



**Njenga & another v National Government Constituencies
Development Fund Board & 3 others (Environment & Land Petition
E012 of 2024) [2025] KEELC 1488 (KLR) (21 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1488 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION E012 OF 2024
LL NAIKUNI, J
MARCH 21, 2025
IN THE MATTER OF: ENFORCEMENT OF THE BILL OF
RIGHTS UNDER ARTICLE 22(4) OF THE
CONSTITUTION OF KENYA
AND
IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF
THE BILL OF RIGHTS AND
CONSTITUTION UNDER ARTICLES 3,
10, 27, 40, 47 AND 50(1) OF THE
CONSTITUTION OF KENYA

BETWEEN

DANIEL MWANGI NJENGA 1ST PETITIONER

MARGARET N. MWANGI 2ND PETITIONER

AND

**NATIONAL GOVERNMENT CONSTITUENCIES DEVELOPMENT FUND
BOARD 1ST RESPONDENT**

**FUND ACCOUNT MANAGER NYALI CONSTITUENCY DEVELOPMENT
FUND 2ND RESPONDENT**

**PARLIAMENT SECRETARY MINISTRY OF LANDS, PUBLIC WORKS,
HOUSING AND URBAN DEVELOPMENT 3RD RESPONDENT**

ATTORNEY GENERAL 4TH RESPONDENT



RULING

I. Introduction

1. Before this Honourable Court for its determination is the Notice of Preliminary objection by The National Government Constituencies Development Fund Board, the 1st Respondent herein, dated 3rd July, 2024. The objection challenges the entire Petition and the Notice of Motion application filed by the 1st and 2nd Petitioners herein and both dated 27th May, 2024.
2. Upon service of the Preliminary objection, parties were directed to canvas the objections through submissions as stated herein below.

II. The Preliminary objection by the 1st Respondent

3. The 1st Respondent brought an objection on the following grounds:-
 - a. The Petition discloses no constitutional issue. It merely attempts to constitutionalize an ordinary civil dispute.
 - b. The Petition offends the doctrine of constitutional avoidance by seeking the application of the Constitution to matters fully addressed by statute.
 - c. The Petition offends the doctrine of exhaustion in so far as it relates to the administration of the Act, in light of Section 56 of the National Government Constituencies Development Fund Act of 2015.

III. Submissions

4. On 21st November, 2024 while the Parties were present in Court, they were directed to have the Preliminary Objection dated 3rd July, 2024 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and the Court reserved 28th January, 2025 as the date to deliver its ruling. Unfortunately, due to unavoidable circumstances, it was eventually read out on 21st march, 2025 accordingly.

A. The Written Submissions by the 2nd Respondent

5. The 2nd Respondent through the Law firm of Messrs. Kiunga Kingirwa & Co Advocate filed their written submissions dated 24th January, 2025. M/s. Mengech Advocate commenced their submissions by stating that before the Honourable Court was the Petitioners' Petition dated 27th May, 2024 (Hereinafter referred to as "The Petition") seeking the following prayers:-
 - a. A declaration that the 1st, 2nd, and 3rd Respondents' decision to arbitrarily and capriciously construct Khadija Police Station, thereby encroaching and trespassing on the Petitioners' parcel of land number LR. 10330/Section 1/MN (Orig.No.1469/353), is a breach and violation of the rule of law and private proprietary rights, contrary to Articles 10, 27, 40 and 47 of the Constitution of Kenya, 2010.
 - b. An injunction restraining the Respondents, whether by themselves, their servants, and/or agents, from trespassing, encroaching, and continuing with further construction of the said Khadija Police Station on the Petitioners' private land known as LR. 10330/Section 1/MN (Orig. No. 1469/353), unless full compensation at the current market value is paid.



