



**Kenya Power & Lighting Co. PLC v County Government of Nairobi City & another
(Environment and Planning Petition E009 of 2025 & Environment and Land Petition
E013 of 2025 (Consolidated)) [2025] KEELC 4390 (KLR) (12 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4390 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND PLANNING PETITION E009 OF 2025 &
ENVIRONMENT AND LAND PETITION E013 OF 2025 (CONSOLIDATED)**

AA OMOLLO, J

JUNE 12, 2025

BETWEEN

KENYA POWER & LIGHTING CO. PLC APPLICANT

AND

COUNTY GOVERNMENT OF NAIROBI CITY 1ST RESPONDENT

NAIROBI CITY WATER & SEWERAGE CO. LTD 2ND RESPONDENT

RULING

1. The 1st and 2nd Respondents filed Notice of Preliminary Objections dated 25.2.25 and 26.2.25 respectively on the grounds;
 - i. that this Court is bereft of Jurisdiction to hear and determine this case, the same being outside the ambit of Section 13 of the *Environment and Land Court Act* 2011.
 - ii. That the Court lacks jurisdiction to hear and determine this matter in the first instant by dint of provisions of article 189 of the *Constitution* of Kenya as read together with sec 3, 5 and 30 of the *Intergovernmental Relations Act* cap 265, sec 41 (1) (b) of the *National Rating Act*. and sec. 121 (2) of the *Water Act*.
 - iii. That the instant Petition raises no Constitutional issues ripe for determination by a Constitutional Court and is an affront to the Doctrine of Constitutional Avoidance.
2. In support of the preliminary objection, the Respondents each filed submissions both dated 14th March 2025 while in opposition the Petitioners filed submissions dated 15th April 2025. The 1st Respondent stated that on February 24, 2025, the Petitioner filed an urgent application before the court seeking various interim orders, including the reconnection of water supply and unblocking of the sewer system



- to its premises, an injunction against further disconnections or dumping of waste, cleanup of already dumped garbage, and the release of impounded emergency service vehicles.
3. That the Petitioner claimed these retaliatory actions by the 1st and 2nd Respondents were triggered by its disconnection of electricity to their offices due to outstanding electricity bills exceeding KES 1.68 billion. The 1st Respondent argues that the key issues before the court are whether the matter is ripe for determination and whether the court has jurisdiction.
 4. It submits that this dispute, arising from actions taken by both the Petitioner (a national government agency) and the Respondent (a county government entity) over unpaid electricity bills and wayleave fees is fundamentally an intergovernmental dispute. Citing Article 189 of the Constitution and Sections 3(f), 31, 33,34 and 35 of the Intergovernmental Relations Act 2012, the 1st Respondent contends that such disputes must first undergo alternative dispute resolution (ADR) mechanisms, including negotiation, mediation, and arbitration, before resorting to judicial intervention.
 5. They invoked the doctrine of exhaustion, emphasizing that all non-judicial remedies must be pursued before seeking court redress, and refer to the cases; Mombasa High Court; Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 William Odiambo Ramogi & 3 Others v Attorney General and 4 Others; and Muslim for Human Rights & 2 Others (Interested Parties) (2020) eKLR, Court of Appeal in Geoffrey Muthiga Kabiru and 2 Others v Samuel Munga Henry and 1756 others [2015] eKLR which all affirm that courts should only be approached as a last resort.
 6. Further, the 1st Respondent invokes the principle of constitutional avoidance, arguing that the Petitioner's application does not raise any legitimate constitutional issues and should not have been brought before a constitutional court. In support of this argument, they cited the Supreme Court Petition No. 14 (as consolidated with petition No. 14A, 14B and 14C) of 2014; Communications Commission of Kenya and 5 Others v Royal Media Services Limited and 5 Others [2014] eKLR, Benard Murage v Fineserve Africa Limited and 3 Others [2015] and Mwita J in Petition 45 of 2017- Maya Duty Free Limited v Hon. Attorney General and 3 others where courts ruled against parties who bypassed statutory or administrative remedies, reiterating that jurisdiction is a foundational matter that cannot be assumed.
 7. The 1st Respondent stated further that the Environment and Land Court's jurisdiction has been improperly invoked, as the matter involves intergovernmental financial obligations, not land or environmental disputes. It is their assertion that until the proper dispute resolution procedures under existing legislation are exhausted, this Court should not entertain the petition, and consequently, the proceedings should be dismissed for want of jurisdiction.
 8. The 2nd Respondent also argued that this Court lacks jurisdiction to hear the Petition due to the Petitioner's failure to exhaust statutory dispute resolution mechanisms under the Water Act, 2016 Section 121(2) and the National Rating Act, 2024 Section 41(1)(b). It relied on the decision in Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1, to emphasize that jurisdiction is foundational, without it, a court must immediately "down its tools."
 9. It's their submission that Section 13 of the Environment and Land Court Act, which defines the scope of this Court's jurisdiction does not encompass commercial or contractual disputes like the one at hand. In addition, that the matter falls under administrative and regulatory frameworks provided in the Water and Rating statutes and in support cited the case of Stella Nyawira Njugi & another v Nyeri Water & Sanitation Compant Ltd (NYEWASCO) [20211 KEHC 6936 (KLR) where courts held similar disputes must first go through the specialized water dispute channels.



10. For supporting the doctrine of exhaustion, the 2nd Defendant relied on the case of *William Odhiambo Ramogi & 3 others supra* and *Speaker of the National Assembly v Njenga Karume* [1992] KLR 425 to support the principle that courts must not entertain matters where statutory mechanisms exist and stressed that courts should avoid constitutional interpretation when disputes can be resolved on statutory grounds.
11. In opposing, the Petitioner submitted that the Preliminary Objections (POs) filed by the Respondents are irregular and fail to meet the established legal threshold. That drawing from *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 and *Nyagudi v Agricultural Finance Corporation & 2 others* [2023] KEHC 1322 (KLR), the Petitioner argues that a proper PO must raise a pure point of law based on uncontested facts and must be supported by pleadings.
12. However, the Respondents have not filed any substantive responses to the Petition and the objections raised concern contested facts such as the nature of the dispute and alleged breaches, making them inappropriate for determination as preliminary points. The Petitioner asserts that the Environment and Land Court (ELC) has jurisdiction pursuant to Article 162(2)(b) of the *Constitution* and Section 13 of the *Environment and Land Court Act*, 2011.
13. It submits that the Petition raises significant constitutional claims, including violations of the right to a clean and healthy environment under Article 42 and other rights under Articles 28 and 47, stemming from acts such as illegal waste dumping and water disconnection. Citing *East Africa Wildlife Society & 3 others v Kenya National Highways Authority & 3 others* [2025] KEELC 1259 (KLR), the Petitioner affirms that the ELC retains jurisdiction even when public law issues are intertwined.
14. That arguments based on the *Intergovernmental Relations Act*, *National Rating Act*, and *Water Act* are misplaced, as these statutes either do not apply to the Petitioner or the relevant tribunals are non-functional and in particular, the Water Tribunal's current lack of quorum, evidenced by public domain sources such as the Judicial Service Commission website and the Judiciary Job Portal.
15. The Petitioner argues that doctrines such as constitutional avoidance and exhaustion do not apply where statutory remedies are ineffective or unavailable, particularly where fundamental rights are at stake. They also cited the case of *Communications Commission of Kenya v Royal Media Services Ltd* [2014] eKLR and *R v IEBC ex parte NASA* where courts have held that they must not shy away from adjudicating constitutional matters.
16. Further, the petitioner stated that the authorities cited by the Respondents are factually and legally distinguishable as they largely involve private law disputes or procedural issues, unlike the multifaceted, public interest nature of the present Petition. That none of the cited cases directly address environmental or constitutional rights as alleged in the present case.
17. The Petitioner to pursue claims across multiple forums contradicts Article 159 of the *Constitution*, risks conflicting decisions, and frustrates access to justice thus urge the Court to dismiss the Preliminary Objections and affirm its jurisdiction.

Analysis and Determination:

18. Article 189 (3) & (4) of the *Constitution* provides thus:

“3. In any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation.



4. National legislation shall provide procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration”

19. The 1st Respondent argues that article 189 ousts the jurisdiction of this court to entertain this Petition. However, a plain reading of the article which discusses co-operation between County and National governments provides for settling disputes using national legislation. Under sub-paragraph (4) the procedures are to include alternative dispute resolution mechanisms. It does not limit the application of the national legislation to the mechanisms of negotiations, arbitration and mediation. Therefore, I find the limb of the objection premised on this article as lacking in merit.
20. The second limb of the objection is premised on breach of the principle of the doctrine of exhaustion. The principle of the doctrine is that where there exists an alternative dispute resolution mechanism, parties are encouraged to approach those bodies first instead of directly running to court (see the decision in the case of *William Odhiambo Ramogi & 3 others v Attorney General & 4 others supra*). In the same case of William Odhiambo, the five bench High Court judges held that where the alternative remedy is not adequate, the parties should find recourse in the court.
21. The question then is whether the bodies cited by the Respondents (the Water Tribunal and the *Rating Act*) were adequate to handle the dispute the subject of this Petition. The Petitioner stated that their petition concerns violations of article 42 (the right to clean and healthy environment) article 28 (the right to human dignity) and article 47 (the right to a fair administrative action). Thus, the Petition is challenging the actions of the Respondents which has violated their Constitutional rights and whether there is merit or otherwise in the petition cannot be determined by way of a P.O. Can the Water Tribunal *National Rating Act* grant such reliefs?
22. The said question is answered by referring to the holding of the Supreme Court in the case of *Abidha Nicholus v Attorney General* (2023) eKLR at paragraph 107 & 108 thus;

“ 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. See also our decision in *Bia Tosha Distributors Ltd v Kenya Breweries Ltd & 6 Others* (Pet.No.15 of 2020) [2023] KESC 14(KLR) (Const. and JR) (17 February 2023) (Judgment).

- 108 It was therefore sufficient that the appellant alleged that a right in the *Constitution* had been infringed or threatened with violation, making it clear that in light of the provisions of the *Constitution* and the ELC Act, the issues raised were within the original jurisdiction of the ELC. That is also why



Section 3 of *EMCA* provides that, one of the general principles under the Act is the entitlement to a clean and healthy environment.”

23. Thus, the existence of alternative dispute resolution mechanisms do not automatically oust the jurisdiction of this court by dint of article 162(2) of the Constitution to hear petitions alleging violations of the bill of rights. Parties must alleging want of jurisdiction must demonstrate the adequacy of the alternative mechanism and which in my view and I so hold a basis was not laid. Why do I say so? A preliminary objection does not allow this court to dig into facts to ascertain the basis of the of the objection so that the sufficiency for instance the Water Tribunal cannot be discerned.
24. This is because this court cannot tell why the 2nd Respondent disconnected the water and sewer line services to the Petition to invoke the jurisdiction of the Water Tribunal. The provisions of section 121 of the *Water Act* states that;
- (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.”
25. Thus, after my analysis of the grounds offered in support of and against the preliminary objection together with the relevant law referenced, I hold that it lacks merit and it is dismissed with costs in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JUNE, 2025

A. OMOLLO

JUDGE

