REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELCLPET NO. E101 OF 2024

ELIJAH MBATHA KITHIMBA.....PETITIONER

VERSUS

THE EXECUTIVE COMMITTEE MEMBER IN CHARGE OF LAND & URBAN PLANNING, NAIROBI CITY COUNTY.....1ST RESPONDENT

NAIROBI CITY COUNTY.....2ND RESPONDENT

NIGEL HAVERGAL SHAW.....3RD RESPONDENT

EASTLANDS COLLEGE OF TECHNOLOGY ENTERPRISES SERVICES LIMITED.....4TH RESPONDENT

AND

NAIROBI PHYSICAL AND LAND USE PLANNING LIAISON COMMITTEE.....INTERESTED PARTY

RULING

1. The 3rd and 4th respondents filed the notice of preliminary objection dated 17th November, 2025 challenging the petition dated 20th December, 2024 on the following grounds:-

i. That this honourable court lacks jurisdiction to entertain the present suit for the reason that the petitioner/applicant herein has failed, ignored, and/or neglected to exhaust the alternative

means of dispute resolution as provided by the Physical and Land Use Planning Act. Consequently, the instant suit is premature, an abuse of court process, vexatious, frivolous and actuated by malice.

2. The preliminary objection was canvassed by way of written submissions. The 3rd and 4th respondents filed their submissions dated 16th February, 2026. The petitioner filed his submissions dated 6th March, 2026. I have considered the preliminary objection and the written submission filed by the respective parties. The issue for determination is *whether the objection ought to be upheld*.

3. Law, J.A. in **Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors (1969) EA 696** stated as follows:-

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration..."

4. Also, the case of **John Musakali vs. Speaker County of Bungoma & 4 others (2015) eKLR,** it was held that: -

> ***"The position in law is that a preliminary objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the preliminary objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable preliminary objection on a point of law."***

5. Further, Ojwang J (As he then was) in **Oraro -vs- Mbaja (2005) KLR 141** where after quoting the statement of Law, JA. in the Mukisa Biscuits case (supra) went on to state that:-

> ***"A 'preliminary objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, 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. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point….***

> ***Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence…"***

6. From the above cited authorities, it is clear that for a preliminary objection to succeed, the same must consist of a pure point of law, with the facts not disputed by the opposing party. Also, a preliminary objection should possess the ability to dispose of the issue that is before court without going to trial and lastly, the same ought to stem from and not outside of pleadings.

7. In their written submissions, the 3rd and 4th respondents argued that the suit is premature as the petitioner has failed to exhaust the available procedures under the **Physical and Land Use Planning Act, Cap 303 Laws of Kenya**. In a bid to establish whether these facts are correct, the court will be confined to the pleadings only and nothing outside of that.

8. The petitioner filed the petition dated 20th December, 2024 seeking the following reliefs against the respondents:-

> ***a. A declaration be and is hereby issued that the respondents' acts of refusing to provide copies of applications and supporting documents,***

copies of minutes of the decision and building plan approvals and other documents duly requested concerning property Nairobi/Block 60/450 constitutes a violation of the petitioner's right to access to justice and right to fair administrative action.

b. A declaration be and is hereby issued that the 1st and 2nd respondents' alleged building approvals and or permissions in respect of property Nairobi/Block 60/450 are illegal, unprocedural and unreasonable.

c. A declaration is hereby issued that the 1st and 2nd respondents' purported building plan approvals and/or permission in respect of property Nairobi/Block 60/450 violate, deny, threaten and infringe on the petitioner's rights under Articles 31,42,47,48,60 and 70 of the Constitution of Kenya.

d. A declaration be and is hereby issued that the 1st and 2nd respondents' purported and/or alleged building plan approvals and permissions in respect of property Nairobi/ Block 60/450 violate Article 10 of the Constitution of Kenya and the rule of law, public participation, integrity, transparency and accountability.

e. An order of permanent injunction be and is hereby issued restraining and/or stopping all

development activities pursuant to the complained of application for development permission and any other covert permission and/or approval issued in respect of property Nairobi/Block 60/450.

f. An order be and is hereby issued prohibiting the respondents from issuing any planning permission contrary to the developments in the area and contrary to the Physical and Land Use Planning Act, No. 13 of 2019 and that all developments on the property Nairobi/Block 60/450 be in line with the developments in the neighbourhood.

g. Any other orders and/reliefs that the honourable court deems fit to issue.

h. Costs of the petition.

i. Interest on costs from the date of judgment till payment in full.

9. The facts as relied on in the petition are as follows:-

"8. The petition concerns the 3rd Respondent's attempts, in collusion and conspiracy with the 1st and 2nd respondents, to construct a storey apartment development on plot less than half an acre, within a community where development is

controlled and limited to single dwelling houses not exceeding one storey building and next to strategic installation in clear violation of all applicable development laws and previous decisions, which acts threaten the constitutional and other rights of the petitioner and other residents in the gated community.

9. ***The 1st, 2nd and 3rd respondents' development approvals, if any, are being undertaken in an opaque and clandestine manner, contrary to the law and hence in violation of the 2nd Respondent's constitutional duty under Article 186 (I) read together with Section 8 of Part Two of the Fourth Schedule of the Constitution, which acts violate the Petitioner's rights to privacy under Article 31 of the Constitution, right to clean and healthy environment under Article 42 of the Constitution, 69 and 70 of the Constitution, right to fair administrative action and that is expeditious, efficient, lawful, reasonable and procedurally fair under Article 47 of the Constitution and the right to access to justice under Article 48 of the Constitution.***

10. ***lt is not in dispute that the Petitioner is the registered proprietor of Nairobi/Block 60/451 , a property adjoining and sharing a common boundary and wall with Nairobi/Block 60/450. The Petitioner has, in compliance with development approvals, erected a single dwelling residence in line with the user of the parcel of***

land and those other parcels in the area, where the residents have resided in peace and tranquility for over 3 decades, and the area has always housed low density single dwelling residences and gated communities not exceeding one storey and proper spacing between the walls in the neighbourhood.

11…

12. The Petitioner confirms that there has never been any on-site notice of the proposed or approved change of user or any development approval, and the revelation that there was indeed a purported change of user and approvals on the development took the petitioner by shock, surprise and awe.

13. Aggrieved by the proposed development of the high density apartment on the tiny plot, the Petitioner wrote a letter cum demand to the 3rd Respondent and copied the other Respondents objecting to the developments and calling for the all the approvals on the proposed developments. The objection was based on:-

i. The proposed development would lead to a serious invasion and breach of privacy and security for the Petitioner as the windows would be looking directly into the compound and house of the Petitioner and any object thrown from the windows or

balconies are likely to litter and damage the Petitioner.

ii. ***The windows have been designed to face the Petitioner's residence and thus the same amounts to serious invasion of privacy of the Petitioner since the spacing between the two buildings is less than 800 centimetres against the stipulated regulations and policies.***

iii. ***The proposed development approvals were granted without consideration of Section 58 of the Physical Planning and Land Use Act 2019 which calls for a notice to issue to members of the public on the developments as the petititoner's take and consideration was never put in place as required by the law.***

iv. ***The 3rd Respondent failed to provide the Petitioner with sketch of the building elevation so that in filling the Environmental Assessment Form, the Petitioner would then be able to know whether the windows of the development are facing directly into the Petitioner's residence.***

v. ***There be no zoning policy that every tiny plot of less than half an acre in the area should be converted into a village of tenements and overcrowded apartment which are intended to accommodate over 100 people.***

14. ***By the letter dated 13th December, 2024, the Petitioner requested to be supplied with copies of all the applications and approvals with regards to the complained development and any development approvals granted, including minutes of that decision and all documents related thereto. None has been provided to date. The 3rd Respondent has instead opted to continue with the development and construction works without considering the concerns of the Petitioner.***

15. ***The letter dated 13th December, 2024 did not elicit any response not even the courtesy of acknowledgment from the 3rd Respondent and all the other Respondents. Despite the demand letter dated 13th December, 2024, the 3rd and 4th Respondents have continued with the project without due consideration of the rights of the Petitioner…***

22. ***All requests to the 3rd Respondent to provide documents and explain the circumstances that the approvals for the proposed development were granted in favour of land parcel number Nairobi/Block 60/450, remain unanswered, not to mention that the Petitioner and neighbours have never been given an opportunity to make comments and/or object to the developments, which will definitely change the general physical characteristics of the area and put a strain on***

<u>the basic amenities</u>. This changes the character in the area and immensely devalues the property of the Petitioner."

10. The 3rd and 4th respondents submitted that the petitioner was required to first lodge an appeal against the issuance of the development permit by the 2nd respondent with the Nairobi county physical and land use planning liaison committee, the interested party. To buttress on this issue, they relied on the cases of **Mutanga Tea & Coffee Company Ltd v Shikara Limited & Municipal Council of Mombasa [2015] KECA 469 (KLR)** and **Ndiara Enterprises Ltd v Nairobi City County Government [2018] KECA 825 (KLR)**.

11. In opposition thereto, the petitioner argued that this court has the original jurisdiction to hear and determine matters related to land and environment and invoking **Section 72 (3)** of the **Physical and Land Use Planning Act** is a mockery to this court's jurisdiction. Further, that the said provision is curved out in a manner that can only entertain a person who has been accorded the latitude and luxury of time. The petitioner further submitted that the issues in this petition look into very crucial sacrosanct rights which require urgent resolution.

12. A careful analysis of the facts of the petition and the prayers sought reproduced above reveals that the petitioner is displeased with the way the 3rd respondent has undertaken the construction of his project which is adjacent to his property. He alleges that he wrote a demand letter to the 3rd respondent to supply the relevant information which elicited no response. Looking at the facts as pleaded in the petition, the available remedy would lie with the interested party which has the mandate to hear and determine such disputes. The functions of the county physical and land use planning liaison committee are outlined under **Section 78** of the **Physical Land Use and Planning Act** which provides as follows:-

> ***"(a) hear and determine complaints and claims made in respect to applications submitted to the planning authority in the county;***
>
> ***(b) hear appeals against decisions made by the planning authority with respect to physical and land use development plans in the county;***
>
> ***(c) advise the county executive committee member on broad physical and land use planning policies, strategies and standards; and***
>
> ***(d) hear appeals with respect to enforcement notices."***

13. In the case of **William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020] eKLR**, the court stated as follows:-

> ***"The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. This encourages alternative dispute resolution mechanisms in line with article 159 of the Constitution and was aptly elucidated by the High Court in R v Independent Electoral and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, where the court opined thus:***
>
> ***This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 in the following oft-repeated words:Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to***

since there are good reasons for such special procedures.

While this case was decided before the Constitution of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine. This is Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR, where the Court of Appeal stated that:It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews…The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The ex parte applicants argue that this accords with article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution."

14. While this court retains jurisdiction to hear and determine constitutional issues concerning environment and land matters, the same jurisdiction is restrained where there exists alternative authorities which have been bestowed with the mandate to determine disputes such as in this petition. Before approaching this court, it is necessary that the petitioner first exhausts the remedies provided under **Section 78** of the **Physical Land Use and Planning Act**.

15. From the above, I find merit in the notice of preliminary objection dated 17th November, 2025, and it is hereby upheld. The petition dated 20th December, 2024 is hereby struck out. I make no orders as to costs.

It is so ordered.

DATED, SIGNED & DELIVERED VIRTUALLY
THIS 22ND DAY OF APRIL, 2026.

HON. MBOGO C.G.
JUDGE
22/04/2026.

In the presence of:
Ms. Benson Agunga - Court assistant
Ms. Mweru holding brief for Mr. Kabiru for the 3rd and 4th Respondnets
Ms. Karanja for the 1st and 2nd Respondents
No appearrance fo rthe Petitioner