



**Mugambi & another v Summerville Properties Limited (Environment & Land Case E432 of 2024) [2024] KEELC 14091 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 14091 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E432 OF 2024**

**JO MBOYA, J  
DECEMBER 19, 2024**

**BETWEEN**

**JULIETTE MUGAMBI ..... 1<sup>ST</sup> PLAINTIFF**

**MUGAMBI MWENDA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**SUMMERVILLE PROPERTIES LIMITED ..... DEFENDANT**

**RULING**

**Introduction And Background:**

1. The Plaintiffs/Applicants have approached the court vide Notice of Motion Application dated 8<sup>th</sup> November 2024; brought pursuant to the provisions of Article 40 of *the Constitution* of Kenya, Order 51 Rule 1 and Order 40 Rule (2) and (4) of the Civil Procedure Rules 2010, Sections 1A, 1B, 3, and 3A of the *Civil Procedure Act*; in respect of which the Applicants have sought the following reliefs:
  - i. ....Spent
  - ii. That pending the hearing and determination of the instant application inter partes and the Plaintiff/Applicant’s Application dated 18<sup>th</sup> October 2024 set for inter partes hearing on 12<sup>th</sup> November 2024, this Honourable Court be pleased to issue a temporary injunction restraining and/or halting any further excavation, grading, drilling or construction activities whatsoever on the Respondent’s plot No. 28428/80 which is adjacent to the Applicant’s property situated in L.R No. plot no. 12825/196.
  - iii. That pending the hearing and determination of the instant application and the Plaintiff/Applicant’s Application and suit dated 18<sup>th</sup> October 2024, this Honourable Court be pleased to issue a temporary injunction restraining and/or halting any further excavation, grading,



drilling or construction activities whatsoever on the Respondent's plot No. 28428/80 which is adjacent to the Applicant's property situated in L.R No. plot no. 12825/196.

- iv. That the costs of this Application be in the cause.
2. The instant Application is anchored on various/numerous grounds which have been highlighted at the foot thereof. In addition, the Application is supported by the Affidavit sworn by Julliette Mugambi [the 1<sup>st</sup> Applicant herein]. For coherence the Supporting Affidavit is sworn on 8<sup>th</sup> November 2024.
3. Upon being served with the instant Application, the Defendant/Respondent filed a Replying Affidavit sworn on 15<sup>th</sup> November 2024 and a Notice of Preliminary Objection of even date. In particular, the Defendant/Respondent has averred that the issues that underpin the subject matter are issues that ought to have been mounted before the Liaison Committee in accordance with the provisions of Sections 10 and 78 of the Physical and Land Use Act 2019; and before the National Environment Tribunal [NET] in accordance with the provisions of Section 129 and 130 of the EMCA [1999].
4. The Application beforehand came up for hearing on 20<sup>th</sup> November 2024 when same [Application] could not proceed. Thereafter, the court ordered and directed that the parties do proceed file and exchange written submissions.
5. Arising from the directions of the court, the Plaintiffs/Applicants herein filed written submissions dated 22<sup>nd</sup> November 2024 whereas the Defendant/Respondent filed written submissions dated 25<sup>th</sup> November 2024. The two [2] sets of written submissions form part of the record of the court.

### **Parties' Submissions:**

#### **a. Applicants' Submissions**

6. The Applicants' filed written submissions dated 22<sup>nd</sup> November 2024 and wherein the Applicants have adopted the grounds contained at the foot of the Application. In addition, the Applicants have also reiterated the contents of the Supporting Affidavit together with the annexures annexed thereto.
7. Furthermore, learned counsel for the Applicants has thereafter highlighted and canvassed four[4] salient issues for determination by the court. Firstly, learned counsel for the Applicants has submitted that the issues being raised by the Applicant herein fall within the jurisdiction of the Environment and Land court. In this regard, learned counsel has contended that this court is therefore seized of the requisite jurisdiction to entertain and adjudicate upon the matter.
8. Learned counsel for the Applicants has submitted that even though there are aspects of the matter that touch on and concern the development plan that was approved by the planning authority, the excavation that was being undertaken by the Defendant/Respondent has impacted on the Plaintiffs' right to and enjoyment of L.R No.12825/196, belonging to and registered in the names of the Applicants. In this regard, it has been contended that the issue beforehand does not exclusively fall within the jurisdiction of the County Physical and Land Use Planning Liaison Committee.
9. Other than the foregoing, learned counsel for the Applicants has submitted that even where a segment of the dispute falls within a statutory tribunal, the Applicants would still have the liberty to approach the Environment and Land Court where it is demonstrated that the dispute resolution forum is not possessed of the requisite expertise to address all the issues in dispute. To this end, learned counsel for the Applicants has submitted that the doctrine of exhaustion has exceptions and limitations.
10. To vindicate the submissions touching on and concerning the question of jurisdiction, learned counsel for the Applicants has cited and referenced various decisions including Samuel K. Macharia & Another



v Kenya Commercial Bank Limited & Another 2012 eKLR; Abidha Nicholas v Attorney General & 7 Others 2023 KESC and Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 Others 2023 KESC, respectively.

11. Premised on the foregoing submissions, learned counsel for the Applicants has therefore invited the court to find and hold that the matter herein falls within the jurisdictional remit of this court.
12. Secondly, learned counsel for the Applicants has submitted that the Applicants herein have established and demonstrated that same are entitled to an order of temporary injunction. In particular, the counsel for the Applicants has submitted that the activities being carried out by the Defendant herein on L.R No. 28428/80 including the excavation[s], drilling and construction thereon have occasioned serious harm and damages to the Applicants' property namely, L.R No. 12825/196.
13. In particular, learned counsel for the Applicants has submitted that the offensive excavation and the attendant construction being carried out on the Respondent's property has caused the Applicants' wall to develop serious cracks. Besides, it has also been submitted that the offensive excavation has also caused fault lines to develop on the Applicants' house sitting on L.R No. 12825/196.
14. It is the further submissions by learned counsel for the Applicants that on or about April 2024, the cracks and the fault lines, which were notable on the Applicants' main house, exacerbated and this caused the Applicants to lodge a complaint with the County Government of Kiambu and National Environment Management Authority [NEMA].
15. Owing to the fact that the excavation and the construction being undertaken by the Respondent was occasioning injury and harm to the Applicants, learned counsel for the Applicants has submitted that both the Applicants and the Respondent attended a joint inspection team which also included representative[s] from National Construction Authority [NCA] and the County Government of Kiambu. In this regard, it has been posited that various recommendations were arrived at and/or reached.
16. Be that as it may, it has been contended that despite the various recommendations that were reached/ arrived at, the Respondent herein has failed and/or neglected to undertake remedial actions/works to avert the imminent collapse of the Applicants' house sitting on L.R No. 12825/196.
17. Arising from the foregoing submissions, learned counsel for the Applicants has therefore submitted that the Respondent herein is culpable for the cracks and the fault lines which have developed both on the perimeter wall and the main house belonging to the Applicants. To this end, learned counsel for the Applicants has posited that the Applicants have established and demonstrated a prima facie case with probability of success.
18. In support of the submissions that the Applicants have established a prima facie case with probability of success, learned counsel for the Applicants has cited and referenced the decision in Giella versus Cassman Brown Limited and Another [1973] EA 353; and Nguruman Limited v Jan Bonde Nielsen & 2 Others [2024] eKLR
19. Thirdly, learned counsel for the Applicants has submitted that as a result of the serious cracks and the fault lines which have developed in the Applicants' main house, the Applicants have been forced to vacate their house. Furthermore, it has been contended that the house in question is not just a house but the same is the matrimonial home and the only family home for the Applicants. In this regard, the circumstances leading to the vacation of the house by the Applicants have [sic] occasioned irreparable loss.



20. In addition, it has been submitted that the Applicants herein actually took out a mortgage to purchase/acquire the suit property. Besides, it has been contended that the Applicants continue to service the mortgage to date.
21. Consequently and in view of the foregoing, it has been submitted that the loss that arises from the impugned actions, namely, the excavations, drilling and the construction, is therefore irreparable and thus incapable of being quantified in monetary terms.
22. To underscore the submissions that the Applicants are bound to suffer irreparable loss, learned counsel for the Applicants has cited and referenced inter alia the holding in the case of *Re Estate of Gideon Kibitok Tarus (Deceased) [2021] eKLR and Robert Mugo Karanja v Ecobank Kenya Limited & Dalali Traders, Nairobi HCCC No. 221 of 2018 [Commercial and Tax Division]*.
23. Fourthly, learned counsel for the Applicants has submitted that the suit and the Application by the Applicants herein is not defeated by the doctrine of laches. In particular, it has been submitted, that even though the impugned excavation commenced in November 2023, the Applicants' herein have variously engaged the Respondent on a number of occasions in an endeavour to address/redress the dispute beforehand. To this end, learned counsel for the Applicants has referenced various meetings including the meetings held on 25<sup>th</sup> April 2024; 2<sup>nd</sup> May 2024; and 30<sup>th</sup> July 2024.
24. Furthermore, it has been submitted that even though the Respondent had initially created an impression that same was amenable to an amicable settlement, it has been contended that the Respondent subsequently adopted a hardline stand calculated to frustrate the amicable settlement. In this regard, it has been submitted that it is the subsequent change of mind by the Respondent that has warranted the filing of the instant suit.
25. Further and at any rate, learned counsel for the Applicants has submitted that the Applicants herein engaged the Defendant/Respondent in good faith and same [Applicants] expected that the dispute beforehand could be sorted out amicably. Nevertheless, it has been contended that when the Respondent developed the reluctance to proceed with the amicable settlement, the Applicants were left with no other alternative but to approach the court.
26. In a nutshell, learned counsel for the Applicants has therefore submitted that the doctrine of laches which has been cited and referenced by the Respondent herein is irrelevant and inapplicable.
27. Flowing from the foregoing submissions, learned counsel for the Applicants has therefore implored the court to find and hold that the Application beforehand is meritorious. In this regard, the court has been invited to proceed and grant the reliefs sought thereunder.

#### **b. Respondent's Submissions**

28. The Respondent filed written submissions dated 25<sup>th</sup> November 2024 and wherein the Respondent has adopted and reiterated the averments contained in the Replying Affidavit sworn on 15<sup>th</sup> November 2024. Furthermore, the Respondent has also highlighted the Preliminary Objection which essentially touches on and concerns the jurisdiction of the court to entertain and adjudicate upon the instant matter.
29. Additionally, learned counsel for the Respondent has highlighted and canvassed four [4] salient issues for consideration and determination by the court. First and foremost, learned counsel for the Respondent has submitted that the construction activities that have been taken/undertaken by the Respondent flow from the development plan which was duly approved by the planning authority, namely, the County Government of Kiambu.



30. Other than the foregoing, it has also been submitted that the excavation and the construction have also been undertaken in accordance with the terms and conditions stipulated in the Environment Impact Assessment Licence, which was issued by NEMA.
31. As a result of the fact that the activities complained of were duly approved and licenced by the relevant authorities, it has been submitted that if the Applicants herein are aggrieved then same [Applicants] ought to have filed their complaints with the County Physical and Land Use Planning Liaison Committee. To this end, learned counsel for the Respondent has cited and referenced Sections 10 and 78 of the *Physical and Land Use Planning Act* 2019.
32. In addition, learned counsel for the Respondent has also cited and referenced various decisions including *Owner of Motor Vessel Lilian S v Caltex Oil Kenya Limited* 1989 eKLR; *Jospeh Kipng'eno Koech & 2 Others v Nakuru County Assembly & 5 Others* 2013 eKLR; *The Speaker of the National Assembly v Njenga Karume* 1992 eKLR; *Abidha Nicholas v Attorney General & 7 Others* 2021 eKLR; and *Kibos Distillers Limited & 4 Others v Benson Ambuti Adegia & 3 Others* 2020 eKLR.
33. Premised on the foregoing submissions, learned counsel for the Respondent has invited the court to find and hold that the issues that underpin the subject suit and the consequential application fall outside the jurisdiction of the Environment and Land Court. In this regard, the court has been implored to find and hold that same [court] is devoid of the requisite jurisdiction to entertain and adjudicate upon the dispute.
34. Secondly, learned counsel for the Respondent has submitted that the Applicants herein have neither established nor demonstrated the existence of a prima facie case with probability of success. In particular, it has been contended that the Applicants' herein have not tendered any evidence to create a nexus between the Respondent's construction activities and the alleged cracks and damages on the Applicants' property. In the absence of such evidence, it has been posited that the Applicants have therefore not shown a prima facie case.
35. Additionally, it has been submitted that the cracks, separation of the boundary walls and the caving of the paving slabs, which are complained of occurred during the period when the country experienced heavy rainfall. In this regard, it has been contended that the cracks and the damages being complained of are as a result of the heavy rains and not a consequence of the construction activities which had gone on for several months prior to the alleged damages.
36. To buttress the submissions that the Applicants herein have neither established nor demonstrated the existence of a prima facie case with probability of success, Learned counsel for the Respondent has cited and referenced the decision in *Mrao Limited v First American Bank of Kenya* [2003] eKLR and *Nguruman Limited v Jan Bonde Neilsen & 2 Others* [2014] eKLR.
37. Thirdly, learned counsel for the Respondent has also submitted that the Applicants herein have failed to demonstrate/prove that same [Applicants] shall be disposed to suffer irreparable loss. To this end, it has been submitted that the loss, if any; that the Applicants shall be disposed to suffer is quantifiable and compensable in monetary terms. In any event, it has been submitted that the Applicants herein have since engaged a quantity surveyor who proceeded to and prepared a Bill of Quantities detailing [sic] the nature of the damages and the costs of repairs attendant to [sic] the damages in question.
38. In particular, it has been contended that following the appointment and/or retention of M/S Towercost Consultants Limited who are civil engineers/quantity surveyors, same [Towercost Consultants Limited] prepared the Bill of Quantities indicating the cost of repairs in the sum of KShs. 5,219,911.20 only.



39. Other than the foregoing, learned counsel for the Respondent has also submitted that the Applicants herein have also impleaded special damages in the sum of KShs. 1,851,000/- only. In this regard, it has been posited that the Applicants herein have by themselves ventured forward and quantified the loss that is claimed to have accrued and/or arisen as a result of the acts complained of.
40. Based on the foregoing, learned counsel for the Respondent has submitted that the loss, if any, that the Applicants shall be disposed to suffer is therefore not irreparable. On the contrary, it has been submitted that the loss in question is quantifiable and compensable in monetary terms.
41. In the circumstances, learned counsel for the Respondent has submitted that the Applicants have thus failed to prove and demonstrate a critical ingredient that underpins the grant of an order of temporary injunction.
42. To buttress the submissions touching on and concerning the necessity to prove irreparable loss, learned counsel for the Respondent has cited and referenced the holding in the case of Kenya Commercial Finance Company Limited v Afaraha Education Society [2001] E.A; Cheru v Mwaniki [2024] KEELC 3497 KLR and Paul Gitonga Wanjau v Gathithi Tea Factory Company Limited & 2 Others [2016] eKLR, respectively.
43. On the other hand, learned counsel for the Respondent has also submitted that the construction being complained of has proceeded and same is at an advanced stage. In particular, it has been contended that the construction has reached the 3<sup>rd</sup> Floor. In this regard, learned counsel for the Respondent has therefore submitted that there is no more excavation, grading and drilling that is being undertaken either in the manner complained of or at all. In this regard, it has been contended that the grant of the order of temporary injunction would therefore work injustice against the Respondent.
44. In view of the foregoing submissions, learned counsel for the Respondent has therefore submitted that the Applicants herein have failed to meet and or establish the requisite conditions to warrant the grant of the orders of temporary injunction. To this end, the Respondent has invited the court to find and hold that the Application beforehand is devoid of merits.

#### **Issues For Determination:**

45. Having reviewed the Notice of Motion Application and the response thereto and upon taking into account/ consideration the written submission by the advocates for the respective parties, the following issues emerge [crystallise] and are thus worthy of determination:
  - i. Whether the court is seized of the requisite jurisdiction to entertain and adjudicate upon the subject matter.
  - ii. Whether the Applicants have established a prima facie case with probabilities of success.
  - iii. Whether the Applicants shall be disposed to suffer irreparable loss or otherwise.

