Benjamin v Kenya National Examinations Council (KNEC) & 2 others; Kenya Primary Schools Heads Association (KPSHA) & 3 others (Interested Parties) (Petition E475 of 2023) [2024] KEHC 4801 (KLR) (Constitutional and Human Rights) (25 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4801 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E475 OF 2023

LN MUGAMBI, J

APRIL 25, 2024

BETWEEN

DR MAGARE GIKENYI J BENJAMIN ..... PETITIONER

AND

KENYA NATIONAL EXAMINATIONS COUNCIL (KNEC) ... 1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF EDUCATION ..... 2ND RESPONDENT

ATTORNEY GENERAL ..... 3RD RESPONDENT

AND

KENYA PRIMARY SCHOOLS HEADS ASSOCIATION (KPSHA) . INTERESTED PARTY

KENYA PRIVATE SCHOOLS ASSOCIATION ..... INTERESTED PARTY

KENYA PARENTS ASSOCIATION ..... INTERESTED PARTY

LAW SOCIETY OF KENYA ..... INTERESTED PARTY

RULING

Background

1. This is a ruling on the Amended Notice of Preliminary objection dated 14th February, 2024 filed by the Kenya National Examinations Council as against the instant Petition. Comparable Preliminary Objections in other related Petitions i.e. Petition No. E477 of 2023, Petition No. E478 of 2023 and Petition No.488 of 2023 were heard together.

2. The petitions challenged the credibility of the 2023 Kenya Certificate of Primary Education (KCPE) examination results and the integrity of the process of production of these results.

3. Initially, the 1st respondent filed a Notice of Preliminary objection dated 8th February 2024 but subsequently amended it on 14th February 2024. The preliminary objection challenges this Court's jurisdiction to hear this Petition on account of the doctrine of exhaustion of remedies. The 1st Respondent lists the following grounds as the basis of its objection:

    i. The subject matter of the dispute should be or should have been handled under the available alternative dispute settlement machinery set under Rules 26 and 27 of Legal Notice No.131 of 2015 -The Kenya National Examination Council (Marking of Examinations, Release of Results and Certification) Rules which the petitioner failed to invoke.

    ii. Upon being handled under Legal Notice No.131 of 2015 if the petitioner is still aggrieved with the decision of the 1st respondent, the petitioner should have appealed to the Kenya National Examinations Appeals Tribunal pursuant to Section 40 J(3) of the Kenya National Examinations Council Act Chapter 214A of the Laws of Kenya.

    iii. The petition does not disclose any breach of fundamental freedoms and rights set under *the Constitution*.

4. The 2nd and 3rd respondents and the interested parties neither filed their responses nor submissions to this preliminary objection. None was in the Court file or on the online Court portal (CTS).

1st Respondent's Submissions

5. In support of the preliminary objection, the 1st respondent through Obura Mbeche and Company Advocates filed submissions dated 20th February 2024. Counsel pointed out that the core of this petition is an allegation that there were widespread errors in the marking and releasing of the 2023 KCPE examination results.

6. Placing reliance on *Mukisa Biscuit Co. V. West End Distrobutors Limited* (1969) EA 696 on what amounts to a point of law, he argued that it is based on assumption that the facts pleaded by adversary are correct. Counsel submitted that the 1st respondent's objection is indeed a point of law as it goes to jurisdiction as to being whether this Court is the right forum for the resolution of the issues raised in the Petition in view of Rules 26 and 27 of the *Kenya National Examinations Council (Marking of Examinations, Release of Results and Certification) Rules* and section 40J (3) of the *Kenya National Examination Council Act* Chapter 2014A.

7. Counsel submitted that Rule 26 provides that a person may lodge a query with the 1st respondent on the examination results while rule 27 states that a candidate can apply to the 1st respondent for review of the decision in respect of the examination results. Section 40 J(3) of the Act on the other hand provides that where a person is aggrieved by the decision of the 1st respondent he/she can lodge an appeal to the Tribunal in the prescribed form. This Section additionally makes known the appeal can be filed by a person through the County Director of Education.

8. Counsel thus submitted that the petitioner ought to have first exhausted this statutory mechanism before filing the present petition. It was submitted that lack of compliance with these provisions is

evident from the fact that the petition was filed on 25th November 2023, 2 days after the release of the results on 23rd November 2023.

9. To augment his submissions, the 1st Respondent Advocate relied on the case of *Republic vs Sacco Societies Regulatory Authority, Ex Parte Joseph Kiprono Maiyo And Others* (2017)eKLR where the Court held as follows:

> "
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> "36. There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. This principle was well articulated by the Court of Appeal in Speaker of National Assembly vs. Njenga Karnme [2008/ 1 KLR 425, where it was held that:
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> "Irrespective of the practical difficulties enumerated ... these should not in our view be used as a justification for circumventing the statutory procedure ... In our view, there is considerable merit in the submission that 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. We observe without expressing a concluded view that Order 53 of the *Civil Procedure Rules* cannot oust clear constitutional provisions and statutory provisions.
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> 37. It is now a cardinal principle that, save in the most exceptional circumstances, the judicial review jurisdiction would not be exercised and the court must not exercise it where there exist alternative remedy.
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> In Re Preston [1985/AC 835 at 825D Lord Scarman was of the view that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort."

10. Other Judicial decisions relied on by the 1st Respondent were:

> *Cortec Mining Kenya Limited vs The Cabinet Secretary Ministry of Mining and The Attorney General* (2017) eKLR, *Republic vs The Ministry of Interior and Coordination of National Government}}* (2014) eKLR, *Speaker of National Assembly vs James Njenga Karume* (1992) eKLR, *Adero & Another vs Ulinzi Sacco Society Ltd* (2002) IKLR 62, *Geoffrey Muthinja and Another vs Samuel Muguna Henry And Six Others* (2015) eKLR, *Sammy Ndung'u Waity vs Independent Electoral & Boundaries Commission and Three Others* (2019) eKLR and *Republic vs The Kenya National Examinations Council, Ex-Parte The Board of Management of Ortum Secondary School* (Kapenguria High Court JR No.9 and 10 of 2018).

Petitioner's Submissions

11. In opposition to the 1st respondent's preliminary objection, the petitioner filed submissions dated 14th February 2024. He raised two issues for determination. One, whether the objection is merited and two, whether it has met the threshold of a preliminary objection.

12. The petitioner attacked the legality of the preliminary objection stating that it touches on disputed facts and issues hence cannot qualify as a pure point of law. Consequently, he argued that the

preliminary objection had failed to meet the set threshold. He relied on Mukisa Biscuit Manufacturing Company Limited (supra) where it was held that:

> "...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 a suit.... the first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop...."

13. Moreover, the petitioner asserted that the question whether or not he exhausted the cited mechanisms, is a matter of fact not law. This is since the 1st respondent ought to present evidence to ascertain these mechanisms were not utilized for the Court to reach its conclusion.

14. Furthermore, the petitioner highlighted a number of other factual questions in the petition which require the Court to examine evidence adduced to reach a conclusive finding. He relied on the case of Dr. *Magare Gikenyi J Benjamin vs Ministry of Labour & 5 others* (2022) eKLR where it was held that:

> "13. Drawing from the above authority, a preliminary objection ought to satisfy the following elements: It should raise a pure point of law; It is argued on the assumption that all facts pleaded by the other side are correct and It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

15. He also cited the case of Mohammed Abdi Mahamed vs Ahmed Abdullahi Mohammed & 3 others (2018) eKLR. The petitioner asked this Court to dismiss the preliminary objection with costs. He asserted that the petition is a frivolous application aimed at defeating the cause of justice.

Analysis and Determination

i. Whether the Instant Objection meets the legal threshold of a Preliminary objection

ii. If so, whether the preliminary objection is merited.

Whether the Instant Objection meets the legal threshold of a Preliminary Objection

16. It was the Petitioner's contention that the instant objection does not qualify as a preliminary objection.

17. What constitutes a preliminary objection was set out in the case of Mukisa Biscuit Manufacturing Co. Ltd (Supra) and later emphasized by the Supreme Court in the *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others*(2014)eKLR as follows:

> "
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> "(31) To restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co Ltd –vs. - West End Distributors (1969) EA 696:
> "a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation

or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion".

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

> " A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law.
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> It may be noted that preliminary objections are narrow in scope and cannot raise substantive issues raised in the pleadings that may have to be determined by the court after perusal of evidence...."

19. Additionally, the observation in the *Oraro vs. Mbaja* [2005] 1 KLR offers significant insight where the Court observed that:

> " A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration..... A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop... The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence....."

20. It is ostensible from the Petition that the main grievance that underlies this Petition as is discernible from the Petition are alleged errors in the 2023 KCPE Examination Results. That is the theme that runs through the entire Petition. For instance in the particulars of discrimination provided at paragraph 50 of the Petition, the Petitioner alleges at sub-paragraph (a):

> " Respondents awarding candidates with a lower mark a higher grade while the one with lower mark is awarded higher grade. While both of them range, the respondents awarded different grades and in an absurd manner"

c) Respondents grading two or more candidates with same marks but different grades

d) Respondents awarding candidates extremely low marks not consistent with what the candidate has been scoring previously"

21. Under another sub-heading titled 'Irrational and Arbitrary and Unreasonable" the same theme of examination errors is what is highlighted. Under paragraph 53; the Petitioner states:

> " That the actions of the Respondents arbitrary releasing incorrect results, awarding same mark in one subject for a whole school, grading two or more candidates with the same marks but different grades, awarding candidates with a lower mark a higher grade while the one with lower mark is awarded higher grade, awarding candidates extremely low marks not consistent with what the candidate has been scoring previously, awarding sign language to some candidates yet they did not sit for the same and releasing results not obeying the Gausian curve, are illegal irregular and irrational to say the least smirk of the abuse of public office"

22. Finally, the final sub-heading in the Petition that carries the same theme also loudly protests the accuracy of the results and is titled "Specific Violations of *the Constitution* by the Respondents" against the Petitioner where similar allegations about errors/inaccuracies are repeated. Paragraph 58 (a) says:

> " that the respondents arbitrary and without accountability graded candidates without ensuring correctness of the said grading hence inaccurate information this is against Article 35(2) and 232 (1) (1 e) of *the Constitution*"

23. Although the Petitioner stated that the Respondents preliminary objection does not meet the legal threshold because it introduces disputed facts, on the contrary, the 1st Respondent has not attempted to rely on contrary facts to raise the preliminary objection but instead relied on what is pleaded in petition. All the 1st Respondent was to pick on the recurring theme in the entire Petition being the alleged errors in the 2023 KCPE examination results as the basis for preliminary objection. They did not introduce any facts to the contrary.

24. The issue of whether other alternative forums exist is a question of law if they do, they are be provided for in law. It is not a question of fact as argued by the Petitioner. And if a Statute shows they exist, then burden shall shift to the Petitioner to demonstrate that they are inadequate to address the issues raised in the petition.

25. However, if the Court is satisfied that the alternative remedies exists and that they provide an adequate mechanism, then this Court has no option but to divest itself of the matter in deference to the statutory mechanism that gives primary jurisdiction to alternative forum. That means that proceedings in this Court would have to be terminated. This would thus effectively satisfy the second characteristic of a preliminary objection which is that it must be capable of disposing off the matter. I find that the present objection satisfies all the key ingredients of a preliminary objection. I reject the Petitioner's argument that the objection does not meet requisite the legal threshold of preliminary objection.

Jurisdiction

26. Jurisdiction connotes the Court's general authority to adjudicate a legal dispute that is presented before it. In the words of Blacks' Law Dictionary, Tenth Edition- it refers to "A court's power to decide a case or issue a decree"

27. The Supreme Court of Kenya had the occasion to elaborate on this term *In the Matter of the Interim Independent Electoral Commission* (2011) eKLR when it stated thus:

> " 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. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step." The Lillian 'S' case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*."

28. Likewise, the Court of Appeal in Phoenix of E.A. Assurance Company Limited (supra) noted as follows:

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> " 19. ... Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself...In another locus classicus in this subject, this Court pronounced; Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. (1989):
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> "Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."

29. The jurisdiction of the High Court is provided for under article 165 (3) of *the Constitution* as follows:

> (3) Subject to clause (5), the High Court shall have—
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> (a) unlimited original jurisdiction in criminal and civil matters;
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> (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
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> (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

i. the question whether any law is inconsistent with or in contravention of this Constitution;

ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

iv. a question relating to conflict of laws under Article 191; and (e) any other jurisdiction, original or appellate, conferred on it by legislation.

(4) Any matter certified by the court as raising a substantial question of law under clause (3)(b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.\

(5) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2). Const2010 *Constitution of Kenya, 2010* 72

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

The Doctrine of Exhaustion

30. The jurisdictional question raised in this case is based the on principle of exhaustion of remedies. Strictly speaking, it does not means that the Court is incapable of dealing with the matter, rather, the argument is that primary jurisdiction is not vested in the High court but in the alternative procedure for the resolution of the dispute in question, which must be followed before the jurisdiction of this court can be invoked.

31. In this matter, the 2nd Respondent's argument is that this is a matter which should have been resolved in the manner provided for in rules 26 and 27 of the *Kenya National Examinations Council (Marking of Examinations, Release of Results and Certification) Rules* and Section 40J (3) of the Kenya National Examination Council Act instead of instituting of this Constitutional Petition before this Court.

32. On the other hand, the Petitioner insisted that the alleged alternative dispute resolution mechanism does not exist.

33. The doctrine of exhaustion of remedies is rooted in article 159 (2) of *the Constitution* which requires Courts to promote the alternative dispute resolution mechanisms. Although the High Court enjoys unlimited original and civil jurisdiction under article 165 of *the Constitution*, it must be appreciated that there are other bodies or structures that are legally mandated to resolve disputes under the law and which Courts must defer to. *Black's Law Dictionary* 10th Edition explains the doctrine of exhaustion of remedies as follows:

> " The doctrine that if an administrative remedy is provided by a Statute, a claimant must seek relief first from the administrative body before judicial relief. The doctrine's purpose is to maintain comity between the courts and administrative agencies and to ensure courts will not be burdened by cases in which judicial relief is unnecessary."

34. The Supreme Court in Sammy Ndung'u Waity (supra) underscored the importance of this principle by stating thus:

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> "(63) Where *the Constitution* or the law, consciously confers jurisdiction to resolve a dispute, on an organ other than a court of law, it is imperative that such dispute resolution mechanism, be exhausted before approaching the latter. Were it not so, parties would bide their time, overlooking the recognized forums, and later springing a complaint at the courts. Such a scenario would be a clear recipe for forum shopping, an undertaking that must never be allowed to fester in the administration of justice. We are fortified in this regard, by the persuasive authority by the Court of Appeal, in Geoffrey Muthinja Kabiru & 2 Others; [2015] eKLR; wherein the Appellate Court observed:
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> "It is imperative that where a dispute resolution mechanism exists outside the Courts, the same be exhausted before the jurisdiction of the Courts be 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."

35. Equally, the Supreme Court in *Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* (2019) eKLR stated as follows:

> "... the Court must exercise restraint in exercising its jurisdiction under Article 165. Where there exist alternative methods of dispute resolution, the Court must exercise deference to the bodies statutorily mandated to deal with specific disputes in the first instance.... The foregoing verdict also finds support in an adage principle in administrative law of "Exhaustion of Administrative Remedies" and from the jurisprudence emanating from this Court and the lower Courts, which has been restated with notoriety to the effect that, where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their Jurisdiction conferred by *the constitution*

and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance ...In the pursuit of such sound legal principles, it is our disposition that disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute... Such a deferred jurisdiction and the postponement of judicial intervention and reliefs until the mandated statutory or constitutional bodies take action rests, not alone on the disinclination of the judiciary to interfere with the exercise of the statutory or any administrative powers, but on the fact of a legal presumption that no harm can result if the decision maker acts upon a claim or grievance. Such formulation underlies the analogous cases, frequently cited for the exhaustion doctrine, in which the court refuses to enjoin an administrative official from performing his statutory duties on the ground that until he has acted the complainant can show no more than an apprehension that he will perform his duty wrongly, a fear that courts will not allay. Such cases may be expressed in the formula that judicial intervention is premature in the absence of administrative action."

36. However, despite the existence of the alternative forums, there are some exceptional cases where the Court may find its intervention necessary especially if it the forum found to be inadequate to meet the ends of justice in a particular case. The Court of Appeal in *Fleur Investments Limited vs Commissioner of Domestic Taxes & another* [2018] eKLR stated:

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> " 22. For this proposition the appellant called in aid this Court's finding in the case of Speaker of National Assembly vs Njenga Karume (1990-1994) EA 546 where the Court expressed itself in relevant part as follows: -
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> "...where there was an alternative remedy and especially where parliament has provided a statutory procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully to the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it..."
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> 23. ... Whereas courts of Law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under *the Constitution* and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly."

37. In *Krystaline Salt Limited vs Kenya Revenue Authority* (2019)eKLR the Court observed:

> " 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."

38. Further, the Court in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* (2020) eKLR outlined the exceptions to the rule as follows:

> " 60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.
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> 61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR.
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> 62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court."

39. Section 40J of the *Kenya National Examinations Council Act* lists types of disputes that may arise from the Council decisions in respect of an examination and provides how an aggrieved person can seek redress from the Tribunal established under the said Act. It provides:

Appeals from decisions of the Council

(1) A person who is aggrieved by a decision of the Council to withhold or cancel the results of a candidate may lodge an appeal to the Tribunal in the prescribed form.

(2) An institution that is aggrieved by the decision of the Council to withhold or cancel the results of the candidates in that institution may lodge an appeal to the tribunal in the prescribed form.

(3) Notwithstanding the provisions of subsection (1), a person aggrieved by a decision of the Council may appeal to the Tribunal through the County Director of Education in the County in which the applicant is resident.

(4) The County Director of Education shall transmit to the Tribunal any applications received under subsection (3) within five days of receipt.

(5) Where the person aggrieved by the decision of the Council is a minor, the application under subsection (1) shall be made by the parent or guardian of the minor.

(6) An appeal under subsection (1) shall be—

(a) in writing; and

(b) lodged with the Tribunal within a period of fourteen days from the date of the decision of the Council.

(7) The parties to an appeal lodged under subsection (1) may appear before the Tribunal in person or be represented by an advocate or any other person whom the Tribunal may permit to be heard on behalf of such party.

40. The Tribunal referred to in Section 40J is the National Examinations Appeals Tribunal established under Section 40B of the Act and its decisions are appealable to the High Court under Section 40 (O).

41. Additionally, the National Examination Council Rules, published pursuant to Legal Notice number 131 of 2015 provide:

26.

(1) A person may lodge a query to the Council on—

(a) a candidate's personal details; or

(b) examination results.

(2) In resolving queries lodged under paragraph (1), the Council shall be guided by, the Act, these Rules, written laws, Council policies, Council procedures and Council regulations.

(3) An applicant submitting any query to the Council for resolution shall ensure the applicant provides all the required evidence to enable the Council process and validate the query promptly.

27.

(1) A candidate may apply to the Council for review of the decision in respect to the candidate's examination results or data under the Act, these Rules or any other written law.

(2) A review under paragraph (1) shall be lodged to the Council by the candidate within thirty days from the date of release of the examination results.

(3) An application for review under paragraph (2) shall be made to the Council in writing.

(4) The Council shall upon receiving an application for review, consider the application and make a decision.

(5) In determining an application for review, the Council may— (a) approve the request; (b) approve part of the request; or (c) reject the request.

(6) A decision made in response to the review shall be in writing and shall be communicated to the applicant within ninety days from the date of receipt of the application.

(7) The decision of a review under these Rules shall be final.

42. A reading of the entire Petition reveals that it was precipitated by allegations of 'massive errors in the 2023 KCPE examination results' released by the 1st Respondent. That is dominant theme that defines this Petition.

43. This being so, the dispute resolution mechanism of this kind of complaint is covered by the rules and provisions under the *Kenya National Examinations Act* and the Act itself. This is a dispute which ought to have subjected to statutory mechanism provided for Under rule 26 by the Petitioner first as a query to the 1st Respondent in respect of the said examination results before instituting this Court Constitutional Petition.

44. If dissatisfied, he would have had the right to appeal to the Tribunal established under the same Act and in fact, can come to High Court if not satisfied with the decision of the Tribunal. However, he chose to come to the High Court first, which is the third tier. By approaching the High Court directly, the Petitioner by-passed an elaborate statutory mechanism of redressing examination related grievances without any exceptional reasons whatsoever. In my humble view, the issues in this Petition could have been resolved on non-constitutional grounds.

45. The upshot therefore is that the preliminary objection succeeds. The Petition is hereby struck out. I make no orders as to costs.

Dated, signed and delivered at Nairobi this 25th day of April, 2024.

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L N MUGAMBI

JUDGE

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