



**Luthuli v Canaan Escada Limited & 3 others (Constitutional Petition E334 of 2023)
[2025] KEHC 4343 (KLR) (Constitutional and Human Rights) (3 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4343 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E334 OF 2023**

LN MUGAMBI, J

APRIL 3, 2025

BETWEEN

NYONG’O OMONDI LUTHULI PETITIONER

AND

CANAAN ESCADA LIMITED 1ST RESPONDENT

SWAN FACILITIES LIMITED 2ND RESPONDENT

COUNTY GOVERNMENT OF NAIROBI 3RD RESPONDENT

**NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY 4TH
RESPONDENT**

JUDGMENT

1. The petition dated 13th September 2023 is supported by the petitioner’s affidavit in support sworn on 12th September 2023. The petition is also supported by Christine Muchemi’s supporting affidavit sworn on 13th September 2023. The petition is further supported by supplementary affidavits dated 9th December 2023, 31st January 2024, 7th February 2024, 15th February 2024 and 29th July 2024.
2. The petitioner brings this petition primarily against the 1st and 2nd respondents on the claim that they have been pumping contaminated water to his apartments located at Escada Apartments in Nairobi. He alleges that their actions contravene his right to clean and safe water under Article 43(1) (d) of the Constitution. Additionally, he alleges their actions are in contravention of Article 28, 49 and 53(2) of the Constitution.
3. Accordingly, the petitioner seeks the following relief against the respondents:



- i. A declaration that the action of the 1st and 2nd respondent of pumping and/ or supplying contaminated water to the petitioner's apartments being 1401 and 1402 violates the petitioner's constitutional right to clean and safe water in adequate qualities as provided under Articles 28, 43 (1)(d) and 46 of the Constitution.
- ii. A permanent injunction restraining the 1st and 2nd respondent from pumping contaminated water at Escada Apartments, erected on Land Reference Number 1870/X/134, Lantana Road, Westlands, Nairobi.
- iii. Writs of mandamus directed to the 4th respondent to conduct a fresh environmental assessment of the borehole at Escada Apartments, erected on Land Reference Number 1870/X/134, Lantana Road, Westlands, Nairobi.
- iv. Writs of mandamus directed to the 3rd respondent to cancel the license and permit of the borehole issued to the 1st and 2nd respondent located at Escada Apartments, erected on Land Reference Number 1870/X/134, Lantana Road, Westlands, Nairobi if they fail to Water Filtration System.
- v. An order compelling the 1st and 2nd respondent to forthwith install a Water Filtration System at the main borehole located at Escada Apartments, erected on Land Reference Number 1870/X/134, Lantana Road, Westlands, Nairobi.
- vi. An order that the petitioner be compensated for the loss incurred of Kshs. 138, 676,00 in replacing his own water filtration system due to the clogging caused by the contaminated water supplied by the 1st and 2nd respondent.
- vii. Damages against the 1st and 2nd respondent for infringement of the petitioner's constitutional rights.
- viii. Any other further orders, directions, declarations and remedies as this Court may deem fit and just in the circumstances.
- ix. The costs of this petition be borne by the 1st and 2nd respondent.

Petitioner's Case

4. The petitioner an American citizen depones that he is the owner of two apartments namely, 1402 and 1403 at Escada Apartments located on Land Reference No.1870/X/134 on Lantana Road at Westlands, Nairobi. He informs that he resides in the Apartment when he is in the Country with his family.
5. He states that the Apartment's source of water is a borehole that is supplied and charged by the 2nd respondent. He informs that the 2nd respondent is the management company of the Escada Apartments. This borehole was drilled and made by the 1st respondent who was the developer of these Apartments.
6. The petitioner avers that on 31st May 2023, he noticed that the water being supplied to his apartment was brownish and with impurities. Concerned, he contacted Davis and Shirliff Ltd to carry out an iron test analysis on the samples of the water.
7. He depones that the results of the test delivered on 6th June 2023, made it apparent that the 1st and 2nd respondents had been supplying contaminated borehole water to his units. The results further stated that the levels of iron in the water do not meet the World Health Organization's standard.



