



REPUBLIC OF KENYA



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**Mwanthi & 17 others v Speaker, County Assembly of Machakos & 3
others (Constitutional Petition E024 & E018 of 2025 (Consolidated))
[2025] KEHC 14412 (KLR) (18 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 14412 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CONSTITUTIONAL PETITION E024 & E018 OF 2025 (CONSOLIDATED)**

NIO ADAGI, J

SEPTEMBER 18, 2025

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 22, 23, 24, 27, 28, 38, 47,
50, 73, 174, 175, 177, 178, 185, 196, 232, AND 259 OF THE
CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE CONTRAVENTION AND THREATENED
CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE
PETITIONERS**

AND

**IN THE MATTER OF THE UNCONSTITUTIONAL SUSPENSION OF DULY
ELECTED MEMBERS OF THE COUNTY ASSEMBLY FROM THE COUNTY
ASSEMBLY CHAMBERS AND FROM DISCHARGING THEIR CONSTITUTIONAL
DUTIES**

AND

**IN THE MATTER OF THE UNCONSTITUTIONAL REMOVAL OF DULY ELECTED
MEMBERS FROM THE VARIOUS COMMITTEES OF THE COUNTY ASSEMBLY
OF MACHAKOS**

AND

**IN THE MATTER OF BREACH OF STANDING ORDERS NUMBERS 103, 104,
105, 106, 107, 108 AND 156 OF THE MACHAKOS COUNTY ASSEMBLY**



**STANDING ORDERS
AS CONSOLIDATED WITH
REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CONSTITUTIONAL PETITION NO. E018 OF 2025
IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 22, 23, 24, 27, 28, 38, 47,
50, 73, 174, 175, 185, 196, 232, AND 259 OF THE CONSTITUTION OF
KENYA, 2010**

AND

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**IN THE MATTER OF THE CONTRAVENTION AND THREATENED
CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE
PETITIONERS**

AND

**IN THE MATTER OF THE UNCONSTITUTIONAL BARRING OF DULY ELECTED
MEMBERS OF COUNTY ASSEMBLY FROM ACCESSING COUNTY ASSEMBLY
CHAMBERS AND DISCHARGING THEIR CONSTITUTIONAL DUTIES**

BETWEEN

STEPHEN NZUE MWANTHI	1 ST PETITIONER
NICHOLAS KITAVI NZIOKA	2 ND PETITIONER
FELIX MUTUNGA NGUI	3 RD PETITIONER
RAPHAEL LUCKY NZAU	4 TH PETITIONER
CATHERINE KYEE	5 TH PETITIONER
CATHERINE MUIA	6 TH PETITIONER
ANASTACIA MUTEVU	7 TH PETITIONER
HELLEN NDETI	8 TH PETITIONER
CONSTANCE MBULA	9 TH PETITIONER
MERCY NJAGI	10 TH PETITIONER
PAUL MWANZIA	11 TH PETITIONER
JUSTUS MUTUKU	12 TH PETITIONER
PHOEBE KOKI	13 TH PETITIONER
MARY NTHENYA	14 TH PETITIONER



AND

SPEAKER, COUNTY ASSEMBLY OF MACHAKOS 1ST RESPONDENT

CLERK, COUNTY ASSEMBLY OF MACHAKOS 2ND RESPONDENT

AS CONSOLIDATED WITH
CONSTITUTIONAL PETITION E018 OF 2025

BETWEEN

NICHOLAS KITAVI NZIOKA 1ST PETITIONER

STEPHEN NZUE MWANTHI 2ND PETITIONER

JUDAS MBILI NDAWA 3RD PETITIONER

FELIX MUTUNGA NGUI 4TH PETITIONER

RAPHAEL LUCKY NZAU 5TH PETITIONER

CHARLES MBUVA 6TH PETITIONER

PHOEBE KOKI MAWA 7TH PETITIONER

ANNA NTHENYA NDILO 8TH PETITIONER

CATHERINE KYEE 9TH PETITIONER

ALL SUING AS ELECTED MEMBERS OF THE COUNTY ASSEMBLY OF
MACHAKOS, IN THEIR INDIVIDUAL AND REPRESENTATIVE CAPACITIES
ON BEHALF OF THEIR RESPECTIVE ELECTORATES

AND

SPEAKER OF THE COUNTY ASSEMBLY OF MACHAKOS .. 1ST RESPONDENT

CLERK OF THE COUNTY ASSEMBLY OF MACHAKOS 2ND RESPONDENT

RULING

Introduction

1. This ruling is on the 1st Respondent's notice of Preliminary Objection dated 16th of June 2025 raised to the Petitioners' Petition and the Notice of Motion dated 11th June 2025. The objection is grounded upon the following grounds:
 - a. That the legal mechanisms available for redress of the Petitioner's claim have not been exhausted as per Standing Order 106A of the County Assembly of Machakos Standing Orders.
 - b. That this court therefore lacks jurisdiction to hear and determine the Petition and Application on the Applicants/Petitioners.
2. The notice of Preliminary Objection was raised following the Petitioners' notice of motion application dated 11/06/2025 basically seeking for orders that pending the hearing and determination of the



