Kenya Power & Lighting Ltd v Bhogal (Civil Appeal E017 of 2021)
[2024] KECA 179 (KLR) (23 February 2024) (Judgment)

Neutral citation: [2024] KECA 179 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E017 OF 2021

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

FEBRUARY 23, 2024

BETWEEN

KENYA POWER & LIGHTING LTD ..... APPELLANT

AND

AJIT BHOGAL ..... RESPONDENT

(Being an appeal from the Judgment of the Environment and Land Court at Mombasa (C. K. Yano, J.) dated 23rd November 2020 in Mombasa ELC Case No 276 of 2006)

JUDGMENT

1. Before us is a first appeal by the appellant arising from the judgment of the Environment and Land Court at Mombasa (C.K Yano, J.) delivered on 23rd November, 2020 at in ELC Case No. 276 of 2006 in which, by way of a plaint dated 30th November 2006, the respondent sued the appellant claiming: general damages; aggravated damages; exemplary damages; a permanent injunction restraining the appellant by itself, its directors, officers, shareholders and its servants or agents or any of them or otherwise howsoever from entering, re-entering or remaining upon Plot No. 571, section V, M.N. Mombasa (the suit land); and costs of the suit. The cause of action, according to the respondent was the appellant's trespass on the respondent's suit land.

2. The respondent's case as pleaded and testified by his witnesses was that he is the freehold proprietor and owner, and is entitled to possession of the suit land; that, in the year 1999- 2000, the appellant, by an act of trespass, entered upon the suit land without the licence or consent of the respondent, and had remained thereon to date and constructing thereon, inter alia, a 2nd 132 KV Line Carrying electricity from Rabai to Kipevu; that, as a result, the respondent was subjected to the flagrant disregard of his rights, title and interest in the suit land, and suffered loss and damage on account of diminution of its value, and saleability; that the suit land is further subjected to the passing and re-passing by persons unauthorized by the respondent, and to the unauthorized use and re-use and occupation

thereof contrary to the law relating to the respondent's right to title and interest in the suit land; and that the appellant carried out works on the suit land for its own use and benefit notwithstanding the respondent's demand that the appellant' ceases to trespass thereon.

3. At the hearing of the suit, the respondent testified as PW1 and, while reiterating the foregoing, stated that the appellant for a wayleave vide a letter dated 3rd December 1998, but that he wrote back in letter dated 21st December, 1998 declining the request; that the appellant further wrote to him undertaking to utilise less space, but that he once again turned down the request vide his letter dated 26th August 1999; that, notwithstanding denial of the request, the appellant proceeded to construct the said 2nd 132 KV Line Carrying electricity from Rabai to Kipevu; that, as a consequence, on 2nd May 2001, he demanded that the appellant refrains from doing so; that the respondent also received a complaint of infringement by his client, Interfreight EM, on 2nd August 2005; that on 1st September 2005, through his advocates, he demanded for damages for trespass and copied the letter to the Electricity Regulatory Board (ERB), Minister for Energy and Distribution Manager, KPLC Board; and that ERB asked the appellant to review the complaint within 30 days, but that the dispute was never resolved and the trespass persisted.

4. It was the respondent's case that, when he acquired the suit property in the early 1980s, the first power line was already in existence and, hence, his complaint was only over the 2nd line; that he intended to put up a pre-fabricated panels workshop; that he built a warehouse which was to house the workshop, but that the same needed extension, which was curtailed by the restriction caused by the 2nd line; that the 1st line divided the subject property into 80:20 while the 2nd line, which was about 60000 square feet (1.5 acres), passed near the warehouse and occupying a portion measuring 80% thereby rendering the works for cranes impossible due to the overhead line; that the 2nd line was not within the 1st line wayleave trace and, consequently, it rendered a large portion of the suit property unusable; that he would use the affected portion for consignment but that, due to interference of the crane by the lines, he stopped and only used it for parking lorries and cargo storage; that although the plot was under some use, he could not develop it further because of the lines; that, in his estimation, and based on his experience as a property dealer, he was entitled to Kshs 50 million being the market value of the 1.5 acres plus interest; and that the expected profit was Kshs 15 million monthly subject to tax.

