



**Genesis for Human Rights Commission v Balbinus Investment Ltd & 2 others  
(Constitutional Petition 34 of 2022) [2023] KEELC 18932 (KLR) (7 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18932 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
CONSTITUTIONAL PETITION 34 OF 2022**

**LL NAIKUNI, J**

**JUNE 7, 2023**

**IN THE MATTER OF: ARTICLE 1, 2, 3, 19, 20, 21, 22, 23, 42,  
69, 70, 159 AND 165 OF THE  
CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: ARTICLE 42, 66 AND 69 OF THE  
CONSTITUTION OF KENYA, 2010.**

**AND**

**IN THE MATTER OF: SECTION 3 OF THE ENVIRONMENT  
MANAGEMENT AND CO-ORDINATION**

**ACT**

**AND**

**IN THE MATTER OF: SECTION 78, 90, 92, 93, 102, 103 AND  
108 OF THE ENVIRONMENT**

**MANAGEMENT AND COORDINATION**

**ACT CAP. 387 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: CONSTRUCTION OF FORTY-ONE HIGH  
RISE APARTMENT ON PLOT NO.**

**MN/1/1727 IN NYALI SUB-COUNTY**

**WITHIN MOMBASA COUNTY**

**AND**

**IN THE MATTER OF: THE RIGHT TO LIFE AND RIGHT TO A**



**CLEAN AND HEALTHY ENVIRONMENT  
AND TO HAVE THE ENVIRONMENT  
PROTECTED FOR THE BENEFIT OF THE  
PRESENT AND FUTURE GENERATION**

**BETWEEN**

**GENESIS FOR HUMAN RIGHTS COMMISSION ..... PETITIONER**

**AND**

**BALBINUS INVESTMENT LTD ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA) .... 2<sup>ND</sup>  
RESPONDENT**

**CEC IN CHARGE OF HEALTH COUNTY GOVERNMENT OF  
MOMBASA ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**I. Introduction**

1. The 1<sup>st</sup> Respondent, Balbinus Investment Limited moved this Honorable Court through filing of a Notice of Preliminary Objection dated 4<sup>th</sup> October, 2022 raised an objection onto the main Petition filed by the Petitioner herein. Primarily, the 1<sup>st</sup> Respondent raised several issues but mainly that the Present Petition filed on the 22<sup>nd</sup> September 2022, at the Environment and Land Court Division of the High Court which has no jurisdiction to hear and or entertain this Petition in any manner. Invariably, the Present Petition was a nullity at inception, and incapable of being heard and determined by this Court as it deals with issues pertaining to compliance with the Environment Impact Assessment license (hereinafter referred to as “The EIA”) which is a preserve of the National Environment Tribunal pursuant to the provision of Section 129 (1) of Environment & Management Coordination Act, 1999 (Hereinafter referred to as “The EMCA, 1999”). Those matters can only come to this court on an Appellate capacity. As a result, this court lacks the requisite jurisdiction to deal with this matter currently in its original capacity.
2. Prior to dealing with the issues of the objection herein, it is imperative that the Court provides a brief background to the matter. The Petitioner filed a Petition dated 21<sup>st</sup> September, 2022 where he sought the following orders:
  - a. A Declaration that the construction of a Forty-one high rise apartment on Plot No.MN/1/1727 in Nyali sub-county within Mombasa county along Mount Kenya road in Nyali without adherence to the conditions of the license issued by the 2<sup>nd</sup> Respondent is a violation of the Residents constitution Right as provided under Article 26 and 42 of *the constitution*.
  - b. A Declaration that fundamental rights of the Petitioners under Articles 21 and 50 of *the constitution* of Kenya will be violated and threatened.



- c. An order of Permanent injunction restraining the 1<sup>st</sup> Respondents by themselves, their agents, servants and employees and/or any other person acting on their behalf and/or instruction from the construction of forty-one high rise apartment on the aforesaid parcel of land until compliance with license conditions.
- d. Aggravated damages
- e. Such other and /or further relief as this Honourable court may deem fit and just to grant.
- f. The costs of and occasioned by this petition to be provided for.

## II. The Notice of Preliminary Objection by the 1<sup>st</sup> Respondent

2. The 1<sup>st</sup> Respondent in support of the Preliminary Objection dated 4<sup>th</sup> October, 2022 on the following grounds:-
  - a. The Present Petition was filed on the 22<sup>nd</sup> September 2022, at the Environment and Land Court Division of the High Court. That Court had no jurisdiction to hear and or entertain this Petition in any manner.
  - b. Invariably, the Present Petition was a nullity at inception, and incapable of being heard and determined by this Court.
  - c. This Court is established as a High Court pursuant to the provision of Article 162(2) (b) of *the Constitution* of Kenya, 2010 and exercises its jurisdiction over those matters ordained to it by *the Constitution*. This is the right Court for all Land Matters.
  - d. The present application however deals with issues pertaining to compliance with the EIA license which is a preserve of the National Environment Tribunal (hereinafter referred as “The NET”) pursuant to Section 129 (1) EMCA. Those matters can only come to this court on an Appellate capacity. As a result, this court lacks the requisite jurisdiction to deal with this matter currently in its original capacity.
3. Therefore, on the authority of the case of “Motor Vessel Lillian “S” -Versus - Caltex Oil (1989) eKLR in which Nyarangi JA held (see page 8) that:-
 

“It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it a Court has no power to make one more step. When a Court has no jurisdiction, there would be no basis for continuation of proceedings. 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. I can see no grounds why a question of jurisdiction could not be raised during the proceedings. As soon as that it is done, the court would hear and dispose of that issue without further ado. And also that “out of nothing, comes nothing”.
4. Where there is no jurisdiction, any further or more steps taken by a Court is void ab initio. Therefore, it is necessary for this Court to determine the issue of jurisdiction that has been raised before it, at this earliest opportunity, before any other step can be taken in the matter.



### III. Submissions

5. On the 1<sup>st</sup> November, 2022, while all the parties were in court consented to canvassing the Preliminary Objection dated 4<sup>th</sup> October, 2022 by way of written submissions and a ruling date was set on Notice. The 1<sup>st</sup> Respondent submitted their written submissions. The other Parties did not file written submissions.

#### A. The Written Submissions by the 1<sup>st</sup> Respondent

6. On 25<sup>th</sup> October, 2022, the Learned Counsel for the 1<sup>st</sup> Respondent through the Law firm of Messrs. Balala & Abed Advocates filed their written submissions dated 23<sup>rd</sup> October, 2022. Mr. Makori Advocate submitted that the submissions are by the 1<sup>st</sup> Respondent in support of their Notice of Preliminary Objection filed in court on 4<sup>th</sup> October 2022 stating that Court had no jurisdiction to hear and or entertain this Petition in any manner. The 1<sup>st</sup> Respondent contends that it is within its right to raise the preliminary objection as per the case of “Mukisa Biscuits Manufacturing Co. Ltd – Versus - West End Distributors Ltd [1969] EA 696 where a preliminary objection was described as follows:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication of the 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.”

7. The Learned Counsel contended that the Present Petition was filed on the 22<sup>nd</sup> September 2022, at the Environment and Land Court Division of the High Court. This Court is established pursuant to Article 162 (2) (b) of *the Constitution* and exercises its jurisdiction over those matters ordained to it by *the Constitution*. It is of the same status as the High Court and is the right Court for all Land Matters. The present Petition and application therein however deal with issues pertaining to compliance with the EIA license which is a preserve of the National Environment Tribunal pursuant to sec. 129(1) EMCA. Those matters can only come to this court on an appellate capacity. As a result, this court lacks the requisite jurisdiction to deal with this matter currently in its original capacity.
8. The Learned Counsel referred Court to the case of “Samuel Kamau Macharia – Versus - Kenya Commercial Bank & others, (2012)eKLR, where the Supreme Court held thus:

“(68) A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

9. The Learned Counsel argued that the above findings were fully supported in the case of “Motor Vessel Lillian “S” -Versus - Caltex Oil (Supra) in which Nyarangi JA held that:

“It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it a Court has no power to make one more step. When a Court has no jurisdiction, there would be no basis for continuation of proceedings. 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.”



10. The contention by the Learned Counsel was that again more recently, in the case of “Benson Ambuti Adege & 2 others – Versus - Kibos Distillers Limited (2020)eKLR, the Court of Appeal found for a fact that the Environment & Land Court had no jurisdiction to hear the matters that had been appealed from by parties. It then proceeded to evaluate and determine other matters arising in that Appeal after making a finding that the ELC had no jurisdiction to hear that matter. On a further appeal to the Supreme Court, that Court held at paragraph 53 as follows:-

“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 4<sup>th</sup> Respondent to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> 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.”

11. It went on further and admonished the court of Appeal at Paragraph 54 stating:-

“The Court of Appeal, in over 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. Also, once it had determined that ten ELC did not have the jurisdiction to hear and determine the issue before it, it should have held that any determination made was void also initio.”

12. In this respect, reference is made to Article 163(7) of *the Constitution*, which in mandatory terms makes provision that “all Courts are bound by the decisions of the Supreme Court”. Where there is no jurisdiction, any further or more steps taken by a Court is void ab initio. Specific reliance shall also be based on the case of “Benson Ambuti Adege – Versus - Kibos Distillers Limited. On the issue of jurisdiction, at paragraph 10 of that decision, the Supreme Court cited with approval the Court of Appeal decision which was as follows:

“To this extent, I find that the learned Judge erred in law in finding that the ELC had jurisdiction simple because some of the prayers in the Petition were outside the jurisdiction of the Tribunal or the National Environmental Complaints Committee. A party or litigant cannot be allowed to confer jurisdiction on a Court or oust jurisdiction of a competent organ through the art and craft of drafting pleadings. Even if a Court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other determine a dispute. Original jurisdiction is not an ouster clause the oust the inclusive clause that confers jurisdiction on a Court or body to hear and determine all and sundry disputes. Original jurisdiction 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 – Versus - James Njenga Karume (1992) eKLR where it was stated that where there is clear procedure for the redress of a particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. (...) 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 organs, I note that original jurisdiction is not the same thing as unlimited jurisdiction.”

13. The Learned Counsel averred that following on the same guidance given by that decision as summarized above, with regard this Petition by the Petitioner - Genesis for Human Rights Commission, it was submitted as follows:-
  - (a) This Petition is filed in a Court that lacks jurisdiction to hear and determine the same. It ought to be struck out on that ground.
  - (b) Section 129 of *Environmental Management and Co-ordination Act* required the Petitioner to file any complaints to the National Environment Tribunal for determination of any issue as regards the EIA license a step they clearly never took. No other body or any other forum can have this issue raised for determination except the tribunal.
  - (c) This court is not vested with any powers to then go ahead and transfer this matter to the tribunal for determination.
14. The Learned Counsel asserted that the import of all the above submissions is that this Petition cannot be dealt with in any other manner by this Court, except that the same be struck out. In the premises, we refer the Court to the decision in the case of “Kenya Ports Authority – Versus - Modern Holdings [2017] eKLR for the decision that:-

“...where a cause is filed in a Court without Jurisdiction, there is no power on that Court to transfer it to a Court of Competent jurisdiction. (see page 7 of authority.)

And then, at page 8, the Court went on further to state:

“The first point that must be stressed is that *the Constitution* in Article 1 decrees that;

“Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution”.

Secondly we reiterate that jurisdiction of any court or tribunal flows from either *the Constitution* or statute or both....” The court finally summarized that position that “out of nothing comes nothing.”
15. The Learned Counsel argued that luckily for this court and as per the admission of the Petitioner’s Advocate as well as their pleadings in court, they do admit that the Petition is solely on the enforcement of the EIA license and nothing else. Having done so, and as per the pronouncement of the Supreme Court as reproduced in paragraph 7 above, this Court’s hands are tied and it should down its tools as regards the issues of the EIA license. This court can only determine such issues if raised at the appellate stage. Therefore, and in summary, it is submitted that this Petition was filed in a Court without the jurisdiction to entertain the same. Therefore and as a consequence, this Petition ought to be struck out with costs to the 1<sup>st</sup> Respondent.
16. The Learned Counsel opined on costs that they normally follow the event and given that this court lacks jurisdiction, then the entire petition ought to be struck out with costs to the Respondents. This issue was raised because the Respondents as had been clearly indicated in their Grounds of Opposition were apprehensive that the Petitioner was a non-existent body. No proof of registration had been produced in court to show that indeed the Petitioner was a registered organization. The upshot of this was the challenge that might be faced in enforcement and compliance with any court orders issued. It was therefore submitted that should the suspicion be true, then the Advocate should bear the burden of payment of costs if granted on behalf of their client.



17. In conclusion, the Learned Counsel held that the Court lacked jurisdiction to entertain the Petition and it should therefore be struck out with costs.

#### **IV. Analysis and Determination**

18. Upon perusal of the pleadings and submissions filed in respect of the instant application, I will now turn to the substantive issue at hand. Three ( 3 ) issues arise for my determination:-
- a. Whether the Preliminary objection dated 4<sup>th</sup> October, 2022 by the 1<sup>st</sup> Respondent meets the threshold of such an objection based on Law and Precedents.
  - b. Whether or not this court is clothed with jurisdiction to hear and determine these proceedings. If yes; What orders commends themselves to be given.
  - c. Who will bear the Costs of the objection

#### **Issue No. a). Whether The Preliminary Objection Dated 4<sup>Th</sup> October, 2022 By The 1<sup>St</sup> Respondent Meets The Threshold Of Such An Objection Based On Law And Precedents.**

19. The principles to be applied in preliminary objections are now well settled as per the Mukisa Biscuit Manufacturers Ltd. (Supra). A party raising a preliminary objection should know that the issues must be purely on a point of law and not facts as was stated in the Mukisa case:

“So far as I am aware, a Preliminary Objection consists of a pure 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 on 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.”

Newbold, P.:

“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.”

20. A preliminary objection should not be raised if any facts have to be ascertained and the court and the parties assume that the facts as pleaded are correct. In the case of “Independent Electoral & Boundaries Commission –v- Jane Cheperenger & 2 Others [2015] eKLR.

“(21) The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to Preliminary Objections. The true Preliminary Objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the Preliminary Objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”



21. In the case of Owners of “Motor Vessel “Lillian S” – Versus - Caltex Oil (K) Ltd (supra), Nyarangi JA held as follows:

“By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...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.”

22. In the Supreme Court case of “Samuel Kamau Macharia & another – Versus - Kenya Commercial Bank Limited & 2 others [2012] eKLR para 68, the court observed thus:

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings... Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

23. In the case of “Benard Murage – Versus - 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.”

24. It therefore behooves this Court to consider and determine whether or not it has jurisdiction to entertain the instant proceedings. Let me begin by analyzing whether or not the Petitioner was required to exhaust the dispute resolution mechanism under EMCA prior to filing this petition.

25. The National Environment Tribunal is established under the provisions of Section 125 (1) of the EMCA which reads:

- (1) There is established a Tribunal to be known as the National Environment Tribunal which shall consist of the following members...



26. Further the provision Section 129 EMCA sets out the jurisdiction of the NET 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, or the transfer of 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 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.
27. The provision of Section 130 further makes provision for appeals to the Environment and Land Court as follows:
- (1) Any person aggrieved by a decision or order of the Tribunal may, within thirty days of such decision or order, appeal against such decision or order to the Environment and Land Court.
  - (2) No decision or order of the Tribunal shall be enforced until the time for lodging an appeal has expired or, where the appeal has been commenced, until the appeal has been determined.
  - (3) Notwithstanding the provisions of subsection (2), where the Director-General is satisfied that immediate action must be taken to avert serious injuries to the environment, the Director-General shall have the power to take such reasonable action to stop, alleviate or reduce such injury, including the powers to close down any undertaking, until the appeal is finalised or the time for appeal has expired.
  - (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



28. In the case of case of “Patrick Musumba – Versus - National Commission & 4 others Nairobi [2016] eKLR, the court relied on the Court of Appeal Decision on Republic – Versus - NEMA Ex parte Sound Equipment Ltd [2011] eKLR where the Court made it clear that;

“challenges to Environmental Impact Assessment study report and/or Environmental Impact Assessment Licences shall be made to the National Environment Tribunal established under section 125 of Environment Management and Coordination Act. The tribunal should have been given the first opportunity and option to consider the matter. The Tribunal is the specialized body with capacity to minutely scrutinize the Environmental Impact Assessment study report as well as the licences”.

29. The Petitioner its Notice of Motion application dated 21<sup>st</sup> September, 2022 averred that if there was any environment impact assessment which was done prior to the commencement of the said projection by the 2<sup>nd</sup> Respondent who are the licensing and enforcement agents then they have abdicated their statutory duty thus exposing the said resident to effects of Toxic and Hazardous substance detriment to their health. It is clear from the Petitioner’s allegations that 2<sup>nd</sup> Respondent was never approached by both the 1<sup>st</sup> Respondent who was building and the Petitioner. EMCA only envisages and provides for an appeal to NET. In view of the foregoing, I find that the Petitioner was obligated to invoke the jurisdiction of National Environment Tribunal under section 125 and 129 of EMCA and the exhaustion of the alternative dispute resolution mechanism as provided for by EMCA could have been applicable herein. The question we ought to ask ourselves is whether there was any decision made by the 2<sup>nd</sup> Respondent, NEMA?

30. On the contested jurisdiction between NET and the ELC, in the case of “Ken Kasinga – Versus - Daniel Kiplagat Kirui & 5 others [2015] eKLR, Emukule J. of the High Court stated as follows:

“ .... In my view, so long as a dispute can be categorized as being a dispute over environment, or over land, the ELC has unlimited jurisdiction. This jurisdiction is both original and appellate. One cannot therefore be faulted if he originates his suit in the ELC and not in NET, for the ELC has original jurisdiction. I am unable to accept the argument of the respondents, that the ELC has no jurisdiction in a matter concerning the issuance or rejection of an EIA licence. True, a person aggrieved by the decision has avenue to appeal to NET within 60 days, but that does not mean that he is prevented from contesting that decision in an appropriate pleading filed in the ELC as a court of first instance.....” (Emphasis supplied)

31. In the case of “West Kenya Sugar Co. Limited – Versus - Busia Sugar Industries Limited & 2 others, [2017] eKLR, the Learned Judge stated:

“This argument that the court has no jurisdiction is based on a misunderstanding of the matter before this court. What is before the court is a constitutional petition in which the petitioner has alleged several violations of his rights enshrined in *the constitution*. The National Environment Tribunal does not have mandate to deal with constitutional violations relating to the environment. That is the preserve of the ELC....” (Emphasis supplied)



32. The provision of Section 13 of the Environment and Land Court, Act No. 19 of 2011 provides for the jurisdiction of the court that is envisaged under the provision of Article 162(2) (b) of the Constitution of 2010 which reads:

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.
- (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.
- (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.

33. From the provision under the provision Section 13 above, the ELC has original and appellate jurisdiction to hear and determine disputes relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources. It also provides that the court shall have the jurisdiction to hear any other disputes relating to environment and land.

34. In the case of “Kibos Distillers Ltd & 4 others – Versus - Benson Ambuti Adegga & 3 others [2020] eKLR:-

“A party or litigant cannot be allowed to confer jurisdiction on a court or to oust jurisdiction of a competent organ through the art and craft of drafting of pleadings. 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.

I make reference to the case of Speaker of the National Assembly – Versus - 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.”

35. The Court went further to state:

“It is this Court’s observation 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.”

36. It is trite law that where there are laid down procedures and processes for hearing disputes then a party must adhere to such procedures including filing the cases in the right forums. It is also noteworthy that where statutes have established tribunals for hearing disputes, then the parties must exhaust such remedies before filing their cases in other forums. Parties are not allowed to forum shop for their convenience. There has to be order and certainty in administration of justice.

37. 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 constitutional prayers 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.

38. In this matter, the key dispute in the Petition was whether the 1<sup>st</sup> Respondent was polluting the environment and whether the EIA licence was complied with. The competent organ with original jurisdiction to hear and determine the matter was the Tribunal. The legal effect of Section 130 (5) of EMCA which makes the decisions of the ELC on appeal to be final.

39. The case before this court is a constitutional petition where the Petitioner contends that there exist construction going on along Mount Kenya road which is a construction of a forty one high rise apartment on Plot No.MN/1/1727 in Nyali sub-County within Mombasa County and the construction is emitting noise and dust that apart from causing a lot of inconveniences has affected the quality of air in the area and exposed the residents to severe ailments such as respiratory, skin and eye diseases. The Petitioner averred that the said construction in the area has degraded the environment and deleterious owing to the noise and massive dust. The generation of massive dust has deleted the environment and has rendered the entire Estate uninhabitable and the residents thereof stand the



danger of contracting diseases of Respiratory nature, cancer, skin and eye diseases due to the dust emanating from the said construction. The heavy machinery at the said construction has been emitting Noise above the allowed levels and the Residents have suffered greatly. The said construction has commenced without adhering to the conditions of the license as issued by the 2<sup>nd</sup> Respondent.

40. The Petitioner filed a Petition dated 21<sup>st</sup> September, 2022 where he sought the following orders:
- a. A Declaration that the construction of a Forty-one high rise apartment on Plot No.MN/1/1727 in Nyali sub-county within Mombasa county along Mount Kenya road in Nyali without adherence to the conditions of the license issued by the 2<sup>ND</sup> Respondent is a violation of the Residents constitution Right as provided under Article 26 and 42 of the constitution.
  - b. A Declaration that fundamental rights of the Petitioners under Article 21 and 50 of the constitution of Kenya will be violated and threatened.
  - c. An order of Permanent injunction restraining the 1<sup>st</sup> Respondents by themselves, their agents, servants and employees and/or any other person acting on their behalf and/or instruction from the construction of forty-one high rise apartment on the aforesaid parcel of land until compliance with license conditions.
  - d. Aggravated damages
  - e. Such other and /or further relief as this Honourable court may deem fit and just to grant.
  - f. The costs of and occasioned by this petition to be provided for.
41. Having carefully perused the Petition herein and the supporting affidavits, it is clear to me that the Petitioners are challenging the approval and license obtained by the 1<sup>st</sup> Respondent from the 2<sup>nd</sup> Respondents respectively. It is also not in dispute that the Petitioners are alleging violations of various rights enshrined in the constitution, including the right to a clean and healthy environment provided for in the provision of Articles 42 and 70 of the Constitution and the right to fair administrative action and right to equal protection and benefit of the law as provided for under the provision Articles 47 and 27 of the constitution. From the pleadings, it is manifestly evident that the Petition is multifaceted and has presented issues some of which could be determined by the court while the others can effectively be determined by the National Environment Tribunal and the National Environmental Complaints Committee.
42. I am guided by the above authorities and find that the Petitioner failed to demonstrate that there existed exceptional circumstances to warrant them to move this Court before exhausting the mechanism set out in EMCA.

#### **Issue No. c). Who is to bear the Costs of the objection**

43. It is now well established that and from Rule 26 (1) and (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules 2013, the award of costs is at the discretion of the Cost. Costs is the award that a party is granted at the conclusion of any legal action or proceedings in any litigation.
44. In exercising its discretion to award costs, the court shall take appropriate measures to ensure that every person has access to court to determine their rights and fundamental freedoms.
45. The Proviso of the Provisions of Section 27(1) of the Civil Procedure Act Cap 21 holds that costs follow the event. By event it means the results of the legal action or process in any litigation (see the



Supreme Court Case of Jasbir Rai Singh Rai – Versus- Tarhochan Singh (2014) eKLR and Mary Wambui Munene –Versus- Ihururu Dairy Co - operative Societies eKLR (2014)

46. In the instant proceeding, although the 1<sup>st</sup> Respondent has succeeded in prosecuting their applications and taking that the Petition is still on Course, it is just, fair, reasonable and equitable that each party bears their own costs.

## V. Conclusion & Disposition

47. In conclusion, I am persuaded making reference to the decision in “Kibos Court of Appeal Judgment, that the Petitioner herein ought to have exhausted the alternative mechanisms of dispute resolution in the EMCA. In view of the foregoing, this court lacks original jurisdiction to entertain the suit in view of the existing alternative statutory dispute resolution mechanism. I also note that there are matters the National Environmental Tribunal may not have jurisdiction to deal with that may have to be referred to this court. Therefore, the Honorable Court proceeds to make the following orders:-
- a. That the Preliminary Objection dated 4<sup>th</sup> October, 2022 by the 1<sup>st</sup> Respondent herein be and is allowed but upon the fulfilment of the pre – conditions stated herein below.
  - b. That the aggrieved parties – invariably the Petitioner to lodge this matter at the National Environmental Tribunal on the matters that deal with EIA licences.
  - c. That an order be made that the parties to make sure that the matter at the NET is expeditiously heard and dispensed with within the next 60 days from the date of this Ruling hereof.
  - d. That proceedings in this Petition are stayed by virtue of the Constitutional prayers until the conclusion of the proceedings at the NET.
  - e. That the matter be mentioned on 21<sup>st</sup> September, 2023 to ascertain the progress made before the NET and for taking directions on the Petition herein.
  - f. That there shall be no orders as to costs.

It is so ordered accordingly.

**RULING DELIVERED MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 7<sup>TH</sup> DAY OF JUNE 2023.**

**HON. JUSTICE L. L. NAIKUNI (JUDGE)**

**ENVIRONMENT AND LAND COURT AT MOMBASA.**

