



**Muthoni & 130 others v National Land Commission & 3 others;
Del Monte Corporation (Interested Party) (Constitutional Petition
E003 of 2022) [2023] KEELC 16053 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 16053 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
CONSTITUTIONAL PETITION E003 OF 2022
LN GACHERU, J
FEBRUARY 23, 2023**

BETWEEN

CYRUS NJOROGE MUTHONI & 130 OTHERS PETITIONER

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

COUNTY GOVERNEMENT OF MURANG'A 3RD RESPONDENT

CHIEF LAND REGISTRAR 4TH RESPONDENT

AND

DEL MONTE CORPORATION INTERESTED PARTY

RULING

1. The Petitioners herein Cyrus Njoroge Muthoni & 130 Others filed a Constitutional Petition dated 25th May 2022, and sought for various reliefs among them;
 - a. a declaration be made that all that land comprising of LR No. 12157 and LR No. 13169 belongs to the people of Murang'a County to be held by the County Government of Murang'a in trust for them;
 - b. a declaration be made that any other resultant parcel, subdivision, amalgamation of LR No. 12157 and LR No. 13169 be declared null and void;
 - c. that LR No. 12157 and 13169 be redistributed to the Petitioners and the County Government of Murang'a in the rate of 70:30 respectively and for costs of the Petition.



2. The Petition herein is a historical injustice claim, in that, the Petitioners claimed that the suit property mentioned above belonged to their forefathers, but the colonialists took it away from their said forefathers and forced the natives to move into higher, colder and less productive villages of Ndaka-ini, Kandara and Wanyaga, after being forcibly evicted from the ancestral land, the suit properties included.
3. Further that after their forefathers fought for independence, the colonialists regularized the theft of the people's ancestral land through land adjudication in in 1950. That at that time many of the Petitioners forefathers were either in Detention camps, Prisons or otherwise forced to hide in fear of their lives.
4. Therefore, the Petitioners Ancestral Land became Government Land vide the Commission of Lands one James Abysus O' Loughin and thus the Petitioners ancestors were rendered landless. However, through a process where the Petitioners forefathers were not involved, the Interested Party Delmonte Corporation Limited, was granted by the said Commissioner of Lands, large tracts of land lying between Thika River and Sagana River, which is approximately 4500 acres, which is arable land and belonged to the Petitioners ancestral land. That the said allocation was done through a grant No. 27031 which was to remain in force with effect from 1st May 1973.
5. The Petitioners further claimed that the grant had a provision that the grantee had an option to purchase the freehold reversion of a portion or portions of the said parcel of land not exceeding 5000 acres. In essence, the grant made it possible for the Interested Party (Delmonte Co. Ltd,) a foreign Company to acquire freehold interest in the land, contrary to express provisions of Article 65(1) (2) of *the Constitution* 2010. That in all this, neither the Petitioners nor their forefathers were consulted.
6. Further, the Petitioners claimed that their population has grown more than fivefold between 1969 and 2019 and the Petitioners still remain in the villages designated to their forefathers in 1940 & 1950.
7. Further that the dire situation compelled some members of the community surrounding the suit parcels of land to complain to the National Land Commission, over Land Ref. No. 12157, 12157/2, 12157/3, 12157/4, 12157/5 and 13289, which are all held by the Interested Party. Further, the said lease(Grant) has been the subject of litigation in numerous other matters including Murang'a ELC No. 86 of 2018, and Nairobi High Court Constitutional Petition No. 398 of 2015.
8. That the Petitioners have written to the Respondents seeking information as to whether the Interested Party has expressed interest in having the grant to LR. No. 12157 and 13169 renewed. However, the Respondents have not given them any response. Therefore, the Petitioners are apprehensive that there will be a repeat of injustice if the lease is renewed and hence this Petition.
9. The Petitioners further claimed that the renewal of the impugned grant constitutes another threat to the Petitioners' right to their ancestral property as provided by Article 40 of *the Constitution*. Further that the grant subject hereof provides for a renewal for a further term of 45 years, and the Petitioners have made all effort to access information as to whether there is intention by the Respondents and /or impugned grant renewed, but none has been forthcoming and thus contravenes the Petitioner's right under Article 35 of *the Constitution*.
10. This Petition is opposed by the Respondents and the Interested Party herein.
11. The 1st Respondent – National Land Commission, filed a Replying Affidavit of Zacharia Ndege in response to the Petition. Zacharia Ndege is the Principal Land Administration Officer of the 1st Respondent.
12. He averred that there was no evidence in support of Historical Land injustices claim as pleaded by the Petitioners. He further claimed that the Petition is bad in law as it offends the provision of Section 15



- of the *National Land Commission Act*, which provide that any Historical Land Injustices claim ought to be lodged with the National Land Commission before the same is lodged in a Court of Law. He further averred that the suit is premature under the doctrine of exhaustion.
13. Further, that the entire suit is based on speculative, allegations and conclusions, and that their cause of action is non-existent and is not active as the grant has been renewed. Again that the Petitioners have not established that they have a right which has been infringed since their claim are speculative in nature and the Petitioners have not demonstrated any loss and irreparable damage. The 1st Respondent urged the Court to dismiss the Petition.
 14. The 2nd & 4th Respondents responded to the Petition via a Preliminary Objection dated 16th January 2023, wherein they objected to the Petition in that; -
 - a. That this Petition is incompetent, bad in law as it offends the provisions of Article 67 of *the Constitution*, Section 15 of the *National Land Commission Act* and the National Land Commission (investigation of Historical Land Injustices) Regulations, 2017.
 - b. That this Honourable Court does not have jurisdiction to entertain this matter.
 - c. That this suit contravenes the provisions of Section 6 of the *Civil Procedure Act*, Cap 21, as there is a pending matter being MURANG'A ELC 53 OF 2018 – KANDARA RESIDENTS ASSOCIATION & 4 OTHERS VERSUS DEL MONTE(K) LTD & 4 OTHERS, in which the issues raised therein are substantially the same issues raised in this matter.
 15. The 3rd Respondent filed a Response to the Petition and averred that; though the 3rd Respondent partly agrees to the fact that the land should be restored to the original occupants, it averred that several parties have registered with the 3rd Respondent as per the annexed lists and those in the lists are the bonafide squatters who were removed from the ancestral lands and the said land should be shared equally among all the listed original inhabitants.
 16. Further, that it is only the 3rd Respondent in conjunction with all Interested Parties who can verify the bonafide original inhabitants and their offsprings. That the division of the said land to the Petitioners herein only, while leaving out other deserving squatters would create more chaos and bloodshed and thus they supported prayers No (a) & (b) of the Petition but opposed prayer No. (c).
 17. The Interested Party opposed the Petition through the Replying Affidavit of Harry Odondi, a Legal Officer, who denied that any Historical Land injustices took place on the parcel of land known as LR No. 12157, as alleged by the Petitioners. He further averred that the Interested Party came into lawful possession of the suit property in 1973, after Independent via a grant from the Government of Kenya. He also averred that as of today, there is no current determination or finding by any competent authority regarding the existence of historical land injustices as alleged by the Petitioners.
 18. It was his averment that the filing of Multiparty of suits does not amount to proof that the persons who filed the suit are entitled to the/subject property.
 19. He further averred that this Petition is subjudice to Thika ELC Case No. 37 of 2020, filed by Kandara Residents Association vs Ananas Holdings Ltd. That Ananas Holdings are the owners of LR No. 13169, and the said Ananas Holdings Ltd have developed the said land are not a party to this Petition.
 20. He reiterated that the Interested Party's interest on the suit land are Leasehold and not Freehold, and that the Interested Party is of immense value to the people of Kenya and the 131 Petitioners herein are a negligible number in Comparison to the direct and indirect beneficiaries of the Interested Party's



activities on the suit property. Therefore, he urged the Court that due to the Public interest above state, the Petition herein should be dismissed.

