Base Titanium Limited v Kiswili (On Behalf of 65 others) & 3 others (Civil Appeal E142 of 2022) [2025] KECA 1330 (KLR) (18 July 2025) (Judgment)

Neutral citation: [2025] KECA 1330 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E142 OF 2022

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

JULY 18, 2025

BETWEEN

BASE TITANIUM LIMITED ..... APPELLANT

AND

MICHAEL KISWILI (ON BEHALF OF 65 OTHERS) ..... 1ST RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 2ND RESPONDENT

COMMISSIONER OF MINES AND GEOLOGY ..... 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

(Being an appeal against the Ruling and Order of the Environment and Land Court at Kwale (Dena, J.) delivered on 10th February, 2022 in ELC Petition No. 3 of 2021)

JUDGMENT

1. Michael Kiswili (suing on his own behalf and on behalf of 65 Others) (the 1st respondent), filed a petition in the Environment and Land Court (the ELC) at Mombasa, being Petition No. 3 of 2021 dated 18th March 2020, seeking the following reliefs:

    a. A declaration that the 1st respondents' right to a clean and healthy environment have been denied and continue to be violated;

    b. A declaration that the 1st respondents have a right of redress under Article 162(2) (b) of the *Constitution* as read with Section 12(2) (a) (e) (3) and (7) of the *Environment and Land Court Act*;

    c. The court do issue an order for environmental restoration against the appellant;

d. The Honourable Court do issue an order to compel the 2nd respondent to revoke the Environmental Impact Assessment Licence issued to the appellant by it and the mining licence also issued to the appellant by the 3rd respondent;

e. Any such further or other orders as the court may deem fit and expedient in the circumstances; and

f. Costs of the petition.

2. Their contention was that, since the 1950's, they had resided in Mivumoni "B" village also known as 'Nora Buffer Zone'; that, in the year 2016, the Commissioner of Mines and Geology (the 3rd respondent), issued a mining licence to Base Titanium Limited (the appellant) to mine and extract Titanium and related products within Kwale County for overseas export and processing; and that the said licence was expected to expire in the year 2025.

3. The 1st respondent further pleaded that, under the provisions of the Environment Management and Co-ordination Act (EMCA) Cap 357, the appellant was required to have tendered an Environmental Impact Assessment (EIA) report on the impact its mining activities would have on the residents within the vicinity of the mining operations, but that none was done; that the 1st respondent did not participate in the said EIA contrary to Article 69(1) (d) of the *Constitution*; that the appellant's mining activities, which are located less than three kilometres from their village, resulted in excessive noise and air pollution from dust and other particles which adversely affected the 1st respondent; that the particulars of infringement of their rights included: excessive noise during the day and at night; posing serious health risk to expectant mothers and unborn children; ill health in young children, domestic animals and humans from drinking water contaminated with percolated titanium dust; and poor farm yields from agricultural crops, including fruits and vegetables affected by titanium dust.

4. Simon Hall, the appellant's General Manager, external affairs, opposed the petition by filing a replying affidavit dated 27th April 2021. He defended the project by stating that an EIA was not necessary; and that, in relation to its mining project, the only document that was needed was the licence from the National Environmental Management Authority (NEMA). It denied that it was in breach of the provisions of the EMCA.

5. Further to the foregoing, the appellant filed a Notice of Motion dated 28th April 2021 seeking orders that the petition be struck out. The grounds in support of the Motion were that the court lacked jurisdiction to determine the petition; that the petition raised a dispute concerning alleged wrongful actions committed or omitted by the appellant against the 1st respondent in the course of its mining operations; that, in terms of the provisions of section 155(b) of the *Mining Act*, the jurisdiction to hear and determine the dispute in the first instance is conferred upon the Cabinet Secretary (the CS) of Mining; and that the superior court only has appellate jurisdiction from a decision made by the CS.

6. The 3rd respondent also filed a Preliminary Objection dated 14th September 2021 raising a jurisdictional issue on the following grounds:

a. That the 1st respondents' have failed to exhaust the mandatory internal dispute resolution mechanisms available under Section 129 of the Environmental Management Co-ordination Act, Cap 387;

b. That the superior court has no jurisdiction to determine the issues raised in the suit by dint of Section 9 (2) (3) of the *Fair Administrative Action Act*, and Article 159 (2) of the *Constitution*;

c. That the suit is a nullity and a waste of the court's time because if a court or tribunal makes a decision when it has no jurisdiction, its decision is a nullity as was held in William Mutuura Kariba vs. Samuel Nkari & 2 Others (2018) KEELC 904 (KLR).

7. The learned Judge (Dena, J.) dismissed the appellant's Motion, holding that the 1st respondent was seeking a declaration that their rights to a clean and healthy environment had been denied; and that they therefore have a right of redress under Article 162(2) (b) of the *Constitution* as read with sections 12(2) (a) (e), (3) and (7) of the *Environment and Land Court Act*. The learned Judge conceded that, indeed, some of the orders sought could be dealt with under the National Environment Tribunal under section 129 of EMCA as well as the Director General, Nema or its Committees, in which case the ELC would have an appellate jurisdiction.

8. On the jurisdiction of the court to determine the issues raised under the *Mining Act*, the learned Judge referred to, and concurred with, the findings of Yano, J. in an interlocutory ruling in Peter Nzeki & 14 Others vs. Base Titanium Limited & 4 Others (2020) KEELC 1655 (KLR) where the court held that it had jurisdiction to determine disputes relating to the environment, the use of, occupation and title to, land; and that it had the mandate to determine applications for redress for denial, violation and infringement, and threats to rights and fundamental freedoms relating to the environment and land.

9. Aggrieved, the appellant is before this Court on a first appeal. In a Memorandum of Appeal dated 21st December 2022, it has raised 6 grounds of appeal, which we have condensed into 5, namely that the learned Judge erred:

   i. in law when she found and held that the High Court had original jurisdiction to hear and determine the dispute as pleaded in the petition at first instance;

   ii. in her appreciation and application of the law when she failed to properly interpret and apply Section 155 of the *Mining Act*;

   iii. in failing to find and hold that Section 155 of the *Mining Act* only confers upon the High Court appellate jurisdiction to exercise in the said dispute;

   iv. in law by relying on the ruling of Yano, J. in the case of Peter Nzeki & 14 Others vs. Base Titanium Limited & 4 Others (2020) KEELC 1655 (KLR), which ruling or decision was reversed in his final judgement in the same case on 25th January 2021, in Peter Nzeki & 14 others vs. Base Titanium Limited & 4 others (2021) KEELC 4575 (KLR), which latter decision correctly interpreted Section 155 of the *Mining Act* to the effect that the High Court lacks original jurisdiction to hear and determine the disputes referred to therein, like the present dispute; and

   v. in law by failing to follow and apply the binding decisions of the Court of Appeal in the cases of Mutunga Tea & Coffee Company Ltd vs. Shikara Ltd & Anor (2015) KECA 469 (KLR); and Geoffrey Muthinja & Anor vs. Samuel Muguna Henry & 1756 Others (2015) KECA 304 (KLR) as applied and followed by Yano, J. in his afore stated judgement.

10. The appellant thus prayed that the appeal be allowed; that the ruling and order made by Dena, J. on 10th February 2022 be set aside; that the preliminary objection raised by the appellant be upheld, and that it be ordered that the High Court lacks jurisdiction to hear the dispute at first instance; and that costs of the suit and of this appeal be granted to it.

11. We heard this appeal on 21st January 2025. Learned counsel Mr. Oyatsi was present for the appellant, learned counsel Mr. Gathuku represented the 1st respondent, while learned counsel Ms. Mwanazumba was present for the 2nd, 3rd and 4th respondents.

12. Mr. Oyatsi highlighted the appellant's submissions dated 2nd October 2024. Counsel submitted that, in this instance, the superior court's jurisdiction was appellate and not original; that there was an alternative dispute resolution mechanism which ought to have been exhausted first by an aggrieved party; and that section 115 of the *Mining Act* provides that disputes of acts or omissions of an environmental nature allegedly committed by a mining operator in the course of mining are to be determined by the Cabinet Secretary of Mining. Counsel referred to the decisions of Mutanga Tea & Coffee Company Ltd vs. Shikara Limited & Another (2015) eKLR; and Geoffrey Muthinja & Another vs. Samuel Muguna Henry & 1756 others (2015) eKLR, submitting that the trial Judge erred by failing to appreciate the binding decisions of this Court which emphasised on the need of an aggrieved party to follow the procedures for dispute resolution prescribed in the Act.

13. On behalf of the 1st respondent, Mr. Gathuku highlighted submissions dated 14th October 2024. It was submitted that the ELC has the sole discretion of hearing and determining disputes relating to the environment and land use as outlined in the preamble to the ELC Act; that the issues being raised by the 1st respondent in the petition had nothing to do with the *Mining Act*, but are hinged on the provisions of Article 162(2) (b) of the *Constitution* as read with section 12(2) (a), (e), 3 and 7 of the ELC Act; and that the declaratory orders sought by the 1st respondent cannot be made by the Commissioner of Mines and Geology as they fall under the sole jurisdiction of the ELC. Counsel emphasised and reiterated that the 1st respondent was not concerned with the physical mining activities of the appellant but, rather, the effect of such mining activities on their environment.

14. In a rejoinder to the 1st respondent's submissions, the appellant filed further submissions dated 28th October 2024. It submitted that, contrary to the assertion by the 1st respondent, the *Mining Act* does not oust the ELC's jurisdiction, but that it provides that the ELC sit in an appellate capacity over the decisions made by the CS, Mining.

15. The 2nd, 3rd and 4th respondents filed grounds for affirming the decision of the trial court pursuant to rule 96(3) of the Court of Appeal Rules, 2022. Ms. Mwanazumba submitted that the prayers sought by the 1st respondent were multi- faceted: that there are those which can be dealt with by NEMA and CS of Mining while others can be dealt with by the ELC, specifically the right to a clean and healthy environment; that the decision of Peter Ndeki (supra) by Yano, J. correctly held that the court has jurisdiction to deal with a mining issue where the substratum of the dispute is the right to a healthy environment; and that, accordingly, the ELC had jurisdiction to determine the issues before it.

16. We have considered the record of appeal, the respective parties' submissions and the law. By dint of rule 31(1) of this Court's Rules, 2022 we are required, as a first appellate court, to re-examine the evidence on record and draw our inferences of fact. We are also mindful that we can only depart from the findings by the trial Court if they were not based on the evidence on record, or where the said court is shown to have acted on wrong principles of law as was held in Jabane vs. Olenja (1986) KLR 661, or if its discretion was exercised injudiciously as held in Mbogo & Another vs. Shah (1968) E.A.

17. The main issue for determination in this appeal is whether the trial court correctly found that it had jurisdiction to determine the issues before it.

18. As a recap, the 1st respondent was aggrieved by the appellant's mining activities, prompting them to file a constitutional petition before the ELC asserting that their right to a clean and healthy environment had been violated. The appellant objected to the ELC's jurisdiction by stating that, since the subject

matter revolved around mining, the ELC was divested of jurisdiction, and that, instead, it was the CS of Mining who was seized with jurisdiction pursuant to section 155 of the *Mining Act* to adjudicate over the dispute. The provision reads as follows:

> 155. Determination of disputes by Cabinet Secretary Subject to the provisions of this Act, the Cabinet Secretary may inquire into and determine the following matters-
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> a. a dispute of the boundaries of an area held under a prospecting or mining right;
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> b. any wrongful act committed or omitted in the course of prospecting and mining operations, by any persons against any other person;
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> c. a claim by any person to be entitled to erect, cut, construct or use any pump, line of pipes, flume, race, drain, dam or reservoir for mining purposes;
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> d. a claim to have any priority of water taken, diverted, used or delivered for mining purposes, as against any other person claiming the same; or
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> e. assessment and payment of compensation where provided for under this Act.

19. To start with, the ELC is conferred with jurisdiction by dint of Articles 162 of the *Constitution* and section 13 of the *Environment and Land Court Act*, Cap 8D. Article 162(2) b. of the *Constitution* makes proviso for the establishment of courts with equal status as the High Court, one of them being the ELC as follows:

> 2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-
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> a. employment and labour relations; and
>
> (b) the environment and the use and accupation of, and title to, land.
>
> 3. Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2). (emphasis added)

20. In order to give effect to Article 162(3), Parliament enacted the ELC Act, Cap 8D. Section 13 of the said Act outlines the jurisdiction of the ELC as follows:

> 1. The Court shall have original and appellate jurisdiction to hear and determine all dispute 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.
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> 2. In exercise of its jurisdiction under Article 162(2) (b) of the *Constitution*, the Court shall have power to hear and determine disputes-
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> a. relating to environmental planning and protection, climate issues, land use, planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
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> b. relating to compulsory acquisition of land;
>
> c. relating to land administration and management;
>
> d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
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> e. any other dispute relating to environment and land.

3. Nothing in this Act shall preclude 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*. (emphasis added)

21. The jurisdiction of the ELC is therefore settled to the effect that it has the mandate to determine constitutional petitions where a party seeks redress for 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*.

22. In this case, the dispute as pleaded in the petition before the ELC was one which cross-cut the jurisdiction of the ELC, CS, Mining and the National Environment Tribunal. In other words, it was one which can be referred to as a 'cocktail or a 'multi -faceted' or a 'mixed grill' dispute. We say so because, the 1st respondent not only prayed for a declaration of the right to a healthy and clean environment, but also prayed that the mining license issued to the appellant be revoked by the 3rd respondent, and that the EIA report be revoked by the 2nd respondent. A dispute over a wrongful act committed in the course of prospecting or mining is one that falls for determination by the CS Mining by virtue of Section 155 of the *Mining Act* while a person aggrieved by, among other things, refusal to be granted a licence or imposition of a condition or limitation on the licence, or imposition of an environmental restoration order under EMCA, may appeal to the National Environment Tribunal by dint of Section 129 of EMCA.

23. Turning to the ground that the 1st respondent failed to exhaust the internal dispute resolution mechanisms before moving to court, it is trite that the doctrine of exhaustion commends that a party should, in the first instance, exhaust all the possible avenues to litigate their cause before approaching the courts. The Supreme Court emphasized this position in the decision of Mumba & 7 others (Sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) vs. Munyao & 148 others (Suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) (Petition 3 of 2016) (2019) KESC 83 (KLR) where it was held as follows:

> ...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."

24. This Court in Nyaoga vs. Chairman Kisii County Assembly & 3 others (2023) KECA 1540 (KLR) gave credence to the importance of utilizing all the available avenues in the first instance before seeking redress in a court of law as follows:

> The doctrine of exhaustion of remedies was created by courts in order to promote an efficient justice system and autonomous administrative state. It is a principle that requires parties to exhaust all available local administrative remedies before seeking redress in a court of law on a constitutional issue. An aggrieved party must first pursue all avenues of relief found within the administrative agency responsible for the issue at hand. The reason for this is to allow administrative agencies to address, and to potentially resolve the issue before escalating the same to the courts."

25. There are three schools of thought which have been discussed at all levels of the superior courts in our jurisdiction in determining if a court should be seized with jurisdiction where there are mixed issues

being raised by a party in their pleadings, so much so that it becomes difficult to determine which dispute resolution forum is to be seized with jurisdiction.

26. The first approach is the "pre-dominant purpose test" which Prof.Ngugi, J. (as he then was), was a proponent in the decision of Suzanne Achieng Butler & 4 others vs. Redhill Heights Investments Limited & Another (2016) KEHC 1313 (KLR) in respect of which we must point out that, on this Court under the citation appeal to Redhill Heights Investments Limited vs. Suzanne Achieng Butler & 4 others (2018) KECA 776 (KLR), was not considered on merit since it was established that the parties therein filed a consent to settle the issue. The learned Judge (as he then was) held as follows:

> "When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.
>
> The Court must first determine whether the pre- dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse."

27. In the second approach, Munyao, J. took the view that a court should consider the "predominant issue" of the parties in their dispute when he held as follows in the case of Lydia Nyambura Mbugua vs. Diamond Trust Bank Kenya Limited & Another (2018) KEELC 1599 (KLR):

> On my part, I would modify the above test, andhold the position that what is important when determining whether the court has jurisdiction, is not so much the purpose of the transaction, but the subject matter or issue before court...That is why I hold the view, that in making a choice of which court to appear before, one needs to find out what the predominant issue in his case is, and not necessarily, the predominant purpose of the transaction. If the litigant's predominant issue will touch on the use of land, or occupation of land, or a matter that affects in one or another, title to land, then such issue would fall for determination before the ELC."

28. In Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna & 5 others (2017) KECA 79 (KLR), the issue was which court, as between the High Court and the ELC, had jurisdiction to determine disputes arising out of charges. This Court took the path of the 'pre-dominant issue' test in determining the jurisdiction of either court and, the dominant issue at hand being one of settlement of amounts arising from the charge instrument, the High Court was found to be vested with jurisdiction.

29. Finally, turning to what we refer to as binding on this Court, the Supreme Court in Nicholus vs. Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (2023) KESC 113 (KLR) also had an occasion to determine an unerringly similar issue to what we have before us. A brief background is that Nicholus filed a constitutional petition alleging that his rights to a clean and healthy environment had been infringed by Joseph Andeere Nyaanga (2nd respondent therein) and Owang Isaak Ogweyo (3rd respondent therein), who were conducting mining activities which posed health risks. Their further complaint was that the Kenya Power and Lighting Company had trespassed into their land and erected electricity poles.

30. A jurisdictional challenge was raised in which the ELC, sitting in Kisumu, found the objection to its jurisdiction merited. In relation to the issues reserved for NEMA, the court held that the National

Environment Tribunal (NET) had jurisdiction in the first instance and the ELC's jurisdiction was restricted to appeals. On the issue of the alleged illegally erected electricity poles, the ELC held that the Energy and Petroleum Regulatory Authority (EPRA) had the power to entertain the dispute in the first instance and that, if dissatisfied by any decision made by EPRA, the appellant could then move to the Energy and Petroleum Tribunal (EPT) for redress on appeal.

31. On appeal to this Court in Nicholus vs. Attorney General & 14 others; National Environmental Complaints Committee (NECC) & 5 others (Interested Parties) (2023) KECA 34 (KLR), the decision by the ELC was upheld, but with the finding that the appellants ought to have amended their pleadings to exclude the prayers which should have been the subject of determination before NEMA and EPRA.

32. The Supreme Court took a different view. The learned Judges took cognizance of the fact that the dominant issue before the ELC was the right to clean and healthy environment while citing various constitutional provisions and, accordingly, held that:

> " The availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief. But there is also a need to emphasize the need for the court to scrutinize the purpose for which a party is seeking relief, in determining whether the granting of such constitutional reliefs is appropriate in the given circumstances. This means that a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs, is a necessary prerequisite on the part of any superior court."

33. The view taken by the Supreme Court has been a subject of discourse by this Court. For instance, in the case of Daniel N. Mugendi vs. Kenyatta University & 3others (2013) KECA 41 (KLR) , the Court was dealing with an appeal against a determination by the High Court (Mumbi Ngugi, J. (as she then was)) where she declined to hear the appellant's constitutional petition on grounds that she was divested of jurisdiction since the matter touched on violation of the appellant's employment rights. According to the learned Judge, the appellant ought to have ventilated his grievances in the Industrial Court (now Employment and Labour Relations Court (the ELRC).

34. After hearing the parties, the Court upheld the learned Judge's decision of downing her tools and referring the matter to the Industrial Court upon finding that, in as much as the petition was mixed grill in nature in the sense that it raised both constitutional issues as well as a question of breach of an employment contract, by virtue of the *Constitution* having created the ELRC as a court of equal status to the High Court, the best place to ventilate the grievance was in the ELRC. The Court held in part:

> " The appellant did not concisely and exactly set out the specific allegations of violation of rights under the *Constitution* or the orders sought. Our view is that the subject petition set out breaches of a contract of employment as the cause of action and then narrated what orders were being sought. Such was only suitable for lodging a claim at the Industrial Court. And for that the appellant who proceeded to the High Court did not contribute to the principle of expeditious disposal of matters. He went to the wrong venue and he was so told.
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> After hearing arguments in this appeal and finding that the appellant went to the wrong court, we wondered whether the High Court could have severed his "mixed grill" petition so that alleged breaches of rights could be handled by it while the employment claim went

to the Industrial Court. We even considered whether the inelegant drafting of the claims of violations of rights could be amended and heard by the High Court. While Mr. Wetangula for the respondent thought that the whole appeal should fail with no directions regarding "severance" of the claim, Mr. Kipkorir pleaded with us to allow the appeal so that, if we quote him correctly:

> " We should be heard on merit now that the Industrial Court is in place."
>
> The question now is whether the appellant should go back and "sever" the composite petition alleging violation of his fundamental rights and breach of contract of employment. Much as such a severance would entail time and resources to effect the necessary amendments and make due motions, we are of the view that with necessary amendments, which appear imperative to make out a clear use of breach of rights being effected, the appellant can and should be heard by the Industrial Court on the two claims i.e. violation of rights and breach of contract of employment. The position that the Industrial Court can and should entertain the claim as laid by the appellant, is in line with the decision of Majanja, J. in Petition No.170 of 2012 – United States International University (USIU) Vs The Attorney General"

35. Summing up its observations, the Court stated as follows:

> " We have quoted in extenso the pertinent parts of the judgment above for the relevance attached to this appeal. In sum on this ground of jurisdiction, we find as we had stated earlier that the High Court had no jurisdiction to entertain the claim which essentially was based on breaches of contract of employment along with some unstated claims of breaches of rights, as the learned judge did find."

36. The same approach has been adopted in South Africa in the South African case of Gcaba Vs. Minister of Safety and Security & Others CCT 64/08 (2009) ZACC 26, which the Court of Appeal authoritatively cited in the Prof. Daniel Mugendi's case (ibid). The court delivered itself thus:

> " 44. ...I would adopt the position of the Constitutional Court of South Africa in Gcaba Vs Minister of Safety and Security (Supra). The Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of Article 162(3), section 12 of the Industrial Court Act 2011 has set out matters within the exclusive domain of that court. Since the court is of the same status of the High Court, it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret the *Constitution* and fundamental rights and freedoms, is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of Section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce, not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the *Constitution* within the matter before it."

37. In addition to the foregoing, we find the reasoning in William Odhiambo Ramogi & 3 others vs. Attorney General & 6 others; and Muslims for Human Rights & 2 others (Interested Parties) (2020)

KEHC 10266 (KLR) where the High Court (Achode, Nyamweya (as they then were), & Ogola, JJ.), illuminating. The learned Judges stated:

> "In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court... it is our view that, where the reliefs under the alternative mechanism are not adequate or effective, then there is nothing that precludes the adoption of a nuanced approach, as we have stated. What must matter at the end is that a path is chosen that safeguards a litigant's right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. This is because, to achieve a harmonious and effective legal framework, it is imperative to strike a judicious balance between the emphasis on providing the initial opportunity for resolution to entities established by law and the assertion of a litigant's right to access the court. However, such convergence requires a case-by-case assessment by considering issues such as the nature of the dispute and the adequacy of the alternative dispute mechanism."

38. It was therefore sufficient that the 1st respondents alleged that a right under the *Constitution* had been infringed or threatened with violation, made it clear that, in light of the provisions of the *Constitution* and the ELC Act, the issues raised fell within the original jurisdiction of the ELC. Section 3 of EMCA provides that one of the general principles under the Act is the entitlement to a clean and healthy environment. It states:

> (1) Every person in Kenya is entitled to a clean and healthy environment in accordance with the *Constitution* and relevant laws and has the duty to safeguard and enhance the environment."

39. Section 3(3) of EMCA is even more instructive as it grants any person who claims that their right to a clean and healthy environment has been violated the right to apply to the ELC for redress by specifically stating:

> "If a person alleges that the right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may on his behalf or on behalf of a group or class of persons, members of an association or in the public interest may apply to the Environment and Land Court for redress and the Environment and Land Court may make such orders, issue such writs or give such directions as it may deem appropriate to-
>
> a. prevent, stop or discontinue any act or omission deleterious to the environment;
>
> b. compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment;
>
> c. require that any on-going activity be subjected to an environment audit in accordance with the provisions of this Act;

d. compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and

e. provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing."

40. Having analysed the afore-cited judicial authorities, we come to the inescapable conclusion that the ELC has jurisdiction to determine the constitutional issues raised before it. We reiterate that what the 1st respondent were seeking to enforce was their rights to a clean and healthy environment. Their complaint was not raised to have the appellant cease from its mining activities. The petition having raised constitutional issues, the CS Mining ultimately became divested of jurisdiction to adjudicate over the dispute. We underscore the principle that constitutional petitions, among other reliefs a petitioner may seek, concern declarations of infringement of rights. They are special in nature, and the mandate to determine them is conferred upon the courts by the *Constitution* and the relevant statues enacted thereunder and, in this instance, the ELC Act.

41. By reason of the foregoing, we find nothing on which to fault the learned Judge (Dena, J.), for the finding in her ruling where she rendered herself thus:

> " Having looked keenly at the prayers sought, the dominant prayer is the one seeking for a declaration that the petitioners have rights to a clean and healthy environment. The fabric upon which the same is woven touched on the infringement of the right to a clean and healthy environment...consequently the right to a clean and healthy environment can only be enforced by this court, and the same apply (sic) to the issue arising out of the infringement of such rights."

42. In the premises, we find that the appeal is unmerited and hereby dismiss it with costs to the 1st respondent.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF JULY, 2025.

A. K. MURGOR

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE- MACHARIA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR