



**Abdille v Xpedia Management Limited & another; Liberty Africa Technologies Limited  
(Interested Party) (Constitutional Petition E345 of 2020) [2022] KEHC 17098 (KLR)  
(Constitutional and Human Rights) (16 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 17098 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E345 OF 2020**

**AC MRIMA, J  
DECEMBER 16, 2022**

**BETWEEN**

**MOHAMMED MOHAMUD ABDILLE ALIAS HILLAAC BAND ... PETITIONER**

**AND**

**XPEDIA MANAGEMENT LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**SAFARICOM LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**LIBERTY AFRICA TECHNOLOGIES LIMITED ..... INTERESTED PARTY**

**JUDGMENT**

**Introduction:**

1. The Petitioner, Mohammed Mohamud Abdille, describes himself as an author, composer, arranger, publisher, performer, track producer and executive producer of musical works, running his art in the name and style of Hillaac Band.
2. On 12<sup>th</sup> September, 2014, the Petitioner executed a Mechanical Deed of Assignment (hereinafter referred to as ‘the Deed’) with Xpedia Management Limited, 1<sup>st</sup> Respondent herein, a company in the business of promotion and distribution of musical and artistic works through digital platforms.
3. Through the Deed, the Petitioner assigned the 1<sup>st</sup> Respondent his musical rights for subsequent use by Safaricom Limited, the 2<sup>nd</sup> Respondent herein, through ‘Skiza Tunes’, an online subscription platform that enables mobile users to download ring tones and ring-back tones to their phones.



4. Liberty Africa Technologies Limited, the Interested Party herein, is also a company in the business of promotion and distribution of various musical and artistic works through digital platform. It is the medium through which the Petitioner received revenue generated by 1<sup>st</sup> Respondent.

**The Petition:**

5. Through an undated amended Petition supported by an undated Affidavit and a supplementary Affidavit dated 30<sup>th</sup> November 2021, the Petitioner approached this court with the grievance that the 2<sup>nd</sup> Respondent denied him access to revenue reports, statements and data arising from daily downloads of his musical works on the Skiza tune.
6. He pleaded further that he was not given access to corresponding earnings generated from the use of his works, in violation of his right to access information as guaranteed under Article 35 of the Constitution.
7. The Petitioner posited that the 1<sup>st</sup> Respondent, in conformity with the Deed was obligated to periodically remit to him a part of all that revenue collected by the 2<sup>nd</sup> Respondent upon the use of his musical works within SkizaTunes platform.
8. It was his case that between the period starting January 2018 and May 2018, the 2<sup>nd</sup> Respondent remitted performance of his works via mail but thereafter stopped without offering any explanation.
9. The Petitioner posited further that the Interested Party periodically remitted revenue on behalf of the 1<sup>st</sup> Respondent but he was never informed of the delegation and was not aware if there is a paid agency agreement between the 1<sup>st</sup> Respondent and the Interested Party.
10. He pleaded that the 1<sup>st</sup> Respondent and the Interested Party have conspired to keep secret the value and earnings/revenue of the Petitioner's musical works.
11. He posited further that the Respondents and the Interested Party are underpaying him and have connived to give him adulterated revenue reports.
12. It was his case further that the 2<sup>nd</sup> Respondent's platform known as \*622# for use by musicians to verify correctness of revenue earned from the use of their musical works on the skiza tunes platform were unrealizable since the revenue reports thereon don't tally with what is provided by the 1<sup>st</sup> Respondent. Moreover, it was his case that some of his musical works were not available.
13. The Petitioner pleaded that he needs to exercise his right to access information in order to verify the authenticity and correctness of the revenue reports from the 1<sup>st</sup> Respondent in comparison to the original revenue reports generated by the 2<sup>nd</sup> Respondent.
14. He pleaded that the foregoing information was necessitated by the fact that his revenue had declined over the past year and in the year 2014-2016, he received little to no revenue for his works.
15. He further pleaded that he wanted to establish the relationship between the 1<sup>st</sup> Respondent and the Interested Party in terms of revenue obtained from the 2<sup>nd</sup> Respondent for his musical works and an account of all the monies received from the 1<sup>st</sup> and or the 2<sup>nd</sup> Respondent in respect of his works.
16. It was his case that he required the information sought in order to exercise and protect his economic and social rights provided for in Article 43 of the Constitution and the denial of the same violated his source of livelihood.



