



Northern Block Residents Limited v Gigiri Mart Limited & 2 others (Petition E063 of 2024) [2025] KEELC 1196 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1196 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

PETITION E063 OF 2024

MD MWANGI, J

MARCH 7, 2025

IN THE MATTER OF ARTICLES 1, 10, 21,22, 23, 42, 47, 69, 70, 162 AND 184 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 55, 56 AND 61 OF THE PHYSICAL AND LAND USE PLANNING ACT

AND

IN THE MATTER OF SECTION 58 (7) OF THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT, 1999

AND

IN THE MATTER OF ENVIRONMENTAL (IMPACT ASSESSMENT AND AUDIT) REGULATIONS, 2003 (REGULATIONS)

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS AND ENFORCEMENT OF THE CONSTITUTION) PRACTICE AND PROCEDURE RYLES 2013 AND ALL OTHER ENABLING POWERS AND PROVISIONS OF LAW

BETWEEN

NORTHERN BLOCK RESIDENTS LIMITED PETITIONER

AND

GIGIRI MART LIMITED 1ST RESPONDENT

NAIROBI CITY COUNTY GOVERNMENT 2ND RESPONDENT



**NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY 3RD
RESPONDENT**

JUDGMENT

Background

1. This matter was instituted vide the petition dated 31st July 2024. The Petitioner, Northern Block Residents Limited describes itself as a registered society representing residents of Red Hill Road Area. It pleads that it seeks to protect the community's constitutional rights to a clean and healthy environment and meaningful public participation in development decisions affecting them.
2. The Respondents who have been sued are Gigiri Mart Limited, which is described as the developer being the 1st Respondent. Nairobi City County Government is the 2nd Respondent whereas the National Environmental Management Authority (NEMA) is the 3rd Respondent.
3. In the introduction of the petition, the Petitioner states that the petition concerns the development of a convenient store by the 1st Respondent on a parcel of land along Red Hill Road in Nairobi. The Petitioner avers that the 1st Respondent obtained approvals from the 2nd Respondent to construct the store despite the area being zoned for low density residential use.
4. The Petitioner further asserts that the issues in the petition revolve around the lack of meaningful public participation before the approvals were granted, the potential negative impacts on the adjacent wetland as confirmed, by the National Land Commission and the failure by the Respondents to provide information to the residents regarding the approval process.
5. The Petitioner justifies filing its petition before this court on the premises that the court has the jurisdiction conferred under Article 62(2)(b) of *the Constitution* to hear and determine disputes in relation to the environment and the use and occupation of land. Section 13 of the ELC Act underscores the court's jurisdiction over matters relating to environmental planning and protection, climates issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals, and other natural resources.
6. The Petitioner further avers that the statutory mechanisms such as appeals to the National Environment Tribunal (NET) or engagements with County Physical and Land Use Planning Liaison Committees are inadequate and not efficacious in this instance on the basis that the claims in the petition involve direct constitutional violations, which are beyond the scope of the administrative bodies.
7. The Petitioner invokes the provisions of article 70 of *the Constitution* which allows any person who alleges that their right to a clean and healthy environment has been violated to apply to court for redress. The Petitioner further alleges that the 1st Respondent's application for development permission fell short of the provision of Section 58 of the *Physical and Land Use Planning Act*, 2019 (PLUPA) that requires that an applicant for development permission submits their application in the prescribed form to the county executive committee member accompanied by the prescribed documents, plans and particulars. The Petitioner contends that the development permission given to the 1st Respondent was irregular.
8. The Petitioner further claims that the Environment Impact Assessment (EIA) Study Report submitted by the 1st Respondent to the 2nd Respondent, NEMA was deficient. It further alleges that the 1st



Respondent commenced construction before obtaining an Environment Impact Assessment (EIA) license contrary to the provisions of Section 58 of the *Environmental Management and Co-ordination Act* 1999 (EMCA).

