Valentini v Farid & 3 others (Environment & Land Petition E005 of 2024) [2025] KEELC 253 (KLR) (30 January 2025) (Ruling)

Neutral citation: [2025] KEELC 253 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND PETITION E005 OF 2024

FM NJOROGE, J

JANUARY 30, 2025

BETWEEN

RITA VALENTINI ..... PETITIONER

AND

SHADIA MUNINI FARID ..... 1ST RESPONDENT

COUNTY GOVERNMENT OF KILIFI ..... 2ND RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 3RD RESPONDENT

THE HON ATTORNEY GENERAL ..... 4TH RESPONDENT

RULING

The Petition

1. In the petition dated 18/10/2024, the following prayers are sought:

    a. A declaration that the petitioner's rights to a clean and healthy environment as guaranteed by article 42 of *the constitution* has been violated by the actions and the inactions of the respondents as outlined in the petition;

    b. A conservatory orders halting the construction by the 1st respondent on parcel no 9643;

    c. A conservatory order compelling the respondents jointly and severally to take measures to stop /prevent/discontinue the development or any omission deleterious to the environment on the property;

    d. Further orders and/or directions as this court may deem just fair and necessary;

e. An order directing the respondents to remove all developments that have taken place during the pendency of the suit proceedings to restore the project site to its original condition.

2. The basis of the plaintiff's claim is that her plot neighbours the 1st respondent's. The 1st respondent is constructing a three storey residential apartment block on LR NO 9643 right on the boundary wall next to her plot and being a high rise building, she is apprehensive that it would infringe on her privacy; the 1st respondent in person has informed her that is the nature of the structure she is putting up. Upon her complaint to the 2nd and 3rd respondents the 3rd respondent (hereinafter also "NEMA") confirmed no EIA licence had been issued for the project, and issued a stop order. The 2nd respondent (hereinafter also "the County") also visited the property and confirmed the project had no approvals and it also issued a stop order, and confirmed to the petitioner that the zoning guidelines for area the project is located in do not allow construction of high rise apartments. The construction, according to the petitioner, is contrary to existing building rules, laws and regulations and is being undertaken in a low density residential area that allows low density dwellings; no change of user approval, NCA approval, Physical Planning approvals and EIA licence have been issued and it is a danger to the environment and the public. Further, its structural integrity is unknown and it is being squeezed into a small plot, and it will permanently change the scenery of the area, and above all the petitioner's view of the sea from her terrace will be blocked. Flora and fauna have been destroyed without prior approvals with no plans to replace such flora. Despite the stop orders the 1st respondent continued with the project. The petitioner avers that the structure under construction has windows and doors directly facing her property with a clear view of the petitioner's swimming pool and bedrooms and she has not consented to that state of affairs and that is contrary to Article 31 on her rights to privacy.

The Notice of Motion

3. The notice of motion dated 18/10/2024 is the subject of this ruling. It was filed alongside the petition and it reiterated the above matters and sought that this court issues conservatory orders:

   a. stopping, halting, and discontinuing the 1st respondent, his servants/ proponents, or any other person from undertaking any further development and construction activities on the suit property pending the hearing and determination of the petition;

   b. compelling the respondents to jointly or severally take immediate measures to stop, prevent or discontinue any development or any omission deleterious to the environment on the suit property pending the hearing and determination of the petition;

   c. any further orders and/or directions deemed just fair and necessary.

4. In the application, the petitioner adds that the structure under construction is a four storey building and there are more than 4 apartments and other associated amenities on the suit premises. She has resided on her plot for more than 14 years. She exhibited her letter of complaint apparently received by the Municipal Manager's office on 5/1/2024. That letter also sought that the petitioner be furnished with copies of any approvals issued to the 1st respondent for the project. An improvement notice by the 3rd respondent, issued on 9/1/2024 showed that upon a visit to the site no EIA licence was shown to the officers of the 3rd respondent. A letter from the County Physical Planning Officer /Municipal Planner dated 16/1/2024 not only reported to the acting Municipal Manager that there were no approval plans and/or documentation permitting the development but also confirmed that Casuarina area of Malindi is a low density residential area with ground building coverage of 50%, and inter alia, a minimum plot size of o.5 ha; building line of 9 m on roads above and 18m and 6m on roads below 18m; setback of 4.5 m for the lounges and 2.4 for the kitchen a court size of 6x6 m; parking space for 1-2 bedroom units

and 2 parking spaces for 3 bedroom units. Plots on the sea frontage have a permitted height of ground plus two while the 2nd row has a permitted height of ground plus three. Photographs were exhibited showing the offending structure which seems quite close to what appears to be a boundary hedge, with windows overlooking the hedge apparently into the petitioner's residence. It is a correct observation top state that from the point at which the photograph marked "RV6" was taken, the photographer's view of the sea would be totally obliterated if the structure went higher.

Responses.

5. The application is opposed. The 1st respondent filed a notice of preliminary objection on 30/10/2024 and a replying affidavit dated 4/11/2024. The 2nd respondent filed a replying affidavit dated 13th December 2024.

The Preliminary Objection.

6. The directions issued by this court on 5/11/24 were that the preliminary objection is to be disposed of first. The preliminary objection dated 30/10/2024 is premised on the following limbs:

    a. That this court has no jurisdiction over the issuance of the EIA licenses by NEMA;

    b. The petition and application have been brought in contravention of Section 129(1)(e) of the *Environmental Management and Co-Ordination Act* Cap 387 as read with regulation 46(2) of the Environmental (Impact Citation Assessment and Audit) Regulations 2003, and Rule 4 of the National Environment Tribunal Procedure Rules 2003.

    c. The doctrine of constitutional avoidance deals with instances where a constitutional court will decline to deal with a matter because there exists another remedy provided in law which the aggrieved party is yet to utilize.

    d. Dissatisfaction with the process leading to the award of the environmental impact assessment licence by the 3rd respondent herein must be resolved by NEMA and this court's jurisdiction is only triggered once the National Environmental Tribunal decides on the issue.

7. The 1st respondent, the 3rd respondent, and the petitioner filed their submissions on the notice of preliminary objection.

Submissions On The Preliminary Objection

1st Respondent's Submissions

8. The 1st respondent's submission is to the effect that she filed an application for an EIA licence, commissioned an EIA Study Report (the Report) and submitted it to NEMA and neither the petitioner nor any other member of public has raised any concerns with the project. An EIA Licence was then issued by NEMA. The County Government of Kilifi also gave its approval on 5/3/2024. The 1st respondent averred that Section 61 of the *Physical and Land Use Planning Act* 2019 provides for a procedure for dispute resolution where a party is aggrieved by the decision of a county executive member concerning any development permission matters such as the present in that a challenge to the Planning Authority's decision shall in this case lie to the 2nd Respondent's County Physical and Land Use Planning Liaison Committee from whose decision the appeal shall then lie to this court. The 1st respondent submitted that the issues arising from the preliminary objection were as follows:

    a. Whether the petition contravenes provisions of *the Constitution*, section 129(e) of EMCA and regulation 46(2) of the Regulations; and Rule 4(2) of the NET Rules.

b. Whether the petition contravenes section 61(3) of the *Physical and Land Use Planning Act* 2019.

9. On the first issue the objector cited Kiriro Wa Ngugi & 19 others v AG & 2 others 2020 eKLR and submitted that the petition is founded on claims of inter alia, lack of approvals by the NCA and Physical Planning approvals and an EIA Licence issued by NEMA; that the mere peripheral reference to *the Constitution* does not render the dispute amenable to be determined by the ELC where substantive legal provisions exist to govern the disputed matters and which also provide for a channel for a redress; that the claims that there is no EIA Licence are misleading as there is already an EIA Licence issued after due process was followed and it has not been revoked; that Section 67 EMCA provides for revocation suspension or cancellation of an EIA Licence and under Section 129 EMCA as read with Regulation 46(2) and NET Rule 4(2), the National Environment Tribunal (NET) is the appropriate first instance forum for such a dispute before the petitioner can come to court. The petitioner having come to court prior to satisfaction of such processes, the petition contravenes Article 169(2) (c) and Section 67 EMCA as read with regulation 46(2) and NET Rule 4(2).

10. On whether the petition contravenes Section 1(3) of the *Physical and Land Use Planning Act* 2019, (hereinafter "PLUPA") it is submitted, citing Francis Gitau Parsimei & 2 others v National Alliance party& 4 others 2012 eKLR that it is trite law that where a procedure has been prescribed by law then it must be strictly followed in resolving the dispute.

11. The 1st respondent cited Sections 58 and 59 of the PLUPA as providing for application for development permission and preparation of plans and documents by qualified persons respectively. She states that the allegation that there was no development permission granted is false and misleading. She stated that the 2nd respondent's approval for the suit project on 5/3/2024 which has not been challenged or revoked. This court, says the 1st respondent, lacks jurisdiction to hear and determine the petition and the application owing to Section 61(3) and 61(4) PLUPA 2019, and the correct forum is the County Physical and Land Use Planning Liaison Committee (hereinafter "the L.C.") and the petitioner should have lodged her challenge there. Benson Karomo & Hubert Seifert (Suing as Chairman and Secretary of the New Nyali Residents Association V Paul Onyango Kiagi & County Government of Mombasa 2021 KELEC 447 is cited to support that proposition. It is submitted that the petition was prematurely filed and it contravenes the doctrine of constitutional avoidance and this court thus lacks jurisdiction. The only jurisdiction that this court has, says the 1st respondent, is appellate jurisdiction under Section 64(1) of the PLUPA 2019 and original jurisdiction ought not be confused with appellate jurisdiction or unlimited jurisdiction, and this court ought not use its appellate jurisdiction to usurp original jurisdiction of other organs. Citing Kibos Distillers Ltd & 4 Others V Benson Ambuti Andega & 3 Others 2020 KECA 875 eKLR, it was submitted that the petition ought be struck out for failure on the petitioner's part to exhaust all available dispute resolution mechanisms before filing it.

2nd Respondent.

12. The 2nd respondent never filed any submissions on the preliminary objection.

3rd Respondent's Submissions

13. The 3rd respondent indicated at the court sitting on 17/12/2024 through its counsel that it wished to adopt the submissions of the 1st respondent as analyzed herein above.

4th Respondent's Submissions.

14. The 4th respondent in his submissions supported the 1st respondent's submissions but only on the issue of Jurisdiction and placed her submission before court in a less complex manner. Citing Owners of Motor Vessel Lillian S v Caltex Oil K Ltd 1989 eKLR and Samuel Kamau Macharia & Anor v Kenya Commercial Bank & 2 others Application No 2 of 2011 as well as Bernard Murage v Fine serve Africa Ltd & 3 others 2015 eKLR he submitted that the present petition has fallen afoul of the doctrine of constitutional avoidance or exhaustion which doctrine serves to postpone judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interests within the mechanisms in place for resolution outside the courts. That according to inter alia Speaker of The National Assembly Vs Karume 1992 KECA and Crystalline Salt Limited V Kenya Revenue Authority 2019 eKLR, the clear procedure for the redress of any grievance prescribed by an Act of Parliament then that procedure should be strictly followed. As the petitioner has not exhausted all available remedies, he submits, her application should be struck out.

Petitioner's Submissions in Response to the Preliminary Objection.

15. The petitioner framed two issues for determination arising from the Preliminary Objection as follows:

    a. Whether the ELC has jurisdiction to hear and determine the petition;

    b. Whether the doctrine of constitutional avoidance applies to this matter.

