Adipo v Secretary/CEO Law Society of Kenya & another (Constitutional Petition E012 of 2024) [2024] KEHC 12811 (KLR) (18 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12811 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CONSTITUTIONAL PETITION E012 OF 2024

RE ABURILI, J

OCTOBER 18, 2024

BETWEEN

GODRICK KENNEDY OKELLO ADIPO ..... PETITIONER

AND

SECRETARY/CEO LAW SOCIETY OF KENYA ..... 1ST RESPONDENT

PRESIDENT LAW SOCIETY OF KENYA ..... 2ND RESPONDENT

RULING

1. The petitioner applicant is an advocate of the High Court of Kenya and a member of the Law Society of Kenya. By a petition dated 27th June, 2024, he seeks several orders from this court among them, a declaration that his rights as enshrined in Article 35(1) of *the Constitution* to access information from the respondents have been infringed and violated. He also seeks for an order directing the respondents to release all information relating to membership of CPD Committee 2024 to 2026 with respect to those who have served for more than two terms and others unqualified under regulation 5 of the Advocates (CPD)Rules,2014.

2. Simultaneous with the Petition, the petitioner also filed a Notice of motion dated 27th June, 2024 and in prayer number 2, the petitioner/ applicant seeks for an order directed at the respondents to immediately release all information relating to members unqualified to the CPD Committee and their status which include Justine Makena Kaari, Robert Shammah, Yasmin Woche, Hnery Ongicho, martin Oloo, Christine B, Samuel Nderitu Benjamin Musau, Mercy Okiro among others which did not elicit any response from the respondents . The petitioner also prayed for costs of the application.

3. The respondents filed a preliminary objection dated 15th July 2024 to the effect that this court has no jurisdiction to hear and determine the petition and therefore the application on the ground that the petitioner and not exhausted the internal dispute resolution mechanisms provided for by the Law Society of Kenya Regulations 95 and 96 hence the petitioner should be struck out.

4. The Preliminary objection was canvassed orally on 29th September, 2024.

5. Mr. Amanya counsel for the respondents submitted that in the Petition dated 27th June 2024, the Petitioner is an advocate of the High Court while the Respondent is the LSK and its President. That under the Regulations (Regulation 95(1) of the LSK Regulations, 2020) and 96(1), the aggrieved party shall have the matter resolved via arbitration.

6. Counsel submitted that the issue in the petition is one relating to affairs of the society hence this court lacks jurisdiction until the remedy provided for in the Regulations is exhausted. He submitted that the Petitioner does not say that he tried to have the dispute resolved internally and failed and that there are many decisions on the requirement for exhaustion of remedies. It was submitted that the Petitioner has not demonstrated that he applied and was denied the opportunity to serve at the CPD Committee. That the Data Protection and Privacy Act requires consent of the third-party members for their information to be supplied to the Petitioner.

7. It was further submitted that the Petition is grounded on Article 35(2) of *the Constitution* yet there is no evidence of how that Article has been violated. That if the petitioner is claiming that the information he is seeking is not in his possession, the information is privileged and only kept by the LSK.

8. Mr. Amanya pointed out that at Paragraph *5*, the petitioner has mentioned parties who are not parties to this petition and that therefore the court will be making orders against persons who are not given the opportunity to be heard. He submitted that the petitioner has a practicing certificate for this year and that he had the opportunity apply to serve in the CPD Committee AS THE Society advertised the positions. Counsel for the respondent urged this court to strike out the petition for being bad in law. He relied on the Anarita Karimi & Other case.

9. On his own behalf, Mr. Okello Counsel submitted that on the issue of jurisdiction, the High Court derives its jurisdiction from Articles 165(3), (23) to hear and determine petitions of this nature. That this petition is on violation of a bill of rights under Article 35 on the Right to or Freedom of Information.

10. On exhaustion of remedies doctrine, he submitted that Article 159 encourages Alternative Dispute Resolution mechanisms but that there is emerging jurisprudence on exceptions. He referred to the case of Mutanga Tea & Coffee Co. Ltd vs Shikara Ltd (2015) eKLR where the High Court stated that there are exceptional circumstances where the exhaustion doctrines will not serve values enshrined in *the Constitution* or law, and that the High Court will permit the suit before it; especially where a party pleads important constitutional issues.

11. The petitioner maintained that this petition meets the threshold of a constitutional petition where there is violation of fundamental Right of Access to Information. He also cited Mativo J in Night Rose Cosmetic Ltd vs Nairobi County Government & 2 Others (2018) eKLR.