- c. An order for compensation by way of damages equivalent to the current market value of Parcel of Land number LR. 10330/Section1 1/MN (Orig. No. 1469/353).
 - d. General damages for the violation of Articles 10, 27, 40(1), (2), (3) and (4) and 47 of the Constitution.
 - e. Costs of the proceedings.
 - f. Any other orders or reliefs that this Honorable Court may deem fit to grant
6. The Learned Counsel submitted that also before the Honourable Court was the Petitioners' Application dated 27th May, 2024 (Hereinafter referred to as "The Application") seeking the following orders:-
- a. Spent.
 - b. Pending the inter-partes hearing of the application herein an order of injunction does issue restraining the 1st and 2nd Respondents, their servants, agents, employees and or any other person(s) claiming under them whomsoever and howsoever from continuing with further construction of Khadija Police Station or in whatever nature encroaching and or trespassing into the Petitioners' parcel of land known as LR.10330/Section 1/MN (Orig. No. 1469/353).
 - c. Pending the inter-partes hearing of the application herein an order of injunction does issue restraining the 1st and 2nd Respondents their servants, agents, employees and/or any other person(s) whomsoever and howsoever from trespassing, encroaching, dealing, interfering and continuing with further construction on the Petitioners/Applicants' property known as LR. 10330/Section 1/MN (Orig. No.1469/353).
 - d. The costs of the application be provided for.
7. According to the Learned Counsel, in response to the Petition and the application the 1st Respondent raised a Preliminary Objection dated the 3rd day of July 2024 on the following grounds that:-
- a. The Petition discloses no constitutional issue. It merely attempts to constitutionalize an ordinary civil dispute.
 - b. The Petition offends the doctrine of constitutional avoidance by seeking the application of the Constitution to matters fully addressed by statute.
 - c. The Petition offends the doctrine of exhaustion in so far as it relates to the administration of the Act, in light of Section 56 of the National Government Constituencies Development Fund Act of 2015.
8. Therefore, according to the Learned Counsel the submissions herein were in support of the 1st Respondent's preliminary objection. The Learned Counsel relied on the following two (2) issues for determination:-
9. Firstly, on whether the Petition before this Honourable Court had met the threshold for a Constitutional Petition. The Learned Counsel contended that the Appellants' Petition as filed failed to meet the requisite threshold for a Constitutional Petition, as it never adhered to the standard of reasonable precision in pleading, a cornerstone principle in constitutional litigation. In saying so, the Counsel cited the High Court case of: "Anarita Karimi Njeru – Versus - Republic (1976-1980) KLR 1272", which laid the foundation for this requirement, holding that a party seeking redress on a constitutional matter must set out with reasonable precision the specific grievances they are raising, the



- constitutional provisions alleged to be violated, and the precise manner in which such violations have occurred. The rationale for this principle was to enable the court to fully comprehend the nature of the dispute and exercise its constitutional mandate appropriately. This ensured that the judicial process was not misused or reduced to speculative or generalized claims without evidential and legal backing.
10. Further, the Counsel referred Court to the Court of Appeal in “Mumo Matemu – Versus - Trusted Society of Human Rights Alliance & 5others [2013]eKLR” reinforced this requirement. The court observed that a Constitutional Petition that lacked clarity in framing the allegations and failed to distinctly identify the provisions violated and the mode of violation never met the Constitutional Petition threshold. The court underscored the importance of precision as a procedural necessity to guard against frivolous or vexatious litigation, which could waste judicial time and resources.
 11. The Learned Counsel submitted that in the present case, the 1st & 2nd Petitioners merely made broad and generalized references to constitutional provisions, including the provision of Articles 10, 27, 40 and 47 of the Constitution, without specifying the actions or omissions allegedly attributable to the 1st Respondent that would amount to a violation of these provisions of the law. The Petitioners had not identified with specificity the factual foundation for their claims, nor had they demonstrated the causal link between the actions of the Respondent and the alleged violations. For instance:-
 - i. Citing Article 10: While the Petitioners alleged violations of national values and principles of governance, they had not explained how the 1st Respondent's actions or inactions contravened these principles, nor had they specified which particular values were infringed.
 - ii. Article 27: The Petitioners cited the right to equality and freedom from discrimination but failed to identify the alleged discriminatory treatment, the affected class of persons, or the manner in which the 1st Respondent acted in contravention of this article.
 - iii. Article 40: The alleged violation of the right to property was not substantiated by clear particulars. There was no evidence presented to show any direct interference with the Petitioners' property rights by the 1st Respondent.
 - iv. Article 47: While the Petitioners invoked the right to fair administrative action, they had not demonstrated how the 1st Respondent failed to meet the threshold of fairness, legality, and procedural propriety required under the Fair Administrative Action Act
 12. The Petitioners' reliance on omnibus provisions without particularity or evidence results in a Petition that was speculative, ambiguous, and untenable. This undermined the ability of this Honourable Court to properly adjudicate the matter, as the alleged constitutional violations remain unclear and unsubstantiated. Moreover, Constitutional Petitions were not meant to serve as a substitute for other remedies or for a available under statutory or common law. The Petitioners had not demonstrated that they had exhausted alternative remedies where applicable, or why such remedies would be inadequate. Courts had consistently cautioned against invoking constitutional jurisdiction as a matter of first instance in situations where statutory mechanisms were in place. This was particularly pertinent given that the Petitioners had failed to demonstrate any unique constitutional issue warranting the intervention of this Honourable Court at this stage.
 13. The Learned Counsel further asserted that the lack of reasonable precision prejudices the Respondents by compelling it to respond to broad and vague allegations without clarity as to the specific claims it must address. This lack of specificity also eroded the principles of fair hearing and procedural justice, which required parties to be given adequate notice of the case they were to respond to. In light of the above, they respectfully submitted that the Petition was fundamentally defective and failed to meet the threshold for a proper Constitutional Petition.



