Legal Advice Centre t/a Kituo Cha Sheria v National Environment Management Authority & 5 others (Petition E002 of 2023) [2023] KEELC 17563 (KLR) (18 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17563 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

PETITION E002 OF 2023

EK MAKORI, J

MAY 18, 2023

IN THE MATTER OF: 1, 2, 10, 11, 19, 20, 21, 22, 23, 24, 42, 43, 60, 69, 70 AND 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: CONVENTION ON BIOLOGICAL DIVERSITY

AND

IN THE MATTER OF: NAGOYA PROTOCOL ON ACCESS TO GENETIC RESOURCES AND THE FAIR AND EQUITABLE SHARING OF BENEFITS ARISING FROM THEIR UTILIZATION TO THE CONVENTION ON BIOLOGICAL DIVERSITY

AND

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

AND

MALINDI PETITION NO E002 OF 2023 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

AND

AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS

AND

ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION

BETWEEN

LEGAL ADVICE CENTRE T/A KITUO CHA SHERIA ..... PETITIONER

AND

THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 1ST RESPONDENT

KENYA FOREST SERVICE ..... 2ND RESPONDENT

COUNTY GOVERNMENT OF KILIFI ..... 3RD RESPONDENT

MINISTRY OF ENVIRONMENT AND FORESTRY ..... 4TH RESPONDENT

KENYA PLANT HEALTH INSPECTORATE SERVICE ..... 5TH RESPONDENT

ATTORNEY GENERAL ..... 6TH RESPONDENT

RULING

Introduction

1. 'Campaigners allege 'biopiracy' over export of Kenyan baobabs'. This is the lead story carried by the Guardian newspaper on October 24, 2022 that saw an awe-struck public debate on both print and social media outlets over the future of the towering Kilifi baobab tree. The pictures of these gigantic trees being transported by huge trucks for export to Georgia under the aegis of regeneration in botanical gardens by a Georgian National - Georgy Gvasiliya, ignited a national debate with environmentalists on the forefront alleging contravention of the Nagoya Protocol that governs the conditions for export of genetic resources that requires communities to give prior informed consent on the use of resources, and an agreement between whoever is taking them, and the community on how the benefits should be shared. That the appropriate stakeholders should have been identified, sit together and negotiate to avoid being shortchanged. It is this background that birthed the current petition

The Petition

2. The petitioner filed the petition dated the January 18, 2023 premised upon violation of the *Constitution* as highlighted in paragraphs 33-49 of the petition.

3. It has sought various reliefs as follows:

    a. A declaration that the actions of the respondents are in violation of Articles 10,11,42,43,60 and 69 of the *Constitution*.

    b. A declaration that the actions of the respondents are in violation of the Article 1, 8 and 10 of the Convention on Biological Diversity, Article 22 of the African Charter on Human and People's Rights and Article 27 of the International Covenant on Civil and Political Rights which Kenya is a signatory to.

    c. A declaration that the actions of the 1st respondent are in violation of Section 50, 51 and 53 of the *Environmental Management and Coordination Act* 1999.

    d. An order for compensation to the affected community in Kilifi County against the respondents for violation of constitutional rights.

    e. A conservatory order to issue against the respondents to stop; discontinue actions of allowing the uprooting and exportation of baobab trees, as it is harmful to the environment.

    f. An order to compel the Respondents to restore the trees uprooted by Ariba Seaweed International Limited in their natural environment.

g. An order to compel the respondents to engage and educate the public in the affected areas of the importance in conservation of the Baobab trees.

h. An order that this being a public interest case, there be no orders as to costs.

i. Any other relief that the court shall deem fit to grant.

The response to the petition

4. The Respondents opposed the petition directly and tacitly. The 1st respondent filed a replying affidavit in response to the petition and took up a Notice of Preliminary Objection dated March 3, 2023 to be determined in limine and on priority to the petitioner's/applicant's notice of motion application and seeking to have the petition and the application both struck out for want of jurisdiction. The other respondents support the Preliminary Objection too.

5. When the court directed parties to file written submissions on the Preliminary Objection raised, it is the petitioner and the 1st respondent who obliged since as stated the other respondents supported the contour taken by the 1st respondent that this court has no jurisdiction to entertain the notice of motion application and the entire petition.

The Preliminary Objection

6. The 1st respondent is of the view that this court or the Environment and Land Court as established has no jurisdiction to entertain the current petition as presented and should down tools at the earliest because of the Pullman doctrine on judicial abstention.

The Submissions

By the 1st Respondent

7. On whether this court has jurisdiction to hear and determine the petition herein, the 1st respondent submits that the court lacks such jurisdiction by dint of the provisions of the National Environment Management Authority ('NEMA' or 'the Authority') as established under Section 7 of the Environmental Management and Coordination Act No 8 of 1999 ('the EMCA') as the principal instrument of Government mandated to exercise general supervision and coordination over all matters relating to the environment.