5. In its defence, the appellant denied the respondent's claim and averred that there was an existing 132KV line between Rabai and Kipevu; that, sometime in the year 2005, the appellant's agents, servants and/or employees realized that the respondent had encroached upon the appellant's way leaves trace of 30 metres by extending his wall to the existing 132 KV line; that the 2nd 132 KV line was within the approved wayleaves trace as it was 2312 metres from the centre line; and that, in the premises, the respondent was not entitled to damages.

6. The appellant, through its Assistant Wayleave Officer, who testified as DW1, stated that, on 3rd December 1998 and 21st December 1998, the appellant requested the respondent in writing for wayleave but the requests were declined on the basis that it would render the respondent's land sterile; and that, consequently, the construction of the power lines was done on the existing wayleave lines.

7. September 2012, Tuyoitt J. (as he then was) visited the site where the respondent showed the court the lines. During that visit, the respondent explained that the old and the new lines were parallel to each other; that the old line lay on the eastern side of the plot; that the respondent was unable to use that part of the plot which was about 1 acre; that, as regards the 2nd line, he could not use 30 feet on each side measuring about 3.5 acres; and that the whole land, including the godown, was 4.7 acres.

8. On his part, Walter Okello Mbogo, a wayleave officer with the appellant explained that the old line was at the centre of the wayleave trace; that the trace was 30 metres on each side; that the new line was

about 20 metres from the old line, and so was within the trace; and that, from the centre of the new line, one could develop 15 metres.

9. After hearing the petition on 23rd November, 2020, the learned Judge (Yano, J.) identified the following issues for determination:

   a. whether the defendant trespassed on the plaintiff's land;

   b. whether the plaintiff was entitled to general damages for trespass and, if so, the quantum payable;

   c. whether the plaintiff was entitled to exemplary and aggravated damages;

   d. whether a permanent injunction could be issued restraining the defendant from entering, re-entering or remaining upon the suit land; and

   e. who was to bear costs of the suit.

10. In his judgement, the learned Judge found that the respondent was the registered owner of Plot No. 571, Section V M.N. Mombasa; that there were two 132KV lines put up by the appellant on the suit property; that the dispute was only in respect of the 2nd 132 KV line carrying electricity from Rabai to Kipevu; and that the appellant sought the consent of the respondent prior to the construction of the 2nd 132KV electricity supply line running from Rabai to Kipevu, to which the respondent declined, unless he was suitably compensated; that a joint survey was conducted by order of the court on 15th March 2018 where the respondent's surveyor, Mr. P. M. Mwendwa, was present together with Mr. Amunga representing the appellant, leading to the preparation of a report dated 19th March 2019; that there was no explanation as to why the report was neither sent to Mr Amunga nor executed by him as the representative of the appellant; that there was no other report made by Mr Amunga on the joint survey; that, in those circumstances, the report on the record would be taken as representing the joint position found by the surveyors representing the parties; that the reference to Ketraco in the said report instead of Kenya Power & Lighting Co. Ltd was an error that did not go to the substance of the report since it was done on the suit property, and not on any other property.

11. It was the learned Judge's finding that the case was one of trespass to land as it involved entry by the appellant into the respondent's land albeit pursuant to statutory authority (to wit the Electric Power Act, No. 11 of 1997, and the repealed Wayleaves Act); and that the applicable law was the *Energy Act*, the *Land Act*, 2012 and the *Land Registration Act*, 2012. According to the learned Judge, the Electric Power Act and the Wayleaves Act provided for payment of compensation to landowners. Based on sections 46, 47 and 52 of the *Energy Act*, the learned Judge held that:

> " under the law, permission of the landowner is required before entering such land and laying electric supply lines. Moreover, a notice is required to be given, which notice should be accompanied by a statement giving the particulars of entry. After the notice, an owner may give assent and is entitled to compensation to be agreed."

12. The learned Judge found that, in this case, the appellant without lawful authority entered into the respondent's land and constructed the 2nd 132 KV line thereon despite having been denied permission on numerous occasions; that, from the aforementioned provisions of the law, it was explicit that the consent of the respondent was mandatory; that such consent was not obtained; that the appellant also failed to compensate the respondent as required; that the appellant's actions amounted to trespass, and that the trespass was continuing; that a wayleave is an analogous right governed under part X of the

Land Act, 2012 (sections 143-149); and that section 148 of the Act provide for compensation for right of way, such as wayleaves.

13. The learned Judge held that the respondent's claim for Kshs.300, 000, 000/- as compensation calculated at the rate of Kshs 15, 000,000/- per year for 20 years since 1999 was special damages which was neither pleaded nor proved, and that the court could only grant nominal damages as provided by law. Accordingly, the learned Judge proceeded to award the respondent the sum of Kshs. 20, 000,000/- as general damages for trespass. On the authority of Rookes v Barnard [1964] 1 All ER 367; and Obongo & Another v Municipal Council of Kisumu [1971] EA 91, the learned Judge found no evidence of malice or arrogance, and declined to make an award of exemplary and aggravated damages. He pronounced himself as hereunder:

> "The other issue to consider is whether an order of permanent injunction should issue as sought by the plaintiff. In this case, there is no dispute that the 2nd 132 KV electric lines are in place. Evidence has been led that the power lines supplies power from Rabai to Kipevu and serves the coastal region. In my view, it would be impractical at this stage to grant the injunction order sought as that would mean the removal of the power line on the section and doing so will incapacitate the whole line and cause untold suffering to the populace and the public facilities along the line. In my view, the justice of the case is that the defendant be given time to negotiate appropriate wayleave agreement/rights of way with the plaintiff as provided for by the law. Indeed that is what the defendant attempted to do by writing to the plaintiff previously before unilaterally laying the electric power line without first obtaining the consent and /or permission of the plaintiff. The court shall make a pronouncement on this at a later stage."

14. The timelines for the said negotiation was given as 120 days from the date of judgement with liberty to apply. The costs of the suit were awarded to the respondent.

15. Aggrieved by the decision, the appellant is before us challenging the same on the grounds that the report dated 19th March 2019 was not joint as it was only signed by the respondent's surveyor; that general damages of Kshs 20, 000,000/= was manifestly excessive; and that the court was bereft of original jurisdiction to hear the dispute which involved wayleaves, a dispute that ought to be resolved under the mechanism provided for in the *Energy Act*, 2019.

16. We heard this appeal on the Court's virtual platform on 4th October 2023 when learned counsel, Ms. Kabole, appeared for the appellant while learned counsel, Mr. Amadi, appeared for the respondent. Both counsel relied entirely on their filed submissions.

17. It was submitted on behalf of the appellant that the Environment and Land Court was bereft of jurisdiction to hear and determine the Respondent's claim pursuant to Article 162(2) of *the Constitution*, 2010 since it is only vested with jurisdiction to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. Based on this Court's decision in National Social Security Fund Board of Trustees v Tea Growers Association & 14 Others [2023] KECA 80 (KLR), it was contended that an issue going to the jurisdiction of the court can be raised at any stage of the proceedings, and even for the first time on appeal. According to the appellant, the proper forum to adjudge the respondent's claim concerning wayleaves was the Energy Regulatory Commission established under section 4 of the *Energy Act*, 2006 (repealed), which was replaced by the Energy and Petroleum Regulatory Authority (EPRA) under the *Energy Act*, 2019. Reliance was placed on Civil Appeal No. 42 of 2021 Abidha Nicholus v Attorney General & 7 Others (unreported) where this Court opined that since the complaint related to way leaves for transmission, the first forum

for resolution of the dispute was EPRA, and on appeal to the Energy and Petroleum Tribunal under section 36 of the *Energy Act*.

18. The Appellant submitted further that the joint report dated 19th March 2018 and filed in court on 26th March 2018 was not produced as an exhibit by the Respondent. In this regard, reliance was placed on Kenneth Nyaga Mwige vs. Austin Kiguta & 2 Others [2015] eKLR on how a document becomes part of evidence in a case. The appellant asserted that the report did not form part of the evidence on record, and hence the learned Judge erred in relying on the report as a joint report.

