Thiongo v Elsie Ridge Limited & 4 others (Environment & Land Case 1593 of 2016) [2023] KEELC 16300 (KLR) (14 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16300 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 1593 OF 2016

JA MOGENI, J

MARCH 14, 2023

BETWEEN

GEOFFREY MUNGAI THIONGO ..... PLAINTIFF

AND

ELSIE RIDGE LIMITED ..... 1ST DEFENDANT

SICHUAN HUASHI ..... 2ND DEFENDANT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 3RD DEFENDANT

NATIONAL CONSTRUCTION AUTHORITY ..... 4TH DEFENDANT

NAIROBI CITY COUNTY GOVERNMENT ..... 5TH DEFENDANT

RULING

1. There are two (2) preliminary objections that the court is called upon to determine. The first was filed by the 1st Defendant on 7/12/2022 and the second by 2nd Defendant on 9/12/2022. Those Preliminary Objections contend and seek for orders that: -

   By 1st Defendant

   1. The approvals challenged by the plaintiff in this suit are creatures of statute which the Plaintiff has since utilized and/or failed to do so and ousts this honourable court's jurisdiction to grant the orders sought in the suit in the first instance.

   2. That Section 78 of Physical Planning (*Physical and Land Use Planning Act*) provides a clear and mandatory mechanism of Appeals challenging Building

approvals/plans for any development such as that that has been developed on the suit properties.

3. The plaintiff has failed to invoke the mandatory provisions of statute under the Physical Planning and Land Use Act challenging the plans and approvals of the subject developments on the suit properties and this court has no jurisdiction to canvass the issues raised herein in the first instance.

4. That determination of Net Appeal No. 193 of 2016 challenging the NEMA approvals given to the 1st defendant on the development on LR No. 15005/12 and LR NO. 15005/13 - suit properties ousts this honourable court jurisdiction to deal with the question of the subject NEMA approval in the first instance a second time.

5. That by dint of Section 129 of the Environmental Management & Coordination Act and section 78 of the Physical Planning Act. this honourable court lacks jurisdiction to grant the orders sought against the defendants in the suit in the 1st Instance for want of ripeness and exhaustion.

    a. Under the doctrine of "Exhaustion" where there is an alternative method of dispute resolution established by legislation (In this case the Under the Physical and Planning Act and Environmental Management & Coordination Act EMCA) courts must exercise restraint in proceeding with any such matter and must give preference to such dispute resolution mechanism established by law with the mandate to deal with specific disputes in the 1st instance.

    b. National Environment Tribunal having determined NET NO. 193 OF 2016 challenging the NEMA approval for development on L.R NO. 15005/12 and LR NO. 15005/13 takes away this court's jurisdiction to deal with this matter once again in the 1st instance.

By 2nd Defendant

1. The court has no jurisdiction to deal with the suit as no appeal was filed within 30 days of the decision dated 16th November 2016 from the National Environmental Tribunal in National Environmental Tribunal Appeal No. 193 of 2016 Geoffrey Mungai Thiongo v The Director of NEMA and Elsie Ridge Ltd in accordance with the mandatory requirement of section 130 of the *Environmental Management and Co-ordination Act*.

2. The time for filing any appeal is time barred and the court cannot exercise original jurisdiction when the appeal before the National Environmental Tribunal Appeal No. 193 of 2016 Geoffrey Mungai Thiongo v The Director of NEMA and Elsie Ridge Ltd was dismissed in its entirety.

3. The matter is res judicata as it has been dealt with by the National Environmental Tribunal in National Environmental Tribunal Appeal No. 193 of 2016 Geoffrey Mungai Thiongo V The Director of NEMA and Elsie Ridge Ltd.

4. The court lacks original jurisdiction to entertain the present suit owing to the doctrine of exhaustion of statutory remedies for the reasons that, the Plaintiff's suit herein primarily raises the question of planning, use and development of the 1st Defendant's property which matters are regulated under the Physical Planning Act, 1996 (No. 6 of 1996) (repealed) and the *Physical and Land Use Planning Act*, 2019. The plaintiff failed, ignored and/or neglected to exhaust the alternative means of dispute resolution as provided by the said legislation.

5. The alleged constitutional issues in the Amended Plaint are peripheral in nature and overshadowed by the dominant issue that the Plaintiff has failed to exhaust the doctrine of statutory remedies.

6. The court has no jurisdiction to order the destruction of the 1st Defendant's suit property as this would contravene articles 40 and 50 of *the Constitution* by condemning third parties unheard who have bought the various apartments.

7. The Deponent has perjured himself in his Verifying Affidavit when he swore on oath in the Plaint dated 19th December 2016 that that there had never been previous proceedings over the subject matter. This averment was false, and the suit should be struck out with costs.

2. The preliminary objections were disposed of by way of written submissions. All parties filed submissions in support and opposition to the preliminary objections, respectively which I have considered. The Plaintiff filed their written submissions dated 24/01/2023, the 1st Defendant filed submissions dated 18/01/2023 and further submissions dated 25/01/2023 and the 2nd Defendant filed submissions dated 16/12/2022.

3. Having examined the Amended Plaint dated the 20/01/2022, and taken into account the Reliefs sought, and having reviewed the rival submissions, the issue that suffices for Determination is whether the preliminary objections are merited.

Analysis and determination

4. The Preliminary Objections raised by the 1st and 2nd Defendants herein mainly relates to the lack of original jurisdiction of this Court by virtue of mandatory provisions of the Physical Planning (*Physical and Land Use Planning Act* and the Environmental Management & Coordination Act (EMCA), that the determination of NET Appeal No. 193 of 2016 ousts the court's jurisdiction and that the Court has no jurisdiction to deal with the suit as no appeal was filed within 30 days of the decision of NET Appeal No. 193 of 2016, res judicata, the doctrine of exhaustion, that the constitutional issues are peripheral in nature and overshadowed by the dominant issue and that the plaintiff has perjured himself.

5. On the question of res judicata, the Court finds that this was already pronounced by Justice Okong'o and the same is therefore spent. I shall therefore not pronounce myself further on this.

6. On the question of jurisdiction, the 1st and 2nd Defendants are essentially challenging the jurisdiction of this court on the basis that the complaints raised by the Plaintiff, in particular prayers (a)-(g) is within the mandate of the NET Tribunal pursuant to section 129 of EMCA and prayers (a), (b), (c) and (g) are within the mandate of the Physical Planning Liaison Committee under the repealed Physical Planning Act, 1996. Both parties heavily deny that this court has jurisdiction. The 2nd defendant contended that this court cannot exercise original jurisdiction when the appeal before the NET Tribunal was

dismissed. They further submitted that once the Plaintiff's appeal was dismissed on 16/12/2016 by the NET Tribunal, the Plaintiff was mandatorily required to file an appeal before the ELC within 30 days.

7. Additionally, the 2nd defendant concedes that the new point of law that was brought out by the present preliminary objections was the doctrine of exhaustion. I shall delve on the same.

8. The preliminary objections ventilated by the 1st and 2nd defendants are essentially premised on the provisions of two separate and distinct Acts of Parliament: Section 129 of the *Environmental Management & Coordination Act* 1999 (2015) and Section 78 of the *Physical and Land Use Act*, 2019.

9. As pertains to the first limb, the provisions of Section 129 (1) & (2) of the *EMCA* 1999 (2015), have provided instances where Disputes pertaining to compliance with breach and/or violation of the Provisions of the Act, ought to lodge with and/or addressed by the National Environmental Tribunal, which is established pursuant to the Provisions of section 125 of the said Act.

10. For ease of reference, it is appropriate to reproduce the provisions of Section 129 of the EMCA Act,1999, which provides as hereunder:

> 129. Appeals to the Tribunal
>
> (1) Any person who is aggrieved by
>
> a. a refusal to grant a licence or to the transfer of his licence under this Act or regulations made thereunder:
>
> b. the imposition of any condition, limitation, or restriction on his licence under this Act or regulations made thereunder; [Rev. 2012] Environmental Management and Co-ordination CAP. 387 E12 - 66 [Issue 1]
>
> c. the revocation, suspension, or variation of his licence under this Act or regulations made thereunder.
>
> d. the amount of money which he is required to pay as a fee under this Act or regulations made thereunder.
>
> e. the imposition against him of an environmental restoration order or environmental improvement order by the Authority under this Act or regulations made thereunder, may within sixty days after the occurrence of the event against which he 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 to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance.

11. From the foregoing provision, it becomes evident and/or apparent that the Reliefs that have been sought by the Plaintiff herein particularly (a)-(g) respectively, are matters which essentially ought to be ventilated before and/or addressed by the National Environmental Tribunal in the first instance.

12. As pertains to the second limb, the relevant provision is section 78 of the *Physical and Land Use Act,* 2019, which provides as hereunder:

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

13. Again, looking at the aforesaid provisions, the Reliefs sought by the Plaintiff herein relating to Prayers (a), (b), (c) and (g), respectively, which are essentially challenging the approval relating to change of user and approval of the proposed project, are matters that fall within the Statutory remit of the liaison committee.

14. In view of the foregoing, I agree with the 1st and 2nd Defendants that there does exists Statutory Dispute Resolution Mechanism, which ought to have been invoked in the first instance, before recourse was made to this Honourable court.

15. I note that the Plaintiff did approach the NET Tribunal with his grievances. However, there is no evidence relating to exhaustion that has been availed. The Plaintiff does contend in the Amended Plaint that the doctrine of exhaustion does not apply in the present suit. The Plaintiff avers as follows:

> " Par 34 Further, the Plaintiff avers that whilst the Physical Planning Act and the *Environmental Management and Co-ordination Act* both provide for an avenue for appeal whilst challenging issuance of approvals and licences, that avenue was not available, effective nor sufficient to the Plaintiff. In particular, the remedy was not available as the period of appeal granted to the Plaintiff was wholly inadequate and insufficient particularly due to lack of information. On sufficiency, the relevant bodies would not be in a position to consider the matters raised by the Plaintiff in this suit and the remedies that it was mandated by law to provide were limited to those set out in their respective constitutive statutes. On effectiveness, based on acts complained of having being committed by the Defendants, prospects of an effective remedy were indeed slim to none. The exhaustion doctrine was therefore inapplicable in the present suit.
>
> Par 35. The Plaintiff avers the above notwithstanding his appeal to the National Environment Tribunal. Appeal No NET/193/2016 was dismissed at a preliminary stage on account of being time barred."

16. The Doctrine of Exhaustion is defined in B*lack's Law Dictionary* 10th Edition as follows –

> " exhaustion of remedies. The doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative 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 juridical relief is unnecessary."

17. In *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR the Court 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."

18. I find and hold that evidence relating to exhaustion is not sufficient on the Plaintiff's part. The Plaintiff indeed had the right to appeal. He exercised the same by channeling his grievances to the NET Tribunal. However, his appeal was never heard on merit because the same was dismissed for being filed out of time. It is the Plaintiff's case that he was never involved in the public participation exercise that would have led to the granting of approval to the 1st Defendant to develop the adjoining parcel of land known as LR No. 15005/12. The Plaintiff also explained that he made further inquiry and found that the 3rd defendant only received a report of the environmental impact on 5/12/2015 but an EIA Licence No. NEMA/EIA/PSL/2094 had been granted on 21/07/2015. That the licence was issued before an Environmental Impact Assessment Study Report was done. From the Ruling issued in NET Tribunal Appeal No. NET/193/2016, it appears the Plaintiff approached the Tribunal on 20/09/2016. His appeal was dismissed for being time barred and therefore the Tribunal did not delve on the merit of the suit and this court cannot consider the merits of the suit at all. The present suit was filed on 19/12/2016. The Plaintiff is clearly put in some effort in attempting to address the subject dispute before the statutory fora.

19. I must add that in instances where an Alternative Dispute Resolution Mechanism has been provided, a litigant is obliged to comply or better still implead that the said Alternative mechanism provided shall not suffice in respect to a particular matter. Section 9 [2] of the *Fair Administrative Actions Act*.

20. As pertains to whether or not this honourable court has jurisdiction to address and/or attend to the subject dispute, it is important to take note of the following provisions: article 42, 69, 70 & 162 (2) b of *the Constitution* of Kenya 2010, Section 13 of the *Environment and Land Court Act*, 2011 and Section 3(3) & 3(5) of the Environmental Management & Coordination Act, 1999 (2015).

21. Section 13 of the *Environment and Land Court Act* No. 19 of 2021 provides that:

> 13. Jurisdiction of the Court
>
> 1. The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
>
> 2. In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes?
>
> a. relating to environmental planning and protection, climate issues, land use planning, title, tenure,

boundaries, rates, rents, valuations, mining, minerals, and other natural resources.

b. relating to compulsory acquisition of land.

c. relating to land administration and management.

d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

e. any other dispute relating to environment and land. [Rev. 2012] No. 19 of 2011 Environment and Land Court 9 [Issue 1].

3. Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation, or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*,2010.

4. In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

5. Deleted by Act No. 12 of 2012, Sch. (6) Deleted by Act No. 12 of 2012, Sch.

6. In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including?

a. interim or permanent preservation orders including injunctions.

b. prerogative orders.

c. award of damages.

d. compensation.

e. specific performance.

f. restitution.

g. declaration.

or (i) costs.

22. Other than the foregoing provisions, I also note that Section 3(3) of the *Environmental Management & Coordination Act,* 1999 (2015) which provides as hereunder:

2. If a person alleges that the entitlement conferred under subsection (1) has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully

available, that person may apply to the High Court for redress and the High Court may make such orders, issue such writs or give such directions as it may deem appropriate to—

a. prevent, stop or discontinue any act or omission deleterious to the environment.

b. compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment.

c. require that any on-going activity be subjected to an environment audit in accordance with the provisions of this Act.

d. compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and

e. provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing.

23. The provisions alluded to hereinbefore clothed and/or confer this honourable court with the requisite jurisdiction to entertain the subject dispute and grant the relief sought. Further, the existence of other statutory bodies conferred and/or vested with mandate to interrogate some aspect of the subject dispute, does not deprive, and oust the jurisdiction of this honourable court, which is a superior court of record.

24. From a reading of the aforementioned provisions, this Honourable Court is conferred and/or vested with both Original and Appellate Jurisdiction to hear all Disputes pertaining to and/or concerning Environmental Planning and Protection, Climate Issues, Land use Planning, Title, Tenure, Boundaries, Rates, Rents, Valuation, Minerals, and other Natural Resources.

25. It is also Imperative to take cognizance of the provision of section 13 (3) of the *Environment and Land Court Act*, Number 19 of 2011, which provides as hereunder:

> "(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*."

26. I opine that this Honourable Court has and is seized of the requisite Jurisdiction to entertain and/or adjudicate upon the subject dispute. However, both the 1st and 2nd Defendant strongly submitted that this Honourable court ought not to assume jurisdiction where there exists Alternative Dispute Resolution Mechanism provided for in an act of Parliament and which should thus be the first frontier, in the Event of a Dispute arising.

27. As pertains to the Jurisdiction, I am guided by the Decision of the Supreme Court in *Samuel Kamau Macharia v Kenya Commercial Bank* (2012) eKLR where the honourable Court underscored the source of a court's Jurisdiction and in particular, observed as hereunder:

> "A court jurisdiction flows from either *the constitution* or legislation or both".

28. On the other hand, in the case of E*sther Gachambi Mwangi v Samuel Mwangi Mbiri* (2013) eKLR, the Court of Appeal observed as that:

> " As was stated in the Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd 1989 KLR 1, jurisdiction is everything. Without it, a court has no power to take one more step. In the Matter of Advisory Opinions of the Supreme Court under Article 163(3) of *the Constitution*, Constitutional Application No. 2 of 2011; the Supreme Court noted that The Lillian 'S' case [1989] KLR 1] establishes that "jurisdiction flows from the law, and the Recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity..."

29. Having found and held that this honourable court is conferred and/or clothed with both Original and Appellate Jurisdiction in respect of all, if not, most of the Reliefs sought, the critical question that should therefore be answered, is whether in such scenario the Honourable court should exercise and/or assume original jurisdiction.

30. Conversely, the other question would thus be what happens to the Appellate jurisdiction of this honourable court, in the event the Honourable court assumes Original Jurisdiction. Clearly, the court cannot exercise both jurisdictions, [that is, Original and Appellate], simultaneously and in my humble view, one aspect of Jurisdiction must, no doubt give way for the other.

31. Further, it is my humble opinion that like in disputes under the Environmental Management and Coordination Act, 1999 (2015), where this honourable court is the final appellate court, it would deprive any aggrieved party of the undoubted Right of Appeal. In this regard, this Honourable court would have restricted and/or otherwise diminished the Claimants' Constitutional Rights of access to justice, particularly, the Right of Appeal.

32. I further hold the opinion, the Right to access to justice, under article 48 of *the Constitution*,2010, envisages a scenario where a litigant or a citizen, can be able to exhaust all the level of appeals provided for and/or sanctioned under the law. Consequently, this court while exercising the choice, whether to assume the Original Jurisdiction or defer same, to a statutory Body so established, the Honourable Court should be minded to provide the latitude for Appeal.

33. In any event, I wish to state that even where the Honourable Court, has both the original and Appellate Jurisdiction, it does not mean that the honourable court therefore must render the established statutory agencies and/or bodies irrelevant and/or dysfunctional.

34. A balance must be struck, so as to facilitate ordered functioning within the Bodies that are conferred with certain statutory mandates and to ensure that same achieve the Purpose of their creation and Existence.

35. In this regard, I adopt and rely on the decision of the Court of Appeal in the case of *Kibos Distilers Limited & 4 Others v Benson Ambuti & 3 Others* (2020) eKLR, where the honourable court held that:

> " Even if a court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and determine a dispute. Original jurisdiction is not an ouster clause that ousts the jurisdiction of other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction on a court or body to hear and determine all and sundry 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 that in Speaker of the National Assembly v 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 thing as unlimited jurisdiction.

A court cannot arrogate itself an original jurisdiction simply because claims and prayers in a petition are multifaceted. The concept of multifaceted claim is not a legally recognized mode for conferment of jurisdiction to any court or statutory body.

In addition, Section 129 (3) of EMCA confers power upon the NET to inter alia exercise any power which could have been exercised by NEMA or make such other order as it may deem fit. The provisions of Section 129 (3) of EMCA is an all-encompassing provision that confers at first instance jurisdiction upon the Tribunal to consider the prayer Nos. 1, 7, 8, 9 and 10 in the petition. It was never the intention of *the Constitution* makers or legislature that simply because a party has alleged violation of a constitutional right, the jurisdiction of any and all Tribunals must be ousted thereby conferring jurisdiction at first instance to the ELC or High Court".

36. Lastly, I have considered the prayers sought by the Plaintiff in the Amended Plaint dated 20/01/2022. The prayers for ease of reference are paraphrased as follows:

a. A declaration that the development on LR Nos 15005/13 was done without obtaining the statutorily required approvals for change of use from Nairobi County Government.

b. A declaration that the development on LR Nos. 15005/13 was done without approval of the requisite structural and architectural plans.

c. A declaration that the current development LR No 15005/12 was limited to a development of up to four floors and any floors constructed in excess of those approved was done so illegally and in contravention of the existing approvals.

d. A declaration that the NEMA approval for the development on LR Nos. 15005/12 and LR Nos 15005/13 was obtained by way of falsehoods, without due consideration of all relevant material and is in contravention with the approved zoning policy of the Nairobi City County.

e. A declaration that the development on LR Nos 15005/12 and LR Nos 15005/13 did not comply with of the EIA requirements under the Physical Planning Act.

f. A declaration that the current development LR No 15005/12 and LR No. 15005/13 is consequently illegal.

g. An order for restoration of the LR No 15005/12 and L R No 15005/13 (within a period to be determined by this court) to their status prior to the development thereon at the cost of the Defendants.

h. Compensatory damages for violation of the Petitioners' rights under *the Constitution*,

i. General damages for the resultant loss of value to the Plaintiff's properties namely. I.R. No. 15005/7 and I R. No. 15005/8.

j. Punitive damages

k. Costs of the suit

l. Any other order that this court deems fit and just to grant in the circumstances.

37. I opine that the dispute beforehand is multifaceted and/or raises cross-cutting issues, including declaratory orders pertaining to breach or violation of the Plaintiff's constitutional and fundamental rights. However, In the case of *Bernard Murage - v - Fine serve Africa Limited & 3 others* [2015] eKLR the Supreme Court again stated that:

> "Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first."

38. Section 129 (3) of EMCA confers power upon the NET to inter alia exercise any power which could have been exercised by NEMA or make such other order as it may deem fit. The provisions of Section 129 (3) of EMCA is an all-encompassing provision that confers at first instance jurisdiction upon the Tribunal. to consider the prayer Nos. (g), (h), (i) and (j) in the Amended Plaint. It was never the intention of *the Constitution* makers or legislature that simply because a party has alleged violation of a constitutional right, the jurisdiction of any and all Tribunals must be ousted thereby conferring jurisdiction at first instance to the ELC or High Court. (See *Kibos Distillers* (supra).

39. I am therefore guided by the foregoing decisions, and I shall exercise judicial restraint and allow the established constitutional and statutory bodies, if any, to appropriate, exercise and carry out their extensive mandate in accordance with enabling statutes, before assuming Jurisdiction, in the event, upon the lodgment of Appeals, where appropriate.

40. On the question of Doctrine of Exhaustion, it is important that Plaintiff's and/or litigants, knowing of the existence of alternative dispute resolution mechanism, should proceed to and exhaust same before approaching the Honourable court. I agree with the decision of the Court in the case of *Geoffrey Muthinja Kabiro v Samuel Muguna Henry* (2015) eKLR, where it held 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 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".

Disposal orders

41. The totality of the foregoing is that the truncheons aimed at the head of the plaintiff's suit as against the defendants is inescapable. I find merit in the Preliminary Objections dated 6/12/2022 and 9/12/2022, and for which reasons the Plaintiff's Suit is struck out with costs to the 1st and 2nd defendants.

42 Orders accordingly.

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT AT NAIROBI THIS 14TH DAY OF MARCH, 2023.

MOGENI J.

JUDGE

In the virtual presence of :-

Mr Lubellelah for the 4th Defendant

Mr. Muhizi holding brief for Allen Waiyaki Senior Counsel for 2nd Defendant

Ms. Hanoi holding brief for Ms. Njoroge for the Plaintiff

No appearance for the 1st Plaintiff and 5th Defendant

Ms. Caroline Sagina: Court Assistant