17. He posited that the failure to release the information violated his rights under Article 35(1)(b) and in breach of Article 2 and 10 on the Supremacy of the Constitution and National Values and principles of governance that bind all persons.
18. On the foregoing factual and legal backdrop, the Petitioner prayed for the following reliefs;
  - I. An order of declaration declaring that the Respondent's continued refusal/denial of access by the Petitioner to the original 2<sup>nd</sup> Respondent's revenue reports/statements indicating the daily ad monthly downloads and earnings of the Petitioner's musical works on the Skiza tunes platform is without any just, lawful and reasonable cause and is in violation of the right to access information guaranteed at Article 35(1)(b) of the *Constitution*.
  - II. An order of declaration declaring that the Petitioner's fundamental rights and freedoms as enshrined under Article 43 of the *Constitution* of Kenya have been contravened and infringed upon by the Respondents through their refusal to give the Petitioner the information it requested or release all the original 2<sup>nd</sup> Respondent's revenue reports/statements indicating the daily and monthly downloads and earnings of the Petitioner musical works on the Skiza tunes platform.
  - III. A compulsory Order compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to forthwith release to the Petitioner all the Original 2<sup>nd</sup> Respondent's revenue reports/statements indicating daily and monthly downloads and earnings the Petitioner's musical works on the Skiza Tunes platform from the date of assignment and prior period when the same was utilized.
  - IV. A compulsory Order compelling the Interested Party to forthwith release an account for all the monies in its receipt from the 1<sup>st</sup> Respondent related to the Petitioner.
  - V. An order of declaration declaring that the Petitioner is entitled to the payment of damages and compensation for the violation and contravention of its fundamental human rights by the Respondents herein as provided for under Article 35(1) of the *Constitution* of Kenya 2010.
  - VI. The Court to assess the quantum of damages and compensation to be paid by the Respondents and the Interested Party.
  - VII. Costs of this Petition.

### **The Submissions**

19. In further support of its case, the Petitioner filed written Submissions dated 30<sup>th</sup> November 2021.
20. In rebutting the 1<sup>st</sup> Respondent's claim that the Petition did not meet constitutional threshold it was submitted that this Court has an obligation under Article 23 of the Constitution to uphold and enforce the Bill of Rights.
21. It was its case further that under Article 165(3) of the Constitution this Court has original unlimited Jurisdiction in civil and criminal matters in determining whether a right or a fundamental freedom has been infringed.



22. The Petitioner asserted that that he was not seeking damages for breach of contract, but was looking to enforce his constitutional rights under Article 35 and 43 of the Constitution as read alongside Article 11 of *International Covenant on Economic and Social and Cultural rights*.

23. It was his case that that *Access to Information Act* does to prohibit a Person from lodging a suit for infringement to access to information. Support to that end was placed on the decision in Constitutional Petition No. 468 of 2017, *Katiba Institute v Presidents Delivery Unit & 3 others* [2017] eKLR where it was observed;

...I have read the Act [*Access To Information Act*] but could not trace a provision making a report to CAJ a condition precedent to triggering the jurisdiction of this Court to deal with petitions filed seeking to challenge violations of the right to access information under Article 35 of the *constitution*. This Court has unlimited jurisdiction under Article 165(3) (b) to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

24. In a nutshell the Petitioner submitted that the Petition needs resolution of a constitutional issue through interpretation of the Constitution. Support to that end was drawn from the decision in Petition E406 of 2020, *RC v KKR* [2021] eKLR thus;

“...broadly speaking, a constitutional issue is, therefore, one which confronts the various protections laid out in a Constitution. Such protections may be in respect to the Bill of Rights or the Constitution itself. In any case, the issue must demonstrate the link between the aggrieved party, the provisions of the Constitution alleged to have been contravened or threatened and the manifestation of contravention or infringement.”