19. It was submitted that, since the report was not signed by the appellant's representative, it could not amount to a joint report; that the anomaly as to the name Ketraco instead of Kenya Power & Lighting ought not to be taken lightly since Ketraco was not a party to the suit; that the learned Judge misdirected himself while awarding general damages of Kshs. 20,000,000/=since he acknowledged that the Respondent never tendered any evidence of damage or loss caused on the suit land by the appellant; and that a large part of the suit land was still being used by the respondent despite the presence of the High Power voltage electricity supply lines and, hence, the award was manifestly excessive. In the appellant's view, the amount ought to be reduced to Kshs. 3,000,000/=.

20. On the respondent's part, it was submitted that, on 21st September 2012, the trial court recorded a consent order that a joint survey be carried out; that, on 15th March 2018, each party was represented when the joint survey was carried out, and a report dated 19th March 2017 prepared and, therefore, the report became part of the court record pursuant to the consent order. According to the respondent, the report was not challenged or sought to be expunged, and no independent report was filed on behalf of the appellant. In the respondent's view, the award of damages is discretionary and, in this case, an award of Kshs. 20,000,000/= was nominal.

21. We have considered the issues raised before us. In our view, the following issues fall for determination:

    a. whether this Court may inquire into the jurisdiction of the trial court at this stage, and whether the court had jurisdiction to entertain the matter;

    b. whether the report dated 19th March 2019 was a joint report, and whether it was produced in evidence; and

    c. whether the award of general damages of Kshs. 20,000,000/= was manifestly excessive.

22. In determining these issues, we are alive to our duty as a first appellate court. As held by this Court in Selle & another v Associated Motor Boat Co. Ltd & others [1968] EA 123, we are enjoined to reconsider the evidence, evaluate it and draw our own conclusion on facts and the law. We would only depart from the factual findings by the trial court if they were not based on evidence on record; where the said Court is shown to have acted on the wrong principles of law as was held in Jabane v Olenja [1986] KLR 661; or where its discretion was exercised injudiciously as was held in Mbogo & Another v Shah [1968] EA 93.

23. With regarding to the issue as to whether this Court may take up and determine a jurisdictional issue for the first time in this appeal, there is a long line of authorities that an issue going to the jurisdiction of the court may be raised at any time in the proceedings, even for the first time on appeal as reiterated by this Court in National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others (supra) in which it was held that: competence of the court to hear and determine a suit.

Jurisdiction could be raised at any stage of the proceedings in the High Court, on appeal and even in the Supreme Court for the first time. It could be raised by any of the parties or by the court, and once raised the court would do well to examine it and render a

> considered ruling on it... Where a court was drained of the jurisdiction to entertain a matter, the proceedings flowing from it, no matter the quantum of diligence, dexterity, artistry, sophistry, transparency and objectivity injected into it, would be marooned in the intractable web of nullity... If proceedings were conducted by a court without jurisdiction, they were a nullity. Any award or judgment and or orders arising from such proceedings of a court acting without jurisdiction were also a nullity."

24. The only rider, as held by the predecessor to this Court in Sultan Sir Saleh Bin Ghaleb and Others vs. Saif Bin Sultan Hussain Al Quaiti and Others [1957] EA 55, is that:

> "...if the objection depends on the existence of a certain set of facts which might, if the objection had been taken in the court of trial, have been shown by evidence not to exist, the absence of such evidence from the appellate court's record will normally be considered to be due to the objector's failure to make his objection at the right time and accordingly the court will not make any presumption against the party who might have called the evidence, but will, on the other hand, presume that the evidence could and would have been called, and will accordingly overrule the objection."

25. In view of the foregoing, we find and hold that the question whether or not the trial court had the jurisdiction to entertain the matter was properly taken before us notwithstanding that it was never raised in the court below. Unfortunately, the respondent did not find it fit to address itself to this momentous issue.

26. The jurisdictional issue is based on the ground that the respondent ought to have exhausted the alternative remedies before moving the Environmental and Land Court. The doctrine of exhaustion of remedies has been a subject of numerous decisions in this jurisdiction. This Court in Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR, while pronouncing itself on the doctrine, held that:

> "It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."

