



**Githeng'o v Nairobi City County Government (Petition E047 of 2021)
[2022] KEHC 13944 (KLR) (Constitutional and Human Rights) (13 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 13944 (KLR)

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

PETITION E047 OF 2021

HI ONG'UDI, J

OCTOBER 13, 2022

BETWEEN

JOHN KANG'ACHA GITHENG'O PETITIONER

AND

NAIROBI CITY COUNTY GOVERNMENT RESPONDENT

JUDGMENT

1. The petition date February 8, 2021 was filed under articles 19, 20, 21, 22, 258 and 259(1) of the Constitution for the alleged contravention of the rights and freedoms under articles 10(1)(a),(b),(c) & (2) (a), (b), 20,21,24,27(1),(2),(3),(4),(5), 28,29(1), 31, 40, 43(1) (a), 46(c), and 47 (2), 73, 174, 176 and 185 of the Constitution.
2. The petitioner seeks the following orders:
 - a. This honourable court be pleased to order that the director of trade and licensing grants him a hawker and street vendor application form.
 - b. This honourable court be pleased to order that within fourteen days (14) after application the directorate of trade and licensing issues the petitioner with a license to conduct hawking activities along Aga Khan walk in the Nairobi central business district.

The Petitioner's Case

3. The petition is supported by the petitioner's affidavit sworn on February 8, 2021. He avers that his right against discrimination and equality has been infringed by the respondent. This is by the respondent's refusal to issue a trade license to him as he operates his business as a hawker/street vendor at the Nairobi central business district along Aga Khan Walk/City Hall Way junction. The petitioner averred that the Nairobi city county & Trade Licensing Act, 2019 empowers the director of trade & licensing to



issue hawkers and street vendors with licenses, but the director issues the licences discriminatively. Further that having not been issued with a licence he is always arrested and his property seized by the respondent.

4. In his supplementary affidavit dated March 8, 2021 he averred that he had been charged at the City Court with 2 counts;
 - i. placing a weighing machine on a foot path
 - ii. interfering with the work of county officers where he entered a plea of not guilty.That he tried to raise his grievances before the Magistrates Court but he was advised to approach the High Court if he had issues with the respondent's licensing department. He thus states that he has not been accorded a fair hearing in the sub-ordinate court at City Hall.
5. He further averred that his attempt to reclaim his seized items from the respondent was frustrated by the county officer.

The Respondent's Case

6. The respondent filed the following summarized grounds of opposition to the petition:
 - i. The petition is premature, as the petitioner has not followed the laid down procedure in line with section 13(1-8) of the Nairobi City County Trade Licensing Act. That the Act provides for an appeal process under section 13(5) of the Act.
 - ii. Section 10 of the Act prohibits hawking or being a street vendor without a licence. There was no evidence that the petitioner ever applied for the same.
 - iii. Section 8(2) of the Act creates an offence for anyone found operating a trade or business without a licence. The punishment is Kshs 100,000/= in default (6) months imprisonment or both fine and imprisonment.
 - iv. No prima facie case had been established for the grant of the prayers sought. The respondent denies infringing the petitioners rights.

The Petitioner's Submissions

7. The petitioner filed written submissions dated December 15, 2021 and further submissions dated December 20, 2021. He identified the issues for consideration as follows:
 - i. Whether the petitioner ever presented an application to the director of trade and licensing for the grant of a hawker's or street vendor's license.
 - ii. Whether the petitioner attached any evidence establishing that he did apply for the license in the prescribed form to the director of trade licensing.
 - iii. Whether the petitioner complied with section 13 (1-8) of the Nairobi City County Trade Licensing Act.
 - iv. Whether the Director of Trade Licensing has powers to reject an application under section 11 (2) of Nairobi City County Trade Licensing Act.
 - v. Whether this court has jurisdiction at this stage to grant the orders prayed for in the petition.
 - vi. Whether the respondent infringed on the petitioner's fundamental rights and freedoms.