14. Secondly, on who should bear the costs for the Petition. The Learned Counsel averred that it was the Petitioners who should bear the costs of the Petition. In saying so, the Counsel argued that its due to their failure to meet both the constitutional and statutory prerequisites for filing the Petition in the first place. It was well-established in law that the awarding of costs was at the discretion of the court, with the general rule being that the unsuccessful party in litigation should bear the costs. However, this discretion was exercised in light of various factors, including the conduct of the parties and whether the Petition had been filed in good faith and with reasonable legal merit.
15. In the present case, the Petitioners had failed to adhere to the established procedural requirements for filing a Constitutional Petition. This was such as providing sufficient precision in their pleadings, identifying the specific provisions of the Constitution allegedly violated, and substantiating their claims with facts and evidence. This has resulted in the petition being deficient in both form and substance, thereby wasting judicial time and resources. The Learned Counsel submitted that the Petitioners had not acted with the diligence and good faith expected of parties seeking constitutional redress.
16. The Petitioners' failure to meet the required standards also placed an undue burden on the Respondents, who had been compelled to respond to vague and general claims that lacked the clarity necessary for an informed and effective defence. As a result, the 2nd Respondent had been forced to incur costs in addressing this flawed Petition, which could have been avoided had the Petitioners complied with the basic requirements of constitutional litigation.
17. In the interests of justice and fairness, and to discourage the filing of meritless or poorly-pleaded Petitions that unnecessarily clog the court's docket, the Learned Counsel submitted that it was just and equitable for the Petitioners to bear the costs of this Petition. This would serve to hold the Petitioners accountable for their failure to meet the necessary legal and procedural standards, while also protecting the integrity of the judicial process. Therefore, the 2nd Respondent respectfully requested that the Honourable Court orders the Petitioners to bear the costs of the Petition.
18. The Learned Counsel in light of that sought and prayed that this Honourable Court:-
 - a. Finds that the Petition never met the Constitutional threshold for precision.
 - b. Dismisses the Petition in its entirety.
 - c. Awards costs of the Petition to the Respondents.

B. The Written submissions by the 1st & 2nd Petitioners

19. The 1st & 2nd Petitioners herein through the Law firm of Messrs. Mogaka Omwenga & Mabeya Advocates filed their written submission dated 20th January, 2025. Mr. Mogaka Advocate submitted that this case concerned and surrounded a blatant violation of constitutional rights as enshrined under the provision of Article 40 of the Constitution of Kenya, 2010, which guaranteed every Citizen the right to property and protection from arbitrary deprivation. The Respondents in this matter, all government bodies, tasked with upholding the rule of law under the provision of Articles 10 and 77 of the Constitution, unlawfully trespassed upon private land- L.R 10330/Section 1/MN (Orig. No. 1469/353), belonging to the Petitioners and erected a police station - Khadija Police Station without the consent of the land owners, thereby directly and clearly infringing upon the sanctity of private ownership in breach of Article 40 of the Constitution. An action that not only undermined the principles of justice but also set troubling precedent of impunity by those entrusted with safeguarding the Constitution.



20. The Learned Counsel submitted that in order to ensure that the unlawful action was addressed decisively, faith was restored in the rule of law and that the fundamental rights that form the cornerstone of their democratic society was upheld, the Petitioners brought the instant matter seeking among others, a declaration that the Respondents' decision to arbitrarily and capriciously construct a Police Station, encroaching and trespassing into the Petitioners' parcel of land was in breach/violation of the rule of law and proprietary rights contrary to the provision of Articles 10, 27, 40 and 47.
21. Upon being served with the Petition, the 1st Respondent, in response thereof filed Notice of Preliminary Objection dated 3rd July, 2024, seeking for the Petition to be struck out on three (3) grounds.
 - a. The Petition disclosed no constitutional issue
 - b. The Petition offended the doctrine of constitutional avoidance by seeking the application of the Constitution to matters fully addressed by statute.
 - c. The Petition offended the doctrine of exhaustion in so far as it related to the administration of the Act, in light of the provision of Section 56 of the National Government Constituencies Development Fund, 2015 (Hereinafter referred to as "The NG – CDF Act").
22. The Learned Counsel submitted that on 21st November, 2024, the court directed that parties file submissions on the Preliminary Objection and it was on the basis of that directive that they proceeded to vehemently oppose the said objection as below:-

The Petition raises a serious constitutional issue.