21. The Interested Party further filed a Notice of Preliminary Objection dated 20th July 2022, seeking dismissal of the entire Petition herein on the following grounds;
 1. As framed, the Petition raises a claim for alleged historical land injustices under Section 15 of the *National Land Commission Act*.
 2. This Court does not have the requisite jurisdiction to hear and determine a claim for alleged historical land injustices.
 3. Under Article 67(e) of *the Constitution* of Kenya, 2010 as read with Section 15 of the *National Land Commission Act*, the National Land Commission is the sole body vested with such jurisdiction.
 4. The entire Petition is time-barred.
22. These are the same grounds raised by the 2nd & 4th Respondents via their Preliminary Objection dated 16th January 2023.
23. Since the Preliminary Objection challenges the jurisdiction of this Court, it was heard first via oral submissions on 23rd January, 2023.
24. In arguing the Preliminary Objection, Mr Thuo for the Interested Party submitted that Jurisdictional issue is a pure point of law and goes to the root of this Petition.
25. It was submitted that the Court does not have jurisdiction, since the Petition raises historical land injustices claim and the said claim ought to have been raised at the National Land Commission. He relied on the Article 67(2) (e) of *the Constitution* which mandate National Land Commission to investigate historical land injustice. That the issue raised in the Petition are what happened during the colonialism time and therefore the claim falls under the mandate of National Land Commission.
26. The Interested Party(Objectors) relied on various cases among them, the case of Lucy Mirigo & 55 Others vs Minister of Land & 4 Others (2014) eKLR, and Supreme Court Advisory Opinion in the matter of National Land Commission (2015) eKLR, and Kenya Chambers of Commerce vs Delmonte Kenya Ltd & 3 Others (2020) eKLR.
27. Mr Thuo further submitted that similar issues as to this Petition herein were raised and the Courts held that the matter ought to have gone to National Land Commission for determination first as National Land Commission has mandate to investigate disputes revolving around historical land injustice. That the Petitioners have alleged that the Interested Party acquired its land through a historical land injustices and that should be investigated by the National Land Commission, where history of the said acquisition will be tabled and that is a good reason as to why the matter should first go National Land Commission.
28. Mr Thuo also urged the Court to adhere to the doctrine of Constitutional avoidance and should avoid this Petition by referring it to National Land Commission, which commission has the capacity to deal with the issues raised in the Petition. That the National Land Commission is the first port of call.
29. Mr Thuo referred the Court to the case of Anthony Miano & 2 Others vs AG & 2 Others (2021) eKLR, where it was held that where the Law provides for Alternative Disputes Resolution Mechanism, the Court should allow that Alternative dispute resolution mechanism to deal with the matter first.
30. He urged the court to refer the matter to National Land Commission as it has no jurisdiction.