8. The petitioner submitted that the application for issuance of a licence is instigated by word of mouth to the director of trade and licensing, who then issues an application to the party seeking the licence. This is in line with section 9(1)(a-d) of the Act. He contends that following the physical meeting the director informed him verbally that he did not have the hawkers's license application form. In view of this he was not able to file any appeal to the Trade & Licensing Appeals Committee as he had nothing in writing.
9. On the point of jurisdiction the petitioner submitted that article 165 (3) (a-b) of the Constitution confers upon this court unlimited original jurisdiction to determine matters before it. As such the respondent's argument that this court has no jurisdiction at this stage until such a time that the petitioner will have exhausted the available procedural remedies, has no legal basis and amounts to subjugation of the Constitution to conform to other laws.
10. On the issue of discrimination, the petitioner submitted that the director grants licences to big organizations such as Kenya Charity Sweepstake, Sportpesa and newspaper vendors to conduct their retail business activities in the streets of Nairobi central business district to the detriment of the larger marginalized hawkers. This to him was not in line with article 27 of the Constitution. Further, that the respondent's failure to return his seized goods violated his right to property under article 40 of the Constitution.
11. In the further submissions in response to the respondent's submissions, the petitioner on the point of jurisdiction vis-a-vis the doctrine of exhaustion submitted that under section 12 (4) & (5) and section 13 (5) the director is to communicate his decision in writing and give reasons for any denial. In this case the director never complied hence making it impossible for him to file the appeal within 7 days. He thus submitted that there was no mechanism put in place to implement the laws governing the issuance of licences to the hawkers.
12. He further submitted that by verbally answering him, the director placed the petitioner at a disadvantaged position to institute a written appeal to the Trade Licensing Appeals Committee, as doing so would render the appeal a one sided argument. This is since the petitioner would not have had written documents from the director to attach to the appeal. The petitioner in view of this pleaded to be exempted from the obligation on the doctrine of exhaustion of remedies as required under section 9 (4) of the Fair Administrative Action Act.
13. In support of this argument he relied on the case of Krystaline Salt Limited v Kenya Revenue Authority (2019)eKLR where it was held that what constitutes exceptional circumstances depends on the facts and circumstances 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. Similar reliance was placed on the case of Republic v Council for Legal Education ex parte Desmond Tutu Owuoth (2019) eKLR and Republic v Kenya Revenue Authority ex parte Style Industries Limited (2019) eKLR.

The Respondent's Submissions

14. The respondent through the firm of Koceyo & Company Advocates filed written submissions dated December 2, 2021. On the issue of jurisdiction, counsel submitted that it is trite law that no court can hear and determine a case if it lacks jurisdiction over that particular matter. In Phoenix of EA Assurance Company Limited v S M. Thiga-t/a Newspaper Service [2019] eKLR, the court observed that it is a truism that jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. Similar reliance on this point was placed on t Peter Gichuki



King'ara v Independent Electoral and Boundaries Commission & 2 others (2013) eKLR and *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd*(1989).

15. Counsel submitted that the petitioner had failed to follow the laid down procedures of dispute resolution in this case. He argued that the *Fair Administrative Action Act*, No 4 of 2015 under section 9(2) provides that the High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted unless exempted under section 9(4) of the Act.
16. He further submitted that the petitioner had not made any application for exemption and further that the circumstances leading to the instant petition did not reasonably qualify to be considered as exceptional as seen in *Republic v Zacharia- Kabuthu & another (sued as trustees and on behalf of and as officials of the Kenya Evangelical Lutheran Church)*; *Johaness Kutuk Ole Meliyio & 2 others (interested parties) ex parte Benjamin Kamala & another* (2020) eKLR, and *Katemuge Clan Being Represented by the Representatives Hereunder named; James Kimiso & 2 others v Director Land Adjudication & 5 others* (2020) eKLR and *Republic v Kenya Revenue Authority, Commissioner Ex parte Keycorp Real advisory Limited* (2019) eKLR.
17. Counsel hence argued that section 13 (1-8) of the Nairobi City County Trade Licensing Act laws of Kenya requires that any person aggrieved by a decision of the director appeals to the appeals committee within 7 days in writing. This was bypassed by the petitioner. Counsel therefore argues that this court lacks jurisdiction at this stage to grant the orders sought in the petition until such a time that the petitioner exhausts the available procedural remedies.
18. It is counsel's contention that the petitioner who is not a licenced hawker or hawker under section 10 of the Act lacks the *locus standi* to file this petition. He therefore submitted further that the petitioner had not attached any evidence establishing that he applied for the license in the prescribed form to the director. The burden still rested on him to prove his case as espoused under section 107 of the *Evidence Act*. He could not therefore claim for an unproved right.

Analysis And Determination

19. Having considered the pleadings, submissions and the law I find the issues for determination to be as follows:
 - i. Whether the petitioner has the necessary *locus standi* to file this suit.
 - ii. Whether this court has jurisdiction to entertain the matter.
 - iii. Whether the petitioner is entitled to the reliefs sought.

Issue no (i) Whether the petitioner has locus standi to file this suit

20. The *locus standi* of the petitioner in filing this suit was challenged by the respondent, who contended that since the petitioner lacked a licence to operate his hawking business, he had no legitimate right to file this suit. This is since the petitioner could not pursue a right that did not belong to him in the first place. The petitioner did not submit on this issue although he maintained that the suit was brought before this court owing to the respondent's violation of his constitutional rights in refusing to grant him the sought for licence.



21. The meaning of the term *locus standi* was explained in the case of *Daykio Plantations Limited v National Bank of Kenya Limited & 2 others* [2019] eKLR as follows:

“...In the case of *Law Society of Kenya V Commissioner of Lands & Others*, Nakuru High Court civil case No 464 of 2000, the court held that;-

“*locus standi* signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in court of law”. Further in the case of *Alfred Njau and others v City Council of Nairobi* (1982) KAR 229, the court also held that;-

“the term *locus standi* means a right to appear in court and conversely to say that a person has no *locus standi* means that he has no right to appear or be heard in such and such proceedings”.

It is therefore evident that *locus standi* is the right to appear and be heard in court or other proceedings and literally, it means ‘a place of standing’...”

22. The heart of the principle of *locus standi* was accordingly exhaustively elucidated by the Court of Appeal in the case of *Randu Nzai Ruwa & 2 others v Secretary, the Independent Electoral and Boundaries Commission & 9 others* [2016] eKLR court stated:

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“28. It still remains to reiterate that the landscape of *locus standi* has been fundamentally transformed by the enactment of the Constitution in 2010 by the people themselves. In our view the hitherto stringent *locus standi* requirements of consent of the Attorney General or demonstration of some special interest by a private citizen seeking to enforce a public right have been buried in the annals of history. Today by dint of articles 22 and 258 of the Constitution, any person can institute proceedings under the bill of rights,”

The court further held that a legal wrong or injury to a person or to a determinate class of persons, the person or a member of the determinate class of persons, or even a member of the public can maintain an application under articles 22. Pursuant to article 22(3), as I have said, the Chief Justice has made the Mutunga Rules which, inter alia provide for the application of the right of standing. Specifically rule 4 confirms that a person as an individual acting in his/her own interest, who alleges a denial, violation or infringement of any right or fundamental freedom under the Constitution may apply to the High Court for protection. Although the Mutunga Rules had not been made when the appellants filed their applications, I have made reference to them to demonstrate that the intention of the framers of the Constitution from which those rules are derived, was to allow any person who genuinely believed that there was a violation of fundamental freedoms and constitutional rights to approach the court for redress.”

23. I am well guided by the above authorities. The main ground raised by the respondent on the issue of *locus* is that the petitioner does not have a licence to enable him operate as a hawker. Further that he had nothing to show that he had applied for one. On the other hand the petitioner insists he did apply for one but the response he was given was verbal. The complaint by the petitioner is the issuance of the hawkers license. Any person with or without the licence has the right under article 22(3) to file a petition on his own behalf or on behalf of others. Rule 4 of the *Mutunga Rules* gives the petitioner that right to file this petition as he believes his rights have been violated. The restrictions the respondent is



relying on were done away with by the 2010 Constitution under articles 22 & 258. I therefore find that the petitioner has *locus standi* to sustain this petition.

Issue no (ii) Whether this court has the requisite jurisdiction to entertain this matter

24. The jurisdiction of this court to entertain this suit was similarly challenged by the respondent in light of the doctrine of exhaustion. It was argued that the petitioner had failed to exhaust the available mechanisms of dispute resolution under the Nairobi City County Trade Licensing Act in accordance with the requirement under section 9(2) of the Fair administrative action Act.
25. The petitioner disputed this assertion arguing in his view that there was no mechanism put in place to implement the laws governing the issuance of licenses to hawkers. In addition he noted that since his communication with the director had been verbal, this limited him from instigating an appeal at the Trade Licensing Appeals Committee as he had no documentation to support his case. He urged the court to treat his case as an exemption to the doctrine of exhaustion.
26. The Supreme Court has on a number of occasions addressed its mind in respect of the issue of jurisdiction. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR the Supreme Court held as follows: -

“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 counsels 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. where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

Also see

- i. *Owners and Masters of Motor vessel “Joey” v Owners and Masters of Motor Tugs “Barbara” and Steve “B”* (2007) eKLR;
 - ii. *In the matter of Interim Independent Electoral Commission* [2011] eKLR.
27. It has been held severally that a party is required to exhaust any alternative dispute resolution mechanism before filing a matter in court as a matter of law. To this end the Court of Appeal in the case of Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others (2015) eKLR observed as follows:

“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.” Also see *Krystalline Salt Limited* (supra)

28. The next issue to consider is what invokes the doctrine of exhaustion in the context of litigation. This was aptly discussed by the five judge bench in the case of *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (interested parties)* [2020] eKLR where they opined as follows:

“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...”

