



East Africa Wildlife Society & 3 others v Kenya National Highways Authority & 3 others; Law Society of Kenya & 5 others (Interested Parties) (Environment and Planning Petition E001 of 2024) [2025] KEELC 1259 (KLR) (13 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1259 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND PLANNING PETITION E001 OF 2024
LN GACHERU, BM EBOSO & JO OLOLA, JJ
MARCH 13, 2025**

BETWEEN

**EAST AFRICA WILDLIFE SOCIETY 1ST PETITIONER
KENYA FOREST WORKING GROUP 2ND PETITIONER
AFRICA CENTRE FOR PEACE AND HUMAN RIGHTS 3RD PETITIONER
LEMPAA SUYIANKA 4TH PETITIONER**

AND

**KENYA NATIONAL HIGHWAYS AUTHORITY 1ST RESPONDENT
KENYA WATER TOWERS AGENCY 2ND RESPONDENT
NORKEN INTERNATIONAL LIMITED 3RD RESPONDENT
NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY 4TH
RESPONDENT**

AND

**LAW SOCIETY OF KENYA INTERESTED PARTY
NATIONAL MUSEUMS OF KENYA INTERESTED PARTY
KENYA WILDLIFE SERVICE INTERESTED PARTY
KENYA FOREST SERVICE INTERESTED PARTY
CONSERVATION ALLIANCE OF KENYA INTERESTED PARTY
SENATOR JOHN METHU INTERESTED PARTY**



RULING

A. Background

1. The petitioners instituted this petition seeking, inter-alia, a declaration that Kenya National Highway Authority's plan to build the Mau Mau Lot 4: Ihithe-Ndunyu Njeru Road, traversing the Aberdare National Park and the Aberdare Forest Reserve, violates Articles 10, 11, 42, and 69 of the Constitution, and is therefore invalid; a declaration that development in water towers is limited to eco-tourism and research, and that in parks and conservancies like the Aberdare National Park, change to any other use is not permitted except for conservation purposes; and a permanent injunctive order restraining the respondents from building the planned Road.
2. They also seek a declaration that Norken International Limited's (3rd respondent) conflict of interest in conducting the environmental social impact assessment(ESIA) with respect to the impugned project violates Articles 10 and 47 of the Constitution, and that the environmental impact assessments (EIA) must be conducted by neutral and impartial experts; a structural interdict directing the Kenya National Highways Authority(KENHA- the 1st respondent) to prepare and submit to the Court for scrutiny within 90 days of the order, alternative routes for the road passing outside the Aberdare National Park and the Aberdare Forest Reserve; and an order directing the National Environment Management Authority (NEMA- the 4th respondent), Kenya Wildlife Service (KWS- the 3rd Interested party), Kenya Water Towers Agency (KWTA), Kenya Forest Service (KFS- the 4th Interested party), to within 90 days of the order, prepare and present to the Court for scrutiny and thereafter post and update yearly on their website, a joint inventory of biological diversity of Kenya, indicating threatened, endangered, or rare species in Kenya.
3. The above prayers arise from the petitioners' contention that KENHA- 1st respondent, plans to build a 52 km road linking Ihithe and Ndunyu Njeru areas in Central Kenya, traversing the Aberdare National Park and Forest Reserve.
4. It is the petitioners' case that in order for the 1st respondent to achieve that goal, it must destroy 25 km of closed canopy forest, thereby destroying the Park and the Reserve, and ruining its unique biodiversity. The petitioners assert that the proposed road would alter and destroy the Aberdare eco-system forever. They aver that the proposed road would create deleterious environmental results, cause irreversible damage to a fragile and delicate ecosystem, adding that the project violates the Constitution.
5. In that regard, the petitioners aver that apart from loss of biodiversity, the said road construction will lead to tree cover loss, unjustifiable limitation of the right to a clean and healthy environment, violate the inhabitants' right to cultural heritage and worsen the impact of climate change.
6. The petitioners aver that the decision by NEMA to license the road with no mitigation measures poses the risk of extinction of critically endangered species and is ultra-vires its duty as provided under Section 9 of Environmental Management Coordination Act (EMCA). They further assert that the 4th respondent's decision violates the principles of justification, the rule of law, good governance, accountability and transparency as provided under Article 10 of the Constitution.
7. The 1st respondent is opposed to the petition. In a replying affidavit sworn on its behalf by its Assistant Director Environment Safeguards, Adams Mureithi, it contends that the Environment and Land Court (ELC) lacks the requisite jurisdiction to hear the matter as there are alternative mechanisms provided under Sections 129-130 of the Environmental Management Coordination Act(EMCA). It is



the 1st respondent's case that in line with the Government's Vision 2030, it commenced construction of the project termed Mau Mau Road in line with the Country's objective of attaining a sustainable safe road network.

8. The 1st respondent further avers that the petition as filed is nothing but a direct challenge to the Environmental Impact Assessment licence (the License) issued to it by the 4th respondent on the 5th January 2024. It is the 1st respondent's case that all the issues raised were fully addressed through the mitigation measures set out in the Environmental Impact Assessment Study Report as well as the conditions attached thereto. It is their case that all the issues raised in the petition can be adjudicated upon by the National Environment Tribunal (the NET).
9. The 1st respondent asserts that it conducted public participation and that prior to the commencement of the project, environmental experts examined the project and identified its potential impacts. The 1st respondent avers that the petition does not demonstrate any breach of human rights and/or fundamental freedoms as guaranteed under the Constitution and that the same does not meet the threshold of a constitutional petition.
10. It is the 1st respondent's case that the project will have limited environmental impact on the eco-system, and that it will not change the eco-system as alleged. The 1st respondent asserts that the key objectives of the Vision 2030 cannot be achieved if flagship projects are not implemented.
11. In addition to its response, the 1st respondent filed a notice of Preliminary Objection dated 6th December 2024, urging the court to dismiss the petition on the following grounds verbatim:
 - i. This Honourable court lacks the requisite Jurisdiction to entertain, hear, determine and / or grant the prayers sought in the Petition as filed.
 - ii. The petition as filed is incompetent and totally defective for want of compliance with the mandatory provisions of Sections 129 and 130 of the Environmental Management and Coordination Act (EMCA).
 - iii. The petition does not lie in light of the petitioners' failure to exhaust alternative remedies available to them under Sections 129 and 130 of the Environmental Management and Coordination Act (EMCA)
 - iv. The petition as filed against the 1st respondent offends Sections 3 as well and 67 of the Kenya Roads Act, 2007;
 - v. The petition and the application as filed are incompetent and totally defective for want of compliance with the mandatory provisions of Sections 3 and 9(2) of the Fair Administrative Action Act No. 4 of 2015; and
 - vi. The petition as filed herein is frivolous, vexatious and an utter abuse of the court process and a waste of the precious Judicial time.
12. Following directions issued herein as to the hearing of the preliminary objection, we did ask the parties to make both written and oral submissions. We have accordingly carefully perused and considered the respective rival submissions and authorities placed before us by the learned advocates representing the parties. The preliminary objection is the subject of this ruling.



B. Submissions

13. In support of the objection, the 1st respondent filed submissions dated 25th February, 2025. Citing the pronouncement in *The Owners of Motor Vessel Lillian “S” vs Caltex Oil (Kenya) Ltd [1989] KLR*, counsel submitted that jurisdiction is everything and without it a court cannot make any further steps. Counsel added that in *Samuel Kamau Macharia & Anor vs Kenya Commercial Bank Limited [2012] eKLR*, the court noted that jurisdiction flows from the *Constitution*, legislation or both and the court can only exercise jurisdiction as conferred by the *Constitution* or any other written law.
14. Counsel submitted that the petitioners have not exhausted the remedies provided under Sections 125, 129 and 130 of EMCA, which sets out the jurisdiction of the NET over disputes relating to the issuance of an EIA license which form the subject matter of the petition herein; that as guided by the exposition in *Kibos Distillers Limited & 4 Ors vs Benson Ambuti Adegga & 3 Ors[2020]eKLR*, original jurisdiction of the court does not oust the jurisdiction of other competent organs mandated to hear and determine a dispute.
15. Counsel added that under the doctrine of subsidiarity, and guided by Articles 159(2)(c) of the *Constitution* of Kenya, the dispute herein should be determined at the NET. Counsel relied on the decision in *Geoffrey Muthinja & Anor vs Samuel Muguna Henry & 1256 Others [2015] eKLR* and *NGO’s Co-ordination Board vs EG & 4 Others: Katiba Institute (Amicus Curiae) [2023] KESC 17 (KLR)*.
16. Counsel observed that judicial abstention or judicial restraint is a doctrine not founded on constitutional or statutory provisions, but one that has been established through common law practice; that the doctrine was best expressed by the Court of Appeal in *Speaker of National Assembly vs Karume[1992]KLR 21* , wherein it was noted that when there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, the same should be exhausted. Further reliance was placed on the cases of *Republic vs National Environment Management Authority Ex-parte Sound Equipment Ltd [2011] eKLR* and *Albert Chaurembo Mumbo & 7 Others vs Maurice Munyao & 148 Others [2019] eKLR*.
17. Counsel argued that the Supreme Court decision in *Nicholus Abidha vs Attorney General & 7 Ors: National Environmental Complaints Committee & 5 Ors[2023]KESC 113* dealt with a matter in which there was an allegation of breach of an individual’s right to property, and the rights to a clean environment, which is not the case in this petition, adding that the court in the above case clearly held that it is only where the reliefs under the alternative mechanisms are ineffective that this court should entertain a claim. Counsel argued that the petitioners are not seeking to enforce any of their fundamental rights under the *Constitution*, adding that they had not alleged that the remedies under NET are inadequate or that they have had any difficulties accessing the NET. Counsel further submitted that this dispute ought to have been canvassed before the NET, and urged the court to so find and dismiss the petition.
18. The 1st petitioner filed submissions dated 6th March, 2025. Counsel for the 1st petitioner submitted that pursuant to Article 162 (2)(b) of the *Constitution* of Kenya, 2010 as read with Section 13(1) of the *Environment and Land Court Act* (the Act), the ELC has original and appellate jurisdiction to hear and determine disputes relating to environment and land dispute.
19. Counsel submitted that the question of exhaustion of remedies in such matters as alleged in the objection has been settled through case law; that in *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023) [2023] KESC 113 (KLR)* which continues to be binding and applicable in this petition, the Supreme Court



examined the question of jurisdiction over petitions alleging violation of the right to a clean and healthy environment and held that as between the ELC and the NET, it is the ELC that is vested with the mandate and jurisdiction to determine disputes involving alleged constitutional violations.

20. It was further submitted that in *National Environment Management Authority & Another v KM (Minor suing through Mother and Best friend SKS) & 17 others* (Civil Appeal E004 of 2020 & 4 E032 of 2021 (Consolidated)) [2023] KECA 775 (KLR) (“Owino Uhuru Case”), the Court of Appeal found that the ELC had jurisdiction to hear and determine the stated constitutional petition because the Petitioners claimed violation of their right to a clean and healthy environment. Reliance was also placed on the case of *Ken Kasinga v Daniel Kiplagat Kirui & 5 others* [2015] eKLR and *West Kenya Sugar Co. Limited v Busia Sugar Industries Limited & 2 others* [2017] eKLR.
21. Counsel argued that the issues in this petition touch on public participation, adherence to fundamental constitutional principles, and potential violations of the right to a clean and healthy environment, adding that the said issues go beyond and transcend the jurisdiction of NET, hence this Court is the appropriate forum to adjudicate them.
22. It was contended that the doctrine of exhaustion is not absolute. Reliance was placed on the decisions in *Wanyonyi v Ford Kenya Party & 2 others* (Complaint E013 (KK) of 2022) [2022] KEPPDT 922 (KLR); *Nchebere & 15 others v National Chairman Orange Democratic Movement & 2 others* (Complaint E002 of 2022) [2022] KEPPDT 1064 (KLR); *Odhiambo v Midiwo & 3 others* (Tribunal Case E003 (KSM) of 2022) [2022] KEPPDT 1011 (KLR); *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others* (Interested Parties) [2020] eKLR.
23. It was further submitted that objection on the basis of Sections 3 and 67 of the *Kenya Roads Act* is unfounded; that in *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 Others* [2021] eKLR, the Supreme Court restated that statutory provisions cannot oust the jurisdiction of constitutional courts in matters involving the violation of human rights; that similar sentiments were expressed by the courts in *Space Geo Limited v Kenya National Highway Authority* [2019] KEHC 6258 (KLR), *Simonash Investment Limited v Kenya National Highway Authority & Others* [2019] eKLR, and *Priscilla Ndunge Kiilu v Machakos County Government & 2 Others* [2021] eKLR.
24. On alleged non-compliance with the provisions of Sections 3 and 9(2) of the Fair Administrative Actions *Act, No 4 of 2025*, it was argued that Section 9(4) of the Act allows the court to exempt litigants from exhausting alternative remedies in instances where the remedies are deemed insufficient or inadequate; that as observed by the court in *United Millers v. Kenya Bureau of Standards & 5 Others (Civil Appeal No. 273 of 2019)*, there may be occasions where the invocation of the doctrine would not serve the values enshrined in the *Constitution* or the law, in which case a party may perfectly be entitled to move to court directly.
25. Further reliance was placed on the cases of *R v Independent Electoral and Boundaries Commission & Others ex parte The National Super Alliance Kenya (NASA)* [2017] eKLR, *Moffat Kamau & 9 Others v Aelous (K) Ltd & 9 Others* [2016] eKLR, *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 Others* [2018] eKLR, and *West Kenya Sugar Co. Limited v Busia Sugar Industries Limited & 2 Others* [2017] eKLR.
26. Finally, counsel for the 1st petitioner submitted that the instant petition raises weighty constitutional, environmental and administrative issues that require full adjudication by this court, which is clothed with adequate jurisdiction to hear and determine the petition. Counsel urged the Court to reject the objection for lack of merit.



27. The 3rd and 4th petitioners filed submissions dated 28th February, 2025. Counsel submitted that pursuant to Article 162(2)(b) of the Constitution of Kenya, 2010, and Section 13 of the ELC Act, this court has original and appellate jurisdiction to hear and determine all disputes relating to environment and land.
28. Counsel argued that the Supreme Court of Kenya in the case of *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023)* [2023] KESC 113 clarified that NET lacks jurisdiction over claims alleging constitutional violations, such as the right to a clean and healthy environment and that Section 129 of EMCA does not apply to such claims.
29. Counsel further submitted that the Court of Appeal in *National Environment Management Authority & Another v KM (Minor suing through Mother and Best friend SKS) & 17 others (Civil Appeal E004 of 2020 & E032 of 2021 (Consolidated))* [2023] KECA 775, held that Section 129(3) of the EMCA cannot be used to arrogate to NET specific powers given to Courts under the Constitution, particularly the powers under Article 23(3) which provide for reliefs that can be granted in a claim for violation of constitutional rights.
30. Counsel argued that in *Ken Kasinga v. Daniel Kiplagat Kirui & 5 Others* [2015] eKLR and *West Kenya Sugar Co. Limited v Busia Sugar Industries Limited & 2 others* [2017] eKLR, the Court properly held that ELC had jurisdiction to hear and determine disputes concerning alleged violations of the right to a clean and healthy environment, emphasizing the role of the court in enforcing environmental rights under Article 70 of the Constitution.
31. Counsel added that a big chunk of the issues in this dispute i.e. ambit of Sections 129 and 130 of the EMCA relate to the legality and constitutionality of the entire road project, including issues of public participation, adherence to constitutional principles, and potential violations of the right to a clean and healthy environment. Counsel submitted that guided by the Supreme Court decision in *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023)* [2023] KESC 113, this court has jurisdiction to determine the matter.
32. It was argued that whereas the doctrine of exhaustion requires that where a statute provides a dispute resolution mechanism, that procedure should be followed before resorting to the courts, this doctrine is not absolute. Reliance was placed on the decisions in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR; that in *R v Independent Electoral and Boundaries Commission (I E B C) ex parte National Super Alliance (NASA) Kenya and 6 others* [2017] eKLR in which the High Court acknowledged that there are exceptions to the exhaustion doctrine, particularly where the alternative forum is inadequate or where the issues are outside the jurisdiction of the alternative forum. Counsel argued that given that the NET's mandate is limited to specific decisions by NEMA, and considering the constitutional issues raised in this Petition, the alternative remedies are insufficient.
33. In response to the objection on the basis of Sections 3 and 67 of the Kenya Roads Act, it was submitted that lack of a pre-litigation notice cannot defeat a constitutional petition; that in *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 Others* [2021] eKLR, the Supreme Court reaffirmed that statutory provisions cannot oust the jurisdiction of constitutional courts in matters involving rights violations. Further reliance in this regard was placed on the case of *Simonash Investment Limited v Kenya National Highway Authority & Others* [2019] eKLR and *Priscilla Ndunge Kiilu v Machakos County Government & 2 Others* [2021] eKLR.



34. Counsel submitted that the reasoning in the aforesaid cases aligns with the jurisprudence in *Kenya Bus Services Ltd & Another vs. Minister for Transport & 2 Others* [2012] eKLR, where the court emphasized the need to balance procedural formalities with the broader constitutional imperative of access to justice, adding that the cumulative weight of these authorities decisively establishes that while procedural requirements under Section 67(a) of the *Kenya Roads Act* exist, they must be applied in a manner that does not undermine constitutional rights, particularly access to justice.
35. It was argued that KeNHA's reliance on Sections 3 and 9(2) of the *Fair Administrative Action Act* 2015, is misplaced because the Act was enacted to promote, not to stifle access to justice; that Section 9(4) of the said Act allows courts to exempt litigants from exhausting alternative remedies where such remedies are inadequate. In support, Counsel cited the cases of *R v Independent Electoral and Boundaries Commission & Others ex parte The National Super Alliance Kenya (NASA)* [2017] eKLR, *Moffat Kamau & 9 Others v Aeolus (K) Ltd & 9 Others* [2016] eKLR, *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 Others* [2018] eKLR, and *West Kenya Sugar Co. Limited v Busia Sugar Industries Limited & 2 Others* [2017] eKLR.
36. Counsel further argued that the preliminary objection is legally untenable, misconceived, and an attempt to derail a legitimate constitutional challenge, adding that the petition herein raises serious constitutional, environmental, and administrative law issues that require full adjudication.

C. Analysis and Determination

37. The 1st respondent itemized six (6) grounds of objection in the notice of preliminary objection dated 6th December 2024. In their subsequent written submissions dated 25th February 2025, they identified and submitted on only one issue: The 1st respondent only submitted on the question as to whether this court has jurisdiction to entertain and determine this Petition. Therefore, that is the major issue which we will focus on in disposing the preliminary objection
38. Law JA defined a preliminary objection in *Mukisa Biscuit Manufacturing Company Limited Vs. West End Distributors Limited* (1969) EA 696:

“..... a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.
39. Nyarangi JA stated in the *Owners of the Motor Vessel 'Lilian 'S' Vs Caltex Oil (Kenya) Ltd* (1989) KLR 1, as follows on the question of jurisdiction:

“..... 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 the moment it holds the opinion that it is without jurisdiction”
40. In *Samuel Kamau Macharia & Another –Vs- Kenya Commercial Bank Limited & 2 Others* [2012] eKLR, the Supreme Court stated the following on jurisdiction:

“68) A Court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate 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.”

41. Vide the present objection, the 1st respondent has averred that this court lacks jurisdiction to deal with this petition because the petitioners have not exhausted the remedies under NET. This is a jurisdictional issue, and the Court finds and holds that the notice of preliminary objection as raised by the 1st respondent meets the test of what amounts to a preliminary objection. It raises pure points of law and can be determined without ascertainment of facts from elsewhere.
42. The 1st respondent’s submissions on the single issue in the preliminary objection focused on Sections 125, 129 and 130 of the EMCA. The 1st respondent did not submit on Sections 3 and 67 of the [Kenya Roads Act](#) and Sections 3 and 9(2) of the [Fair Administrative Action Act](#). The gist of the preliminary objection is that the petitioners have not exhausted the remedies provided under Sections 125, 129 and 130 of the EMCA, hence the petition should be dismissed.
43. They contend that this petition challenges the EIA licence issued to the 1st respondent by the 4th respondent. It is their case that under Section 129 of the EMCA, the body vested with primary jurisdiction to adjudicate disputes relating to grant of licenses under the EMCA is the NET. They argue that the petitioners were obligated to file an appeal at the NET to challenge the 4th respondent’s decision to grant the 1st respondent the EIA licence.
44. In summary, the petitioners’ case, on the other hand, is that the instant petition raises constitutional issues that go beyond the ambit of Sections 129 and 130 of the EMCA. They contend that the issues raised in this Petition include the right to a clean and healthy environment, biodiversity loss, deforestation, conflict of interest, the culture of justification, the rule of law and the right to cultural preservation. It is their case that the petition raises questions relating to violation of Articles 10, 11, 42, 47 and 69 of the [Constitution](#). They contend that under Articles 23, 70, 162(2) (b) and 165(4) of the [Constitution](#), Section 13 of the [Environment and Land Court Act](#) and Section 3 of the EMCA, this court is the adjudicatory body vested with primary jurisdiction to hear and determine questions relating to violation of the [Constitution](#) in relation to the right to a clean and healthy environment.
45. Section 125 of the EMCA establishes the NET. It sets out the jurisdiction of NET limited to matters as set out under Sections 129 (1) and (2) which provides:
 - “(1) Any person who is aggrieved by—
 - (a) a refusal to grant a licence or to the transfer of his licence under this Act or regulations made thereunder;
 - (b) the imposition of any condition, limitation or restriction on his licence under this Act or regulations made thereunder;
 - (c) the revocation, suspension or variation of his licence under this Act or regulations made thereunder;
 - (d) the amount of money which he is required to pay as a fee under this Act or regulations made thereunder;
 - (e) the imposition against him of an environmental restoration order or environmental improvement order by the Authority under



this Act or regulations made thereunder, may within sixty days after the occurrence of the event against which he is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

- (2) Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose.

46. Section 130 of the said Act provides as follows:

“Any person aggrieved by a decision or order of the Tribunal may, within thirty days of such decision or order, appeal against such decision or order to the Environment and Land Court”.

47. The broad jurisdiction of this court is donated by Article 162 (2) (b) of the [Constitution](#) which obligated Parliament to establish the court in the following terms:

.....

- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to--
 - (a); and (b) the environment and the use and occupation of, and title to, land.
- (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

48. The above broad jurisdiction is elaborated in details in Section 13 of the [Environment and Land Court Act](#) as follows:

- “13(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the [Constitution](#) and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under Article 162(2)(b) of the [Constitution](#), the Court shall have power to hear and determine disputes—
 - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and



(e) any other dispute relating to environment and land.”

49. Besides the *Environment and Land Court Act*, there are other statutes that confer jurisdiction upon this court. One such statute is the EMCA. Section 3(3) of the said Act confers jurisdiction upon the Environment and Land Court in the following terms:

“3(3) If a person alleges that the entitlement conferred under subsection (1) has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Environment and Land Court for redress and the Environment and Land Court may make such orders, issue such writs or give such directions as it may deem appropriate to—

- (a) prevent, stop or discontinue any act or omission deleterious to the environment;
- (b) compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment;
- (c) require that any on-going activity be subjected to an environment audit in accordance with the provisions of this Act;
- (d) compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and
- (e) provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing.”

50. In addition, by virtue of the Bill of Rights; Article 70 and Article 165 (5) of the *Constitution*, this court is vested with jurisdiction to adjudicate questions relating to whether a right or fundamental freedom in the Bill of Rights has been infringed or is threatened with infringement in relation to the environment; and use, occupation, and title to land. In this regard Article 70(1) provides as follows:

70(1) If a person alleges that a right to a clean and healthy environment recognized 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.

51. This Article 70(1) is on enforcement of environmental rights, and as provided by Article 162(2)(b), the court with jurisdiction to adjudicate environmental disputes is the one established as under Article 162(3), which is the Environment and Land Court. The question as to whether the ELC can exercise primary jurisdiction in disputes where Parliament has, through statute, established alternative remedies or alternative dispute resolution mechanisms, has been the subject of pronouncements by our superior courts in a number of decisions.

52. In *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023)* [2023] KESC 113 (KLR) (28 December 2023) (Judgment) the Supreme Court of Kenya held as follows:

“Having considered the above complaints, we reiterate our earlier finding in this judgment that the mandate and jurisdiction to determine these questions lie with the ELC under



articles 22, 23(3) and 162(2)(b) of the Constitution as read with Section 4(1) of the Environment and Land Act. We say so because neither the NET, EPRA nor EPT have the jurisdiction to determine alleged violations of the Constitution. That right to access the court for redress of alleged constitutional violations, should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms. We say this persuaded by the elegant reasoning in *William Odhiambo Ramogi & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR where the High Court (Achode (as she then was), Nyamweya (as she then was), & Ogola, JJ) stated:“

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.” [Emphasis ours].

105. We agree with the above reasoning and find that the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief. But there is also a need to emphasize the need for the court to scrutinize the purpose for which a party is seeking relief, determining whether the granting of such constitutional reliefs is appropriate in the given circumstances. This means that a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs, is a necessary prerequisite on the part of any superior court.

53. The Supreme Court on the same case stated as follows:

“Flowing from the above findings and in that context, it is our view that, where the reliefs under the alternative mechanism are not adequate or effective, then there is nothing that precludes the adoption of a nuanced approach, as we have stated. What must matter at the end is that a path is chosen that safeguards a litigant’s right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. This is because, to achieve a harmonious and effective legal framework, it is imperative to strike a judicious balance between the emphasis on providing the initial opportunity for resolution to entities established by law and the assertion of a litigant’s right to access the court. However, such convergence requires a case-by-case assessment by considering issues such as the nature of the dispute and the adequacy of the alternative dispute mechanism. See also our decision in *Bia Tosha Distributors Ltd v Kenya Breweries Ltd & 6 Others (Pet No 15 of 2020)* [2023] KESC 14(KLR) (Const. and JR) (17 February 2023) (Judgment).

108. It was therefore sufficient that the appellant alleged that a right in the Constitution had been infringed or threatened with violation, making it clear that in light of the provisions of the Constitution and the ELC Act, the issues raised were within the original jurisdiction of the ELC. That is also why section



3 of EMCA provides that, one of the general principles under the Act is the entitlement to a clean and healthy environment. That section provides:

“Entitlement to a clean and healthy environment(1)Every person in Kenya is entitled to a clean and healthy environment in accordance with the Constitution and relevant laws and has the duty to safeguard and enhance the environment.”

109. Section 3 (3) of EMCA is even more instructive as it grants any person, who claims that their right to a clean and healthy environment has been violated, the right to apply to the ELC for redress by specifically stating: “If a person alleges that the right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may on his behalf or on behalf of a group or class of persons, members of an association or in the public interest may apply to the Environment and Land Court for redress and the Environment and Land Court may make such orders, issue such writs or give such directions as it may deem appropriate to—(a)prevent, stop or discontinue any act or omission deleterious to the environment;(b)compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment; (c)require that any on-going activity be subjected to an environment audit in accordance with the provisions of this Act;(d)compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and(e)provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing.”

54. The Court of Appeal in *National Environment Management Authority & another v KM (Minor suing through Mother and Best friend SKS) & 17 others (Civil Appeal E004 of 2020 & E032 of 2021 (Consolidated))* [2023] KECA 775 (KLR) (23 June 2023) (Judgment), noted that the provisions of Section 129(3) of the EMCA cannot be used to arrogate to the NET specific power given to the courts under the Constitution, particularly the powers under Article 23(3) which provide for relief that can be granted in a claim for violation of Constitutional rights. It held:

“We therefore find no arrogation of jurisdiction by the Environment and Land Court either by judicial craft or arising from the pleadings before it, as the claim was one of violation of the rights to a clean and healthy environment and the remedies sought were well within its jurisdiction and powers, which powers are not specifically granted to the NET under EMCA.”

55. Flowing from the exposition of the Supreme Court in the *Nicholus* case (supra), the following can safely be said to be the prevailing general law on the jurisdiction of the ELC in the context of the issue before us:

a. Section 129 and 130 of the EMCA does not vest in the NET jurisdiction to entertain claims relating to violation or threatened violation of the Constitution.



- b. The right to access the court for redress of alleged constitutional violations should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms.
 - c. The mandate and jurisdiction to determine questions relating to violation of the Constitution in the context of the environment and use, occupation and title to land vests in the ELC.
 - d. Establishment or alternative remedies of dispute resolution mechanisms by Parliament does not divest the court of the original jurisdiction donated to them by the Constitution and;
 - e. Where Parliament has, through statute, established alternative remedies or alternative dispute resolution mechanisms, a party inviting a superior court to exercise original jurisdiction is obligated to satisfy the criteria set by the law.
56. We have carefully read the petition that is the target of this preliminary objection. In summary, the petitioners allege violation and/or threats of violation of Articles 10, 11, 42 and 69 of the Constitution. Among the reliefs they seek in the petition are:
- i. a declaration that the 1st respondent's plan to build the Mau Mau Lot 4: Ihithe -Ndunyu Njeru Road traversing the Aberdare National Park and the Aberdare Forest Reserve violates Articles 10, 11, 42 and 69 of the Constitution, and therefore is invalid; and
 - ii. a declaration that Norken International Limited's conflict of interest in conducting the ESIA, on the facts of the case violates Articles 10 and 47 of the Constitution.

Therefore, it is clear from the content of the petition and from the key reliefs sought in the Petition that the petitioners allege violations and/or threats of violations of the Constitution.

57. The Supreme Court in the Nicholus Abidha [supra] was emphatic that jurisdiction granted to the NET under the EMCA does not include adjudication of disputes relating to alleged violations of the Constitution. The Supreme Court stated thus:

“Having considered the above complaints, we reiterate our earlier finding in this judgment that the mandate and jurisdiction to determine these questions lie with the ELC under articles 22, 23(3) and 162(2)(b) of the Constitution as read with Section 4(1) of the Environment and Land Act. We say so because neither the NET, EPRA nor EPT have the jurisdiction to determine alleged violations of the Constitution. That right to access the court for redress of alleged constitutional violations, should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms.”

58. In his oral submissions before us, Prof Mumma, counsel for the 1st respondent, argued that the petition has been camouflaged as a claim relating to constitutional violations, when in the real sense it is a challenge against the ESIA Report and the EIA licence. We have considered the above contention. Our reading of the petition reveals that the petitioners are alleging violations or threatened violations of the Constitution.

59. Having considered the petition, the notice of preliminary objection, and the rival written submissions together with the various case law cited before us, we come to the conclusion that apart from the issue of the EIA licence herein the petition raises various constitutional issues. The issues raised in the petition touch on violation of various constitutional rights such as the rights to a clean and healthy environment, depletion of tree cover, climate change and threat to biodiversity among others. Those issues cannot be adjudicated by NET. It is the Environment and Land Court which is conferred with jurisdiction to deal with the same.



60. Accordingly, we come to the conclusion that the court has jurisdiction, and this preliminary objection is not merited. The same is dismissed with costs being in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MARCH 2025.

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L. N GACHERU

JUDGE

.....

B. M EBOSO

JUDGE

.....

J. O OLOLA

JUDGE