8. The petitioner avers that following this he took preemptive steps and installed a Dayliff water filter system for his units so as to ensure that they would consume clean and safe water.
9. He posits that soon thereafter, he noted that the filtration system would clog frequently. He proceeded to make an enquiry with Davis and Shirtliff Ltd and to seek a remedy. He states that as a result of the clog, he spent Ksh.138,676 to have it replaced. He informs that the results indicated that the clog was as a result of the filthy water that was being pumped from the borehole.
10. The petitioner states that he requested Davis and Shirtliff Ltd to conduct a further test on the water being supplied from the borehole. That is a bacteriological water analysis. Davis and Shirtliff Ltd results dated 22nd August 2023, detailed that the level of total coliforms, E. Coli and total viable count at 37 degrees Celsius were too numerous to count. Considering this, a water treatment filtration machine was recommended.
11. The petitioner's averments in relation to the tests that were carried out by Davis and Shirtliff LTD are reiterated and corroborated by Christine Muchemi in her affidavit in support and supplementary affidavit. She also informs that she is the Davis and Shirtliff LTD employee who carried out the said tests.
12. The petitioner is grieved since his family uses the borehole water for domestic consumption. He states that the bacterial coliform originates from human and animal fecal matter in raw sewage and thus a high likelihood that the borehole water is contaminated with matter from sewage. He argues that this is a health hazard to his family. Moreover, he avers that there is a risk of a disease outbreak at the Apartments as many tenants are unaware of this fact.
13. He depones that vide a demand letter dated 22nd August 2023, the petitioner asked the 1st and 2nd respondents to reimburse him the amount he had incurred to install the water filtration machine and further asked that they install a water filtration machine for the Escada Apartments as a whole.
14. In a response dated 31st August 2023, these respondents informed that they would not install the water filtration system. The petitioner states that in a letter dated 28th August 2023, he lodged the complaint with the 3rd respondent. The 3rd respondent however did not respond.
15. The petitioner asserts that as a consequence of violation of his constitutional rights due to the contaminated water he has been forced to buy and replace the water filtration system at his own cost thus deserves compensation as envisaged under Article 46(1)(d) of the *Constitution*.
16. He contends that he continues to incur extra costs since he was also forced to install an additional iron and sediment filter, a chlorine tank, a dosing meter and a weekly service by Davis and Shirtliff.
17. He asserts that having exhausted the available mechanisms, he moved to this Court to seek redress. The petitioner furthermore argues that the petition which raises constitutional violations is incapable of being determined by the Water Services Regulatory Board and the Water Tribunal under the *Water Act*.
18. Additionally, the petitioner asserts that the Defect of Liability period is irrelevant in this matter as the petition solely concerns infringement of constitutional rights.
19. Likewise, he contends that the homeowners at Escada Apartments under the annexure marked 'NOL1' in his further supplementary affidavit confirm that the water at the apartment is contaminated and unfit for human consumption. Accordingly, he asserts that Yohanness Kidande's averments in response are a deliberate misrepresentation of the facts so as to mislead the Court.



1st and 2nd Respondents' Case

20. The 1st and 2nd respondent in rejoinder to the petition filed a Notice of Preliminary Objection dated 5th October 2023 on the basis that:
 - i. The petition is prematurely before the Court as the petitioner has not exhausted the available remedies provided under Section 82 as read together with Section 101 of the Water Act, 2016 and Section 119 as read together with Section 121 (2) of the Water Act, 2016.
 - ii. The affidavits in support of the petition and the notice of motion application are fatally defective and inadmissible in Court as it contravenes the provisions of section 88 of the Evidence Act.
21. Correspondingly, the 1st and 2nd respondents filed their replying affidavit through Yohannes Kidane, their Chief Operations Officer sworn on 25th January 2023.
22. He asserts that the petition as framed is frivolous, vexatious, misconceived and premature thus an abuse of the Court process. He argues that the petitioner has failed to exhaust the dispute resolution mechanisms provided in law.
23. He avers that the issues raised in the petition arise from the contractual relationship between the petitioner and the 2nd respondent to supply water at a fee. It is stated that any dispute that would arise from such a relationship is to be referred to the Water Tribunal as the first port of call with the Court only having appellate jurisdiction. He stresses that the petitioner failed to exhaust this mechanism before moving this Court.
24. He depones that the 1st respondent in constructing Escada Apartments implemented extensive meticulous measures including carrying out water quality analysis for the borehole in order to guarantee its safety for all the residents. He informs that the borehole and water installations were part of the amenities tied to the Apartment and indicated in the Agreement. As a result, the 1st and 2nd respondent were issued with a Certificate of Practical completion dated 31st August 2022.
25. He informs that issuance of this Certificate commenced the Defect Liability period which normally runs for a period of six months. He makes known that during this period, home owners are required to communicate any form of defect to the 1st respondent for rectification.
26. He asserts that by the time this period lapse on 28th March 2023, none of the homeowners including the petitioner, had raised the impugned issues. He claims that the 1st respondent is only liable for defects that are brought to its attention during that period and thus the respondents are indemnified of any defect in the Apartment thereafter.
27. He states that the borehole was drilled to supplement the water supplied by the Nairobi City County which is used for domestic use. He claims that the borehole water was never meant to be used for cooking or drinking but general use such as cleaning. He alleges that this is the reason the petitioner bought the water filtration system. He adds that this was done without their consultation and thus the 1st and 2nd respondents are not liable to compensate him.
28. He moreover claims that before they begun supplying water to the Apartment, the borehole water was subjected to chemical and biological tests to determine its suitability. Upon confirmation of its suitability, the 1st respondent was issued with a permit to operate the borehole. He adds that the 2nd respondent has been conducting periodic tests on the borehole water to ensure its suitability.



