



Pamwhite Limited v Karomo and Seinfert (Suing as the Chairman and Secretary, respectively of the New Nyali Residents Association) & 4 others (Civil Appeal E015 of 2023) [2025] KECA 930 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KECA 930 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E015 OF 2023
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
MARCH 7, 2025**

BETWEEN

PAMWHITE LIMITED APPELLANT

AND

BENSON KAROMO AND HERBERT SEINFERT (SUING AS THE CHAIRMAN AND SECRETARY, RESPECTIVELY OF THE NEW NYALI RESIDENTS ASSOCIATION) 1ST RESPONDENT

IDEAL LOCATIONS LIMITED 2ND RESPONDENT

KIRKE LIMITED 3RD RESPONDENT

CONRAD PROPERTIES 4TH RESPONDENT

THE COUNTY GOVERNMENT OF MOMBASA 5TH RESPONDENT

(An Appeal against the Ruling of the Environment and Land Court at Mombasa (L. L. Naikuni, J.) dated 5th May, 2022 in Mombasa ELC No.219 of 2020)

JUDGMENT

1. The 1st respondent, the New Nyali Residents Association, is an association of property owners and residents of new Nyali in Mombasa represented in this suit by its officials, Benson Karomo and Hubert Seinfert, the Chairman and Secretary respectively. The 2nd respondent, Ideal Locations Limited, is the owner of the properties known as Land Reference Number 14407 and 16088, section 1, Mainland North Mombasa Municipality (C.R 42055) and (C.R 46440) respectively, the 3rd respondent, Kirke Limited, is the owner of the property known as LR No. MN/1/3174 while the 4th respondent, Conrad Properties, is the owner of the property known as LR No MN/1/3154. The respondents' properties border the suit property known as Plot No. MN/I/3156 belonging to the 1st appellant, Pamwhite



Limited, upon which a commercial development known as “Festival City Shopping Centre” is being undertaken. The 5th respondent is the County Government of Mombasa.

2. The 1st - 4th respondents filed suit against the appellant and the 5th respondent, the County Government of Mombasa, seeking:
 - a. A declaration that the approval No. P/2020/201 issued to the 2nd respondent’s Chief Officer Lands, Planning & Housing for the appellant’s commercial development known as Festival City Shopping Center on property known as Plot No. MN/I/3156 was issued by an unauthorized officer and is therefore illegal, null and void for all intents and purposes.
 - b. An order of permanent injunction to restrain the appellant either by itself, its agents, employees, directors, shareholders or any other person acting on its behalf from constructing and developing commercial development known as Festival City Shopping Center on the property known as Plot No. MN//3156 and until proper approval/permission is granted by the Mombasa County Government in compliance with sections 57(1), 58(1), 60 and 61 of the Physical and Land Use Act, 2019 and after undertaking qualitative public participation and consultation with the Appellants, neighbors and the public at large.
 - c. An order of permanent injunction to restrain the appellant either by itself, its actors, agents, employees, directors, shareholders or any other person acting on its behalf from constructing and developing commercial development known as Festival City Shopping Center on property known as Plot No. MN/I/3156 and until the appellant undertakes proper change of user under, and complies with, the National Building Regulations, 2015, the conditions on the title of the said property and the Memorandum of understanding dated 28th September 2017 between the appellant and the Mombasa County Government.
 - d. An order of permanent injunction to restrain the appellant either by itself, its agents, employees or any other person acting on its behalf from granting approval to the appellant’s commercial development known as Festival City Shopping Center on property known as Plot No. MN/1/3156 unless and until the Respondent complies with the provisions of the *Physical and Land Use Planning Act*, 2019, National Building Regulations, 2015 and the Memorandum of Understanding dated 28th September 2017 between the respondents.
 - e. Costs of this suit to be paid by the appellant and the 5th respondent jointly and severally.
3. Simultaneously with the suit, the 1st - 4th respondents filed a Notice of Motion dated 26th November, 2020 seeking:
 - a. An order of injunction to restrain the appellant either by itself, its contractors, agents, employees, directors, shareholders or any person acting on its behalf from constructing and developing commercial development known as Festival City Shopping Centre on the Property known as Plot no MN/1/3156.
 - b. That, pending and hearing and determination of the suit, there be issued an order of injunction to restrain the appellant either by itself, its contractors, agents, employees, directors, shareholders or any person acting on its behalf from constructing and developing commercial development known as Festival City Shopping Centre on Property known as Plot no MN/1/3156.
4. It was the 1st - 4th respondents’ case that the appellant had failed to obtain permission for its development from the County Executive Committee Member of the Mombasa County as required by section 57 (1) of the Physical and Land Use Planning Act, 2019; that the development undertaken by the appellant



was illegal as it was being undertaken in breach of the statutory provisions and regulations; that, under the provisions of sections 57(1), 58(1), 60 and 61 of the *Physical and Land Use Planning Act* 2019, it was only the County Executive Committee Member of a County Government who has the legal mandate and is duly authorized to issue and give development permissions or approvals; and that the appellant purported to have obtained the approval, and the 5th respondent was purported to have issued the approval or permission for the appellant's development in an irregular and illegal manner, because it was issued by the Chief Officer Lands, Planning and Housing and not the County Executive Committee Member of the County Government of Mombasa who is the only officer authorized to give the approvals or permission for development as envisaged by law.

5. In response, the appellant filed a Replying Affidavit dated 14th December 2020 sworn by its director opposing the application. They claimed that the 1st to 4th respondents were given an opportunity to present their views before the issuance of the development approval together with the general public, institutions, organizations or individuals through an advertisement published in the local dailies of wide national circulation and reader base being "The Daily Nation" newspaper notification dated 26th February 2020 inviting anybody with an objection to the Change of User and, after consideration, the approval was granted for development and that, therefore, the approval was lawful.
6. It was their case that approval was granted pursuant to the provision of section 20(i) of the *Physical and Land Use Planning Act* 2019, which provides that the County Director of Physical and Land Use Planning issued the permission in exercise of the express authority under the aforementioned section; that the approvals were obtained from all the government departments concerned ;that the Chief Lands officer in the Ministry of Lands and Physical Planning consented to the proposal for change of user vide a letter dated 15th March 2020; that the Coast Regional Surveyor consented to the project vide a letter dated 26th May 2020 where he raised no objection to the change of user and development; that the County Physical and Land Use Planning officer in the Ministry of Lands consented to the proposed Change of User and development vide a letter dated 10th June 2020; that the County Government of Mombasa through the Director of Planning and Housing department issued a Change of User Certificate and Consent on 17th June 2020 where he raised no objection to the Change of User; and that the County government of Mombasa issued the development permission on 12th August 2020.
7. By way of a further affidavit dated 17th February 2021 sworn by its director, the appellant conceded that it was true that, pursuant to the provisions of sections 57(1), 58(1), 60 and 61 of the *Physical and Land Use Planning Act* 2019, the County Executive Committee Member was the only person who had the legal mandate to authorize the development or approval and that, pursuant to section 20(j) of the *Physical and Land Use Planning Act* 2019, the permission of the County Executive Committee Member could be issued by the County Director of Physical and Land Use Planning, who had express authority and mandate to issue development permissions and that, therefore, the approval was valid.
8. They also filed a Notice of Preliminary Objection on 2nd June 2021 on the grounds that: the suit is incurably defective because the administrative decisions by public bodies can only be challenged by way of judicial review and not through a Plaint and that, therefore, the trial court could not entertain the suit. According to the appellant, the jurisdiction of the ultimate guarantor of legality to scrutinize actions and decisions of administrative officers, institutions, bodies and tribunals is vested in the High Court sitting as a judicial review court; that the suit is premature and any attempt to entertain the present proceedings in court is unconstitutional, particularly since there are adequate mechanisms to deal with the issues raised in the present suit and that, therefore, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted; that the suit arises from the decision making and communication on the issuance of development permission under "The *Physical and Land Use Planning Act* No. 13 of 2019 and that, therefore, any claim in relation to the decision making and



- communication on issuance or refusal or revocation of a development permission should be lodged with the County Physical And Land use Planning Liaison Committee; that the suit is incurably defective and repugnant to the provisions of the law.
9. On their part, the 5th respondent, while opposing the application filed a Replying Affidavit dated 18th February 2021 sworn by its Director of Legal Services, where it was contended that, under the provisions of sections 2 and 45(4) of the County Governments Act, a Chief Officer is an authorized officer and could therefore execute the mandate of the County Executive Committee Member, and that any dispute in relation to a decision on issuance of development permission under the Physical and Land Use Planning Act should be lodged with the County Physical and Land Use Planning Liaison Committee.
 10. In response to the Preliminary Objection, Mr. Oluga, learned counsel for the 1st - 4th respondents swore a replying affidavit in which he deposed: that the Mombasa County Physical and Land Use Planning Liaison Committee has never been constituted and does not exist; that he came to learn that Mombasa County Physical and Land Use Planning Liaison Committee does not exist and had not been constituted as of 4th October 2021; that, on that date, he went to the Department of Land, Housing and Physical Planning, Mombasa County Government at Bima Towers with a view of lodging an appeal to the Mombasa County Physical and Land Use Planning Liaison Committee on behalf of a client who had been served with an Enforcement Notice under section 71(1) (a) as read with section 75 of the Physical and Planning Land Use Act, 2019; that, while there, he requested to be directed to the Registry of the Mombasa County Physical and Land Use Planning Liaison Committee so that he could file the appeal; that he was immediately informed by the receptionist that the Mombasa County Physical and Land Use Planning Liaison Committee does not exist and has no registry; that he doubted the information and proceeded to the County Attorney's Office to investigate further; that it was confirmed to him that the Mombasa County Physical and Land Use Planning Liaison Committee does not exist, and was informed that appeals to the Mombasa County Physical and Land Use Planning Liaison Committee were at the time being received in the office of the Clerk of Mombasa County Assembly; that he proceeded to the Clerk's Office where the document was received and stamped, and received by the County Government of Mombasa and the Department of Land, Housing and Physical Planning of Mombasa County Government, who are listed in the appeal as respondents. It was deponed that, since the Mombasa County Physical and Land Use Planning Liaison Committee does not exist and was not handling any appeals or disputes at the time, and that it did not have a Registry; that the appeal lodged at the office of the Clerk of Mombasa County Assembly was not and has never been assigned a reference number and it remains undetermined to date.
 11. It was further deponed that, while the issues raised in this suit do not fall within the jurisdiction of the County Physical and Land Use Planning Liaison Committee, it is clear that even if the issues fell within the Committee's jurisdiction, the dispute could not be referred to the Committee because it did not exist; that, therefore, the court in this case should exceptionally assume jurisdiction; and that it is worth noting that perhaps out of the realization that the Mombasa County Physical and Land Use Planning Liaison Committee did not exist, that the 5th respondent, the County Government of Mombasa withdrew its Notice of Preliminary Objection to the trial court's jurisdiction so as to enable the hearing proceed in court rather than before a non-existent Committee.
 12. The trial Judge dismissed the preliminary objection having found that the court has jurisdiction to determine the suit. The court held that the gist of the 1st - 4th respondents case was that they are aggrieved by the decision of the 5th respondent in granting the development permission to the appellant for a commercial development known as Festival City Shopping Centre on the property known as Plot no MN/1/3156 vide the approval No. P/2020/201 issued by the 5th respondent's Chief Officer,



- Planning and Housing, and that the original jurisdiction to entertain the present suit owing to the doctrine of exhaustion of statutory remedies lies with the County Physical and Land Use Planning Liaison Committee, and that the court only has an appellate jurisdiction to determine the dispute.
13. The court nevertheless proceeded to assume jurisdiction of the matter on the basis that the Mombasa County Physical and Land Use Planning Liaison Committee was non-existent, a fact that the appellant had not rebutted nor controverted and that the 1st - 4th respondents had no other recourse but in the Environment and Land Court.
 14. Aggrieved, the appellant filed an appeal to this Court on the grounds that: the learned Judge was in error in law and in fact in dismissing the appellant's Notice of Preliminary Objection dated 2nd June, 2021 and, yet by dint of section 61 (3) as read with section 61 (4) of the *Physical and Land Use Planning Act*, the Court had no jurisdiction to determine a dispute touching on matters of Physical and Land Use Planning, unless it was an appeal from the County Physical and Land Use Planning Liaison Committee, and in admitting the Replying Affidavit filed by the 1st to 4th respondents advocate, one Willis O. Oluga sworn on 1st November, 2021 against the Notice of Preliminary Objection on a point of law, when replying affidavits are based on facts and, the court is not permitted to consider evidence but pure points of law; in disregarding a ruling delivered by N.A. Matheka (J.), in E.L.C No.227 of 2020 (Mombasa), which was a similar matter filed by the 1st respondent seeking similar reliefs; in dismissing the appellant's preliminary objection yet, it had no jurisdiction to entertain the 1st- 4th respondents' suit.
 15. The parties filed written submissions and, when the appeal came up for hearing on a virtual platform, learned counsel, Ms. Chengo holding brief for Mr. Kenga appeared for the appellant while learned counsel Mr. Oluga appeared for the 1st- 4th respondents. There was no appearance for the 5th respondent though duly served with the hearing notice.
 16. In their written submissions, counsel for the appellant submitted that the issue concerned the issuance of a development license or building permit, and that the guiding legislation is the Physical Planning and Land Use Act, 2019; that the architecture of the dispute resolution mechanism put in place by the legislature, is that the statutory dispute resolution mechanism by way of County Physical and Land Use Planning Liaison Committee was to be mandatorily observed and within 14 days of a grievance and/or dispute; that the 14 days is a jurisdictional issue and goes to the core of any dispute arising from the grievance on issuance or refusal of development permission. The legislature, equally in mandatory terms, required the committee to hear and determine the appeal within fourteen days from the date of filing. This dispute resolution mechanism contemplated under section 61 (3) of the *Physical and Land Use Planning Act* is clear and without ambiguity; that section 61 (3) provides that a person aggrieved should appeal to the County Physical and Land Use Planning Liaison Committee within 14 days and, thereafter, the Committee is mandated to determine the appeal within 14 days; that crafty pleadings by way of Plaint were brought to court on 26th November, 2020, which was well past the 14-day jurisdictional timeline (,a delay of over 5 months) and brought before the wrong forum because the Environment and Land Court can only exercise appellate jurisdiction under section 61(4) of the *Physical and Land Use Planning Act*.
 17. Counsel challenged the 1st- 4th respondent's response to the Preliminary objection and stated that the trial Judge ought not to have relied on the 1st- 4th respondent counsel's replying affidavit.
 18. On their part, counsel for the 1st - 4th Respondents submitted that there was no application to expunge the replying affidavit from the court record. It remains validly part of the record, and that Mr. Oluga Advocate swore the affidavit as an officer of the court to bring important information to the court's



attention, to wit, that the Mombasa County Physical and Land Use Planning Liaison Committee has never been constituted and does not exist.

19. Counsel submitted that the appellant filed a Statement of Defence on 18th February 2021, and that the appellant did not raise the points it raised in the Preliminary Objection in its Statement of Defence; that what is appealable to the County Physical and Land Use Planning Liaison Committee is the “decision of the county executive committee member” and nothing else. That, the jurisdiction of the County Physical and Land Use Planning Liaison Committee can only be invoked in instances where there is a “decision of the County Executive Committee member”. Put differently, the County Physical and Land Use Planning Liaison Committee can only sit and preside over an appeal against the decision of the County Executive Committee member and not a decision by any other person or officer, and that in instances where there is no decision of the County Executive Committee member as in this case, there is nothing to appeal against to the County Physical and Land Use Planning Liaison Committee. In essence, it is the decision of the County Executive Committee member which triggers the jurisdiction of the County Physical and Land Use Planning Liaison Committee.
20. Counsel further submitted that the 1st - 4th respondents’ case as pleaded at paragraphs 12-15 of the Amended Plaintiff was that there was no development permission granted to the appellant by the County Executive Committee member of the County Government of Mombasa. The permission was issued by the Chief Officer of Lands, Planning & Housing and not the County Executive Committee member. Therefore, NO DECISION has been made by the County Executive Committee member. The development permission being challenged in this suit was made by the Chief Officer Lands, Planning & Housing and not the County Executive Committee member and, in effect, no decision has been made giving rise to an appeal to the County Physical and Land Use Planning Liaison Committee under section 61 (3) of the *Physical and Land Use Planning Act*, 2019. The appellant’s preliminary objection was rightfully dismissed.
21. As a first appellate court, this Court has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of *Selle & Another vs Associated Motor Boat Co. Ltd & Others* [1968] EA 123 as follows:

...Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally.”
22. From the Record of appeal and the submissions by parties, the following issues arise for determination: i) whether the learned Judge rightly considered the replying affidavit sworn on 1st November 2021 by the 1st to 4th respondents’ advocate; and ii) whether the learned Judge was wrong in dismissing the appellant’s Preliminary Objection while the court allegedly lacked jurisdiction to entertain the 1st to 4th respondents’ suit.
23. On the question of the affidavit sworn by Willis Oluga, the 1st- 4th respondents’ counsel, a consideration of the record shows that the issue was not raised by the appellant during the hearing of the preliminary objection in the trial court, and neither was the issue raised in their written submissions. Therefore, this issue was not determined by the trial Judge.



24. It is trite law that an issue which was not raised, argued and or pronounced upon by a trial court cannot be validly raised as a ground of appeal or as an issue for determination before the appellate court. See *Republic vs Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & others ex-parte Tom Mbaluto* [2018] eKLR, where this Court held as follows regarding new points on appeal:

25. It is in the discretion of the Court to allow a party to raise a new point on appeal, depending on the circumstances of the case.

...In this case, we have stated that the appellant never raised the issue in his judicial review application, neither party addressed the issue in the High Court, the learned judge quite properly did not address the issue and, to make matters worse, the appellant did not raise the issue in his memorandum of appeal in this Court.... As has been stated time and again, there is a philosophy and logical reason behind our appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the appellate court to consideration of the issues that were canvassed before and decided by the trial court. If that were not the case, the appellate court would become a trial court in disguise and make decisions without the benefit of the input of the court of first instance.”

26. As a consequence, this ground having not been raised as an issue before the trial Judge, it cannot be raised and determined by this Court this late in the day. This ground is therefore dismissed.

27. On the substantive issues of the preliminary objection that the Mombasa County Physical and Land Use Planning Liaison Committee and not the court had jurisdiction to hear the complaint, and the complaint that the 1st-4th respondents ought to have filed judicial review proceedings instead of a Plaint, it is trite that where there is a challenge to a decision by a body or a person that infringe rights under public law, the dispute must as a general rule proceed by way of Judicial Review, and not by a plaint.

28. In the case of *Pastoli vs Kabale District Local Government Council & Others* (2008) 2EA 300, it was held that:

When Parliament prescribes the manner or form in which a duty is to be performed or power exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions. The courts must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done (though in some cases it has been said that there must be “substantial compliance” with the statutory provisions if the deviation is to be excused as a mere irregularity). Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision of the appropriate category. The whole scope and purpose of enactment must be considered and one must assess the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act. In assessing the importance of the provision, particular regard may be had to its significance as a protection of individual rights that may be adversely affected by the decision and the importance of the procedural requirement in the overall administrative scheme established by the statute. Although nullification is the natural and usual consequences of disobedience, breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced or if a serious public inconvenience would be caused by holding them to be mandatory or if the Court is for any reason disinclined to interfere with the act or decision that is impugned. In a nutshell,



the above principles indicate that to determine whether the legislature intended a particular provision of Statute to be mandatory, the Court must consider the whole scope and purpose of the Statute. Then to assess the importance of the impugned provision in relation to the general object intended to be achieved by the Act, Court must consider the protection of the provision in relation to the rights of the individual and the effect of the decision that the provision is mandatory.”

29. Article 159(2) (d) of the Constitution is patently clear that justice shall be administered without undue regard to procedural technicalities and that the purpose and principles of this Constitution shall be protected and promoted, particularly where the need to effect substantive justice is the core basis on which to invoke the provision. As held by the trial judge, taking the drastic action of shutting out the 1st-4th respondents from the seat of justice by denying them an opportunity to be heard due to a primarily procedural flaws, in this case a lack of form of the pleadings, would be going against the very purpose and objectives of both *the Constitution* and the *Fair Administrative Action Act*, 2015. In addition, that would infringe constitutional imperatives, particularly when the appellant is not likely to suffer any prejudice. Accordingly, we would add that the 1st - 4th respondents’ suit was not only against the 5th respondent, but also against the appellant who is not an administrative body. Consequently, we are satisfied that the trial judge rightly dismissed the appellant’s objection to the manner in which the suit was filed so that this ground fails and is likewise dismissed.
30. We now turn to the issue as to whether the trial judge was wrong in dismissing the appellant’s Preliminary Objection for the reason that the court had no jurisdiction to entertain the 1st - 4th respondents’ suit.
31. It is the appellant’s contention that the suit instituted by the 1st- 4th respondents was premature since sufficient alternative statutory mechanisms exists to deal with the issues raised in the present suit; that the jurisdiction of the court should not have been invoked until such mechanisms were exhausted as provided for under the doctrine of exhaustion and the *Physical and Land use Planning Act*.
32. In determining this issue, the trial Judge had this to say:

“Respectfully, however crafty the Plaintiff has drawn the Plaint to oust the jurisdiction of the Mombasa County Physical and Land use Planning Liaison Committee, the gist of the Plaintiffs case is that they are aggrieved by the decision of 2nd Defendant herein to grant development permission to the 1st Defendant for commercial development known as Festival City Shopping Centre on Property known as Plot no MN/1/3156 vide the approval no P/2020/201 issued by the 2nd Defendant’s Chief Officer and, planning and housing.

It is clear that the original jurisdiction to entertain the present suit owing to the doctrine of exhaustion of statutory remedies lies with the County Physical and Land use Planning Liaison Committee and this Court only has appellate jurisdiction.”
33. The court proceeded to assume jurisdiction on the basis that the Mombasa County Physical and Land use Planning Liaison Committee did not exists and has never been constituted.
34. In the case of Samuel Kamau Macharia & Another vs Kenya Commercial Bank & 2 Others, Application No. 2 of 2011 [2012] eKLR, the Supreme Court pronounced itself on jurisdiction thus:

(68) 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 the counsel for the first and second respondents in his submission 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.

35. In the matter of Interim Independent Electoral Commissions, Constitutional Application No. 2 of 2011 [2011] eKLR, the Supreme Court similarly expressed that where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits and that a court 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*.
36. Under the principle of Exhaustion of Administrative Remedies, it is trite law that where there exists an alternative method of dispute resolution established by legislation, courts must exercise restraint in exercising jurisdiction conferred by *the Constitution* and should defer to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance. See also *Narok County Council vs Trans Mara County Council* [2000] 1 EA; *Kones vs Republic & Another ex parte Kimani wa Nyoike & 4 Others* (2008)3 KLR (EP); *Speaker of the National Assembly vs Njenga Karume* (2008)1 KLR (EP) 425; and the Supreme Court decision in the case of *Mumba & 7 others (Sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) vv Munyao & 148 others (Suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) (Petition 3 of 2016) [2019] KESC 83 (KLR)*.
37. This Court in the case of *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR stated that:

“It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The ex parte Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.”

38. This Court also considered the exceptions to the doctrine of exhaustion, and expressed itself thus:
59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In *R vs Independent Electoral and Boundaries Commission (I E B C) & Others ex parte The National Super Alliance Kenya (NASA)* (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:
39. What emerges from our jurisprudence in these cases are at least two principles: while exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, the regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the *Shikara Limited Case* (supra), the High Court may, in exceptional circumstances, find that the exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation, especially in virgin areas or where an important constitutional value is at stake.”



40. There is also the persuasive High Court case of William Odhiambo Ramogi & 3 others v Attorney General & 4 others: Muslims for Human Rights & 2 others (Interested parties) [2020] eKLR where a five judge bench held:

”...the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court’s jurisdiction must be construed restrictively. “

41. Recently, this Court in the case of Kenya Revenue Authority & 2 others vs Doshi Iron Mongers Limited (Civil Appeal 66 of 2020) [2024] KECA 640 (KLR) held that:

However, in order for a legal provision relied upon to support the doctrine of exhaustion and constitutional avoidance to pass muster, it ought to meet certain tests, and these are that the reliefs prescribed in the alternative forums must be available, effective and sufficient and, as set out in the decision of the African Commission of Human and People’s Rights in the case of Dawda K. Jawara vs. Gambia ACmHPR 147/95- 149/96:

‘A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]...the Governments assertion of non-exhaustion of local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case.’”

42. What becomes evident is that the doctrine of exhaustion is not cast in stone since there may be occasions when the invocation of the doctrine would not serve the values enshrined in *the Constitution* or law, in which case a party may be perfectly entitled to move to court for relief. See *United Millers Limited vs Kenya Bureau of Standards & 5 others* [2021] eKLR. The cited authorities are explicit that, notwithstanding the enactment of a forum created by statute to determine specified categories of disputes, where parties are unable to access such forums because they do not exist or are inaccessible for one reason or the other thereby impeding their ability to access justice, in such circumstances courts are empowered to step in to hear and determine such matters and dispense much-needed reliefs to the parties.

43. The facts of the instant case make it clear that the prescribed remedy for the 1st - 4th respondents, to wit, the Mombasa County Physical and Land Use Planning Liaison Committee did not exist, and that it had not been constituted, a fact that was not rebutted by the 5th respondent. In the absence of the prescribed forum, it was in the interest of justice for the trial court to assume jurisdiction and proceed to determine the dispute. As such, the trial Judge cannot be faulted for assuming jurisdiction in the suit and dismissing the Preliminary objection.

44. On the basis of the extant circumstances, we find that we have no reason to interfere with that decision.

45. In sum, the appeal lacks merit and is accordingly dismissed with costs to the 1st- 4th respondents.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF MARCH, 2025.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA, CArb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

Deputy Registrar