#### **Analysis And Determination**

##### **Issue No. 1 Whether the court is seized of the requisite jurisdiction to entertain and adjudicate upon the subject matter.**

46. Learned counsel for the Respondent has submitted that the issues being raised and canvassed at the foot of the instant suit touch on and concern the development approval which was granted by the County Government of Kiambu. To the extent that the issue touches on and concerns the development approval issued by the designated planning authority, it has been contended that the



- dispute beforehand ought to have been raised and canvassed before the County Physical and Land Use Planning Liaison Committee. In particular, learned counsel for the Respondent has cited and referenced Sections 10 and 78 of the *Physical and Land Use Planning Act* 2019.
47. On the other hand, it has also been submitted that the other aspect of the complaint relates to the alleged non-compliance with the conditions stipulated in the ENvironmanet Impact Assessment Licence. In this regard, it has been posited that the complaints touching on and concerning issues to do with the E.I.A Licence ought to have been raised and canvassed before the National Environment Tribunal (NET), in accordance with the provisions of Sections 129 and 130 of the EMCA [1999].
  48. In view of the foregoing, the Respondent has therefore challenged the jurisdiction of the Environment and Land Court to entertain and adjudicate upon the subject matter. For good measure, learned counsel for the Respondent has implored the court to strike out the suit.
  49. On behalf of the Applicants, it has been contended that the issues raised at the foot of the suit transcend/traverse the jurisdiction of the County Physical and Land Use Planning Liaison Committee as well as the National Environment Tribunal. In particular, it has been submitted that the issues that underpin the suit fall squarely within the jurisdiction of the Environment and Land Court. In this regard, learned counsel for the Applicants has invited the court to take cognisance of Sections 13 (2) (3) & (7) of the *Environment and Land Court Act* 2011.
  50. Additionally, learned counsel for the Applicants has also invited the court to take into account/consideration the provisions of Section 3[3] of the Environment Management Coordinating Act [EMCA] 1999 as well as Article 162 (2) (b) of *the Constitution*.
  51. Having taken into account/considered the rival submissions by learned counsel for the respective parties, I beg to take the following position. Firstly, the issues complained of by the Applicants herein touch on the propriety of the development approval, compliance with the E.I.A Licence, the right to clean and healthy environment and the damages that have [sic] been suffered by the Applicants as a result of the offensive actions complained of.
  52. To my mind, a segment of the issues in dispute falls within the jurisdiction of the County Physical and Land Use Planning Liaison Committee in terms of Sections 10 and 78 of the *Physical and Land Use Planning Act*, 2019; while the other segment/perspective of the dispute falls within the jurisdiction of National Environment Tribunal in terms of the provisions of Sections 129 and 130 of the EMCA.
  53. Nevertheless, there is a substantial portion that also falls within the Environment and Land Court. To this end, it suffices to reference the provisions of Sections 3[3] of the EMCA and 13(2) (3) & (7) of the *Environment and Land Court Act*. In this scenario, the Applicant herein could very well choose to address the limb that falls within the County Physical and Land Use Planning Liaison Committee before the said Committee before approaching the jurisdiction of the ELC.
  54. However, looking at the cross-cutting issues and taking into account the necessity to have all the issues addressed with finality, the Applicant herein was at liberty to exercise their rights of election/ choice and to collapse all the complaints into one and thereafter approach the Environment and Land Court.
  55. Having collapsed all the complaints and having approached the Environment and Land Court, the said court is obligated to entertain and adjudicate upon the issues in dispute. For coherence, it behoves the court to facilitate the realisation of the right of access to justice without fettering its statutory and constitutional mandate. After all, the Court is seized of the jurisdiction and the question is whether to assume the jurisdiction or to defer to the statutory Tribunal[s], in the first instance. [See article 48 of *the Constitution*].



56. At any rate, it is not lost on this court, that the Supreme Court has since clarified the jurisdictional question attaching to a scenario where various perspectives of a case fall for determination before diverse fora. For good measure, the Supreme Court clarified that a party, the Applicants herein not excepted, are at liberty to approach the Environment and Land Court where the predominant question/issue falls within the jurisdiction of the court.
57. To this end, it suffices to cite and reference the holding 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) (28 December 2023) (Judgment)
97. In this context, and in the exercise of these powers, Parliament enacted the Environment and *Land Act* 2011, (No. 19 of 2011) and by section 4 thereof established the ELC. Its jurisdiction is as provided for in Section 13 with Section 13 (1) specifically outlining that the court ‘shall have original and appellate jurisdiction to hear and determine all disputes in accordance with article 163(2)(b) of *the Constitution*’. Section 13(2) then grants express and original jurisdiction in matters;(a)relating to environmental planning and protection, trade, 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.And further provides;“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 the environment and land under articles 42, 69 and 70 of *the Constitution*.”
98. These provisions must be read in contrast to those in EMCA which provide for instances where disputes pertaining to compliance with breach and/or violations of the provisions of EMCA and which disputes ought to be lodged with and/or addressed by NET, which is established pursuant to the provisions of section 125 of the said Act. Redress for constitutional violations is not part of that mandate.
99. In addition to, and turning to the provisions of the *Energy Act*, it is uncontested that the said Act provides for a dispute resolution mechanism for complaints to be determined by EPRA that is vested with such authority under section 10 of the said Act. Should a party be dissatisfied with the decision of EPRA, then he or she has the right to file an appeal before the EPT as provided for under section 36 of the *Energy Act*. It is only when one is dissatisfied with the decision of the EPT that such a party can appeal the Tribunal’s decision to the ELC.
100. In addressing the conundrum placed before us, we must remind ourselves that, what is in dispute before this Court is the applicability of these provisions to the appellant’s claim and not the true meaning of the provisions of either EMCA or the *Energy Act*. This is because the provisions of EMCA or the *Energy Act* do not expressly oust the jurisdiction of the ELC in respect of the procedure for the determination of disputes that involve the management of the environment or issues of petroleum and energy. In the ordinary course of events, the ELC still has original jurisdiction over the matters that are handled by NEMA, unless such jurisdiction is specifically and expressly ousted in a constitutionally compliant manner. The same holds true for proceedings under the *Energy Act*. In so saying, we are persuaded by the finding of the Court of Appeal in *Kenya Revenue Authority & 2 others vs Darasa Investments Ltd* [2018] eKLR which held as follows:“What then, is the consequence, if any, of the respondent’s failure to invoke the alternative remedies? As appreciated by the parties,



availability of an alternative remedy is not a bar to judicial review proceedings. It is only in exceptional cases that the High Court can entertain judicial review proceedings where such alternative remedies are not exhausted. This position is fortified by the decisions of this court in *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 Others* [2017] eKLR and *Kenya Revenue Authority & 5 others v Keroche Industries Limited* [CA No 2 of 2008](#). Perhaps that is why the legislature at section 9(4) of the [Fair Administrative Action Act](#) stipulates that: “Notwithstanding subsection (3), the High Court 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. Our reading of the above provision reveals that contrary to the appellant’s contention, the High Court or a subordinate court may on its own motion or pursuant to an application by the concerned party, exempt such a party from exhausting the alternative remedy.”

101. Reference to the High Court above must be read *mutatis mutandis* with jurisdiction conferred on courts of equal status to it including the ELC. Section 9(2) of the [Fair Administrative Action Act](#), we must add, provides that where there exist internal mechanisms for the resolution of a dispute, the court will not review the administrative action until the internal dispute mechanism has been exhausted. As we had earlier stated, in our view, that fact notwithstanding, 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. That is also why Section 9(4) of the [Fair Administrative Action Act](#) creates the exception that exhaustion of administrative remedies may be exempted by a court in the interest of justice upon application by an aggrieved party.
102. In the above context, what was in issue in the appellant’s petition? The appellant claims as regards the environmental question that, NEMA issued a stop order that was favourable to him but that NEMA failed to enforce the stop order. Despite the existence of the stop order, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents continued their mining activities. The issue therefore that arose in the petition was whether the acts of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, by failing to adhere to the stop order, violated the appellant’s rights under articles 40 and 42 of [the Constitution](#).
103. The other claim by the appellant is that KPLC trespassed on his property, dug holes, and erected electricity poles thereon without notice to him or his authority to do so.
104. Having considered the above complaints, we reiterate our earlier finding in this judgment that the mandate and jurisdiction to determine these questions lie with the ELC under articles 22, 23(3) and 162(2)(b) of [the Constitution](#) as read with Section 4(1) of the Environment and [Land Act](#). We say so because neither the NET, EPRA nor EPT have the jurisdiction to determine alleged violations of [the Constitution](#). 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. We say this persuaded by the elegant reasoning in *William Odhiambo Ramogi & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR where the High Court (Achode (as she then was), Nyamweya (as she then was), & Ogola, JJ) stated: “In the instant case, the Petitioners allege violation of their fundamental rights. 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.” [Emphasis ours].



105. We agree with the above reasoning and find that the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. 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. But there is also a need to emphasize the need for the court to scrutinize the purpose for which a party is seeking relief, in determining whether the granting of such constitutional reliefs is appropriate in the given circumstances.

This means that 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.

106. The restraint and effective remedy rule, which we find favor in, is what led the Supreme Court of India in *United Bank of India vs Satyawati Tondon & Others*; (2010) 8 SCC to state as follows:“44.... we are conscious that the powers conferred upon the High Court under article 226 of *the Constitution* to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under article 226 of *the Constitution*.45.It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under article 226 of *the Constitution* and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance.” [Emphasis ours]

107. Flowing from the above findings and in that context, it is our view that, where the reliefs under the alternative mechanism are not adequate or effective, then there is nothing that precludes the adoption of a nuanced approach, as we have stated. What must matter at the end is that a path is chosen that safeguards a litigant’s right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer.

This is because, to achieve a harmonious and effective legal framework, it is imperative to strike a judicious balance between the emphasis on providing the initial opportunity for resolution to entities established by law and the assertion of a litigant’s right to access the court. However, such convergence requires a case-by-case assessment by considering issues such as the nature of the dispute and the adequacy of the alternative dispute mechanism. See also our decision in *Bia Tosha Distributors Ltd v Kenya Breweries Ltd & 6 Others* (Pet No 15 of 2020) [2023] KESC 14(KLR) (Const. and JR) (17 February 2023) (Judgment).

58. Flowing from the ratio decidendi in the case supra, I am in agreement with learned counsel for the Applicants that the Environment and Land Court is seized of the requisite jurisdiction to entertain and adjudicate upon the dispute beforehand.
59. On the contrary, I am not persuaded by the arguments on behalf of the Learned Counsel for the Respondent to the effect that the Environment and Land Court is not seized of the requisite jurisdiction. In any event, it suffices to state that there is a difference between lack/ want of jurisdiction



and postponement of jurisdiction. Suffice it to state that in the latter case, the court is possessed of jurisdiction and the question relates to assumption in the first instance or otherwise.

**Issue No. 2 Whether the Applicants have established a prima facie case with probabilities of success.**

60. The Application beforehand seeks orders of temporary injunction to restrain the Respondent herein from undertaking various actions including excavation, drilling and construction on L.R No. 28428/80 which abuts L.R No. 12825/196. Notably, the latter parcel of land belongs to and is registered in the names of the Applicants.
61. The Applicants herein have contended that the actions and/or activities being carried out by the Respondent on its property [L.R No. 28428/80] have occasioned various cracks and fault lines to develop on the main house sitting on the Applicants' property. For good measure, the Applicants aver that the cracks and the fault lines arose because of the excavation and the vibrations which were being carried out on the Respondent's property.
62. Suffice it to state that the Applicants herein were constrained to and indeed reported the offensive activities to the County Government of Kiambu; National Environment Management Authority [NEMA] and to the National Construction Authority (NCA), respectively.
63. Arising from the report that was lodged/mounted by the Applicants with the authorities [details highlighted in the preceding paragraph] a joint inspection was commissioned and undertaken in the presence of both the Applicants and the Respondent and whereupon it was confirmed that the Applicant's house had developed cracks and fault lines.
64. Additionally, it is also imperative to underscore that the Applicants herein also held various meetings with the Respondent in an endeavour to remedy the damages that had been occasioned to the Applicants' house. Instructively, the Applicants have contended that at the onset, the Respondent created an impression that same was amenable to remedying the damages complained of.
65. Without endeavouring to address causation of the damages that are complained of by the Applicants, it suffices to posit that the Applicants herein have placed before the court plausible material to warrant a finding that the complaints being adverted to espouse a prima facie case with probability of success.
66. Consequently and to this end, I come to the conclusion that the Applicants have indeed demonstrated a prima facie case which is a precursor and/or prelude to partaking of an order of temporary injunction.
67. Before departing from the issue beforehand, it suffices to cite and reference the case of Jan Bonde Nielsen v Nguruman Limited & 2 others [2016] eKLR where the Court of Appeal stated as hereunder:
  - (24) Starting with what amounts to a prima facie case, the learned Judges expressly accepted the definition given in Mrao Ltd. –v- First American Bank of Kenya Ltd. & 2 Others, (supra). In that case, a prima facie case was defined as follows:

“In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case”.



On this definition, the learned Judges expressly stated: -

“We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be urgent necessity to prevent the irreparable damages that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title, it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or as otherwise put, on a preponderance of probabilities”.

**Issue No. 3 Whether the Applicants shall be disposed to suffer irreparable loss or otherwise.**

68. Having found and held that the Applicants herein have established and demonstrated a prima facie case with probability of success, it suffices to state that the Applicants are called upon to venture forward and demonstrate the likelihood of irreparable loss accruing unless the orders of temporary injunction are granted.
69. Pertinently, irreparable loss constitutes the critical ingredient or the cornerstone [pillar] upon which an order of temporary injunction is anchored. To this end, it is therefore incumbent upon every applicant, the Applicants beforehand not excepted, to demonstrate that same [applicant] shall suffer irreparable loss.
70. The centrality of irreparable loss in an application for temporary injunction was highlighted and elaborated upon in the case of Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86, where the Court of Appeal stated and held as hereunder:

If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage.
71. Flowing from the decision supra, it is now appropriate to revert to the factual matrix and to discern whether the Applicants herein shall be disposed to suffer irreparable loss.
72. To start with, the Applicants themselves instructed and retained M/S Towercost Consultants Limited to inspect the house sitting on the suit property and thereafter to prepare a bill of quantities highlighting the costs of repairs. In this regard, the designated consultants proceeded to and undertook inspection and thereafter generated a bill of quantities showing that the cost of carrying out repairs amounts to KShs. 5,219,911.20/- only.
73. Other than the cost of repairs which have been highlighted and captured at the foot of the bill of quantities prepared by M/S Towercost Consultants Limited, it is also important to point out that the



Applicants have also impleaded special damages in the sum of KShs. 1,851,000/- only. Instructively, the plea of special damages is reckoned to address the damages suffered by the Applicants.

74. Arising from the foregoing, it is not lost on the court that the Applicants themselves have ventured forward and ascertained the monetary value/damages attendant to the harm caused to the house sitting on L.R 12825/196 [suit property].
75. In a nutshell, there is no gainsaying that the loss, if any, that the Applicants are disposed to suffer is indeed quantifiable and ascertainable. Furthermore, I beg to underscore that the Applicants herein did not contend that the Respondent shall not be able to pay [sic] the damages, if any, awarded by the court.
76. In the premises, I come to the conclusion that insofar as the damages, if any, that are likely to be suffered by the Applicants are quantifiable and ascertainable in monetary terms, then the Applicants herein are not entitled to the equitable relief of temporary injunction.
77. To this end, it is apposite to recall and reiterate the holding in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, where the court stated thus:

In conclusion, we stress that it must always be borne in mind that the very foundation of the jurisdiction to issue orders of injunction vests in the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of the multiplicity of suits and where facts are not shown to bring the case within these conditions the relief of injunction is not available.

78. In the premises, my answer to issue number three [3] is to the effect that the Applicants have not established that same shall be disposed to suffer irreparable loss. Absent irreparable loss, no order of temporary injunction can issue and/or granted.

**Final Disposition:**

79. Flowing from the foregoing analysis, [details highlighted in the body of the Ruling] it must have become crystal clear that the Applicants herein have not established and/or proved the requisite conditions that underpin the grant of an order of temporary Injunction.
80. In the premises, the final orders that commend themselves to the court are as hereunder:
  - i. The Application dated 8<sup>th</sup> November 2024 be and is hereby dismissed.
  - ii. Costs shall be in the cause insofar as the Respondent herein ad hitherto created an impression that the matter was being addressed mutually between the parties.
81. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF DECEMBER 2024**

**OGUTTU MBOYA,**

**JUDGE.**

In the presence of:

Hilda – court Assistant.

Mr. Chebon holding brief for Mr. Brian Otieno for the Plaintiffs/Applicants.

Mr. Ochieng and Mr Mbakaya for the Defendant/Respondent.

