Vescon Properties Limited v Kenya Power and Lighting Company Limited (Environment & Land Petition 15 of 2022) [2024] KEELC 206 (KLR) (24 January 2024) (Ruling)

Neutral citation: [2024] KEELC 206 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION 15 OF 2022

EK MAKORI, J

JANUARY 24, 2024

IN THE MATTER OF: ARTICLES1, 2, 3, 10(2), 19, 20, 21, 22, 23, 40, 47, 48, 60, AND 165 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 1, 3, 27, 28, 40, 47, 48, AND 50 OF THE CONSTITUTION OF KENYA, 2010 AND ALL OTHER ENABLING PROVISIONS OF LAW.

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTIONS ACT, OF 2015

AND

IN THE MATTER OF: THE ENERGY ACT, CAP 314 LAWS OF KENYA

AND

IN THE MATTER OF: THE TRESPASS ACT, CAP 294 LAWS OF KENYA

AND

IN THE MATTER OF: ENCROACHMENT OF LAND PLOT NO. KILIFI/ MTWAPA / 407

ENCOMPASSING SUBDIVISIONS NOS. 6151, 6152, 6153, 6154, 6155 AND 6156.

BETWEEN

VESCON PROPERTIES LIMITED ..... PETITIONER

AND

KENYA POWER AND LIGHTING COMPANY LIMITED ..... RESPONDENT

RULING

1. The Respondent's Preliminary Objection attacks the jurisdiction of this Court to entertain the Petitioner's Petition dated 24th April 2023 and application seeking conservatory reliefs against the actions of the Respondent in the entry, trespassing, and installing and erecting of power lines by the Respondent on the Petitioner's suit property herein referred to as Plot No. Kilifi/Mtwapa/407 encompasses subdivisions No. 6151, 6152, 6153, 6154, 6151, and 6156.

2. The Preliminary Objection significantly raises the issue that under the doctrine of exhaustion, this matter ought to have first been dispensed with by the Energy and Petroleum Regulatory Authority (EPRA), the Energy and Petroleum Tribunal (EPT), and after that an Appeal to the High Court (in this case the ELC). The respondent cited various provisions of the law namely: - Sections 3(1), 10; 11(e), (f), (i), (k) & (l); 23; 24; 25; 36; 40; 42 and 224(2)(e) of the *Energy Act*, 2019 together with Regulations 2, 4, 7, and 9 of the Energy (Complaints and Disputes Resolution) Regulations, 2012. Article 159(2) (c), 165(b), and 169 (1) (d) and (2) of *the Constitution* of Kenya, 2010. Sections 9(2) and (3) of the *Fair Administrative Action Act*, 2015.

3. The Respondent has quoted several authorities by the Superior Courts on this issue among others:

    i. Abidha Nicholus v Attorney General & 7 others; National Environmental Complaints Committee (NECC) & 5 others (Interested Parties) [2021] eKLR;

    ii. Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR;

    iii. Nairobi ELC No. E092 of 2022, Lawrence Warari Nduni vs. Teresia Karagi Kirui & 4 Others (unreported).

    iv. Kerugoya ELC No. E003 of 2022, Dr. Florence Mukii v The Kenya Power & Lighting Company Limited (unreported);

    v. Adero Adero and Another vs. Ulinzi Sacco Society Limited [2002] eKLR;

    vi. Kakamega High Court Civil Appeal no. 162 of 2018, Kenya Power & Lighting Co. Ltd vs. Geoffrey Orina Oganga (unreported);

    vii. Thomas Schering vs. Nereah Michael Said & 3 others [2019] eKLR;

    viii. Benard Nyakundi Osugo v Kenya Power Limited [2021] eKLR; and

    ix. Nairobi HC No. E176 of 2021, Hon. Kennedy Odhiambo Nyagudi vs. Agricultural Finance Corporation & 2 Others (unreported).

4. What the Respondent at the end submitted is that the current petition and application for conservatory orders offend the doctrine of exhaustion and ought to be dismissed with costs.

5. The Petitioner on the other hand is of the view that there are Constitutional issues raised in this matter touching on Article 40 of *the Constitution* on the right to own property without deprivation

6. The Petitioner also asserted that the entry to the land by the Respondent without consent from it as the owner and registered proprietor amounted to trespass contrary to Section 3(1) of the *Trespass Act* Cap 294 Laws of Kenya which provides that:

> "Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence."

7. The Petitioner further averred that a Wayleave Agreement is a statutory right that would grant the Respondent the rights to install its electricity lines and other equipment on, over, or under private land which is often registrable as an easement, which makes it specifically described and defined which is pursuant to Section 143 (4) of the *Land Act* which provides that:

> "A wayleave shall authorize persons in the employment to or who are acting as agents of or contractors for any of the organizations, authorities, and bodies to enter on the servient land for the purpose of executing works, building and maintain installations and structures and in setting all such works, installations, and structures on the servient land and to pass and re-pass along that wayleave in connection with purposes of those organisations, authorities or bodies."

8. The petitioner further stated that Rule 3 of the Energy (Complaints and Disputes Resolution) Regulations, 2012 that the complaints envisaged by the lawmakers under that rule which were to be referred to the ERC for determination were those of consumers of services rendered by the Respondent.

9. The Petitioner has cited the following provisions of the law and authorities in countering the Objection raised:

   i. Articles 3, 165 (3) (a), 162 (2) of *the Constitution* and Sections 4 and 13 of the *Environment and Land Court Act*, 2012 clearly and cogently provide that the overall jurisdiction to hear and determine all issues pertaining to the administration and management of land and that trespass to land is within the ambit of the jurisdiction of this Honourable court.

   ii. the case of R v Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati [2008] KLR 728, where it was opined that a provision ousting the ordinary jurisdiction of the court must be construed strictly and if capable of two interpretations, the meaning preserving the ordinary jurisdiction of the court must prevail.

   iii. The Tanzanian case of Mtenda v University of Dar-Es-Salaam that was cited In R v Kenya Revenue Authority Ex Parte Webb Fontaine Group FZ-LLC & 3 Others [2015] eKLR, in support of the submissions that a Court should not lightly find its jurisdiction ousted and that for the protection of the Petitioner's proprietary rights, the Court must be jealous of its jurisdiction by upholding the provisions of the law.

10. The issue that falls for the determination of this Court is whether the petition herein as originated is squarely within the jurisdiction of this Court or whether the issues raised herein ought to have been commenced in another forum in this case EPRA as the first forum, EPT as the second forum and The ELC as the third forum.

11. Jurisdiction is everything. When a Court has been invited to look at it, it has to do so instantly and if it finds that it has no such powers to hear a matter, it downs tools or better these days holds in abeyance

the proceedings (to await the primary adjudication by the relevant forum) or sends it to the appropriate forum for determination.

12. On the downing of tools - see Nyarangi J. in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1:

> "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 downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

13. The topic of mixed grill or multifaceted cases and the appropriate jurisdiction to originate the same have been discussed by our Superior Courts. It has been an all-out - a higher and lower tide season in our Courts at the same time; on the doctrine of exhaustion or abstention. See for example the journey of the Kibos Case - reported as Benson Ambuti Adega & 2 others v Kibos Sugar and Allied Industries Limited & 4 others; Kenya Union of Sugar Plantation and Allied Workers (Interested Party) [2019] eKLR). A look at the then emerging jurisprudence from the Superior Courts, particularly the Supreme Court we had what the Superior Court referred to as - the Pullman doctrine (arising from a USA decision - Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 61 S. Ct. 643, 85 L. Ed. 971 (1941).).

14. In the original Kibos Case, on 25th October 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*.

15. 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*

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

> "(a) A declaration be and is hereby issued that the petitioner's 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."

17. 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 (Kibunja J.) 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."

18. The matter went to the Supreme Court it is reported as 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 U.S. 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 U.S. 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..."

19. 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."

20. There was thinking then, that the issue of exhaustion had crystallised as per the cited cases and the journey of the Kibos Case I have quoted above and as submitted ably by counsel for Respondent Mr. Adoda citing yet another leading case in this realm - Abidha Nicholus v Attorney General & 7 others; National Environmental Complaints Committee (NECC) & 5 others (Interested Parties) [2021] eKLR; which like the Kibos Case at the ELC and the Court of Appeal the doctrine of abstention was upheld, but the Supreme Court has further provided guidance on the strictures to follow before the application of the doctrine of abstention is applied. The appeal to the Supreme Court is reported as Petition No. E007 of 2023 - Abidha Nicholus v The Attorney General and 7 Others, the National Environmental Complaints Committee and 3 Others – Interested Parties, significantly the apex Court held as follows:

" Looking at all the above issues in perspective, we must start by giving due consideration to the provisions of Article 70(1) of *the Constitution* which provides for the locus standi in the enforcement of environmental rights by way of a constitutional petition. It provides that:

"If a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being, or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter."

(118) It is this provision that generously allocates the appellant herein the right to file his constitutional petition before the ELC and looking at the orders that the appellant had set out in his constitutional petition, it is evident to us without much effort that, the remedies of appealing to NEMA and EPRA, respectively, are not efficacious and adequate. Under EMCA, Section 129 provides for matters that may require determination by NET. They are all related to licenses and not constitutional violations as is the case in the present dispute. The fact that licenses may well be a part of the appellant's petition does not in any way outlaw the hearing and determination of it by ELC.

(119) Similarly, in respect of the *Energy Act*, Section 106 of the Act provides that appeals to the EPT from decisions by EPRA shall be in relation to issues relating to licensing while Section 25 generally grants jurisdiction to the EPT to hear and determine disputes and appeals in accordance with the Act or any other written law. Determination of allegations of constitutional violations cannot be such issues as to attract the Tribunal's attention.

[120] In addition to the above findings, since the appellant's claim is multifaceted, by his own choice, the most appropriate forum for the determination of his petition was the ELC which would then

interrogate and determine them based on such facts and law as shall be placed before it. The superior courts therefore clearly fell into error by finding that the appellant had not demonstrated that he would not have received efficacious relief if he had followed the dispute resolution process outlined in the *Energy Act*. We say so because though the claims against the 2nd and 3rd respondents are intertwined and arise from the same series of events, it would have been impractical to expect the appellant to appeal the decisions of both NEMA and KPLC before two different tribunals.