8. That Section 9 (j) and (l) of the EMCA outlines the objectives of the 1st Respondent to include the identification of projects and programmes or types of projects and programmes, plans and policies for which environmental audit or environmental monitoring must be conducted under the EMCA and monitoring and assessing of activities, including activities being carried out by relevant lead agencies, in order to ensure that the environment is not degraded by such activities, environmental management objectives are adhered to and adequate early warning on impending environmental emergencies is given.

9. In regard to the powers of the 1st respondent in relation to the consideration of applications for Environmental Impact Assessment Licenses and issuance of the same, Section 58 of the EMCA states as follows:

> ' 58. Application for an Environmental Impact Assessment Licence
>
> 1) Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person,

being a proponent of a project, shall before for an financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.

3) The environmental impact assessment study report prepare under this subsection shall be submitted to the Authority in the prescribed form, giving the prescribed information and shall be accompanied by the prescribed fee.

6) The Director-General may, approve any application by an expert wishing to be authorised to undertake environmental impact assessment. Such application shall be made in the prescribed manner and accompanied by any fees that may be required.'

10. That Section 129 (1) and (2) of the EMCA further provide as follows:

' 129. Appeals to the Tribunal1) Any person who is aggrieved by—

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

b) The imposition of any condition, limitation or restriction on the persons licence under this Act or its regulations;

c) The revocation, suspension or variation of the person's licence under this Act or its regulations;

d) The amount of money required to paid as a fee under this Act or its regulations;

e) The imposition against the person of an environmental restoration order or environmental improvement order by the Authority under this Act or its Regulations may within sixty days after the occurrence of the event against which the person is dissatisfied, appeal to the Tribunal in such manner as may be prescribed by the Tribunal.

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

11. It is further submitted by the 1st Respondent that, Section 129 (3) of the EMCA provides as follows in relation to the powers of the National Environment Tribunal (NET):

1. Upon any appeal, the Tribunal may—

a. Confirm, set aside or vary the order or decision in question;

b. Exercise any of the powers which could have been exercised by the Authority in the proceedings in connection with which the appeal is brought; or

c. Make such other order, including orders to enhance the principles of sustainable development and an order for costs, as it may deem just;

d. If satisfied upon application by any party, issue orders maintaining the status quo of any matter or activity which is the subject of the appeal until the appeal is determined;

e. If satisfied upon application by any party, review any orders made under paragraph (a).

12. Relying on the Statutory provisions quoted, the 1st Respondent firms up the submissions that NET is empowered to issue conservatory/injunctive orders while exercising its mandate. Further, the jurisdiction of NET is of a judicial nature in relation to the licensing powers of the 1st Respondent.

13. The main issue raised by the petitioner/applicant in the subject notice of motion application is in relation to the several statutory approvals, permits and licences applied and granted by the respondents in relation to the subject - felling and export of 8 baobab trees and thus, this matter should not be reckoned by the ELC in the first instance (only on appeal) by dint of not only Section 129 of the EMCA, but also Section 70 of the *Forest Conservation and Management Act*. Further and in relation to the Phytosanitary Certificate issued by the 5th respondent, Section 27 of the *Kenya Plant Health Inspectorate Service Act* provides for arbitration as the mode of dispute resolution.

14. Thus, the 1st respondent urges this court to decline entertaining the matter as the petitioner/applicant suit goes against the trite legal principle that one must first exhaust internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. In the present matter, and as guided by Section 129 of the EMCA, NET would have been the appropriate mechanism of appeal or review before the petitioners/applicants sought the audience of this court.

15. The 1st Respondent has referred this court to the case of *Geoffrey Muthinja Kabiru & 2 Others V Samuel Munga Henry & 1756 others [2015] eKLR* where the principle of exhaustion was discussed the court opined as follows: -

> ' We see this as the crux of the matter in this and similar cases. 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 the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. 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 of courts. This accords with Article 159 of the *Constitution* which commands Courts to encourage alternative means of dispute resolution.
>
> We find and hold that the exhaustion doctrine applies even where, as was argued by the appellants herein, what is sought to be challenged is the very authority of the organs before whom the dispute was to be placed.
>
> By failing to do so, and quite apart from the force of their apprehensions, the appellants effectively failed to exhaust their remedies and essentially short-circuited the process by filing suits prematurely.'

