Wambua & 2 others (Suing for themselves and on behalf of the other residents of Muumoni Village, Utithini Sub-Location, Masii Location, whose names appearing on the schedule attached herein) v County Government of Machakos & 3 others (Constitutional Petition E004 of 2022) [2023] KEELC 786 (KLR) (8 February 2023) (Ruling)

Neutral citation: [2023] KEELC 786 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

CONSTITUTIONAL PETITION E004 OF 2022

A NYUKURI, J

FEBRUARY 8, 2023

IN THE MATTER OF ARTICLES 10, 19, 20, 21(1), 22, 23(1) & 3, 27(1), (2), (4) & (5), 42, 43(1), 47(1) & (2), 50(1), 69(2), 70(1), 162(1), 165 (3) (B), 186(1), 259 (1) AND 260 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF RULES 4, 11, 13 AND 23(1) OF THE PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF CONTRAVENTION OF ARTICLES 10, 19, 20, 21(1), 22, 23(1) & (3), 27(1), (2), (4) & (5), 42, 43(1), 47(1) & (2),

50(1), 69(2), 70(1), 162(1), 165(3)(B), 186(1), 259(1) AND 260 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF SECTION 42 OF THE ENVIRONMENTAL MANAGEMENT AND COORDINATIONACT NO. 8 OF 199

AND

IN THE MATTER OF CONTRAVENTION OF SECTION 29 OF THE PHYSICAL PLANNING ACT (CAP. 286) LAWS OF KENYA

AND

IN THE MATTER OF THE CONTRAVENTION OF SECTION 6 OF THE LAND CONTROL ACT (CAP. 302) LAWS OF KENYA

IN THE MATTER OF ARTICLES 10, 19, 20, 21(1), 22, 23(1) & 3, 27(1), (2), (4) & (5), 42, 43(1), 47(1) & (2), 50(1), 69(2), 70(1), 162(1), 165 (3) (B), 186(1), 259 (1) AND 260 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF RULES 4, 11, 13 AND 23(1) OF THE PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS PRACTICE AND PROCEDURE RULES, 2013

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IN THE MATTER OF CONTRAVENTION OF ARTICLES 10, 19, 20, 21(1), 22, 23(1) & (3), 27(1), (2), (4) & (5), 42, 43(1), 47(1) & (2), 50(1), 69(2), 70(1), 162(1), 165(3)(B), 186(1), 259(1) AND 260 OF THE CONSTITUTION OF KENYA 2010

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AND

IN THE MATTER OF THE CONTRAVENTION OF SECTION 6 OF THE LAND CONTROL ACT (CAP. 302) LAWS OF KENYA

BETWEEN

MARTHA MUTHEU WAMBUA ..... 1ST PETITIONER

SOLOMON KILONZO KUMUYU ..... 2ND PETITIONER

FREDRICK MUSYOKA MULE ..... 3RD PETITIONER

SUING FOR THEMSELVES AND ON BEHALF OF THE OTHER RESIDENTS OF MUUMONI VILLAGE, UTITHINI SUB-LOCATION, MASII LOCATION, WHOSE NAMES APPEARING ON THE SCHEDULE ATTACHED HEREIN

AND

COUNTY GOVERNMENT OF MACHAKOS ..... 1ST RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 2ND RESPONDENT

JOSEPHAT MUTUVA KING'OO ..... 3RD RESPONDENT

JOSAN FUNERAL SERVICES LTD ..... 4TH RESPONDENT

RULING

Introduction

1. This ruling is in respect of the Preliminary Objection dated 30th March 2022, filed by the 2nd Respondent and the application dated 18th March 2022 filed by the Petitioners.

2. By application dated 18th March 2022, the Petitioners/Applicants sought the following orders;

    a. Spent.

    b. Spent.

    c. That a temporary order of injunction be issued restraining and/or preventing the 3rd and 4th Respondents either by themselves or through the other Respondents, their agents, servants and/or any other person working under their instructions from construction or continuing to construct a Funeral Home/Mortuary on parcel of Land No. Masii/Utithini/333 pending hearing and determination of the Petition herein.

    d. That the costs of this application be met by the Respondents.

3. The application was supported by affidavit of the three Petitioners in this matter. The Applicants' case is that the 1st and 3rd Petitioners are the registered proprietors of Parcels of land numbers Masii/Utithini/373, Masii/Utithini/373 and Masii/Utithini/510 respectively. (Suit properties). Further, that the 3rd Respondent purports to have purchased land measuring 100 feet by 100 feet to be excised from parcel number Masii/Utithini/333 registered in the name of Ruth Munyoki Wambua (deceased), and which land borders the Petitioners parcels of land stated herein above.

4. It was the Applicants' assertion that the 3rd and 4th Respondents were constructing a funeral home/mortuary on Parcel No. Masii/Utithini/333 on the strength of improperly and unlawfully obtained approvals and licences issued by the 1st and 2nd Respondents respectively as there was no public participation. They also averred that the funeral home was being constructed on agricultural land without an approval for change of user from agricultural land to commercial plot.

5. The Applicants alleged that the construction of the funeral home was going on both during the day and at night as well as over the weekends and that this caused noise pollution which is a violation to the Petitioners' right to a clean and healthy environment. They also stated that the dust from the said construction was settling on the water at the Petitioners' dams and dams constructed along the Mukuyuini seasonal river hence causing water pollution therefore violating the Petitioners' right to clean and safe water in adequate quantities.

6. The application was opposed. The 2nd Respondent filed a Preliminary Objection dated 30th March 2022 against both the Petition and the application dated 18th March 2022, based on the following grounds;

    a. The jurisdiction of this Honourable Court has not been invoked properly by dint of Sections 125, 126 and 129 of the Environmental Management and Coordination Act.

    b. The Petition has at its centre, the prayer to cancel a decision that was made by National Management Authority (hereinafter referred to as "NEMA") and as such, it should be heard and determined by the National Environment Tribunal at the first instance. This is now well

established by the Court of Appeal in Kibos Sugar Ltd and Others vs. Benson Ambuti Adega & Others [2020] eKLR.

c. The application dated 18th March 2022 and filed herein is thus bad in law, defective, an abuse of the court process and the same ought to be struck off with costs.

7. The 1st Respondent through their Senior Physical Planner, one Titus Munyao Mulinge, filed a replying affidavit sworn on 3rd November 2022 in opposition to the application. The 1st Respondent's case was that Parcel Masii/Utithini/333 was initially agricultural land but on 21st July 2021, an advertisement for change of user was published in the Standard Newspaper of the even date from agricultural to public purpose use which is a mortuary facility and that no objection was raised within the stipulated 14 days as required under the *Physical and Land use Planning Act*, 2019.

8. That subsequently, upon payment on 27th September 2021, of the requisite approval fees, change of user was granted for the proposed project on 5th October 2021. He averred that there was no dispute on ownership of the suit property and that public participation was done during change of user and in obtaining NEMA certification for the EIA Licence, which licence was not challenged.

9. Josphat Mutura King'oo, the 3rd Respondent, filed a replying affidavit sworn on 30th March 2022. His case was that the Petitioners were not owners of the parcels of land known as Masii/Utithini/373, 273 and 510. He stated that he is the bonafide owner of a portion of Parcel Masii/Utithini/333 having purchased the same from the family of the late Ruth Munywoki Wambua and that there is no dispute on ownership.

10. The 3rd Respondent averred that the mortuary project began after compliance with all the necessary statutory requirements to wit; that change of user was advertised in the Newspaper on 22nd July 2021 and as no objections were raised within the prescribed period, change of user was approved. Further, that an Environmental Impact Assessment Expert prepared the necessary reports and advised all requirements. He also stated that he engaged a total of 126 people living on lands around the project in a public participation exercise. That the public baraza was convened by the area Chief, Mrs Salome Mutisya and held on 21st November 2021.

11. The 3rd Respondent took the view that the Petitioners were insincere and dishonest as they were present during the sensitization and participation meetings and signed the attendance list as numbers 18, 20 and 24. He stated that he got the necessary licence from NEMA and put up a perimeter wall. He denied creating noise and air pollution as the excavation is manual and not by machine. That the nearest dam is 500 meters away and that he has complied with the experts recommendations which has ensured that the dust levels are below the ones advised. He stated that he intends to treat all his waste water and none will go to the river as alleged by the Petitioners. Further, that there will be an incinerator and a bio digester. He also stated that he has sufficient parking space.

12. He maintained that all necessary mitigation measures as outlined in the EIA report were being followed and that the Petitioners suit is unjustified as the same violates the Constitutional proprietary rights of the owners of the suit property.

13. The Petitioners filed a supplimentary affidavit dated 2nd May 2022. They averred that they were in occupation and use of parcels Masii/Utithini/273, 510 and 373 respectively. That the 3rd Respondent did not attach a permit for change of user and that change of user cannot be approved in respect of land registered in a deceased persons name. They maintained that the list of attendees shows that the Petitioners were opposed to the project at the said meeting. They stated that the list by the 3rd Defendant has only 125 names while Mumiri village has over 1,000 residents. He faulted the public participation that the same was not advertised through radio stations, daily newspapers, churches and

barazas. He held the view that constructing a mortuary on the said land amounts to intermeddling with property of a deceased person. Further, that there was only extension of change of suer and not change of use from agricultural to commercial use.

14. On 26th May 2022, the Petitioners filed a replying affidavit in response to the Preliminary Objection. They stated that this court has original and appellate jurisdiction to hear all matters relating to environment and violation of Constitutional rights by dint of Article 162 (2) (b) of *the Constitution* and Section 13 (1) of the *Environment and Land Court Act*.

    Their position was that the Preliminary Objection was not in the nature of a demurrer as it raised issues of fact as opposed to pure points of law. They held the view that the Preliminary Objection did not conform to the principles set out in the case of Mukisa Biscuits Manufacturing Co. vs. West End Distributors [1969] EA 696. They further urged the court that in the event the court finds that it had no jurisdiction, then it ought to transfer the Petition to the National Environment Tribunal for hearing and determination.

15. The court directed parties to file submissions in respect of both the preliminary objection and the application. On record are the Applicants' submissions dated 18th March 2022, the 2nd Respondent's submissions dated 30th March 2022 and the 3rd and 4th Respondents' submissions dated 9th May 2022.

Submissions

16. Counsel for the Petitioners/Applicants submitted that the Petitioners had met the threshold for grant of temporary injunction as laid down in the case of Giella vs. Cassman Brown [1973] EA 358. Counsel argued that the Applicants had demonstrated that the 3rd and 4th Respondents did not obtain the necessary approvals, licences, permits and consents before starting to construct a mortuary on land that is not registered in their name. Further, that the construction of the mortuary on the property stated has resulted in noise, air and water pollution and that there is no parking space hence the likelihood of congestion on the Machakos – Kitui road.

17. It was submitted for the Applicant that the Applicants had established that their right to clean air and clean and safe drinking water and a safe and healthy environment had been infringed by the Respondents' actions and therefore they have an arguable case. Reliance was placed on the cases of Abdi Sheikh Idriss vs. County Government of Garissa & 2 Others [2020] eKLR, Joseph Gachuhi Ngugi & 2 Others vs. County Government of Nyeri & 3 Others [2021] eKLR, Philip Kiptanui Rugut & 2 Others vs. Natural Environment Management Authority & 4 Others [2021] eKLR, for the proposition that they had met the threshold for grant of temporary injunction.

18. Counsel contended that the Applicants had demonstrated that they stood to suffer irreparable loss which could not be compensated by an award of damages. Counsel argued that the air and water pollution was a violation of their Constitutional right to a clean environment and a right to a safe water and that the bad odour from the mortuary will affect persons living near the mortuary. They further argued that the balance of convenience tilted in the Applicants favour.

19. On the part of the 2nd Respondent, counsel submitted that as this suit falls within the ambit of Section 129 of EMCA, the Petitioners ought to have appealed against the decision of NEMA to the National Environment Tribunal. It was submitted that the Petitioners failed to exhaust the available dispute resolution mechanisms provided for in law.

20. Reliance was placed on the decision in the case of United Millers Limited vs. Kenya Bureau of Standards and 5 Others [2021] eKLR, for the proposition that where there is an alternative mechanist of dispute resolution, a party should not move to court.

21. Counsel for the 3rd and 4th Respondents submitted that the Petitioners main contention was in regard to the licence issued by NEMA, approval for change of user and approval by the National Construction Authority, the procedure used in applying for the licences and whether the construction caused them adverse effects. It was argued for the 3rd and 4th Respondents that they provided the NEMA licence dated 7th December 2021, documents showing a Baraza, minutes of the Baraza signed by the attendees who participated in public consultation. He pointed out that the meeting was attended by 125 people, of which 97 supported the project while 23 opposed it and that measures in the EIA report were put in place to mitigate issues raised by those who objected to the project. Counsel relied on Section 58 (1) of Environment Management Authority to argue that the EIA report was issued after NEMA was satisfied that all the legal requirements had been met.

22. Counsel pointed out that the Applicants were not arguing that the proposed mitigation measures were inadequate. Counsel argued that if the Petitioners were not satisfied with the decision of NEMA, they ought to have filed an appeal before NET or NEC as per the law hence by filing this Petition, they have flouted the doctrine of exhaustion. Reliance was placed on the case of Kibos Distillers Limited & 4 Others vs. Benson Ambi Adega & 3 Others (Supra). In that regard, counsel argued that this court lacks jurisdiction to determine this Petition.

23. On whether the change of user was proper, counsel argued that the registered owners of the parcel of land where the construction is to be done, have not raised any objection and that change of user was duly advertised. Counsel referred to the case of Hosea Kiplagat & 6 Others vs. National Environment Management Authority & 2 Others [2018] eKLR, for the proposition that once change of user is advertised, as required in law, then the same is proper.

24. It was further the 3rd and 4th Respondents' contention that the Applicants had approached court with unclean hands despite seeking equitable orders; as they initially denied there having been any public participation but later stated that they attended the meetings for public participation but objected to the project.

25. Counsel also argued that the Applicants were guilty of latches as the approvals were made in 2021 yet the Applicants waited until March 2022 to raise objections.

26. Relying on Sections 107, 108 and 109 of the *Evidence Act*, counsel argued that there was no evidence that the Applicants stood to suffer irreparable injury that may not be compensated in damages if the injunction is not granted. They argued that the 3rd and 4th Respondents stood to suffer the greatest inconvenience if the Application for injunction was allowed.

Analysis and Determination

27. I have carefully considered the application, the responses, the Preliminary Objection and the submissions. In my considered view, the issues that arise for determination are;

    a. Whether the Petitioners flouted the doctrine of exhaustion by filing this Petition in this court.

    b. Whether the Applicants have met the conditions for grant of temporary injunction.

28. The doctrine of exhaustion of administrative remedies means that, where a party is dissatisfied with a decision of an administrative body, authority or institution, and there is legislation providing for a mechanism to challenge such decision before judicial intervention, then such party must first pursue the available alternative dispute resolution mechanisms before seeking judicial intervention. The purpose of the exhaustion doctrine is to promote efficiency in the justice system and grant opportunity to autonomous agencies which have the advantage of deeper expertise to handle disputes emanating

from their processes. (See Peter A. Delvin in "Jurisdiction, Exhaustion of Administrative Remedies, and Constitutional claim, New York University Law Review, Issue Number 5 Volume 93, November 2018.]

29. In the case of Speaker of the National Assembly vs. James Njenga Karume [1992] eKLR, the Court of Appeal held as follows;

> In our view, there is considerable merit in the submissions 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. We observed without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear Constitutional and statutory provisions....

30. Similarly, in the case of Republic vs. National Environment Management Authority Ex Parte Sound Equipment Ltd [2011] eKLR, the Court of Appeal held as follows;

> Where there was an alternative remedy especially where parliament had produced a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted and that in determining whether an exception should be made and judicial review granted. It is necessary for the court to look carefully at the suitability of statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it.

31. The Supreme Court has affirmed the position taken by the Court of Appeal on the question of exhaustion of remedies. In the case of United Millers Limited vs. Kenya Bureau of Standards & 5 Others [2021] eKLR, paragraph 26, the Supreme Court pronounced itself as follows;

> We also take judicial notice that the superior courts' findings as jurisdiction is in harmony with our finding in Albeit Chaurembo Mumbu & 7 Others vs. Maurice Munyao & 148 Others; SC Petition No. 3 of 2016 [2019] eKLR, wherein we stated that, even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunal or any other quasi-judicial authorities and organs to deal with the dispute as provided for int eh relevant parent statute. We emphasized that where there exists an alternative method of dispute resolution established by legislation, the courts must exercise restrain in exercising their jurisdiction conferred by *the Constitution* and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance.

32. The Black's Law Dictionary, 11th Edition, defines exhaustion of remedies as;

> The doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administration body before judicial relief is available. The doctrine's purpose is to maintain comity between the courts and administrative agencies and to ensure that courts will not be burdened by cases in which judicial relief is unnecessary.

33. Essentially therefore, while the doctrine of exhaustion of remedies is not purely a jurisdictional issue, it requires that courts ought to exercise restraint and be hesitant to hear and determine matters which although they appear to apparently have jurisdiction, but the same have been delineated by legislation to be heard and determined by other administrative bodies.

34. It is a doctrine that upholds the notion of separation of powers and promotes the efficient use of judicial resources. I am in agreement with the position taken by Rebeccah L. Donnellan in "Exhaustion Doctrine should not be a doctrine with Exceptions", 103, W. Va.L.Rev [2001], who has aptly captured the basis of the doctrine of exhaustion of remedies. She states that the doctrine respects the administrative autonomy of administrative organs by placing the primary responsibility for administering programmes they have been charged to do by the legislature and the courts ought not to interfere in their exercise of their powers and duties. She further argues, which I concur with, that the doctrine allows administrative bodies to act within the sphere of their special competence, expertise and special knowledge and therefore they have an opportunity to correct their own errors. And lastly, that when a matter is heard by an administrative agency that has statutory power to determine, ultimately should the matter find its way in court, the court will have the benefit of the agency's record and factual findings and this will lead to more accurate decisions as agencies expertise especially on complex factual issues is of help as the agency is utilized as a fact finder. (Rebecca L. Donnellan, Exhaustion Doctrine should not be a doctrine with Exceptions, 103, W. Va.L.Rev [2001].

35. The aforesaid learned author further states, which I am in agreement with, that the exception to the doctrine of exhaustion of remedies include cases where the remedy by the agency will be inadequate to the claim or where the remedy will be futile.

36. In the instant suit, the Respondents have argued that the claim by the Petitioner who faults the decision of NEMA ought to have been filed before the National Environment Tribunal, as provided for under Section 129 of the EMCA. That Section provides as follows;

    1. Any person who is aggrieved by;

        a. The grant of a licence or permit or a refusal to grant a licence or permit, under this Act or its regulations;

        b. The imposition of any condition, limitation or restriction on the persons licence under this Act or its regulations;

        c. The revocation, suspension or variation of the person's licence under this Act or its regulations;

        d. The amount of money required to be paid as a fee under this Act or its regulations;

        e. The imposition against the person of an environmental restoration order or environmental improvement order by the authority under this Act or its regulations.

        May within sixty days after the occurrence of the event against which the person is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

    2. Unless otherwise expressly provided in this Act, where this Act empowers the Director General, the Authority or Committees of the Authority or its agents to made decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose.

    3. Upon any appeal, the Tribunal may;

        a. Confirm, set aside or vary the order or decision in question;

        b. Exercise any of the powers which could have been exercised by the authority in the proceedings in connection with which the appeal is brought; or

c. Make such other order, including orders to enhance the principles of sustainable development and an order for costs, as it may deem just;

d. If satisfied upon application by any party, issue orders maintaining the status quo of any matter or activity which is the subject of the appeal until the appeal is determined.

e. If satisfied, upon application by any party, review any orders made under paragraph (a).

37. It is therefore clear that where any person is dissatisfied with the decision of NEMA in granting a permit or licence to any other person, Section 129 of EMCA allows such aggrieved person to file an appeal before the National Environment Tribunal (NET). NET has the powers to confirm, set aside or vary the orders of NEMA, make any orders that could have been made by NEMA or make any order to enhance the principle of sustainable development.

38. In the instant Petition, the Petitioners' key complaint is that the 1st Respondent (NEMA) granted licences and permits for the construction of a funeral home/mortuary on the land parcel No. Masii/ Utithini/333 without considering the Petitioners' objection as the 3rd and 4th Respondents are not the registered proprietors of the suit property, there is no parking area, waste water will be discharged into the Petitioners' dam and Mukuyuni river, there was no public participation and that therefore the Petitioners' right to a healthy and safe environment protected under Article 42 of *the Constitution* is threatened with violation. The Petitioners also faulted the process of granting the 4th Respondent the approval for change of user.

39. This dispute therefore turns on whether there is an alternative dispute resolution mechanism for the Petitioners' complaint. As discussed above, Section 129 of EMCA places appeals against decisions of NEMA at NET. Having considered the Petitioners' complaint, it is clear that the Petitioners were aggrieved with the decision of NEMA to grant licences and permits for the 4th Respondent to construct a mortuary on Parcel Masii/Utithini/333. The Petitioner has urged this court to find that their claim is properly filed before this court. In opposing the Preliminary Objection, they stated that by dint of Article 162 (2)(b) of *the Constitution* of Kenya 2010 and Section 13(1) of the *Environment and Land Court Act*, this court has original and appellate jurisdiction to hear all matters relating to the environment and violation of Constitutional rights.

40. I do not argue with the Petitioners' argument that Article 162(2)(b) of *the Constitution* and Section 13(1) of the *Environment and Land Court Act* clothes this court with jurisdiction to hear a matter by a person aggrieved with the decision of NEMA. Even if the Petitioners have framed their claim as a Constitutional Petition, it is still a grievance against the decision of NEMA and therefore falling within the purview of the four concerns of Section 129 of EMCA. I must add that while the ELC has power to hear and determine matters touching on land and environment and on matters of violations of the right to a clean and healthy environment, as provided for in Article 162(2)(b) of *the Constitution* as read with Section 13 of the Environment and *Land Act*, that jurisdiction does not extend to hear in its original jurisdiction, matters concerning decisions of NEMA.

41. This is because EMCA has delineated those matters and placed them before NET. Therefore, the jurisdiction of the ELC in so far as the decisions of NEMA are concerned, is only appellate and can only be exercised in respect to the decision of NET. Section 130(1) of the EMCA provides as follows;

1. Any person aggrieved by a decision or order of the Tribunal may, within Thirty days of such decisions or order, appeal against such decisions or order to the Environment and Land Court;

2. .....

3. .....

4. Upon the hearing of an appeal under this section, the Environment and Land Court may-

   a. Confirm, set aside or vary the decision or order in question;

   b. Remit the proceedings to the Tribunal with such instructions for further consideration, report, proceedings or evidence as the court may deem fit to give;

   c. Exercise any of the powers which could have been exercised by the Tribunal in the proceedings in connection with which the appeal is brought; or

   d. Make such other order as it may deem just, including an order as to costs of the appeal or of earlier proceedings in the matter before the Tribunal.

5. The decision of the Environment and Land Court on any appeal under this Section shall be final.

42. It is clear that in Environmental Management and governance, the key statute providing for the institutional framework thereof is the EMCA. (See the Preamble of EMCA). And at the centre of Environmental Protection and Conservation and Management and is NEMA, which has the power of general supervision and coordination over all matters relating to the environment, as provided for in Section 9 of the EMCA. The obligation of the state to protect the environment prescribed under Article 69 of *the Constitution*, which includes establishing systems of environmental impact assessment, environmental audit and monitoring of the environment and eliminating processes and activities that endanger the environment is manifest in the establishment of NEMA as the principal instrument of Government in the implementation of all policies relating to the environment.

43. Therefore, EMCA has provided mechanisms of dispute resolutions in respect of decisions made by NEMA by placing appeals against NEMA decisions at the NET and escalating the same to the ELC which is the final decision maker. An observation of the powers of the ELC under Section 130 of the EMCA, shows that the ELC can still exercise the same powers of NET, which ultimately boil to the same powers of NEMA. It would therefore be irregular, unlawful and an undesirable shortcut for anyone aggrieved with the decision of NEMA to side step NET and rush to this court in the guise of a Constitutional Petition.

44. The argument that because the ELC has original jurisdiction by dint of Article 162(2)(b) of *the Constitution* as read with Section 13 of the *Environment and Land Court Act*, to hear matters concerning the environment and therefore it can hear matters relating to the decisions of NEMA, is untenable. The jurisdiction of ELC in so far as the decisions of NEMA are concerned, can only be exercised as an appellate jurisdiction under Section 130 of the EMCA.

45. I associate myself with the position taken by the Court of Appeal in the case of Republic Kibos Distillers Limited & 4 Others vs Benson Ambuti Adega & 3 Others [2020] eKLR, where the Court of Appeal stated as follows;

> To this extent, I find that the learned judge erred in law and in finding that the ELC had jurisdiction simply because some of the prayers in the Petition were outside the jurisdiction of the Tribunal or National Environmental Complaints Committee. A party or litigant cannot be allowed to confer jurisdiction on a court or to oust jurisdiction of a competent organ through the art and craft of drafting of pleadings. Even if a court has original jurisdiction, the concept or original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and

determine a dispute. Original jurisdiction is not an ouster clause that ousts the jurisdiction of other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction on a court or a body to hear and determine all the subduing disputes. Original jurisdiction simply means the jurisdiction to hear specifically Constitutional or legislatively delineated disputes of law and fact at first instance. To this end, I reiterate and affirm the dicta in Speaker of the National Assembly vs. James Njenga Karume [1992] eKLR, where it was stated 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.

Further, I observe that the jurisdiction of the ELC is appellate under Section 130 of EMCA. The ELC also has appellate jurisdiction under Sections 15, 19 and 38 of the Physical Planning Act. An original jurisdiction is not an appellate jurisdiction. A court with original jurisdiction in some matters and appellate jurisdiction in others cannot by virtue of its appellate jurisdiction usurp original jurisdiction of other competent organs. I note that original jurisdiction is not the same thin as unlimited jurisdiction...

..in addition, Section 129(3) of EMCA confers power upon NET to inter alia exercise any power which could have been exercised by NEMA or making such other order as it may deem fit. .....it was never the intention of *the Constitution* makers or legislative that simply because a party has alleged violation of a Constitutional right, the jurisdiction of any and all Tribunals must be ousted hereby conferring jurisdiction at first instance to the ELC or High Court.

46. Therefore, I hold and find that as regards the impugned decision of NEMA, this court must exercise restraint and wait for the matter to be taken before the NET first.

47. On whether the approval for change of user is unlawful, I note that Rule 4 of the Physical and Land Use Planning (General Development Permission and Control) Regulations, 2021, allows anyone who seeks to put land into a use other than that which it is registered under, to apply to the planning authority (County Executive Committee Member) for change of user or extension of use.

In consideration of the application for change of user, the planning authority must take into account the parameters set out in Paragraph 5 to the 3rd Schedule of the Act, which includes the effect of the change on the neighbourhood, visual impact, effect on the right to view, defined location and size of the land, current user, area zoning and regulation and infrastructure availability and adequacy. The Petitioners have complained in this court that the approval for change of user did not consider several matters including land ownership, parking and the effect on the neighbourhood.

48. However, under Section 78(b) of the *Physical and Land Use Planning Act* No. 13 of 2019, the County Physical and Land Use Planning Liaison Committee is the institution that is mandated to hear and determine appeals against the decisions of the Planning Authority and in this matter the decision of the County Government of Machakos approving change of user from agricultural to public use/ mortuary. Section 80 (3) requires the chairperson in the County Physical and Land Use Planning Liaison Committee to cause the determination of the committee to be filed in the Environment and Land Court and the court shall record the determination as a judgment of the court and the same shall be published in the Gazette or in any one newspaper of national circulation.

49. In view of the above, it was contrary to Section 78 of the *Physical and Land Use Planning Act* No. 13 of 2019 for the Petitioners to file their complaint in this court faulting the decision of the 1st Respondent to approve change of user. They ought to have filed the same before the County Physical Land Use Planning Liaison Committee.

50. In the premises therefore, the matters complained before this court, were brought to this court prematurely as this court lacks jurisdiction to determine them at this stage. The result is that the Petition is struck out with costs to the 1st, 2nd, 3rd and 4th Respondents.

51. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 8TH DAY OF FEBRUARY 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Ms Guy for the 1st Respondent

Mr. Kilonzo for Petitioners/Applicants

Mr. Muna for 3rd & 4th Respondents

No appearance for 2nd Respondent

Josephine – Court Assistant