REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC JUDICIAL REVIEW NO. 21 OF 2020

NIRMAL SING SIDHU..................................1ST APPLICANT

KEVIN MULI..2ND APPLICANT

SAMSON MICHAEL......................................3RD APPLICANT

KULVINDER RANA.......................................4TH APPLICANT

MUHAMED BANK...5TH APPLICANT

JASBIR KAUR SIDHU...................................6TH APPLICANT

HAWUA DIRIE HUKI.....................................7TH APPLICANT

NIDHI RANA..8TH APPLICANT

FATIMA HASSAN HUSSEIN...........................9TH APPLICANT

-VERSUS-

THE DIRECTOR GENERAL, NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY....................1ST RESPONDENT

COUNTY GOVERNMENT OF NAIROBI..2ND RESPONDENT

AND

LAVINGTON UNITED CHURCH.........INTERESTED PARTY

RULING

INTRODUCTION

1. Vide Chamber Summons Application dated the 24th November 2020, the Applicants herein have sought for the following Orders:

a. ………………………………………………………………………….(Spent).

b. Leave of the court be granted to seek Judicial Review Orders;

I. Certiorari to bring into this court and to quash the National Management Authority (NEMA) Environmental Impact Assessment License number NEMA/EIA/PSL/8582 dated 24th October 2019, issued by the 1st Respondent.

II. Certiorari to bring into this court and to quash the Nairobi City County Change of User Approval, PPA-CU-

AAB493, issued by the 2nd Respondent on the 23rd October 2018.

III. Prohibition; to prohibit against further or any other Construction that is breach of the Zoning Regulation of the 2nd Respondent.

c. Leave granted in (b) above do operate as a Stay of the Environmental Impact Assessment License number NEMA/EIA/PSL/8582 dated 24th October 2019, issued by the 1st Respondent and Change of User pproval, PPA-CU-AAB493, issued by the 2nd Respondent on the 23rd October 2018 and further restrain the interested party from proceeding with the construction of L.R No 3734/991 pending the hearing of the substantive application of this matter.

d. Any other, further or alternative orders be made as the court may deem just and expedient.

e. Costs of this application be provided for.

2. The subject Application is stated to be premised on the grounds that are outlined in the Statutory Statement accompanying the Application together with the Verifying Affidavit sworn by one, Nirmal Singh Sidhu, which is sworn on the 24th November 2020.

3. Upon the filing of the subject Application, the Respondents herein, as well as the Interested Party took out a Notice of Preliminary Objection contesting the Jurisdiction of the Court to hear and entertain the subject Application and primarily contending that this court lacks the Jurisdiction to entertain and/or adjudicate upon the subject Application.

SUBMISSIONS:

4. First and foremost, it is worthy to note that the subject matter was initially filed in the High Court, before same was transferred to this Honourable Court vide ruling rendered on the 30th November 2020, same being the ruling of Hon. Justice P Nyamweya Judge (*as she then was).*

5. Following the transfer of the subject matter to this court, same was placed before the Presiding Judge of this court who thereafter issued directions to the effect that the matter be dealt with by Lady Justice K Bor, Judge.

6. In this regard, the file was duly placed before the Honourable Judge on the 10th December 2020, whereupon, the judge proceeded to and issued directions that the Chamber Summons Application dated the 24th November 2020, be canvased and/or disposed of by way of written submissions.

7. Premised on the directions by the Honourable Judge, the Parties in respect of the subject matter, were obliged to file and exchange written submissions in respect of Preliminary objection, but it appears the filing and exchange of the written submissions on the preliminary objection, took too long, but were ultimately filed and exchanged by the Parties and thereafter paving way for the crafting of the subject ruling.

8. On the part of the Interested Party, it was contended that the subject Complaint touches on and/or concerns the issuance of the NEMA license over and in respect of the project that was being carried out and/or undertaken by the Interested party.

9. Based on the foregoing, it was submitted that if the Applicants herein were aggrieved by the issuance of the license, same were obliged to file an appeal before the National Environment Tribunal in accordance with Section 129 (1) of the Environment and Coordination Act, 1999 (2015).

10. On the other hand, it was further submitted that as pertains to the issue of change of user, it behooved the Applicants herein to comply with the provisions of Section 61 (3) of the Physical Planning and Land Use Act, 2019, which provided and established a clear statutory mechanism to address the grievances of any aggrieved person.