16. Further reference to this doctrine of exhaustion is highlighted in the case of *Savraj Singh Chana v Diamond Trust Bank (Kenya) Limited & another [2020] eKLR*, where Korir J observed as follows: -

> ' It is appreciated that the cited decision does indeed recognize that the unlimited jurisdiction of the High Court of Kenya under Article 165(3)(b) of the *Constitution* to determine questions on whether a right or fundamental freedom has been infringed or violated. Nevertheless, it must be appreciated that the High Court does not exercise its jurisdiction in a vacuum. Jurisdiction is exercised within the laid down principles of law. One of those principles is one which requires that where a statutory mechanism has been provided for the resolution of a dispute, that procedure should first be exhausted before the courts can be approached for resolution of that dispute. Indeed, like any other legal principle, this doctrine has exceptions. In my view, it is the duty of a party who bypasses a statutory dispute resolution mechanism to demonstrate that there were reasons for avoiding that route. In the case before me, the Petitioner has simply pointed to the jurisdiction of this Court. The exhaustion principle does not actually take away the constitutional jurisdiction of this Court. What it simply does is to provide the parties with a faster and more efficient mechanism for the resolution of their disputes. The courts will step in later if any party is aggrieved by the decision of the statutory body mandated to resolve the dispute.'

17. The 1st Respondent thus submits that since the instant matter falls under the ambit of the National Environment Tribunal, without exhausting the mechanism available as provided in Section 129, the instant application/petition offends the doctrine of exhaustion, is premature and brought with mala fides.

18. In further support of the Preliminary Objection that this court lacks jurisdiction to entertain the instant notice of motion application and petition filed by the petitioner/applicant herein, the 1st Respondent submits that the original jurisdiction of the ELC, does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and determine a dispute. Further, that the fact that a claim/petition is multi-pronged (containing other prayers not touching on a NEMA licence), cannot remove the jurisdiction otherwise conferred on the NET. This position was upheld by Makhandia JA in the case of K*ibos Distillers Limited and 4 others v Benson Ambuti Adega and 3 Others Civ Appeal No 153 of 2019 [2020] eKLR* where the judge emphatically reiterated the need for courts to exercise absentation when a remedy lies to another organ by dint of legislation providing such forum.

19. The 1st respondent restates that it matters not that the petitioner has included other prayers such as seeking cancellation of the respondents' approvals or for constitutional reliefs. That though the Petitioner has not expressly sought the cancellation of the approvals given by each of the cited respondents, the effect of its prayers is to defeat those approvals.

20. The 1st respondent contends that the Supreme Court in yet another case - *United Millers Limited V Kenya Bureau of Standards and 5 Others [2021] eKLR*, supported the view as held by the Court of Appeal in the Kibos Case.

21. The 1st Respondent concludes that with the holding of the Supreme Court of Kenya's decision in affirming the Court of Appeal in the Kibos Case reported as Benson Ambuti Adega & 2 others V Kibos Distillers Limited & 5 Others [2020]eKLR, Petition 3 of 2020, the ELC has no jurisdiction to entertain this matter in the manner it is drafted.

22. With the authorities cited, the 1st respondent is of the view that according to Section 129 of the EMCA, the main issue in the current application and petition is a dispute to the discernment of NEMA in the

issuing of an EIA License and Access Permit (Annexure MM3 and MM4), and hence qualifies as an appeal to NET in the first instance rather than a petition before this court.

23. Equally, that according to Section 70 of the *Forest Conservation and Management Act* as read with Section 129 of the EMCA, the main issue in the current application and petition is a dispute to the discernment of the Kenya Forest Service in the issuing of its approval Permit (Annexure MM6(b)), and hence qualifies as an appeal to NET in the first instance rather than a petition before this court.

24. The 2nd Respondent prays that the instant Preliminary Objection be allowed as the matter in question offends the provisions of Section 129 of the EMCA and as a result, the court should down its tools (as per the holding of Law JA in *Mukisa Biscuits Manufacturing Company Limited V West End Distributors [1969] E.A. 696)* and decline to entertain the notice of motion application and petition herein.

25. The 1st Respondent further opines that the petitioner has also circumvented the statutory procedure outlined at Section 31 of the EMCA that requires that any complaints or allegations of environmental injury be presented at the Public Complaints Committee on Environment. The recent case of *Salat Aden Mohamed & another v Noor Aden Abdullahi & 4 Others [2022] eKLR* is on all fours on this matter.

26. That the Salat Aden decision is very instructive and persuasive since very similar prayers are compared to the ones in this petition, ware made. The only distinction would be that in the present petition, the decision of the 1st respondent (NEMA) being an EIA licence, does exist and is exhibited by NEMA as Annexure MMW3. However, in both cases, the statutory procedures of visiting the Public Complaints Committee as well as the National Environment Tribunal have been circumvented.

27. That it's Instructive too that an appeal/proceedings at the National Environment Tribunal touching on the same subject matter as this Petition - the felling and exportation of 8 baobab trees - was filed as NET 45 of 2022 by Omar Salim Mwakweli and Others vs NEMA and Georgy Gvasaliya.

