Institution of Surveyors of Kenya v National Social Security Fund & another (Petition E251 of 2025) [2025] KEHC 12462 (KLR) (Constitutional and Human Rights) (14 August 2025) (Ruling)

Neutral citation: [2025] KEHC 12462 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E251 OF 2025

AB MWAMUYE, J

AUGUST 14, 2025

IN THE MATTER OF ARTICLES 1, 2, 3 (1), 10, 19, 20, 22, 23 (1), (3), 24, 47, 48, 165(3) & 227 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE CONTRAVENTION OF ARTICLES 10, 227 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE VALUERS ACT

AND

IN THE MATTER OF PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2015

AND

IN THE MATTER OF CONTRAVENTION OF SECTIONS 55,60, 70(3) 124(7) OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2015

AND

IN THE MATTER OF THE COMPETITION ACT NO. 12 OF 2012

AND

IN THE MATTER OF THE CONTRAVENTION OF SECTIONS 21(3) (C)(D) (I) OF THE COMPETITION ACT NO. 12 OF 2012

BETWEEN

INSTITUTION OF SURVEYORS OF KENYA ..... PETITIONER

AND

NATIONAL SOCIAL SECURITY FUND ..... 1ST RESPONDENT

PUBLIC PROCUREMENT & REGULATORY AUTHORITY 2ND RESPONDENT

RULING

1. The 1st Respondent filed a preliminary objection seeking the dismissal of the Petition and the Application by the Petitioner. The Petitioner filed a Petition dated 5th May 2025, which was accompanied by an application of even date. The Petitioner challenges the legality of NSSF's procurement process initiated through Tender No. NSSF/ONT/AV/18/2024/25, arguing it failed to comply with constitutional and statutory requirements of fairness, transparency, and equity under Article 227 and the *Public Procurement and Asset Disposal Act*. The tender is alleged to contain irregular and unlawful conditions.

2. The Petitioner argues that demanding bidders to have not less than a Kshs.300 million professional indemnity cover is unreasonable, excessive, and not related to the actual risk. They claim this requirement lacks legal foundation and unfairly excludes small and medium-sized practitioners, conflicting with Articles 54, 55, and 227 of *the Constitution*. Furthermore, requiring the lead consultant and at least two others to hold Master's degrees, and the plant and equipment valuer to have a Mechanical Engineering degree or be a member of the Royal Institution of Chartered Surveyors (RICS), violates the *Valuers Act*. The Petitioner emphasises that these qualifications are not based on any Kenyan statutory or professional standards. As a result, these academic and professional requirements are seen as arbitrary and exclusionary, undermining open competition and fairness.

3. The Petitioner argues that making RICS membership a requirement places a foreign professional body above Kenya's legally recognised Institution of Surveyors and the Valuers Registration Board, which is the only statutory regulator. They claim this is discriminatory and weakens Kenya's regulatory system. The criteria used in the tender, which awarded the contract to the lowest bidder meeting technical and mandatory standards, are considered flawed. The Petitioner states that such criteria ignore the statutory mandate to use Quality-Based Selection (QBS) for professional services like valuation. They argue that price should not determine the award, especially when law mandates standardized fees, and that too much focus on cost undermines the quality and integrity of procurement results.

4. According to the Petitioner, the requirement to quote fees in advance is challenged as professionally improper and a violation of rules governing valuers, which mandate value-based pricing only after completion of the assignment. The Petitioner asserts that the educational requirements for consultants are not recognised by the statutory regulator, making them ultra vires.

5. It was averred that the short tender timeline, spanning weekends and a public holiday, curtailed fair participation. Despite raising concerns with the NSSF, the Petitioner received no adequate response. According to the Petitioner, given the magnitude and public significance of the procurement, the Petitioner argues that the hurried process indicates a lack of transparency and an intention to limit meaningful participation, contrary to constitutional and statutory mandates governing public procurement.