29. The court went on to outline 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.
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.”
30. A determination of this question accordingly requires an examination of the law and a reading of the facts of this case. To begin with, the Nairobi City County Trade Licensing Act 2019 divulges under section 3 that its provisions apply as follows:

This Act shall apply to all persons who trade or have businesses in Nairobi with the exemption of professions.

31. This for all intents and purposes includes hawkers who are defined under section 2 as a person who, whether on his or her own account sells goods by retail other than in trading premises or in a market established by the county. As such the Act under section 8 requires that all these persons should have a licence to operate their business failure to which the person commits an offence and is liable on conviction to a fine not exceeding Kenya shillings one hundred thousand or to imprisonment for a term not exceeding six months or to both such fine and imprisonment.



32. The born of contention in this matter revolves around the petitioner's license as required by the Act. To obtain one, section 9 of the Act provides as follows:
- (1) An application for the grant of a trade licence shall
 - (a) be lodged with the directorate of trade licensing;
 - (b) be in the approved form;
 - (c) contain such information and be accompanied by such documents as are required by the approved form;
 - (d) be signed in a manner specified in the approved form; and
 - (e) be accompanied by the prescribed application fee in the first schedule.
 - (2) An application may be made in an electronic format approved by the directorate.
 - (3) The directorate may, before dealing with an application, require the applicant to furnish such additional information or documents as is necessary to enable the application to be dealt with.
 - (4) The directorate shall keep and maintain an updated database of all licence holders.
 - (5) The prescribed application fee shall not be refundable.
33. With reference to the Hawkers and Street Vendors License as is the case herein the Act under section 10 stipulates as follows:
- (1) No person shall trade as a hawker or a street vendor unless he or she is in possession of a valid hawker or street vendor's license granted to him or her for that purpose by the directorate unless they operate a business exempted from licensing under this Act.
 - (2) The license described in sub-section (1) shall be in such form as may be prescribed and shall be granted subject to the following conditions-
 - (a) the kind of goods which may be hawked;
 - (b) the area within which the hawking shall be operated;
 - (c) the hours during which the goods may be hawked, and such other conditions as licensing authority may think fit to impose.
34. The petitioner acknowledged that he had not made a formal application and/or payment as required above but instead had a verbal conversation with the director of trade and licensing on the licence issue. The verbal conversation was not reduced into writing. What is important however, are the steps taken by the petitioner in acquiring the licence. The facts of this case undoubtedly show that the petitioner failed to adhere to the licensing requirements procedure under the Act. What is more the petitioner claimed that the applications forms were to be issued by the director and the same did not exist for hawkers. This I must say is untrue since the Act clearly addresses how a party seeking such a license can acquire it. It inevitably followed that the petitioner did not lodge a complaint with the Trade Licensing Appeals Committee under section 13 of the Act.
35. Taking this into consideration, the petitioner cannot then turn and require this court to address his grievance when he failed to abide by the dictates of the Nairobi city county trade licensing Act. Likewise, the reasons put forth by the petitioner on why his petition falls within the exceptions of the doctrine of exhaustion do not hold water. If indeed the director did not attend to him or address his



issue he should have raised a complaint at any of the county offices – and produced evidence to that effect. All he did was to rush to the court before exhausting the set out procedures.

36. Indisputably the petitioner’s case runs afoul the doctrine of exhaustion which requires a party to exploit all available remedies before invoking this court’s jurisdiction.
37. For that reason the petition fails and I dismiss it accordingly. Given the petitioner’s standing I hereby order each party to bear its own costs.

Orders accordingly.

DATED AND SIGNED THIS 11TH DAY OF OCTOBER, 2022 AT MILIMANI, NAIROBI.

H. I. ONG’UDI

JUDGE OF THE HIGH COURT

DELIVERED AND SIGNED THIS 13TH DAY OF OCTOBER, 2022 AT MILIMANI, NAIROBI.

MUGURE THANDE

JUDGE OF THE HIGH COURT

