



Buku v National Environmental Authority & 3 others (Environment & Land Case E289 of 2021) [2021] KEELC 4752 (KLR) (14 October 2021) (Ruling)

Mercy Wangari Buku v National Environmental Authority & 3 others [2021] eKLR

Neutral citation: [2021] KEELC 4752 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E289 OF 2021**

**JO MBOYA, J
OCTOBER 14, 2021**

BETWEEN

MERCY WANGARI BUKU PLAINTIFF

AND

NATIONAL ENVIRONMENTAL AUTHORITY 1ST DEFENDANT

DIRECTOR, URBAN PLANNING NAIROBI COUNTY 2ND DEFENDANT

SHELTER AFRIQUE LIMITED 3RD DEFENDANT

**DIRECTOR GENERAL, NAIROBI METROPOLITAN SERVICES 4TH
DEFENDANT**

RULING

1. The Plaintiff herein filed the subject suit vide the Complaint dated the August 3, 2021, in respect of which same sought a Plethora Reliefs, namely;
 - a. A declaration that the Defendants have violated the Plaintiff's rights to a clean and healthy environment under Article 42 of the *Constitution of Kenya, 2010*.
 - b. A declaration that the Defendants have violated the rights of the Plaintiff under Article 69 of the Constitution of Kenya, 2010 to ensure sustainable exploitation of natural resources, eliminate processes and activities that are likely to endanger the environment.
 - c. A declaration that the 1st & 2nd Defendant have violated the rights of the Plaintiff by failing to observe the provision of Article 35 of the Constitution



of Kenya 2010 and Section 42 (1) paragraph b, 58 (2) & 64 (1) of the Environmental Management and Coordination Act.

- d. A declaration that the 1st & 2nd Defendants are in breach and in violation of Section 52 of the Environmental Management & Coordination Act, Section 17 (1) of the Environmental (impact assessment and audit) regulations, 2003 and Section 55 (a, d, f & g) of the physical and Land use Planning Act, 2019, respectively.
 - e. A declaration that the 2nd Defendant is in breach and violation of Nairobi County zoning guidelines, issued by Nairobi County guideline under the Urban and City's Act, No 13 of 2011.
 - f. An order quashing the decision of the 2nd Defendant granting the 3rd Defendant approval of change of user and approval of the proposed development dated April 12, 2021.
 - g. An order revoking the environmental impact assessment license dated April 20, 2021 granted by the 1st Defendant to the 3rd Defendant.
 - h. An order compelling the 3rd Defendant to carryout and submit a fresh environmental impact assessment report to the 1st Defendant taking account of the fact as set out in paragraph 8 to 20 of the Plaintiff.
 - i. An order compelling the 3rd Defendant to re-design the proposed development so as to comply with the zoning approval for Kileleshwa area as set out in the Nairobi County Guidelines issued by Nairobi County Government under the Urban and City's Act No 13 of 2011.
 - j. A conservatory order/permanent injunction prohibiting the 1st & 2nd Defendant from granting the 1st & 2nd Defendant any license, permission or authority to construct the proposed development until a fresh, full environmental a social impact assessment study is undertaken by the 3rd Defendant in accordance with the law and until the 3rd Defendant submits revised architectural plans re-designing the project to comply with the Nairobi County zonings permission for Kileleshwa Area.
 - k. General and punitive damages.
 - l. Costs of this suit
 - m. Interest on k & l above at court rates from the date of judgment until payment in full.
 - n. Any other relief as the honourable court my deem just and fit to grant.
2. Contemporaneous with the filing of the Plaintiff, the Plaintiff herein also took out a Notice of motion Application dated the August 3, 2021, and in respect of which the Plaintiff sought for Orders of temporary injunction directed to and/or against the activities by the 3rd Defendant over and in respect of LR NO 3734/357, pending the hearing and determination of the application in the fist instance and of the suit herein.
 3. It is imperative to note that the Notice of motion Application under reference and which was lodged under certificate of urgency, was placed before Lady Justice K Bor, Judge, on the August 5, 2021, and



on which date the Honourable Judge Ordered and directed that the status quo on LR NO 3734/357, Othaya Road, be maintained.

