



Onono & 2 others (All Suing on Behalf of the KMA South C Residents Association) v The Director General, National Environment Management Authority & 4 others (Environment and Land Case Civil Suit E217 of 2022) [2022] KEELC 3696 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3696 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E217 OF 2022**

**JO MBOYA, J
JULY 28, 2022**

BETWEEN

**WILFRED ONONO 1ST PLAINTIFF
ANWAR SIDI 2ND PLAINTIFF
PASCAL MUTETI 3RD PLAINTIFF
ALL SUING ON BEHALF OF THE KMA SOUTH C RESIDENTS ASSOCIATION**

AND

**THE DIRECTOR GENERAL, NATIONAL ENVIRONMENT MANAGEMENT
AUTHORITY 1ST DEFENDANT
NAIROBI METROPOLITAN SERVICES 2ND DEFENDANT
AVIERO LIMITED 3RD DEFENDANT
BENJAMIN NYADIKA OMBATI 4TH DEFENDANT
GREEN DIME CONSULTANCY LIMITED 5TH DEFENDANT**

RULING

Introduction and Background

1. Vide the Notice of Motion Application dated the June 14, 2022, the Plaintiffs’/Applicants’ herein have approached the Court seeking for the following Reliefs;
 - a.(Spent).
 - b. Pending the hearing and determination of this Application, the Honourable Court be pleased to issue an Injunction Order stopping the 3rd Defendant/ Respondent, its agents and/or



proxies and any other person acting in its names from making any Demolition, Constructions and/or Developments on the Property known as L.R No. 209/22146, situated in South C Estate within the City county of Nairobi and belonging to the 3rd Defendant.

- c. Pending the hearing and determination of this suit, the Honourable Court be pleased to issue an Injunction Order stopping the 3rd Defendant/ Respondent, its agents and/or proxies and any other person acting in its names from making any Demolition, Constructions and/or Developments on the property known as L.R No. 209/22146, situated in South C Estate within the City county of Nairobi and belonging to the 3rd Defendant.
 - d. Pending the hearing and determination of this Application and the Suit, the Honourable Court be pleased to revoke the EIA License/PSL/15527, dated the November 26, 2021 issued to the 3rd Defendant/Respondent by the 1st Defendant.
 - e. Pending the hearing and determination of the Application and the Suit, the Honourable Court be pleased to Stay the License Number C.P.D/DC/5735/22146/tlr dated December 17, 2021 issued by the 2nd Defendant to the 3rd Defendant and/or any such further License that may be purported to be issued in respect of the Developments on the subject property.
 - f. The Applicants' be awarded costs of the Application.
2. The subject Application is premised and/or anchored on various Grounds, which have been enumerated at the foot thereof and same is further supported by the affidavit of one, namely, Wilfred Onono sworn on even date.
 3. Upon being served with Application, the 2nd, 3rd, 4th and 5th Defendants/ Respondents herein proceeded to and entered appearance and thereafter filed their Responses to the subject Application.
 4. For coherence, the 2nd Respondent entered appearance on the 14th July and thereafter filed a Notice of Preliminary Objection dated the July 14, 2022.
 5. On the other hand, the 3rd, 4th and 4th Defendants/ Respondents filed a Notice of Appointment of Advocate and thereafter filed two Replying Affidavits, one sworn by Mohamed Ali Mohamud and the other sworn by Benjamin Nyandika Ombati. Besides, the 3rd, 4th and 5th Defendants also filed a Notice of Preliminary Objection.
 6. Nevertheless, the 1st Defendant/Respondent herein only entered appearance but did not file any Response to and or in respect of the subject Application.

Deposition by the Parties:

The Plaintiffs'/applicants Case;

7. Vide Supporting Affidavit sworn on the June 24, 2022, one, Wilfred Onono avers that the Plaintiffs/ Applicants herein are members of a Residents' Association namely, KMA South C Residents Association, which is comprised of persons residing within South C Estate in the City of Nairobi.
8. Further, the deponent has averred that on or about the November 21, 2021, the 1st and 2nd Defendants/ Respondents herein proceeded to and granted in favor of the 3rd Defendant/Respondent an EIA License No. NEMA/EIA/PSL/15527, which allowed the 3rd Defendant/Respondent to proceed and construct a Thirteen-level residential building comprising of Forty residential units and parking spaces.
9. On the other hand, the deponent has averred that the impugned EIA License was issued after an alleged EIA study report, purportedly prepared by the 4th and 5th Defendant/Respondents.