12. He submitted that jurisdiction of courts to consider valid grievances from parties who lacked adequate audience before a forum created by statute or who may not have the quality of audience before the forum which is proportionate to the interest the party wishes to advance in a suit, such must not be ousted.

13. It was submitted that the petitioner has met the 2nd threshold as his rights under Article 35 of *the Constitution* are violated. Further, that Regulations 95 & 96 do not provide for remedies for violation of rights. The petitioner submitted that he only seeks for information on the qualifications of 9 members of the committee and that he wrote 2 letters seeking for information which letters were never responded to by the respondents. He relied on the case of National Assembly vs Njenga Karume.

14. Further submissions were that the Respondents being custodians of information on the qualification of the 9 members of the committee, they must provide that information. On Data Privacy and Protection, it was submitted that there will be no infringement of rights of the persons whose information is sought as the information is not privileged since all that he needs is the qualifications of the specific members in that committee on CPD, albeit the Regulations provide for qualifications to be members of the Committee.

15. The petitioner submitted that *the Constitution* is supreme to Data Privacy and Data Protection Act and that *the Constitution* has to be read wholly. That unless the information is privileged, then it is absolute and the officer should act in good faith. He concluded that there is no restriction to seeking for such information.

16. In a brief rejoinder, Mr. Amanya submitted that the two authorities cited, in the Mutanga Tea & Coffee, the court struck out the suit for not following the procedure set out for resolution of the dispute and that the matter went up to the Court of Appeal. On the Night Rose Cosmetics case, it was submitted that at paragraphs *33 – 40*, Mativo J was categorical at paragraphs 36-39 that exceptional circumstance had not been established. On violation of rights, it was submitted that if there are clear provisions of the law providing for exhaustion of remedies, that must be followed.

17. It was submitted that it was not demonstrated as to how Article 35 has been violated and that the Data Privacy Act and *Access to Information Act* must be adhered to. It was submitted that no leave for exemption to follow alternative procedure was sought in this petition and that in the Mutanga Tea & Coffee case, the court was clear on exceptions. Further, that Article 35 is not absolute but is subject to other Acts of Parliament. He urged this Court to strike out this petition with costs.

Analysis and determination

18. Having carefully considered the petition, the responses thereto, and the submissions of the parties in support of and against the petition in the form of a preliminary objection filed and argued orally, I find that the issue for determination are as follows:

    a. Whether the Court has jurisdiction to determine this matter where the petitioner alleges that his right to access information under Article 35 of *the Constitution* was infringed by the actions or omissions of the respondents.

19. The respondents claim that the petition is premature as the Petitioner has failed to exhaust the available dispute resolution mechanisms before approaching the High Court. The alternative mechanisms include the internal dispute resolution mechanisms stipulated in regulations 95 and 95 of the Law Society of Kenya Regulations, 2020.

20. The Petitioner on his part contends that the jurisdiction of the High Court to hear and determine petitions of this nature is derived from Articles 165 (3) and 23 of *the Constitution*. And that he did not have to exhaust those alternative mechanism as the law provides for exceptions. Further, that *the Constitution* overrides the statutes proving for exhaustion of remedies.

21. From the onset, Jurisdiction is everything. Jurisdiction is what gives a court the power, authority and legitimacy to entertain a matter before it. The locus classicus on jurisdiction is the oft cited case of Owners of the Motor Vessel "Lillian S' v. Caltex Oil (Kenya) Ltd [1989] KLR 1., where Nyarangi, JA. famously stated:

> " Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending

other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."

22. The Supreme Court very recently emphasized the significance of jurisdiction as follows in the case of Kenya Hotel Properties Limited *v Attorney General & 5 others (Petition 16 of 2020)* [2022] KESC 62 (KLR) (Civ) (7 October 2022) (Judgment) as follows:

> "On our part, and this is trite law, jurisdiction is everything as it denotes the authority or power to hear and determine judicial disputes. It was this court's finding in In R v Karisa Chengo [2017] eKLR, that jurisdiction is that which grants a court authority to decide matters by holding;
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> "By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics... where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

23. Article 165(3) of *the Constitution* confers on the High Court extensive jurisdiction to deal with any matter that falls within its jurisdiction, which jurisdiction is not exhaustive, given that Article 165(3)(e) provides that the High Court can have any other jurisdiction, original or appellate, conferred on it by legislation.

24. under Article 165(3)(d)(ii), the High Court has jurisdiction to determine the question whether anything said to be done under the authority of *the Constitution* or of any law is inconsistent with, or in contravention of, *the Constitution*.

