



Board of Management Ngara Girls High School & another v Erdemann Property Limited & another; Ministry of Education (Interested Party) (Environment and Land Petition E066 of 2024) [2025] KEELC 5478 (KLR) (18 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5478 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND PETITION E066 OF 2024**

**JG KEMEL, J
JULY 18, 2025**

BETWEEN

**BOARD OF MANAGEMENT NGARA GIRLS HIGH SCHOOL 1ST
PETITIONER**

LOISE NDOVU MWATHE 2ND PETITIONER

AND

ERDEMANN PROPERTY LIMITED 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

AND

MINISTRY OF EDUCATION INTERESTED PARTY

JUDGMENT

The Case of the Petitioners

1. Vide a Petition dated the 8/8/2024 the Petitioners moved this Court and sought the following orders;
 - a. A declaration be and is hereby issued to the effect that the occupation and continued occupation by Erdemann Property Limited of the Petitioner’s property known as LR.NO. L.R/209/136/239/R constitutes a violation of the Ngara Girls High School right to property as guaranteed under Articles 27 (1) and 40 of the Constitution of Kenya, 2010 (hereinafter called CoK).
 - b. An order of mandatory injunction directing the 1st Respondent whether by itself or by its agents, servants or otherwise however to forthwith remove and demolish all the structures erected on Petitioner’s property known as L.R. No..LR/209/136/239/R.



- c. An order of permanent injunction restraining the Defendant by itself, or by its agent, servant or otherwise however from entering upon, remaining on or continuing in occupation of and/or otherwise dealing with or in any way whatsoever interfering with the Petitioner's access to use of and quiet possession of the Petitioner's property known as L.R.No. L.R./209/136/239/R, the suit property.
 - d. A declaration be and is hereby issued to the effect that Erdemann Property Limited, the Attorney General and the Ministry of Education have contravened Ngara Girls High School fundamental rights and freedoms, and acted contrary to Articles 10,12, 27,28,40,42,47,53,69 and 70 of the Constitution of Kenya,2010 as read with Sections 4 and 5 of the Fair Administrative Actions Act, 2015, as read with Sections 4 and 23 of the [Climate Change Act](#) and Article 3,6,24,28,29 and 31 of the Convention on the Rights of the Child,1989 as read with the United Nations Committee on the Rights of the Comment No.26.
 - e. The Petitioner be awarded general and punitive damages to be paid by the 1st Respondent, Erdemann Property Limited, for trespass and violation of the Ngara Girls High School's rights.
 - f. The Petitioner be awarded general and punitive damages to be paid by the Respondents for violation of the Ngara Girls High School.
 - g. An order does issue pursuant to Article 23 of the [Constitution](#) and Section [23](#) of the [Climate Change Act](#), 2016 to compel the 1st Respondent, Erdemann Property Limited, to restore all that parcel of land namely known as L.R. No.LR/209/136/239/R, to its original status, including the building of the Ngara Girls High School's perimeter wall.
 - h. The cost of this Petition be borne by the Respondent.
 - i. Any other or further orders, writs and directions this Court considers appropriate and just to grant for the purpose of the enforcement of the Petitioners' fundamental rights and freedoms.
2. The Petition is based on the facts, the various provisions of the [Constitution](#) alleged to have been violated, the various conventions on the protection of the environment and the child that Kenya is a signatory, the statutory provisions of the law and the supported by the affidavits duly sworn by Dr. Beatrice Achieng Ndiga, and Loise Ndotu Mwathe, the Principal and Parent of the 1st Petitioner respectively.
 3. It was averred that the Petitioners entered into a lease agreement with the 1st Respondent in regard to a portion of its property Known as L R No 209/136/239/R (suit land) solely for purposes of temporary stocking of building material during the construction of its development namely River Estate Project on LR 209/22016 and for related construction activities for the period of the construction. The lease was for 3 years terminating on 10/6/23.
 4. That despite the non-renewal of the lease, the 1st Respondent continues to illegally occupy and trespass on the suit land while undertaking concrete processing thus polluting the environment and disrupting learning activities in the school to the detriment of the rights of the children, staff and the community around it.
 5. In addition, that the 1st Respondent has forcibly occupied the school play ground thus depriving the minors the infrastructure for play and recreation contrary to their rights decreed in Art 31 of the [Constitution](#) as well as the Convention on the rights of the child which provides for the right to play and leisure.



6. Despite demand to stop the occupation, the 1st Respondent is insistent on remaining on the suit land, termination of the lease notwithstanding. To this end, the Petitioners are aggrieved by the inaction on the part of the 1st Respondent and the Interested Party in resolving the matter.
7. The Petitioners have anchored their case on several provisions of the Constitution being Articles 1(2), 2(5), 3, 10, 12, 21, 22(1) & (2), 258(1) & (2), 27, 28, 35, 40, 42, 47, 53, 54, 56, 69, 70, 73 & 232. The Petition is also based on the provisions of Article 24 of the Convention on the Rights of the Child, 1989, the United Nations Committee on the Rights of the Child in its General Comment No 26.
8. On the violation of the right to clean and healthy environment, it was averred by the Petitioners that the 1st Respondent's activities on the suit land pose a hazard to the minors and the staff health and wellbeing.
9. Secondly, that the 1st Respondent was notified in writing variously on 11/5/23 and 4/7/23 that the lease would not be renewed, which notification has been ignored.
10. The environment and health concerns arising from the 1st Respondent's continued illegal trespass of the land include but not limited to degradation, effects of climate change arising from air pollution, respiratory tract ailments and allergies due to dust and noise pollution. That this has created a hostile and unsafe environment for the learner's contrary to the right to clean and healthy environment thus impeding their right to education play and recreation.
11. The Petitioners took issue with the inaction on the part of the 2nd Respondent and the Interested Party who despite their mandate have failed to stop the activities of the 1st Respondent. That under Section 4 of the Fair Administrative Actions Act (FAAA), they are obligated to give reasons to the Petitioners for the administrative action or inaction in view of the various letters written to them seeking intervention.
12. That contrary to Section 5 of the FAAA, the 2nd Respondent is accused of failing to address the Petitioner's grievances thus allowing the environmental degradation to go on unabated.
13. That the failure to act is contrary to the state's mandate/obligations under the Climate Change Act 2016 to undertake measures to mitigate the effects of climate change such as pollution and environmental degradation occasioned by the 1st Respondent. That the Respondents failed the precautionary test as espoused in Article 3 of the United Nations Framework Convention on Climate Change.
14. It was further averred that the continuous occupation of the suit land by the 1st Respondent is not in the best interest of the child.

The 1st Respondents Case

15. In answer to the Petition, the 1st Respondent opposed the Petition through the Replying Affidavit sworn by Otieno John Kenneth Rajwayi on 3/4/25.
16. According to the deponent the case of the Petitioners is premised on two issues namely, alleged trespass by the 1st Respondent and secondly that the 1st Respondent's operations are causing environmental degradation in form of noise water and air pollution.
17. Consequently, that these are issues that can be resolved through the existing dispute resolution mechanisms being Section 152E of the Land Act on account of the alleged trespass and on allegations of environmental degradation, a complaint or an appeal to the National Environment Tribunal (NET) and Nairobi County Physical and Land Use Planning Liaison Committee (Liaison Committee) under Section 129 of the Environment Management & Coordination Act (EMCA), section 61 (3) and 72(3)



of Physical Planning and Land Use Act (PLUPA) as well as the provisions of section 7(1) (b) and 9(2) of the FAAA and Article 47 & 50 of the *Constitution*. The deponent faults the Petitioner for wrongly invoking the jurisdiction of this Court.

18. He deposed that the 1st Respondent has been carrying out its operations on Plot No C an area of about 0.4910 Ha (part of LR 209/20566) for the last 5 years. That they have discovered that they do not occupy the Petitioner's land hence not a trespasser. Further that their operations are licensed with mitigating safeguards to curb possible negative impact and that it has used these safeguards to limit that pollution caused by third parties in the area.
19. Giving the background of the 1st Respondent and its associated developments, the deponent averred that it owns LR No 209/22016 (original No LR 209/20567) Ngara delineated on Survey Plan No 424644 measuring 2.228 Ha along Jadongo Road. On it, it has developed the mega project by the name River Estates Housing Development.
20. That though the 1st Respondent mistakenly entered into a lease agreement with the 1st Petitioner on 10/6/2020 over L R No 209/136/239/R measuring 0.4910 ha for temporary stocking of material and ancillaries during the construction of the project, it has now emerged that no such property exists as the said property is an excision from LR No 209/20566 occupied by the 1st Respondent.
21. On approvals, he deposed that the 1st Respondent sought and obtained all the statutory and regulatory approvals in respect of the development including undertaking an elaborate Environmental and Social Impact Assessment (ESIA) and Environmental Impact Assessment (EIA) study report leading to its licensing in compliance with Section 58 of EMCA and a License Ref No. NEMA/EIA/PSL/6420 duly issued. That the Lead experts engaged all the project affected persons who strongly supported the proposed project. Other approvals obtained included development permission from the Nairobi City County Government and regulatory approvals from National Construction Authority, Water Resources Authority and the Kenya Civil Aviation Authority. The Interested Party too gave its nod to the Lease vide its Letter dated the 1/7/2020.
22. That to mitigate any adverse effects of the project, NEMA imposed various general construction operations and decommissioning conditions.
23. Moreover, he deposed that the suit land was not in use at all by the 1st Respondent as it comprised undulated slope and the 1st Respondent undertook to level the parcel, erect a perimeter wall and a 260-bed capacity dormitory in addition to the monthly rent of Kshs 300,000/-. That the delay in completing these projects is due to the unresolved boundary issue.
24. The deponent further admitted that the 1st Respondent lays no claim on the Petitioner's suit lands being 209/136/338, 209/136/339 and 209/136/239/R save as a leasee/tenant of the parcel measuring 0.4910 HA to facilitate the construction of the project on LR. 209/22016 owned by the 1st Respondent.
25. That vide the letter dated the 5/9/24 authored by the Solicitor General, it emerged that the suit land is owned by Hebatulla Investment and Hebatulla Properties Limited and the Petitioner was gifted a bigger portion measuring 0.9483 ha. That evidently there is no property described as LR No 209/236/139/R and that the 1st Respondent has therefore not trespassed onto the Petitioner's land as the alleged suit land belongs to a third party. That the Petitioner has no interest in the suit land and consequently no cause of action has accrued in its favour.
26. In the end the Court was urged to find that the Petition is unmerited and ought to be dismissed.



The 2nd Respondent's Case

27. The 2nd Respondent did not file any response to the Petitioners case.

The Interested Party's Case

28. Supporting the Petition, Dr. Belyo R Kipsang, the Principal Secretary Ministry of Education swore a Replying Affidavit on behalf of the IP on 31/10/24 and stated that every child has a right to free and compulsory basic education under the Basic Education Act Cap 211 and Art 53 of the Constitution. That the continuous occupation of the suit land by the 1st Respondent following the expiry of the lease is illegal and its activities (concrete processing) are affecting the quality of learning at the school. That the land in question was donated to the school by Hebatullah Investments Limited /Hebatullah Properties Limited and the school is in the process of processing the title deed.

Further Replying Affidavit by the Petitioner.

29. In a further rejoinder, Dr. Beatrice Achieng Ndiga contended that the 1st Respondent is operating a processing plant with emissions of noise and dust in the school vicinity.
30. In addition, she stated that the school has been in continuous occupation of LR No 209/136/239/R measuring 1.6 ha (4.0 acres). The parcel of land was gifted to the school by Hebatullah Investments Limited vide a Court order in HCCC No 346 of 2005, which orders have never been set aside appealed and or vacated. That the school has continued to be in possession of the suit land. As avowed by the then PS, Education Dr Belyo Kipsang, the Ministry is in the process of facilitating the titling of the said land in favour of the school.
31. That the 1st Respondent in paragraph 12 of the affidavit sworn by Otieno John Kenneth Rajway admits and concedes to have set up a batching plant which fortifies the Petitioners complaints on environmental degradation to the detriment of the girls and the school community.
32. It was averred that this Court is the right forum to adjudicate this Petition pursuant to Article 70 of the Constitution of Kenya which donates to this Court original jurisdiction to hear and determine matters environmental. That the 1st Respondent has during the pendency of the suit set up a batching plant on the suit land further firming the Petitioner's case. It is stated that the development approvals are not under challenge by the Petitioner but it is the execution of the project and the batching plant which entail blasting, noisy emissions and water pollution that has aggrieved the Petitioners. According to the Petitioners the 1st Respondent has not taken adequate measures to safeguard the environmental degradation leading to the filing of the suit.
33. Relying on the case of Nicholus Vs Attorney General & Others [2023] eKLR the Petitioner urged the Court to seize its jurisdiction and determine the Petition.

The Written Submissions

34. On the question of trespass and right to property, the Petitioners submitted that despite the termination of the lease the 1st Respondent has continued to illegally occupy, take possession and trespass on the property while undertaking concrete processing which continues to cause havoc noise emission of dust and pollution disrupting the learning activities in the school and affecting the rights of the minors.
35. The Petitioner cited the case of Municipal Council of Eldoret Vs Titus Gatitu Njau (2020) KECA 782 (KLR) where the Court stated that trespass is a violation of the right to possession and a plaintiff



- must prove that he has a right to immediate and exclusive possession of the land which is different from ownership.
36. Learned Counsel submitted that the 1st Respondent has deliberately and illegally encroached on the schools play ground contrary to the provisions of Art 31 of the Convention on the Rights of the Child which emphasize the child's right to play and leisure. The continued occupation and trespass have resulted to a continued violation of its rights to property under Article 40 of the *Constitution*.
 37. Relying on the case of Pastor James Jesse Gitahi & 202 Others –vs- AG (2013) KEHCP 6024 (KLR) the Petitioners submitted that learning in the school has continuously been disrupted by the noise pollution contrary to the rights of the child provided for in the General Comment No 26 of the UN Committee on the Rights of the Child which state that the purpose of assessing the best interest of the child shall be to ensure the full and effective enjoyment of all rights including the right to clean, healthy and sustainable environment and that children should be protected against environmental harm as well as their well-being and development taking into account the attendant future risk and harm. That the 1st Respondents actions have jeopardized and compromised the rights of the students with respect to the quality of education and education in general,
 38. The Petitioners attributed the environmental degradation, noise water and air pollution, to the activities of the 1st Respondent on the land which activities have contravened the provisions of Section 27 (1), 42 69 and 70 of the *Constitution* and Art 3, 6, 24 , 28 and 29 of the Convention to the rights of the child. The Petitioners quoted in extenso from the decision of the Court in the case of Adrian Kamotho and Odando & Anor Vs NEMA & 3 others (Environment & Land Petition 43 of 2019) (2023) KEELC 21431 (KLR).
 39. The Petitioners begrudged the 2nd Respondent and the IP for failing to consider the Petitioners complaints and grievances and further failing to respond to the concerns in regard to the actions of the Respondent; that they abdicating their duties under the provisions of S 4 and 5 of FAAA despite the violations having been brought to their attention in writing. That they failed to give written reasons for any of their administrative actions and/or inactions which actions condoned the illegalities carried out by the 1st Respondent.
 40. Turning to the convention of international and customary international law on environmental protection and conservation, the petitioners pointed out that the 1st Respondent actions are contrary to the Art 3 of the UN Framework convention on climate change 1992 which required the 1st Respondent to take precautionary measures to anticipate prevent or minimize the cases of environmental degradation and climate change and mitigate its adverse effects.
 41. On general and punitive damages, the Court was urged to adopt the polluter pays principle and find that the orders of punitive and general damages are awardable on the basis of continuing trespass and continuing contravention of the *Constitution* and violation of the petitioner's rights. To this end the case of Rhoda S Kiilu Vs Jiangxi Water and Hydropower Construction Kenya Limited (2019) KEELC 1664 (KLR) and that of the NEMA & Anor Vs KM (Minor suing through mother and best friend SKS) & 17 Others [2023] KECA 775 (KLR) was quoted.
 42. The 1st Respondent framed three issues for determination; whether the Court has jurisdiction to determine the Petition in light of the doctrine of constitutional avoidance and exhaustion; whether the 1st Respondent has trespassed and infringed on the Petitioners right to property on LR NO 209/136/239/R; Whether the 1st Respondent's activities occasioned any environmental noise, water and air pollution.



43. On whether the Court has jurisdiction to determine the Petition in light of her doctrine of constitutional avoidance and exhaustion, Learned Counsel for the 1st Respondent submitted that the petitioner alleges trespass and contestation of the proprietorship of the plot No C with an approx. 0.4910 Ha (exercised from L R No 209/20566) and/or school property being LR No 209/136/239/R and that the 1st Respondents activities have occasioned environmental degradation.
44. Learned Counsel urged that the Petition does not present any constitutional question for the determination of the Court in view of the existence of other forums being the Courts ordinary jurisdiction, the NET and the Liaison Committee. Citing the case of the Owners of the Motor Vessel “Lilian S” v Caltex Oil (Kenya) Ltd [1989] KLR, Learned Counsel urged that in light of the apparent want of jurisdiction the Court ought to down its tools to allow the Petitioner to seek redress in available legal forums. To this end the 1st Respondent cited a number of decisions by the Superior Courts in support of this proposition Gabriel Mutava & 2 others Vs Managing Director KPA & Anor (2015) KEELRC 762 (KLR) Daniel Mugendi Vs Kenyatta University & 3 others (2013) eKLR.
45. On whether the 1st Respondent has trespassed and infringed on the Petitioners right to property on LR NO 209/136/239/R, Learned Counsel stated that the provisions of Section 152E, F and G of the Land Act prescribes an elaborate procedure for the recovery of possession of land by serving the requisite notice to the would-be trespasser of not less than 90 days before the intended date of eviction.
46. Referring to the lease dated 10/6/2020, Learned Counsel stated that it has emerged that LR No 209/136/239/R is non-existent and that the suit land measuring 0.4910 ha occupied by the 1st Respondent is an excision of LR 209/20566 owned by a 3rd party and not the Petitioner as alleged. To that end the question for determination is the ownership of the land, a question that cannot be brought before a constitutional Court.
47. On whether the 1st Respondent’s activities occasioned any environmental noise, water and air pollution Learned Counsel referred the Court to the provisions of Section 61(3) and 72(3) of the PLUPA Act 2019 that allows the petitioner to approach the County Physical and Land Use Planning Liaison Committee for redress. Further on environmental degradation the provisions of Section 9(2)(l) and (n) of the EMCA mandates the NEMA to ensure that the environment is preserved failure in which a party has liberty to appeal to the NET. Consequently, it was argued that the alleged grievances of the petitioner ought to first have been lodged before the Liaison Committee and the NET in compliance with Section 9(2) of the FAAA.
48. In support of the above proposition, the Court was referred to the decision in the case of Speaker of the National Assembly Vs Karume (1992) eKLR where the Court held as follows;
- “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 procedure.”
49. That much as the alleged grievances of the Petitioner are unmerited, the omission to exhaust the existing mechanisms and pay fidelity to the doctrine of constitutional avoidance and exhaustion, renders the Petition fatally incurable. See the decision of the Court in Geoffrey Muthinja Kabiru & 2 others Vs Samuel Munga Henry & 1756 others (2015) eKLR where the Court extolled the doctrine of avoidance and exhaustion for serving 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 the restoration outside the Courts as it accords with Article 159 of the Constitution which commands the Court to encourage alternative means of dispute resolution.
50. Various, in the case of *COD & Anor Vs Nairobi City Water & Sewerage Company Limited* (2015) ECLR it was held that the Constitution cannot be used as general substitute for normal procedures.
 51. Similarly, in the case of *Johnstone Ogechi Vs the National Police Service* (2017) eCLR the Court found that attempting to move the Court by way of a Constitutional Petition will not render statutory provisions inapplicable for there are prescriptive statutory provisions regulating the fora for adequately resolving, at first instance, the dispute.
 52. It was further submitted that the 1st Respondent has not caused any environmental degradation given that it has undertaken its activities lawfully and obtained all the required approvals from Environmental Management and Coordination Act (EMCA), National Construction Authority (NCA), Water Regulatory Authority (WRA), Kenya Civil Aviation Authority (KCAA) in respect to the project with strict mitigation measures to curb environmental degradation. To this end Learned Counsel submitted that some of the mitigation factors put in place by the 1st Respondent include building additional speed pumps to control vehicular traffic, rehabilitation and watering of Jadongo road, additional dust proof netting erection. The 1st Respondent stated that it has obtained licensing from NEMA for making concrete materials, an activity incidental to the project under Licence No NEMA/EIA/PSL/3718 dated 28/1/25. That activities of the 1st Respondent were lauded as furthering social justice or public interest by procuring employment and livelihoods to Kenyans.
 53. It was further submitted that the allegations of environmental degradation disrupting learning activities in the school have not been established. That no amount of evidence has been led to demonstrate that the limits of the subject area on air quality, water quality and noise and vibration levels are in contravention of the provisions of the EMCA (water regulations, noise and excessive vibration pollution control) regulations nor that the 1st Petitioner is in breach of any set standards for the area.
 54. To add on the above, the 1st Respondent refuted the Petitioner's claim that it is in unlawful occupation of the LR NO 209/136/239/R (Plot C, measuring 0.491 ha) and excised from LR 209/20566. That for one to prove trespass the party must first demonstrate ownership of the land and evidence of trespass as it were and that in this case though the petitioner and the 1st Respondent entered into a lease agreement over the disputed land, the 1st Respondent has discovered through the letter dated the 5/9/2024 authored by the Solicitor General that the disputed land measuring 0.491 ha is to be retained by Hebatulla Investment Limited/Hebatulla Properties Limited. The 1st Respondent therefore admits being in possession and occupation of the said land. However, it is submitted that none of the Petitioner's properties have been encroached by the 1st Respondent. That in any event the 1st Respondent is entitled to refunds for monies paid under the lease entered into by mistake and/or misrepresentation/fraud on the part of the Petitioner. That Plot No C is not a playground and that its presence for the last 4 years has been with the blessing of the Interested Party. That the claim over the alleged school playground being LR No 209/136/239/R have not been proven.
 55. Save for filing a list of authorities, the 2nd Respondent and the Interested Party did not file any written submissions.

Analysis and Determination

56. Arising from the pleadings, the rival affidavit evidence and the extensive submissions of the parties, the key issues that fall for determination are;
 - a. Whether the Court has jurisdiction to determine the petition.



- b. Whether the 1st Respondents activities amount to trespass thus violating the Petitioners' right to property.
- c. Whether the Petitioners right to clean and healthy environment have been violated.
- d. Whether the Petitioner is entitled to general and punitive damages including restorative reliefs against the 1st Respondent.
- e. Costs
- f. Final orders and conclusions

Whether the Court has Jurisdiction to Determine the Petition

57. It is a general principle of law that a Court's jurisdiction flows from the Constitution, statute or both. The centrality of the concept of jurisdiction in Kenya's legal system cannot be gainsaid. Nyarangi JA outlined the significance of jurisdiction in the adjudication of civil disputes in Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1 in the following words:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. 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 pending other evidence. A Court of law downs its tools in respect of the matter before it at the moment it holds the opinion that it is without jurisdiction."

58. The Supreme Court of Kenya pronounced itself on the concept of jurisdiction in Samuel Kamau Macharia & Anor Vs Kenya Commercial Bank Limited & 2 others [2012] eKLR as follows:

"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. We agree with Learned Counsel for the first and second respondents in his submissions that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in the Matter of Interim Independent Electoral Commission (Applicant), Constitution Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a Court or tribunal by statute law."

59. The broad jurisdiction of this Court is set out in Article 162(2) of the Constitution as follows:

- "(2) Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to:
 - (a) employment and labour relations; and



- (b) the environment and the use and occupation of, and title to, land.”

60. Section 13 of the Environment & Land Court (ELC) Act sets out in details, the extent of the jurisdiction of the Court in the following terms:

- “(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the *Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under Article 162(2) (b) of the *Constitution*, the Court shall have power to hear and determine disputes; -
- a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. relating to compulsory acquisition of land;
 - c. relating to land administration and management;
 - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. any other dispute relating to environment and land.
- (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the *Constitution*.
- (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate Courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
- (5) Deleted by *Act No. 12 of 2012*, Sch.

61. The Act also mandates the Court to make any order and grant any relief as the Court deems fit and just, including; (a) interim or permanent preservation orders including injunctions; (b) prerogative orders; (c) award of damages; (d) compensation; (e) specific performance; (g) restitution; (h) declaration; or (i) costs

62. It is a principle of law that where there is clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament that procedure should be strictly followed. See the case of Speaker of the National Assembly (supra).

63. It is the 1st Respondent’s case that the right forum to adjudicate the Petitioners’ grievances would have been the NET, the Liaison Committee and that the Petitioners have prematurely invoked the constitutional power of this Court. That the Petitioners have offended the provisions of Section 9(2) of the FAAA that provides that a party approaching the Court must first exhaust the internal remedies available.



64. The Petitioners think otherwise. According to them their dispute is before the right forum and the Court was urged to so find.
65. The general rule is that a party must exhaust any available alternative dispute mechanisms provided in law. The question of the doctrine of restraint and exhaustion of alternative mechanisms has now been settled. In the case of *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023)* [2023] KESC 113 (KLR) the Court culled the following principles;
- a. there is nothing that precludes the adoption of a nuanced approach, that safeguards a litigant’s right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer.
 - b. That right to access the Court for redress of alleged constitutional violations, should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms. The apex Court relied on the reasoning in *William Odhiambo Ramogi & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR where the Court held that where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court (read the ELC Court).
 - c. the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the Court is not restrained from providing constitutional relief.
 - d. a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs, is a necessary prerequisite on the part of any superior Court.
66. In order to determine the objection, there is need to look at the mandates of the proposed forums as to the suitability and adequacy in adjudicating the claim placed before the Court;
- a. Section 129 of the EMCA creates the NET with powers to hear and determine appeals arising from the decisions of NEMA to grant or refuse to grant or transfer licenses, or when granted impose conditions limitations and restriction on the persons licences, revocation suspension or variation of the licence or on the fees chargeable on the licence. To the extent that the petitioner has not raised a complaint with respect to the areas touching on the mandate of NEMA, and to the extent that there is no decision that has been made by NEMA to warrant the invocation of this provision, this Courts view is that the forum proposed by the 1st Respondent remains unavailable/non-suited in the circumstance of this case.
 - b. Section 3 (3) of EMCA grants any person, who claims that their right to a clean and healthy environment has been violated, the right to apply to the ELC for redress.
 - c. Section 61 (2) of PLUPA empowers the County Executive Committee (CEC) on application to grant development permission and stipulate the conditions necessary, refuse to grant the



development permissions with reasons, a party aggrieved by the decision of the CEC regarding an application for development permissions may appeal against the decision of the CEC to the County Physical and Land Use Planning Liaison Committee. It is also open for an applicant aggrieved by an enforcement notice issued under Section 73 of the PLUPA by the CEC to an occupier owner, agent and developer of land to file an appeal with the Liaison committee for hearing and determination of the question of the probity of the said notice. In this case there is no decision that has been made by the CEC with respect to either development approvals, denial and variation nor enforcement of any notice and in the absence of a cause of action that requires the invocation of the powers of the Liaison committee, I therefore find the forum as proposed by the 1st Petitioner at best otiose in my view.

- d. My review of the mandates of all the above quasi-judicial forums do not include any redress for constitutional violations as contended by the 1st Respondent.
 - e. The provisions of Section 152E provides that in the case of private property the owner or the person in charge is of the opinion that a person is in occupation of the land without his consent, may issue notice of not less than 90 days on the intended eviction. In this case the Petitioners aver that they have issued several notices to the 1st Respondent to vacate the suit land to no avail. The notices have not been disputed by the 1st Respondent. Moreover, this cause of action falls within the mandate of the Court as culled out under Section 13 of the ELC Act.
 - f. Section 9 (2) of the FAAA on procedure for judicial review of administrative actions requires the Court not to review an administrative action or decision unless the mechanisms including internal mechanisms for appeal or review until all remedies available under any other written law are first exhausted. The petitioners' case is centrally founded on the right to clean and healthy environment and not review of any administrative actions. To that end, the Court having held that the proposed remedies and forums proposed by the 1st Petitioner are inadequate and for lack of a better word inapplicable, it is the view of the Court that the provisions of this Act do not apply to the case of the Petitioners.
 - g. In any event Section 9(4) of FAAA stipulates notwithstanding subsection (3), the High Court (read ELC) or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the Court considers such exemption to be in the interest of justice.
67. All in all, and taking the cue from the reasoned decision of the apex Court in *Abidha Niculus supra*, it is the view of this Court that to the extent that the Petition revolves around the right to clean and healthy environment, the right forum is this Court.
68. For the reasons given above, the Court finds the objection unmerited and falls for dismissal.

Trespass and Damages

69. It is the case of the Petitioners that despite the expiry of the lease between the 1st Petition and the 1st Respondent, the 1st Respondent has refused to vacate the land notwithstanding several notices issued to it to do so.
70. The 1st Respondent has argued that the issue of trespass does not arise since the land does not belong to the Respondent and further that the alleged parcel LR No 209/136/239/R is nonexistent. That for those reasons the cause of action relating to trespass is totally unfounded and urged the Court to disregard it.



71. Trespass is defined under section 3(1) of the [Trespass Act](#) to mean any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.
72. The word “occupier” means any person who occupies, controls or resides on any premises, or any part of any premises without regard to the title under which he or she so occupies it. It may even include one that holds possessory rights. Black’s Law Dictionary defines occupancy as the act, state, or condition of holding, possessing, or residing in or on something; actual possession, residence, or tenancy especially of a dwelling or land. In my view an occupier includes a person with possessory rights and/or user rights over land.
73. What constitutes trespass was elaborated upon in the case of *Municipal Council of Eldoret v Titus Gatitu Njau* [2020] KECA 782 (KLR) where the Court of Appeal state thus:³⁴. The trial judge’s award for damages on trespass has also been challenged. Section 5 of the [Trespass Act](#) provides as follows: “Trespass with intent to commit an offence or to intimidate, insult or annoy (1) Any person who- (a) enters into or upon property in the possession or occupation of another with intent to commit an offence or to intimidate, insult or annoy any person lawfully in possession or occupation of such property;...”³⁵. In *M’Mukanya v M’Mbijiwe* (1984) KLR 761, the ingredients of the tort of trespass were revisited by this Court and restated as follows: “Trespass is a violation of the right to possession and a plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership (See *Thomson v Ward*, (1953) 2QB 153.”³⁶. Further, in *Winfield & Jolowicz on Tort*, Sweet & Maxwell, 19th Edition at page 428 states as follows: “Trespass to land, like the tort of trespass to goods, consists of interference with possession. Mere physical presence on the land does not necessarily amount to possession sufficient to bring an action for trespass. It is not necessary that the claimant should have some lawful interest in the land. This is not to say that legal title is irrelevant, for where the facts leave it uncertain which of several competing claimants has possession, it is in him who can prove title that can prove he has the right to possession. More generally, in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land. (Emphasis mine).
74. A continuing trespass is defined in *Jowitt’s Dictionary of English Law* 2nd Edition as follows: “A continuing trespass is one which is permanent in its nature; as where a person builds on his own land so that part of the building overhangs his neighbor’s land”. In *Black’s Law Dictionary* 8th Edition, a continuing trespass is defined as: - “A trespass in the nature of a permanent invasion on another’s rights, such as a sign that overhangs another’s property. “Finally, in *Clerk & Lindsell on Torts* 16th Edition, paragraph 23 - 01, it is stated that: - “Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues.”
75. I have perused the Lease Agreement dated the 10/6/2020 between the parties herein in regard to L.R NO. L.R/209/136/239/R measuring 3595 square meters. Clause 2 of the Lease Agreement, provides the purposes of the lease is to be used by Lessee solely for the temporary stocking of material during the construction stage of the River Estate Project on LR No..209/22016 and for incidental purposes related to such construction during the period running from the execution of this agreement and continuing until this agreement is terminated as provided herein. The lease was for a term of 3 years and upon its expiry on the 10/6/2023, the Petitioners notified the 1st Respondent that it would not renew the lease. The Court has seen several notices to this effect. At the insistence of the 1st Respondent the parties agreed to extend the lease till the 31/12/24 on the undertaking that the 1st Respondent was



- to vacate the property and hand over possession to the 1st Petitioner. The 1st Respondent sought for extension of lease to allow it to relocate the concrete making plant to another site.
76. One of the reasons attributed to the decision not to renew the lease was that the 1st Respondent had arbitrarily changed the use of the land from stocking building materials to the manufacture of concrete building stones, an activity that was fueling air, noise and water pollution.
77. The 1st Respondent has not disputed that it is not occupying the suit land. From the pictorials presented to the Court, the existence of the concrete making equipment is undeniable. See BAN -4.
78. On the question of ownership of the suit land, the Court has perused the orders of the Court issued on 13/9/2012 in HCCC No 346 of 2005 -The Board of Governors Ngara Girls High School Vs Bishop Joshua Mulinge, Pastor Morrison Kareithi (Of Gods House of Miracles & Hebatullah Investments Limited. In the said consent Hebatullah Investments Limited donated a portion of LR NO. L.R/209/136/239/R to the school. A number of correspondences on record attest to the efforts by the school, the Nairobi City County and the Office of the Ministry of Lands to complete the excision of the portions in favour of the 1st Petitioner. This position has been confirmed by the Principle Secretary of Education, Dr. Kipsang Belyo when he tersely stated that the land was donated to the school by Hebatullah Investment Limited and the school is in possession and that it is at an advanced stage in the processing of the title.
79. It is not lost on this Court that vide the letter dated the 29/9/23 the 1st Respondent requested for an extension of the lease to allow them relocate the batching plant from the suit land further buttressing the 1st Petitioner's case that the 1st Respondent has always known that their concrete making equipment was hazardous to the school community hence the readiness to relocate it.
80. From the forgoing therefore, it is the conclusion of the Court that the 1st Petitioner is not an idler on the land and the basis of its possession has been sufficiently explained. The averment of the 1st Respondent that it has no locus to issue eviction notices does not hold water. The Lease Agreement has not been disputed. The 1st Respondent entered the land with the permission and consent of the 1st Petitioner holding possessory rights and it is not available to the 1st Respondent to challenge its locus at the tail end of their disengagement.
81. In conclusion the Court finds that the 1st Respondent's continued occupation of the suit land is without the consent of the 1st Petitioner. It is without any legal basis and therefore trespass has been proven and founded and so I find.

Damages on Trespass

82. Having found that the 1st Respondent is in trespass of the suit land, the next point is the assessment of the damages payable in favour of the 1st Respondent.
83. On the assessment of damages on trespass, I rely on the Court of Appeal decision in Kenya Power & Lighting Co. Ltd –vs- Florence Musau Nthenya & Another (2017) KEHC 4601(KLR) where the Court distilled the following principles;
- a. Harlsbury's Laws of England 4th Edition Vol. 45 at para 26 page 1503, namely, the owner of the land is entitled to nominal damages where there is no actual damage occasioned to the owner by the trespass, such amounts as will compensate the owner for loss of use resulting from the damage caused by the trespass, reasonable damages are payable where the trespasser has made use of the owner's land, exemplary damages are payable where the trespassers conduct towards the owner is not only oppressive but also cynical and carried out in deliberate disregard



of the right of the owner of the land with the object of making a gain by his/her unlawful conduct, general damages may be increased where the trespass is accompanied by aggravating circumstances to the detriment of the owner of the land.

- b. Duncan Nderitu Ndegwa vs. Kenya Pipeline Company limited & Another [2013] eKLR - damages payable for trespass are the amount of diminution in value or the loss of reinstatement of the land with the overriding principle being to put the claimant in the position he was in prior to the infliction of harm.
 - c. Philip Ayaya Aluchio vs. Crispinus Ngayo [2014] eKLR, - the measure of damages for trespass is the difference in the value of the Plaintiffs' property immediately before and immediately after the trespass or the cost of restoration whichever is less.
84. The rent payable by the 1st Respondent was Kshs. Three Hundred Thousand (Kshs.300,000) on the extension of the lease. Taking the said amount and applying the same over the period of the continued trespass, I find the sum of Kshs. Three Million (Kshs.10,000,000) being general damages for trespass reasonable in the circumstances of this case.

The Right to Clean and Healthy Environment

85. It is the Petitioners' case that the activities of the 1st Respondent have continued to violate their right to clean and healthy environment by causing environmental degradation, air, water and noise pollution to the detriment of the learners in the school.
86. The 1st Respondent does not deny this but states that it has taken mitigation measures to manage the hazards including seeking and obtaining approvals from all the necessary governmental authorities with respect to its activities on the land and specifically with respect to the development of the River Estate Project. It is also averred that the 1st Respondent has erected additional speed bumps to control matatus motor bikes to prevent raising dust and noise and rehabilitation and watering of Jadongo Road and putting up additional dust proof netting.
87. It is to be noted that the matter of development and or licensing approvals and permits is not in issue. The concern of the Petitioners is the unmitigated violation of their right to clean and healthy environment.
88. Under the preamble to the Constitution, a clean, healthy and sustainable environment takes preeminence in the hearts of Kenyans so much so that the Constitution states;
- “respecting of the environment which is their heritage and determined to sustain it for the benefit of future generations.”
89. So important is a clean, healthy and sustainable environment that it is deemed to be the cornerstone upon which the enjoyment of political economic and social rights can be attained.
90. Save for the Constitution, statute and resilient customary/locally acceptable practices, Kenya is a signatory to a number of international conventions on safeguarding the environment. These conventions and treaties have been ratified under Art 2 (6) of the Constitution of Kenya.
91. EMCA defines the environment to include the physical factors of the surroundings of human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics. It includes both the natural and the built environment. From this definition, it is clear that the environment goes beyond the physical settings to include issues such as social, economic and cultural conditions that influence the life of an individual or a community.



People form part of the environment which is why it is critical to eliminate processes that pose danger to human health.

92. EMCA defines pollution as any direct or indirect alteration of the physical, thermal, chemical, biological, or radioactive properties of any part of the environment by discharging, emitting or depositing wastes so as to affect any beneficial use adversely, to cause a condition which is hazardous or potentially hazardous to public health, safety or welfare, or to animals, birds, wildlife, fish or aquatic life, or to plants or to contravene any condition, limitation or restriction which is subject to a licence under EMCA.
93. Section 3 of EMCA gives effect to the entitlement to a clean and healthy environment which is enshrined in Article 42 of the Constitution.
94. Section 3(1) of EMCA provides that every person in Kenya is entitled to a clean and healthy environment in accordance with the Constitution and relevant laws, and is required to safeguard and enhance the environment. Section 3(2A) of EMCA provides that every person shall cooperate with State organs to protect and conserve the environment and ensure the ecological sustainable development of natural resources.
95. NEMA plays a central role in the preservation and protection of the environment including the ecologically sensitive habitats. It is the watch dog of environmental well-being in our County as can be seen in the provisions of Section 9 of EMCA, which provides thus:

“(1) The object and purpose for which the Authority is established is to exercise general supervision and coordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment.

(2) Without prejudice to the generality of the foregoing, the Authority shall—

- a. co-ordinate the various environmental management activities being undertaken by the lead agencies and promote the integration of environmental considerations into development policies, plans, programmes and projects with a view to ensuring the proper management and rational utilization of environmental resources on a sustainable yield basis for the improvement of the quality of human life in Kenya;
- b. take stock of the natural resources in Kenya and their utilization and conservation;
- c. establish and review in consultation with the relevant lead agencies, land use guidelines;
- d. examine land use patterns to determine their impact on the quality and quantity of natural resources;
- e. carry out surveys which will assist in the proper management and conservation of the environment;
- f. advise the Government on legislative and other measures for the management of the environment or the implementation of relevant international conventions, treaties and agreements in the field of environment, as the case may be;



- g. advise the Government on regional and international environmental conventions, treaties and agreements to which Kenya should be a party and follow up the implementation of such agreements where Kenya is a party;
- h. undertake and co-ordinate research, investigation and surveys in the field of environment and collect, collate and disseminate information about the findings of such research, investigation or survey;
- i. mobilise and monitor the use of financial and human resources for environmental management
- j. identify projects and programmes or types of projects and programmes, plans and policies for which environmental audit or environmental monitoring must be conducted under this Act;
- k. initiate and evolve procedures and safeguards for the prevention of accidents which may cause environmental degradation and evolve remedial measures where accidents occur;
- l. monitor and assess activities, including activities being carried out by relevant lead agencies, in order to ensure that the environment is not degraded by such activities, environmental management objectives are adhered to and adequate early warning on impending environmental emergencies is given;
- m. undertake, in co-operation with relevant lead agencies, programmes intended to enhance environmental education and public awareness about the need for sound environmental management as well as for enlisting public support and encouraging the effort made by other entities in that regard;
- n. publish and disseminate manuals, codes or guidelines relating to environmental management and prevention or abatement of environmental degradation;
- o. render advice and technical support, where possible, to entities engaged in natural resources management and environmental protection so as to enable them to carry out their responsibilities satisfactorily;
- p. prepare and issue an annual report on the state of the environment in Kenya and in this regard may direct any lead agency to prepare and submit to it a report on the state of the sector of the environment under the administration of that lead agency;
- q. perform such other functions as the Government may assign to the Authority or as are incidental or conducive to the exercise by the Authority of any or all of the functions provided under this Act.”



96. Article 42 of the *Constitution* guarantees every person the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69, and to have obligations relating to the environment fulfilled under Article 70.
97. Article 69 of the *Constitution* of Kenya obliges the state to respect protect and conserve the environment. It provides as follows;
- “(1) The State shall—
- a. ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;
 - b. work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya;
 - c. protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;
 - d. encourage public participation in the management, protection and conservation of the environment; establish;
 - e. protect genetic resources and biological diversity;
 - f. systems of environmental impact assessment, environmental audit and monitoring of the environment;
 - g.) eliminate processes and activities that are likely to endanger the environment; and
 - h. utilise the environment and natural resources for the benefit of the people of Kenya.
- (2) Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.”
98. Article 70 of the *Constitution* stipulates that where a person alleges that their right to a clean and healthy environment protected under Article 42 has been, is being or is likely to be denied, violated, infringed or threatened, the person may apply to the Court for redress in addition to any other legal remedies that are available in respect to the same matter. On such an application the Court may make any order, or give any directions, it considers appropriate to prevent, stop or discontinue any act or omission that is harmful to the environment. The Court may also compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or to provide compensation for any victim of a violation of the right to a clean and healthy environment.
99. Article 70 (3) of the *Constitution* provides that for purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.
100. In this case it is not in dispute that the 1st Respondent obtained an Environmental Impact Assessment approval on 28/1/2025 with respect to the proposed stationary concrete batching plant on LR No



- 209/20566. This must have been with the intention of relocating the plant currently on the suit land to its own property.
101. According to the Environmental and Social Impact Assessment report the 1st Respondent was to take mitigation measures to prevent noise and air pollution.
 102. The measures embodied in the approval are geared to eliminate and or prevent damages to the environment. The Precautionary principle is a doctrine that when there are threats of serious and irreversible damage to the environment a lack of full scientific certainty is not a reason for postponing measures to prevent the damage. The 1st Respondents responsibility is to take measures or precautions to ensure that there is no damage to the environment even as it actualizes its project.
 103. A concrete plant, also known as a batch plant or batching plant or a concrete batching plant, is equipment that combines various ingredients to form concrete. Some of these inputs include water, air, admixtures, sand, aggregate (rocks, gravel, etc.), fly ash, silica fume, slag, and cement. A concrete plant can have a variety of parts and accessories, including: mixers (either tilt drum or horizontal, or in some cases both), cement batchers, aggregate batchers, conveyors, radial stackers, aggregate bins, cement bins, heaters, chillers, cement silos, batch plant controls, and dust collectors. The heart of the concrete batching plant is the mixer, and there are many types of mixers, such as tilt drum, pan, planetary, single shaft and twin shaft. The twin shaft mixer can ensure an even mixture of concrete through the use of high horsepower motors, while the tilt mixer offers a comparatively large batch of concrete mix.
 104. The 1st Respondent has argued that the petitioners have not proven that the activities of the 1st Respondent have occasioned environmental degradation noise air and water pollution. That in any event no attempt has been made to lead evidence evincing the limits for the subject area on air water and noise quality to arrive at a conclusion that there has been breach.
 105. Undeniably the operation of a batching plant churns out lots of dust in the air as well as deafening noise produced in the process.
 106. In one of the correspondences on record with the local community, the 1st Respondent admitted dust pollution in the school was a problem and were keen to ensure that the local residents are not affected just like the school.
 107. The School through its nurse presented a report showing increased cases of respiratory illnesses amongst the girls. Unchallenged evidence was led that the dust emitted has enveloped the class rooms, dormitories, dining and the playing field thus polluting the ecosystem in and around the school.
 108. The Court observes that the project was subject of NEMA approvals which contained conditions on precautionary measures to eliminate the air water and noise pollution.
 109. Save for the measures taken to water the Jadongo Road and erection of speed bumps on the road, not much has been said on the cogent steps taken by the 1st Respondent to prevent the release of dust into the atmosphere.
 110. Article 69 (2) of the *Constitution* states that every person has a duty to cooperate with state organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.
 111. This being a school environment the 1st Respondent under the precautionary principle is expected to eliminate the pollution. In other words, the 1st Respondent was under a constitutional obligation not to derogate on the rights of the Petitioners as far as the right to clean healthy and sustainable environment.



112. The principle seeks the elimination of pollution. The tenor of the 1st Respondents arguments borders on the level of pollution that the school should tolerate and not its primary responsibility to eliminate it.
113. The Court is not satisfied that the measures of watering the road, and putting up dust nets is adequate measures in fulfilment of the precautionary principle.
114. The Court has already linked the activities of the 1st Respondent to the pollution in line with the evidence led by the school. In any event Article 70 (3) of Constitution of Kenya, an applicant does not have to demonstrate that any person has incurred loss or suffered injury. It is to be observed that one need not proof injury in a claim of violation of environmental rights. Even a threat to violation is sufficient to found a valid claim.
115. Lastly, the Court has been invited to make a finding that the 2nd Respondent and Interested Party have contravened the rights of the Petitioners under Art 47 and specifically section 4 and 5 of the FAAA. It was their case that despite writing to them severally, they failed to stop the activities of the 1st Respondent. The 2nd Respondent and the Interested Party have not countered this allegation. That said the 2nd Respondent supported the case of the Petitioners in this matter and by extension the Interested Party. Both parties are represented by the Hon Attorney General who have taken a position in favour of the Petitioners. I have perused some of the letters, the basis of the Petitioners allegation and it is noted that the School Administration was seeking the way forward from the 2nd Respondent whether to renew the lease or not. It is not clear why they were taking this trajectory in the face of policy directions from the 2nd Respondent in writing to cease leasing the suit land (this general policy applied to other schools too). I have also seen extensive involvement of the 2nd and Interested Party in the matter to attempt to resolve the ownership question of the school visa vis a third party. In conclusion, the court is not persuaded that the Petitioners have demonstrated breach of their rights under Article 47 and or Section 4 and 5 of the FAAA.

The Right to Education

116. The rights to free and compulsory education is provided for under Article 53 of the [Constitution](#) of Kenya as follows;
53. (1) Every child has the right—
- (a) to a name and nationality from birth;
 - (b) to free and compulsory basic education;
 - (c) to basic nutrition, shelter and health care;
 - (d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;
 - (e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and
 - (f) not to be detained, except as a measure of last resort, and when detained, to be held—
 - (i) for the shortest appropriate period of time; and
 - (ii) separate from adults and in conditions that take account of the child’s sex and age.



- (2) A child's best interests are of paramount importance in every matter concerning the child.
117. Under the Economic and social rights guaranteed under Article 43 of Constitution of Kenya every person has a right to the highest attainable standards of health which includes the right to health care services; reasonable standards of sanitation; clean and safe water in adequate quantities and to education.
118. This Court has been invited to hold that as a result of the violation of the environment through pollution to the air water and noise, the rights of the children under Article 53 of Constitution of Kenya have been affected in respect to their ability to have a conducive learning environment devoid of pollution.
119. The Court notes that Kenya is a signatory of various conventions which guarantee and safeguard of the rights to the child to life and a healthy environment. It is common knowledge that environmental degradation affects the children more so disproportionately given their age and development needs. Every effort must therefore be put in place to safeguard their learning environment through a clean and healthy environment.
120. The Court finds that the concrete making plant operated by the 1st Respondent on the suit land did violate the rights of the students not only to education, dignity and the right to clean and healthy environment. Article 28 of the *Constitution* of Kenya stipulates that every person has inherent dignity and the right to have that dignity respected and protected. Learning in a polluted area as described by the Petitioners takes away the dignity of the young learners by creating a hostile environment. Operating a concrete making machine therefore is not in the best interest of the learner/child.

Whether the 1st Respondent is Liable for the Violation of Environmental Rights

121. The Supreme Court of Kenya in *Export Processing Zone Authority & 10 Others (Suing on their own behalf and on behalf of all residents of Owino-Uhuru Village in Mikindani, Changamwe Area, Mombasa) vs National Environment Management Authority & 3 others* [2024] KESC 75 (KLR) expressed itself as follows:

“Furthermore, in *David M. Ndeti vs. Orbit Chemical Industries Limited* [2014] KEHC 4354 (KLR), the Court in its analysis of *Ryland vs. Fletcher* took the view that a non-natural use of land relates to the nature of the activity carried out by the defendant on his land and it must be one that is special, exceptional or out of the ordinary, hazardous or inherently dangerous. It should also be one that carries high risk of great harm which risk cannot be ameliorated by the defendant despite exercise of reasonable care. The time and place where the activity is carried out is, in addition, a factor to consider so that a factory set up in an otherwise industrial area would not be deemed as non-natural use of land. In the case of *M. C. Mehta vs. Union of India* [1987] 1 SCC 395, the Court stated that the test upon which such liability is to be imposed is based on the nature of the activity. Consequently, where an activity is inherently dangerous or hazardous, then absolute liability for the resulting damage attaches on the person engaged in the activity.”

122. The Court has perused the conditions attached to the NEMA licensing of the concrete patching plant and notes that the plant would be operational between 8 am and 5 pm which is the prime learning period for the school. The activity being inherently hazardous is expected to affect the learning environment.



123. The principle of strict liability in the case of *Rylands v. Fletcher* (1868) LR 3 HL 330, where the Court was of the view that where a person brings something onto their land which is likely to cause mischief if it escapes and it does escape resulting in damage, such person shall be held strictly liable whether or not they were negligent. Absolute liability in contract means that where an unlawful act causes harm, the defendant is liable without necessity for proof of intent or negligence. Therefore, while strict liability allows for defence, absolute liability on the other hand has no room for any form of defence whatsoever.
124. The principle of polluter pays is an embodiment of absolute liability. Section 2 of EMCA as follows:
- “the cost of cleaning up any element of the environment damaged by pollution, compensating victims of pollution, cost of beneficial uses lost as a result of an act of pollution and other costs that are connected with or incidental to the foregoing, is to be paid or borne by the person convicted of pollution under this Act or any other applicable law.”
125. The principle of polluter pays was discussed at length by the Supreme Court in the case of *Export Processing Zone Authority Owino- Uhuru* (supra) as follows:
- “The polluter pays principle therefore inclines that the person who will be targeted to carry out clean-up of contaminated land is the polluter, regardless of whether the contamination was foreseeable when the pollution event occurred or whether the polluter was at fault. The test of ‘causing’ involves some active operation or chain of operations to which the presence or continued presence of the pollutants is attributable. Such involvement may take the form of a failure or omission to act in certain circumstances. The test of ‘knowingly permitting’ would also require both knowledge that the substances in question were in, on or under the land and the possession of the power to prevent such substances being there. There is also the presumption that if a person has caused or knowingly permitted the presence of a contaminated substance on one piece of land, he will also be regarded as having caused or knowingly permitted that substance to be present on any land to which it appears to have migrated.”
126. Similarly, in the case of *Michael Kibui & 2 Others* (suing on their own behalf as well as on behalf of the inhabitants of Mwamba Village of Uasin Gishu County) v *Impressa Construzioni Giuseppe Maltauro SPA & 2 others* [2019] eKLR the Court held as follows:
- “The principle of polluter pays entails that a person involved in any polluting activity should be responsible for the costs of preventing or dealing with any pollution caused by that activity instead of passing them to somebody else. The polluter should bear the expenses of carrying out pollution prevention and control measures to ensure that the environment is in an acceptable state. In international law, the principle is embedded in the Rio Declaration on Environment and Development (1992) which reads at principle 16 that national authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments taking into account that the polluter should, in principle bear the costs of pollution with due regard to the public interests and without distorting international trade and investment. In this case, the 1st respondent is held liable as he is the polluter.”
127. In this case it is not in dispute that the 1st Respondent, erected the concrete making plant on the suit land next to the Petitioners’ School.



128. The pollution described above is traceable to the activities of the 1st Respondent. It has not been disputed that the 1st Respondent erected the concrete batching plant on the suit land and brought materials, the manufacture of which released dust into the air and polluted the air, water and environment coupled with the noise pollution.
129. Proceeding from the provisions of Article 70 (2 a-c of the Constitution of Kenya, this court is empowered to issue reliefs not limited to compensation. It is trite that under the principle of polluter pays, the Petitioners are entitled to compensation for the violation of the constitutional rights to clean and healthy environment.
130. Further the law provides for the complete restoration of the property and the school premises to rid it of the pollution occasioned by the 1st Respondent's activities. The Petitioners have demanded the sum of Kshs 100 Million without laying a basis for it. Though the 1st Respondent has not disputed the figures at all, in its submissions, the court is not persuaded in the absence of any justification to grant the amount. It is also noted that save for denial of liability, the 1st Respondent has not offered to carry out any clean up and restoration measures to bring the School premises to its previous position.
131. The Court has taken into consideration such factors as the duration of the pollution, the inadequacy of the mitigating factors adopted by the 1st Respondent, their suitability and adequacy, if any, and the large number of students and the school community that have and continue to be affected by the pollution for over a period of one year. In the circumstances of the case, it is the view of the Court that a sum of Kenya Shillings Ten Million (Kshs 10,000,000) is reasonable. This sum shall be payable by the 1st Respondent in favour of the 1st Petitioner being compensation for the violation of the right to clean and healthy environment.
132. To buttress the concept of polluter pays principle, the Court finds that the 1st Respondent is responsible for the clean up and full restoration of the land in the sum of Kenya Shillings (Kshs.10,000,000).

Costs

133. The Court has found that it is the activities of the 1st Respondent and its defiance to the notices including the erection of a concrete parking machine that have led the parties to the Court. Consequently, I find no reason why I should deny the Petitioners costs in view of the success of their claims.

Final Orders for Disposal

- a. A declaration be and is hereby issued that the occupation and continued occupation by Erdemann Property Limited of the Petitioner's property known as LR.NO. L.R/209/136/239/R constitutes a violation of the Ngara Girls High School right to property as guaranteed under Articles 27 (1) and 40 of the Constitution of Kenya, 2010.
- b. An order of mandatory injunction be and is hereby issued directing the 1st Respondent whether by itself or by its agents, servants or otherwise however to forthwith remove and demolish all the structures erected on Petitioner's property known as L.R. NO.LR/209/136/239/R within a period of 60 days from the date of this judgement.
- c. It is hereby ordered that a permanent injunction restraining the Defendant by itself, or by its agent, servant or otherwise however from entering upon, remaining on or continuing in occupation of and/or otherwise dealing with or in any way whatsoever interfering with the Petitioner's access to use of



and quiet possession of the Petitioner's property known as LR.No. L.R/209/136/239/R, the suit property.

- d. It is hereby declared that Erdemmann Property Limited has contravened Ngara Girls High School fundamental rights and freedoms, and acted contrary to Articles 10,12, 27,28,40,42,47,53,69 and 70 of the Constitution of Kenya,2010 as with Sections 4 and 23 of the Climate Change Act and Article 3,6,24,28,29 and 31 of the Convention on the Rights of the Child,1989 as read with the United Nations Committee on the Rights of the Comment No.26.
- e. The Petitioner be and is hereby awarded general damages in the sum of Kshs. Three Million (Kshs.3,000,000) to be paid by the 1st Respondent, Erdemmann Property Limited, for trespass and violation of the Ngara Girls' High School's possessory rights. The same accrues with interest at Court rates till the complete handover of the suit land and payment in full.
- f. An order does issue pursuant to Article 23 and 70 of the Constitution to compelling the 1st Respondent, Erdemmann Properties Limited, to pay the sum of Kshs. Ten Million(Kshs.10,000,000) being the compensation for the violation of the rights to clean healthy and sustainable environment.
- g. The 1st Respondent is hereby ordered to restore all that parcel of land namely known as L.R. No.LR/209/136/239/R, to its original status, including the construction of the perimeter wall within 60 days
- h. In default, 1st Respondent is ordered to pay to the 1st Petitioner the sum of Kshs. Ten Million (Kshs. 10,000,000) for the restoration of the land within 90 days.
- i. The cost of this petition shall be borne by the 1st Respondent.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF JULY, 2025 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered Online in the Presence of;

Mr. Ochieng Oginga for the 1st and 2nd Petitioners

Mr. Lusi for the 1st Respondent

Mr. Allan Kamau for the 2nd Respondent

Mr. Allan Kamau for the Interested Party

CA – Ms. Yvette Njoroge

