



REPUBLIC OF KENYA



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**Mugata v Nyaberi & 3 others; Ethics and Anti-Corruption Commission
(Interested Party) (Petition E249 of 2024) [2025] KEHC 12505 (KLR)
(Constitutional and Human Rights) (14 August 2025) (Ruling)**

Neutral citation: [2025] KEHC 12505 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E249 OF 2024

AB MWAMUYE, J

AUGUST 14, 2025

IN THE MATTER OF ARTICLES 1,2,4,10,19,20,21,22,23,27,165,201 AND 258 O

THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION AND VIOLATION OF

**CONSTITUTIONAL PRINCIPLES UNDER
ARTICLES 10(1), AND 201 OF THE CONSTITUTION**

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION AND VIOLATION OF

SECTIONS 8,9(A), AND 10 OF THE PUBLIC OFFICERS AND ETHICS ACT

**AND IN THE MATTER OF RULES 3,4,11& 13 OF THE CONSTITUTION OF KENYA
(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND**

PROCEDURE RULES

BETWEEN

SAMUEL MUGATA PETITIONER

AND

CHARLES NYABERI 1ST RESPONDENT

NATIONAL OLYMPICS COMMITTEE OF KENYA 2ND RESPONDENT



KENYA VOLLEYBALL FEDERATION 3RD RESPONDENT

KENYA NATIONAL SPORTS COUNCIL 4TH RESPONDENT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED PARTY

RULING

1. Contemporaneously with the petition dated 17th May 2024 herein, the Petitioner filed a Notice of Motion application dated 17th May 2024 seeking: -
 - a. That the application be certified urgent and be heard ex parte in the first instance.
 - b. Pending hearing and determination of the application, the Honourable Court be pleased to issue a conservatory order of injunction against the 2nd Respondent, their assigns, agents, employees, officers, servants or any person acting on their behalf from including the 1st Respondent in the preparation for the upcoming Paris Olympics and sending him as part of the delegation to represent Kenya in the Olympics.
 - c. Pending hearing and determination of the application, the Honourable Court be pleased to issue a conservatory order of injunction barring the 1st Respondent from attending meetings or participating in meetings of the 3rd Respondent and 4th Respondent.
 - d. Pending hearing and determination of the Petition herein the Honourable Court be pleased to issue a conservatory order of injunction against the 2nd Respondent, their assigns, agents, employees, officers, servants or any person acting on their behalf from including the 1st Respondent in the preparation for the upcoming Paris Olympics and sending him as part of the delegation to represent Kenya in the Olympics.
 - e. Pending hearing and determination of the Petition, the Honourable Court be pleased to issue a conservatory order of injunction against the 1st Respondent from attending meetings of the National Executive of the 3rd Respondent.
 - f. The costs be provided for.
2. It is the Petitioner's case that the 1st Respondent was Chief De Mission of the delegation representing Kenya at the 10th All Africa Games in Maputo, Mozambique, where the Kenyan team faced logistical challenges regarding accreditation, accommodation, and transport facilities. According to the Petitioner, this led Parliament, through the departmental committee on Labour and Social Welfare, to conduct investigations into the causes of the challenges faced by the Kenyan team during the competition, which found that the 1st Respondent and the advance team were responsible for the logistical issues and recommended disciplinary action against them.
3. The Petitioner contends that he wrote a letter dated 29th September 2023 to the Clerk National Assembly and copied the Chair of the Ethics and Anti-Corruption Commission (EACC), inquiring about the status of implementation of Parliament's recommendation, but he has not received feedback from EACC.
4. It is averred that the inclusion of the 1st Respondent by the 2nd Respondent in the preparation for the upcoming Olympics and the list of the team heading to Paris for the Olympics as the head of



delegation of the volleyball is a breach of the principles of governance and national values enshrined in *the Constitution*.

5. Upon being served with the petition and the application, the 1st, 3rd and 4th Respondents filed a Notice of Preliminary objection, the subject matter of this ruling, urging this Court to dismiss the application and the petition on the following grounds: -
 - i. This Honourable Court is divested of jurisdiction to hear and determine the Petition and the Notice of Motion Application as the Petitioner has not exhausted the statutory dispute resolution mechanisms under the *Sports Act*, 2013.
 - ii. The Petition does not meet the threshold of a Constitutional Petition as provided in the case of *Anarita Karimi Njeru v Republic* [1979] eKLR.
6. The Court gave directions that the preliminary objection be argued by way of written submissions. The parties complied.

PETITIONER'S SUBMISSIONS

7. The Petitioner, in his submissions, distils two issues for determination on the Respondents' preliminary objection, thus;
 - I. Whether the court has jurisdiction to hear and determine the Petition.
 - II. Whether the Petition meets the threshold set in the case of *Anna Karimi Njeru vs Republic* [1979] eKLR.
8. Submitting on the first issue, Counsel for the Petitioner stated that this court has the requisite jurisdiction to hear and determine the Petition. It was argued that despite there being a dispute resolution mechanism established in the *Sports Act*, the existence of an alternative dispute resolution mechanism does not automatically oust the jurisdiction of the court and the principle of exhaustion, since the reliefs sought fall under the jurisdiction of this court. Reliance was placed on the decisions of *William Odhiambo Ramogi & 3 Others v Attorney General & 4 Others; Muslims for Human Rights & 2 Others (Interested Parties)* [2020] KEHC 10266 (KLR) and *Kenya Power & Lighting Co. Plc v County Government of Nairobi City & Another (Environmental and Land Petition No. E009 of 2025 and Land Petition No. E013 of 2025)*.
9. It was submitted that the Petition sought a declaration that the 1st Respondent violated Articles 10 and 201 of *the Constitution*, and was unfit to hold public office, hence this court is the appropriate forum to grant the reliefs sought as opposed to the Tribunal.
10. Regarding whether the Petition meets the constitutional threshold for a constitutional petition, it was submitted that the petition identifies with precision the facts relied upon, the Constitutional provisions violated, the nature of injury caused and the reliefs sought by the Petitioner, thus satisfying the requirements as set out in *Anarita Karimi Njeru v Republic* [1979] eKLR, *Mumo Matemu v Trusted Society for Human Rights & 5 Others* [2013] eKLR and *the Constitution* of Kenya (Protection of Rights and Procedure Rules, 2013) and urged this Honourable Court to dismiss the Notice of Preliminary objection with costs.

1st, 3rd And 4th Respondents Submissions

11. The Respondents submitted that the dispute in the Petition is sports-related as it involves two sports officials and other sports organisations, and ought to be determined by the Sports Tribunal as it is vested with jurisdiction under Section 58 of the *Sports Act* to hear and determine sports-related disputes.



12. Counsel for the Respondents submitted that where the law provides for a procedure for the resolution of a dispute, that procedure or process has to be strictly followed, and where it is not followed, the courts are divested of jurisdiction to entertain a dispute and thus argued that the Petitioner has not followed and exhausted the dispute resolution mechanism provided under the *Sports Act*. To buttress this position, reliance was placed on the decision of *Narok County Council vs. Trans Mara County Council & Another Civil Appeal No. 25 of 2000*.
13. It was further submitted that the Petitioner has not demonstrated that the dispute resolution mechanism provided in the *Sports Act* is less convenient or less appropriate. Additionally, it was argued that the Petition does not set out exceptional circumstances to justify why he should be exempted from the dispute resolution prescribed by the *Sports Act* and relied on the decision of *Leonard Otieno v Airtel Kenya Limited [2018] eKLR*.
14. On whether the Petition meets the constitutional threshold for a Petition, it was submitted that a Constitutional Petition should state with a reasonable measure of precision the provision of *the Constitution* alleged to have been violated, the particulars of the alleged complaints of violation and how the constitutional provisions have been violated, which the instant petition has failed to demonstrate.
15. It was also submitted that the Petition solely states the constitutional provision upon which it is based, but does not demonstrate how the Respondents' conduct violated those provisions. To support this position, counsel relied on the decisions in *Anarita Karimi Njeru v Republic (supra)*, *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (supra)*, and *Bernard Murage v Fineserve Africa Limited & 3 others [2015] eKLR* and argued that the Petition does not meet the Constitutional threshold for a Petition and thus urged this court to allow the Preliminary Objection with costs.

Analysis And Determination

16. I have carefully considered the grounds raised in the Notice of preliminary objection, and the respective submissions by the parties herein, and distil the following issues for determination: -
 - i. Whether the preliminary objection is properly raised
 - ii. Whether the Petitioner's petition is properly presented
 - iii. Whether the doctrine of Constitutional avoidance militates against the Petitioner's Petition and application herein.

Whether the preliminary objection is properly raised

17. 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.
18. 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.”



19. 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.”

20. 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 Petitioner’s petition is properly presented

21. For good purpose, in constitutional litigations there has always been insistence that the petition the basis for the litigation be crafted and presented with a reasonable degree of precision on the Constitutional provisions violated or threatened to be violated, how they have been violated or are threatened to be violated, and where a violation of the petitioner’s right[s] in the Bill of rights is alleged, the rights and how they have been violated on infringed upon. In my view, a reasonable degree of precision does not equate to mathematical precision.

22. Elaborating on this, the Court in the *Anarita Karimi Njeru vs the Republic* (supra), the Court stated: -

“We could, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important [if only to ensure that justice is done in his case] that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

23. It should be noted the case of *Anarita Karimi Njeru* (supra) has been relied upon from time and time again to demonstrate the threshold of a successful Constitutional Petition. It should be appreciated the requirements for a successful Constitutional Petition are simple and are thus: - the petitioner should set out the Constitutional provisions, which he believes have been violated or threatened, and the manner in which the respondent(s) have violated those provisions. It is not enough for the Petitioner to just list the Constitutional Provisions without demonstrating how they were infringed upon.

24. Reinforcing the principles in the *Anarita Karimi* case [supra] the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (supra), not only reaffirmed its essence but also applied a contemporary outlook of its enduring legacy. The Court observed that the precision requirement shouldn’t be mistaken for exactitude. Further, the doctrine in the *Anarita Karimi* case ensures a proper definition of issues in a constitutional petition, so that the Court can apply its mind to the real issues. Additionally, it relays to the other party the exact case that it has to defend.

25. The Respondents contend that the petitioner’s pleadings are deficient as they merely list constitutional provisions without specifically demonstrating how the conduct of the 1st Respondent violated those provisions. On the other hand, the Petitioner contends that the Petition meets the requirements of Rule 10 (2) of *the Constitution* of Kenya (Protection of Rights and Procedure Rules, 2013 as it identifies with precision the facts relied upon, the Constitutional provisions violated, the nature of the injury caused and the reliefs sought.



26. In *Anarita Karimi Njeru v Republic* (supra), the court emphasised that constitutional petitions must demonstrate with reasonable precision the nature of the alleged violations, the facts relied upon, and how rights or values were infringed. A scrutiny of the Petition indicates the Petitioner has not demonstrated how the acts of the Respondents violated the listed constitutional provisions. The Petitioner has cited constitutional provisions without showing specific factual links to the alleged violations. Therefore, it is the court's finding that the Petition does not meet the threshold for a Constitutional Petition.

Whether the doctrine of Constitutional avoidance militates against the Petitioner's Petition and application herein.

27. The third issue, however, 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.
28. 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.”

29. The Respondents argued that the case mainly involves the management of a sports federation, which is governed by the *Sports Act*, 2013, establishing the Sports Dispute Tribunal for such disputes. However, the Petitioner recognises the dispute resolution mechanism in the *Sports Act* but maintains that its existence does not automatically exclude this Court's jurisdiction, since the reliefs sought cannot be provided by the Sports Dispute Tribunal but can be granted by this court.
30. The preceding discussion highlights 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..”

31. 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.”

32. 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.

33. The doctrine of constitutional avoidance, which the respondents’ 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.”

34. 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.”

35. 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 remedies available before the Sports Dispute Tribunal, the petitioner has acted contrary to this principle.
36. In the instant case, the petitioner’s grievances, which revolve around the governance of a sports federation and the suitability of an official, can be addressed under the *Sports Act* framework. The Sports Dispute Tribunal has both the expertise and mandate to adjudicate sports-related disputes, and the petitioner has not demonstrated why this statutory avenue is inadequate. Furthermore, the petitioner has not shown that the Sports Dispute Tribunal is incapable of addressing his complaints, nor has he sought any remedy exclusive to the High Court.
37. In *Godfrey Paul Okutoyi & Others -vs- Habil Olaka & Another* [2018] eKLR, the court held that: -
“It is time it becomes clear to both litigants and counsel that rights conferred by statute are not constitutional rights under the Bill of Rights and therefore, a breach of an ordinary statute is redressed through a court of law in the manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with the statutory provision that should give rise to a constitutional petition. A party should only file a constitutional petition for redress of a breach of *the Constitution* or denial, violation, or infringement of or a threat to a right or fundamental freedoms. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure”
38. Constitutional petitions should not be used as a substitute for ordinary dispute resolution mechanisms, as this undermines the constitutional architecture that allocates different forums for different disputes. The petitioner’s attempt to frame a sports governance dispute as a constitutional question appears to be an abuse of the constitutional jurisdiction of the court.
39. From the foregoing, this court finds that the doctrine of constitutional avoidance applies in this case, as the Sports Disputes Tribunal provides a competent and specialized forum for resolving the dispute. The High Court’s jurisdiction should not be invoked where alternative mechanisms exist and where no exceptional circumstances have been demonstrated to warrant direct constitutional intervention.
40. Accordingly, this court finds the Notice of Preliminary Objection to be with merit, the Petition and the Notice of Motion are dismissed in their entirety with no orders as to costs.

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

BAHATI MWAMUYE

JUDGE

In the presence of: -

Counsel for the Petitioner – Ms. Ngetich

Counsel for the Respondents – No appearance

Counsel for the Interested Party - No appearance

Court Assistant – Ms. Lwambia