25. Article 23(1) further provides that the High Court has jurisdiction to hear and determine applications for redress of denial, violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights. This jurisdiction is to be exercised in accordance with Article 165 of *the Constitution*.

26. Article 23(3) of *the Constitution* no doubt confirms the extent of the width of the jurisdiction of this Court to grant appropriate relief.

27. The above Articles on jurisdiction of this Court must however, be read together with other Articles of *the Constitution*. Article 159(2)(c) of *the Constitution* provides that in exercising judicial authority, courts and tribunals shall promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. This position has been adopted by Kenyan courts. In Violet Ombaka Otieno & 3 others v Moi University [2019] eKLR, the Court cited with approval the Court of Appeal's decision in Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR where it was held that:

> "[30] [...] 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."

28. The Court further explained the exception to that principle as follows:

> " 31. While it is this Court's jurisprudential policy in this regard to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for, and this is also now required by section 9(2) and (3) of the *Fair Administrative Action Act*, the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. Where such an alternative remedy cannot be used by an applicant, this Court can exempt such an applicant from its application as provided by section 9(4) of the *Fair Administrative Action Act*."

29. The exception to the exhaustion doctrine was also explained in Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR thus:

> " 47. 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. Indeed, in the case before us, the alternative statutory forum envisaged in the PPAD Act, namely the Public Procurement Administrative Review Board, in an earlier suit involving at an attempt to award the same tender, referred some of the issues raised to the High Court for hearing and disposition since the Review Board was persuaded that resolution of the issue involved serious questions of constitutional and statutory interpretation..."

30. The approach adopted by the Court in the above case was based on the decision of the Court of Appeal in its earlier decision in Republic v National Environmental Management Authority [2011] eKLR where it was stated that:

> " The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it..."

31. From the above decisions, it is clear that albeit the High Court has jurisdiction to hear and determine matters on the violation and or threatened violation of rights and fundamental freedoms, where there is a mechanism already established to determine such disputes, the same should be pursed before approaching the Court. There are, however, exceptions to this rule, being situations where the mechanism provided is not well placed to determine such an issue. Furthermore, the jurisdiction of the Court can be invoked where the question raised concerns a constitutional value which is at stake.

32. Under Section 14(1) of the *Access to Information Act*:

> " 14.
>
> (1) Subject to subsection (2), an applicant may apply in writing to the Commission requesting a review of any of the following decisions of a public entity or private body in relation to a request for access to information—
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> (a) a decision refusing to grant access to the information applied for;
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> (b) a decision granting access to information in edited form;
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> (c) a decision purporting to grant access, but not actually granting the access in accordance with an application;
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> (d) a decision to defer providing the access to information;
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> (e) a decision relating to imposition of a fee or the amount of the fee;
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> (f) a decision relating to the remission of a prescribed application fee;
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> (g) a decision to grant access to information only to a specified person; or
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> (h) a decision refusing to correct, update or annotate a record of personal information in accordance with an application made under section 13.

33. Section 2 of the said *Access to Information Act* provides that "Commission" "means the Commission on Administrative Justice established by section 3 of the *Commission on Administrative Justice Act*, No. 23 of 2011." Section 14 confers the Commission on Administrative Justice with the authority to review a decision restricting the access to information not only by public entities but also private bodies.

34. As earlier stated, this Court appreciates that this court has unlimited jurisdiction under Article 165(3) (b) of *the Constitution* to determine questions on whether a right or fundamental freedom has been infringed, violated or threatened to be infringed or violated. Nevertheless, the High Court does not exercise its jurisdiction in a vacuum. Jurisdiction must be exercised within the laid down principles of law. One of those principles is one which requires that where a statutory mechanism has been provided for the resolution of a dispute, that procedure should first be exhausted before the courts can be approached for resolution of that dispute.

35. Indeed, like any other legal principle, this doctrine has exceptions. However, it is the duty of a party who sidesteps a statutory dispute resolution mechanism to demonstrate that there were reasons for avoiding that route. In doing so, they must include in the prayers for the orders sought, an order of the Court to exempt them from resorting to the alternative mechanisms and with reasons for the exemption.

36. In the instant case, the Petitioner has simply pointed to the jurisdiction of this Court. However, the exhaustion principle does not actually take away the constitutional jurisdiction of this Court. What it simply does is to provide the parties with a faster and more efficient mechanism for the resolution of their disputes. The courts will step in later if any party is aggrieved by the decision of the statutory body mandated to resolve the dispute.

37. Regulation 95 of the Law Society of Kenya Regulations, 2020 provides that:

> " 95 (1) Parties to a dispute referred to in regulation 96(1) may
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> attempt to reach settlement by—
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> (a) negotiation;
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> (b) conciliation; or
>
> (c) mediation.
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> (2) The procedure for negotiation, conciliation or mediation shall be simple and the process shall be guided by the international best practices or any law for the time being regulating negotiation, conciliation and mediation.
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> (3) A decision or settlement by the use of any of the methods under paragraphs (a), (b) or (c) of sub-regulation (1) shall be concluded within 28 days from the date of lodging the dispute.
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> (4) A decision or settlement by the use of any of the methods under paragraphs (a), (b) or (c) of sub-regulation (1) shall immediately be filed with the secretary and shall, subject to the Act and these Regulations, be binding on the parties to the dispute.

38. On the other hand, Regulation 96 specifically provides for Arbitration as the mode of resolution of disputes relating to the exercise of the mandate of the management of the Society, branch or Chapter or relating to the rights of a member against any member or council, branch or Chapter committee. The Regulation stipulates as follows:

> 96 (1) Where a dispute arises—
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> (a) relating to the exercise of the mandate or the management of the affairs of the Society, a branch or a chapter; or
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> (b) relating to the rights of a member against any other member or the Council, branch executive or chapter committee, the aggrieved party shall—
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> (i) refer the dispute in writing to the secretary, where the dispute concerns the national office of the Society; or Kenya Subsidiary Legislation, 2020492492
>
> (ii) refer the dispute in writing to the branch secretary of the relevant branch where the dispute involves an issue or a party at the branch level.
>
> (2) A dispute may exist between or amongst one or more of the parties listed in sub-regulation (1).
>
> (3) Where a dispute has been lodged with a branch secretary and the dispute cannot be resolved within 30 days, the branch secretary shall, within 7 days, forward the dispute to the secretary

and the procedure for hearing and disposal of the dispute provided under this regulation shall thereafter apply.

(4) The secretary or a branch secretary shall, within 14 days upon receiving notification of a dispute from an aggrieved party, or upon the secretary receiving notification of a dispute from a branch under sub regulation (3), refer the dispute to an arbitrator or arbitrators appointed by the parties to such dispute for determination.

(5) The number of arbitrators so appointed shall not, in relation to any one dispute, exceed three persons.

(6) Where a dispute is between—

(a) a member and another member; or

(b) a member and a branch executive or chapter committee, and the parties to the dispute cannot agree on an arbitrator within 14 days, the president shall appoint an arbitrator to hear and determine the dispute.

(7) Where a dispute involves—

(a) the Council; or

(b) a member of the Council, and any other party, and the parties cannot agree on an arbitrator within 14 days of lodging of the dispute, the arbitrator shall be appointed by the Chairperson of the Chartered Institute of Arbitrators, Kenya Chapter.

(8) The arbitrator or arbitrators shall hear and determine a dispute in accordance with the law for the time being regulating arbitration, and the decision shall be final and binding on all parties to such dispute.

(9) The time provided under this regulation for lodging or taking other step in dispute resolution process is subject to regulation 45 where the dispute concerns elections.

39. The above Regulations clearly provide for how disputes among members of the Law Society of Kenya, or between members and the Society or the Council or the Breach Chapter Committee are to be resolved.

40. Besides, and more importantly, as far as the right to access information under Article 35 of *the Constitution* is concerned, which is the subject of this petition, that Article was implemented by the enactment of the *Access to Information Act*. The preamble of the *Access to Information Act*, 2016 clearly states that it is an "Act of Parliament to give effect to Article 35 of *the Constitution*; to confer on the Commission of Administrative Justice the oversight and enforcement functions and powers and for connected purposes."

41. The Act was enacted to give effect to the right of access to information under Article 35 of *the Constitution*. From the provisions of the Act, it is clear that Article 35 on the right to access information is not absolute.

42. In their wisdom, which is not under any challenge, the legislators considered it essential that any issue concerning denial of information should first be addressed by the Commission on Administrative

Justice. It is for that reason that section 23(2) of the Act empowers the Commission on Administrative Justice as follows:

> " The Commission may, if satisfied that there has been an infringement of the provisions of this Act, order-
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> a. the release of any information withheld unlawfully;
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> b. a recommendation for the payment of compensation; or
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> c. any other lawful remedy or redress."

43. The Act at Section 23(3) provides for appeal mechanisms for persons who are aggrieved by the decision of the Commission as follows:

> " 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."

44. With such clear provisions, this Court does not think that Parliament intended to bestow both original and appellate jurisdiction on the High Court in matters where the Commission on Administrative Justice has been given jurisdiction under the *Access to Information Act*. This is so, considering that Section 23(5) of the Act provides that an order of the Commission on Administrative Justice can be enforced as a decree.

45. From the above exposition, it is clear to this Court that what the Petitioner seeks from this Court is readily available to him before the Commission on Administrative Justice, even it were that the dispute resolution mechanisms provided for in the Law Society of Kenya Regulations 95 and 96 of the Law Society of Kenya Regulations, 2020 are ineffective, or that *the Constitution* at Article 23 is obviously superior to the Regulations cited by the Respondents' counsel.

46. In the cited case of Mutanga Tea & Coffee Company Ltd v Shikara Limited & another [2015] eKLR, the Court of Appeal explained the purpose of the exhaustion doctrine thus:

> " This Court has in the past emphasized the need for aggrieved parities to strictly follow any procedures that are specifically prescribed for resolution of particular disputes. Speaker Of The National Assembly V. Karume (supra), was a 5(2)(b) application for stay of execution of an order of the High Court issued in judicial review proceedings rather than in a petition as required by *the Constitution*. In granting the order, the Court made the often-quoted statement that:
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> "[W]here there is a clear procedure for the redress of any particular grievances prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed."
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> (See also Kones V. Republic & Another Ex Parte Kimani Wa Nyoike & 4 Others (2008) 3 KLR (ER) 296).
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> It is readily apparent that in those cases the Court was speaking to issues of the correct procedure rather than of the correct forum for resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the Court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by *the Constitution* or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.

The basis for that view is first that Article 159 (2) (c) of *the Constitution* has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word "including" leaves no doubt that Article (159(2)(c) is not a closed catalogue. To the extent that *the Constitution* requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reading of *the Constitution* would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165(3)(a) of *the Constitution* in a way that will accommodate the alternative dispute resolution mechanisms.

Secondly, such alternative dispute resolution mechanisms normally have the advantage of ensuring that the issues in dispute are heard and determined by experts in the area; and that the dispute is resolved much more expeditiously and in a more cost-effective manner. In *Rich Productions Ltd. V. Kenya Pipeline Company & Another, Petition NO. 173 OF 2014*, 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."

On the same reasoning, this Court, in Republic V. The National Environmental Management Authority, CA NO 84 OF 2010 upheld a decision of the High Court, which declined to entertain a judicial review application by a party who had a remedy, which he had not utilized, under the National Environment Tribunal. The Court reiterated that where Parliament has provided an alternative remedy in the form of a statutory appeal procedure, it is only in exceptional circumstances that an order of judicial review will be granted. More recently in *Vania Investment Pool Ltd. V. Capital Markets Authority & 8 Others, CA NO 92 OF 2014* this Court also upheld a decision of the High Court in which the court declined to entertain a judicial review application by an applicant who had failed to first refer its dispute to the Capital Markets Appeals Tribunal established by the *Capital Markets Act*.

We are therefore satisfied that the learned judge did not err by striking out the appellant's suit and application which sought to invoke the original jurisdiction of the High Court in circumstances whereas the relevant statutes prescribed alternative dispute resolution mechanisms and afforded the appellant the right to access the High Court by way of appeal, which mechanisms he had refused to invoke. To hold otherwise would, in the circumstances of this appeal, be to defeat the constitutional objective behind Article 159(2)(c) and the very raison d'etre of the mechanisms provided under the two Acts.

What we have stated above also sufficiently disposes of the appellant's contention that the High Court failed to invoke its inherent jurisdiction or abdicated its jurisdiction. It also answers the applicant's contention that the failure to follow the prescribed dispute resolution mechanism was a mere technicality curable under Article 159 (2) (d) of *the Constitution*. Granted the express constitutional principle under which the dispute

resolution mechanisms provided by the PPA and the EMCA are underpinned, it cannot be claimed that lack of compliance with those mechanisms is a mere technicality."

47. I have extensively cited the above decision because it answers several questions about the exhaustion principle. In light of the cited case law and what I have stated in this ruling, follows that the matters raised in the petition are not yet ripe for determination by this Court.

48. Accordingly, I find the preliminary objection raised by the respondents to the petition as a whole and to the Notice of motion for conservatory orders merited, I uphold it and proceed to strike out the Petition and the Notice of Motion both dated June 27, 2024 with an order that the parties shall bear their own costs of these proceedings.

49. This file is closed.

50. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 18TH DAY OF OCTOBER, 2024

R.E. ABURILI

JUDGE