Kenya Towers Ltd v Omboga & 7 others (Civil Appeal 422 of 2019) [2025] KECA 686 (KLR) (11 April 2025) (Judgment)

Neutral citation: [2025] KECA 686 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 422 OF 2019

W KARANJA, WK KORIR & GV ODUNGA, JJA

APRIL 11, 2025

BETWEEN

KENYA TOWERS LTD ..... APPELLANT

AND

DOUGLAS ONYANCHA OMBOGA ..... 1ST RESPONDENT

MATHEW MBABU ..... 2ND RESPONDENT

COLLINS SERONEY ODHIAMBO ..... 3RD RESPONDENT

JOHN OCHIENG OBONDI ..... 4TH RESPONDENT

JOSEPH KARANJA WAMUGI ..... 5TH RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 6TH RESPONDENT

COMMUNICATIONS AUTHORITY OF KENYA ..... 7TH RESPONDENT

PEMAN CONSULTANTS LTD ..... 8TH RESPONDENT

(An appeal against the Judgment of the Environment and Land Court at Machakos (O. A. Angote, J.) dated 18th January 2019 in ELC Case No. 102 of 2017)

JUDGMENT

1. Kenya Towers Ltd ("the appellant"), had a contract with Airtel Kenya Ltd mandating the appellant to acquire land, build towers/masts and manage passive infrastructure for Airtel Kenya Ltd in the Kenya. In 2014, the appellant in furtherance of its obligations under the contract sought to erect a base transceiver station within Mavoko Municipality in Machakos County. To meet this objective, the appellant contracted Peman Consultants Ltd (the 8th respondent) to conduct a survey of the area to determine the best location for the base transceiver station. The 8th respondent then identified

Mavoko Town Block 49/52 ("the suit land") situated within Maisha Bora Crescent Estate as the ideal location to host the transceiver station. The suit land was owned by Joseph Karanja Wamugi ("the 5th respondent").

2. Douglas Onyancha Omboga, Mathew Mbabu, Collins Seroney Odhiambo and John Ochieng Obondi, the respective 1st, 2nd, 3rd and 4th respondents in this appeal, and who were the respective 1st to 4th petitioners at the trial court, owned plots known as Mavoko Town Block 49/42, 49/43, 49/39, 49/40, 49/44, 49/53, 49/5 and 49/3 adjacent to the suit land. In a petition dated 4th March 2016 and amended on 24th August 2016, the 1st, 2nd, 3rd, and 4th respondents averred that they had not been consulted and were not involved in any environmental impact assessments or other approvals for the project. It was their case that the telecommunication mast, which was 30 meters high, did not meet the specifications stated in the Environmental Impact Assessment ("EIA") Project Report and that the tower's base affected the use of their parcels of land. It was their case that the project would interfere with their right to quiet use and enjoyment of their parcels of land. Further, that the project would violate their right to a clean and healthy environment devoid of radiation and radioactive substances, noise, and generator fumes. Consequently, the 1st to 4th respondents sought a declaratory order that Joseph Karanja Wamugi ("the 5th respondent" herein), the National Environment Management Authority (NEMA) ("the 6th respondent" herein), Kenya Towers Limited (the appellant herein), Communications Authority of Kenya (CAK) ("the 7th respondent" herein) and Peman Consultants limited ("the 8th respondent" herein) were in breach of their fundamental right to a clean and healthy environment; a declaration that the respondents in the petition were in breach of their right of use and quiet enjoyment of their properties; a conservatory order stopping the respondents in the petition from further violating their rights; an order of mandamus compelling the respondents in the petition to remove the telecommunication tower; and costs of the petition.

3. In opposition to the petition, Mr. Chris Taracha, the appellant's Project Manager, deposed, through a replying affidavit sworn on 9th December 2016, that it had an agreement with Airtel Kenya Limited to acquire, build, and manage passive infrastructure in the country. In 2014, it sought to erect a base transceiver station within Mavoko Municipality, Machakos County. The appellant then engaged the 8th respondent to survey the area and determine the best location for the base transceiver station. The suit land was identified as the best location. It again engaged the 8th respondent to acquire all the necessary approvals for the project, including the E.I.A. Licence issued on 28th September 2015 by the 6th respondent. It was the appellant's case that it had conducted public participation on the project before commencing the construction. The appellant additionally deposed that the mast posed no health concerns and was erected in compliance with the terms and regulations of the Environmental Management and Co- ordination Act (EMCA) and the County Government of Machakos bylaws.

4. On his part, the 5th respondent swore a replying affidavit on 2nd November 2016 in response to the petition through which he averred that he was the legitimate owner of the suit land and had leased it to the appellant. He denied carrying out any development on the land or violating the 1st - 4th respondents' rights and prayed for the dismissal of the petition with costs.

5. Through the replying affidavit sworn on 20th July 2016 by its Deputy Director, Compliance and Enforcement, Zephaniah Ouma, NEMA gave an account of its functions and stated that it received an E.I.A. Project Report from the 8th respondent. Through a letter dated 20th August 2015, it sought the views of lead agencies on the proposed project to no avail. Upon being satisfied that the proposed project met all legal requirements, it issued an E.I.A. Licence for the project, subject to various conditions to be met by the proponent. It later received a complaint from one of the 1st – 4th respondents alleging that they had not been consulted on the project. It was the 6th respondent's

averment that it wrote to the project's proponent, advising them to hold consultations with the complainant and cease all construction on site. Its case was that the proponent had not shared the progress report on the consultations, and that a stop order issued on 22nd February 2016 was still intact. In conclusion, NEMA asserted that it followed all the laid-down rules and procedures before issuing the E.I.A. Licence to the appellant and that the petition should be struck out because it lacked merit.

6. The CAK responded to the petition through a replying affidavit sworn on 18th July 2016 by Mr. Christopher Kemei, its Director of Licensing, Compliance and Standards, who highlighted the procedure for licensing telecommunication systems in Kenya under the Kenya Information and Communication (Licensing and Quality of Service) Regulations 2010 (*Legal Notice No. 71/2010*). He also pointed out that the appellant was responsible for obtaining approvals from other government agencies and local authorities. The 7th respondent, however, denied issuing the appellant with a telecommunications licence and asked for the dismissal of the petition.

7. The 8th respondent, through a replying affidavit sworn on 14th November 2016 by its Managing Director, Mr. Christopher Muchiri, deposed that it was duly registered by the 6th respondent as an E.IA. entity. It was contracted by the appellant to conduct an E.I.A. of the proposed project, including obtaining approvals for the change of user of the suit land. It secured all the necessary approvals from the County Government of Machakos and NEMA. The 8th respondent also deposed that it carried out a consultative session with the 1st – 4th respondents on 9th January 2016, where all the issues they raised were well covered in the project report and in the conditions attached to the E.I.A. Licence. Finally, the 8th respondent challenged the trial court's jurisdiction, stating that the National Environment Tribunal ("Tribunal") was the appropriate forum with original jurisdiction to hear the complaint of the 1st - 4th respondents.

8. In allowing the petition, the learned Judge noted that the failure to involve the public in decisions affecting the environment or provide access to information violated the environmental rights of individuals. The learned Judge found that despite the objections raised by the 1st - 4th respondents and the stop order issued by the 6th respondent, the appellant proceeded with the project, thus violating the law. The learned Judge allowed the petition, holding that the 1st - 4th respondents were never involved in the project before or after the E.I.A. Licence was issued to the appellant. Consequently, the trial court declared that the appellant had breached the 1st - 4th respondents' fundamental right to a clean and healthy environment. Subsequently, an order of mandamus was issued, compelling the appellant to remove the telecommunication tower within thirty (30) days from the date of the judgment. The appellant was also ordered to meet the 1st – 4th respondents' costs of the petition.

9. Dissatisfied with the judgment, the appellant is now before us faulting the learned Judge for: failing to find that, considering the low-risk nature of the project, there had been sufficient public participation before the project was started; finding that all residents around the project area should have been consulted before the commencement of the project; finding that the residents around the project area were not consulted before the commencement of the project; finding that NEMA's letter stopping the construction was indeed issued to the appellant; formulating a standard for the preparation of project reports higher than what is provided under the Environmental (Impact Assessment and Audit) Regulations, 2003; requiring that the questionnaire forms filled in by residents must indicate the house and land title numbers; finding that non-compliance with procedure automatically results in a project violating the constitutional right to a clean and healthy environment; and, failing to determine the question of jurisdiction.

10. When this matter came up for hearing on 9th December 2024, learned counsel Mr. Kuyo appeared for the appellant while his counterpart Mr. Olonde appeared for the 1st, 2nd, 3rd and 4th respondents. There

was no appearance or participation by the 5th, 6th, 7th and 8th respondents in this appeal despite service of the hearing notice. Counsel, having filed submissions, opted to rely on them, accompanied by brief oral highlights at the hearing.

11. Learned counsel Mr. Kuyo for the appellant submitted that the learned Judge erred by holding that the residents' questionnaires during consultations should indicate the house and land title numbers. Counsel contended that this requirement is more burdensome than what the law requires. He referred to section 58 of EMCA and regulation 17 of the Environmental (Impact Assessment and Audit) Regulations, 2003 (*Legal Notice No. 150 of 2016*) to argue that the telecommunication infrastructure project in question was classified as requiring a project report rather than a full E.I.A. study report. Mr. Kuyo submitted that the obligation to engage potentially affected individuals through public participation, as stated in Regulation 17, applies to projects undergoing a full E.I.A. study report. Counsel argued that the learned Judge should not have imposed public participation requirements which are associated with an E.I.A. study report on the appellant in the context of the project report provided by the appellant and accepted by NEMA.

12. Urging that the appellant had met the required standard of public participation, Mr. Kuyo submitted that the appellant conducted extensive consultations before the project commenced, and the learned Judge's conclusion to the contrary contradicted the evidence presented in court. Counsel further submitted that public participation does not require consultation with local residents' associations that were unknown at the time of the consultations. He cited the Supreme Court case of British American Tobacco Kenya PLC (formerly British American Tobacco Kenya Limited) vs. Cabinet Secretary for the Ministry of Health & 2 Others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (Affected Party) [2019] KESC 15 (KLR) for the proposition that public participation is intended for everyone and is not restricted to particular entities. He argued that the decision-making body retains the discretion to adopt views as it sees fit. Counsel maintained that the appellant did not violate any statutory procedures, and there was no basis for holding that the 1st - 4th respondents' constitutional rights had been violated.

13. Finally, Mr. Kuyo submitted that the Environment and Land Court (ELC) lacked jurisdiction to determine the petition. He argued that the appropriate procedure for resolving grievances arising from the issuance of E.I.A. licences is to present such disputes before the Tribunal. Counsel submitted that under section 129 (1) (a) of the EMCA, the Tribunal has original jurisdiction over complaints from persons aggrieved by the granting of a license under the Act, while the ELC pursuant to section 130 of the EMCA, possesses appellate jurisdiction to hear appeals from the Tribunal regarding issues surrounding the issuance of E.I.A. licences. Counsel referred to the case of Kibos Distillers Limited & 4 Others vs. Benson Ambuti Adega & 3 Others [2020] eKLR to buttress his submission on jurisdiction. He also cited the case of Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989] eKLR to assert that a decision made by a court lacking jurisdiction is a nullity. Consequently, Mr. Kuyo urged us to set aside the judgment for want of jurisdiction by the ELC. Ultimately, counsel urged that the appeal be allowed, the impugned judgment be overturned, and costs be awarded to the appellant.

14. For the 1st, 2nd, 3rd, and 4th respondents, learned counsel Mr. Olonde supported the impugned judgment. Counsel pointed out that the 1st, 2nd, 3rd, and 4th respondents were deliberately excluded from the process leading to the erection of the tower, to which they had objections. It was also his proposition that projects of this nature required public participation from all stakeholders directly affected by the projects, and their deliberate exclusion violated this necessity and defeated the purpose of public participation. Counsel reiterated that the erection of the tower would negatively impact the land use, expose residents to health hazards, and affect the planning of their parcels of land. Counsel invoked Article 69 of *the Constitution* to argue that the appellant should not be allowed to circumvent the

statutory requirements by using individuals with no genuine interest and who were not directly affected by the project. Essentially, it is the 1st–4th respondents' plea that the appeal be dismissed with costs.

15. We have considered the record of appeal, the judgment of Angote, J., the grounds of appeal, and the submissions by counsel, including the authorities cited and the applicable law. This being a first appeal, and as was restated in Abok James Odera T/A A.J Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates [2013] KECA 208 (KLR), our primary role is to re- evaluate, re-assess and re-analyze the evidence and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons for our decision. In our view, even though the appellant has raised 10 grounds of appeal, the determination of the issue of the failure by the learned Judge to address the question of jurisdiction will resolve the appeal before us.

16. The 8th respondent challenged the Court's jurisdiction on the ground that the Tribunal was the appropriate forum to hear the 1st - 4th respondents' grievances and that the ELC could only come in at the appellate stage. Similarly, the 6th respondent in its submissions before the trial court raised the issue of the jurisdiction of the trial court. There was also the question as to whether the dispute met the threshold for the institution of a constitutional petition. Upon reviewing the judgment by the trial court, it is evident that the question surrounding its jurisdiction fell through the cracks and was never addressed by the learned Judge. This despite the learned Judge at paragraph 18 of the judgment capturing the 8th respondent's protest against his jurisdiction, thus:

> "That all the issues raised by the Petitioners were well covered in the project report and in the conditions in the Environmental Impact Assessment Licence and that in any event, it is the National Environment Tribunal that is vested with jurisdiction to hear Appeals from any person aggrieved by the approval of the 2nd Respondent (now the 6th respondent) of an Environmental Impact Assessment Project Report and issuance of an Environmental Impact Assessment Licence."

17. As was held in Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd (supra), jurisdiction is everything, without which the decision of a court is null and void ab initio and any determination made by such a court will be amenable to being set aside ex debito justitiae.

18. The matter giving rise to this appeal was premised on a constitutional petition, and a question had been raised as to whether that was the correct procedure for the resolution of the dispute between the parties. Another jurisdictional question was whether the ELC had original jurisdiction to hear and determine the 1st – 4th respondents' case. The issue of jurisdiction could have been easily resolved by this Court had the trial Judge addressed it, but this was not done. As matters stand, we are at sea as to how the trial court would have rendered itself. In our view, even though we possess the requisite jurisdiction to address the question of jurisdiction, we are of the view that our jurisdiction can only be properly engaged where the court appealed from has addressed the issue. That way, the work of this Court will be limited to issues canvased by the parties and addressed by the court below. That is the only way any aggrieved party will have a chance for a second bite at the cherry before this Court. This Court can only properly exercise its appellate jurisdiction where the Court appealed from has rendered itself on the issue that is the subject of the appeal. Here, we do not have the opinion of the trial court on the issue of jurisdiction, which, in our view, was core to the question as to whether the learned Judge could proceed to hear and determine the petition.

19. As already stated, this matter was heard by the trial court as a constitutional petition. We have also pointed out that another key jurisdictional point is whether it was the ELC or the Tribunal that had

the original jurisdiction in respect to the issues raised in the petition. Although the 8th respondent did not participate in this appeal, the appellant has raised the issue of jurisdiction in its grounds of appeal and made submissions on it. We cannot therefore ignore the issue.

20. It is not lost upon us that our appellate role under Article 164 (3) of *the Constitution* includes hearing of appeals from the ELC. We are, therefore, convinced that our proper determination of the question of jurisdiction should be on appeal from a determination by the ELC. Therefore, the proper and appropriate order is one referring the matter back to ELC to pronounce itself on the issue of jurisdiction. We find support for this position in the holding by the Supreme Court in Geo Chem Middle East vs. Kenya Bureau of Standards [2020] KESC 1 (KLR) that:

> "As is the practice in all other disputes, where an Appellate Court holds that a lower Court has wrongly declined to determine a matter in the "mistaken" belief that it lacks jurisdiction to do so, the Court has to remit that matter to the lower Court, directing it to exercise its jurisdiction. Only after the lower Court has complied with such an order would a substantive appeal lie to the Appellate Court."

21. Similarly, in Nyutu Agrovet Limited vs. Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch [2019] KESC 11 (KLR), the Supreme Court held that:

> " Without a firm decision by the Court of Appeal on that issue, we cannot but direct that the matter be remitted back to that court to determine whether the appeal before it meets the threshold explained in this Judgment or in the words of Kimondo, J, the "journey was a false start"."

22. Flowing from the foregoing discussion, we find that the appeal is for allowing, the judgment of the ELC is set aside and the file remitted to that court for determination of the question as to whether it had jurisdiction to hear and determine the 1st–4th respondents' petition. The Judge presiding over the ELC at Machakos, or any other Judge appointed by him or her, is directed to determine the issue of jurisdiction expeditiously and on priority based on the material on record.

23. In view of the fact that the appeal has been necessitated by a mistake on the part of the trial court, the appropriate order is to direct the parties to meet their own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF APRIL 2025

W. KARANJA

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

Deputy Registrar