



**Enukan & 72 others v Tullow Kenya BV & 2 others; National Environment Management Authority & another (Interested Parties); Kenya Legal and Ethical Issues National Environment Tribunal Work on Hiv & Aids (kELIN) & another (Amicus Curiae) (Environment and Land Constitutional Petition E001 of 2024) [2025] KEELC 8329 (KLR) (26 November 2025) (Ruling)**

Neutral citation: [2025] KEELC 8329 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT LODWAR  
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E001 OF 2024**

**CK NZILI, J**

**NOVEMBER 26, 2025**

**IN THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS  
UNDER ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 40, 42, 43, 53, 56, 57,  
69, 70, 162(2)(B) AND 258 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTIONS OF ARTICLES 2(5) & (6), 3(1),  
10(2), 19, 20, 21(1), (2), (3), 22(1), (2), 23(1), (3), 24(1), (3), 26, 27, 28, 35(1), (3), 40, 42, 43(A),  
(C), (D), 44(1), (2A), 53, 56, 57 AND 70 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLE 3(3) OF THE  
UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE 1992**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION  
OF ARTICLE 8(1) OF THE PARIS AGREEMENT 2015**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 16 AND 24  
OF THE AFRICA CHARTER ON HUMAN AND PEOPLES' RIGHTS (ACHPR) 1981**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 3(B), 112 OF  
THE TREATY FOR THE ESTABLISHMENT OF THE EAST AFRICAN COMMUNITY 1999**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF SECTIONS  
3, 15, 19, 20, AND 23 OF THE CLIMATE CHANGE ACT NO. 11 OF 2016**

**AND**



**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF SECTION 3 AND 56A OF  
THE ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT NO. 8 OF 1999**

**AND**

**IN THE MATTER OF RULES 10(1), 11(1) & 13 OF THE CONSTITUTION  
OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL  
FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**BETWEEN**

<b>JOYCE ENUKAN .....</b>	<b>1<sup>ST</sup> PETITIONER</b>
<b>STELLAH APETET .....</b>	<b>2<sup>ND</sup> PETITIONER</b>
<b>EMMANUEL KONYIPAD .....</b>	<b>3<sup>RD</sup> PETITIONER</b>
<b>DANIEL ESINYEM .....</b>	<b>4<sup>TH</sup> PETITIONER</b>
<b>KELVIN AJIE .....</b>	<b>5<sup>TH</sup> PETITIONER</b>
<b>JAMES ELAAR .....</b>	<b>6<sup>TH</sup> PETITIONER</b>
<b>DAVID EWOTON .....</b>	<b>7<sup>TH</sup> PETITIONER</b>
<b>DICKSON ETABO .....</b>	<b>8<sup>TH</sup> PETITIONER</b>
<b>SIMON EREGAE .....</b>	<b>9<sup>TH</sup> PETITIONER</b>
<b>SAMUEL EMASE .....</b>	<b>10<sup>TH</sup> PETITIONER</b>
<b>JOHN EKWOM .....</b>	<b>11<sup>TH</sup> PETITIONER</b>
<b>MARGIRET NAKWEE .....</b>	<b>12<sup>TH</sup> PETITIONER</b>
<b>ABIGEL NANGIRO (1ST TO 13TH PETITIONERS MINORS SUING THEIR NEXT FRIEND ADVICE CENTRE T/A KITUO CHA SHERIA) .....</b>	<b>13<sup>TH</sup> PETITIONER</b>
<b>ELKANAH ELIMLIM LOKIPEET .....</b>	<b>14<sup>TH</sup> PETITIONER</b>
<b>ILIKWEL LOREGAE EKWOM .....</b>	<b>15<sup>TH</sup> PETITIONER</b>
<b>PAULINA AMUCHA ENULAN .....</b>	<b>16<sup>TH</sup> PETITIONER</b>
<b>JOSEPH EKALE EKARU .....</b>	<b>17<sup>TH</sup> PETITIONER</b>
<b>CHARLES ESINYEN ARIONG .....</b>	<b>18<sup>TH</sup> PETITIONER</b>
<b>LONYEITA IPORI .....</b>	<b>19<sup>TH</sup> PETITIONER</b>
<b>EKASKOUT LOMOSONG LOMOKORI .....</b>	<b>20<sup>TH</sup> PETITIONER</b>
<b>ISAAC KEBO EKWAM .....</b>	<b>21<sup>ST</sup> PETITIONER</b>
<b>NILEMKES LOCHIYO .....</b>	<b>22<sup>ND</sup> PETITIONER</b>
<b>PAULO EMANI KURE .....</b>	<b>23<sup>RD</sup> PETITIONER</b>
<b>MUSA ESINYON EJORE .....</b>	<b>24<sup>TH</sup> PETITIONER</b>



JAMES EMOIP ELOTU .....	25 <sup>TH</sup> PETITIONER
JAMES EKUTAN .....	26 <sup>TH</sup> PETITIONER
EKAALE EKWOM .....	27 <sup>TH</sup> PETITIONER
AKURETE EDOME .....	28 <sup>TH</sup> PETITIONER
LOPEM ETOOT EKWOM .....	29 <sup>TH</sup> PETITIONER
AMEYEN LOPOROCHO LOGALAN .....	30 <sup>TH</sup> PETITIONER
PAUL EMANIKOR EMURIA .....	31 <sup>ST</sup> PETITIONER
ELIM ARUPE .....	32 <sup>ND</sup> PETITIONER
JAPHETH EYANAE .....	33 <sup>RD</sup> PETITIONER
AJORE INGOLE LOWAAR .....	34 <sup>TH</sup> PETITIONER
REBECA EKALE .....	35 <sup>TH</sup> PETITIONER
AKIRU LOMOJONG .....	36 <sup>TH</sup> PETITIONER
KLIKWEL LOREGAE .....	37 <sup>TH</sup> PETITIONER
LOSENY NGUOMO LODURIKO .....	38 <sup>TH</sup> PETITIONER
RAPHAEL AMODOI NAKOROT .....	39 <sup>TH</sup> PETITIONER
APURILO KOMOLE .....	40 <sup>TH</sup> PETITIONER
NAKITELA LORUKENYIT .....	41 <sup>ST</sup> PETITIONER
LOKWAARO ALEWA .....	42 <sup>ND</sup> PETITIONER
NAPEYOK ESINYEN .....	43 <sup>RD</sup> PETITIONER
SILALE LOMANGAT .....	44 <sup>TH</sup> PETITIONER
IKARU AMODOI .....	45 <sup>TH</sup> PETITIONER
KOOLI NAKUUMA .....	46 <sup>TH</sup> PETITIONER
EKOMOL EYANAE .....	47 <sup>TH</sup> PETITIONER
ILIKWEL EDUNG .....	48 <sup>TH</sup> PETITIONER
AKAALE KOOLI .....	49 <sup>TH</sup> PETITIONER
NAWAAR KISIKE .....	50 <sup>TH</sup> PETITIONER
APUA EKATELA .....	51 <sup>ST</sup> PETITIONER
NATION LOPATIO .....	52 <sup>ND</sup> PETITIONER
EKAMATE EROT .....	53 <sup>RD</sup> PETITIONER
DENNIS NAMURON .....	54 <sup>TH</sup> PETITIONER
YANO EKADELI .....	55 <sup>TH</sup> PETITIONER
EDUNG DANIEL .....	56 <sup>TH</sup> PETITIONER



EMMANUEL ESEKON .....	57 <sup>TH</sup> PETITIONER
EKASI STEPHEN .....	58 <sup>TH</sup> PETITIONER
BENSON EYANAE .....	59 <sup>TH</sup> PETITIONER
PHILIP LOKAMN .....	60 <sup>TH</sup> PETITIONER
DAVID LOSINYEN .....	61 <sup>ST</sup> PETITIONER
MUNYES MATHON .....	62 <sup>ND</sup> PETITIONER
SAMAL METHUSELAH .....	63 <sup>RD</sup> PETITIONER
LAWRENCE LOSIPAAN .....	64 <sup>TH</sup> PETITIONER
TITUS LOTIENG .....	65 <sup>TH</sup> PETITIONER
DERICK KUWOM .....	66 <sup>TH</sup> PETITIONER
AKITELA SILVESTER .....	67 <sup>TH</sup> PETITIONER
JOHNSON ETABO .....	68 <sup>TH</sup> PETITIONER
ELIUD LOBECK .....	69 <sup>TH</sup> PETITIONER
SILAS LOKUSI .....	70 <sup>TH</sup> PETITIONER
JOSPHAT ERUKUDI .....	71 <sup>ST</sup> PETITIONER
NICOLUS NG'AKIM AK .....	72 <sup>ND</sup> PETITIONER
LOPEYOK RICARDO SIMEON .....	73 <sup>RD</sup> PETITIONER