16. The petitioner cited Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors 1969 EA 696 on what constitutes a proper preliminary objection and Article 162 (2) (b) as read with Articles 23(1) and 70 of *the Constitution*. In addition, she cites section 3 of EMCA as granting court jurisdiction over grievances pertaining to a clean and healthy environment and Section 3(5) as stating that the principles of sustainable development shall guide the exercise of jurisdiction by the court. She relies on Article 162 (2) (b) and Section 13 ELCA to state that the court has original and appellate jurisdiction to hear all disputes under Article 162(2) (b) relating to inter alia environmental planning and protection, climate issues, land use planning, title, tenure, and boundaries and the petition deals with violations to the right to a clean and healthy environment. She draws attention to claims to violation of the right to privacy. The violation of that right, she states, violates her right to ownership and peaceful enjoyment of her property. She further draws attention to claims of potential lack of structural integrity and the destruction of flora and the absence of an NCA licence in the petition. She states that it is beyond the ability of specialized tribunals such as NET to handle such issues due to their limited mandate. She gives an example of the failure to obtain change of user and failure to comply with zoning regulations, mandatory need for registration with NCA for all construction works of public or private nature and the need for quality assurance by NCA which may help avert catastrophes such as building collapse. These are issues beyond the NET's powers, submits the petitioner. Thus, it is stated, the petition is multifaceted as there are pertinent development and licensing issues and issues of the right to a clean and healthy environment which can not be severed from it and so it is fit for handling by this court. He stated that Abidha Nicholas V Attorney General & Others 2023 eKLR case held that availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief and that if the alternative remedy is deemed inadequate, the court may proceed to provide relief; that there was impracticality in having the applicant appeal the impugned decisions before two different tribunals. Citing Titan Ltd v Qiye Co Ltd & Anor ELC 524 of 2013 KEELC 20354 KLR, Millenium Gardens Management Ltd Vs Metricom Home Nbi Co Ltd, Nairobi city County Govt & 2 others (ELC Petition E121 of 2023) 2024 KEELC 4016 KLR, the petitioner submitted that it is thus improper for the 1st respondent to reduce the present petition to a mere dispute on the issuance of the licenses.

Her right to privacy under Article 31 and clean and healthy environment under Article 42 of the environment matters too, as does the failure on the part of the respondents to ensure environmental protection as guaranteed by Articles 69 and 70 of *the Constitution*.

17. The petitioner also pointed out that she had made inquiries to the respondents before coming to court on whether the 1st respondent had approvals from the 2nd and 3rd respondents and the answers were in the negative. Despite that answer, the construction was still going on as seen in the photographs exhibited by the petitioner, and the petition states that as at the time of its filing, the licences and approvals had not been issued and there was no signage at the site, which assertions are not denied. Due to her inquiry, it was therefore for the respondents to notify the petitioner of the issuance of the licenses if any were later issued. Without that knowledge she avers, she could not have approached the 3rd respondent. Also, only an EIA license has been attached and there is no EIA study report exhibited, and so there is no evidence of public participation in the project as per Regulation 17 of the Environmental (AA&A) Regulations 2003.

18. It is submitted that the court has not been requested to go into the merits of the decision by NEMA and that is the preserve of the NET, nonetheless the court has power to quash any process or decision for non-adherence to national values in *the Constitution* of Kenya, and the court has been asked to determine if the petitioner's rights under Articles 10,232 and 73 have been violated by denial to participate in the decision to allow the erection of a 4 storey building have been threatened.

19. It is stated that the multifaceted nature of the issues which makes the dispute not fit to be taken to the NET, the doctrine of constitutional avoidance does not arise herein.

20. As to whether the petition contravenes the provisions of Section 61(3) of the PLUPA 2019, it was stated, citing Odida (Suing as Administratrix Od the Estate of Ododa Majiwa) V County Govt of Migori ELC 12 of 2023 [2023] KEELC 22532 and Auko V Republic 2024 KECA KLR that the ground is new and not contained in the notice of preliminary objection and should be struck out. Without prejudice to the foregoing, it was further submitted that the ground lacks merit as an inquiry was made of the 2nd respondent prior to the filing of the petition and the answer was that no approval had been given under the Act yet construction had already begun. It was the duty of the respondents to notify the petitioner and the public as per Section 57 and 58 PLUPA to allow for an objection to the development if any. The respondents have not sworn any affidavit that the petitioner was notified of the application for building approval and that she consequently failed to raise an objection thereto and thereafter appeal to the Committee under Section 61(3) of PLUPA. She wonders aloud as to how the 1st respondent could have expected her to go to the Liaison Committee when she had not been made aware of the application for or the grant of building approval and cited Tom Brown Limited & another v CEC Member in Charge of Planning & 2 others ELC E053 of 2022) 2023 KEELC 17853 KLR where such a question had arisen, and Gatere & Another v Kenya Electricity transmission Co Ltd (ELC E039 of 2023) 2024 KEELC 4560 (KLR). Finally, the petitioner asserted that the claims of lack of change of user had not been denied; she stated that change of user does not fall user the mandate of the Liaison Committee under PLUPA since no such change had ever been granted to warrant the petitioner to move to the Liaison Committee. Without evidence of application and grant of change of user, the respondents can not invoke and use the provisions of the Act against the petitioner, and only the option of seeking redress for violation of her constitutional rights.

Determination

21. The 1st respondent avers that there is already an EIA Licence issued after due process was followed and it has not been revoked; that Section 67 EMCA provides for revocation suspension or cancellation of an EIA Licence and under Section 129 EMCA as read with regulation 46(2) and NET Rule 4(2), NET

is the appropriate forum for such before the petitioner can come to court; that the petitioner having come to court prior to satisfaction of such processes, the petition contravenes Article 169(2) (c) and Section 67 EMCA as read with regulation 46(2) and NET Rule 4(2). In that regard, the petitioner is alleged to be in contravention of the doctrine of exhaustion.

22. She also avers that Sections 58 of PLUPA as providing for application for development permission and that the 2nd respondent's approval for the suit project issued on 5/3/2024 has not been challenged or revoked. This court, says the 1st respondent, lacks jurisdiction to hear and determine the petition and the application owing to Section 61(3) and 61(4) PLUPA 2019, and the correct forum is the County Physical and Land Use Planning Liaison Committee ("the L.C.") and the petitioner should have first lodged her challenge there. In this regard it was submitted that the petition was prematurely filed and it contravenes the doctrine of exhaustion or constitutional avoidance and this court thus lacks jurisdiction.

23. A scrutiny of the preliminary objection and the parties' submissions leads this court to conclude that the only substantive issue arising from the preliminary objection is whether the doctrine of exhaustion applies to the present case in view of the cited provisions of EMCA and the PLUPA, the inclusion of other controversies not subject to the jurisdiction of the 2nd and 3rd respondents, and also in view of the failure to provide the petitioner with information as to the existence of the licences and approvals after they were issued. The issue of whether the doctrine of exhaustion applies with regard to the processes under the PLUPA is however not part of any of the limbs of the preliminary objection, and as parties are bound by their pleadings, that issue will not be addressed by this court in substance.