6. In opposing both the Petition and the application, the 1st Respondent filed a Replying affidavit sworn by David Koross on 23rd May 2025 and also filed a preliminary objection dated 23rd May 2025. The preliminary objection, which is the subject of this ruling, is based on the following grounds: -

i. The substratum of the Petition and Application relates to a procurement dispute, and there exist elaborate and satisfactory dispute resolution mechanisms that are available to the Petitioner under Clause 50 of Section I- Instructions to Tenderers at page 24 of the Tender Document as read together with ITT 50.1 of Section II- Tender Data Sheet (TDS) at page 27 of the Tender Document; and also under Part IV and Part XV of the *Public Procurement and Asset Disposal Act* Chapter 412 C of the Laws of Kenya(hereinafter referred to as the PPADA), as read together with the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as the Regulations)

ii. The Petition and Application are in flagrant violation of the principle of constitutional avoidance or the doctrine of exhaustion, as the Petitioner has neither attempted nor exhausted any of the dispute resolution mechanisms available to it under the PPADA and the Regulations, in the first instance, prior to invoking the jurisdiction of this Honourable Court.

iii. That the facts and circumstances of the instant Petition and Application, the reliefs sought, regulatory regime available to the Petitioner and the nature of the interests involved do not disclose any exceptional circumstances that would warrant any exception to the doctrine of exhaustion.

iv. The Petition and the Application ought to be struck out for want of this Honourable Court's jurisdiction on account of the principle of constitutional avoidance or the doctrine of exhaustion.

v. The Application is, in any event, fatally defective for want of a Supporting Affidavit.

vi. The Petition and Application are otherwise an abuse of the Court process and should be struck out with costs to the 1st Respondent.

7. The Court gave directions that the Notice of Preliminary Objection be addressed by way of written submissions and only the 1st Respondent complied with the Court's directions.

1St Respondent's Submissions

8. In its written submissions dated 23rd June 2025, the 1st Respondent submitted that the Petition violates the doctrine of exhaustion, which requires parties to pursue all available statutory dispute resolution processes before approaching the Court. Counsel referenced several authorities, including Geoffrey Muthiga Kabiru & 2 Others v Samuel Muguna Henry & 1756 others [2015] eKLR, emphasising that courts are last-resort forums. They explained that in procurement disputes under the *Public Procurement and Asset Disposal Act* (PPADA), parties must first file complaints with either the Public Procurement Administrative Review Board (PPARB) or the Public Procurement Regulatory Authority (PPRA). Furthermore, Counsel argued that the Petitioner did not utilise these mechanisms despite the Tender Document requiring it and contended that the Petition bypasses the legal framework, making it improper before the Court.

9. The 1st Respondent further argued that the Petition is inconsistent with the doctrine of constitutional avoidance, which holds that constitutional interpretation should be reserved only where no alternative legal avenues are available. Citing legal authorities from our jurisdiction and foreign comparative law, such as the Zimbabwean and South African courts, it is asserted that where statutes such as the PPADA provide adequate remedies, including judicial review, constitutional claims should not be invoked. It was argued that the reliefs sought, such as certiorari, prohibition and mandamus, are appropriately addressed through different mechanisms of judicial review proceedings under the *Fair Administrative*

Action Act and the PPADA itself. Therefore, there is no demonstrable need to frame the dispute as a constitutional matter, and the Court is urged to abstain from exercising jurisdiction on this basis.

10. It was also submitted that the Application is fundamentally defective due to the absence of a proper Supporting Affidavit for the Notice of Motion. Counsel emphasised that Rule 19 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules mandates that every application be supported by an affidavit and argued that the one annexed in this instance supports the main Petition rather than the Application, and fails to reference or substantiate any specific grounds for the Application. This defect is not merely procedural but substantive, rendering the Application incurably incompetent. The Respondent submits that without an affidavit properly tied to the Notice of Motion, the Application cannot be sustained and must be struck out.

11. In conclusion, the Respondents contend that the Petition and Application are procedurally and substantively flawed. The Petition is brought in breach of the doctrine of exhaustion and violates the constitutional avoidance principle by prematurely invoking constitutional jurisdiction where statutory remedies exist. The 1st Respondent thus urge the Court to uphold its preliminary objection, strike out both the Petition and Application, and award costs accordingly.

Analysis And Determination

12. It is trite that an application that is not opposed need not automatically succeed. The applicant has a duty to prove his case and the court will determine the same on merit. (See Sitelu Konchellah vs Julius Lekakeny Ole Sunkuli & Sunkuli & 2 others (2018) eKLR.)

13. I have carefully considered the grounds raised in the Notice of preliminary objection, and the respective submission herein, and find the following issues arise for determination: -

    i. Whether the preliminary objection is properly raised.

    ii. Whether the doctrines of exhaustion and Constitutional avoidance militate against the Petitioner's Petition and application herein.

Whether the preliminary objection is properly raised

14. Undeniably, a valid and proper preliminary objection must be based solely on a point of law, free from facts that require proof or evidence for their determination. When a court needs to examine such facts, the issue cannot be raised as a preliminary objection on a point of law.

15. The nature and scope of a preliminary objection is cogently defined in the statement of Law, JA, in the case of Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696 at 700: -

> " So far as I am aware, 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 or to refer the dispute to litigation."

16. This principle on what constitutes a proper preliminary objection has been followed by courts in Kenya for many years, and there is a host of authorities to that effect. In the case of Omondi vs National Bank of Kenya Ltd & others [2001] KLR 579; [2001] 1 EA 177, the Court observed: -

> " .. In determining [preliminary objections] the Court is perfectly at liberty to look at the pleadings and other relevant matters in its record and it is not necessarily to file affidavit

evidence on those matters.... What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion."

17. Considering the ratio decidendi in the above-cited cases, I conclude, without much hesitation, that the issues raised fall squarely within the scope of a preliminary objection.

Whether the doctrines of exhaustion and Constitutional avoidance militate against the Petitioner's Petition and application herein.

18. This issue raises concerns regarding the jurisdiction of this court, and I am thus obligated to consider the same, as it is a threshold issue to be resolved at the earliest opportunity. It is well recognised in our law that a court of law shall down its tools in respect of a matter before it, the moment it holds that it lacks jurisdiction.

19. It is trite that the issue of jurisdiction should be determined at the earliest time possible. In Owners of the Motor Vessel "Lillian"(S) versus Caltex Oil (Kenya) Ltd [1989] KLR1, it was held as follows: -

> " Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court had no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. .....
>
> "By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of 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 the kind and nature of the actions and matters of which the particular court had cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristic. 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."

20. The Respondent's PO is anchored on the doctrines of exhaustion and constitutional avoidance. The doctrine of exhaustion is a legal principle anchored under Article 159(2) of *the Constitution*. Article 159(2) provides;

> " In exercising judicial authority, the courts and tribunals shall be guided by the following principles;
>
> a. justice shall be done to all, irrespective of status;
>
> b. justice shall not be delayed
>
> c. alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

d. justice shall be administered without undue regard to procedural technicalities; and

e. the purpose and principles of this constitution shall be protected and promoted" (emphasis added)

The doctrine of exhaustion binds parties particularly where a contract or term of engagement provides so to first explore and exhaust the available alternative dispute resolution mechanism before resorting to courts Before one can say the doctrine applies, heshe alleging must demonstrate the following;

i. That a mechanism exists to resolve the dispute

ii. That the alternative mechanism is lawful, fair and contains sufficient safeguards for valid, objective and fair determination of a dispute

iii. That the alternative mechanism is expeditious, efficient, lawful, reasonable and procedurally fair (Article 47(1) of *the Constitution*)

The above guidelines determine whether the doctrine of exhaustion applies in a particular set of circumstances

21. The doctrine of exhaustion encourages disputants to seek other means of resolving their conflicts rather than, or before coming to Court. The jurisdiction of the Court should only be invoked when all other means of dispute resolution fail or are exhausted. This was the holding in the case of Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR wherein the Court of Appeal stated: -

> " 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 the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. 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 of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

22. Closely linked to the doctrine of exhaustion is the doctrine of Constitutional avoidance. Similar to res judicata or the doctrine of exhaustion, this doctrine can prevent a court from hearing a case. Constitutional avoidance is defined as a preference for resolving a case through any means other than addressing a constitutional issue. This principle is associated with the doctrine of justiciability, which sets limits on the constitutional arguments courts can consider. Justiciability primarily involves three principles: standing, ripeness, and mootness. The doctrine of avoidance was reinforced in Sports and Recreation Commission v Sagittarius Wrestling Club and Anor [2001] (2) ZLR 501 (S), where the court stated the following:

> " ...Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights.."

23. In Chawira & Ors v Minister of Justice Legal and Parliamentary Affairs & Ors CCZ 3/17, the Constitutional Court of Zimbabwe held that: -

> " As we have already seen, in the normal run of things courts are generally loathe to determine a constitutional issue in the face of alternative remedies. In that event they would rather skirt and avoid the constitutional issue and resort to the available alternative remedies."

24. Constitutional avoidance is a doctrine that has developed regarding the interpretation of constitutional questions. Under the doctrine, the courts avoid ruling on constitutional questions if they can resolve a case on other grounds, including statutory issues. The fundamental principle of constitutional avoidance is that courts should determine a constitutional issue only when it is a strict necessity.

25. The doctrine of constitutional avoidance, which the 1st respondent's advocate submitted on, simply underscores the restraint that is exercised by the courts whereby they avoid deciding disputes based on *the Constitution* where it is clear that such disputes can properly be decided or resolved without invoking *the Constitution* but on other legal grounds. Justice Mativo in Lugo v Director of Public Prosecutions [2022] KEHC 10574 (KLR) explained the concept more elaborately as follows: -

> " The doctrine of ripeness and constitutional avoidance gives credence to the concept that *the Constitution* does not operate in a vacuum or isolation. It has to be interpreted and applied in conjunction with the applicable legislation together with other legal remedies. Where there are alternative remedies the preferred route is to apply such remedies before resorting to *the Constitution*. The possibility of the elevation of any dispute to a constitutional issue is what is sought to be avoided by doctrine of ripeness and constitutional avoidance. It is borne out of realization that all legislative and common law remedies are part of the legal system. In other words a constitutional issue is not ripe until the determination of constitutional issue is the only course that give the litigant the remedy he seeks. Both Constitutional avoidance and ripeness avert determination of constitutional issues until it becomes necessary to the extent that it is the only course available to assist the litigants cause. The exceptions to the doctrine of constitutional avoidance are: i.Where the constitutional violation is so clear and of direct relevance to the matterii.In the absence of an apparent form of ordinary relief and,iii.Where it is found that it would be a waste of effort to seek a non-constitutional resolution of the dispute."

26. The Supreme Court of Kenya in Communications Commission of Kenya and 5 Others v Royal Media Services Ltd & 5 Others [2014] eKLR, observed thus: -

> "(105) We shall now turn to the Constitutional-Avoidance Doctrine. The doctrine is at times referred to as the Constitutional -Avoidance Rule. Black's Law Dictionary, 10th Edition at page 377 defines it as:
>
> "The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion."
>
> (106) The doctrine interrogates whether there are other ways of resolving a dispute outside a constitutional petition."

27. It is worth noting that where *the Constitution* or legislation provides a dispute resolution mechanism, it must be strictly followed before invoking the jurisdiction of the courts. By approaching the High

Court directly without first exhausting the other remedies available before the relevant authority, the petitioner has acted contrary to this principle.

28. The twin doctrines of exhaustion and constitutional avoidance are now well established in Kenya's constitutional jurisprudence. The doctrine of exhaustion mandates that when there is an alternative statutory dispute resolution mechanism, it must be utilised before approaching the courts. The *Public Procurement and Asset Disposal Act*, 2015 (PPADA), under Section 167(1), explicitly states that "a candidate or a tenderer who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review...." The Petitioner's grievances directly concern the propriety, legality, and fairness of the procurement process, which are issues within the jurisdiction of the Public Procurement Administrative Review Board (PPARB). The failure to submit a complaint to the PPARB constitutes a breach of the exhaustion requirement.

29. The exhaustion doctrine is not an empty procedural requirement, but one tied to the principle of good governance and judicial economy. It is imperative that where a statute establishes a dispute resolution mechanism, the same must be strictly followed before invoking the jurisdiction of the Court. In the instant case, the Petitioner raised complaints about the fairness and legality of procurement terms, including the tender period, professional qualifications, and evaluation criteria, precisely the kind of disputes envisaged under the PPADA. The Petitioner's direct approach to the High Court without first invoking the PPARB's jurisdiction thus violates the judicially acknowledged exhaustion principle.

30. Disputes concerning the procurement process ought to be addressed through the mechanisms provided under the PPADA unless there are exceptional circumstances. No such exceptional circumstances have been demonstrated by the Petitioner in the present case. The Petitioner has not alleged any bias, structural incapacity, or futility in accessing the PPARB. The Petitioner's correspondence with the procuring entity cannot substitute for a statutory review process. As a result, the Court is entitled to find that the doctrine of exhaustion was improperly sidestepped.

31. The Petitioner's concerns regarding technical qualifications, discriminatory financial conditions, and alleged procedural errors in the procurement process all relate to issues of statutory interpretation and administrative action. These matters are properly addressed under the PPADA and, if necessary, through judicial review mechanisms provided under Section 175 of the PPADA and the *Fair Administrative Action Act*, rather than through the constitutional jurisdiction of the Court. Constitutional interpretation is not a panacea for all grievances especially where Parliament has provided clear statutory recourse. The present dispute does not involve novel constitutional questions, nor does it present a situation where statutory interpretation would be inadequate. The Petition, therefore, improperly elevates a procurement grievance into a constitutional dispute.

32. Constitutional litigation must not be a substitute for normal procedures for invoking judicial review or appealing administrative action. The Petitioner's attempt to invoke Article 227 on procurement fairness, and Article 55 on youth empowerment, without first testing the legality of the procurement criteria through the PPARB or regulatory challenge, offends these principles. The constitutional issues are not so intertwined as to make statutory procedures ineffective or irrelevant.

33. The Petitioner also failed to demonstrate the existence of exceptional circumstances that would justify bypassing the PPARB. The exception to the doctrine of exhaustion is not simply about alleging a violation of rights, it must be shown that the alternative remedy is either inaccessible, ineffective or illusory. Here, the PPARB, the PPRA, and the ordinary judicial review jurisdiction of the High Court under the FAAA are all accessible and operational. The Petitioner's assertion that the procurement

process was hurried and unreasonable could still have been raised before the PPARB within the statutory timeline.

34. Ultimately, this Court is obliged under the constitutional principle in Article 159(2)(c) to encourage alternative dispute resolution. Judicial restraint is appropriate when statutory alternatives exist and have not been exhausted. This maintains institutional respect and prevents undermining the roles of administrative bodies such as the PPARB. The Petitioner's resort to a constitutional petition instead of utilizing the administrative review process constitutes an abuse of court process. Consequently, the Petition breaches both the exhaustion doctrine and the principle of constitutional avoidance.

35. From the foregoing, the Petition is therefore prematurely and improperly before this Court. As such, the Court upholds the 1st Respondent's preliminary objection and strikes out the Petition and Application in their entirety for want of jurisdiction with no orders as to costs.

File Closed Accordingly.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 14TH DAY OF AUGUST 2025.

BAHATI MWAMUYE

JUDGE

In the presence of: -

Counsel for the Petitioner – Ms. Achieng h/b Mr. Opondo

Counsel for the 1st Respondent – Ms. Maina h/b Ms. Nungo

Counsel for the 2nd Respondent – No appearance

Court Assistant – Ms. Lwambia