



**Isulu Natural Resource Deposits Community Based Organisation v  
Minister of Mining and Blue Economy and Maritime Affairs & 5 others;  
Competition Authority (Interested Party) (Petition E438 of 2024)  
[2025] KEHC 3558 (KLR) (Constitutional and Human Rights) (21 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3558 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION E438 OF 2024**

**EC MWITA, J**

**MARCH 21, 2025**

**BETWEEN**

**ISULU NATURAL RESOURCE DEPOSITS COMMUNITY BASED ORGANISATION ..... PETITIONER**

**AND**

**MINISTER OF MINING AND BLUE ECONOMY AND MARITIME AFFAIRS ..... 1<sup>ST</sup> RESPONDENT**

**MINERAL RIGHTS BOARD ..... 2<sup>ND</sup> RESPONDENT**

**CABINET SECRETARY OF ENVIRONMENT CLIMATE CHANGE AND FORESTRY ..... 3<sup>RD</sup> RESPONDENT**

**SHANTA GOLD LIMITED ..... 4<sup>TH</sup> RESPONDENT**

**SATURN RESOURCES LIMITED ..... 5<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 6<sup>TH</sup> RESPONDENT**

**AND**

**COMPETITION AUTHORITY ..... INTERESTED PARTY**

**RULING**

1. This is a ruling on a preliminary objection dated 16<sup>th</sup> September 2024, challenging the jurisdiction of this court to hear the petition. The 4<sup>th</sup> and 5<sup>th</sup> respondents raised the preliminary objection arguing



- that the petition was filed before a court without jurisdiction, a position that was supported by the other respondents.
2. According to the respondents, Article 162(2) of the Constitution establishes a special court to deal with environmental use and occupation. This led to the enactment of the Environment and Land Court Act to give effect to Article 162(2). The Environment and Land Court (ELC) is to hear and determine issues relating to activities on land, including minerals. That is the court with jurisdiction to hear disputes relating to denial of the right to environmental health.
  3. The respondents argued that the Constitution bars this Court from hearing matters reserved for the other Courts. The respondents maintained that the response to the preliminary objection is a generalized assertion that the petition can be heard by any court.
  4. The respondents raise another objection that the petition is premature. They argue that parties are required to exhaust the available remedies for resolving disputes before approaching the Court. They pointed out to section 155 of the Mining Act, 2016 which vests on the Cabinet Secretary authority to inquire into commission of wrongful acts during prospecting, which the petitioner had not done. The respondents cited several decisions including the decision in *Mumba & 7 others* sued on their own behalf and on behalf of Albert Chaurembo v *Mumba & 7 others* (sued on their own behalf and on behalf of predecessors or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme ) v *Maurice Munyao & 148 others* (sued on their own behalf and on behalf of the plaintiffs and other members /beneficiaries of the Kenya Ports Authority (pensions (petition No. 3 of 2016) [2019] KSC 83 (KLR) (Para 116) on the need to exhaust available dispute resolution mechanisms before approaching courts.
  5. It was argued that the 4<sup>th</sup> respondent holds an Environmental Impact Assessment licence issued by National Environmental Management Authority (NEMA) and any issue regarding the licence should have been raised with the National Environment Tribunal (NET). They argued that disputes on environment should be first be referred to NET. The petition before this Court is thus, premature. They relied on several other decisions to support their position that this Court has no jurisdiction to hear the petition.
  6. The petitioner opposed the preliminary objection, arguing that this Court has unlimited jurisdiction under Article 165(3) of the Constitution and is the proper Court to hear the petition. According to the petitioner, mining by its very nature, requires a court with unlimited jurisdiction. This is because mining exercise attracts international investment and companies to carry out mining. This goes beyond the jurisdiction of the ELC since a judge presiding the ELC has limited mandate and handles purely local issues limited in nature.
  7. On the other hand, a constitutional court has a much broader jurisdiction such as mining which attracts international players as well as issues of corruption. These issues can only properly be addressed by this Court. The petitioner thus, maintained that the petition was filed in the proper court.
  8. Regarding exhaustion, it was argued that the petitioner sent a memorandum to the Cabinet Secretary but it was ignored. The petitioner further argued that the doctrine of exhaustion does not apply to this Court and NET cannot stand above this Court in terms of jurisdiction.
  9. The petitioner maintained that a preliminary objection must be pleaded by one party and should be capable of disposing of the matter; should not call for exercise of discretion or evidence as the doctrine of exhaustion does. In the view of the petitioner, the actions taken by the 1<sup>st</sup> respondent make the matter fall outside the jurisdiction of the ELC.



10. I have considered the arguments by counsel for the parties on the preliminary objection. I must point out that the law is settled on what a preliminary objection is and that objection to jurisdiction can be raised at any time, including on appeal.
11. The principles for determining what amounts to a preliminary were stated in the often-cited case of *Mukisa Biscuits Manufacturing Company Limited v West End Distributors* [1969] EA 696, thus:

A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...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.
12. A preliminary objection is one that consists of a point of law which if argued as a preliminary point, may dispose of the suit at that preliminary stage without the need for the matter to go for full hearing.
13. In this petition, the question is, first, whether this Court has jurisdiction to hear and determine the petition. If the answer is in the affirmative, whether the petition is premature and offends the doctrine of exhaustion.

## **Jurisdiction**

14. The respondents have argued that this court has no jurisdiction to hear and determine the petition. Jurisdiction is the power or authority conferred on a court to hear and determine disputes presented before it. When a court's jurisdiction is challenge, the court has to consider and determine the fundamental question of its jurisdiction over the matter. Should the court conclude that it has no jurisdiction to hear a particular matter, that is the end. It cannot take any further step, but must down its tools. (See *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited* [1989] eKLR).
15. In *Samuel Kamau Macharia v Kenya Commercial Bank Ltd & 2 others* [2012] eKLR, the Supreme Court stated as follows:

(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... 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.
16. In *re the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011* [2011] eKLR, after referring to the decision in *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited* (supra), the Supreme Court again stated:

(30) The Lillian 'S' case 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 endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the *Constitution*.



17. Jurisdiction of a court must flow from the Constitution, statute or both. A court should only exercise jurisdiction as conferred on it by the Constitution or the law. It must not act without jurisdiction.
18. The jurisdiction of this court is donated by Article 165(3) of the Constitution. The court has unlimited original jurisdiction in criminal and civil matters; jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; jurisdiction to hear an appeal from a decision of a tribunal appointed under the Constitution to consider removal of a person from office, other than a tribunal appointed under Article 144; jurisdiction to hear any question respecting interpretation of the Constitution, including the determination of— whether any law is inconsistent with or in contravention of the Constitution; whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution; any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; questions of conflict of laws and any other jurisdiction, original or appellate conferred on it by legislation.
19. In short, Article 165(3) authorises this court to hear and determine a wide range of matters exercising both original and appellate jurisdiction. However, the broad jurisdiction of this court is not without caveat. Article 163(5) provides that the High Court shall not have jurisdiction in respect of matters reserved for the Supreme Court and matters falling within the jurisdiction of the courts contemplated in Article 162(2).
20. Article 162(2) provides that Parliament shall establish courts with equal status to the High Court to hear and determine disputes relating to employment and labour relations and the “environment and the use land occupation of, and title to, land.” Parliament was also to determine jurisdiction and functions of those courts.
21. Parliament enacted the Environment and Land Act, 2011 (the ELC Act) which established the ELC in compliance with Article 162(2)(b). Section 13 of the ELC Act provides for the jurisdiction of the ELC.
22. Section 13(1) provides that the court shall have jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of the Act or any law applicable in Kenya relating to environment and land. Section 13(2) provides that in exercise of its jurisdiction under Article 162(2) of the Constitution the ELC has power to hear and determine-
  - a. 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. land administration and management
  - d. 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 land.
23. In particular, section 13(3) provides that nothing in the Act should preclude the ELC from hearing and determining “applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom relating to a clean and healthy environment” under Articles 42, 69 and 70 of the Constitution. Section 13(7) further enumerates the orders and reliefs the ELC may grant. They include, among others, prerogative orders, award of damages and compensation.



24. Article 165) (5) expressly excludes this court from hearing matters reserved for the ELRC and ELC. In that regard, the constitutional authorisation given to this court excludes it from hearing matters reserved for the ELC. The question whether this court has jurisdiction to hear and determine this petition must, therefore, be viewed not only through the prism of Article 165(3) and (5), but also Article 162(2)(b) as read with section 13 of the ELC Act.
25. In this petition, the petitioner seeks the following reliefs: a conservatory order restraining the 4<sup>th</sup> and 5<sup>th</sup> respondents from carrying mining exploration in Isulu and Bushangala as it amounts to mineral exploitation; a declaration that the prospecting licence issued to AfrOre International (Barbados) Limited expired and has no capacity to assign mining rights; an order of mandamus directing the 4<sup>th</sup> respondent to place gold ore measuring 164 km (sic) in safe custody; an order of mandamus compelling the 4<sup>th</sup> and 5<sup>th</sup> respondents to provide information on mineral engagement between itself and the government and a declaration that the activities of the 5<sup>th</sup> respondent borders on mineral exploration and should cease its mining activities with immediate effect. (underlining provided)
26. The reliefs sought no doubt relate to mining activities that the ELC has jurisdiction to deal with under section 13 of the ELC Act. In that regard, a plain and faithful reading of Article 165(5) shows that this Court is excluded from hearing matters reserved for that court. Those matters include, contracts, choses in action or other instruments relating to enforceable interests in land and minerals.
27. The prayers sought in the petition include, a declaration that the activities the 4<sup>th</sup> respondent is involved in amount to mineral exploitation, that the licence granted had expired and orders stopping mineral exploitation. There can be no doubt that according to section 13 of the ELC Act, the issues raised in the petition fall within the jurisdiction of the ELC and the Constitution prohibits this court from hearing matters reserved for the ELC.
28. The edict in the Supreme Court decision in Samuel Kamau Macharia v Kenya Commercial Bank Ltd & 2 others (supra), is clear that a court of law cannot arrogate to itself jurisdiction exceeding that which is conferred by the Constitution or the law. Similarly, according to the Matter of Interim Independent Electoral Commission (supra), assumption of jurisdiction by courts in Kenya is regulated by the Constitution, statute law and principles laid out in judicial precedents. That the Constitution excludes this court from hearing matters reserved for other superior courts established as contemplated by Article 162(2) is not in doubt.
29. In this petition the petitioner's counsel made very strong submission that this is the court with jurisdiction to hear the petition because mining has the potential to attract international investors. Though an attractive submission it was, this court must remain true to the Constitution and the law. Article 3 demands that every person respects, upholds and defends the Constitution. This court can do no better than obey the clear command that it must not hear matters reserved for the ELC. This is a constitutional caveat it has an obligation to respect and uphold. This court must therefore refrain from conferring on itself jurisdiction through the craft of judicial interpretation.
30. I agree with the respondents that this court has no jurisdiction to hear and determine this petition. The preliminary objection is sustained.
31. Having determined that this court has no jurisdiction over this matter, the issue of non-exhaustion does not arise for its consideration.
32. Consequently, and considering the issues raised in the petition and the public interest aspect, the proper course to take, in my view, is to transfer this petition to the court with jurisdiction for consideration and further action.



33. The petition is hereby transferred to the Environment and Land Court for further action. The file be placed before the Principal Judge of the Environment and Land Court for directions. Each party do bear their own costs of the preliminary objection.

**DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MARCH 2025.**

**E C MWITA**

**JUDGE**