27. The Supreme Court in NGOs Co-ordination Board vs. EG & 4 others; Katiba Institute (Amicus Curiae) [2023] KESC 17 (KLR) (the NGOs Co-ordination Board Case) outlined the doctrine of exhaustion of administrative remedies and adopted its finding in Albert Chaurembo Mumbo & 7 others vs. Maurice Munyao & 148 others [2019] eKLR where it held 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."

28. In the afore-cited decision, the Court emphasized that, where there exists an alternative method of dispute resolution established by legislation, courts must exercise restraint in exercising their jurisdiction as conferred by *the Constitution*, and must give deference to the dispute resolution bodies established by statute with the mandate to deal with such specific disputes in the first instance.

29. In the NGOs Co-ordination Board Case (supra), the Supreme Court adopted this Court's position in R v National Environmental Management Authority [2011] eKLR where it was observed that:

> " The principle running through these cases is where there was an alternative remedy and especially where parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it..."

30. The Supreme Court in Abidha Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023) [2023] KESC 113 (KLR) (The Abidha Nicholus Case) stated that:

> " The principle, expressed in the above decision, which we agree with, is therefore that, where there is an alternative remedy, especially where Parliament has provided a statutory appeal procedure, then it is only in exceptional circumstances that the court can resort to any other process known to law."

31. However, in order for a legal provision relied upon to support the doctrine of exhaustion and constitutional avoidance to pass muster, it ought to meet certain tests, namely that the reliefs available in the alternative forums must be available, effective and sufficient. As was observed in the decision of the African Commission of Human and People's Rights in the case of Dawda K. Jawara vs. Gambia ACmHPR 147/95-149/96:

> " A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]
>
> ... the Governments assertion of non-exhaustion of local remedies will therefore be looked at in this light ... a remedy is considered available only if the applicant can make use of it in the circumstances of his case."

32. The Supreme Court in The Abidha Nicholus Case similarly explained that:

> " [107] Flowing from the above findings and in that context, 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. See also our decision in Bia Tosha Distributors Ltd v Kenya Breweries Ltd & 6 Others (Pet.No.15 of 2020) [2023] KESC 14(KLR) (Const. and JR) (17 February 2023) (Judgment)."

33. Related to these doctrines is the doctrine of judicial restraint.

The Supreme Court in The Abidha Nicholus Case cited its earlier decision in Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others SC Petition No. 3 of 2020 [2020] eKLR in which it expressed itself as follows:

> "(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
>
> 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."

34. According to the Supreme Court in the Abidha Nicholus Case (supra), one of the exceptional circumstances is where the reliefs under the alternative mechanism are not adequate or effective, for example where what is alleged is a violation of *the Constitution*. The Court expressed itself as hereunder:

> "Having considered the above complaints, we reiterate our earlier finding in this judgment that the mandate and jurisdiction to determine these questions lie with the ELC under Articles 22, 23(3) and 162(2)(b) of *the Constitution* as read with Section 4(1) of the Environment and *Land Act*. We say so because neither the NET, EPRA nor EPT have the jurisdiction to determine alleged violations of *the Constitution*. That right to access the court for redress of alleged constitutional violations, should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms. We say this persuaded by the elegant reasoning in William Odhiambo Ramogi & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR where the High Court (Achode (as she then was), Nyamweya (as she then was), & Ogola, JJ) 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.'"

35. In the Abidha Nicholus Case, the Supreme Court appreciated that the *Energy Act*:

> "...provides for a dispute resolution mechanism for complaints to be determined by EPRA that is vested with such authority under Section 10 of the said Act. Should a party be dissatisfied with the decision of EPRA, then he or she has the right to file an appeal before the EPT as provided for under Section 36 of the *Energy Act*. It is only when one is dissatisfied with the decision of the EPT that such a party can appeal the Tribunal's decision to the ELC."

36. However, the Supreme Court proceeded to hold that:

> " In addressing the conundrum placed before us, we must remind ourselves that, what is in dispute before this Court is the applicability of these provisions to the appellant's claim and not the true meaning of the provisions of either EMCA or the *Energy Act*. This is because the provisions of EMCA or the *Energy Act* do not expressly oust the jurisdiction of the ELC in respect of the procedure for the determination of disputes that involve the management of the environment or issues of petroleum and energy. In the ordinary course of events, the ELC still has original jurisdiction over the matters that are handled by NEMA, unless such jurisdiction is specifically and expressly ousted in a constitutionally compliant manner. The same holds true for proceedings under the *Energy Act*."

37. In that case, the Supreme Court identified one of the appellant's complaint to be that KPLC trespassed on his property, dug holes, and erected electricity poles thereon without notice to him or his authority to do so. That, in substance, is the case before us. The Supreme Court then proceeded to hold that:

> " Having considered the above complaints, we reiterate our earlier finding in this judgment that the mandate and jurisdiction to determine these questions lie with the ELC under Articles 22, 23(3) and 162(2)(b) of *the Constitution* as read with Section 4(1) of the Environment and *Land Act*. We say so because neither the NET, EPRA nor EPT have the jurisdiction to determine alleged violations of *the Constitution*. That right to access the court for redress of alleged constitutional violations, should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms."

38. In the case before the trial court, the respondent claimed that, as a result of the appellant's actions, the respondent was subjected to the flagrant disregard of his rights, title and interest in the suit land and suffered loss and damage in the diminution of its value and saleability. While we are not prepared to hold that the mere fact mention of *the Constitution* or constitutional rights suffices for the purposes of bypassing the dispute resolution mechanisms provided under the *Energy Act*, where the resolution of a dispute may entail a determination of the violation of Article 40 of *the Constitution*, that may well be

a ground for invoking the jurisdiction of the court. Thus our understanding of the holding in Abidha Nicholus Case is that:

> " We agree with the above reasoning and find 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."

39. The Supreme Court concluded that:

> " Earlier in this judgment, we held that there are substantive constitutional violations that have been raised in the petition that have not been answered in the proper forum. Having found that the jurisdiction of the ELC was properly invoked and that the matters in the appellant's constitutional petition fell within the purview of Article 162(2)(b) and Section 13 of the ELC Act, and to ensure the appellant gets his day in court, we hereby declare that the petition filed before the ELC should be determined on its merits for a determination on the alleged violations of the appellant's rights inter alia to a healthy and clean environment as well as his right to property for the acts committed by KPLC and whether the acts of NEMA of failing to enforce the stop order created a legitimate expectation that his concerns will be addressed."

40. Having considered the manner in which the respondent presented his claim, we are not persuaded that the claim was presented in the wrong forum. Accordingly, we find no merit in that ground of appeal. We hereby dismiss it on the basis that the reliefs under the alternative mechanism were neither adequate nor effective for the purposes of addressing not only the respondent's grievances, but also the reliefs sought.

41. The next issue for our consideration is whether the report dated 19th March 2019 was a joint report, and whether it was produced in evidence. It is noted that on 21st September 2012 it was ordered by consent that:

> A. A joint survey report by a surveyor to e agreed by the parties to explain exact position of these lines and how much land lies under them.
>
> B. Matter be mentioned on Monday 22/9/12 for further hearing date."

42. However, it turned out that the parties were unable to agree on a joint report. Although there was a proposal made by the respondent's counsel that each party appoints its own surveyor to undertake the survey and avail its report, the record does not show when, if at all, such a proposal was translated

into an order. However, on 21st March 2018, counsel for the respondent was recorded as informing the court that:

> The matter is for mention to confirm if the joint survey report has been filed. The report is ready and I am in the process of filing it. We can have another date.

43. Thereafter, the matter proceeded to the defence case. There is no indication on record as to whether the said report was admitted as exhibit in the case. However, the learned Judge in his judgement expressed himself as hereunder regarding the said report:

> "In this case, a joint survey was conducted by order of the court on 15th March 2018 where the plaintiff's surveyor, Mr. P.M. Mwendwa was present together with Mr. Amunga representing the defendant. A report dated 19th March 2019 was prepared and forms part of the record. The defendant has challenged the said report because it was neither sent to Mr. Amunga nor executed by him as the representative of the defendant. Further, that the report referred to a different entity known as Ketraco. The court was however not told why Mr. Amunga did not sign the report if at all he did not. Mr. Amunga also failed to file any other report on the joint survey that was done. The court will take the report on record as representing the joint position found by the surveyors representing the parties herein. The objection on the reference to Ketraco line instead of Kenya power & Lighting Co. Ltd is to me an error that does not go to the substance of the report. Moreover, the report was done on the suit property, and not any other property."

44. As already indicated, the record does not reveal when the said report was admitted as an exhibit in the case and, in light of lack of concurrence by the parties and their counsel regarding a joint survey, it was an error on the part of the learned Judge to consider the report by a surveyor appointed by the respondent as a joint survey report. Before that report was considered as a joint report, there ought to have been an express court order setting aside the earlier consent order and expressly giving the way forward. The procedure for producing documents was restated by this Court in Kenneth Nyaga Mwige v Austin Kiguta & 2 Others (supra) where it was held:

> "How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not became part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record...Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation or it authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the documents produced as an exhibit and be part of the court record.

> If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would be hearsay, untested and unauthenticated account."

45. It is therefore our view, and we find that the so called "joint report" having not been produced as an exhibit in court, the learned Judge erred in treating it as such. Without the said report, the only evidence on record were allegations made by the respondent and disputed by the appellant blaming each other for the trespass. In directing that a joint survey be undertaken and a report be available, the learned Judge appreciated that it was necessary "to explain exact position of these lines and how much land lies under them". It is the exact position of the lines and the portions of land affected that could have guided the trial court in arriving at determination either way. Without that guidance, we find that the learned Judge could not have found in favour of the respondent. The law on proof of allegations as codified in section 3 of the *Evidence Act* is that a fact is not proved if it is neither proved nor disproved. In that event, it is not proved. That is the position that prevails in the absence of the survey report, which itself was discredited as having not been signed by the appellant's representative, and referred to Ketraco rather than to the appellant.

46. The last issue, which in light of our finding above is no longer necessary for our determination, is whether the award of general damages of Kshs. 20,000,000/= was manifestly excessive. We only wish to note that, in our view, the learned Judge rightly found that the respondent was not entitled to an award of Kshs. 300,000,000;= it claimed on the ground that the same was neither pleaded nor proved. He also found that the respondent was not entitled to aggravated damages. However, he was of the view that the respondent was entitled to nominal damages. While expressing itself on an award of nominal damages, the predecessor of this Court (Crabbe, JA) in Kanji Naran Patel v Noor Essa and Another [1965] EA 484 stated as follows:

> " Nominal damages" is a technical phrase which means that you have negative anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives no right to any real damages at all, yet gives you a right to the verdict or judgement because your legal right has been infringed. But the term "nominal damages" does not mean small damages. The extent to which a person has a right to recover what is called by the compendious phrase damages, but may be also represented as compensation for the use of something that belongs to him, depends upon a variety of circumstances, and it certainly does not in the smallest degree suggest that because they are small they are necessarily nominal damages. Nominal damages are a sum that may be spoken of, but that has no existence in point of quantity and a mere peg on which to hang costs." [Underlining ours].

47. The same position was adopted by this Court in Jogoo Kimakia Bus Services Ltd v Electrocom International Ltd [1992] KLR 177.

48. We therefore fail to understand how the learned Judge, having correctly found that the respondent had failed to prove special damages, proceeded to grant such a huge amount as nominal damages without any basis. Nominal damages, in our view, is not necessarily an arbitrary amount whose figure is to be plucked from the air. By any standard, the amount awarded by the learned Judge as nominal damages in the sum of Kshs. 20,000,000/= cannot be said to have been of "no existence in quantity and a mere peg on which to hang costs." To the contrary, it was a substantial sum whose justification we are unable to find, in view of the distinct lack of evidence regarding the situation on the ground. We hasten to add that nominal damages are not a percentage of what was claimed but not proved.

49. In the premises, we hereby allow this appeal, set aside the judgement of Yano, J. dated 23rd November 2020 in Mombasa ELC Case No 276 of 2006 in its entirety. We hereby substitute therefor an order dismissing the respondent's suit against the appellant with costs to the appellant. We also award the costs of this appeal to the appellant.

50. Those shall be our orders.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR