

**Mwangi & another v Naivasha County Hotel t/a Sawela Lodges (Petition  
E003 of 2021) [2022] KEHC 10975 (KLR) (19 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 10975 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA**

**PETITION E003 OF 2021**

**GWN MACHARIA, J**

**JULY 19, 2022**

**IN THE MATTER OF ARTICLES 2(1) & (2), 10(2) (B), 19, 20, 22, 23(3),  
28, 29, 31,165, 258 & 259 (1) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS  
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF SECTION 25, 26, 32 & 37 OF  
THE DATA PROTECTION ACT NO.24 OF 2019**

**BETWEEN**

**JOHN MWANGI ..... 1<sup>ST</sup> PETITIONER**

**VINCENT GITHANGA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**NAIVASHA COUNTY HOTEL T/A SAWELA LODGES ..... RESPONDENT**

**RULING**

**The Petition**

1. The Petitioners through a Petition and Supporting Affidavit dated the 5<sup>th</sup> day of July, 2021 raise allegations of infringement of their privacy rights as provided under article 31 of *the Constitution*.
2. Furthermore, the petitioners allege that the respondent took photographs of them during a team building activity at the respondent's premises and proceeded to make posts on various social media platforms using the said pictures with the intention of marketing the Respondent's products. The Petitioners aver that the foregoing actions of the Respondent violated their right to privacy as they did not consent to having their photos taken and the use of the same. The Petitioners additionally claim that their rights under article 2(1) & (2), 10(2) (b), 19, 20, 22, 23(3), 28, 29, 31,165, 258 & 259 (1) of *the Constitution* were violated by the Respondent.



## The Preliminary Objection

3. The Respondent opposed the Petition vide a Notice of Preliminary Objection filed on the 12<sup>th</sup> day of August, 2021 on grounds, inter alia, that:
  - i. The Honourable Court lacks jurisdiction to hear and determine issues raised in the Petition as the same does not raise justifiable constitutional matters.
  - ii. The matters raised by the Petitioners fall under the jurisdiction of the Data Protection Commissioner established under the [Data Protection Act, 2019](#) and this Honourable Court ought to discourage invocation of the constitutional process where there exists a parallel or alternative statutory remedy.
  - iii. The allegations of taking and using photographs without the consent of the Petitioners are under the province of investigation by the office of the data commissioner under the [Data Protection Act, 2019](#).
  - iv. The Data Protection Act provides for an avenue for the Petitioners to seek redress.
  - v. Even if the allegations raised in the Petition merit litigation, the claim is founded on tort and should not be entertained as a constitutional petition.
  - vi. The Petition does not meet the required standards for Petitions alleging the violation of the human rights bill.
4. The Respondent thus urged the Honourable Court to dismiss the Petition.

## Respondent's Submissions

5. The Respondent relied on the locas classicus case of *Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd*, (1969) E.A. 696 page 700 which guides a Court with what constitutes a preliminary objection. It was observed as follows: -

“...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.”

6. It was the Respondent's submission that the Honourable Court lacked the jurisdiction to entertain the Petition as the available alternative dispute resolution mechanisms were yet to be exhausted by the Petitioners prior to filing the petition. The argument is on the basis that where there is a clear procedure for redress of any particular grievance by [the Constitution](#) or an Act of Parliament, that procedure



should be strictly followed. Reference was made to the provisions of sections 56, 57, 58, 62, 63, 64, 65 and 66 of the [Data Protection Act, 2019](#) with particular attention to section 65 which provides:

“A person who suffers damage by reason of a contravention of a requirement of this Act is entitled to compensation for that damage from the data controller or data processor”

7. The Respondent urged the Court to consider the position in [Governor of Kericho County v Kenya Tea Development Agency & 30 others Ex-Parte Ktda Management Services Limited](#) [2016] eKLR where it was state:

“We are of the view that the Competition Act provides an efficacious remedy for resolution of matters concerning price-fixing and manipulation. This is not to say that the High Court does not have jurisdiction to deal with allegations of breach of fundamental rights and freedoms in such case. It only means that the High Court recognises that there are other legal bodies that exist to resolve certain disputes. This principle is recognised by Article 159(2)(d) of [the Constitution](#) that obliges the court to promote alternative dispute resolution. Further because of Articles 10 and 21 of [the Constitution](#), these bodies are obliged to give effect to the National values and principles of governance and provisions of the Bill of Rights.”

8. The court was also invited to consider the position in [Rich Productions Ltd v Kenya Pipeline Company & another](#) Petition No. 173 of 2014, where the High Court explained why it must be slow to undermine prescribed alternative dispute resolution mechanisms thus:

“The reason why [the Constitution](#) and the law establish different institutions and mechanism for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the Court retains the inherent and wide jurisdiction under Article 165 to supervise bodies such as the 2nd respondent, such supervision is limited in various respects, which I need, not go into here. Suffice to say that it (the court) cannot exercise such jurisdiction in circumstances where parties before it seek to avoid mechanisms and processes provided by law, and convert the issues in dispute into constitutional issues when it is not.”