Constitutional Petition herein, a conservatory order be issued restraining the Respondents, jointly and severally, from enforcing or purporting to enforce any directives written, verbal or otherwise issued to exclude or suspend the Petitioners from the Assembly or its operations, and from taking any adverse or retaliatory action against the Petitioners in relation to their constitutional role in initiating or supporting the pending removal process against the Speaker and for this court to issue such further or other orders as it may deem just and appropriate in the circumstances to safeguard the Petitioners' constitutional rights and preserve the integrity of the County Assembly and its operations.

Factual Matrix.

3. The facts giving rise to this matter as far as I can distil them from the pleadings herein are that the Petitioners are Honourable members of the County Assembly of Machakos whereas the Respondents are the Speaker and Clerk respectively of the County Assembly of Mombasa. According to the Petitioners, the 1st Respondent, the Speaker of the County Assembly of Machakos has, without any lawful cause, due process, or justification, barred the Petitioners from accessing the Assembly and discharging their constitutional functions.
4. That the said actions are retaliatory, having been taken after the Petitioners filed a removal Petition against the Speaker, a matter still pending and unresolved.
5. On their part, the Respondents claim that on 10th June 2025, chaos broke out in the County Assembly Chambers of Machakos as the Speaker attempted to deliver official communication from the Chair. The Petitioners, who are Members of the said County Assembly, became rowdy, shouted down the proceedings, rushed towards the Speaker's dais, and attempted to seize the Mace, a sacred symbol of the Assembly's authority.
6. The Speaker was forced to exit the chambers under threat. In the process, the sergeant-at-arms was physically injured. The Speaker documented this account in her Replying Affidavit at paragraphs 16—21 and annexed Hansard records and security communications marked AK2 and AK6.
7. It is alleged that these events constituted clear gross misconduct, and the Speaker lawfully invoked Standing Orders 103—106 to suspend the members for twenty-eight (28) sitting days. The suspension was limited to those who had disrupted House proceedings. It was not connected in any way to the leadership wrangles or purported motions for her removal.

Directions

8. The two consolidated Petitions herein came up for directions and the Preliminary Objection under determination dated 16/06/2025 filed by the 1st Respondent was directed to be heard first. Parties were then directed to file and exchange their respective submissions on the Preliminary Objection. Both parties complied by filing their submissions.

1st Respondent's Case

9. The 1st Respondent, Hon. Anne Kiusya, Speaker of the County Assembly of Machakos has cited the decision in the famous case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 on the locus classicus of what merits as a preliminary objection, where the court observed 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.”



10. The 1st Respondent submits that, that point of law, is what she has raised as the locus standi of the Petitioners herein, and subsequently, which birthed the contention as to the jurisdiction of this Honourable Court to hear and determine the matter before it.
11. The 1st Respondent, based her Preliminary Objection on the Petitioners' inability to exhaust legal mechanism available to them under the standing Order number 106A of the Machakos County Assembly, in seeking redress over the claims set out in their Petition and application herein.
12. The 1st Respondent contends that failing to do so, the Petitioners lack locus standi to prosecute their petition and application herein before this court, and their petition, its rosiness notwithstanding, should suffer the singular fate of being completely dismissed and costs awarded the 1st Respondent herein.
13. The 1st Respondent has placed reliance on the Supreme Court decision in Hassan Ali Joho & another v Suleiman Said Shabal & 2 Others SCK Petition No 10 of 2013 [2014] eKLR where it was held that: -

“...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.”
14. The 1st Respondent submits that the locus standi, is the purest point of law that can be, as coupled up with Jurisdiction, and without either, the court ought to immediately down its tools and make not a further step, as was held in the celebrated case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (Civil Appeal 50 of 1989) [1989] KECA 48 (KLR) (17 November 1989) (Judgment). Where the locus standi of a party is contested for want of exhaustion of local remedies available in seeking redress, as provided for by Standing Order 106A of the Machakos County Assembly Standing orders, the same is and should be taunted as being repugnant to the progressiveness of Article 159 of the Constitution of Kenya, and subsequently struck out. That is the fate fit fir the Petitioners' Petition and application dated the 12th of June 2025.
15. The 1st Respondent submits that the Petitions and applications by the Petitioners herein are bad in law and should subsequently be dismissed and costs awarded to the 1st Respondent

2nd Respondent's Case

16. The 2nd Respondent being the Clerk of the County Assembly of Machakos and Administrative head of Assembly operations, fully associates himself with and supports the Preliminary Objection and adopts the grounds set out therein. The 2nd Respondent further relies on the Replying Affidavit sworn by the 1st Respondent, Hon. Anne Kiusya, Speaker of the Assembly, which outlines the factual basis justifying the disciplinary measures taken on 10th June 2025.
17. According to the 2nd Respondent, the Petitioners have improperly invoked this Court's jurisdiction without exhausting internal dispute resolution processes. Their approach undermines the autonomy of the County Assembly and amounts to forum shopping in the face of clear institutional remedies.
18. The 2nd Respondent submits that by failing to invoke and exhaust the internal statutory remedies, the Petitioners have rendered their Petition premature and incompetent. This court, in the absence of exhaustion and in the face of no exceptional grounds, lacks jurisdiction to entertain the matter.