11. Based on the provisions of Se4ction 129(1) of the Environment Management and Coordination Act, 1999 and Section 61(3) of the Physical Planning and Land Use Act, 2019, the Interested Party submitted that the court herein was devoid and/or bereft of Jurisdiction and hence the subject Application ought to be struck out.

12. In support of the foregoing submissions, the Interested Party relied on several decisions including, **Republic v County Director-Physical Planning Department, Kiambu County & 3 Others, Ex-Parte Shinaz Shamshudin Jamal & Another (2016) eKLR, Simba Coporation Ltd v Director General National Environment Management Authority & Another (2017) eKLR, Albert Muma, Chairman, Karen Langata District Association v Director General National Environment Management Authority & 2 Others (2019) and David Awuori & 2 Others on behalf of Gigiri Village Association v Director General Nema & 2 Others (2018) eKLR.**

13. On the other hand, the 1st Respondent supported the Preliminary Objection by and/or on behalf of the Interested Party and reiterated the provisions of Section 129 of the Environment Management and Coordination Act, 1999 (2015).

14. For clarity, it was submitted that any person who is aggrieved by the issuance of a license, a permit or a refusal to grant a license or a permit, etc by the Director General of NEMA has a right to appeal to the National Environment Tribunal as the port of first call and hence the Applicants herein have approached the jurisdiction of this court prior to and/or before exhausting the existing statutory avenues provided for and/or established under the law.

16. Premised on the foregoing, the 1st Respondent herein has therefore submitted that it is inappropriate for the Applicants to have by-passed the statutorily established avenues for addressing their grievances and in particular the National Environment Tribunal and in approaching this Honourable court, in the manner that they did. In this regard, the 1st Respondent has therefore implored the court to find and hold that the court is not seized of jurisdiction to entertain the subject application.

16. On their part, the Applicants have contended that this court is seized and/or possessed of the requisite Jurisdiction to entertain and/or adjudicate upon the subject application and therefore the court should not decline assumption of jurisdiction.

17. In this regard, the Applicants' counsel has invited the court to take note and cognizance of the Provisions of Articles 162 (2) (b) of the Constitution 2010, Section 3(3) of the Environment Management and Coordination Act, 1999 (2015) and Section 13 (7) of the Environment and Land Court Act, 2011.

18. Secondly, on the issues as to whether the Applicants herein would access and/or approach the Jurisdiction of National Environment Tribunal, pursuant to and in line with Section 129 of the Environment Management and Coordination Act, 1999 (2015), the Applicants have argued that same do not fall within the cluster of the persons described as any aggrieved persons, to the extent that same were neither Parties to the Application for the License nor were same served with the License, to warrant an Appeal to the National Environment Tribunal.

19. In support of the foregoing submission, the Applicants have relied on various decisions including the case **of Republic v Natitional Environment Tribunal & 2 Others Ex-parte Abdul Afidh Sheikh Ahmmed Zubeidi (2013), eKLR, Republic v National Environmental Tribunal & 2 Others (2010) eKLR, Republic v National Environmental Tribunal & 3 Others Ex-parte Overlook Management Ltd and Siversand Camping Site Ltd and Republic v Nairobi City County & 2 Others (2016) eKLR.**

20. On the other hand, the Applicants have also submitted that the Physical Planning and Land Use Act, 2019, took effect and/or commenced to operate on the 5th August 2019, yet the change of user approval, which is challenged was issued by the 2nd Respondent on the 23rd October 2018.

21. Based on the foregoing, the Applicants have submitted that the provisions of Section 61(3) of the Physical Planning and Land Use Act, 2019, which have been relied on by both the Interested Party and the 1st Respondent, are therefore inapplicable, insofar as same cannot act retrospectively.

ISSUES FOR DETERMINATION:

22. Having reviewed the Chamber Summons Application dated the 24th November 2020, the Statutory Statements dated the 24th November 2020, the Verifying Affidavit sworn on even date and the documents attached to the Statement of facts (*as opposed to the verifying affidavit)* and also having reviewed the Notice of Preliminary[HJM1] Objection dated the 11th January 2021, and having taken into account the written submissions filed by the Parties herein, the following issues do arise and are germane for determination;

> **a. Whether the Honorable Court can grant Leave for the Commencement of Judicial Review orders in the nature of Certiorari and Prohibition in respect of Decisions which are more than Six Months from the date when the Application for Leave is filed.**
>
> **b. Whether the Honorable court can grant Leave for the commencement of Judicial Review when there exists other Statutory Mechanisms provided for and established under the Law which have not been Exhausted.**
>
> **c. Whether this Court has the Jurisdiction to entertain and adjudicate upon the subject Application.**

ANALYSIS AND DETERMINATION:

ISSUE NUMBER 1:

Whether the Honorable Court can grant Leave for the commencement of Judicial Review orders in the nature of Certiorari and Prohibition in respect of decisions which are more than six Months from the date when the Application for leave is filed.

23. First and foremost, before venturing to address and/or deal with the first issue herein, it is appropriate to note and/or observe that under the current legal dispensation, there are various Legal Regimes, that underpin Application for Judicial Review orders. Consequently, it behooves an Applicant and/or litigant, to be vigilant and to exercise his/her right of election carefully and diligently.

24. I say so and advisedly, because under certain legal regimes an Applicant/litigant does not require Leave to commence Judicial Review proceedings. One such instance, relates to Judicial Review proceedings that are sought vide Constitutional Petitions in pursuance of Article 23 of the Constitution, 2010.

25. In support of the forgoing observation, it is imperative to take note of the decision of the Court of Appeal in the case of **County Government of Nyeri and another versus Cecilia Wangechi Ndungu [2015] eKLR,** where the court stated as hereunder;

> **"The appellants took issue with the orders that were issued by the trial court. They argued that the orders were judicial review orders yet what was before the court was not judicial review proceedings. The respondent filed the Petition in the Industrial Court pursuant to Article 22 of the Constitution. On this issue we can do no better that reproduce Article 23 (3)**

(f) of the Constitution: -

> **"Article 22 (3) In any proceedings brought under Article 22, a court may grant appropriate relief including-**
>
> **(a)………..**
>
> **…………..**
>
> **(f)an order of judicial review."**

26. Perhaps, the only thing I may wish to point out in respect of the foregoing decision is that whereas the court of appeal alluded to Article 22 (3) paragraph f the correct Article 23(3) paragraph f and therefore there was a slight error in the reproduction of the relevant Article. Other than that slight issue, the point is settled that one can pursue and/or obtain an order of Judicial Review vide a Petition albeit without seeking Leave.

27. The Second instance that it is important to take note of is provided for vide Section 13(7) of the Environment and Land Court Act, which can also be accessed and utilized by an Applicant and certainly without seeking leave to pursue Judicial review.

28. The other option available is certainly in the Fair Administrative Act, 2015, which was enacted to operationalize the provisions of Article 47 of the constitution 2010.

29. In my humble understanding, the provisions of the Fair Administrative Actions Act, 2015, constitute a complete code which can be actualized and applied without being subordinated to any other Act and/ or Statute. Consequently, under the provisions of this Act, one does not require leave to commence Judicial review proceedings.

30. Fourthly, an Applicant can commence Judicial review proceedings pursuant to and in line with the provisions of Sections 8 and 9 of the Law reforms Act, Chapter 26 laws of Kenya, as read together with the Provisions of Order 53 of the Civil Procedure Rules and where one invokes the latter provisions, it is incumbent upon the Applicant to seek for and obtain leave of the court, in the prescribed manner.

31. I have underlined the foregoing because the Applicants before the court have chosen to approach the court pursuant to the provisions of Order 53 Rules 1(1) and 2 of The Civil procedure Rules and have therefore sought to be granted Leave to commence Judicial Review proceedings in the nature of Certiorari and Prohibition nature.

32. On the other hand, even though the Applicants have sought for Leave to commence judicial proceedings in the nature of certiorari and prohibition nature, same have clearly stated that the impugned decisions, which are sought to be challenged were made on the 24th October 2019 and 23rd October 2018 respectively.

33. Other than the foregoing, it is also important to note that the Application in respect of Leave is being sought, is dated the 24th November 2020. Consequently, it is evident and/or apparent that by the time the Application for leave was being made the two decisions which are sought to be impeached were more than six months old.

34. Before determining as to whether leave can be granted, it is imperative to take note of the provisions of Order 53 Rule 2 of the Civil Procedure Rules 2010, which provides as hereunder;

> **Time for applying for certiorari in certain cases [Order 53, rule 2.]**
>
> **2. Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.**

35. Based on the aforesaid provision, it is my humble finding and holding that the Application for Leave to file and/or commence Judicial Proceedings in the nature of certiorari in respect of decisions which were made more than six months before the date of the Application, is not only misconceived but is legally untenable.

36. In the premises, I am afraid that the application for leave, to commence judicial review proceedings in the nature of certiorari, would be an act in futility and/or vanity. Consequently and given that courts of law do not act in vanity, I must decline to so act.

37. In support of the foregoing position, I do adopt and rely on the decision in the case of **Wilson Osolo v John Ojiambo Ochola & another [1996] eKLR**, where the Court of Appeal observed as hereunder;

> **Section 9(3) of the Law Reform Act reads:**
>
> **"(3) In the case of an application for an order of certiorari to remove any judgment order decree conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other**

proceeding or such shorter period as may be prescribed under any written law;…….”

It can readily be seen that order 53 rule 2 (as it then stood) is derived verbatim from S.9(3) of the Law Reform Act. Whilst the time limited for doing something under the civil Procedure Rules can be extended by an application under order 49 of the Civil Procedure Rules that procedure cannot be availed of for the extension of time limited by statute, in this case, the Law Reform Act.

There is no provision for extension of time to apply for such leave in the Limitations of Actions Act (Cap 22, Laws of Kenya) which gives some limited right for extension of time to file suits after expiry of a Limitation period. But this Act has no relevance here.

38. The other aspect of the Application herein relates to leave to prohibit further construction by and/or at the instance of the Interested party. Simply put, the construction has since commenced or so I hear the Applicants to be saying.

39. The question that needs to be answered, in determining whether to grant Leave to takeout Judicial Review proceedings in the nature of prohibition is how efficacious would the order of prohibition be to deal with an act that has since occurred and/or accrued.

40. In this regard, one needs to take cognizance of the import and tenor of what an order of prohibition does and to appreciate this, the decision in the case of **Republic v Kenya National Examination Council Ex-parte Geoffrey Mbuthi Gathenji (1997) eKLR**, would suffice;

“It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings

41. As concerns the subject matter, it is conceded that the impugned construction has commenced and what is complained against is further construction, the question is how shall an order of Prohibition negates what had already commenced.

ISSUE NUMBER 2

Whether the Honorable court can grant Leave for the commencement of Judicial Review when there exists other Statutory mechanisms provided for and established under the Law which have not been Exhausted.

42. The Complaint by the Applicants herein is that the 1st Respondent proceeded to and issued an Environmental Impact Assessment License to and/or in favor of the Interested Party vide license number NEMA/EAI/PSL/8582 dated the 24th October 2019 and on the other hand the 2nd Respondent issued an approval of change of user vide approval number PPA-CU-AAB493 dated the 23rd October 2018.

43. Based on the foregoing, it is the Applicants contention that the NEMA license and the change of user approval herein, were irregularly issued and hence same should be called into court and be quashed.

44. Nevertheless, the Interested Party and the 1st Respondent herein have contended that the issues being raised by the Applicants herein are issues that fall within the statutory Jurisdictions of certain bodies, which are created and established under the law and which ought to have dealt with the Applicants complaints beforehand.

45. First and foremost, the Interested Party, has raised the issue that the complaint pertaining to the Validity, propriety or otherwise of the Environmental Impact Assessment license ought to have been dealt with in line with the provisions of Section 129 of the Environmental Management and Coordination Act, 1999 (2015), which provides as hereunder;

129. Appeals to the Tribunal

(1) Any person who is aggrieved by—

(a) the grant of a licence or permit or a refusal,

(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. Pursuant to the foregoing provisions, it is evident that any person aggrieved by, any of the events that are itemized in terms of the clauses enumerated under sub clause 1, is expected to file and/or lodge an Appeal at the National and Environment Tribunal within sixty (60) days of the decision, in this case, the issuance of the impugned license.

47. In respect of the subject matter, it would be recalled that the Applicants herein have clearly indicated that same were privy to and knowledgeable with the proceedings relating to the Environmental Impact Assessment and that same participated in the proceedings relating thereto, raised objections and even when the license was issued, same mounted a complaint culminating into the issuance of a stop order.

48. On the other hand, it was also stated by the Applicants that even though a Stop Order had been Issued, same was thereafter discharged and/or rescinded, without notice to them, namely, the Applicants. Clearly, the Applicants were privy and/ or party to the proceedings leading to the issuance of the license and were therefore Parties aggrieved by the issuance of the License.

49. In my humble view, the Applicants herein, were obliged and/or enjoined under the Law to lodge and or file the Appeal before the National Environment Tribunal in the 1st Instance.

50. In support of the foregoing observation, I adopt and endorse the decision in the case of **Albert Mumma in his capacity as Chairman, Karen Langata District Association (KLDA) v Director General - National Enviromental & 2 others [2019] eKLR,** where the Court held thus:

> **"On the question of locus, it is now also accepted that the appellant bringing an appeal under section 129(1) of EMCA must have participated in the process leading up to the issuance of a license in order to have *locus standi*."**

51. Other than the foregoing, the fact that the Applicants herein participated in the process of issuing a license, also lends credit to the fact that same were Parties aggrieved by the decision to issue the license and hence same ought to have filed the Appeal before the national Environment Tribunal.

52. Similarly, I adopt and endorse the reasoning in the case of **Republic –vs- National Environmental Tribunal & 3 Others Ex-Parte Overlook Management Ltd and Silversand Camping Site Limited**, where Honourable Justice Emukule J, also buttressed the same position. He was rendered himself thus:

> **"That to me, would be a construction or interpretation which would be consonant with, and would promote the legislative purpose. It is an interpretation which gives the Respondent its territory to consider appeals, not by the whole world, but by persons with Locus Standi as we have found above, persons who have been before the Authority, a Committee of the Authority, or the Director- General and is aggrieved by the decision of either the Authority, a Committee thereof, or the Director General. That in my view and understanding is an interpretation which clearly defines, conforms and gives effect, to the relevant provisions stated above and also clearly delineates the jurisdiction of the Respondent Tribunal." (***Emphasis, mine)*

53. On the other hand, it is also imperative to note that the provisions of the physical planning act, now repealed and replaced by the Physical Planning and Land Use Act, 2015, had similar provisions, where an aggrieved party was required to mount a complaint before the County Physical liaison Committee and thereafter the National Liaison Committee.

54. For the avoidance of doubt, the provisions of Section 61 of the Physical Planning and Land Use Act, 2019, have reiterated what was hitherto captured and/or provided for under the Physical Planning Act, now repealed.

55. Consequently, where an Applicant was dissatisfied with an approval relating to Change of User, like in the instance case, same was enjoined to comply with the established Statutory process, before approaching the court.

56. Perhaps, it is important to note that where a Statute has provided for and/or established an appropriate Dispute Resolution Mechanism, Parties are bound and/or obliged to exhaust the prescribed avenue, before approaching the court or otherwise such a Party must satisfy the court that the prescribed avenue and/or forum is unsuitable to handle and/or deal with the dispute beforehand.

57. However, in respect of the subject matter, the Applicants herein have not placed before the Court any such material to show that the established Statutory avenues and/or forum are neither suitable nor appropriate to deal with and/or address their complaints.

58. In short, the Applicants herein have approached the Court prematurely, albeit before exhausting the available Statutory Dispute Resolution Mechanism provided for and/or established under the law. Consequently, the subject proceedings are barred by the Doctrine of Exhaustion.

59. In support of the foregoing reasoning, I adopt and restate the holding of the Court of Appeal in the case of **Samson Chembe Vuko –vs- Nelson Kilimo & 2 Others (2016)eKLR,**:-

> **" 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….This Court has in the past emphasized the need for aggrieved parties to strictly follow any procedures that are specifically prescribed for resolution of particular disputes…**
>
> **.It is readily apparent that in those cases the Court was speaking to issues of the correct procedure rather than of the correct forum for resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the Court must apply**

with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the Constitution or a Statue, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.

The basis for that view is first that Article 159(2) (c) of the Constitution has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation and traditional dispute resolution mechanisms. The use of the word "Including" leaves no doubt that Article 159(2) (c) is not a closed catalogue. To the extent that the Constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear Constitutional objective. A holistic and purposive reading of the Constitution would therefore entail construing the limited original jurisdiction conferred on the High Court by Article 165(3) (a) of the Constitution in a way that will accommodate the alternative dispute resolution mechanisms. Secondly, such alternative dispute resolution mechanisms normally have the advantage of ensuring that the issues are heard and determined by experts in the area; and that the dispute is resolved much more expeditiously and in a more cost effective manner…."

ISSUE NUMBER 3

Whether this Court has the Jurisdiction to entertain and adjudicate upon the subject Application.

60. On the issue of Jurisdiction of this court, to handle and/or entertain dispute pertaining to claims concerning the Right to clean and healthy environment, pursuant to Articles 42, 43 and 70 of the Constitution 2010, I have held previously that I have both original and Appellate jurisdiction.

61. For clarity, I hold original jurisdiction, as donated pursuant to various provisions of the law including, inter alia, Sections 3(3) of the Environmental Management and Coordination Act and 13(7) of the Environment and Land Court Act.

62. Nevertheless, there also instances where the Environment and Land Court holds both original, as well as Appellate Jurisdiction and this is evident under the provisions of Section 3(3), 129 and 130 of the Environmental Management and Coordination Act, 1999 (2015); Section 13(3) and (7) of the Environment and Land Court Act, as read together with Section 133 of the Land Act and many others.

63. Consequently, in instances where the Court holds both Original, as well as Appellate Jurisdiction, it behooves the Court to exercise deference and allow Statutory Institutions and/or Bodies conferred with first instance Jurisdiction, to assume and exercise jurisdiction and thereafter the Court can appropriate the Appellate jurisdiction.

64. Clearly, such kind of restraint, would breed sanity and allow the rest of the statutory bodies to discharge their statutory mandate and/ or obligations without being rendered redundant or otiose.

65. In support of the foregoing opinion, I adopt and rely in the decision in the case of **Benard Murage - v - Fine serve Africa Limited & 3 others [2015] eKLR** the Supreme Court again stated that;

"Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first."

66. Other than the foregoing Decision, it is also worthy to take note of the Decision in the case of **Kibos Distilers Limited & 4 Others v Benson Ambuti & 3 Others (2020) eKLR, where the Honourable** Court of Appeal held as hereunder;

"**Further, I observe that the jurisdiction of the ELC is appellate under Section 130 of EMCA. The ELC also has appellate jurisdiction under Sections 15, 19 and 38 of the Physical Planning Act. An original jurisdiction is not an appellate jurisdiction. A court with original jurisdiction in some matters and appellate jurisdiction in others cannot by virtue of its appellate jurisdiction usurp original jurisdiction of other competent organs. I note that original jurisdiction is not the same thing as unlimited jurisdiction.**

A court cannot arrogate itself an original jurisdiction simply because claims and prayers in a petition are multifaceted. The concept of multifaceted claim is not a legally recognized mode for conferment of jurisdiction to any court or statutory body.

In addition, Section 129 (3) of EMCA confers power upon the NET to *inter alia,* exercise any power which could have been exercised by NEMA or make such other order as it may deem fit. The provisions of Section 129 (3) of EMCA is an all-encompassing provision that confers at first instance jurisdiction upon the Tribunal to consider the prayer Nos. 1, 7, 8, 9 and 10 in the petition.

It was never the intention of the Constitution makers or legislature that simply because a party has alleged violation of a constitutional right, the jurisdiction of any and all Tribunals must be ousted thereby conferring jurisdiction at first instance to the ELC or High Court".

67. In a nutshell, the issue beforehand is not whether this court is seized of the requisite Jurisdiction to entertain the subject matter, but whether the court should assume Jurisdiction and deal with the subject matter, whereas there exists statutorily prescribed Dispute Resolution Mechanism that ought to have been invoked and exhausted beforehand.

68. In my humble view, I must decline Jurisdiction and adhere to the Doctrine of Exhaustion, as by law prescribed.

FINAL DISPOSITION:

69. I have endeavored to and addressed all the issues that were outlined herein before and in each one of them, I have come to the conclusion that the Applicants herein, either approached the Court to late in the day or otherwise prematurely before exhausting the Statutorily prescribed Dispute Resolution Mechanism.

70. In a *nutshell,* I come to the conclusion that the Chamber Summons Application dated the 24th November 2020, is not only incompetent, but Misconceived. Consequently, same be and is hereby struck out with costs to the 1st Respondent and Interested Party only.

71. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF APRIL, 2022

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

June Nafula Court Assistant

Ms. Joy Anami H/B for Dr. Mutubwa for the Applicants

Mr. Wangoma H/B for Mr. Mulla for the Interested Party.

Ms. Lilian Omwenga for the 2nd Respondent

No appearance for the 1st Respondent

[HJM1]