9. It was further submitted by the Respondent that the issues raised in the Petition fell under civil law of tort and ought not to be tailored as constitutional human rights. Reliance was placed on the case of [C NM v W M G](#) [2018] eKLR where it was held:

“Courts abhor the practice of parties converting every issue into a constitutional question and filing suits disguised as constitutional Petitions when in fact they do not fall anywhere close to violation to constitutional Rights.”

10. Additionally, the Respondent in urging the Court to allow the notice of preliminary objection cited the case of [Uhuru Muigai Kenyatta v Nairobi Star Publications Limited](#) [2013] eKLR where it was held:

“I need say no more. Where there is a remedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in Haco Industries (supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in AG vs S.K. Dutambala Cr.



Appeal No.37 of 1991 (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions.”

11. The Respondent submitted that the Petition ought to collapse under the doctrine of constitutional avoidance.

### **The Petitioners’ Response.**

12. The Petitioners in opposition to the Respondent’s preliminary objection filed their written submissions on the 18<sup>th</sup> day of February, 2022.

13. The Petitioners submitted that the Court had the jurisdiction to entertain the instant Petition as was the position in [\*Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others\*](#) [2012] eKLR where it was held:

“(68) A Court’s jurisdiction flows from either [\*the Constitution\*](#) or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by [\*the constitution\*](#) or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”

14. It was the Petitioners’ strong position that by virtue of articles 23(1) and 165(3) (b) of [\*the Constitution\*](#), the Court had jurisdiction to determine questions of violation, denial, threat to or infringement of a right or fundamental freedoms.

15. Further, the [\*Magistrates’ Court Act\*](#), 2015 at section 8(2) caps the jurisdiction of subordinate courts to hear only applications relating to the right to freedom from torture, inhuman and degrading treatment and freedom from slavery and servitude as provided for under article 25(a) and (b) of [\*the Constitution\*](#).

16. In buttressing the foregoing position, the Petitioners quoted the case of [\*Anthony Miano & others v Attorney General & others\*](#) [2021] eKLR where it was stated:

“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.”

17. The Petitioners argue that the provisions of section 65 of the Data Protection Act only provide for an effective remedy for compensation but does not confer upon the data commissioner the jurisdiction to investigate issues relating to violation of constitutional rights.

18. The Petitioners also oppose the Preliminary Objection on the basis that it offends the laid down requirements in the locus classicus case of Mukisa Biscuits (Supra). The Petitioners thus urged the Court to dismiss the preliminary objection as it was not purely based on law but facts which could be argued.



## Analysis and Determination

19. After a careful consideration of the respective submissions and the relevant law, I have demarcated the following issues for determination:
- i. Whether the Preliminary Objection is sustainable in law.
  - ii. Whether the Court is barred by the doctrine of exhaustion from entertaining the dispute.
  - iii. Whether there are any constitutional issues raised in the Petition.

### Whether the Preliminary Objection is sustainable in law.

20. The jurisprudence on preliminary objections is exhaustive. In Civil Suit No. 85 of 1992, *Oraro vs. Mbaja* [2005] 1 KLR 141, Ojwang J (as he then was), cited with approval the position in *Mukisa Biscuit -vs- West End Distributors* (supra) and stated as follows on the operation of preliminary objection: -

“... I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified 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, and 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.”

21. The Courts have also addressed the value of pleadings when it comes to ascertaining the sustainability of a preliminary objection. In *Omondi -vs- National Bank of Kenya Ltd & Others* [2001] KLR 579; [2001] 1 EA 177, it was observed that: -

“...In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary 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 and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant’s costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion.”

22. The objection raises issues of jurisdiction of this Honourable Court, the doctrines of exhaustion as well as the Petitioners’ claim being a civil claim under the law of tort which are not constitutional in nature. I find that the foregoing issues have the ability to bring to an end the Petition if allowed; thus the preliminary objection is sustainable in law.

### Whether the Court is barred by the doctrine of exhaustion from entertaining the dispute.

23. It is the Respondent’s position that the Petitioners before approaching court have failed to exhaust the available avenues for addressing their grievances with references being made to the provisions of the [Data Protection Act, 2019](#).
24. I wish to make reference to Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 [William Odhiambo Ramogi & 3 others v](#)



Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR where a 5-Judge bench stated as follows:

- “52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine 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. This encourages alternative dispute resolution mechanisms in line with Article 159 of the Constitution and was aptly elucidated by the High Court in R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, where the Court opined thus:
42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 in the following oft-repeated words:

Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

43. While this case was decided before the Constitution of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.

This is Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others [2015] eKLR, where the Court of Appeal stated that:

It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”

25. In the foregoing case, the Court proceeded to address exceptions to the exhaustion doctrine which has been argued by the Petitioner's that the issue of infringement of their rights provided for under the Constitution will not be addressed under the provisions of the Data Protection Act, 2019 as to how to seek redress.