31. Mr Thuo further submitted that this Petition is time barred and should be struck out. He referred the Court to Section 7 of the [Limitation of Actions Act](#) which provides;
- “An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”
32. He also submitted that since this Petition is for recovery of land, it ought to have been filed within 12 years. The Petitioners have alleged that their grievances have endured for due 6 score years and since each score is 20 years, then the grievances have endured for 120 years. The Petitioners are seeking to recover interests in land and since the Petition is filed outside of 12 years, then this Petition is time barred.
33. It was his further submissions that though the suit herein is a Constitution Petition, and the Petitioners have claimed that it has no time limit, but as long as the suit is for recovery of land, then it is bound by [Limitation of Actions Act](#), and therefore the claim is time barred; whether brought via Constitution Petition or Plaintiff.
34. This Preliminary Objection was supported by the 1st Respondent – National Land Commission. Miss Kisengese for National Land Commission associated herself with the submissions of the Interested Party and reiterated that this Court lacks jurisdiction to hear and determine the matter. She submitted that the Petitioners herein never approached the 1st Respondent (National Land Commission) to adjudicate the claim. It was her further submissions that National Land Commission has the mandate to investigate historical land disputes claims and this is one of them.
35. She further submitted that the doctrine of exhaustion which is provided for in law states that a litigant should exhaust all available mechanism for solving disputes before filing a claim to court. She relied on the case of William Odhiambo Ramogi & 3 Others vs AG & 4 Others; Muslims for Human Right & 2 Others (Interested Parties) (2020) eKLR, where the Court expounded the question of exhaustion of Alternative disputes mechanism remedies before going to Court. Ms Kisengese further submitted that the Petitioners herein did not exhaust that remedy.
36. She also submitted on the principle of ripeness of a claim and it was her submissions that a claim is ripe if the facts have matured, warranting judicial intervention. M/s Kisengese also submitted that the claim herein has not matured to warrant being filed in court through this Petition.
37. She also submitted on the doctrine of Avoidance, and relied on the case of Communication Commission of Kenya & 5 Others vs Royal Media Services Ltd & 5 Others Petitions No. 14A, 14B & 14C (2014) eKLR, where the Court pronounced itself on the principle of avoidance. It was her further submissions that the Court is stopped from determining the issue which can adequately be determined by National Land Commission.
38. Further, that though the Petitioners cited Petition No. 3 of 2020, the Court in the said determination took into account the mandate of National Land Commission. That since [the Constitution](#) which is the Supreme Law has given mandate to National Land Commission, then this Petition can adequately be handled by the said National Land Commission, and there was no evidence tabled that National Land Commission was approached by the Petitioners. She urged the Court to dismiss the Petition for want of Jurisdiction.
39. M/s Kerubo for the 2nd & 3rd Respondents who had also filed a similar Preliminary Objection on 16th January 2023, supported the Preliminary Objection by Interested Party and aligned herself with the submissions made by the Interested Party and 1st Respondent. She also urged the Court to strike out Petition for want of jurisdiction.



40. Ms Macharia holding brief for Mr Kimwere Josphat for the 3rd Respondent; - County Government of Murang'a also concurred with the submissions made by the Interested Party - Objectors and the 1st Respondent. She urged the court to allow the Preliminary Objection.
41. The Preliminary Objection is opposed by the Petitioners through Mr Nguringa of Ishmael & Co. Advocates, who submitted by first urging the Court to expunge from record the authorities relied on by the Interested Party as they were served upon him nine (9) minutes before the start of Court. It was Mr Nguringa's submissions that the issues raised by the Objectors (Interested Party, 2nd & 4th Respondents) were legally petty. He further submitted that the matter cannot be time barred because this is a Petition and not a claim brought through a Plaint. It was Mr Nguringa's further submissions that the law has been pronounced severally on that issue. He further submitted that the suit land though acquired through a historical land injustice, they became available last year (2022) when they became due for renewal of leases. Further, that if the issue of time was to be raised, then time started to run from the implementation of the Constitution 2010 and this Petition was filed in May 2022 and thus within the 12 years period.
42. He further submitted that though the Interested Party alleged that the matter squarely belonged to the National Land Commission, Section 13 of the [Environment and Land Court Act](#) gives this Court(ELC) original and Appellate jurisdiction over all matters relating to land.
43. That nothing bars any person from filing a Constitution Petition and that referring the mater first to National Land Commission, is a matter of Judicial courtesy. He relied on the cases of SafePak Ltd Vs Henry Wambugu & 11 Others (2019) eKLR, and Chief Land Registrar & 4 Others vs Nathan Tirop Koech & 4 Others (2018) eKLR, where the Court of Appeal held that the hands of the Court (ELC) are not tied, but its role was complementary. It was the Petitioners further submissions that Section 15 of the [National Land Commission Act](#) and Article 67 (2) (e) of Constitution are not grey areas. Petitioners also cited the case of Delmonte (K) Ltd vs National Land Commission & Kandara Resident Association & 3 Others (Interested parties) (Pet No. 3 of 2020) (2022) KEELC 2234 (KLR), Where this Court handled the matter and found that it had jurisdiction and National Land Commission was restrained from determining any historical land injustices on the various parcels of land that the instant Preliminary Objection is meant to determine the consistency of this Court.
44. The Petitioners urged the Court to dismiss the Preliminary Objection since the matter is of immense public interest. That if the Preliminary Objection is upheld, there would be no other forum where the matters of Delmonte can be adjudicated upon, since there is a Judgement of this Court ousting the jurisdiction of National Land Commission.
45. In response to the Petitioners submissions, Mr Thuo submitted that the authorities supplied that morning were indeed mentioned in the Petitioners authorities.
46. Further on the cause of action arising in the year 2022, Mr Thuo submitted that a look at the Petition, the Petitioners are trying to undo perceived historical land injustice which were not committed last year (2022).
47. Further that the Court did not stop National Land Commission from considering Delmonte Land matters and that the said submission was misleading.
48. The Court has considered the Petition in general, the response thereto and the Notice of Preliminary Objection as filed by the Interested party. A similar Preliminary Objection has been filed by the 2nd and 4th Respondents. The 1st Respondent has also averred in its response to the Petition that the Petitioners had offended the doctrine of exhaustion and therefore the Petition is bad in law and premature.



49. From the available submissions, it is clear that the Preliminary Objection herein is challenging the jurisdiction of this court.
50. There are two issues for determination;
- i. Whether the Court has jurisdiction or whether the Petitioners exhausted all the available avenues for Alternative disputes resolutions mechanism before coming to this Court.
 - ii. Whether the Petition is time barred.
51. The Preliminary Objection herein which is challenging the jurisdiction of this Court is a pure point of law. Jurisdiction is everything and without it, the Court has no option but to down its tool. See the case of Owners of Motor Vessel Lilian s vs Caltex Oil(Kenya)Ltd 1989 KLR, where the Court held;
- Jurisdiction is everything and without it, a Court has no power to take one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
52. Jurisdiction is defined in Halsbury’s Law of England (4th Ed) Vol .9 as.....the authority which a Court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for decision.
53. Black’s Law Dictionary 9th Edition define Jurisdiction as the Courts power to entertain, hear and determine disputes before it.
54. Jurisdiction is so Central in Judicial proceedings and can be raised at any stage of proceedings. In the case of Jamal Salim vs Yussuf Abdulahi Abdi & Another. Civil Appeal No. 103 of 2016(2018)eKLR, the Court of Appeal held among other findings that Jurisdiction is such an important matter that it can be raised at any stage of the proceedings.
55. The Petition herein was filed in May 2022, and the Interested Party filed the Preliminary Objection on 20th July 2022, and that was at the earliest stage before the hearing of the main Petition kicked off.
56. In the case of Samuel Kamau Macharia & Another vs Kenya Commercial Bank Ltd & Others (2012) eKLR, the Supreme Court of Kenya stated as follows on the source of Courts jurisdiction.
- “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.....”
57. Further in the case of Orange Democratic Movement vs Yusuf Ali Mohamed & 5 Others (2018) eKRL, the Court of Appeal held as follows;
- “.....A party cannot through its pleadings confer Jurisdiction to a Court when none exists.
- In this context, a party cannot through draftmanship and legal craftsmanship couch and convert an Election Petition into a Constitution Petition and confer Jurisdiction upon the High Court Jurisdiction is conferred by law and not through pleadings and legal draftmanship. It is both the substance of the claim and relief sought that determines the Jurisdiction competence of a Court”.