28. It is the 1st respondent's views that the notice of motion dated February 23, 2023 and the petition dated January 18, 2023 for the reasons as canvassed ought to be dismissed with costs.

by the Petitioner

29. In rejoinder, the petitioner submits that the Preliminary Objection dated March 3, 2023 and the petition and application are not premised on the *Environmental Management and Co-ordination Act* 1999, the *Kenya Plant Health Inspectorate Service Act* 2012 and the *Forest Conservation and Management Act* 2016 but on the *Constitution* of Kenya 2010.

30. Section 125, 126 and 129 of the *Environmental Management and Co-ordination Act* 1999 relied upon by the 1st Respondent relates to disputes under EMCA. The instances in which one may appeal to the National Environment Tribunal under Section 129 relate to licences and licensing and all end with the phrase 'under this Act or its regulations'. A literal interpretation of the phrase is that appeals only lie to the Tribunal if they emanate from the instances outlined under Section 129 under EMCA and its regulations. The petition and the application do not emanate from EMCA but from violations of Articles 10, 11, 42, 43, 60 and 69 of the *Constitution*.

31. The 1st Respondent also relies on Section 70 of the *Forest Conservation and Management Act* 2016 which relates to 'disputes that may arise in respect of forest conservation, management, utilization or conservation'. The petition and application do not entail such a dispute but rather focuses on violations of Articles 10, 11, 42, 43, 60 and 69 of the *Constitution*.

32. Further, Section 27 of the *Kenya Plant Health Inspectorate Service Act* 2012 provides:

> ' Any person aggrieved by acts or omissions under this Act or the laws specified under the First Schedule may seek redress under the arbitration rules of the respective Acts or any other relevant law.'

33. The laws specified under the First Schedule of the *Kenya Plant Health Inspectorate Service Act* 2012 are the *Plant Protection Act*, the *Seeds and Plant Varieties Act*, the Agricultural Produce (Export) Act and the Suppression of Noxious Weeds Act. The present petition and application falls neither under the *Kenya Plant Health Inspectorate Service Act* nor the laws under its First Schedule but under the *Constitution*. Consequently, the petition and application is not subject to arbitration under the *Kenya Plant Health Inspectorate Service Act*.

34. The Environment and Land Court has jurisdiction to hear all other environmental disputes falling outside the purview of Section 129(1) of EMCA. The ELC derives its jurisdiction from Article 162 (2) (b) of the *Constitution* which established the ELC to determine disputes relating to the environment and the use and occupation of, and title to, land. Further, Section 13 of the *Environment and Land Court Act* 2011 confers the ELC with the original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the *Constitution* relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources. It also provides that the court shall have the jurisdiction to hear any other disputes relating to the environment and land.

35. Further, the Environment and Land Court is a Court of superior record with status of High Court hence, it has the jurisdiction to determine Constitutional Petitions. In Nakuru Constitutional Petition No 2/2013 Mohammed Said vs County Council of Nandi [2013] eKLR, the Court sought to clear the ambiguity on the role of ELC in hearing and determining Constitutional Petitions in disputes relating to the right to a clean and healthy environment under Articles 42,69,70 of the *Constitution* of Kenya. The court in dismissing the preliminary objection challenging the jurisdiction of the ELC stated as follows:

> ' It is the same issue with the Environment and Land Court. The Court has jurisdiction to interpret the *Constitution* and fundamental rights and freedoms over matters, which fall under the subject matter of environment and land.
>
> I do not agree with counsel for the 2nd Respondent that the Environment and Land Court can only hear petitions touching on Articles 42, 69 and 70 of the *Constitution*. The jurisdiction of the Court is not restricted only to hearing petitions falling under Articles 42, 69 and 70. It can hear any constitutional petition under any provision of the *Constitution* so long as the matter relates to the environment and the use and occupation of, and title to, land.'

36. The present petition and application have been brought under Articles 10, 11, 42, 43, 60 and 69 of the *Constitution* and not under EMCA. Consequently, the ELC has the jurisdiction to hear and determine these constitutional issues, which relate to the environment. As was held in *West Kenya Sugar Co Limited V Busia Sugar Industries Limited & 2 Others [2017] eKLR*, where the court dismissed a similar preliminary objection:

> ' This argument that the court has no jurisdiction is based on a misunderstanding of the matter before this court. What is before the court is a constitutional petition in which

the petitioner has alleged several violations of his rights enshrined in the *Constitution*. The National Environment Tribunal does not have mandate to deal with constitutional violations relating to the environment. That is a preserve of this court. A look at the mandate given to the National Environment Tribunal under section 129 of EMCA aforesaid shows a limited scope of the matters it can handle on appeal. They particularly deal with licence and licensing.'

37. Further, in *Paolo Di Maria & 5 Others v Alice M. Kuria & 5 Others [2021] eKLR* the court dismissed a similar Preliminary Objection finding that the court had the requisite jurisdiction to hear and determine the plaintiff's suit as per Article 162 (b) of the *Constitution* and Section 13 of the *Environment and Land Court Act* which gives the court a wide mandate to hear and determine matters relating to the environment and land.

38. The applicant locks horns with the 1st respondent's assertion that there exists an appeal before the Tribunal on the issues before this court namely NET 45 of 2022 Omar Salim Mwakweli and Others V NEMA and Georgy Gvasaliya.

39. The alleged appeal before the Tribunal is also improperly pleaded seeing, as it is trite law that new issues cannot be raised through submissions. This position was affirmed in *Clips Ltd V Brand imports (Africa Ltd formerly named Brand Imports Ltd [2015] eKLR* where the court stated:

> ' However, it is trite law that new issues cannot be raised in submissions. Korir, J in the case of Republic v Chairman Public Procurement Administrative Review Board & another Ex-Parte Zapkass Consulting and Training Limited & another [2014] eKLR held that:
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> 'The Applicant, the respondents and the Interested Party all introduced new issues in their submissions. Submissions are not pleadings. There is no evidence by way of affidavits to support the submissions. New issues raised by way of submissions are best ignored.'
>
> Furthermore, it is trite law that documentary evidence cannot be annexed to submissions and consequently the Court ought to ignore the same. The Court of Appeal in Douglas Odhiambo Apel & another v Telkom Kenya Limited Civil Appeal No 115 of 2006, upheld the trial court's decision to disregard evidence that had been attached to submissions.'

40. The Petitioner therefore submits that the allegation of a pending appeal be disregarded and ignored. In any event, proceedings before the ELC and the Tribunal are different for the reason that they have different jurisdictions with the ELC dealing with the wider scope of constitutional violations relating to the environment whereas the scope of the Tribunal is limited to the disputes under Section 129 on licences and licensing under EMCA.

41. Whether the 1st Respondent has raised a proper preliminary objection, the Petitioner thinks otherwise and contends that a proper Preliminary Objection based on the celebrated case of Mukhisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] has not been achieved as held by Law JA that a preliminary objection consists of a point of law which has been pleaded. The nature of a preliminary objection is such that when argued, may dispose of the suit. Law, JA gave examples of preliminary objections key amongst them being objection to the jurisdiction of the Court.

42. In the present case, the 1st Respondent has not challenged the jurisdiction of this court to entertain the petition but rather the application. No jurisdictional issue has been raised against the Petition. Consequently, the preliminary objection raised is not capable of disposing of the entire suit.

43. Whether costs should be awarded. The petitioner avers that it is well settled that on matters of public interest litigation such as this one, parties are not awarded costs citing the Supreme Court in *Mumo*

Matemu V Trusted Society of Human Rights Alliance and 5 Others [2014] eKLR and *Jasbir Singh Rai and 3 Others V Tarlochan Singh Rai and 4 Others [2014] eKLR* where costs were declined because they were public interest matters.

Analysis and Determination

44. The main issue for determination is whether the Preliminary Objection should be sustained - striking out the pending application and the main petition in limine. As held by Law JA in Mukhisa Biscuit Manufacturing Co Ltd V West End Distributors Ltd [1969] thus:

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

45. The thrust of the Preliminary Objection rest squarely on the jurisdiction of this court, as held by Nyarangi JA in *Owners of the Motor Vessel 'Lillian S' V Caltex Oil (Kenya) Ltd [1989] eKLR*:-

> ' I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

46. The Preliminary Objection raised by the 1st Respondent attacks the jurisdiction of this court to entertain the petition and the application. It has to be addressed in a moment. It has the potential of disposing the entire suit or its substratum.

47. As correctly submitted by the petitioner quoting several authorities, since the establishment of the ELC in 2012 and under Article 162 (2)(b) of the *Constitution*, perhaps the jurisdiction of the court has been the most addressed subject by the Lower Courts falling under the direct supervision of the ELC, the ELC itself, the coordinate courts and the other Superior Courts of record that is the Court of Appeal and the Supreme Court. That issue is yet to crystalize. I entirely agree with the Petitioner's authorities on the wide mandate of the ELC as established with a scope of redressing constitutional violations relating to the environment whereas the scope of the Tribunal (NET) is limited to the disputes under Section 129 on licences and licensing under EMCA as for example, affirmed in the cited decision of this court in West Kenya Sugar Co. Limited V Busia Sugar Industries Limited & 2 Others [2017] eKLR, where the court observed as follows:-

> ' This argument that the court has no jurisdiction is based on a misunderstanding of the matter before this court. What is before the court is a constitutional petition in which the petitioner has alleged several violations of his rights enshrined in the *Constitution*. The National Environment Tribunal does not have mandate to deal with constitutional violations relating to the environment. That is a preserve of this court. A look at the mandate given to the National Environment Tribunal under section 129 of EMCA aforesaid shows a limited scope of the matters it can handle on appeal. They particularly deal with licence and licensing.'

48. But then is this the jurisprudence holding sway that the ELC has unlimited jurisdiction to handle all petitions filed on the constitutional violations relating to the environment where other entities like NEMA and NET are involved particularly where the foremost feature in a petition revolves around licence and licensing?

49. The current petition obviously has the aspect of issuance of licence to fell and transport 8 baobab trees and have the same exported to Georgia - outside this Country. The petition too has other mixed grill prayers like the protection of the genetic value and benefit sharing of the baobab tree, any future felling of the tree, the public participation and education of the general populace on the need to preserve the tree, the general effect of the felling of the tree on the climate and compensation for wrongful extraction of the same.

50. A look at the emerging jurisprudence from the Superior Courts, particularly the Supreme Court we have now what the Superior Court referred to as - the Pullman doctrine (arising from a US decision as quoted by the apex court (supra)) or what I can call - the Kibos doctrine on judicial abstention which we have to grapple with on the issue of jurisdiction when a petition has mixed grill or multifaceted issues to deal with like in the current petition.

51. In the original Kibos Case, on October 25, 2018, the petitioners filed a constitutional petition against the respondents before the Environment and Land Court (ELC) seeking several declaratory orders inter alia that their right to a clean and healthy environment as guaranteed by Articles 42 and 43 of the *Constitution* had been violated; a declaration that the 1st to 3rd respondents illegally acquired Environmental Impact Assessment (EIA) Licences for Kibos Sugar & Allied Factory; a permanent injunction to restrain the 1st to 3rd respondents from continuing with operations of their factories and or milling sugar cane; an order of environmental restoration requiring the 1st to 3rd respondents to demolish any structures erected on LR No 654/23 and LR No 11273 in Kibos area; and a declaration that the failure by the Kisumu County Government and NEMA to stop the degradation of the environment by the 1st to 3rd respondents was unconstitutional, illegal and contravened the provisions of Section 108 of the Environmental Management and Coordination Act, 1999 and Articles 3, 10 and 47 of the *Constitution*.

52. In the Petition, the 1st, 2nd and 3rd petitioners further sought compensatory damages for violation of their right to a clean and healthy environment guaranteed under Articles 43, 46 and 47 of the *Constitution*

53. A Preliminary Objection, raised on the jurisdiction of the ELC- Kibunja J was dismissed and after full trial the judge gave the following orders:

    (a) A declaration be and is hereby issued that the petitioners right to a clean and healthy environment as guaranteed by Articles 42 and 43 of the *Constitution* had been violated by the actions and omissions of the respondents.

    (b) A declaration be and is hereby issued that the issuance of EIA Licence No 000259 to the Kibos Sugar Limited by NEMA based on the Environmental Project Report only for milling of 500 tonnes of sugar cane without the Kibos Sugar Carrying out an EIA Study and going on to construct a 1650 TCD was unconstitutional, illegal and in contravention of Sections 58, 59, 60, 61, 62 and 63 of EMCA and Regulations 17, 18, 22, 23 and 24 of the Environmental (Impact Assessment and Audit) Regulations, 2003.

    (c) A declaration be and is hereby issued that the variation of the 1st respondent's EIA Licence No 000259 by NEMA and subsequent issuance of certificate of variation of EIA Licence No

0000151 without an EAI study and report being submitted for approval was unconstitutional, illegal and in contravention of Sections 58, 59, 60, 61, 62 and 63 of EMCA and Regulation 25 of the Environmental (Impact Assessment and Audit) Regulations, 2003.

(d) A declaration be and is hereby issued that the EIA Licences issued to the three respondents by NEMA have been illegally and un-procedurally acquired.

(e) An order of a permanent injunction be and is hereby issued restraining the three respondents from in any way continuing with operations of their factories and or milling sugar cane at Kibos area without first carrying out EIA studies and submitting the reports to NEMA for approval and fresh EIA Licences issued in accordance with the law.

(f) An order of environmental restoration be and is hereby issued requiring the three respondents to demolish any structures erected on Land Parcels LR No 654/23 and 11273 in Kibos without an approved EIA Study Report with a view to restoring the environment to its original status should they fail to obtain a fresh EIA Licence within one hundred and twenty (120) days; the petitioner in conjunction with NEMA and County Government of Kisumu be and are hereby authorized to appoint an auctioneer to carry out the said restoration ordered and to recover the costs from the three respondents.

(g) A declaration be and is hereby issued that the failure, neglect and refusal by NEMA and County Government of Kisumu to stop the activities of the three respondents is illegal and contravenes Section 108 of EMCA.'

54. The orders provoked an appeal reported in Kibos Distillers Limited and 4 others v Benson Ambuti Adega and 3 Others Civ Appeal No 153 of 2019 [2020] eKLR where Makhandia JA. in overturning the orders of this court stated as follows: -

> ' In the instant matter, the learned Judge citing the case of Ken Kasinga v Daniel Kiplangat Kirui & 5 others [2015] eKLR, and other decisions from Courts of coordinate jurisdiction, held that where a claim in a Petition or suit is multifaceted, a Court can have jurisdiction despite existence of another forum, institution or agency that has been legislatively conferred with jurisdiction to determine the matter. With due respect, this is a wrong exposition of the law. Such a reasoning implies that jurisdiction may be conferred through the art and craft of drafting pleadings – that all that a litigant need to do is draft pleadings that such claims are raised in a multifaceted way and thereby oust the jurisdiction of any specialized tribunal or agency. This promotes forum shopping. To this extent, I find that the learned Judge erred in law in finding that the ELC had jurisdiction simply because some of the prayers in the Petition were outside the jurisdiction of the Tribunal or the National Environmental Complaints Committee. A party or litigant cannot be allowed to confer jurisdiction on a Court or oust jurisdiction of a competent organ through the art and craft of drafting pleadings. Even if a Court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and determine a dispute. Original jurisdiction is not an ouster clause that ousts the jurisdiction of other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction on a Court or body to hear and determine all and sundry disputes. Original jurisdiction only means the jurisdiction to hear specifically constitutional or legislatively delineated disputes of law and fact at first instance. To this end, I reiterate and affirm the dicta in Speaker of the National Assembly v. James Njenga Karume [1992] eKLR where it was stated that where there is a clear procedure for the redress of a particular

grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed.

[...] A Court with original jurisdiction in some matters and appellate jurisdiction in others cannot by virtue of its appellate jurisdiction usurp original jurisdiction of other organs. I note that original jurisdiction is not the same thing as unlimited jurisdiction.

A Court cannot arrogate itself an original jurisdiction simply because claims and prayers in a Petition are multifaceted. The concept of multifaceted claim is not a legally recognized mode of conferment of jurisdiction to any Court or statutory body.'

55. The matter never settled an appeal was preferred to the apex Court – the Supreme Court of Kenya in *Benson Ambuti Adega & 2 others V Kibos Distillers Limited & 5 Others [2020] eKLR*, Petition 3 of 2020, Maraga, CJ & P, Mwilu, DCJ & VP, Ibrahim, Wanjala, Njoki & Lenaola SCJJ. held as follows: -

' It would seem that the ELC had failed to appreciate that there were properly constituted institutions that were mandated to hear and determine the issues, but instead chose to arrogate to itself the jurisdiction to hear and determine all the issues raised in the Petition. The Petitioners stated that the Superior Court correctly relied on the doctrine of judicial abstention, and exercised it discretion to hear and determine the Petition.'

(51) Judicial abstention, as with judicial restraint, is a doctrine not founded in constitutional or statutory provisions, but one that has been established through common law practice. It provides that a Court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination, if there would be other appropriate legislatively mandated institutions and mechanism.

(52) The abstention doctrine, also known as the Pullman doctrine, was deliberately first reviewed by the US Supreme Court in Railroad Commission of Texas v Pullman Co, 312 US 496 61 S. Ct. 643, 85 L Ed 971 (1941). The doctrine, and as applied within the context of the US legal system, allows federal courts to decline to hear cases concerning federal issues where the case can also be resolved with reference to a state-based legal principle. The Supreme Court, in an opinion by Justice Brennan in England v Louisiana State Board of Medical Examiners, 375 US 411 (1964) also noted that a State Court determination would indeed bind the federal court. The proper procedure, the Court determined, is to give notice that the federal issue is contended, but to expressly reserve the claim on the federal issue for the federal court. If such a reservation is made, the parties can return to the federal court, even if the State Court makes a ruling on the issue.

(53) Applying these principles to the instant Petition, the more favorable relief that the Superior Court should have issued was to reserve the constitutional issues on the rights to a clean and healthy environment, pending the determination of the issue with regards to the issuance of EIA licenses by the 4th Respondent to the 1st, 2nd and 3rd Respondents. The Court should have reserved the issues pending the outcome of the decision of the Tribunal, thereby affording any aggrieved party the opportunity to appeal to the Court. It would then

have determined the reserved issues, alongside any of the appealed matter, if at all, thus ensuring the parties right to a fair hearing under Article 50 of the *Constitution* was protected. [54] The Court of Appeal, in our view, gave quite an elaborate and definitive definition pertaining to the jurisdiction of the trial Court in hearing and determining the Petition. However, once it had established that the ELC did not have the jurisdiction to hear and determine the Petition, the appellate Court should at that juncture issued appropriate remedies, which could have included, but not limited to, remitting back the matter to the appropriate institutions for deliberation and determination. Also, once it had determined that the ELC did not have the jurisdiction to hear and determine the issues before it, it should have held that any determination made was void ab initio, and that the appellate Court therefore and with respect failed to properly exercise its discretion and supervisory mandate in this instance,'

56. The position taken by the Supreme Court in the *Kibos Case is also replicated by the apex Court in United Millers Limited V Kenya Bureau of Standards and 5 Others [2021] eKLR*, as follows:

> ' (25) Considering all the above, it is clear to us that the judicial review application before the trial Court and the subsequent appeal to the Court of Appeal were determined on a preliminary jurisdictional issue. We have previously in Peter Odour Ngoge v Francis Ole Kaparo & others; SC Petition No 2 of 2012, [2012] eKLR, emphasized the significance of respecting the hierarchy of the judicial system, as one of the principles guiding the exercise of our jurisdiction under Article 163 (4) (a) of the *Constitution*. From the foregoing, we find no difficulty in concluding that the issues before the High Court as well as the Court of Appeal did not either involve the interpretation and application of the *Constitution* or take a trajectory of Constitutional interpretation or application. While issues of constitutional interpretation and application had been raised in the substantive application for Judicial Review, they were nipped in the bud when the preliminary objection was upheld for failure to exhaust the statutory alternative dispute resolution mechanisms.
>
> (26) We also take judicial notice that the superior courts' findings on jurisdiction is in harmony with our finding in Albert Chaurembo Mumbo & 7 others v Maurice Munyao & 148 others; SC Petition No 3 of 2016, [2019] eKLR, wherein we stated that, even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute. We emphasized that where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their Jurisdiction conferred by the *Constitution* and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance.
>
> (27) In view of the reasons tendered, we find that this Court has no jurisdiction to hear and determine Petition No 4 of 2021 or the instant application for conservatory or stay orders.'

57. The Kibos doctrine is then to the effect that where a claim in a petition or suit is multifaceted as the one we have here the best approach to take is to reserve the constitutional issues to await the determination of the primary adjudicative authority in this case it has been brought to the courts attention that there

is active litigation on the issuance of licences on the 8 baobab trees in NET 45 of 2022 Omar Salim Mwakweli and Others V NEMA and Georgy Gvasaliya, of course I agree with the petitioners that this issue has been raised at the submission level and should be frowned upon. But then, as held by the apex Court in the Kibos Case (supra) the best approach to take is to refer the matter to the relevant adjudicative organ. In this case I ought to have referred the matter to NET, it has been brought to my attention that such suit already exists and I need not make a referral. Let that claim run its full course. I therefore down tools on the dominant issue of licencing.

58. The extraction, translocation and exportation of the baobab tree will continue to attract public interest from environmentalist and the Government alike. The hitherto unknown benefit of the tree which was feared for bad omen by the Kilifi residents, has now been unearth if the presentation by the petitioner in its suit papers is anything to go by. The future and survival of that tree imposing its gigantic stature in its natural state in Kilifi County and the Country at large will remain under focus in the present and the near future particularly in this era of climate change. The proceedings before NET and perhaps the balance of the Constitutional violation claims in this petition will also be something to watch. In my view and in the spirit of environmental conservation efforts, the petitioner cannot be condemned to pay costs. Not yet.

59. The upshot is that the Preliminary Objection raised succeeds partially as follows:

    i. The notice of motion dated is hereby dismissed

    ii. The Petition partly collapses on ALL aspects relating to licensing now within the purview of NET 45 of 2022 Omar Salim Mwakweli and Others V NEMA and Georgy Gvasaliya.

    iii. The pending Constitutional violation claims are hereby stayed pending the determination of NET 45 of 2022 Omar Salim Mwakweli and Others V NEMA and Georgy Gvasaliya.

    iv. As this is public interest litigation, costs to be borne by each party at this stage.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 18TH DAY OF MAY 2023.

E. K. MAKORI

JUDGE

In the Presence of: -

Ms. Nellius Njuguna for the Petitioners

Mr. Gitonga for 1st Respondent

Mr. Nyale for the 3rd Respondent

Court Clerk: Happy

In the Absence of: -

AG for the 2nd, 4th, 5th and 6th Respondent