26. In the Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* (supra) went on to say:
59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In *R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA)* (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:
- What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the *Shikara Limited Case* (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.*)
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.
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.
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.
27. The Petition is anchored on the use of personal data without the consent of the Petitioners. The issues raised in the Petition are extensively covered in the *Data Protection Act, 2019*. In particular, section 65 of the said Act as relied upon by the Respondent provides as follows:

“65.



- (1) A person who suffers damage by reason of a contravention of a requirement of this Act is entitled to compensation for that damage from the data controller or the data processor.
- (2) Subject to subsection (1)—
  - (a) a data controller involved in processing of personal data is liable for any damage caused by the processing; and
  - (b) a data processor involved in processing of personal data is liable for damage caused by the processing only if the processor —
    - (i) has not complied with an obligation under the Act specifically directed at data processors; or
    - (ii) has acted outside, or contrary to, the data controller's lawful instructions.
- (3) A data controller or data processor is not liable in the manner specified in subsection (2) if the data controller or data processor proves that they are not in any way responsible for the event giving rise to the damage.
- (4) In this section, "damage" includes financial loss and damage not involving financial loss, including distress."

28. Further, a party aggrieved by the decision of the Data Commissioner has the right of appeal to the High Court as provided for in Section 64 as follows:

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

29. I also borrow from the position in *Governor of Kericho County v Kenya Tea Development Agency & 30 others Ex-Parte KTDA Management Services Limited* [2016] eKLR cited by the Respondent where the court held that:

“We agree with the respondent that the allegations raised about price fixing and manipulation falls within the province of investigation by the Competition Authority established under the Competition Act (Chapter 504 of the Laws of Kenya). Under section 4 of the Act, the Authority is empowered to receive complaints from legal or natural persons or consumer bodies and has the power to investigate restrictive trade practices which include price fixing manipulation.

We are of the view that the Competition Act provides an efficacious remedy for resolution of matters concerning price-fixing and manipulation. This is not to say that the High Court does not have jurisdiction to deal with allegations of breach of fundamental rights and freedoms in such case. It only means that the High Court recognises that there are other legal bodies that exist to resolve certain disputes. This principle is recognised by Article 159(2)(d) of *the Constitution* that obliges the court to promote alternative dispute resolution. Further because of Articles 10 and 21 of *the Constitution*, these bodies are obliged to give effect to the National values and principles of governance and provisions of the Bill of Rights.”





30. In view of the foregoing, I find that the Petitioners have not sufficiently demonstrated why the Petition ought to be exempted from the exhaustion rule. I am inclined to find that the Petition is barred by the doctrine of exhaustion.

**Whether there are any constitutional issues raised.**

31. The Honourable Court is guided by the position of the Supreme Court of Kenya on what amounts to a constitutional issue. In the case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR it was held:

“Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru vs. Republic, (1979) KLR 154*: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”

32. The issues raised in the instant Petition are in the nature of grievances between private parties. The Petition is anchored on the grounds that the Respondent failed to seek the Petitioners’ consent. The Court is of the considered view that the same does not amount to a constitutional issue but a dispute between private individuals. I marry this view with the position in *Uhuru Muigai Kenyatta* (Supra) where it was held that:

“11. Similarly, in *Re Application by Bahadur* [1986] L.R.C (Cost.) 297 at 298, the Court in Trinidad and Tobago held as follows;

“*The Constitution* is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can found a claim under substantive law, the proper course is to bring the claim under that law and not under *the Constitution*”.

12. I am in agreement with the above findings and looking at Article 21 of *the Constitution*, it is the State and every State Organ that is required to “observe, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.” No such obligation is imposed on an individual (including a company) and so I am in agreement with the Respondent arguments in that regard...”

33. In view of the foregoing, I arrive at the conclusion that the Petition fails to raise constitutional issues. It is not one that should be canvassed by this Court is a constitutional issue.

**Disposition**

34. Flowing from the foregoing findings and conclusions, the following orders of this Court do hereby issue: -

(a) The Preliminary Objection dated 12<sup>th</sup> August, 2021 is hereby upheld.



(b) The Petition is hereby struck out with costs to the Respondent.

35. It is so ordered.

**DATED AND DELIVERED AT NAIVASHA THIS 19<sup>TH</sup> DAY OF JULY, 2022.**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

..... for the Petitioners.

..... for the Respondent.

