



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC PETITION CASE NO. 7 OF 2020**

**IN THE MATTER OF ARTICLES 2 (1) 3 (1), 10, 19, 20, 22, 23, 28, 35, 40, 42, 43 (1), 69, 70, 159, 162 (b) AND 258 (1) OF THE**

**CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ALELGED INFRINGEMENT, AND/OR ONGOING INFRINGEMENT OF ARTICLES 28, 35, 40, 42**

**AND 43 (1) (a) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL**

**FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF SECTIONS 5, 34, 35, 37, 42, 43, 44, 101, 102, 103, 104, 109, 110, 124, 136, 176, 177, 178, 179, 180, 181,**

**AND OTHER RELEVANT SECTIONS OF THE MINING ACT, ACT NO. 12 OF 2016 AND THE SUBSIDIARY**

**LEGISLATION THERETO**

**AND**

**IN THE MATTER OF SECTIONS 3, 3A, 7, 9, 11, 42, 58, 59, 72, 74, 75, 108, 112 AND OTHER RELVANT SECTIONS OF**

**THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT, AT NO. 9 OF 1999 AND THE SUBSIDIARY**

**LEGISLATION THERETO**

**AND**

**IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT**

**AND**

**IN THE MATTER OF ACCESS TO INFORMATION ACT**

**IN THE MATTER OF SECTION 13 OF THE ENVIRONMENT AND LAND COURT ACT, ACT NO. 19 OF 2011**

**BETWEEN**

**ABIDHA NICHOLUS.....PETITIONER**

**VERSUS**

THE ATTORNEY GENERAL.....	1 <sup>ST</sup> RESPONDENT
JOSEPH ANDEERE NYAANGA.....	2 <sup>ND</sup> RESPONDENT
OWANG' ISAACK OGWEYO.....	3 <sup>RD</sup> RESPONDENT
CABINET SECRETARY MINISTRY OF PETROLEUM AND MINING.....	4 <sup>TH</sup> RESPONDENT
CABINET SECRETARY ENVIRONMENT AND FORESTRY.....	5 <sup>TH</sup> RESPONDENT
NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY.....	6 <sup>TH</sup> RESPONDENT
COUNTY COMMISSIONER, SIAYA COUNTY.....	7 <sup>TH</sup> RESPONDENT
KENYA POWER & LIGHTING COMPANY LIMITED.....	8 <sup>TH</sup> RESPONDENT
THE NATIONAL ENVIRONMENTAL COMPLAINTS COMMITTEE (NECC).....	1 <sup>ST</sup> INTERESTED PARTY
COMMISSION ON ADMINISTRATIVE JUSTICE.....	2 <sup>ND</sup> INTERESTED PARTY
KATIBA INSTITUTE.....	3 <sup>RD</sup> INTERESTED PARTY
KITUO CHA HAKI.....	4 <sup>TH</sup> INTERESTED PARTY
ACACIA EXPLORATION KENYA LIMITED.....	5 <sup>TH</sup> INTERESTED PARTY
MEMBER OF COUNTY ASSEMBLY EAST ASEMBO WARD.....	6 <sup>TH</sup> INTERESTED PARTY

### RULING

Abidha Nicholas (hereinafter to as the Petitioner) has come to court against the respondents claiming to be the owner of property known as Ramba on LR No. Siaya/Ramba/719 and 720 both of which have touched River Odundu. The Petitioner alleges that in the year 2018 the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents surveyed plot Ramba 716 which was a shaft left by previous mining entities between 1988 and 2008 and that in 2019 the said 2<sup>nd</sup> and 3<sup>rd</sup> Respondents commenced their operations.

The Petitioner and other concerned parties questioned the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents about their licences/permits or authorizations but they rebuffed the same claiming that they were protected by the rich and powerful in the Country and that they would buy any government functionaries.

On 09<sup>th</sup> April, 2019 the Petitioner on his own behalf and that of members of Ramba Community interested in conserving the environment, while invoking Articles 35 (1) of the Constitution and Access to information act, wrote to the officers of the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents requesting for information about mining activities which were being carried out in Ramba area within Rarieda Sub-County, Siaya County.

The 4<sup>th</sup> and 5<sup>th</sup> Respondents ignored, declined and/or refused to respond to the subject matter and have never explained the reasons for the same.