23. In the case of: "Minister of Safety & Security – Versus - Luiters (2007) 28 ILJ 133 CC", the court held thus:-

“when determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider constitutional rights and values.”
24. Similarly, in the case of:- "Hakizaman Abdoul Abdulkarim – Versus - Arrow Motors E.A Ltd & another (2017) eKLR", Mativo J, held thus:-

“A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.” He went on to apply with approval, the holding illuminated in the South African case of *Fredricks & others – Versus - MEC for Educational and Training Eastern Cape & others* 9200 (23(LJ)81) where it was held:-- "the Constitution provides no definition of constitutional matter, what is constitutional matter must be gleaned from reading of the Constitution itself...constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of state...the interpretation, application and upholding of the Constitution are also constitutional issues...So too is the question of the interpretation of any legislation or the development of the common law promotes the spirit, purport and object of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional



matters and issues connected with decisions on constitutional matters is clearly on extensive jurisdiction...”

25. The Learned Counsel, further referred Court to the case of:- “Munene – Versus - Director of Public Prosecutions & 3 others (2023) eKLR” Mrima J held thus:-

“In other words, the Petitioner seeks the intervention of this court on the basis that the Respondents have confronted his rights and fundamental freedoms guaranteed under the Bill of rights in the Constitution. In such a scenario, the issues transcend the borders of ordinary issues into the realm of and crystallize into constitutional issues. The Petition raises pure and serious constitutional issues for consideration by this court. This court is duty bound under Article 165 (3) of the Constitution to determine any question as to whether a right or freedom has been infringed, denied, violated or threatened.”

26. According to the Learned Counsel, the Respondents decision and action of arbitrary taking over the Petitioners' parcel of land and building a police post was not only inconsistent with the Constitution but also a clear violation and infringement of the Petitioners' rights as guaranteed in the Constitution. Therefore, from the above cited case law and from a reading of the Constitution, it was apparent that the Petitioners' case raised a serious constitutional issue that could only be determined by this Honourable court.

27. It was the Learned Counsel's submission that the contention in the Preliminary objection that the Petition was devoid of a constitutional issue must and ought to fail. On the issue that the Petition was an exception to the Doctrine of Constitutional Avoidance. The Learned Counsel submitted that the constitutional rights were to be enjoyed by all and any violation of a person's rights warranted the aggrieved party to seek redress from the constitutional court which was clothed with the requisite jurisdiction.

28. Constitutional avoidance had been defined as a preference of deciding a case on any other basis other than one which involves a constitutional issue being resolved. See the case of “Sports & Recreation Commission – Versus - Sagittarius Wrestling Club & anor”. Black's Law Dictionary definition of the doctrine was applied by the supreme court in “Communications Commission of Kenya – Versus - Royal Media Services Limited & 5 others (2014) eKLR” that:-

“The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion.”

29. There were exceptions to this doctrine and the Petitioners intended to demonstrate to the Court that their Petition was an exception. In the case of “KKB – Versus – SCM & 5 Others (2020) eKLR”, the court held that the exceptions were:-

- i. Where the constitutional violation is so clear and of direct relevance to the matter
- ii. In absence of an apparent alternative form of ordinary relief
- iii. Where it is found that it would be a waste of effort to seek a non-constitutional resolution of the dispute

30. The Learned Counsel submitted that the constitutional violation in their instance was so clear and of direct relevance to the case that only a constitutional court could effectively and conclusively issue remedy. The Petition raised issues indicating blatant acts of impunity by government departments/ agencies or officers which ought to prompt this court to consider the constitutional implications. That



before any other reliefs could be issued, it was of uttermost importance that the issue of infringement of the Petitioners' fundamental right to property be dealt with and this was the only court with the requisite jurisdiction. See "Omar – Versus - Attorney General and 3 Others".

31. It was the Learned Counsel's contention that there was no alternative ordinary relief that could replace their prayer number one in the Petition. The Petitioners' main prayer was a declaration that the Respondent herein violated and infringed their rights under the provision of Articles 10, 27, 40 & 47 of the Constitution and this relief could only be granted by this court. Moreover, the rest of the prayers were based on this declaration. Thus, there was an absence of an apparent alternative form of ordinary relief. The Learned Counsel averred that their Petition fell under the first two exceptions and as such, the same ought to be allowed to proceed and determined on merits.
32. On whether the Petition was an exception to the Doctrine of Exhaustion. The Learned Counsel submitted that the 1st Respondent's preliminary objection impugned the jurisdiction of this Court on the principle of exhaustion. The 1st Respondent had relied on the provision of Section 56 of the NG – CDF Act, 2015 to plead the doctrine of exhaustion. The section provides:-
 1. All complaints and disputes by persons arising due to the administration of this Act shall be forwarded to the board in the first instance.
 2. Complaints of a criminal nature shall be...
 3. Complaints of a civil nature shall be forwarded to the board in the first instance and where necessary an arbitration panel whose costs shall be borne by the parties to the disputes...
 - 4
33. The Learned Counsel submitted that a review of the said section revealed that the provisions was silent on what should be done on constitutional issues/disputes. It had provided for criminal and civil disputes only. Had the legislatures of the said Act intended for constitutional matters to be forwarded to the board too, they would have stated so as categorical as they had with civil & criminal disputes. But it being trite that constitutional matters were issues that could only be dealt with by the High Court or courts of equal status as provided for under provision of Article 165 (3) and (5) of the Constitution, the legislation, being inferior to the Constitution, it must be inferred, had this in mind, hence the silence. Therefore, the provision of Section 56 never applied in this Petition and thus the contention could not stand. According to the Learned Counsel, the Petition herein was still exempted from the Doctrine of exhaustion.
34. To buttress on this point, he cited the case of:- "Geoffrey Muthiga Kabiru & 2 others – Versus - Samuel Munga & 1756 others (2015) eKLR", the Court of Appeal held thus:-

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction is invoked.”
35. The court went on to state that:-

“however, our case law has developed a number of exceptions to the doctrine. In R – Versus - IEBC & others Ex-Parte NASA, after exhaustively reviewing Kenya's decisional law on exhaustion doctrine, the High Court described the its exception thus:- what emerges from our jurisprudence in these cases are at least two principles;- while exceptions to the exhaustion requirements are not clearly delineated, courts must undertake an extensive analysis of facts, regulatory scheme involved, the nature of the interests involves, including level of public interest and polycentricity of the issue (and hence the ability of a statutory



forum to balance them) to determine whether an exception applies. As the court of appeal acknowledged in Shikara Ltd case, the High Court may in exceptional circumstances find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit placed before it. This exception 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.

Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere bootstraps or merely framed in bill of rights language as a pre-text to gain entry to the court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights and freedoms is a question which can only be determined by the high court.”

36. Additionally, he cited the case of: “Fleur Investments Limited – Versus - Commission of Domestic Taxes and anor (2018) eKLR”, the Court of Appeal held thus:-

“whereas courts of law are enjoined to defer to specialized tribunals and other ADR statutory bodies created by parliament to resolve certain specific disputes, the court cannot, being a bastion of justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the Constitution and other legislations for protection. The court is perfectly in order to interfere where there is clear abuse of discretion by such bodies where arbitrariness, malice, capriciousness and disrespect of rules of justice manifest.”

37. According to the Learned Counsel, from the facts as pleaded in the Petition, it could not be lost that the Petitioners were not only seeking for enforcement of their rights but also seeking protection the said right from the court. The Respondents arbitrarily and capriciously decided to trespass into the Petitioners’ parcel of land and build a police station. There was no communications, consultations, consent or compensation of any nature. There was nothing in the pleadings to suggest that the Petitioners were constitutionalizing the issues. What was clear was the blatant violation of the Petitioners’ rights as guaranteed in the Constitution and as such, taking into account the decided cases, the Petition squarely fell under those exempted from the doctrine of exhaustion and the Petitioners urged the Honourable court to permit the same to be heard and determined in before this court.

38. In the end, the learned Counsel submitted that the Preliminary objection lacked merit and ought to be dismissed with costs to the Petitioners. These were their humble submissions.

IV. Analysis and Determination

39. I have considered the Notice of Preliminary Objection raised by the Respondents – the submissions by all the parties and the myriad of authorities cited herein, the relevant provisions of the Constitution of Kenya, 2010 and the statutes.

40. To reach an informed, reasonable and fair decision, the Honourable Court will consider three (3) issues arising from the in the Notice of Preliminary Objection for its determination:-

- a. Whether the objection meets the required threshold as found from Law and Precedents.
- b. Whether the Notice of Preliminary objection dated 3rd July, 2024 is merited?
- c. Who bears the Costs of the Notice of Preliminary objection dated 3rd July, 2024.



Issue No. a). Whether the objection meets the required threshold as found from Law and Precedents.

41. Under this Sub – heading, the Honourable Court will decipher on the substratum of the matter is whether the objection raised pure points of law. In determining this instant Notice of Preliminary Objection, the Court will first consider what amounts to a Preliminary Objection and then Juxtapose the said description herein and come up with a finding on whether what has been raised herein fits the said description.
42. According to the Black Law Dictionary a Preliminary Objection is defined as being:
“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”
43. The above legal preposition has been made graphically clear in the now famous case of “Mukisa Biscuits – Versus - Westend Distributor Limited [1969] EA 696”, the court observed that: -
“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. ”
44. This statement of the law has been echoed time and again by the courts: see for example, “Oraro – Versus - Mbaja [2007] KLR 141”. The same position was held in the case of “Nitin Properties Limited – Versus - Jagjit S. Kalsi & another Court of Appeal No. 132 of 1989[1995-1998] 2EA 257” where the Court held that;
“A preliminary Objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any facts has to be ascertained or if what is sought is the exercise of Judicial discretion.”
45. Similarly in the case of “United Insurance Company Limited – Versus - Scholastica A Odera Kisumu HCC Appeal No. 6 of 2005(2005) LLR 7396”, the Court held that:-
“A preliminary Objection must be based on a point of law which is clear and beyond any doubt and Preliminary Objection which is based on facts which are disputed cannot be used to determine the whole matter as the facts must be precise and clear to enable the Court to say the facts are contested or disputed .”
46. See also the case of “In the matter of Siaya Resident Magistrate Court Kisumu HCCMisc. App No. 247 of 2003” where the Court held that;
“A Preliminary Objection cannot be raised if any facts has to be ascertained.”
47. I have further relied on the decision of “Attorney General & Another – Versus - Andrew Mwaura Githinji & another [2016] eKLR” as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-
(i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.



- (ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
 - (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.
48. Therefore from the above holdings of the Courts, it is clear that a preliminary Objection must be raised on a pure point of law and no fact should be ascertained from elsewhere.
49. Taking into account the above findings and holdings of various Courts on what amounts to a preliminary Objection, the Court now turns to the grounds raised by the 1st Respondent herein. This are that Petition discloses no constitutional issue. It merely attempts to constitutionalize an ordinary civil dispute, the Petition offends the doctrine of constitutional exhaustion in so far as it relates to the administration of the Act, in light of the provision of Section 56 of the NG – CDF Act of 2015 and the Petition offended the doctrine of constitutional avoidance by seeking the application of the Constitution to matters fully addressed by statute. In this case, I am satisfied that the objection raises pure points of law in that the preliminary objection. Since an issue going to the jurisdiction of this Court has been raised that issue must be dealt with in limine.

Issue No. b). Whether the Notice of Preliminary objection is merited.

50. Under this Sub title the Court shall examine whether the Notice of Preliminary objection is merited. An objection to the jurisdiction of the court has been cited as one of the preliminary objections that consists a point of law. Indeed the locus classicus case on the question of jurisdiction is the celebrated case of “The Owners of Motor vessel Lillian ‘S’ -Versus - Caltex Kenya Limited. [1989] KLR 1” where the Court held:

“By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance 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 the 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 cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...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.”

51. Jurisdiction means a courts power to decide case or issue a decree. In Kenya, the Environment and Land Court is a statutory creation by the Constitution of Kenya under the provision of Article 162 (b). Here, the Courts are vested it with original and unlimited jurisdiction. From the preamble of the ELC Act, the jurisdiction of the court is defined as “.....a Superior court to hear and determine disputes relating



to the environment and the use and occupation of, and the titles to, land and to make provisions for its jurisdiction functions and powers and for connected purposes.....”

52. The Supreme Court in the case of “Samuel Kamau Macharia – Versus - Kenya Commercial Bank & 2 Others, Civil Appl. No. 2 of 2011”, observed that:-

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings... Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

53. Having affirmed that the Preliminary Objection by the Respondents herein Defendant is based on pure points of law, it therefore behoves this Court to consider and determine whether or not it has jurisdiction to entertain the instant proceedings.

54. Let be begin by analyzing whether or not the Petitioner was required to exhaust the dispute resolution mechanism under the provision of Section 56 of the NG – CDF Act prior to filing this suit. It is not in controversy that the provisions of said provision of Section 56 of the NG – CDF Act, makes provisions for dispute resolution mechanisms. Subsection (1) thereof provides that:-

“All complaints and disputes by persons arising due to the administration of this Act shall be forwarded to the Board in the first instance...”

55. Further, sub section (3) provides:-

“Disputes of a civil nature shall be referred to the Board in the first instance and where necessary an arbitration panel whose costs shall be borne by the parties to the dispute, shall be appointed by the consensus of the parties to consider and determine the matter before the same is referred to court...”

56. Undoubtedly, there has existed a dispute between the Petitioners and the Respondent. This is in form of the use, title and occupation of the suit land. It is alleged that the Respondents blatantly and arbitrarily took over the suit land, a private property which belonged to the Petitioners without their consent and proceeded to cause the construction of a Police station on it. These are cogent issues and which require determination. The main contention is the for a to make that determination. The Petitioners opted to institute a Constitutional Petition before this Honourable Court. It was not in dispute that the Petitioners did not approach the National Government Constituency Development Fund Board for the resolution of the dispute. Have they erred in failing to do so? To provide an answer to that query, I have sought refuge from the case of:- “Benson Ambuti Atega & 2 others – Versus - Kibos Distillers Limited & 5 others [2020] eKLR”, the Supreme Court of Kenya stated that: -

“Judicial abstention, as with judicial restraint, is a doctrine not founded in constitutional or statutory provisions, but one that has been established through common law practice. It provides that a Court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination, if there



would be other appropriate legislatively mandated institutions and mechanism. Emphasize added”.

Also see the Supreme Court case of Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) – Versus - Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/ Beneficiaries of the Kenya Ports Authority Pensions Scheme) [2019] eKLR.”.

57. Certainly, this court has jurisdiction to determine disputes relating to use and occupation of and title to land as provided under Article 162 (2) (b) of the *Constitution* of Kenya, 2010 and Section 13 (2) of the *Environment and Land Court Act*, No. 19 of 2011. The question is whether the court should invoke the doctrine of exhaustion of remedies and proceed to exercise restraint in dealing with the dispute at hand. I have considered the claim of the Petitioners where they allege that they hold title/ leases to property Number sub division 10330/ Section I/MN (Orig. No. 1469/353 Section I/MN) delineated on Land Survey Plan Number 215133 pursuant to a lease registered as Number C.R. 12723/300 registered under the provisions of the Registration of Title Act, Chapter 281, Laws of Kenya; the Petitioners implicated the 1st and 2nd Respondents who are the National Government Constituencies Development Fund, Nyali, Mombasa County and the National Constituency Development Fund Board.
58. In the case of:- “Nairobi Petition No. E406 of 2020 Renita Choda -Versus- Kirit Kapur Rajput (unreported)”, this Court also dealt with the doctrine of exhaustion and its exceptions. This is what I stated:-

“64. The doctrine of exhaustion was recently dealt with in detail by a 5 - Judge Bench in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 (2020) eKLR. The Court stated as follows: -

52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the *Constitution* and was aptly elucidated by the High Court in R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, where the Court opined thus:

42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly



– Versus - Karume [1992] KLR 21 in the following oft-repeated words:

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

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

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

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

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

59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte



The National Super Alliance Kenya (NASA) (*supra*), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the *Shikara Limited Case* (*supra*), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the *Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 Others – Versus - Aelous (K) Limited and 9 Others.*)

60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the *Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.
61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd – Versus - Nairobi County Government & 2 others* [2018] eKLR.
62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or



merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.”.

59. There is a reason why such statutory Tribunals and/or Quasi – Judicial entities were established and provided for in law. Where there is dispute mechanism provided for then parties must exhaust the same before moving to courts as was held in the case of “Samson Chembe Vuko – Versus - Nelson Kilumo & 2 Others [2016] eKLR”, that: -

“It has been said time without number, that whenever an Act of Parliament provides for a clear procedure or mechanism of redress, the same ought to be strictly followed.”

60. The disputes envisaged under the Act as arising and subject to disposal before a competent arbitrator include disputes arising out of nomination, approval and even gazettement of the committee members. Therefore, notwithstanding the spirited argument mounted by the Petitioners herein in their submission and through a plethora of authorities, my strongest finding herein is that they were obligated under the Act to have exhausted the dispute resolution mechanisms availed to them under statute. This was to be done first before presenting a Petition for determination by this Court. For some unclear or apparent reason, the Petitioners opted to ignore that aspect.

61. To buttress the above reliance is placed in the case of “Ahmed Ismail Adan & 7 others – Versus - The National Constituency Development Fund Board & 2 [2017] eKLR”, where the facts of the case were similar to the instant Petition and where it was stated that:

“...An important tenet of the concept of the rule of law is that this Court before exercising its jurisdiction under Article 165 of the *Constitution* in general must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or state organs to deal with the dispute under the relevant provision of the parent statute.... Where there exists sufficient and adequate mechanism to deal with a specific issue or dispute by other constitutional designated organs, the jurisdiction of this Court should not be invoked until such mechanisms is exhausted...” (Emphasis mine)

62. In the instant Petition, the Petitioners have not demonstrated to this Court that they indeed exhausted the existing statutory mechanism which involves the selection of a competent arbitrator by parties to resolve the subsisting dispute and have faced any challenges in doing so thereby requiring this Court’s intervention. The Petitioners’ actions thus amounts to an abuse of Court process and having approached this Court with unclean hands are not deserving of the remedies sought.

63. It is trite that under the doctrine of “exhaustion” where there is an alternative method of dispute resolution established by legislation, Courts must exercise restraint in exercising their jurisdiction conferred by law and must give deference to such dispute resolution mechanisms established by law with the mandate to deal with such specific disputes in the first instance.

64. The doctrine of “exhaustion” was affirmed by the Supreme Court of Kenya in “Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in the title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) – Versus - Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other



Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) (2019) eKLR” where it was held as follows on this important doctrine:-

“(118) in the pursuit of such sound legal principles, it is our disposition that disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of superior courts is not a substitute for known legal procedures. Even where superior Courts had jurisdiction to determine profound questions of law, first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.

(119) Such a deferred jurisdiction and the postponement of judicial intervention and reliefs until the mandated statutory or constitutional bodies take action rests, not alone on the disinclination of the Judiciary to interfere with the exercise of the statutory or any administrative powers, but on the fact of a legal presumption that no harm can result if the decision maker acts upon a claim or grievance. Such formulation underlies the analogous cases, frequently cited for the exhaustion doctrine, in which the Court refuses to enjoin an administrative official from performing his statutory duties on the ground that until he has acted the complainant can show no more than an apprehension that he will perform his duty wrongly, a fear that courts will not allay. Such cases may be expressed in the formula that judicial intervention is premature in the absence of administrative action.” (Emphasis mine)

65. On the importance of observing the rules of natural justice, and in particular hearing a person who is likely to be adversely affected by the decision before the decision is made is of great importance and should not be taken lightly in view of any claim before a Court of Law.
66. In view of the above, I have no doubt in view of the facts of this case, to state that this Court lacks jurisdiction to issue any of the prayers sought in the instant Petition. In my own view, the Petitioners should agree to submit themselves before the National Constituency Fund Board for the resolution of their genuine land dispute as provided for under the provision of Section 56 of the NG – CDF Act. It is not late in as far as limitation of time is concerned. Should they be aggrieved by the decision of the Board, then this Court will be their next point of call as an appellate level.
67. For these reasons, I find therefore that the Notice of Preliminary Objection is merited and the same is allowed.

Issue No. c). Who bears the Costs of the Notice of Preliminary objection dated 3rd July, 2024

68. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR” and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR”, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR”, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.



69. In the present case, the 1st and 2nd Respondents shall have the costs of the Notice of Preliminary objection dated 3rd July, 2024, the Notice of Motion application and Petition dated 27th May, 2024.

V. Conclusion and Disposition.

70. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, the Court arrives at the following decision and make below orders:-

- a. That the Preliminary Objection dated 3rd July, 2024 be and is found to have merit and is hereby allowed.
- b. That the Notice of Motion application and the Petition dated 27th May, 2024 are both dismissed for lack of jurisdiction.
- c. That the 1st and 2nd Respondents shall have the costs of the Notice of Preliminary objection dated 3rd July, 2024, the Notice of Motion application and Petition dated 27th May, 2024.

It is so ordered accordingly.

RULING DELIVERED THROUGH THE MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 21ST DAY OF MARCH 2025.

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**HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT
AT MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. No appearance for the 1st, 2nd Petitioners.
- c. M/s. Mundia holding brief for M/s. Mengich Advocate for 1st and 2nd Respondents.
- d. No appearance for the 3rd & 4th Respondents

HON JUSTICE LL. NAIKUNI (ELC JUDGE)

