

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC PETITION NO. E007 OF 2025

RAPHAEL KIPYEGON NG'ETICH KUNAH.....
PETITIONER

VERSUS

EVERGREEN TEA FACTORY LTD.....
RESPONDENT

RULING.

Introduction.

- 1.** This ruling is in respect of the Petitioner/Applicant's Notice of Motion application dated 18th June, 2025. The application is expressed to be brought under **Articles 21, 22, 23, 40, 42, 43, 70, 159 (2)(d) & 165 (3)(d)** of the Constitution of Kenya and **Rules 3, 4, 23 & 24** of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

- 2.** The application seeks the following orders;

a. Spent

b. Spent

c. That pending the hearing and determination of this Petition, an interim order of temporary injunction be issued restraining the Respondent, acting through its agents, servants, hoodlums, employees or through anybody acting on the authority of its directors from trespassing, discharging toxic waste water from the factory or in any way dealing and/or interfering with the Petitioner's use and quiet enjoyment of the parcel of land known as Kericho/Manaret S.S/193.

d. That this Honourable Court be pleased to certify that this petition raises weighty constitutional issues on violation of fundamental rights and freedoms specifically Articles 40, 42 and 43 of the Constitution of Kenya, 2010 and that the same should proceed to hearing and determination of the main petition on a priority basis.

e. That the costs of this application be provided for.

3. The application is based on the grounds on its face and the supporting affidavit of the Petitioner/Applicant which is sworn on 18th June, 2025.

Factual Background.

4. The Petitioner/Applicant commenced the present proceedings vide the Petition dated 18th June, 2025 where he seeks the following prayers;

a. A declaration that the acts of the Respondent of dumping excavated soil and debris from its factory, digging of quarry pits and taking of murram and stones from the Petitioner's property was illegal, unconstitutional and violated the Petitioner's right to own property.

b. A declaration that the act of trespassing onto the Petitioner's property being Kericho/Manaret S.S/193 is a gross violation of the Petitioner's right as guaranteed under

Article 40 of the Constitution of Kenya, 2010.

c. A declaration that the Petitioner's right to a clean and healthy environment as well as the right to clean and safe water in adequate quantities as guaranteed by Article 42 and 43(1)(d) of the Constitution of Kenya, 2010 have been violated by the acts of the Respondent.

d. An order of permanent injunction restraining the Respondent by itself, agents, servants, hirelings working under the authority of its directors from invading, further trespassing, interfering with, or continuing to interfere with the quiet and peaceful enjoyment, possession, use and/or any dealing of the Petitioner's property being Kericho/Manaret/S.S/193.

e. A declaration that the Respondent is liable to compensate the Petitioner for the unlawful trespass and destruction of the Petitioner's property which include digging quarry

pits and depositing toxic waste water onto his parcel of land in the sum of Kshs. 21,387,500.

f. An order for compensation to the Petitioner for loss of eucalyptus trees and loss of the fish fingerlings in the sum of Kshs. 8,000,000.

g. An order do issue directing the Respondent by its servants or agents to remove all deposits of waste water, soil and other debris deposited on the Petitioner's land being Kericho/Manaret/ 8.S/193 and to restore the land to the original state it was in before the Respondent committed acts of trespass thereon, within 60 days of the judgment.

h. General, exemplary and punitive damages.

i. Any other relief that the Court deems just to grant.

j. Costs be provided for.

5. The Respondent filed a response to the petition. The Replying Affidavit is sworn on 26th September, 2025 where it

denies the averments in the Petition and seeks that the Petition be dismissed with costs.

6. The application under consideration first came up for hearing on 17th July, 2025 when the Court gave directions that it be served upon the Respondent.
7. On 30th September, 2025, the Court issued directions that the application be canvassed by way of written submissions.
8. It was mentioned severally to confirm filing of submissions and on 26th January, 2026 it was reserved for ruling.

The Petitioner/Applicant's Contention.

9. The Petitioner/Applicant contends that he is the registered owner of land parcel No. Kericho/Manaret/S.S/193 which measures 2.5 Ha and adds that he was issued with a title deed on 26th September, 2005.

- 10.** He also contends that in the year 2018, the Respondent constructed a factory which manufactures and processes tea on the parcel of land adjacent to his land.
- 11.** He further contends that in the course of the construction, the Respondent trespassed onto his parcel of land and begun dumping excavated soil and debris without his authority.
- 12.** It is his contention that he asked them to stop the said dumping but they ignored his pleas. He goes on to state that this has caused significant damage on the suit parcel of land wherein he used to plant maize and other farm produce.
- 13.** It is also his contention that the Respondent further trespassed onto his parcel of land and dug quarry pits before extracting murram and stones. He goes on to state that this was done without his authority and his land was left in a state that he cannot utilize.

- 14.** It is further his contention that the Respondent cut down approximately 3000 eucalyptus trees that he had planted on the suit parcel of land without his consent and as a result, he has suffered a significant loss.
- 15.** He contends that after the factory was constructed, the Respondent directed its toxic water waste onto the suit parcel of land.
- 16.** He also contends that the said water contains toxic chemicals which have resulted in the loss of fish fingerlings valued at kshs. 2,000,000/= and goes on to explain that the fingerlings were donated to him by a company known as Sustainable Alternative Agricultural Technologies.
- 17.** He further contends that the Respondent also blocked the natural flow of a river that cuts through his parcel of land.

- 18.** It is his contention that the Respondent has discharged chemicals onto the suit parcel of land which has rendered the water in the river unsafe.
- 19.** It is also his contention that he instructed Keriasek & Co. Ltd to conduct an assessment to show the extent of the loss that he continues to suffer.
- 20.** It is further his contention that a report was prepared which shows that he continues to suffer a loss of Kshs. 21,387,500/= as a result of the dumping of the debris, digging of quarry pits and the cost of murram and stones that were extracted from his land.
- 21.** The petitioner/Applicant contends that he instructed Emerald Environment Limited to take samples from his parcel of land to the laboratories to determine whether there were toxic chemicals in the soil. He goes on to state that a report was thereafter prepared and it confirmed his suspicions.

- 22.** He also contends that despite requesting the Defendant's directors to desist from their unlawful activities, they have continued to show no regard for his rights as provided for under **Articles 40** and **42** of the Constitution of Kenya. He goes on to state that the discharge of toxic water to the river in addition to blocking the river has deprived him off his right to clean and safe water as provided for under **Article 43(1)(d)** of the Constitution of Kenya.
- 23.** He further contends that the Respondent's Directors have allowed their employees to trespass onto the suit parcel of land where they dump debris and waste products from the construction site of the factory without regard to his right to property.
- 24.** He contends that he wrote a letter to the National Environment and Management Authority and complained of the atrocities visited upon his land by the Respondent.

- 25.** It is his contention that the said letter was copied to the County Government of Bomet and the Respondent herein but no action was taken by the National Environment and Management Authority.
- 26.** It is also his contention that the Respondents agents and/or servants have deliberately made it impossible for him to enjoy his property.
- 27.** It is further his contention that the Respondent's agents and/or servants ought to have deposited the soil and/or debris from their factory to other places other than his land.
- 28.** He contends that the Respondent's agents and/or servants should be compelled to restore his land to its previous state so that he can utilize it.
- 29.** He also contends that there are sites where murrum and stones ought to have been dug from which sites do not include his property.

30. He further contends that the Respondent should be compelled to compensate him for the 3000 eucalyptus trees that were cut down.

31. It is his contention that he has come before this Court to seek orders to protect his rights, prevent further damage to his property and to hold the Respondent accountable for his unlawful actions.

32. He ends his deposition by stating that unless this Court intervenes and grants the orders sought, he will continue to suffer irreparable harm including further destruction of his property and environmental degradation which is irreversible.

The Respondent's Response.

33. In response to the Petitioner/Applicant's application, the Respondent filed a Replying Affidavit sworn on 26th September, 2025.

- 34.** The Replying Affidavit is sworn by **Amit Shah** one of the Directors of the Respondent.
- 35.** He deposes that the Petitioner/Applicant's application is based upon the contention that the Respondent continues to commit acts of environmental degradation by discharging toxic waste onto the suit parcel of land.
- 36.** He also deposes that the Environmental Management and Co-ordination Act provides for the appropriate legal and institutional framework to deal with the issues raised in the Petition.
- 37.** He further deposes that **Section 58**, the Environmental Management and Co-ordination Act makes it mandatory for the Respondent to obtain a License because of the magnitude of its operations.
- 38.** It is his deposition that the Environmental Management and Co-ordination Act provides for mechanisms to protect the public.

39. It is also his deposition that **Section 31** of the Environmental Management and Co-ordination Act establishes a committee to investigate complaints.

40. It is further his deposition that part VII of the Environmental Management and Co-ordination Act provides that after licensing has been done, licensed entities including the Respondent are monitored and Environmental audits done.

41. He deposes that Part VII of the Environmental Management and Co-ordination Act establishes the Standards and Enforcement Review Committee whose functions are provided for under Sections **71(h) & 71(i)** and goes on to state that they are required to document the analytical methods by which the water quality and pollution control standards are determined.

42. He relies on **Section 91(1)(f)** and Part IX of the Environmental Management and Co-ordination Act and

deposes that where there is a clear procedure for redress prescribed by the Constitution and/or an Act of Parliament, then it should be followed.

- 43.** He also deposes that he has been advised by his advocates on record that litigants and their advocates came up with multifaceted claims in order to confer jurisdiction on a Court of law to oust the jurisdiction of quasi-judicial bodies such as those established under the Environmental Management and Co-ordination Act.
- 44.** He further deposes that the Petitioner/Applicant has sidestepped all the prescribed procedures and has filed the Petition prematurely.
- 45.** It is his deposition that the Petition does not raise constitutional issues and before its filing, the Petitioner/Applicant filed Sotik CM ELC Case No. 1 of 2020.

- 46.** It is also his deposition that the said filing confirmed that his grievances could be pursued in an ordinary suit as opposed to a Constitutional Petition.
- 47.** It is further his deposition that he tried to transfer the said suit to this Court by filing Kericho ELC Misc. Application No. E017 of 2024. He goes on to state that after the Petitioner/Applicant lost his bid to transfer the said suit, he filed the present petition.
- 48.** He deposes that the Petitioner/Applicant is abusing the Court process.
- 49.** He also deposes that the Respondent is discharging treated waste onto land parcel No. **Kericho/Manaret/S.S/1195**.
- 50.** He further deposes that the Respondent is issued with annual licenses by the National Environment Management Authority and goes on to state that before the said licenses are issued, annual audits are undertaken and submitted to the National Environment Management Authority.

- 51.** It is his deposition that if at all the Petitioner/Applicant's contentions were true, then they would have been addressed in the audits that are submitted to the National Environment Management Authority.
- 52.** It is also his deposition that before the factory was established, an Environmental Impact Assessment Study was conducted and waste disposal was one of the parameters that was covered.
- 53.** It is further his deposition that the issuance of the license is based upon the promise that waste management measures are put in place to prevent environmental degradation.
- 54.** He deposes that the National Environment Management Authority has certified the Respondent's operations as statutorily compliant and if at all the Petitioner/Applicant has grievances, then they ought to be raised before the Authority.

- 55.** He reiterates that the Respondent does not discharge toxic waste onto the suit parcel of land and deposes that if that were true, then the neighboring parcel of land would have been affected given the daily production at the factory.
- 56.** He also deposes that the Respondent does not require the suit parcel of land for any purpose and if at all the Respondent was guilty of the issues raised by the Petitioner/Applicant, then members of the community would have lodged complaints.
- 57.** He further deposes that he has attached to the Affidavit in Reply, affidavits sworn by the Petitioner/Applicant's siblings who confirm that the Respondent is innocent of the allegations cast against it. He goes on to state that the Petitioner/Applicant's siblings are **Dennis Ngetich** and **Dominic Ngetich**.

- 58.** It is his deposition that the Respondent did not dump the excavated soil on the suit parcel of land. He goes on to state that the soil it excavated was transported to neighboring parcels of land to persons who needed to backfill their properties.
- 59.** It is also his deposition that the Respondent did not dig a quarry on the suit parcel of land and adds that it was the Petitioner/Applicant who dug a quarry on the suit parcel of land and sold the material that was excavated to members of the public.
- 60.** It is further his deposition that the Respondent did not cut down the Petitioner/Applicant's eucalyptus trees and adds that the Respondent obtains its firewood from its suppliers.
- 61.** He deposes that the Respondent did not block the flow of the river as alleged and if at all that was true, then there would have been complaints and prosecution as it is a criminal offence.

- 62.** He also deposes that the Respondent did not kill any fingerlings on the suit parcel of land as alleged as it has never discharged untreated waste into the suit parcel of land.
- 63.** He further deposes that the Petitioner/Applicant's letter that was allegedly sent to the National Environment Tribunal and copied to the County Government of Bomet is a ruse crafted to hoodwink the Court into believing that he approached the Tribunal.
- 64.** It is his deposition that the purported letter only serves to highlight the Petitioner/Applicant's mischief and raises questions as to the bonafides of his claims.
- 65.** It is also his deposition that he has attached photographs he took on 26th August, 2025 of the lagoons on land parcel No. Kericho/Manaret/S.S/1195 where the Respondent is discharging treated water waste.

- 66.** It is further his deposition that there is a wall constructed around land parcel No. Kericho/Manaret/S.S/1195 and there is therefore no water runoff.
- 67.** He deposes that from the said pictures, the vegetation and trees around the lagoons are vibrant and healthy which would not have been possible if the discharge contained toxic matter.
- 68.** He also deposes that the lagoons were constructed on the said parcel of land as part of the Respondent's waste water treatment plans that were prepared at the time of licensing of the construction of the factory.
- 69.** He further deposes that as part of the statutory compliances, the waste water must conform to the prescribed statutory standards. He goes on to state that the Respondent has always complied with the said requirements.

- 70.** It is his deposition that he has attached a bundle of Water Quality Certificates which confirm that the waste water being discharged meets the established safety standards since the year 2017.
- 71.** It is also his deposition that the Respondent has met all the prescribed Water Quality Standards as prescribed by the Kenya Bureau of Standards for enforcement by the National Environment Management Authority.
- 72.** It is further his deposition that it is a criminal offence for the Respondent to discharge untreated water waste.
- 73.** He deposes that there is no explanation why the Petitioner/Applicant has not approached the National Environment Management Authority or the police to air his grievances.
- 74.** He also deposes that there is no evidence that the local administration is aware of the Petitioner/Applicant's

complaints and therefore his application is an afterthought and has been brought in bad faith.

- 75.** He further deposes that the Petitioner/Applicant did not seek an injunction when he filed Sotik CM ELC Case No. 1 of 2020 and he is therefore guilty of laches for seeking the injunction years later.
- 76.** It is his deposition that the facts presented by the Petitioner/Applicant in the present suit are at variance with the facts pleaded in Sotik CM ELC Case No. 1 of 2020.
- 77.** It is also his deposition that the suit parcel of land is surrounded by other properties and is at a low altitude area. He goes on to state that water from the said properties ends up on the suit property which is a fact that is well within everyone's knowledge.

78. It is further his deposition that no logical explanation has been given for the Petitioner/Applicant singling out the Respondent.

79. He ends his deposition by urging the Court to strike out and/or dismiss the Petition and the application under consideration.

The Petitioner/Applicant's Response.

80. In response to the Respondent's Replying affidavit, the Petitioner/Applicant filed a Supplementary Affidavit sworn on 15th October, 2025.

81. He deposes that the Respondent has not disputed that it is discharging waste water onto his parcel of land and it is therefore violating his rights under **Articles 40** and **42** of the Constitution of Kenya.

- 82.** He reiterates that he wrote a letter to the National Environment Management Authority dated 20th July, 2018 which letter did not elicit any response.
- 83.** He also deposes that waste from the Respondent's parcel of land continues to be discharged onto his parcel of land.
- 84.** He reiterates the averments in his affidavit in support of the application and deposes that his family members cannot bring a claim of infringement of his rights since he is the registered owner of the suit parcel of land.
- 85.** It is his deposition that the fact that the water discharged from the Respondent's factory is treated does not give the Respondent the right to discharge it onto his parcel of land.
- 86.** It is also his deposition that the Respondent should be barred from discharging the said waste onto the suit parcel of land as he has a right to a clean and healthy environment.

- 87.** It is further his deposition that he is advised by his advocates on record that under **Article 162 (2)(b)** of the Constitution, this Court has jurisdiction to hear and determine disputes relating to the environment, use and occupation of land.
- 88.** He deposes that this Court is given a mandate under **Articles 23(1)** and **70** of the Constitution of Kenya to give a remedy in case of breach of the right to a clean healthy environment as provided for under **Article 42** of the Constitution. He goes on to state that the Respondent cannot therefore claim that the Court does not have jurisdiction to hear and determine the Petition.
- 89.** He also deposes that the National Environment Management Authority cannot determine a dispute on infringement of his constitutional rights.
- 90.** He ends his deposition by urging the Court to allow his application as the Respondent does not deny discharging waste onto the suit parcel of land.

Issues for Determination.

- 91.** The Petitioner/Applicant filed submissions on 24th October, 2025 while the Respondent filed submissions on 24th November, 2025.
- 92.** The Petitioner/Applicant submits on the following issues;
- a. *Whether the Petitioner/Applicant has met the conditions requisite for grant of the orders of interim injunction.***
 - b. *Whether the Petition raises issues of violation of fundamental rights and freedoms under Articles 40, 42 and 43 of the Constitution of Kenya.***
- 93.** The Petitioner/Applicant reiterates the averments in his affidavit in support of the application and while relying on the judicial decisions of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] eKLR, Nguruman Limited vs Jan Bonde Nielson & 2 Others [2014]eKLR**, submits that the Respondent has violated his rights by discharging waste water onto his parcel of land.

94. It is the Petitioner/Applicant's submissions that he has attached photographs to his supplementary affidavit that show a ditch that has been dug from the Respondent's factory where water flows up to his parcel of land.
95. It is also the Petitioner/Applicant's submissions that the said water flow does not leave the land and it instead stagnates in areas where the Respondent excavated stones and murrum.
96. It is further the Petitioner/Applicant's submissions that he has therefore established a *prima facie* case.
97. The Petitioner/Applicant relies on the judicial decision of **Waithaka vs Industrial and Commercial Development Corporation [2001] eKLR** and submits that he is the registered owner of the suit parcel of land.

- 98.** The Petitioner/Applicant reiterates that he did not allow the Respondent to discharge water waste onto the suit parcel of land and neither does the contention that the water is treated, warrant the Respondent to discharge it.
- 99.** The Petitioner/Applicant submits that he has attached photographs that show the state of the suit parcel of land which has stagnant water and uneven ground.
- 100.** The Petitioner/Applicant also submits that damages cannot serve as an adequate remedy for the injury inflicted on his parcel of land.
- 101.** The Petitioner/Applicant further submits that he will suffer irreparably if the injunctive reliefs will not issue.
- 102.** It is the Petitioner/Applicant's submissions that the balance of convenience tilts in his favour.

103. It is also the Petitioner/Applicant's submissions that if the injunction sought is not granted, then he will be deprived of his legal right to a clean and healthy environment as the waste water will continue being discharged onto the suit parcel of land.

104. It is further the Petitioner/Applicant's submissions that the Respondent will not suffer any prejudice if the orders sought are granted.

105. On the second issue, the Petitioner/Applicant reiterates the averments in his Affidavit in support of the application and submits that his Petition raises grave violations of his fundamental rights and freedoms as provided for under the Constitution.

106. The Petitioner/Applicant concludes his submissions by urging the Court to allow his application as prayed.

107.The Respondent reiterates the averments of its Director as set out in the Replying Affidavit and while relying on **Article 159 (2) (c)** of the Constitution of Kenya, the judicial decisions of **Mutanga Tea & Coffee Company Ltd v Shikara Limited & Another [2015] eKLR, Speaker of the National Assembly v James Njenga Karume [1992]eKLR, Kones V. Republic & Another Ex Parte Kimani Wa Nyoike & 4 Others (2008) 3 KLR (ER) 296** submits that where a specific dispute resolution mechanism is prescribed by the Constitution and/or statute, an aggrieved party should exhaust the said mechanism before invoking the inherent jurisdiction of the High Court (sic).

108.The Respondent relies on **Article 165 (3)(a)** of the Constitution of Kenya, the judicial decision of **Rich Productions Ltd vs Kenya Pipeline Company & another Petition No. 173 of 2014, Republic vs National Environmental Management Authority CA No. 84 of 2010, Vania Investment Pool Ltd vs Capital Markets Authority & 8 Others CA No. 92 of 2014** and submits

that failure to follow the prescribed dispute resolution mechanism is not a mere technicality that is curable under **Article 159 (2) (d)** of the Constitution of Kenya.

109. The Respondent relies on the judicial decisions of **Kibos Distillers Limited & 4 Others vs Benson Ambuti Adegga & 3 Others [2020]eKLR, Geoffrey Muthinja & another vs Samuel Muguna Henry & 1756 Others [2015]eKLR** and submits that this Court does not have jurisdiction to hear and determine the Petition.

110. It is the Respondent's submissions that the Petition herein does not raise constitutional issues.

111. The Respondent reiterates the averments in its Replying Affidavit, relies on the judicial decisions of **Benard Murage vs Fine Serve Africa Limited & 3 Others [2015] eKLR** and **Meme vs Republic [2004]eKLR** as was cited in **Japheth Ododa Origa vs Vice Chancellor University of Nairobi & 2 Others [2018] eKLR** and submits that the

Petitioner/Applicant has not explained what changed to warrant the transmutation of his claim into a constitutional petition after filing a civil suit that was pending in Court for many years.

112. It is the Respondents submissions that if the Petitioner/Applicant had genuine grievances, then he ought to have pursued his claim before the National Environment Management Authority which is the agency that is legally charged with environmental management.

113. It is also the Respondents submissions that there is no *prima facie* evidence that shows that it is engaging in the activities that are alleged by the Petitioner/Applicant.

114. The Respondent relies on **Order 40 Rule 1(1)(a)** of the Civil Procedure Rules, the judicial decision of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KECA 175 (KLR)** and submits that the Petitioner/Applicant does

not have a *prima facie* case as this Court lacks jurisdiction to entertain the Petition.

115. The Respondent reiterates that the dispute herein has been presented before the wrong forum given the provisions of the Environmental Management and Co-ordination Act.

116. The Respondent submits that the Petitioner/Applicant has not created a nexus between the suit parcel of land and land parcel No. 1195 where it discharges waste water.

117. The Respondent also submits that the actions it allegedly committed which are sought to be injuncted have already occurred as per the pleadings and therefore there is nothing left to injunct.

118. The Respondent further reiterates the averments in its Replying Affidavit, relies on the judicial decisions of **Nguruman Limited vs Jan Bonde Nielson & 2 Others [2014] KECA 606 (KLR), Kenya Commercial Finance**

Co. Ltd vs Afraha Education Society [2001] Vol. EA 86

and submits that there are three pillars on which rest the foundation of any order of injunction.

119. The Respondent submits that the three pillars are conditions that are to be applied as separate, distinct and logical hurdles which an Applicant is expected to surmount sequentially.

120. The Respondent also submits that the establishment of a *prima facie* case is not sufficient basis for a Court to grant an interlocutory injunction.

121. The Respondent further submits that the Court must be satisfied that the injury that is likely to be suffered, in the event an injunction is not granted, will be irreparable.

122. The Respondent submits that if damages recoverable in law is an adequate remedy and a Respondent is capable of paying, no interlocutory injunction can be granted however

strong an Applicant's claim may appear to be at that stage of the proceedings.

123. It is the Respondent's submissions that if a party fails to establish a *prima facie* case, then the Court need not consider irreparable injury and balance of convenience.

124. It is also the Respondent's submissions that the burden of proving irreparable injury is on an Applicant who must demonstrate *prima facie* the nature and extent of the injury.

125. It is further the Respondent's submissions that speculative injury will not do.

126. The Respondent submits that there must be more than unfounded fear and/or apprehension on the part of an Applicant.

127. The Respondent also submits that the equitable remedy of temporary injunction is issued solely to prevent grave and

irreparable injury that cannot be adequately compensated by an award of damages.

128. The Respondent further submits that an injury is irreparable where there is no standard by which the amount can be measured with reasonable accuracy.

129. The Respondent relies on the judicial decisions of **American Cyanamid Co. vs. Ethicon Ltd [1975] AC 396**, **Ramanial Trambaklal Hatt vs Republic [1975] EA 332**, **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**, reiterates that the activities complained of occurred in the year 2018 and submits that the Petitioner/Applicant did not seek an injunction in the previously instituted suit.

130. It is the Respondent's submissions that the Petitioner/Applicant has not surmounted the legal hurdles required in order for the Court to issue an order of injunction.

131. The Respondent then submits that the balance of convenience militates against granting an injunction.

132. The Respondent concludes its submissions by urging the Court to strike out the Petition for offending the provisions of the Environmental Management and Co-ordination Act together with the application under consideration.

Analysis and Determination.

133. I have considered the Petitioner/Applicant's application, the response thereto, the Supplementary Affidavit and the rival submissions. It is my view that the following issues arise for determination;

a. *Whether this Court has jurisdiction to hear and determine the Petition and the Petitioner/Applicant's application.*

b. *Whether the Petitioner/Applicant has met the criteria for grant of an order of temporary injunction pending the hearing and determination of this petition.*

c. Who should bear the costs of the application.

A. Whether this Court has jurisdiction to hear and determine the Petition and the Petitioner/Applicant's application.

134. The Respondent contends that the issues raised by the Petitioner/Applicant in the Petition and the application under consideration relate to alleged discharge of effluent from its factory to the Petitioner/Applicant's parcel of land.

135. The Respondent also contends that the Environment Management and Co-ordination Act provides for the institutional framework to resolve any such issues.

136. The Respondent further contends that the National Environment Management Authority is established under the said Act and the Petitioner/Applicant ought to have approached it before coming to Court.

137. The Respondent submits that where a statute provides for a dispute resolution mechanism, the said mechanism has to be exhausted before a party approaches the Court.

138. The Petitioner/Applicant on the other hand contends that he has raised issues of infringement of his rights to a clean and healthy environment which issues the National Environment Management Authority does not have jurisdiction to hear and determine.

139. The Supreme Court in **Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) [2023] KESC 113 (KLR)** held as follows;

“91. On our part, in NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae) (Petition 16 of 2019) [2023] KESC 17 (KLR) (Constitutional and Human Rights) (24 February 2023) (Judgment) (NGOs Co-ordination

Board) we outlined the doctrine of exhaustion of administrative remedies and adopted our finding in *Albert Chaurembo Mumbo & 7 others v Maurice Munyao & 148 others*; SC Petition No 3 of 2016, [2019] eKLR where we held that:

“...even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.”

92. In the above decision, we furthermore emphasized that, where there exists an alternative method of dispute resolution established by legislation, courts must exercise restraint in exercising their jurisdiction as conferred by the Constitution and must give deference to the dispute

resolution bodies established by statute with the mandate to deal with such specific disputes in the first instance.

93. This position was also adopted by the Court of Appeal in R v National Environmental Management Authority, CA No 84 of 2010; [2011] eKLR that we persuasively relied on in NGOs Co-ordination Board (supra). The Court of Appeal in doing so, observed that;

“The principle running through these cases is where there was an alternative remedy and especially where parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was

necessary for the Court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it ..." [Emphasis ours]

94. The principle, expressed in the above decision, which we agree with, is therefore that, where there is an alternative remedy, especially where Parliament has provided a statutory appeal procedure, then it is only in exceptional circumstances that the Court can resort to any other process known to law.

95. But the above decisions do not unravel the conflict alluded to above because, under article 165(1)(c) of the Constitution, the

High Court has the jurisdiction to determine whether a right or fundamental freedom outlined in the Bill of Rights has been denied, violated, infringed upon, or is under threat. In that context, article 165(5)(b) imposes limitations on the High Court's jurisdiction concerning matters falling within the purview of the courts specified in article 162(2) which provides that;

“Parliament shall establish courts with the status of the High Court to determine disputes relating to(a)employment and labour relations; and(b)the environment and the use and occupation of, and title to, land.”

96. Consequently, article 165(2)(b) mandates the establishment of courts possessing the status of the High Court to inter alia and of relevance to the appeal before us,

address issues related to the environment, as well as the utilization and ownership of land with Parliament assuming the responsibility to delineate the functions and jurisdiction of that Court as stipulated in sub- article (3).

97. In this context, and in the exercise of these powers, Parliament enacted the Environment and Land Act 2011, (No 19 of 2011) and by section 4 thereof established the ELC. Its jurisdiction is as provided for in section 13 with Section 13(1) specifically outlining that the Court 'shall have original and appellate jurisdiction to hear and determine all disputes in accordance with article 163(2)(b) of the Constitution'. Section 13(2) then grants express and original jurisdiction in matters;...

98. These provisions must be read in contrast to those in EMCA which

provide for instances where disputes pertaining to compliance with breach and/or violations of the provisions of EMCA and which disputes ought to be lodged with and/or addressed by NET, which is established pursuant to the provisions of section 125 of the said Act. Redress for constitutional violations is not part of that mandate...

100. In addressing the conundrum placed before us, we must remind ourselves that, what is in dispute before this Court is the applicability of these provisions to the appellant's claim and not the true meaning of the provisions of either EMCA or the Energy Act. This is because the provisions of EMCA or the Energy Act do not expressly oust the jurisdiction of the ELC in respect of the procedure for the determination of disputes that involve the management of the environment or issues of

petroleum and energy. In the ordinary course of events, the ELC still has original jurisdiction over the matters that are handled by NEMA, unless such jurisdiction is specifically and expressly ousted in a constitutionally compliant manner. (Emphasis mine)

140. In the above cited judicial decision, the Supreme Court held that the provisions of the Environmental Management and Coordination Act do not expressly oust the jurisdiction of the Environment and Land Court in respect of the procedure for the determination of disputes that involve the management of the environmental issues.

141. The Supreme Court also held that the Environment and Land Court has original jurisdiction over matters that are handled by the National Environment Management Authority unless such jurisdiction is specifically and expressly ousted in a constitutionally compliant manner.

142. The Supreme Court further held as follows;

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

143. In the present petition, it is not disputed that the Petitioner/Applicant is alleging violation of his Constitutional rights.

144. Given the finding of the Supreme Court in **Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties)** (supra). I find that this Court has jurisdiction to hear and determine the Petitioner/Applicant’s application and the Petition herein.

145. The merits or otherwise of the Petition shall be determined during its hearing.

B. Whether the Petitioner/Applicant has met the criteria for grant of an order of temporary injunction pending the hearing and determination of this petition.

146. In the judicial decision of **Giella v. Cassman Brown [1973] EA 358**, the Court set out the conditions for grant of interlocutory injunctions. They are as follows;

“The conditions for the grant of interlocutory injunction are now I think well settled in East Africa. First an Applicant must show a prima facie case with probability of success. Secondly an interlocutory injunction will not be normally granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an

award of damages. Thirdly if the Court is in doubt it will decide an application on the balance of convenience.” (Emphasis mine)

147. The Petitioner/Applicant must first establish a *prima facie* case. A *prima facie* case was defined in the judicial decision of **Mrao Limited v. First American Bank of Kenya & 2 Others [2003] eKLR** as follows;

“A prima facie case in a civil case include but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the Court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.” (Emphasis mine)

148. The Petitioner/Applicant contends that at the time the Respondent’s factory was being constructed, its agents

trespassed onto the suit parcel of land, dumped excavated soil, dug quarries and extracted murram.

149. The Petitioner/Applicant also contends that the Respondent's agents cut down approximately 3000 eucalyptus trees and upon completion of the construction of the factory, it began to release toxic water waste onto the suit parcel of land.

150. The Petitioner/Applicant further contends that as a result, he lost his fish fingerlings and the soil on the suit parcel of land is full of toxic chemicals.

151. It is the Petitioner/Applicant's contention that the Respondent has also blocked the natural flow of the river and his right to clean and safe water has been infringed.

152. The Petitioner/Applicant therefore submits that he has established a *prima facie* case.

153. The Respondent on the other hand denies that it deposited excavated soil onto the suit parcel of land, it also denies that

it cut down the Petitioner/Applicant's eucalyptus trees and that it changed the course of the river.

154.The Respondent contends that it has a license from the National Environment Management Authority that allows it to discharge treated waste water onto its parcel of land No. **Kericho/Manaret/S.S/1195** which is fenced and there is no run off water.

155.The Respondent also contends that it was the Petitioner/Applicant who dug his own parcel of land and extracted murram for sale.

156.The Respondent further contends that the suit parcel of land lies at a low altitude area and water from the surrounding parcels of land end up on the suit property.

157.The Respondent submits the Petitioner/Applicant does not have a *prima facie* case as this Court does not have jurisdiction to hear and determine the Petition.

158. I have addressed the issue of jurisdiction under issue (A) above and found that this Court has jurisdiction.

159. Among the documents attached to the affidavit in support of the application is a copy of the title deed for land parcel No. Kericho/Manaret S.S/193 which shows that the land is registered in the name of **Raphael Kipyegon Kunah** the Petitioner/Applicant.

160. The Petitioner/Applicant has also attached a copy of a report prepared by Emerald Environment Ltd. In the said report, it is stated that water samples were taken and a water analysis done.

161. At page 5 of the report it is observed as follows;

***“In conclusion, the study established evidence of dumping of cart away materials in the parcel. The study also established possible quarrying of murram materials on the farm.*”**

However, the study did not establish any evidence of chemical pollution attributed to the factory activities. The heavy metal contaminations may be mostly attributed to background levels due to geological characteristics. (Emphasis mine)

162. The Respondent has on the other hand attached copies of “Water Sample Analytical Certificates- Waste Water Analysis” that have been prepared by the Lake Victoria South Water Services Board. They are issued on 5th April, 2019, 2nd October, 2020, 5th November, 2021, 24th October, 2022, 24th October, 2023 and 7th November, 2024. The comments on the said certificates is that the effluent meets the NEMA standards for discharge into the environment.

163. It is important to note that the Petitioner/Applicant is specifically seeking that an injunction be issued restraining the Respondent from trespassing, interfering in any way with

his use and enjoyment of the suit parcel of land and discharging toxic water waste from the factory.

164. Taking into consideration the above reports attached by both the Petitioner/Applicant and the Respondent, it is evident that the waste water discharged by the Appellant meets the NEMA standards and there is no evidence of chemical pollution attributed to the factory activities.

165. That being the case, I find that the Petitioner/Applicant has not demonstrated a *prima facie* case.

166. The second condition for grant of orders of temporary injunction is that the Petitioner/Applicant must demonstrate that he will suffer irreparable injury that would not be adequately compensated by way of damages.

167. In **Nguruman Limited v. Jan Bonde Nielsen & 2 Others [2014] eKLR**, the Court of Appeal pronounced itself as follows:

“On the second factor, that the Applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the Applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the Applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount,

will never be adequate remedy.”

(Emphasis mine)

168. The judicial decision in **Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR** provides an explanation of what is meant by irreparable injury. It is as follows;

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.” (Emphasis

mine)

169. The Petitioner/Applicant submits that he will suffer irreparable injury which cannot be compensated by an award

of damages because the Respondent is discharging waste water onto his parcel of land.

170. The Petitioner/Applicant also submits that the fact that the waste water is treated does not warrant the Respondent to discharge it onto his parcel of land.

171. The Respondent on the other hand denies discharging any waste water onto the suit parcel of land.

172. At this stage of the proceedings, it is difficult to establish whether or not the Respondent is discharging waste water onto the suit parcel of land. It requires a site visit and/or report.

173. Nonetheless, taking into consideration the circumstances of this Petition, it is my view that the Petitioner/Applicant has not demonstrated that he will suffer irreparable damage which cannot be adequately compensated by way of damages if the orders sought are not granted.

174. If after making considerations on the existence of a *prima facie* case and irreparable injury the Court is still in doubt, then an application for temporary injunction is to be determined on the basis of balance of convenience.

175. The Petitioner/Applicant has neither demonstrated that he has a *prima facie* case nor demonstrated that he will suffer irreparable damage which cannot be adequately compensated by way of damages if the orders sought are not granted. This means that orders of temporary injunction should not and cannot be granted in his favour.

176. The third condition for grant of orders of temporary injunction is that if the Court is in doubt as to whether an Applicant has established a *prima facie* case or has established that he/she will suffer irreparable injury, then the Court will decide the application on the balance of convenience.

177. I have found that the Petitioner/Applicant has not met the first two conditions as relate to *prima facie* case and irreparable injury. It follows that this court is not in doubt as to whether it should or should not grant an order of temporary injunction.

178. For what it is worth, I shall now determine whether or not the balance of convenience tilts in favour of the Applicant.

179. In **Pius Kipchirchir Kogo v Frank Kimeli Tenai [supra]** the Court held as follows;

“The meaning of balance of convenience will favour of the Plaintiff’ is that if an injunction is not granted and the Suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is

ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer. In other words, the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting it"

180. The Petitioner/Applicant application is hinged on alleged activities of the Respondent which commenced in the year 2018 when the Respondent constructed a factory which manufactures and processes tea on the parcel of land adjacent to his land.

181.The Petitioner/Applicant complains of various acts of trespass to his parcel of land which he alleges begun during construction and have continued over the years.

182. The Petitioner/Applicant has also quantified the loss that has been occasioned to him and that he continues to suffer.

183.The report attached by the Petitioner/Applicant to the application says that the acts he complains of cannot be attributed to the Respondent.

184.The Respondent has attached "*Water Sample Analytical Certificates- Waste Water Analysis*" prepared by the Lake Victoria South Water Services Board issued every year from 2019-2024. The comments on the said certificates is that the effluent meets the NEMA standards for discharge into the environment.

185.It is not lost on this Court that orders of injunction sought are intended to prevent the Respondent from

trespassing, discharging toxic waste water from the factory or in any way dealing and/or interfering with the Petitioner's use and quiet enjoyment of the parcel of land known as Kericho/Manaret S.S/193.

186. Taking into consideration the totality of the circumstances of this case and particularly the two reports that I have made reference to, I find that the Petitioner /Applicant has failed to demonstrate that the inconvenience caused to him will be greater than that which may be caused to the Respondent if orders of temporary injunction are not granted. I find that the balance of convenience does not tilt in favour of the Petitioner/Applicant.

187. The Petitioner/Applicant has therefore failed to satisfy the conditions for grant of an order of temporary injunction.

188. Before penning off, I note that under prayer (4) of the application under consideration, the Petitioner/Applicant

seeks that the Court certifies this Petition as raising weighty constitutional issues on violation of fundamental rights and freedoms and the same should heard and determined on a priority basis.

189. Both parties failed to address the Court on the need to have the Petition determined on a priority basis and I shall therefore deem it as abandoned.

C. Who should bear the costs of the application.

190. The general rule is that costs shall follow the event. This is in accordance with the Provisions of **Section 27** of the Civil Procedure Act (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.

Disposition.

191. Taking the foregoing into consideration, I find that the Petitioner/Applicant's Notice of Motion Application dated 18th June, 2025 lacks merit and it is hereby dismissed with costs.

192. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO
THIS 30TH DAY OF APRIL, 2026.**

**L. A. OMOLLO
JUDGE.**

**In the presence of: -
Parties - Absent.**

Court Assistant; Mr. Joseph Makori.