25. In respect to the information withheld by the 2<sup>nd</sup> Respondent, the Petitioner submitted that they are entitled to it as per the provision of section 4 of *Access to Information Act* which requires information held by a public or a private entity to be provided expeditiously at a reasonable cost.

26. It was his case that since the 2<sup>nd</sup> Respondent is the sole custodian of information relating to an artist’s work, and having undertaken to avail such information by dialling \*622#, it is estopped from renouncing that duty.

27. It was further its case that as a matter of social justice, accountability, transparency and openness the 2<sup>nd</sup> Respondent ought to be compelled to supply the Petitioner the information sought.

28. It was his case that he satisfied the criteria under Article 35(1)(b) of the *Constitution* that makes it a requirement that the right to information is granted where it is needed for the exercise or protection of any fundamental right or freedom.

29. While speaking to entitlement to information held by a private entity, reference was made to the decision in Petition No. 278 Of 2011, *Nairobi Monthly Company Limited V Kenya Electricity Generating Company & 2 Others* [2013] eKLR where it was observed as follows;

“...Unless one intends to dissolve the distinction between the public and private spheres, private-sector information must be treated differently. The *Constitution* makes information in private hands available on a 'need to know' basis, meaning that a requester is only entitled to such information if the request can be justified by providing reasons why the information is required. The reasons recognised by Article 35(1)(b) of the *Constitution* as



sufficient justification for imposing duties of transparency on the private sector are that the information is required for the exercise or protection of any right."

30. In conclusion, the Petitioner urged the Court to allow the Prayers sought.

### **1<sup>st</sup> Respondents and Interested Party's Case**

31. The 1<sup>st</sup> Respondent opposed the Petition through the affidavit and further affidavit of Sydney Wachira, a Director in the company, deposed to on 1<sup>st</sup> December 2020 and 1<sup>st</sup> February 2021 respectively.
32. However, upon amendment of the Petition, the Interested Party and the 1<sup>st</sup> Respondent filed a joint response through the Replying Affidavit and further Affidavit of Olive Githongo, the content manager of the 1<sup>st</sup> Respondent deposed to on 21<sup>st</sup> October 2021 and 19<sup>th</sup> January 2022 respectively.
33. In the joint Replying Affidavit, it was deposed that the Petition does not meet the constitutional threshold for the reason that the relationship between the Petitioner and the 1<sup>st</sup> Respondent is contractual and as such their differences ought to be resolved through civil means.
34. Further to the foregoing, she deposed that the Petitioner had not exhausted the statutory means of disputes as required under Access to information.
35. It was deposed that the Petition was an abuse of court process since no rights were infringed and because the 1<sup>st</sup> Respondent has been remitting to the Petitioner statements of revenue performance for his songs since February 2015 to date.
36. In respect to the period between September 2014 to January 2015, it was her case that there was no performance revenue reports that the Petitioner's songs made.
37. It was her case further that on the request of the Petitioner's advocates, the Petitioner was invited to the 1<sup>st</sup> Respondent's offices where he was issued with statements of accounts relating to his work commercially exploited on Skiza tunes platform.
38. She deposed that consequently, the Petitioner demanded to know active subscribers renewing his song on a daily basis but was informed that the 1<sup>st</sup> Respondent has no such information as it consists billing information which is in the custody of the 2<sup>nd</sup> Respondent.
39. It was her case that the 2<sup>nd</sup> Respondent advised him that access to such information was not possible since daily active subscribers keep changing everyday depending on which customer had the funds to renew a specific skiza tune.
40. It was her case further that the Petitioner was supplied with reports for total downloads for his works by the 2<sup>nd</sup> Respondent.
41. She deposed further that even upon changing his Advocates, the Petitioner sought similar information through the new Advocates where they were informed that similar information had been sought and given but was nonetheless given.
42. It was her deposition that the Petitioner had not complained to the 1<sup>st</sup> Respondent of any disparities in their reports but has instead rushed to this Court.
43. In closing, she deposed that no evidence had been tendered to show the disparities between the Revenue statements remitted to the Petitioner by the 1<sup>st</sup> respondent and the ones obtained from the \*622# platform.