19. The 2nd Respondent further submits that the Petitioners' failure to disclose their own misconduct and the fact that internal remedies existed constitutes material non-disclosure. They did not place before the court the Hansard or security reports that captured the chaotic events of 10th June 2025, nor did they disclose that the Senate endorsed the 1st Respondent's actions. This misrepresentation justifies striking out the Petitions and applications herein with costs.
20. On the other hand, the Petitioners in both Petitions have opposed the preliminary objection.

The case of the Petitioners in Petition E018 of 2025

21. These Petitioners submit that the Preliminary Objection is both legally and factually misconceived. It fails to meet the legal threshold of a valid Preliminary Objection and seeks to defeat a Petition that raises serious and justiciable constitutional questions concerning the arbitrary exclusion of elected representatives from the County Assembly without notice, hearing, or lawful process.
22. That the Petition raises substantial questions of law that directly implicate Constitutional provisions, including Articles 10, 27, 28, 38, 47, 50, 73, and 196, which safeguard political rights, human dignity, fair administrative action, due process, and accountability in governance.
23. That the Petitioners' exclusion from the Assembly chambers was not the result of lawful disciplinary proceedings under the Standing Orders but was rather executed unilaterally by the Speaker, without motion, vote, complaint, or referral to the relevant committee.
24. These Petitioners claim that the actions amount to a constructive expulsion that disenfranchised the Petitioners' constituents and undermined representative democracy. They therefore call upon this Court to protect constitutional values and to assert its supervisory jurisdiction under Articles 23, and 165 of the Constitution. The Petitioners placed reliance on the Mukisa Biscuit Case (Supra).
25. Guided by the Mukisa Biscuit case, these Petitioners submitted that the Preliminary Objection raised by the 1st Respondent is entangled with contested and disputed matters of fact, including whether the internal disciplinary mechanism under Standing Order 106A was applicable, whether it was triggered, whether the Petitioners had access to it, and whether it provided an adequate and effective remedy. Each of these questions requires an examination of the Speaker's conduct, the nature of communication to the Petitioners, the procedural steps taken or omitted, and the actual content of the Standing Orders in light of the Constitution. These are not issues that can be resolved as pure points of law without delving into evidence.
26. Moreover, it was submitted that the Court would be required to interpret whether a violation of Standing Orders occurred and whether the Petitioners' constitutional rights were violated. These are not matters that can be resolved at a preliminary stage without a full hearing.
27. That the validity of the objection therefore depends on factual inquiry and legal interpretation. It does not raise a pure point of law as defined in Mukisa Biscuit and fails the test for a properly constituted preliminary objection.
28. This Court was thus asked to decline the invitation to determine substantive constitutional and evidentiary issues through a procedure intended only for clear-cut legal objections.
29. On the doctrine of exhaustion of remedies, it was submitted that the doctrine of exhaustion is a judicial principle that encourages litigants to utilize all available statutory and administrative remedies before seeking recourse to the courts. However, this doctrine is not absolute and is subject to well-recognized exceptions. Reliance was placed on the Court of Appeal in Geoffrey Muthinja Kabiru & 2 Others v



Samuel Munga Henry & 1756 Others [2015] eKLR which held that while the exhaustion principle is sound, it is not cast in stone. Where a remedy is unavailable, inadequate, or illusory, or where a public body has acted ultra vires, courts have a duty to intervene. The actions of the 1st Respondent in this matter were clearly ultra vires and therefore this court is properly seized of the matter.

30. It was asserted that in the present case, the 1st Respondent alleges that the Petitioners should have invoked Standing Order 106A, which purportedly provides an internal remedy. It is important to note that the first and second Petitioners are members of the powers and privileges committee and could not therefore adjudicate in their own case or in a matter in which they are an interested party.
31. Furthermore, with the suspension of the 1st and 2nd Petitioners, the powers and privileges committee would not have been properly constituted to consider any appeals.
32. There was no complaint tabled, no motion moved, no vote taken, and no referral made to the Committee on Powers and Privileges. The Speaker acted unilaterally and without due process. There was therefore no procedure in place capable of being exhausted.
33. Moreover, the Petitioners were summarily barred from accessing the Assembly premises without being heard, without written reasons, and without any procedural safeguards under the Standing Orders. This amounts to a procedural ambush, not a disciplinary process.
34. That even if Standing Order 106A were theoretically applicable, it does not offer an adequate or effective remedy in a case such as this, where serious violation of constitutional rights and duties are alleged. Exhaustion does not apply where the underlying conduct is blatantly unlawful or where the forum lacks authority to address constitutional violations.
35. These Petitioners submitted that the High Court has consistently held that its jurisdiction under Article 165 of the Constitution cannot be ousted by reference to subordinate legislative procedures such as Standing Orders.
36. That Article 159(2)(d) of the Constitution enjoins courts to do justice without undue regard to procedural technicalities. Where elected officials are barred from office in violation of the Constitution and Standing Orders, this Court must intervene substantively to safeguard public interest and constitutional integrity.
37. The Petitioners allege that they were not given an opportunity to trigger or exhaust any remedy. No such remedy was ever placed before them. They were locked out of the Assembly without lawful cause. To now claim that they should have exhausted a non-existent or inaccessible procedure is legally untenable and fundamentally unjust.
38. It is argued that the Petition raises substantial constitutional questions that fall squarely within the jurisdiction of the High Court as set out under Article 165(3)(b) and (d) of the Constitution of Kenya. These provisions empower this Court to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened, and to hear and determine questions involving the interpretation of the Constitution.
39. The Petitioners assert that the actions of the 1st Respondent, in arbitrarily barring them from the Assembly, violated their rights under Articles 10 (national values and principles), 27 (equality and non-discrimination), 28 (dignity), 38 (political rights), 47 (fair administrative action), 50 (fair hearing), 73 (leadership and integrity), and 196 (Public participation and county assembly powers, privileges and immunities).
40. It is contended that these are matters that cannot be addressed by reference to Standing Orders alone, or by internal mechanisms that lack constitutional authority to adjudicate on fundamental rights.



The question before this Court is not merely whether a Standing Order was followed or violated—it is whether elected public officials were excluded from performing their constitutional mandate in a manner that undermines the democratic fabric of the Constitution.

41. That Standing Orders of a County Assembly, while useful for regulating internal procedure, are subordinate instruments. They cannot be interpreted in a manner that limits or excludes constitutional rights, nor can they oust the jurisdiction of the High Court to address violations thereof. Article 2(1) of the Constitution declares the Constitution as the supreme law of the land, and Article 2(4) nullifies any law, including customary or procedural rules, that is inconsistent with the Constitution.
42. It is submitted that it would therefore be contrary to the letter and spirit of the Constitution to allow internal Assembly procedures to shield acts that are alleged to be unconstitutional. It is the Court's role to serve as the guardian of the Constitution and to provide a remedy whenever public power is exercised in a manner that violates constitutional rights or principles.
43. That the Preliminary Objection also fails to consider the practical implications and the balance of convenience, both of which favour a full hearing of the Petition on its merits. The Petitioners submit that they are elected representatives of the people of Machakos County, and their continued exclusion from the Assembly directly affects the representation of their constituents and undermines the principle of devolution and participatory governance under Article 174.
44. The Petitioners submit that if the actions of the Respondents, if left unexamined by the Court, would create a dangerous precedent where Speakers or other administrative officers of legislative bodies could, through arbitrary fiat, lock out elected members without recourse, accountability, or justification. Such conduct, left unchecked, would erode public trust in the rule of law in the governance of public institutions.
45. That the overriding objective of the Constitution, as articulated in Articles 159, 10, and 259, is to foster a governance system that is transparent, accountable, just, and participatory. It would be a perversion of justice for this Court to decline jurisdiction merely on the basis of a technical objection that lacks factual support and seeks to shield alleged abuse of office.
46. The interests of justice therefore require that the Preliminary Objection be dismissed and that the substantive Petition proceed to hearing so that the serious constitutional issues raised may be fully ventilated and adjudicated on their merits.

The case of the Petitioners in Petition E024 of 2025

47. These petitioners submit that Jurisdiction is defined in Halsbury's Laws of England (4th Ed.) Vol. 9 at page 350 as;

“...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.”

48. Further, and as aptly enumerated in the infamous case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (1989) KLR 1”, Nyarangi J. held that: -

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”



49. It is argued that whereas the Respondents content that this court has no jurisdiction, it is these Petitioners' submission that this Court has the requisite jurisdiction, moved as a Constitutional Court to answer and give remedies for constitutional questions where there is clear breach and violation of the Petitioners Constitutional rights as enumerated in the pleadings filed.
50. The Petitioners submit that this court has jurisdiction to entertain the Petitions because their constitutional rights have been infringed upon and continue to be infringed by the Respondents. They refer to Article 22 of the Constitution provides for the enforcement of bill of Rights where individuals acting in the interest of a group or class of persons have the right to institute court proceedings for a claim that their right or fundamental freedom in the Bill of Rights has been violated or are under threat. In upholding and enforcing the Bill of Rights, Article 23 grants this court the unfettered jurisdiction to hear and determine applications/suits seeking for redress of violation or threats to rights or fundamental freedoms enshrined in the Bill of Rights.
51. On first exhausting the procedure under Standing Order 106A of the County Assembly Standing Orders, these Petitioners submit that the Petition relates to the infringement of Articles 10, 27, 28, 38, 47, 50, 73, 174, 175, 185 and 196 of the Constitution. The orders sought are orders that only the court with jurisdiction under Article 23 of the Constitution can issue. The only avenue for redress of such infringement is the mandated court under the Constitution and not the Committee as urged by the Respondents. Jurisdiction stems from the law. The law does not confer the Committee the jurisdiction to hear and determine matters relating to violation of the Constitution.
52. Reliance is placed on West Kenya Sugar Co. Limited v Busia Sugar Industries Limited & 2 others [2017] eKLR, where Mukunya J, while addressing a similar objection that challenged the ELC Jurisdiction vis a vis the NEMA Tribunal vide a constitutional petition where the Petitioner had alleged violations of his rights under the Constitution, it was held that the mandate given to the NET under Section 129 of EMCA is limited in the scope of matters it can handle on appeal, and rendered itself thus:
- “This argument that the court has no jurisdiction is based on a misunderstanding of the matter before this court. What is before the court is a constitutional petition in which the petitioner has alleged several violations of his rights enshrined in the Constitution. The National Environment Tribunal does not have mandate to deal with constitutional violations relating to the environment. That is the preserve of this Court. A look at the mandate given to the National Environment Tribunal under 5 section 129 of EMCA aforesaid shows a limited scope of the matters it can handle on appeal. They particularly deal with license and licensing...This court was established by Article 162(2)(b) of the Constitution of Kenya 2010. One of its mandates therein is to determine the environment and the use and occupation of and title to land. The issues herein deal with the environment use and occupation of land...”
53. Further reliance was placed on the holding in the Supreme Court of Kenya Petition E007 of 2023 Nicholus Abidha v Attorney General & 7 Others; National Environmental Complaints Committee & 5 Others (Interested Parties) (Petition E007 of 2023) [2023] KESC 113 (KLR), where the court was clear on the jurisdiction to entertain and determine a multifaceted petition of the nature and form of the current petitions filed before this honorable court when it held as follows;
- “ [100] In addressing the conundrum placed before us, we must remind ourselves that, what is in dispute before this Court is the applicability of these provisions to the appellant's claim and not the true meaning of the provisions of either EMCA or the Energy Act. This is because the provisions of EMCA or the



Energy Act do not expressly oust the jurisdiction of the ELC in respect of the procedure for the determination of disputes that involve the management of the environment or issues of petroleum and energy. In the ordinary course of events, the ELC still has original jurisdiction over the matters that are handled by NEMA, unless such jurisdiction is specifically and expressly ousted in a constitutionally compliant manner. The same holds true for proceedings under the Energy Act.

[105] We agree with the above reasoning and find that the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief.

[107] Flowing from the above findings and in that context, it is our view that, where the reliefs under the alternative mechanism are not adequate or effective, then there is nothing that precludes the adoption of a nuanced approach, as we have stated. What must matter at the end is that a path is chosen that safeguards a litigant's right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. This is because, to achieve a harmonious and effective legal framework, it is imperative to strike a judicious balance between the emphasis on providing the initial opportunity for resolution to entities established by law and the assertion of a litigant's right to access the court. However, such convergence requires a case-by-case assessment by considering issues such as the nature of the dispute and the adequacy of the alternative dispute mechanism."

54. That this decision of the supreme court has been relied on severally by this Court as it did in *Nzomo (Suing on his own behalf and on behalf of Kunde Road Residents Welfare Association) v Ontime Real Estate Ltd & 2 others (Environment & Land Petition E004 of 2023) [2024] KEELC 1572 (KLR) (14 March 2024) (Ruling)* where Justice Omollo in dismissing a similar preliminary objection as the one currently before this court held as follows:

“25. In light of the foregoing finding in the case of *Abidha Nicholas supra* on jurisdiction, the question then is whether this petition raises any constitutional issues. The Respondents submitted that paragraphs 44 – 56 of the petition which raises administrative issues which have nothing to do with breach of constitutional rights. I have perused the petition and note for instance that paragraphs 55, 56 and 58 raises the issue of destruction of indigenous trees (harm to the environment). Paragraph 61 pleads breach of rights under article 184 of the Constitution and a breach of the right to public participation under article 10. Whether or not there is merit in the alleged breaches can only be determined during the hearing of the petition.

26. Consequently, I draw the conclusion that both the application and the two sets of the Preliminary Objection are not merited as the two applicable statutes (EMCA No. 3 of 1999 and PLUPA No. 13 of 2019) do not oust the jurisdiction of the court where the claim based on alleged breaches of constitutional rights. Secondly, the Petition is not *res judicata* as there is no merit decision in place. They are all dismissed with costs.



55. It is submitted that in a similar instance, a 3-judge bench in *East Africa Wildlife Society & 3 others v Kenya National Highways Authority & 3 others; Law Society of Kenya & 5 Others (Interested Parties) (Environment and Planning Petition E001 of 2024)* which relied on the mentioned Supreme Court decision in the case of *Nicholas Abidha* held as follows:

“Flowing from the exposition of the Supreme Court in the *Nicholus* case (supra), the following can safely be said to be the prevailing general law on the jurisdiction of the ELC in the context of the issue before us:

- a. Section 129 and 130 of the EMCA does not vest in the NET jurisdiction to entertain claims relating to violation or threatened violation of the *Constitution*.
- b. The 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.
- c. The mandate and jurisdiction to determine questions relating to violation of the *Constitution* in the context of the environment and use, occupation and title to land vests in the ELC.
- d. Establishment or alternative remedies of dispute resolution mechanisms by Parliament does not divest the court of the original jurisdiction donated to them by the *Constitution* and;
- e. Where Parliament has, through statute, established alternative remedies or alternative dispute resolution mechanisms, a party inviting a superior court to exercise original jurisdiction is obligated to satisfy the criteria set by the law.”

56. Further, in *Millennium Gardens Management Limited v Metricon Home Nairobi Company Limited; Nairobi City County Government & 2 others (Interested Parties) (Environment & Land Petition E121 of 2023) [2024] KEELC 4016 (KLR) (2 May 2024) (Ruling)*, Justice Angote placing reliance on the supreme court decision of *Nicholas Abidha* held as follows;

“60. In light of the foregoing determination, the question of whether the alternate avenues proposed by the Respondent and the Interested Parties are sufficient must be answered in the negative. The Court calls to its aid the following exposition by the Supreme Court in *Nicholas Abidha* (supra):

.....
.....

61. By dint of the same binding reasoning of the Supreme Court, as the claim herein is multifaceted, it would be impractical to require the Petitioner to lodge several appeals when this court can address all, especially where an alleged breach of the *Constitution* and violation of human rights has been raised.
62. The submission by the 2nd Interested Party that the Petitioner moved this Court before they could act on the Respondent’s failure to comply with the enforcement notice is a question of fact which the Court cannot determine at this moment.



63. In conclusion, the Court finds the Preliminary Objection dated 31st October, 2023 to be unmerited and proceeds to dismiss the same. Costs shall abide the outcome of the Petition.
57. The Petitioners submit that from the above-mentioned cases, it is clear that regardless of the existence of Tribunal, or Committees or other forums, where issues of violations of Constitutional Rights have been alleged, then the appropriate division of the High Court has original jurisdiction to hear and grant remedies. This is especially true since the Tribunal and Committees have no mandate in law to issue constitutional reliefs/remedies as per the provisions of Article 23 of the Constitution. These remedies are only available in the High Court and thus, when the court is confronted with the issue of violations of the Constitution, then it has the requisite jurisdiction not only to entertain the same, but to also hear and grant remedies as sought so as to stop further breach and violation of the Constitution.
58. It is further submitted that whereas the 1st Respondent now wants the Petitioners to comply with the provisions of the Standing Orders No. 106A, they are in clear breach and blatant violation of the same standing orders having suspended the Petitioners from both the Assembly and the Committees without following the procedure provided for under the Standing Orders that they now wish to rely on. Furthermore, the period of suspension is also in clear contravention of the period provided for in the Standing Orders and as such, the Respondents cannot violate the procedures in the Standing Orders, violate the Petitioners Constitutional rights and then seek to have the same applied when they are called to answer for their breaches. The Court ought to frown on the selective insistence on application of Standing Orders that is being perpetuated by the Respondents.
59. This court is invited to note the fact that the perpetrator of the breaches of the Constitution that has led to the filing of the current petition, is the Speaker of the County Assembly of Machakos, the 1st Respondent herein. The 1st Respondent is also the Chair of the Powers and Privileges Committee, which she now insists the Petitioners go to for an alleged appeal. The 1st Respondent wants to be the instigator, the prosecutor and the judge in her own case. This is not tenable. Her breaches of the Standing Orders, the law and the Constitution cannot be heard by herself.
60. In addition, the Respondents having raised the question of Jurisdiction by way of a Preliminary Objection, it is imperative for this court to make a finding on whether the objection before court is indeed a Preliminary Objection, that is, a pure point of law and one where facts are not contested.
61. Reference is made to the Black Law Dictionary, 11th Edition, defines a Preliminary Objection as being:
“In a case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”
62. Further, in the now famous case of “Mukisa Biscuits – Versus - Westend Distributor Ltd [1969] EA 696”, the Court of Appeal observed that: -
“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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue.”
63. It is argued that the facts pleaded by the Petitioners in this case have been vehemently denied by the Respondents who have in fact filed affidavits giving their alternative set of facts. There is no agreement between the parties on what the true facts of this matter are and this can only be determined upon a



full hearing being conducted in the matter. A Preliminary Objection as categorically provided by the Court of Appeal can only sail where there is an agreement that the facts pleaded are correct. Where facts are disputed, a Preliminary Objection cannot be allowed by the Court.

64. That this position has been upheld severally by the Court where it has dismissed Preliminary Objections on account of facts being contested as is in the current case.
65. Reliance was also placed on the case of *Oraro v Mbaja* [2005] KEHC 3182 (KLR) where the court stated as follows;

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. I am in agreement with learned counsel, Mr. Ougo, that “where a Court needs to investigate facts, a matter cannot be raised as a preliminary point.” This legal principle is beyond dispute, as there are divers weighty authorities carrying the message. In addition to the ones I have cited, Mr. Ougo drew my attention to yet others. In *El-Busaidy v. Commissioner of Lands & 2 Others* [2002] 1KLR 508 Mr. Justice Onyancha in this Court remarked as follows (pp. 515 – 516):

“I have considered the arguments and the legal authorities quoted from both sides. It is my prima facie finding of the Defendant’s application basing it on affidavit that the origin of the title known as Mombasa/Block IX/102, needs to be investigated to establish whether or not the title was an absolute title under the Registration of Titles Act. It should be established in evidence whether or not the conversion of the said title to operate under [the] Government Lands Act, Cap. 280 by [the] first Defendant was proper and lawful and therefore effective and not null and void. It is my further finding that until that is done, all the relevant facts thereto are in dispute. Under those circumstances the law applicable in relation to the issue of a preliminary point of objection is that laid in the case of *Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd.* [1969] E.A. 696 at page 700...”

The learned Judge went on to say (p.516):

“The preliminary objection herein was raised by the Defendants. Can it be said that they do accept the facts as pleaded by the Plaintiff to be true; in which case they could then apply the provisions of section 136(1) to it to make the Plaintiff’s pleadings a non-starter? But the Defendants defend this suit because they do not accept the Plaintiff’s facts as pleaded. Clearly therefore, the Defendant’s preliminary point is not based on a commonly accepted set of facts and the set of facts herein would not therefore be the basis of a preliminary point of objection and a point of law as understood and accepted in our jurisdiction.”

66. These Petitioners submit that they agree with the above position that where facts are in dispute, then a Preliminary Objection cannot succeed. That also as can be noted from the submission filed by the Respondents, especially the 2nd Respondent, the same refer to the Affidavits of the 1st Respondent as



a basis for the said Preliminary objection and also as a way to buttress the said preliminary objection. The fact that the Respondents have to refer to the facts and arguments set out in the affidavits filed in opposition to the case as a foundation for their Preliminary Objection, clearly confirms that the objection is not a pure point of law and as such, cannot be accepted by this Court. The same should be dismissed on this point alone.

67. These Petitioners invite this court to find and hold that the Preliminary Objection filed by the 1st Respondent is without merit and to proceed and dismiss the same with costs to the Petitioners so as to pave way for the determination of the serious constitutional issues and violations that have been pleaded by the Petitioners on merit.

Analysis and determination

68. I have carefully considered the notice of Preliminary Objection dated 16/06/2025 raised by the 1st Respondent, the responses thereto, the parties' rival submissions and the relevant provisions of Standing Order number 106A of the County Assembly of Machakos upon which the preliminary objection is premised and the other cited laws. The only issue for my determination is whether the Preliminary Objection herein is merited.

69. A Preliminary Objection is defined in the *Mukisa Biscuit Manufacturing Co. Ltd vs Westend Distributors Ltd* [1969] E.A. 696 where the court observed that:

“...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.”

Sir Charles Newbold P. added as follows at page 701:

“ 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.”

70. I am duly guided by the foregoing and I do not see any reason to depart from the same. It follows therefore, that I shall base my findings on pure questions of law as regards jurisdiction of this Court as raised in the Preliminary Objection.

71. The gravamen of the 1st Respondents' Preliminary Objection is that the Petitioners have not exhausted the Internal Dispute Resolution Mechanisms as per the County Assembly of Machakos Standing Order 106A, and as such, they have not properly invoked the jurisdiction of this court.

72. The current wording of County Assembly of Machakos Standing Order 106A is as follows:

106A. Appeal against suspension

1. Except as provided in this Standing Order, the suspension of a Member or the application of this Standing Order shall not be subject to debate.
2. A Member suspended from the House under this Part may appeal in writing to the Powers and Privileges Committee within three days of the suspension.



3. Despite paragraph (2), the Committee may, with leave of the House, admit an appeal received after three days.
 4. Upon receipt of the Member's appeal, the Committee shall within seven days-
 - (a) notify the Member, in writing, of the day appointed for the hearing of the appeal;
 - (b) notify the Speaker, who shall thereafter admit the Member to the precincts of the Assembly on the day(s) appointed for the hearing of the appeal; and
 - (c) consider the appeal and after according the Member the right to be heard, submit a report to the House either –
 - (i) upholding the suspension; or
 - (ii) reducing the period of suspension; or 95
 - (iii) readmitting the Member to the House.
 - (5) The decision of the Committee regarding the suspension shall be final.
 - (6) The Member who presided in the House or Committee of the whole House during suspension of an appealing Member shall not participate in the proceedings of the Committee during the appeal, except to give evidence when so required.
 - (7) A Member designated by the Committee shall inform the House of the decision of the Committee regarding the suspension and the Speaker shall thereupon effect the decision.
 - (8) The House may, in exceptional circumstances permitted by the Speaker, debate the report of the Committee without amendment or resolution.
73. I rely on the decision in *Speaker of the National Assembly vs Karume* [2008]1 KLR where the court held that where a statute has established a dispute resolution mechanism, it ought to be followed. I also rely on *Samson Chembe Vuko vs Nelson Kilumo & 2 Others* [2016] eKLR where the Court citing inter alia the above decision upheld a similar objection as in this case.
74. Further, in *Mutanga Tea & Coffee Company Ltd vs Shikara Limited & Another* {2015} eKLR, the Court of Appeal re-stated the same position.
75. The question therefore that begs for an answer is whether the dispute resolution mechanism established under the Machakos County Assembly Standing Order is competent to resolve the issues raised in the applications and petitions herein consolidated. Except the submission that the invocation of Standing Order 106A is irrelevant in the circumstances, as the Petitioners were not subjected to any internal process capable of exhaustion and that the doctrine of exhaustion does not apply where there is no identifiable, effective, or available alternative remedy, no argument was presented before me that the mechanism is not competent to resolve the dispute.
76. Our jurisprudential policy is to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute. See *The Speaker of National Assembly vs James Njenga Karume* {1992} KLR. It is also settled that the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]; a remedy is considered available only if the applicant can make use of it in the circumstances of his case. See *Dawda K. Jawara vs*



Gambia, ACmHPR 147/95-149/96- A decision of the African Commission of Human and Peoples' Rights.

77. Having fully considered the dispute disclosed in Petitioners' consolidated applications herein and the County Assembly of Machakos Standing Order 106A, I am clear in my mind that the mechanism established under the said Standing Order can afford the Petitioners an effective remedy. In any event, the Petitioners have not demonstrated that they cannot get an effective remedy under the dispute resolution mechanism established under the said Standing Order. A remedy will be effective if it is objectively implemented, taking into account the relevant principles and values of administrative justice present in the Constitution and our law. The "deepest norms" of the Constitution should determine whether the dispute involves explicit constitutional adjudication, or whether it could safely be left to the statutory provisions. In this regard, I am persuaded beyond doubt that the adjudication of the issues complained herein can safely be left to the statutory provisions.
78. As regards whether or not the powers and privileges committee would have been properly constituted to consider any appeals on the suspension of the 1st and 2nd Petitioners is an issue that would be dealt with at the appeal.
79. In view of my analysis herein above, it is my conclusion that the Petitioners ought to have exhausted the available mechanism under Standing Order 106A of the County Assembly of Machakos before approaching this court.
80. On this ground alone, I find that the consolidated applications and petitions offend the doctrine of exhaustion. The upshot is that the Preliminary Objection succeeds.
81. Having upheld the Preliminary Objection as herein explained, I find no reason to address the issue whether or not the applications satisfy the test for granting the orders sought. It also appears that a substantial part of the applications herein has been overtaken by the lapse of the twenty-eight (28) days period that the Petitioners were on suspension.
82. Consequently, the exparte orders issued herein on 12th June 2025 and any subsequent orders issued thereafter are hereby set aside. The applications and the Petitions filed by the Petitioners in the consolidated matters herein are hereby dismissed with no orders as to costs.
83. The suspension period of twenty-eight days having lapsed, I order that the Petitioners herein be forthwith allowed to attend and participate in the official sittings of the County Assembly of Machakos unless they are otherwise lawful barred and while so attending they are expected to maintain law and order.
84. Orders accordingly.

RULING WRITTEN, SIGNED & DATED AT MACHAKOS THIS 18TH SEPTEMBER 2025

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 18TH SEPTEMBER 2025

In the presence of :

Mr. Mutua for Petitioners in Petition E024/2025

Mr. Kalla for Petitioners in Petition E018/2025

Mr. Kioko for 1st Respondent



Mr. Kiamba h/b for Mr. Mbalu Mutua for 2nd Respondent

Millygrace- Court Assistant