4. Following the service of the Plaint and summons to enter appearance, the Defendants herein, variously entered appearance and some of them, namely, the 3rd Defendant have since filed a Replying affidavit, sworn on September 24, 2021, ostensibly in opposition to the Notice of motion Application.
5. On the other hand, the 3rd Defendant herein has similarly filed a Notice of Preliminary Objection dated September 23, 2021, whereby same contends that this honourable court is divested of jurisdiction to entertain and/or adjudicate upon the Plaint and Notice of motion Application dated the August 3, 2021.
6. As a result of the Preliminary objection filed, this honourable court ordered and/or directed that the same be canvassed and/or be disposed of beforehand and in particular, to enable the court to be able to address the jurisdictional question promptly and effectively and thereafter render a determination thereof.

The Notice of Preliminary Objection

7. The Notice of Preliminary Objection filed by and/or behalf of the 3rd Defendant raises the following grounds;
 - i. 'This Honourable court is divested of jurisdiction to hear and determine the suit and the application by dint of the mandatory provisions of Section 129 (1) (a) of the *Environmental Management & Coordination Act*, 1999 as read together with regulation 46 (1) (f) of the Environmental (impact assessment and audit) regulations, 2003.
 - ii. This Honourable court jurisdiction to hear and determine the suit and the application is further ousted by dint of the mandatory provision of Section 78 (b) of the *Physical & Land Use Planning Act*, 2019.'

Submissions By The Parties

8. The 3rd Defendant herein, who is the originator of the Notice of Preliminary Objection filed her written submissions on the September 28, 2021, whereby same contended that the jurisdiction of this honourable court to entertain and/or adjudicate upon the subject dispute, has been ousted, restricted and/or otherwise limited by the provisions of Section 129 (1) (a) of the Environmental Management & Coordination Act, 1999 as read together with regulation 46 (1) (f) of the Environmental (Impact assessment and audit) Regulations, 2003.
9. According to the 3rd Defendant herein, though this honourable court has both the original and appellate jurisdiction to deal with matters pertaining to the Environment and Land Disputes, by dint of Article 162 (2b) of the *Constitution*, 2010, as well as Section 13 of the *Environment & Land Court Act*, 2011, as read together with Section 3 (3) Environmental Management & Coordination Act, the latter Act has by dint of Section 129 (1a) established a statutory Body, which is clothed with the mandate and authority to attend to and/or deal with Disputes pertaining to the compliance with provision of the said Act, including allegations of breach and/or violation of the provisions thereof.
10. The 3rd Defendant further submitted that the issues raised vide the subject Plaint essentially revolve around the process culminating into the issuance of the Environmental Impact assessment license by the 1st Defendant in favor of the 3rd Defendant herein, pertaining to the Project being undertaken by the 3RD Defendant.



11. On this account, the 3rd Defendant contended that the subject dispute ought to and should have been lodged with the National Environmental Tribunal pursuant to and in line with the provision of Section 129 (1) (a) of the Environment Management & Coordination Act, 1999.
12. On the other hand, the 3rd Defendant has also contended that the aspect of the subject case that touches on and/or challenges the approval of change of user and approval of the proposed development by the 2nd & 4th Defendant herein, is a matter that is captured and/or provided for Section 78 (b) of the Physical & Land Use Planning Act, 2019.
13. As pertains to the latter issue, the 3rd Defendant contended that if the Plaintiff herein was aggrieved by the approval relating to the change of user and approval of the proposed project in favor of the 3rd Defendant, it was incumbent upon the Plaintiff to ventilate her complaints and/or grievances, if any, through the liaison committee in the 1st instance and that the Plaintiff could only approach this honourable court by way of an Appeal.
14. Based on the two limbs, which have been alluded to hereinbefore, the 3rd Defendant anchored the Preliminary Objection on the basis of the Doctrine of Exhaustion and, I may add, the Doctrine of Avoidance, whereby the 3rd Defendant contends that where there exists separate statutory dispute resolution mechanism, same ought to be exhausted before one can approach the honourable . In this regard, the 3rd Defendant avers that the Statutory Body should be the first Port of call and not otherwise.
15. It was the 3rd Defendant further argument that the doctrine of Exhaustion is well grounded and sound in law. In this regard, the 3rd Defendant adverted to the provision of Article 159 (2c) of the Constitution 2010, which underscores the place of alternative dispute resolutions, as a mode of Dispute Settlement.
16. Finally, the 3rd Defendant referred to various Decisions whereby the various courts, have considered the place and importance of the Doctrine of Exhaustion. For clarity, the 3rd Defendant referred to the following Decisions;
 - a. [Mutanga Tea & Coffee Company Limited v Shikara Limited & Another \[2012\] eKLR](#)
 - b. [Deepak Harakch & Another v Anmol Limited & 4 Others \[2018\] eKLR](#)
 - c. [Samson Chembe Vuko v Nelson Kilumo & 2 Other \[2016\] eKLR](#)
 - d. [Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others \(2015\) eKLR](#)
 - e. [Angela Mbugua & 4 Others v K O Holdings Limited & 2 Others \[2020\] eKLR,](#)
 - f. [Zoa Limited v Arvind Money & 2 Others \[2020\] eKLR](#)
17. On the basis of the foregoing submissions and fortified by the Decisions alluded to in the preceding paragraph, the 3rd Defendant implored the Honourable court to find and hold that the court was divested of Jurisdiction to entertain and/or adjudicate upon the subject Dispute and thus the Honourable Court should decline the assumption of Jurisdiction in the matter.

The 1st Defendant's Submissions

18. The 1st Defendant herein supported the preliminary objection raised on behalf of the 3rd Defendant. In this regard, the 1st Defendant reiterated that there exists a separate statutory dispute resolution mechanism, which is meant to address and/or deal with the subject dispute.
19. The 1st Defendant further averred, that where the honourable court has both the original and appellate jurisdiction, in matters relating to environmental and land use, where there exists an alternative



dispute resolution mechanism established by an Act of Parliament, the honourable court should defer assumption of jurisdiction and allow the established statutory bodies, the latitude to appropriate and / or exercise their mandate in the first instance.

The 2nd & 4th Defendant Submissions

20. On behalf of the 2nd & 4th Defendant, learned counsel Mr Allan Kamau filed very extensive and elaborate submissions. Besides, counsel for the 2nd & 4th Defendant, also relied on a Number of Decisions, most notably the Decision of the Court of Appeal in the case of *Kibos Distillers Limited & 4 Others v Benson Ambuti & 3 Others (2020) eKLR.*
21. I must point out, that even though the Preliminary Objection did not belong to the 2nd & 4th Defendant, the submissions filed on their behalf and the authorities relied on, were very forceful, germane, pertinent and spot on .Besides, same were succinct and one could easily have mistaken that the Preliminary objection belonged to same.
22. Without repeating verbatim the arguments of the counsel of the 2nd & 4th Defendants, it is imperative to point out one silent aspect of the said submissions, where counsel stated that a litigant cannot confer jurisdiction on a court or seek to oust jurisdiction of a competent statutory Organ, through the art and craft of Drafting pleadings and introduction of a host of Reliefs.
23. In this regard, counsel pointed out that even in multi-faceted/ cross cutting cases, a court cannot assume jurisdiction, if the fulcrum of the complaint, lies for determination elsewhere, in a statutorily established Body and/ or Agency.
24. In a nutshell, the 2nd & 4th Defendant agreed with the 3rd Defendant that this honourable court' is divested of Jurisdiction to entertain and/or adjudicate upon the subject dispute and in this regard counsel urged the court to decline the jurisdiction .For clarity, counsel underscored the role of the doctrine of avoidance.

Plaintiff's Submissions

25. Confronted with the Preliminary Objection raised on behalf of the 3rd Defendant and vehemently,supported by the rest of the Defendants, the Plaintiff herein filed her submissions on the October 1, 2021.
26. In response, the Plaintiff extensively reproduced the provisions of Section 13 of the Environment and Land Court Act No 19 of 2021. In this regard, and in a bid to give emphasis to the Plaintiff's position, it suffices to reproduce the said Provisions and same are reproduced as hereunder;

13. Jurisdiction of the Court

- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes?



- (a) Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) Relating to compulsory acquisition of land;
 - (c) Relating to land administration and management;
 - (d) Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) Any other dispute relating to environment and land. [Rev 2012] No 19 of 2011 Environment and Land Court 9 [Issue 1]
- (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution, 2010

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

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

- (7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including?
- (a) interim or permanent preservation orders including injunctions;
 - (b) Prerogative orders;
 - (c) Award of damages;
 - (d) compensation
 - ; (e) Specific performance
 - ; (g) Restitution;
 - (h) Declaration;
 - or (i) costs.

27. Other than the foregoing provisions, the Plaintiff also placed emphasis on the provision of Section 3(3) of the Environmental Management & Coordination Act, 1999 (2015) which provides as hereunder;

- (3) 'If a person alleges that the entitlement conferred under subsection (1) has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress and the High Court may make such orders, issue such writs or give such directions as it may deem appropriate to—



- (a) Prevent, stop or discontinue any act or omission deleterious to the environment;
- (b) Compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment;
- (c) Require that any on-going activity be subjected to an environment audit in accordance with the provisions of this Act;
- (d) Compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and
- (e) Provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing.'

28. According to the Plaintiff, the provisions alluded to hereinbefore clothed and/or confer this honourable court with the requisite jurisdiction to entertain the subject dispute and grant the relief sought.
29. On the other hand, the Plaintiff further submitted that the existence of other statutory bodies conferred and/or vested with mandate to interrogate some aspect of the subject dispute, does not deprive and oust the jurisdiction of this honourable court, which is a superior court of record.
30. Besides, it was also the Plaintiff's further argument that the dispute beforehand is multifaceted and/or raises cross-cutting issues, including declaratory orders pertaining to breach or violation of the Plaintiff's constitutional and fundamental rights, which are issues that cannot be ventilated before statutory bodies in the manner contended by the Defendants. In this regard, Counsel for the Plaintiff contended that such Declaratory reliefs can only be pursued before this Honourable Court and not before the Quasi-Judicial bodies, the latter, which Counsel contended do not have such jurisdiction.
31. Finally, the Plaintiff drew the attention of the Honourable court to various Decisions emanating from this honourable court ,namely, The Environment and Land Court, and for completeness, it is appropriate to enumerate the said Decisions and same are as hereunder;
- i. [David Merika & Another v Director General Nema & 2 Others \[2020\] eKLR](#) Decision of Hon Justice Kemei, Judge.
 - ii. [Julias Nyaga Kithome v Janton Investment Limited & Another \[2021\] eKLR](#). Decision of Hon Justice Njoroge, Judge.
 - iii. [Getrude Mukoya Mwenda & Others v Cabinet Secretary, Ministry of Infrastructure Housing & Urban Development \[2020\] eKLR](#). Decision of Hon. Justice Yano, Judge
 - iv. [Ken Kasinga v Daniel Kiplagat Kirui & 5 Others \[2015\] eKLR](#). Decision of Hon Justice Munyao Sila, Judge.
 - v. [John Kabukuru Kibicho & Another v County Government of Nakuru & Another \[2016\] eKLR](#). Decision of Hon Justice Munyao Sila, Judge.
 - vi. [Taib Investment Limited v Fahim Salim Said & 5 Others \[2016\] eKLR](#). Decision of Hon. Justice Angote, Judge.



32. Premised on the foregoing Decisions, the Plaintiff contends that the Provisions of Article 162 (2b) of the Constitution, 2010, as read together with Section 13 of the Environment and Land Court Act, 2011, together with the provisions of Section 3(3) of the Environmental Management & Coordination Act 1999, this Honourable court ought to assume and exercise its constitutional Mandate. In this regard, Counsel contended that the grant of the Preliminary Objection would be tantamount to abdication of Jurisdiction and by extension a failure to protect the Constitution, 2010.
33. It is also the contention by the Plaintiff, that the environment and land court has taken a common stand on the limits and/or extent of its Jurisdiction. For clarity, counsel contended that Jurisdiction is granted by the constitution and the statute law and that where same is explicit, the Court ought not to forsake its Jurisdiction.
34. In sum, the Plaintiff's Counsel implored this Honourable court to take into account the Supreme Court Decision in the case of *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR*, where the honourable court underscored the source of a court's Jurisdiction and in particular, observed as hereunder;

' A court jurisdiction flows from either the constitution or legislation or both'

34. Be that as it may, , must point out that the Plaintiff's Counsel however, did not address her mind to the latest Decision by the Honourable Court of Appeal in respect of Kibos Distillers Ltd and 5 others versus Benson Ambuti Adega and 3 Others, [Supra], wherein similar or near similar issues arose. In this regard and despite the invite by the Honourable Court to Counsel to say a word, Counsel remained tight and reiterated the substance of the Decisions by this Honourable Court, albeit differently constituted.

Issues For Determination

35. Having examined the Plaint dated the August 3, 2021, and taken into account the Reliefs sought, particulars of which have been reproduced elsewhere in the body of this Ruling and having reviewed the forceful submissions rendered by either side, the following issues suffice for Determination;
- i. 'Whether there exists other/ Alternative Statutory Dispute Resolution Mechanism provided under the law to redress the Subject Dispute and if so, whether same has been Exhausted?
 - ii. Whether the Honourable court has Jurisdiction to entertain the subject Dispute in line with the provision of Section 3(3) of the Environmental Management & Coordination Act 1999, (2015) and Section 13 of the Environment and Land Court Act, No 19 of 2011.
 - iii. Whether this Honourable court should assume Jurisdiction in this matter on the face of the Doctrine of Exhaustion and particularly, where same have both Original and Appellate Jurisdiction in respect of the said Dispute.

Issue Number One

36. The Preliminary Objection ventilated by the 3rd Defendant, is premised on the provisions of two separate and distinct Acts of Parliament, namely;
- a. Section 129 (1a) of the Environmental Management & Coordination Act 1999 (2015)
 - b. Section 78 (b) of the Physical and Land Use Act, 2019



37. As pertains to the first limb, the provisions of Section 129 (1) & (2) of the EMCA 1999 (2015), have provided instances where Disputes pertaining to compliance with breach and/or violation of the Provisions of the Act, ought to be lodged with and/or addressed by the National Environmental Tribunal, which is established pursuant to the Provisions of Section 125 of the said Act.
38. For ease of reference, it is appropriate to reproduce the provisions of Section 129 of the EMCA Act, 1999, which provides as hereunder;

129. Appeals to the Tribunal

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

(2) Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance

39. From the foregoing provision, it becomes evident and/or apparent that the Reliefs that have been sought by the Plaintiff herein particularly c, d, g, h & j, respectively, are matters which essentially ought to be ventilated before and/or addressed by the National Environmental Tribunal in the first instance.
40. As pertains to the second limb of the Preliminary Objection, the relevant provision is Section 78 of the Physical and Land Use Act, 2019, which provides as hereunder;

Functions of the County Physical and Land Use Planning Liaison Committee

The functions of the County Physical and Land Use Planning Liaison Committee shall be to—

- (a) Hear and determine complaints and claims made in respect to applications submitted to the planning authority in the county;
- (b) Hear appeals with respect to enforcement notices.
- (c) Advise the County Executive Committee Member on broad physical and land use planning policies, strategies and standards; and



(d) Hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the county;

41. Again, looking at the aforesaid provisions, the Reliefs sought by the Plaintiff herein relating to Prayers e, f, I and j, respectively, which are essentially challenging the approval relating to change of user and approval of the proposed project, are matters that fall within the Statutory remit of the County liaison committee.
42. In view of the foregoing, I answer the first limb of issue Number 1, raised by the counsel for the 3RD Defendant by stating that there does exist Statutory Dispute Resolution Mechanism, which ought to have been invoked in the first instance, before recourse was made to this Honourable court.
43. As pertains to the second limb of issue Number One [1], I find and hold that no Evidence relating to Exhaustion has been availed and in any event the Plaintiff, which is the central Document as pertains to the determination of the Preliminary Objection, does not allude to any effort having been made to address the subject dispute before the statutory fora, which have been discussed in the preceding paragraphs.
44. I must add that in instances where an Alternative Dispute Resolution Mechanism has been provided, a litigant is obliged to comply or better still implead that the said Alternative mechanism provided shall not suffice in respect to a particular matter. Section 9 [2] of the *Fair Administrative Actions Act*.
45. Nevertheless, in respect to the subject matter no such statement has been alluded to and neither has the Plaintiff stated or contended that she approached and/ or filed any Complaint before the said Bodies, whatsoever.

Issue Number Two

46. As pertains to whether or not this honourable court has jurisdiction to address and/or attend to the subject dispute, it is important to take note of the following provisions, namely;
 - a. Article 42, 69, 70 & 162 (2) b
 - b. Section 13 of the Environment and Land Court Act, 2011
 - c. Section 3(3) & 3(5) of the Environmental Management & Coordination Act, 1999 [2015]
47. I must say that from the reading of the forecited Provisions, this Honourable Court is conferred and/ or vested with both Original and Appellate Jurisdiction to hear all Disputes pertaining to and/ or concerning Environmental Planning and Protection, Climate Issues, Land use Planning, Title, Tenure, Boundaries, Rates, Rents, Valuation, Minerals and other Natural Resources.
48. It is also Imperative to take cognizance of the provision of Section 13 (3) of the Environment and Land Court Act, Number 19 of 2011, which provides as hereunder;
 - ' (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.'
49. In my humble view this Honourable Court has and is seized of the requisite Jurisdiction to entertain and/ or adjudicate upon the subject dispute. In this regard, I share the sentiments of the learned Judges of the Environment and Land Court, whose Decisions I alluded to and which form part of the forceful



and indeed persuasive submissions that were rendered by and on behalf of the Plaintiff's Counsel herein and which submissions I have reproduced extensively hereinbefore.

50. Nevertheless, I must add that none of the parties has challenged the fact that this court is clothed and/or conferred with such Jurisdiction. To my mind, the golden submissions that have been made relates to whether this Honourable court ought to assume jurisdiction where there exists Alternative Dispute Resolution Mechanism provided for in an act of Parliament and which should thus be the first frontier, in the Event of a Dispute arising.
51. Suffice it to say, that as pertains to the Jurisdiction, I can do no better than to reproduce the Decision of the supreme court in *Samuel Kamau Macharia v Kenya Commercial Bank [2012] eKLR*, the Import of which I have referred to in the earlier paragraphs.
52. On the other hand, I also beg to echo the sentiments of the Court of Appeal in the Decision in the case of *Esther Gachambi Mwangi v Samuel Mwangi Mbiri [2013] eKLR*, where the court observed as hereunder;

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

Issue Number Three

53. Having found and held that this honourable court is conferred and/or clothed with both Original and Appellate Jurisdiction in respect of all, if not, most of the Reliefs sought, the critical question that should therefore be answered, is whether in such scenario the Honourable court should exercise and/or assume original jurisdiction.
54. On the other hand, The flipside question would thus be what happens to the Appellate jurisdiction of this honourable court, in the event the Honourable court assumes Original Jurisdiction. Clearly, the court cannot exercise both jurisdictions, [that is, Original and Appellate], simultaneously and in my humble view, One aspect of Jurisdiction must, no doubt give way for the other.
55. Further, it is my humble opinion that like in disputes under the Environmental Enagement and Coordination act, 1999 [2015], where this honourable court is the final appellate court, it would deprive any aggrieved party of the undoubted Right of Appeal. In this regard, this Honourable court would have restricted and/or otherwise diminished the Claimants’ Constitutional Rights of access to justice, particularly, the Right of Appeal.
56. I further hold the opinion, the Right to access to justice, under Article 48 of the Constitution,2010, envisages a scenario where a litigant or a citizen, can be able to Exhaust all the level of appeals provided for and/or sanctioned under the law. Consequently, this court while exercising the choice, whether to assume the Original Jurisdiction or defer same, to a statutory Body so established, the Honourable Court should be minded to provide the latitude for Appeal.



57. In any event, I wish to state that even where the Honourable Court, has both the original and Appellate Jurisdiction, it does not mean that the honourable court therefore must render the established statutory agencies and/or bodies irrelevant and/or dysfunctional.
58. In my humble view, a balance must be struck, so as to facilitate ordered functioning within the Bodies that are conferred with certain statutory mandates and to ensure that same achieve the Purpose of their creation and Existence.
59. In this regard, I adopt and rely on the Decision of the Court of Appeal in the Decision in the case of *Kibos Distillers Limited & 4 Others v Benson Ambuti & 3 Others* [2020] eKLR, where the honourable court held as hereunder;

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

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

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

60. In my humble view and guided by the foregoing Decision, I must advocate for exercise of judicial Restraint by this honourable court, in this kind of matters and thus allow the established constitutional and statutory bodies, if any, to appropriate, exercise and carry out their extensive mandate in accordance with enabling statutes, before assuming Jurisdiction, in the event, upon the lodgment of Appeals, where appropriate.
61. As pertains to the second limb of this issue, which is essentially grounded on the Doctrine of Exhaustion, it is important that Claimants and/or litigants, knowing of the existence of alternative dispute resolution mechanism, should proceed to and exhaust same before approaching the Honourable court.
62. In this regard, I share the strong position that the Honourable Court must be the Forum of the last call and not the Port of first call. In support of the foregoing position, I am compelled to take guidance in the case of *Geoffrey Muthinja Kabiro v Samuel Muguna Henry* [2015] eKLR, where the honourable court held as hereunder;

' It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as



is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution'.

63. On the other hand, an argument may well be raised, and indeed same has previously been raised that under the provisions of Articles 22, 48 and 258 of the Constitution, 2010, any aggrieved party has a right or access to court and that the said rights are unlimited and thus the Doctrine of Exhaustion constitutes a clog and/or fetter to the enjoyment of the constitutional rights.

64. But, it must be remembered that Alternative Dispute Resolution Process, is anchored in the Constitution. Consequently, it behooves all and sundry to read the Constitution in a harmonious manner, and thus ensuring that the Constitutional provisions complement each other and not otherwise. In support of the foregoing observation, I am fortified by the decision of the Supreme Court in *Re The Matter of Kenya National Commission of Human Rights, Supreme Court Ref. No 1 of 2012 [2014] eKLR* where the Supreme Court underscored the Principle of harmonious and/or wholistic interpretation of the Constitution and held as hereunder;

' But what is meant by a 'holistic interpretation of the Constitution'? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.'

65. Be that as it may, to the Proponents of the said school of thought, it is sufficient to take note of the observation by the Court of Appeal in the Decision in the case of *Bethwel Allan Omondi Okal v Telkom (K) Limited (founder) & 9 Others [2017] eKLR*, where the court held as hereunder;

' The Appellant might want to argue that he has a constitutional right of access to justice, and we agree that he does, but the High Court and this Court have pronounced themselves many times to the effect that a party must first exhaust the other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the High court by way of constitutional petitions. See *International Centre for Policy and Conflict & 4 others vs The Hon Uhuru Kenyatta and others, Petition No 552 of 2012*, and *Speaker of National Assembly vs Njenga Karume [2008] 1KLR 425*.'

66. As for me, I must say, that I subscribe to the finding and holding of the Court of Appeal in the foregoing Decision and in this regard, I would exercise deference to the other statutory bodies and allow same to assume, appropriate and/or otherwise exercise their mandate, in the first instance. Only then, shall the Parent Statutes have meaning and Purpose.

Final Disposition

67. In a nutshell, I have come to the inescapable conclusion that the Preliminary Objection raised by the 3rd Defendant herein is Meritorious.

68. In any event, the legal terrain pertaining to the extent and applicability of the Doctrine of Exhaustion and the twin Sister, namely, the one of Avoidance, are now well beaten. Decisions in this regard are



now legion and hence any Reasonable litigant, including their advocates, exercising some degree of diligence and Research, would have established as much.

69. In sum, the Preliminary Objection September 23, 2021, be and is hereby allowed. Consequently, the Plaintiff dated the August 3, 2021, is hereby struck out.
70. As concerns the costs, it is important to note that the Preliminary Objection was only filed by the 3rd Defendant and the rest of the Defendants, merely escorted the 3rd Defendant.
71. Consequently, costs are hereby awarded to the 3rd Defendant only and same shall be borne by the Plaintiff.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF OCTOBER 2021.

HON. JUSTICE OGUTTU MBOYA,

JUDGE

ENVIRONMENT AND LAND COURT,

MILIMANI.

In the Presence of;

June Court Assistant

