



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ngunjiri v Kiambi & another (Petition E225 of 2023) [2025] KEHC 3793 (KLR)  
(Constitutional and Human Rights) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3793 (KLR)

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

**PETITION E225 OF 2023**

**LN MUGAMBI, J**

**MARCH 27, 2025**

**BETWEEN**

**SAMUEL MAINA NGUNJIRI ..... PETITIONER**

**AND**

**FAITH KIAMBI ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH MUTHARIA ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The petition dated 3<sup>rd</sup> July 2023 was amended on 13<sup>th</sup> February 2024. It is supported by the petitioner's affidavit of even date.
2. The gravamen of this Petition is that the respondents installed a closed-circuit television (CCTV) camera directly pointing at the petitioner's house without consulting or obtaining his consent and have thus violated his right to privacy under Article 31 of *the Constitution*.
3. Consequently, the petitioner seeks the following reliefs:
  - i. A declaration that the actions of the 1<sup>st</sup> respondent to install the CCTV Cameras made to capture the details of the petitioner and his family without his consent violated the right to privacy as provided for by Article 31 of *the Constitution*.
  - ii. An order of injunction against the 1<sup>st</sup> respondent her agents and or employees from installing any CCTV Cameras or any other surveillance gadget directed at the petitioner's house or its environs made to collect data and information taking place within the petitioners House, residence and its environs.



- iii. An Order be granted to have the data held and stored in the said CCTV Camera installed at Faith Apartments in Ngumba Estate on the corridor of House Number 8 and 7 be destroyed in the presence of both parties herein and also in the presence of OCS Kasarani Stadium Police Station.
- iv. A declaration that the decision to have the petitioner arbitrarily evicted via its letter dated 9<sup>th</sup> June 2023, contravenes his constitutional Rights under Article 39 of *the Constitution*.
- v. A mandatory injunction against the 2<sup>nd</sup> respondent, his agents, his employees, and or his principals to withdraw the letter dated 9<sup>th</sup> June 2023 and to desist from frustrating the petitioner and or his family for pursuing the matter herein or otherwise.
- vi. An order for compensation by the respondents for the violation of the petitioner's rights and fundamental freedoms.
- vii. An Order that any camera installed by the 2<sup>nd</sup> respondent, his agents, employees and or his principals be done by consent of the petitioner herein with the full disclosure of the purpose of the collected data with the appreciation that the petitioner can access the data collected.
- viii. Costs of the petition shall be borne by the respondents.

#### **Petitioner's case**

4. The petitioner states that he and his family reside at Faith Apartment at Ngumba Estate on Thika Road. The 1<sup>st</sup> respondent is his next-door neighbour.
5. He depones that on 1<sup>st</sup> May 2023 the respondents without consulting him, installed the CCTV camera directly facing his house. That the said camera CCTV camera is angled in a way that it covers his main door entrance, the living room and the common area.
6. The petitioner alleges that the 1<sup>st</sup> respondent owned up that she installed the cameras to spy on his family and would not remove the CCTV camera. He alleges that this camera has been collecting information about his family's movements.
7. The petitioner states that distressed by this action, his wife on 2<sup>nd</sup> May 2023 raised the issue with the 2<sup>nd</sup> respondent who is the landlord. He alleges that the landlord in response stated that he did not need their consent to install CCTV cameras. A follow up email sent on 4<sup>th</sup> May 2023 to the landlord was also futile.
8. Their concerns falling on deaf ears, the petitioner proceeded to report the matter to Kasarani Stadium Police station on 11<sup>th</sup> May 2023 under OB No: 11/3/5/2023. He avers that nothing much was done following his complaint.
9. He states that his suggestion on 12<sup>th</sup> May 2023 to have the CCTV camera tilted to a different angle to avoid recording his family's activities was met with hostility and further non-responsiveness from the 1<sup>st</sup> respondent. The petitioner raised the issue with the 2<sup>nd</sup> respondent again on 16<sup>th</sup> May 2023. The landlord promised to intervene however it is alleged that no intervention was done. Further follow ups on 18<sup>th</sup> and 25<sup>th</sup> May 2023 did not bear any fruit.
10. Thereafter, the petitioner engaged the services of an Advocate who through a demand letter dated 31<sup>st</sup> May 2023, demanded that the CCTV camera be removed and the data collected erased. In response, the 1<sup>st</sup> respondent through her Advocate stated that the CCTV camera had been installed for their own security.



11. The petitioner depones that he engaged a technician to advice on the purpose of the CCTV camera. That the technician confirmed that the CCTV camera has an audio and video coverage of 30 meters and 45 degrees in a straight line. He noted that the distance of the doors of the petitioner and the 1<sup>st</sup> respondent is 6 meters apart.
12. As such, the camera is able to capture the common walkways and the petitioner's living room and bedroom window. The camera in addition has the capacity to store over 512GB-2T which can store a record of up to 365 days.
13. The petitioner depones that soon after, the 2<sup>nd</sup> respondent through his Advocate in a letter dated 9<sup>th</sup> June 2023 directed the petitioner to vacate the apartment citing misbehavior that cannot be tolerated. He states that no other reasons were issued. Equally, he is aggrieved that up to the time the petition was filed, the 2<sup>nd</sup> respondent failed to consider their concerns over the CCTV camera.
14. The petitioner asserts that since the CCTV camera was installed his family which includes minors has been affected greatly more so taking into consideration the dangers that come with the liberty in the digital world.
15. He informs moreover that's his children are not able to play freely on the common areas and that they have lacked peace of mind as they do not understand why they are being recorded. His wife has also had to adjust her work schedule out of fear of what would happen to their 6 month old baby who is usually left with the house manager.
16. The petitioner is also concerned about the data being recorded which he has no access to. He as well states that he has to leave work early since he is afraid that an attack may be made against his family thus the need to protect them. This issue has equally caused him and his family emotional, psychological and mental distress forcing him to take blood pressure medication.
17. On this premise, the petitioner asserts that his right to privacy as envisaged under Article 31 of *the Constitution* has been contravened by the respondents.

### **1<sup>st</sup> Respondent's case**

18. The 1<sup>st</sup> Respondent filed the response dated 9<sup>th</sup> July 2023 and a Notice of Preliminary Objection dated 10<sup>th</sup> July 2023 in which she alleges that the petition is misconceived and an abuse of the Court process.
19. The 1<sup>st</sup> respondent objected the petition on the basis of jurisdiction due to the fact that the Data Protection Act provides the process raising the complaint in the statute. That the complaint is first required to be lodged with the Data Commissioner under Section 56 and that the High Court only enjoys appellate jurisdiction under Section 64 of Data Protection Act. It is argued thus that the petition cannot be entertained until that process is exhausted.
20. The 1<sup>st</sup> respondent additionally avers that the right to privacy is not absolute and must be balanced against the right to security of person.
21. The 1<sup>st</sup> respondent affirms that the petitioner and his family are her next-door neighbors. She contends that the petitioner is a bad neighbor who is quarrelsome and keeps devising evil and criminal activities against her.
22. It is averred that the 1<sup>st</sup> respondent became fearful of her security when she discovered that strangers were peering through her window. The persons were also dropping objects of witchcraft at her door and spying on her. It is on this basis that she decided to install the CCTV camera so as to know what activities were being planned against her.



23. It is stressed that the 1<sup>st</sup> respondent has the right to protect her family's safety. She contends that installation of the CCTV cameras for personal safety is exempted under the Data Protection Act under Section 51.

### **2<sup>nd</sup> Respondent's Case**

24. The 2<sup>nd</sup> respondent filed his answer to the petition dated 19<sup>th</sup> July 2023.
25. The 2<sup>nd</sup> respondent supported the 1<sup>st</sup> respondent's objection that the petition is incompetent and bad in law in view of Section 56 and 64 of the Data Protection Act and the sixth Schedule of *the Constitution*.
26. The 2<sup>nd</sup> respondent further states that petition is an abuse of the court process as overlooks the mandate of the Data Commissioner and this Court's appellate jurisdiction in such matters as provided in the Act.
27. The 2<sup>nd</sup> respondent avers that he did not participate in the installation of the CCTV camera. He notes that the petitioner did not prove that he did so.
28. Additionally, he avers that his efforts to mediate on the issue between the 1<sup>st</sup> respondent and the petitioner did not yield any fruit.
29. He depones that in his opinion the best option was to separate the two thus issued the directive to the petitioner to vacate the apartment.

### **Petitioner's response to the 1<sup>st</sup> Respondent's Preliminary Objection**

30. The petitioner in response filed grounds of opposition dated 13<sup>th</sup> July 2023 on the grounds that:
- i. *The Constitution* which is the supreme law of the land vests the High Court with unlimited and original jurisdiction over all civil and criminal matters as per the provisions of Article 165.
  - ii. Article 23 of *the Constitution* vests the High Court with the jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
  - iii. Section 56 of the Data Protection Act uses permissive as opposed to mandatory terms in dictating the choice of avenue of lodging complaints and as such a party is at liberty to institute a complaint at either the High Court or the office of the Data Commissioner.
  - iv. Section 64 of the Data Protection Act offers an avenue of appeal to the High Court only if a party is aggrieved by an administrative action taken upon them by the Data Commissioner and this would apply to parties who opt at instituting proceedings at the Data Commissioner.
  - v. The violation of human rights sought in the Petition is not that of privacy alone but also access to information, freedom of movement and residence and it is proper to enjoin parties to the same transaction to preserve court's time.
  - vi. The Petition and Application before this court falls within the exceptions of the doctrine of exhaustion.

### **Petitioner's Submissions**

31. The petitioner in support of his case filed three sets of submissions through Ricar Advocates LLP. The first set of submissions which are undated cover the issues raised in the 1<sup>st</sup> respondent's Preliminary



Objection, the second and third set, covers the issues set out in the petition and are dated 23<sup>rd</sup> July and 30<sup>th</sup> November 2024 respectively.

32. The first set of submissions addressed the question of whether the issues raised in this petition can be raised before this Court. The Petitioner's Advocate submitted that the petition raises constitutional questions that can only be determined by this Court which has the jurisdiction to determine whether a right or fundamental freedom has been denied, violated, infringed and threatened under Article 165(3) of *the Constitution*. In addition, there is the 2<sup>nd</sup> respondent's intention to terminate the tenancy.

33. It was argued on behalf of the Petitioner that the mandate of the Data Commissioner as envisaged under the Data Protection Act does not cover the extent of the prayers sought in the petition. Reliance was placed in *Kenya Human Rights Commission v Commissions of Authority of Kenya and 4 others* (2018) eKLR where it was held that:

“A person's right to privacy entails that such a person should have control over his or her personal information and should be able to conduct his or her personal affairs relatively free from unwanted intrusions. Privacy, in its simplest sense, allows each human being to be left alone in a core which is inviolable.”

34. It was submitted on behalf of the Petitioner that the doctrine of exhaustion is not absolute and has exceptions as held in *Ndiara Enterprises limited vs. Nairobi City County Government* [2018] eKLR where it was held that:

“Where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum, and only invoke the court process upon sufficient demonstration that the dispute as laid was incapable of being effectively dealt with in that other forum; secondly, that the High Court has mandate to exempt a party from complying with the principle of the doctrine of exhaustion limited to circumstances where such an action on the part of the court is meant to serve the noble interests of justice to the parties before the court in instances where there is sufficient demonstration of the existence of exceptional circumstances or, alternatively, where there is demonstration that the alternative remedy will be less convenient, beneficial and or less effective in the circumstances.”

35. It was further submitted for the petitioner that Section 56 of the Data Protection Act is not couched in mandatory terms and thus does not require the parties to compulsorily lodge complaints before the Data Protection Commissioner. It was thus argued that the Petition is bad in law. Dependence was placed on *Makoffu v Kenya Power and Lighting Company Limited (Pet. No. E377 of 2021)* where it was held that:

“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 and values.”

36. On behalf of the petitioner, it was argued that the Petition raised the following constitutional issues for determination: the jurisdiction of this Court, whether the petitioner's right to privacy was infringed, whether the act of the 2<sup>nd</sup> respondent contravenes Article 39 of *the Constitution*, whether the petitioner is entitled to the relief sought.

37. On the first issue, Counsel answered in the affirmative stating that the Court is vested with jurisdiction to determine this matter by virtue of Article 165(3)(d) of *the Constitution*. Reliance was placed in Law



Society of Kenya v Supreme Court of Kenya & another; Abdulahi SC & 19 others [2024] KEHC 7819 (KLR) where it was held that:

“There can be no denial that what is before this court is a constitutional petition brought under article 22 as read with articles 23(1) and 165(3) of *the Constitution*, challenging what the petitioner perceives to be constitutional infractions on various articles of *the Constitution*. The petitioner wants this court to exercise its mandate under article 165(3) (b) and (d)(ii) to investigate and determine the veracity, or otherwise of the alleged infringements and redress the violations, if any.

In that respect, my review of the petition is that the issues raised therein are not idle. They fall within the ambit of article 23(1) as read with article 165(3)(b)(d)(ii) and, therefore, under the jurisdiction of this Court.”

38. Counsel relying on the doctrine of stare decisis noted that this Court pronounced itself on a similar issue in Ondieki v Maeda (Petition E153 of 2022) [20231 KEHC 18290 (KLR) as follows:

“While it is clear that the respondent had a legitimate reason to install the CCTV camera, this ought to have been done in an orderly manner by consent or even through the management of the houses especially considering that the two parties were neighbors ..... Given the scenario that prevailed, I find that the petitioner’s right to privacy was breached by the respondent.”

39. Equal dependence was placed in Koinange vs. Commission of Inquiry into The Goldenberg Affair Nairobi HCMCA No. 372 of 2006 [2006] 2 KLR 529, Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others [2013] eKLR and Rift Valley Sports Club vs. Patrick Tames Ocholla Nakuru HCCA NO. 172 of 2002 [2005] eKLR.

40. Secondly, Counsel reiterating the petitioner’s averments and relying on Article 31 of *the Constitution*, submitted that undeniably the respondents violated the petitioner’s right to privacy as set up the CCTV cameras to spy on him and his family. Moreover, the action of installing the cameras without consulting and getting consent from the petitioner is said to be in breach of Article 26 and 32 of the Data Protection Act.

41. It was noted that the petitioner’s request to access the CCTV camera footage was denied by the 1<sup>st</sup> respondent hence defeating the assertion that the cameras were actually installed for security. Counsel stressed that although the right to privacy is not absolute the same must be balanced against the right to security of person. It is claimed that the 1<sup>st</sup> respondent failed to show reasonable grounds as to why she denied the petitioner his right to privacy.

42. Reliance was placed in Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10; others [2015] eKLR where it was held that:

“The concept of right to privacy demarcates for the individual realms or dimensions that he needs in order to be able to enjoy individual freedom exacted and legally safeguarded in modern societies. Such realms or dimensions of privacy substantialize the liberties that are secured because the mere securing of freedom does not in itself necessarily entail that the conditions are secured for us to be able to enjoy these liberties as we really want to”.

43. On the third issue, Counsel first stated that the 2<sup>nd</sup> respondent had failed to file a substantive replying affidavit. The respondents were accused of colluding to install the CCTV camera and that a request to re-angle the camera had ignored. It was underscored that while the petitioner does not have an issue



with installation of a CCTV camera, the contention was in relation to the angle of the camera which in effect curtails their right to movement in their own house as their every step is being recorded. This problem was argued to be further compounded by the 2<sup>nd</sup> respondent's attempt to evict the petitioner from the apartment. These acts are for this reason adjudged to be in violation of Article 39(3) of *the Constitution*.

44. To support this point reliance was placed in *Okello Okello John Livingstone and 6 others v The Attorney General & another*. (Constitutional Petition No. 1 of 2005(CA) where it was held that:

“A constitutional provision containing a fundamental human right is a permanent provision intended to cater for all times to come and therefore should be given a dynamic, progressive, liberal and flexible interpretation.”

45. Accordingly, Counsel submitted that the petitioner was entitled to the relief sought and compensation in terms of general damages for violation of his rights. Reliance was placed in *Peter Mauki Kaijenga & 9 others vs Chief of the Defence Forces & another* [2019] eKLR where the Court observed as follows:

“When exercising this constitutional jurisdiction, the court is concerned to uphold, or vindicate the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation.”

46. Like dependence was placed in *Gitobu Imanyara & 2 others v Attomev General* [2016] eKLR, *Evelvn College of Design Vs AG and another* (2013) eKLR, and *Robert Mwangi Mugo v OCS Nvahiruru Police Station & 2 others* [2022] eKLR.

### **1<sup>st</sup> Respondent's submissions**

47. Catherine Muriuki and Company advocates filed submissions dated 31<sup>st</sup> October 2024 on behalf of the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent directed her submissions on only one issue; namely: whether this Court has jurisdiction to entertain this petition.

48. It was submitted on her behalf that a reading of Section 56 of the Data Protection Act makes it plain that there exists a mechanism for internal dispute resolution where a party is aggrieved by the decision of any person on an issue that contravenes the Act. The manner in which this is to be done is provided under Section 56 and 57 of the Act.

49. Counsel stressed that the petitioner ought to have utilized this process before filing this suit. It was further argued that Section 64 of the Act grants a party aggrieved by the decision of the Data Commissioner to appeal the same before this Court. Reliance was placed in *R vs Peterkin ex parte Soni* (1972) Imm AR 253 where it was held that:

“Where parliament has provided a form of appeal which is equally convenient in the sense that the appellate tribunal can deal with the injustice of which the complaint complains this court should in my judgment as a rule allow the appellate machinery to take its course.”

50. Like dependence was placed in Section 9(2) of the *Fair Administrative Action Act* and *Republic vs National Environmental Management Authority* [2011] eKLR.



## 2<sup>nd</sup> Respondent's Submissions

51. The 2<sup>nd</sup> respondent through Osoro and Company Advocates filed submissions dated 22<sup>nd</sup> October 2024. The issues raised for discussion were: whether the High Court could determine claims arising from allegations of infringement of Article 31(c) and (d) of *the Constitution* on the right to privacy before they were determined by the Office of the Data Protection Commissioner (Data Commissioner); whether the Data Commissioner had the jurisdiction to determine whether a person's privacy rights in the Bill of Rights had been denied, violated, infringed or threatened; whether the Data Commissioner had the jurisdiction to interpret *the Constitution*; what was a constitutional issue and what was the nature of a constitutional petition; what did interpretation of *the Constitution* entail and what was the distinction between determining the denial, violation, infringement or threat to the privacy rights in the Bill of Rights and interpreting *the Constitution*.
52. On the first issue, Counsel submitted that the Court is supposed to only exclusively deal with constitutional issues. Considering this, where there are alternative avenues provided for dispute resolution, there should be postponement of judicial consideration of such issues until the provided mechanisms are exhausted.
53. Counsel submitted that the Data Protection Act is deliberately enacted to ensure that claims arising from Article 31(c) and (d) of *the Constitution* are determined by Data Protection Commissioner as the first port of call. Counsel added that the petitioner had not demonstrated the exceptions to this doctrine in filing this petition.
54. Counsel also submitted that the petitioner had not demonstrated how the 2<sup>nd</sup> respondent had violated his rights as it was clear that it was the 1<sup>st</sup> respondent who had installed the CCTV camera.

## Analysis and Determination

55. Having perused the pleadings and submissions of the parties herein, this Court identified the following as the issues for determination in this Petition; namely:
  - i. Whether this Court has jurisdiction to determine this petition.
  - ii. Whether the petitioner's right to privacy under Article 31 of *the Constitution* was violated by the respondents; and
  - iii. Whether the petitioner is entitled to the reliefs sought

## Whether this Court has jurisdiction to determine this petition

56. Jurisdiction refers to authority of the Court to legally hear and determine a dispute. The High Court in the case of Benson Makori Makworo v Nairobi Metropolitan Services & 2 others [2022] KEHC 26937 (KLR), cited with approval the decision of Court appeal in in explaining the concept of jurisdiction as follows:

“I will, however, briefly reiterate what the Court of Appeal stated in Nakuru Civil Appeal No. 119 of 2017 Public Service Commission & 2 Others vs. Eric Cheruiyot & 16 Others consolidated with Civil Appeal No. 139 of 2017 County Government of Embu & Another vs. Eric Cheruiyot & 15 Others (unreported) in a decision rendered on 8th February, 2022 on the doctrine of jurisdiction in general as follows: -

36. Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Becroft



Saunders in “Words and Phrases Legally Defined”, Volume 3 at Page 113 defines court jurisdiction as follows:

By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given...”

57. When a jurisdictional issue is raised, it is incumbent upon the Court to inquire into the matter and ascertain if it has jurisdiction or not. In doing so, the Court is guided by *the Constitution*, the relevant statutes or the principles that have been developed through judicial precedents as was observed by the Supreme Court in the Matter of the Interim Independent Electoral Commission [2011] KESC 1 (KLR);

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent.”

58. The jurisdiction of the High Court to hear and determine disputes relating to violation of rights and fundamental freedoms is provided for in Article 23 (1) as read Article 165 (3) (b) as follows:

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- (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

Article 165 (3) Subject to clause 5, the High Court shall have-

- b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

59. It must however be appreciated that a court’s jurisdiction is not exercised in vacuum. As was held in the case of Benson Ambuti Ambega & 2 Others v Kibos Distillers Limited (2020) eKLR

“... a Court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination, if there would be other appropriate legislatively mandated institutions and mechanism...”

60. This brings me to the doctrine of exhaustion raised by the respondents. The doctrine bars the Court from adjudicating a dispute where a statute or a regulatory regime has provided other alternative means



of accessing a remedy instead of directly seeking the relief from the Court. Constitutionally, this finds support in Article 159 of *the Constitution* which requires that in exercising judicial authority, courts and tribunals shall be guided by the principles stipulated thereunder and this includes ‘alternative forms of dispute resolution...’

61. Elaborating on the doctrine, the Court in *John Githui v Trustees, Nakuru Golf Club* [2019] KEHC 5523 (KLR) stated:

“25. There is no doubt that the doctrine of exhaustion of local remedies is one of esteemed juridical ancestry in Kenya. In *Republic v IEBC Ex Parte NASA-Kenya & 6 Others* [2017] eKLR, the Court – a three-judge bench -- described our jurisprudential policy on the doctrine of exhaustion which the Respondents raised in a bid to preliminarily swat away the Applicants’ suit in the following words:

This doctrine [of exhaustion] 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.

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 Muthinja 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.

We have read these cases carefully and considered the salutary decisional rule of law they announce.....

26. The existence of the doctrine is not in question. What is in question is whether it is applicable in the case at hand...”



62. There are however exceptions to the exhaustion doctrine as was explained in *Krystalline Salt Limited v Kenya Revenue Authority* [2019] KEHC 6939 (KLR) where it was held as follows:

“What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/ or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile.

...this court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy.”

63. The gist of this case is the violation of right to privacy under Article 31 (c) of *the Constitution*. It provides:

Every person has the right to privacy, which includes the right not to have—

- a) ...
- b) .....
- c. information relating to their family or private affairs unnecessarily required or revealed

64. It is also necessary to illustrate how the Courts have demarcated the scope of this right. This was judicially considered in the case of *Kenya Human Rights Commission v Communication Authority of Kenya & 4 Others* [2018] eKLR where the Court elaborated thus:

“52. Privacy is a fundamental human right, enshrined in numerous international human rights instruments. It is central to the protection of human dignity... The right to privacy embodies the presumption that individuals should have an area of autonomous development, interaction, and liberty, a “private sphere” with or without interaction with others, free from arbitrary state intervention and from excessive unsolicited intervention by other uninvited individuals. Activities that restrict the right to privacy, such as surveillance and censorship, can only be justified when they are prescribed by law, necessary to achieve a legitimate aim, and proportionate to the aim pursued.

53. A person’s right to privacy entails that such a person should have control over his or her personal information and should be able to conduct his or her personal affairs relatively free from unwanted intrusions. Privacy, in its simplest sense, allows each human being to be left alone in a core which is inviolable. Yet the autonomy of the individual is conditioned by her relationships with the rest of society. Equally, new challenges have to be dealt with. The emergence of new challenges is exemplified by this case, where the debate on privacy is being analyzed in the context of a global information based society. In an age where information technology governs virtually every aspect of our lives, the task before the Court is to impart constitutional meaning to individual



liberty in an interconnected world. Our constitution protects privacy as an elemental principle, but the Court has to be sensitive to the needs of and the opportunities and dangers posed to liberty in a digital world.

54. Data protection is an aspect of safeguarding a person's right to privacy. It provides for the legal protection of a person in instances where such a person's personal particulars (information) is being processed by another person or institution (the data user). Processing of information generally refers to the collecting, storing, using and communicating of information. The processing of information by the data user/responsible party threatens the personality in two ways: a) First, the compilation and distribution of personal information creates a direct threat to the individual's privacy; and (b) second, the acquisition and disclosure of false or misleading information may lead to an infringement of his identity.”
65. The question however becomes, does it fall within the realm of this Court to adjudicate upon this matter at this juncture?
66. The respondents' contention is that this is not a dispute for this Court as its determination ought to be in accordance with the procedure provided for under Section 56 of the *Data Protection Act, 2019* and only finding its way into the High Court through an appellate process as specified under Section 64 as an appeal against the decision of the Data Commissioner.
67. The Petitioner maintained that this is an issue that pertains the violation of his rights and fundamental freedom to privacy under Article 31 (c) of *the Constitution* which within the jurisdiction of this Court to decide by dint of Article 23 as read with Article 165 (3) (b) of *the Constitution*.
68. It is necessary that the Court explores the relevant provisions of the *Data Protection Act, 2019* in order to determine if the matter should come directly to this Court or the Court should in the first instance defer to the determination of the Data Commissioner.
69. To start, the preamble to the *Data Protection Act, 2019* declares that it is “AN ACT of Parliament to give effect to Article 31(c) and (d) of *the Constitution*; to establish the Office of the Data Protection Commissioner; to make provision for the regulation of the processing of personal data; to provide for the rights of data subjects and obligations of data controllers and processors; and for connected purposes.”
70. The Data Commissioner is appointed under Section 6 of the Act with functions and powers attached to this office being stipulated under Section 8 and 9 of the Act.
71. On the issue of complaints, the Act under Section 56 provides:
- Complaints to the Data Commissioner
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 orally or in writing.
  3. Where a complaint made under subclause (1) is made orally, the Data Commissioner shall cause the complaint to be recorded in writing and the complaint shall be dealt with in accordance with such procedures as the Data Commissioner may prescribe.



4. A complaint lodged under subclause (1) shall contain such particulars as the Data Commissioner may prescribe.
5. A complaint made to the Data Commissioner shall be investigated and concluded within ninety days.

72. On the outcome, Section 58 (1) of the Act provides that:

Where the Data Commissioner is satisfied that a person has failed, or is failing, to comply with any provision of this Act, the Data Commissioner may serve an enforcement notice on that person requiring that person to take such steps and within such period as may be specified in the notice.

73. Section 64 of the Act provides as follows concerning an appeal:

Right of appeal

A person against whom any administrative action is taken by the Data Commissioner, including in enforcement and penalty notices, may appeal to the High Court.

74. Further, under Section 2 of the Data Protection Act, in the context of this case, the 1<sup>st</sup> respondent who installed the CCTV for collection of data would assume the designation of ‘Data Controller’ which the Act defines as follows:

“data controller” means a natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purpose and means of processing of personal data.

75. On the other hand, the Act defines the petitioner would be the ‘Data Subject’ which is defined in Section 2 as follows:

“data subject” means an identified or identifiable natural person who is the subject of personal data.

76. ‘Processing of information’ or data is defined to mean any operation or sets of operations which is performed on personal data or on sets of personal data whether or not by automated means, such as:

1. collection, recording, organisation, structuring;
2. storage, adaptation or alteration;
3. retrieval, consultation or use;
4. disclosure by transmission, dissemination, or otherwise making available; or
5. alignment or combination, restriction, erasure or destruction.

77. The Act further under Section 25 outlines the principles of Data protection as follows:

Every data controller or data processor shall ensure that personal data is—

- a. processed in accordance with the right to privacy of the data subject;
- b. processed lawfully, fairly and in a transparent manner in relation to any data subject;



- c. collected for explicit, specified and legitimate purposes and not further processed in a manner incompatible with those purposes;
- d. adequate, relevant, limited to what is necessary in relation to the purposes for which it is processed;
- e. collected only where a valid explanation is provided whenever information relating to family or private affairs is required;
- f. accurate and, where necessary, kept up to date, with every reasonable step being taken to ensure that any inaccurate personal data is erased or rectified without delay;
- g. kept in a form which identifies the data subjects for no longer than is necessary for the purposes which it was collected; and
- h. not transferred outside Kenya, unless there is proof of adequate data protection safeguards or consent from the data subject.

78. Section 18(1) of Act further provides that no person shall act as a data controller or data processor unless registered with the Data Commissioner. In same manner Section 26 of the Act outlines the data subject right's follows:

- a. to be informed of the use to which their personal data is to be put;
- b. to access their personal data in custody of data controller or data processor;
- c. to object to the processing of all or part of their personal data;
- d. to correction of false or misleading data; and
- e. to deletion of false or misleading data about them.

79. Section 32 (1) of the Act sets out the threshold for a breach of data as follows:

A data controller or data processor shall bear the burden of proof for establishing a data subject's consent to the processing of their personal data for a specified purpose.

80. It clear from the examination of the above statutory provisions that the grievance by the Petitioner is matter that involves data violation and thus any complaint relating to breach of privacy by unlawful collection of personal data ought to have been lodged with the Data Commissioner for investigation and taking of necessary enforcement action before rushing to file this Petition. As held in *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another* [2016] eKLR;

“... Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation...”

81. It is the finding of this Court that the instant petition offends the doctrine of exhaustion of remedies. For this reason, the petition is hereby struck out. Each Party to bear its own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH MARCH, 2025.**



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**L N MUGAMBI**

**JUDGE**

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