



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELCLC CASE NO. E458 OF 2025

**ALLOYS APELL KWENGU.....1ST
PLAINTIFF**

**JACQUELINE GITHINJI.....2ND
PLAINTIFF**

**PHILIP MUCHUNGU.....3RD
PLAINTIFF**

**NICHOLAS MULILA.....4TH
PLAINTIFF**

**MARY K. MWITI.....5TH
PLAINTIFF**

**PATRICK BEN MWANGI.....6TH
PLAINTIFF**

**MARY CHRISTINE NYAMBURA.....7TH
PLAINTIFF**

=VERSUS=

**ALPHANA BUSINESS PARK LIMITED.....1ST
DEFENDANT**

**NAIROBI CITY COUNTY.....2ND
DEFENDANT**

**NATIONAL ENVIRONMENT
MANAGEMENT AUTHORITY.....3RD
DEFENDANT**

**NATIONAL CONSTRUCTION AUTHORITY.....4TH
DEFENDANT**

RULING

1. This ruling is in respect of the Notice of Preliminary Objection dated 3rd October 2025, in which the 2nd Defendant challenges this Court's jurisdiction to hear and determine the suit on the grounds that the Plaintiff failed to exhaust the statutory dispute resolution mechanisms provided under the applicable legal framework.
2. The 2nd Defendant argues that the Plaintiff should have first invoked the appellate procedures under Sections 61(3) and (4) and 78 to 81 of the Physical and Land Use Planning Act by appealing to the Physical and Land Use Planning Liaison Committee regarding development approvals granted to the 1st Defendant. Similarly, it was contended that any challenge related to approvals or licences issued by the National Environment Management Authority should have been addressed before the National Environment Tribunal in accordance with Section 129 of the Environmental Management and Coordination Act.
3. Based on the foregoing, the 2nd Defendant contends that the suit and the accompanying application are premature, incompetent, and violate the express statutory provisions, thereby rendering them a non-starter and an abuse of the Court process.

4. Accordingly, the 2nd Defendant urged the Court to uphold the Preliminary Objection and strike out both the Plaint and the Notice of Motion dated 11th September 2025, with costs.
5. The preliminary objection was canvassed by way of written submissions.

THE 2ND DEFENDANT'S SUBMISSIONS

6. The 2nd Defendant filed submissions dated 26th October 2025.
7. On behalf of the 2nd Defendant, Counsel submitted that the Preliminary Objection raises a pure point of law relating to jurisdiction, based on the doctrine of exhaustion of statutory remedies. Counsel relied on **Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696** and **Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others [2014] eKLR**, for the definition and scope of a preliminary objection. Counsel cited **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR**, to underscore that jurisdiction is fundamental and once lacking, the Court must lay down its tools.
8. Counsel further submitted that the Court's jurisdiction is limited by statute and cannot be assumed in disregard of established dispute resolution mechanisms. In this regard, Counsel cited **Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others Civil Application No. 2 of 2011** and **Kibos Distillers Ltd &**

- 4 others v Benson Ambuti & 3 others [2020] eKLR**, to emphasize that jurisdiction originates from the Constitution or statutes and cannot be granted by the parties through pleadings.
9. It was submitted that the Plaintiffs failed to exhaust the statutory mechanisms provided under the Physical and Land Use Planning Act and the Environmental Management and Coordination Act, which require appeals to the County Physical and Land Use Planning Liaison Committee and the National Environment Tribunal, respectively. Counsel argued that these forums are vested with primary jurisdiction to determine disputes relating to development approvals and environmental licences, and must be approached first.
 10. Counsel cited **Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR** and **William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR**, where it was emphasized that Courts are forums of last resort and litigants must first utilize available administrative remedies. Further reliance was placed on **Speaker of the National Assembly v Karume**, where the Court held that where a statute provides a clear procedure for redress, that procedure must be strictly followed.
 11. Counsel also relied on **Mutunga Tea and Coffee Company Ltd v Shikara Ltd & another [2014] eKLR**

- and **Sanjay Solanki & 8 others v Hirji Kanji Patel & 5 others [2013] eKLR**, to submit that failure to exhaust statutory remedies under planning and environmental legislation deprives the Court of jurisdiction.
12. Regarding the doctrine of constitutional avoidance, Counsel submitted that the dispute does not raise any constitutional issue warranting the Court's jurisdiction. Counsel further submitted that the Plaintiffs improperly bypassed statutory forums. Counsel relied on **Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others [2014] eKLR** and **Sumayya Athmani Hassan v Paul Masinde Simidi & another [2019] eKLR**, to assert that when adequate statutory remedies are available, Courts should decline to entertain matters framed as constitutional disputes.
13. In conclusion, Counsel submitted that the Plaintiffs' suit is premature, incompetent, and an abuse of the Court process. Counsel urged the Court to uphold the Preliminary Objection and strike out the suit with costs.

THE 3RD DEFENDANT'S SUBMISSIONS

14. The 3rd Defendant filed its submissions dated 7th November 2025.
15. On behalf of the 3rd Defendant, Counsel submitted that the Preliminary Objection raises a pure point of law regarding jurisdiction in accordance with the principles set forth in **Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696**. Counsel

contended that jurisdiction is a fundamental issue that can be determined without considering the merits of the case.

16. Counsel argued that the Plaintiffs dispute the legality of development approvals and environmental licences, which are regulated by the statutory regimes established by the Environmental Management and Coordination Act and the Physical and Land Use Planning Act. Counsel submitted that Section 129 of EMCA grants original jurisdiction to the National Environment Tribunal, while the Physical and Land Use Planning Liaison Committee is tasked with resolving disputes related to development permissions, with the Court having only appellate jurisdiction.
17. Counsel further submitted that these statutory mechanisms are mandatory and serve as the first port of call. In light of the foregoing, Counsel argued that the Plaintiff has prematurely invoked this Court's jurisdiction without first exhausting the prescribed remedies. Counsel relied on Article 159(2)(c) of the Constitution and Sections 9(2) and (3) of the Fair Administrative Action Act to underscore the importance of the doctrine of exhaustion.
18. Counsel cited **Speaker of the National Assembly v James Njenga Karume [1992] eKLR, Savraj Singh Chana v Diamond Trust Bank (Kenya) Limited & another [2020] eKLR**, and **United Millers Limited v Kenya Bureau of Standards & 5 others [2021] eKLR**, to submit that where a statutory dispute resolution

mechanism exists, it must be invoked first, unless exceptional circumstances are demonstrated. It was contended that no such exceptional circumstances had been pleaded or established.

19. Counsel submitted that the Plaintiff approached the Court prematurely and in disregard of clear statutory procedures, thereby rendering the suit incompetent.
 20. In conclusion, Counsel urged the Court to uphold the Preliminary Objection and strike out the suit with costs.
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THE PLAINTIFF'S SUBMISSIONS

21. The Plaintiff filed their submissions dated 18th January 2026.
22. On behalf of the Plaintiffs, Counsel submitted that the Preliminary Objection is incompetent as it does not meet the legal threshold of a preliminary objection. Counsel argued that a preliminary objection must raise a pure point of law capable of disposing of the suit without recourse to evidence. Counsel relied on **Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696**, **John Musakali v Speaker County of Bungoma & 4 others [2015] eKLR**, and **Oraro v Mbaja [2005] KLR 141**, to submit that a preliminary objection cannot be based on disputed facts or require evidentiary interrogation.
23. Counsel argued that the objection is based on disputed factual issues concerning the nature of the Plaintiff's

- claim, which falls outside the jurisdiction of statutory bodies because it does not challenge the legality of development approvals per se. Instead, it seeks redress for alleged interference with and destruction of adjacent property by the 1st Defendant.
24. Counsel further asserted that the doctrine of exhaustion is inapplicable in the present circumstances, as the dispute does not fall within the jurisdiction of the Physical and Land Use Planning Liaison Committee or the National Environment Tribunal, whose authority is limited to appeals against approvals and licenses.
 25. Counsel invoked the recognized exceptions to the doctrine of exhaustion to submit that Courts may assume jurisdiction when statutory remedies are ineffective, impractical, or inadequate to serve the ends of justice. To support this argument, reliance was placed on **Krystalline Salt Limited v Kenya Revenue Authority [2019] eKLR, Republic v Council for Legal Education ex parte Desmond Tutu Owuoth [2019] eKLR, and Republic v Kenya Revenue Authority ex parte Style Industries Limited [2019] eKLR.**
 26. Counsel submitted that the Preliminary Objection is essentially a defence disguised as a jurisdictional objection and urged the Court to dismiss it with costs.

ANALYSIS AND DETERMINATION

27. Having considered the preliminary objection and the rival submissions, the issue for determination is whether the preliminary objection is merited.
28. The law on preliminary objections is well settled. A preliminary objection must be based on a pure point of law. In **Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd [1969] EA 696**, Law JA stated as follows:

“So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which, if argued as a preliminary point, may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

29. Further on, **Sir Charles Newbold JA** stated;

“The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is

the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

30. The principle was restated in **Oraro v Mbaja (2005) eKLR**, where Ojwang J (as he then was) described it as follows:

“I think the principle is abundantly clear. “A Preliminary Objection” correctly understood is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and, in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears 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.”

31. The objection before the Court concerns jurisdiction and is based on the doctrine of exhaustion. Jurisdiction is a pure point of law and can be properly raised as a preliminary

objection when the facts necessary for its determination are not disputed and are clear from the pleadings.

32. The 2nd and 3rd Defendants contend that this Court lacks jurisdiction to hear and determine the suit because the Plaintiffs have not exhausted the statutory dispute resolution mechanisms established under the Physical and Land Use Planning Act and the Environmental Management and Coordination Act. The Plaintiffs contend that the preliminary objection requires the Court to examine contested facts regarding the nature of the Plaintiffs' claim and the reliefs sought.

33. It is trite that jurisdiction is everything, and without it, the court cannot take one more step. In **Owners of Motor Vessel 'Lillian S' vs Caltex Oil (Kenya) Limited (1989) eKLR**, the Court held that:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...”

34. Similarly, the Supreme Court in **Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR** held that:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the

Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

35. A Court derives its jurisdiction from the Constitution, legislation, or both. This Court derives its jurisdiction from Article 162(2)(b) of the Constitution and Section 13 of the Environment and Land Court Act.

36. The doctrine of exhaustion has since been propounded in several decisions. It was elaborately stated in **Speaker of National Assembly vs Karume [1992] KLR**, where the Court held that:

“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.”

37. **Section 129 of the Environmental Management and Coordination Act** provides that

“Any person who is aggrieved by;

a) the grant of a licence or permit or a refusal to grant a licence or permit, or the transfer of a licence or permit, under this Act or its regulations;

- b) the imposition of any condition, limitation or restriction on the persons licence under this Act or its regulations;**
- c) the revocation, suspension or variation of the person's licence under this Act or its regulations;**
- d) the amount of money required to paid as a fee under this Act or its regulations;**
- e) the imposition against the person of an environmental restoration order or environmental improvement order by the Authority under this Act or its Regulations,**

may within sixty days after the occurrence of the event against which the person is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

(2) Unless otherwise expressly provided in this Act, where this Act empowers the Director-General, the Authority or Committees of the Authority or its agents to make decisions, such decisions may be subject to an appeal to the Tribunal in accordance with such procedures as may be established by the Tribunal for that purpose.

38. The National Environment Tribunal has jurisdiction to hear appeals from persons aggrieved by specific decisions made by the National Environment Management Authority, its Director General or its committees, including decisions related to licences, permits, environmental restoration orders and environmental improvement orders.
39. Similarly, the Physical and Land Use Planning Act establishes liaison committees to hear and determine disputes related to physical and land use planning. Sections 61, 78, 79, 80 and 81 of that Act provide a statutory framework for challenging development permissions and planning decisions before the relevant liaison committee, with further recourse to this Court in appropriate cases.
40. The Defendants argued that the Plaintiffs are challenging development approvals and environmental licences issued to the 1st Defendant.
41. In **Kibos Distillers Limited & 4 others v Benson Ambuti Atega & 3 others [2020] eKLR**, the Court of Appeal emphasised that the Environment and Land Court cannot assume original jurisdiction merely because a dispute is framed as multifaceted or constitutional, particularly where Parliament has vested primary jurisdiction in specialized statutory bodies. The Court held that original jurisdiction is distinct from unlimited jurisdiction, and that the presence of multifaceted claims

does not justify bypassing statutory forums. The same principle was applied in **National Environmental Tribunal v Overlook Management Limited & 5 others [2019] eKLR.**

42. The doctrine of exhaustion is not absolute. The Court must examine the pleadings and the reliefs sought to determine whether the dispute entirely falls within the statutory forum or raises issues that the statutory body cannot competently decide or remedy.
43. The Supreme Court in **Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) [2023] KESC 113 (KLR)** adopted a nuanced approach that respects statutory dispute resolution mechanisms while maintaining access to justice in appropriate cases.
44. The Apex Court acknowledged that, although alternative mechanisms should ordinarily be exhausted, a court may intervene when circumstances justify an exemption. This aligns with Section 9(4) of the Fair Administrative Action Act, which allows a Court, in exceptional cases and when the interests of justice demand, to exempt a party from the obligation to exhaust internal remedies.
45. In **Krystalline Salt Ltd v Kenya Revenue Authority [2019] KEHC 6939 (KLR)**, the Court held that:
“Additionally, what constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the

administrative action at issue. Thus, where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too, where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile. These requirements have not been shown to exist in this case.

63. The Fair Administrative Action Act does not define 'exceptional circumstances.' However, this court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must, in other words, be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy."

46. The issue to determine is whether, based on the pleadings and the reliefs sought, the Plaintiffs' dispute should have initially been referred to the National Environment Tribunal or the Physical and Land Use Planning Liaison Committee, and whether these forums can provide effective relief.
47. The Plaintiffs' claim, as pleaded, is that the 1st Defendant commenced construction on the suit property without the participation or consultation of the Plaintiffs, who assert

that they are the lawful owners and occupants of neighbouring plots. They further contend that the development has damaged their boundary walls, interfered with the access road, and disturbed the common adjoining infrastructure. They also challenge the legality and procedural propriety of any approvals granted to the 1st Defendant.

48. The Plaintiffs seek, among other reliefs, a permanent injunction restraining the 1st Defendant from constructing or making physical alterations to the suit property, a mandatory injunction compelling the 1st Defendant to compensate them for damage caused to their walls after an assessment at the 1st Defendant's expense, the restoration of the common adjoining infrastructure including the access road, a review and revision of approvals issued to ensure compliance with legal requirements and the welfare of the Plaintiffs and the neighbourhood, and declarations that the 1st Defendant is in breach of relevant building and planning laws.
49. It is clear from the pleadings that the Plaintiffs' claim extends beyond an appeal against a development approval or an environmental licence. The suit also involves claims regarding alleged physical damage to neighbouring properties, interference with access infrastructure, injunctive relief, restoration, and compensation. These matters fall within the jurisdiction of

- this Court under Article 162(2)(b) of the Constitution and Section 13 of the Environment and Land Court Act.
50. The National Environment Tribunal and the County Physical and Land Use Planning Liaison Committee have statutory authority over specific aspects of the dispute. The Liaison Committee's mandate under Section 78 of the Physical and Land Use Planning Act is limited to complaints and claims related to applications submitted to the county planning authority, appeals against decisions made by the planning authority, advice on physical and land use planning policy, and appeals concerning enforcement notices. Its jurisdiction does not extend to resolving proprietary claims, compensating for damage to private property, or granting permanent injunctive relief based on alleged interference with private land.
 51. The jurisdiction of the National Environment Tribunal is broader in environmental decision-making, as outlined under Section 129(3) of EMCA. On an appeal, the Tribunal can confirm, set aside or vary the impugned decision, exercise powers that could have been exercised by the Authority, make such orders as it deems just, including orders to enhance the principles of sustainable development, issue status quo orders pending the determination of an appeal, and review its orders where appropriate. This jurisdiction may therefore extend to consequential or restorative orders related to an environmental licence or decision under challenge.

52. However, the NET's remedial power does not transform it into a Court of general jurisdiction over all disputes arising from a development project. Its jurisdiction remains limited to appeals against decisions, acts or omissions within the statutory scope of EMCA. The Defendants have not demonstrated that NET, or the Liaison Committee, can determine the entire claim pleaded by the Plaintiffs.
53. It is pertinent to note that the Plaintiffs are not merely seeking the cancellation or variation of approvals. They complain of acts already undertaken on the ground and the alleged consequences of those acts on their property and access. The Court cannot, at this preliminary stage, separate these complaints from the pleaded cause of action without examining evidence.
54. For that reason, the objection as framed is too broad. The pleadings disclose a composite dispute involving planning approvals, alleged nuisance or interference with neighbouring property, damage to walls, access, restoration and injunctive relief.
55. The existence of some issues that may be subject to statutory dispute resolution does not, on its own, deprive this Court of jurisdiction over the entire suit. The Court may, at an appropriate stage, identify or isolate issues that should first be addressed by the relevant statutory bodies, or stay certain aspects of the proceedings pending such determination. Striking out the entire suit at this preliminary stage would be disproportionate when part of

the claim falls within the jurisdiction of this Court and when the adequacy of the alternative remedies is contested.

56. The Defendants have not shown that the suit is entirely premature, incompetent, or barred by the doctrine of exhaustion.

57. Accordingly, the 2nd Defendant's Preliminary Objection dated 3rd October 2025 is hereby dismissed with costs.

RULING SIGNED, DATED, AND DELIVERED VIA MICROSOFT TEAMS THIS 8TH DAY OF MAY 2026.

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HON. T. MURIGI
JUDGE

IN THE PRESENCE OF :-

Nyagena for the Plaintiff

Mamo for the 2nd Defendant

Ms Kahuria for the 3rd Defendant

Cindy Ogolla holding brief for Yvonne Gitugi for the 4th Defendant

Ahmed -Court assistant