9. It is the Petitioner's further claim that the project report submitted by the 1st Respondent to NEMA fell short of the requirements of regulation of the Environmental (Impact Assessment and Audit) Regulations, 2003. Further that there was no meaningful public participation during the conduct of the Environment Impact Assessment (EIA) study contrary to the provisions of Regulation 17.
10. The Petitioner particularizes the infringement/violations of its fundamental rights at paragraph 51 of its petition alleging that the process leading to the approval and ongoing construction of Gigiri Mart was fundamentally flawed and violated several constitutional rights and fundamental freedoms of the Petitioner and its members. The Petitioner highlights the alleged violations as;
 - i. Violation of the right to public participation,
 - ii. Violation of the right to a clean and healthy environment,
 - iii. Unfair administrative action, and
 - iv. Failure to ensure sustainable development.
11. The Petitioner prays for various orders, namely;
 - a. A declaration that the change of use and development permission granted to the 1st Respondent by the 2nd Respondent for the Gigiri Mart Development is unconstitutional, illegal, null and void ab initio for contravening mandatory statutory and regulatory requirements, including the need for meaningful public participation and a comprehensive environmental and social impact assessment.
 - b. An order setting aside the development permission granted by the 2nd Respondent to the 1st Respondent on 6th October 2021 for failing to comply with the mandatory conditions imposed therein, including the requirements for traffic assessment report and NEMA approval of the Environment Impact Assessment (EIA) report prior to the commencement of development.
 - c. A permanent injunction restraining the 1st Respondent, its agents, employees, servants or any other person acting under its authority or instruction from carrying out any further construction or operation of the Gigiri Mart Development.
 - d. An order directing the 1st Respondent to demolish, at its own costs any structures or developments erected or carried on the subject parcel of land in contravention of the applicable laws and regulations and to restore the land to its original state subject to the supervision and satisfaction of the relevant authorities.
 - e. The costs of this petition.
 - f. Any other relief that this Honourable Court may deem just and appropriate in the circumstances.

Response by the 1st Respondent

12. The 1st Respondent responded to the petition by way of a replying affidavit sworn by one Samuel Njuguna Kimani, a director of the 1st Respondent on 8th August 2024.



13. The deponent terms the petition as an afterthought and an abuse of the court process for the reasons that;
 - a. The Honourable Court lacks jurisdiction to hear and determine the matter;
 - b. The issues raised in the instant petition are res judicata and offend the doctrine of issue estoppel;
 - c. The Honourable Court is being invited to sit on appeal over a decision of a court of equal and concurrent jurisdiction which heard and determined the matter on merits in ELC Appeal E032 of 2023 (Vimal Shah –vs- Gigiri Mart Ltd & others);
 - d. The Honourable Court is being invited to exercise jurisdiction by bypassing existing remedies in regard to the resolution of development approvals under the *Physical and Land Use Planning Act* and the Environmental Management Act;
 - e. That the court is being invited to render an advisory opinion in a vacuum which jurisdiction the court lacks by virtue of Article 163 (6) of *the Constitution*;
 - f. That it is an abuse of the court process for material non-disclosure, the Petitioner and its advocates having failed to disclose the existence and conclusion of ELC Appeal E032 of 2023, wherein the question of development approvals was heard and determined on merit and which decision was not appealed from.
14. The 1st Respondent asserts that the material non-disclosure by the Petitioner renders the petition incompetent and a violation of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. In any event, the deponent asserts that the subs tram of the petition has since decapitated and the court is no longer seized of the jurisdiction to entertain hear and determine the instant petition and entertain these proceedings because;
 - i. Pursuant to Sections 6(3) and (4) ; 78; 80; and 93 of the *Physical and Land Use Planning Act* (PLUPA), the instant claim is overtaken by events and is stale as the Petitioner failed to invoke and exhaust the available dispute resolution mechanism therein and within the statutory timelines thereof.
 - ii. Pursuant to Sections 129 and 130 of the Environmental Management and Coordination Act (EMCA), the instant claim is overtaken by events and is stale as the Petitioner failed to invoke and exhaust the available dispute resolution mechanism therein and within the statutory timelines thereof.
15. The 1st Respondent insists that the jurisdiction of this court over decisions from the County Physical and Land Use Planning Liaison Committee is time bound jurisdiction and neither can the parties by consent or this court expand the timelines provided under the statutes. It would be akin to amending the provisions of the statute on the aspect of time-bound jurisdiction.
16. The 1st Respondent affirms that the 1st Respondent development approval was and is compliant with the law and all such processes were undertaken as required under the law. The 1st Respondent clarifies that its development is comprised of a multi-ongoing development whose value is over Kshs. 100 million together with the value of the suit property.
17. The 1st Respondent denies the alleged violations and contravention of *the constitution*. Contrary to the Petitioner’s allegations, the 1st Respondent asserts that it publicized its proposed development including change of user, and advertised the same in the local dialects inviting members of the public



to submit their concerns and complaints if any. No such concerns were raised by the Petitioner. They cannot therefore purport to bypass the set mechanism and raise grievances after the lapse of set statutory timelines for purposes of raising such concerns.

18. The 1st Respondent accuses the Petitioner of using these proceedings to engage the court in an academic exercise and merely vexing and dragging the 1st Respondent through the proceedings by giving the complaint a cosmetic face lift and changing the parties while gambling for similar orders that have been declined by the relevant bodies and a court of competent jurisdiction and equal status.
19. It is the 1st Respondent's case that the petition is premised on mere speculation and unreasonableness. The Petitioner has failed to plead its petition with precision on allegations of environmental degradation and wetlands and has further failed to give particulars as by law required.
20. The 1st Respondent claims that the Petitioner has misinterpreted and misapplied the import of Article 69 of *the Constitution* of Kenya, 2010 and has not demonstrated the nexus on the same in regard to the 1st Respondent's use and utilization of its private property since the same is not a national resource to be shared by all and sundry.
21. The 1st Respondent affirms that the effect of the orders sought by the Petitioner is to deny and take away its rights to utilize, and enjoy its occupation of the suit property in accordance with the provisions of Article 40 of *the Constitution*. Further, the grant of such orders would amount to discrimination of the 1st Respondent and a denial of its fundamental rights to equal protection of the law and the right to own property. It would also be subjected to double jeopardy by being condemned over matters that have been heard and determined by the relevant statutory bodies including a court of competent jurisdiction.
22. The 2nd and 3rd Respondents did not file responses to the petition. Indeed, the 3rd Respondent did not even enter appearance in this matter in spite of it having been served.

Supplementary affidavit by the Petitioner

23. The Petitioner filed a supplementary affidavit in response to the 1st Respondent's replying affidavit. The supplementary affidavit is sworn by one Dr. Samuel Moragia Nyachae at Nairobi on 30th November 2024.
24. The deponent states that the 1st Respondent's replying affidavit addresses procedural matters rather than addressing substantive constitutional violations raised in the petition. He asserts that the petition is distinct from ELC Appeal E032 of 2023 and is brought by a community organization seeking to protect environmental rights and enforce meaningful public participation in developmental decisions affecting their neighborhood. The deponent acknowledges the previous proceedings but insists that the constitutional issues raised in this petition were not substantively determined in that other matter.
25. The Petitioner reiterates that this court has the jurisdiction and indeed the constitutional obligation to hear and determine this petition notwithstanding the existence of those other statutory dispute resolution mechanisms for the reason that;
 - i. The violations are primarily constitutional in nature touching on fundamental rights and freedoms that can only be effectively addressed by this court.
 - ii. The statutory mechanism under the *Physical and Land Use Planning Act* (PLUPA) and the Environmental Management and Coordination Act (EMCA) are inadequate to address constitutional violations of this magnitude.



- iii. The environmental concerns raised involve matters of great public interest that transcend individual grievances and require constitutional remedies.
26. The Petitioner alleges that the doctrine of res judicata does not apply in this case because the parties in this petition are different from those in the previous proceedings and the subject matter of this petition involves constitutional rights not previously adjudicated. Finally, that the issues raised concern the ongoing violations affecting the broader community.
27. The deponent while acknowledging the 1st Respondent's right to develop its property under Article 40 of *the Constitution* affirms that the right must be balanced against;
- a. The community's right to a clean and healthy environment under Article 42 of *the Constitution*;
 - b. The right to public participation;
 - c. The right to fair administrative action; and
 - d. The State's obligations regarding environmental protection under Article 69.
28. The deponent highlighted that the 1st Respondent had failed to produce a comprehensive Environmental Impact Assessment conducted before commencing construction, approval of Environmental Impact Assessment by the 3rd Respondent, implementation of any environmental protection measures and mitigation strategies for the identified environmental risks. He further contradicts the 1st Respondent's claim on public participation stating that there was no meaningful public participation in the development approval process more specifically stating that there were no public meetings convened to discuss the proposed development nor was there any direct engagement with the affected residents. The purported newspaper advertisements were insufficient to constitute meaningful public participation. Further that there were no feedback mechanisms established to address community concerns.

Court's directions.

29. The directions by the court were that the petition be canvassed by way of written submissions. Though the 2nd Respondent had not filed a response to the petition, the court granted it leave to file written submissions on matters of law which it did.

Submissions by the Petitioner.

30. The Petitioner's submissions are dated 11th December 2024. The Petitioner reiterates that its petition challenges the constitutionality of development approvals granted to the 1st Respondent for the construction of Gigiri Mart on L.R. No. 12814.
31. On the jurisdiction of the court, the Petitioner insists that the court's jurisdiction is anchored in article 162(2)(b) of *the Constitution*. Further, the Petitioner submits that the Supreme Court decision in Nicholus –vs- Attorney General and 7 others (2023) KESC 113 (KLR) determined that the existence of alternative remedies does not automatically bar constitutional petitions where such alternative remedies are inadequate to address constitutional violations alleged. It argues that the principle is particularly relevant in this matter where the violations alleged transcend mere statutory non-compliance and strike at fundamental constitutional rights. The Petitioner submits that the constitutional jurisdiction of the court cannot be ousted by statutory provisions.



32. On the claim by the 1st Respondent that the petition is res judicata, the Petitioner submits that the elements established in *Mareka & another –vs- Gimu Development Company (K) Ltd (2024) KEELC 7413 (KLR)* have not been satisfied in this case. While acknowledging the previous matter involving an individual resident, the Petitioner asserts that the current petition;
- a. Is brought by a different party (a community organization) with distinct standing;
 - b. Raises constitutional issues not previously adjudicated;
 - c. Presents new evidence particularly regarding environmental impact; and
 - d. Seeks broader public interest remedies.
33. The Petitioner referring to the Court of Appeal decision in the case of the Independent Electoral & Boundaries Commission –vs- Maina Kiai (2017) eKLR, states that all the elements of res judicata must be satisfied conjunctively.
34. On statutory timelines, the Petitioner submits that constitutional rights cannot be limited by statutory provisions. In any event, it submits that the alleged constitutional violations are continuing in nature with ongoing environmental impact and persistent denial of public participation rights. The Petitioner further emphasizes on the public interest dimension of this petition stating that environmental rights, by their nature are collective rights affecting both present and future generations. Therefore, the remedies sought are in rem, not in persona, aiming to protect not just individual rights but the broader public good and environmental integrity.
35. On the violation of the right to a clean and healthy environment, under article 42, the Petitioner cites the case of *Adrian Kamotho Njenga –vs- Council of Governors & 3 others (2020) KEELC 3929 (KLR)* where it was held that the right has 3 distinct components, namely;
- i. The substantive right itself,
 - ii. Unrestricted access to court for redress when the right is threatened, and
 - iii. The courts broad remedial powers to prevent or discontinue environmental harm.
36. The Petitioner submits that the 1st Respondent’s actions constitutes egregious violations of both constitutional and statutory environmental protections. It alleges that there is no evidence that the 1st Respondent ever submitted its own EIA Report or obtained the mandatory license from NEMA. It alleges that the purported EIA acknowledgement letter dated 14th January 2021 was issued to Telkom Kenya Limited, not the 1st Respondent. It therefore submits that the 1st Respondent cannot invoke Section 58 (9) of EMCA regarding deemed approvals as the provision only applies where an applicant has actually submitted an EIA report and received no report within three months.
37. The Petitioner relies on the case of *Ken Kasinga –vs- Daniel Kiplangat Kirui & 5 others (2015) eKLR*, where as he submits, the court held that where environmental protection procedures are not followed, including public participation, then an assumption may be drawn that the right to a clean and healthy environment is under threat. The Petitioner submits that the 1st Respondent’s environmental compliance present a threefold failure as follows:-
- a. No EIA report was submitted in their name;
 - b. No approved EIA study report has been produced; and
 - c. No NEMA license issued under Section 58 of EMCA.



38. The Petitioner further questions the 1st Respondent's documentation regarding riparian compliance. It asserts that no evidence has been presented to demonstrate compliance with the directive regarding riparian protection nor has any documentation been provided to authenticate the communications or establish a clear chain of authority between the various entities mentioned.
39. Regarding the protection of the wetland ecosystem adjacent to the development site, the Petitioner submits that without a proper EIA, there is no assessment of;
 - a. Direct impacts including wetland degradation, habitat destruction and water quality deterioration;
 - b. Indirect effects including increased traffic population and waste management challenges;
 - c. Cumulative environmental impacts on the broader ecosystem; and
 - d. Mitigation measures to address these impacts.
40. On the violation of the right to public participation, the Petitioner submits that public participation must be meaningful and not reduced to a mere formality or box-ticking exercise. Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations, 2003 prescribes specific requirements for public participation in environmental matters. It is the Petitioner's submission that the 1st Respondent's purported compliance with the regulations was inadequate. Consequently, it alleges that the failure of public participation has denied residents their constitutional right to participate in decisions fundamentally affecting their environment and community.
41. On the allegation of violation of the right to fair administrative action, the Petitioner accuses the 2nd Respondent of failing to take any enforcement action. It claims that no written reasons were provided for allowing deviation from mandatory requirements and there was a complete failure to monitor and enforce compliance with development conditions, neither was there any explanation provided for accepting environmental documentation from an entity other than the developer.
42. On costs, the Petitioner submits that each party should bear its own costs as its petition epitomizes public interest litigation seeking to protect fundamental environmental rights.

The 2nd Respondent's submissions.

43. The 2nd Respondent in setting out the background of the matter affirms that the application for change of user was applied for and granted to the 1st Respondent's predecessor in title such that at the time the property was transferred to the 1st Respondent, it was rightfully for use of construction of a convenience store.
44. Secondly, the 2nd Respondent submits that this court is being invited to adjudicate over a matter that has been considered and determined by the 2nd Respondent's County Physical and Land Use Liaison Committee, which is clothed with the requisite jurisdiction to hear and determine disputes of such nature.
45. Pursuant to the leave granted to the 2nd Respondent by the court, to submit on matters of law, the 2nd Respondent submits on two issues as follows;
 - i. Whether the approval given to the 1st Respondent by the 2nd Respondent was legally valid; and
 - ii. Whether the present suit as instituted by the Petitioner is an abuse of the process.



46. In addressing the 1st issue, the 2nd Respondent extensively submits on the Physical and Land Use Planning (General Development Permission and Control) Regulations, 2021. On change of user, the conversion of the suit property's use from "telephone exchange" to "convenience store" is not in dispute. To that extent, the 2nd Respondent submits that no case of non-compliance can arise.
47. The 2nd Respondent further submits that the Petitioner has put nothing forward to challenge the 1st Respondent's satisfaction of the requirements under Rule 15. The 2nd Respondent had no justification whatsoever to disqualify the 1st Respondent's application having satisfied all the regulatory requirements.
48. It is the 2nd Respondent's submissions that the 1st Respondent duly complied with the requirements for public participation having fully complied with Rule 16 by putting up an onsite notice. The Petitioner and its members were offered adequate opportunity to make known their views on the proposed change.
49. The 2nd Respondent refers to the decision in Mui Coal Basin Local Community and 15 others – vs PS Ministry of Energy & 17 others (2014) eKLR, on public participation, where it was held that public participation does not dictate that everyone must give their views on an issue of environmental governance.
50. On the 2nd issue, the 2nd Respondent relies on the decision in Karuri & others –vs- Dawa Pharmaceutical Company limited & others (2007) 2 EA 235, where the court inter alia stated that a constitutional court must guard its jurisdiction among other things to ensure that it sticks to its constitutional mandate and that it is not abused or trivialized.
51. The 2nd Respondent accuses the Petitioner of using craft to convert this matter into a constitutional one while it is not. The intention is to circumvent the laid down statutory processes for addressing the issues raised in the petition. It urges the court to exercise judicial restraint and dismiss the petition.

1st Respondent's submissions.

52. The 1st Respondent's submissions are dated 18th November, 2024. The 1st Respondent identifies two issues for determination, namely;
 - a. Whether the court has jurisdiction to hear and determine the petition; and
 - b. Whether the Petitioner has made a case to warrant the grant of the reliefs sought.
53. On the first issue, the 1st Respondent submits that the petition is a mere afterthought and an abuse of the court process for the reasons that;
 - i. The Honourable court lacks jurisdiction to hear and determine the matter;
 - ii. The issues raised in the instant petition are res judicata and offend the doctrine of issue estoppel;
 - iii. The Honourable court is being invited to sit on appeal over the decision of a court of equal and concurrent jurisdiction, which heard and determined the matter on merits in Nairobi ELCA E032 of 2023 (Vimal Shah –vs- Gigiri Mart Limited & others);
 - iv. The Honourable court is being invited to exercise jurisdiction by passing existing remedies in regard to the resolution of disputes over development approvals and environmental approvals under the *Physical and Land Use Planning Act* and the Environmental Management Act.



- v. That the court is being invited to render an advisory opinion in a vacuum which jurisdiction the court lacks by virtue of Article 163 (6) of *the Constitution* of Kenya, 2010.
54. The 1st Respondent accuses the Petitioner of abusing the process of court for material non-disclosure by failing to disclose the existence and conclusion of ELCA E032 of 2023, wherein the question of the development approvals was heard and determined and which decision has not been appealed from. The 1st Respondent relies on the decision in Sceneries Limited –vs- National Land Commission, (2017) eKLR, where emphasis was laid on the solemn duty of a person who approaches a court of law for a grant of relief, equitable or otherwise, to candidly disclose all the material/important facts/documents which have a bearing on the issues raised in the case.
55. The 1st Respondent further reiterates that the petition is res judicata insisting that the Petitioner already litigated over the issues being raised in the instant petition through Vimal Shah, one of its members.
56. The 1st Respondent further submits that the petition offends the principle and doctrine of issue estoppel and the Petitioner is thus precluded from raising the same issues pertaining to the grant of development approval after the same have been litigated upon and a decision rendered on merit over the same. It submits that res judicata is intertwined with issue estoppel. The Petitioner is merely abusing the court process by litigating and re-opening the same issues that have been previously litigated upon and judgment rendered on the same. In essence, this court is being invited to sit on appeal over its own decision
57. The 1st Respondent cites the case of Graham Rioba Sagwe & others –vs- Fina Bank Limited & 5 others (2017) eKLR, where the court outlined situations that may give rise to abuse of the court process. It is the 1st Respondent’s case that the Petitioner has not come to court with clean hands.
58. On the issue whether the Petitioner has made out a case to warrant issuance of the orders sought, the 1st Respondent submits that the Petitioner has not established any violation or contravention of any of its rights. The Petitioner is merely engaging the court in an academic exercise and vexing and dragging the 1st Respondent through these meaningless proceedings. The petition is speculative and unreasonable. The Petitioner has not therefore made a case for the grant of the orders sought.

Issues for determination

59. Having considered the petition, the response by the 1st Respondent and the submissions on record by the Petitioner and the 1st and 2nd Respondents, the issues for determination in this case are:-
- a. Whether the court has the jurisdiction to hear and or entertain the petition as a whole or any portion of it;
 - b. Whether the Petitioner has proved the alleged constitutional violations and or violations of its right to a clean and healthy environment;
 - c. Whether the Petitioner is entitled to any of the reliefs sought in the petition; and
 - d. What orders should issue in regard to the costs of the petition.



Analysis for determination

A. Whether the court has the jurisdiction to hear and or entertain the petition as a whole or any portion of it.

60. Needless to say, jurisdiction is central in every proceeding. As pronounced in the case of Republic – vs- Karisa Chengo (2017) eKLR;

“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 statute, charter or commission under which the court is constituted and may be extended or restricted by like means. If no restriction 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 to 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 judgment is given”.

61. In Samuel Kamau Macharia & another –vs- Kenya Commercial Bank Limited & 2 others, the Supreme Court of Kenya emphasized on the issue of jurisdiction stating that;

“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.”

62. The issues in this case resonates with issues in the case of Nicholus –vs- Attorney General and 7 others; National Environmental Complaints Committee and 5 others (supra) determined by the Supreme Court of Kenya. In its decision, the Supreme Court of Kenya quoted its earlier decision in the case of NGOs Co-ordination Board –vs- EG & 4 others KESC 17 (KLR), where it had discussed the doctrine of exhaustion adopting its earlier finding in the case of Albert Chaurembo Mumbo & 7 others –vs- Maurice Munyao & 148 others, stating that,

“Even where superior courts have jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunal or any quasi-judicial authorities and organs to deal with the dispute as provided in the relevant parent statute.”

63. The import of this pronouncement by the Supreme Court of Kenya on the principle of exhaustion is that courts must exercise restraint and must give deference to disputes resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance.

64. The principle of exhaustion is now well established in this country. The High Court in the case of Republic –vs- IEBC Ex-parte National Super Alliance (NASA) Kenya & 6 others (2017) eKLR, observed that the principle is now of esteemed judicial lineage in this country. As early as 1992, the Court of Appeal in the case of Speaker of National Assembly –vs- Karume (1992) KLR 21, had stated that,

“Where there is a clear procedure for redress of any particular grievance prescribed by *the constitution* or an Act of Parliament that procedure should be strictly followed. Accordingly,



the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

65. In the case of Geoffrey Muthiga Kabiru & 2 others –vs- Samuel Munga Henry & 1756 others (2015) eKLR, the Court of Appeal affirmed the principle of exhaustion when it 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 brew The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is 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...this accords with Article 159 of *the Constitution* which commands courts to encourage alternative means of dispute resolution.”
66. The Supreme Court of Kenya in the Nicholus case (supra) too emphasized on the principle of exhaustion and stated that it is only in exceptional cases that the court can resort to any other process known in law if the alternative remedy is deemed inadequate.
67. I find the petition before me quite intriguing. Whereas the Petitioner, painstakingly insists that its petition is wholly intended to enforce its constitutional rights and seek redress for infringement and violations of those rights, it goes round and round but ends upon challenging the grant of development approvals to the 1st Respondent by the 2nd Respondent; a grievance that squarely falls within the mandate of the County Physical and Land Use Planning Liaison Committee established under Section 76 of the *Physical and Land Use Planning Act*.
68. The petition further challenges the grant of an Environmental Impact Assessment License by the 3rd Respondent. This is a challenge that falls under the mandate of the National Environment Tribunal (NET) established under *Environmental Management and Co-ordination Act* (EMCA).
69. The Petitioner in its petition asserts that the 1st Respondent obtained approvals from the 2nd Respondent to construct the convenient store despite the area being zoned as a low density residential use. It goes further and aver that its petition revolves around the lack of meaningful public participation before the approvals were issued, the potential negative impacts on the adjacent wetland and failure by the Respondents to provide information to residents regarding the approval process.
70. The liaison committee established under Section 76 of *Physical and Land Use Planning Act* (PLUPA) is mandated to amongst other functions hear and determine complaints and claims made in respect to applications submitted to the planning authority in the county and hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the County.
71. The Liaison Committee comprises of professionals with the expertise to address matters physical and land use development and planning. Amongst the professionals constituting the committee is a registered physical planner, a registered architect, a registered surveyor and representatives from the National Land Commission and National Construction Authority. The committee is further authorized under Section 77 (2) of *Physical and Land Use Planning Act* (PLUPA) to co- opt a maximum of five (5) experts to assist in its deliberations.
72. The Liaison Committee is, in this court’s opinion adequately equipped and resourced in terms of professional capacity to handle the issues of physical land use and development.



73. It appears like the Petitioner's real intention was to challenge the constitutionality and adequacy of the Rules established under the two statutes, i.e. the *Physical and Land Use Planning Act* (PLUPA) & the *Environmental Management and Co-ordination Act* (EMCA), but again shies off. Its petition falls short of that. To that extent, the court agrees with the submissions of the 1st Respondent that the Petitioner is inviting this court to render an advisory opinion. It is merely engaging the court in an academic exercise.
74. It is difficult to fathom, as the Supreme Court of India observed in *United Bank of India –vs- Satyawati Tondon & others*, how this court should entertain a challenge on the grant of development approvals and an Environmental Impact Assessment (EIA) License ignoring the fact that the Petitioner can access alternative remedies before the statutory bodies established under the statutes to handle the specific grievances.
75. In addition to challenging the grant of development approval by the 2nd Respondent and the Environmental Impact Assessment (EIA) License by the 3rd Respondent, the Petitioner alleges violation to its right to a clean and healthy environment under Article 42 of *the Constitution*. This court needs to emphasize that it recognizes and upholds the right of every person, the Petitioner herein included, to approach the court for redress where such person alleges that the right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be denied, violated, infringed or threatened with violation or infringement.
76. The claim before me is a multifaceted claim. The Supreme Court of Kenya in the *Nicholus* case (supra) guided that a court must determine all contested matters judicially. In a multifaceted claim the court should address each issue within its jurisdiction including remitting parts of the claim to the relevant statutory body while retaining what is properly before it. At paragraph 135 thereof, the Supreme Court of Kenya stated thus;
- “In concluding on this issue, it is our finding that it is upon a party to frame its pleadings as it deems fit but in doing so should not create such a disjointed case that a court has to struggle in the identification of each facet thereof. Elegant pleadings also ensure that the responding party has a clear case to answer to. A court on its part, must not descend to the arena of litigation but instead determine all contested matters judicially and in a multifaceted claim, address each issue within its jurisdiction including remitting parts of the claim to the relevant statutory body while retaining what is properly before it. In the present case and for reasons given above, the issues raised were well within the ELC's jurisdiction to determine and there was no reason to either reserve or remit any of them and we so hold.”
77. Guided by the above decision and having carefully dissected the petition by the Petitioner, my finding is that this court only has jurisdiction to consider and entertain the claim of violation of the right to a clean and healthy environment.
78. The challenge to the grant of development approvals by the 2nd Respondent and alleged violation of procedures in the process is an issue that ought to be canvassed and has indeed already been canvassed before the Nairobi City County Physical and Land Use Liaison Committee.
79. The challenge to the issuance of the Environmental Impact Assessment (EIA) License and the allegations of violation of procedures towards the issuance of the Environmental Impacts Assessment (EIA) License should be placed at the door of the National Environmental Tribunal (NET), not before this court at the first instance.



80. As the court in the case of International Centre for Policy and Conflict Resolution and 5 others –vs- Attorney General & 4 others (2013) eKLR, stated,

“An important tenet of the concept of rule of law is that this court before exercising its jurisdiction under Article 165 of *the Constitution* in general must exercise restraint. It must first give an opportunity to the relevant constitutional bodies and state organs to deal with the dispute under relevant provision of the parent statute. Where there exists sufficient and adequate mechanisms to deal with a specific issue or dispute by other constitutional organs, the jurisdiction of the court should not be invoked until such mechanism have been invoked”.

B. Whether the Petitioner has proved the alleged Constitutional violations of the right to a clean and healthy environment.

81. At paragraphs 56 - 59 of its petition, the Petitioner particularized the allegations of violation of the right to a clean and healthy environment as follows;

- a. The development, which is a commercial shopping mall, is glaringly incompatible with the land use zoning, for the area, which is a low-density residential neighborhood. This violates the residents’ legitimate expectation to enjoy a peaceful, serene and uncongested living environment.
- b. The project site is adjacent to a sensitive riverine/swamp wetland ecosystem, as confirmed by the National Land Commission’s letter dated 12th July 2022. The Petitioner contends that the construction and operation of a large commercial development in such close proximity to the wetland poses significant risks of pollution, degradation and irreversible harm to this delicate ecosystem.
- c. The 1st and 2nd Respondents failed to ensure that a comprehensive and rigorous Environment and Social Impact Assessment (ESIA) study was conducted for the project and that adequate mitigation measures were put in place to address all the potential adverse impacts identified in such a study, before commencing construction.
- d. The traffic generated by the commercial development is likely to significantly increase vehicular emissions and noise pollution in the area, adversely impacting the health and well-being of the residents and the environment.

82. The burden of proof of the above allegations was upon the Petitioner who claims that its rights are threatened with violation and or have been violation by the actions of the 1st Respondent.

83. The 1st Respondent and the 2nd Respondent in their submissions pointed out that the petition by the Petitioner was lacking in precision and details of the alleged violation. Indeed, the Petitioner in its petition besides making the allegations and quoting the various articles of *the Constitution* is lacking in material evidence. It fails to answer pertinent questions, like what the alleged negative impacts on the adjacent wetland would be, and how they would affect its right to a clean and healthy environment. Further it does not explain how exactly the development by the 1st Respondent would degrade the wetland.

84. Indeed the Petitioner has not provided any evidence that the area where the 1st Respondent’s development has been erected is zoned as a low-density residential neighbourhood as alleged. To say the least, the petition is based on assumptions without any concrete evidence. The Petitioner should have placed before the court evidence in form of reports by experts or by regulatory authorities.



85. From the foregoing, the court finds and holds that the Petitioner has not proved the allegations of violation or infringement of the Petitioner's right or those of its members to a clean and healthy environment arising out of the actions of the 1st Respondent as alleged or at all.

C. Whether the Petitioner is entitled to any of the reliefs sought in the petition.

86. With my finding that the Petitioner has not proved the allegations of violation or infringement of its right to a clean and healthy environment, it goes without saying that the Petitioner is not entitled to any of the reliefs or orders sought in its petition. The petition is dismissed in its entirety.

D. What orders should issue in regard to the costs of the petition.

87. As if contemplating the eventual dismissal of its petition, the Petitioner submitted that its petition epitomizes public interest litigation, seeking to protect fundamental environmental rights, ensure proper public participation and uphold constitutional principles of fair administrative action. The Petitioner therefore urged the court to direct that each party bears its own costs.

88. While the court has a duty to protect the noble motive of public interest litigation, care has to be taken to safeguard that space to ensure that public interest litigation does not degenerate into litigation for selfish private interests, as affirmed in the case of Republic –vs- IEBC & 2 others ex parte Alinor Derow Abdullahi & others (2017) eKLR.

89. I am not persuaded that this petition qualifies as public interest litigation. The litigation was instituted in the name of and for the benefit of a specified group. It was not for the benefit of the general public. I therefore award the costs of this petition to the 1st Respondent against the Petitioner.

90. The final disposition therefore is that the petition is dismissed with costs to the 1st Respondent.
It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 7TH DAY OF MARCH, 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Kimathi for the Petitioner

Mr. Ochieng for the 1st Respondent

Ms. Maganda for the 2nd Respondent

N/A for the 3rd Respondent

Court Assistant: Mpoye

M.D. MWANGI

JUDGE