58. Therefore, from the above holdings of superior Courts, it is very clear that Jurisdiction is derived from *the Constitution*, an Act of Parliament or by both.
59. The Interested Party and the Respondents have submitted that this Court has no jurisdiction to deal with this Petition relating to Historical Land Injustices claim because the first port of call should be the National Land Commission. They submitted that the Petitioners contravened Article 67 (2) (e) of *the Constitution* and Section 15 of the National Land Commissions Act.
60. Article 67 of *the Constitution* creates the National Land Commission and establishes its functions. Article 67(2) (e) states;
- The functions of National Land Commission are (2) (e) to initiate investigating, on its own initiative on a Complaint into present, or historical land injustices, and he recommend appropriate redress.
61. Further Section 15 of National Land Commission Act provides that;
- “15 (1) pursuant to Article 67(3) of *the Constitution*, the Commission shall receive, admit and investigate all historical land injustices, Complaints and recommend appropriate redress.
62. Therefore, it is evident from this provision of *National Land Commission Act*, that National Land Commission has the mandate to investigate all historical land injustice complaints.
63. Part II of National Land Commission Act set out the functions of National Land Commission. A further consideration at Section 5 (1) (e) of *National Land Commission Act* shows that indeed investigation of historical land injustices is on of such functions it states as follows;
- Further, Section 5(1) (e) of National Land Commission states;
- Pursuant to Article 67(2) of *the Constitution*, the functions of the National Land commission shall be;-
- 5(1) (e) to initiate, investigations, on its own initiative or on a Complaint, into present or historical land injustices redress.”
64. Indeed, from the provisions of the Constitution and the *National Land Commission Act*, the National Land Commission is the first institution that has an initial mandate to deal with historical land injustices claims.
65. The Court has gleaned through the Petition herein and has noted that the foundation is the historical land injustices that were allegedly committed by the colonialists against the forefathers of the Petitioners herein.
66. In their claim, the Petitioners have alleged that after the Country attained Independence, the then Commissioner of lands allocated the subject properties to Delmonte Company Limited, the Interested Party (Objector) without consulting the Petitioners forefathers who were the initial owners of this subject suit property. That because of that taking away of the subject property from the Petitioners forefathers, the Petitioners have been forced to remain in the villages that were set up in 1940s and 1950s and their population has busted and they are in dire need of the said parcels of land.
67. Their opposition to the renewal of the grant held by the Interested Party (Delmonte Company Limited) is due to the alleged historical land injustices and the fact that the land belongs to them



through their forefathers and therefore should revert back to the people of Murang'a County and the Murang'a County in general.

68. These are complaints of historical land injustices which should be investigated by National Land Commission as provided by Article 67(2) (e) of *the Constitution*, Section 5(1) (e) and 15(1) of the *National Land Commission Act*.
69. From the Petition filed herein, there is no evidence that these particular Petitioners have ever lodged any claim before the National Land Commission.
70. The Petitioners ought to have made National Land Commission their first port of call and may be if aggrieved by any decisions of National Land Commission, then they should have filed the Petition or Judicial Review in an ELC Court.
71. If the Petitioners have not approached National Land Commission, is this Petition/claim ripe for this Court and/or is it prematurely filed?
72. Having found that the Petitioners did not approach National Land Commission at first, then the Petitioners are in breach of the doctrine of exhaustion. The doctrine of exhaustion was dealt with in the case of William Odhiambo Ramogi & 3 Others vs Attorney General & 4 Others; Muslims for Human Rights & 2 Others (Interested parties) eKLR, where the Court held;

The question of exhaustion of administrative remedies arise where a litigant, aggrieved by an agency's action seeks redress from a Court of Law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose 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 its own interest within the mechanism in place for resolution outside the Court. This encourages Alternative dispute resolution mechanism in line with Article 159 of *the Constitution*

73. The Petitioners Claim arise from an alleged Historical land injustices committed by the colonialists. Therefore, the Petitioner's ought to have approached National Land Commission, and file their complaint. It is evident from the Petitioners' Petition that they claimed that some members of their community filed a historical land injustice claim before National Land Commission, and which has resulted in various Court cases. The Court finds that even the Petitioners herein should have filed their complaint before National Land Commission so that National Land Commission, can investigate their complaints. Alternatively, they should have joined as claimants or parties in the other suits that they cited in their Petition.
74. The Petitioner submitted that this Court in its Judgement in Petition No. 3 of 2020 ousted the Jurisdiction of National Land Commission. The Court has had an opportunity to consider the said Judgement which was a Petition brought by Delmonte Kenya Ltd (the Interested Objector) herein wherein it challenged the decision of National Land Commission on the basis that it was not given an opportunity to be heard.
75. That Petition was on the basis of contravention of the Petitioners Fundamental Right, in the Conduct of proceedings before National Land Commission on historical injustices which proceedings resulted in a decision that upheld the Complaints filed before National Land Commission before hearing the Petitioner. In the above Petition No. 3 of 2020, National Land Commission had opposed the Jurisdiction of the Court to hear and determines the said petition. The Court finds and held that it had jurisdiction to hear and determine that Petition because it dealt with issues of breach of Fundamental rights which were allegedly violated and/or abused. Further the Court held that it cannot usurp



functions of National Land Commission especially on the issue of renewal of leases which is a duly performed by National Land Commission. Therefore, this Court finds and holds that the Court did not oust the Jurisdiction of National Land Commission over Delmonte land matters and Petitioners cannot allege that they have no other avenue to ventilate their claim. In the case of Speaker of National Assembly vs Karume (1992) KLR 21, the Court held as follows;

where there is a clear procedure for redress of any particular grieves prescribed by the constitution, or an Act of Parliament, that procedure should be strictly followed.

76. Accordingly, the special procedure provided by any law must strictly be adhered to since there are good reasons for such special proceedings.
77. From the above decision of the Court, it is imperative that before coming to Court, a litigant should exhaust all the other available mechanism to redress the grievance of that particular litigant.
78. Further in the case of Geoffrey Muthiga & 2 Others vs Samuel Munga Henry & 176 Others (2015) eKRL, the Court of Appeal held;

.....where a dispute resolution mechanism exists outside Courts, the same should be exhausted before the jurisdiction of the Courts is involved. Courts ought to be a fora of last resort and not the first port of call, the moment a storm brews.....

The exhaustion doctrine is a sound one and seeks 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 interests within the mechanisms in place for resolution outside the Court....”

79. Therefore, this Court finds that since Article 67 (2) (e) Section 5(1) (e) and 15(1) of the National Land Commission Act are very clear that National Land Commission is the first port of call when it comes to investigations of historical land injustices. The Petitioners failed to exhaust the available mechanism for alternative disputes resolution before coming to this Court. This Court has had an opportunity to consider the authorities relied by the Petitioners. In the case of Safepak Ltd vs Henry Wambega & 11 Others (2019) eKLR, though the Court of Appeal declined to find that the Court(ELC) had no Jurisdiction, that authority is distinguished from this particular case because on Para 32, the said Court of Appeal had observed and found that “..... It would appear that the Petitioners did indeed refer the claim to the National Land Commission, the 12th Respondent in the appeal.....on Page 33, the Court further stated that “the Record of Appeal was however silent on the intervention by the National Land Commission.....”.
80. Further in the same case Safepak Ltd (Supra) the Court of Appeal had on Page 31 held that “.....those authorities stand for the proposition with which we agree that where there is a clear procedure for the redress of any particular grievances presented by the Constitution or an Act of Parliament, that procedure should be followed provided that the remedy thereunder is effectual”.
81. Though the Petitioners herein could still file this claim in this Court, however the procedure for redress is very clearly prescribed in the Constitution and the National Land Commission Act. They should have made the National Land Commission their first stop, given that there were other similar complaints which had passed through National Land Commission just before these Petitioners came to this Court. There are other claims relating to these parcels of land and for consistency, it would have been prudent for the Petitioners herein to have approached National Land Commission and presented their claim thereon.



82. In their submissions, the Petitioners did not submit that the Petition herein falls under the exceptions to the exhaustion requirement, so that the Court can allow the Petition herein to proceed without exhausting the available mechanism.
83. In the case of Mutanga Tea & Coffee Company Limited vs Shikara Ltd & Another, the Court of Appeal held that the Court in exceptional circumstances can find that the exhaustion requirement would not serve the values enshrined in *the Constitution* or Law and permit the suit to proceed before it.
84. The Court of Appeal went further to expound that 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 Constitution value is at stake.
85. Do the Petitioners herein meet that criteria for exception to the exhaustion doctrine?
86. The issues raised by the Petitioners are claims of historical land injustices and renewal of leases. These issues have been litigated in various complaints to National Land Commission and cases filed later in relation to the said claims. This is not a virgin areas and no Constitutional values is at stake. As the Court stated earlier, for consistency, the Petitioners ought to have approached National Land Commission first.
87. The other principle to consider is whether the parties who have grievances lack adequate audience before a forum created by a Statute or who may not have the quality of evidence before the forum which is proportionate to the interest the party wishes to advance in a suit.
88. There is no evidence advanced by the Petitioners that the National Land Commission has failed to give the Petitioners audience or that the National Land Commission, personnel cannot adequately handle a historical land injustices claim or even hear an objection on the issue of renewal of leases.
89. Thus, the Court finds that the Petition herein do not fall under the exceptions to the exhaustion doctrine.
90. For the above reasons, the Court finds that the Petitioners herein did not exhaust the available mechanisms for redress of their grievances which are complaints of historical land injustices in nature. The said grievances ought to have been tabled before National Land Commission as provided by Article 67(2) (e), of *the Constitution*, Sections 5(1) (e) and 15 (1) of the *National Land Commission Act*. Therefore, this Court finds that this Petition was prematurely brought to Court and though this Court can be clothed with jurisdiction to hear a historical land injustices claim, the Petitioners herein should first have employed the alternative disputes resolution mechanism through National Land Commission. The Court concurs with the 1st Respondent that this Petition or claim is not ripe to be brought to this Court.
91. On the second issue of whether the Petition is time barred as provided by Section 7 the *Limitation of Actions Act*, this Court finds that the Petition herein is a Constitution Petition based on historical land injustices. Constitution Petition cannot be caught by *Limitation of Actions Act*.
92. See the case of Safepak Ltd vs Henry Wambugu & 11 Others (2019) eKLR, Where the Court of Appeal Quoting its decision in Chief Land Registrar & 4 Others vs Nathan Tirop Koech & 4 Others (2018) eKLR held that;

.....the Court concludes that there is no time limit for filing a Constitutional Petition and that the Limitation in the Limitation of Actions does not apply to violations of right and freedoms guaranteed under *the Constitution*”



In the above cited case, the Court of Appeal held further that the Judge correctly determined that Section 7 of the Limitation of Action Act does not apply in this matter. This Court is bound by the above decisions of the Court of Appeal and finds that the Limitation of Actions Act does not apply in the present petition.”

93. Therefore, if the Court had not found that the Petitioners failed to exhaust all the available mechanisms for alternative disputes resolution before coming to this Court, it would not have found that this Petition is time barred.
94. On the first issue of whether the Court should expunge the second bunch of authorities filed by the Interested Party for having been served that morning, the Court finds that this Preliminary Objection is not based on those authorities but on the provision of law. The Court could still have researched on its own volition and considered the said authorities. However, it is good practice to serve the other Counsel with the authorities to be relied on good time.
95. Having now carefully considered the instant Notice of Preliminary Objection as filed by Interested Party and supported by all the Respondents, but opposed by the Petitioners, the Court finds and holds that the Petitioners have not exhausted the Mandatory Alternative disputes resolution Mechanism which ought to have been exhausted before filing a Petition of this nature which is based on historical land injustices. Article 159(2) (c) of the Constitution encourages Courts to embrace Alternative disputes resolution mechanisms.
96. For the above reasons, the Court finds the Petitioners herein failed to exhaust the alternative procedure or mechanism available to remedy their claim. The Petition is not ripe and the Court should avoid it. The Court proceeds to uphold the Preliminary Objection dated 20th July 2022, as filed by Interested Party. Consequently, the Petition herein is struck out and this being a public interest case based on historical land injustices, each party should bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 23RD DAY OF FEBRUARY, 2023.

L. GACHERU

JUDGE

Delivered virtually in the presence of;

Mr Nguring'a for the Petitioners

M/s Kisengese for the 1st Respondent

M/s Kerubo for 2nd & 4th Respondents

Mr Kimwere for 3rd Respondent

Mr Thuo for Interested Party(Objector)

Court Assistants – Joel Njonjo & Mwende

L. GACHERU

JUDGE

23/02/2023

