to dismiss the Respondents Notice of Preliminary Objection.

Analysis and determination

Since the Respondent is *inter alia* challenging the jurisdiction of the court to hear and determine the Petition, the court is satisfied the its Notice of Preliminary Objection meets the threshold in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distribution Ltd (1969) EA 696. See also John Musakali v. Speaker County Assembly of Bungoma & 4 others (2015) eKLR.** It is common ground that whenever a Preliminary Objection is raised, it ought to be disposed of at the earliest opportunity owing to its potential to dispose of the suit at that stage.

On jurisdiction, while the Petitioner's maintained that the court had jurisdiction to hear and determine the instant suit, the Respondent, on the other hand submitted that the court had no jurisdiction because there was no employer/employee relationship between the parties. It is settled law that the jurisdiction of a court to hear and determine a suit is primordial

and foundational and as aptly captured by Nyarangi J A. It is in **Owners of the Motor Vessel Lillian S" v Caltex Oil (Kenya) Ltd (1989) KLR 1 "*Jurisdiction is everything*"**

Needless to emphasize, jurisdiction is conferred by the Constitution or an Act of Parliament or both as held by the Supreme Court of Kenya in **Samuel Kamau Macharia & another v. Kenya Commercial Bank & others (2012) eKLR.**

The jurisdiction of the Employment and Labour Relations Court (hereinafter ELRC) is based on Article 162 (2) (a) of the Constitution of Kenya and section 12 of the Employment and Labour Relations Court Act Article 162 (2) (a) of the Constitution of Kenya donated to Parliament Power to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations and under section 12(1) of the Employment and Labour Relations Court Act, the court has exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162 (2) of the Constitution and the provisionS of the Act or any other written law which extends jurisdiction to the court relating to employment and labour relations including the examples given thereunder which include disputes relating to or arising out of employment an employer and an employee"

While the term“relating” denotes having relationship to or with something else, or *“belonging to the same group”, arising out of means, “to originate or to stem,”* or to result (from).

It is common ground that the Applicant’s and the Respondent had an employment relationship which ended between 21st July, 2025 and 1st December, 2025 and the public advertisement on the Daily Nation Newspaper on 14th January 2026 is traceable to the employment relationship. Indeed, the notice was clear that the Petitioners/Applicants had ceased to be employees of the Respondent and were no longer authorised to represent, transact for or act for and on behalf of the Respondent.

In the court’s view, the substratum of the suit and the Petitioners’ previous employment were inseparable.

In **VSO Jitolee v Betty Wafula (2024) KEHC 1964 (KLR) Majanja J,** held as follows;

> *“Whether the claim is one between an employer and employee is a matter of substance and not farm. On the face of the plaint whose contents must be taken as true and correct for purposes of determining the Preliminary Objection, the Respondent ceased to be an employee of the appellant in 2005: Her claim is grounded on the employee benefit scheme…”*

Neither the decision in **Albert Chaurembo Mumba & 7 others v Maurice Munyao & 14 & others (2019) eKLR** nor in **Kenya Tea Growers Association & 2 others v The National Social Security Fund Board of Trustees & 13 other (2024) KESC 3 (KLR),** ousted the jurisdiction of the ELRC to hear and determine disputes between former employees and the employer and in particular where the grievance arose out of the employment relationship.

From the foregoing analysis, the court is satisfied that the dispute is an employer and employee for purposes of determination. It cannot be denied that the Respondent's public notice was published on account of the Petitioners having been employees of the company and there was no allegation that they engaged in any conduct adverse to the Respondent's business interests. In the court's view nothing turns on this issue.

The more potent foundation of the Respondent's Preliminary Objection is the issue of prematurity of the Petition.

As to whether the Petition was filed prematurely in light of the provisions of the Data protection Act, parties adopted contrasting positions with the Petitioners maintaining that the suit was not premature.

Needless to belabour, the Data Protection Act was enacted to give effect to the provisions of Article 31 (c) of the Constitution of Kenya and provide

for the rights of data subjects and obligations of data controllers and processors and for connected purposes.

Under section 3 of the Act the object and purpose of the Data Protection Act includes Protection of the Privacy of individuals and establishment of legal and institutional mechanisms to protect personal data and must important “to provide data subjects with rights and remedies to protect their personal data from processing that is not in accordance with the Act”

Significantly, the Act establishes the office of the Data Protection Commissioner as a body corporate. Under section 8(1) of the Act:

The office shall;

(a) Oversee the implementation of and be responsible for the enforcement of this Act.

(b) …

(c) …

(d) …

(e) …

(f) receive and investigate any complaint by any person on infringement of the rights under this Act.

This provision is couched in mandatory tune to underscore the core functions of the office of the Data Protection Commissioner. The office is required to receive and investigate complaints.

Under section 56 of the Data Protection Act;

(1) A data subject who is aggrieved by a decision of any person under this Act may lodge a complaint with the Data Commissioner in accordance with this Act.

(2) A person who intends to lodge a complaint under this Act shall do so in writing.

