



**Odiwuor v Jomo Kenyatta University of Agricultural and Technology (Petition E031 of 2023)
[2025] KEHC 1141 (KLR) (Constitutional and Human Rights) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1141 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E031 OF 2023

LN MUGAMBI, J

FEBRUARY 27, 2025

BETWEEN

DALPHINE GRACE ODIWUOR PETITIONER

AND

**JOMO KENYATTA UNIVERSITY OF AGRICULTURAL AND
TECHNOLOGY RESPONDENT**

RULING

Introduction

1. The petition dated 1st February 2023 alleges that the respondent violated the petitioner's constitutional rights under Articles 28, 31, 41, 47 and 50 of *the Constitution*. The Petitioner alleged that the respondent conducted disciplinary proceedings that were devoid of the due process by failing to grant the petitioner a fair hearing. The gist of the said disciplinary proceedings was that the petitioner had been involved in examination irregularities.
2. In response, the Respondent filed a Notice of Preliminary Objection dated 9th May 2023 hence this ruling. The respondent opposes the petition on the basis that:

The petitioner's claim violates the doctrine of constitutional avoidance.

Parties' Submissions

Respondent's Submissions

3. In support of its objection, the respondent through Ashitiva Advocates LLP filed submissions dated 10th July 2024.



4. Counsel relying in *Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others* [2014]eKLR submitted that the Supreme Court guided as follows:

“The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis.”
5. Comparable reliance was placed in *Uhuru Muigai Kenyatta v Nairobi Star Publications Limited* [2013] eKLR, *COD & another v Nairobi City Water & Sewerage Co. Ltd* [2015] eKLR, *Jorum Kabiru Mwangi & 2 others v Co-operative Bank of Kenya, Kawangware Branch* (2016) eKLR and *Republic v Paul Kihara Kariuki, Attorney General & 2 others ex parte Law Society of Kenya* (2020) eKLR.
6. Counsel stated the petitioner’s case as set out under paragraphs 11 to 49 indicates that her claim revolves around the respondent’s alleged failure to adjudicate on her matter fairly.
7. According to Counsel, the petitioner’s claim is a civil dispute that can be sufficiently addressed through judicial review proceedings. Further that this is made obvious in the relief sought being inter alia orders of mandamus and certiorari. Counsel stressed that the dismissal of Miscellaneous Application No. E137 of 2022 did not prevent the petitioner from instituting fresh judicial review proceedings.
8. In like manner, Counsel highlighted that the petitioner’s claim that her reputation had been damaged in the way the exam invigilators removed her from the exam room, is an issue that can be determined under the civil law on defamation.
9. Consequently, Counsel asserted that the petition is not sufficient to attract any constitutional violations as there exists alternative civil law remedies.

Petitioner’s Submissions

10. The petitioner opposing the respondent’s objection filed submissions dated 29th October 2024 through the firm of Henia Anzala and Associates Advocates. Counsel outlined three issues for determination being: whether the preliminary objection is properly before Court; whether the petition offends the doctrine of constitutional avoidance and whether the claim raises any constitutional question ripe for determination by the Court.
11. Counsel in the first issue relying in *Mukisa Biscuit Manufacturing Co. Ltd -Versus- West End Distributors Ltd* [1969] EA 696 recapped that a point of law is one which has been pleaded and if argued as such may dispose of the suit. On this ground, Counsel noted that the respondent had filed the preliminary objection before filing its response to the petition yet the preliminary objection ought to have arisen from the response. Considering this, Counsel argued that the preliminary objection was defective and lacking in merit.
12. Reliance was placed in *Coast Hauliers Limited v Imperial Bank Limited (In Recievership)* [2021] eKLR where it was held that:

“It is apparent that in this case the defendant got it all wrong when it raised a Preliminary Objection before it had even had filed its statement of defence and by relying on the wrong provisions of law.”
13. Like dependence was placed in *Stephen Onyango Achola and Another v Edward Hongo Sule and Another* [2004] eKLR.
14. On the second issue, Counsel submitted that the petition does not violate the doctrine of constitutional avoidance. Reiterating the petitioner’s assertions in her supporting affidavit, Counsel



submitted that the petition raises a number of constitutional violations against the respondent including the constitutional validity of the respondent's Common Examination Regulations. Counsel stressed that a constitutional violation was the only way the petitioner could demonstrate that her constitutional rights had been violated as judicial review does not consider the merits of a case.

15. That notwithstanding, Counsel submitted that *the Constitution* grants this Court power to grant judicial review remedies as one of the reliefs. The claim of defamation was said to be misconceived as the petitioner had not sought any relief with reference to defamation.
16. To buttress this point, reliance was also placed in Communications Commission of Kenya (supra), Martha Kerubo vs University of Nairobi (2021) eKLR and KKB v SCM & 5 others [2022] KEHC 289 (KLR).
17. Lastly, Counsel was certain in third issue in light of the arguments herein, that the petition raises a constitutional question that is ripe for determination as seen in C N M v W M G [2018] eKLR. Likewise, Counsel emphasized that the petitioner before filing this suit had exhausted all the available remedies before the respondent.

Analysis and Determination

18. Upon perusal of the parties' pleadings and submissions the following is the issue that arises for determination:

Whether the respondent's preliminary objection is merited.

19. What constitutes a preliminary objection was set out by the Supreme Court in Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others (2014)eKLR 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”.

20. Discussing its nature in Dismas Wambola v Cabinet Secretary, Treasury & 5 others (2017) eKLR, the Court noted as follows:

“A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law.



It may be noted that preliminary objections are narrow in scope and cannot raise substantive issues raised in the pleadings that may have to be determined by the court after perusal of evidence....”

21. The preliminary objection raises the issue that the petition offends the doctrine of constitutional avoidance. The doctrine asserts that *the Constitution* should not be invoked to resolve disputes that are not Constitutional controversies, that is to say, matters that may be resolved by application of ordinary legislation, regulatory regime or established legal principles.
22. Discussing the doctrine of Constitutional avoidance, the Supreme Court in Communications Commission of Kenya (Supra) observed:

“(256) The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. 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. Likewise, in *C O D & another (supra)* with regard to this principle the Court noted as follows:

“ 11. Similarly, in *Papinder Kaur Atwal -vs- Manjit Singh Amrit Nairobi* Petition No. 236 of 2011 where after considering several authorities on the issue, Justice Lenaola remarked as follows:

“All the authorities above would point to the fact that *the constitution* is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes..... I must add the following; Our Bill of Rights is robust. It has been hailed as one of the best in any Constitution in the World. Our Courts must interpret it [with] all the liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violation thereof.”

12. The Supreme Court of India has also held that ordinary remedies available under common law and statutes must be pursued in the ordinary manner or as provided under statute. For instance, in *Re Application by Bahadur*[1986] LRC (Const) the Court expressed itself as follows at page 307:

“The Courts have said time and again that where infringements of rights are alleged which can be founded in a claim under substantive



law, the proper course is to bring the claim under such law and not under *the Constitution*. This case highlights the un-wisdom of ignoring that advice.... *The Constitution* sets out to declare in general terms the fundamental concepts of justice and right that should guide and inform the law and the actions of men. While an infringement of *the Constitution* might in certain cases give rise to the redress provided for at section 14, yet, as has been proclaimed by the highest Court in the land, it is not, “a general substitute for the normal procedures for invoking judicial control of administrative action.” (See *Harrikissoon v A-G* [1979] 3 WLR 62).”

24. Correspondingly, in *Council of County Governors v Attorney General & 12 others* (2018) eKLR the Court expressed itself as follows:

“59. 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* (supra) (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.

60. In the South African case of *S v Mhlungu*, [1995] (3) SA 867 (CC), Kentridge AJ, stated in the dissenting opinion respecting the principle of avoidance (at paragraph 59), that he would lay 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. And in *Ashwander v Tennessee Valley Authority*, 297 U.S. 288, 347 (1936)), the U.S. Supreme Court 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.”

25. The respondent in raising this Preliminary Objection argued that the dispute is a civil matter which should have been filed as a judicial review proceeding.

26. The doctrine of constitutional avoidance as guided in the cited authorities necessitates that this Court refrain from making determinations on constitutional issues that have their foundations in an existing statutory law which is sufficient and provides adequate mechanisms to deal with the specific issue. The doctrine is to the effect that where a dispute is one which can be determined under another area of law other than under *the Constitution*, then it is best that it be so determined and pure constitutional issues be left to be determined as such.

27. A perusal of the petition shows the respondent’s disciplinary proceedings were commenced and concluded including the appeal. Dissatisfied with the manner in which the disciplinary process was conducted the petitioner filed the instant petition.

28. This Petition not only challenges the process but also alleges there was violation of fundamental freedoms and rights protected under Article 28, 31, 41, 47 and 50 of *the Constitution*.

29. Judicial review proceedings perse would only deal with the propriety of the process leading up to a body’s decision. The Court of Appeal in *Commission on Administrative Justice v Kenya Vision 2030*



Delivery Board & 2 others [2019] KECA 322 (KLR) underscored the essence of judicial review as follows:

“The principles that guide the High Court in the exercise of judicial review Jurisdiction are as were aptly restated by the Court in Kingdom Kenya 01 Limited versus the District Land Registrar, Narok & Fifteen (15) others [2018] eKLR as follows:-

“Judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision-making process.”

30. Taking that route would thus have limited the Petitioner to pleading her case in a piecemeal manner.
31. The Constitution under Article 23 (3) of the Constitution includes an order of judicial review as part of constitutional remedies by providing thus:

In any proceedings brought under Article 22, a court may grant appropriate relief, including--

- a. a declaration of rights;
 - b. an injunction;
 - c. a conservatory order;
 - d. a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
 - e. an order for compensation; and
 - f. an order of judicial review.
32. This position has been affirmed by the superior courts severally. For instance the Court of Appeal in Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others [2017] eKLR stated as follows:

“92. In our considered view presently, judicial review in Kenya has Constitutional underpinning in Articles 22 and 23 as read with Article 47 of the Constitution and as operationalized through the provisions of the Fair Administrative Action Act. The common law judicial review is now embodied and ensconced into constitutional and statutory judicial review. Order 53 of the Civil Procedure Act and Rules is a procedure for applying for remedies under the common law and the Law Reform Act. These common law remedies are now part of the constitutional remedies that the High Court can grant under Article 23 (3) (c) and (f) of the Constitution. The fusion of common law judicial review remedies into the constitutional and statutory review remedies imply that Kenya has one and not two mutually exclusive systems for judicial review. A party is at liberty to choose the common law Order 53 or constitutional and statutory review procedure. It is not fatal to adopt either or both. In the instant case, we have examined the original application filed before the High Court. Whereas the application is stated to be grounded on Order 53 of the Civil Procedure Rules, on the face thereof, Articles 10, 38 (2), 47, 88 and 227 of the Constitution are cited. In our view, this correctly reflects the fusion of



constitutional and common law judicial review in Kenya as one system for judicial review.”

33. In the light of the above cited case law and principles, it is this Court’s finding that the respondent’s preliminary objection lacks merit and is therefore dismissed as filing a Judicial Review would not have addressed the constitutional violations, already alluded to.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF FEBRUARY, 2025.

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L N MUGAMBI

JUDGE