AND

TULLOW KENYA BV .....	1 <sup>ST</sup> RESPONDENT
MINISTRY OF ENERGY & PETROLEUM DEVELOPMENT	2 <sup>ND</sup> RESPONDENT
THE HON ATTORNEY GENERAL .....	3 <sup>RD</sup> RESPONDENT

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY ....	INTERESTED PARTY
TURKANA COUNTY GOVERNMENT .....	INTERESTED PARTY

AND

KENYA LEGAL AND ETHICAL ISSUES NATIONAL ENVIRONMENT TRIBUNAL WORK ON HIV & AIDS (KELIN .....	AMICUS CURIAE
INITIATIVE FOR STRATEGIC LITIGATION IN AFRICA (ISLA) .....	AMICUS CURIAE



## RULING

1. Through a preliminary objection dated 17/7/2024, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents ask the court to strike out or dismiss the petition herein on account of:
  1. Pursuant to Section 125 of the Environment Management and Coordination Act (EMCA), there is a tribunal to hear and determine disputes concerning violations of the environment, rendering this court devoid of jurisdiction, save on limited appeals, to determine the petition.
  2. Section 36 of the [Energy Act](#), this court has no jurisdiction to determine the instant dispute relating to the energy and petroleum sector arising under the Act or any other Act, as Section 36 established a tribunal with the requisite jurisdiction.
  3. The dispute herein is purely academic, hence not justiciable.
2. Learned state counsel Mr. Odongo submitted that the two cited statutes establish the National Environmental Tribunal and Energy and the Petroleum Tribunal, which are competent to handle the issues raised in the petition, which fall under their ambit.
3. Learned state counsel submitted that the preliminary objection falls under the description in *Mukisa Biscuits Manufacturing Co. Ltd -vs- West End Distributions Ltd* [1969] EA 469. Learned counsel submitted that, regarding the merits, paragraphs 27 - 41 of the petition, as amended, essentially challenge the aspect of waste management practices. Paragraph 113 alleges that the waste management plant at Twiga 1 had not been licensed by the National Environment Management Authority, making it a licensing dispute underpinned by Section 129(1)(a) of the Environment Management and Coordination Act, which falls under the jurisdiction of the National Environment Tribunal (NET).
4. Learned Counsel submitted that paragraphs 52-54 of the amended petition raise issues of groundwater contamination, which also fall under Section 129 of the Environment Management and Coordination Act. Learned Counsel submitted that the issues raised are technical in character, which require the expertise of the Tribunals and not this court.
5. As regards paragraph 55 of the amended petition, learned counsel submitted that issues raised of leakage of oil, which allegedly occurred in February 2015, were raised in the response by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and were remedied. Therefore, learned counsel submitted that as to whether the remedial measures were adequate or not, the jurisdiction to handle such issues is the National Environment Tribunal as per Section 129(d)(e) of the Environment Management and Coordination Act.
6. Regarding paragraphs 68 - 67 of the amended petition, regarding explosives disposal, learned counsel submitted that the issue is a licensing dispute over petroleum products, which under Section 36 of the [Energy Act](#) fall under the Energy and Petroleum Tribunal.
7. Regarding paragraph 113 of the amended petition, learned counsel submitted that the issues raised are on permits and regulatory compliance, which are ideally statutory and not constitutional violations, whose jurisdiction of this court to handle is ousted by Section 36 of the [Energy Act](#).
8. Learned state counsel submitted that all the referenced disputes cannot be handled through craftsmanship, vesting jurisdiction in this court. As per the *Stanley Mombo Amuti -vs- Kenya Anti-Corruption Commission* [2019] eKLR. Learned counsel submitted that such a practice is a bad one and that the court should not assume jurisdiction where it is exclusively excluded by the two statutes.



9. Learned counsel asked what the motive was behind the petition, which claims statutory violations as constitutional violations. Learned counsel submitted that the two tribunals only handle such disputes if lodged with them within 60 days of the decision.
10. Learned counsel submitted that in this petition, the matters pleaded are on issues that took place in 2013 and 2015, and therefore, the motive behind filing a constitutional petition is to escape the stringent timelines provided under Section 129 of the Environment Management and Coordination Act and the *Energy Act*.
11. Further, learned counsel submitted that even the reliefs sought by the petitioners flow from statutory and not constitutional violation. Learned counsel submitted that though he is aware of *Nicholus -vs- Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) [2023] KESC 113 (KLR)*, and that it is distinguishable from the instant petition, since the issues thereto were constitutional in nature, unlike in this one, which raises issues on statutory and not constitutional violations.
12. Learned counsel submitted that the petition before the court is on an alleged statutory violation, crafted in a constitutional language, and therefore, the court should rely on the doctrine of exhaustion and find the petition prematurely filed before the petitioners have exhausted the statutory internal dispute mechanism for the available remedies under both the National Environment Tribunal and Energy and Petroleum Tribunal.
13. Equally, learned counsel submitted that the preliminary objection does not intend to deny the petitioners access to justice but seeks to ensure that parties do not use their drafting strategies to avoid the already established structures or statutory limitations established by the statutes.
14. Learned counsel submitted that pursuant to Article 48 of *the Constitution*, a dispute is to be resolved within a reasonable time whenever it arises. In this instant petition, learned counsel submitted that the issues raised are finding themselves in court in 2024 when they arose as pleaded in 2013 and 2015.
15. Learned counsel, one Mr. Emmanuel Wetangula, appearing together with Mr. Boko Angwenyi and Miss Wambui Wangai, supported the preliminary objection, while learned counsel Mr. Ngara for the regulator told the court that his client was not taking part in the preliminary objection.
16. Further, learned counsel Mr. Mulekyo for the petitioners opposed the preliminary objection, given that the thread flowing from paragraphs 71 - 105 of the amended petition states that the petition is based on issues of violation or infringement of several constitutional rights and freedoms that cannot be addressed by the two tribunals.
17. Learned counsel submitted that the petitioners were not challenging any license procedures or permits but seeking remedies based on the violation of their environmental, water, and life rights as outlined in paragraphs 31 – 41 of the amended petition, which issues cannot be handled by the Tribunal since they lack the mandate to deal with such violations.
18. Learned counsel submitted that the preliminary objection is not a pure point of law; otherwise, the issues raised can only be addressed by the court at a full hearing under its jurisdiction, as set out in Article 165(3) of *the Constitution*, by determining the constitutional question raised, which also includes the interpretation of *the Constitution*.
19. Learned counsel submitted that the Environment and Land Court jurisdiction is not limited to determining constitutional questions in isolation but extends to hearing matters that involve the interpretation and the application of *the constitution*. learned counsel submitted that the petitioners, at paragraphs 71 - 101 of the amended petition, have demonstrated the violation of inter alia the right to



- life, right to highest attainable health and many other violations of constitutional rights under Articles 26, 143, and 35, which, as held in *Nicholus -vs- Attorney General* (supra) case fall under the jurisdiction of the this and not the National Environment Tribunal and Energy and Petroleum Tribunal.
20. Learned counsel urged the court to be guided by the *Nicholus -vs- Attorney General* (supra), to find that the non-exhaustion doctrine does not apply to this petition, as in that case, where the available alternative forums lack efficacy and adequacy to address the issues raised.
  21. In a rejoinder, learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents submitted that a pure point of law includes a question on jurisdiction and statute-barred disputes. Learned counsel submitted that under Article 165(3) of *the Constitution*, this court's jurisdiction can be ousted by either a statute or *the Constitution*, and in this case, Section 129 the Environment Management and Coordination Act, and Section 36 of the *Energy Act*, express that disputes such as in the instant petition should have been filed before the National Environment Tribunal and Energy and Petroleum Tribunal, respectively.
  22. Equally, learned counsel urged the court to invoke the doctrine of constitutional deference since there are institutional mechanisms under the respective statutes that have the requisite specialized skills, expertise, and capacity to determine such issues of both fact and law, which, as demonstrated in the preliminary objection, are of statutory and not constitutional violations.
  23. Learned counsel relied on *Speaker of the National Assembly -vs- James Njenga Karume* [1992] eKLR, on the constitutional deference doctrine application. Learned counsel submitted that what the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are seeking is the striking out of the mended petition and for its dismissal, which will not be a determination on merits.
  24. A preliminary objection was defined in *Mukisa Biscuits Manufacturing Co. Ltd -vs- West End Distributors Ltd* [1969] EA 696, as one consisting of a point of law which has been pleaded, or which arises by clear implications out of the pleadings and which, if argued as a preliminary point, may dispose of the suit. Examples include an objection as to the jurisdiction of the court or a plea of limitation. It cannot be raised if any facts are to be ascertained or if what is sought is the exercise of judicial discretion. The jurisdictional issue must be determined first.
  25. In *Aviation & Allied Workers Union -vs- Kenya Airways Ltd & Others* [2015] eKLR, the Supreme Court held that to ascertain whether what is raised is a pure point of law, the court has to be satisfied that there is no proper contest as to the facts of the matter are deemed as agreed, as they are prima facie presented in the pleadings on record.
  26. From the foregoing, a preliminary objection must therefore be raised on the assumption that all facts pleaded by the adverse party are correct. A preliminary objection must also not raise substantive or factual issues from the pleadings, which must be determined by the court upon perusal of evidence. It means, therefore, that a preliminary objection should not be raised if any facts on which it is relied upon have to be ascertained by the court.
  27. Coming to the preliminary objection, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents claim that this court's jurisdiction is ousted, for the issues raised are not constitutional violations but alleged statutory violations which fall under the jurisdiction of the National Environment Tribunal and the Energy Petroleum Tribunal by dint of Section 129 of the Environment Management and Coordination Act, and Section 36 of the *Energy Act*.
  28. When an issue of jurisdiction is raised, the court must first determine whether or not it has jurisdiction as a court bereft of jurisdiction in a matter or issue must down its tools. See *Owners of the Motor Vessel Lillian "S" vs Caltex Oil (K) Ltd* [1989 KLR 1.



29. The jurisdiction of this court is created by Article 162(2) (b) of *the Constitution* and Section 13 of the *Environment and Land Court Act* to handle disputes relating to the environment, the use and occupation, and title to land. The court exercises both original and appellate jurisdiction on matters of environment and land under the *Environment and Land Court Act* or any other law applicable in Kenya relating to environment and land. Both *the Constitution* and the *Environment and Land Court Act* provide that the court is not precluded from hearing and determining applications for redress of or a denial, violation, or infringement of, or threat to, rights or fundamental freedoms relating to a clean and healthy environment under Articles 42, 69, and 70 of *the Constitution*.
30. Section 13(4) of the *Environment and Land Court Act* provides that, in addition to Sections (1) and (2), the court shall exercise appellate jurisdiction over the decisions of subordinate courts, or local tribunals in respect of matters falling within its jurisdiction.
31. Courts have held that in determining whether a court has jurisdiction and whether the matter is about land and environment, the predominant purpose test should be applied. See *Butter & Others -vs- Bentall Jurenda & Another* [2017] eKLR.
32. The first limb of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' preliminary objection is that matters or issues raised herein fall under the jurisdiction of the tribunals and not this court; otherwise, the petitioners should have come to this court after exhausting the alternative dispute forums established by the statute.
33. The basis of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' preliminary objection is that paragraphs 22 - 41, 52, 55, 113, of the amended petition speaks to licensing and permits and oil leakages which arose in 2013 or 2015, and as to whether adequate remedial or mitigation measures were put in place, which disputes ideally fall under the jurisdiction of National Environment Tribunal, and Energy and Petroleum Tribunal, under Section 129(1)(e) (g), and 36 of the *Energy Act*.
34. The doctrines of exhaustion, constitutional avoidance, and deference are what ideally the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have invoked for his court to decline jurisdiction. In the *Speaker of the National Assembly -vs- Karume* [1992] KECA 42 (KLR), the court said that where a clear procedure for redress exists, it must first be exhausted.
35. The question of exhaustion of administrative remedies requires that a concerned party diligently pursues all alternative available means of redress before coming to the court for intervention. This position was highlighted in a five-judge bench in *William Odhiambo Ramogi & Others -vs- Attorney General & Others* [2020] eKLR.
36. The court said that the doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is diligent in the protection of his own interest within the mechanism in place for resolution outside the courts. See also *Godfrey Muthinja & Others -vs- Samuel Muguna Henry & Others* [2015] eKLR.
37. The pitfalls of the doctrine have been expounded. In *Fleur Investment Ltd -vs- Commissioner of Domestic Taxes & Another* [2018] eKLR, the court observed that though the doctrine seeks to declutter the courts, it risks victimizing individuals with legitimate issues that cannot be addressed via the internal mechanism, and also interferes with access to justice.
38. In *Mutanga Tea and Coffee Company Ltd -vs- Shikara Limited & another* [2022] KEELC 13349 (KLR), the court held that the assumption of the doctrine is that the statutory mechanism is effective unless it is demonstrated to have failed, or is unavailable as opposed to being slow or silent.
39. In *NGOs Co-ordination Board -vs- EG & 4 others; Katiba Institute (Amicus Curiae)* [2023] KESC 17 (KLR), the Supreme Court held that even when superior courts had jurisdiction to determine



profound questions of law, the first opportunity has to be given to the relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant statutes. The court said that where there is an Alternative Dispute Resolution mechanism established by legislation, the courts must exercise restraint in exercising their jurisdiction and accord deference to such dispute resolution bodies under the doctrine of exhaustion.

40. In *Aluochier -vs- Senate & 2 others* [2025] KESC 59 (KLR), the court held that where a party alleges a violation of constitutional rights, he is entitled to interrogation of those allegations by the court under Article 163(4)(a) of *the Constitution*.
41. In *Kindiki -vs- Christian Foundation Fellowship Church Mpakone through its Registered Trustees & 5 others* [2024] KEELC 6063 (KLR), the preliminary objection based on the doctrine of exhaustion had been raised.
42. In *Nicholas -vs- Attorney General & Others* [2023] KESC 113 [KLR] (28<sup>th</sup> December 2023) (Judgment), which affirmed *John Florence Maritime Services Ltd & another -vs- Cabinet Secretary Transport & Infrastructure & 3 others* [2021] KESC 39 (KLR), that a court should not have a narrow mind when evaluating whether a matter raises constitutional issues and that the search for constitutional issues extends beyond specific constitutional provisions that it should not start or stop with a determination whether or not there is a specific provision of *the Constitution* that is at issue.
43. The court said that a court should employ a holistic enquiry of all the various facets of the law as pleaded by the parties to establish if it indeed raises a constitutional question. On the jurisdictional law limits of Energy and Petroleum Regulatory Authority (EPRA), Energy and Petroleum Tribunal, and NEMA, and on the filing of the petition before resorting to the said tribunals, the court reviewed the existing law schools of thought as captured in *Orata International Ltd -vs- DG NEMA* [2019] eKLR, *Borbor & Others -vs- NEMA* [2022] KEELC 2947 [KLR], *Kibos Distillers Ltd & Others -vs- Benson Ambuti Ndege & Others* [2020] eKLR, *KEN Kasinja -vs- David Kiplagat Kirui & Others* [2015] eKLR, *Ngo's Coordination Board -vs- EG & Others Katiba Institute AC* (supra).
44. In *Albert Chaurembo Mumba & 7 Others -vs- Maurice M. Munyao & 148 Others* [2016] eKLR, the court emphasized that where there exists an alternative method of dispute resolution established by law or constitution, courts must exercise judicial restraint and give preference to those other alternative dispute resolutions as established by statutes, with the mandate to deal with such specific disputes in the first instance, unless there are exceptional circumstances.
45. The court regarding the Environment and Land Court's mandate under Article 162(2)(b) and 165(1)(b) and (c), (2)(b) of *the Constitution*, Section 4 of the *Land Act*, Section 13(1) of the *Environment and Land Court Act* vis-à-vis Section 125 of the Environment Management and Coordination Act, and Sections 10 and 36 of the *Energy Act*, the court said that the latter laws DO NOT oust the jurisdiction of the Environment and Land Court.
46. The court clarified that in respect of the procedure for the determination of disputes that involve the management of the environment or issues of petroleum and energy, the Environment and Land Court has original jurisdiction on matters that the National Environment Management Authority handles, unless such jurisdiction is expressly and explicitly ousted in a constitutional compliant manner.
47. Further, the court fortified by *Cortec Mining Kenya Limited -vs- Cabinet Secretary Ministry of Mining & 9 others* [2017] eKLR and *Kenya Revenue Authority -vs- Keroche Industries* Court of Appeal No. 2 of 2018, held that Section 9(1) of the *Fair Administrative Action Act*, where there are exceptional circumstances, a party may be exempted in the interest of justice from non-exhaustion doctrine.



48. Again, the court, guided by Kenya Revenue Authority & Others -vs- Darasa Investments Ltd [2018] eKLR, held that the availability of an alternative remedy was not a bar.
49. In Kindiki -vs- Christian Foundation Fellowship Church Mpakone (supra), based on the cited law, this court observed that there can be no right in law without a remedy, that a right gives a person a right holder, a claim with respect to a duty holder, who has to meet both positive and negative obligations as held in Musembi & 13 others -vs- Moi Educational Centre Co. Ltd & 3 others [2021] KESC 50 (KLR).
50. In Standard Chartered Financial Services Limited v Manchester Outfitters (Suiting Division) Limited Now Called King Woolen Mills Limited & 2 others [2025] KESC 68 (KLR), the court citing Reserve Bank of India -vs- Peerless General Finance & Investment Co. Ltd & Others [1987] 1SCC 424, held that the basis on the interpretation of statutes is the text and the context, or in other words why it was enacted, reading it as a whole, and then, section to section, clause by clause, phrase by phrase, word by word, to know its impact.
51. In In re Estate of Lihasi Bidali alias Charles Lihasi Bidali (Deceased) (Petition E030 of 2024) [2025] KESC 56 (KLR) (5 September 2025) (Judgment), the court cited Kimani & 20 others (On behalf of themselves and all members of Korogocho Owners Welfare Association) -vs- Attorney General & 2 others [2020] KESC 9 (KLR), that mere allegation of constitutional violation or citation of constitution provisions or issues, with nothing to do with the application or interpretation of *the constitution* does not bring an appeal within Article 163(a)(b) of *the Constitution*.
52. The court further held that it is only the cardinal issues of constitutional law, or jurisprudential moment, and legal issues founded on cogent constitutional controversy, that the Supreme Court can handle.
53. As to whether a court has jurisdiction in a certain matter, the court in Kenya Wildlife Service -vs- Sea Star Malindi Limited (Petition E022 of 2024) [2025] KESC 42 (KLR) (27 June 2025) (Judgment), held that it is a fundamental principle of justice that each cause of action must be determined on the evidence and the legal principles in the specific cause of action.
54. According to the petitioner, the amended petition raises constitutional questions or issues, which can only be determined by this court and not the tribunal alluded to by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. To discern the gist of the issues raised by the petitioners, one definitely has to look at both the factual context of the petition, as well as the constitutional and statutory basis of it.
55. In Diasproperty Limited & another -vs- Githae & 8 others (Petition E019 of 2024) [2025] KESC 19 (KLR) (11 April 2025) (Judgment), the court cited Sonko -vs- Clerk County Assembly of Nairobi City Council & Others [2022] KESC 26 [KLR] and Wanjigi -vs- Chebukati & 2 others (Application 6 (E012) of 2022) [2022] KESC 40 (KLR) (18 July 2022) (Ruling). It is never a role of the court to wander around in the maze of pleadings and averments in order to assume jurisdiction by way of elimination.
56. The court cited Ibren -vs- Independent Electoral and Boundaries Commission & 2 others (Petition 19 of 2018) [2018] KESC 75 (KLR) (21 December 2018) (Judgment)], that a court has to be moved under the correct provisions of the law and that the rules of pleadings in an adversarial system serve to ensure the parties define the issues for determination so as not to take the rest of the parties by surprise.
57. The court held that to ascertain whether or not jurisdiction has properly been invoked, the court will consider inter alia the nature of the pleadings and the remedies sought.
58. In Attorney General -vs- Okoiti & Others Civil Appeal E416 of 2021 [2025] KECA 309 [KLR] (21<sup>st</sup> February 2025) (Judgment), the court said that while interpreting a constitution, a court is not



necessarily bound by the position taken by the parties before it, that the duty of the court is to protect *the Constitution* and that under Article 22(4) of *the Constitution*, the court is supposed to determine the question whether an omission to undertake a step contravened the circumstances.

59. The court said ejusdem generis rule applied to both statutory and constitutional interpretation, and that in the interpretation of a constitutional provision containing a fundamental right or geared toward the realization of a constitutional right, the court should adopt a dynamic, progressive, liberal, or flexible approach, keeping in view the ideals of the people, the socio, economic, political and cultural values, to extend the benefit of the same to the possible maximum.
60. The amended petition dated 29/10/2024 is brought in a representation capacity for the Turkana community resident in Lokichar Basin, Turkana County, as people affected by the oil exploration estimated at one million. It is averred that they have suffered loss and damage, and continue to be affected by the impacts of the actions and omissions of the respondents, who, as the 1<sup>st</sup> respondent, as duly licensed by the 2<sup>nd</sup> respondent, continues to carry out exploration and drilling of oil and gas in the South Turkana Basin in Turkana County.
61. It is deposed that the 1<sup>st</sup> interested party is statutorily and constitutionally vested with responsibility for environmental protection supervision and coordination programs, which responsibility is also co-shared with the 2<sup>nd</sup> interested party.
62. The petition is anchored under Articles 22(1), 22(3), 70, 24, and 70(1) of *the Constitution* on the right to a clean and healthy environment and Section 13 2(a)(b) of the *Environment and Land Court Act*.
63. The petitioners aver that their claim is for a rights-based environmental justice where they seek appropriate and effective remedies contextually prayed for. The factual basis is set in paragraphs 16 -70, covering the events of the licensing of the 1<sup>st</sup> respondent by the 1<sup>st</sup> interested party to conduct the exploratory well drilling to determine the presence of oil and natural gas, in the reference blocks with effect from 4/3/2011 and 30/4/2012, after obtaining Environmental Impact Assessment licenses.
64. The petitioners aver that the Environmental Impact Assessment and Environmental and Social Impact Assessment (ESIA) licenses issuance had placed some obligations on the 1<sup>st</sup> respondent on possible adverse effects and their mitigation measures, which the 1<sup>st</sup> interested party had an equal responsibility to oversee and ensure its implementation to safeguard the rights of the petitioners as residents in the area where the oil and gas exploration and drilling were happening.
65. The petitioners addressed the instances of the adverse effects to them and the environment which arose during the said phase due to the equipment, machinery, oil and gas exploration drilling method and apparatus, storage and disposal of the materials and the reaction of the 2<sup>nd</sup> respondent, the 1<sup>st</sup>, 2<sup>nd</sup> and interested parties with regard to the said issues by way of a letter, directives, notifications, and monitoring and implementation reports.
66. The petitioners on paragraph 40 aver that due to the said concerns and issues, the 1<sup>st</sup> respondent sued the 1<sup>st</sup> interested party before the National Environmental Tribunal in Appeal No. 13 of 2018 for review of these directives, but which resulted in several alleged negotiations leading to the revocation of the 1<sup>st</sup> interested party's decision dated 7/8/2018, which exposed and has continued to expose them to danger of hazardous waste.
67. The petitioners aver that attempts by the 2<sup>nd</sup> interested party, by a letter dated 26/9/2019 to intervene on their behalf regarding hazardous waste, cuttings, and disclosures, public participation were unsuccessful, the 2<sup>nd</sup> interested party abandoned them and their concerns, effectively leaving them to live in a hazardous waste-infected environment, yet in the Environmental and Social Impact



- Assessment received by the 1<sup>st</sup> interested party from the 1<sup>st</sup> respondent had shown the potential of harmful effects to the environment in general and in particular by the green house gases emission associated with the proposed project steps such as exploration products, transportation, refining and distribution, and the dangers of leaking emission throughout the processes.
68. The petitioners aver that the 1<sup>st</sup> respondent has breached environmental obligations regarding the foreseeable direct and indirect effects of greenhouse gases throughout the process of the project. The petitioners aver that the 1<sup>st</sup> respondent has failed to provide information in the Environmental and Social Impact Assessment regarding the direct and indirect effects of the project on the environment.
  69. The petitioners rely on a credible peer-reviewed empirical academic study reports about the significance of the oil and gas exploration in the Lokichar basin on the massive negative impacts on internal ground and surface water quality.
  70. The petitioners aver that on 7/10/2021, the 1<sup>st</sup> interested party in conjunction with the 2<sup>nd</sup> interested party and the 1<sup>st</sup> and 2<sup>nd</sup> respondents, conducted environmental monitoring and agreed to develop a detailed remediation plan of the South Lokichar field, engage the 1<sup>st</sup> interested party's licensed hazardous waste handlers to treat the contaminated High Density Polythene (HDPE) lining and waste oil and oily waste, but have failed to do so.
  71. The petitioners aver that in February 2015, there was an oil leak at Amosing and the discharge of the same to the environment, negatively affecting it, where the respondents failed to take adequate remedial measures or inform the community of its danger or carry out an Environmental Impact Assessment or Environmental and Social Impact Assessment, yet it has contaminated the environment.
  72. The petitioners highlight, in paragraphs 59 - 70, the particulars of the continuing environmental degradation and degeneration as a result of the acts of the respondents, including the failure to secure and have the abandoned sites secured despite leaving the drilling waste and cuttings on site, and the burning of hazardous explosive waste on 31/5/2022, and the demand for information on waste management and its disposal by the respondents and the interested parties contrary to Article 35 of *the Constitution*.
  73. The petition is anchored on Article 2(5) and (6) of *the Constitution*, invoking international environmental conventions to which Kenya is a party, including United Nations Framework Convention on Climate Change (UNFCCC), Kyoto Protocol, Paris Agreement 2015, African Charter on Human and Peoples Rights, East African Community Treaty, and Maastricht Principles on Human Rights of Future Generations.
  74. Articles 10, 19, 20, 21, 26, 27, 28, 29(c), 35, 43, 69(1), and 259 of *the Constitution* and the Environmental Management and Coordination Act 2015, *Climate Change Act* 2015, Waste Management Act, and Declaration of the Right to Development 1986, Principle 5 of the Draft Principle of Human Rights and the Environment 1994, Stockholm Declaration, Water Quality Regulations 2006, the Committee of Economic, Social and Cultural Rights, General Comment No 15 of the Right to water, have also been invoked.
  75. In paragraphs 106 - 180, the petitioners give an in-depth description of the violation of the right, such as violence of developments, and its social and environmental consequences, breach of the right to a clean and healthy environment, breach of the right to clean and safe water in adequate quantities, and the right to the highest attainable standard of health, breach of other socio-economic rights, nexus between breach of the right to a clean and health environment and other rights, violation and or threats to violation of the right to life, violation to development, violation of the values of human dignity, breach of the right of accountability and the right to information, breach of the right to security, climate



change violation, violation of the right to children, breach of law and violation of right by the 2<sup>nd</sup> respondent, breach of the rights of present and future generation, and the statutory violation by the respondents.

76. The petitioners seek:

- a. A declaration for violation of the right to a clean and healthy environment, denial, and breach of the community's rights to enjoy and use of their land, right to health, information, economic and social rights, right to life, physical integrity, security of person, right to their own means of substance, right to development, human dignity, safe and health environment, clean and safe water, right against discrimination, right of children.
- (b) An order compelling the 1<sup>st</sup> defendant to remove and dispose of all wastes and chemicals within the Lokichar Basin.
- b. Order for remediation of the sites polluted by the 1<sup>st</sup> respondent, restoration and monitoring of the environment, in the alternative establishment of a special fund for evaluating the damages and carry out the restoration, periodical monitoring of groundwater and soil contamination, fine, declaration that the acts and omissions of the 1<sup>st</sup> respondent during the exploration, drilling of oil and gas constituted a hazardous environmental activity that is criminally punishable, was a violence of development rights, and Article 10 of *the Constitution*, order for the ODPP to institute criminal proceedings against the 1<sup>st</sup> respondent, and its directors for the environmental breaches committed during and after the exploratory phase.
- c. A declaration that the petitioners are entitled to compensation for the violation.
- d. A declaration that the 1<sup>st</sup> respondent is liable to meet future claims related to the environmental damage out of its activities in the Lokichar Basin.
- e. An award of damages for the harm and injury suffered by appointment of an independent panel of experts in the area of reparations and compensation for environmental damages and human rights abuses to assess the appropriate level of compensation.
- (g) An order that the 1<sup>st</sup> respondent provide a suitable environmental bond in the sum of USD. 2 billion or such sum as the court may impose.

77. The 1<sup>st</sup> respondent relies on a response dated 14/11/2024, while the 2<sup>nd</sup> and 3<sup>rd</sup> respondents rely on a response and replying affidavit of Moses Mburu dated and sworn on 11/11/2024 and 19/3/2025, respectively.

78. The 1<sup>st</sup> respondent, while admitting it was licensed by the 2<sup>nd</sup> respondent and the 1<sup>st</sup> interested party in paragraph 11 of the responses, admits commissioning and effecting the Environmental and Social Risk Management and Impact Assessment Plan dated 14/1/2012, but denies the correlation between its activities and the violence of development, adverse impacts of its activities to the petitioners or the environment as alleged or at all, averred that it had undertaken remedial measures, explained how it undertook its exploration activities alongside contractors and private individuals in line with The National Environment Management Authority and government directives and using best international practices and methods in the field of oil and gas exploration, how on 23/12/2013, it made an application to vary the existing EIA license from water based drilling to synthetic oil based drilling which the interested party approved on 12<sup>th</sup> and 15<sup>th</sup> January 2014.

79. On waste management, the 1<sup>st</sup> respondent in paragraph 35 - 56 explains the measures it undertook to comply with the law, including environmental audit, issuance of a new Environmental Impact



Assessment license in January 2014, decommissioning, and collection of samples on 3/4/2017 by an independent consultant report dated 28/7/2017 on soil, water and air quality analysis in line with Environmental Management and Coordination Act (Air Quality) Regulations, issuance of compliance letter after submitting Environmental Audit on 19/2/2018, recommendation by the 1<sup>st</sup> interested party on handling of hazardous waste sustainable waste management as per Environmental Management and Coordination Act Regulation, submissions of revised waste management strategy to the 1<sup>st</sup> interested party and the 2<sup>nd</sup> respondent on July 2018, compliance with the directives by a letter dated 7/8/2018 by 1<sup>st</sup> interested party on removal of accumulated drilling cuttings waste as per Waste Regulation 2006, barricading of the Twiga 1 site by the County since 27/3/2017, making it impossible to remove the waste, consultation with the 1<sup>st</sup> interested party and the 2<sup>nd</sup> interested parties between 2018/2019 until an amicable solution was attained and a consent recorded on 11/6/2020 and the consent of the National Environment Management Authority directives dated 8/7/2018 before the National Environment Tribunal, licensing of the Twiga 1 as a treatment plant and waster disposal site on 28/12/2020, formed a joint working group of stakeholders including the petitioners responses to the concerns of the 2<sup>nd</sup> interested party on its letter dated 29/9/2019.

80. On soil, water, and air contamination, the 1<sup>st</sup> respondent averred that it had adhered to IFC Environmental, Health and Safety Guidelines for Offshore Oil and Gas Development to avoid any alleged contamination in the sites as per quality samples taken in 2023, and that it adhered to all improvement orders issued by the 1<sup>st</sup> interested party by contracting Charles & Baker to carry out remedial work on South Lokichar and also Dunlay Ltd to collect any contaminated HDPE liner(s) during the Early Oil Pilot Scheme, site and deliver to a NEMA approved incinerator and also supplying the locals with 400,000 liters of water daily.
81. Regarding the explosives, the 1<sup>st</sup> respondent avers that it has a licensed integrated operation base at Kapese Campsite, which is secure, and in May 2022, it sought approval of the 1<sup>st</sup> interested party to dispose of expired explosives and also shared with the 2<sup>nd</sup> respondent the proposed mechanism and plan of destruction of the explosives, following which, on 31/5/2022, a registered government blaster was engaged and in the process unfortunately there was an injury and a fatality, which was not as a result of any negligence or deliberate pollution of the environment.
82. The 1<sup>st</sup> respondent avers that it has shared all its waste management information with the interested party and that the National Bureau of Statistics will show the positive impact of its project to the country at large in the county.
83. The 1<sup>st</sup> respondent in paragraphs 88 - 131 denies the alleged violation of the rights, including violence of the development of the right to a clean and healthy environment, clean and safe water and health standard social and economic rights, nexus between breach of right to clean health environment and other rights, rights to life, right to development, values of human dignity, rights to security of persons, rights of children, rights of the present and future generation and statutory violation.
84. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents in paragraph 8 of the supporting affidavit of Moses Mburu admit permits, licenses, and EIA reports were issued to the 1<sup>st</sup> respondent to undertake oil exploration, drilling, and production in Block 10BA, 13T, and 10BB on 13/1/2013, 30/1/2013, and 15/1/2014, to use Synthetic Oil-Based Mud (SOBM) instead of Water Based Mud (WDM), as per annexure MM-(1), and (2), who proceeded to drill 47 wells out of which 13 wells had successful hydro-carbon discoveries, the rest being decommissioned and plugged using the best international standards and subject to the supervision of the 2<sup>nd</sup> respondent.
85. On the management of solid and liquid wastes in paragraph 9, the 2<sup>nd</sup> respondent deposed that they commissioned a multi-sectoral stakeholder engagement to check the waste, in the nine sites that



- produced a report dated 22/2/2021, annexed as MM-(3), coming up with recommendations leading to the issuance of a license for a waste health plant and disposal site on 11/1/2023, annexed as MM-(4).
86. The 2<sup>nd</sup> respondent deposed that it has registered exploration works by facilitating joint inspection exercises, stakeholder engagement, and qualitative and objective analysis samples to ensure sustainable exploration and development, utilization management, and conservation of the environment and natural resources.
87. The 2<sup>nd</sup> respondent deposes that Section 60 of the Petroleum Act places a responsibility on the contractor to manage products, transportation, storage, treatment, or disposal of wastes arising out of upstream petroleum operations in accordance with all the applicable environmental, health, safety, and best petroleum industry practice and that under Section 60(4) thereof, the 1<sup>st</sup> interested party has a responsibility to issue and supervise the relevant waste management license and at the same time the 2<sup>nd</sup> respondent has a mandate to provide technical and policy support, as well as to intervene where there is a breach and that Section 60(5) thereof, are offences relating to management, production, transportation, storage, health, clean up or disposal of wastes out of upstream operation, otherwise, it was not aware of any alleged breach.
88. Regarding mitigating measures and surveillance to mitigate environmental pollution in paragraph 15, the respondent denied receipt of any complaint, avers it has appointed a County Liaison Officer to conduct day-to-day surveillance, create weekly reports, coordinate ground logistics, compile monthly grievances and ensure implementation of community outreach and awareness as per annexure marked MM-(5), since 5/2/2020 and that on 4/7/2024, the County Land Management Committee of the area lodged a complaint on suspected water and soil contamination as per annexure MM-(6), which the 2<sup>nd</sup> respondent, up[on receipt circulated to the 1<sup>st</sup> and 2<sup>nd</sup> respondent to facilitate public participation as per a letter dated 29/7/2024, marked MM-(7), collected samples and forwarded to the Government Chemist as per letter dated 28/10/2024, annexed as MM-(8), ad a report dated 18/12/2024 and an Environmental Monitoring Report dated January 2025 was released, annexure as MM-(9) and MM-(10), all showing that in the 9 sites, there was no foil and water contamination.
89. On death of livestock out of pollution, the 2<sup>nd</sup> respondent denied the same, save for a newspaper report on 24/1/2024 but a fact finding mission was undertaken between 11/2/2024 and 1/3/2024, involving many stakeholders, who reviewed previous reports and orders of the 1<sup>st</sup> interested party, held stakeholders engagements and interviews and came up with report dated March 2024, attached as MM-(11).
90. Further, the 2<sup>nd</sup> respondent avers that a report by a veterinary officer attached as MM-(12) showed that the soil and waste samples collected from the site showed no relationship of pollution with the deaths.
91. On breach of obligation in the permits, the 2<sup>nd</sup> respondent deposed that on 15/10/2021, the 1<sup>st</sup> interested party reviewed measures of the 1<sup>st</sup> respondent to prevent despoilment of the environment and issued an improvement order for South Lokichar setting out additional remedial measures as deemed appropriate as per the order dated 15/10/2021 marked MM-(13).
92. Regarding Articles 10, 42, and 69 of the Constitution and the Petroleum Act, the 2<sup>nd</sup> respondent deposed that it has put in place several measures to ensure sustainable exploration works, including sensitization meetings, multi-sectoral engagements, joint multi-sectoral inspection and environmental monitoring inspection as per annexure marked MM-(14), (10), dated 20/1/2021, 22/1/2021, 10/9/2021 and October 2024.
93. The 2<sup>nd</sup> respondent deposed that they have ensured full compliance with the provisions of the Environmental Management and Coordination Act and the Petroleum Act. Further, the 2<sup>nd</sup>



respondent deposes that Article 2(5)(6), 10, and 69(2) call for complimentary with international law to National Laws or its application where there is a lacuna in local laws, and balancing between environmental conservation ad sustainable development so much so that the Petroleum Act and the Environmental Management and Coordination Act have provisions to seek to integrate environmental conservation within the county’s economic development agenda.

94. The 2<sup>nd</sup> respondent deposes that the petitioners have failed to cooperate with it under Article 69(2) in a bid to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.
95. The 2<sup>nd</sup> respondent deposes that the Energy and Petroleum Tribunal of violent development does not apply since it has diligently performed a continued performing obligation to protect and conserve the environment for the present and future generation, as set out under the Constitution, Petroleum Act, the Environmental Management and Coordination Act , and that it is not aware of the alleged harmful substances or wastes which escaped or were released to the environment or which caused an displacement of the petitioners through pollution of air, soil and water, otherwise no evidence has been tendered to show that petroleum exploration was done outside the law or resulted to pollution or displacement of people without just and prompted compensation or that there are no accruing benefits from the project to the local community, and or that there is violation by the 2<sup>nd</sup> respondent to the right to clean and health environment as alleged or at all, or that the 2<sup>nd</sup> respondent participated in compromising the quality or quantity of water or violation of social-economic rights or failed to ensure sustainable exploration, sound waste measurements, or conservation of the environment, filed to avert or minimize loss or damages associated with petroleum exploration, neglected to formulate appropriate policies, programs, plans, regulations or laws for sustainable exploration, or allowed the 1<sup>st</sup> respondent to pollute the environment.
96. The 2<sup>nd</sup> respondent in paragraph 46 deposed that its role in environmental conservation and exploration of natural resources is defined by Article 69 of the Constitution to include ensuring sustainable exploration, utilization, management, and conservation of the environment and natural resources, and to work to achieve and maintain a tree cover, facilitate public participation in management, protection, and conservation of the environment, establish systems of Environmental Impact Assessment, environmental audit and monitoring of the environment, eliminate processes and activities that are likely to endanger environment and natural resources for the benefit of Kenyans.
97. The 2<sup>nd</sup> respondent in paragraph 47 of the affidavit deposes that its obligations in the exploration process under Section 3 of the Petroleum Act in relation to conservation include reviewing applications for license or permits before entering into negotiations in relation to a petroleum agreement, negotiating, entering into, or revoking the petroleum agreement, overseeing upstream petroleum operations, and develop, public and review national polices and strategic plans. Approval exploration activities, suspend, revoke, or terminate petroleum agreements, take action or decision, or give permission or consent or control guard, approve field development plans, order cessation, discontinuance, or review of upstream petroleum operations.
98. The last limb is that the preliminary objection has also raised the issue that the issues raised are academic and not justiciable. Sustainability has been said to be different from merit. In Attorney General - vs- Okoiti & Others Civil Appeal E416 of 2021 [2025] KECA 309 [KLR] (21<sup>st</sup> February 2025) (Judgment), the court held that an issue that was not sustainable merely because it has no merit, while a sustainable issue may also turn out to be unmerited.



99. The court said that would not bar a court from interrogating its merits. The court said that it was not convinced that Article 159(1) of *the Constitution* provides that judicial authority as derived from the people and is vested inter alia in courts and other quasi-judicial bodies.
100. In *Likowa -vs- Aluochier & 2 others* (Petition E008 of 2024) [2025] KESC 25 (KLR) (Election Petitions) (16 May 2025) (Judgment), the court cited *Institute for Social Accountability & Another -vs- National Assembly & Others* Petition No. 1 of 2018 [2022] KESC 39 [KLR] (8<sup>th</sup> August 2022) (Judgment), the court held that a matter is moot when it has no practical significance or when the decision will not have the effect of resolving the controversy affording the rights of the parties before it, and where the decision of the court will have no practical effect on the right of the parties, and that the court will decline to decide on the case.
101. In *Dande & Others -vs- Inspector General, National Police Service & Others* [2023] KESC 40 [KLR], the court held that the doctrine of moot requires that a controversy must exist through judicial proceedings, and that an issue is moot if it will not have the effect of resolving a live controversy affecting or potentially affecting the rights of the parties. The court said that such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. The court said that the doctrine of moot is therefore based on the notion that judicial resources ought to be utilized efficiently and should not be dedicated to an abstract proposition of law, and that courts should avoid deciding on matters that are abstract, academic, or hypothetical, or the review of upstream petroleum operations.
102. The court has set out in extension the replying affidavit of Mr. Moses Mburu, given that it was filed after the preliminary objection dated 17/7/2024 and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' response dated 11/11/2024.
103. For obvious reasons, as can be seen, the affidavit, which is on oath, is in complete variance with both the preliminary objection and the response or particulars as regards the issues on jurisdiction which were captured in the response at paragraphs 7, 8, 8A, and 9.
104. As a starting point, a preliminary objection must not be blurred with factual details liable to be contested and, in any event, to be proved through the processes of evidence. In *Oraro -vs- Mbaja* [2005] 1 KLR 145, the court said that any assertion that 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 that the court should allow to proceed.
105. In *Omondi -vs- National Bank of Kenya & Others* [2001] KLR 579, the court said that in determining a preliminary objection, the court is perfectly at liberty to look at the pleadings and other relevant matter in the record.
106. Jurisdiction is defined as the authority of the court to decide matters that are litigated before it. See *David Ndi & Others -vs- Attorney General & Others, KHRC & Others* [2020] eKLR. In *Black's Law Dictionary*, a matter of law and a matter of fact are defined as a matter involving judicial inquiry into the truth of alleged facts and not the applicable law, respectively.
107. In *Meta Platforms, Inc & 2 others -vs- Motaung & 186 others; Kenya National Human Rights and Equality Commission & 14 others (Interested Parties)* (Civil Appeal E232 & E445 of 2023 (Consolidated)) [2024] KECA 1262 (KLR) (20 September 2024) (Judgment), the court cited *Aviation and Allied Workers Union of (K) -vs- Kenya Airways & Others* [2015] eKLR, that the discerns such a point of law, the court has to be satisfied that there is no proper contest as to the facts and that facts are deemed as agreed as are prima facie presented in the pleadings on record.



108. The court said that the jurisdiction to strike out suits must be exercised sparingly and with circumspection and only where a suit is vexatious, without substance, frivolous, or scandalous. The court cited *DT Dobie & Co. (K) Ltd -vs- Muchina* [1982] KLR 1, that a suit ought not to be summarily dismissed unless it appears so hopeless or weak and beyond redemption or incurable by way of amendments.
109. The court said striking out is a draconian, coercive, and drastic act, which deprives a party of his right to a plenary trial and therefore shall not only be exercised with great care and circumspection, but only in the clearest of cases as regards the facts and the law.
110. The court cited *Gitobu Imanyara & Others -vs- Attorney General* [2016], stating that the primary purpose of a constitutional remedy is to vindicate a guaranteed right and to prevent or deter future infringements.
111. In *Kamau -vs- County Government of Trans Nzoia & Another ELC Petition E003 of 2020* [2025] KEELC 5528 [KLR] (23<sup>rd</sup> July 2025) (Judgment), the court cited *Nicholas -vs- Attorney General & Others* [2023] KESC 113 [KLR] (28<sup>th</sup> December 2023), that the doctrine of exhaustion should not be used to deny claimants seeking constitutional remedies from accessing justice, especially if the alternative forum has no powers to grant constitutional remedies, or if it is in the interest of justice, or it is inadequate to address the issues raised.
112. In this preliminary objection, the court has gone through the issues raised by the petitioners vis-à-vis the responses and the annexures to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents showing the chronology of the events since the conception of the project, issuance of permits, licenses and EIA to the 1<sup>st</sup> respondent to explore for oil and gas presence in the South Lokichar Basin, drilling of 42 wells and the striking of hydrocarbon presence in 13 of them, the preparation of Environmental and Social Impact Assessment, and Environmental Impact Assessment reports, implementation to the project, monitoring and evaluating, public participation, issuance of permits and licenses on hazardous waste disposal, response to concerning by stakeholders including the 2<sup>nd</sup> interested party on behalf of the petitioners, issuance of decision by the 1<sup>st</sup> interested party leading to litigation at the National Environment Tribunal in Appeal No. 13 of 2018, and the filing of a consent and the revocation of the decisions by the 1<sup>st</sup> interested party on 7/8/2018, without consulting the locals and or the 1<sup>st</sup> respondent addressing critical concerns affecting the petitioners generally and in particular the environment, without consulting the locals, and eventually other interventions and negotiations as depicted in the annexures marked MM-(1) - (12).
113. From all these pleadings, it cannot be true, as submitted by the respondents, that the petition is solely or wholly, on permits and licenses which fall under the jurisdiction of both the National Environment Tribunal and Energy and Petroleum Tribunal.
114. Similarly, it cannot be true that the issues raised are moot, academic, and not ripe for the court's determination. This is evident from the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents' own admissions and annexures as the magnitude of the project, being the first of its kind in Kenya and which can be discerned from the annexures by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, require an ongoing monitoring, evaluation, and screening to ensure that there is sustainable exploration, production, storage, transportation, waste management.
115. The issues raised are constitutional and not statutory in nature. They require constitutional resolutions. The National Environment Tribunal and Energy and Petroleum Tribunal lack jurisdiction to determine issues relating to an alleged breach of the constitutional right to a clean and healthy environment.



116. The principle of constitutional avoidance, as held in *Communications Commission of Kenya & Others -vs- Royal Media Services Ltd & Others* [2014] eKLR, applies where a court will not determine a constitutional issue since it can be properly decided on another basis or forum stipulated by statute.
117. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents in paragraphs 37, 38, 39, 40, 41, 42, 43, 44, and 45, generally and in particular paragraphs 46 and 37 of the replying affidavit sworn by Moses Mburu on 13/4/2025, vividly and clearly capture their constitutional obligations as set out in Article 69 of *the Constitution* and Section 3 of the *Petroleum Act* in environmental conservation and exploration of natural resources.
118. With due respect to learned counsel Mr. Odongo, who is an officer of this court, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents represented the State, which has a positive obligation under international and natural laws, in respect of the environment. Article 42 of *the Constitution*, grants this court and not either the National Environment Tribunal or the Energy and Petroleum Tribunal, to redress be approached by the petitioners for legal redress in addition to any other legal remedies available in respect of the same matters, where the right to a clean and health environment is recognized and protected by Article 42 has been, or is likely to be denied, violated, infringed or threatened.
119. In exercising its jurisdiction, the court can prevent, stop, or discontinue any act or omission that is harmful to the environment, compel any public officer to take remedial measures to prevent or discontinue the acts or omission, and provide compensation for any victim of such violation of the right to a clean and healthy environment.
120. Article 70(2)(3) clearly says that an applicant under this Article does not have to demonstrate any personal incurred loss or suffered injuries. More importantly, Article 22 grants the petitioners the right to institute the petition in person, or acting on behalf of others, or as a member of, or in the interest of a group or class of persons, in association or in public interest.
121. The thread running through not only the petitioners' pleadings but also the respondents' responses and the annexures thereto is clear that the issues raised are live, real, apparent, happening, cross-cutting, novel, and live controversies.
122. In *Nicholas -vs- Attorney General* (supra), the apex court was clear that the provisions of the Environmental Management and Coordination Act and the *Energy Act* do not expressly oust the jurisdiction of the Environment and Land Court in respect of the procedure involving the management of the environment or issues of petroleum and energy.
123. The court said that in the ordinary course of events, the Environment and Land Court has original jurisdiction over matters handled by the National Environment Management Authority unless specifically ousted in a constitutionally compliant manner, and so is for proceedings under the *Energy Act*.
124. The apex court was spot on that neither the National Environment Tribunal, Energy and Petroleum Regulatory Authority, nor the Energy and Petroleum Tribunal has jurisdiction to determine an alleged violation of *the constitution*. The court said that the right to access the court for redress of an alleged constitutional violation should not be impeded or stifled in a manner that frustrates the enforcement of judicial rights and freedoms.
125. The court said that the availability of an alternative remedy did not necessarily bar an individual from seeking constitutional relief, especially where the existing alternative means of redress are inadequate, inappropriate, and ineffective.



126. The court emphasized that a nuanced approach should be adopted to the relationship between the constitutional reliefs for violation of rights and alternative means of redress, while considering the specific circumstances of each case to determine the appropriateness of seeking constitutional reliefs.
127. The court said that to achieve a harmonious and effective legal framework, it was imperative to strike a judicious balance between the emphasis on providing the initial opportunity for alternative resolution to entities established by law and the assertion of a litigant's right to access the court.
128. In *Nicholas -vs- Attorney General* (supra), the court said that courts must undertake extensive analysis of facts, the regulatory scheme involved, the nature of the interest involved, and the ability of a statutory forum to determine where exceptions to the doctrine of exhaustion apply.
129. Guided by the reasoning of the apex court, I have carefully considered the pleadings herein, and the predominant complaints and issues raised are, in my view, constitutional and not statutory. The answers cannot be derived from the statutes. The mandate and the jurisdiction to hear and determine the questions, issues, and concerns of the petitioners lie with the Environment and Land Court under Articles 22, 23(3), 42, 69, and 70 of *the Constitution* as read together with Section 13 of the *Environment and Land Court Act*. National Environment Tribunal and the Energy and Petroleum Tribunal have no such mandate or jurisdiction to determine breach of the right to a clean and healthy environment and allied rights in this petition. To strike out the petition will be drastic, draconian, and amount to impeding or stifling the petitioners' right to access the court for the enforcement of their fundamental rights and freedoms.
130. In *William Odhiambo Ramogi* (supra), the court said that where a suit primarily seeks to enforce fundamental rights and freedoms, and it is demonstrated that the claimed constitutional violations are not mere bootstraps, it is not barred by the doctrine of exhaustion, since the enforcement of fundamental rights and freedoms is a question that can only be determined by the High Court.
131. The broader environmental footprint of oil and gas development in Kenya is what the petition is all about. The petitioners invoke the Paris Agreement, the law governing environmental impact assessments, and Environment, Social Impact Assessment, *Climate Change Act* 2016, and the significant effects of the projects. The true scope of the project on the environment is what the petition is all about.
132. The respondents' responses are that they have fully complied with their constitutional and statutory obligations to ensure that there is sustainable exploration, production, and related steps in the oil and gas project in Southern Lokichar.
133. The petitioners, on the other hand, are raising aspects of denial, violation, breach, and infringement of their rights to health and a clean environment, right to life, right to development, breach of social and economic rights, and the denial of the right to access to information on waste management.
134. In *R Finch -vs- Surrey County Council* [2024] UKSC 20, the court said that whether something is an effect of a project is a question of law and not a question of judgment, and the decision maker. The court also looked at the appropriate legal test for answering the question of what the effects of a project are or are not.
135. In this petition, the question of upstream activities, unlike in the *R Finch -vs- Surrey County Council* (supra), on downstream activities, cannot be answered elsewhere but in this court. The 1<sup>st</sup> respondent admits that the project is in line with the IFC Social and Economic Sustainability Standard for Multinational Corporations (MNCS). The same requires the 1<sup>st</sup> respondent to observe ecological and social risks during the life of the project (See IFC Performance Standards April 20<sup>th</sup>, 2006).



136. Article 62(1)(f) of *the Constitution* vests natural resources in the government. Article 60(1) provides that the extraction, processing, and use of resources, including oil and gas, should be equitable, efficient, productive, and sustainable.
137. Article 69(1)(b) outlines the need to ensure the utilization of the resources for the benefit of the public. This includes the locals located in the area of extraction who are the petitioners and the 2<sup>nd</sup> interested parties.
138. Article 66(2) speaks to the benefit that should be obtained by local communities in the course of the extraction of the oil and gas.
139. The National Energy and Petroleum Policy emphasizes the benefits to the local community. The same applies to the local content policy.
140. The *Community Land Act* speaks of the proper administration of community land to give effect to Article 63(3) of *the Constitution* and emphasizes the equitable sharing of the benefits that accrue to investments in natural resources. Sections 3, 6(b), (c), (g), and (b) of the *Community Land Act* speak of agreements between an investor and the community, community participation.
141. Section 9(g) of the *Petroleum Act* 2019 speaks of effective, efficient, and beneficial operations in the exploration, development, contracting, and production of oil and related activities, covering upstream, midstream, and downstream petroleum.
142. Section 2 defines the local community as people living in a subcounty within which a petroleum resource is found. Section 50(2) requires the submission of a local content plan and the training of locals as one of the critical components for local content.
143. Section 18 speaks to a model production sharing contract to benefit the State and its citizens.
144. Section 29 of the *Energy Act* defines local content and local community. It establishes Energy and Petroleum Regulatory Authority, which is responsible for overseeing compliance with local content processes.
145. The *Mining Act* gives effect to Article 66 of *the Constitution*. Section 47 requires that the community must be consulted and informed of the benefits that they will derive from a project, and who must give consent in the form of a written contract before the commencement of the project.
146. The Natural Resources (Classes of Transaction Subject to Ratification) Act 2016. Under Section 3(1), include the extraction of crude oil and natural gas. It demands that before the National Assembly ratifies the transactions, it must first outline the benefits derived from the transactions by the local community.
147. Section 9(1) provides for stakeholders' consultations, including committees living where the mining of a natural resource takes place, being allowed to agitate for their interests to be incorporated in the policies.
148. The foregoing shows that the issues raised by the petitioners cannot fit the description set in paragraph 3 of the replying affidavit of Moses Mburu that "It is a mon-starter, founded on entirely on hearsay, inadmissible material, speculation, non-justifiable issues, academic, or merely a grope in the dark, out of touch, mischievous, baseless, or unfounded, since the 2<sup>nd</sup> and 3<sup>rd</sup> respondents acted and continues to act within the ambits of Articles 42 and 69 of *the Constitution* and the provisions of the *Petroleum Act* and Environmental Management and Coordination Act.



149. As held in Attorney General -vs- Okoiti & 3 Others (supra), though a justifiable issue may well turn out to be unmerited, that does not bar the court from interrogating its merit.
150. The upshot is that the preliminary objection dated 17/7/2024 is not only not a pure point of law, but also incompetent and lacking merits. It is dismissed with costs to the petitioners.
151. Orders accordingly.

**RULING DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALA ON THIS 26<sup>TH</sup> DAY OF NOVEMBER 2025.**

**HON. C.K. NZILI**

**JUDGE, ELC KITALA.**

In the presence of:

Court Assistant – Dennis

Mulekyo Mwariri for Petitioner present

Miss Namuland for the Amicus present

Odongo for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents present

Wambui for the 15<sup>th</sup> respondent present

Ngara for 1<sup>st</sup> Interested Party present

No appearance for the 2<sup>nd</sup> Interested Party