(3) …

(4) …

(5) A complaint made to the Data Commissioner shall be investigated and concluded within ninety days. part VIII of the Data Protection Act confer upon the Data Commissioner enormous powers of enforcement under section 57 of the Act the Data Commissioner has extensive investigating powers under section 65 of the Act.

Finally, under section 65 of the Act:

(1) A person who suffers damage by reason of a contravention of a requirement of this Act is entitled to compensation for that damage from the data controller or the data processor.

The damage may be financial or non-financial and includes distress. Although neither the provisions of section 56 nor 57 of the Act make the lodgement of complaints with the Data Commissioner mandatory, the fact that the objectives of the Act include provision of rights of the data subject and an elaborate enforcement mechanism has been provided evinces that

Parliament intended to established the first part of call for all persons whose rights under the Act had been violated or infringed by others.

A wholistic reading of the Act leads to the conclusion that parliament embedded expediency in the investigation and conclusion of complaints by data subjects and other persons.

The foregoing provisions underscores the National Assembly's deliberate intention to establish a an elaborate internal grievance resolution mechanism for persons whose rights under the Act were violated and which ought to be exhausted before the court's jurisdiction was invoked.

The foregoing is consistent with the provisions of article 159(2) (a) of the Constitution of Kenya which enjoins the court to promote other forms of dispute resolution.

In **NGO's Co-ordination Board v E G & 4 others; Katiba Institute (Amicus Curie) (2023) eKLR,** the Supreme Court stated as follows;

> *"… Even when superior courts had jurisdiction to determine profound question of law the first opportunity has to be given to the relevant person, bodies tribunals or other quasi – judicial authorities and organs to deal with the dispute as provided for in the parent statute.*

It is now firmly established that in cases where there is an alternative dispute resolution mechanism established by legislation, the courts must exercise restraint in exercising their jurisdiction and accord deference to such dispute resolution bodies under the doctrine of exhaustion. This court, in its previous decisions has settled the jurisprudence regarding the doctrine of exhaustion of administrative remedies."

The Court of Appeal expressed similar sentiments in **Speaker of the National Assembly v Karume (1992) KECA 42 (KLR)** as follows:

"In our view there is considerable merit in the submission 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."

Finally, in **Geoffrey Muthinja Kabiru & 2 others v Samuel Muguna Henry & 1756 others (2015) eKLR the court held *inter alia*:**

"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 a fora of last resort and not the first port of call… The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is post ponement 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…" See also **Republic v Commissioner General, Kenya Revenue Authority *Ex parte* Sanofi Aventis Ltd (2019) eKLR, William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslim for Human Rights & 2 others Interested Parties (2020) eKLR.**

The foregoing analysis of statutory provisions and the rendition of courts leaves no doubt that in the instant case, parliament prescribed a grievance resolution mechanism, out of court whenever a data subjects rights under the Data Protection Act were infringed and the Petitioner's ought to have invoked the process prior to filing the instant Petition.

The court's position is fortified by the sentiments of **Mumbi Ngugi J. (as she then was) in James Tinai Murete & others v County Government of Kajiado & another. Nailantei Supeyo & 19 Others: Interested Parties (2015) eKLR thus:**

"First it is my view that the legislature could not intend to establish a dispute resolution mechanism and render it redundant by giving parties the option to choose whether to follow it or not…"

These sentiments apply on all fours to the circumstances of the instant case and as demonstrated by the 3rd Petitioner.

As regards the 3rd petitioner, having filed a complaint with the Data Commissioner on the same matter, he could not simultaneously be a party to the petition in a court of law. Litigating the same matter before two forums as constitutes an abuse of the court process.

However, as held by Mativo J (as then was) in **Satya Bham a Gandhi v Director of Public Prosecution & 3 others (2018) KEHC 6100 (KLR)**

> *"The concept of abuse of judicial process is imprecise. It involves circumstances and situations of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.*
>
> *The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves where the process of court has not been resorted to fairly, properly, honestly to the detriment of the other party.*
>
> However, abuse of court process in addition to the above arises in the following situations:-
>
> *(a) Instituting a multiplicity of actions on the same subject matter against the same opponent.*
> *(b) …*
> *(c) where two similar processes are used in respect of the exercise of the same right.*
> *(d) …*
> *(e) …*
> *(f) where a party has adopted the system of forum – shopping in the enforcement of a conceived right."*

Applying the foregoing principles to the circumstances of the instant case, it is clear that the 3rd Petitioner/Applicant's case against the Respondent constitutes an abuse of the court process as he had already filed a complaint with the Data Commissioner, a recognized grievance resolution mechanism. The 3rd Petitioner/Applicant, cannot have it both ways. The 3rd Petitioner/Applicant's case against the Respondent herein is unsustainable and is struck out.

In the end, it is the finding of the court that the Respondent's Notice of Preliminary Objection dated 3rd March, 2026 is merited. The Petition herein is struck out with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI
ON THIS 20th DAY OF APRIL, 2026

DR. JACOB GAKERI
JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has

been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE