



**Millennium Gardens Management Limited v Metricon Home Nairobi Company Limited;
Nairobi City County Government & 2 others (Interested Parties) (Environment &
Land Petition E121 of 2023) [2024] KEELC 4016 (KLR) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4016 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E121 OF 2023**

OA ANGOTE, J

MAY 2, 2024

BETWEEN

MILLENNIUM GARDENS MANAGEMENT LIMITED PETITIONER

AND

METRICON HOME NAIROBI COMPANY LIMITED RESPONDENT

AND

NAIROBI CITY COUNTY GOVERNMENT INTERESTED PARTY

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY INTERESTED
PARTY**

MBAAZI AVENUE RESIDENTS ASSOCIATION (MARA) INTERESTED PARTY

RULING

Background

1. Vide a Notice of Preliminary Objection dated 31st October, 2023, the Respondent objects to the Petition and Motion dated 12th October, 2023 on the grounds that;
 - i. The Honourable Court lacks jurisdiction to hear and determine the instant Application and Petition.
 - ii. The Petitioner's/Applicant's Notice of Motion Application and Petition dated 12th October, 2023 offends the Doctrine of Exhaustion as it violates the express provisions of Section 76 and 78 of the *Physical and Land Use Planning Act*, 2019.



- iii. The Petitioner's/Applicant's Notice of Motion Application and Petition dated 12th October, 2023 offends the Doctrine of Exhaustion as it violates the express provisions of Sections 31, 32 and 33 of the Environmental Management and Coordination Act No. 8 of 1999.
 - iv. The Petitioner's/Applicant's Notice of Motion Application and Petition dated 12th October, 2023 offends the Doctrine of Exhaustion as it violates the express provisions of Section 126 of the Environmental Management and Coordination Act No. 8 of 1999.
 - v. The entire Notice of Motion Application and Petition dated 12th October, 2023 is fatally defective, vexatious, frivolous, incompetent, misconceived, misplaced and an abuse of the process of this Honorable Court hence ought to be dismissed with costs to the Respondents.
2. In support of the Objection, the Respondent filed submissions on 15th January, 2024. Counsel submitted that a Courts' jurisdiction is derived from the Constitution, statute or both and that the Court can only exercise jurisdiction granted to it. It was submitted that this Court derives its jurisdiction from Section 13(1) of the Environment and Land Court Act, granting it wide original and appellate jurisdiction to deal with land and environment matters.
 3. Counsel submitted that Sections 31, 32 and 33 of the Environment Management Co-ordination Act, 1999 [EMCA] provides for the establishment of the Complaints Committee whose function is to investigate any allegations or complaints against any person or against the Authority in relation to the condition of the environment.
 4. It was submitted that similarly, Section 61 (3)(4), Section 72 and Section 78 of the Physical Planning and Land Use Act, 2019 [PLUPA], grants the County Physical and Land Use Planning Liaison Committee jurisdiction to determine matters arising from the use, regulation and development of land.
 5. Counsel for the Petitioner submitted that the Petitioner's application and Petition are grounded on the allegations that the Respondent's proposed development contravenes the County's zoning policy; was commenced without carrying out proper public participation; poses grave environmental and socio-economic hazards to the Petitioner's members; and, compromises the structural integrity of the Petitioner's apartment.
 6. Counsel urged that the foregoing matters can be adequately adjudicated by the County Physical and Land Use Planning Liaison Committee or the Complaints Committee; that the invocation of this Court's jurisdiction is premature and the Court lacks jurisdiction and that as expressed by the Court in Owners of The Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd (1989)1 KLR 1, jurisdiction is everything, without it, a court has no power to make one more step.
 7. It was submitted that as expressed by the Court of Appeal in Speaker of National Assembly vs Karume [1992] KLR 21, where a clear procedure for the redress of any grievance is prescribed by the Constitution or an Act of Parliament, it should be strictly followed; that the Court of Appeal reiterated this position in Whitehorse Investments Ltd vs Nairobi City County [2019] eKLR and that in Kibos Distillers Limited & 4 Others vs Benson Ambuti Adegwa & 3 Others [2020] eKLR, the Court of Appeal was categorical that Courts should not use their original jurisdiction to usurp the jurisdiction of competent organs.
 8. Reliance in this respect was also placed on the cases of Orata International Limited vs National Environment Management Authority [2019]eKLR, Borbor & 2 Others vs National Environment Management Authority, [2022]eKLR, Immaculate Gicuku Mugo vs Kiambu County Government [2021]eKLR, Kenya Revenue Authority & 2 Others vs Darasa Investments Limited[2018]eKLR.



9. In opposition, the Petitioner's counsel filed submissions in which he submitted that this Court has jurisdiction to determine the Petition and the Motion; that its jurisdiction aforesaid is found in Article 162(b), as read with Articles 23(1) and 70 of *the Constitution* of Kenya which grants the Court jurisdiction to give legal remedies in case of breaches of the right to a clean and healthy environment and that this position is reiterated in Section 3 of the EMCA.
10. Counsel submitted that the Petition deals with violations of the right to a clean and healthy environment, an issue which specialized tribunals like the National Environment Tribunal (NET) and the Liaison Committee cannot determine having limited mandates; that the Supreme Court in *Abidha Nicholas vs Attorney General & Others* [2023] eKLR noted that the availability of an alternative remedy does not necessarily bar an individual from seeking a constitutional relief and that if the alternative relief is deemed inadequate, the Court may go ahead and provide relief.
11. Counsel submitted that on the issue of multi-faceted claims as herein, the Supreme Court in *Abidha* (supra) found that the ELC Court was best placed to deal with the same noting the impracticality of having the Appellant appeal the impugned decisions before two different tribunals.
12. Counsel also relied on the cases of *Peter Karungo Njoroge vs Hijaz Development Limited & 4 Others* [2018] eKLR and *Justus Kalii Makau vs Linet Achieng Amala & 2 Others* [2019] eKLR in which the ELC upheld its jurisdiction to determine matters before it noting that they raised constitutional questions.
13. The 1st Interested Party filed submissions in support of the Objection on 8th December, 2023. Counsel submitted that Section 78 of the PLUPA, 2019 provides for the functions of the County Physical and Land Use Planning Liaison Committee (the Liaison Committee) to include the hearing and determination of complaints and claims made in respect to applications submitted to the planning authority in the county.
14. Counsel submitted that even though the Petitioner is unsure of whether the Respondent obtained the necessary approvals from the planning authorities and may not have been in a position to lodge complaints with the County Physical and Land Use Planning Liaison Committee, from the provisions of Section 32 and 33 of the EMCA, the National Environmental Complaints Committee (NECC) is mandated to receive complaints of any nature, against any person, relating to the management of the environment.
15. Further, Counsel submitted, the NECC is clothed with powers to require the appearance of any person for examination concerning matters relevant to the investigation of any complaint; that not having lodged any complaint with NECC regarding its members' grievances against the Respondent's construction activities, this Court cannot be treated as the first port of call.
16. It was urged that whereas the Petitioner's prayers are couched as constitutional concerns, it is clearly concerned with the grant of an EIA License and should have lodged an appeal with NET pursuant to Section 129 of the EMCA and that in *Omar Salim Mwakweli & 3 Others vs Vipingo Development Limited & 2 Others* [2021] eKLR, the Court, relying on the Court of Appeal decision of *Republic vs NEMA Ex-Parte Sound Equipment Ltd* [2011] eKLR affirmed that challenges to EIA Licenses should be made to the NET.
17. Reliance in this respect was also placed on the cases of *Patrick Musimba vs National Land Commission & 4 Others* [2016] eKLR and *Zakaria Macharia Kagunya & 2 Others vs County Government of Laikipia & 2 Others* [2016] eKLR.



18. Counsel submitted that the Supreme Court in *Benson Ambuti Adega & 2 Others vs Kibos Distillers Limited & 5 Others* [2020] eKLR settled the place of the doctrine of exhaustion stating that a Court, though it may be vested with the requisite jurisdiction to hear and determine certain issues presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination, if there are other appropriate legislatively mandated institutions and mechanisms.
19. Counsel averred that the County Government of Nairobi issued an Enforcement Notice dated 4th October, 2023 requiring the cessation of construction works due to the Respondent's non-compliance with the approval conditions and that further, the Office of the Governor vide a letter to the Respondent and copied to NEMA dated 9th October, 2023 suspended any further works and recommended that a meeting be convened within 14 days between the residents and the County officials to review the scope of the project and the concerns raised by the Petitioner.
20. Counsel urged that the Petition was filed before the County could weigh in on the Petitioner's concerns and that the totality of all the foregoing is that the Petition and the application are premature.
21. The 2nd Interested Party filed submissions in support of the Objection on 1st March, 2024. Counsel submitted that this Court has no jurisdiction to entertain the application whose mandate falls with the County Physical and Land Use Planning Liaison Committee, pursuant to the provisions of Section 61 (3)(4), Section 72 and Section 78 of the Physical Planning and Land Use Act, 2019 (PLUPA).
22. It was submitted that the Motion violates the doctrine of exhaustion. Reliance in this respect was placed on the cases of *Francis Mugarami Kamau & 6 Others (Suing on their behalf and on behalf of the Residents and Home owners of Migaa Integrated Golf Estate) vs Sycamore Pine Limited & 2 others* [2021] eKLR.
23. Further, it was submitted by the 2nd Interested Party that Section 31 of the Environmental Management and Coordination Act (EMCA) establishes the Public Complaints Committee mandated to investigate any allegations and complaints against any person or against the Authority in relation to the condition of the environment in Kenya and that Section 129 of the EMCA provides for appeals to the Tribunal.
24. According to Counsel, the Court in *Kibos Distillers Limited & 4 others vs Benson Ambuti Adega & 3 Others* [2020] eKLR, noted that 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.
25. Similarly, it was submitted, that the Court in the case of *Speaker of the National Assembly vs Hon. James Njenga Karume* [2008] 1KLR 425 cited in *One Hundred and Two Peponi Road LLP & Another vs National Environment Management Authority & 2 Others* [2021] eKLR, held 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. Reliance was also placed on the case of *Alice Mweru Ngai vs KPLC Ltd* [2015] eKLR.
26. The 3rd Interested Party did not file submissions [As at 17/04/2024]

Analysis and Determination

27. Having considered the Preliminary Objection and the submissions in support and in opposition thereto, the single issue that arises for determination is whether the Petitioner has properly invoked the jurisdiction of this Court.



28. The threshold of a Preliminary Objection is now settled. Reference is made to the Court of Appeal in the locus classicus case of *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors (1969) EA 696 at 700* where Law, JA stated as follows:
- “...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.”
29. In the same case, Newbold, P further held that:
- “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 but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”
30. The Respondent’s Preliminary Objection is based on the fact that the Court has no jurisdiction to entertain this matter, as jurisdiction lies with the County Physical Planning Liaison Committee and/or the National Environment Complaints Committee (previously known as the Public Complaints Committee) and the National Environmental Tribunal (NET); and that subsequently, the institution of the suit in this Court contravenes the exhaustion doctrine.
31. It is trite that jurisdiction is everything. This was succinctly captured by Nyarangi, J.A. in *Owners of Motor Vessel ‘Lillian S’ vs 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.”
32. The question as to the jurisdictional competence of this Court on account of the fact that the doctrine of exhaustion has been contravened is a pure question of law, as one need only look at the pleadings to ascertain the same and there is no need, so to speak, to receive evidence. The question of jurisdiction as brought by the Respondent and supported by the Interested Parties is a proper Preliminary Objection.
33. It is stated that the Court does not have jurisdiction to determine this Petition because the issues raised ought to have been addressed to the County Physical and Land Use Planning Liaison Committee and/or the NECC and NET, and that by instituting the Motion and Petition in this court, the Petitioner went against the doctrine of exhaustion.
34. In response, the Petitioner asserts that whereas it is aggrieved by the decision to award development approvals to the Respondent to construct on the suit property, its grievances also involve the violation of its constitutional rights, including the right to a clean and healthy environment, which are issues that this Court has jurisdiction to determine.



35. The doctrine of exhaustion requires a party to exhaust any alternative dispute resolution mechanism provided by the statute before resorting to Courts. Speaking to the ambit and rationale for this doctrine, the Court of Appeal in *Geoffrey Muthinja and Another vs Samuel Muguna Henry & 1756 others* [2015] eKLR observed 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.”

36. In the case of *William Odhiambo Ramogi & 3 Others vs Attorney General & 4 Others: Muslims for Human Rights & 2 Others (Interested parties)* [2020] eKLR, a five-judge bench held 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...”

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

“As observed above, the first principle is that the High Court(read ELC) 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 the 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...”

38. The Court is so guided.

39. Turning to the facts of this case, vide the Petition dated 12th October, 2023, the Petitioner seeks as against the Respondent, inter-alia, a declaration that the Respondent's intended development on



L.R No 330/155(Original No 330/39/8) along Mbaazi Avenue, Thompson Area, Nairobi County (hereinafter the suit property) infringes on the Petitioner's members' right to a clean and healthy environment.

40. Further, it is the Petitioner's case that the development is contrary to the provisions of Article 10 of *the Constitution* to the extent that no proper public participation was undertaken and permanent injunctive orders should issue restraining the carrying out of the proposed development.
41. Filed contemporaneously with the Petition was a Motion of an even date seeking conservatory orders restraining the construction of the proposed development, pending the hearing and determination of the Petition.
42. Briefly, it is the Petitioner's case that the Respondent has commenced construction of three 16 storey blocks of apartments comprising of 512 units on the suit property entailing 336 one bedroom units; 144 two bedroom units and 32, three bedroom units and a two level underground and one ground parking, all on a one- acre piece of land which adjoins the property managed by the Petitioner.
43. The Petitioner contends that the aforesaid development is irregular, unlawful and contrary to the 1st Interested Party's zoning policy which prohibits development of over four storeys; that the development will cut off natural sunlight to the neighbouring apartments affecting air circulation, reception of TV/DSTV and other ariel communication devices and that it will further create a health hazard as it will interfere with air circulation creating incessant fumes emanating from cars parked at both the underground and ground levels.
44. The Petitioner also contend that the construction will compromise the structural integrity of its member's buildings, contaminate the underground water surface and stretch the drainage system and that the project poses grave environmental, infrastructural, health, sanitation and other socio-economic hazards.
45. On their part, the Respondent and the Interested Parties assert that the Petitioner has prematurely invoked this Court's jurisdiction; that the Petitioner had several avenues of recourse before coming to the Court including the County Physical and Land Use Planning Liaison Committee, the National Environment Complaints Committee and the NET.
46. The Petitioner herein challenges the proposed development on account of the fact that it is contrary to the County zoning policies; that the EIA License was issued without consideration of the Petitioner's members concerns; that no public participation was undertaken contrary to Articles 10, 47 and 69 and that the development will violate its members' right to a clean and healthy environment.
47. As regards issues of development control and planning within the County, the same falls under the purview of the Physical Land Use Planning Act, 2019. Section 76 of the Act provides for the County Physical and Land Use Planning Liaison Committee whose mandate at Section 78 includes 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.”



48. On the other hand, Section 61(3) and (4) of the Act establishes an appeal mechanism for any person aggrieved by the decision of a County Executive Committee member in respect of a development permission within 14 days of the said decision. An appeal from the decision of the Committee lies to this Court.
49. It is noted that the jurisdiction of the County Physical and Land Use Planning Liaison Committee under Section 78 of the Act is only invoked when there exists an application for permission or a decision relating to development permission.
50. The Petitioner is equally concerned with the environmental impacts of the proposed development, and in this regard, has recourse provided under Sections 31, 32 and 33 of the EMCA which establishes the NECC and outline its functions and powers. The functions of the NECC as set out under Section 32 include to:
 - a. to investigate;
 - i. any allegations or complaints against any person or against the Authority in relation to the condition of the environment in Kenya;
 - ii. on its own motion, any suspected case of environmental degradation, and to make a report of its findings together with its recommendations thereon to the Cabinet Secretary.”
51. As regards the contention that the EIA License was issued despite their protestations and/or without considering their opinions, Section 129 comes into play. It sets out the jurisdiction of NET to include hearing appeals filed by persons aggrieved by the grant of a licence or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under the Act or its regulations.
52. The Court agrees that the Petitioner had multiple avenues open to it. However, it also seeks redress for constitutional violations which can only be granted by this Court pursuant to Article 162(2)(b) of *the Constitution*, Section 13 of the ELC Act and Section 3 of the EMCA. It is clear that the claim by the Petitioner is multi-faceted.
53. The Supreme Court has had the opportunity to weigh in on the doctrine of exhaustion in light of multi-faceted claims as herein. In *Benson Ambuti Adega & 2 Others vs Kibos Distillers Limited & 5 Others* [2020] eKLR the Court stated;

“ 51. The trial Court, as did the appellate Court, correctly determined that the Petition was multifaceted, and presented issues in an omnibus manner. The point of divergence between the two Superior Courts was where the trial Court then went further to determine that these multifaceted issues could be determined by the Court “in the interests of justice.” It would seem that the ELC had failed to appreciate that there were properly constituted institutions that were mandated to hear and determine the issues, but instead chose to arrogate to itself the jurisdiction to hear and determine all the issues raised in the Petition. The Petitioners stated that the Superior Court correctly relied on the doctrine of judicial abstention, and exercised its discretion to hear and determine the Petition.

52. Judicial abstention, as with judicial restraint, is a doctrine not founded in constitutional or statutory provisions, but one that has been established through common law practice. It provides that a Court, though it may be



vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination, if there would be other appropriate legislatively mandated institutions and mechanism.

.....

54. Applying these principles to the instant Petition, the more favorable relief that the Superior Court should have issued was to reserve the constitutional issues on the rights to a clean and healthy environment, pending the determination of the issue with regards to the issuance of EIA licenses by the 4th Respondent to the 1st, 2nd and 3rd Respondents. The Court should have reserved the issues pending the outcome of the decision of the Tribunal, thereby affording any aggrieved party the opportunity to appeal to the Court. It would then have determined the reserved issues, alongside any of the appealed matter, if at all, thus ensuring the parties right to a fair hearing under Article 50 of the Constitution was protected.
55. The Court of Appeal, in our view, gave quite an elaborate and definitive definition pertaining to the jurisdiction of the trial Court in hearing and determining the Petition. However, once it had established that the ELC did not have the jurisdiction to hear and determine the Petition, the appellate Court should at that juncture issued appropriate remedies, which could have included, but not limited to, remitting back the matter to the appropriate institutions for deliberation and determination. Also, once it had determined that the ELC did not have the jurisdiction to hear and determine the issues before it, it should have held that any determination made was void ab initio, and that the appellate Court therefore and with respect failed to properly exercise its discretion and supervisory mandate in this instance.”

54. In the more recent decision, the Supreme Court in *Nicholas Abidha vs AG & Others* [2023] stated as follows:

“...the resolution of environmental issues before NEMA has been the subject of prior decisions by our superior courts and two schools of thought have emerged in that regard. On one hand, there is a series of decisions that have taken the position that, even though the ELC has original and appellate jurisdiction on environment and land matters, parties should exhaust the mechanisms provided for under EMCA, by first referring a matter to NET before an appeal can lie to the ELC.

There is however another school of thought that has posited that, if the complaints and prayers by a petitioner relate to infringement of the constitutional right to a clean and healthy environment or any other constitutional violation, then NET lacks the jurisdiction to determine the constitutional issue hence the provisions of Section 129 of EMCA are inapplicable to such claims...the above decisions do not unravel the conflict alluded to above because, under Article 165(1)(c) of the Constitution, the High Court has the jurisdiction to determine whether a right or fundamental freedom outlined in the Bill of Rights has been denied, violated, infringed upon, or is under threat. In that context, Article 165(5) (b) imposes limitations on the High Court's jurisdiction concerning matters falling within the purview of the courts specified in Article 162(2)...Consequently, Article 165(2)(b)



mandates the establishment of courts possessing the status of the High Court to inter alia and of relevance to the appeal before us, address issues related to the environment, as well as the utilization and ownership of land with Parliament assuming the responsibility to delineate the functions and jurisdiction of that court as stipulated in sub-article (3).

- (97) In this context, and in the exercise of these powers, Parliament enacted the Environment and *Land Act* 2011, (No. 19 of 2011) and by Section 4 thereof established the ELC. Its jurisdiction is as provided for in Section 13 with Section 13 (1) specifically outlining that the court ‘shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 163(2)(b) of *the Constitution*’. Section 13(2) then grants express and original jurisdiction...
- (98) These provisions must be read in contrast to those in EMCA which provide for instances where disputes pertaining to compliance with breach and/or violations of the provisions of EMCA and which disputes ought to be lodged with and/or addressed by NET, which is established pursuant to the provisions of Section 125 of the said Act. Redress for constitutional violations is not part of that mandate.
- (99) In addition to, and turning to the provisions of the *Energy Act*, it is uncontested that the said Act provides for a dispute resolution mechanism for complaints to be determined by EPRA that is vested with such authority under Section 10 of the said Act. Should a party be dissatisfied with the decision of EPRA, then he or she has the right to file an appeal before the EPT as provided for under Section 36 of the *Energy Act*. It is only when one is dissatisfied with the decision of the EPT that such a party can appeal the Tribunal’s decision to the ELC.
- [100] In addressing the conundrum placed before us, we must remind ourselves that, what is in dispute before this Court is the applicability of these provisions to the appellant’s claim and not the true meaning of the provisions of either EMCA or the *Energy Act*. This is because the provisions of EMCA or the *Energy Act* do not expressly oust the jurisdiction of the ELC in respect of the procedure for the determination of disputes that involve the management of the environment or issues of petroleum and energy. In the ordinary course of events, the ELC still has original jurisdiction over the matters that are handled by NEMA, unless such jurisdiction is specifically and expressly ousted in a constitutionally compliant manner. The same holds true for proceedings under the *Energy Act*. In so saying, we are persuaded by the finding of the Court of Appeal in *Kenya Revenue Authority & 2 others vs Darasa Investments Ltd* [2018] eKLR which held as follows:
- “What then, is the consequence, if any, of the respondent’s failure to invoke the alternative remedies? As appreciated by the parties, availability of an alternative remedy is not a bar to judicial review proceedings. It is only in exceptional cases that the High Court can entertain judicial review proceedings where such alternative remedies are not exhausted. This position is fortified by the decisions of this court in *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 Others* [2017] eKLR and *Kenya Revenue Authority & 5 others v Keroche Industries Limited* CA No 2 of 2008.”
- [101] Reference to the High Court above must be read mutatis mutandis with jurisdiction conferred on courts of equal status to it including the ELC. Section 9(2) of the *Fair Administrative Action Act*, we must add, provides that where there exist internal mechanisms for the resolution of a dispute, the court will not review the administrative action until the internal dispute mechanism has been exhausted. As we had earlier stated, in our view, that fact notwithstanding, there is nothing that precludes the adoption of a nuanced approach, that safeguards a litigant’s



right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. That is also why Section 9(4) of the *Fair Administrative Action Act* creates the exception that exhaustion of administrative remedies may be exempted by a court in the interest of justice upon application by an aggrieved party.

- [102] In the above context, what was in issue in the appellant's petition? The appellant claims as regards the environmental question that, NEMA issued a stop order that was favourable to him but that NEMA failed to enforce the stop order. Despite the existence of the stop order, the 2nd and 3rd respondents continued their mining activities. The issue therefore that arose in the petition was whether the acts of the 2nd and 3rd respondents, by failing to adhere to the stop order, violated the appellant's rights under Articles 40 and 42 of *the Constitution*.
- [103] The other claim by the appellant is that KPLC trespassed on his property, dug holes, and erected electricity poles thereon without notice to him or his authority to do so.
- [104] Having considered the above complaints, we reiterate our earlier finding in this judgment that the mandate and jurisdiction to determine these questions lie with the ELC under Articles 22, 23(3) and 162(2)(b) of *the Constitution* as read with Section 4(1) of the Environment and *Land Act*. We say so because neither the NET, EPRA nor EPT have the jurisdiction to determine alleged violations of *the Constitution*. That right to access the court for redress of alleged constitutional violations, should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms. We say this persuaded by the elegant reasoning in *William Odhiambo Ramogi & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR...
- [105] We agree with the above reasoning and find that the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief. But there is also a need to emphasize the need for the court to scrutinize the purpose for which a party is seeking relief, in determining whether the granting of such constitutional reliefs is appropriate in the given circumstances. This means that a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs, is a necessary prerequisite on the part of any superior court.
- [107] Flowing from the above findings and in that context, it is our view that, where the reliefs under the alternative mechanism are not adequate or effective, then there is nothing that precludes the adoption of a nuanced approach, as we have stated. What must matter at the end is that a path is chosen that safeguards a litigant's right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. This is because, to achieve a harmonious and effective legal framework, it is imperative to strike a judicious balance between the emphasis on providing the initial opportunity for resolution to entities established by law and the assertion of a litigant's right to access the court. However, such convergence requires a case-by-case assessment by considering issues such as the nature of the dispute and the adequacy of the alternative dispute mechanism. See also our decision in *Bia Tosha Distributors Ltd v Kenya Breweries Ltd & 6 Others (Pet.No.15 of 2020)* [2023] KESC 14(KLR) (Const. and JR) (17 February 2023) (Judgment).



- [108] It was therefore sufficient that the appellant alleged that a right in *the Constitution* had been infringed or threatened with violation, making it clear that in light of the provisions of *the Constitution* and the ELC Act, the issues raised were within the original jurisdiction of the ELC. That is also why Section 3 of EMCA provides that, one of the general principles under the Act is the entitlement to a clean and healthy environment. That section provides: ...
- [110] As we stated earlier, there is nothing that therefore bars the appellant, reading the plain provisions of the law above, from filing a claim before the ELC as he had two options available to him once NEMA was unable to enforce the stop order against the 2nd and 3rd respondents. The first option was to appeal to the NET, as was rightfully held by the Court of Appeal. The other option was to file a claim before the ELC, which the appellant did, as against both NEMA and KPLC for the claim under the *Energy Act*. The ELC was thereafter obligated to interrogate his claims on merit and render a determination one way or the other. By not doing so, it fell into error which the Court of Appeal failed to rectify.”
55. Whereas the Supreme Court in Benson Ambuti(supra) and Nicholas Abidha(supra) addressed the question of multifaceted claims, in Benson Ambuti, the Court was of the view that the ELC is to defer to the established statutory authorities, while in Nicholas Abidha, it held that a Petitioner could choose an appropriate forum as between the Court and the alternative process.
56. From the foregoing binding decision of the Apex Court, the principles that can be deciphered in dealing with an objection on jurisdiction on the basis of failure to exhaust alternative avenues are that first, the disputes must be determined on a case by case basis, and secondly, that the court is called upon to consider the efficacy of the alternative remedies and must be satisfied that constitutional claims are not a smoke screen meant only to escape the strictures of alternative process.
57. Considering the constitutional violations alleged, and view of the multi facet claims raised by the Petitioner, some of which ought to be determined by more than one alternative dispute mechanisms, this Court is not prepared to, at this point, find that the same constitute a smoke screen to escape the alternative processes.
58. As already stated above, the Petitioner is seeking this Court’s intervention in the face of constructions alleged to be undertaken without proper public participation, a constitutional right, which may lead to a degradation of the environment and a violation of the right to a clean and healthy environment.
59. In Nabatkhanu Karim H.P & 12 Others vs Hwaock IM & Another; National Environment Management Authority (Interested Party) [2021] eKLR the Court held that:
- “In their petition, the Petitioners have contended that as a result of the Respondents’ violation of the zoning regulations, the provisions of the sublease under which the suit property is held and the provisions of the Environment Management and Coordination Act, 1999 (EMCA), their constitutional rights to among others, a clean and healthy environment is threatened with violation by the Respondents. The Petitioners have contended further that they were not consulted before a change of user approval was given to the Respondents for the development in dispute in breach of their constitutional and statutory right to be heard before a decision affecting their interests is made...The Petitioners have a right both under EMCA and *the Constitution* to approach the court for redress for violation or threatened violation of their right to a clean and healthy environment. The Liaison Committees established under the *Physical and Land Use Planning Act*, 2019 and the National Environment Tribunal established under EMCA have no jurisdiction to determine issues regarding violation of a right to clean and healthy environment. I do not



agree with the Respondents that the Petitioners have brought this petition to challenge the legality of the Change of user approval that has been issued to the Respondents. The Petitioners' case is that the change of user approval was issued or obtained without public participation and that the development that is being undertaken following that approval is going to violate their right to a clean and healthy environment.

I also find no merit in the second limb of the Respondents' preliminary objection. In *C N M v W M G* [2018] eKLR, the court stated as follows on what constitutes a constitutional issue:

"21. The question of what constitutes a constitutional question was ably illuminated in the South African case of *Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others* (2002) 23 ILJ 81(CC) in which Justice O'Regan recalling the Constitutional Court's observations in *S vs. Boesak* (2001)(1)SA 912(CC) notes that:-

"*The Constitution* provides no definition of "constitutional matter." What is a constitutional matter must be gleaned from a reading of *the Constitution* itself: If regard is had to the provisions of*the Constitution*, constitutional matters must include disputes as to whether any law or conduct is inconsistent with *the Constitution*, as well as issues concerning the status, powers and functions of an organ of State..., the interpretation, application and upholding of *the Constitution* are also constitutional matters. So too is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of *the Constitution*, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction."

I am satisfied that the petition herein raises constitutional issues. As stated earlier, the Petitioners have contended among others that their right to a clean and healthy environment has been violated/is likely to be violated by the failure on the part of the Respondents to comply with the provisions of various statutes and *the Constitution*. I am not in agreement with the Respondents that the issues raised before the court are purely civil in nature and should be litigated as such. Due to the foregoing, the Respondents preliminary objection fails wholly and an appropriate order shall be made at the end of the ruling."

60. In light of the foregoing determination, the question of whether the alternate avenues proposed by the Respondent and the Interested Parties are sufficient must be answered in the negative. The Court calls to its aid the following exposition by the Supreme Court in *Nicholas Abidha* (supra):

"Looking at all the above issues in perspective, we must start by giving due consideration to the provisions of Article 70(1) of *the Constitution* which provides for the locus standi in the enforcement of environmental rights by way of a constitutional petition. It provides that: "If a person alleges that a 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, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter."

118. It is this provision that generously allocates the appellant herein the right to file his constitutional petition before the ELC and looking at the orders that the appellant had set out in his constitutional petition, it is evident to us without



much effort that, the remedies of appealing to NEMA and EPRA, respectively, are not efficacious and adequate. Under EMCA, Section 129 provides for matters that may require determination by NET. They are all related to licenses and not constitutional violations as is the case in the present dispute. The fact that licenses may well be a part of the appellant's petition does not in any way outlaw the hearing and determination of it by ELC.

119. Similarly, in respect of the *Energy Act*, Section 106 of the Act provides that appeals to the EPT from decisions by EPRA shall be in relation to issues relating to licensing while Section 25 generally grants jurisdiction to the EPT to hear and determine disputes and appeals in accordance with the Act or any other written law. Determination of allegations of constitutional violations cannot be such issues as to attract the Tribunal's attention.

120. In addition to the above findings, since the appellant's claim is multifaceted, by his own choice, the most appropriate forum for the determination of his petition was the ELC which would then interrogate and determine them based on such facts and law as shall be placed before it. The superior courts therefore clearly fell into in error by finding that the appellant had not demonstrated that he would not have received efficacious relief if he had followed the dispute resolution process outlined in the *Energy Act*. We say so because though the claims against the 2nd and 3rd respondents are intertwined and arise from the same series of events, it would have been impractical to expect the appellant to appeal the decisions of both NEMA and KPLC before two different tribunals."

61. By dint of the same binding reasoning of the Supreme Court, as the claim herein is multifaceted, it would be impractical to require the Petitioner to lodge several appeals when this court can address all, especially where an alleged breach of *the Constitution* and violation of human rights has been raised.

62. The submission by the 2nd Interested Party that the Petitioner moved this Court before they could act on the Respondent's failure to comply with the enforcement notice is a question of fact which the Court cannot determine at this moment.

63. In conclusion, the Court finds the Preliminary Objection dated 31st October, 2023 to be unmerited and proceeds to dismiss the same. Costs shall abide the outcome of the Petition.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 2ND DAY OF MAY, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Otieno for Respondent

Mr. Maina for Kabua for Petitioner

Ms Odhiambo holding brief Baka for 1st Interested Party

Court Assistant - Tracy