24. It was held as follows in Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya, Al Ghurair Printing and Publishing LLC, Attorney General, Jubilee Party, Ekuru Aukot & Third Party Alliance, Samuel Waweru & Stephen Owoko Oganga [2017] KEHC 4663 (KLR):

> " 41. The issue of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks judicial review of that action without pursuing available remedies before the agency itself. The Court must decide whether to review the agency's action or to remit the case to the agency, permitting judicial review only when all available administrative proceedings fail to produce a satisfactory resolution.
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> 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:
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> > "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."

25. In the Abidha Case (supra) the petitioners enquired from the respondents about their EIA Licence and were not shown any. Invoking Articles 35 (1) of *the Constitution* and *Access to Information Act* they made an enquiry to NEMA and obtained no response at first. They later obtained information from NEMA that first, the site had been visited and a stop order had been issued as the mine was operating without an EIA licence, and, later on, that a licence had been issued. They went to court claiming that the respondents had violated the constitutional and fundamental rights and freedoms of the Ramba

Community as they had threatened to cause harm on the people of Ramba and the Petitioner in person; that the respondents were mining contrary to the law as the 2nd and 3rd Respondents have no E.I.A licence and no mining licence, that there was violation of right to clean and healthy environment and violation of a fair administrative action and breach of the right to property. The petition included a complaint against the Kenya Power & Lighting Company Ltd (KPLC) alleging that the 2nd and 3rd Respondent had sought for electricity supply from it, and it had thus trespassed into the petitioner's land and dug holes and erected electricity poles thereon in order to supply the said power. In the case KPLC filed the first Preliminary Objection that this honourable court lacks jurisdiction to hear and determine the dispute and suit as against it; that the Petition against it offends the provision of Section 3 (1) 10, 11 (a), f, I, k and l, 23, 24, 36, 40, 42 and 224 (2) of the *Energy Act* 2019 together with regulations 2, 4, 7 and 9 of the Energy (Complaints and Disputes Resolution of regulation 2012 as read together with Article 157 (2) c and 169 (1) (d) and 2 of *the Constitution* of Kenya 2010 and Section 9 (2) and (3) of the Fair Administration Act 2015; that the petitioner should stick to the dispute resolution avenues available in law.

26. The second objection in the Abidha Case resembled that in the present case: it was that Section 125 of the Environment and Co-ordination Act Cap 387 Laws of Kenya (EMCA) establishes the National Environment Tribunal whose jurisdiction is spelt out under Section 129 (1), (2), (3) & (4) of the said Act; that the orders that the petitioner seeks in the petition and application herein were orders that were within the mandate of the National Environmental Tribunal to handle; that the ELC as such lacked the original jurisdiction on the portion of the claim dealing with the environment; that the fact that under Section 130 of the said Act, appeals from the National Environment Tribunal lie to the Environment and Land Court made the claim premature as far as the environment is concerned and that this court will have the last bite on the cherry as the appellate court; that the petitioner should have exhausted the administrative and judicial mechanism set out in the Environment and Co-ordination Act (EMCA) (Cap 387) Laws of Kenya which he did not do before moving the ELC.

27. The ELC, citing Samuel Kamau Macharia and another – v- Kenya Commercial Bank and 2 Others, Application No. 2 of 2011, Benard Murage - v - Fine serve Africa Limited & 3 others [2015] eKLR and Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others [2020] eKLR held that its jurisdiction in relation to disputes reserved for National Environment Management Authority and the National Environment Tribunal is restricted to the appeals emanating from the tribunal and that the authority has the power to cancel or revoke a licence or suspend such licence for such time not more than 24 months where the licensee contravenes the provisions of the licence. That EMCA (Cap 387) Laws of Kenya vests the National Environment Tribunal with the powers to hear appeals from the decisions of NEMA; that any person dissatisfied by the decision of the NET can appeal to the ELC under Section 130 of Environment and Co-ordination Act (EMCA) (Cap 387) Laws of Kenya; that the petitioner has not exhausted the available remedies set out by Parliament in the Environment and Co-ordination Act (EMCA) (Cap 387) Laws of Kenya before coming to this court. It thus allowed the Preliminary Objection and struck out the petition for want of jurisdiction. On appeal, the Court of Appeal upheld the ELC decision.

Non-disclosure.

28. It is necessary first to deal with the issue of the respondents' non-disclosure of the existence of the licences. The question is whether it may disentitle the respondents from raising the doctrine of exhaustion in the present matter.

29. This case may be distinguished from the Abidha case only for the fact that upon the petitioner's enquiry, the 1st respondents herein remained silent while the 2nd and 3rd respondents confirmed that

there were no licenses or approvals; even when licences or approvals were subsequently issued it appears that they never informed the petitioner so that she may pursue the avenues for redress under the various Acts cited herein above, i.e. EMCA and the PPLUA. On that basis, the petitioner has raised the issue as to whether indeed she can be blamed for filing the application which included not just the issue of lack of licenses but also other matters not within the jurisdiction of the NEMA, NET, or the Liaison Committee. That she relies on non-disclosure to save her petition from the doctrine of exhaustion is crystal clear when she submits as follows:

> " It was upon the respondents to notify the petitioner of the issuance of the NEMA licence if at all they were later issued since she had made an enquiry. Without that knowledge, she could not have approached the National Environment Tribunal."

30. She also notes that a project report has not been exhibited, and that in the circumstances it is not possible to decipher whether public participation had occurred yet that is a right provided for under *the Constitution*.

31. This court is satisfied that the petitioner had enquired of the respondents on whether the approvals and licences had been issued and the answer she got from them was either silence or in the negative yet the construction works were still going on. Notably, it would have been easy to blame the petitioner for filing the petition had she been informed prior to that filing that the 1st respondent had already obtained licences and approvals. By the time the petitioner was filing the petition and the motion the respondents had still not informed her that any licences or approvals had since been issued to the 1st respondent. As she came to court, the petitioner appeared quite certain that the 1st respondent did not possess licences or approvals; it appears that once those licences were issued in the wake of her inquiry, she was not informed of the fact. In fact, the NCA certificate of compliance was brought to the attention of the court at the last sitting of the court just before the ruling date for the objection was issued prompting laments from the petitioner; that certificate's validity commences on 26/11/2024 while the petition was filed on 18/10/2024, implying that all along the project before 26/11/2024 the project was proceeding devoid of such a certificate that it was compliant with the provisions of Section 5 of the NCA *Act No 41 of 2011* and Regulation 17 of the NCA Regulations 2014.

32. The issue now arising upon such disclosures by the respondents at this stage in the proceedings of the existence of licences and approvals is whether the petitioner ought to be held entirely liable for failure to exhaust the statutory remedies under EMCA and whether the doctrine of exhaustion can still be applied against the petition.

33. Notably, in the Abidha appeal decision, the court observed that the information required by the appellant therein had been supplied by NEMA. The court stated as follows:

> " 4. It was the case of the appellant that only upon seeking the intervention of the CAJ, that NEMA wrote, on August 26, 2019, stating that the miners had submitted an Environmental Impact Assessment (EIA) Report for an existing small scale artisanal gold mining activity at San-Martin Ramba, specifically on Siaya/Ramba/711. Critical in the communication was that NEMA had issued a stop order of the impugned mining activities until licences were received from it and the Ministry of Mining. The stop order had been with effect from July 31, 2019. The appellant complained that even after this date, the miners continued, and in fact ramped up the mining activities under the watch of the 1st and 4th to 7th respondents, NEMA included.

5. Around June, 2020, the appellant received information that the 4th respondent had obtained a prospecting licence covering Ramba area in the name of AfriOre International (Barbados) Limited which was later transferred to Acacia Exploration Kenya Limited (Acacia). At about the same time the 5th respondent (perhaps NEMA) issued an EIA licence over the same area to an entity unrelated to the activities of the two miners. Upon inquiry, Acacia indicated it was not connected with those activities. The grievance by the appellant is that the miners continue with their activities unabated and boast of their 'prowess' (perhaps patronage) of powerful businessmen and politicians."

34. Unlike in the present petition, the failure of NEMA to supply the requested information was thus not a stumbling block standing in the way of the determinations of either the ELC or the Court of Appeal in the Abidha case. However, the inescapable fact remains that, whether or not the information was provided before the petition was lodged, the 1st respondent is now in possession of licences and approvals and unless checked, is intent on proceeding with the project on the strength thereof. These licences can not be ignored. Though the issuance of licences, approvals and certificates for the 1st respondent's project are new disclosures, and were not addressed in the petition, petitions too are subject to amendments. The usual course adopted in cases is to amend pleadings upon new disclosures being made in the replies. Nevertheless, no amendments have been made to the petition as yet for the court to assess the petitioner's reaction the said disclosures. The petition and the application being premised on lack of approved plans permits and an EIA licence, and the petition not having been amended yet, there is no controversy properly laid out before this court as at present on the propriety of the manner of their issuance or validity or any other related issue; the 1st respondent's preliminary objection appears to be quite premature and for dismissal when viewed in such light.

35. However, the unsavoury circumstances that would be created by wholly dismissing the preliminary objection on the basis of the non-disclosure and apparent prematurity is however clearly evident; if present preliminary objection was dismissed and this court were to proceed with the petition without amendments, then the petitioner may be prejudiced; also perchance the present preliminary objection was dismissed on the same grounds and the application and petition were to be heard on their merits, that would necessitate their prior amendments to make them accord with the reality borne out of the new disclosures, otherwise either of the opposing parties may suffer untold prejudice; unfortunately, upon such amendment, the end result would be that the dispute that should have been lodged before the NET would then land squarely in this court, with the appearance that by allowing amendments this court has egged on the petitioner to hope for a resolution before it notwithstanding the EMCA provisions in Section 129; it is also probable that in that event, controversy on the propriety of the manner of the issuance or validity of licence or any other issue in connection thereof may arise before this very court rather than before NET; however, even in those circumstances, as per the Abidha Nicholas Appeal decision, this court would still not be the right first-instance forum for the determination of propriety of the manner of issuance of EIA licence or its validity or any other related issue; logically and predictably too in those circumstances, an absurdity may result in that the question may arise yet again before this very court as to whether an objection based on the exhaustion doctrine may be validly raised for a second time after the amendments. That absurdity is just but one of the potentially unfavourable consequences of dismissal of the current objection. In the interests of justice and in order to achieve the overriding objective of rules of procedure and to avoid convoluting or protracting this dispute, the appropriate course of action on the part of this court is to eschew those consequences by not issuing any order that would bring them to reality. In the end, for the sake of propriety in the proceedings and in the interests of expedition of dispute resolution both before this

court and before any other relevant tribunal or body as required by article 159(2)(b), the reality of the existence of the licences, permits, approvals or certificates overshadows the fact that their issuance was apparently concealed from the petitioner.

36. In the light of the foregoing analysis, it is only proper that the court must thus give room to the petitioner to grapple with what seems to be concealment of information, and it must now approach the doctrine of exhaustion and its applicability herein as though the licences, permits, approvals or certificates were made known to her prior to the commencement of the petition. The conclusion is that the apparent concealment of the information, though it misled the petitioner into filing this petition, should not affect the issue as to whether the doctrine of exhaustion is applicable in this case or not.

Inclusion in the Petition of Matters Subject to Jurisdiction of other Fora

37. The inclusion in a petition of matters subject to jurisdiction of fora other than the 2nd and 3rd respondents herein four bodies is now a non-issue following the holding in the Abidha Nicholas Appeal as follows:

> " 40. We state categorically and without equivocation that the multifaceted nature of any petition, or suit for that matter, is not a basis to find a court to arrogate jurisdiction to itself. This court already made a finding on this issue and castigated such reasoning in Kibos Distillers Limited & 4 Others -vs- Benson Ambuti Adega & 3 Others [2020] eKLR; In the instant matter, the learned judge citing the case of Ken Kasinga -vs- Daniel Kiplagat Kirui & 5 others, [2015] eKLR, and other decisions from courts of coordinate jurisdiction held that where a claim in a petition or suit is multifaceted, a court can have jurisdiction despite existence of another forum, institution or agency that has been legislatively conferred with jurisdiction to determine the matter. With due respect, this is a wrong exposition of law. Such a reasoning implies that jurisdiction may be conferred through the art and craft of drafting of pleadings - that all that a litigant need to do is to draft pleadings such that claims are raised in a multifaceted way and thereby oust the jurisdiction of any specialized tribunal or agency. This promotes forum shopping."

38. In the light of the above holding, the doctrine of exhaustion, if it is found appropriate, may be applied in this case regardless of whether or not there are in this petition any other claims not subject to statutorily prescribed processes, or which are subject to the jurisdiction of NEMA, NET or the Liaison Committee.

Whether Doctrine of Exhaustion Is Applicable in The Present Petition

39. Finally, this court has arrived at the point of determining whether the doctrine is applicable herein. The law relating to appeals to NET was not made in a vacuum; there is a rationale by the legislature that though the courts of law exist, that is the body best suited to handle appeals referred to them from NEMA decisions. The existing legal rule, as espoused in Speaker of the National Assembly Vs Karume 1992 KECA and Crystalline Salt Limited V Kenya Revenue Authority 2019 eKLR is that the procedure for the redress of any grievance prescribed by an Act of Parliament should be strictly followed; therefore, now that the respondents have disclosed that the relevant licences approvals, permits or certificates are in existence, it is salutary that the licence and approval issues raised in this petition be made the subject of appeal before NET rather than be the subject of first-instance litigation before this court which should ideally be an appellate forum.

40. In view of the above analysis, this court, following the Court of Appeal decisions in Abidha Nicholus and Kibos Distillers Limited cases (supra) holds that the doctrine of exhaustion applies in this case as the petitioner has not exhausted all available remedies.

Whether or not the entire petition should be struck out.

41. The question that now remains is whether, in applying the doctrine of exhaustion, it is proper to strike out the entire petition and application or only portions of it ought to be struck out. Ex abundanti cautela, in a petition, several legal and constitutional provisions must be examined before the exhaustion doctrine is applied since, indubitably, it is inextricably intertwined with the locus standi of a party. Alfred Njau and Others v City Council of Nairobi (1982) KAR 229, defined the term locus standi as follows; -

> " 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".

42. In Malindi ELC Case No 092 Of 2024 Africa Muslims Agency Trust Registered Trustees v Khamisi R. Nzili, Headmaster Ama Primary School, Kilifi this court stated as follows:

> " It is clear that locus standi has been expanded in recent times in constitutional matters such that it is hard to disqualify a claimant from presenting a claim on the basis of locus. This is seen in Mumo Matemu Vs Trusted Society of Human Rights Alliance & Others [2013] eKLR where the court held as follows:
>
> > "Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of *the Constitution* by necessity and logic broadens access to the courts. In this broader context, this court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process...."""

43. The petitioner came to court under the auspices of Article 42, but before that there is Article 10 and Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations to consider.

44. Article 10 of *the Constitution* provides as follows:

> " 10. National values and principles of governance
>
> (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—
>
> (a) applies or interprets this Constitution;
>
> (b) enacts, applies or interprets any law; or
>
> (c) makes or implements public policy decisions.
>
> (2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development."

45. Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations provides as follows:

17. Public participation

(1) During the process of conducting an environmental impact assessment study under these Regulations, the proponent shall in consultation with the Authority, seek the views of persons who may be affected by the project.

(2) In seeking the views of the public, after the approval of the project report by the Authority, the proponent shall—

(a) publicize the project and its anticipated effects and benefits by—

(i) posting posters in strategic public places in the vicinity of the site of the proposed project informing the affected parties and communities of the proposed project;

(ii) publishing a notice on the proposed project for two successive weeks in a newspaper that has a nationwide circulation; and

(iii) making an announcement of the notice in both official and local languages in a radio with a nationwide coverage for at least once a week for two consecutive weeks;

(b) hold at least three public meetings with the affected parties and communities to explain the project and its effects, and to receive their oral or written comments;

(c) ensure that appropriate notices are sent out at least one week prior to the meetings and that the venue and times of the meetings are convenient for the affected communities and the other concerned parties; and

(d) ensure, in consultation with the Authority that a suitably qualified co-ordinator is appointed to receive and record both oral and written comments and any translations thereof received during all public meetings for onward transmission to the Authority.

46. Environmental governance institutions must consider sustainable development and public participation in EIA process. The legal basis for environmental stakeholder involvement is Article 10 of *the Constitution* and Section 58 EMCA and regulation 17 of the Environmental (Impact Assessment and Audit) Regulations. Thus public participation is both a legal and a constitutional right per se. It is thus an appropriate issue for trial as to whether upon failure to secure an EIA licence before project implementation, the subsequent acquisition thereof after the project has been done

completely absolves the project proponent from consequences that may arise non-compliance with that requirement in the first place.

47. The cumulative effect of Articles 41,69 And 70 of *the Constitution* also comes into sharp focus at this juncture. Article 42 provides as follows:

> " 42. Environment
>
> Every person has the right to a clean and healthy environment, which includes the right—
>
> (a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and
>
> (b) to have obligations relating to the environment fulfilled under Article 70." (Emphasis mine.)

48. Article 69 provides as follows:

> " 69. Obligations in respect of the environment
>
> 1. The State shall—
>
> (a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;
>
> (b) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya;
>
> (c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;
>
> (d) encourage public participation in the management, protection and conservation of the environment;
>
> (e) protect genetic resources and biological diversity;
>
> (f) establish systems of environmental impact assessment, environmental audit and monitoring of the environment;
>
> (g) eliminate processes and activities that are likely to endanger the environment; and
>
> (h) utilise the environment and natural resources for the benefit of the people of Kenya.
>
> (2) Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources."

49. Article 70 provides as follows:

> " 70. Enforcement of environmental rights
>
> 1. If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.
>
> 2. On application under clause (1), the court may make any order, or give any directions, it considers appropriate—
>
> (a) to prevent, stop or discontinue any act or omission that is harmful to the environment;
>
> (b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or
>
> (c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.
>
> (3) For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury."

50. Article 70(1) unconditionally opened the floodgates of environmental litigation to the public. It is indeed apparent that protection of locus standi is elevated far above the doctrine of exhaustion by that Article. As long as a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress. Environmental rights are human rights that *the Constitution* jealously guards, hence the inclusion of Article 42 in Chapter 4 – Bill of Rights.

51. To merit being a petitioner in environmental litigation requires attainment of a very low threshold, all that a person needs to do is to identify a right to a clean and healthy environment recognised and protected under Article 42 and allege, even where he has not demonstrated or can not demonstrate that he has incurred loss or suffered injury, that it has been, is being or is likely to be, denied, violated, infringed or threatened. In Registered Trustees of Jamie Masjid Ahl-Sunnait-Wal-Jamait Nairobi v Nairobi City County & 2 others [2015] eKLR, it was held as follows:

> " First, I will point out that as far as the issue of locus standi was and is concerned, Maathai –v- Kenya Times Media Trust Ltd [1989] eKLR was and is bad law. Putting aside the circumstances under which that decision was made, it is pretty clear that it was decided prior to not only the promulgation of *the Constitution* 2010 but also prior to the legislation of the EMCA, 1999. The Maathai decision was indeed decided when the majority of court decisions held the view that it was the duty, solely of the Attorney General to sue on behalf of the public for purpose of preventing public wrongs and a private individual could only do so where he was able to show that he would sustain injury as a result of a public wrong and in any event the private individual still had to obtain the consent of the Attorney General; See Kariuki –v- County Council of Kiambu and another [1995- 1998] 1EA 90 and Gourriet –v- H. M. Attorney General & Union of Post Office Engineering Unions [1977]1 All ER 696.

The Constitution 2010 as well as the EMCA 1999 both however introduced the concept of the "aggrieved person". A liberal reading of Article 70 of *the Constitution* as well as Section 3 of the EMCA, 1999 reveals this. Both under *the Constitution* and the EMCA, 1999 an aggrieved person need not show that the respondent's action or omission has caused or is likely to cause to the aggrieved person any personal loss or injury.

In my view, both *the Constitution* and the EMCA 1999 were spot on as it would have been inconsistent with the purpose of environmental law to require that a person's private interest must necessarily be affected for him to be an aggrieved person. The reason is that environmental law proceeds on the basis that the environment is a legitimate concern for everyone, present and future. Consequently, if an individual or organization has a genuine interest in or sufficient knowledge of an environmental issue to qualify him or them to raise issues in public interest they should be regarded as aggrieved persons to bring action for determination on merits."

52. Of course it can be argued that such a low threshold is susceptible to abuse by unscrupulous persons but it is not beyond the vigilance of this court to weed out unnecessary or incompetent petitions. Environment is life and the low threshold is indeed a mark of the high calling to which this court has been appointed to the extent that an extraordinary measure of trust has been has been invested in its diligence and ability strike a certain balance in order to weed out offending petitions without prejudicing genuine environmental litigation. Indeed, the Court of Appeal in appreciating that delicate balance stated as follows in Abidha (supra):

> "While a court should not make an order that can be construed as impinging on a party's right to fair hearing, it must always be vigilant so that its process is not abused."

53. Also, in Registered Trustees of Jamie Masjid (supra) the issue of locus was addressed as follows:

> "It is apparent that the meaning therefore to be attributed to who an aggrieved person is, may vary from statute to statute or constitutional provisions where the environment is concerned but he certainly is one with a legal grievance. As was stated by Lord Denning in the Privy Council case of Attorney General of Gambia –v- Njie [1961]AC 617, 634 the words aggrieved person
>
> > "are of rude import and should not be subjected to a restrictive interpretation. They do not include of course, a mere busy body who is interfering in things which do not concern him: but they do include a person who has a genuine grievance".
>
> As is clear from Lord Denning's statement above a distinction must always be drawn between the mere busy body and the person affected or having a reasonable concern in the matter in which the suit relates. While I would not like to risk a definition of what constitutes standing in the context of public and private law (i.e one affected), I would be happy to state that a busy body is someone who interferes in something with which he has no legitimate concern. That alone should be able to help define conversely who has standing."

54. It is also clear from the framing of the provisions of Article 70(1) that a petition alleging denial, violation infringement or threat of infringement of environmental rights under Article 42 may be filed in addition to any other legal remedies that are available in respect to the same matter. This is vital because it implies that a constitutional petition based on the same set of facts as an action before another

forum may exist parallel to that other action in that other forum; that as long as the constitutional petition confines itself to matters of violation or threatened violation or denial of rights, it matters not whether the petitioner is during the pendency of the petition, prosecuting an ordinary cause of action based on the same facts before another forum on the same set of facts. That other cause of action must be deemed to be different and the two litigations should keep to their lane on the highway to eventual justice. The rationale for the provisions in Articles 42, 69 and 70 is clearly that the other forum not seized of constitutional jurisdiction shall determine the ordinary legal issues while this court determines the constitutional issues.

55. The totality of the import of the foregoing constitutional provisions spontaneously deal a serious blow to any prospects of having an entire constitutional petition struck out for violation of the exhaustion doctrine. They also mandate a court to jealous and eternal vigilance against violation or threat of violation of constitutional rights and call on the court to decline to defer to any distractions that may, under the aegis of the exhaustion doctrine or any other defence in the nature of a procedural defect, occasion the court a loss of focus on the constitutional issues already raised before it.

56. To appropriately effectuate such liberal provisions, when a party pleads the exhaustion doctrine and especially in a multifaceted petition, and seeks its striking out or dismissal for breach of the exhaust doctrine or some other defence of procedural defect, this court must habituate its reflexes to unrelentingly scour the terrain of the impugned petition for identification of any fact, set of facts or allegations that would even in the remotest sense point to probability of existence of a constitutional violation or threat thereof not tied to matters subject to exhaustion, and upon finding a scintilla of such fact, etc, decline to strike out a whole petition in limine.

57. A middle path has been suggested by the Supreme Court in the Kibos Case where it took the view that even where a court declines to hear a multifaceted suit because it lacks original jurisdiction in respect to some of the causes of action, the court should fashion orders that do not impede a party's right to fair hearing in respect to the matters which are properly before it; that the trial court ought to reserve those issues properly before it pending the exhaustion of the dispute resolution mechanism of the other matters.

58. The Court of Appeal in Abidha adopted that position with the appropriate qualification that the order to be made by a court in those circumstances will depend on the peculiar circumstances of each case. The Court of Appeal in Abidha stated as follows:

> " A court has no business making benign orders in favour of a party who has deliberately and in bad faith crafted pleadings so as to cheat jurisdiction. In addition, a court will not be kind to a party who persists in filing a multifaceted claim even in the face of a warning that the claim will be challenged on the question of jurisdiction." (emphasis mine)

59. As to the fate of the multifaceted petition before it, the Abidha case appellate bench proceeded further to hold as follows:

> " 49. How did the matter at hand fare? the responsibility to bring a petition that was not multifaceted was always on the petitioner. Confronted by the objection, he had the option to seek leave to amend his petition so as to trim off matters that belonged elsewhere in the first instance. Instead, he ploughed on, and he has to live with the risk he took. Having reached the correct decision that it lacked original jurisdiction in respect to certain claims in the petition, the ELC

had no business splitting the petition on behalf of the appellant so as to retain matters it would properly be seized of."

60. To this court, the appellate court's intimation in the above excerpt that amendments could have cured the Abidha petition of its kaleidoscopic nature and thus saved it from a wholesale striking out or dismissal is a vindication of what was stated earlier on in the present ruling regarding amendments. It is not clear what length of time Abidha had, between the lodging of the preliminary objection and its hearing, that he may have utilized to amend his petition. In the present case that window was relatively brief and was not incommoded by rambunctious chest thumping of parties but characterized by humble pleas for expedition of justice by the 1st respondent in view of this court's order for interim cessation of all works on the suit project pending hearing of the motion before it, as well as an expectant wait for justice by the petitioner who had already laid her entire plea before this court.

61. It is quite doubtful then that, being of the calm assurance that the substantive part of her defence to the exhaustion doctrine lay in the simple response that the respondents' withheld from her the information that would have directed her to the alternative dispute resolution mechanism under the NET, the petitioner would have galvanized herself into amendment of the petition as the battle over the preliminary objection gathered pace. In fact, she extensively submitted on that particular issue, even citing established precedents as obviating her need to comply with statutory provisions under EMCA where information had been withheld. She cited the cases of Tom Brown Limited & another v CEC Member in Charge of Planning & 2 others ELC E053 of 2022) 2023 KEELC 17853 KLR as well as Gatere & Another v Kenya Electricity Transmission Co Ltd (ELC E039 of 2023) 2024 KEELC 4560 (KLR) where such a question had arisen.

62. In the Gatere case (supra) the court had held as follows:

> " The gazettement and other preparatory acts by the defendant with respect to the plaintiff's land are what would have created that relationship. As that relationship has not been created, the *Energy Act* and the Energy (Complaints and Disputes Resolution) Regulations 2012 are inapplicable and thus matters of alleged trespass and violation of the plaintiffs' constitutional rights to property are not the issues envisaged by the Act and Regulations and they are clearly for trial and determination by the original jurisdiction of this court. It would be indeed unclear how could (sic) the plaintiffs could report any complaint or lodge any dispute under the Act while the process of wayleave acquisition over their land has never been disclosed to them by the defendant. It is correct that there is an overwhelming host of statutory and subsidiary provisions that govern the disputes between the defendant and complainants, but these can not kick in unless the actions of the defendant have been properly invoked under the *Energy Act*, and any act outside that statute calls for the ordinary remedies between citizens. Thus the plaintiff's claim against the defendant being not about the irregularity of the wayleave acquisition process but about trespass and violation of constitutional rights regarding land, Articles 22, 162(2) (b) of *the Constitution* of Kenya 2010 and Section 13(1) (2) of the *Environment and Land Court Act* confer original jurisdiction to this court to hear and determine the dispute. The mere entry into the land by the defendant and construction thereon while claiming without providing proof that notice had been given to the plaintiffs and that gazettement of their land had been carried out is not sufficient to enable the defendant invoke the provisions of the Act against the plaintiffs and thereby seek shelter under the doctrine of exhaustion. The acts and omissions of the defendant have left the plaintiff (sic) unaffected by the Act and Regulations in a manner that enables them to seek redress for torts and violations of constitutional rights. On the basis of the foregoing I therefore find that the Regulations and the provisions of the

Energy Act cited by the defendant do not apply to them at all and consequently the doctrine of exhaustion does not therefore apply in the present case and the present parties...The preliminary objection raised by the defendant must therefore fail and it is hereby dismissed with costs."

63. Multifaceted as the present petition is, I detect no mala fides in its drafting as would persuade me that the petitioner was trying to cheat jurisdiction or any indication that she defied any prior express warning or benign signals pointing out with specificity or even intimating, respectively, that her petition as crafted would be impugned on jurisdictional grounds.

64. In this court's view also, the consequences of the unwarranted reticence of the 2nd and 3rd respondents outlined herein above are a vital indicator that it is time public bodies and officers ingrained in themselves an intrinsic sense of responsibility that by constant gnaws at their conscience, elicits basic courtesies such as simple acknowledgement and dispatch of informative letters on matters of their concern which a citizen had demonstrated, especially in writing, serious interest in! In the present dispute it can not be understood why no informative letters were addressed to the petitioner by the 2nd and 3rd respondents informing her that licences had been issued, which would have obviated the need for the filing of a petition on the assumption that they had not been issued. As long as the luxury of such lackadaisical mien persists in those offices, needless litigation against them and the risk of its concomitant overheads is likely to increase and impact adversely on the public purse.

Conclusion

65. In the final analysis this court finds that the doctrine of exhaustion shall apply albeit in a limited fashion to this petition in that though the matters reserved by EMCA for determination by NEMA or NET shall be redirected to those two bodies, the petition shall not be wholly struck out but shall remain in limbo pending the determination by those two bodies or any or them, and the constitutional issues evident on the face thereof shall be saved for determination by this court after the proceedings before them are finalized. Therefore, this court issues the following orders:

    a. By reason of the doctrine of exhaustion the petition herein is stayed pending ventilation of any action, if preferred, by the petitioner against the 1st and 3rd respondents and/or any other party before the 3rd respondent and/or the National Environment Tribunal under the relevant provisions of EMCA in connection with the Environmental Impact Assessment Licence No NEMA /EIA/PSL/31281 issued to the 1st respondent on 11/3/2024 or any other related issues;

    b. The interim orders issued in this petition on 5/11/2024 halting all works on the project are hereby extended until the date of determination of the proceedings mentioned in (a) hereinabove;

    c. The costs of the preliminary objection shall in any event be borne by the respondents;

    d. The petition shall be mentioned on 30/4/2025 for a report by the parties as to the outcome of the proceedings in (a) hereinabove and for further directions.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 30TH DAY OF JANUARY 2025.

MWANGI NJOROGE

JUDGE, ELC MALINDI