44. With respect to the 1<sup>st</sup> Interested Party, it was deposed that Liberty Africa runs a payment system known as wallet which was used to remit payments on behalf of the 1<sup>st</sup> Respondent.
45. She deposed that its role was that of being a medium of payment of monies only received by the 1<sup>st</sup> Respondent from the 2<sup>nd</sup> Respondent on behalf of the Petitioner.
46. On the foregoing basis, it was her case that the Petitioner is not a party to the contractual relationship it has with the Interested Party.
47. She deposed that it was not true that the 1<sup>st</sup> Respondent had refused to remit the 2<sup>nd</sup> Respondent's original skiza tunes record. She stated that the 1<sup>st</sup> Respondent has been periodically providing the Petitioner with his revenue reports through excel sheets breaking down the information belonging to him and shares the information as received from the 2<sup>nd</sup> Respondent.
48. In conclusion, it was its case that it is not in control of the information or affairs of the 2<sup>nd</sup> Respondent and therefore not in a position to produce original skiza tunes on its behalf.
49. It urged that the Petition be dismissed.

### **The Submissions**

50. In its written Submissions dated 21<sup>st</sup> January 2022, the 1<sup>st</sup> Respondent and the Interested Party identified the issues for determination as being; the validity of the Interested Party's Replying Affidavit, whether the Petition raises constitutional issues and whether the Petitioner's right to access information was infringed.
51. On the first issue, it was submitted that the Replying Affidavit of the 1<sup>st</sup> Respondent and the Interested party was properly on record since there is no requirement in law that director's legal authority must first be filed in order for a person to plead or swear on behalf of a company.
52. It was its case that the averments by the deponent of an affidavit on behalf of a company that he or she has authority to swear the affidavit is sufficient.
53. Support of the foregone position was drawn from Court of Appeal case in *Makupa Transit Shade Limited & Another v Kenya Ports Authority & Another* [2015] eKLR where it was observed inter-alia;  

In our view, the Authority, as with other corporate bodies, has its affidavits deposed on its behalf by persons with knowledge of the issues at hand who have been so authorised by it.  
It was therefore sufficient for the deponents to state that "they were duly authorised
54. On the second issue, it was submitted that the Petition fails the test established in *Anarita Karimi Njeru -v- Republic* (1979) eKLR by failing to demonstrate the manner in which his right to access to information and his social and economic rights have been infringed, the nature and extent of the infringement and the nature and injury that he has suffered.
55. It was submitted that since Petitioner admitted that he received revenue from the 1<sup>st</sup> Respondent for his musical works, there was no demonstration of violation of his economic rights as provided for under Article 43 of the *Constitution*.
56. It was submitted further that the Petitioner had not shown the injuries he suffered from the violation of his rights as alleged and that no data was produced by the Petitioner to show the amount of money he allegedly lost.



57. It was urged that constitutional litigation ought not to be used as a means to resolve all manner of litigation that would otherwise be handled in other legally constituted means.

58. To buttress the foregoing, reliance was placed on the decision in *Roshanara Ebrahim -v- Asbleys Kenya Limited & 3 others* [2016] eKLR where it was observed;

Constitutional Litigation is not a panacea for all manner of litigation, we reiterate that the first port of call should always be suitable statutory underpinned forums for the resolution of such disputes.”

59. It was submitted that the issues before this Court were contractual in nature not falling within the constitutional realm.

60. It was urged that this court should not adjudicate on it on the basis of the decision in communications *Commission of Kenya & 5 Others v Royal Media Services & 5 Others*, Petition No. 14, 14A, B & C of 2014, as quoted with authority in the *Roshanara Ebrahim v Asbleys Kenya Limited & 3 others* [2016] eKLR where it was observed;

“...The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis.

“...I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

61. On the foregoing it was submitted that the dispute before this Court is contractual in nature that can be dealt with through contract law in a civil court.