(121) We must hasten to add that, it is the 2nd and 3rd respondents alleged unabated mining activities on L.R. No. Siaya/Ramba/716 that led them to dump waste or effluent onto the appellant's property namely L.R No. Siaya/Ramba/719 and 720. While conducting these mining activities, the 2nd and 3rd respondents allegedly requested electricity connection from KPLC, who then proceeded to dig holes and erect electricity poles on his property. These matters are contested in the context of the claims of constitutional violations and only the ELC could properly hear and determine them. [122] Having so found, we note that, in Benson Ambuti Case (supra), we addressed the question of appropriate reliefs in a multifaceted claim. The appeal before the Court in that case was also on the question of the jurisdiction of the ELC vis-à-vis the NEMA and or the National Environmental Complaints Committee (NECC). Our jurisdiction to determine the appeal was challenged primarily on the premise that the appeal was not one involving issues of interpretation or application of *the Constitution* under Article 163(4)(a) of *the Constitution* as there were no constitutional issues determined by the Superior Courts. Though our determination to that effect was that the decisions by the superior courts did not involve the interpretation or application of *the Constitution*, we nevertheless addressed the question of appropriate reliefs in a multifaceted suit. We held thus:

> "[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 U.S. 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 U.S. 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."

(123) Our finding in this matter is instructive and relevant to this appeal because, the Court of Appeal held that once the ELC found that it lacked original jurisdiction with respect to certain claims in the petition, then the ELC was not to split matters and retain those it felt it had jurisdiction to determine. The Court of Appeal (Tuiyott J.A) held:

> "Having reached the correct decision that, it lacked original jurisdiction in respect to certain claims in the petition, the ELC had no business splitting the petition on behalf of the appellant so as to retain matters it would properly be seized of. At any rate, I do not think that the order eventually made by the ELC can be said to be inimical to the petitioner's right to fair hearing."

(124) The Court of Appeal in our view, in making the findings it did above fell into error because, as we held earlier in this judgment, there was nothing that barred the appellant from filing an appeal against the decision of the trial court once his petition was struck out. The appellant had two options available to him; appeal the

decision or file a new claim. The appellant chose the latter and we have found that his chosen path was the correct one. Such a finding is also well within the confines of our decision in Benson Ambuti Case (supra) and ensures that a party's right to a fair hearing under Article 50 of *the Constitution* is protected.

(125) In concluding on this issue, it is our finding that it is upon a party to frame its pleadings as it deems fit but in doing so should not create such a disjointed case that a court has to struggle in the identification of each facet thereof. Elegant pleadings also ensure that the responding party has a clear case to answer to. A court on its part, must not descend to the arena of litigation but instead determine all contested matters judicially and in a multifaceted claim, address each issue within its jurisdiction including remitting parts of the claim to the relevant statutory body while retaining what is properly before it. In the present case and for reasons given above, the issues raised were well within the ELC's jurisdiction to determine and there was no reason to either reserve or remit any of them and we so hold."

21. Looking at this claim the Petitioner seeks orders against the Respondent in the entry, trespassing, and installing and erecting of power lines by the Respondent on the Petitioner's suit property herein referred to as Plot No. Kilifi/Mtwapa/407, which encompasses subdivisions No. 6151, 6152, 6153, 6154, 6151, and 6156. The Petitioner has pleaded violation of the right to own property without deprivation under Article 40 of *the Constitution* which provides:

"(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property--

(a) of any description; and (b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person--

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation--

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that--

(i) requires prompt payment in full, of just compensation to the person; and (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land. (5) The State shall support, promote, and protect the intellectual property rights of the people of Kenya. (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

22. The respondent correctly submitted that the issues touching on wayleave could be primarily addressed by the Energy and Petroleum Regulatory Authority (EPRA), then to the Energy and Petroleum Tribunal (EPT) on appeal, and thereafter an Appeal to the High Court (in this case the ELC). The respondent cited various provisions of the law to support that contention namely: - Sections 3(1), 10; 11(e), (f), (i), (k) & (l); 23; 24; 25; 36; 40; 42 and 224(2)(e) of the *Energy Act*, 2019 together with Regulations 2, 4, 7, and 9 of the Energy (Complaints and Disputes Resolution) Regulations, 2012.

23. The Petitioner in a rejoinder contended that the entry into his land without consent amounted to trespass and deprivation of property under Article 40 of *the Constitution*.

24. Looking at that claim, whereas the issue of Wayleaves could be addressed under the provisions of the *Energy Act*, the issue of violation of the Petitioner's right to property lies with this Court. The question at the trial will be, has the Petitioner been compensated?

25. I will then find the petition is properly before this Court and the Preliminary Objection is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 24TH DAY OF JANUARY 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Adoda for the Respondent

Court Clerk: Happy

In the absence of:

Ms. Mwangi for the Petitioner