On the 23<sup>rd</sup> July, 2019 the Petitioner on his behalf and that of Ramba community further wrote to the Commission of administrative Justice reporting the failure by the said 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents to respond to the aforesaid letter or explain the reason for their failure. The intervention of the Ombudsman was necessary to enable the Petitioner highlight the grievances and seek for documents/more information. The mining activities of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were illegal as they were not authorized.

The petitioner laments that the mining activities are illegal under the watch of the 1<sup>st</sup>, 4<sup>th</sup> to 7<sup>th</sup> respondents. That the activities of the 2<sup>nd</sup> and

3<sup>rd</sup> respondents are unlicensed, unpermitted mining activities and wanton destruction of the environment.

The petitioner has come to court claiming that the respondents have violated the constitutional and fundamental rights and freedoms of the Ramba Community as they have threatened to cause harm on the people of Ramba and the Petitioner in person.

Moreover, that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are mining contrary to the law as the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have no E.I.A licence and no mining licence.

Furthermore, that the licence that was issued to Afri-Ore (BerbedoS) International Ltd was issued without involving the community.

The Petitioner further claims that there is violation of right to clean and healthy environment and violation of a fair administrative actions. Lastly, the petitioner claims that there is breach of right to property.

The complaint against the 8<sup>th</sup> Respondent is that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent had sought for Electricity supply from the 8<sup>th</sup> Respondent who had also trespassed into the petitioner's land and dug holes and erected electricity poles thereon.

The 8<sup>th</sup> Respondent was aware that the petitioner was the owner of the said property but proceeded to dig holes and erect poles without notification to him and failed to seek his consent and ignored all requirements of the Energy Act.

On the 7/10/2020 the 8<sup>th</sup> Respondent filed a Preliminary Objection that this honourable court lacks jurisdiction to hear and determine the dispute and suit as against the 8<sup>th</sup> respondent. That the Petition against the respondent offends the provision of Section 3 (1) 10, 11 (a), f, I, k and l, 23, 24, 36, 40, 42 and 224 (2) of the Energy Act 2019 together with regulations 2, 4, 7 and 9 of the Energy (Complaints and Disputes Resolution of regulation 2012 as read together with Article 157 (2) c and 169 (1) (d) and 2 of the Constitution of Kenya 2010 and Section 9 (2) and (3) of the Fair Administration Act 2015.

The 8<sup>th</sup> Respondent relies on the case of **Mukisa Biscuits vs West End Distributors Ltd (1969) ELR 696** when it was stated that 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 objection may dispose of the suit.

The gravamen of the 8<sup>th</sup> Respondent submission is that the petitioner should stick to the dispute resolution avenues available in law. The 8<sup>th</sup> Respondent relies upon Article 159 (2) of the Constitution of Kenya that expressly recognises alternative forms of dispute resolution including reconciliation, mediation audition and traditional dispute resolution mechanism.

The 8<sup>th</sup> respondent further relies on Article 169 (1) d of the Constitution that requires the creation of local Tribunals. The 8<sup>th</sup> Respondent further argues that this court has no jurisdiction due to the provisions of Section 9 (2) (3) of the fair Administrative Act 2015.

In response, the Petitioner argues that the petition raises issues touching on enforcement of rights and freedoms under the constitution. The petitioner argues that the main breach by the 8<sup>th</sup> Respondent is breach of right to property in violation of Article 40, Section 46, 47 and 48 of the Energy Act.

He argues that the court is conferred with jurisdiction under Article 162 (2) b to entertain disputes concerning use and occupation of land. Article 23 (1) of the Construction of Kenya 2010 authorizes the court to enforce rights and freedoms if the same are threatened or infringed.

I have considered the preliminary objection raised by the 8<sup>th</sup> Respondent and do find that it is premised on the Energy Act 2019.

Section 3 of Energy Act 2019 provides that:

**1) "If there is a conflict between this Act and any other Act, this Act shall prevail on the following matters—**

**(a) the importation, exportation, generation, transmission, distribution, supply or use of electrical energy; the exploration, production, transportation, distribution, and supply of any other form of energy; and (c) all works and apparatus for any or all of these purposes. (2) Save where this Act expressly provides otherwise, any license granted or anything done under this Act shall not affect the right, privilege, obligation or liability acquired by any licensee or other person in any contract or under any written law prior to the commencement of this Act."**

The import of the above is that the Energy Act 2019 prevails over any other Act of Parliament or law but definitely not over the constitution of Kenya 2010. However, there is no indication that the Act is in conflict with the Constitution of Kenya 2010. If there was any such conflict, then the Constitution would prevail.