62. Separately, this court’s jurisdiction was denied on the claim that the Petitioner had not exhausted the means for resolution. Courts attention was drawn to the decision in *Thomson Kerongo & another -v- Stephen Kalonzo Musyoka & 2 others* [2021] eKLR where it was observed

“...Section 8 of The *Access to Information Act* provides the manner in which an application to access information is to be made. An applicant dissatisfied by the decision of a public entity or private body in relation to a request for access to information may apply for review of the decision to the Commission on Administrative Justice under Section 10 of the Act.”

63. In challenging violation of the right to information, it was submitted that the Petitioner did not prove the elements for its violation.

64. In respect of the prayer to compel the interested party to release all monies received by it from the 1<sup>st</sup> Respondent, it was submitted that such prayer could not be granted on the basis that there was no privity of contract between the two.

65. In conclusion the 1<sup>st</sup> Respondent and the Interested Party stated that the Petitioner had not made a case to warrant the grant of the orders sought.

### **The 2<sup>nd</sup> Respondent’s Case**

66. The 2<sup>nd</sup> Respondent opposed the Petition through the Affidavit of Daniel Ndaba, the senior legal counsel-litigation, deposed to on 21<sup>st</sup> January 2021.



67. It was his case that in order for the 2<sup>nd</sup> Respondent to use the sound recordings or copyright works of various artists on skiza platform, it is required to enter into agreement with the respective artist.
68. He deposed, however, that due to sheer number of artists and different rights that accrue from usage of copyrights, it is a challenge for the 2<sup>nd</sup> Respondent to individually contract all the copyright owners to obtain permission as well as monitor usage of the copyrighted works.
69. He deposed that as a result, the 2<sup>nd</sup> Respondent engages content service providers (CPS), responsible for sourcing, formatting and conversion of music into ringtones as ring-back tones, enter into contract with owners of copyright works to be used on skiza platform.
70. He deposed that the CSP then uploads the digital content onto skiza portal for marketing and distribution to subscribers.
71. It was his case that payment for usage is managed through the CPS who in turn pay the copyright owners.
72. Speaking to the dispute at hand, he deposed that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent entered into a content provision agreement dated 24<sup>th</sup> April 2009 where the 1<sup>st</sup> Respondent agreed to grant the 2<sup>nd</sup> Respondent non-exclusive, revocable rights and licences to use and reproduce the content delivered it.
73. It was his case that on the strength of the agreement between the 1<sup>st</sup> the 2<sup>nd</sup> respondent and the mechanical assignment between the 1<sup>st</sup> Respondent and the Petitioner, the 2<sup>nd</sup> Respondent received digitized sound recording of the Petitioner's musical works for use on the skiza platform.
74. He deposed that the revenue collected from sound recording are collected by the 2<sup>nd</sup> respondent on a daily basis thereafter, it remits the revenue to the 1<sup>st</sup> Respondent on a monthly basis after deducting its share.
75. It was his case that upon receipt, the 1<sup>st</sup> Respondent is expected to remit the Petitioner's share according to the deed.
76. He deposed that to foster transparency, the 2<sup>nd</sup> Respondent upgraded its portal where copyright owners could access their revenue by dialling \*622# to query their revenue.
77. It was its case that for users to access their statement on \*622# platform, they had to update their details.
78. He deposed further that the Petitioner was unable to access to revenue statement on schedule B because copyrighted owner's information was not updated on the portal.
79. He deposed that the foregoing issue can be resolved upon the Petitioner providing his information.
80. In the end, he deposed that the Petition did not disclose violation of constitutional rights since the 2<sup>nd</sup> respondent has at all times used the digitized form of the Petitioner's music based on the agreement with the 1<sup>st</sup> Respondent.
81. He stated that the Petitioner, having voluntarily assigned its rights to the 1<sup>st</sup> respondent, he could not claim that the 2<sup>nd</sup> respondent had infringed his rights.
82. It was his case that the 2<sup>nd</sup> Respondent shares the revenue reports with the 1<sup>st</sup> Respondent according to the terms of the agreement between them and to that end, the Petitioner is a third party who cannot enjoy any rights under the constitution or under the agreement.
83. He deposed that where there are clear contractual arrangements the Petitioner should invoke and enforce the provisions rather than pursue the constitutional line.





84. Further to the forgoing, it was submitted that the information being requested is exempted from disclosure under section 6(1)(e) of the [Access to Information Act](#), 2016.
85. It was urged that the Petition be dismissed with costs.

### **The Submissions**

86. In its written submissions dated 24<sup>th</sup> January 2022, the 2<sup>nd</sup> Respondent stated that the Petition was caught up by the Constitutional Avoidance doctrine which requires a party to exhaust other avenues before resorting to a constitutional court.
87. It reiterated the 1<sup>st</sup> Respondent's claim that there was no privity of contract between the Petitioner and the 2<sup>nd</sup> respondent to give rise to any rights to benefit the Petitioner.
88. Further to the foregoing, it was submitted that the right to access information is not absolute. Support was drawn from the decision in Petition No. 147 of 2019, [Philip Njoroge Kimani -v- Liberty Africa Technologies Limited & Safaricom Limited](#) where the Petition with similar facts as in the instant case was dismissed.
89. Court was urged to invoke constitutional avoidance doctrine and dismiss the Petition for being an abuse of Court process.

### **Analysis:**

90. The Court has carefully considered the pleadings and submissions on record. Given the various issues raised, there appears to be a preliminary one which hinges on the jurisdiction of the Court. It is on whether this Court's jurisdiction is ousted by exhaustion doctrine by dint of constitutional avoidance doctrine.
91. This Court will in the first instance deal with the issue.
92. As the objection to the jurisdiction of the Court is based the doctrine of exhaustion, the Court will endeavour a 'brief look at the doctrine of jurisdiction.
93. The Court of Appeal in Nakuru Civil Appeal No. 119 of 2017 [Public Service Commission & 2 Others v Eric Cheruiyot & 16 Others](#) consolidated with Civil Appeal No. 139 of 2017 [County Government of Embu & Another v Eric Cheruiyot & 15 Others](#) (2022) KECA 15 (KLR) had the following to say on the aspect of jurisdiction: -

36. Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in "*Words and Phrases Legally Defined*", Volume 3 at Page 113 defines court jurisdiction as follows:

By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal



has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

37. The locus classicus on jurisdiction is the celebrated case of *Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd* [1989] KLR 1. Nyarangi, JA. relying, inter alia, on the above cited treatise by John Beecroft Saunders held as follows:  

...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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.
38. A decision made by a court of law without proper jurisdiction amounts to a nullity ab initio, and such a decision is amenable to setting aside ex debito justitiae.
39. The Supreme Court in *In the Matter of Interim Independent Electoral Commission* [2011] eKLR, Constitutional Application No. 2 of 2011 held that jurisdiction of courts in Kenya is regulated by the Constitution, statute, and principles laid out in judicial precedent. The Supreme Court at paragraph 30 of its decision held in part as follows:  

...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.
40. In *Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited & 2 others* [2012] eKLR, Application No. 2 of 2011, the Supreme Court reiterated its holding on a court's jurisdiction. In the matter of the *Interim Independent Electoral Commission* (supra) at paragraph 68 of its ruling, the Supreme Court held as follows:  

(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 itself jurisdiction exceeding that which is conferred upon it by law.
94. The Supreme Court in Petition No. 7 of 2013 [\*Mary Wambui Munene v. Peter Gichuki Kingara and Six Others\*](#), [2014] eKLR, stated that 'jurisdiction is a pure question of law' and should be resolved on priority basis.
95. A look at the exhaustion doctrine now follows.
96. The doctrine of exhaustion in Kenya traces its origin from Article 159(2)(c) of the [\*Constitution\*](#) which recognizes and entrenches the use of alternative mechanisms of dispute resolution in the following terms: -  

159(2) In exercising judicial authority, the Courts and tribunals shall be guided by the following principles-

  - (a) ...
  - (b) ...
  - (c) alternative forms of dispute resolution including resolution, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause 3.
97. Clause 3 is on traditional dispute resolution mechanisms.



98. The doctrine of exhaustion was comprehensively dealt with by a 5-Judge Bench in 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. The Court 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 v 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 v 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.

99. The Court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In *R. v 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 v 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.

100. The above decision was appealed against by the Respondents. The Court of Appeal in upholding the decision and in dismissing the appeal in Mombasa Civil Appeal No. 166 of 2018 [Kenya Ports Authority v William Odhiambo Ramogi & 8 others](#) [2019] eKLR held as follows: -

The jurisdiction of the High Court is derived from Article 165 (3) and (6) of the *Constitution*. Accordingly, the High Court has unlimited original jurisdiction in criminal and civil matters, including determination of a question of enforcement of the bill of rights and interpretation of the *Constitution* encompassing determination of any matter relating to the Constitutional relationship between the different levels of government.

At the High Court, we note that the learned Judges dealt with this matter under the question framed as follows: Is the court barred from considering the suit at present by virtue of Article 189 of the *Constitution* and sections 33 and 34 of *Inter-Governmental Relations Act* of 2012 (IGRA)? The parties have advanced similar arguments as before the learned Judges of the High Court. The High Court went further than just looking at the ruling by Ogola J. They also took into account the doctrine of exhaustion as enunciated in *Republic v Independent Election and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 6 Others* [2017] eKLR. They applied a dual pronged approach before concluding that the dispute was not an inter-governmental dispute under IGRA. First, they considered that the test for determining the matter as an inter-governmental dispute for



purposes of application of IGRA was not simply to look at who the parties to the dispute were, but the nature of the claim in question and; secondly, they considered that the claimed Constitutional violations seeking to be enforced are not mere “bootstraps.” We have keenly addressed our minds to the learned Judges’ decision and are satisfied that they stayed within the expected contours and properly directed themselves. Once they determined that the dispute was not inter-governmental in nature, we do not think it is necessary to consider whether the petitioners had exhausted their legal avenue. Jurisdiction by the High Court under Article 165 (5) of the *Constitution* became automatic. And in our view, it could not be ousted or substituted.

- 101 Further, in Civil Appeal 158 of 2017, *Fleur Investments Limited -v- Commissioner of Domestic Taxes & another* [2018] eKLR, the Learned Judges of the Court of Appeal relied on an earlier decision in *Speaker of National Assembly v Njenga Karume* (1990-1994) EA 546 to assume jurisdiction by bypassing the mechanism under Income Tax Tribunal. They observed as follows: -
23. For the reasons we have given earlier and others that will become apparent, there were definitely exceptional circumstances that existed in this case that were outside the ambit of the Income Tax Tribunal which called for intervention by way of judicial review. 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.
102. Returning to the matter at hand, the Petitioner mainly seeks information on his returns from his Skiza tunes as well as compensation. The question which this Court must now answer is whether the Commission on Administrative Justice (hereinafter referred to as ‘the Commission’) has powers to hear and determine the dispute at hand.
103. The Commission is established under Section 3 of the *Commission of Administrative Justice Act*, No. 23 of 2011 (hereinafter referred to as ‘the CAJ Act’).
104. The *CAJ Act* is an Act of Parliament to restructure the Kenya National Human Rights and Equality Commission and to establish the Commission on Administrative Justice pursuant to Article 59(4) of the *Constitution*; to provide for the membership, powers and functions of the Commission on Administrative Justice, and for connected purposes.
105. Pursuant to Section 4 of the *CAJ Act*, the Commission is a Commission within the meaning of Chapter Fifteen of the *Constitution* and has the status and powers of a Commission under that Chapter. Section 8 provides for the functions of the Commission whereas Section 26 provides for its powers.
106. Further powers of the Commission are provided for in the *Access to Information Act*, No. 31 of 2016 (hereinafter referred to as ‘the Information Act’).
107. The *Information Act* is an Act of Parliament to give effect to Article 35 of the *Constitution*; to confer on the Commission on Administrative Justice the oversight and enforcement functions and powers and for connected purposes.
108. Article 35 of the *Constitution* which is at the heart of the Information Act states as follows: -



