



Abdalla & 6 others v Khansa Developers Limited & 3 others (Environment and Land Constitutional Petition 16 of 2022) [2022] KEELC 3486 (KLR) (26 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3486 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 16 OF 2022**

LL NAIKUNI, J

JULY 26, 2022

BETWEEN

MOHAMED AHMED ABDALLA & 6 OTHERS PETITIONER

AND

KHANSA DEVELOPERS LIMITED 1ST RESPONDENT

RAMESH CHANDRA HARIA 2ND RESPONDENT

COUNTY GOVERNMENT OF MOMBASA 3RD RESPONDENT

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 4TH
RESPONDENT**

RULING

I. Introduction

1. This is a ruling making a determination by this honorable court with regard to the notice of preliminary objection dated May 24, 2022 filed and raised by the 1st and 2nd respondents herein. Solely, they sought the orders that the notice of motion application dated May 5, 2022 filed by the petitioners herein be struck out and/or dismissed with costs for threefold main reasons that they were premature and it offended the provisions of section 72 (3) and (4) of the *Physical and Land Use Planning Act* (PLUPA) and section 129 (1) of “the *Environment Management and Co - ordination Act* (hereinafter referred to as “the EMCA, 1999”).



2. To put matters into context, the petition was filed on May 5, 2022. The petitioners claimed that their constitutional rights under the provision of articles 10, 47, 69 and 70 of the Constitution had been infringed. They sought following orders *inter alia*:
 - a. That the proposed developments on plot No Mombasa/Block XXVI/565 and approvals issued by the 3rd and 4th respondents were illegal for failure to comply with the provisions of articles 10, 40, 42, 47 and 69 of the Constitution;
 - b. That a permanent injunction orders be issued restraining the 1st and 2nd respondents from proceeding with the development until a proper public participation was carried out, appropriate social amenities eg sewer system are established;
 - c. That permanent injunction orders be issued restraining the 3rd and 4th respondents herein from issuing any further approvals to the 1st and 2nd respondents prior to the compliance of the prior order.
 - d. That temporary injunction orders be issued restraining the 1st respondent from proceeding with any further developments and conservatory orders staying/suspending development approvals/permits issued by the 2nd and 3rd respondent pending the hearing and determination of the petition.

II. The Petitioners Case

3. The application by the petitioners is based on the grounds, testimonial facts and averments made in the 43 paragraphed support affidavit of Mohamed Ahmed Abdalla sworn and made on May 5, 2022 together with six (6) annexures marked as exhibit 1 to 6th. The petitioners averred that are owners of all that parcels of land known as land reference numbers Mombasa/Block/1068, 840, 807, 961 - 964, 404 - 406 and 442 - 444 which were adjacent to all that land known as land reference numbers Mombasa/Block/595 owned by the 1st and 2nd respondents herein and where the impugned development was currently taking place. It was the petitioner's case that the said development had been undertaken in total disregard to the environmental considerations and same interfered with the natural status of the area. The petitioners further contended that the 3rd & 4th respondents had failed to enforce the applicable principles of law, by-laws, guidelines and laws and regulations governing such developments in the County of. The petitioners had further averred that the respondent's actions have infringed on their constitutional rights as espoused under articles 42, 10, 69(d), 47, and 40 of the Constitution. The petitioners annexed a stop order from NEMA dated April 11, 2022.

The 1st petitioner swore a further affidavit deposing that the County Liaison Committee contemplated under section 72 PLUPA was not functional.

III. The Submissions.

4. On May 30, 2022 while all the parties were present in court, they were directed to dispose off the preliminary objection by way of written submissions. Subsequently, they all complied accordingly and court reserved a day for delivering the ruling.

A. The Submissions by the 1st & 2nd Respondents Case

5. On June 2, 2022 the learned counsel for the 1st and 2nd respondents the law firm of Messrs JM Makau & Company Advocates filed their written submissions dated June 2, 2022. Mr Makau, the learned



counsel for the 1st and 2nd respondents herein submitted that the petitioners had not demonstrated any attempts to follow the procedure as laid down in PLUPA before approaching this court. Hence it would be improper to endeavour to adduce any evidence on facts at this juncture as this would defeat the purpose of a preliminary objection. He further submitted that to allow affidavit evidence at this point may necessitate the filing of counter affidavit thus blurring the pure point of law raised. The Learned counsel submitted that the prayers sought in the notice of motion application were directed to the complaints arising from acts of omission or commission of the 3rd and 4th respondents in the exercise of their statutory functions as per PLUPA and EMCA, 1999.

The learned counsel submitted that the entire notice of motion application and petition are predicated upon both PLUPA and EMCA. He submitted that the alleged infringement of the petitioners' constitutional rights is not stated nor are their reliefs sought on the alleged violations.

6. Mr Makau further submitted that the law had prescribed a procedure for the petitioners to follow in seeking redress, and where the law prescribes a procedure, it must be followed. To buttress this case, the counsel referred court to the case of Mohamed Ali Salim & 2 others v Municipal Council of Mombasa & others eKLR. The learned counsel contended that the disputes raised by the petitioners should be first decided by the Country Physical and Land Use Planning Liaison Committee and the NEMA tribunal. He submitted that the court is mandated to only exercise appellate jurisdiction. He argued that the petitioners had jumped the gun and run afoul of “the doctrine of exhaustion” and “doctrine of constitution avoidance”.

B. The Submissions by the Petitioners

7. On June 23, 2022 the counsel for the petitioners the law firm of Messrs John Bwire & Associates Advocates filed their written submissions dated June 21, 2022. Mr Muliro Learned counsel for the petitioners drew up three (3) issues for this court to determine. These were:-

The first issue, whether the suit offended the provision of section 72 (3) & (4) of PLUPA. On this issue, the learned counsel submitted that the provision of section 72 (3) & (4) of PLUPA was only applicable to persons who had been served with an enforcement notice or were aggrieved with the said enforcement notice which according to cancel was not what had been brought before this court. The counsel submitted that the crux of the petition was that the rights of the petitioners under the provisions of articles 10 and 47 of the Constitution of Kenya had been violated and that the petitioner's right to a clean and healthy environment had been infringed, violated and threatened. Therefore, according to him the provision of section 72 of PLUPA was inapplicable and did not divest this courts jurisdiction to hear and determine this matter as provided for under the provision of article 162(2) of the Constitution and section 13 of the Environment and Land Court Act, No 19 of 2011. Besides, the counsel submitted that the Liaison Committee had not been established hence under section 93 of PLUPA, this court had jurisdiction to hear and determine this matter. To put emphasis on this claim, the learned counsel cited the case of Depar Limited v County Executive Committee Member for Lands, Physical Planning, Housing and Urbanization & another [2021] eKLR and the case of Immaculate Gicuku Mugo v Kiambu County Government [2021] eKLR.

8. The second issue was whether the suit offended the provisions of section 129(1) of EMCA, 1999. The learned counsel submitted that the 1st and 2nd respondents had not obtained the requisite approvals from the 4th respondent capable of being challenged within the ambit of section 129(1) of EMCA, 1999. The counsel further submitted that the petition was not about the imposition of conditions or limitations to a license or the money paid under EMCA, or about the revocation of a license, or the issuance of an environment restoration/improvement order but rather it was on the violations of the constitutional rights of the petitioners under the provision of articles 10, 40, 42, 47, 69 and 70. The



counsel submitted that the provision of section 3 of EMCA, 1999 granted this court jurisdiction to hear and determine any dispute where a person alleges that the right to a clean and healthy environment had been infringed. To buttress this claim, the learned counsel cited the case of; John Muthui & 19 others v County Government of Kitui & 7 others [2020] eKLR and the case of Joyce Mutindi Muthama & another v Josephat Kyololo Wambua & 2 others [2018] eKLR.

9. The third issue was on whether the suit offended the doctrine of exhaustion. The counsel submitted that section 72 of PLUPA and section 129 (1) EMCA were not applicable to this suit. Therefore, the principle of exhaustion was not applicable herein.

C. The Submission by the 3rd Respondent

10. On June 15, 2022 the counsel for the 3rd respondent the County Attorney of the County Government of Mombasa filed their written submissions dated June 14, 2022. Mr Murtaza Tajbhai, the learned counsel for the 3rd respondent submitted on two issues. The first was whether the preliminary objection was properly raised. The counsel answered this question in the affirmative by relying on the case of Mukhisa Biscuit Manufacturing Co Limited v West End Distributors Limited (1969) EA 696. He submitted that the preliminary objection was challenging the jurisdiction of this court was on a pure point of law.
11. The second issue was on whether the court had jurisdiction to entertain and determine this petition. The learned counsel answered this question in the negative. He relied on two cases, the speaker of the Speaker of the National Assembly v James Njenga Karume [1992] eKLR and Bernard Murage v Fine Serve Africa Limited & 3 others [2015] eKLR. He submitted that where there is a procedure for redress prescribed by the Constitution or an Act of parliament that procedure should be strictly followed and not every violation of the law must be raised before the high court as a constitutional issue. The counsel further submitted that despite this court having original jurisdiction, it could not exercise its original jurisdiction. He argued that in so doing it would be usurping the original jurisdiction of the tribunals. He further submitted that since the petitioner was challenging the EIA License procured by the 1st and 2nd respondents and an injunction preventing the construction of the project by the 1st and 2nd respondents until a fresh EIA study with the participation of the petitioners, the appropriate forum for the petitioners was the tribunal. The counsel cited the Court of Appeal decision in Kibos Distillers Limited & 4other v Benson Ambuti Adega & 3 others [2020] eKLR.

IV. Analysis and Determination

12. I have had a careful perusal of the record of all the pleadings filed by the petitioners and the respondents herein being the supporting affidavits, replying affidavits, the submissions, the relevant provisions of statutes and the Constitution of Kenya in relation to the filed notice of preliminary objection dated May 24, 2022.
13. In order to arrive at an informed, fair, just and reasonable decision, the court has condensed all the issues raised by the parties herein into four (4) salient sub – headings as guide for its determination. These are:-
 - a. Whether the notice of the preliminary objection dated May 24, 2022 raised by the 1st and 2nd respondents herein meets the threshold of an objection based on law and precedents.



- b. Whether this honorable court has jurisdiction to hear and determine the notice of motion application dated May 5, 2022 and the main petition dated May 5, 2022 filed by the petitioners herein.
- c. Whether the doctrines of exhaustion/n and constitutional avoidance is applicable here.
- d. Who will bear the costs of the preliminary objection.

Issue No (a). Whether The Notice Of The Preliminary Objection Dated May 24, 2022 Raised By The 1st And 2nd Respondents Herein Meets The Threshold Of An Objection Based On Law And Precedents.

14. According to the *Black Law Dictionary* a preliminary objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

The above legal preposition has been made graphically clear in the now famous case of *Mukisa Biscuits Manufacturing Co Limited v West End Distributors Limited* [1969] EA 696. Where Lord Charles Newbold P held that a proper preliminary objection constitutes a pure points of law. The learned judge then held that:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

15. In *Omondi v National Bank of Kenya Ltd & others* [2001] KLR 579; [2001] 1 EA 177, it was observed that a court in determining a preliminary objection can look at the pleadings and other relevant documents but must abide by the principle that the objection must raise pure points of law. It was held thus: -

“.....In determining (preliminary objections) the court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the court for the reason that the defendant’s costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done *ex debito justitiae* (as of right) but as a matter of judicial discretion.”

16. On the same issue, I wish to cite the case of *Attorney General & Another v Andrew Mwaura Gitbinji & another* [2016] eKLR:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a preliminary objection inter alia:-



- i. A preliminary objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
 - ii. A preliminary objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
 - iii. The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.
17. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. Certainly, the issues raised by the 2nd and 3rd respondents, the 3rd and 4th interested parties herein are serious and pure issues of law which this court is duty bound to critically venture to be heard and determined prior to them being set down the case for full trial on its own merit. The issues are not fanciful nor remote. For these reasons, therefore, I find that the objection raised by the respondents and the interested parties were properly filed hereof. It constitutes matters akin to be determined at the preliminary level before embarking on the hearing of the case on its own merit in conformity to the case of Mukisa Biscuits Manufacturing Co Limited (*supra*). Therefore, I shall proceed to consider them and determine them accordingly.
18. As a matter of course, the [Constitution of Kenya](#) under article 259 (1) provides a guide on how it should be interpreted as such:-

"This [Constitution](#) shall be interpreted in a manner that:-

- a. Promotes its purposes, values and principles;
- b. Advances the rule of law, and the human rights and fundamental freedoms in the bill of rights;
- c. Permits the development of the law; and
- d. Contributes to good governance....."

This court must give a liberal interpretation and consideration to any provision of the [Constitution](#) and have regard to the language and wording of the [Constitution](#) and where there is no ambiguity attempt to depart from the straight texts of the [Constitution](#) must be avoided.

Further, it is important to fathom that the [Constitution](#) is

"a living instrument having a soul and consciousness of its own."

It must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.

19. A petition ought to follow the principles laid down of drafting constitutional petitions. Based on the principles set out in the edit of the Court of Appeal case of the [Mumo Matemu v Trusted Society of Human Rights Alliance & another](#) [2013] eKLR provided the standards of proof in the constitutional petitions as founded in the case of [Anarita Karimi Njeru v Republic](#) [1980] KLR 154 [1979] eKLR. Trevalyan, J (as he then was) and Hancox J (as he then was) stated as follows:

"We would however again stress that if a person is seeking redress from High Court on a matter which involves a reference to the [Constitution](#) it is important (if only to ensure that



justice is done to his/her case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.” where the court is satisfied that the petitioner’s claim were well pleaded and articulated with absolute particularity. It held:-

“Constitutional violations must be pleaded with a reasonable degree of precision.....”

Further, in the *Thorp v Holdsworth* (1886) 3 Ch D 637 at 639, Jesse, MR said in the year 1876 and which hold true today:

“The whole object of pleadings is to bring the parties to an issue and the meaning of the rule.....was to prevent the issue being enlarged which would prevent either party from knowing when the cause came on for trial what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues and thereby diminish expense and delay especially as regards the amount of testimony required on either side at the hearing”.

In other words, cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assists in that regard and are a tenet of substantive justice, as they give fair notice to the other party.....”

20. In direct application of these set out principles for filing a constitutional petition to this case, the honorable court wishes to address itself on two broad issues. Firstly, has the petition filed by the petitioners herein pleaded with reasonable precision as founded in the Anarita Karimi (*supra*). To respond to this query, the honorable court totally concurs all that the petitioners have dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting this petition against the respondents and the Interested parties herein and pleading for the prayers sought.
21. The petitioners claims that the respondents violated and infringed the provisions of articles 10, 20, 21, 24, 27, 40, 42, 47, 69, 70 and 258 of the *Constitution of Kenya* among others and has specifically provided all the particulars of the ostensible violation, infringement or denial of these fundamental rights in the Bill of rights that have been allegedly violated; provide the particulars of the alleged violations; and provide particulars in which the respondents and the Interested parties had purportedly infringed the rights.
22. In Petition No 370 of 2015, *Isiolo County Assembly Service Board & another v Principal Secretary (Devolution) Ministry of Devolution and Planning & another* [2016] eKLR at paragraph 13, JL Onguto, J noted-

“It is clear that the parameter of a preliminary objection is no longer limited to such objections as may lead to the ultimate disposal of the case but even such objections as may lead to a stay of proceedings. Such objections if successful would assist in saving the objecting party, some time and resources. The objection would also save the much sought after judicial time”.

23. The Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR pronounced itself:-

“[21] The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—



against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits."

In *Hassan Ali Joho & another v Suleiman Said Shabbal & 2 others*, Petition No 10 of 2013, [2014] eKLR decision which has been subsequently cited by the Supreme Court in *Hassan Nyanje Charo v Khatib Mwashetani & 3 others*, Civil Application No 23 of 2014, [2014] eKLR; and in *Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 others*, Application No 50 of 2014, [2015] eKLR, the Supreme Court further stated at paragraph 15:

"Thus a preliminary objection may only be raised on a 'pure question of law'. To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are *prima facie* presented in the pleadings on record."

24. From the face of it, the preliminary objection raises three (3) main and weighty issues which are on pure legal nature. These are the jurisdiction of this court, the exhaustion doctrine, and there being no issue of constitutional nature have been raised in the petition by the petitioners. This court fully concurs with the learned counsels for the 1st, 2nd and 3rd respondents herein that all these issues could easily terminate the entire petition if allowed. It is, therefore, that the preliminary objection passes the propriety test and the objection is for consideration.

Issue No (b). Whether This Honorable Court Has Jurisdiction To Hear And Determine The Notice Of Motion Application Dated May 5, 2022 And The Main Petition Dated May 5, 2022 Filed By The Petitioners Herein.

25. It is trite law that the moment a party in a suit challenges the jurisdiction of a court, anything else the court does from then onwards becomes a nullity whatsoever. Once that happens, it is significant that that huddle is finally tackled first and foremost. This is because without jurisdiction the court has no mandate to make one more step. It must down its tools. This legal preposition was well established in the now famous case in the now famous case of *Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited* [1989] eKLR dealt with a court, jurisdiction thus:-

"Jurisdiction is everything. Without it, a court has no powers to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion it is without jurisdiction.....where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given".

26. In the case of *Samwuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, court held:-

"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."

27. So, under this sub heading does this court have jurisdiction to hear and determine the notice of motion application and the petition? By the statutes, the National Environment Tribunal (hereinafter referred to as "the NET") is established by the provisions of section 125 (1) of the *Environmental Management and Coordination Act*, (EMCA, 1999). The jurisdiction of NET is set out in the provision of section



129 of EMCA, 1999. The provision of section 129 of EMCA, 1999 provides inter alia, that any person who is aggrieved by the grant of a license or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, or the imposition of any condition, limitation or restriction on a licence, or the revocation, suspension or variation of a licence under the Act or regulations made thereunder, may within sixty (60) days after the occurrence of the event against which that person is dissatisfied, appeal to the NET. The tribunal may confirm, set aside or vary the order or decision in question. The Tribunal may also issue orders maintaining the *status quo* of the matter or activity which is the subject of appeal before it until the appeal is determined. Appeals on the decisions of the Tribunal lie to this court under the provision of section 130 of EMCA.

28. The provision of section 72(3) and (4) of PLUPA provides the framework on how a party who is aggrieved by an enforcement notice is required to seek redress. It provides that the person may appeal to the relevant County Physical and Land Use Planning Liaison Committee within fourteen (14) days of being served with the notice and the committee shall hear and determine the appeal within thirty (30) days of the appeal being filed.
29. It is the case of the 1st and 2nd respondents that the petitioners should have ventilated their grievances at the Physical & Land Use Planning Liaison Committee of the County of Mombasa and the NET. This honorable court has carefully and keenly perused the filed pleading both the notice of motion application and the main petition. The plain reading of this provision of the law, it is only applicable to persons who
- a). have been served with an enforcement notice and
 - b). are aggrieved with the said enforcement notice.

Apart from the prayers sought in the petition to the effect:-

“Prayer b), (iv) & (v):- a permanent injunction restraining the 1st and 2nd respondents, their agents, employees or such other persons acting under their directions from carrying out, further carrying out or in any way proceeding with the proposed development of 18 floors storey building on plot number Mombasa/Block XXVI/595 until.....a fresh environment impact assessment is carried out within the law and a report submitted to the 4th respondent, the petitioners herein and the surrounding members of the public; and the project is subjected to a proper environmental audit and a report prepared, detailing the short and long term significant effects of the project on not only the environment, but also to the petitioners and members of the public....

The petitioners herein have not been served with any enforcement notice. Thus, the petitioners herein are not challenging any of the enforcement notice and thus the issue here is one of invalidating, quashing or challenging the enforcement notice as it is non-existent.

This court has taken judicial notice and read through the 7 paragraphed further affidavit of Mohammed Ahmed Abdalla dated June 21, 2022 filed with leave of court and noted the averments under paragraphs 4, 5 and 6 of the said affidavit which makes a confirmation to the fact that the Land Use Planning Liaison Committee for the County of Mombasa under the provision of section 72 of PLUPA has never been constituted. Therefore, it means it does not exist where such dispute ideally should be referred and dealt with accordingly. This fact has not been rebutted by any of the respondents. Where such a



vacuum exists, where this Committees are not established and hence operational the law under section 93 of PLUPA expressly comes in and which provides:-

“ All disputes to Physical and Land Use Planning, before establishment of the National and County Physical and land Use Planning Liaison Committees shall be heard and determined by the Environment and Land Court”.

This fact is supported by the decisions of “Depar Limited (supra) and Immaculate Gicuku Mugo (supra)” cited by the learned counsel for the petitioners. Indeed, I reiterate and as will be elaborately stated herein below, the jurisdiction of this court is created by operation of law.

30. Further, this court does not see where the petitioners are challenging the approval of licenses issued by NEMA or the enforcement notice from the County Government of Mombasa. On the contrary, the crux of the dispute is as found under paragraphs 18 to 35 of the supporting affidavit. The petitioners claim that the 3rd and 4th respondents have deliberately failed to enforce the applicable law, by-laws, guidelines, and regulations governing such developments within the County of Mombasa. The petitioners have also claimed that the 4th respondent issued a stop order to the development noting that there was no proof of an environmental impact assessment (hereinafter referred “the EIA”) for the project and that there were complaints from the neighbours about the air pollution. Further to this, the petitioners claim their rights to a clean and healthy environment, the right to fair administrative action, and the right to public participation have been infringed, threatened and violated. Based on the provisions of articles 69 and 70 of the Constitution of Kenya, all matters pertaining to the enforcement of the fundamental rights and freedoms as enshrined in the Constitution of Kenya can only be determined by the High Court and courts of equal status such as this court. The tribunals and the subordinate courts are barred from entertaining such claims. For this reason, therefore ELC has a jurisdiction to hear and determine this case.

Issue No (c). Whether The Doctrines Of Exhaustion And Constitutional Avoidance Is Applicable Here

31. Legally speaking, the doctrine of exhaustion has its origin from the provision of article 159(2)(c) of the Constitution of Kenya which recognizes and entrenches the use of alternative mechanisms of dispute resolution in the following terms: -

“159(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles-

- (a)
- (b)
- (c) alternative forms of dispute resolution including resolution, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause 3.”

32. The Court of Appeal in the case of Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR, stated that:-

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial



consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts.”

In the instant case, this court’s jurisdiction was challenged through the preliminary objections raised by the 1st & 2nd respondents herein. Among the numerous grounds, they submitted based on the doctrine of exhaustion, that the petitioners ought to have exhausted all the available and sufficient avenues to resolve the environmental dispute before invoking this court process. To them, the doctrine of exhaustion provided that a litigant ought to explore all other available mechanisms in dispute resolution before proceedings to the courts. Where there were clear procedures of redress of any particular grievance prescribed by the Constitution or statute, then the procedure should be strictly followed and adhered to.

33. I associate myself with the reasoning in the case of Geoffrey Muthinja Kabiru (*supra*) where the Court of Appeal (PN WakiI, RN Nambuye & PO Kiage, JJA) held as follows:

“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.”

34. The court in the International Legal Consultancy Group case also quoted with approval the cases of the Speaker of the National Assembly v The Hon James Njenga Karume, Civil Application No NAI 92 of 1992 [NAI 40/92 UR] (unreported) and Stanley Mungathia Daudi and 4 others v Hon Cyprian Kubai and others, Meru Petition No 5 of 2013, where similar sentiments were voiced with regard to the need to follow dispute resolution mechanisms provided for under different statutes where the court noted-

“There is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed”

35. That being said, are constitutional petitions barred by the doctrine of exhaustion? A five-judge bench in William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR elaborately dealt with the doctrine of exhaustion. They held as follows:-

“In the instant case, the petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in bill of rights language as a pretext to gain entry to the court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.” (Emphasis added)



36. In determining whether this petition is a mere bootstrap or not, I have to take it through the Anarita Karimi test. (See *Anarita Karimi Njeru v Republic* [1976-1980] KLR 1272). The court in deciding the case observed as follows:-

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves the reference to the *Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.”

37. A court must be able to identify the specific rights alleged to have been infringed and the particulars as to how these rights were alleged to be infringed. Did the petitioners meet this requirement? I have carefully perused the petition. The petitioners allege that the provision of articles 42, 10, 69 (d), 47, and 40 of the *Constitution* have been infringed. They have systematically detailed the alleged manner in which each of the rights were violated by the respondents. This court can easily discern the rights complained of by the petitioner and the alleged manner in which the rights were allegedly infringed. In the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR the Court of Appeal held as follows:-

“We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not conterminous with exactitude. Restated, although precision must remain a requirement is important, it demands neither formulaic prescription of the factual claims nor formulaic prescription of the constitutional provisions alleged to have been violated.”

38. I have noted that all the learned counsels for the petitioners, 1st, 2nd and 3rd respondents herein have heavily relied on the now roller coaster decision of *Benson Ambuti Adega & 2 others v Kibos Distrillers & 5 others* Civil Appeal No 153 of 2019 whereby the Court of Appeal held that:-

“Even if a court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and determine a dispute. Original jurisdiction is not an ouster clause that ousts the jurisdiction of other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction to a court or body to hear and determine all and sundry disputes. Original jurisdiction only means the jurisdiction to hear specifically constitutional or legislative delineated law and facts at first instance. To this end I reiterate and affirm the dicta in *Speaker of the National Assembly v James Njenge Karume* [1992] eKLR where it was stated that where there is a clear procedure for the redress of a particular grievance prescribed by the *constitution* or an Act of Parliament, that procedure should be strictly followed.”

While the Supreme Court of the same case – *Petition No 3 of 2020* held, *inter alia*:-

“The issue of jurisdiction has been canvassed severally before this court since its inception. Jurisprudence on the same has been established through a number of decisions that have come before it,Citing the decision of R v Karisa Chengo [2017] eKLR, the court determined that by jurisdiction is meant the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its



decision. The limits of this authority are imposed by the stature, charter or commission under which the court is constituted, and may be extended or restricted by like means. If no restrictions or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as the area over which the jurisdiction shall extend, or it may partake both these characteristics.....where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing, Jurisdiction must be acquired before Judgement is given”.

In the long run after hearing the appeal and considering all the issues raised thereof, this court upheld the decision of the Court of Appeal. My own quick interpretation of the decision by these two superior courts is that the Environment & Land Court while handling such cases presented before it has to make a clear distinction of the matters to deal with and which ones to refer to NET. The court is left to strictly deal with matter on the infringement, threat, denial and violation of the bill of rights and the right to clean and healthy environment is concerned. All the other issues are to be referred to NET in accordance with the provision of section 125 and 129 of *EMCA, 1999*. That is exactly what this court has proceeded to do in concurrence with the preliminary objection raised by the 1st and 2nd respondents herein.

39. To me the petitioner has filed this petition with great precision. Precision does not entail a formulaic prescription of the constitutional provisions alleged to have been infringed. A Petitioner, by whichever method, in his or her pleadings needs only identify the rights complained of and provide particulars of the rights which entails detailing the way the alleged rights were infringed. The honorable court, therefore, is of the view that the petitioners did draft this petition with a reasonable degree of precision, hence it cannot be termed as a bootstrap. Further to this under provision article 162 (2) (b) of the *Constitution* and sections 4 and 13 of the *Environment and Land Court Act*, gives this court the legal mandate to hear any matter related to the environment and land, including constitutional petitions such as this instant one.

Issue No (d) Who Will Bear The Costs Of The Preliminary Objection?

40. As it has been settled that costs are a discretion of the court. Costs is an award which is granted to a party after the conclusion of any proceedings, legal action or process.

In this case, the matter being of great public interest and taking that the preliminary objection dated May 24, 2022 filed by the 1st and 2nd respondents has partly succeeded then in the given circumstances, it is just fair that each party bears their own costs.

V. Conclusion & Disposition

41. Ultimately, after the elaborate analysis of the framed issues herein, this honorable court now proceeds to make the following findings in relation to the filed preliminary objection. These are:-
- a. That a declaration that this honorable court has jurisdiction to hear and determine the notice of motion application dated May 5, 2022 and the main petition dated May 5, 2022 based on the powers vested on it under section 93 (1) of *PLUPA* and the as long as there is no Liaison Physical & Committee established under the *PLUPA* under the provision of sections 72 and 73 of *PLUPA* for the County Government of Mombasa.
 - b. That arising from the above finding therefore, the doctrine of exhaustion and constitution avoidance is not applicable here.



- c. That a declaration be and is hereby made that all matters pertaining to the issuance of fresh environmental impact assessment (EIA) and Environmental Audit and issuance of a report thereof raised up in this pleadings hereof under prayers (b) (iv) & (v) respectively to be petitioned by any party herein to be dealt with and finalized by the National Environment Tribunal within the next fourteen (14) days from the date of this ruling as provided for under section 129 (1) of *EMCA, 1999* and the legal ratio of the Court of Appeal and Supreme Court decision of *Kibos Distributers Limited* (*supra*) and thus for that reason the doctrine of exhaustion be applicable in this case and to that extent the preliminary objection dated May 24, 2022 be and is hereby allowed.
- d. That for expediency sake, both the notice of motion application and the main petition both dated May 5, 2022 to have been heard and finally disposed off within the next ninety (90) days from the date of this ruling. There shall be a mention of the matter on October 12, 2022 for purposes of ascertainment on compliance of these directions and further orders forward moving thereof.
- e. That in the meantime the interim conservatory orders granted be and are hereby extended to October 12, 2022.
- f. That being a matter of great public interest each party to bear their costs.

It is ordered accordingly.

RULING SIGNED, DELIVERED AND DATED THIS 26TH DAY OF JULY 2022

HON JUSTICE MR LL NAIKUNI

JUDGE

ENVIRONMENT & LAND COURT AT MOMBASA

In the presence of:

- a. M/s Yumnah, Court Assistant.
- b. Mr Muliro Advocate for the petitioners.
- c. Mr Makau Advocate for the 1st & 2nd respondents.
- d. Mr Tajbhai Advocate for the 3rd respondent.
- e. Mr Makau Advocate holding brief for Lizansa Advocate for the 4th respondent.