Section 10 of the Energy Act provides for the functions of the Authority as the generation, importation, exportation, transmission, distribution, supply and use of electrically energy with exception of licensing of nuclear energy.

Section 11 provides for the powers of the Authority whilst Section 23 of the Act provides for the decision of the Authority and Section 24 provides for the Appeal against the decision of the Activity. The appeal against the decision of the authority should be made to the Energy and petroleum Tribunal. The Tribunal has jurisdiction to hear and determine all matters referred to it relating to the energy and petroleum Sector arising under the Act.

Section 40 provides that all appeals from the decision of the Authority will be made to the Tribunal in accordance to the provisions of the Act.

The Tribunal has the appellate jurisdiction to hear and determine appeals to all disputes arising from the decision of the authority or licencing authority relating to energy matters and any matter referred to the Authority or any licencing Authority.

The energy (Complaints and Disputes Resolution) regulations 2012 provides for conflict resolution in the Energy Sector.

The Regulations define a conflict as including dissatisfaction with the service rendered by or a practice of any person carrying out any undertaking pursuant to a licence, permit or registration issued or granted by the Commission, under the Act.

A complainant means any person affected by a respondent's undertaking activity or practice regulated under the Act.

Regulation 4 provides that the regulations apply to complaints and disputes in the following areas:

**a) billing, damages, disconnection, health and safety, electrical installations, interruptions, licensee practices and procedures, metering, new connections and extensions, reconnections, quality of service, quality of supply, tariffs, way leaves, casements or rights-of-way in relation to the generation, transmission, distribution, supply and use of electrical energy.**

**b) damages, adulteration and under-dispensing of products, licensee practices and procedures, health and safety in relation to the importation, refining, exportation, wholesale, retail, storage or transportation of petroleum products;**

**c) and any other activity and/or matter regulated under the Act.**

If the complaint or dispute is not resolved to the satisfaction of a party, the dispute is referred to the Commission.

I do find that the Petitioner's complaint against the 8<sup>th</sup> respondent is in respect of way leaves, easements or rights of way in relation to the distribution and supply of Electrical energy. The petitioner alleges that the 8<sup>th</sup> Respondent has allowed Electrical posts to be placed in his parcel of land and that the Authority has the power to entertain the dispute. If dissatisfied, the petitioner can move to the Tribunal. This court further finds that Section 9 (2) and 3 of the fair Administration Act 2015 removes this kinds of disputes from this court and places jurisdiction to the Energy Authority.

The upshot of the above is that the objection raised by the 8<sup>th</sup> respondent succeeds and the petition against the 8<sup>th</sup> Respondent is struck out as there is alternative mechanism for resolving the dispute.

The 2<sup>nd</sup> Preliminary Objection is dated 9/9/2020, filed by Bruce Odeny & Company Advocates for the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> issue raised by the 2<sup>nd</sup> Respondent is that the Application is brought by way of Chamber Summons as opposed to notice of motion.

The import of the Preliminary Objection is that Section 125 of the Environment and Co-ordination Act (**EMCA**) (cap 387) Laws of Kenya establishes the National Environment Tribunal whose jurisdiction is spelt out under section 129 (1), (2), (3) & (4) of the said Act. The orders that the petitioner seeks in his petition and application herein are orders that are within the mandate of the National Environmental Tribunal to handle. This court as such lacks the original jurisdiction on the portion of the claim dealing with the environment.

Under section 130 of the said Act, appeals from the National Environment Tribunal lie to the Environment and Land Court. This makes the claim herein as far as the environment is concerned to be premature and that this court will have the last bite on the cherry as the appellate court.

The 2<sup>nd</sup> Respondent submits that by enacting Environment and Co-ordination Act (**EMCA**) (cap 387) Laws of Kenya, Parliament restricted the Environment and Land Court from hearing same disputes relating to Articles 42, 69 and 70 of the constitution.

According to the 2<sup>nd</sup> respondent section 7 of Environment and Co-ordination Act (**EMCA**) (cap 387) Laws of Kenya establishes N.E.MA to deal with environmental issues.

That Environment and Co-ordination Act (**EMCA**) (cap 387) Laws of Kenya has provided for various resolution of environment issues both through administrative and Judicial means that ought to be appreciated. The petitioner should have exhausted the administrative and Judicial mechanism set out in the Environment and Co-ordination Act (**EMCA**) (cap 387) Laws of Kenya. The 2<sup>nd</sup> Respondent argues that the applicant has not exhausted all remedies available to him before moving this court.

In reply the Petitioner argues that this court was established by Parliament pursuant to Article 162 (2) b of the Constitution and given jurisdiction to hear and determine disputes relating to the Environment and the use and occupation of and title to land.

He argues further that Article 23 (1) and 70 of the Constitution mandates the court to give a legal remedy in case of breach of the rights to a clean and healthy environment recognised and provided under Article 42 of the Constitution.

This court agrees with the submissions that Articles 22, 162(2) (b) of the constitution of Kenya 2010 and section 13(1) (2) of the environment and land court act confer jurisdiction to the court to hear and determine disputes relating to the environment, the use, the occupation of, and title, to land.

Specifically, section 13(1) provides that the Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land and that In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; to compulsory acquisition of land relating to land administration and management; relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land;

Nothing in the Act precludes the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

However, the court jurisdiction in relation to disputes reserved for National Environmental Authority and the National Environmental Tribunal is restricted to the appeals emanating from the tribunal.

The Supreme Court in **Samuel Kamau Macharia and another – v- Kenya Commercial Bank and 2 Others, Application No. 2 of 2011**, pronounced itself on jurisdiction thus:

*“[68] A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. .... Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation....” (Emphasis provided).*

In the case of **Benard Murage - v - Fine serve Africa Limited & 3 others [2015] eKLR** the Supreme Court again stated that;

*“Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.”*

The court of appeal in **Kibos Distillers Limited & 4 others v Benson Ambuti Atega & 3 others [2020] Eklr** held that

**“A party or litigant cannot be allowed to confer jurisdiction on a court or to oust jurisdiction of a competent organ through the art and craft of drafting of 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 simply 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 that 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 any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.**

**Further, I observe that the jurisdiction of the ELC is appellate under Section 130 of EMCA. The ELC also has appellate jurisdiction under Sections 15, 19 and 38 of the Physical Planning Act. An original jurisdiction is not an appellate jurisdiction. 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 competent 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 for conferment of jurisdiction to any court or statutory body.”**

The dispute before me revolves on the mining activities of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents at the Ramba area including the processing of gold, and the pollution that is resultant from the processing of the gold. This issue falls within the powers of the NEMA as it revolves on issuance of a licence and pollution. Section 7 of Environment and Co-ordination Act (**EMCA**) (cap 387) Laws of Kenya establishes NEMA and section 9 sets out its objects that include co-ordination of the various environmental management activities being undertaken by the lead agencies and promotion of the integration of environmental considerations into development policies, plans, programmes and projects with a view to ensuring the proper management and rational utilization of environmental resources on a sustainable yield basis for the improvement of the quality of human life in Kenya.

**Section 58 provides** for an Environmental Impact Assessment Licence which the authority has the power to issue.

This is followed by **section 63** that provides that The Authority may, after being satisfied as to the adequacy of an environmental impact assessment study, evaluation or review report, issue an environmental impact assessment licence on such terms and conditions as may be appropriate and necessary to facilitate sustainable development and sound environmental management. The authority has the power to cancel or revoke a licence or suspend such licence for such time not more than 24 months where the licensee contravenes the provisions of the licence.

The Environment and Co-ordination Act (**EMCA**) (cap 387) Laws of Kenya provides for the the National Environmental Tribunal with the powers to hear appeals from the decisions of NEMA. Any person dissatisfied by the decision of the tribunal can appeal to the ELC. UNDER section 130 of Environment and Co-ordination Act (**EMCA**) (cap 387) Laws of Kenya

This court finds that the petitioner has not exhausted the available remedies set out by parliament in the Environment and Co-ordination Act (**EMCA**) (cap 387) Laws of Kenya before coming to this court. I do allow the Preliminary Objection and strike out the petition for want of jurisdiction. No order as to costs this being a public interest litigation.

**DATED AT KISUMU THIS 2<sup>ND</sup> DAY OF FEBRUARY, 2021**

**ANTONY OMBWAYO**

**JUDGE**

**This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2019.**

**ANTONY OMBWAYO**

**JUDGE**