35. Access to information:
- (1) Every citizen has the right of access to—
    - (a) information held by the State; and
    - (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.
  - (2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.
  - (3) The State shall publish and publicise any important information affecting the nation.
109. Section 3(a) of the *Information Act* provides for one of the object and purpose of the Act as follows: -  
The object and purpose of this Act is to—
- (a) give effect to the right of access to information by citizens as provided under Article 35 of the *Constitution*;
110. In discharging the above duty, the Commission is specifically conferred with the functions in Section 21 of the *Information Act*.
112. Section 21(1)(f) and (2) has it that: -
21. Functions of the Commission
    - (1) The functions of the Commission shall be to—
      - (f) hear and determine complaints and review decisions arising from violations of the right to access to information;
    - (2) The Commission shall have all the powers as are provided for under this Act, its constitutive Act and the *Constitution* as are necessary for the performance of its functions under this Act.
113. Where the Commission is satisfied that there has been an infringement of the provisions of the *Constitution* and the *Information Act*, it is permitted under Section 23(2) of *Information Act* to exercise the following powers: -
23. Powers of the Commission
    - (2) The Commission may, if satisfied that there has been an infringement of the provisions of this Act, order—
      - (a) the release of any information withheld unlawfully;
      - (b) a recommendation for the payment of compensation; or
      - (c) any other lawful remedy or redress.
114. The Section continues to state as follows: -
- (3) A person who is not satisfied with an order made by the Commission under subsection (2) may appeal to the High Court within twenty-one days from the date the order was made.



- (4) An order of the Commission under subsection (2) may be filed in the High Court by any party thereto in such manner as the Commission may, in regulations made in consultation with the Chief Justice, prescribe and such party shall give written notice of the filing of the order to all other parties within thirty days of the date of the filing of the order.
- (5) If no appeal is filed under subsection (3), the party in favour of whom the order is made by the Commission may apply ex-parte by summons for leave to enforce such order as a decree, and the order may be executed in the same manner as an order of the High Court to the like effect.

115. By placing the prayers sought in the Petition and the powers of the Commission, it is apparent that the Commission has the powers to grant all the remedies sought in the Petition. The Commission can order the provision of all the information sought unless such provision is exempted under the [Information Act](#). The Commission can also order compensation.
116. Further, the Petitioner has not demonstrated the exhaustion requirement would not serve the values enshrined in the [Constitution](#) or law. The Commission is headed by a person who has knowledge and at least fifteen years' experience in matters relating to human rights, law, conflict resolution, arbitration or administrative justice, holds a degree from a university recognized in Kenya and meets the requirements of Chapter Six of the [Constitution](#).
117. The members of the Commission are also person with wealth of knowledge in various fields. With such a composition, the Commission is able to determine if the [Constitution](#) is complied with or otherwise. It can also determine if there is any infringement of any rights and fundamental freedoms and can even order compensation.
118. As said, the Petitioner did not show how he will be disadvantaged if the dispute is handled by the Commission.
120. In the words of the Court of Appeal in [Speaker of National Assembly v Karume case](#) (supra) '... 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...'
121. On the basis of the foregoing, this Court, therefore, finds that the Court's jurisdiction has been prematurely invoked. The Petitioner ought to pursue his claim through the Commission and in compliance with the law.
122. Having so found, a consideration of the rest of the issue in this matter will not aid the Petitioner in any way. This Court opts to end this matter here.
123. In the end, the following final orders are hereby issued: -
  - a. This Court lacks the jurisdiction over the dispute in this matter on the basis of the doctrine of exhaustion.
  - b. The Petition is hereby struck out.
  - c. Since the dispute still subsists, each party to bear

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 16<sup>TH</sup> DAY OF DECEMBER, 2022.**



**A. C. MRIMA**

**JUDGE**

Judgment virtually delivered in the presence of: -

Miss Mutuka Learned Counsel Advocates for the Petitioner.

Miss. Kihenjo Learned Counsel for the Respondent.

Kirong/Regina – Court Assistants.