29. On this premise, he claims that the water which has been supplied from the borehole has been clean and safe and that they have never received any complaints from the Apartment owners. He avers therefore that the petitioner's averments are unfounded and malicious with an aim of disparaging the 1st and 2nd respondents' reputation.
30. He denies knowledge of the samples that were taken and tested as averred by the petitioner. He states that the conditions under which the samples were taken cannot be verified as the respondents did not participate in the process. He asserts that the sampling and testing was done unilaterally by the petitioner through Davis and Shirtliff LTD without their consultation.
31. He alleges that the petitioner's call to have the 1st and 2nd respondents install a water filtration system is driven by the need to secure business for Davis and Shirtliff Ltd. He as a result claims that the petitioner and the Davis and Shirtliff are working in collusion to blackmail the 1st and 2nd respondents.
32. It is further alleged that the orders sought are prejudicial as will curtail water supply for Escada Apartments. Additionally, he avers that the petition does not raise any constitutional issue neither reasonable cause of action.

3rd Respondent's Case

33. The 3rd respondent's response and submissions to the petition is not in the Court file or Court Online Platform (CTS).

4th Respondent's case

34. In rejoinder, the 4th respondent filed a replying affidavit by its Director General, Mamo B. Mamo, sworn on 12th October 2023. (The affidavit is missing a few pages both in the Court file copy and CTS copy.)
35. He makes known that the 4th respondent as its mandate utilizes tools of environmental governance such as Environmental Impact Assessment (EIA) to ensure sustainable development by mainstreaming environmental and social safeguards in all projects, plans and programs.
36. He asserts that once the 4th respondent has exercised its mandate in issuance of an EIA certificate it cannot be called upon to undertake further environmental assessment as is being advanced by the petitioner. Instead its role is reduced to that of monitoring through self and control audits submitted by the licensee.
37. That said, he avers that the 4th respondent is willing and prepared to implement any orders as is statutorily required, that may arise as a result of these proceedings.

Petitioner's Submissions

38. The petitioner filed through Mutanda Law Advocates filed submissions dated 27th August 2024 and rejoinder submissions dated 20th September 2024.
39. Counsel identified the issues for determination as: whether the doctrine of constitutional avoidance is available and thus whether the Court has jurisdiction to hear & determine the matter, whether the petitioner's affidavit is proper? whether the borehole water supplied by the 1st and 2nd respondents is contaminated and whether the petitioner's and his family's constitutional rights were violated entitling the sought relief.
40. Counsel on the first and second issue submitted that this Court has jurisdiction to entertain this matter. Counsel submitted that the doctrine of exhaustion does not apply in the circumstances of this case.



This is because the Water Services Regulatory Board and the Water Tribunal under the Water Act do not have the jurisdiction to determine constitutional issues and power to grant the prayers sought.

41. Reliance was placed in Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others [2023] KESC 113 (KLR) where it was held that:

“earlier in this judgment, we held that there are substantive constitutional violations that have been raised in the petition that have not been answered in the proper forum. Having found that the jurisdiction of the ELC was properly invoked and that the matters in the appellant’s constitutional petition fell within the purview of Article 162(2)(b) and Section 13 of the ELC Act, and to ensure the appellant gets his day in court, we hereby declare that the petition filed before the ELC should be determined on its merits for a determination on the alleged violations of the appellant’s rights inter alia to a healthy and clean environment as well as his right to property for the acts committed by KPLC and whether the acts of NEMA of failing to enforce the stop order created a legitimate expectation that his concerns will be addressed.”

42. Like dependence was placed in Erick Otieno Ogumo & 2 others v Chigwell Holdings Limited; County Government of Nairobi & another (Interested parties) [2022] eKLR.

43. Counsel further submitted that the Environment and Lands Court’s jurisdiction is limited to Article 42, 69 and 70 of the Constitution while this petition raises various constitutional violations. Counsel for these reasons submitted that the petition was properly filed before this Court.

44. It was submitted in the third issue that the petitioner’s supporting affidavit sworn on 12th September 2023 was properly attested to by a Notary Public in the United States of America. It was noted that the Notary Public’s authority as indicated in the stamp was set to expire on 1st February 2025. The Notary Public’s authority was further affirmed under the annexure marked ‘NOL1’ in the petitioner’s supplementary affidavit dated 1st February 2024. Counsel asserted that the 1st and 2nd respondents had not adduced any evidence contrary to this concerning the Notary Public.

45. To buttress this point reliance was placed in Technoservice Limited v Nokia Corporation & 3 others [2021] eKLR where it was held that:

“The parties cannot waive irregularities in the form of a jurat, but where the place of swearing is omitted, the Court may possibly assume that the place was within the area in which the notary before whom it was taken was certified to have jurisdiction, and the irregularity, may be overlooked.”

In short, the English Courts of Judicature may treat an omission to state the place where the affidavit is taken as an irregularity which the Court can overlook despite the apparently mandatory rendition of section 5 of the Commissioners of Oath Act of 1889. In my opinion if failure to state the place where an affidavit was taken in the jurat thereof does not ipso facto make such an affidavit fatally defective and inadmissible in an English Court despite the wording of the section of the law which I have just read, there is neither rhyme nor reason to hold that such an affidavit if filed in a Kenyan Court is fatally defective and inadmissible. In Peeraj General Trading & Contracting Company Limited, Kenya & another v Mumias Sugar Company Limited [69] after analyzing decided cases, the court had this to say:-

I am in total agreement with the reasoning of Ringera J. (as he then was) and I do adopt the same herein. Indeed, Section 88 of the Evidence Act, Cap 80 of the Laws of Kenya provides that documents which would be admissible in



the English Courts of Justice are admissible in Kenyan Courts without proof of the seal or stamp or signature authenticating it or of the judicial or official character claimed by the person by whom it purports to be signed. In England by virtue of Order 41 rule 12 of the *Rules of the Supreme Court*, affidavits taken in commonwealth countries are admissible in evidence without proof of the stamp, seal or the official position of the person taking the affidavit. The same position obtains in Kenya. As there is no such presumption in favour of documents made outside the commonwealth, it follows that the affidavit in the instant case which was taken in Dubai, in the United Arab Emirates, would have to be proved by affidavit or otherwise to have been taken by a Notary Public in UAE and that the signature and seal of attestation affixed thereto was that of such Notary Public.”

46. On the fourth issue, Counsel submitted that the 1st and 2nd respondent in their replying affidavit by stating that the water was not for domestic purposes had admitted to it being unsafe. It was argued that despite indicating so in the replying affidavit, the 1st and 2nd respondent never disclosed this information in the Community Guidelines as seen under the annexure marked ‘NOL5’ in the petitioner’s supplementary affidavit dated 1st February 2024. In addition, Counsel challenged the allegation that the borehole was part of the defect liability period as a constitutional right cannot be defeated by a contractual clause.
47. Counsel further submitted that the contamination of the borehole water had been ascertained by Davis and Shirliff Ltd water analysis test reports as evidenced in his affidavits. Counsel stressed that this fact had not been rebutted by the respondents. It was also observed that these respondents had not relied on any expert evidence to ascertain the safety of the water. Counsel also impugned the respondents’ reliance on a test result that was not produced by the original author. As such its authenticity was disputed. Counsel submitted in sum that the petitioner had proved that the borehole water was contaminated.
48. Reliance was placed in *Erick Otieno Ogumo* (*supra*) where it was held that:
- “On right to clean and safe water in adequate quantities, the Petitioners have adduced evidence and produced reports indicating that the water in the borehole provided by the Respondent is not safe for human consumption. The water by the Nairobi Sewerage Company is also not adequate as admitted by the Respondent. The Respondents have also admitted that the water is not fit for human consumption and the Respondent has to that extent installed water filtration systems to houses in phase 3 and are requesting for more time is an acknowledgement of their obligation. I find in my view that there is violation of Article 43 (1) (d) of the *Constitution*.”
49. In view of the foregoing, Counsel submitted in the fifth issue that the petitioner and his family’s constitutional rights had been violated by the 1st and 2nd respondent. Counsel particularly submitted that these respondents’ actions of pumping and supplying the petitioner’s apartments with contaminated water not fit for human use contravenes Article 43 (1) (d) of the *Constitution*. Further, by doing so the respondents violated their right to human dignity. Additionally, Counsel submitted that the 2nd respondent had violated their rights under Article 46 of the *Constitution* by charging them a fee while supplying unsafe water. Equally supply of the unclean water was said to be in violation of his child’s rights under Article 53 (2) of the *Constitution*.



50. Similarly, reliance was placed in Erick Otieno Ogumo (*supra*) where it was held that:

“It is trite law that where a party alleges, the said party must prove as espoused in Section 107 of the *Evidence Act*. The petitioners have raised issues concerning violation of their constitutional rights. They have cited Article 28 and 53(2) of the *Constitution*, they have pleaded that there are no play areas for their children and that as a result the children are forced to compete with motor vehicles exposing them to danger. The Respondent has not controverted this contention. I find such failure to provide playground is not in the best interest of the child as espoused in Article 53(2) of the *Constitution*.”

51. Comparable dependence was placed in *MWK v another v Attorney General & 3 others* [2017] eKLR and *Ahmed Mohammed Noor v Abdi Aziz Osman* [2019] eKLR.

52. On this premise, Counsel submitted that the petitioner had proved that his rights and those of his family had been violated by the 1st and 2nd respondents thus entitled to the relief.

1st and 2nd Respondents’ Submissions

53. On 12th September 2024, MMA Advocates LLP filed submissions on behalf of these respondents. The issues for determination were outlined as: whether this Court has jurisdiction to adjudicate this matter and whether the alleged constitutional violations had been proved.

54. Counsel on the first issue submitted that the 3rd respondent is mandated under Section 77(1) of the *Water Act* to provide water and sanitation services to any residential area. This is through the Nairobi City Water and Sewerage Company. Bearing this in mind, Counsel submitted that all complaints concerning the quality of water ought to be channeled to the Nairobi City Water and Sewerage Company or the 3rd respondent. Counsel also submitted that Section 82 of the *Water Act* provides an appeal mechanism for a person aggrieved by the decision of a water services provider. Counsel submitted that the petitioner failed to lodge his appeal with the Water Services Appeals Board under this Section.

55. Moreover, it was asserted that even where the petitioner had lodged his complaint, he still would have had an opportunity for a further appeal before the Water Tribunal under Section 121 (1) of the *Water Act* and finally the Environment and Land Court under Section 124 of the *Water Act*. Reliance was placed in *Republic v Chengo & 2 others* [2017] KESC 15 (KLR) where it was held that:

50. It is against the above background, that Article 162(1) categorises the ELC and ELRC among the superior Courts and it may be inferred, then, that the drafters of the *Constitution* intended to delineate the roles of ELC and ELRC, for the purpose of achieving specialization, and conferring equality of the status of the High Court and the new category of Courts. Concurring with this view, the learned Judges of the Court of Appeal in the present matter observed that both the specialised Courts are of “equal rank and none has the jurisdiction to superintend, supervise, direct, shepherd and/or review the mistake, real or perceived, of the other”. Thus, a decision of the ELC or the ELRC cannot be the subject of appeal to the High Court; and none of these Courts is subject to supervision or direction from another. In their words: “By being of equal status, the High Court therefore does not have the jurisdiction to superintend, supervise, direct, guide, shepherd and/or review the mistakes, real or perceived, of the ELRC and ELC administratively or judiciously as was the case in the past. The converse equally applies. At the end of the day however, ELRC and ELC are not the High Court and vice versa. However, it needs to be emphasized that status is not the same thing as jurisdiction. the *Constitution* though does not define the word ‘status’. The intentions of the framers of the



Constitution in that regard are obvious given the choice of... words they used; that the three Courts (High Court, ELRC and ELC) are of the same juridical hierarchy and therefore are of equal footing and standing. To us it simply means that the ELRC and ELC exercise the same powers as the High Court in performance of its judicial function, in its specialised jurisdiction but they are not the High Court.”

52. In addition to the above, we note that pursuant to Article 162(3) of the Constitution, Parliament enacted the Environment and Land Court Act and the Employment and Labour Relations Act and respectively outlined the separate jurisdictions of the ELC and the ELRC as stated above. From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of Courts, with *suis generis* jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal’s decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.”
56. On this basis, Counsel submitted that this Court does not have jurisdiction to entertain this suit on two fronts. First that the petitioner failed to exhaust the available mechanisms in the Water Act and second, the Environmental and Land Court’s under the appellate jurisdiction.
57. Similar reliance was placed in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR and William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR.
58. Counsel also challenged the validity of the petitioner’s supporting affidavit sworn on 12th September 2023. Counsel argued that there was no proof of a certificate of authentication of the notary public seal issued by John Ing Hong Oei, at the time of filing this petition and the notice of preliminary objection. Counsel also pointed out that it was contradictory that the petitioner averred that he had appeared before the Notary Public in the United States while also appearing before a Commissioner of Oaths in Kenya to produce the annexed annexures.
59. Relying in Peeraj General Trading & Contracting Company Limited, Kenya & another v Mumias Sugar Company Limited [2016] eKLR and Section 88 of the Evidence Act, Counsel stressed that the affidavit is incurably defective and ought to be struck out including the attached annexures. Reliance was placed in Otieno & another v Independent Electoral and Boundaries Commission (IEBC) & 2 others [2022] KEHC 10054 (KLR) where it was held that:
- “We have no hesitation in finding that the purported Replying Affidavit filed by the 1st Respondent is fatally defective as the same contravenes all the legal requirements for the making of an affidavit. Hence it has no legal value in the matter before us. We have checked all the eight copies of the Replying Affidavit as filed in the Court Registry and confirmed that none of the copies was signed, commissioned and dated. Consequently, as the same is defective, it is deemed that there is no Replying Affidavit on record filed by the 1st Respondent.”
60. On the second issue, Counsel recapping the averments in the 1st and 2nd respondents’ affidavits submitted that it was evident that the respondents following the Defects Liability Period ceased to have any control and obligation to carry out any repair works on the apartment. As such, it was argued that the petitioner’s allegations were not sustainable. Nonetheless Counsel submitted that the water tests



that had been conducted by the 1st and 2nd respondents had established that the water was clean and safe and as per the required standards and even issued a Certificate.

61. Counsel stressed that no other resident had complained over the issue save for the petitioner. This is notwithstanding the supplementary affidavit filed by the petitioner claiming so. Counsel stressed that the affidavit did not have any proof of ownership. It was further accused of being an afterthought.
62. Counsel also argued that while the petitioner claims that it is the 1st and 2nd respondents who pumped the contaminated water, no proof was adduced of the same. Equally, the Davis and Shirtliff Ltd reports were adjudged to be unverified.
63. In a nutshell, Counsel submitted that the petitioner had not proved how the 1st and 2nd respondent had violated his and his family's constitutional rights as alleged. Reliance was placed in *Anarita Karimi Njeru v. Republic* (1979) eKLR where it was held that:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed...”

4th Respondent's submissions

64. This respondent's submissions are not in the Court file or Court Online Platform (CTS).

Analysis and Determination

65. Arising from the pleadings and submissions of the parties; I opine the following to be the issues that fall for determination in this Petition:
 - a. Whether the instant Petition offends the doctrine of exhaustion of remedies
 - b. Whether this Court this Court has jurisdiction to hear and determine this Petition
 - c. Whether the Respondents infringed the Petitioner's Constitutional rights
 - d. Whether the Petitioner is entitled to reliefs sought.
Whether the instant Petition offends the doctrine of exhaustion of remedies
66. The doctrine of exhaustion of remedies is a jurisdictional issue as it asserts that the Court should not take up and hear the matter if there exists a primary forum that is provided for in legislation for resolution of the dispute in question.
67. The Court of Appeal in *Geoffrey Muthiga Kabiru & 2 Others Vs. Samuel Munga Henry & 1756 Others* [2015] EKLRL elaborated on the doctrine as follows:

“It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...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 the Courts. The ex parte



Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”

68. The Petitioner’s grievance pertains to water safety in regard to water supplied by the 1st and 2nd Respondents to Escada Apartments. He complains that the same it is laced with disease causing bacteria due to infiltration of the faecal matter into it and thus fears for himself and his family wellness.

69. Section 63 of the Water Act secures the right to clean water by stating thus:

“Every person in Kenya has the right to clean and safe water in adequate quantities and to reasonable standards of sanitation as stipulated in Article 43 of the Constitution.”

70. Section 119 thereof establishes the Water Tribunal whose jurisdiction is set out in section 121 of the Act as follows:

1. The Tribunal shall exercise the powers and functions set out in this Act and in particular shall hear and determine appeals at the instance of any person or institution directly affected by the decision or order of the Cabinet Secretary, the Authority and Regulatory Board or of any person acting under the authority of the Cabinet Secretary, the Authority and Regulatory Board.
2. In addition to the powers set out in subsection (1), the Tribunal shall have the power to hear and determine any dispute concerning water resources or water services where there is a business contract, unless the parties have otherwise agreed to an alternative dispute resolution mechanism.

71. In Section 121(2) of the Water Act, 2016 the Act states:

“...the Tribunal shall have the power to hear and determine any dispute concerning water resources... or services where there is a business contract”

72. The Petitioner complains that the water supplied by the 1st and 2nd Respondents is contaminated with human waste and his pleas to the 1st and 2nd Respondent have gone unheeded. In my view, the dispute should have first been raised with the Water Tribunal. This is not a matter that needed to invoke Constitutional jurisdiction of this Court to determine.

73. As was held in *Albert Chaurembo Mumbo & 7 Others Vs. Maurice Munyao & 148 Others*; Sc Petition No 3 Of 2016, [2019] EKLR,

“... even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.”

Whether this Court this Court has jurisdiction to hear and determine this Petition

74. Over and above my finding above, it is also crystal clear to me that this is not even a matter that ought to have found its way into the High Court even assuming that the Water Tribunal was not an appropriate forum. It is a matter that would have fallen for determination by the Environment and Land Court for the following reasons.



75. The jurisdiction of the High Court is provided for in Article 165 (3)(b) of the Constitution which gives this court jurisdiction to determine the question of whether a right or fundamental freedom in the Bill of Rights has been violated, infringed or threatened.
76. However, Article 165(5)(b) imposes limitations on the High Court's jurisdiction concerning matters falling within the purview of the courts specified in Article 162(2). Article 162 (2) of the Constitution establishes courts with the status of the High Court to hear and determine disputes relating to employment and labour relations and the environment and the use and occupation of and title to land.
77. The Environment and Land Court is established under the Environment and Land Court Act, 2011, (No. 19 of 2011) whereby Section 13(1) of the Act gives the Court original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution.
78. Section 13(2) of the Environment and Land Court Act specifies the Court's jurisdiction of the Court to as follows:
- 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 disputes relating to environment and land.
79. It provides further that:
- “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 the environment and land under Articles 42, 69 and 70 of the Constitution”
80. The grievance relating to the right to clean and adequate water is a matter within the competence of the Environment and Land Court having regard to Article 162 (2) (b) of the Constitution as read with Sections 2 and 124 of the Water Act, 2016.
81. The Supreme Court underscored the constitutional jurisdiction of the Environment and Land Court to deal with violation of fundamental rights in matters falling within taking its purview in *Nicholus Vs. Attorney General & 7 Others; National Environmental Complaints Committee & 5 Others* (interested Parties) (petition E007 Of 2023) [2023] KESC 113 by holding thus:
- “[104] Having considered the above complaints, we reiterate our earlier finding in this judgment that the mandate and jurisdiction to determine these questions lie with the ELC under Articles 22, 23(3) and 162(2)(b) of the Constitution as read with Section 4(1) of the Environment and Land Act. We say so because neither the NET, EPRA nor EPT have the jurisdiction to determine alleged violations of the Constitution. That right to access the court for redress of alleged constitutional violations, should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms.”
82. Having reached the above conclusions, I am unable to consider the remaining issues as without jurisdictions, I am obliged to down my tools.



83. The upshot is thus this Petition is struck out. I make no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3RD DAY OF APRIL, 2025.

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L N MUGAMBI

JUDGE