10. Nevertheless, the deponent has averred that the purported EIA study report which was prepared by the 4th and 5th Defendants/Respondents herein was carried out and/or undertaken without the participation and/or involvement of the Residents of KMA South C Resident Association, who are said to be the stakeholders and the affected persons.
11. In any event, it has also been averred that the EIA study report which was conducted by the 4th and 5th Defendants/Respondents, similarly was not advertised in the Daily Newspapers and the Kenya Gazette and prescribed under the law.
12. Notwithstanding the foregoing, the deponent has added that even though the 4th and 5th Defendants purported to have generated and issued Questionnaires to be filled by Members and/or Persons resident in the neighborhood of the proposed project, none of the members of KMA South C Residents Association was involved and/or contacted.
13. Premised on the foregoing, the deponent has therefore averred that the EIA Study report, which culminated into the issuance of the EIA License, was therefore procured and obtained by fraud.
14. Other than the foregoing, the deponent has averred that the 3rd Defendant/Respondent herein has since commenced operations at the *locus in quo* on a 24-hour basis and that the operations of the 3rd Defendant/Respondent are generating excessive noise, ground vibration, toxic dust and bad odor, which portend a threat to the Right to Clean and Healthy Environment.
15. Besides, the deponent has also averred that other than the 1st Defendant/Respondent, the 3rd Defendant/Respondent also issued a license and/or permit to and in favor of the 3rd Defendant/Respondent, allowing same to change the user of the suit property as well as to carryout demolition of the building that was hitherto standing within the suit property.
16. In the premises, the deponent has averred that the actions and/or omissions by and/or on behalf of the 1st and 2nd Defendants/Respondents herein have actually created a situation that constitutes a threat to the constitutional rights of the residents of KMA South C Estate, including the Plaintiffs/Applicants herein.
17. Consequently and based on the foregoing averments, the Deponent has implored the Honourable Court to grant the Reliefs, which have been enumerated at the foot of the subject Application.

Response by the 2nd Respondent:

18. Upon being served with the subject Application, the 2nd Defendant/Respondent filed a Notice of Preliminary Objection dated the July 14, 2022 and in respect of which, the 2nd Defendant/Respondent has raised the following grounds;
 - i. The Honourable Court is divested of Jurisdiction to hear and determine the Suit and the Application by dint of the Mandatory Provisions of Section 129 (1) (a) of the [Environmental Management and Coordination Act, 1999](#) as read together with Regulations 46 (1) (f) of the Environmental (Impact Assessment and Audit) Regulations 2003.
 - ii. This Honorable Court's Jurisdiction to hear and determine the suit and the Application is further ousted by dint of Mandatory provisions of Sections 78 (b) of the [Physical Planning and Land Use Act, 2019](#).
 - iii. The Plaintiffs/Applicants have not Exhausted the existing Dispute Resolution Mechanism before invoking the Jurisdiction of the Honorable Court.



iv. The Suit herein offends the Doctrine of Constitutional avoidance.

Response by the 3rd, 4th and 5th Defendants'/respondents':

19. The 3rd, 4th and 5th Defendants/Respondents responded to the subject application by filing two Replying affidavit and a Notice of Preliminary Objection, the latter which is dated the July 15, 2022.
20. Vide Replying Affidavit sworn on the July 15, 2022, one Mohamed Ali Mohamud, hereafter referred to as the deponent, has averred that same is a Director of the 3rd Defendant/Respondent and therefore authorized and/or mandated to swear the subject affidavit.
21. Further, the deponent has averred that the 3rd Defendant/Respondent is the lawful and registered proprietor of the property known as L.R No. 209/22146, situate within South C Area in the City County of Nairobi.
22. On the other hand, the deponent has averred that the suit property has a user, which designates and confirms, that same as meant for Multi dwelling units, (read flats.)
23. Besides, the deponent has averred that the 3rd Defendant herein was intent on commencing the construction of a Multi-dwelling unit over the suit property and in this regard, same commenced the process of seeking a Change of User over and in respect of L.R No's 209/ 10473/14 and L.R No 209/ 10473/13 which parcels of land were latter amalgamated and thereby gave rise to L.R No. 209/22146, the latter which is the suit property.
24. It has been averred that the process leading to the change of user was pursued and/or carried out openly and in the manner prescribed under the law and in particular, the intended change of user was duly advertised in accordance with the law, to enable any person and/or Interested Party to raise and/or take any objection.
25. Other than the foregoing, the deponent has also averred that documents speaking to the change of users were also displayed and published within the KMA Estate, where the Plaintiffs/Applicants are residents.
26. Nevertheless, the deponent has proceeded and stated that despite the advertisement which were carried out in the local daily's and published within the KMA Estate, no objection was generated and/or raised to the change of user application and same was duly approved and sanctioned by the 2nd Defendant/ Respondent.
27. Other than the foregoing, the deponent has also averred that the 3rd Defendant/Respondent also commissioned the 4th and 5th Defendants/Respondents to carryout an EIA Study report in respect of the intended project and in this regard, the 4th and 5th Defendants/Respondents duly carried out the requisite study, which was thereafter presented to the 1st Defendant/Respondent, for necessary action and approval.
28. Further, the deponent has averred that after the 1st Defendant/Respondent reviewed the EIA Study Report, same proceeded to and granted the requisite EIA License, which authorized the commencement of the impugned project by and/or on behalf of the 3rd Defendant/Respondent.
29. It has been averred that after procuring and obtaining all the relevant licenses and approval, the 3rd Defendant/Respondent proceeded to site and commenced preparation for the construction of the duly approved project.



30. However, the deponent has stated that on the January 16, 2022, the Plaintiffs/Applicants herein called a Press-briefing near the site of the intended project and raised several Complaints, inter-alia that the approval and licenses, which were issued to and in favor of the 3rd Defendant/Respondent, were procured vide fraud.
31. The deponent has averred that arising from the media Briefing and the Misrepresentation perpetrated by the Plaintiffs/Applicants, the 1st and 2nd Defendants/Respondents were constrained to move to the site of the intended project and same thereafter issued a stop order, stopping the preparation and the preliminary construction activities that had been commenced at the development site.
32. Nevertheless, the deponent has averred that following the issuance of the stop order, same was invited to the offices of the 1st and 2nd Defendants/Respondents to present Evidence of the License and Approvals authorizing the intended project, which same duly submitted as requested.
33. On the other hand, the deponent has further averred that upon reviewing the license and the approvals, relating to the intended project, the 1st and 2nd Defendant/Respondents were duly convinced of the validity and propriety of the approvals and license and thereafter same reviewed and rescinded the stop order, which had hitherto been issued upon the complaint by the Plaintiffs/Applicants.
34. Other than the foregoing, the deponent has also averred that on behalf of the 3rd Defendant/Respondent, the 4th and 5th Defendant/Respondent herein also commissioned and prepared a Summary Project Report, which contained the measures put in place to address and take care of any adverse effects, that may arise and/or ensue from the construction of the impugned project.
35. Besides, it has further been averred that the summary Project Report was similarly presented and submitted to the 1st and 2nd Defendant/Respondent and after same was reviewed, the 3rd Defendant/Respondent was advised to scale down the intended project from 14 floors to 12 floors.
36. In this regard, the deponent has thereafter averred that both the 1st and 2nd Defendants/Respondents thereafter issued the letters dated May 5, 2022 and also the April 1, 2022, confirming due compliance and authorizing a go-ahead with the impugned project.
37. Based on the foregoing, the deponent has therefore averred that the impugned project was duly licensed and approved by all the relevant authorities, inter-alia National Management Environment Authority, Nairobi Metropolitan Service and the National Construction Authority. Consequently, it has been averred that the impugned project is therefore lawful and legitimate.
38. On the other hand, the deponent has further averred that the Plaintiffs/Applicants herein have been aware of and privy to the issuance of the license relating to the change of user as well as the Environmental Impact Assessment license but same failed to ventilate their complaints through the established and laid down statutory mechanism.
39. Pursuant to the foregoing, the deponent has invited the court to take into account the Provisions of Section 61 (3), 61 (4) and 78 (b) of the *Physical Planning and Land Use Act*, 2019.
40. Other than the provisions alluded to in the preceding paragraph, the deponent has also invited the Honourable Court to find and hold that the issues complained of at the foot of the subject matter ought and should have been addressed vide the provisions of Section 129 (1) of the *Environment Management Co-ordination Act*, 1999 (2015).
41. In the circumstances, the deponent has thus implored the Honourable Court to find and hold that the court is devoid and/or bereft of the requisite Jurisdiction to entertain and/or adjudicate upon the subject dispute.



Submissions by the Parties:

42. The subject matter came up for hearing of the Application dated the June 24, 2022, on the July 18, 2022, when it transpired that the 2nd, 3rd, 4th and 5th Defendants/Respondents had filed and/or lodged Notices of Preliminary Objection challenging the Jurisdiction of the court.
43. Owing to the fact, that Preliminary Objections had been raised and same were challenging the Jurisdiction of the court, the court was compelled to and indeed issued directions, whereupon it was directed that the Notice of Motion Application dated the June 24, 2022 as well as the two sets of preliminary objections, were to be canvassed and disposed of simultaneously.
44. Other than the foregoing, it was also directed that the Application and Preliminary objections be canvassed vide oral submissions by and/or on behalf of the Parties.
45. On behalf of the Plaintiffs'/Applicants', it was submitted that the impugned actions and/or activities by the 3rd Defendant/Respondent, as pertains to the construction of the impugned project, posed a threat and danger to the enjoyment of the Right to Clean and Healthy Environment by the Plaintiffs'/Applicants.
46. Further, it was also submitted that the Right to a Clean and Healthy Environment is a Constitutional Right, underscored vide Article 42 of *the Constitution*, 2010 and hence the said right ought not to be interfered with and/or violated with abandon, in the manner the Defendants/Respondents have violating same.
47. Thirdly, it was submitted that the 1st and 2nd Defendant/Respondents owed a duty to the Plaintiffs'/Applicants to ensure that no licenses and/or approvals are granted, over and in respect of a project that threatens the Lives and welfare of the Plaintiffs'/Applicants, albeit without their involvement and/or participation.
48. Premised on the foregoing, Learned counsel submitted that the Plaintiffs'/Applicants herein have therefore laid before the Honourable Court a credible basis to warrant the intervention of the court.
49. In any event, Learned Counsel for the Plaintiffs'/Applicants' have further submitted that the Complaints raised and/or ventilated by the Plaintiffs'/Applicants touch on and/or concerned breach, violation and/or infringement of the Plaintiffs'/Applicants Constitutional rights. Consequently, such violations, breaches and/ or infringements can only be addressed before the Environment and Land Court and not otherwise.
50. On the issue of Jurisdiction, Counsel for the Plaintiffs'/Applicants submitted that the Environment and Land Court has the Original Jurisdiction to entertain and adjudicate upon the subject dispute. In this regard, counsel invited the court to consider the provisions of Section 3(3) of the *Environment Management and Coordination Act*, 1999.
51. Further, Learned counsel also drew the attention of the court on the provision of Section 13(2) of the *Environment and Land Court Act*, 2011 which also underscores the scope and/or extent of the Jurisdiction of the Court.
52. On behalf of the 2nd Defendant/Respondent, learned Counsel Mr. Allan Kamau submitted that the issue at the foot of the subject dispute relates to the issuance of the License relating to and/or concerning the change of user in respect of the suit property.
53. In this regard, Learned counsel submitted that a Person aggrieved and/or dissatisfied by any such license and/or approval, is statutorily obliged to file an appeal with the County Liaison Planning Committee



and thereafter with National Liaison Planning Committee in line with the provisions 61(3), 61(4) and 78(b) of the *Physical Planning and Land Use Act*, 2019.

54. On the other hand, Counsel has also submitted that the issue pertaining to and/or concerning the Revocation of the EIA License issued by NEMA, is a matter that falls within the Jurisdictional remit of the National Environment Tribunal, by dint of Section 129(1) of the *EMCA Act*.
55. Based on the foregoing, counsel for the 2nd Defendant/Respondent has therefore contended that this Honourable court is devoid and/or divested of Jurisdiction to entertain and/or adjudicate upon the subject suit, to the extent that the Plaintiffs/Applicants have not exhausted the Statutory Dispute Resolution Mechanisms established and provided under the law.
56. In support of the foregoing submissions, Learned counsel referred the Court to the decision in the case of *Kibos Distillers Ltd & 5 others versus Benson Ambuti Adega & Others* (2020)eKLR, *Benson Ambuti Adega & Others versus Kibos Distillers Ltd & 5 others* (2021)eKLR.
57. Consequently, Counsel implored the court to find and hold that though the court has original jurisdiction to entertain and/or adjudicate upon dispute relating to clean and healthy environment, where there exists a Statutory Mechanism, the Court ought to exercise deference and therefore allow the Designated Statutory Body to appropriate their mandate.
58. On behalf of the 3rd, 4th and 5th Defendants/Respondents, counsel adopted and reiterated the submissions made on behalf of the 2nd Defendant/Respondent. For clarity, counsel underscored the importance of the Doctrine of exhaustion and Constitutional avoidance.
59. Further, counsel for the 3rd, 4th and 5th Defendants/Respondents that even though the right to clean and healthy environment is a constitutional right, it does not mean that same cannot be interrogated by statutorily established body, duly clothed with Jurisdiction.
60. In support of the foregoing submissions, Learned counsel invited the court to take cognizance of the provisions of Section 129(1) of the *EMCA Act*, 1999.
61. In a nutshell, counsel contended that this Court was not seized of the requisite Jurisdiction to entertain and/or adjudicate upon the subject dispute, particularly, on account of the existence of Dispute Resolution Mechanism established via various Acts of Parliament.

Issues for Determination:

62. Having reviewed the Application dated the June 24, 2022, the Supporting Affidavit thereto and the Responses filed by and/or on behalf of the Defendants/Respondents; and having similarly considered the submissions ventilated on behalf of the Parties, the following Issues are pertinent and thus deserving of determination;
 - i. Whether this Court is seized of Jurisdiction and/or Mandate to adjudicate upon a claim concerning and/or pertaining to threat to the Right to Clean and Healthy Environment
 - ii. Whether this Honorable Court ought to assume and exercise her original Jurisdiction irrespective of the existing and established Statutory Dispute Resolution Mechanisms provided under the Law.



Analysis and Determination

Issue Number 1 Whether this Court is seized of Jurisdiction and/or Mandate to adjudicate upon a claim concerning and/or pertaining to threat to the Right to Clean and Healthy Environment

63. As pertains to whether or not this Honourable Court has Jurisdiction to address and/or attend to the subject dispute, it is important to take note of the following provisions, namely;
- a. Articles 42, 69, 70 & 162 (2) b of *the Constitution*, 2010.
 - b. Section 13 of the *Environment and Land Court Act*, 2011.
 - c. Section 3(3) & 3(5) of the *Environmental Management & Coordination Act*, 1999 (2015).
64. I must say that from the reading of the fore cited Provisions, this Honourable Court is conferred and/or vested with both Original and Appellate Jurisdiction to hear all Disputes pertaining to and/or concerning Environmental Planning and Protection, Climate Issues, Land use Planning, Title, Tenure, Boundaries, Rates, Rents, Valuation, Minerals and other Natural Resources.
65. It is also Imperative to take cognizance of the provision of Section 13 (3) of the *Environment and Land Court Act*, Number 19 of 2011, which provides as hereunder;
- “(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*.”
66. In my humble view, this Honourable Court has and is seized of the requisite Jurisdiction to entertain and/or adjudicate upon the subject dispute. In this regard, I share the sentiments of the learned Judges of the Environment and Land Court, whose Decisions I alluded to and which form part of the forceful and indeed persuasive submissions that were rendered by and on behalf of the Plaintiff’s Counsel herein and which submissions I have reproduced extensively hereinbefore.
67. Nevertheless, I must add that none of the Parties has challenged the fact that this court is clothed and/or conferred with such Jurisdiction. To my mind, the golden submissions that have been made relates to whether this Honourable court ought to assume jurisdiction where there exists Alternative Dispute Resolution Mechanism provided for in an Act of Parliament and which should thus be the first frontier, in the Event of a Dispute arising.
68. Suffice it to say, that as pertains to the Jurisdiction, I can do no better than to reproduce the Dictum of the Supreme Court of Kenya in the case of *Samuel Kamau Macharia v Kenya Commercial Bank* (2012) eKLR , where the Supreme Court observed as hereunder:

“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. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where



the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law”

69. On the other hand, I also beg to echo the sentiments of the Court of Appeal in the Decision in the case of Esther Gachambi Mwangi v Samuel Mwangi Mbiri (2013) eKLR, where the court observed as hereunder;

“As was stated in the Owners of the Motor Vessel “Lillian S” v. Caltex Oil (Kenya) Ltd 1989 KLR 1, jurisdiction is everything. Without it, a court has no power to take one more step. In the Matter of Advisory Opinions of the Supreme Court under Article 163(3) of *the Constitution*, Constitutional Application No. 2 of 2011; the Supreme Court noted that The Lillian ‘S’ case [1989] KLR 1] establishes that “jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity...”

Issue Number 2: Whether this Honorable court ought to assume and exercise her original Jurisdiction irrespective of the existing and established Statutory Dispute Resolution Mechanisms provided for under the Law.

70. Having found and held that this Honourable Court is conferred and/or clothed with both Original and Appellate Jurisdiction in respect of all, if not, most of the Reliefs sought, the critical question that should therefore be answered, is whether in such scenario the Honourable court should exercise and/or assume original Jurisdiction.

71. On the other hand, The flipside question would thus be what happens to the Appellate jurisdiction of this Honourable Court, in the event the Honourable court assumes Original Jurisdiction. Clearly, the court cannot exercise both jurisdictions, that is, (Original and Appellate), simultaneously and in my humble view, One aspect of Jurisdiction must, no doubt give way for the other.

72. Further, it is my humble opinion that like in disputes under the *Environmental Management and Coordination act*, 1999 (2015), where this Honourable Court is the final Appellate Court, it would deprive any aggrieved party of the undoubted Right of Appeal. In this regard, this Honourable court would have restricted and/or otherwise diminished the Claimants’ Constitutional Rights of access to justice, particularly, the Right of Appeal.

73. Notwithstanding the foregoing, I also hold the opinion, that the Right Of Access to Justice, under Article 48 of *the Constitution*, 2010, envisages a scenario where a litigant or a citizen, can be able to Exhaust all the levels of Appeals provided for and/or sanctioned under the law. Consequently, this court while exercising the choice, whether to assume the Original Jurisdiction or defer same, to a statutory Body so established, the Honourable Court should be minded to provide the latitude for Appeal.

74. In any event, I wish to state that even where the Honourable Court, has both the original and Appellate Jurisdiction, it does not mean that the honourable court therefore must render the established Statutory Agencies and/or Bodies irrelevant and/or Dysfunctional.



75. In my humble view, a balance must be struck, so as to facilitate ordered functioning within the Bodies that are conferred with certain Statutory mandates and to ensure that same achieve the Purpose of their creation and Existence.
76. To buttress the foregoing observation, I adopt and restate the dictum of the Court of Appeal in the case of *Kibos Distillers Limited & 4 others versus Benson Ambuti & 3 others* (2020) eKLR, where the honourable court 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”.

77. In my humble view and guided by the foregoing Decision, I must advocate for exercise of Judicial Restraint by this Honourable Court, in this kind of matters and thus allow the established Constitutional and Statutory Bodies, if any, to appropriate, exercise and carry out their extensive mandate in accordance with enabling statutes, before assuming Jurisdiction, in the event, upon the lodgment of Appeals, where appropriate.
78. As pertains to the second limb of this issue, which is essentially grounded on the Doctrine of Exhaustion, it is important that Claimants and/or litigants, knowing of the existence of alternative dispute resolution mechanism, should proceed to and exhaust same before approaching the Honourable court.
79. In this regard, I share and reiterate the considered position that the Honourable Court must be the Forum of the last resort and not the Port of first call. In support of the foregoing position, I adopt and underscore the holding in the case of *Geoffrey Muthinja Kabiro v Samuel Muguna Henry* (2015) eKLR, where the Honourable Court of Appeal held 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”.

80. On the other hand, an argument may well be raised, and indeed same has previously been raised that under the provisions of Articles 22, 48 and 258 of *the Constitution*, 2010, any aggrieved Party has a right of access to court and that the said rights are unlimited and thus the Doctrine of Exhaustion constitutes a clog and/or fetter to the enjoyment of the constitutional rights.

81. But, it must be remembered that Alternative Dispute Resolution Process, is anchored in *the Constitution*. Consequently, it behooves all and sundry to read *the Constitution* in a harmonious manner, and thus ensuring that the Constitutional provisions complement each other and not otherwise.

82. To vindicate the foregoing observation, I am fortified by the decision of the Supreme Court in *Re The Matter of Kenya National Commission of Human Rights*, Supreme Court Ref. No. 1 of 2012 [2014] eKLR where the Supreme Court of Kenya underscored the Principle of harmonious and/or Holistic interpretation of *the Constitution* and held as hereunder;

“But what is meant by a ‘holistic interpretation of *the Constitution*’? It must mean interpreting *the Constitution* in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what *the Constitution* must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances.

Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.”

83. Be that as it may, to the Proponents of the said school of thought, namely, that Every Constitutional Violation must be addressed by the Courts, it is sufficient to take cognizance of the observation by the Court of Appeal in the case of *Bethwel Allan Omondi Okal v Telkom (K) Limited (Founder) & 9 Others* (2017) eKLR, where the court held as hereunder;

“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 vs Njenga Karume* [2008] 1KLR 425.”

84. As for me, I must say, that I subscribe to the finding and holding of the Court of Appeal in the foregoing Decision and in this regard, I would exercise deference to the other statutory bodies and allow same to assume, appropriate and/or otherwise exercise their mandate, in the first instance .

85. Only then, shall the Parent Statutes have meaning and Purpose.

Final Disposition:

86. Premised on the foregoing, I have come to the inescapable and irresistible conclusion that the Preliminary Objections raised by the 2nd, 3rd, 4th and 5th Defendants/Respondents herein are Meritorious.



87. In any event, the legal terrain pertaining to the extent and applicability of the Doctrine of Exhaustion and the twin Sister, namely, the one of Constitutional Avoidance, are now well beaten. Decisions in this regard, are now legion and hence any Reasonable litigant, including their advocates, exercising some degree of diligence and Research, would have established as much.
88. In sum, the Preliminary Objections 14th and 15th days of July 2022, be and are hereby allowed. Consequently, the Plaint dated the 24th day of June 2022, be and is hereby struck out.
89. As concerns the Costs, it is common ground that the Complaints herein touched on and/or concerned the Right to Clean and Healthy Environment, as enshrined vide Article 42 of *the Constitution* 2010 and save for the fact that suit was mounted pre-maturely, it would not be appropriate to condemn the Plaintiffs/Applicants to bear the costs of the proceedings.
90. In any event, the issue underpinning the decision herein stems from the failure and/or lapse on the part of the Advocate for the Plaintiffs/Applicants and not otherwise. Consequently, the order that commends itself to me is that Either Party shall bear own costs.
91. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY, 2022.

**HON. JUSTICE OGUTTU MBOYA,
JUDGE,**

In the Presence of;

Kevin Court Assistant

Mr. Mola for the Plaintiffs/Applicants

Ms. Lisanza for the 1st Defendant/Respondent

Mr. Allan Kamau for the 2nd Defendant/Respondent

Mr. Peter Muchoki for the 3rd, 4th and 5th Defendants/Respondents

