



**Sikalieh (Chairman) Suing on behalf of Karen Langata District Association  
v Nairobi County Government & 3 others (Environment & Land Petition  
E039 of 2022) [2022] KEELC 15120 (KLR) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15120 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION E039 OF 2022  
OA ANGOTE, J  
NOVEMBER 24, 2022**

**BETWEEN**

**SAMORA SIKALIEH (CHAIRMAN) SUING ON BEHALF OF KAREN  
LANGATA DISTRICT ASSOCIATION ..... PETITIONER**

**AND**

**THE NAIROBI COUNTY GOVERNMENT ..... 1<sup>ST</sup> RESPONDENT  
NAIROBI METROPOLITAN SERVICES ..... 2<sup>ND</sup> RESPONDENT  
MANJIT SINGH SETHI ..... 3<sup>RD</sup> RESPONDENT  
PERMINDER SINGH SETHI ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. This Ruling is in respect of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents' Notice of Preliminary Objection dated 12<sup>th</sup> October, 2022, objecting to the Motion and Petition of 29<sup>th</sup> September, 2022 on the grounds that;
  - i. This Honourable Court is bereft of jurisdiction on account of Sections 76, 78(a) and (b), and 80(3) of the *Physical and Land Use Planning Act*, 2019 which inter-alia established the County Physical and Land Use Planning Liaison Committee and demands that the Committee has jurisdiction to hear and determine complaints and claims made in respect to applications submitted to the Planning Authority in the county;(b) hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the county; and that the Chairperson of a County Physical and Land Used Planning Liaison Committee shall cause the determination of the committee to be filed in the Environment and Land Court and the Court shall record the determination of the committee as a judgment of the Court and published in the Gazette of at least one newspaper of national circulation.



- ii. The issues for determination in the Application and Petition herein are res judicata in that a decision was rendered on the same by the Nairobi City County Physical and Land use Planning Liaison Committee vide the Notification of Determination dated 3<sup>rd</sup> March, 2022 in No NCCG/NMS/PLUPLC/004/2022 and no appeal or review has been preferred against the same.
  - iii. The purported Application and Petition as framed and filed is a disguised Appeal against the decision of the Nairobi City County Physical and Land Use Liaison Planning Committee when no such Appeal has been properly filed.
  - iv. The Application and Petition as framed and filed is fatally defective, misconceived and an abuse of the Court process in that not only does it not raise constitutional issues for determination, but it also runs afoul of the doctrine of exhaustion of remedies.
2. The Preliminary Objection proceeded by way of submissions.

### Submissions

- 3. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents/ Applicants in the Preliminary Objection filed submissions on 21<sup>st</sup> October, 2022, wherein counsel submitted that this Court is bereft of jurisdiction on account of the fact that the Petitioner did not exhaust the remedies available to them under Sections 76, 78(a) and (b) and 80 (3) of the *Physical and Land Use Planning Act*, 2019.
- 4. It was submitted that the Court in Owners of the *Motor Vessel "Lilian S vs Caltex Oil (Kenya) Limited* [1989]eKLR, held that jurisdiction is everything and without it, a court cannot take one more step and that as espoused by the Court of Appeal in *Kibos Distillers & 4 Others vs Benson Ambuti & 3 Others* (2020) eKLR, a litigant cannot be allowed to confer jurisdiction on a court or to oust the jurisdiction of a competent organ through the art and craft of drafting pleadings.
- 5. Counsel for the Respondents submitted that in this respect, the Court in *Kibos Distillers (supra)* relied on the Supreme Courts' decisions in *Samuel Kamau Macharia & Another vs Kenya Commercial Bank & 2 Others*, Application No 2 of 2011 and *Benard Murage vs Fine Serve Africa Limited & 3 Others*[2015]eKLR where the Court reiterated that where there is an alternative statutory remedy, the same should be pursued first before recourse is had to the Court.
- 6. According to counsel, the Petitioner ought to have first approached the Nairobi County Planning and Liaison Committee as provided for under Section 78 of the *Physical Planning and Land Use Act*, 2019 and that the prayers in the Petition essentially challenge the granting of development permission to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents to develop the suit property which issue falls within the statutory remit of the County Liaison Committee.
- 7. It was submitted that as per the doctrine of exhaustion, this Court should be a last resort. Reliance in this respect was placed on the cases of *Mercy Wangari Buku vs National Environmental Authority & 3 Others* [2021] eKLR and *Geoffrey Muthinja Kabiro vs Samuel Muguna Henry* [2015] eKLR.
- 8. Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents submitted that the Court ought to align itself with the reasoning in the decision of *Issa Ahmed & 15 Others vs Mohamed Al -Sawae* [2021] eKLR where the Court, faced with a similar objection, found that the Plaintiff ought to have followed and exhausted the alternative mechanism provided by Parliament under the *Physical Planning and Land Use Act* before engaging the Environment and Land Court.



9. The 1<sup>st</sup> Respondent's counsel filed submissions on 31<sup>st</sup> October, 2022 wherein counsel submitted that the 1<sup>st</sup> Respondent agrees and aligns itself with the submissions by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents' counsel. Counsel placed further reliance on the case of *Mui Coal Basin Local Community & 15 Others vs Permanent Secretary, Ministry of Energy & 17 Others*[2017]eKLR in which the Court engaged into an in-depth discussion of the dispute resolution system in the country.
10. The 1<sup>st</sup> Respondent's counsel relied on the case of *KKB vs SCM & 5 Others*(Constitutional Petition No 014 of 2020)KEHC 289,(KLR)(22<sup>nd</sup> April, 2022) *Eric Kiprotich Soi & Another vs Director General Nairobi Metropolitan Services*[2022]eKLR which discussed the concept of constitutional avoidance in which courts are called upon to decline to entertain matters brought before them where there is another mechanism through which the dispute could be resolved.
11. In opposition to the Preliminary Objection, the Petitioner's counsel filed submissions on 28<sup>th</sup> October, 2022. Counsel submitted that this Court is duly vested with jurisdiction to determine the present Motion and Petition and the same are not res judicata.
12. Counsel submitted that Section 76 of the *Physical and Land Use Planning Act* establishes the County Physical and Land Use Planning Committee for each county while Section 78(a) empowers the Committee to hear and determine complaints and claims made with respect to the planning authority in the County while Section 78(b) empowers the Committee to hear appeals against decisions made by the Planning Authority with respect to physical and land use development in the County.
13. It was submitted that the Petition raises constitutional issues that go beyond the jurisdiction of the County Physical and Land Use Planning Liaison Committee; that the Petition raises issues touching on the Petitioner's right to a clean and healthy environment as set out under Article 42 of the *Constitution*; breach of Article 69(1) which guarantees the Petitioner's rights to meaningful participation in the management and conservation of the environment and breach of Article 35 of the *Constitution* which guarantees the right to information.
14. It was submitted that the Petitioner has also challenged the legality of the decision by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to grant the 3<sup>rd</sup> and 4<sup>th</sup> Respondents permission to undertake construction on the suit property in violation of the judgment and decree of this Court in ELC Petition 40 of 2020 where the Court vide its judgment on the 21<sup>st</sup> October, 2021 prohibited the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from *inter alia* approving physical developments or issuing development permissions or change of user under the *Physical Planning Act* without giving the Petitioner all the necessary information and the opportunity to make written or oral comments.
15. It was submitted that the Court equally prohibited the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from issuing any approvals that don't comply with the local Physical Development Plan No 42/25/2005/1-Approved Plan 292 published in Kenya Gazette 6137 of 4/8/2006.
16. According to Counsel, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' actions being contrary to the judgment of the Court are a threat to the rule of law as a national value and principle of governance pursuant to Article 10 of the *Constitution* and that the aforementioned are constitutional questions which this Court can determine.
17. Reliance was placed on the case of *Paolo Di Maria & 5 Others vs Alice M Kuria & 5 Others*[2021] eKLR and *Dominic G Ng'ang'a & Anor vs Director General Environmental Management Authority & 4 Others*[2020]eKLR where it was held that the ELC had jurisdiction to entertain the matter as it raised concerns relating to the violation of a clean and healthy environment.



18. Reliance was further placed on the cases of *Taib Investments Limited vs Fabim Salim Said & 5 Others* [2016]eKLR and *Mohamed Said vs County Council of Nandi*[2013]eKLR.

### **Analysis & Determination**

19. Having considered the Preliminary Objection, and the submissions in support and in opposition thereto, the issues that arises for determination are;
- i. Whether the Preliminary Objection is competent and if so?
  - ii. Whether the Preliminary Objection is merited?
20. The threshold of a Preliminary Objection was set out by the Court of Appeal in the *locus classicus* case of *Mukisa Biscuits Manufacturing Co. Ltd. vs West End Distributors* (1969) EA 696 at 700 wherein Law, JA stated that:
- “...a ‘preliminary objection’ consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
21. Newbold, P further held as follows:
- “ A Preliminary Objection is in the nature of what used to be a demurrer. 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 is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing butt unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”
22. The Supreme Court in the case of *Hassan Ali Jobo & Another vs Suleiman Said Shabbal & 2 Others*, Petition NO. 10 of 2013, [2014] eKLR re-affirmed the principle as set out in the Mukhisa case stating;
- “ A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. 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 is the exercise of judicial discretion’.”
23. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents’ Preliminary Objection is three pronged. First, that the Court has no jurisdiction to entertain this matter which jurisdiction lies with the County Physical Planning Liaison Committee and as such, the institution of the matter in this Court contravenes the exhaustion doctrine. Second, that no constitutional questions have been raised in the Petition and Motion, and lastly, that the issues for determination in the Motion and Petition are res judicata as a decision on the same was rendered by the Nairobi City County Physical and Land Use Planning Liaison Committee.



24. It was submitted by the Respondents' counsel that the Motion and Petition as framed are a disguised Appeal against the decision of the Nairobi City County Physical and Land Use Planning Liaison Committee when no such appeal has been filed.
25. It is trite that jurisdiction is everything. The significance of jurisdiction was succinctly captured by Nyarangi, J.A. in *Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited* [1989] KLR 1:
- “Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that 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 judgment is given.”
26. Similarly, the Court of Appeal in the case of *Kakuta Maimai Hamisi vs Peris Pesi Tobiko & 2 Others* [2013] eKLR had the following to say on the centrality of the issue of jurisdiction: -
- “So central and determinative is the jurisdiction that it is at once fundamental and overarching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.”
27. What is clear from the foregoing is that jurisdiction is a crucial aspect that when raised must be determined at the onset of the proceedings. It is potentially dispositive because if the Court is to find that it has no jurisdiction, it will have no option but to terminate proceedings.
28. The question as to whether the doctrines of exhaustion and constitutional avoidance have been contravened are pure questions of law as well because one needs to only look at the pleadings to ascertain the same and there is no need, so to speak, to receive evidence. The Court therefore finds that the question of jurisdiction as brought by the Respondents is a proper preliminary objection.
29. The next limb of the objection is with respect to the principle of res judicata. The plea of res judicata is anchored on Section 7 of the *Civil Procedure Act*, 2010 which provides that no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.
30. The Court of Appeal in the case of The *Independent Electoral and Boundaries Commission vs Maina Kiai & 5 Others*, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR, held that:
- “Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;
- a. The suit or issue was directly and substantially in issue in the former suit.
  - b. That former suit was between the same parties or parties under whom they or any of them claim.



- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

31. In outlining the rationale behind the doctrine of res judicata, the Court of Appeal in *John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others* (2015) eKLR stated thus;

“The rationale behind res judicata is based on the public interest that there should be an end to litigation over the same matter. *Res judicata* ensures the economic use of the court’s limited resources and timely termination of cases. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law.”

32. A successful plea of res judicata will, where successful, dispose of the suit and the same is a proper preliminary question.

33. On the next limb which is that the Petition and Motion are a cloaked Appeal against the decision of the Nairobi City County Physical and Land Use Planning Committee, the Court is not convinced that the same constitutes a pure question of law. While it may hinge on the jurisdiction of the Court, deciphering whether the Petition and Motion are “disguised” of necessity involves an interrogation of the facts pushing this question outside the limb of a preliminary objection. As succinctly expressed by Ojwang, J (as he then was) in *Oraro vs Mbaja* (2005) KLR 141;

“A ‘Preliminary Objection’ correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point... Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”



34. It is claimed by the Respondents that the Motion and Petition are res judicata; that similar issues were determined by the Nairobi City Council Physical and Land Use Planning Liaison Committee vide the Notification of Determination dated 3<sup>rd</sup> March, 2022 in No NCCG/NMS/PLUPLC/004/2022 and that no appeal or review has been preferred against the same.
35. The Court has considered the record. The Notification of determination No. NCCG/NMS/PLUPLC/004/2022 has been adduced thereto. The same was filed by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents herein as against the 2<sup>nd</sup> Respondent. After hearing the parties, the Nairobi County Physical and Land Use Planning Liaison Committee held the Appellants (2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein) had satisfied the Condition relating to storm water drainage.
36. Having considered the decision of the Committee against the principles espoused in The *Independent Electoral and Boundaries Commission vs Maina Kiai & 5 Others*, (*supra*), it is apparent that it falls short of the principle of res judicata. While the parties in the present Petition are similar to those in the Complaint, it is apparent that the Complaint has not been finally determined.
37. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents have averred that this Court does not have jurisdiction to determine this Petition as the jurisdiction is vested in the County Physical and Land Use Planning Liaison Committee and that the Petitioner has, by instituting the Motion and Petition, gone against the doctrine of exhaustion.
38. In response, the Petitioner asserts that whereas indeed it is aggrieved by the decision to award development approvals to the 3<sup>rd</sup> & 4<sup>th</sup> Respondents to construct on the suit property, its grievances also touch on violation of constitutional rights, which issues this Court has jurisdiction to determine.
39. The doctrine of exhaustion requires a party to exhaust any alternative dispute resolution mechanism provided by statute and/or law before resorting to the courts. Indeed, it is now generally accepted that a party is required to exhaust any alternative dispute resolution mechanism before filing a matter in court as a matter of law. To this end, the Court of Appeal in the case of *Geoffrey Muthinja & Another v Samuel Muguna Henry & 1756 Others*[2015]eKLR observed as follows:
- “It is imperative that where a dispute resolution mechanism exists outside courts, the same must 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.”
40. The question of what invokes the doctrine of exhaustion before embarking on the Court process was aptly discussed in the case of *William Odhiambo Ramogi & 3 others vs Attorney General & 4 Others: Muslims for Human Rights & 2 Others(Interested parties)* [2020]eKLR by a five judge bench as follows:
- “The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine 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...”

41. The Court went on to outline the exceptions to the rule as follows:

“As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court’s jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.

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.”

42. Turning to the facts of this case, the Petitioner challenges the legality of approval of development permissions issued by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to the 3<sup>rd</sup> & 4<sup>th</sup> Respondents to undertake construction of 12 houses on L.R No 192/14 measuring 2.541Ha along Lower Peponi Road Karen(hereinafter the suit property) on the basis that the Petitioner was not given all the relevant information nor an opportunity to participate by providing written or oral comments as required by the applicable law.
43. It is the Petitioner’s case that the 1<sup>st</sup> Respondent failed to live up to its obligations under the Recognition Agreement leading to the Petitioner filing Petition No 40 of 2018 seeking declarations that the Respondents failure to give effect to the Recognition Agreement was unconstitutional and breached the Petitioners legitimate expectations and prohibitions restraining the Respondents from approving physical developments or issuing physical developments permissions or change of user in the Petitioners zone or issuing the same without giving the Petitioner all the relevant information.
44. According to the Petitioner, the Court *vide* its judgment delivered on the 21<sup>st</sup> October, 2021, found in favour of the Petitioner and granted them the orders sought.
45. In the current Petition, the Petitioner has sought for an order invalidating/nullifying and or quashing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents’ decision to approve constructions aforesaid, an injunction restraining the Respondents or any person under their control from cutting down indigenous trees, excavating, and undertaking construction of the 12 houses on the suit property and a prohibition order to restrain the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from approving physical developments or issuing development permissions on the suit property without submitting to the Petitioner all the information regarding the development applications.



46. The Motion, filed simultaneously with the Petition, is seeking for a temporary injunctive order to restrain the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from undertaking of any construction on the suit property pending the hearing and determination of the Petition.
47. The Petitioner has contended that contrary to the judgment of the Court aforesaid, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have proceeded to approve and license the 3<sup>rd</sup> and 4<sup>th</sup> Respondents to undertake construction on the suit property; that the construction violate the Physical Planning Act and the zoning policy set out in the Karen Langata Physical Development Plan; that the actions of clearing and excavating the property in preparation for construction of the houses is causing environmental destruction and that the Respondents' actions contravene several constitutional provisions including Article 10, 35, 42, 69(1)(d), 69(2), 159(1).
48. Having regard to the foregoing narration, and in particular the orders sought by the Petitioners, it is apparent that they are aggrieved by the decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to issue development permission to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents to undertake construction on the suit property.
49. Pursuant to section 2 of the *Physical Land Use Planning Act*, 2019, the county executive committee is the authority responsible for development control and planning within the county, meaning that they are responsible for, amongst other things, the issuance of development approvals, compliance and licenses. Section 61(3) of the *Act* provides for a complaint mechanism against a decision of the County Executive Committee;

“An applicant or an interested party that is aggrieved by the decision of a county executive committee member regarding an application for development permission may appeal against that decision to the County Physical and Land Use Planning Liaison Committee within fourteen days of the decision by the county executive committee member and that committee shall hear and determine the appeal within fourteen days of the appeal being filed.”

50. Section 76 of the *Physical and Land Use Planning Act*, 2019 provides as follows;

“There is established a County Physical and Land Use Planning Liaison Committee for each county.”

51. Section 78 outlines the functions of the Liaison Committees as follows:

78. The functions of the County Physical and Land Use Planning Liaison Committee shall be to  
—
  - (a) hear and determine complaints and claims made in respect to applications submitted to the planning authority in the county;
  - (b) hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the county;
  - (c) advise the County Executive Committee Member on broad physical and land use planning policies, strategies and standards; and
  - (d) hear appeals with respect to enforcement notices.



52. Whereas Section 80 under the head- Appeal to a County Physical and Land Use Planning Liaison Committee provides;

- “(1) A person who appeals to County Physical and Land Use Planning Liaison Committee shall do so in writing in the prescribed form.
- (2) A County Physical and Land Use Planning Liaison Committee shall hear and determine an appeal within thirty days of the appeal being filed and shall inform the appellant of the decision within fourteen days of making the determination.
- (3) The Chairperson of a County Physical and Land Use Planning Liaison Committee shall cause the determination of the committee to be filed in the Environment and Land Court and the court shall record the determination of the committee as a judgment of the court Procedure of the County Physical and Land Use Planning Liaison Committees. Appeal to a County Physical and Land Use Planning Liaison Committee 653 2019 Physical and Land Use Planning and published in the Gazette or in at least one newspaper of National circulation.”

53. The aforementioned sections clearly set out the procedure for complaints against the approval permissions issued by the county. The above notwithstanding, the Petitioner contends that the issues raised herein go far beyond the ambit of the County Physical and Land Use Planning Liaison Committee and that the Petition is seeking this court to answer constitutional questions.

54. This brings us to the doctrine of constitutional avoidance. The said doctrine frowns upon the practice of bringing ordinary disputes to the constitutional court. The Supreme Court observed as follows in *Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 Others* [2014] eKLR:

- “(256) The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v. Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed...”

- (258) From the foundation of principle well developed in the comparative practice, we hold that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents’ claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright-infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court.”

55. The effect of the doctrine of constitutional avoidance is that where there are adequate statutory avenues for resolution of a dispute, the constitutional court will defer to the statutory options and



decline to entertain the dispute. In essence, therefore, when formulating his claim, a claimant must pursue statutory relief where it is available through an ordinary suit as opposed to approaching the constitutional court.

56. In *Sumayya Athmani Hassan vs Paul Masinde Simidi & Another* [2019] eKLR the Court of Appeal stated as follows:

“... where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the *Constitution* without challenging the legislation in question. That principle has been reinforced by the Supreme Court in *Communications Commission case (supra)*.

(17) In conclusion, we find that the alleged unlawful interdiction and termination of a contract of employment was not a constitutional issue and thus the petition did not disclose a cause of action anchored on the *Constitution*. Accordingly, the petition being incompetent, the court acted in excess of jurisdiction and erred in law in determining the petition. ...”

57. Going back to the pleadings, the Petitioner raises several issues touching on the enforcement of the Recognition Agreement and compliance with court orders and constitutional violations. However, the Petition and the Motion ultimately are seeking to quash the development approvals and injunctive orders on the basis that they violate the *Physical and Land Used Planning Act* as well as Clause 2.4(a) of Recognition Agreement.

58. The Petitioner’s argument being in the nature of breach of the *Physical and Land Use Planning Act* and contract can be canvassed in an ordinary civil suit. No constitutional question or indeed remedy is sought from the Court.

59. As held in the case of *Revital Healthcare (Epz) Limited & Another vs Ministry of Health & 5 Others* [2015] eKLR quoted with approval the case of *John Harun Mwau vs Peter Gastrow & 3 Others* [2014] eKLR:

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights....It is an established practice that where a matter can be disposed of without recourse to the *Constitution*, the *Constitution* should not be invoked at all. ...”

60. In the case of *Kibos Distillers Limited & 4 Others vs Benson Ambuti Adega & 3 Others* [2020] eKLR, it was held by the Court of Appeal that a court cannot arrogate itself an original jurisdiction simply because claims and prayers in a Petition are multifaceted. The Court of Appeal went further to hold that the concept of multifaceted claim is not a legally recognized mode for conferment of jurisdiction to any court or statutory body.

61. Having considered the law and the decisions of the Court of Appeal and the Supreme Court, it is the finding of this court that where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the *Constitution* without challenging the legislation in question.



62. As was held by the Court of Appeal in *Kibos Distillers Limited & 4 Others vs Benson Ambuti Adegga & 3 Others* [2020] eKLR, a party or litigant cannot be allowed to confer jurisdiction on a court or to oust jurisdiction of a competent organ through the art and craft of drafting of pleadings.
63. Even if a court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs, in this case the Nairobi City County Physical and Land Use Liaison Planning Committee, that has been legislatively mandated to hear and determine disputes relating to approvals of development plans by the 1<sup>st</sup> Respondent.
64. That being the case, the Petitioner should challenge the permission that was granted to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents to develop the suit property as provided for in the *Physical and Land Use Planning Act*. Until the procedures provided for in the *Physical and Land Use Planning Act* are exhausted, this court is bereft of jurisdiction.
65. To the extent that the Petition and the Motion ultimately are seeking to quash the development approvals and injunctive orders on the basis that they violate the *Physical and Land Use Planning Act* as well as Clause 2.4(a) of Recognition Agreement, it is the finding of this court that the Petition and the Motion offends the doctrines of exhaustion and constitutional avoidance, thereby depriving this court of the jurisdiction to hear and determine it.
66. In view of the foregoing, the Court is satisfied that grounds 1 and 4 of the Notice of Preliminary Objection dated 12<sup>th</sup> October, 2022 have been established.
67. For those reasons, the Petition and the Notice of Motion dated 29<sup>th</sup> November, 2022 are struck out with costs to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Mr. Ondego for Petitioner

Mr. Kiprono for 3<sup>rd</sup> and 4<sup>th</sup> Respondent

Ms Muthee for Wafula for 1<sup>st</sup> Respondent

