



**Kimani v Mugan, Chief Githurai 44 Location & 8 others (Petition E021 of 2023) [2025] KEELC 3358 (KLR) (23 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3358 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
PETITION E021 OF 2023**

**JO MBOYA, J  
APRIL 23, 2025**

**BETWEEN**

**JOSEPH MBURU KIMANI ..... PETITIONER**

**AND**

**GEORGE MUGAN, THE CHIEF GITHURAI 44 LOCATION . 1<sup>ST</sup> RESPONDENT**

**PERIS MUTHONI, THE CHIEF LUCKY SUMMER LOCATION .... 2<sup>ND</sup> RESPONDENT**

**MOSES MWANGI, THE ASSISTANT CHIEF GITHURAI 44 SUB-LOCATION ..... 3<sup>RD</sup> RESPONDENT**

**THE ASSISTANT CHIEF, KAMUTHI SUB-LOCATION ..... 4<sup>TH</sup> RESPONDENT**

**HARRISON KIMARU (SUED ON HIS OWN BEHALF AND HIS CAPACITY AS CHAIRPERSON OF NYUMBA KUMI, BUDALANGI, GITHURAI 44 SUB-LOCATION & MEMBER OF COMMUNITY POLICING COMMITTEE, GITHURAI 44 SUB-LOCATION) ..... 5<sup>TH</sup> RESPONDENT**

**JOSEPH KARIITHI (SUED ON HIS OWN BEHALF AND IN HIS CAPACITY AS A MEMBER OF NYUMBA KUMI, BUDALANGI, GITHURAI 44 SUB-LOCATION) ..... 6<sup>TH</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 7<sup>TH</sup> RESPONDENT**

**CABINET SECRETARY, MINISTRY OF INTERIOR & CO-ORDINATION OF NATIONAL GOVERNMENT ..... 8<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 9<sup>TH</sup> RESPONDENT**



## JUDGMENT

1. Vide Petition dated 10<sup>th</sup> May 2023, the Petitioner herein has sought various reliefs. The reliefs sought at the foot of the Petition as hereunder:
  - a. A permanent injunction restraining the Respondents and any other public officers and/or police officers whether by themselves, their agents, employees and/or servants, from:
    - i. Entering into the suit land, breaking, demolishing, destroying, defacing, flattening or in any other way or manner interfering with the buildings, structures, developments and all amenities thereupon; and
    - ii. Harassing, intimidating, threatening and arresting the Petitioner, his family members, agents, employees and/or servants and interfering with the Petitioner's ownership and quiet and peaceful enjoyment, possession and/or use of the suit land in any way whatsoever.
  - b. A declaration that the 1<sup>st</sup> to 6<sup>th</sup> Respondents' entry into the suit land and demolition and destruction or damage of buildings, structures and developments thereupon, fencing off or occupation of land is unlawful, illegal and unconstitutional and amounts to trespass and a gross violation of the Petitioner's rights and freedoms as particularised under Paragraph 23 hereinabove.
  - c. A declaration that the Petitioner's rights and freedoms as particularised under Paragraph 23 above have been contravened by the 1<sup>st</sup> to 6<sup>th</sup> Respondents.
  - d. A declaration that the Respondents are liable to compensate the Petitioner for the trespass upon the suit land and demolition and destruction of buildings, structures and developments thereupon.
  - e. A declaration that the 1<sup>st</sup> to 6<sup>th</sup> Respondents have committed criminal offences and should be investigated, charged and prosecuted accordingly.
  - f. The Officer Commanding Police Division (OCPD) Kasarani Sub-County and the Deputy County Commissioner, Kasarani Sub-County do ensure strict compliance with order (a) above.
  - g. Special damages for the destruction or damage caused to and on the suit land to be quantified during the hearing of this suit.
  - h. Compensatory damages for the loss incurred for loss of use of the suit land from 27<sup>th</sup> April 2023 by the Petitioner until the Petitioner's occupation and use of land in reinstated to be quantified during hearing of this suit.
  - i. General damages for trespass upon the suit land, unlawful occupation of land, demolition and destruction of buildings, structures and developments thereupon and interference with the Plaintiff's right to quiet possession and peaceful enjoyment of the suit land.
  - j. Compensation for the violation of violation of the Petitioner's rights and freedoms as outlined under Paragraph 23 hereinabove.



- k. Exemplary damages for the oppressive, arbitrary, wrongful, illegal and unconstitutional actions of the 1<sup>st</sup> to 6<sup>th</sup> Respondents and violation of the Petitioner's rights and freedoms as outlined under Paragraph 23 hereinabove.
  - l. Interests on (g) to (k) above at court rates.
  - m. The 1<sup>st</sup> to 6<sup>th</sup> Respondents be condemned to pay the costs of and incidental to this suit and the damages and other pecuniary awards as shall be awarded to the Petitioner by this Honourable Court.
  - n. Any other/further order or relief that this Honourable Court may deem fit, just and equitable to grant.
2. The Petition is premised on the various grounds which have been highlighted in the body thereof. The Petition is further supported by the affidavit of the Petitioner sworn on even date, namely, 10<sup>th</sup> May 2023 and to which the Petitioner has annexed various documents inter alia a copy of the lease instrument and certificate of lease pertaining to L.R. No. Nairobi/Block 119/3513 [the suit property].
  3. Furthermore, the deponent has also annexed a plethora of photographs [albeit without the requisite Electronic Certificate] indicating the destruction that is alleged to have been perpetrated by the Respondents.
  4. The Respondents were duly served with the Petition. To this end, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Respondents duly entered appearance but did not file any response to the Petition.
  5. The 5<sup>th</sup> and 6<sup>th</sup> Respondents entered appearance and filed a Response to the Petition by way of a Replying Affidavit sworn on 10<sup>th</sup> January 2025 and wherein the deponent has contended that the portion of land being claimed by the Petitioner herein comprises of the riparian reserve and not part of the suit property. Furthermore, the deponent has averred that the Petitioner herein has since proceeded to and annexed the riparian land and thereafter commenced to sub-divide same for own purposes.
  6. It was further contended that after sub-dividing portions of the riparian land, the Petitioner proceeded to and rented out portions thereof to third parties. Besides, it was contended that the Petitioner also erected a car wash business on the riparian land.
  7. Additionally, it was contended that arising from the impugned actions by the Petitioner, the members of the community got alarmed and thereafter raised the complaint with the 5<sup>th</sup> Respondent. To this end, it has been contended that the 5<sup>th</sup> Respondent escalated the matter to the OCS Kasarani Police Station and the area chief respectively.
  8. The Petition herein came up for hearing on various dates when the parties sought time to attempt an out of court settlement. Nevertheless, the intended out-of-court settlement did not materialise. In this regard, the parties thereafter covenanted to canvass and dispose of the Petition by way of affidavit evidence.
  9. Moreover, the parties also agreed to file and exchange written submissions. To this end, the court proceeded to and issued directions pertaining to the filing and exchange of the written submissions. In addition, the court also circumscribed the timelines for the filing and exchange of the written submissions.
  10. The Petitioner proceeded to and filed written submissions dated 30<sup>th</sup> December 2024 whereas the 5<sup>th</sup> and 6<sup>th</sup> Respondents filed written submissions dated 10<sup>th</sup> January 2025 but filed on 30<sup>th</sup> January 2025. The two [2] sets of written submissions form part of the record of the court.



### **Petitioner's Case:**

11. The Petitioner's case is predicated on the Supporting Affidavit sworn on 10<sup>th</sup> May 2023 and a Supplementary Affidavit sworn on 20<sup>th</sup> January 2024. In particular, the Petitioner has contended that same is the lawful and registered proprietor of the suit property. Furthermore, the Petitioner has contended that by virtue of being the registered proprietor of the suit property, same is at liberty to utilise the suit property without interference from and/ or restriction[s] by the Respondents herein.
12. It was the further contention by the Petitioner that same entered upon and took possession of the suit property in the year 2007. Furthermore, the Petitioner has averred that upon taking possession of the suit property, same constructed various permanent and temporary structures thereon. Besides, the Petitioner has averred that same has also been running assorted businesses including a car wash, hotel and a green grocery store in the building situate on the suite property.
13. Moreover, the Petitioner has also contended that same has also been using the riparian land that lies adjacent to and borders the suit property. To this end, the Petitioner has averred that same has been farming food crops namely maize and beans thereon.
14. It was the contention by the Petitioner that on or about the 27<sup>th</sup> April 2023, the 1<sup>st</sup> to the 6<sup>th</sup> Respondents together with other persons whose details were not known to the Petitioner descended onto the Petitioner property and demolished various buildings and structures that had been constructed thereon. To this end, the Petitioner has annexed a bundle of photographs to demonstrate the alleged demolition/destruction that occurred (sic) on 27<sup>th</sup> April 2023.
15. Furthermore, the Petitioner averred that arising from the offensive actions and/or activities complained of, same [Petitioner] proceeded to and reported the incident to the Deputy County Commissioner Kasarani on even date. Nevertheless, the Petitioner has averred that despite reporting the incident to the Deputy County Commissioner, same [Petitioner] did not receive any help, or at all.
16. Moreover, the Petitioner averred that on 8<sup>th</sup> May 2023, the 1<sup>st</sup> to 6<sup>th</sup> Respondents in the company of the Deputy County Commissioner Kasarani reverted to the suit property and occasioned further demolition. In addition, it has been contended that the 1<sup>st</sup> and 6<sup>th</sup> Respondents contended that the suit property is public land.
17. Additionally, it has been contended by the Petitioner that the portion of land that has been interfered with by the Respondents forms part of the suit property and thus the actions and/or omissions of the Respondents constitute wrongful interference. In this regard, the Petitioner has posited that his rights to own the suit property have been violated, breached and/or infringed upon by the Respondents.
18. Other than the foregoing, the Petitioner has also contended that the suit land indeed borders the riparian land. In any event, it has been posited that the riparian land comprises of an unsurveyed v-shaped portion of land which lies between the previous course of the stream and the boundary of the suit land. In this regard, the Petitioner has referenced a survey report which was commissioned by himself and prepared by own surveyor. For coherence, the survey report is dated 8<sup>th</sup> August 2023.
19. Be that as it may, the Petitioner has contended that despite the contention by the 5<sup>th</sup> and 6<sup>th</sup> Respondents that same [Petitioner] has encroached onto the riparian land, the truth is that same has not encroached onto the riparian land.
20. Arising from the foregoing, the Petitioner has implored the court to find and hold that the Petition beforehand raises pertinent issues and thus deserving of the intervention of the court. Furthermore, the



Petitioner has thereafter referenced the various reliefs sought at the foot of the Petition. For coherence, the Petitioner has invited the court to grant the relief[s] sought.

**The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, And 9<sup>th</sup> Respondents' Case:**

21. The named Respondents duly entered appearance through the Honourable Attorney General. However, the named Respondents did not file any response to the Petition.

**5<sup>th</sup> And 6<sup>th</sup> Respondents' Case:**

22. The 5<sup>th</sup> and 6<sup>th</sup> Respondents duly entered appearance and thereafter filed a response vide Replying Affidavit sworn by Joseph Kariithi. The Replying Affidavit is sworn on 10<sup>th</sup> January 2025.
23. It has been contended that though the Petitioner is the registered owner and proprietor of the suit property, the Petitioner herein has since proceeded to and annexed the portion of land that comprises of the riparian reserve. Furthermore, it has been averred that the Petitioner has proceeded to and sub-divided the riparian reserve and thereafter rented same out to third parties.
24. Moreover, it was averred that arising from the offensive actions and/or activities by the Petitioner, the area in question has witnessed extensive and heavy floodings which have been occasioned by the activities perpetrated by the Petitioner.
25. Furthermore, it was contended that in the year 2023 and in particular during the rainy season [April to May] the area witnessed and experienced heavy flooding and the community residing in the neighbourhood established that the flooding was occasioned by the dumping of various materials by the Petitioner. Nevertheless, it was posited that despite the pleas by the neighbouring community, the Petitioner refused and/or declined to vacate the riparian reserve.
26. On the contrary, it was averred that the Petitioner proceeded to and continued with the offensive activities including renting out portions of the riparian land. It is the renting out of portions of the riparian land that attracted the attention of the community members, who went to the site, namely, the riparian reserve, on 27<sup>th</sup> April 2023. In particular, it has been averred that the members of the community went to the site [riparian reserve] to witness the construction of various structures that were being undertaken on the riparian reserve.
27. Furthermore, it has been contended that when the members of the community went to the riparian reserve, they found a number of young men who were busy erecting structures and that when it transpired that the disputed portion was riparian land the young men became aggressive and thereafter destroyed the structures on the land including the Petitioner's car wash. In particular, it has been contended that the young men undertook the demolition when they realised that the Petitioner had defrauded them.
28. Be that as it may, the 5<sup>th</sup> and 6<sup>th</sup> Respondents have posited that the portion of land which is being claimed by the Petitioner constitutes and compromises of the riparian reserve. In this regard, it has been posited that the Petitioner cannot lay a claim to and in respect of the portion under reference.
29. Having reviewed the Petition; the affidavits in support thereof; and the response by the 5<sup>th</sup> and 6<sup>th</sup> Respondents and upon taking into consideration the written submissions filed on behalf of the Petitioner and the 5<sup>th</sup> and 6<sup>th</sup> Respondents, I come to the conclusion that the determination of the instant Petition turns on three key issues, namely; whether the complaints at the foot of the Petition disclose breach, violation and/or infringement of the Petitioner's Human Rights and Fundamental freedoms to warrant the filing of a constitutional petition or otherwise; whether the



- Petition beforehand is prohibited by the doctrine of exhaustion/constitutional avoidance; and what reliefs, if any, ought to be granted.
30. Regarding the first issue, namely, whether the complaints at the foot of the Petition disclose breach, violation and/or infringement of the Petitioner's Human Rights and Fundamental freedoms to warrant the filing of a constitutional petition or otherwise, it is worthy to recall that the Petitioner is contending that the Respondents herein trespassed onto (sic) the suit land and thereafter occasioned extensive damages and/or destruction.
  31. In particular, the Petitioner has contended that the 1<sup>st</sup> to 6<sup>th</sup> Respondents in the company of other unknown people trespassed onto the suit property and demolished the Petitioner's buildings and structures which had been erected on a portion of the suit property. To this end, the Petitioner has exhibited various photographs attesting the offensive actions and/or activities that are complained of.
  32. Having highlighted the various activities and/or actions that have been complained of, the Petitioner has thereafter proceeded to and sought various reliefs including a declaration that the Respondents are liable to compensate the Petitioner for the trespass upon the suit land and demolition of buildings, structures and developments thereon. Furthermore, the Petitioner has also gone ahead and sought general and compensatory damages for trespass upon the suit land.
  33. What becomes apparent from the Petition filed by the Petitioner is to the effect that the Respondents herein are said to have trespassed onto the Petitioner's property, namely, the suit property. To my mind, the cause of action that underpins the Petition beforehand is one of trespass to land and not otherwise. For good measure, the foregoing position is discernible from the body of the Petition as well as the reliefs sought at the foot of the Petition.
  34. The question that does arise is whether a claim founded on trespass and compensation on account of damages arising from trespass constitute violation of human rights and fundamental freedoms to warrant the filing of a constitutional petition or at all.
  35. It is not lost on this court that trespass to land is actually a private law claim. In this regard, whosoever impleads trespass is called upon to approach the court in the ordinary manner stipulated and prescribed under the various statutes regulating such claims. Instructively, a claim based on trespass is underpinned by the provisions of Section 3 of the [Trespass Act](#) Cap 294 laws of Kenya and a host of other statutes.
  36. To my mind, the issues that have been baptised and/or clothed as constitutional issues herein touch on and/or concern trespass to land. For good measure, the dispute beforehand ought to have been commenced in the usual manner of proceedings by way of a Plaint.
  37. It is important to underscore that parties, the Petitioner herein, must be reminded that [the Constitution](#) must not be trivialised by filing flimsy claim[s] in the name of Constitutional Petition[s]. Notably, [the Constitution](#) ought to be invoked and deployed in befitting cases where human rights and fundamental freedoms have been breached, violated and/or infringed upon.
  38. In the case of Kennedy Odoyo Okello v District Land Registrar, Migori & 2 others [2015] KECA 553 (KLR), the Court of Appeal addressed the circumstances under which a constitutional petition ought to be filed. For good measure, the court underscored that where there are no constitutional issues, parties ought to seek recompense, [if at all], under the private law remedies.
  39. For coherence, the court stated thus:
  38. With regard to grounds 9 and 10, there is no basis of alleging that the appellant's constitutional right to property was breached by any of the respondents. It is elementary law that where a property is lawfully



charged to a financial institution to secure repayment of a loan, upon default, the charge has a statutory right to sell the charged property to realize the advanced sum. In such circumstances, it amounts to crying wolf for the appellant to allege that his constitutional right to property and those of his family members have been breached.

In our view, the petition did not raise any constitutional issues and whatever complaint the appellant had squarely lay in the domain of private law.

40. Furthermore, the Court of Appeal in the case of Gabriel Mutava, Elizabeth Kwini & Mary Martha Masyuki v Managing Director Kenya Ports Authority & Kenya Ports Authority [2016] KECA 411 (KLR) stated as hereunder:

In saying all these, we are not oblivious to the fact that a party is entitled to sue under *the Constitution* even if there is an alternative remedy, and or other mechanism for the resolution of the dispute. However, it has since emerged on the authorities that constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. Constitutional Litigation is not a panacea for all manner of litigation, we reiterate that the first port of call should always be suitable statutory underpinned forums for the resolution of such disputes.

41. In my humble view, the issues adverted to and highlighted by the Petitioner herein fall within the realm [domain] of private law. Same ought to have been canvassed in the ordinary manner stipulated and provided for by statute. The Petitioner ought not to have invoked the jurisdiction of the court by way of a Petition. Suffice it to posit that the deployment of the constitutional petition as a mechanism for addressing the issues beforehand amounts to trivialising *the Constitution*.
42. Next is the issue as pertains to the doctrine of exhaustion and constitutional avoidance. It is imperative to underscore that the dispute herein touches on and concerns the extent and scope of the riparian reserve [riparian land] which lies adjacent to the suit property belonging to the Petitioner. On one hand, the Petitioner contends that the disputed portion of land falls within the suit property. However, there is no gainsaying that the Petitioner has also conceded that there is the riparian land which borders the suit property.
43. Furthermore, the Petitioner has also conceded that same has been using the riparian land for purposes of farming and other related activities. Nevertheless, the Petitioner maintains that the offensive activities which are complained of were perpetrated on the suit land.
44. On the other hand, the 5<sup>th</sup> and 6<sup>th</sup> Respondents have contended that the portion of land which is being claimed by the Petitioner falls on the riparian reserve which is public land. Furthermore, it has been posited that the Petitioner herein has encroached upon the riparian land, annexed same and commenced to sub-divide the riparian land. Besides, it has also been contended that the Petitioner has since rented out portions of the riparian land to third parties.
45. Moreover, it has been contended that arising from the actions and/or activities by the Petitioner, the community living in the neighbourhood of the suit land have experienced extensive and heavy flooding. The extensive and heavy flooding have been attributed to the interference with the riparian land by the Petitioner.
46. Two things do arise and which merit interrogation and discussion. There comes to the fore an aspect that there is a dispute pertaining to the boundary extent between the suit property belonging to the



Petitioner and the riparian reserve. To this end, it was imperative that the boundary between the suit land and the riparian reserve ought to have been determined and/or demarcated beforehand.

47. Pertinently, the Petitioner herein cannot be heard to contend that the offensive actions were undertaken on the suit property yet the boundary demarcation between the suit property and the riparian reserve has not been demarcated. To this end, what comes to mind is the import and tenor of Sections 18 and 19 of the *Land Registration Act* 2012.
48. Simply put, the suit beforehand ought not to have been filed and/or mounted until and unless the Chief Land Registrar or the designated Land Registrar had visited the locus in quo [site of Dispute] and demarcated the boundary between the suit property and the riparian reserve.
49. For ease of appreciation, the provisions under reference are reproduced as hereunder:

Boundaries.

18.

- (1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.
- (2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.
- (3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:

Provided that where all the boundaries are defined under section

19

- (3), the determination of the position of any uncertain boundary shall be done as stipulated in the *Survey Act*, Cap. 299.

Fixed boundaries.

19.

- (1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.
- (2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.



(3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.

50. From the foregoing provisions, it is evident that the Petitioner was obligated to ensure that the locus in quo was visited by the Land Registrar and the disputed boundary demarcated. Only then would the Petitioner be heard to contend that there was (sic) trespass.
51. The second perspective that comes into play is the fact that where there is a dispute pertaining to and concerning the extent of the riparian reserve, such a dispute must first be referred to the Water Resource Authority for purposes of determination in accordance with the provisions of the [Water Act 2016](#) and the Water Regulations made thereunder.
52. The need to have the riparian reserve determined and ascertained by the designated authority was highlighted and elaborated upon by the Court of Appeal in the case of Superior Homes (Kenya) PLC v Water Resources Authority & 9 others [2024] KECA 1102 (KLR) where the court stated as hereunder:
53. Again, it must be noted that the Rules do not define “riparian land” with precision. Any land over which the Authority has imposed obligations upon the owner on account of its proximity to a water body qualifies as riparian land. An important aspect of the definition is proximity to a water body.
54. Part IX of the Rules provides for conservation of riparian and catchment areas. Rule 116 provides as follows:

“Determination of Riparian Land 116:

1. - Riparian land”, as defined in Part I of these rules shall not imply a change of ownership but impose management controls on land use for water resource quality as defined in these Rules.
2. Unless otherwise determined by a Water Resources Inspector, the riparian land on each side of a watercourse shall be defined as a minimum of six metres or equal to the full width of the watercourse up to a maximum of thirty metres on either side of the bank.
3. The width of the watercourse shall be equal to the distance between the top edges of its banks.
4. The riparian land shall be measured from the top edge of the bank of the watercourse and this shall also apply to seasonal and perennial watercourses.
5. Unless otherwise determined by a Water Resources Inspector-
  - a. the riparian land adjacent to a lake, reservoir or stagnant body of water shall be defined as minimum of two metres vertical height or thirty metres horizontal distance, whichever is less, from the highest recorded water level.
  - b. The riparian land adjacent to the eye of a spring shall be a minimum radius of three metres to a maximum radius of fifteen metres, measured from around the edge of the spring.



- c. the riparian land adjacent to the ocean is defined as a minimum of two metres vertical height or thirty metres.”
55. From the above rule, it is crystal clear that a declaration of land as riparian land does not affect its character or proprietorship. Such declaration merely imposes on the proprietor management controls on land use for the benefit of water quality. Rule 116(2) provides how riparian land is to be determined where the 1st respondent has not already determined such land. The rule states the default position. It is common ground that, in this case, the 1st respondent had not determined the riparian land.
56. By dint of rule 116(2), riparian land is defined with reference to a watercourse, so that riparian land is a minimum of 6 metres on either side of the watercourse or equal to the full width of the watercourse up to a maximum of 30 metres on either side of the riverbank. For the purposes of the rules, the full width of the watercourse is the distance between the top edges of the river’s banks. Rule 116 (4) provides how riparian land is to be measured, which is from the top edge of the bank of the watercourse.
53. To my mind, the determination of whether or not the disputed portion of land falls within the riparian reserve or otherwise would have required the intervention of the designated authority. The intervention of the designated authority brings into question the doctrine of exhaustion.
54. Suffice it to state that the Petitioner herein ought to have raised the dispute as pertains to the extent and scope of the riparian reserve with the Water Resource Authority and thereafter pursued visitation to the locus in quo. Moreover, it is not lost on this court that the determination of the scope and/or extent of the riparian reserve constitutes a fundamental prerequisite to pursuing any claims and/or compensation by the Petitioner. Instructively, the Petitioner cannot be heard to seek recompense, if at all, where the disputed ground falls within the riparian reserve. In any event, there is no gainsaying that riparian reserve is public land. [See the provisions of Article 62 of *the Constitution*, 2010]
55. The doctrine of exhaustion and its applicability has been elaborated upon in a number of decisions. In the case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR the Supreme Court stated as hereunder:
- (256) The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v. Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:
- I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”
- (257) Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936)).
56. The import and tenor of the doctrine of exhaustion was re-affirmed by the Supreme Court of Kenya [the apex Court] in the 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) v 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 the Court stated thus:

117. Of precise relevance to this case is *Bethwell Allan Omondi Okal v Telkom (K) Ltd (Founder) & 9 others* [2017] eKLR. In that case, the appellants who were former employees of Telkom (K) Ltd felt aggrieved and discriminated against following the implementation of what was referred to as “Trivial Pension Payout”, by the Authority which they accused of fraud, corruption and mismanagement and for paying some categories of retirees less increments in their pension payments than others. The trial court made a finding that since the complaints were against the Authority, that there were other statutory inbuilt administrative dispute resolution mechanisms under the RBA Act that ought to have been followed before recourse to the High Court.

He opined that any dispute should have been referred to arbitration in the first instance pursuant to Rule 36 of the Consolidated Deed of Trust and Rules, made under the RBA Act and that if the appellant was dissatisfied with the decision of the arbitrator, then he could appeal to the Retirement Benefits Appeals Tribunal established under the RBA Act. On Appeal, the Court of Appeal dismissed the appeal stating that:

“The Appellant might want to argue that he has a constitutional right of access to justice, and we agree that he does, but the High Court and this Court have pronounced themselves many times to the effect that a party must first exhaust the other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the High court by way of constitutional petitions. See *International Centre for Policy and Conflict & 4 others vs The Hon. Uhuru Kenyatta and others*, Petition No 552 of 2012, and *Speaker of National Assembly v Njenga Karume* [2008] 1KLR 425.

We hold that if indeed the appellant had any dispute with the RBA, he ought to have followed the route prescribed by the RBA, before proceeding to the High Court. We hold like the court below, and for the reasons we have given, that the appellant’s petition lacked merit and was for dismissal.”

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.

57. Likewise, the necessity to exhaust existing statutory dispute resolution mechanisms before approaching the jurisdiction of the court was also highlighted in the case of *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others* [2023] KESC 113 (KLR)

106. The restraint and effective remedy rule, which we find favor in, is what led the Supreme Court of India in *United Bank of India vs Satyawati Tondon & Others*; (2010) 8 SCC to state as follows:

“44 ... we are conscious that the powers conferred upon the High Court under article 226 of *the Constitution* to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very



wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under article 226 of *the Constitution*.

45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under article 226 of *the Constitution* and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance.” [Emphasis ours]
107. 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)*.
58. Finally, it is also important to reference the decision in *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] KECA 304 (KLR)* where the Court of Appeal emphasized the need to comply with the doctrine of exhaustion. The court stated as hereunder:
- 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 the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen.
- 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 of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.
59. To my mind, the determination of the dispute beforehand ought to have started with the ascertainment of the extent and/or scope of the riparian reserve. Thereafter, the Petitioner would be at liberty to raise any claims of trespass, if at all. In this regard, the complains by the Petitioner are certainly premature.
60. Lastly, it is important to address the reliefs, if any, that ought to issue. It is instructive to underscore that the Petitioner has sought a myriad of reliefs. Notably, the Petitioner has sought a declaration that the 1<sup>st</sup> to 6<sup>th</sup> Respondents have trespassed onto the suit property.
61. However, while discussing issue number two [2], I have highlighted that the determination of the trespass or otherwise would be dependent on two things, namely, determination of the boundary of the suit land vis a vis the riparian reserve and two, the involvement of Water Resource Authority. In the



absence of the statutory intervention in accordance with Sections 18 and 19 of the Land Registration Act, I am afraid that the declaration sought is premature.

62. The Petitioner has also sought a declaration that the court should find that the 1<sup>st</sup> to 6<sup>th</sup> Respondents have committed criminal offence[s] and thus same ought to be investigated, charged and prosecuted. Suffice it to state, that it is the Inspector General who is tasked with the mandate of undertaking investigations and thereafter escalating the investigations to the office of the Director of Public Prosecutions for purposes of discerning whether a criminal offence has been committed and whether a person ought to be charged or otherwise. [See the provisions of Articles 244 and 245 of the Constitution].
63. Other than the foregoing, I beg to state that the rest of the reliefs that have been sought by and on behalf of the Petitioner herein are really dependent on the determination of the scope and extent of the riparian reserve. However, insofar as the scope and extent of the riparian reserve had not been determined, it is premature to speak to and/or engage with (sic) claims pertaining to recompense.
64. In short, I am afraid that the reliefs that have been outlined by the Petitioner are not only misconceived but legally untenable taking into account the obtaining circumstances.

**Final Disposition:**

65. For the reasons that have been highlighted in the body of the Judgement, I come to the conclusion that the Petition beforehand is barred by the doctrine of exhaustion and constitutional avoidance. In this regard, the Petition beforehand is premature, misconceived; and legally untenable.
66. In the premises, the final orders of the court are as hereunder:
  - i. The Petition be and is hereby struck out.
  - ii. Costs of the Petition be and are hereby awarded to the 5<sup>th</sup> and 6<sup>th</sup> Respondents only.
  - iii. The Costs in terms of Clause [11] above shall be agreed upon and in default, same shall be taxed in the conventional manner.
67. It is so ordered.

**DATED SIGNED AND DELIVERED AT NAIROBI ON THE 23<sup>RD</sup> DAY OF APRIL, 2025.**

**OGUTTU MBOYA, FCIArb**

**JUDGE.**

In the presence of:

Brandy – Court Assistant.

Mr. Simon Kiragu for the Petitioner.

No Appearance for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Respondents.

No appearance for the 5<sup>th</sup> and 6<sup>th</sup> Respondents.

